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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BRIAN CORTLAND et al.,

Cross-Appellants,

vs.

LEWIS COUNTY,

Respondent.

Appeal from the Superior Court of Washington for Thurston County

Brief of Respondent Lewis County

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I. INTRODUCTION

Brian Cortland, Brian Green, and Christopher Hupy (“Plaintiffs”) appeal the trial court’s award of penalties for Lewis County’s failure to provide three court transcripts in response to their Public Records Act (PRA) requests. The trial court found Lewis County to have honestly, but incorrectly claimed that the transcripts were exempt from disclosure under RCW 42.56.290. Based on the *Yousoufian* factors,¹ the trial court awarded Plaintiffs about \$12,000 for the transcripts’ withholding. This award was within its discretion and should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUE

1. Is a \$10 per day penalty within a trial court’s discretion if, using the *Yousoufian* factors, it finds that an agency incorrectly claimed an exemption in good faith but otherwise strictly complied with the PRA’s procedural requirements?

III. STATEMENT OF THE CASE

In each of three PRA requests in spring 2017, Plaintiffs sought copies of a different court transcript Lewis County had obtained during ongoing litigation against Plaintiffs. Clerk’s Papers (CP) at 35-36; 13-24. Lewis County denied each request, claiming that the transcript was exempt under RCW 42.56.290 because, in civil

¹ *Yousoufian v. Office of Ron Sims, King Cty. Exec.*, 168 Wn.2d 444, 466-68, 229 P.3d 735 (2010).

litigation, one party may not obtain a copy of a transcript paid for by its adversary. *Id.*

In 2018, Plaintiffs sued under the PRA. CP at 1. Lewis County produced the transcripts during the litigation and defended its claim of exemption, arguing that transcripts one party obtains for pretrial preparation purposes are exempt from civil discovery and so are exempt from PRA production. CP at 3; see *generally* Supp. CP at 140-78² (Lewis County Merits Brief). The trial court noted that Lewis County had demonstrated a custom of civil practice, supported by sound policy, that one party to civil litigation cannot take a transcript ordered by the other. Supp. CP. at 201-02² (Merits Transcript at 22-23). However, this custom was not embodied in the law and did not support an exemption under RCW 42.56.290. *Id.*; CP at 37-39, 106.

Thereafter, the parties litigated penalties. Plaintiffs asked for a penalty of more than \$1 million, arguing bad faith and an extreme need for deterrence. CP at 134. Lewis County sought a penalty of about \$1200 for an honest, but mistaken claim of exemption. *Id.*

² Lewis County has filed a supplemental designation of Clerk's Papers asking for transmission of its merits briefing and a transcript of the trial court's oral merits ruling. It is not certain what page numbers the two new documents will receive.

Relying on the *Yousoufian* factors, the trial court imposed a penalty of \$11,950. CP at 135. It found that Lewis County had promptly, clearly, and intelligibly explained its honest claim of exemption, but the exemption was legally wrong. *Id.* at 133-35. Lewis County had otherwise strictly complied with the PRA and did not act out of bad faith or animus against Plaintiffs. *Id.* However, the trial court opined that Lewis County's claim of exemption could not be reasonable because it was legally wrong; it directed Lewis County to think more carefully when claiming exemptions. *Id.* 134-35.

Plaintiffs sought timely review.³ They now challenge the trial court's treatment of three *Yousoufian* factors.

IV. ARGUMENT

The trial court's penalty in this matter was within its discretion. It found that Lewis County had honestly, but mistakenly claimed an exemption in prompt, clear, and intelligible terms, and had otherwise strictly complied with the PRA. The penalty addressed agency culpability and deterrence, to dissuade Lewis County from claiming uncertain exemptions. It therefore reflected *Yousoufian's* rubric and fell within the trial court's discretion. This Court should affirm.

³ Lewis County initially appealed this matter, and Plaintiffs sought timely cross-review. Notice of Appeal (Apr. 26, 2019); Notice of Cross-Appeal (May 1, 2019). Lewis County then sought voluntary dismissal of its appeal, leaving Plaintiffs as the only appealing party. Perfection Letter (May 24, 2019).

A. Standard of Review

Neither party challenges the trial court's findings of fact, so they are verities on appeal. *Yousoufian*, 168 Wn.2d at 450.

For legal questions, Plaintiffs cite an incorrect standard of review. The amount of a PRA penalty award is reviewed for abuse of discretion; a court should affirm even if it quibbles with the reasoning below. *Sanders v. State*, 169 Wn.2d 827, 866-68, 240 P.3d 120 (2010). The *Yousoufian* test could not be more discretionary: its factors “may overlap, are offered only as guidance, may not apply equally or at all in every case, and are not an exclusive list of appropriate considerations. Additionally, no one factor should control.” *Yousoufian*, 168 Wn.2d at 468. As a result, PRA penalty review is “extremely deferential.” *Hoffman v. Kittitas Cty.*, 4 Wn. App. 2d 489, 495, 422 P.3d 466 (2018), *aff'd*, No. 96286-3, ___ Wn. 2d ___, 2019 Wash. LEXIS 590 (Sep. 26, 2019). Appellate courts may not engage in “piecemeal de novo review of individual *Yousoufian II* factors.” *Hoffman*, 2019 Wash. LEXIS 590, at *15.

B. 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).

The trial court found that Lewis County's claimed exemption was clear, prompt, intelligible, and honestly made, but “cannot be

considered reasonable because it was legally wrong.” CP at 133-35. Plaintiffs argue that the trial court was therefore required to apply *Yousoufian*'s fourth aggravating factor, the “unreasonableness of any explanation for noncompliance by the agency.” See *Yousoufian*, 168 Wn.2d at 468. No such application was required.

The trial court treated this “unreasonableness” as the absence of the overlapping mitigating factor rather than as an aggravator. See *id.* at 467 (listing “the reasonableness of any explanation for noncompliance by the agency” as a mitigating factor); CP at 135 (declining to find Lewis County's noncompliance reasonable under this mitigating factor). Doing so was sensible here, when the only unreasonableness was an error in legal judgment in an uncertain area.⁴ CP at 134-35. In light of the prompt, honest, clear, and intelligible—but wrong—claim of exemption, the trial court permissibly concluded that “unreasonableness” did not aggravate the penalty, but “reasonableness” did not mitigate it either.

Nor was the trial court required to address the mitigating and aggravating factors separately—or delineate how any particular factor applied, for that matter. Cf. *Hoffman*, 4 Wn. App. 2d at 495

⁴ The trial court's premise, that one cannot be considered reasonable if one turns out to be legally mistaken, is dubious. But, its award was reasonable and is to be affirmed even if one quibbles with its logic. *Sanders*, 169 Wn.2d at 868.

(discouraging “a heightened critique of a trial court's discretionary penalty decision simply because the court chose to articulate its decision in a way that was more transparent than necessary”). The Court should reject Plaintiffs’ hyper-parsing of these two factors.

Plaintiffs further contend that Lewis County’s claimed exemption was unreasonable because the transcripts covered in-court (i.e., public) subject matter, and because Lewis County gave Plaintiffs the transcripts a year later during the PRA litigation. The trial court easily rejected these assertions. As to the former, the trial court found that Lewis County had followed an established custom, supported by sound policy, reflecting the exemption it claimed—but the custom was not sufficiently codified in the law to be an exemption under RCW 42.56.290. Supp. CP. at 201-02 (Merits Transcript at 22-23); CP at 37-39, 106. That is far from unreasonable. As to the latter, the state Supreme Court has specifically encouraged agencies to give out disputed records during litigation to further the PRA’s intent to promote access to records. *Sanders*, 169 Wn.2d at 838. So, the trial court properly rejected these arguments. This Court should affirm its penalty order.

C. The trial court did not apply mitigating factor five to decrease the penalty; Plaintiffs misinterpret the order.

Plaintiffs argue that the trial court, despite finding Lewis County's exemption "unreasonable," applied *Yousoufian* mitigating factor five to lower the penalty in this matter. This argument misapprehends the trial court's order.

As explained above, the trial court found the "reasonableness" mitigating factor relevant, but inapplicable. See CP at 134-35. This factor therefore did not mitigate the penalty: the trial court's denoting of a mitigating factor as relevant does not mean it applied that factor to lower the penalty. For comparison, consider the trial court's consideration of aggravating factor 8, economic loss: it found the factor relevant but noted no economic loss (hence no aggravation of the fine). *Id.* at 134. The trial court was simply noting what factors it found implicated in the case. The Court should reject Plaintiffs' mistaken reading of the penalties order.

D. The trial court did not err in rejecting Plaintiffs' claim of bad faith.

Plaintiffs assert that Lewis County acted in bad faith by claiming that the transcripts here were exempt from disclosure. The trial court had discretion to reject this assertion when it found, on the

facts, that Lewis County promptly, intelligibly, clearly, and honestly claimed an exemption that turned out to be mistaken.

The standard of review has recently changed on this issue. Plaintiffs correctly cite case law describing bad faith as a mixed question of law and fact with a split abuse-of-discretion, de-novo form of review. See *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 51-52, 313 P.3d 457 (2013) (outlining this standard). However, the state supreme court recently abrogated this analysis, holding: “[e]ngaging in de novo review of the bad faith factor would risk distorting its role as one piece of a holistic, discretionary determination of the appropriate penalty amount.” *Hoffman*, 2019 Wash. LEXIS 590, at *14-15. This court should therefore review the penalty determination as a whole for abuse of discretion. *Id.* at *15.

Under the proper standard, the trial court’s decision here was clearly within the appropriate realm. Lewis County articulated a prompt, clear, honest claim of exemption that turned out to be wrong. CP at 133-35. The claim of exemption was based on an existing custom supported by sound policy, but the custom wasn’t expressly embodied in the law to serve as a PRA exemption. Supp. CP. at 201-02 (Merits Transcript at 22-23); CP at 37-39, 106. Such an honest mistake is not bad faith even under the prior, more stringent

standard. See *Francis*, 178 Wn. App. at 63 (noting that bad faith does not arise merely from “following a legal position that was subsequently reversed”). Moreover, the Plaintiffs suffered no economic loss, and the trial court used other mechanisms to address agency culpability and deterrence. See CP at 134-35 (targeting “an element of recklessness” through its penalty to direct Lewis County to “think more carefully before claiming uncertain exemptions”). These are the touchstone of the *Yousoufian* test. *Yousoufian*, 168 Wn.2d at 461-62 & n.8. On the whole, the trial court’s penalty determination was reasonable and followed the purpose and factors of the test guiding its discretion. This Court should affirm.

E. Plaintiffs are not entitled to fees or costs on appeal.

Because the Court should affirm, Plaintiffs will not prevail and should receive neither fees nor costs on appeal. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 707, 310 P.3d 1252 (2013); *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 387, 374 P.3d 63 (2016); see also *City of Lakewood v. Koenig*, 160 Wn. App. 883, 896-97, 250 P.3d 113 (2011) (awarding no fees if neither party substantially prevails).

Even if Plaintiffs were to prevail, the Court should award only a portion of their costs and fees on appeal because some of their

work was unproductive. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (discounting from a reasonable fee “hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time”); accord *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 114 Wn.2d 677, 689, 790 P.2d 604 (1990); *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 25, 332 P.3d 1099 (2014). Specifically, Plaintiffs failed to timely file materials related to their cross-appeal and engaged in a protracted back-and-forth with the clerk and Court on matters unrelated to the merits of this case. If the Court were to reverse and award Plaintiffs any attorney fees, it should decline to award any costs or fees associated with this tangential work.

V. CONCLUSION

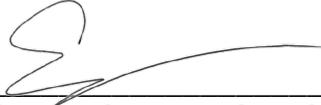
The trial court’s penalty award was within its discretion. The penalty tracked the trial court’s findings that Lewis County promptly, clearly, intelligibly, and honestly claimed an exemption that turned out to be mistaken. It reasonably addressed agency culpability and deterrence, which are the thrust of the appropriate legal test. Accordingly, the trial court did not err, and this Court should affirm.

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RESPECTFULLY submitted this October 23, 2018.

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