

FILED  
Court of Appeals  
Division II  
State of Washington  
9/9/2019 3:14 PM  
No. 52999-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

BRIAN GREEN,

*Appellant,*

v.

Lewis County,

*Respondent.*

---

APPELLANT'S REPLY BRIEF

---

Joseph Thomas, WSBA #49532  
Attorney at Law  
5991 Rainier Ave. S., # B  
Seattle, Washington 98118  
(206) 390-8848  
Joe@JoeThomas.org

## TABLE OF CONTENTS

I. ARGUMENT.....	1
A. Respondent by its own admission agrees there is reversible error when the trial court failed to make an adequate record concerning costs. ....	1
B. Appellant has not invited error because the written order awarding costs and attorney’s fees was provided in the clerk’s papers .....	3
C. The record is absent of the trial court apportioning costs in the cost order.....	7
D. There is no basis in the law to apportion costs on merits-based and penalty-based arguments. ....	9
E. Conclusion. ....	14

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>ACLU v. Blaine School Dist. No. 503</i> , 975 P. 2d 536 (Wash. Ct. App. 1999) .....	11-12
<i>Andersen v. Gold Seal Vineyards</i> , 81 Wn.2d 863 (1973) .....	10
<i>BIAW v. State, Dept. of L&amp;I</i> , 98 P. 3d 537 (Wash. Ct. App. 2004) .....	9
<i>Blomstrom v. Tripp</i> , 402 P. 3d 831, 839 (Wash. 2017) .....	7
<i>City of Lakewood v. Koenig</i> , 250 P. 3d 113 (Wash. Ct. App. 2011) .....	10
<i>Eagle Point Condominium Owners Ass'n v. Coy</i> , 9 P. 3d 898 (Wash. Ct. App. 2000) .....	2
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561 (1963) .....	5
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123 (1978).....	13
<i>Lindberg v. Kitsap County</i> , 133 Wash.2d 729 (1997) .....	12
<i>Magana v. Hyundai Motor America</i> , 220 P. 3d 191 (Wash. 2009) .....	2
<i>Mahler v. Szucs</i> , 957 P. 2d 632 (Wash. 1998) .....	2
<i>Mitchell v. Washington State Institute</i> , 225 P. 3d 280 (Wash. Ct. App. 2009) .....	12
<i>O'Neill v. City of Shoreline</i> , 332 P. 3d 1099 (Wash. Ct. App. 2014) .....	12
<i>PAWS v. UW</i> , 114 Wn.2d 677 (1990).....	10, 12-13
<i>Riss v. Angel</i> , 934 P. 2d 669, 681 (Wash. 1997).....	10
<i>Sanders v. State</i> , 240 P. 3d 120 (Wash. 2010).....	11
<i>Spokane Cty. v. Cty. of Spokane</i> , 261 P. 3d 119 (Wash. 2011) .....	13

<i>State v. Dailey</i> , 93 Wn.2d 454 (1980).....	4
<i>State v. Friedlund</i> , 341 P. 3d 280 (Wash. 2015).....	4-5
<i>State v. Moen</i> , 129 Wn.2d 535 (1996) .....	7
<i>Stiles v. Kearney</i> , 277 P. 3d 9 (Wash. Ct. App. 2012).....	8
<i>Stephens v. Omni Ins. Co.</i> , 159 P. 3d 10 (Wash. Ct. App. 2007) .....	8
<i>Tacoma Recycling v. Capitol Material</i> , 34 Wn. App. 392 (1983).....	6
<i>Tiberino v. Spokane County</i> , 13 P. 3d 1104 (Wash. Ct. App. 2000) .....	12

**FEDERAL CASES**

<i>United States v. Berkowitz</i> , 927 F.2d 1376 (7th Cir.1991) .....	8
--	---

**STATUTES**

42.56.550.....	12
----------------	----

**COURT RULES**

CR 52 .....	6-7
-------------	-----

## I. ARGUMENT

The trial court erred in failing to award 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. Appellant was the prevailing party at the trial court because this lawsuit was the catalyst to the production of the requested documents and Appellant received an affirmative judgment in his favor at the trial court. The trial court erred by failing to award the costs of the court transcript to Appellant.

This Court should either award the costs of the transcript to Appellant or remand this case back down to the trial court for further proceedings to create an adequate record for review.

**A. Respondent by its own admission agrees there is reversible error when the trial court failed to make an adequate record concerning costs**

Respondent by its own admission agrees there is reversible error when the trial court failed to make an adequate record concerning costs. In its Response Brief, Respondent argues the order on costs is “a bare conclusion, devoid of any reasoning.” Resp’t Br. at 8.

(arguing that the trial court needed to establish a record for review of its attorney fee ruling). They nevertheless drafted the costs order to list a bare conclusion, devoid of any reasoning. *See id.* at 184. The reasoning was explicable from the briefing and argument before the court, *see* CP at 139-40, but they chose not to include any basis in the order. Nor did Mr. Green seek to have a transcript of the

See Resp't Br. at 8.

As Appellant argued in the opening brief, which Respondent does not contest, is “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). For there to be an adequate record the trial court must explain its analysis and show how it resolved disputed issues of fact. *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). Additionally, the plain language of the Public Records Act also mandates an additional requirement the trial court explain how it liberally awarded costs and fees.

In *Eagle Point Condominium Owners Ass'n v. Coy*, the appellant challenged the fee award because the trial court “simply announced a number.” *Eagle Point Condominium Owners Ass'n v. Coy*, 9 P. 3d 898, 909 (Wash. Ct. App. 2000). Upon review, the Division I Court of Appeals explained that for a fee award to be adequate there must be findings of fact and conclusions of law. When inspecting the trial court’s fee award the *Eagle Point* court found “the court's findings and conclusions in this case are entirely conclusory.” *Id.* Since the *Eagle Point* court found that it could not properly exercise its “supervisory role to ensure that discretion

is exercised on articulable grounds” it remanded the case back to the trial court for findings of facts and conclusions of law for the fee award.

Here both parties agree the trial court’s order concerning cost is nothing more than a bare conclusion, devoid of any reasoning. The written order does not identify a single finding of fact concerning costs. CP 184. The order does not present any cognizable legal theory used in the determination that only partial costs are to be awarded. CP 184. The order does not explain why the court chose which costs and the legal basis for it. CP 184.

The trial court erred when it did not create an adequate record for review of the cost order.

**B. Appellant has not invited error because the written order awarding costs and attorney’s fees was provided in the clerk’s papers**

Respondent wrongly argues that Appellant is inviting error by relying upon the written order signed by the trial court judge awarding all costs and reasonable attorney’s fees because Appellant created the sparse record on which he now capitalizes.” *See* Resp’t Br. at 7-8. Respondent argues, without any legal authority, that since the written order is “a bare conclusion, devoid of any reasoning” Appellant had the burden to supplement the written order with a transcript of the hearing.

Appellant fulfilled his burden of producing in the clerk's paper the written order on costs which is the ultimate understanding of the issue presented. Respondent waived this argument by failing to object to the proposed order at the trial court.

**1. No law or authority requiring a party to supplement the written order with a transcript on appeal**

It is a mistaken understanding of the law for Respondents to argue that Appellant invited error by not supplementing the written order on costs with the court transcript of the hearing. Resp't Br. at 7-8. There is no law or authority which requires a party to supplement the written order with a transcript on appeal.

The law is clear that since the written order is the ultimate understanding of the trial court's ruling, the court of appeals utilizes the written order. "The written decision of a trial court is considered the court's ultimate understanding of the issue presented." *State v. Dailey*, 93 Wn.2d 454, 459 (1980) (internal quotation marks omitted). While a party can supplement the written order with the transcript, it is optional and not necessary. "A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Friedlund*, 341 P. 3d 280, 283

(Wash. 2015); *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67 (1963) (explaining “[i]t must be remembered that a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.”).

Here it is undisputed that the trial court entered a written order concerning costs. It is further undisputed the written order concerning costs is included the clerk’s papers before this court.

The oral ruling by the trial court is not required to be part of the record because it has no binding effect. Only the written order is binding, and the written order is included in the court record.

There is not invited error because Appellant supplied the binding written order for review in the clerk’s papers.

**2. Wrong to say Appellant invited error when it is the trial court’s signed written order, not Appellant’s order**

Respondents are again mistaken on its understanding of the law when it appears to suggest that Appellant invited error when drafting the written order on costs. Resp’t Br. at 7-8. The signed written order on costs is the trial court’s order, which Respondent’s had an opportunity to

review and object to before it was signed and entered. Respondent's failure to object to the proposed order waived any argument that there is invited error.

The Washington Superior Court Civil Rules mandate the trial court enter a written order into the record for a proceeding tried upon the facts. "[T]he court shall find the facts specially and state separately its conclusions of law." CR 52(a). Five days before the written order is signed by the judge and entered into the court record, the defeated party shall be served with the proposed findings of facts and conclusions of law. CR 52(c). The purpose of the five-day period of review of the proposed order is intended to permit parties to determine if the findings and conclusions corresponded to the court's oral opinion. *See Tacoma Recycling v. Capitol Material*, 34 Wn. App. 392, 394-95 (1983). Within 10 days of entry of the findings and conclusions, the signed written order may be amended upon motion of either party. CR 52(b).

Here, Respondent repeatedly failed to object to the form of the order at the trial court. It is not contested that Appellant properly served the proposed cost order upon Respondent within the timeframe in CR 52(c). Once the proposed cost order was served, Respondent had the opportunity to determine if the findings and conclusions corresponded with the trial court's oral opinion before it was signed by the judge and

entered into the court record. The record is absent of Respondent objecting that the proposed order failed to correspond with the court's oral opinion. It is not contested that Respondent then could have moved to amend the cost order pursuant to CR 52(b). The record is absent of Respondent moving to amend the cost order.

When Respondent repeatedly failed to object to the cost order at the trial court it signified that it believed the findings and conclusions corresponded with the trial court's oral opinion. "[T]he purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." *Blomstrom v. Tripp*, 402 P. 3d 831, 839 (Wash. 2017); *State v. Moen*, 129 Wn.2d 535, 547 (1996). It frustrates the purpose of requiring an objection at the trial court for Respondent to stay silent at the trial court, and to only object to the cost order now on appeal.

**C. The record is absent of the trial court apportioning the costs in the cost order**

Without citation to the record Respondent argues the trial court apportioned the costs in the cost order. Resp't Br. at 8-13. When Respondent does not cite to the record to substantiate its argument, it only gives the issue passing treatment of an issue. As a matter of law, arguments that only give issues passing treatments are waived. This Court

should deem Respondent's argument about apportioning costs waived as it does not cite to the record to identify where the trial court apportioned costs.

Inadequate briefing of an issue constitutes “[p]assing treatment of an issue or lack of a reasoned argument” and “does not provide a sufficient basis for review.” *Stiles v. Kearney*, 277 P. 3d 9, 17 (Wash. Ct. App. 2012); *Stephens v. Omni Ins. Co.*, 159 P. 3d 10, 28 (Wash. Ct. App. 2007) (declining to review the issue of res judicata because the party asserting res judicata only gave it “passing treatment” by failing to explain the argument); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991) (holding that “perfunctory and undeveloped arguments ... are waived”).

Here, the word “apportion” or any derivative does not appear in the cost order. CP 184. The cost order is absent of findings of fact and conclusions of law to identify whether costs were apportioned on merits and penalty phases or not. *Id.* By Respondent's own admission, it characterized the cost order as “a bare conclusion, devoid of any reasoning.” Resp't Br. at 8.

The record is silent of Respondent identifying where in the record the trial court apportioned costs into anything, let alone merits and penalty phases. In fact, in its argument Respondent does not even explain how it

believes the trial court apportioned the court record. Respondent merely states a conclusion about the cost order without even attempting to substantiate it.

Respondent waived this argument by making a perfunctory argument without any citation to the record for substantiation.

**D. There is no basis in the law to apportion costs on merits-based and penalty-based arguments**

Respondent is misinterpreting case law, as there is no basis in the law to apportion costs on merits-based and penalty-based arguments for determining costs. Resp't Br. at 8-13. Appellant was the prevailing party in the trial court because his lawsuit forced the disclosure of records and he received an affirmative judgment in his favor. Therefore, pursuant to the plain language of RCW 42.56.550(4) Appellant must be awarded all costs of the court transcript since it was purchased and used at the trial court in this above entitled appeal.

There is no debate as to what constitutes a prevailing party in the Public Records Act. "A plaintiff prevails if prosecution of the action could reasonably be regarded as necessary to obtain the information, and the existence of the lawsuit had a causative effect on the release of the information." *BIAW v. State, Dept. of L&I*, 98 P. 3d 537, 544 (Wash. Ct. App. 2004). Stated in a simpler way, "the prevailing party is the party

who receives an affirmative judgment in his or her favor.” *City of Lakewood v. Koenig*, 250 P. 3d 113, 120 (Wash. Ct. App. 2011); *PAWS v. UW*, 114 Wn.2d 677, 683 (1990) (stating a prevailing party “is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case”).

The prevailing party standard in the Public Records Act is in accordance with the State of Washington’s general standard for a prevailing party. “In general, a prevailing party is one who receives an affirmative judgment in his or her favor.” *Riss v. Angel*, 934 P. 2d 669, 681 (Wash. 1997); *Andersen v. Gold Seal Vineyards*, 81 Wn.2d 863, 865 (1973).

Here it is undisputed that Appellant’s lawsuit was the catalyst to the production of the requested documents. CP 35-37. It is also undisputed that Appellant received an affirmative judgment in his favor at the trial court. *See e.g.* 106-11; CP 176-84. The record is absent of any evidence that Respondent received an affirmative judgment.

Under the well-established case law governing the Public Records Act, Appellant and only Appellant was the prevailing party at the trial court.

Respondent misinterprets *Sanders v. State* to assert that the penalty hearing is an issue for which it can be a prevailing party. Resp’t Br. at 8-

13. At no point did the *Sanders* court state the penalty briefing was an issue to determine the prevailing party. *See generally Sanders v. State*, 240 P. 3d 120 (Wash. 2010). What the *Sanders* court did do was award costs and attorney's fees based upon the issues in the complaint plaintiff prevailed upon.

To determine the extent to which Justice Sanders "prevailed," the trial court separated the case into four issues: (1) whether the documents withheld by AGO were exempt, (2) the remedy for a violation of the "brief explanation" requirement, whether AGO's search for records was legally sufficient, and (4) whether AGO's subsequent production was ipso facto an admission that the SPDs were nonexempt and thus withheld wrongfully.

*Sanders v. State*, 240 P. 3d 120, 139-40 (Wash. 2010). The *Sanders* court solely looked at issues that went to the merits of whether the records were wrongfully withheld under the Public Records Act. The court explained that "[a]round 95 percent of the claimed exemptions proved valid, suggesting that Justice Sanders's fees and costs should be deeply discounted." *Id.* at 141. There is no mention that the *Sanders* court used the penalty phase to determine costs and attorney's fees.

Moreover, no court has mentioned the penalty phase when construing the term "all costs" found in RCW 42.56.550(4). *See ACLU v. Blaine School Dist. No. 503*, 975 P. 2d 536, 542 (Wash. Ct. App. 1999)

(explaining “[t]he 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”); *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 reason why Washington courts fail to mention the penalty phase awarding all costs is because it would undercut the purpose of the Public Records Act.

The purpose of awarding all costs is the same as awarding reasonable attorney’s fees, which is “is to encourage broad disclosure and to deter agencies from improperly denying access to public records.” *Tiberino v. Spokane County*, 13 P. 3d 1104, 1110 (Wash. Ct. App. 2000) (citing *Lindberg v. Kitsap County*, 133 Wash.2d 729, 746 (1997)); *PAWS v. UW*, 114 Wn.2d 677, 687 (1990) (stating “strict enforcement of fees and

finer will discourage improper denial of access to public records”) *rev’d* on other grounds, 114 Wash.2d 677, 790 P.2d 604 (1990); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129 (1978).

If courts started considering costs and attorney’s fees to be issues in Public Records Act litigation, then attorneys and perhaps their clients would opt-out of the penalty phase. The penalty phase is a mandatory legal operation that only arises if a plaintiff proves he or she was denied the right to copy and inspect records. *See Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 261 P. 3d 119, 131 (Wash. 2011) (stating “once a trial court finds an agency violated the PRA, daily penalties are mandatory, but the amount is subject to the trial court’s discretion”). It is likely, some attorneys would end their representation of clients after the merits stage. Why would an attorney want to gamble their attorney’s fees on issues with enormous amounts afforded to the trial court when that attorney could spend that time arguing more cases to the merits? Then the clients would either be forced to continue the litigation pro se or end the litigation without the statutory penalty. Either scenario undercuts the public’s ability to hold agencies accountable and to try to deter future violations. The legislature provides attorney’s fees to encourage individuals to enforce the Public Records Act in court. It undercuts the purpose of the Public

Records Act for a court to discount attorney's fees for the amount of success at the penalty phase.

All costs means all costs. There is no there is no legal basis to apportion costs on penalty-based arguments. Moreover, for a court to decide costs on penalty-based arguments would undercut the intent and spirit of the Public Records Act and possibly cause attorney's and plaintiffs to opt-out of the penalty phase in the future, leading to underenforcement.

#### **E. Conclusion**

The trial court erred in failing to award 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. Appellant was the prevailing party at the trial court because this lawsuit was the catalyst to the production of the requested documents and Appellant received an affirmative judgment in his favor at the trial court. The trial court erred by failing to award the costs of the court transcript to Appellant.

This Court should either award the costs of the transcript to Appellant or remand this case back down to the trial court for further proceedings to create an adequate record for review.

Respectfully submitted this 09 day of September 2019.



---

Joseph Thomas, WSBA # 49532

**Certificate of Service**

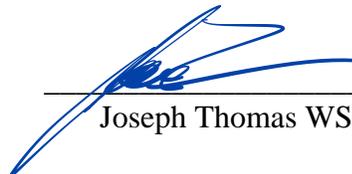
I declare under penalty of perjury under the laws of the State of Washington that on the date specified below, I caused to be served a copy of the following documents via email through the Court of Appeals electronic portal:

- Appellant's Reply Brief

To the following:

Mr. Eric Eisenberg  
Lewis County Chief Civil Deputy Prosecuting Attorney  
Law & Justice Center, 2nd Floor  
345 West Main Street  
Chehalis, WA, 98532

Dated this 09 day of September 2019,



---

Joseph Thomas WSBA # 49532

**LAW OFFICE OF JOSEPH THOMAS**

**September 09, 2019 - 3:14 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52999-8  
**Appellate Court Case Title:** Brian Green & Brian Cortland. Appellants v Lewis County, Respondent  
**Superior Court Case Number:** 17-2-05239-3

**The following documents have been uploaded:**

- 529998\_Briefs\_20190909151358D2903836\_1512.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was 2019.09.09 Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- appeals@lewiscountywa.gov
- briangreenband@tds.net
- eric.eisenberg@lewiscountywa.gov
- lori.cole@lewiscountywa.gov

**Comments:**

---

Sender Name: Joseph Thomas - Email: joe@joethomas.org  
Address:  
5991 RAINIER AVE S # B  
SEATTLE, WA, 98118-2763  
Phone: 206-390-8848

**Note: The Filing Id is 20190909151358D2903836**