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No. 52999-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN GREEN,

Appellant,

v.

Lewis County,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Brian Green[1] appeals the trial court ruling in which failed to award all costs Appellant incurred in gaining access to the requested records, pursuant to RCW 42.56.550(4). Specifically, the trial court failed to award to Appellant the costs of a court transcript of the penalty hearing in this above entitled matter, which was used as an exhibit in the motion for presentation of the penalty order filed with the trial court. In fact, merely stated a conclusion that the court transcript was no properly compensable and did not enter any findings of facts and conclusions of law to substantiate the order.

When the trial court fails to award all costs that were incurred in gaining access to the requested records, it undermines the Public Records Act's the enforcement mechanism which is used to hold agencies accountable and to "discourage improper denial of access to public records." *PAWS v. UW*, 125 Wn.2d 243, 272 (1994); *PAWS v. UW*, 114 Wn.2d 677, 686 (1990); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 140 (1978)).

Since the trial court did not establish an adequate record with findings of facts and conclusions of law to substantiate its determination on costs, this Court should remand this case back down to the trial court

[1] Note, at the trial court there were two co-plaintiffs in the trial court: Mr. Brian Cortland and Mr. Brian Green. Only Mr. Green is pursuing this appeal as an Appellant.

for findings of facts and conclusions of law. Alternatively, this Court should rule the trial court erred in failing to award Appellant costs for the court transcript, and award the costs for the court transcript in this appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in its December 21, 2018 Order on All Costs and Reasonable Attorney's Fees.
2. The trial court erred in failing to make any findings of facts to and conclusions to establish an adequate record for appeal regarding the costs to be awarded or not awarded to Plaintiffs as the prevailing party pursuant to RCW 42.56.550(4).
3. The trial court erred in failing to award all costs pursuant to RCW 42.56.550(4) as the prevailing party when it awarded him partial costs as it did not find any other costs to be properly compensable.

III. ISSUES PRESENTED

1. Whether the trial court created an adequate record for appeal when it simply announced a partial amount of costs to be awarded without identifying any findings of facts or conclusions of law in the record to support its conclusion.
2. Whether the trial court abused its discretion when it failed to award Plaintiffs all costs incurred in gaining access to the requested records, pursuant to RCW 42.56.550(4).

3. Whether Mr. Green is entitled to an award of all costs and reasonable attorney's fees as the prevailing party in this appeal.

IV. STATEMENT OF THE CASE

Appellant Brian Green prevailed in the trial court upon the merits of the legal claim they were denied by Respondent Lewis County the right to copy and inspect records under the Public Records Act, Chapter 42.56 RCW. CP 176-184.

After the trial court found a violation of the Public Records Act, both parties entered into a CR 2A agreement stipulating to the number of documents wrongfully withheld and the number of days those documents were wrongfully withheld. CP 38-39. Respondent Lewis County admitted to withholding 359 documents for a period of 60 days. *Id.* The CR 2A agreement did not reach the issue of the statutory penalty pursuant to RCW 42.56.550(4) to be assessed against Respondent for the wrongful withholding. *Id*.

At the hearing to determine the statutory penalty, the trial court made an oral ruling from the bench on the statutory penalties pursuant to RCW 42.56.550(4). CP 56-94.

Subsequently, Appellant filed a motion for presentation of the statutory penalty order with the trial court. CP 40-94. In the motion for presentation of the order, Appellant argued "After reviewing the certified

verbatim transcript of this proceeding, which is attached to this Motion as Exhibit C, Appellant was very concerned about Respondent's proposed order because there are findings of facts and conclusions of law that this court did not rule upon." CP 41. Appellant attached the court transcript as Exhibit C to the motion for presentation of the order. CP 56-94.

The first page of the court transcript identifies it is from case No. 17-2-05239-34. CP 56. The transcript identifies the "Honorable [Judge] John Skinder" presided over the August 03, 2018 hearing. CP 56. The transcript identifies the subject matter of the hearing as the "Penalty hearing." CP 56. The court transcript was prepared by Court Reporter Ralph H. Beswick, CCR. CP 56; CP 94. Mr. Beswick also certified the court transcript as a "true and correct record of the proceedings." CP 94.

Appellant timely filed a motion for all costs and reasonable attorney's fees, pursuant to RCW 42.56.550(4), as the prevailing parties at the trial court. CP 176-184. In the motion for all costs and reasonable attorney's fees, Appellant argued that it should receive $791.35 in costs spent in gaining access to the requested records. CP 115-116. The requested costs were broken down into four categories: $255 spent purchasing a court transcript of the penalty hearing; $240 spent on the trial court filing fee; $150 in electronic filing fees for judge's copies; and

$146.35 spent on gas for Appellant to go to and from the hearings. CP 116.

In its response to the motion for all costs and reasonable attorney's fees, Respondent did not contest that Appellant was entitled to costs, but instead challenged the amount of costs to be awarded. CP 139.

The trial court entered the Order on All Costs and Reasonable Attorney's Fees Pursuant to RCW 42.56.550(4) on December 21, 2018. CP 176-184. Specifically, the trial court awarded the full $240 for the filing fee and the full $150 for the bench copies – for $350 in total. CP 184. The trial court stated it did "not find any other costs to be properly compensable." CP 184. The record is absent of the trial court entering any findings of facts or conclusions of law to substantiate its order on the costs.

V. ARGUMENT

Public Records Act decisions based on documentary evidence are not reviewed in the same manner as other determinations:

> Public agency actions challenged under the PRA are reviewed de novo. An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits. The reviewing court is not bound by the trial court's factual findings.

Cornu-Labat v. Hosp. Dist. No. 2 of Grant Cty., 298 P. 3d 741, 745

(Wash. 2013) (internal citation omitted). So, this Court has leeway to consider the evidence with regard to findings made or not made when determining the issues. Legal issues are reviewed de novo. *E.g. State v. Ramirez*, 426 P. 3d 714, 718-19 (Wash. 2018).

A. The trial court erred in failing to make an adequate record for appeal when it simply announced the amount of costs to be awarded and it must be remanded to the trial court for findings of facts and conclusions of law

The trial court erred when it failed to make an adequate record of finding of fact and conclusions of law regarding an award of costs regarding the court transcript Plaintiffs purchased of the penalty hearing of this above entitled matter, which was used in the motion for presentation of the penalty order. This case must be remanded back to the trial court for findings of fact and conclusions of law regarding whether the court transcript purchased and used in this case is a properly compensable cost pursuant to RCW 42.56.550(4).[2]

"Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler v. Szucs*, 957 P. 2d 632, 651-52 (Wash. 1998); *224 Westlake, LLC v. Engstrom Properties*, 281 P. 3d 693, 715 (Wash. Ct. App. 2012); *Deep Water*

[2] While Plaintiffs also argued to the trial court that Mr. Green's mileage should be awarded as a cost, this is not contested on appeal.

Brewing v. Fairway Resources Ltd., 215 P. 3d 990, 1018 (Wash. Ct. App. 2009); *Scoccolo Const., Inc. v. City of Renton*, 9 P. 3d 886, 890 (Wash. Ct. App. 2000). Therefore, the trial court has the mandatory duty to "enter findings of fact and conclusions of law supporting an award of attorney fees" and costs. *Magana v. Hyundai Motor America*, 220 P. 3d 191, 202 (Wash. 2009); *accord Eagle Point Condominium Owners Ass'n v. Coy*, 9 P. 3d 898, 909 (Wash. Ct. App. 2000) (stating "appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds.").

The plain language of the Public Records Act provides for "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all costs." RCW 42.56.550(4).

When the trial court fails to perform its mandatory duty of entering findings of fact and conclusions of law to support the award of costs it undermines the intent and purpose of the Public Records Act. It is well-established that "strict enforcement of fees and fines will discourage improper denial of access to public records." *PAWS v. UW*, 125 Wn.2d 243, 272 (1994) (internal quotation marks omitted); *PAWS v. UW*, 114 Wn.2d 677, 686 (1990); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 140, 580 P.2d 246 (1978)). Fines and fees are the legislatively prescribed

punishment for agencies that violate the Public Records Act, without which agencies could act with impunity.

Plaintiffs argued it should be awarded $255 spent purchasing a court transcript of the penalty hearing that was used to argue the proposed order for the penalty hearing. CP 116; *c.f.* CP 56-94 (transcript). Defendants argued that Plaintiffs should only be awarded $315 in costs (the filing fee and half of the bench copies) because the "other fees were either related to the penalty phase (on which Plaintiffs did not prevail) or were not incurred in litigation in this matter." CP 139.

Here the trial court awarded Plaintiffs $390 in costs as the prevailing party in this lawsuit pursuant to RCW 42.56.550(4). CP 184. Specifically, the trial court awarded the full $240 for the filing fee and the full $150 for the bench copies. CP 184. The record is absent of the trial court analyzing why the court transcript of the penalty hearing that was used in a motion for a proposed order was not properly compensable. The record is absent of the trial court making any findings of facts or conclusions of law regarding the court transcript of the penalty hearing.

The trial court failed to make an adequate record about the awarded costs pursuant to RCW 42.56.550(4) when it did not make any findings of facts or conclusions of law whether the court transcript Plaintiffs purchased of the penalty hearing of this above entitled matter,

which was used in the motion for presentation of the penalty order, is properly compensable. From the record there is no way to identify which facts and law the trial court used to make this determination.

This Court must remand this back to the trial court for complete findings of facts and conclusions of law with regard to the court transcript Plaintiffs purchased of the penalty hearing of this above entitled matter, which was used in the motion for presentation of the penalty order.

B. The trial court erred when failed to award all costs pursuant to the plain language of RCW 42.56.550(4)

The trial court erred when it failed to award Plaintiffs all costs pursuant to the plain language of RCW 42.56.550(4). Specifically, the trial court erred when it did not compensate Plaintiffs' for the costs incurred in purchasing the penalty hearing court transcript purchased in this above entitled matter, which was used in the motion for presentation of the penalty order. It is untenable for the trial court to fail to award costs incurred in purchasing the court transcript which was used in a motion in this above entitled lawsuit to gain access to the requested records.

The plain language of the Public Records Act provides for "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all

costs." RCW 42.56.550(4). Washington courts have liberally construed "all costs" in Public Records Act lawsuits.

> The public records act does not contain a definition of what it means by 'all costs,' but the plain meaning of the word 'all' logically leads to the conclusion that the drafters of the act intended that the prevailing party could recover all of the reasonable expenses it incurred in gaining access to the requested records.

ACLU v. Blaine School Dist. No. 503, 975 P. 2d 536, 542 (Wash. Ct. App. 1999); *see also O'Neill v. City of Shoreline*, 332 P. 3d 1099, 1105 (Wash. Ct. App. 2014) (construing RCW 42.56.550(4) as "permit[ting] a prevailing requester in a Public Records Act action to recover all costs"); *Mitchell v. Washington State Institute*, 225 P. 3d 280, 292 (Wash. Ct. App. 2009) (stating "the plain meaning of the word 'all' logically leads to the conclusion that the drafters of the act intended that the prevailing party could recover all of the reasonable expenses it incurred in gaining access to the requested records.").

The cardinal rule of statutory construction is to give effect to the legislative intent. *Frias v. Asset Foreclosure Services, Inc.*, 334 P. 3d 529, 533 (Wash. 2014) (stating "[i]n matters of statutory construction, we are tasked with discerning what the law is, not what it should be"). The legislative intent of the Public Records Act is for the statute to be "a strongly worded mandate for broad disclosure of public records." *Nissen*

v. Pierce County, 357 P. 3d 45, 52 (Wash. 2015); *Resident Action Council v. Seattle Housing Authority*, 300 P. 3d 376, 381 (Wash. 2013); *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 125 (Wash. 2011). Therefore, when courts award all costs pursuant to RCW 42.56.550(4), it is in furtherance of the intent that the Public Records Act is a broad mandate for disclosure.

Similarly, to the construction of the word 'all' in the Public Records Act, in other areas of law Washington courts have construed the word 'all' broadly, pursuant to its common dictionary definition. For example, in the context of RCW 7.06.050 the court of appeals held the "plain and ordinary meaning of that word [as] '[b]eing or representing the entire or total number, amount, or quantity.'" *Perkins Coie v. Williams*, 929 P. 2d 1215, 1218 (Wash. Ct. App. 1997) (quoting American Heritage Dictionary of the English Language 47 (3d ed. 1992)). Similarly, when construing the word 'all' in RCW 82.14B.030(4) the court held "[u]se of the word 'all' shows legislative intent that each and every radio access line (telephone number) be taxed, whether the service is telephone service or cell phone service, without implied exceptions." *TracFone Wireless, Inc. v. Dept. of Revenue*, 242 P. 3d 810, 815 (Wash. 2010).

Here the trial court failed to award Appellant all costs, pursuant to the statutory mandate in RCW 42.56.550(4). The trial court failed to

award Appellant costs incurred in purchasing the court transcript. It is undisputed the court transcript was used by Appellant as an exhibit to argue the motion for presentation of the penalty order in this above entitled lawsuit. The record is absent of any objection as to the use of the court transcript in the motion for presentation of the penalty order.

Because the court transcript was used in the motion for presentation of the order, it was a cost incurred by Appellant in gaining access to the requested records. It is well-established the purpose of "fines and fees [is to] discourage improper denial of access to public records." *PAWS v. UW*, 125 Wn.2d 243, 272 (1994) (internal quotation marks omitted); *PAWS v. UW*, 114 Wn.2d 677, 686 (1990); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 140, 580 P.2d 246 (1978)). Therefore, when Appellant purchased the transcript of the penalty hearing for the motion for the presentation of the penalty order it was a cost incurred to discourage the improper denial of access to public records furthering the purpose of the Public Records Act.

C. Motion for All Costs and Attorney's Fees – Appellant is entitled to an award of all costs and reasonable attorney's fees under the Public Records Act as the prevailing party in this appeal

Should Appellant prevail on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act

and RAP 18.1.

RCW 42.56.550(4) of the PRA provides:

> 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.

Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." *Spokane Research Fund v. City of Spokane*, 117 P. 3d 1117, 1125 (Wash. 2005); *see also American Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App 106, 115 (1999). The PRA does not allow for court discretion whether to award attorney fees to a prevailing party. *PAWS v. UW*, 114 Wn. 2d 677, 687-88 (1990); *Amren v. City of Kalama*, 929 P.2d 389, 394 (Wash. 1997). The only discretion the court has is in determining the amount of reasonable attorney's fees. *Id*.

The Washington State Supreme Court in *Limstrom v. Ladenburg*, 136 Wn. 2d. 595, 616 (1998), remanded back to the trial court to determine whether a violation of the PRA occurred, but awarded attorney fees – "[including] fees on appeal" – to the requestor. Should Appellant prevail on appeal on appeal in any respect, he should be awarded his fees and costs on appeal pursuant to the Public Records Act and RAP 18.1.

VI. CONCLUSION

The trial court made two critical errors when making the award of costs to Appellant as the prevailing party in the lawsuit: 1. Failing to make an adequate record for the award of costs, including findings of facts and conclusions of law; and 2. Failing to award the costs incurred in purchasing the court transcript that was used in the motion for the presentation of the order for the statutory penalty.

There are two satisfactory options of how to resolve the trial court's errors. First, this Court can remand the case back down to the trial court for a finding of fact and conclusions of law to substantiate the award of costs – including why the court transcript that was used in the motion for the presentation of the order is not properly compensable. Second, this Court could rule the trial court erred in not finding the court transcript properly compensable since it was a cost incurred in gaining access to the requested records.

Regardless of which option this Court chooses to correct the trial court's error, Appellant is the prevailing party in this appeal and should be awarded all costs and reasonable attorney's fees.

Respectfully submitted this 10 day of July, 2019.

Joseph Thomas WSBA # 49532

Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Appellant's Opening Brief

To the following:

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Dated this 10 day of July, 2019.

Joseph Thomas WSBA # 49532

LAW OFFICE OF JOSEPH THOMAS

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