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NO. 98728-9

**SUPREME COURT OF THE
STATE OF WASHINGTON**

KIMBERLYN DOTSON, Appellant

v.

PIERCE COUNTY, Respondent

AMICUS CURIAE MEMORANDUM BY THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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TABLE OF CONTENTS

I. INTRODUCTION AND IDENTITY OF AMICUS 1

II. SUMMARY OF ARGUMENT 1

III. ARGUMENT 3

A. The Plain Language of the Statute Shows that Plaintiff's Action Was Timely Because Pierce County's October 26, 2016 Production of Responsive Records Re-Started the Clock 3

B. The "Discovery Rule" Should Apply in PRA Cases and Would Have Led to Just Results in Both This Case and in *Belenski*. 7

C. Equitable Tolling is a Poor Substitute for the Discovery Rule. 8

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Beard v. King County,
76 Wn. App. 863, 889 P.2d 501 (1995) 7, 10

Belenski v. Jefferson County,
186 Wn.2d 452, 378 P.3d 176 (2016) 2, 3, 4, 5, 7, 8

Denny's Restaurants, Inc. v. Sec. Union Title Ins. Co.,
71 Wn. App. 194, 859 P.2d 619 (1993) 7

Doe v. Finch,
133 Wn.2d 96, 942 P.2d 359 (1997) 7

Douchette v. Bethel School Dist. No. 403,
117 Wn.2d 805, 818. P.2d 1362 (1991) 7, 9

Finkelstein v. Security Properties, Inc.,
76 Wn.App. 733, 888 P.2d 161 (1995) 9

Gazija v. Nicholas Jerns Co.,
86 Wn.2d 215, 543 P.2d 338 (1975) 7

Millay v. Cam,
135 Wn.2d 193, 955 P.2d 791 (1998) 9

Nickum v. City of Bainbridge Island,
153 Wn. App. 366, 223 P.3d 1172, (2009), *as amended* (Dec. 8, 2009) 9

State v. Duvall,
86 Wn. App. 871, 940 P.2d 671 (1997) 9

Yousoufian v. Office of Ron Sims, 168 Wn. 2d 444, 468, 229 P.3d 735, 748
(2010) 6

Statutes

RCW 42.56.550(4) 6

RCW 42.56.550(6) 3, 5, 6, 9

RCW 42.56.550(a) 2

I. INTRODUCTION AND IDENTITY OF AMICUS

The Washington Employment Lawyers Association ("WELA") brings this motion for leave to file an Amicus Curiae Memorandum in the above referenced case. WELA has approximately 210 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has appeared in numerous cases before this Court involving employee rights.

WELA members routinely advise and represent public employees. The State of Washington alone employs over 116,000 people. When assisting those employees with potential employment claims, WELA members frequently conduct investigations through Public Records Act requests as part of an attorney's obligations to investigate viability of claims. Thus, the Public Records Act stands as an important tool in investigation of claims, allowing prompt resolution of claims and a means to avoid non-meritorious litigation entirely. WELA members, like other requestors, rely on governmental entities to be complete and truthful in their responses. The Division II holding in this case, if left to stand, will enable governmental entities to silently withhold records without consequence, whether such withholding is done negligently or intentionally.

II. SUMMARY OF ARGUMENT

Plaintiff Kimberly Dotson requested records from Pierce County

on May 18, 2016.[1] The County produced responsive records on June 23, 2016, then "closed" the request on June 29, 2016. The County then produced more responsive records on October 26, 2016, that it had failed to produce earlier. The County then twice more produced responsive records not produced earlier. Plaintiff filed suit alleging a violation of the PRA, RCW 42.56.550(a) on October 25, 2016. The Court dismissed the case, stating that the statute of limitations began to run when the request was "closed" on June 28, 2016, relying on this Court's decision in *Belenski v. Jefferson County,* 186 Wn.2d 452, 378 P.3d 176 (2016), which held that the statute of limitations for PRA cases "usually begins to run on an agency's final, definitive response to a records request."

On June 2, 2020, Division II of the Court of Appeals held that 1) the statute of limitations in PRA cases runs from the date a request is "closed" by a government entity, even if the entity subsequently produces responsive records it mistakenly withheld, 2) the "discovery rule" does not apply in Public Records Act cases, and 3) under the particular facts of the case, Plaintiff had waived arguments under the doctrine of "equitable tolling." This ruling effectively authorizes indefinite "silent withholding" once a records request is "closed," if not litigated within one year, whether the withholding of responsive records is negligent or intentional.

As explained in greater detail below, the plain language of the statute states the limitation period runs from the date of the "last

[1] The Court of Appeals explained in some detail the context of the records request and how it related to an underlying property rights and wetland regulation dispute. Those facts are not relevant to WELA's arguments, so those details will not be repeated here.

production of a record" that is responsive to the request, so the suit was timely notwithstanding the County's "closure" letter. In addition, the discovery rule should apply in Public Records Act cases any time a requestor later discovers that records were silently withheld, whether through voluntary disclosure by the government agency, or through some other means, such as civil discovery. Finally, equitable tolling is a completely inadequate substitute for application of the discovery rule. While WELA does not take a position whether equitable tolling was waived under the unique facts of this case, a requestor should not be forced to rely on equitable tolling where the requestor had no reason to believe that records had been withheld or exempted from disclosure.

III. ARGUMENT

A. The Plain Language of the Statute Shows that Plaintiff's Action Was Timely Because Pierce County's October 26, 2016 Production of Responsive Records Re-Started the Clock

RCW 42.56.550(6) states that "[a]ctions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." Relying on *Belenski v. Jefferson County,* 186 Wn.2d 452, 378 P.3d 176 (2016), Division II held that the one-year limitations period under RCW 42.56.550(6) began to run on June 29, 2016, when Pierce County formally told Ms. Dotson that her claim was "closed." Slip Opinion at 14.

In *Belenski*, this Court held that the statute of limitations for PRA cases "*usually* begins to run on an agency's final, definitive response to a

records request." *Id.* at 460 (emphasis added). There, a requestor had asked Jefferson County to produce employee "internet access logs." *Id.* at 455. The County responded that it had "no responsive records," which was not true, and never produced any records. The requestor then waited over two years to file suit. This Court held that the statute of limitations had started on the day the County denied having responsive records, as this was the County's "definitive, final response to Belenski's PRA request [and] was sufficient to put him on notice that the County did not intend to disclose records or further address this request." *Id.* at 461. This Court noted that at that point, Belenski could have sued "to hold the County in compliance with the PRA as soon as it gave it's response" rather than waiting over two years. *Id.* However, this Court then remanded the case to the trial court to determine whether the doctrine of equitable tolling should apply, noting on the one hand that the County's response was incorrect, but on the other hand that Belenski was on notice of that fact because he had received such "internet access logs" from the County in the past. In other words, that he knew or should have known that records were being withheld.

The facts of this case are distinguishable from *Belenski*. Here, Pierce County claimed no exemptions and produced some responsive records on June 23, 2016, then "closed" the request on June 29, 2016. However, the County *then produced more records on October 26, 2016 and on two subsequent dates*. While *usually* a closure letter would be a "final, definitive response" that would trigger the statute of limitations, the

subsequent production of responsive records constitutes another "production of a record on a partial or installment basis" under RCW 56.550(6), superseding the closure letter and rendering it a nullity. That later-in-time production then becomes a new "last production" under the statute, restarting the clock. Because of this, Ms. Dotson's lawsuit filed on October 25, 2016 was timely. The fact that the County produced responsive records twice more only serves to underscore that closure letter was not "final" or "definitive."

Division II's holding would allow governmental entities to "close" public records requests, triggering the statute of limitations, then silently withhold records (whether negligently or intentionally) for an indefinite amount of time without consequence. The government could then later produce responsive records, thereby shortening the time for suit. In the extreme, the government could produce records more than a year after closure, and the requestor would be already be out of time under the statute of limitations. In most cases, this would be impossible for the requestor to know. At least in *Belenski* the requestor had some knowledge that the County was withholding responsive records, as he had received the same kind of records in the past. Here, Ms. Dotson had no way to know that Pierce County withheld anything until it revealed it had done so by producing additional records almost four months later. A requestor should be entitled to rely on the government's response; if that response is "no responsive records," the requestor should not be required to sue just to find out if the government was telling the truth. Such a rubric will only

encourage PRA lawsuits, many of which could later be deemed frivolous if the government in fact had no records. And if records are produced after the request is "closed," that should restart the clock.

Division II seemed to find it significant that there were "no facts to support concerns of 'gamesmanship' by the County," suggesting that since the County didn't *intentionally* silently withhold records, it wasn't culpable. Slip Opinion at 15-16. But lack of gamesmanship is not a defense to a failure to comply with the Public Records Act; the statute itself does not make any mention of intentionality, but rather it establishes a duty by public agencies to make public records available for inspection unless subject to exemption. Whether there has been "gamesmanship" in the withholding does not go to liability, but rather to the measure of penalties under RCW 42.56.550(4). The Supreme Court has identified several factors that courts must consider when deciding what penalty to assess, from $0 to $100 per day per record withheld, including "the agency's good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions," whether the withholding was a "negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency," and "agency dishonesty." *Yousoufian v. Office of Ron Sims*, 168 Wn. 2d 444, 468, 229 P.3d 735, 748 (2010).

This Court should accept review to address the effect of producing records after a governmental entity "closes" a request and hold that subsequent production of records constitutes another "last production" under RCW 42.56.550(6) and restarts the one-year limitations period.

B. The "Discovery Rule" Should Apply in PRA Cases and Would Have Led to Just Results in Both This Case and in *Belenski*.

"The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause of action." *Doe v. Finch*, 133 Wn.2d 96, 101, 942 P.2d 359, 361 (1997) (quoting *Beard v. King County,* 76 Wn. App. 863, 867, 889 P.2d 501 (1995)). The *Belenski* Court did not address application of the "discovery rule" to PRA cases, and this appears to be a matter of first impression for this Court. "The decision to extend the discovery rule to a cause of action is essentially a matter of judicial policy." *Denny's Restaurants, Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 216, 859 P.2d 619, 631 (1993) (citing *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 221, 543 P.2d 338, 342 (1975)).

In the present case, Division II rejected its application entirely, citing this Court's decision in *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 813, 818. P.2d 1362 (1991), for the proposition that the discovery rule generally applies *only* in cases where "the statute does not specify a time at which the cause of action accrues." *Slip Op.* at 16. Yet *Douchette* makes no such strict limitation, and simply recognizes the "general rule." *Douchette*, 117 Wn.2d at 813. Although the clear language of the statute forecloses the need to rely upon the discovery rule in this particular case, in future cases there may be no subsequent production and the plain language of the statute will not toll the statute of limitations.

There is no principled reason why the Court should not extend application of the discovery rule to the Public Records Act. Specifically,

the discovery rule should toll the statute of limitations any time a requestor does not know, and even with exercise of due diligence would not have discovered, that records have been silently withheld, whether such withholding is negligent or intentional. Doing so would avoid the need to rely on "equitable tolling" and would have led to just results in both *Belenski* and the present one.

In *Belenski*, there was evidence that the requestor knew or should have known the County's assertion that it had no "internet access logs" was false because he had received such logs from that same county in the past. 186 Wn.2d at 455. Because of this, the discovery rule may not have applied to toll the statute of limitations because the requestor may not have been reasonably diligent. In contrast, in the present case, Ms. Dotson had no reason to believe that any records had been improperly withheld until Pierce County provided additional responsive records on October 26, 2016 - well after the County proclaimed her request closed. She then brought suit within a year of that discovery to address the County's silent withholding of records for the period between June 29 when the County closed the request and October 26 when it produced more records. Under the discovery rule, the limitations period was tolled until *at least* October 26, 2016. Production of records thereafter would re-start the clock from the date those records were produced.

C. Equitable Tolling is a Poor Substitute for the Discovery Rule.

Division II then held that the Plaintiff had waived any argument

under the doctrine of equitable tolling by failing to raise it before the trial court. Slip Opinion at 17. WELA takes no position with respect to waiver. But equitable tolling is not required. The clear language of the statute mandates that the statute begins to run after "the last production of a record on a partial or installment basis." RCW 42.56.550(6). Moreover, equitable tolling is a poor substitute for application of the discovery rule.

In Washington, equitable tolling of a statute of limitations is available "when justice requires," and "when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791, 797 (1998) (citing *Douchette,* 117 Wn.2d at 818). Specifically, "[t]he predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay*, 135 Wn.2d at 206 (citing *Finkelstein v. Security Properties, Inc.,* 76 Wn.App. 733, 739–40, 888 P.2d 161 (1995)).

A "party asserting that equitable tolling should apply bears the burden of proof." *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172, 1178 (2009), *as amended* (Dec. 8, 2009). Courts typically permit equitable tolling to occur only sparingly. *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671, 674 (1997). Even in a case of silent withholding, the requestor would have the burden to show not only that she had been "diligent," but that the County had committed "bad faith, deception, or false assurances." *See Millay*, 135 Wn.2d at 206.

Allowing "equitable tolling" to be the backstop against violations

of the PRA, especially in situations of silent withholding, is wholly insufficient. Ms. Dotson should not have to rely on equitable tolling to save a claim she never knew she had, and had no way of discovering, until revealed by Pierce County through its subsequent production of records. In contrast, under the discovery rule, the statute would be tolled until the requestor "knows, or in the exercise of due diligence should have discovered," of the withholding. *See Beard v. King County,* 76 Wn.App. 863, 867, 889 P.2d 501 (1995). Such "discovery" would take place when the requester otherwise learns that an agency has failed to produce responsive documents. Any silent withholding of records is a violation of the PRA regardless of the good faith nature of the withholding. While bad faith is relevant to penalties, a PRA plaintiff should never have to prove bad faith or "gamesmanship" for purposes of liability.

IV. CONCLUSION

For the above-stated reasons, this Court should accept review of this case and reverse the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 31st day of August 2020.

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