No. 98595-2

SUPREME COURT OF THE STATE OF WASHINGTON

No. 78474-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTY DIEMOND
Petitioner/Plaintiff

v.

KING COUNTY,
Respondent/Defendant.

APPELLANT CHRISTY DIEMOND'S PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF PETITIONER

Petitioner Christy Diemond ("Diemond") was the Plaintiff in the trial court and the Appellant in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Division One issued an opinion on 4/27/2020, filed herewith as **Appendix A**, upholding the underlying ruling of the trial court denying a CR 59 motion to modify a judgment. Division One refused to address solely on procedural grounds the trial court's summary judgment order itself or the orders denying reconsideration or to amend. The Brief of Appellant, Brief of Respondent, and Reply Brief are attached hereto as **Appendix B**.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in (a) upholding the trial court's order denying Petitioner's CR 59 Motion, and (b) finding that the trial court's summary judgment order and orders denying motions for reconsideration and to vacate were not properly before the appellate court and could not and would not be addressed?

2. Whether the Court of Appeals erred in applying an abuse of discretion standard to the order given that it was challenging a grant of summary judgment to an agency in a PRA case and a finding that the agency's search was reasonable and that bank statements, canceled checks, vendor contracts requested were not "reasonably locatable" and need not be produced, and the penalties assessed for years of delay did not conform to this Court's precedents for appropriately penalizing agency violations?

IV. STATEMENT OF THE CASE

When Christy Diemond's mother became terminally ill, Christy began looking for adoptive homes for her two elderly horses so she could care for her mother. CP 274. She was referred to Regional Animal Services of King County ("RASKC") who committed to find her horses adoptive homes, so she gave them up for adoption. *Id.* Instead of finding the horses homes as promised, the RASKC animal control officer Jenee Westberg placed the animals with an alleged "horse rescue" operation, a vendor with whom the officer had a history of placing animals, forcing RASKC to pay the vendor large sums of taxpayer dollars over the coming months allegedly to care for the animals. *Id.* King County, through this RASKC officer and the vendor, then fabricated evidence and turned around and accused Christy of having starved her horses. The County criminally charged Christy to justify the placement and hiring of the "rescue" operation. CP 275. King County would ultimately try and convict Christy, based on fabricated evidence and perjured testimony of two County employees later discovered by Christy to have criminal records known to King County at the time of her prosecution or to have been identified during the criminal case as dishonest and terminated for serious misconduct. CP 55-59, 275. Christy and her attorney were deprived of this information, which should have been disclosed to her under **Brady v. Maryland**, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215

(1963). CP 55-59. Christy began making Public Record Act ("PRA") requests 14 months prior to her trial to prove her innocence and to investigate those individuals who had testified against her because during her criminal trial she had received questionable invoices and records regarding her horses' care. CP 275. Also, in another prosecution of a different horse owner involving the same actors as in Christy's case, the defendant discovered double billing by two different "rescue" entities claiming to treat the same horse at two different facilities at the same time. CP 388-390. This became a pattern found in at least 11 other animal abuse allegations made by the same actors.

Christy made PRA requests to King County for financial records to follow the money trail related to these same vendors and actors to support a motion for a new trial, to appeal to prove her innocence and to clear her name. CP 274-275. The appellate record fully documents King County's failures to respond to Christy's requests. See App. B, Br. of App. at 5-19. She was forced to sue on 6/9/14. Two months after being sued, King County starting producing some of the requested financial records. CP 284, 379-87. The County still had produced no contracts, no checks or warrants, and no bank statements. CP 284. It had produced no invoices for several of the relevant years. CP 284. Nonetheless, the PRA Officer wrote on 8/24/14 that "[w]e have concluded our search for documents and find no further records

(sic) responsive to your request." CP 284, 387. Christy initiated discovery in the lawsuit seeking records requested in her PRA requests. Through discovery she obtained additional records responsive to her requests, records the County had denied existed or that it could find with its 8/24/14 emailed closure. CP 284. The County has still not produced **to this day** contracts, checks, warrants and many bank statements and numerous other documents responsive to her request.

On 8/29/17 the County moved for summary judgment for a determination that its search after it was sued had been reasonable and that the remaining requested records that had still not been produced were not "reasonably locatable" and need not be produced, ever. Christy responded asking for an evidentiary hearing, which was denied. CP 195, 264-265, 511-540. The County admitted its search prior to the lawsuit had not been reasonable. CP 928-930, 1080-1369. Christy established through filed depositions of the County's witnesses that they had been insufficiently trained and that the County lacked a sufficient tracking system for PRA requests. CP 1080-1369.

At an 10/18/17 summary judgment hearing, the trial court found that the County had violated the PRA in numerous ways prior to the lawsuit, determining that there were two groups of records, one of which had been withheld for 810 days and one of which had been withheld for 538 days,

and found numerous aggravating factors for penalty determination, but granted summary judgment to the County finding that its search eventually was "reasonable" such that it did not have to produce the remaining records requested by Christy. CP 193-195 and RP 10/18/17 at 58-60. The records not produced included contracts, cancelled checks or warrants and bank statements related to payments to the "horse rescue" vendor and veterinarian which Christy had requested and still not received. The County alleged it had searched for those records but could not provide them. Many of these vendors are involved as witnesses in criminal court cases, like Christy's, where payments made to vendors are a relevant area of criminal case discovery and trial evidence. CP 937-1369.

For bank records the County claimed it could not match the canceled checks to the bank statements although the statements, like all statements, show check numbers for checks that were cashed, and such check numbers or other payment reference on the statement could with searching be matched up to a specific vendor payment. CP 541-542, 546-555. Nonetheless the County argued the bank statements were not "reasonably locatable" as responsive on their own.

The trial court grouped the records into two groupings, despite their being requested on more than two dates and being produced on more than two dates, and imposed a penalty of $55 per day times these two groups for

a total of 1,348 combined penalty days for a total penalty award of $74,410.00 for the several years of withholding and PRA violations committed against Christy. CP 195-196. Her attorney's fee and cost award was reduced as the penalty amount was less than an Offer of Judgment Christy had received. CP 464-465. Her attorney withdrew for medical reasons just prior to the summary judgment hearing, and Christy was forced to represent herself pro so throughout the remaining trial court litigation. CP 264, 932-936.

Christy as a pro se timely moved for reconsideration of the summary judgment decision (see, e.g., CP 466-509), which motion was denied on 1/3/18 (CP 154). On 1/8/18 she filed a CR 60 motion to vacate the trial court's finding records were not reasonably locatable doing so on the basis of newly discovered evidence showing fraud and misrepresentations by the County. That motion was not heard until 2/22/18 due to delays by the trial court, and was denied on 2/22/18. On 3/1/18 Christy filed a CR 59(h) motion to amend the judgment. It was not heard until 5/24/18 due to delays by the trial court. CP 10-11, 438. It was denied on 5/24/18 (Order filed 5/25/18), but the trial court indicated the motion had been timely. CP 3. In a 5/24/18 Minute Order confirming the trial court's 5/24/18 oral ruling, the trial court noted "Plaintiff's only remedy at this point is to appeal the Court's ruling." CP 5. Christy promptly appealed the 5/25/18 Order and the

underlying summary judgment order that had been the issue of her timely CR 59 motion for reconsideration and the CR 60 motion to vacate.

A Division One Commissioner determined that the 5/25/18 denial could be appealed, but not the other orders as Christy did not earlier appeal from the 1/3/18 CR 59 denial while she waited for the trial court to rule on her long-pending CR 60 and CR 59(h) motions. Division One issued its Opinion on 4/27/2020 without allowing oral argument.

V. ARGUMENT

Review should be granted pursuant to RAP 13.4(b)(1), (2), (3) and (4), as explained below. The Opinion conflicts with decisions of the State Supreme Court and published decisions of the Courts of Appeal meriting acceptance pursuant to RAP 13.4(b)(1) and (2). It further involves a significant question of law under the Constitution of the State of Washington or of the United States meriting review under RAP 13.4(b)(3), and finally it involves an issue of substantial public interest that should be determined by the Supreme Court, meriting review under RAP 13.4(b)(4).

A. Standard of Review Confusion:

The appellate court here applied the "abuse of discretion" standard to the sole order it reviewed –a denial of a CR 59 motion to modify. **Opinion at 2**. But this is a PRA case, and the underlying summary judgment order – frankly all orders in a PRA case – are to be reviewed *de novo*. **See, e.g.,**

O'Connor v. Department of Social & Health Servs., 143 Wn.2d 895, 904, 25 P.3d 426 (2001); **Progressive Animal Welfare Society v. University of Washington**, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) (**PAWS II**"). Here, such *de novo* review was even more necessary as the trial court granted summary judgment **to** the agency and held that the agency's search, after it was sued, was "reasonable" and that no more records were "reasonably locatable" and thus need not be produced.

Caselaw is replete with decisions of the Courts of Appeal and of the Supreme Court holding that rulings granting or denying summary judgment are reviewed *de novo*. ***See, e.g.*, Peterson v. State**, 460 P.3d 1080 (April 17, 2020); **Rocha v. King County,** 460 P.3d 624 (April 9, 2020); **Ehrhart v. King County,** 460 P.3d 612 (April 2, 2020); **In re Gilbert Miller Testamentary Credit Shelter Trust**, __ P.3d __, No. 80094-9-I, 2020 WL 2111250, No. 80094-9-I (Div. 1, May 4, 2020, Published). On summary judgment, trial courts, and reviewing courts, are to construe the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. **Keck v. Collins**, 184 Wn.2d 358, 357 P.3d 1080 (2015). In this case, that meant all facts and reasonable inferences were to be construed in the light most favorable to the requestor non-movant Christy. That clearly did not occur – either at the trial court stage or on appeal, and both were error.

Caselaw, unfortunately, also have statements that review of CR 59 and CR 60 Orders are to be reviewed under an abuse of discretion standard. **See, e.g., Rivers v. Washington State Conference of Mason Contractors,** 145 Wn.2d 674 (2002); **Brundridge v. Fluor Federal Servs., Inc.**, 164 Wn.2d 432 (2008); **Northwest Land and Inv., Inc. v. New West Federal Sav. And Loan Ass'n**, 64 Wn.App. 938 (Div. 3, 1992); **Martini v. Post**, 178 Wn.App. 153 (Div. 2, 2013); **Sligar v. Odell**, 156 Wn. App. 720 (Div. 1, 2010).

This conflict of the dueling standards of review creates the situation we have here, where the CR 60 or CR 59 decisions refusing to modify or reconsider a summary judgment order are allowed to stand, and the appellate court refuses to review the summary judgment order or any of its findings and conclusions that should be reviewed *de novo*. This case represents the opportunity, perhaps the only opportunity, to confirm the standard of review to be applied when a trial court's factual determinations as to adequacy of a search and duty not to produce records in a PRA case is challenged. This case presents an opportunity, and perhaps the only such opportunity, to instruct trial judges as to the standard of review to be applied when faced with a CR 59 or CR 60 motion attacking such findings. Few requestors will have the ability, or incentive, to appeal when a trial court grants summary judgment to an

agency finding a search was reasonable and no more records are "reasonably locatable" or to be produced, and in the absence of appellate guidance more requestors will be denied important public records as was Christy.

B. Jurisdictional Confusion:

King County argued that the trial court, Appellate Commissioner, and Division One panel of judges lacked jurisdiction to hear the appeal or consider all the Orders Christy addressed because the County alleges she failed to meet deadlines set forth in Court Rules for filing motions or her Notice of Appeal. King County alleged that compliance with Court Rule proscribed deadlines is necessary to confer jurisdiction upon such courts.[1]

The Opinion refused to hear Diemond's appeal of the summary judgment order and earlier CR 59 and CR 60 Orders, allowing court rules to dictate the Court's powers. This premise—that courts lose jurisdiction and power to rule if a court rule imposed deadline or procedure is not met—was explicitly declared incorrect by the United States Supreme Court in the 2017 decision of **Hamer v. Neighborhood Housing Services of Chicago**, 138 S. Ct. 13, 199 L.Ed.2d 249 (2017). In **Hamer**, a District Court had held

[1] See, e.g., App. B, Brief of Respondent at 2 ("lacks authority"), at 3 ("does not have authority" and "lack authority"), at 4 ("lacked authority"), at 12 ("lacked authority"), at 14 ("this Court lacks jurisdiction"), at 14 ("lacked authority" and "lacked jurisdiction"), at 15 ("lacked authority" and "lacked discretionary authority"), and at 18 ("it has no appellate jurisdiction", "lacked authority" and "lacks appellate jurisdiction").

that it lacked jurisdiction to hear an appeal of a grant of summary judgment when the appeal was filed beyond the date allowed by Court Rules. The case addressed the misconception that a court rule can preclude jurisdiction of a court. The US Supreme Court held it could not. It held that statutes, created by the Legislature, could control jurisdiction such as determining the date by which a claim must be brought, but court rules were merely "claim-processing rules" which can be waived or forfeited and do not determine whether a court has jurisdiction to hear a matter. **Id.**

This Court in its recent decision in **Denney v. City of Richland**, No. 97494-2, __ P.3d __ (5/7/2020) implicitly recognized this point when it ruled that the PRA requestor was entitled to an extension of time to file his Notice of Appeal due to his confusion as to his deadline. This Court recognized that an "appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice in extraordinary circumstance and to prevent a miscarriage of justice." **Id.** at 10. Caselaw in this state is replete with conflicting authority, still suggesting that court-made rules or procedures can constitute a jurisdictional bar. See, e.g., cases cited by King County, **Griffin v. Draper**, 32 Wn. App. 611 (Div. 2, 1982) (holding appellate court lacked jurisdiction); **Metz v. Sarandos**, 91 Wn. App. 357, 357 P.23d 795 (Div. 2, 1998) (ruling on jurisdictional grounds that trial judge was prohibited from determining that the date starting the 10

day deadline to file a Motion for Reconsideration was the date the party would have received the Order at issue, not the date it was sent to the clerk for filing); **Schaeffer v. Columbia River Gorge**, 121 Wn.2d 368, 949 P.2d 1225 (1993) (declining to grant additional time for the notice of appeal when a party timely filed, but did not timely serve, a motion for reconsideration on his opponent and waited four days to do so, ruling court was precluded from accepting appeals absent extraordinary circumstances for noncompliance with a court rule)

A Court is not precluded from accepting appeals, even absent extraordinary circumstances, and it does not lose jurisdiction to hear an appeal merely because an appellant does not meet court rule imposed deadlines or court procedures. Under **Hamer**, a trial court does not lose jurisdiction to hear a matter if court rule imposed deadlines are missed, nor does an appellate court lose jurisdiction to hear an appeal if court rule imposed deadlines are missed. Only a statute, drafted by the Legislature, can deprive a court of jurisdiction. A court rule imposed deadline or procedure is merely a "claim-processing rule" and cannot deprive a court of jurisdiction. **Id.**

Other Washington State appellate decisions illustrate that the court rule deadline or procedure cannot impose an unchangeable barrier to court jurisdiction. For example, in a series of cases our appellate courts have

recognized that parties must have actual notice of an order before they can be expected to appeal it, automatically accepting appeals filed beyond the court rule deadline without any discussion of jurisdiction or power. In **State ex rel. L.L. Buchanan & Co. v. Washington Public Service Commission**,, this Court held that a failure of a party to serve notice of entry of an order on its opponent did not start the clock for the deadline to file an appeal, making the appeal ultimately filed timely. **State ex rel. L.L. Buchanan & Co. v. Washington Public Service Commission,** 39 Wn.2d 706, 709-710, 237 P/.2d 1024 (1951).

Division One, held in **Coleman v. Dennis**:

> Defendant did not serve Plaintiff or his counsel with a copy of the order granting a new trial. The order was entered in the absence of counsel. Neither the plaintiff nor his counsel waived notice of presentation of the order. **Failure to serve the order or notice of its entry is fatal to defendant's motion to dismiss the appeal**.

Coleman v. Dennis, 1 Wn. App. 299, 301, 461 P.2d 552 (Div. 1, 1969) (emphasis added).

Division Two in the unpublished case of **Wright v. Washington State Department of Labor and Industries**, , held that an administrative appeal was timely filed and should be reinstated when the Department conceded

> that there were significant delays between when the Department issued its decision and when Wright received it, and between when Wright mailed his notice of appeal and when the trial court received it, both caused by the prison mail system.

Wright v. Washington State Department of Labor and Industries 197 Wn. App. 1017, *1, No. 48829-9-II (Div. 2, Dec. 30, 2016).

The United States Supreme Court in **Rosenbloom v. United States**,, ruled an appeal was timely when the District Court failed to timely send the party a notice of entry of an order and the record failed to show with sufficient clarity that the party and his attorney had actual notice of the entry of an order earlier. **Rosenbloom**, 355 U.S. 80, 80-81, 78 S. Ct. 202, 2 L.Ed.23d 110 (1957).

These cases illustrate that court rule imposed deadlines do not control jurisdiction and further that—regardless of what a rule may say—it cannot trump or invalidate other necessary rights such as due process and notice and fundamental fairness.

Even where there is a court rule, Washington's appellate court rules recognize the Court's power to alter its rules, and its procedures, to ensure justice is done. RAP 1.2(a) states

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

RAP 1.2(c) states "The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the

restrictions in rule 18.8(b) and (c).” RAP 18.8(b) provides that the appellate court can extend the time to file a Notice of Appeal or Motion for Reconsideration “in extraordinary circumstances and to prevent a gross miscarriage of justice.”

The trial court was empowered to hear the motions filed by Christy, even if filed beyond court rule imposed deadlines, and the trial judge here explicitly rejected King County’s argument that the 3/1/18 Motion appealed from here was untimely. (The 3/1/18 Motion was not decided until 5/25/18 due to the trial court’s delay.) The trial court further delayed decision for months of the relevant motions filed by Christy as a *pro se*, lulling her into not filing an appeal as she waited for the trial court to rule. The trial court further ruled in its 5/24/18 Minute Entry that Christy was empowered to appeal to the appellate courts. CP 5. Christy demonstrated ample circumstances to justify consideration of her appeal, and the 11/27/17 Order, 1/3/18 Order on Motion for Reconsideration, 2/22/18 Order Denying Motion to Vacate, and 5/25/18 Order denying her motion to amend the Judgment. At the heart of this appeal is an appellate court record showing King County lied to Christy, a criminal defendant it was prosecuting, in 2014 when it told her all records had been produced, failed to perform a reasonable search for those records for years until after it was sued despite knowing that time was of the essence and that Christy needed these records

to defend herself in the criminal case brought against her by the County, and that the County was found by the trial court to have inadequately trained staff, inadequate tracking procedures, a failure to comply with PRA procedural requirements, and to have acted with a "high degree of negligence". CP 7-8. And the record further demonstrates that this same agency has been found by courts to have committed similar violations numerous times, including in the **Yousoufian v. King County** cases I-V.[2] Many years after the end of the lengthy **Yousoufian** litigation, after costing taxpayers one of the largest PRA judgments of all time, King County still had not, and has not, fixed its procedures or learned its lesson. Further, in this case King County still has not produced bank statements, canceled checks, vendor contracts and data and other clearly accessible records sought by Christy, and it was given a free pass by the trial court and allowed to not produce these records on the claim the records are not "reasonably locatable. When the largest County in the State with an eleven billion dollar biennial budget cannot "reasonable locate" its bank statements, canceled checks, vendor contracts, and other backup for routine auditing, that is a

[2] **Yousoufian v. King County**, 114 Wn. App. 836, 60 P.3d 667 (2003) ("**Yousoufian I**"), **reversed on other grounds**, **Yousoufian v. King County**, 152 Wn.2d 421, 98 P.3d 463 (2004) ("**Yousoufian II**"); **Yousoufian v. King County**, 137 Wn. App. 69, 151 P.3d 243 (2007) ("**Yousoufian III**"), **Yousoufian v. King County**, 165 Wn.2d 439, 200 P.3d 232 (2009) ("**Yousoufian IV**"); **Yousoufian v. King County**, 168 Wn.2d 444 ("**Yousoufian V**").

basis for Court enforcement, not a free pass. Division One erred by allowing a technical argument—created by the Defendant and the trial court by delaying ruling on Diemond's motions and lulling her into believing she need not appeal until the court finally ruled—to prevent review of these important issues.

Christy appealed the 11/27/17 Order and the 5/25/18 Order denying her final motion to amend and the intervening orders also denying reconsideration, vacation or amendment. Her notice brings up for review the underlying orders of 1/3/18 and 2/22/18 pursuant to RAP 2.4(b) as these orders or rulings ""prejudicially affects the decision designated in the notice," and (2) "the order is entered, or the ruling is made, before the appellate court accepts review." The trial court delayed for months entering its rulings on Christy's motion, and she appealed when instructed by the trial court in its Minute Entry of 5/24/18 after it orally ruled on 5/24/18 on her 3/1/18 motion. The Division One Opinion erred for refusing to consider the other orders.

C. The Trial Court Abused its Discretion in Denying the CR 59 and CR 60 Motions of Diemond.

Even if the Court were to apply an abuse of discretion standard, the errors here are so clearly contrary to binding precedent an abuse of discretion would be shown. King County admitted that it had not

made a reasonable search for records before being sued and that its statement to Christy in 2014 that all records had been produced was a lie. It admitted it had not produced bank statements, canceled checks, or warrants or contracts and contract data for vendors which the County was required to keep and maintain to comply with its fiscal as well as statutory duties as a County. It showed that it knew how to match up and track which payments belonged to which vendors such that it could identify which bank statements and which canceled checks and warrants met the scope of the records requested by Christy. But the trial court nonetheless gave the County a free pass not to produce such records in the face of evidence showing the County misled the court when it denied that all vendors have contracts and W-9s and other centrally locatable documents it told the court did not exist.

The trial court further abused its discretion by failing to comply with binding PRA precedents, such as **Wade's Eastside Gun Shop Inv. v. Department of Labor & Industries,** 185 Wn.2d 270, 372 P.3d 97 (2016) and **Yousoufian V**, 168 Wn.2d at 462-463 and **Yousoufian II**, 152 Wn.2d at 429-430, requiring that penalty calculations take into account actual economic harm to the requestor and the need for an award to cause deterrence particularly when the

agency is a large wealthy entity like King County and an agency that has been held to have habitually with premeditation continually violated the PRA. The trial court's grouping of the documents, assessment of the penalty, and its denial of motions to amend or reconsider that award, was an abuse of discretion and a rejection of these binding precedents and the will of the people as stated in the PRA.

Finally, the trial court's ruling that the search conducted was reasonable does not follow the guidance from this Court in binding precedents. This Court has held that agencies must do "more than a perfunctory search and follow obvious leads as they are uncovered." **Neighborhood Alliance of Spokane County v. County of Spokane,** 172 Wn.2d 702, 720, 261 P.3d 119 (2011). An agency must search for a record in "those places where it is reasonably likely to be found." *Id.*

> Agencies must make a sincere and adequate search for records. When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful.

Fisher Broadcasting-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688, 692 (2014). The record in this case demonstrating gross incompetence and situations, like **Yousoufian,** where the right hand did not know what the left had

was doing. Employees assigned to handle Christy's request left their jobs or were transferred and the task was handed off to a new employee with insufficient training or explanation and zero tracking systems. CP 391-424, 1080-1369. Employees did not conduct searches themselves but relied on other employees, with insufficient understanding of the request at issue, to run reports or generate lists and did not look further than that document. CP 391-424, 1080-1369. Employees did not look in the building where records were actually housed, and waited to be sued to perform even a cursory attempt to produce records. CP 391-424, 1080-1369. When it came time for summary judgment, King County's excuse why the records were not "locatable" and why its search should be deemed "reasonable" was that it was hard and time consuming, it made a minimal attempt, and that should be deemed good enough. Division One erred in finding the trial court did not abuse its discretion in denying the CR 59 Order it did consider.

VI. CONCLUSION

The Petition should be accepted so this Court can resolve the conflicts created by the Opinion and clarify the correct law for this State.

RESPECTFULLY SUBMITTED this 27th day of May, 2020.

s/Michele Earl-Hubbard
Michele Earl Hubbard, WSBA #26454

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 27, 2020, I filed this Petition for Review with the Division One Court of Appeals and Washington State Supreme Court by E-filing and I served the same by e-mail on:

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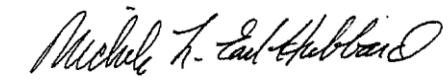
Dated this 27th day of May, 2020, at Shoreline, Washington.



Michele Earl-Hubbard

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 78474-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTY DIEMOND
Petitioner/Plaintiff

v.

KING COUNTY,
Respondent/Defendant.

APPENDICES TO
APPELLANT CHRISTY DIEMOND'S PETITION FOR REVIEW
BY THE WASHINGTON STATE SUPREME COURT

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APPENDIX A

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April 27, 2020

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CASE #: 78474-9-I
Christy Diemond, Appellant v. King County, Respondent
Snohomish County, Cause No. 14-2-04479-6

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm the trial court's orders."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Ellen Fair

FILED
4/27/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTY DIEMOND, Appellant, v. KING COUNTY, Respondent.	No. 78474-9-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Christy Diemond appeals a summary judgment order and an order denying her motion to amend that judgment. Because her claims are barred on procedural grounds, we affirm.

FACTS

In June 2014, Diemond sued King County for alleged violations of the Public Records Act (PRA), chapter 42.56 RCW.

In August 2017, the County moved for summary judgment arguing that it had completed a reasonable search for records responsive to Diemond's PRA requests. The County acknowledged that its response was untimely and proposed a statutory penalty up to $28,350. In response, Diemond argued for a $1,464,615 penalty and moved for an evidentiary hearing to dismiss the motion.

In November 2017, the trial court granted summary judgment and ruled that the County had completed a reasonable search for the requested records, that an evidentiary hearing was unnecessary, and that $74,140 was an

appropriate statutory penalty. The court entered judgment in favor of Diemond the same day.[1]

Diemond then filed a series of post-judgment motions, including: (1) a December 2017 CR 59 motion to reconsider and amend summary judgment, (2) a January 2018 CR 60 motion to vacate summary judgment, and (3) a March 2018 CR 59 motion for amendment of judgment.[2] The trial court denied all of these motions and entered its last denial order on May 25, 2018.[3]

On May 31, 2018, Diemond filed a notice of appeal seeking review of the November 2017 summary judgment order and the May 2018 order denying an amended judgment. A commissioner of this court ruled that the notice was untimely as to the November 2017 order and limited the scope of review to the May 2018 order.[4] Therefore, the scope of this appeal is limited to the trial court's denial of the March 2018 CR 59 motion for amendment of judgment.

ANALYSIS

Diemond assigns error to the trial court's denial of her motion to amend judgment. We review a trial court's grant or denial of a CR 59 motion to amend judgment for abuse of discretion. Brundridge v. Fluor Fed. Svcs., Inc., 164 Wn.2d 432, 454, 191 P.3d 879 (2008). A court abuses its discretion when its

[1] The court later awarded Diemond $20,122.50 in attorney fees and $638.13 in costs.

[2] A common thread runs through all of Diemond's post-judgment motions. That thread is her complaint of a "diminutive award penalty" and request for a higher penalty.

[3] The trial court denied: the December 2017 CR 59 motion to reconsider and amend judgment on January 3, 2018; the January 2018 CR 60 motion to vacate summary judgment on February 22, 2018; and the March 2018 CR 59 motion for amendment of judgment on May 25, 2018.

[4] The commissioner ruled that the notice was also untimely as to the January 2018 CR 60 motion to vacate. To challenge the commissioner's rulings, Diemond was required to file a motion to modify that ruling under RAP 17.7(a). Because she failed to file a motion to modify, we decline to consider Diemond's appeal of these orders.

decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

In March 2018, Diemond filed a second motion to amend the November 2017 judgment. This motion was untimely. CR 59(h) (motion to alter or amend must be filed within 10 days after entry of judgment). The trial court did not abuse its discretion in denying Diemond's motion.[5]

Not having prevailed, we deny Diemond's claim for attorney fees on appeal.

We affirm the trial court's orders.

Andrus, A.C.J.

WE CONCUR:

[5] While we agree with the trial court's finding that the motion did "not present grounds for the judgment to be amended," we affirm on other grounds. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (a reviewing court may affirm a trial court result on any correct ground supported by the record, even if not considered by the trial court).

APPENDIX B

NO. 78474-9-I

IN THE COURT OF APPEALS, DIVISION ONE

CHRISTY R. DIEMOND,

Plaintiff/Appellant

v.

KING COUNTY,

Defendant/Respondent

CHRISTY DIEMOND'S CORRECTED BRIEF OF APPELLANT
(adding newly-assigned CP page numbers in previous blanks)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations and Ordinances

Rules

I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error

1. The trial court erred in granting summary judgment to the Defendant King County finding the records that were not produced were not "reasonably locatable" and that the search eventually conducted was reasonable to make such a determination.

2. The trial court erred in grouping the records into only two groups and imposing only $55 per day for each group for a total penalty of $74,140 for 1,348 days of withholding.

3. The trial court erred in denying Ms. Diemond's Motion to Amend and Motion to Vacate in light of the evidence provided by Ms. Diemond.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in determining that bank statements, cancelled checks and warrants are not "reasonably locatable" by King County?

2. Did the trial court err in grouping the records produced to Ms. Diemond into only two groups when the records within such groups were of different type, had been requested on different days, and were produced on different days, and the grouping and penalty award was

insufficient to comply with the penalty goals and purpose of the PRA and binding precedent?

3. Did the trial court err in denying Ms. Diemond's motion for reconsideration and motion to amend/vacate in light of all the evidence and the requirements of the PRA?

4. Did the trial court err in awarding only $55 per day per two court-declared groups for the records eventually produced after 1,340 days of withholding and failing to impose any penalty for records that have never been provided?

II. STATEMENT OF THE CASE

Plaintiff Christy Diemond was an experienced horsewoman who had raised and trained horses since her childhood. CP 274. In 2011 she owned two horses on her one and a half acre property in Woodinville. *Id.* The horses had been in her care for 20 years and were in their late 30s, living at the time to twice their normal life expectancies. *Id.* That same year, Ms. Diemond's elderly mother became terminally ill. *Id.* Ms. Diemond had invited her mother to come live with her in 2000 and had been caring for her mom for eleven years and enjoying spending time with one another. When her mother became terminal in 2011, Ms. Diemond began looking for someone to adopt the horses so she could focus her energy and resources caring for her mother during her remaining days. *Id.* When Ms. Diemond

contacted some of the local rescues, Save a Forgotten Equine and Hope for Horses, for assistance placing the horses for adoption, a King County Sheriff Bonnie Soule arrived at Ms. Diemond's home out of her jurisdiction, with no notice to Ms. Diemond while Ms. Diemond was bathrooming her mother. Soule insisted Ms. Diemond leave her mother to come outside because Jenny Edwards, director of Hope for Horses wanted Soule to do a "Horse welfare check." Soule offered adoption options and then called Regional Animal Services of King County ("RASKC") regarding those adoption options. RASCK offered to help her find a nice home for the horses, so Ms. Diemond gave her two horses up for adoption to RASKC so she could dedicate herself to care for her mother. *Id.* Instead of finding the horses homes as promised, the RASKC animal control officer Jenee Westberg placed the animals with an alleged "horse rescue" operation, a vendor with whom the officer had a history of placing animals, forcing RASKC to pay the vendor large sums of taxpayer dollars over the coming months allegedly to care for the animals. *Id.* King County, through this RASKC officer and the vendor, then fabricated evidence and turned around and accused Ms. Diemond of having starved her horses. The County criminally charged Ms. Diemond to justify the placement and hiring of the "rescue" operation. CP 275. King County would go on to try and convict Ms. Diemond, based on fabricated evidence and perjured testimony of two

County employees later discovered by Ms. Diemond to have criminal records known to King County at the time of her prosecution or to have been identified during the criminal case as dishonest and terminated for serious misconduct. CP 55-59, 275. Ms. Diemond and her attorney were deprived of this information, which should have been disclosed to her under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). CP 55-59. Ms. Diemond was convicted on October 10, 2012 and sentenced on October 18, 2013. She began making Public Record Act ("PRA") requests 14 months prior to her trial to prove her innocence and to investigate those individuals who had testified against her because during her criminal trial she had received questionable invoices on her horses' care which did not coincide with typical veterinary practices for starved or sick horses but instead appeared to be care for healthy animals. CP 275. Further, the blood work for her animals when they were first turned over to King County was normal. *Id.* Three weeks later, after being in the care of the "rescue" operation hired by RASKC, the veterinarian paid by the County claimed the animals had become anemic. *Id.* Also, just as Ms. Diemond found in her two horses' billings, in another prosecution of a different horse owner involving the same actors as in her case, the defendant discovered double billing by two different "rescue" entities claiming to treat the same horse at two different facilities at the same time. CP 388-390. This became

a pattern found in at least 11 other animal abuse allegations made by the same actors.

Ms. Diemond made requests for financial records to follow the money trail related to these same vendors and actors to support a motion for a new trial, to appeal to prove her innocence and to clear her name. CP 274-275.

Relevant to this PRA appeal, on April 29, 2013 Ms. Diemond made a PRA request to the Records and Licensing Services ("RALS") subdivision of King County for agreements and contracts with nonprofits, veterinarians and rescue groups for the years 2006 to 2012 and stated as soon as she had the names of all such entities that she would also be requesting invoices from these entities. CP 276. Public Record Officer Sean Cockbain acknowledged this request by email on May 7, 2013, estimating he would provide her with the records on or before May 21, 2013. CP 289. On May 23, 2013 Mr. Cockbain provided the alleged list of "nonprofits, vets, rescue groups for Regional Animal Services." CP 291. He stated that he had some of the invoices by year and would start pulling the invoices of the agencies she would like to review. *Id.* On June 13, 2013, Mr. Cockbain emailed Ms. Diemond asking her if she had identified the entities for which she wanted invoices. CP 292. Ms. Diemond called Mr. Cockbain to tell him the list he had sent her was incomplete and was missing several entities who happened

to be members of this group. CP 277 ¶11. Ms. Diemond explained she knew the list was incomplete as she had seen a large PRA production to a defense attorney from a different case alleging horse mistreatment and that production included providers not on Mr. Cockbain's list. *Id.* Mr. Cockbain said he would look into the inconsistencies between her production and the one to that attorney and would update the list. *Id.* After the phone conversation, Ms. Diemond sent Mr. Cockbain a highlighted version of his incomplete list showing the entities on that list for which she wanted all of the records. CP 293. That same day Mr. Cockbain responded by email stating he had several of the invoices on site and would begin collecting them for the ones she had identified. CP 294. He said he would let her know when they were ready for her review. *Id.* He told her he was transferring to another job within the County but that his replacement would be apprised of the status of my request. CP 277, 292.

Instead, four months passed without any notice the records were ready or production of an updated list. On October 23, 2013, Ms. Diemond emailed stating "I have not head back. Please advise. It has been awhile." CP 295. Two weeks later, on November 8, 2013, Ben Gannon, the new Public Records Officer, responded apologizing for the delay, but offering no reason for it. CP 296. He told Ms. Diemond he had been working on another large Public Disclosure Request which turned out to be one of the

compromised animal abuse cases, Laurie Hart, the same case whose defense attorney gave Ms. Diemond some of the records from the response. Hart's production included material requested by Ms. Diemond, but the County failed to give Ms. Diemond any of Ms. Hart's records that had been gathered. *Id.* Mr. Gannon admitted he had not pulled all the invoices yet but suggested November 15, 2013 as a possible date for her to come inspect what had been gathered. CP 296. Ms. Diemond stated that date might work but asked where she would come to view them and for a "ballpark inventory of what and who you have so far". CP 297. On November 13, 2013 Mr., Gannon provided a list of the records that would be there for the November 15, 2013 review and promised to alert her when the remainder of the records arrive. CP 298.

Mr. Gannon did not, in fact, alert her when there were more records. On December 27, 2013, a month and a half after the promised alert that did not come, Ms. Diemond emailed the official Public Records Officer email asking "What has happened to this? I have not heard back from you." CP 299. Three days later, December 30, 2013, Mr. Cockbain, the earlier Public Record Officer, emailed Ms., Diemond to inform her Mr. Gannon no longer worked for the County. CP 300. He admitted he had been asked to handle the outstanding requests until a permanent Public Record Officer was hired, but that he was having difficulty determining the status of the request

following his review of all the County's documentation. *Id.* He also apologized for the delay in gathering the documents, but offered no explanation for it. *Id.* Ms. Diemond emailed Mr. Cockbain to remind him the request had been outstanding since she gave him the highlighted list in June 2013 and he had promised he would be updating his list to include the entities that had been left off of it by him. CP 301. She confirmed Mr. Gannon had never gotten back to her following his promise to locate the remaining documents and to alert her when they arrived. *Id.* On December 30, 2013, Mr. Cockbain emailed back stating he had found the documents Mr. Gannon had asked for him to copy and had located several other responsive documents. CP 302. Mr. Cockbain stated that he did not believe these were all the records responsive to her request. CP 302. Ms. Diemond emailed back that same day asking when he would have all the documents. CP 303. On December 31. 2013, Mr. Cockbain emailed back stating that the new Public Records Officer would not be starting work until January 13, 2014, and that he could not give her an estimate when all of the records would be ready since he needed to assist this new person with the request, he would be out of the office most of the next week, and was working "outside of my normal duties and hours on PDRs so unfortunately it will take more time to complete your request." CP 304. He offered to meet with her on January 6, 2014, before 1 pm to let her review what had been pulled

and located so far. CP 304. They arranged to meet at 11 am on January 6, 2014. CP 305-307.

Ms. Diemond emailed Mr. Cockbain on January 1, 2014, to remind him of the names she had identified that were missing from the original list of entities (names she had provided to him on June 13, 2013). CP 308. She also requested an updated list for 2012 and 2013 as the list he provided had only gone through 2011. *Id.* On January 2, 2014, Mr. Cockbain emailed and agreed to add the 2013 request to the Public Disclosure Request acknowledging 2012 should have been included and that he agreed to check if the omitted entities she mentioned to him in June 2013 had been added to the search. CP 309. On January 2, 2013, Ms. Diemond provided Mr. Cockbain with the names of additional entities she discovered were also missing from his original list and asked him to include them in the search. CP 311. Mr. Cockbain emailed back that he could not add any of the new entities to the search in time for the upcoming inspection but would make sure the new person had the information and added it to the search when that person started on January 13, 2014. CP 312. Ms. Diemond reminded him she was still coming to inspect what had been pulled on January 6, 2014 at 11 am. CP 313. Mr. Cockbain confirmed that appointment. CP 314.

Ms. Diemond travelled 40 minutes from her home in Woodinville to the King County Courthouse building to inspect the records on January

6, 2014. On January 6, 2014, King County produced between 80-100 documents and allowed only a very short inspection as Mr. Cockbain had to leave to "proctor" some event. CP 279. Ms. Diemond asked him to scan and email her copies of all of the documents she had been offered for inspection that day, and Mr. Cockbain committed that he would scan and email them. *Id.* Mr. Cockbain did not, in fact, scan or email them, and they were not provided to Ms. Diemond despite her request and the County's specific agreement to provide them. *Id.*. On January 6, 2014, Ms. Diemond emailed Mr. Cockbain asking for another half hour to re-review some of the documents she had inspected that day. CP 279, 315. He stated he would be out of the office the rest of the week but could meet according to his schedule on four possible days. CP 316. Ms. Diemond responded "Ok. You name the date and time" and asked if there was anyone who could let her look at the records for five minutes to take a picture of one. CP 317. He never responded. On January 13, 2014, she emailed him again asking "Are you back in the office Tuesday tomorrow? Could I come down?" CP 318. On January 14, 2014, she emailed Mr. Cockbain again pointing out he had not answered her. CP 320. She asked if she could come inspect the records again on January 14, 2014, and reminded him her original request sought provider contract data in order to become a provider or servicer to be paid through accounts payable. CP 320. He did not respond. Instead on January

15, 2014, the new Public Record Office Kate Blyth responded and scheduled an inspection date of January 17, 2014. CP 321-325. Ms. Blyth stated she thought she had the records Ms. Diemond had inspected previously with Mr. Cockbain. CP 325.

On January 17, 2014 Ms. Diemond went to inspect the records, again travelling 40 minutes from Woodinville to the Seattle King County Courthouse building. CP 279. Insufficient time was afforded her so she could not inspect one box of documents in the room. *Id.* Ms. Blyth admitted she was uncertain what records had been provided to Ms. Diemond earlier. During the inspection, Mr. Cockbain stopped by and stated that the County does not have contracts with its providers, a statement later determined to be incorrect. CP 279.

On January 23, 2014, Ms. Blyth emailed Ms. Diemond requesting to speak with her to ask some clarifying questions. CP 326. On January 24, 2014 Ms. Blyth emailed Ms. Diemond a spreadsheet of a list of vendors invoices without the invoices themselves. CP 327. On January 28, 2014 Ms. Diemond emailed Ms. Blyth to again point out the problems with the County's responses. CP 290, 328. She noted significant disparities between years 2010-2013 and asked Ms. Blyth for the actual invoices that were referenced in the spreadsheet. *Id.* Ms. Diemond also noted that it was odd that not one of the invoices Ms. Diemond had obtained from other sources

was listed on the spreadsheet. *Id.* She noted that she had only been given a few invoices for the seven year period for two of the entities involved in numerous prosecution—"Save a Forgotten Equine" and "Hope for Horses"—noting that that could not be correct. *Id.* She reminded Ms. Blyth she had requested and still needed contract data and payment data which had not been provided. *Id.* In a separate email on January 28, 2014, she offered even more specifics as to what she contended was still missing, and pointing out she had not been given scans of documents she had been promised by Mr. Cockbain would be scanned and emailed from earlier inspections. CP 328-330.

On January 30, 2014 Ms. Diemond gave Ms. Blyth an invoice she had secured from another court case file that had not been included in the list Ms. Blyth had sent her but which should have included that invoice. CP 280, 331. Then, on February 4, 2014, Ms. Diemond emailed Ms. Blyth asking for a status update on her request. CP 280, 332. She received no response to either email. CP 281.

On February 13, 2014 Ms. Blyth sent Ms. Diemond an email with three documents attached. CP 281, 333. She also stated she would be sending over several emails of scanned documents in bundles of five to six items. CP 281, 333. No such emails were received. Ms. Diemond then emailed Ms. Blyth on February 20, 2014, stating she was anxious to receive

the documents since her appeal deadlines were looming. CP 281, 334. Ms. Blyth set up an inspection appointment for Ms. Diemond on February 27, 2014, and to assist Ms. Blyth in locating the missing documents Ms. Diemond sent her three King County invoices she had received to show what they looked like, and also explaining why she needed the invoices. CP 281, 338-340. She explained the invoices she sent showed the providers had given two different names to the same horse and then billed the County for services for that one dual-named horse claiming he was at two different facilities on the same date, meaning the providers charged twice for the single treatment of a single horse. CP 281, 338-340. This event had been reported on during another owner's trial and in front of the King County Council during public comment by five falsely accused defendants. CP 281. She also reminded Ms. Blyth she was still waiting for contracts and contract data from the list Mr. Cockbain had provided her 2013 and that if the documents were not forthcoming that she would require canceled checks and bank statements. CP 281, 340.

During the February 27, 2014 document inspection, Ms. Diemond asked Ms. Blyth cancelled checks issued by the County and bank statements because it had become clear that the County was not providing the documents she had requested. CP 281.

On March 7, 2014 Ms. Diemond sent another email to Ms. Blyth asking why she had not received a reply to her February 26, 2014 email and why she had not received the provider contracts for some 50 providers and the 2013 invoices and vouchers as promised previously. CP 281, 340-341. A few hours later Ms. Blyth asked Ms. Diemond to submit a new PRA request even though the request had been made earlier to Mr. Cockbain who had accepted it and agreed to modify her original PRA request to include these records when they communicated on January 2, 2014. CP 282, 342. Nonetheless on March 8, 2014, Ms. Diemond complied and made a new PRA request under protest to request the 2013 records again, and she also asked for the records of 2014 through the date of the email. CP 282.

On March 12, 2014, Ms. Diemond sent Ms. Blyth another email complaining that she had not received the requested records and that the County throughout the process had not been responding in a timely manner. CP 282, 343-344. She stated that if Ms. Blyth claimed she needed yet another request for cancelled checks and bank statements, that this email was that new request. CP 282, 343-344. That same day Ms. Diemond and Ms. Blyth spoke by telephone, and Ms. Diemond confirmed the phone conversation in a confirming email. CP 282, 345. Ms. Diemond again raised multiple failures with the County's responses to date. CP 282, 345-346.

Between March 16, 2014 and April 2014 Ms. Diemond had several more communications with Ms. Blyth attempting to obtain the documents. CP 282, 348-367. Ms. Diemond explained to Ms. Blyth about her conviction and that she needed the documents to prove her innocence. *Id.*. Ms. Blyth admitted she was just getting familiar with the invoicing system. CP 282, 350. Another appointment was scheduled for a document review but the records being provided were the same ones she had already been provided. CP 282. On April 9, 2014, Ms. Diemond emailed Ms. Blyth asking about the contracts, invoices, bank statements and cancelled checks. CP 282, 368. Ms. Diemond received a "read receipt" confirming the email had been read, but Ms. Blyth did not reply. CP 283, 368. Ms. Diemond emailed Ms. Blyth on April 19, 2014, requesting a status report. CP 283, 369 Ms. Diemond again received a read receipt confirming the email had been read, but Ms., Blyth did not reply. CP 283, 369.

On April 21, 2014 Ms. Blyth emailed Ms. Diemond promising that several installments would be coming that same day including current invoices and contract information. CP 283, 370-373. As had happened several times before, the promised documents were never sent. CP 283. Two weeks later, on May 2, 2014 after having heard nothing further from Ms. Blyth, Ms. Diemond again emailed her asking where the promised documents were. CP 283, 374. On May 9, 2014 Ms. Blyth sent her three

Excel spreadsheet list regarding two providers attached to an email. CP 283, 375. None of the actual requested documents were produced. CP 283. On May 10, 2014 Ms. Diemond emailed back asking where the "corresponding paperwork to the spreadsheets" was, but received no answer. CP 283, 376. On May 21, 2014, Ms. Diemond emailed Ms. Blyth asking why she had not answered and asking for an update. CP 283, 377. The next day Ms. Blyth sent Ms. Diemond an email with nineteen emails with attached invoices from one of the providers with all the metadata removed and eight pdfs attached from various service providers. CP 283, 378.

On June 9, 2014, having received no further responsive records or confirmation any other documents would be provided, and waiting more than a year for promised records to be produced, Ms. Diemond filed the instant PRA lawsuit in Snohomish Superior Court alleging violations of the PRA.

On August 1, 2014, the County produced its first set of records related to Ms. Diemond's request for billing for cities. CP 284, 379. On August 8, 2014, the County produced selected invoices from 2008 to 2012. CP 284, 380, On August 14, 2014 the County produced some more invoices. CP 284, 381-382. On August 20, 2014 the County produced 21 purchase orders and some more invoices. CP 284, 383-385. The final production made by the County was produced on August 25, 2014 consisting of more

invoices, some W-9s and several Requests for Qualifications. CP 284, 386-387. The County had produced no contracts, no checks or warrants, no bank statements, no invoices for 2006 and the first part of 214. CP 284. Ms. Blyth wrote with her August 25, 2014 production that "[w]e have concluded our search for documents and find no further records (sic) responsive to your request." CP 284, 387.

Ms. Diemond initiated discovery in the lawsuit seeking records requested in her PRA requests. Through discovery she obtained additional records responsive to her requests, records the County had denied existed or that it could find with its August 25, 2014 emailed closure. CP 284. The County has still not produced contracts, checks, warrants and bank statements and numerous other documents responsive to her request.

On August 29, 2017, the County moved for summary judgment for a determination that its search after it was sued had been reasonable and that the remaining requested records that had still not been produced were not "reasonably locatable". Ms. Diemond responded asking for an evidentiary hearing, which was denied. CP 195, 264-265, 511-540. The County admitted its search prior to the lawsuit had not been reasonable. CP 928-930, 1080-1369. Ms. Diemond established through filed depositions of the County's witnesses that they had been insufficiently trained and that the

County lacked a sufficient tracking system for PRA requests. CP 1080-1369.

At an October 18, 2017 summary judgment hearing, the trial court found that the County had violated the PRA in numerous ways prior to the lawsuit, determining that there were two groups of records, one of which had been withheld for 810 days and one of which had been withheld for 538 days, and found numerous aggravating factors for penalty determination, but granted summary judgment to the County finding that its search eventually was "reasonable" such that it did not have to produce the remaining records requested by Diemond. CP 193-195 and RP 10/18/17 at 58-60. The records not produced included contracts, cancelled checks or warrants and bank statements Diemond had requested and still not received. The County alleged it had searched for those records but could not provide them. For bank records the County claimed it could not match the canceled checks to the bank statements although the statements, like all statements, show check numbers for checks that were cashed, and such check numbers or other payment reference on the statement could with searching be matched up to a specific vendor payment. CP 541-542, 546-555. Nonetheless the County argued the bank statements were not "reasonably locatable" as responsive on their own. The trial court grouped the records into two groupings, despite their being requested on more than two dates

and being produced on more than two dates, and imposed a penalty of $55 per day times these two groups for a total of 1,348 combined penalty days for a total penalty award of $74,410.00 for the several years of withholding and PRA violations committed against Diemond. CP 195-196. Her attorney's fee and cost award was reduced as the penalty amount was less than an Offer of Judgment Diemond had received. CP 464-465. Her attorney withdrew for medical reasons just prior to the summary judgment hearing, and Ms. Diemond was forced to represent herself pro so throughout the remaining trial court litigation. CP 264, 932-936.

Diemond as a pro se timely moved for reconsideration of the summary judgment decision (see, e.g., CP 466-509), which motion was denied on February 22, 2018. CP 24-25. On March 1, 2018, Ms. Diemond as a pro se filed a CR 60 Motion to Amend and Vacate the Judgment that is the subject of this appeal. The trial court delayed hearing of the motion for many months as the judge before whom it was noted refused to hear the motion and insisted it be delayed so it could be heard by the originally deciding judge, and the decision on the motion was not issued until May 28, 2018. CP 10-11, 438. The motion was denied on May 28, 2018, and Ms. Diemond promptly appealed that and the underlying summary judgment order that had been the issue of her timely CR 59 motion for reconsideration and the CR 60 motion to vacate. A Commissioner of this Court has ruled

that only the May 28, 2018 Order may be appealed as Ms. Diemond did not appeal the CR 59 denial while she waited for the trial court to rule on her long-pending CR 60 Motion to vacate.

Ms. Diemond retained the undersigned counsel on March 8, 2019, and this Court denied a request for a 90-day extension to get up to speed in the case, but granted a 63-calendar day extension to May 10, 2019.

Prior to filing its Brief of Appellant, Appellant's counsel submitted a supplemental designation of Clerk's Papers and identified those new CPs in the original timely-filed Brief of Appellant as "CP___" explaining in the brief that such page entries would be provided in a Corrected Brief once the Superior Court Clerk had prepared the supplemental Clerk's Papers and provided them to Counsel. This Corrected Brief provides those newly-designated Clerks' Papers pages in the blanks previously stated in the original Brief. The page references in the tables of authorities and table of contents have also been corrected in this Corrected Brief for the few occasions where the page number additions have altered the pagination of the Brief.

III. ARGUMENT

A. The Records that have Not Been Produced are Implicitly "Reasonably Locatable".

King County is the most populated County in the State of Washington and controls a more than **eleven billion dollar biennial budget provided by taxpayers**. See, for example, https://www.kingcounty.gov/depts/executive/performance-strategy-budget/budget/2019-2020-Proposed-Budget.aspx (last visited 5/10/19). As a government agency it is subject to regular audits by the Washington State Auditor as well as County internal audit checks. It must reconcile its monthly bank statements against its accounting data entries to confirm the legitimacy of each such expenditure. CP 33-59, 266-270, 541-542, 546-555, 1080-1369. As a County, it is subject to stringent accounting requirements even greater than that required of private entities. CP 33-59, 266-270, 1080-1369.

Despite these facts, King County in this litigation claimed it could not "reasonably locate" bank statements, cancelled checks or warrants or contracts and contract data for vendors it has paid significant amounts of money for the alleged care and treatment and boarding of animals taken into custody by RASKC. Many of these vendors are involved as witnesses in criminal court cases, like Ms. Diemond's, where the payments being made to the vendors are also a relevant area of criminal case discovery and

trial evidence. CP 937-1369. Below, King County argued it had personnel run various searches to locate records, and it complained that its bank statements do not always list a payee on the statement next to the amount paid, but King County did not show, and could not show, that it was not able to, and frankly was not legally required to, retain and reconcile the payments to the vendors as a matter of its accounting procedures. If King County truly cannot reconcile its payments to vendors to confirm they are legitimate and to confirm what they are for, this should be a great cause for concern to the Court, the public at large, and the state and federal authorities including the State Auditor and Department of Justice. More than a decade ago, in the *Yousoufian v. King County* cases,[1] King County had been held liable for PRA violations and ordered to pay one of the largest PRA penalties at the time due to its failure to locate and produce similar payment documents, there related to a study regarding the King Dome and new stadium to replace it. One should expect that having cost the taxpayers hundreds of thousands of dollars in penalties and legal fees in that case that King County would have improved its practices and

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[1] *Yousoufian v. King County*, 114 Wn. App. 836, 60 P.3d 667 (2003) ("*Yousoufian I"*), *reversed on other grounds*, *Yousoufian v. King County*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II"*); *Yousoufian v. King County*, 137 Wn. App. 69, 151 P.3d 243 (2007) ("*Yousoufian III"*), *Yousoufian v. King* County, 165 Wn.2d 439, 200 P.3d 232 (2009) ("*Yousoufian IV"*); *Yousoufian V*, 168 Wn.2d 444 ("*Yousoufian V"*).

recognized its duty to maintain records in a locatable, and accountable, manner. If more than a decade later King County has truly failed to correct its procedural flaws, the Courts should not allow that to become its excuse for not producing records and give the County a free pass to withhold as was done in this case.

B. King County's Search was not "Reasonable".

The record in this case demonstrating gross incompetence and situations, like *Yousoufian*, where the right hand did not know what the left had was doing. Employees assigned to handle Ms. Diemond's request left their jobs or were transferred and the task was handed off to a new employee with insufficient training or explanation and zero tracking systems. CP 391-424, 1080-1369. Employees did not conduct searches themselves but relied on other employees, with insufficient understanding of the request at issue, to run reports or generate lists and did not look further than that document. CP 391-424, 1080-1369. Employees did not look in the building where records were actually housed, and waited to be sued to perform even a cursory attempt to produce records. CP 391-424, 1080-1369. When it came time for summary judgment, King County's excuse why the records were not "locatable" and why its search should be deemed "reasonable" was that it was hard and time consuming, it made a minimal attempt, and that should be deemed good enough.

The State Supreme Court has held that agencies must do "more than a perfunctory search and follow obvious leads as they are uncovered." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011). An agency must search for a record in "those places where it is reasonably likely to be found." *Id.*

> Agencies must make a sincere and adequate search for records. When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful.

Fisher Broadcasting-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 522, 326 P.3d 688, 692 (2014). The County admitted that prior to the lawsuit its searches were not reasonable. CP 1080-1369. It admitted it did not perform more complete search until faced with discovery in the lawsuit. CP 1080-1369. The County's search, that failed to find bank statements, contracts, cancelled checks and warrants – all required for the County to retain and reconcile to monthly payments to vendors – should not have been deemed reasonable by the trial court, and the County should not have been let off the hook providing these important records to Ms. Diemond, and the public. The County must be able to locate its bank statements. The County must be able to locate its cancelled checks and warrants. The County must be able to locate its contracts with vendors,

and admitted by 2013 that every vendor had a contract generated and searchable in its new Oracle system. CP 1080-1369. King County argued it would have to locate the cancelled check or warrant and then match it up to the bank statement that reflected that payment, and so the bank statements should be deemed to not be reasonably locatable. But this shows the County actually knew how to locate the relevant entries in a bank statement and thus how to isolate the statements that were responsive. The County as part of standard accounting practices has to reconcile the bank statement entries with the back up data to guard against embezzlement and ensure the public's money is not being deducted from the County's bank accounts without a legitimate expenditure. It was reasonable to expect and require the County to locate these records even if it truly disorganized them after reconciliation and did not maintain them in an orderly fashion after payment. (The County is subject to audit internally and by the State, so any claim of such deliberate disorganization and lack of retention is not credible, and certainly not action the Court should reward even if it were true.)

C. The Trial Court Erred in Grouping the Records Produced into Two Groups and Imposing Just $55 Per Day Per Group.

The *Yousoufian* case against King County dealt with King County's failure to identify and produce a total of 18 documents related to

a study regarding the King Dome demolition and construction and taxing related to a new stadium.[2] The trial court had grouped the 18 records into 10 groups and imposed penalties per day per group. *Yousoufian II*, 152 Wn.2d at 446 & n. 4. Each group was separated into categories of documents and then subdivided into the dates of production. *Yousoufian I*, 114 Wn. App. at 849. On appeal, the Supreme Court upheld the trial court's grouping, but twice ordered an increase in the per day amount, finally imposing a per day amount itself of $45 per day per each of the 10 groups, equaling $450 per day and totaling hundreds of thousands of dollars for the withholding of just 18 records. *Yousoufian V*, 168 Wn.2d 444 ("*Yousoufian V"*)

A grouping based on a common legal error is not always supported when the groupings do not have the same number of days withheld. *Zink v. City of Mesa,* 162 Wn. App. 688, 722, 256 P.3d 384 (2011). A trial court may impose a higher penalty amount if a comparable per-group penalty does not properly penalize an agency. *Bricker v. Department of Labor and Industries*, 164 Wn. App. 16, 28-29, 262 P.3d 121 (2011). Courts are further empowered to impose a per page per day penalty even when the amount equals hundreds of thousands of dollars for a fairly short

[2] *Yousoufian I*, 114 Wn. App. 836, *reversed on other grounds*, *Yousoufian II*, 152 Wn.2d 421; *Yousoufian III*, 137 Wn. App. 69, *Yousoufian IV*, 165 Wn.2d 439; *Yousoufian V*, 168 Wn.2d 444 ("*Yousoufian V"*).

period of withholding. *Wade's Eastside Gun Shop Inv. v. Department of Labor & Industries*, 185 Wn.2d 270, 372 P.3d 97 (2016). In *Wade's Eastside Gun Shop* the trial court took into account the fact that the agency in question had been the subject of two other PRA violations, determining that a greater penalty was necessary for repeat violators to achieve the penalty provision's goal of deterring unlawful nondisclosure, a consideration and conclusion upheld by the State Supreme Court. *Id.*, 185 Wn.2d at 280.

The trial court here created two groups in total even though the records were requested at different times, had different periods of withholding, and involved several different types of records. The trial court imposed a single penalty amount of $55 per day to each of the groups, finding one group had been withheld 810 days and another group had been withheld 538 days for total penalty days of 1,348 and a total penalty of $74,410. CP 193-196. Ms. Diemond had identified at least seven distinct groupings CP 414-415. While the trial court found numerous aggravating factors (CP 193-194 and RP 10/18/17 at 58-60), it completely ignored King County's history of past PRA violations and judgments, such as *Yousoufian*, that showed, like the Labor and Industries in the *Wade's* case, a larger penalty was necessary to deter this repeat violator to finally get the message and fix its procedures and attitudes

about the PRA. A central factor in *Yousoufian V* was that the penalty amount be an amount "necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case." *Yousoufian V*, 168 Wn.2d at 467-468.

The State Supreme Court recognized in *Yousoufian V* that a key purpose of PRA penalties if to deter improper denials of access to public records. It stated as follows:

> Finally, the trial court failed to consider deterrence as a factor in determining the penalty. As noted, the purpose of the PRA's penalty provision is to deter improper denials of access to public records. *Yousoufian II*, 152 Wash.2d at 429–30, 98 P.3d 463. The penalty must be an adequate incentive to induce future compliance. Yet nowhere did the trial court mention deterrence. What is more, as Yousoufian points out, the trial court implicitly averted the deterrence factor by analogizing to *ACLU*. Br. of Appellant at 16. In *ACLU*, the agency in question was a small school district, **but here the county is the most populous county in the state. The penalty needed to deter a small school district and that necessary to deter a large county may not be the same.**

Yousoufian V, 168 Wn.2d at 462-463. The Defendant here is the same King County discussed in *Yousoufian I-V*. It is the most populous County in the State with a biennial budget of $11.6 billion dollars. It is a repeat abuser of the public's rights under the PRA and the subject of several expensive judgments for its PRA violations. But King County still has not gotten the message and has not fixed its behavior or its procedures. It ignored Ms. Diemond, blew off her concerns and requests, and made her

sue the County before it made any real effort to locate the records she had requested. She told the PRA Officers about her pending criminal case and the need for the records to help her prove her innocence and seek a new trial. She made sure they knew what she wanted, and gave them examples she had obtained herself from court files to aid them in their search. But she was denied the records she needed for years request after request, and after the time to use them in her criminal case appeals had passed. What's more, in her research, Ms. Diemond found 26 other people preyed upon by these same actors. King County's delay let the name and reputation of this 66-year old well-respected community advocate, working single mother, loving caregiver for her elderly mother be destroyed with no regard to who it harmed. Ms. Diemond had no criminal record, had never set foot in a jail cell, and had a more than perfect and well liked community reputation, but she was deprived of needed records to defend herself against the travesty King County brought against her. The trial court needed to impose a penalty sufficient to deter King County from future violations. It imposed a penalty of just $74,410 for 1,348 days of withholding and no penalty for the numerous records the County still has not produced. King County has demonstrated that its past penalties of hundreds of thousands of dollars in the past was not sufficient to alter its behavior or deter PRA

violations in the future. The mere $74,410 penalty imposed here will certainly not be sufficient.

Ms. Diemond further showed she suffered actual economic loss as a result of the County's PRA violations and withholdings since she was unable to obtain records she needed to defend herself in her criminal trial, lost her job and career as a result, and is indigent as a direct result of King County's frivolous prosecution of her, based on perjured testimony from two undisclosed *Brady* officers and numerous "rescue" embezzlers, and its denial of her due process rights to obtain exculpatory evidence the County withheld and is still withholding from her. *Yousoufian II*, 152 Wn.2d at 429-430, recognized that penalties for PRA violations should be increased "as a deterrent where an agency's misconduct causes a requester to sustain actual personal economic loss." The trial court improperly failed to consider the economic loss and the impact on Ms. Diemond when fashioning the penalty.

D. The Trial Court Erred in Denying the CR 60 Motion to Amend or Vacate.

Ms. Diemond properly opposed the County's summary judgment motion, and timely brought a motion for reconsideration of that decision in the trial court. She also brought a CR 60 Motion to Amend and Vacate the Judgment in the trial court while her timely CR 59 motion was still pending.

A Commissioner of this Court has ruled that Ms. Diemond may only address the CR 60 Motion denial since she did not appeal the CR 59 denial within 30 days of its entrance and waited for a decision on her overlapping, and pending, CR 60 motion to be decided. Respectfully, the Commissioner's conclusion is error but should not alter the outcome here. This Court should address each of the underlying issues raised in the CR 60 Motion, which are those addressed herein, and reverse the trial court's order refusing to vacate and amend the judgment. Ms. Diemond was entitled to the public records she requested, records that have still not been provided though they are ordinary financial documentation records the County is required to create, and to maintain, and to utilize as part of its ordinary accounting reconciliation as well as its audit requirements. The trial court erroneously held that those records were not "reasonably locatable" based on testimony that raised material questions on this issue rather than answered them. Ms. Diemond in her CR 60 Motion further showed that, while King County claimed in its summary judgment motion to a lack of requirements for contracts and W-9 and other intake procedures, and a lack of ability to locate such records if completed, that King County told her she was required to sign a W-9 in order to receive the penalty in this case as that was an initial required step for all County payments. This is something the County had claimed otherwise in its summary judgment briefing. Ms. Diemond further

showed that the King County Ordinance required it to create contracts with vendors, again in direct contradiction of what King County had told the trial court during summary judgment proceedings.

The trial court also grouped records into just two groups in groupings that do not follow the guidance of the appellate courts, and like the trial court in *Yousoufian*, failed to take into account the goal of deterrence, and the size and budget and past PRA violations of King County, when fashioning an appropriate penalty, again as the Supreme Court has ordered must occur.

Ms. Diemond demonstrated that the judgment amount was fundamentally unfair as a matter of law and the judgment contradicted the requirements of *Yousoufian II* and *V*. She demonstrated that the trial court had not complied with *Yousoufian V* in considering the size of the agency and the amount needed to deter violations, and that the trial court neglected to comply with *Wade's Eastside Gun Shop* in considering the past history of the agency and the need to impose a greater penalty for a repeat violator to secure future compliance and deter violations. Ms. Diemond demonstrated that her due process and Constitutional rights were violated by King County's withholding of records essential to her criminal defense and appeals, and that her rights under the PRA were violated by the County's blatant disregard of its duties under the law.

> The purpose of the Public Records Act is to preserve 'the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions.

O'Connor v. Department of Social & Health Servs., 143 Wn.2d 895, 25 P.3d 426 (2001). Appellate review of trial court decisions in PRA cases must be *de novo. O'Connor,* 143 Wn.2d at 904; *Progressive Animal Welfare Society v. University of Washington,* 125 Wn.2d 243, 252, 884 P.2d 592 (2995) ("*PAWS II"*). Even if the Court were to apply an abuse of discretion standard, the errors here are so clearly contrary to binding precedent an abuse of discretion would be shown.

E. Ms. Diemond Should be Awarded Fees and Costs on Appeal and Below on Remand.

RCW 42.56.550(4) of the PRA provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action [.].

Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005); *see also Am. Civil Liberties Union of Washington ("ACLU") v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d

536 (1999). The PRA does not allow for court discretion in deciding **whether** to award attorney fees to a prevailing party. *Progressive Animal Welfare Society v. University of Washington* ("*PAWS I*"), 114 Wn.2d 677, 687-88, 790 P.2d 604 (1990); *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The only discretion the court has is in determining the *amount* of reasonable attorney's fees. *Amren*, 131 Wn.2d at 36-37.

The State Supreme Court in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees—"[including] fees on appeal"—to the requester. Should Ms. Diemond prevail on appeal in any respect, she should be awarded her fees and costs on appeal pursuant to the PRA and RAP 18.1.

Under RCW 42.56.550(4), a public records requestor who prevails against an agency in a PRA claim is entitled to mandatory reasonable attorney's fees, all costs, and a daily penalty of up to $100 per day which can be imposed per page. *Wade's Eastside Gun Shop*, 185 Wn.2d 270, 372 P.3d 97 (2016). Defendant has failed to perform an adequate search for records in violation of the PRA and silently withheld numerous records in violation of the PRA. Further the Defendant admitted guilt to all the above claims on the record completely to all Ms. Diemond's claims without exception. Their argument was only a device to suppress their failure and

reduce a monetary penalty that would act as a deterrent to a large municipality such as King County. This Court should thus further deem Ms. Diemond the prevailing party on those additional claims in this appeal and rule that she is entitled to an award or reasonable attorney's fees, all costs, and statutory penalties for these additional withheld records in amounts to be determined by the trial court after subsequent briefing and hearing by the trial court and remand to the trial court for this additional trial court fee, cost and penalty award once all remaining responsive records have been produced.

IV. CONCLUSION

For all of the reasons described above, Ms. Diemond asks the Court to (a) reverse the trial court's order denying her motion to vacate and amend, (b) to award Ms. Diemond her fees and costs on appeal, and (c) to remand with instructions to the trial court to (i) require King County to produce the bank statements, canceled checks, warrants and contracts previously requested by Ms. Diemond but which still have not been produced, (ii) impose penalties based on groupings according to the date a document was requested and the date it was produced rather than the two groups the trial court improperly utilized and at a higher per day penalty than $55, and (iii) award Ms. Diemond her reasonable fees and costs incurred below through the conclusion of this matter.

Respectfully originally submitted May 10, 2019, and corrected brief (with the newly-assigned Clerks' Papers page numbers inserted) submitted this 3rd day of July, 2019.

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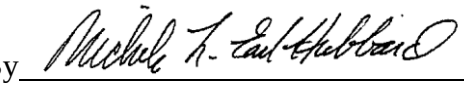
By 
Michele Earl-Hubbard, WSBA # 26454

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 10, 2019, I filed with the Court by E-filing, and I served by e-mail the original Brief of Appellant on the below, and that today, July 3, 2019, I filed with the Court by E-filing and served by email on the below this Corrected Brief of Appellant adding in newly-assigned CP page numbers and correcting any changes in pagination in the tables of authorities and contents due to the additions:

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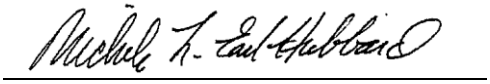
Dated this 3rd day of July, 2019, at Shoreline, Washington.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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CHRISTY R. DIEMOND,

Plaintiff/Appellant,

v.

KING COUNTY

Defendant/Respondent.

BRIEF OF RESPONDENT KING COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Ms. Diemond mistakenly devotes her entire brief to the merits of her PRA case, which are not before the Court. The only issues are: (1) whether the Court should dismiss Diemond's appeal from the order denying her untimely motion for reconsideration because the trial court lacked authority to decide its merits, or, alternatively, (2) whether the trial court abused its discretion in denying Diemond's untimely motion for reconsideration.

The record indicates that the trial court entered judgment on November 27, 2017. Diemond filed a timely motion for reconsideration under CR 59 asking the court to increase the penalty. The court denied this motion on January 3, 2018. On January 8, Diemond filed a motion to vacate under CR 60, which the court denied on February 22, 2018.

On March 1, 2018, Diemond filed a second, untimely motion for reconsideration, once again asking the court to increase the penalty amount. She called this a motion to "alter or amend" the judgment under CR 59(h). The court denied this motion by order dated May 25, 2018, and Diemond filed a notice of appeal on May 31, 2018.

A Commissioner of this Court concluded that Diemond's appeal was timely as to the May 25, 2018 order, but not as to the November 27, 2017 judgment, the January 3, 2018 order denying reconsideration, or the February 22, 2018 order denying Diemond's motion to vacate. Thus, the Commissioner concluded that Diemond's appeal could proceed only as the May 25, 2018 order.

Because courts lack authority under CR 59 to extend the ten day period for filing a motion for reconsideration, the lower court erred in reaching the merits of Diemond's motion. This Court should therefore vacate the trial court's May 25, 2018 order and affirm the judgment below.

Alternatively, review is limited to whether the superior court abused its discretion in denying Diemond's CR 59(h) motion to alter or amend. Because there was no abuse, this Court should affirm.

II. ASSIGNMENTS OF ERROR

The trial court erred in ruling on the merits of Diemond's untimely second motion for reconsideration.

III. ISSUES

1. A trial court does not have authority to extend the ten-day time period for filing a CR 59 motion for reconsideration. In this case, the trial court allowed Diemond to file her second motion for reconsideration nearly a month and a half after the ten-day deadline lapsed, and then denied the motion on its merits. Did the trial court lack authority to rule on the merits of Diemond's second CR 59 motion for reconsideration?

2. An untimely motion for reconsideration does not postpone the 30-day period for appealing an underlying judgment, nor does a CR 60 motion to vacate the judgment. Here, the 30-day appeal period commenced when the trial court denied Diemond's first motion for reconsideration on January 3, 2018. A week later, Diemond filed a CR 60 motion to vacate, and on March 1, 2018, she filed her second (untimely) motion for reconsideration. Did the thirty-day period to

appeal the underlying judgment expire 30 days after January 3, 2018 (i.e. February 2, 2018)?

3. Should this Court dismiss Diemond's appeal from the trial court's denial of her second, untimely motion for reconsideration because the trial court lacked authority to rule on it? Alternatively, did the trial court abuse its discretion in denying Diemond's second, untimely CR 59 motion (to alter or amend) the judgment?

IV. STATEMENT OF THE CASE

Although a discussion of the substantive facts is not necessary to resolve this appeal, King County will summarize them below for background purposes and to correct a number of errors in Diemond's Corrected Brief.

A. Substantive Facts

In 2011, Christy Diemond was charged with two counts of first degree animal cruely for starving and dehydrating two elderly horses she owned. A jury found her guilty on both counts in October 2012, although she was not sentenced until October 2013. Diemond appealed, and this Court affirmed. *See State v. Diemond*, 187 Wn. App. 1005, 2015 WL 1816336 (2015) (unpublished).

On April 29, 2013, Diemond phoned the King County Records and Licensing Services Division (Services Division) and spoke with public records officer Sean Cockbain. CP 1388. Intending to investigate those who had testified against her (Appellant's Brief, at 4), she asked for records about the Regional Animal Services of King County (Animal Services), which is a section of the Services Division. *See* CP 1392. In a May 7, 2013 follow up email to Diemond, Cockbain documented her request as follows:

> How much the cities that use [Animal Services] are charged for services. This is the actual amount. The agreements/KC contracts for nonprofits, vets, and rescue groups for the years 2006-2012. Once these agencies are identified, would like to view invoices for these agencies. [CP 1392].

Cockbain worked with Sean Bouffiou, a Services Division Financial Officer, to prepare a list of "nonprofits, vets, and rescue groups." He prepared a list of these agencies from accounts payable transactions. CP 1385. On May 23, 2013, Cockbain emailed the list to Ms. Diemond and asked her to select the vendors whose invoices she'd like to review. CP 1394. Diemond responded on June 13, 2013 with a list of 35 names. CP 1407.

Diemond was sentenced on the animal cruelty charges on October 18, 2013. A week later, on October 23, 2013, Diemond

contacted Services Division employee Ben Gannon to check on the status of her records request. *See* CP 1421-1422. The parties traded emails in an effort to set a date for Diemond to come in and review the records. *Id.* By the end of December 2013, Cockbain and Diemond had agreed to an inspection date of January 6, 2014. CP 1427.

Diemond inspected records on four occasions between January 6, 2014 and February 27, 2014. CP 1443. Dissatisfied with the response, Diemond emailed the records officer on March 7, 2014. CP 1453. Diemond stated that if invoices could not be provided, she would "expand this request to include all canceled checks and bank statements . . .". *Id*. She formally requested these items on March 12, 2014. *See* CP 1462.

Diemond continued to inspect and request records throughout April and May 2014, but she remained unsatisfied with the Service Division's response. *See* CP 1473-1475. On June 10, 2014, she filed this PRA lawsuit. In response, the Services Division produced invoices and purchase orders in five installments during August 2014. CP 1444. In the final installment, sent on August 25, 2014, the Services Division told Diemond it had completed its search for

responsive documents and that there were no further records. CP 1477. The Services Division later acknowledged this was not correct.

Diemond served King County with discovery requests in her PRA lawsuit on October 22, 2014. CP 1479. Over the next six months, King County answered the interrogatories and identified 300 entities providing animal services to its Services Division. *Id.* In May 2015, County attorneys acknowledged that the County had yet to complete a reasonable search for responsive records, and informed Diemond that a new search would be conducted. *See* CP 1472, 1488-1489. Although the County asked that the list be reduced from 300 to 50, Diemond declined. CP 1491.

Because Diemond's PRA request was a subset of her lawsuit discovery requests, the County decided to use its discovery responses as a new response to her PRA request. CP 1520. The County provided nine "supplemental responses" to Diemond's requests for production, with the last production on August 31, 2015. CP 1521. On that date, County attorney Amy Eiden notified Diemond's attorney that defendant had made its final production pursuant to Diemond's public records act request. *Id.*; CP 1480, 1494. Diemond submitted supplemental interrogatories in December

2015, and over the next year-and-a-half, she deposed 11 County witnesses. CP 1480.

B. Procedural Facts

1. Summary Judgment and Ruling

King County moved for summary judgment in August 2017, asking the court to set the penalty and rule that its search for records (completed August 31, 2015) was reasonable. *See* CP 1515. The County asked the court to find Diemond had submitted a single request on June 13, 2013, and claimed that there were 810 penalty days from that date through August 31, 2015. *See* CP 1533, 1538. Finally, the County asked the court to impose a per-day penalty of $35; this amount, when multiplied by the 810 proposed penalty days, produced a penalty of $28,350. CP 1538.

The court granted King County's motion (in part) in an oral ruling on October 18, 2017, and entered a formal order and judgment on November 27, 2017. CP 193-196. The court agreed that King County had completed a reasonable search for records by August 31, 2015. *Id.* It also found, however, that the County had demonstrated a "high degree of negligence" in responding to the request and set the per-day penalty at $55. *Id.*

The court found that there were two groups of records for purposes of determining the penalty days. The first category was Diemond's June 13, 2013 request for vendor agreements and contracts. There were 810 days between that day and August 31, 2015. The second category was Diemond's March 12, 2014 request for canceled checks and bank statements. There were 538 days between that date and August 31, 2015. CP 193-196. Thus, the total penalty days were 1,348 (810 + 538), and the total penalty amount was $74,140 (1,348 x $55). *See id*.

2. First Motion for Reconsideration and Motion to Vacate

Diemond filed a CR 59 motion for reconsideration on December 1, 2017, arguing in part that there were 12 groups of records, and that the court should amend its judgment to increase the penalty. CP 1378. Diemond did not challenge the $55 per day penalty amount. *Id.* The trial court denied the motion on January 3, 2018.[1] CP 152. Diemond followed up with a CR 60(b) motion to vacate on January 8, 2018 (CP 60), claiming in part that the County's

[1] Diemond's Corrected Brief mistakenly states that her first motion for reconsideration was denied on February 22, 2018. *See* Corrected Brief, at 19.

attorneys had conspired to conceal documents and had committed a fraud on the court. CP 439-463. The court denied this motion on February 22, 2018.[2] CP 24-25.

3. Second Motion for Reconsideration and Appeal

Diemond filed another CR 59 motion (to alter or amend the judgment) on March 1, 2018.[3] CP 20-23. Asserting, once again, that there were at least 12 groups of records, she asked the court to amend the judgment by increasing the penalty. *Id.* King County opposed the motion by arguing, in part, that it was not timely. CP 1371. The court rejected this argument, but denied Diemond's motion on its merits by order dated May 25, 2018.[4] CP 10-11. On May 31, 2018, Diemond filed a notice of appeal from that order as well as the November 27, 2017 judgment. CP 1-9.

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[2] Diemond's Corrected Brief, at 30, mistakenly states that Diemond filed her CR 60 motion to vacate "while her timely CR 59 Motion was still pending." There was no CR 59 motion pending when Diemond filed her CR 60 motion to vacate on January 8, 2018.

[3] Diemond's Corrected Brief mistakenly labels this a CR 60 motion to vacate. *See* Corrected Brief, at 19.

[4] Diemonds Corrected Brief mistakenly states that the trial court denied this motion on May 28, 2018. *See* Corrected Brief, at 19.

4. Notice of Appeal and Commissioner's Ruling

A Commissioner of this Court determined that Diemond's notice of appeal was untimely as to the trial court's November 27, 2017 judgment and its January 3, 2018 denial of Diemond's first motion to reconsider that judgment. *See* Commissioner's letter ruling dated 8/16/18. The Commissioner further ruled that Diemond's appeal was not timely as to the trial court's February 22, 2018 order denying her CR 60 motion to vacate.[5] *Id.*

The Commissioner found that Diemond's appeal was timely only as to the May 25, 2018 order denying her second motion for reconsideration. *Id.* Although this Court gave Diemond the opportunity to establish that the appeal period should be enlarged, she declined to take advantage of it. *See* Commissioner's Ruling letter ruling dated 9/7/18.

[5] Diemond's notice of appeal did not seek review of the trial court's orders of January 3, 2018 or February 22, 2018. CP 1-9. Nonetheless, in an apparent effort to given Diemond every benefit of the doubt, the Commissioner evaluated whether Diemond's notice of appeal was timely as to these two orders.

V. AUTHORITY AND ARGUMENT

A. Because Diemond's Second CR 59 Motion for Reconsideration was not Timely, the Trial Court lacked authority to Rule on its Merits.

A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. *Schaefco, Inc., v. Columbia River Gorge Com'n,* 121 Wn.2d 366, 367-368, 849 P.2d 1225 (1993). The same 10-day deadline applies to motions to alter or amend a judgment under CR 59(h) ("A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.").

The trial court denied Diemond's first CR 59 motion to reconsider on January 3, 2018. Diemond delayed filing her second CR 59 motion for reconsideration until March 1, 2018 – nearly two months after January 3, 2018. This motion was not timely. Because the trial court may not extend the 10 day deadline to file a motion for reconsideration, it lacked authority to rule on the merits of Diemond's second motion via its May 25, 2018 order.[6]

[6] Although the trial court rejected this argument below, King County was not required to cross-appeal because it is not seeking additional

B. The 30-day Appeal Period from the Order Denying Diemond's First Motion for Reconsideration Expired on February 2, 2018 and was not Extended by Diemond's CR 60 Motion to Vacate.

Motions to vacate under CR 60(b) are not among the list of motions that extend the deadline to appeal. RAP 5.2(e); *Anderson v. Larsen*, 200 Wn App. 1058, 2017 WL 4351502 *2 (2017) (unpublished) (appeal from motion to vacate does not extend time for a notice of appeal) . Therefore, Diemond's CR 60 motion to vacate – filed on January 8, 2018 and denied on February 22, 2018 – did not extend the deadline for Diemond to appeal the trial court's January 3, 2018 denial of her first motion to reconsider.

The appeal period expired on February 2, 2018. Diemond's May 31, 2018 appeal is therefore untimely as to the underlying judgment and the January 3, 2018 order denying her first motion for reconsideration. *See Schaefco*, 121 Wn.2d at 368.

Diemond did not seek review of the trial court's February 22, 2018 denial of her CR 60 motion. CP 1-9. Therefore, the February

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relief from this court. *See Ensberg v. Nelson*, 178 Wn. App. 879, 889 note 7, 320 P.3d 97 (2013). This court may affirm on any legal theory established by the pleadings and supported by the proof. *See id.*

22, 2018 order is not before the Court.[7] But even if Diemond had sought to appeal the February 22, 2018 order in her May 31, 2018 notice of appeal, the appeal was not timely. She had 30 days (from February 22, 2019) to appeal the order, and her May 31, 2019 appeal is well beyond the 30 day deadline.

For these reasons, the Court Commissioner properly determined that this Court lacks jurisdiction to review the merits of the trial court's November 27, 2017 judgment, its January 3, 2018 order denying reconsideration of that judgment,[8] and the order denying her CR 60 motion to vacate.

C. The Court should Vacate the May 25, 2018 Order and Dismiss Diemond's Appeal because the Trial Court Lacked Authority to Rule on the Underlying CR 59 Motion.

The Court should dismiss Diemond's appeal from the order denying her second motion for reconsideration because the trial court

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[7] *See* RAP 2.4(b)-(c). Diemond makes no argument that either of these provisions justify a contrary result, and she may not do so for the first time in her reply brief. *See Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 218, 936 P.2d 1163 (1997) (court does not consider arguments raised for first time in reply brief).

[8] *See, e.g., Griffin v. Draper*, 32 Wn. App. 611, 613-614, 649 P.2d 123 (1982) (where party appeals denial of untimely motion for reconsideration, and appeal is filed more than 30 days after underlying judgment, appellate court lacked jurisdiction to review underlying judgment).

lacked authority to rule on its merits. *See Schaefco, Inc., v. Columbia River Gorge Com'n,* 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993).

This was the outcome in *Metz v. Sarandos*, 91 Wn. App. 357, 359, 957 P.2d 795 (1998), where the lower court considered an untimely motion for reconsideration, granted it, and reversed its underlying summary judgment order. On appeal, the court held that the trial court lacked discretionary authority to extend the time for filing a motion for reconsideration. It therefore reversed the order granting reconsideration and reinstated the order granting summary judgment. *Metz,* 91 Wn. App. at 360 (citing *Schaefco*).

D. Alternatively, the Trial Court did not Abuse its Discretion in Denying Diemond's Untimely Motion for Reconsideration.

Assuming the trial court did have authority to deny Diemond's untimely second motion for reconsideration on the merits, the court did not abuse its discretion in denying it.

CR 59(h) states that "A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." Under this rule, the trial court may modify a judgment to make it conform to the judgment intended to be entered. *See Seattle–First*

Nat'l Bank v. Treiber, 13 Wn.App. 478, 480, 534 P.2d 1376 (1975) (discussing analogous language in CR 60(a)). This Court reviews a trial court's decision to deny a CR 59 motion for abuse of discretion. *Lian v. Stalick,* 106 Wn.App. 811, 823–24, 25 P.3d 467 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons. *Id.*

In her second CR 59 motion, Diemond asked the court "for an amendment to increase the amount the judgment penalty [sic] to include the personal losses to Diemond proportionate to the '*high degree of negligence*' et al, noted by the court in her October 18th, 2017 [oral] ruling." (italics in original) CP 20-23. This is merely a rehash of arguments Diemond made in her first motion to reconsider.

CR 59(h) motions to alter or amend are typically directed at judgment errors, irregularities, or some alleged failure of the judgment to conform to the court's intent. *See* 4 Wash. Prac., Rules Practice CR 59, at § 31 (6th ed. 2018). While it is clear that Diemond disagreed with the court's October 17, 2017 oral ruling, its November 27, 2017 judgment, and its January 3, 2013 order denying reconsideration of that judgment, she made no showing of any irregularity or failure to conform to the court's intent. Diemond

therefore failed to demonstrate that the trial court abused its discretion in denying her second motion for reconsideration, and this Court should affirm.

E. Diemond's Corrected Brief Fails to Address the Issues before the Court.

King County does not address the substantive arguments in Diemond's Corrected Brief of Appellant because they are irrelevant. They are premised on the incorrect assumption that the judgment and orders preceding the May 25, 2018 order are properly before this Court for review. But the Court Commissioner expressly ruled that they were not because Diemond did not timely appeal them, and Diemond did not assign error to that ruling.

While Diemond does claim the Commissioner's decision "is in error" (*see* Corrected Brief at 31), she cites no authority and makes no argument as to why. Because her conclusory claim is unsupported by argument, meaningful analysis, or authority, the Court should not consider it. *See Grant County v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978) (where no authorities are cited, court may assume counsel found none; court does not consider points unsupported by argument or law). Diemond failed to convince the

Commissioner that the Court should enlarge the time to appeal under RAP 18.8(b). She does not analyze this provision in her opening brief, and she may not do so for the first time in her reply.

VI. CONCLUSION

On appeal from the trial court's May 25, 2018 order denying Diemond's second, untimely motion for reconsideration, she is asking this Court to review the underlying judgment and other orders over which it has no appellate jurisdiction. The trial court lacked authority to rule on Diemond's second motion for reconsideration because it was not timely, and this Court lacks appellate jurisdiction over the underlying judgment and first reconsideration order because Diemond filed her notice of appeal more than thirty days after they were entered.

Even if technically possible, review of the May 25, 2018 order is impractical because it fails to "bring up" any decisions Diemond wants reconsidered. But if the Court does allow review, it should affirm because the trial court did not abuse its discretion in denying Diemond's second motion for reconsideration.

DATED this 7th day of August, 2019.

DANIEL T. SATTERBERG
Prosecuting Attorney

By: */s/ John R. Zeldenrust*
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Attorneys for Respondent King County

CERTIFICATE OF FILING & SERVICE

I hereby certify that on the 7th day of August, 2019 I filed the foregoing document with the Court of Appeals, Division I and further certify that I served a copy of the same via email to the following:

Michele Earl-Hubbard, WSBA #26454
Attorney for Appellant
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of August, 2019.

LINDSEY MACALALAD
Civil Litigation - Legal Secretary
King County Prosecuting Attorney's Office

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

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NO. 78474-9-I

IN THE COURT OF APPEALS, DIVISION ONE

CHRISTY R. DIEMOND,

Plaintiff/Appellant

v.

KING COUNTY,

Defendant/Respondent

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. SUPPLEMENTAL STATEMENT OF THE CASE

Defendant King County continues to misstate facts relevant to this appeal, including to misstate dates of alleged filings. See, for example, Brief of Respondent at 16, stating Order entered January 2013, instead of 2018.

King County also incorrectly describes the jury's verdict in its prosecution of Christy Diemond, falsely claiming Ms. Diemond was convicted on "both" counts, when she was clearly found not guilty of one of the two charges as the Opinion it cites clearly shows (see **State v. Diemond**, 2015 WL 1816336 at 4 (2015)—a fact frankly irrelevant to this appeal which deals with King County's refusal to provide Ms. Diemond needed records to defend herself in that case until it was too late to aid her.

King County also fails to respond to, or rebut, the clear factual record showing King County has admitted it did not conduct a reasonable search for records when Ms. Diemond made her Public Record Act ("PRA") request to aid her in her defense in the criminal case, and that King County did not even begin to perform a legitimate search until years after her request, after being sued, and after falsely telling Ms. Diemond in 2014 that there were no more records to produce. See, for example, CP 1477, CP 1478-1479 at ¶¶4 and 9, CP 1488, CP 1520 lines 2-7, and CP 144 at ¶7. See also Brief of Respondent at 7 admitting its statement to Ms. Diemond in

2014 that no further records existed was false, and that a reasonable search was not performed to locate responsive records until years after the request and after Ms. Diemond filed suit.

King County further fails to acknowledge the six aggravating factors found by the trial court to exist in its findings in the Summary Judgment Order:

- "While there was some training of the agency's personnel, it was not adequate…",
- "Agency systems to track and retrieve public records were not adequate…",
- "The response was delayed…",
- "Additionally, time was of the essence because of Ms. Diemond's criminal case … [a fact King County knew by at least] March 16, 2014…",
- "Lack of compliance with PRA procedural requirements…", and
- "[A] high degree of negligence…"

CP 7-8.

II. ARGUMENT

A. Introduction

King County chooses to avoid discussion of the merits, hoping for a technical win, based on a faulty premise. King County argues that the trial court, and this Court, lack jurisdiction or the right to consider this appeal, even though that argument has been squarely rejected by the United States Supreme Court in recent precedent binding on this Court, and implicitly overruling the cases cited by King County which are based on a faulty jurisdictional premise. King County further argues for relief it never before sought, and to which it is not entitled, as it did not cross-appeal.

As explained below, this case is a clear example of an agency behaving badly – admitting it did not conduct a reasonable search for records it knew were essential to the requestor until long after it was sued, and acknowledging it still has not produced records such as bank statements, warrants, and canceled checks on the theory these records are not "reasonably locatable" when these records must—based on required accounting practices and pursuant to its statutory obligations—be clearly accessible and locatable by the County. Further, the penalty award at issue in this case is far below that required to deter this repeat PRA abuser,

and the trial court's methodology fails to comply with binding precedent as to amount as well as application.

B. The Trial Court had Jurisdiction to Enter the Orders Entered, and this Court Has Jurisdiction to Hear this Appeal and All Underlying Orders Addressed in Appellant's Brief.

King County argues that the trial court, Appellate Commissioner, and this Court lack jurisdiction to hear this appeal or consider all the Orders Appellant addresses because the County alleges Ms. Diemond failed to meet deadlines set forth in Court Rules for filing motions or her Notice of Appeal. King County alleges that compliance with Court Rule proscribed deadlines is necessary to confer jurisdiction upon such courts. See, e.g., Brief of Respondent at 2 ("lacks authority"), at 3 ("does not have authority" and "lack authority"), at 4 ("lacked authority"), at 12 ("lacked authority"), at 14 ("this Court lacks jurisdiction"), at 14 ("lacked authority" and "lacked jurisdiction"), at 15 ("lacked authority" and "lacked discretionary authority"), and at 18 ("it has no appellate jurisdiction", "lacked authority" and "lacks appellate jurisdiction").

This premise—that courts lose jurisdiction and power to rule if a court rule imposed deadline is not met—was explicitly declared incorrect by the United States Supreme Court in the 2017 decision of **Hamer v. Neighborhood Housing Services of Chicago**, 138 S. Ct. 13, 199 L.Ed.2d

249 (2017). In **Hamer**, a District Court had held that it lacked jurisdiction to hear an appeal of a grant of summary judgment when the appeal was filed beyond the date allowed by Court Rules. The case addressed the misconception that a court rule can preclude jurisdiction of a court. The US Supreme Court held it could not. It held that statutes, created by the Legislature, could control jurisdiction such as determining the date by which a claim must be brought, but court rules were merely "claim-processing rules" which can be waived or forfeited and do not determine whether a court has jurisdiction to hear a matter. **Id.**

Griffin v. Draper, 32 Wn. App. 611 (Div. 2, 1982), cited by King County, held the appellate court lacked jurisdiction to hear an appeal of an underlying judgment and a motion for reconsideration filed 10 months after Judgment was entered solely based on the court rule deadline to appeal within 30 days of a Judgment or 30 days after a decision on a timely motion for reconsideration. The appellant there had notice of the actual judgment and cited no explanation for his decision to wait 10 months to file the motion for reconsideration, but the validity of the decision, based on jurisdictional grounds, is no longer good law based on **Hamer.**

In **Metz v. Sarandos**, 91 Wn. App. 357, 357 P.23d 795 (Div. 2, 1998), also cited by the County, Division Two held that a trial judge was prohibited from determining that the date starting the 10 day deadline to file

a Motion for Reconsideration was the date the party would have received the Order at issue, not the date it was sent to the clerk for filing. Again, Division Two ruled based on jurisdictional grounds. **Metz**, too, is no longer good law. It is also contrary to due process requirements and such a holding today would be Constitutionally invalid, as explained further below.

Finally, **Schaeffer v. Columbia River Gorge**, 121 Wn.2d 368, 949 P.2d 1225 (1993), declined to grant additional time for the notice of appeal when a party timely filed, but did not timely serve, a motion for reconsideration on his opponent and waited four days to do so. This Opinion also is cloaked in jurisdictional grounds argument, erroneously finding that the Court is precluded from accepting appeals absent extraordinary circumstances for noncompliance with a court rule. **Schaeffer**, too, is no longer good law on this point based on **Hamer**. A Court is not precluded from accepting appeals, even absent extraordinary circumstances, and it does not lose jurisdiction to hear an appeal merely because an appellant does not meet court rule imposed deadlines.

Under **Hamer**, a trial court does not lose jurisdiction to hear a matter if court rule imposed deadlines are missed, nor does an appellate court lose jurisdiction to hear an appeal if court rule imposed deadlines are missed. Only a statute, drafted by the Legislature, can deprive a court of jurisdiction.

A court rule imposed deadline is merely a "claim-processing rule" and cannot deprive a court of jurisdiction. **Id.**

Other Washington State appellate decisions illustrate that the court rule deadline cannot impose an unchangeable barrier to court jurisdiction. For example, in a series of cases our appellate courts have recognized that parties must have actual notice of an order before they can be expected to appeal it, automatically accepting appeals filed beyond the court rule deadline without any discussion of jurisdiction or power. In **State ex rel. L.L. Buchanan & Co. v. Washington Public Service Commission**,, the Washington State Supreme Court held that a failure of a party to serve notice of entry of an order on its opponent did not start the clock for the deadline to file an appeal, making the appeal ultimately filed timely. **State ex rel. L.L. Buchanan & Co. v. Washington Public Service Commission,** 39 Wn.2d 706, 709-710, 237 P/.2d 1024 (1951).

This Court, Division One, held in **Coleman v. Dennis**:

> Defendant did not serve Plaintiff or his counsel with a copy of the order granting a new trial. The order was entered in the absence of counsel. Neither the plaintiff nor his counsel waived notice of presentation of the order. **Failure to serve the order or notice of its entry is fatal to defendant's motion to dismiss the appeal**.

Coleman v. Dennis, 1 Wn. App. 299, 301, 461 P.2d 552 (Div. 1, 1969) (emphasis added).

Division Two in the unpublished case of **Wright v. Washington State Department of Labor and Industries**, , held that an administrative appeal was timely filed and should be reinstated when the Department conceded

> that there were significant delays between when the Department issued its decision and when Wright received it, and between when Wright mailed his notice of appeal and when the trial court received it, both caused by the prison mail system.

Wright v. Washington State Department of Labor and Industries 197 Wn. App. 1017, *1, No. 48829-9-II (Div. 2, Dec. 30, 2016).

The United States Supreme Court in **Rosenbloom v. United States**,, ruled an appeal was timely when the District Court failed to timely send the party a notice of entry of an order and the record failed to show with sufficient clarity that the party and his attorney had actual notice of the entry of an order earlier. **Rosenbloom**, 355 U.S. 80, 80-81, 78 S. Ct. 202, 2 L.Ed.23d 110 (1957).

These cases illustrate that court rule imposed deadlines do not control jurisdiction and further that—regardless of what a rule may say—it cannot trump or invalidate other necessary rights such as due process and notice and fundamental fairness.

King County is simply wrong that today, under governing law, a party must meet court rule imposed deadlines to preserve a court's authority to act as the trial court did here, and as this Court is asked to do here.

C. This Appeal of all Underlying Orders Should be Heard.

Even where there is a court rule, Washington's appellate court rules recognize the Court's power to alter its rules, and its procedures, to ensure justice is done. RAP 1.2(a) states

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

RAP 1.2(c) states "The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c)." RAP 18.8(b) provides that the appellate court can extend the time to file a Notice of Appeal or Motion for Reconsideration "in extraordinary circumstances and to prevent a gross miscarriage of justice."

The trial court was empowered to hear the motions filed by Ms. Diemond, even if filed beyond court rule imposed deadlines, and the trial judge here explicitly rejected King County's argument that the March 1, 2018 Motion appealed from here was untimely. (The March 1, 2018 Motion

was not decided until May 25, 2018.) The trial court further delayed decision for months of the relevant motions filed by Ms. Diemond as a *pro se*, lulling her into not filing an appeal as she waited for the trial court to rule. The trial court further ruled in its May 24, 2018 Minute Entry that Ms. Diemond was empowered to appeal to the appellate courts. CP 5. Ms. Diemond has demonstrated ample circumstances to justify consideration of her appeal, and the 11/27/17 Order, 1/3/18 Order on Motion for Reconsideration, 2/22/18 Order Denying Motion to Vacate, and 5/25/18 Order denying her motion to amend the Judgment. At the heart of this appeal is an appellate court record showing King County lied to Ms. Diemond in 2014 when it told her all records had been produced, failed to perform a reasonable search for those records for years until after it was sued despite knowing that time was of the essence and that Ms. Diemond needed these records to defend herself in a criminal case brought against her by the County, and that the County was found by the trial court to have inadequately trained staff, inadequate tracking procedures, a failure to comply with PRA procedural requirements, and to have acted with a "high degree of negligence". CP 7-8. And the record further demonstrates that this same agency has been found by courts to have committed similar violations numerous times, including in the **Yousoufian v. King County**

cases I-V[1] as discussed in Appellant's Corrected Brief of Appellant. Many years after the end of the lengthy **Yousoufian** litigation, after costing taxpayers one of the largest PRA judgments of all time, King County still had not, and has not, fixed its procedures or learned its lesson. Further, in this case King County still has not produced bank statements, canceled checks, vendor contracts and data and other clearly accessible records sought by Ms. Diemond, and it was given a free pass by the trial court and allowed to not produce these records. The appellate court should not allow a technical argument—created by the Defendant and the trial court by delaying ruling on Ms. Diemond's motions and lulling her into believing she need not appeal until the court finally ruled—to prevent review of these important issues.

D. King County Did Not Cross Appeal.

King County did not challenge the trial court's findings as to its misdeeds and aggravating factors for the penalty determination. It did not challenge the amount of the penalty or the groupings. It did not appeal the Court's Order of 5/25/18 which found Ms. Diemond's 3/1/18 Motion it was

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[1] **Yousoufian v. King County**, 114 Wn. App. 836, 60 P.3d 667 (2003) ("**Yousoufian I**"), **reversed on other grounds**, **Yousoufian v. King County**, 152 Wn.2d 421, 98 P.3d 463 (2004) ("**Yousoufian II**"); **Yousoufian v. King County**, 137 Wn. App. 69, 151 P.3d 243 (2007) ("**Yousoufian III**"), **Yousoufian v. King County**, 165 Wn.2d 439, 200 P.3d 232 (2009) ("**Yousoufian IV**"); **Yousoufian v. King County**, 168 Wn.2d 444 ("**Yousoufian V**").

addressing to be timely. (The trial court delayed ruling on the 3/1/18 Motion for nearly two months until 5/25/18.) All findings of the trial court, all of which are unchallenged by King County, are verities on appeal. **State v. Hill**, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). King County, though not appealing or cross appealing, in its Respondent's Brief asks the Court to vacate the 5/25/18 Order and to hold that the trial court lacked authority to issue it. But King County needed to file a timely cross appeal if it wished to seek such relief. It cannot now ask for such relief as a non-appealing Respondent. Unlike the case cited by the County, **Ensberg v. Nelson**, 178 Wn. App. 879, 889 n. 7, 320 P.2d 97 (2013), King County **is** seeking affirmative relief from this Court—that the Court vacate the 5/25/18 Order and rule the trial court had no authority to enter it. To seek such affirmative relief, the County was required to cross-appeal, which it did not do. Its requested relief should be denied.

E. The Notice of Appeal Brings Up for Review the 2/22/18 and 1/3/18 Orders.

Ms. Diemond appealed the 11/27/17 Order and the 5/25/18 Order denying her final motion to amend and the intervening orders also denying reconsideration, vacation or amendment. Her notice brings up for review the underlying orders of 1/3/18 and 2/22/18 pursuant to RAP 2.4(b) as these orders or rulings “”prejudicially affects the decision designated in

the notice," and (2) "the order is entered, or the ruling is made, before the appellate court accepts review." The trial court delayed for months entering its rulings on Ms. Diemond's motion, and she appealed when instructed by the trial court in its Minute Entry of 3/24/18 after it orally ruled on 5/24/18 on her 3/1/18 motion.

F. Appellant Does Not Raise Issues for the First Time on Reply.

King County devoted its Respondent's Brief **not** to responding to the arguments raised but rather to arguing why the appeal should be rejected or the trial court order vacated. Appellant files a strict reply to those arguments, which she is allowed to do under the Rules of Appellate Procedure. RAP 10.3(c). King County's argument that Diemond not be allowed to respond is meritless, and should be rejected.

G. The Trial Court Actions Must be Reviewed De Novo.

This is a PRA case. "The purpose of the Public Records Act is to preserve 'the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions." **O'Connor v. Department of Social & Health Servs.**, 143 Wn.2d 895, 25 P.3d 426 (2001). Appellate review of **all** trial court decisions in PRA cases must be **de novo**. **O'Connor**, 143 Wn.2d at 904; **Progressive Animal Welfare Society v. University of Washington**, 125 Wn.2d

243, 252, 884 P.2d 592 (2995) ("*PAWS II"*). This includes penalty determinations, summary judgment decisions, and decisions rejecting reconsideration or amendment or vacation of judgment.

H. The Trial Court Abused its Discretion in Denying the CR 59 and CR 60 Motions of Diemond.

Even if the Court were to apply an abuse of discretion standard as urged by the County, the errors here are so clearly contrary to binding precedent an abuse of discretion would be shown.

King County admitted that it had not made a reasonable search for records before being sued and that its statement to Ms. Diemond in 2014 that all records had been produced was a lie. It admitted it had not produced bank statements, canceled checks, or warrants or contracts and contract data for vendors which the County was required to keep and maintain to comply with its fiscal as well as statutory duties as a County. It showed that it knew how to match up and track which payments belonged to which vendors such that it could identify which bank statements and which canceled checks and warrants met the scope of the records requested by Ms. Diemond. But the trial court nonetheless gave the County a free pass not to produce such records in the face of evidence

showing the County misled the court when it denied that all vendors have contracts and W-9s and other centrally locatable documents it told the court did not exist.

The trial court further abused its discretion by failing to comply with binding PRA precedents, such as **Wade's Eastside Gun Shop Inv. v. Department of Labor & Industries,** 185 Wn.2d 270, 372 P.3d 97 (2016) and **Yousoufian V**, 168 Wn.2d at 462-463 and **Yousoufian II**, 152 Wn.2d at 429-430, requiring that penalty calculations take into account actual economic harm to the requestor and the need for an award to cause deterrence particularly when the agency is a large wealthy entity like King County and an agency that has been held to have habitually with premeditation continually violated the PRA. The trial court's grouping of the documents, and assessment of the penalty, and its denial of motions to amend or reconsider that award, was an abuse of discretion and a rejection of these binding precedents and the will of the people as stated in the PRA.

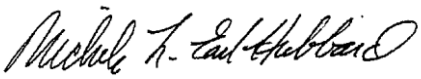
III. CONCLUSION

For all of the reasons described above, Ms. Diemond asks the Court to (a) reverse the trial court's order denying her motion to vacate and amend, (b) to award Ms. Diemond her fees and costs on appeal, and (c) to remand

with instructions to the trial court to (i) require King County to produce the bank statements, canceled checks, warrants and contracts previously requested by Ms. Diemond but which still have not been produced, (ii) impose penalties based on groupings according to the date a document was requested and the date it was produced rather than the two groups the trial court improperly utilized and at a higher per day penalty than $55, and (iii) award Ms. Diemond her reasonable fees and costs incurred below through the conclusion of this matter.

Respectfully submitted this 6th day of September, 2019.

ALLIED LAW GROUP, LLC
Attorneys for Appellant

By 
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I certify under penalty of perjury under the laws of the State of Washington that on September 6, 2019, I filed with the Court by E-filing, and I served by e-mail on the below this Reply Brief of Appellant:

John Zeldenrust, Amy Eiden and John Gerberding
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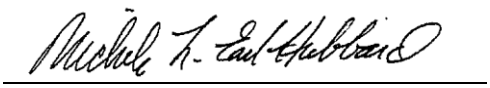
john.gerberding@kingcounty.gov
Attorneys for Respondent

Dated this 6th day of September, 2019, at Shoreline, Washington.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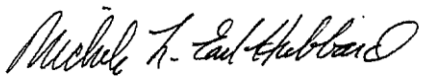
john.gerberding@kingcounty.gov
Attorneys for Respondent

Dated this 27th day of May, 2020, at Shoreline, Washington.



Michele Earl-Hubbard

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