

FILED
Court of Appeals
Division II
State of Washington
11/12/2019 12:11 PM
No. 53282-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRIAN CORTLAND, BRIAN GREEN, AND CHRISTOPHER
HUPY

Cross-Appellants,

v.

LEWIS COUNTY,

Respondent.

APPELLANT'S REPLY BRIEF

Joseph Thomas, #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’s first argument fails because under the <i>Yousoufian</i> multifactor framework a trial court must increase the statutory penalty when an aggravating factor is found.....	1
B. The trial court abused its discretion when it failed to apply aggravating factor number 4 (unreasonableness) to increase the statutory penalty	6
C. The trial court abused its discretion when it found aggravating factor number 5 in its statutory penalty analysis	9
D. The trial court abused its discretion when it ruled on aggravating factor number 5 without providing a legal standard	12

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Faulkner v. Wash. Dept. of Corrections</i> , 332 P.3d 1136 (Wash. Ct. App. 2014)	12
<i>Francis v. Wash. Dept. of Corrections</i> , 313 P. 3d 457 (Wash. Ct. App. 2013)	12
<i>Hearst Corp. v. Hoppe</i> , 90 Wash.2d 123 (1978)	5, 8
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677 (2006).....	6-7, 10
<i>Palmer v. Jensen</i> , 81 Wn. App. 148 (1996).....	9
<i>PAWS v. UW</i> , 125 Wn.2d 243 (1994)	5, 8
<i>PAWS v. UW</i> , 114 Wn.2d 677 (1990)	5, 8
<i>State v. Langstead</i> , 228 P. 3d 799 (Wash. Ct. App. 2010)	2
<i>State v. McEnroe</i> , 333 P. 3d 402 (Wash. 2014).....	3
<i>Stiles v. Kearney</i> , 277 P. 3d 9 (Wash. Ct. App. 2012).....	9
<i>Tapper v. Employment Security</i> , 122 Wn.2d 397 (1993).....	12
<i>West v. Thurston County</i> , 275 P. 3d 1200 (Wash. Ct. App. 2012)	10
<i>Yousoufian v. Office of Ron Sims</i> , 229 P. 3d 735 (Wash. 2010)	
.....	2, 4, 6-8, 10, 11-12

WASHINGTON STATUTES

RCW 9.94A.5372

OTHER AUTHORITIES

Aggravate, *Merriam-Webster Dictionary*3

Mitigate, *Merriam-Webster Dictionary*3

I. ARGUMENT

The penalty must be increased. Appellants have proven the trial court failed to apply aggravating factors which would have increased the statutory penalty, and misapplied a mitigating factor to lessen the penalty. This Court has all of the documentation needed to increase the statutory penalty based upon the newly applied aggravating factors and the non-applied mitigating factor. Alternatively, this Court should remand this appeal back down to the trial court with instructions to increase the statutory penalty, and to the penalty order of how each aggravating and mitigating factor affect the statutory penalty.

A. Respondent’s first argument fails because under the *Yousoufian* multifactor framework a trial court must increase the statutory penalty when an aggravating factor is found

Respondent Lewis County argues the trial court was not required to apply *Yousoufian* aggravating factor number four because “[t]he trial court treated this ‘unreasonableness’ as the absence of the overlapping mitigating factor rather than as an aggravator.” Resp’t Br. at 5. Specifically, Respondents argue “the trial court permissibly concluded that ‘unreasonableness’ did not aggravate the penalty, but ‘reasonableness’ did not mitigate it either.” *Id.*

This misapprehends the purpose of an aggravating factor and frustrates the purpose of the *Yousoufian* multifactor framework. There is

no basis in the law that supports Respondent's contention. If an aggravating factor is found by the court it must increase the penalty. Likewise, if a mitigating factor is found by the court it must decrease the penalty.

The purpose of the court created *Yousoufian* multifactor framework is to ensure "predictability to parties, and a framework for meaningful appellate review." *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010). The multifactor framework is comprised of two separate categories of factors: 1. Aggravating factors; and 2. Mitigating factors. *Id.* at 747-48. The purpose of the aggravating factor is to "increase[e] the penalty." *Id.* at 748. Conversely, mitigating factors serve to "decrease the penalty." *Id.* at 747.

The nature of aggravating factors and mitigating factors stays the same in other areas of the law, outside the realm of the Public Records Act. For example, in criminal law the determination of the sentence is made by using a multifactor framework consisting of aggravating and mitigating factors. In the criminal realm, an aggravating factor serves to increase the sentence and a mitigating factor serves to decrease the sentence. *See e.g. State v. Langstead*, 228 P. 3d 799, 802 (Wash. Ct. App. 2010) (explaining that aggravating factors "elevate[] the maximum" penalty"); RCW 9.94A.537 (states an aggravating factor increases "a

sentence above the standard sentencing range.”). Mitigating factors are meant to “merit leniency” of the penalty. *State v. McEnroe*, 333 P. 3d 402, 403 (Wash. 2014).

Even the common definitions of the words aggravate and mitigate are consistent from legal usage to common usage. A common definition of the word aggravate is “to make worse, more serious, or more severe : to intensify unpleasantly.” Aggravate, Merriam-Webster Dictionary (November 05, 2019, at 2:03 PM), <https://www.merriam-webster.com/dictionary/aggravate>. Also, a common definition of the word mitigate is “to cause to become less harsh or hostile : mollify.” Mitigate, Merriam-Webster Dictionary (November 05, 2019, at 2:05 PM), <https://www.merriam-webster.com/dictionary/mitigate>.

The definition and application of the terms aggravating and mitigating across both law and society are remarkably consistent: aggravating means to increase and mitigating means to decrease. These terms are so basic to law and broader society in general that the definitions must remain consistent.

This makes sense the Washington Supreme Court would choose the commonly accepted definitions of the words ‘aggravating’ and ‘mitigating’ because it would help provide much needed guidance for how

to determine a statutory penalty. Some background into the *Yousoufian* case is necessary to understand why a framework was needed.

This is the second time our court has reviewed the sufficiency of the penalty that has been imposed by the trial court. Furthermore, more than 12 years have passed since Armen Yousoufian submitted his PRA request to the county and 9 years have gone by since he filed this lawsuit. This suggests to us that we need to provide additional guidance on the setting of PRA penalty amounts.

Yousoufian v. Office of Ron Sims, 229 P. 3d 735, 748 (Wash. 2010). In other words, since there was not any guidance for how to determine a penalty, other than the monetary range, court decisions were frustratingly inconsistent pre-*Yousoufian*. With extensive briefing from the parties and from amicus, the Washington Supreme Court adopted the multifactor framework to provide guidance to parties.

Here Respondent's theory of aggravating and mitigating factors defeats the purpose of the multifactor framework adopted by the *Yousoufian* court. Under Respondent's theory of the multifactor framework it is permissive for aggravating factors to increase the penalty, and it is permissive for mitigating factors to decrease the penalty. *See* Resp't Br. at 5 (explaining that while the trial court found Respondent's actions unreasonable "the trial court permissibly concluded that

‘unreasonableness’ did not aggravate the penalty, but “reasonableness” did not mitigate it either”).

What then is the point of an aggravating or mitigating factor? Under Respondent’s theory, the words then become meaningless, as courts have the option of not increasing the penalty when finding an aggravating factor or not decreasing the penalty when finding a mitigating factor.

Respondent’s theory of the aggravating and mitigating factors cannot be reconciled with the public policy supporting the Public Records Act that fines and fees must be strictly enforced. Washington courts have repeatedly found 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 (1978)). There cannot be strict enforcement of fines and fees and the trial court fail to increase the penalty when it finds aggravating factors.

This Court must reject Respondent’s deeply flawed interpretation of the statutory penalty. If this Court adopts Respondent’s theory of the statutory penalty it will mean a bleak future for the Public Records Act. The Public Records Act will lose its teeth because trial courts will have unfettered discretion to apply the statutory penalty, as fines and fees will no longer have to be strictly enforced. Aggravating and mitigating factors

will cease to exist because this Court will have endorsed ‘non-aggravating’ and ‘non-mitigating’ factors that do not impact the statutory penalty at all. Consequently, a trial court will be able to find ‘non-aggravating factors’ and for the first time not impose a statutory penalty for a violation of the right to inspect and copy because the statutory penalty will be purely discretionary. The enforcement mechanism of the Public Records Act will be rendered meaningless.

B. The trial court abused its discretion when it failed to apply aggravating factor number 4 (unreasonableness) to increase the statutory penalty

The trial court abused its discretion when it failed to apply aggravating factor number 4 (unreasonableness) to increase the statutory penalty, after finding multiple times that Respondents acted unreasonably when responding to Appellants’ Public Records Act requests. The trial courts untenable error failed to unreasonably increase the penalty based upon Respondent’s unreasonableness.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). The *Yousoufian* court explained “[a] trial court’s decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a

view that no reasonable person would take.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (internal quotation marks omitted); *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)).

Appellants acquiesce to Respondent’s admission “the trial court permissibly concluded that ‘unreasonableness’ did not aggravate the penalty, but ‘reasonableness’ did not mitigate it either.” Resp’t Br. at 5. This admission was made by Respondent in the first argument in the Response Brief, where it argued the “trial court was not required to aggravate the penalty based on the fourth *Yousoufian* aggravating factor (unreasonableness) because it appropriately addressed this issue under mitigating factor five (reasonableness).” *Id.* at 4 (title of the argument and bolded in original).

Furthermore, the record is absent of the trial court increasing the penalty based upon the finding of unreasonableness. *See* CP 132-36. It is an uncontroverted fact the trial court found Respondent’s actions unreasonable when responding to the Public Records Act request. CP 134-35. But the record is absent as to whether Respondent’s unreasonable actions increased the statutory penalty. Instead, the trial court merely conjured a number out of thin air without tying it to the findings.

Consequently, both parties agree that “unreasonableness did not aggravate the penalty.” Resp’t Br. at 5. And moreover, the record is

absent of the trial court considering its finding of unreasonableness when calculating the statutory penalty.

It is an abuse of discretion for the trial court to fail to increase the statutory penalty when making a finding that one aggravating factor is present. In the seminal 2010 *Yousoufian* case the Washington Supreme Court explained that it created the multifactor framework in Public Records Act cases to “additional guidance on the setting of PRA penalty amounts.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 746 (Wash. 2010). That is because Washington courts have long understood that only “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)).

The trial court abused its discretion when its decision to not increase the statutory penalty for Respondent’s unreasonable conduct. This decision is based upon untenable grounds. As explained earlier in this brief the purpose of an aggravating factor is to increase the statutory penalty. The failure to increase the statutory penalty when finding an aggravating factor applies contravenes the strict enforcement of fines and fees and undercuts the public policy to the Public Records Act. Moreover,

it is also a stance no reasonable person would take because the common and legal definition of aggravating is to increase. No reasonable person would apply an aggravating factor that did not increase the statutory penalty.

C. The trial court abused its discretion when it found aggravating factor number 5 in its statutory penalty analysis

In Respondent's third argument in its response brief, it argues the trial court did not err when it "found the 'reasonableness' mitigating factor relevant, but inapplicable." Resp't Br. at 7. It argued the trial court found the mitigating factor but did not lessen the statutory penalty. *Id.*

First, this argument is nothing more than a bare conclusion and this court should decline to review Respondent's argument, as it is waived as a matter of law. A conclusory argument is "[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); *Palmer v. Jensen*, 81 Wn. App. 148, 153 (1996) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration"). Respondent does not cite any case law in this argument to substantiate its position. In fact, Respondent does not even cross-reference other parts of its brief where it cited legal authority to substantiate its position in this argument. In *West v. Thurston County*, the

Division II Court of Appeals for the State of Washington explained that when a party does not cite to “authority to support [it’s] argument, we do not further consider it.” *West v. Thurston County*, 275 P. 3d 1200, 1208 (Wash. Ct. App. 2012). This is an analogous situation to the situation encountered by the *West* court. Here Respondent did not cite any legal authority to support its argument. This Court must not consider Respondent’s argument.

But even if this Court does consider Respondent’s argument it still fails.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)). The *Yousoufian* court explained “[a] trial court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 743 (Wash. 2010) (internal quotation marks omitted); *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684 (2006)).

Here the trial court enumerated out three specific mitigating factors. CP 135. In pertinent part, the trial court found for mitigating

factor number 5 that Respondent's noncompliance "cannot be considered reasonable because it was legally wrong." CP 135.

No reasonable person would take the stance of the trial court and apply mitigating factor number 5 which concerns reasonableness, when it explains that Respondent's actions were unreasonable. This is simply irreconcilable. Mitigating factor number 5 examines "the reasonableness of any explanation for noncompliance by the agency." *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 747 (Wash. 2010). But the trial court did not find Respondent's actions reasonable. No reasonable person would make such an illogical, nonsensical, and contrary statement. Respondent does not even attempt to reconcile the trial court's explanation of mitigating factor number 5, but it merely says that it was permissible without citing to any legal authority. This argument fails because as explained above, in the first section of this brief the purpose of the mitigating factors are "to decrease the penalty." *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 747 (Wash. 2010). It is futile for the trial court to apply a mitigating factor that does not decrease the penalty. No reasonable person would make a wasted effort. It only serves to confuse appellate review. This frustrates the purpose of the multifactor framework which is to ensure "predictability to parties, and a framework for

meaningful appellate review.” *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735, 748 (Wash. 2010).

D. The trial court abused its discretion when it ruled on aggravating factor number 5 without providing a legal standard

In Respondent’s fourth argument, it argues the trial court correctly used its discretion to determine aggravating factor number 5 bad faith. Resp’t Br. at 7-8.

This fails to address Appellants’ argument that the trial court erred in not applying a legal standard of bad faith to the facts. *See* Appellant Br. at 23-24. Appellants argued the trial court erred when it partially applied the bad faith aggravating factor number 5 because it did not identify a legal standard it used. *Id.*

Washington case law is clear that bad faith in the Public Records Act is a mixed question of law and fact. *Faulkner v. Wash. Dept. of Corrections*, 332 P.3d 1136, 1140 (Wash. Ct. App. 2014) (quoting *Francis v. Wash. Dept. of Corrections*, 313 P. 3d 457, 462 (Wash. Ct. App. 2013)). Even in other areas of the law, such as employment law, Washington courts also use the mixed question of law and fact to determine bad faith. *Tapper v. Employment Security*, 122 Wn.2d 397, 403 (1993) (employment law).

Respondent fails to identify an alternative to the standard of mixed question of law and fact for issues of bad faith. There must be some sort of legal standard to define what is and is not bad faith to guide trial courts, otherwise the decisions will be arbitrary and capricious. Furthermore, regardless of the standard of review, the trial court must identify a legal standard to determine bad faith, so the appellate court can perform its job and make a determination of whether the trial court erred or not.

Respectfully submitted,



Joseph Thomas
Law Office of Joseph Thomas PLLC
5991 Rainier Ave. S., # B
Seattle, WA 98118
206-390-8848
Joe@JoeThomas.org

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 Prosecuting Attorney
345 W. Main Street Chehalis WA 98532

Dated this 12 day of November 2019.



Joseph Thomas
Law Office of Joseph Thomas PLLC
5991 Rainier Ave. S., # B
Seattle, WA 98118
206-390-8848
Joe@JoeThomas.org

LAW OFFICE OF JOSEPH THOMAS

November 12, 2019 - 12:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53282-4
Appellate Court Case Title: Brian Cortland, et al., Cross Appellants v. Lewis County, Respondent
Superior Court Case Number: 18-2-01897-5

The following documents have been uploaded:

- 532824_Briefs_20191112121008D2004410_6978.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2019.11.12 Reply Brief.pdf

A copy of the uploaded files will be sent to:

- amakirkland@homtmail.com
- appeals@lewiscountywa.gov
- briangreenband@tds.net
- eric.eisenberg@lewiscountywa.gov
- fightpubliccorruption@yahoo.com
- 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 20191112121008D2004410