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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MIKE BELENSKI,

Appellant

v.

JEFFERSON COUNTY,

Respondent,

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

This case questions the applicability of the discovery rule to the statutes of limitations used in Public Records Act cases. Plaintiff Michael Belenski (“Belenski”) argues that a general discovery should delay the running of the statutes of limitation until a requestor figures out that records which he asked for were not provided and learns all the facts associated with the agency’s response. He argues that the only limitation that should be applied in Public Records Act cases is the one year statute of limitations in RCW 42.56.550(6), which can only run in the event that records are 1) provided as part of an installment of a larger set of records or 2) an agency claims that the records are exempt. He further argues that a discovery rule should be imposed to prevent the statute of limitations from running when an agency fails to provide any responsive records.

Belenski’s position imposes great hardship on agencies and irrationally construes the statutes of limitation to be non-existent in cases where an agency has responded, but not located or provided the records to the requestor. This is contrary to the intent of the Legislature and precludes the repose intended by statutes of limitation.

The Court of Appeals applied the two year catch all statute of limitations in RCW 4.16.130 in these circumstances. As such it dismissed one of Belenski’s claims, remanding other claims for further proceedings

in the trial court. Belenski's other claims were brought within one year of the agency's response to his request for internet access logs ("IALs"). However, Belenski fails to justify a delay of more than two years and two months in filing his claim for the denial of an opportunity to inspect records requested from the County. Petitioner fails to show due diligence in bringing his claim and he cannot explain why he waited so long.

II. STATEMENT OF FACTS

In considering the "facts" alleged to exist by Belenski, the Court must consider that there have been no factual findings made by any court concerning the application of the statute of limitations and the "discovery" of when Belenski's cause of action would accrue. The trial court in this matter granted summary judgment to the County on the grounds that IALs are not public records.

The Court of Appeals disagreed and reversed the trial court on this ground. Instead, the Court affirmed the granting of summary judgment to the County on the alternate grounds that claims arising from a request made on September 27, 2010 were not commenced within two years from the date of the agency's response on October 4, 2010. The Plaintiff does not dispute that he commenced his action on November 19, 2012, two years and two months after the agency's response.

Belenski contends that he was confused by the agency's response and argues that the statute of limitations should not begin to run until some later date. Belenski does not explain what date he believes the statute of limitations should be commenced from. Belenski recites ongoing discussions with the County concerning subsequent requests for IALs that the County was attempting to provide. The County was faced with numerous technical challenges for providing data from its firewall program in the format that would allow inspections as requested by Mr. Belenski. Belenski recounts conversations concerning IALs which occurred in December 2011 and January 2012. He does not explain why he waited until November 2012 to commence this action.

The trial court in this matter has made no finding of bad faith, no finding of deception, no finding of any misrepresentation or reliance by Mr. Belenski on such representations. The trial court has made no findings that Belenski was induced by the County to delay this action. What is undisputed as of October 4, 2010 Belenski knew that he had requested IALs for an eight month period and that the County did not provide those records in its October 4, 2010 response. This is sufficient information to allow him to seek judicial review under RCW 42.56.550(1).

III. ARGUMENT

A. **BELENSKI FAILS TO DISTINGUISH THE DISCOVERY RULE FROM EQUITABLE TOLLING.**

Belenski's Petition for Review identifies three issues in this case as: 1) whether RCW 42.56.550 is the applicable statute of limitations and 2) whether a discovery rule should be applied to the catch-all statute of limitations, RCW 4.16.130, and 3) whether the County concealed or silently withheld IALs in his September 27, 2010 request. Belenski asks that the court engraft a "discovery rule" onto the statute of limitations in order to allow his untimely suit concerning his first request for IALs. Belenski's briefing mixes discussion of cases supporting the doctrine of equitable tolling with the discovery rule. See, PFR at 13-14. The two are related, but differ in key respects.

The general rule for commencement of a statute of limitations is that it begins to run on the date of the alleged wrong. The "discovery rule" is applied to certain types of tort claims because:

In certain torts, ... injured parties do not, or cannot, know they have been injured; in [those] cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. This is an exception to the general rule and is known as the "discovery rule."

In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992).

The discovery rule postpones the accrual of a cause of action and is traditionally applied in negligence cases where the injury itself is hidden or difficult to detect. Where the statute does not specify a time at which the cause of action accrues, the discovery rule provides that an action accrues when the plaintiff discovers or reasonably should discover all the essential elements of a cause of action. *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991); *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 351, 693 P.2d 687 (1985); *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979). Washington courts have adopted a general discovery rule in certain cases where plaintiffs lack the means to ascertain that a wrong has been committed against them. See *JC v. Corporation of Catholic Bishops of Yakima*, 138 Wn.2d 699, 749, 985 P.2d 1162 (1999) (Durham, J., dissenting).

Washington courts have applied the discovery rule in limited contexts. Primarily it is cases where the cause of action is based on fraud or the nature of the plaintiff's injury is inherently difficult to learn the factual elements giving rise to a cause of action. *O'Neil v. Estate of Murtha*, 89 Wn.App. 67, 72, 947 P.2d 1252 (1997).¹ This generalized

¹ A plaintiff claiming fraudulent concealment must affirmatively plead and prove the nine elements of fraud or show that the defendant breached an affirmative duty to disclose a material fact. *Crisman v. Crisman*, 85 Wn.App. 15, 21, 931 P.2d 163 review denied, 132 Wn.2d 1008, 940 P.2d 653 (1997).

discovery rule extends the statute of limitations for such causes of action until the plaintiff has actual knowledge of the facts necessary to establish the elements of their claim.

The doctrine of equitable tolling, provides an alternative to the discovery rule based on specific facts which would render it inequitable to apply the statute of limitations. The doctrine of equitable tolling is allowed when justice requires. *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998). Equitable tolling is available where there is bad faith, deception, or false assurances made by the defendant, and requires the exercise of due diligence by the plaintiff. See *Finklestein v. Security Properties Inc.*, 76 Wn.App 733, 739-740, 888 P.2d 161 (1995); *Douchette*, 117 Wn.2d at 812.

Washington law allows equitable tolling only if the defendant has engaged in some type of harmful action that induces inaction by the plaintiff in bringing his claim. The doctrine of equitable tolling arises out of the doctrine of *estoppel in pais* to prevent fraudulent or inequitable reliance on a statute of limitation as a defense. *Central Heat Inc. v. Daily Olympian*, 74 Wn.2d 126, 443 P.2d 544 (1968). The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform which lulled the plaintiff into delaying timely action. *Peterson v. Groves*, 111 Wn. App.

306, 311, 44 P.3d 894 (2002). Such representations or promises are notably absent from this case.

In considering equitable tolling, Washington law considers the claimant's reliance on the defendant's alleged deception or false authoritative statements made by the agency that are alleged to have misled the claimant about the nature of the rights. *Douchette*, 117 Wn.2d at 811. A party claiming estoppel to prevent an inequitable resort to the statute of limitations may not sleep on his rights. *Central Heat*, 74 Wn.2d at 135.

In addition to reliance on the inequitable conduct of the defendant, the plaintiff must act with reasonable diligence in protecting his rights. Facts and circumstances which create an estoppel at one point in time do not justify an unreasonable suspension of the statute of limitations. Requiring due diligence effectuates the policy behind statutes of limitation to protect defendants and the courts from litigation of stale claims where plaintiffs have slept on their rights. *Ruth v. Dight*, 75 Wn.2d 660, 665, 453 P.2d 631 (1969).²

² It is a traditional view that it is a compelling ambition of the common law that to answer stale claims in the courts is in itself a substantial wrong. "After all, when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts." *Ruth v. Dight*, 75 Wn.2d at 665.

Under the Public Records Act, the cause of action under RCW 42.56.550(1) accrues at the time the agency responds to the public records request by denying an opportunity to review the requested records. The records requester must have requested “identifiable records” from the agency. RCW 42.56.070. When the agency responds and fails to provide the requested records, that fact is known to the requester. Hence, the requester knows all of the facts to establish the elements of a claim under RCW 42.56.550(1) at the time it receives a response that fails to provide the requested records. At that time, a requester may seek judicial review of the “denial of the opportunity to inspect” the requested records. RCW 42.56.550(1).

Here, Belenski immediately knew that he had not been given the opportunity to inspect the requested IALs. When he received the October 4, 2010 response that there are “no responsive records”, his cause of action has been fully ripened and accrued, and he could have sued to demand that the agency show cause as to why it failed to produce the requested records. He did not do so for two years and two months, barring his claim under either RCW 42.56.550(6) or RCW 4.16.130.

B. THE DISCOVERY RULE DOES NOT APPLY IN PUBLIC RECORDS ACT CASES.

Belenski's petition seeks imposition of a general discovery rule because he alleges he did not know that the County possessed the records which were not provided in response to his request. His position appears to be that a requester should not be forced file a lawsuit until after such records are actually discovered. This type of claim can arise years later when copies of records surface from other sources. Such a rule goes too far, allowing a requestor to sue long after the running of the statutory limitation if they discover a record omitted from an agency's response.

Under the plaintiff's theory, it would not matter whether it is the one year statute of limitations in RCW 42.56.550(6) or the two year catch-all statute of limitations in RCW 4.16.130. Under either circumstance Belenski's position is that the statute of limitations is tolled until the plaintiff discovers the existence of a requested record which was omitted from the agency's original response. Such a position eliminates any repose for an agency in responding to public records requests if it has simply missed a record.

Belenski's position minimizes the statutory burden on the requestor to identify the specific record sought, encouraging broad requests that require extensive searches. In these circumstances, a

discovery rule would expose agencies to unlimited liability when it has failed to produce a record arguably within the scope of a broad request. This allows requestors to send agencies on fishing expeditions and argue that the statute of limitations does not apply for any records which are missed by the agency, no matter how diligent their search efforts are.

The plaintiff's position would force an agency to litigate the adequacy of its search and the reasonableness of its efforts to locate the particular records in question years after its response may have been made. This is inconsistent with the purposes of any statute of limitation, including those applied in Public Records Act cases. Such a rule would force agencies to indefinitely bear the risk that its search failed to locate records. It would allow stale claims, claims where individuals who conducted the searches have moved to other jobs or left agency employment, and would further expose public coffers to unlimited liability for daily penalties under these circumstances.

Similar arguments to Belenski's were rejected in *Douchette* in the context of discrimination claims. This Court rejected extension of the discovery rule to discrimination claims, holding that the cause of action accrued from the date of the last alleged discriminatory action, not when the plaintiff learned of the facts giving rise to her claim. In *Douchette*, the measuring date was the date the plaintiff gave notice of her resignation,

not the date she became aware of all the facts giving rise to her claim.

Douchette, 117 Wn.2d at 813-14.

The legislature's adoption of a one year statute of limitations in Public Records Act cases shows their intent to provide repose and impose strict requirements for requestors to challenge agency responses. The open-ended, ambiguous time period advocated by Belenski frustrates the legislative purpose in adopting the statute of limitations and is inconsistent with Washington law.

Courts cannot and should not rewrite statutes of limitation adopted by the Legislature. The decision whether to adopt a discovery rule should be left to the legislative body that adopted RCW 42.56.550(6). The legislature in its wisdom could adopt the discovery if it finds it equitable to do so. However, the statutes of limitations it has adopted do not include such a rule. Absent some legislative intent to include the discovery rule, this Court should refrain from rewriting the statute as it sees fit.

**C. THERE IS NO BASIS TO APPLY THE DOCTRINE OF
EQUITABLE TOLLING.**

In this case, the Plaintiff, knowing that IALs are created by County computers made a request for these specific records over an eight month period in 2010. Plaintiff made this request on September 27, 2010.

Within days, he was informed that the County had no responsive records,

denying him the opportunity to inspect such logs. Plaintiff does not dispute that he knew that such records were created by County computers, as he had been provided these when making a more focused and discrete requests in the past. CP 120.

At the time of the County's response the Plaintiff had enough information to challenge the response. He failed to seek relief from the Courts for over two years and his claim arising from his September 27, 2010 request is therefore barred by either statute of limitations, RCW 42.56.550(6) or RCW 4.16.130. *Johnson v. Dep't of Corr.*, 164 Wn.App. 769, 265 P.3d 216 (2011), *review denied*, 173 Wn.2d 1032 (2012).

Plaintiff's delay was not based on inducements from the County, but on his own "confusion" and assumptions over records retention requirements applicable to internet logs. The applicable retention schedule requires the County to retain "records relating to monitoring of the agency's information and communications systems to ensure appropriate use". CP 219. However, the County discontinued monitoring internet activity before the request. CP 362. As explained by Mr. Alvarez during their basement encounter in March 2011, the County is not required to maintain the IALs because the County "doesn't use them for anything", including monitoring internet activity. CP 194, 631. Belenski jumped to the erroneous conclusion that the County was required to have

“Certificates of Destruction” for the IALs. Belenski’s belief is unsupported by any legal authority.³

The County’s response to him did not fraudulently induce him to refrain from challenging its determination. The County’s October 4, 2010 response provided sufficient information to permit him to sue under the PRA. It was not made in bad faith, but was consistent with the County’s earlier position that IALs are not public records. As noted by Judge Wood in his written decision granting summary judgment to the County, if correct, its statement would be entirely accurate. See CP at 296. There is no basis to conclude that Mr. Alvarez’s conversation made any false statement of fact when it occurred several months after the County responded and a year and a half before the plaintiff finally sued. In responding to the records retention issues, Mr. Alvarez correctly noted that under the applicable records retention schedule there is no duty to retain IALs when the County is not monitoring the activity of its employees. See CP at 631. See also, CP 219 (former CORE retention schedule §2.4.13, now CORE §2.12, p. 85)

³ Belenski admits his confusion is based on another part of the records retention schedule that requires retention when an agency creates certificates of destruction. CP 120. He assumes that there is a legal mandate to create such certificates. However, he can point to no legal basis for such a mandate. There is none. An agency is not required to certify every “destruction” of records.

In any event, there was no statement or inducement made by anyone from Jefferson County to Mr. Belenski seeking to have him delay or not to file this challenge to the County's October 4, 2010 response. Indeed the record is absent of any discussion seeking to forestall him from filing such a challenge. The County continued to work with him on his other requests in good faith including making efforts to provide access to information that it did not consider a public record. This does not justify Belenski's two year delay in challenging the original response.

Furthermore, Belenski does not allege any reliance on statements made by the County to induce him to delay bringing his lawsuit. Absent such reliance, the Court should not apply equitable tolling. Finally, Belenski's two year delay shows extended periods of time where he was doing nothing to follow up on the response in October 2010. Although the County's response was made in days, Belenski waited until March 2011 to informally inquire of Mr. Alvarez while the two of them were together in the basement of the courthouse. This type of informal casual encounter is not the basis for estoppel of the government. See *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn.App 252, 296, 337 P.3d 328 (2014).

Plaintiff assumed that Certificates of Destruction were required when he made his second records request in October 2010. The County immediately and correctly notified him that no such certificates existed.

Belenski jumped to the conclusion that the County was destroying these records in violation of records retention requirements on his own. CP 120. In fact this was an incorrect assumption on Belenski's part. His dilatory conduct does not reflect the due diligence necessary to equitably toll the statute of limitations. Belenski's argument is that the County should be equitably estopped because it attempted to provide access to records in response to his third records request. The County did not admit that the logs are public records nor make any representation that they considered them to be public records.

Finally, this Court should be wary of relying upon unsubstantiated factual allegations made by the Plaintiff's briefing. The trial court in this matter made no factual findings concerning inequitable conduct alleged by a county. The Court did not make any finding that the County's response was made in bad faith, that it was inaccurate, or that it was relied upon to the detriment of Plaintiff. See CP 290.

Plaintiff argues that the only statute that should be applied is RCW 42.56.550(6) which limits Public Records Act claims to a one year limitation. Plaintiff then claims that this statute does not apply here because the agency did not provide records in installments nor did it claim records were exempt. Instead its response was that it had no responsive public records. Plaintiff's argument simultaneously argues that the one

year statute of limitations applies but does not apply under its own terms. Hence the only logical conclusion, from Belenski's view, is that there is no statute of limitations applying to responses, like Jefferson County's, which indicate that there are no responsive public records.

The application of statutes of limitations by the Courts of Appeal has resulted in conflict between Division I's ruling in *Tobin v. Worden*, 156 Wn. App. 507, 233 P.3d 906 (2010) and Division II's ruling in *Bartz v. Department of Corrections*, 173 Wn.App. 522, 297 P.3d 737 (2013). The Court should clarify the application of statutes of limitation to Public Records Act claims and should overrule *Tobin*. *Bartz* is correct that it makes no sense to evade the statute of limitations when an agency's response is the provision of a single record. This literal reading leads to absurd results, as described in *Bartz*. 173 Wn.App. at 537-538.

Similar to the reasoning in *Bartz*, the legislature's adoption of the one year statute of limitations should apply to all Public Records Act cases whether the agency's response provides multiple installments with multiple records, a single installment with only one record, or an installment producing no records. The Court should reject the excessively literal ruling in *Tobin* and follow the legislative intent in adopting RCW 42.56.550(6) to limit all PRA actions to a single year.

Belenski's Petition for Review claims that the Court of Appeals decision conflicts with *Rental Housing Association v. City of Des Moines*, 165 Wn.2d 525, 538–39, 199 P.3d 393 (2009). This is incorrect. *Rental Housing* involved an agency's inadequate claim of exemption and explained that when an agency claims an exemption it has a duty to identify the documents and explain the basis of its exemption. No such duty exists when an agency does not have "public records" that are responsive. In this case, the County did not assert a statutory exemption for IAL's, but rather asserted that they were not public records. Its duties are therefore not governed by *Rental Housing*.

This is confirmed by *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348 n.3, 217 P.3d 1172 (2009) which ruled that an agency has no duty to provide a log where the records requested are not considered "public records". Thus, the County had no duty to provide a log under *Rental Housing* when it did not consider the records to be "public records" as defined by the PRA.

Plaintiff's construction of RCW 42.56.550(6) leads to the absurd conclusion that there is no limitation for actions which are based on a failure to locate any records or which fail to provide any records in response to the request. There is no rational distinction between an agency's search and provision of one record, ten records, or no records.

The claims should all be treated similarly as the burden on the agency is identical and should therefore be subject to one year statutes of limitations as the legislature intended. See *Bartz*, 173 Wn.App. at 538.

Plaintiff's argument that the County bears the burden of proving that no exception to the statute of limitations applies is equally without merit. As an affirmative defense, the County bears the burden, and met its burden by showing that the Plaintiff's action was filed after any applicable limitations period had expired. Belenski concedes that he filed this action on November 19, 2012, more than two years after the County's October 4, 2010 response. As such, the County has satisfied its burden of demonstrating that it violates both RCW 42.56.550(1) and RCW 4.16.130.

Belenski's contention that the statute of limitations should be equitably tolled requires him to prove that the exception to the rule. Numerous courts hold that this burden falls on the Plaintiff. See *Central Heat*, 74 Wn.2d 549-550; *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 223 P.3d 1172 (2009); *Trotzer v. Vig*, 149 Wn.App. 594, 203 P.3d 1056 (2009); and *Benyaminov v. City of Bellevue*, 144 Wn.App. 755, 767, 183 P.3d 1127 (2008), *review denied* 165 Wn.2d 1020 (2009).

Belenski's argument that the County has the burden of proving that the discovery rule does not apply is illogical and impractical. See Petition for Review at 12. Belenski's position would require the County to be a

“mind reader” in order to prove when he knew that the County had not provided him records, something which should have been apparent from the date of the initial response. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 409, 960 P.2d 447 (1998); *Greenhalgh v. Department of Corrections*, 160 Wn.App. 706, 714, 248 P.3d 150 (2011).

IV. CONCLUSION

The Plaintiff’s argument that the discovery rule applies in Public Records Act cases has no basis of support in case law or in the statutes of limitations adopted by the Legislature. The cause of action for denial of an opportunity to inspect a record under RCW 42.56.550(1) does not require a discovery rule and is not the type of hidden injury that a requestor would be unaware of. A requestor is required to ask for an identifiable record and knows that based on the agency’s response whether or not he has received the record. The agency is obligated to respond within five business days under RCW 42.56.520, at which time a requestor knows all the elements of a PRA action. As such, the discovery rule is inapplicable to claims made under RCW 42.56.550(1).

The Court should allow consideration of claims of equitable tolling only where appropriate under the facts. Here, the facts alleged by Belenski are insufficient because he 1) knew that IALs were being created by the County and 2) knew that he had not received the requested logs at

the time of the County's response on October 4, 2010. CP 120. Plaintiff does not justify his delay of more than two years in bringing his claim.

The Court should hold that equitable tolling can apply in a Public Records Act case, but that this case is not one to which equitable tolling applies. If there are factual questions, the Court should remand the matter back to trial court to determine the facts surrounding his equitable tolling claim. Belenski would bear the burden of proving that equitable tolling is required under the specific facts of this case.

The Court should therefore affirm the Court of Appeals because the suit as to the September 27, 2010 records request was untimely.

DATED this 8th day of February, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I served a copy of the following document upon Petitioner, via e-mail per service agreement of the parties:

SUPPLEMENTAL BRIEF OF RESPONDENT

As follows:

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Dated this 8th day of February, 2016 at Tumwater, Washington.



Jeffrey S. Myers

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Please see the attached document for service and filing.

Thank you,

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