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NO. 54300-8

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

BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6 & 9,

Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2, AND SEATTLE JOHN DOES 1-5, 7-8, & 10-17,
AND SEATTLE JANE DOE 1 AND JOHN DOE,

Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL
DISTRICT #210, AND SEATTLE SCHOOL DISTRICT #1,

Respondents, AND

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT SEATTLE TIMES
COMPANY

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in April 2003 in denying an attorney's fee request that had never been made, briefed or argued by any party. CP 117.
2. The trial court abused its discretion in refusing to vacate that portion of its April 2003 Order and Findings which it deemed to have denied an award of fees against the school districts. CP 3044-45.
3. The trial court abused its discretion in imposing CR 11 sanctions against the Seattle Times Company ("Times") and its attorney for the motions for fees against the school districts and the CR 60 motion to vacate that part of the Order denying fees against the districts and it erred in holding that the Times had misrepresented the facts and the law in its briefs. CP 2530, 3046-47, 3049.
4. The trial court erred when it concluded that *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998), bars a fee award against the school districts in this case. CP 3048.
5. The trial court erred in holding that attorney's fees may not be awarded against an agency under RCW 42.17.340 when a third party brought the action. CP 3045.
6. The trial court erred in concluding that the school districts were not "adverse parties" to the Times in the proceedings. CP 3045.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the school districts in this case "against" the Times? (Errors 1-6).
2. Was the Times' request for fees against the school districts well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law? (Error 3).
3. Are attorney's fees available under RCW 42.17.340 to a requester who successfully dissolves an injunction in a Public Disclosure Act ("PDA") case and obtains, in litigation involving public agencies, a court order requiring the agencies to produce records when the agencies argue for exemption, fail to argue for disclosure and provide support for arguments of exemption? (Errors 1-6.)

III. STATEMENT OF THE CASE

The Times adopts and incorporates herein Section III of the Times' Respondent/Cross-Appellant Brief at 2-22. This related appeal addresses whether the Times is entitled to an award of attorney's fees, costs and statutory penalties from the respondent school districts and whether a CR 11 sanction imposed on the Times and its lawyers for seeking such an award was an abuse of discretion.

A. School Districts' Response to the Times' PDA Requests and in the Litigation.

In November and December 2002, the Times made PDA requests to the Office of Superintendent of Public Instruction ("OSPI") and several school districts to investigate those agencies' handling of complaints of teacher sexual misconduct with students. Beginning December 3, 2002, district personnel and lawyers began emailing one another via a list serve strategizing how to respond. CP 2572-2618, 2621-2623. On December 5-6, 2002, an email from OSPI was sent to school district public information employees and school district lawyers across the state warning them about the Times' investigation. CP 2585, 2601. The respondent school districts and/or their lawyers received all these communications. CP 2572-2618, 2621-2623.

1. Bellevue School District

The Times made a PDA request to Bellevue School District ("BSD")

on December 11, 2002. CP 137. On December 18, 2002, Sharon Howard, Assistant Superintendent and General Counsel of BSD, informed the Times the documents would not be available until January 10, 2003 and only after giving the teachers time to take “legal action to block the release.” CP 138-39. Howard stated that in some cases “we may conclude that release of investigative records, but not names of persons accused, is appropriate because the charges were unfounded.” CP 139. On December 20, 2002, Howard wrote again, stating:

We do not wish to pre-judge any matters we may not have uncovered yet, but there could be situations where full release of all information within the scope of your request would be inconsistent with affected persons’ right to privacy. There are court decisions in this state that have reached that result, even as to records regarding alleged employee misconduct, so we did not want to mislead you by indicating that all materials we discover will necessarily be provided. Determinations as to what is provided cannot be made until we see what records there are, provide notice to affected persons if appropriate, and evaluate the proper balance between the public’s rights to disclosure versus any legitimate privacy rights. . . .

CP 143-44. On January 10, 2003, Howard sent an email to the list serve of school district lawyers stating: “With much assistance from others, we only today replied to the Times request.” CP 2579-80. That response told the Times that BSD had identified the documents but was withholding teacher names and certificate numbers pending the teachers’ opportunity to consider whether to seek to block their release. CP 144-45.

On January 16, 2003, Jerry Painter, General Counsel of the Washington Education Association (“WEA”), emailed Howard regarding the Times’ request. Painter wrote in part:

There is also no requirement for a public agency to create a document such as a spread sheet if one does not exist. So I am curious about BSD’s position on the request. I think you would agree with me that it would be a bum deal if a teacher who is innocent of an accusation would still have to have his/her name dragged through the Seattle Times because of morbid curiosity and not the law.

CP 2540. Howard responded that same day, writing:

Jerry, As I told Kathleen, **Mike Hoge has been helping us with this issue and I encourage you to talk with Mike directly.... I’d be delighted if we could share as little as possible. . . . if WEA wants to pay for any legal fight about this we’d probably be happy to be the defendant or plaintiff if we want to start the fight.** Sharon

Id. (emphasis added).

On January 24, 2003, at 1:26 p.m. Howard emailed Kathleen Heiman of the Bellevue Education Association a chart with the teachers’ names revealed – records then being withheld from the Times -- and stated BSD’s attorney Mike Hoge provided the information to “Taylor” Firkins, the attorney “who is bring [sic] the lawsuit on the teachers/WEA’s behalf.” CP 2541. Minutes later, the lawsuit was filed allegedly on behalf of Bellevue John Does 1-11 against BSD. CP 14-21. That same day, a temporary restraining order was issued blocking the release of records by BSD. CP 22-25. That evening, Howard sent an email to Lorraine Wilson

of the Washington State School Directors' Association ("WSSDA"). CP 2577-78, 2621-23. The email had a subject of "TRO to stop Seattle Times Request" and read:

Lorraine: Judge North in King Cnty Superior Court entered TRO today to prevent BSD from releasing more information regarding their public records request about employees. Taylor [sic] Firkins from Van Siclen firm handled this for WEA and local. **We, of course, did not resist.** . . . What fun, Sharon.

CP 2578 (emphasis added). Wilson forwarded the email to all members of the WSSDA list serve. CP 2577, 2621-22.

On February 7, 2003, Howard sent an email to a teacher about the Times' request. Howard's email read in relevant part:

We worked hard trying to find a way to avoid releasing any information not absolutely required to be. . . We hired outside counsel who has extensive experience with the public records law **to assist us in finding every possible way we could minimize any exposure to employees. There is no reason we would ever want to drag current or former employees through public attention to such matters – even those who were found to have committed misconduct don't need more attention after their discipline or termination has been imposed,** and some have been retired for years since the public records request was for a 10-year period.

However, there are substantial financial penalties to a public agency who guesses wrong about what can be released. We would have to pay the Seattle Times' attorney fees and daily fines can be levied against the District for every day we don't release requested information. **We finally decided the best course of action was to work with the WEA to arrange for them to bring a temporary restraining order to stop this.** The WEA was already doing this for employees

in other Districts so we understood that it would be quick and easy for them to step in. **We coordinated the timing of our notice of release so that the WEA's attorney would know when he had to have his papers filed for our employees.**

As an attorney and employee in this District I am personally appalled that the law could require that even those exonerated may have to have any information released and I am offended that anyone would suggest that this District would be cavalier in doing so. . . . [W]e first alerted any employee potentially impacted, explained the dilemma, and then **worked with the WEA's lawyers to find a way that we do not release anything unless a court finds we have to do so. This was a very responsible way to protect employees and not generate legal exposure to the District. . . .**

CP 2545 (emphasis added). Later that day Howard sent her email to all certificated staff of BSD. CP 2547-48.

On February 8, 2003, Howard emailed another teacher, stating:

I do feel very badly that this situation faced any of our employees or former employees and **did everything in my power to find a way to mitigate any release. Mike Riley and I even talked about the District initiating a lawsuit to stop this and he was willing to recommend that to the school board** to protect any employee who had not been found guilty of any misconduct if there was nothing else we could do and if the WEA had not stepped in we were still considering do [sic] that. . . . **We hoped we would not have to bring the suit ourselves based on some conversations with the WEA General Counsel and we were very pleased when the WEA confirmed it would seek a TRO on behalf of BSD employees. . . .**

As a footnote, Carl, it is **because of all the efforts we took, and were prepared to take, to protect employees and former employees in this situation** that I and the rest of the cabinet feel that the BEA Bulletin is such an unnecessarily

anti-District and unfair characterization of this matter. . . . It would have been so easy to make this a piece about **how we are all in this together and working with the WEA to make the best of a difficult situation. . . .**

CP 2546-47 (emphasis added).

On February 14, 2003, the Times clarified that its PDA request sought all underlying records relating to the complaints, investigations and outcomes. CP 337, 378-81. On February 24, 2003, the trial judge orally ruled that the Times' original request had been a valid PDA request seeking the underlying documents. RP 2/24/03 at 10-11.

On March 10, 2003, BSD filed a Memorandum Regarding Decisionmaking Standards advocating a presumption of adequacy of investigations performed by school districts. CP 73. During the lawsuit, BSD filed nine declarations from its employees in support of the position of plaintiffs. CP 152-222. The witnesses testified to the alleged adequacy of investigations and the risk of employee grievances for wrongfully disciplining employees. CP 184, 187, 196-97, 205, 219. On April 25, 2003, the trial court ordered that records of Bellevue John Does 5, 8, 10 and 11, including the names of the accused teacher, had to be disclosed to the Times. CP 229-30, 239-41. The Times timely appealed the denial of the names and records of Bellevue John Does 1-4, 6-7, and 9, an appeal still pending. CP 223-24.

Following publication of the Times' "Coaches Who Prey" series in December 2003, Times reporter Maureen O'Hagan interviewed BSD Superintendent Mike Riley. CP 2656. Riley stated that he was "not embarrassed about the fact that we [BSD] would work with the BEA or the WEA" to protect records in cases where there is no clear finding of wrongdoing. *Id.* He said if a similar request came into the district today, "I'd pick up the phone right now and call the BEA president and say I don't think we should turn over the information, let's figure out how to play this." *Id.* He said, "I would work with the union to do what I thought was the right thing for the district and our employees." *Id.*

2. Federal Way School District

On December 4, 2002, the Times made a PDA request to FWSD. CP 266. FWSD responded on December 6, 2002, stating it would take 60 days to respond to the request. CP 268-69. On January 17, 2003, FWSD wrote to the Times, saying it found the responsive documents but "[o]n the advice of our legal counsel and in consultation with WEA legal" FWSD would notify the affected teachers that their records would be released, and give them two weeks to obtain injunctions. CP 271.

On January 31, 2003, Tyler Firkins filed a suit and obtained a TRO for five men and two women, all current or former employees of FWSD. CP 252-62. FWSD did not resist the TRO. CP 259-62. On February 4, 2003,

FWSD filed an Answer in this lawsuit asserting a Counterclaim against the Times. CP 806.

On February 6, 2004, FWSD's attorney appeared at a hearing in this case with Firkins and SSD and BSD attorneys. Firkins told the judge

There are three separate cases, and they have kind of come to me in a – in an unusual fashion, in terms of how I get cases from the Union, because the school districts have been struggling with how to deal with the Public Disclosure Act request of the Seattle Times. In fact, apparently there have been e-mails across the State going back and forth as to how to deal with this in the most inexpensive, most efficient way possible.

RP 2/6/03 at 3.

When invited to respond to plaintiffs' request for an injunction as the defendant, SSD's attorney John Cerqui instead urged the trial court to

look at this issue diligently and take its time. There's a lot of sensitive information contained in unfounded allegations. Just, for example, a teacher could be accused of rape, completely falsely, but yet that dissemination in the paper could have some very damaging effect. So I think there are a lot of important issues and factual issues that the court needs to take its time in reaching, and I guess I would just request that that be balanced in your decision in the matter.

RP 2/6/03 at 16. FWSD's attorney Jeff Ganson followed Cerqui, stating, "Exactly the same thing goes for Federal Way School District . . ." *Id.* at 16-17. In another hearing, where the trial court indicated an intention to dissolve the TRO for Federal Way Jane Doe 1 and other individuals Firkins had never contacted and who had never asked to be part of the

lawsuit or consented to Firkins' representation, Ganson urged the trial court to give Firkins more time to track down Federal Way Jane Doe 1 and try and secure her as a client. RP 2/24/03 at 14. Ganson urged the trial court that "these are the sorts of bells that can't be unrung." *Id.*

On February 12, 2003 and February 14, 2003, the Times clarified that its PDA request sought all underlying records relating to the complaints, investigations and outcomes. CP 337, 370, 372. FWSD responded on February 18, 2003, stating it expected to release responsive documents on February 28, 2003, after again notifying the same individuals involved and their union representatives, and giving them a second opportunity to "seek court relief." CP 337, 376. On February 24, 2003, the trial judge orally ruled that the Times' original PDA request had been a valid PDA request seeking the underlying documents. RP 2/24/03 at 10-11.

On April 3, 2003, the trial court circulated its proposed order and findings. The proposed order required that the name and records of Federal Way John Doe 2 be disclosed to the Times. CP 2238. On April 21, 2003, FWSD Human Resources Director Chuck Christensen provided a declaration in support of plaintiffs' motion for reconsideration regarding Federal Way John Doe 2. CP 926-28. Christensen attached a memorandum he drafted and sent to FWSD's attorney summarizing his understanding of the investigation of Federal Way John Doe 2. *Id.* The

memorandum stated FWSD did not investigate complaints made against John Doe 2 because the Des Moines Police Department conducted an investigation and determined the complaints were “without merit” and because no complaint was ever filed with the district itself. *Id.* This was not the first Christensen declaration filed in support of plaintiffs’ pleadings. On February 20, 2003, Christensen filed a declaration advocating the withholding of “letters of directions.” CP 859.

On April 25, 2003, the trial court ordered that records of Federal Way Jane Does 1 and 2 and Federal Way John Does 4 and 5, including the names of the accused teachers, had to be disclosed to the Times. CP 229, 236-38. (The trial court reversed its proposed order following the Christensen Declaration regarding Federal Way John Doe 2. CP 237.). The Times timely appealed the denial of the names and records of Federal Way John Does 1-3, an appeal still pending. CP 223-24.

More than a month after the trial court ordered FWSD to provide records to the Times, FWSD indicated it was withholding records based on previously undisclosed exemptions. On June 12, 2003, FWSD provided a list of 34 records that it had withheld as privileged under RCW 42.17.310(1)(j). CP 2533, 2646-54. (The Times in the trial court had briefed why this exemption could not apply to the records (CP 657-58). FWSD did not dispute these arguments in the trial court.)

On February 19, 2004, FWSD filed a brief in this case with the state Supreme Court and “urged” the court to declare “letters of direction” to be exempt from disclosure under the PDA, in direct opposition to the Times. CP 2533, 2635.

3. Seattle School District

On November 18, 2002, the Times made a PDA request to SSD. CP 336, 340. SSD responded on November 25, 2002, indicating “documents that are not exempt from disclosure will be made available for your inspection or copying” within 30 days, unless additional time was needed and after “affected third parties” were notified. CP 336, 342.

On December 11, 2002 and January 8, 2003, SSD granted itself extensions to comply with the Times’ requests. CP 336, 344, 346. On January 13, 2003, Joy Stevens, an SSD paralegal, wrote an email to SSD attorney Cerqui stating she was “not sure we can refuse to release” records in “cases (such as Tom Hudson) where the individual either resigns or commits suicide before the investigation is completed.” CP 2579.

On January 30, 2003, SSD gave charts to the Times purporting to list “sexual misconduct allegations” but noting “names, certificate numbers (if available), and schools have been redacted from this list at this time, pending our notification of the employees.” CP 336, 348-54. The charts were for two categories: (1) teachers for whom discipline was imposed,

and (2) for those described as “No Discipline Imposed.” SSD produced the charts for both categories without any teacher names or certificate numbers. CP 348-54.

On January 31, 2003, SSD General Counsel Mark Green wrote an email to BSD General Counsel Sharon Howard asking for a copy of BSD’s letter to BSD teachers advising them of their right to obtain a protective order to block the release of records to the Times. CP 2573. Howard sent Green a copy of her letter, indicating the district’s “regret” that records would be produced to the Times. CP 2572.

On February 4, 2003, Firkins filed suit for 17 men and one woman listed on SSD’s charts. CP 1-9. On February 5, 2003, SSD sent the Seattle Education Association (“SEA”) the list of employees notified by SSD, accompanied by an email from SSD paralegal Joy Stevens referring to the Times’ request as “troublesome.” CP 2568.

As discussed in Section III.A.2 above, at the February 6, 2004, hearing SSD’s attorney Cerqui advocated nondisclosure and a consideration of the harms to the accused teachers. RP 2/6/03 at 16.

On February 11, 2003, the trial court entered a TRO barring SSD from releasing records. CP 55-58. SSD initially deemed the TRO to apply to all the teachers on the No Discipline Imposed chart and Discipline Imposed chart (CP 2556), even though SSD knew that the No Discipline Imposed

chart contained at least six teachers who SSD determined had either “engaged in sexual conduct with two children,” were “unfit to continue as a teacher,” or had solicited sex from minors and/or students. CP 2659-77.

On February 12, 2003, the Times clarified that its PDA request sought all underlying records relating to the complaints, investigations and outcomes. CP 336, 355-64. On February 13, 2003, the district, stated it would respond by March 5, 2003 with the documents or with a request for additional time to comply. CP 337, 365-68. On February 24, 2003, the trial judge orally ruled that the Times’ original PDA request was a valid PDA request seeking the underlying documents. RP 2/24/03 at 10-11.

Also, on February 12, 2003, the widow of one of the plaintiffs, Gordon Anderson, informed SSD that her husband had died on December 7, 1994. CP 2558. On February 24, 2003, the original TRO expired for five men and one woman, all apparently listed on the No Discipline Imposed list and one of whom was Gordon Anderson and another was Thomas Hudson.¹ At no time prior to February 24, 2003 did SSD inform the trial

¹ In the spring of 2000, SSD, the Times, and the WEA were involved in a PDA lawsuit regarding access to sexual misconduct investigations by SSD of former SSD school teacher Thomas Hudson. CP 2533, 2640-44. Hudson committed suicide during SSD’s lengthy investigation. After his death, his widow and the WEA filed suit against SSD to block release of records to the Times and others pursuant to their PDA requests. CP 2533. The Times and *Seattle Post Intelligencer* intervened as defendants in the litigation. *Id.* Though SSD was a named defendant, the trial judge determined that SSD had been against the newspaper in the action and that SSD had violated its duties to the newspaper requesters under the PDA. CP 2533, 2640-44. Judge Mary Yu ruled in May 2000 that the records were not exempt, ordered them released to the Times and the *Post Intelligencer*,

court or the Times that one of the No Discipline Imposed individuals was Hudson² or that SSD had learned Anderson died. On February 25, 2003, after the trial court confirmed the TRO no longer covered the five men and one woman, SSD produced a revised chart for the first time naming Anderson and Hudson. CP 1663, 2198-2201.

On March 25, 2003, during a hearing in open court, a former SSD administrator appearing as witness for plaintiffs mentioned the name of a Seattle John Doe. SSD's attorney immediately asked the court to impose a gag order on the Times prohibiting it from disclosing the name revealed in open court and requiring it to destroy notes taken by the Times' reporters. RP 3/25/03 at 40-41. The trial court later granted a protective order for disclosures outside of the hearing, but denied Cerqui's request for a protective order for information revealed during the hearing or destruction of reporters' notes. CP 106-08, 114-15, 117-18.

SSD filed five declarations supporting the withholding of records. CP 67-69, 80-82, 884-89, 904-08. One of them was a declaration "in support of plaintiffs' motion for reconsideration" of a ruling granting the Times access to the records and name of Seattle John Doe 13, a teacher disciplined by SSD. CP 1821-22.

and ordered SSD to pay the newspapers their respective attorney's fees, costs and a statutory penalty pursuant to RCW 42.17.340(4). CP 2640-44.

² SSD did not support the Times' motion to compel Firkins to establish he represented the Doe plaintiffs, even though SSD knew at least two of the plaintiffs were dead.

On April 25, 2003, the trial court ordered that records of Seattle John Does 2, 4, 6, 8-9, 11-17, Seattle Jane Doe 1, and John Doe (another former SSD employee), including the names of the accused teacher, had to be disclosed to the Times. CP 229-31, 234-35, 242-45. The Times timely appealed the denial of the names and records of the remaining Seattle John Does, an appeal still pending. CP 223-24.

More than a month after the court ordered SSD to provide records to the Times, SSD stated for the first time it was withholding records pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, attorney-client privilege and work product privilege. CP 2533, 2646-2654. On June 25, 2003, SSD provided a list of 36 records that it had withheld. CP 2647-50.

B. The Times’ Motions for Fees, Costs and Statutory Penalties Against the Districts and Civil Rule 60 Motion.

On April 25, 2003, the trial court entered its Order for Injunction and Protective Order (“the Order”), ordering “no award of attorneys fees made to any party in this case.” CP 117. At the same time, it issued its Findings of Fact and Conclusions of Law on Order for Injunction. In a section dealing with a request for fees from the plaintiff teachers, the Findings included a sentence reading, “Attorney’s fees are not appropriate under the PDA because the government agencies involved, the School Districts, did

not oppose the Times' request." CP 114.

When the trial court entered its Order and Findings, no request for fees had been made against the districts and the subject had never been mentioned by the trial court or parties. Before the trial court entered its Order and Findings, the Times was unaware of many of the facts establishing its right to fees from the districts. CP 2922-24. It was only after entry of the trial court's Order and Findings that the districts' true position and the extent of their opposition to the Times became clear. *See, e.g.*, CP 2539-49, 2909-2910, 2921.

In September 2003, BSD told the Times it located additional responsive documents regarding four teachers whom BSD had not previously identified. BSD produced records for these teachers on September 25, 2003, but unilaterally decided to withhold one teacher's name, even though the teacher was not a plaintiff in this case. CP 2923.

Additional evidence came in January 2004. In an interview with a Times reporter, BSD's superintendent said that if a similar PDA request came to BSD today, he would "pick up the phone right now and call the BEA president and say I don't think we should turn over the information, let's figure out how to play this." CP 2656. In February 2004, FWSD filed a brief in the Supreme Court which "urged" the court to declare "letters of direction" be exempt from disclosure. CP 2635, 2923.

In light of the Districts' active opposition to release of records, the Times moved for an award of attorney's fees and costs against the Districts on appeal on March 26, 2004, and in the trial court on April 5, 2004. CP 2486-97, 2501-11, 2515-26, Times' Resp./Cross-App.'s Br. at 60-63. The Districts took conflicting positions in both courts in response. In the appellate court, on April 23, 2004, the Districts argued in a joint motion and brief that the appeal could not pertain to an award of fees against the Districts "**as, of course, the Times never requested and the Superior Court had never denied, such award**" and "the trial court had not -- as of the date of the Times' Brief -- denied such a request against the Districts" Joint Br. of Sch. Dist. re: Fees, Section I at 3, 5.(emphasis added). They argued in the trial court exactly the opposite when opposing the Times' fee motion -- that the trial court had denied an attorney fee award against the Districts in its April 2003 Order and Findings. *See* CP 2694-95, 2687, 2689.

On April 16, 2004, the trial court denied the Times' motion for fees without prejudice, inviting the Times to bring a CR 60 motion to vacate the portion of its earlier Order and Findings it determined had dealt with entitlement to fees from the Districts. CP 2530. The Times did as the trial court suggested and brought a CR 60 motion. CP 2896-2905. The trial court then denied the Times' CR 60 motion and granted FWSD's motion

for sanctions against the Times and its counsel under CR 11. CP 3044-47. The trial court held that the case of *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998), foreclosed an award of fees against the Districts. CP 3048.

IV. ARGUMENT

The Times adopts and incorporates herein Section IV.G of its Respondent/Cross-Appellant Brief at 60-63 and Section I.K of its Reply Brief at 27-30.

A. Standard of Review.

A trial court's decision whether to vacate an order under CR 60 and a trial court's imposition of sanctions under CR 11 are both reviewed for abuse of discretion. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 121, 904 P.2d 1150 (1995) (CR 60); *State v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998) (CR 11). An abuse is found when a trial court exercised its discretion on manifestly untenable grounds or based on untenable reasons. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993); *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002).

B. The Times Is Entitled to Attorney's Fees, Costs and Statutory Penalties From the Respondent School Districts.

The Districts argued, as they have the right to do, that certain records are exempt from production. But this position places the Districts

“against” the Times, and therefore the Times is entitled to an award of attorney’s fees and costs should it prevail in the litigation. The Districts were and are clearly “against” the Times in litigation regarding the Times’ right to obtain public records. The Times has already prevailed against the Districts on numerous subjects, including its request to gain the records and names of 22 teachers and its opposition to a gag order for material revealed in open court and destruction of reporters’ notes. Should the Times prevail on additional matters in this appeal – either in preserving its right to the names and records of the three appellants, gaining access to the names and records of additional original plaintiffs in this case, narrowing or striking the protective/gag order entered against its reporters for material revealed in interviews and redacted records, achieving fees against the plaintiffs or their lawyer or union, or in striking the CR 11 sanctions imposed on the Times and its attorney – the Times will have “prevailed” in this appeal “against” the Districts on additional matters further entitling it to its reasonable fees and expenses incurred on review and below and statutory penalties under the PDA. RCW 42.17.340(4); RAP 18.1(a), (b).³

The trial court erred in denying the Times’ fee motions of April 5,

³ A party prevails even though portions of the requested documents are found to be exempt. *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep’t*, 55 Wn. App. 515, 525, 778 P.2d 1066 (1989).

2004. The trial court further erred in deciding the issue – unbeknownst to the parties – before the issue was brought to it or briefed or mentioned by any party. The trial court erred in foreclosing a claim without affording the parties an opportunity to raise and argue it.

C. The Trial Court Abused Its Discretion in Denying the Times’ CR 60 Motion.

Because the trial court treated its April 2003 Order as a judgment foreclosing fees against “any” party, including claims never raised, the trial court invited the Times to recast its fee motions as a CR 60 motion to vacate judgment. The Times disputes that CR 60 is the appropriate framework to view its fee claim, as the motion is one the Times is entitled to assert and brief under the PDA – an opportunity it was denied. But even viewed under CR 60, the trial court abused its discretion in refusing to vacate that portion of the judgment it deemed foreclosed the Times’ PDA fee claims.

Attorney’s fees may be awarded under a CR 60 motion. *See In re Marriage of Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994). Under CR 60(b)(3), a trial court may vacate a final order based on “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b).” CR 60(b)(3). The party seeking relief must provide facts explaining why the evidence

was not previously available. See *Graves v. Department of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424 (1994); see also *People v. Puyallup*, 142 Wn. 247, 248, 252 P. 685 (1927). In addition, the evidence must be material. *Graves*, 76 Wn. App. at 719; see also *Hinton v. Carmody*, 186 Wn. 242, 255, 60 P.2d 1108 (1936). The Times succeeds on both counts. Evidence confirming the Districts' adversity to the Times was not provided until weeks, and in some cases almost a year, after the trial court's Order. This includes material that the Times requested, but did not receive, before the Order. CP 2536-49. The evidence revealing the Districts' opposition to the Times' efforts to obtain public records establishes that the Districts were against the Times and thus are liable for fees, costs and statutory penalties under the PDA.

Further, under CR 60(b)(11), the court may vacate a final order based on "other reason[s] justifying relief" from the judgment. CR 60(b)(11). CR 60(b)(11) relief should be granted when "irregularities which are extraneous to the action of the court" occur, *State v. Keller*, 32 Wn. App. 135, 141, 647 P.2d 35 (1982), and "should not be given a cramped or narrow reading." *Suburban Janitorial Servs. v. Clarke American*, 72 Wn. App. 302, 312, 863 P.2d 1377 (1993). Courts have vacated orders under CR 60(b)(11) in situations involving reliance on mistaken information. See, e.g., *In re Henderson*, 97 Wn.2d 356, 359-60, 644 P.2d 1178 (1982).

It has been deemed appropriate to vacate a judgment under CR 60(b)(11) when the judgment was based on “incomplete, incorrect, or conclusory factual information.” *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993); *see also State v. Scott*, 92 Wn.2d 209, 211-12, 595 P.2d 549 (1979) (vacating judgment in criminal matter based on CR 60(b)(11) where judge had been given inaccurate information at time of first order).

Here, the trial court, unbeknownst to the parties, deemed it had ruled on a fee motion against the Districts that was never made, briefed, or even mentioned during the litigation. The Districts argued before the appellate court that the trial court had not ruled on such a motion. CP 3005. The Times had the same understanding. It was not until the trial court denied the Times’ motion for fees on April 16, 2004, (CP 2530) that the Times realized the trial court intended to foreclose a claim before it was asserted. The trial court should not have ruled on the subject without being informed of the law and facts surrounding it; and when it became apparent assumptions made by the trial court were incorrect, that portion of the order foreclosing a right to seek fees from the Districts. should have been vacated. It was an abuse of discretion not to do so.

D. *Confederated Tribes* Does Not Foreclose a Fee Award under the Facts of this Case.

In *Confederated Tribes*, the state Supreme Court held that the

agency's position in "since the time of the request, has been that the records requested [] are 'public records' and are subject to disclosure under the public disclosure act." 135 Wn.2d at 742. In its appellate briefing, the agency argued the records "easily" met the definition of a public record and argued against exemptions asserted by the tribes. CP 2824, 2826-2847. Thus, in *Confederated Tribes*, the agency was clearly not "against" the requester. From the outset, it was affirmatively arguing in favor of the requester and against the party seeking the injunction.

In sharp contrast to the agency in *Confederated Tribes*, the Districts here did not agree to a wide release of records. They did not argue against exemptions asserted by plaintiffs. They instead sought, and still seek, to limit disclosure. Unlike the agency in *Confederated Tribes*, two of the three agencies did not even bother to file a brief in the appeal of the injunction and **the one that did argued for exemption and against release of records.** Resp. Br. of FWSD at 8. Here the Districts argued against disclosure, in favor of exemptions, and provided declarations in support of motions to deny the Times access to records. CP 67-69, 80-82, 152-221, 858-60; RP 2/6/03 at 3, 16-17; RP 2/24/03 at 13-14, 33. FWSD filed an appellate briefing urging the Court to declare records exempt. CP 2635. One district argued for a gag order on the Times' reporters and a

motion for destruction of their notes. RP 3/25/03 at 40-41.⁴ Two districts, FWSD and SSD, have admitted they did not release all records ordered by the trial court to be released and instead withheld and still withhold responsive records in defiance of that order. CP 2646-54.

Further, despite the fact that the agency in *Confederated Tribes* argued against the injunction and in support of the requester, three of the nine justices believed the requester was still entitled to fees against the agency under the PDA. 135 Wn.2d at 759-61. All three of those justices – Justices Madsen, Alexander, and Sanders – are still on the state Supreme Court. Only one of the justices in the majority – Justice Johnson – is still on the Court. It is possible that the current court would reach a different decision if that same case were it brought to them today. It is clear that that court would recognize the differences between *Confederated Tribes* and the case brought here. When the Times briefed its right to fees on appeal from the Districts, it was before the current Supreme Court on this appeal.

Because the Districts did not respond like the agency in *Confederated Tribes*, that case does not foreclose the Times' fee motions against the Districts. The trial court erred when it concluded it did. The Times is

⁴ The Times' original requests were proper PDA requests, as the trial court originally interpreted them to be during the case below. RP 2/24/03 at 10-11. The trial court's unexplained reversal of itself in its rulings denying fees against the Districts is error and is not supported by the law or factual record. CP 3043. No party appealed that earlier finding, also implicit in the trial court's April 2003 Order, and any arguments to the contrary have been waived.

entitled to trial and appellate court fees against the Districts under RAP 18(b) and the PDA.

E. *Doe I v. State Patrol* Has Not Been Overruled.

The Districts have argued the Division Three case of *Doe I v. State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996), was impliedly overruled by the Supreme Court in *Confederated Tribes*. There is no hint the Court meant to do this. See, e.g., *In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996) (literal language not binding if court did not address issue). Justice Madsen’s dissent recognizes the continued validity of *Doe I*: “The court recently confirmed the mandatory nature of a costs and fees award under [RCW 42.17.340(4)]. *Amren v. City of Kalama*, 131 Wn.2d 25, 35, 929 P.2d 389 (1997) . . . accord *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 302, 908 P.2d 914 (1996).” 135 Wn.2d at 759-60. *Confederated Tribes* does not discuss *Doe I* elsewhere, by either majority or dissent. In *Doe I*, the requester won an award of fees against the agency even though a third-party – like plaintiffs here – had filed the lawsuit to block disclosure of public records.

There is no evidence the *Confederated Tribes* majority considered the principles raised in *Doe I* and rejected them, because the cases have important factual distinctions. Given the continued presence on the Court of the *Confederated Tribes* dissenters – and the departure of all but one of

the majority – the continued vitality of *Doe I* is strong. The Districts can point to no case overruling or calling into question the holding of *Doe I*. It is premised on a clear mandate in the PDA and is very similar to the one here. It supports the Times’ motions for fees. The trial court erred in concluding the case was inapplicable.

F. Because the Times’ Request for Attorney’s Fees Under the PDA Was Not Frivolous, the Civil Rule 11 Order Should Be Reversed.

The Times’ request for fees, costs and sanctions was well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Its CR 60 motion, brought at the trial court’s suggestion, was similarly warranted and supportable. The trial court’s key rationale for imposing CR 11 sanctions was its belief that *Confederated Tribes* foreclosed the Times’ PDA fee requests. The Times motion was – at a minimum – warranted by a good faith argument for the extension, modification or – even if the trial court’s reading of *Confederated Tribes* were correct – reversal of existing law. The Times and its counsel brought a fee motion against SSD in a similar case two years after *Confederated Tribes* and prevailed – providing clear evidence of their good faith and rational belief in the legitimacy of their claim. CP 3162. The trial court abused its discretion in finding that the Times’ request for fees and CR 60 motion violated CR 11. The CR 11

sanction must be overturned. The parasitic CR 11 motions on appeal from FWSD and other parties must similarly be denied.

1. The Times Did Not Misstate the Relevant Portions of the PDA.

The Times did not misrepresent an agency's obligations under the PDA, and its briefs cannot support CR 11 sanctions. Notably, the Districts did not deny RCW 42.17.310(4) requires an agency to cite exemptions when it withholds records from production, or that RCW 42.17.290 requires an agency to provide a requester with the "fullest assistance" and "most timely possible action," or that RCW 42.17.310(2) requires an agency to segregate and promptly release non-exempt portions of responsive documents. These are the elements of the PDA that the Districts failed to follow, and on which the Times Fee Motions were based. CP 2504-05.

2. The Times Properly Framed the Relevant Facts.

The Times' motions were similarly well grounded in fact. A pleading is deemed not well grounded in fact only if it is "baseless," such that "the author of the pleading . . . failed to conduct an objectively reasonable pre-filing inquiry into the factual . . . basis of the claim." *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999). CR 11 sanctions are not warranted merely because counsel gives facts a "different interpretation." *Herring v. Department of Social & Health Servs.*, 81 Wn. App. 1, 35, 914 P.2d 67

(1996).⁵

The record shows FWSD's counsel received alerts, legal memos and advice from other lawyers through the list serve, and FWSD's January 17, 2003, letter acknowledged it was withholding records to give employees time to sue "[o]n the advise [sic] of our legal counsel and in consultation with WEA legal." CP 2768. The Times' conclusions and interpretations are supported by uncontroverted facts and cannot be found to violate CR 11.

G. The Times is and was Entitled to Bring These Claims.

The PDA grants the Times the right to pursue fees from the Districts when the Districts violate the Act. The Times brought such claim when it had evidence establishing clear violations and a clear entitlement to the relief sought. The governing law – as well as good faith arguments for modification, extension or reversal of existing law – supported such claims. Nonetheless, the trial court denied relief based on a flawed belief that the Times was required to assert its request for fees against the Districts during the injunction case against plaintiffs. Cross-claims against parties labeled “codefendants” in a litigation are permissive and may be asserted at any time – even after the primary litigation has concluded. CR

⁵ See also *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (finding abuse of discretion in grant of CR 11 sanctions regarding complaint; “the rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories”); *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

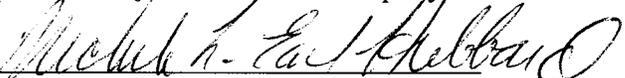
13(g); *Bennett v. Dalton*, 120 Wn. App. 74, 79, 84 P.3d 265 (2004);
Krikava v. Webber, 43 Wn. App. 217, 221, 716 P.2d 916 (1986). This is
true even when coparties are actually adversaries. *Bennett*, 43 Wn. App. at
221-22. Res judicata would not apply unless the relevant issue was
actually litigated prior to the judgment. *Id.* The trial court's April 2003
statements regarding entitlement to fees from the Districts – disposing of
no pending claim -- could not have been a res judicata bar in the future.
The Times' motions should be granted and the CR 11 sanction overturned.

V. CONCLUSION

For the foregoing reasons, the Court should overturn the CR 11
sanctions imposed against the Times and its attorney and award the Times
its reasonable attorney's fees, costs, and statutory penalties from BSD,
FWSD and SSD.

RESPECTFULLY SUBMITTED this 19th day of August, 2004.

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Appendix

Superior Court Civil Rule 11. Signing and Drafting of Pleadings, Motions, and Legal Memoranda; Sanctions

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or paper, that to the best of the attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The

attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

Superior Court Civil Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the

judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

RCW 42.17.340. Judicial review of agency actions

(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 was denied the right to inspect or copy said public record.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2004, true and correct copies of the Supplemental Brief of Seattle Times was served on all parties below at the following addresses by the method indicated:

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EXECUTED this 19th day of August, 2004, at Seattle,
Washington.

Barbara J. McAdams
Barbara J. McAdams

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