

SUPREME COURT  
OF THE STATE OF WASHINGTON

38947-9-II

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RICHARD LINDEMAN AND GINGER LINDEMAN

Petitioners

V

KELSO SCHOOL DISTRICT NO. 458

Respondent

SUPREME COURT NO. 81567-4

Cowlitz County Cause Number: 04-2-00419-6

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STATE OF WASHINGTON

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APPELLANT'S OPENING BRIEF

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## ASSIGNMENT OF ERROR

The appellant assigns as error the decision of the trial court assessing a daily penalty pursuant to former RCW 42.17.340(4) against the Kelso School District for a PDA violation at the minimum level allowed by the statute of \$5.00 per day.

Error is assigned to the conclusions of law 2 and 3 and the order on motion for statutory daily penalty filed in the trial court on April 9, 2008.

## ISSUE PERTAINING TO ASSIGNMENT OF ERROR

On November 15, 2007, this court filed an opinion in cause number 77253-3, holding that a surveillance videotape recording of an altercation between two students on a public school bus was not exempt from disclosure under former RCW 42.17.310(1)(a), thereby reversing decisions of the Cowlitz County trial court and the Court of Appeals, Division II, holding to the contrary. This court remanded the case to the trial court for entry of an order granting the Lindemans' disclosure request and for an award of attorney fees, costs, and discretionary penalties pursuant to former RCW 42.17.340(4). On remand, the trial court assessed the daily penalty for the 1387 days that the tape was wrongfully withheld from the Lindemans at the \$5.00 daily minimum, based on the court's conclusion that the District's denial of the request was based upon a good faith but mistaken belief that the public disclosure act required

the District to withhold the tape from disclosure. Did the trial court err in refusing to set a higher daily penalty, based on a review of the record that reflected that the District near the inception of this case had offered to provide the video to the Lindemans upon their service of a subpoena upon the district, but then refused to relinquish the tape unless the plaintiffs agreed to relinquish their claim for attorney's fees incurred up to that time?

#### STATEMENT OF THE CASE

In January of 2004, the Lindemans retained the services of Jamie Imboden, Attorney at Law, to assist them in obtaining from the Kelso School District No. 458, the school bus videotape which depicted the assault of their minor son by a fellow student on a school bus owned and operated by the District. Before commencing any litigation, Mr. Imboden engaged in correspondence with the District and the District's legal counsel in an attempt to procure production of the tape. His efforts in that regard, and the negotiations and correspondence that ensued are succinctly outlined in an affidavit which Mr. Imboden filed in the Cowlitz County Superior Court on March 12, 2004, after the commencement of litigation. A copy of this affidavit which was made part of the original record in this case as clerk's paper #6 is attached hereto for ease of reference as Appendix A. The affidavit reflects that Imboden sent a written request for production of the tape to the School District on January 30, 2004. On February 13, 2004, the District provided a response, denying the request, claiming that the videotape was exempt from

public disclosure pursuant to RCW 42.17.310(1)(a) as well as 34 CFR Section 99. On February 20, 2004, the Lindemans sent a second request for disclosure, indicating that civil action would be initiated pursuant to RCW 42.17.340 if the videotape was not released. On February 23, 2004, the School District again denied the request and litigation was commenced.

According to the affidavit, Imboden received a telephone call on March 3, 2004, from Clifford D. Foster, Jr., the attorney representing the School District, who advised Imboden that the School District would make the videotape available for inspection and copying upon the service of a subpoena duces tecum to his office. On March 4, 2004, Imboden forwarded a records deposition subpoena to Mr. Foster, as he had requested. The pleadings on file in this matter reflect that the subpoena was also accompanied by a request for reimbursement of the Lindemans' attorney's fees and costs incurred, which at that time were in the amount of \$763.00. The affidavit further reflects that on March 8, 2004, he received a letter from Mr. Foster dated March 8, wherein Mr. Foster refused to comply with the subpoena unless the Lindemans agreed not to pursue their claim for attorney's fees and costs. The affidavit further reflects that on March 12, 2004, a court reporter attended the records deposition pursuant to the subpoena served by the Lindemans, and was denied the right to perform the deposition as noted.

The ensuing decisions of the trial court and the Court of Appeals holding that the videotape was exempt from disclosure demands made pursuant to the PDA were reversed by this court in an opinion filed in cause No. 77253-3 on November 15, 2007. In that opinion, this court held that the videotape recording of an altercation which had occurred between the Lindeman's son and a fellow student on the District's school bus was not exempt from disclosure under former RCW 42.17.317(1)(a), and remanded the matter to the trial court for entry of an order granting the Lindeman's disclosure request, awarding attorney's fees, costs, and discretionary penalties pursuant to former RCW 42.17.340(4).

On remand, the parties agreed that the period of time during which the videotape was improperly withheld from disclosure commenced on February 13, 2004, the date when the School District initially denied the Lindemans request for disclosure of the tape, and that the period of time in question was 1387 days. At issue was the determination of the assessment of an appropriate daily penalty for that period of time pursuant to the statute. On February 14, 2008, the Lindeman's served and filed a motion for determination of statutory daily penalties pursuant to RCW 42.56.550(CP-27), as well as a memorandum of authorities in support of that motion (CP-28). The District filed their responsive brief (CP-30) and the motion was heard by the trial court on March 5, 2008. Counsel for the Lindemans argued that the standard to be utilized in assessing the appropriate daily penalty was set forth in the Yousoufian case.

Yousoufian v The Office of Ron Sims, 137 W.App. 69, 151 P3d 243]. That case utilized standards defined in the Washington Pattern Jury Instructions; the behavior of the District could be categorized as mere negligence, gross negligence, wanton misconduct or willful misconduct, and the daily penalty would be assessed accordingly (RP-1). Reference was also made to the ruling in the Yousoufian case where the court held a daily penalty of \$15.00 was inadequate, where the District was found to have acted with gross negligence (RP-2, Lines 14-18). Counsel argued it was clear from the court's ruling in that case that the mindset and the motive of the parties were particularly important in making a proper assessment of the penalty. (RP-3, Lines 1-6). Counsel also cited the ruling of the court in Zink v Mesa City, which cited the rule that in determining the threshold issue of whether the item in question should be disclosed, the good faith or lack thereof on the part of the agency was irrelevant. (RP-3, Lines 15-19). However, counsel argued that at the point where the court was being requested to assess the daily penalty, the mindset and the motive of the agency in declining to disclose the item were the issues that were front and center, and those primary issues could best be addressed by reviewing the negotiations of the parties. (RP-4, Lines 6-19). Counsel referred to the correspondence attached hereto which reflected that it was the District that proposed the idea of resolving the issue by the Lindemans serving a subpoena duces tecum for the tape, since it appeared that the Lindemans were entertaining the idea of a civil suit. (RP -4, Lines 23-25, RP-5, Lines

1-6). The correspondence also reflected that the Lindemans had agreed to this proposal, had submitted the subpoena and also requested attorneys' fees; that it was in response to that request that the District issued their letter dated March 8, which counsel characterized as the critical document pertaining to the issue before the court. (RP-5, Lines 7-14). Counsel argued that in that letter, the District established a linkage between the disclosure of the tape and the issue of attorney's fees. It was pointed out that in the March 8 letter, the District took the position that the subpoena for the tape did not resolve the issue of whether the tape was subject to disclosure under Chapter 42.17; counsel argued that since the District was taking that position, they could have simply agreed to honor the subpoena which they had initially requested, without impairing their ability to resist the claim for attorney's fees, since ostensibly at that point the District was maintaining that the PDA did not require disclosure of the tape. Counsel observed that resolution of the issue in that manner at that point in time would have effectively rendered unnecessary all of the litigation that subsequently ensued, with the possible exception of whether the District was actually obligated to pay \$763.00, the attorneys' fees that were being requested at that time. (RP-5, Lines 15-25, RP-6, RP-7, Lines 1-5). Counsel then noted that the correspondence of the District reflected that immediately after the District took the position that disclosure under the subpoena process and disclosure under the PDA were totally separate and apart, the District then took the position that they were

not going to honor the subpoena, which they had initially suggested as the means of resolving the issue, unless the Lindemans agreed to forfeit any claim for attorney's fees under the PDA. (RP-7, Lines 6-16). The court inquired whether a separate tort proceeding had been filed and counsel responded no, not to his knowledge. (RP-8, Lines 5-9). Counsel characterized the threat by the District to refuse to honor the subpoena unless the Lindemans relinquished their right to attorneys' fees as a tactic designed to pressure them into giving up their claim for attorney's fees. (RP-8, Lines 11-18). Counsel argued that all of the resulting litigation ensued because the District insisted that they would only honor the subpoena if the Lindemans relinquished their claim for fees pursuant to the PDA, even though in that same letter the District maintained that the subpoena process and the issue of whether disclosure of the tape was required by the PDA were two separate and distinct issues. Counsel argued that this transcended mere negligence or gross negligence and qualified at least as wanton misconduct. (RP-9). Counsel concluded by indicating that the court rulings indicated that the purpose of the penalty is to discourage such behavior and requested the penalty be set accordingly. (RP-10, Lines 1-7).

The attorney for the District then addressed the court. He indicated that the letter that Mr. Imboden addressed to the District stating indicating that he had been retained by the Lindemans to review the assault of their son indicated that they were considering a suit in a tort. (RP-10, Lines 13-22). He also argued that the reason

the tape was not produced was that the tape was exempt under the Public Disclosure Act and FERPA; that was the mindset of the District (RP-11, Lines 4-8). He then indicated that he had explained to Mr. Imboden in 2004 that if they were going to sue the District in a tort action, FERPA and the PDA would not make the videotape non-discoverable and it would make the videotape available to the Lindemans. (RP-11, Lines 15-23). He also indicated that at no time did the District indicate that it had a legal duty to provide the tape under the PDA; if they knew that they had such an obligation, then their position on the attorney's fees would be nothing more than an attempt to avert paying the fees. (RP-11, Lines 23-25, RP 12, Lines 1-3). He then reiterated that he had told Imboden that he could get the tape through the discovery subpoena on the basis of a suit in tort and that in a PDA action, a subpoena could not be lawfully issued to get a record that the agency was claiming as exempt, and so the point was to encourage the plaintiffs to look at this as an effort to facilitate a release of the tape. (RP-12, Lines 7-21). He then indicated that thinking about this from the standpoint of had that conversation not occurred, and the District had simply claimed the tape as exempt, counsel for the District didn't think that there would be any issue but the \$5.00 daily penalty would be appropriate. (RP-13, Lines 7-13). He indicated that he had been attempting to resolve this issue about providing the tape, looking ahead to the possibility of a civil action but the District never indicated that the PDA would allow disclosure of the tape (RP-13, Line 17-24). He

continued to argue that the District was not at any point trying to hide the tape from the Lindemans but instead of getting in a fight over this issue, the District was simply trying to facilitate a resolution of the issue. (RP-15, Lines 5-21). He also indicated that at the same time, it would be improper for him to recommend or for the District to pay attorney's fees in an action where the District did not believe the PDA required disclosure of the tape. (RP-15, Lines 12-15). He also argued that according to the Yousoufian case where there is simply a good faith dispute over whether the exemption applies, the \$5.00 daily penalty is appropriate. He also argued the fact that both the trial court and the Court of Appeals believed that the District engaged in a legally appropriate course of action in withholding the tape was directly relevant to the District's state of mind; they didn't think they were obligated to pay the attorney's fees if they didn't think they had an obligation under the PDA to release the tape. (RP-19, Lines 1-6).

In response, counsel for the Lindemans pointed out that the District was acknowledging that they recognized in the letter of March 8, that disclosure of the tape and the issue of fees were two different and separate issues; he read the following portion of that letter as follows: "I do not believe the subpoena for the challenged record resolves the legal issue of whether the tape is subject to disclosure under Chapter 42.17 RCW." (RP-19, Lines 20-25, RP-20, Lines 1-3). He again pointed out that the subpoena was the District's idea and all they needed to do was to provide the tape pursuant to the service of the subpoena as they had proposed and

the only remaining issue would have been to resolve whether they were obligated to pay the \$763.00 in attorney's fees. (RP-20, Lines 6-19). He also quoted another portion of that letter as follows: "Absent a resolution on the question of your fees, I cannot agree to follow that process", which made it painfully clear that they were establishing linkage between the subpoena procedure and the PDA claim which the District had acknowledged were not connected. (RP-20, Lines 23-25, RP-21, Lines 1-5). Counsel argued that linkage was not appropriate and that was why he characterized it as a pressure tactic; he quoted another portion of the letter as follows: "Accordingly, unless we can enter a stipulation that drops your claim for fees the District will move to quash the subpoena and defend against the show cause order on March 15." (RP-21, Lines 9-15). He argued they were backtracking on the very procedure that they had put in motion for resolving the case, and were indicating that they were going to fight the case if the Lindemans did not give up their right to the \$763.00 in attorneys' fees. (RP-21, Lines 16-24). Counsel argued that this went beyond mere negligence or gross negligence; it was a purposeful tactic which was totally unnecessary and so at a minimum it was wanton misconduct and could easily be characterized as willful misconduct and that the daily penalty should be assessed accordingly. (RP-22, Lines 3-14).

The court then made its ruling. The court conducted an analysis of the issue in two steps; the first step was where would we be separate and apart from the negotiations and discussions, and

step two would be addressing the question of whether the discussions and negotiations alter that position. (RP-22, Lines 15-20). The court indicated that without reference to the negotiations, all factors pointed the court in the direction of setting the penalties at the minimum. The initial basis of the denial was the protection of student information which is part of the statutory framework involving the PDA. Further, he indicated that a total of thirteen judges reviewed the case and six out of the thirteen thought that the District was correct in their interpretation. (RP-22, Lines 21-25, RP-23, Lines 1-5). The court discussed the ruling of the Supreme Court as well as the issue of statutory construction and concluded that while the District got it wrong in the interpretation of the statute, they weren't trying to hide any internal records. (RP-23, RP-24, Lines 1-7). The court indicated that the District was standing on an exemption created for the protection of students and that good faith, while not germane to what is subject to disclosure is certainly pertinent to the penalty and the court concluded that good faith was exercised here. So, separate and apart from negotiations the \$5.00 per day penalty was appropriate. (RP-24, Lines 8-13).

The court then addressed the issue of whether the review of the correspondence in the course of the negotiations gave the court any reason to change his decision. The court interpreted the District's letter of March 8 as indicating that the District was not retreating from their position that the tape was discoverable in the event of a tort action, and did not consider the District's ultimatum

that unless the parties could enter into a stipulation that dropped the Lindeman's claim for fees, the District was going to defend against the show cause order on March 15 as being inappropriate. (RP-24, Lines 14-25, RP-25, Lines 1-10). The court concluded by indicating that he didn't see that the activity between counsel caused the court to change his position, which was that the District acted in good faith but a mistaken belief that they were required to protect information regarding other students and so the \$5.00 per day penalty was appropriate. (RP-25, Lines 17-23).

On April 9, 2008, the court entered Findings, Conclusions and an Order on the Motion for Statutory Penalty (CP-34), and on May 5, 2008 the Lindeman's filed their notice of appeal (CP-37).

### **ARGUMENT**

The ruling of the court in Yousoufian v The Office of Ron Sims, 137 W.App. 69, 151 P3d 243 (2007), is instructive regarding the appropriate standards to be employed when determining an appropriate daily penalty within the range of \$5 per day and \$100 per day, as set forth in the statute. The record in that case reflects that in 1997, Yousoufian requested King County to provide him with certain documents, and the trial court in that case initially found that King County had violated the PDA and imposed a \$5 per day penalty for its failure to reasonably comply with Yousoufian's request, further finding that the County's responses to those requests were untimely and demonstrated a lack of good faith. On the first appeal, the court

reversed the per diem penalty imposed by the trial court on the basis that the trial court had found gross negligence on the part of the County as well as a lack of good faith, and those findings did not support the court's imposition of a minimum penalty of \$5 per day. The court also held that the trial court erred by considering the accompanying award of attorney's fees as a factor to be considered in awarding an appropriate daily penalty, where a higher penalty would otherwise be appropriate. The court then remanded that matter to the trial court for the determination of the appropriate penalty above the statutory minimum. The matter was then appealed by the County to the Supreme Court on whether the daily penalty could be independently assessed in regard to separate groups of records, rather than the number of requests for disclosure. The Supreme Court rejected that argument since it had not been timely raised. The Supreme Court went on to explain that the process for determining the appropriate PDA award requires a determination of the amount of days the party was denied access then determining the appropriate daily penalty between \$5 and \$100 depending on the agencies actions. The court also agreed with the Court of Appeals decision that assessing the minimum penalty of \$5 per day was unreasonable, considering the County's actions. That matter was again remanded to the trial court for determination of an appropriate penalty and then the trial court then imposed a penalty of \$15 per day. The matter was again appealed by Yousoufian, who claimed that the facts of that case warranted a higher penalty. One

of Yousoufian's arguments before the Court of Appeals was that trial courts need more guidance in setting PDA award amounts, and proposed that a standard covering the entire extent of the \$5 to \$100 range be utilized, depending on the degree of the agency's culpability. The court also referenced Judge Sanders' concurring/dissenting opinion when the case was previously before the Supreme Court determining that "as such, the default penalty from which the trial court should use its discretion is the half-way point of the legislatively established range: "\$52.50 per day, per document. The trial court could then apply various criteria to shift the per diem penalty up or down". 137 W.App. at 77. Justice Sanders also set forth the various considerations to assist the trial court in making the proper determination. However, the Court of Appeals chose not to adopt those factors. However, the court did agree that the purpose of the PDA would be served by providing the trial courts with some guidance as to apply the Supreme Court's emphasis on agency culpability to the PDA penalty range.

The court went on then to address the specific question of whether an award of \$15 per day was appropriate, concerning the determination which had already been made in that case that the County had already acted with gross negligence. The court resorted to the Washington Pattern Jury Instructions (WPI) for an appropriate definition of gross negligence, and also noted that an emphasis merely on the presence or absence of an agency's bad faith would only allow for an assessment of the penalty at the extremes of the

penalty range and found that there should be standards which would determine an award evenly throughout that range. The court then turned its attention to definitions of increasing degrees of culpability as set forth in the WPI, such as negligence, gross negligence, wanton misconduct and willful misconduct; the court actually set forth those definitions from the WPI in footnotes in its decision at 137 W.App 69, 79. The court went on to state that "using the WPI as a guide, the minimum statutory penalty should be reserved for such "instances in which the agency has acted in good faith but, through an understandable misinterpretation of the PDA or failure to locate records, has failed to respond adequately". Then, working up from the minimum amount on the penalty scale, instances where the agency acted with ordinary negligence would occupy the lower part of the penalty range. Instances where the agencies actions or inactions constituted gross negligence would call for a higher penalty than ordinary negligence, and instances where the agency acted wantonly would call for an even higher penalty. Finally, instances where the agency acted willfully and in bad faith would occupy the top end of the scale. Examples of bad faith would include instances where the agency refused to disclose information it knew it had a duty to disclose in an intentional effort to conceal government wrongdoing and/or to harm members of the public". 137 W.App at 80. The court declined to attach firm dollar amounts to those degrees of culpability but simply offered them as a guide for the trial court's exercise of discretion. However, the court did hold that in that

case, assessment of a penalty of \$15 per day was inadequate, in view of the trial court's characterization of the County's conduct as grossly negligent. The court characterized the award of \$15 per day as being at the low end of the statutory range and thus unsustainable. The court then remanded the matter once more to the trial court for determination of an appropriate penalty.

Initially, it can be determined from the court's decision discussed above that the mindset of the agency and particularly its motive for refusing to disclose the record is the most dispositive consideration.

In applying that standard to the record in this case, it is immediately apparent that the record does not reflect that as in other cases, the agency simply failed to respond in a timely fashion, or failed to grasp the scope of the request, or failed to fully respond to a burdensome request. Those considerations would certainly support a finding of mere negligence or gross negligence, as in the Yousoufian decision. The negotiations of the parties, which really have nothing to do with the resolution of the legal issue of whether the PDA required disclosure, now become very relevant. Those negotiations clearly reflect that the mindset of the District, and its motive for nondisclosure, make this case qualitatively different than those cases where the agency simply acted in an ignorant or incompetent manner. What we have here, as reflected in the record of this case, is a calculated decision on the part of the District to withhold a videotape, which it had previously agreed to disclose

pursuant to the service of a subpoena, in order to pressure the plaintiffs to relinquish a claim for attorney's fees, and then when the plaintiffs refused to relinquish that claim, the District retrenched to its initial position that disclosure was precluded by the act. The record in this case reflects that the District's motive in retrenching was to claim protection from disclosure under the act as a pressure tactic to achieve for their immediate goal of avoiding payment of \$760 in attorney's fees and costs. Consequently, this would place the proper assessment of daily penalty in the upper quadrant of willful misconduct.

Attached hereto is the affidavit of Jamie Imboden, plaintiff's attorney at the trial court level which is found in Appendix A to this memorandum. This affidavit is listed as Clerk's Paper #6 in the court file and essentially lays out a timeline for the events that lead up to the commencement of litigation in this case. It reflects that on January 3, 2004 the Lindemans sent a written request to the Kelso School District for production of a number of things, including the school bus videotape. A copy of that letter is attached as Exhibit A to Imboden's affidavit as is a copy of the Kelso School District's responsive letter dated February 13, 2004, informing Mr. Imboden that they were refusing to disclose the videotape, claiming it to be exempt from public disclosure pursuant to RCW 42.17.310; that letter is designated as Exhibit B to Imboden's affidavit. Incidentally, the parties agree that it is the date of this responsive letter from the district which commenced the running of the daily penalty phase.

Imboden's affidavit reflects that he sent a second public disclosure request to the district on February 20 indicating that a civil action would be initiated pursuant to RCW 42.17.340 if the videotape was not released and on February 21, 2004, the district again denied the request. Litigation was then commenced.

The affidavit then indicates that on March 3, 2004, Imboden received a telephone call from Clifford D Foster, the attorney for the School District, wherein "he advised me that the School District would make the videotape available for inspection and copying upon the service of a subpoena duces tecum to his office." Also attached hereto in the appendix is a copy of a letter which Mr. Imboden then directed to Mr. Foster; this letter is dated March 4, 2004 and is marked Exhibit 1 at the bottom, since it was actually attached to pleading submitted by Mr. Foster's office to the trial court, so it is simply attached hereto for ease of reference. In this letter Mr. Imboden informs Mr. Foster that he is submitting with the letter a subpoena duces tecum, pursuant to their telephone conference of March 3, 2004. He also indicates that the Lindemans are requesting reimbursement of their costs and attorney's fees, all in the amount of \$763 incurred in commencing litigation to obtain the tape.

Also attached hereto is a copy of Mr. Foster's responsive letter to Mr. Imboden dated March 8, 2004, which plaintiffs submit is the critical document with regard to the issue of willful misconduct on the part of the district. In this letter, Mr. Foster is attempting to clarify that he is agreeing to honor the subpoena for the videotape

“based on the assumption that you would not pursue a claim for attorney’s fees.” He then indicates that “I do not believe that a subpoena for the challenged record resolves the legal issue of whether the tape is subject to disclosure under Chapter 42.17 RCW”. This is a critical statement, because it reflects an understanding on the part of the district that the record in question could be provided pursuant to a subpoena, which would not be the same as disclosing the tape pursuant to the requirements of Chapter 42.17 RCW. In other words, the district was taking the position that it could have honored the subpoena and produced the record, without impugning their ability to argue that the PDA did not require the production of the document. Consequently, at that critical juncture, the District could have simply proceeded forward with their decision to provide the tape in response to the subpoena that they had been given at their request, and continued to object to the plaintiff’s claim for statutory attorney fees, on the basis that they were not providing the tape under the auspices of that statutory construct. Nevertheless, what the District determined to do as reflected in the next paragraph is to take the position that in the public disclosure proceeding, a document otherwise exempt from disclosure under the act was not discoverable or subject to the subpoena power; ostensibly they seemed to be taking a position that they were wrong to offer the video pursuant to service of the subpoena, they recognized this to be an error and would be thereafter refusing to disclose the tape under any circumstances. However, this apparently principled position is

belied by the fact that in the very next paragraph, it is indicated that “accordingly, unless we can enter a stipulation that drops your claim for fees, the District will move to quash the subpoena and defend against the show cause order on March 15. Please give me a call to discuss this matter.” The only logical conclusion to be drawn from this paragraph is that the District was actually taking the position that they didn’t really care about adherence to the PDA, as much as they cared about \$763. They were making a very cynical proposition to the Lindemans that the District would abandon any argument that the PDA protects the document from disclosure, as long as the Lindemans were willing to abandon their request for payment of what at that time was a very modest amount for attorney’s fees and costs. The truly tragic aspect of these negotiations is that the District recognized that it had the legal ability to simply provide the tape pursuant to the issuance of the subpoena, which was their idea in the first place, and then separately resolve the issue of whether they were legally obligated to pay the claim for attorneys fees; in the event that they had provided the tape in response to the subpoena but continued to maintain that they were not obligated to pay those fees since they were not providing the tape pursuant to any obligation under the PDA and that the PDA did not require such disclosure, their actions could have been considered as taken in good faith, or at a minimum, at least being consistent. However, rather than taking this straight forward, practical and common sense approach to resolving the issue, they used the threat of rescinding

their agreement to render the subpoena and defending against the PDA claim as a stick to pressure the Lindemans into relinquishing their claim for attorney's fees and costs, while in the next breath acknowledging their cynical willingness to drop that stick as long as the Lindemans dropped their claim for fees and costs. It is hard to imagine how the tactics of the District as discussed above could qualify as anything less than willful or wanton misconduct.

Willful misconduct is defined in WPI 14.01, as follows: "willful misconduct is the intentional doing of an act which one has a duty to refrain from doing with intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury." Wanton misconduct is defined in WPI 14.01 as follows: "Wanton misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, and reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another." In view of the District's cynical willingness to disregard the PDA in exchange for a few dollars, their subsequent decision to engage in what was so obviously a pressure tactic to coerce the plaintiffs into abandoning a modest claim which could have been resolved separately, certainly qualifies as either willful or wanton misconduct. When one considers that in making that decision, they were purposefully taking

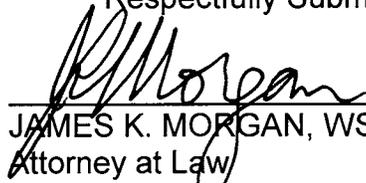
the risk of incurring the substantial penalty which is presently under discussion, a risk that could have been avoided so easily, their willfulness is beyond question. It is clear from the authority cited above that the amount of the daily penalty must be in proportion to the level of misconduct of the agency in order to serve the appropriate deterrent effect, and the message must be sent that when an agency engages in such a stunning display of arrogance and bad faith, it does so at its peril.

#### CONCLUSION

Consequently, the Lindemans would request that the ruling of the trial court setting the penalty at the low end of the scale be reversed and for an assessment by this court of an assessment of a daily penalty at the high end of the statutory range, or in the alternative, for an order of remand to the trial court for that purpose.

Dated this 3 day of September 2008.

Respectfully Submitted,

  
\_\_\_\_\_  
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1 hereto, marked Exhibit "A", and by this reference made a part hereof is a  
2 true and accurate copy of said request.

- 3 3. By letter dated February 13, 2004, the school district denied the  
4 Lindemans' request stating that the videotape was exempt from public  
5 disclosure pursuant to RCW 42.17.310(1)(a) and was protected by the  
6 Family Education and Privacy Act, 34 CFR §99. Attached hereto, marked  
7 Exhibit "B", and by this reference made a part hereof is a true and  
8 accurate copy of said letter.
- 9 4. The Lindemans sent a second public disclosure request on February 20,  
10 2004 stating that a civil action would be initiated pursuant to RCW  
11 42.17.340 if the videotape was not released. Attached hereto, marked  
12 Exhibit "C", and by this reference made a part hereof is a true and  
13 accurate copy of said request.
- 14 5. On February 23, 2004, the school district again denied the Lindemans'  
15 request, forcing them to initiate this action. Attached hereto, marked  
16 Exhibit "D", and by this reference made a part hereof is a true and  
17 accurate copy of said denial.
- 18 6. On March 3, 2004, I received a telephone call from Clifford D. Foster Jr.,  
19 attorney for the school district, wherein he advised me that the school  
20 district would make the videotape available for inspection and copying  
21 upon the service of a Subpoena Duces Tecum to his office.
- 22 7. On March 4, 2004, I forwarded a records deposition subpoena to Mr.  
23 Foster as he requested. The subpoena was accompanied by a request for  
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1 reimbursement of the Lindemans' attorney fees and costs incurred in  
2 trying to obtain access to the videotape. Attached hereto, marked Exhibit  
3 "E", and by this reference made a part hereof is a true and accurate copy  
4 of said subpoena.

5  
6 8. On March 8, 2004, I received a letter via facsimile from Mr. Foster  
7 refusing to comply with the subpoena unless the Lindemans agreed not to  
8 pursue their claim for attorney fees and costs. Attached hereto, marked  
9 Exhibit "F", and by this reference made a part hereof is a true and accurate  
10 copy of said letter.

11  
12 9. On March 12, 2004, a court reporter with Archer and Associates attended  
13 the records deposition pursuant to the Lindemans' subpoena and was  
14 denied the right to perform the deposition as noted.

15  
16 10. This matter is now before the Court because the school district still has not  
17 provided the Lindemans a copy of the videotape as requested in two  
18 letters, by telephone, and by subpoena and because the Lindemans have  
19 refused to waive their rightful claim to reimbursement of their attorney  
20 fees and costs under RCW 42.17.340.

21 Dated this 12 day of March, 2004.

22  
23 M. Jamie Imboden  
M. JAMIE IMBODEN

24 SUBSCRIBED AND SWORN to before me this 12 day of March, 2004.



25  
26 Sandy Fromm  
NOTARY PUBLIC in and for the State of  
Washington, residing in Longview.

27 My commission expires: 12/17/2007.

Crandall, O'Neil & McReary, P.S.

Attorneys at Law

1447 Third Avenue, Suite A / Box 336

Longview, WA 98632

360 425 4470 - Fax 360 425 4477

**CRANDALL, O'NEILL & McREARY, P.S.**  
ATTORNEYS AT LAW  
P.O. BOX 336 • 1447 THIRD AVENUE • SUITE A  
LONGVIEW, WASHINGTON 98632

January 30, 2004

Rose Valley Elementary School  
1502 Rose Valley Road  
Kelso, WA 98626

Re: Client: Richard and Ginger Lindeman  
Student: Michael Lindeman

To whom it may concern:

Please be advised that this office has been retained by Richard and Ginger Lindeman to review the assault of Michael Lindeman, which occurred while he was under the supervision and care of Rose Valley Elementary School. In order to properly evaluate this matter, we hereby request copies of the following:

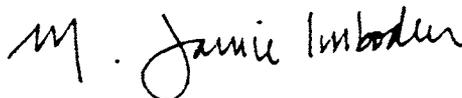
1. Rose Valley Elementary School's written rules and regulations governing student conduct and discipline for violations thereof;
2. Videotape of school bus assault of Michael Lindeman; and
3. Any and all information regarding disciplinary action taken by Rose Valley Elementary School as a result of the assault on Michael Lindeman.

The aforementioned information is requested pursuant to the Family Education and Privacy Rights Act (20 USCA § 1232g) and Revised Code of Washington 28A.600.010.

Your prompt attention to this matter would be greatly appreciated.

Very truly yours,

CRANDALL, O'NEILL & McREARY, P.S.

  
M. Jamie Imboden

cc: Richard and Ginger Lindeman



Kelso School District #458  
601 Crawford Street  
Kelso, Washington 98626

•(360) 501-1900

•FAX (360) 501-1902

FEB 17 2004

February 13, 2004

Crandall, O'Neill & McReary, P.S.  
Attorneys At Law  
M. Jamie Imboden  
P.O. Box 336  
1447 Third Avenue Suite A  
Longview, WA 98632

RE: Michael Lindeman  
Request for Materials

M. Jamie Imboden:

Your request for copies of materials related to Michael Lindeman has been received. Materials have been provided as follows:

1. Rose Valley School's written rules and regulations governing student conduct and discipline for violations thereof:
  - The Rose Valley rules that are published for parents and students are enclosed.
  - The Rose Valley Student Guidelines that are published for teachers are enclosed.
  - The Kelso School District Rights and Responsibilities 2003 – 2004 Handbook is enclosed. Regulation 8132 A, Rules for Students Riding School Buses is found on pages 75, 76 and 77.
  
2. The video tape requested cannot be disclosed. The video tape reveals personally identifiable information about other students. This information is exempt from public disclosure (42.17.310.1a) and is protected by the Family Education and Privacy Act.

3. The information regarding disciplinary action taken by Rose Valley Elementary School is being reviewed. I will send you a copy of my findings, conclusions and recommendations. In addition, your client is being given copies of statements written by adults who have witnessed Mr. & Mrs. Lindeman's interactions with students and staff at Rose Valley School.

Any information regarding your client's child can be made available to you.

Your questions can be directed to the Kelso District legal counsel, Cliff Foster of Dionne and Rorick (2550 1<sup>st</sup> Interstate Center, 999 3<sup>rd</sup> Avenue, Seattle, WA 98104). Mr. Foster can be reached at 206-622-0203.

You can also contact my office at 360-501-1905.

Sincerely,



Stan Riedesel  
Director of Student Services

cc: Glenys Hill, Superintendent  
Patty Page, Assistant Superintendent  
Jim Biwer, Executive Director of Business Services  
Tom Markley, Rose Valley Elementary Principal  
Cliff Foster, Attorney at Law

**CRANDALL, O'NEILL & McREARY, P.S.**  
ATTORNEYS AT LAW  
P.O. BOX 336 • 1447 THIRD AVENUE • SUITE A  
LONGVIEW, WASHINGTON 98632

February 20, 2004

**PUBLIC DISCLOSURE REQUEST**

Stan Riedesel  
Director of Student Services  
Kelso School District #458  
601 Crawford Street  
Kelso, WA 98626

Re: Rose Valley Elementary School

Dear Mr. Riedesel:

Pursuant to RCW 42.17.260(1), request is hereby made to inspect and copy the following public records:

1. Rose Valley Elementary School videotape of school bus assault of Michael Lindeman;
2. Rose Valley Elementary School's written rules and regulations governing student conduct and discipline for violations thereof published for parents and students;
3. Rose Valley Elementary School's Student Guidelines published for teachers; and
4. Kelso School District #458 Rights and Responsibilities 2003-2004 Handbook.

Your failure to make the aforementioned documents available for inspection and copying within five (5) days as provided by RCW 42.17.320 will result in the initiation of legal proceedings under RCW 42.17.340(1). Within said action will be a request, pursuant to RCW 42.17.340(4), for costs, attorney fees, and terms of \$100.00 for each

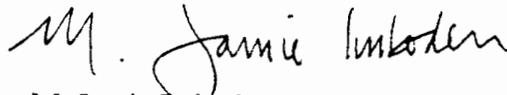
Stan Riedesel  
February 20, 2004  
Page 2

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day the Kelso School District #458 denies the public right to inspect and copy said records.

Very truly yours,

CRANDALL, O'NEILL & McREARY, P.S.



M. Jamie Imboden

cc: Richard and Ginger Lindeman  
Cliff Foster, Attorney for Kelso School District #458

EXHIBIT C  
PAGE 2 OF 2



Kelso School District #458  
601 Crawford Street  
Kelso, Washington 98626

RECEIVED

FEB 23 2004

•(360) 501-1900

•FAX (360) 501-1902

February 23, 2004

Crandall, O'Neill & McReary, P.S.  
Attorneys At Law  
Attn: M. Jamie Imboden  
P.O. Box 336  
1447 Third Avenue Suite A  
Longview, WA 98632

RE: Rose Valley Elementary Student

Dear M. Jamie Imboden:

Your February 20, 2004 request for records from Rose Valley Elementary was received by my office on February 23, 2004.

On February 13, 2004 the following records were sent to you:

1. The Rose Valley rules that are published for parents and students.
2. The Rose Valley Student Guidelines that are published for teachers.
3. The Kelso School District Rights and Responsibilities 2003 – 2004 Handbook. Regulation 8132 A, Rules for Students Riding School Buses is found on pages 75, 76 and 77.

The school bus video tape that you have requested cannot be disclosed. The video tape reveals personally identifiable information about other students. This information is exempt from public disclosure (42.17.310.1a) and is protected by the Family Education and Privacy Act.

Please direct any further questions regarding this matter to our Kelso School District Attorney:

Dionne & Rorick  
Attn: Cliff Foster  
Attorney at Law  
900 Two Union Square  
601 Union Street  
Seattle, WA 98101  
206-622-0203.

Sincerely,

Stan Riedesel  
Director of Student Services

cc: Glenys Hill, Superintendent  
Cliff Foster, Attorney at Law  
Tom Markley, Rose Valley Principal

EXHIBIT D

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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

RICHARD LINDEMAN and GINGER  
LINDEMAN, husband and wife,

Plaintiff,

v.

KELSO SCHOOL DISTRICT NO. 458,

Defendant.

No. 04 2 00419 6

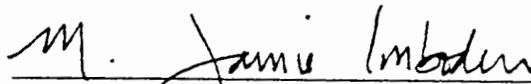
SUBPOENA DUCES TECUM  
FOR DEPOSITION

To: Kelso School District No. 458  
601 Crawford Street  
Kelso, WA 98626

YOU ARE HEREBY COMMANDED to appear before a Notary Public, or before  
some other official authorized by law to administer oaths, at the office of Kelso School  
District No. 458, 601 Crawford Street, Kelso, Washington, on Friday, March 12, 2004 at  
9:00 a.m., and give evidence in the above-entitled action, and there remain until  
discharged.

You are further hereby commanded to bring with you the following items:  
Videotape of school bus assault of Michael Lindeman, minor.

DATED this 4 day of March, 2004.

  
M. JAMIE IMBODEN, WSB# 28416  
Of Attorneys for Plaintiffs

Crandall, O'Neill & McReary, P.S.  
Attorneys at Law  
1447 Third Avenue, Suite A / Box 336  
Longview, WA 98632  
360 425 4470 - Fax 360 425 4477

ATTORNEYS AT LAW  
900 TWO UNION SQUARE  
601 UNION STREET  
SEATTLE WASHINGTON 98101

TEL (206) 622-0203  
FAX (206) 223-2003  
attorneys@dionne-rorick.com

**DIONNE  
& RORICK**

RECEIVED

MAR 10 2004

March 8, 2004

Via Facsimile and Regular Mail

H. Jamie Imboden  
Attorney at Law  
P.O. Box 336  
Longview, WA 98632

**Re: Kelso School District; Lindeman**

Dear Mr. Imboden:

I have received your letter of March 4, 2004 and the subpoena duces tecum.

As I believe I indicated in our phone conversation, my statement that I would honor the subpoena duces tecum for the videotape was based on the assumption that you would not pursue a claim for attorney fees. I do not believe that a subpoena for the challenged record resolves the legal issue of whether the tape is subject to disclosure under chapter 42.17 RCW. As I stated, under RCW 42.17.310(1)(a), 34 CFR §99.31(a)(9), and 34 CRF §99.12(a) (copy enclosed), personally identifiable information may not be released without consent of the parent or adult student involved.

As we further discussed, the District may release such information in response to a valid court order or subpoena if it provides advance notice of the subpoena or court order to the parents of the students involved. Absent a resolution of the question of your fees, I cannot agree to follow this process. The videotape would be discoverable in the event of a tort action, and subject to subpoena in the discovery process. But in your public disclosure proceeding, a subpoena duces tecum for a document otherwise exempt from public disclosure is not discoverable or subject to the subpoena power. I do not believe that you have any basis under chapter 42.17 RCW to have a court enter an order making this document discoverable and thus justify an award of attorney fees.

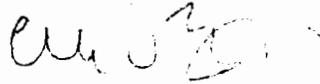
Accordingly, unless we can enter a stipulation that drops your claim for fees, the District will move to quash the subpoena and defend against the show cause order on March 15<sup>th</sup>. Please give me a call to discuss this matter.

EXHIBIT F  
PAGE 1 OF 2

Imboden  
March 8, 2004  
Page 2

Sincerely,

DIONNE & RORICK



Clifford D. Foster Jr.

CDF:bc

cc: Glenys Hill  
Stan Riedesel

Enclosure

e:\kelso\001\40308ii.ltr.doc

I **RONI A. BOOTH**, Clerk of the  
Superior Court of Cowlitz County,  
State of Washington, hereby certify  
that this instrument is a true and  
correct copy of the original on file  
in my office. **9-2-08**

**RONI A. BOOTH**

By  Deputy

EXHIBIT F  
PAGE 2 OF 2