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NO. 60929-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BILL TOBIN and SUSAN TOBIN, a Marital Community,

Appellants,

v.

STEPHANIE WARDEN, individually and as Director, King County
Department of Development and Environmental Services; PAULA
ADAMS, individually and as Communications Director, King County
Department of Development and Environmental Services, and KING
COUNTY DEPARTMENT OF DEVELOPMENT AND
ENVIRONMENTAL SERVICES, a subdivision of KING COUNTY,
WASHINGTON, a Municipal corporation,

Respondents,

RESPONSE BRIEF OF KING COUNTY RESPONDENTS

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I. OVERVIEW

Appellants Bill Tobin and Susan Tobin filed a Complaint in Snohomish County Superior Court seeking judicial review of responses by the King County Department of Development and Environmental Services (DDES) to their requests for public records. The requests for records were made in 2005 and DDES responded to their requests in 2005. The Tobins filed their Complaint over two years later, in July 2007, and served King County in August 2007.

King County, DDES and the individually named defendants, hereinafter referred to collectively as King County, moved to dismiss the lawsuit based on the newly enacted one-year statute of limitations in the Public Records Act, RCW 42.56.550(6). The Honorable Gerald Knight granted King County's motion to dismiss and subsequently denied the Tobins' motion for reconsideration. The Tobins filed a timely appeal of the trial court's order.

The Tobins assign error to the trial court's dismissal order as well as its denial of their motion for reconsideration.

II. STATEMENT OF ISSUES

1. Whether the one-year statute of limitations in RCW 42.56.550(6) applies to all actions under the Public Records Act or only to actions involving a "claim of exemption or the last production of a record on a partial or installment basis."

2. Whether the statute of limitations in RCW 4.16.080 applies to the claims asserted by the Tobins' lawsuit alleging violations of the Public Records Act.
3. Whether the trial court properly granted King County's motion to dismiss.
4. Whether the trial court properly denied the Tobins' motion for reconsideration.
5. Whether the Tobins are entitled to attorney fees for this appeal.

III. BACKGROUND

In April and June of 2005 Appellant Susan Tobin made two requests under the Public Records Act, RCW ch. 42.56. for records maintained by King County Department of Development and Environmental Services ("DDES"). The requests were for two specific documents relating to complaints of violations of the King County Code. CP 115, ¶ 4.1; CP 117, ¶ 4.12. DDES responded to the requests in May and June of 2005. CP 116, ¶ 4.7; CP 117-119, ¶¶ 4.13; 4.17. Over two years later Ms. Tobin and her husband Bill Tobin filed an action in Snohomish County Superior Court seeking judicial review of DDES' responses to their requests. CP 113-150. The public disclosure requests and DDES' responses are described in further detail below.

A. Tobin Document Request

In April 2005, Greg Wessel, a staff member of King County DDES received a letter describing a possible violation of the King County Code

by owners of a property located on Vashon Island. CP 130. Appellants Bill Tobin and Susan Tobin were the owners of the property described in the letter. Greg Wessel followed up by notifying the Tobins of the complaint and met with the Tobins at the property. The Tobins asked to see the complaint letter but Mr. Wessel did not have it with him at the time of the visit. CP 145.

On Friday, April 22, 2005, Ms. Tobin made a public disclosure request to DDES by e-mail. In her request Ms. Tobin sought a copy of “any complaints filed against my Vashon Island property, parcel 3523029045.” CP 115, ¶ 4.1; CP 125. DDES responded by mailing a redacted copy of the only written complaint letter regarding this property to the Tobins, on Tuesday, May 3, 2005. CP 116, ¶4.7; CP 127-128.

B. Ferguson Document Request

Ms. Tobin submitted a second public disclosure request to DDES on Friday, June 3, 2005. CP 117, ¶ 4.12; CP 134. In this request Ms. Tobin sought a copy of an anonymous letter received by DDES on or around November 24, 2004, regarding DDES code enforcement file #E0401001. CP 134.

Paula Adams of DDES responded to this request by mailing to the Tobins a copy of the code enforcement “complaint research form” detailing the receipt of the anonymous complaint for code enforcement file

#E0401001. Ms. Adams sent this document and a cover letter to the Tobins on Thursday, June 9, 2005. CP 117-118, ¶ 4.13; CP 136. After receiving the record from DDES, Ms. Tobin followed up with a letter providing more information regarding the record she had requested. This follow-up letter was sent to DDES on June 13, 2005. CP 118, ¶4.15; CP 139. Ms. Adams from DDES responded to the June 13, 2005 letter by providing a copy of what was believed to be the record sought by Ms. Tobin. In her cover letter accompanying the record, Ms. Adams apologized for the earlier error and stated that she believed “that the enclosed letter fulfills your original request.” CP 142-143. The Tobins received this second response on June 23, 2005.¹ CP 118-119, ¶ 4.17. The record that the Tobins received on June 23, 2005 was the same redacted letter previously provided to the Tobins pursuant to their April 22, 2005 request. After receiving this response, the Tobins never followed up or informed DDES that the record that was sent in response to their Ferguson request was not the record they had requested.

C. The Administrative Appeal Before the King County Hearing Examiner

The complaint letter that Greg Wessel received regarding the Tobin property eventually resulted in DDES issuing a Notice and Order,

¹ This letter is dated June 9, 2005, an obvious error. As was done below, King County accepts as true for the purposes of these proceedings that the Tobins received this letter on June 23, 2005.

which constitutes an administrative finding of a code violation. King County Code (KCC) 23.24.020(A). The Tobins appealed the Notice and Order to the King County Hearing Examiner. As part of their discovery request in the administrative appeal the Tobins requested the same record that had been the subject of their April and June 2005 public disclosure requests. CP 44, ¶ 4; CP 48-49. By the time the Tobins made their discovery request, the original complaint letter could not be located. CP 45, ¶ 6. The Tobins moved for dismissal of the Notice and Order. One basis they relied upon was DDES' inability to produce the original complaint letter. CP 145. The Hearing Examiner dismissed the Notice and Order as a sanction, finding that DDES had engaged in an unlawful search of the Tobin property. In his decision the examiner ordered an additional sanction "because of the loss while in DDES custody of the unredacted original complaint document." CP 149.

D. The Tobins' 2007 Complaint and Trial Court Proceedings

The Tobins' served their Complaint for Damages for Violation of the Washington Public Records Act on King County on August 27, 2007. CP 113. The Complaint asserted two causes of action. The first cause of action related to the Tobin document request made on April 22, 2005, and alleged a violation of RCW 42.56.520. CP 120, ¶¶ 5.1-5.3. The second

cause of action related to the Ferguson document request made on June 3, 2005, and also alleged a violation of RCW 42.56.520. CP 121, ¶¶ 6.1-6.3.

King County filed an Answer and concurrently filed a motion to dismiss.² CP 105-110; CP 95-104. The basis of the motion was that the Tobins' claims were barred by the statute of limitations set forth in RCW 42.56.550(6). The trial court granted King County's motion to dismiss. CP 41-42. The Tobins filed a motion for reconsideration of the order dismissing their Complaint. CP 18-40. The trial court denied the motion for reconsideration. CP 5-6. The Tobins timely filed a Notice of Appeal. The appeal was stayed pending review by the Washington Supreme Court in Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 199 P.3d 393 (2009). This Court lifted the stay on June 19, 2009.

IV. ARGUMENT

A. The Applicable Standards of Review

Upon review of a motion for summary judgment an appellate court takes the same position as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). On appeal, an order granting summary judgment may be affirmed on any basis supported by the record. Hadley

² King County presented the motion to dismiss as a motion for judgment on the pleadings or in the alternative for summary judgment. In its order dismissing the action the trial court designated the motion as a summary judgment motion. CP 41-42.

v. Cowan, 60 Wn. App. 433, 444, 804 P.2d 1271 (1991) (citing LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989)).

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A motion for summary judgment should be granted if there are no disputed material facts and the moving party is entitled to judgment as a matter of law. Phillips v. King County, 87 Wn. App. 468, 476, 943 P.2d 306, 312 (1997); Harrington v. Spokane County, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005). In determining whether an issue of fact exists, the court views all evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Once the moving party demonstrates that there is no genuine issue as to any material fact, the burden shifts to the nonmoving party to establish that a genuine issue exists as to a material fact. A factual dispute is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. at 248. The nonmoving party cannot simply rest on its allegations or conclusory statements without any significant

probative evidence tending to support the complaint. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case then the trial court should grant the motion. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The standard of review for a motion to reconsider is abuse of discretion. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (citations omitted).

B. The Tobins' 2007 Lawsuit is Subject to the One-Year Statute of Limitations in RCW 42.56.550(6).

The requests for records which are the subject of the Tobins' 2007 lawsuit were made and responded to in April and June 2005. Shortly thereafter, amendments to RCW ch. 42.17 were enacted, including an amendment reducing the time period for bringing claims for violations of the public disclosure laws. In order to properly analyze the application of the statute of limitations to the Tobins' lawsuit, a brief discussion of the statutory amendments is presented below.

1. The Legislature Shortened the Time Period for Filing Actions Under the Public Records Act from Five Years to One Year.

Prior to July 24, 2005, the statute of limitations for actions under the Public Disclosure Act (PDA) was five years. Former RCW 42.17.410 (2004) (“Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred”). In 2005, the Legislature amended the PDA, and among the amendments was a shortened statute of limitations. Under the new limitation period, actions had to be filed within “one-year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). See Laws 2005 c 483 § 5; former RCW 42.17.340(6) (2005).

The limitation period was added to former RCW 42.17.340, which addressed judicial review of PDA claims. So that the amendments can be considered in context, the full text of this provision is provided here with the amended provisions underlined:

Sec. 5 RCW 42.17.340 and 1992 c 139 s 8 are each amended to read as follows:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) 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. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

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

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Laws 2005 c 483 § 5. The effective date of the new statute of limitations was July 24, 2005.³

At about the same time that the statute was amended, portions of the PDA were recodified and are now found at RCW Chapter 42.56 as the Public Records Act (PRA). RCW 42.17.340 and RCW 42.17.410 were recodified in the PRA as RCW 42.56.550. See Laws 2005 c 274 § 103. The recodification became effective on July 1, 2006. The recodification did not change the new statute of limitations or modify its effective date in any way.

2. The Amended Statute of Limitations Applies Retroactively to the Claims Asserted by the Tobins.

The new one-year statute of limitations for PRA actions became effective approximately one month after DDES' last response to the Tobins' records requests. It is thus necessary to address whether the one-year statute of limitations applies retroactively. The issue is one that is well-settled in Washington:

When the legislature enacts a shortened statute of limitations, the time frame for bringing claims that accrued before the new law's enactment begins to run on the new statute's effective date.

³ Pursuant to the Washington State Constitution, Art. 2, § 41 (Amendment 26), laws take effect 90 days after the adjournment of the session in which they were enacted. The 2005 legislative session ended on April 24, 2005. The amendments to the PDA adopted during that session thus became effective on July 24, 2005.

1000 Virginia L.P. v. Vertecs Corp., 127 Wn. App. 899, 912, 112 P.3d 1276 (2005) (citing Merrigan v. Epstein, 112 Wn.2d 709, 717, 773 P.2d 78 (1989)). See also In re Parentage of M.S., 128 Wn. App. 408, 115 P.3d 405 (2005).

Under established Washington law, the 2005 amendment shortening the time for bringing a claim under the PRA from five years to one year applies retroactively to claims prior to the effective date of the statutory amendment. All claims under the PRA that occurred before the amendment to the statute of limitations must be brought within one year of the effective date of the amendment, which was July 24, 2005.⁴

3. The Plain Language of the Limitations Statutes Defy the Tobins' Contention that RCW 4.56.550(6) is Inapplicable to Their Claims.

The Tobins do not dispute that that RCW 42.56.550(6) applies retroactively. Instead the Tobins argue, as they did before the trial court, that the statute of limitations in RCW 42.56.550(6) does not apply to their

⁴ The retroactive application of shortened statute of limitations is an exception to the general rule that statutory amendments apply prospectively. See, e.g., 1000 Virginia L.P., 127 Wn. App. at 913. More precisely, it is a specific instance of an exception to the general rule. The exception allows statutory amendments to be applied retroactively when the amendment is remedial. Marine Power Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal, 39 Wn. App. 609, 616-17, 694 P.2d 697 (1985). A statutory amendment is remedial if it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Miebach v. Colasurdo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). Statutes of limitation are generally acknowledged to be procedural and an amendment may be applied retroactively. But rather than unfairly start the statutory clock ticking at a point in time potentially well in the past (where true retroactive effect might preclude bringing a claim altogether), the new limitation period begins to run on the effective date of the statutory amendment.

claims at all. They assert that the applicable statute of limitations is the three-year period found in RCW 4.16.080. Appellants' Brief at 21-24. Specifically they argue that their claims should be governed by the provisions of RCW 4.16.080 which establishes a three-year limitations period for personal injury actions and actions "upon a statute for penalty or forfeiture." RCW 4.16.080(2)&(6).

The Tobins' argument ignores the plain, unambiguous language of the Limitations of Actions statute which states,

Except as otherwise provided in this chapter, and except when in special cases a different limitation imposed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

RCW 4.16.005. The one-year statute of limitations for actions to enforce the Public Records Act is just such "different limitation imposed by a statute not contained in [RCW ch. 4.16]" and it is controlling in this case.

The specific limitations provision that the Tobins cite to as the applicable statute also contains express language which makes it clear that it is not controlling. That provision states in pertinent part:

an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, *except when the statute imposing it prescribed a different limitation....*

RCW 4.16.080(6) (emphasis added). Again, RCW 42.56.550(6) prescribes “a different limitation” and makes RCW 4.16.080(6) inapplicable. In light of the express language contained in these statutes the Tobins’ attempt to extricate themselves from the one-year limitations period must be rejected.

4. The Washington Supreme Court’s Decision in a Case Involving RCW 42.56.550(6) Resolves the Question Against the Tobins.

Since the Tobins filed their Complaint in 2007 the Washington Supreme Court has ruled on a case in which the statute of limitations in RCW 42.56.550(6) was at issue. In Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 536, 199 P.3d 393 (2009) the central issue was whether the city’s claim of exemption was effective for triggering the statute of limitations under RCW 42.56.550(6). Id. at 537. In July 2005, the plaintiffs in Rental Housing Association made a public records request for documents relating to a crime free rental housing program enacted by the City of Des Moines. The City provided hundreds of pages of documents, but withheld many records under the deliberative process and work product exemptions. Id. at 528-29. The City did not state which exemption applied to which document and provided only a general characterization of the documents withheld. Id. at 529. In April

2006, after several requests from plaintiffs, the City of Des Moines provided a privilege log identifying the withheld records. Id. at 533-34.

In January 2007, the plaintiffs filed suit and the trial court held that their action was barred by the PRA's new one-year statute of limitations in RCW 42.56.550(6). Id. at 534-35. The trial court found that the City's initial citation to the deliberative process and work product exemptions was a "claim of exemption" sufficient to commence the one-year statute of limitations. The plaintiffs appealed directly to the Washington Supreme Court which accepted review. Id. at 535.

The Court concluded that "a valid claim of exemption under the PRA should include the sort of 'identifying information' a privilege log provides." Id. at 538 (quoting Progressive Animal Welfare Society v. University of Washington, 125 Wn. 2d 243, 271 n. 18, 884 P.2d 592 (1994)). Such a privilege log must individually describe the withheld records by stating the type of record withheld, its date and number of pages, and, unless otherwise protected, author/recipient. The log must also provide a brief explanation of how an exemption applies to each record. This explanation should provide enough information to enable the requestor to make a threshold determination of whether the claimed exemption is proper. Id.

In resolving the specific issue before it, the Court first addressed the applicable statute of limitations, stating “[t]his case presents our first opportunity to address RCW 42.56.550(6), which was enacted in 2005 and provides a one-year statute of limitations for PRA actions.” Id. at 535. Significantly, the Court’s analysis made no distinction between the kinds of responses provided by agencies in determining the applicable statute of limitations. Instead it simply stated that RCW 42.56.550(6) as amended, “provides a one-year statute of limitations for PRA actions” and “replaces prior longer limitations periods applicable to PRA claims.” Id. at 535-36 (citations omitted). The Supreme Court’s analysis in Rental Housing Association leaves no doubt that the one-year statute of limitations in RCW 42.56.550(6) applies to the Tobins’ claims.

5. The Bifurcated Scheme Proposed by the Tobins is Contrary to Statutory Construction and Unworkable.

That the Tobins’ action is subject to a one-year statute of limitations is reinforced by applying basic rules of statutory construction and consideration of the practical effect of implementing two different limitations periods for PRA violations. The Tobins insist that the one-year statute of limitations in RCW 42.56.550(6) only applies to those actions where an agency is claiming an exemption or provides the requested records on a partial or installment basis. Because DDES did not claim an

exemption or provide the records on a partial or installment basis, the Tobins maintain that their action should be subject to the three-year limitations period set forth in RCW 4.16.080. Appellants' Brief at 17-19.

Statutory construction is a question of law. Pasco v. Public Employment Relations Commission, 119 Wn.2d 504, 507, 833 P.2d 381 (1992) (citation omitted). “ [T]he underlying purpose inherent in the function of judicial interpretation of statutory enactments is to *effectuate the objective*-often referred to as the intent-of the legislature.’ ” Lacey Nursing Center, Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995) (quoting Murphy v. Campbell Investment Co., 79 Wn. 2d 417, 419-20, 486 P.2d 1080 (1971)) (emphasis in original). In construing a statute, courts must read statutes in their entirety and not in a piecemeal fashion. Donovick v. Seattle-First National Bank, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988) (citation omitted).

Courts should begin their analysis with the statute's plain language and ordinary meaning, but also look to “the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole.” Quadrant Corp. v. State Growth Management Hearings Board, 154 Wn.2d 224, 238-39, 110 P.3d 1132 (2005). Courts must also avoid interpreting a statute in a manner that leads to unlikely, strained, or absurd results. State v.

Stannard, 109 Wn. 2d 29, 36, 742 P.2d 1244 (1987) (citing State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972)).

- a. Applying principles of statutory construction leads to the inevitable conclusion that RCW 42.56.550(6) imposes a one-year statute of limitations for all actions under the Public Records Act.

Viewed as a whole, the entire thrust of RCW 42.56.550 is to establish a right of action, and a means for judicial review, for individuals who believe an agency has not met its obligations under the Public Records Act. RCW 42.56.550 is entitled “Judicial Review of Agency Actions.” The very first sentence of the first subsection states:

(1) Upon the motion of any person *having been denied an opportunity to inspect or copy a public record by an agency*, the superior court in the county in which a record is maintained *may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record* or class of records.

RCW 42.56.550(1) (emphasis added). This is precisely the claim that the Tobins brought against King County. The essence of their claim is that they were denied the opportunity to inspect two letters sent by anonymous complainants to DDES.

The standard of review for claims such as the Tobins’ is set out in the same section and states:

(3) *Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.*

RCW 42.56.550(3) (emphasis added). It should be noted that the Tobins' claims in this case were exclusively based on RCW 42.56.520. CP 120-122, ¶¶ 5.2, 6.2, 7.2, 7.3

Further, the Tobins sought damages under another subsection of RCW 42.56.550, which states:

(4) 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.* In addition, it shall be *within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.*

RCW 42.56.550(4) (emphasis added). Again, the statutory fine plus attorneys fees is precisely the remedy that the Tobins are seeking in the present case. CP 122, ¶¶ 7.4, 7.5 & 7.6.

Following the provisions for right to judicial review, the standard of review, and the potential remedies, RCW 42.56.550 sets forth the statute of limitations:

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

RCW 42.56.550(6) (emphasis added). King County submits that the simple, logical, and common-sense reading of this language is that all actions under RCW 42.56.550 must be brought within one year.

Rather than this straightforward reading of the statute, the Tobins propose a scheme in which the one-year statute of limitations applies only to certain limited situations. They support their position with a bifurcated system of determining which statute of limitations period applies. This result is achieved only by a strained reading of the statutes which is contrary to their plain language.

b. The Tobin's Proposed Bifurcated Scheme is Unworkable and Produces Illogical Results.

Not only does the Tobins' argument lack statutory support, it creates an unnecessarily complicated and unworkable system. In order to implement the Tobins' bifurcated statute of limitations system, a court must first decide whether the agency's response fell into one of the following categories: (1) claims of exemption, (2) production of records on a partial basis, (3) production of records on an installment basis, (4) complete production of records, (5) complete but tardy production of records, and the (6) failure to produce records. Under the Tobins' analysis, categories 1, 2, and 3 would have a one-year statute of

limitations under RCW 42.56.550(6), but categories 4, 5, and 6, would have a three-year limitation period under RCW 4.16.080.

The Tobin' proposal is unworkable because it makes the determination of the statute of limitations contingent upon the outcome of the matter in dispute. For example, if the agency and the requester disagree about whether records were produced in a timely manner, it would be impossible to know which limitation period (one or three years) to apply. Likewise, the same problem would exist if there was a dispute about whether the production was partial or complete.

But there is a more basic problem with this scheme: it creates a disincentive for agencies to produce complete records in a timely fashion. For example, the Tobins argue that the one-year statute of limitations applies when there has been the production of records on a partial or installment basis. Such a production might take place over months and may ultimately be incomplete, but the claim must be brought within one year of the last production of the record. On the other hand, a complete production of records produced in one batch but a day or two after the five-day deadline for production would be subject to a *three-year* statute of limitations. Such a distinction is inherently arbitrary. It is also unreasonable to suggest that the legislature, which was appropriately concerned with assuring swift and complete response to public records

requests, would create a situation where a full response would actually give the requester three times as long to bring a lawsuit as compared to an incomplete response or a response provided on an installment basis. This creates a disincentive for agencies to provide a single, complete response and is an illogical reading of the statute.

In sum, the Tobins seek to construe RCW 42.56.550(6) in a piecemeal fashion and out of context. Reading RCW 42.56.550 as a whole, it is clear that the legislature intended to create a one-year statute of limitations period for all claims under the PRA. To read the statute otherwise results in unworkable and illogical consequences and should be rejected.

C. The Tobins' Discovery Requests Made During the Appeal of their Code Enforcement Proceeding is Not the Triggering Event for the One-Year Statute of Limitations.

The Tobins alternatively argue that they filed their lawsuit within the one-year limitations period in RCW 42.56.550(6) by attempting to convert a discovery request into a public disclosure request. Appellants' Brief at 16. The Tobins contend that the limitations period starts with the agency's "last response" and claim that DDES' last response was on

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October 18, 2006.⁵ They reason that since their lawsuit was filed within one year of October 18, 2006, their action was timely under RCW 42.56.550(6). Appellants' Brief at 16.

After filing their appeal of the Notice and Order, the Tobins submitted "Appellants' Pre-Hearing Motions" to the Hearing Examiner on or about December 6, 2005. CP 44, ¶ 4; CP 48-49. On October 18, 2006 the King County Hearing Examiner held a pre-hearing conference on this appeal. At the pre-hearing conference a number of issues were addressed, including discovery motions submitted by the Tobins. The discovery motions included requests for production of documents relating to DDES file E0500307 and E041001, including unredacted copies of the complaint letters. CP 45, ¶¶ 7, 8.

The record unequivocally establishes that the October 18, 2006 response the Tobins refer to was not a response to their 2005 requests for public records. It was a response to discovery requests made within the appeal of the code enforcement proceeding. While the discovery request included a request for the same records as the 2005 public disclosure requests, this overlap did not convert the discovery request into a PRA request. Nor did the discovery request and DDES' response extend the

⁵ This date is noted as October 12, 2006 in the Appellant's Brief but should actually be October 18, 2006, which was the date that the prehearing conference was held. The difference in dates does not change the analysis for purposes of addressing the Tobins' argument.

time period for which the Tobins needed to file their action under RCW 42.56.550(6). The hearing examiner appropriately addressed DDES' loss of the original complaint letters in his decision and order, ultimately sanctioning DDES by dismissing the Notice and Order issued to the Tobins. CP 149. The Tobins' merging of their PRA requests with their discovery requests is simply an attempt to circumvent the limitations period.

D. DDES' Responses in May and June 2005 Effectively Triggered the Statute of Limitations in RCW 42.56.550(6).

As previously discussed, since the Tobins filed their suit, the Washington Supreme Court has ruled on a case where application of RCW 42.56.550(6) was at issue. See Rental Housing Association of Puget Sound v. City of Des Moines, 165 Wn.2d 536, 199 P.3d 393 (2009). The Tobins' PRA requests raise issues similar to those in Rental Housing Association, namely, whether DDES' responses to the requests were sufficient to commence the one-year statute of limitations. The Court in Rental Housing Association held that the city did not trigger the statute of limitations until a privilege log containing specific information was provided. The records request in Rental Housing Association was for a voluminous set of records and the responses included the withholding of entire categories of records without identifying the particular records that

were withheld. Id. at 528-29. By contrast, the Tobin request was for a single document, which was provided, albeit with certain portions redacted. Unlike the withholding of entire categories of records without specifically identifying the records as was done in Rental Housing Association, DDES provided the actual record that was requested. While the copy of the complaint letter contained some redactions, the record itself contained sufficient information to identify the record and to discern the nature of the information that was redacted. Thus DDES' response is distinguishable from the city's response in Rental Housing Association. Providing the record in this manner was sufficient to commence the statute of limitations.

Similarly, DDES' response to the request for the Ferguson record was sufficient to trigger the statute of limitations. The Ferguson request was also for a single record. The last production of the record pursuant to the Ferguson request occurred on June 23, 2005. Paula Adams of DDES provided a copy of the complaint letter from the Tobin file and a letter stating that she believed the record satisfied the request.⁶ In other words, this was DDES' final response to their Ferguson request. If the Tobins

⁶ It is conceded that the record provided on June 23, 2005 was not the record that was sought in the Ferguson request. For purposes of determining whether an agency's response triggered the statute of limitations, King County submits that it is irrelevant whether the correct record was provided. The issue is what event starts the clock running. Here that event is the June 23, 2005 correspondence and its accompanying record.

believed DDES' response violated the PRA, they had a right of action under RCW 42.56.550 at that point. The Tobins should have filed their lawsuit within one year of July 24, 2005, the effective date of the amended statute of limitations, but they did not. Instead they waited more than one year past the limitations period to file their lawsuit. The trial court correctly ruled that their action was barred as untimely.

E. The Trial Court's Denial of the Tobins' Motion for Reconsideration was Proper.

The Tobins also assign error to the trial court's denial of their motion for reconsideration of the order dismissing their lawsuit, arguing that King County raised a material fact in its reply brief in support of its motion to dismiss.

The standard of review for a trial court's ruling on a motion for reconsideration is abuse of discretion. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (citations omitted). "Motions for reconsideration are addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of that discretion." Holaday v. Merceri, 49 Wn. App. 321, 324, 742 P.2d 127 (1987) (citing State v. Scott, 92 Wn.2d 209, 212, 595 P.2d 549 (1979)). The trial court abuses its discretion only if no reasonable person would have taken the view adopted by the trial court.

Holaday, 49 Wn. App. at 324 (citing State v. Henderson, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980)). The Tobins fail to demonstrate that the trial court abused its discretion in denying their motion for reconsideration.

The Tobins contend that King County raised a “material fact” for the first time in its reply brief in support of its motion to dismiss. The “material fact” they refer to is King County’s characterization of its responses to the Tobins PRA requests as partial. The Tobins argue that this raised an issue of material fact thus the trial court should not have dismissed their case on summary judgment. Appellants’ Brief at 24-26.

A “material fact” in the context of a summary judgment motion is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn. 2d 267, 279, 937 P.2d 1082 (1997) (citations omitted). King County may not have characterized its records response as partial until it addressed it as such in its reply brief, but that is not a material fact upon which the trial court’s decision depended. The trial court did not have to accept King County’s assertion that the response was partial in order to conclude that the Tobins’ action was barred by the statute of limitations in RCW 42.56.550(6). It could have simply found that the one-year limitations period in RCW 42.56.550(6) applies to all

actions under the PRA, and not just to actions where the agency provided the records on a partial or installment basis as urged by the Tobins.

The Tobins also make much of the timing of King County's characterization of its response as partial. Appellants' Brief at 24-26. But King County's referring to DDES' responses as being partial was in reply to a specific argument raised by the Tobins' in their response brief. In responding to King County's motion to dismiss the Tobins contended that the one-year statute of limitations didn't apply to their requests because RCW 42.56.550(6) only applied where the agency provides the records on a partial or installment basis. CP 79-80. Because King County did not construe RCW 42.56.550(6) in such a limited fashion it was unnecessary to characterize the nature of the records responses one way or another. King County's position was that RCW 42.56.550(6) applied irrespective of the way the records were provided. It only became necessary to make the distinction because of the Tobins' arguments in their response brief.

The trial court did not abuse its discretion denying the Tobins' motion for reconsideration.

F. The Tobins Are Not Entitled to Reasonable Attorney Fees for their Appeal.

The Tobins seek attorney fees for the cost of the appeal, arguing that if this Court reverses the trial court's order then they are the

prevailing party and therefore entitled to attorney fees under RCW

42.56.550(4). That subsection states in pertinent part,

(4) 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.

While RCW 42.56.550(4) provides for costs and attorney fees in PRA actions, the Tobins' request for attorney fees for this appeal is premature and should be denied. Even if the Tobins are successful in this appeal, they are not the prevailing party which would entitle them to attorney fees. In the context of PRA actions, the question whether a plaintiff has prevailed "relates to the legal question of whether the records should have been disclosed on request." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) (footnote omitted). Here a reversal of the trial court's decision would not result a determination that the records should have been provided. It would simply reinstate the lawsuit, with the issue of whether DDES' responses violated the PRA still undecided. Thus the Tobins cannot be considered the prevailing party and their request for attorney fees on appeal must be denied.

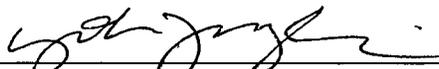
V. CONCLUSION

The trial court did not err in granting King County's motion to dismiss for the Tobins' untimely filing of their lawsuit alleging violations of the Public Records Act. The trial court likewise properly denied the Tobins' motion for reconsideration. For the foregoing reasons, the trial court's rulings should be affirmed.

DATED this 26th day of October, 2009.

Respectfully submitted,

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