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No. 35720-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ASOTIN COUNTY,

Respondent

v.

RICHARD EGGLESTON

Appellant

BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a Public Records Act ("PRA") case which turns on defining when a party is a "prevailing party" and is therefore entitled to an award of attorney fees and penalties.

Asotin County brought a Motion and Order to Show Cause seeking an injunction in an effort to withhold the documents requested, or in the alternative, heavily redact them. After review of briefs filed by both parties and *in camera* review of the documents, the trial court ordered the records be produced to Mr. Eggleston with some minor approved redactions. The trial court erred in denying Mr. Eggleston's request for costs and attorney's fees for having to defend against the County's Motion.

In PRA cases, the prevailing party is entitled to "all costs, including attorney's fees, incurred in connections with such legal action."

The court erred again when it denied consideration of penalties. There is a wealth of common law cases properly providing costs and fees to prevailing parties when the documents held by the public entity are ultimately determined to be subject to disclosure, as they were in this case.

The County sought to deny Mr. Eggleston his right to inspect and copy public records; Mr. Eggleston successfully defended his right. As the prevailing party, an award of attorney fees is mandatory and the Court must also properly consider an award of penalties.

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to find that Mr. Eggleston was the prevailing party.

2. The trial court erred in making Finding of Fact No. 5 (CP45):

Respondent asserts entitlement to an award as prevailing party. Respondent did not have any motion for affirmative relief before the court 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. Rather, Respondent opposed exemption or redaction.

3. The trial court erred in making Finding of Fact No. 6 (CP45):

Plaintiff has prevailed with respect to the request to selectively redact.

4. The trial court erred by failing to award attorney fees to Mr. Eggleston, who was the prevailing party.

5. The trial court erred by failing to grant reconsideration of its earlier erroneous decision.

6. The trial court erred by failing to consider and award penalties for every day they County failed to provide the records.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a person requests to inspect or copy public records and has to successfully defend the right to inspect or copy because the agency responds by bringing a legal action in the courts seeking an injunction prohibiting the disclosure; is the person the “prevailing party”? (Assignments: 1, 2, 3, 4, 5)

2. When a requester is the prevailing party, does the statute make the award of attorney fees mandatory? (Assignments 4, 5)

3. When an agency does not timely disclose public records pursuant to a request, but instead engages in litigation to prevent the disclosure, is a trial court obliged to consider the relevant factors relating to penalties and make a proper award thereof? (Assignment 6)

STATEMENT OF FACTS

This appeal seeks reversal of the trial court for erroneously failing to award mandatory attorney fees and penalties.

On July 24, 2017, Mr. Eggleston made a request for public records from Asotin County seeking “documents or records relating to the legal costs incurred by the county relative to any and all legal actions or cases involving me ...”. *CP9*. The term “[A]ll legal actions” in his request refers specifically to two cases: a PRA case in which the County wrongfully withheld records from Mr. Eggleston, who was then forced to sue (*CP25*) (this case can be found at *Eggleston v Asotin County, et al.*, Washington Court of Appeals Case No. 34340-5-III); and a contract and tort claim by Mr. Eggleston against the County for breach of the contract entered into for the purchase of his land in relation to the 10 Mile Bridge project and on-going damages to his property, the case is pending in Walla Walla Superior Court. (*CP25*)

That same day the County responded with a form 5-day letter and stating they would need three weeks to prepare the documents. *CP89*.

On August 8, 2017, the County filed a Motion for Order to Show Cause, seeking an order “allowing the County to withhold the invoices the County has paid to outside counsel ... and other communications with insurance counsel In the alternative, the County request[ed] heavy redaction” *CP1*. The matter was noted for a show cause hearing on September 5, 2017. *CP19*.

On August 10, 2017, the County sought, and was granted a new hearing date on September 19, 2017. *CP21*.

On August 19, 2017, the County served Mr. Eggleston with Motion and Order to Show Cause and notice of the new court date. *CP22*.

On September 15, 2017, Mr. Eggleston responded to the Order to Show Cause. *CP23-41*. Mr. Eggleston discussed, at length, the case of *West v Thurston County*, 168 Wn.App. 162, 275 P.3d 1200 (Div. 2 2012) as a case that is directly on point; and that

- 1) “attorney invoices may **not** be withheld in their entirety,”
- 2) work product redactions must be justified, and
- 3) the County is responsible for costs and penalties for resisting disclosure. [citation omitted.]

CP30-31[emphasis in original]. Mr. Eggleston proceeds to

not object to an *in camera* review; in fact he encourages and requests it. But the records must be promptly and timely produced after the Court’s review. The endless

delays suggested by the County's pleadings must not be allowed.

CP33-34. He further argues:

A proper application of the law will result in the Court ordering the disclosure and production of records to Mr. Eggleston; the records may be redacted, but must be produced. Mr. Eggleston will, therefore, be the prevailing party as the County has sought to exempt record in their entirety.

CP36. And he concluded his response with:

“the County’s motion for an order allowing the County to withhold the invoices must be denied. The County’s request to allow them to ‘heavily redact’ the invoices must be denied; the redactions must be narrowly drawn to cover ONLY that information which is truly within the scope of a narrowly construed and carefully applied exemption.”

CP37.

The Show Cause hearing was held on September 19, 2017; and the Court took the matter under advisement and issued an “Interim Ruling” on September 26, 2017, which stated:

This matter came before the court on September 19, 2017. **The issue at hand is whether or not the County could preclude production of invoices generated by attorneys representing the County** in various legal actions. The County produced its records for in camera review of the court. Having reviewed those documents, the Court finds that the records are subject to a valid exception under RCW 42.56.290. Having so determined, **it is incumbent upon the county to provide the Court its requested redactions so that a determination can be made as to**

whether or not they are justified as work product or privileged information. In the alternative, the County may waive redaction and authorize the disclosure in its entirety.

CP42. (emphasis added)

The County provided the records as ordered, and the Court approved some redactions (even though the redaction log is not included in the Clerk's Papers, a quick review of the redacted documents (*CP47-86*), reveals the minimal redactions that were authorized). *CP44-46*. The Court stated, *inter alia*:

The issue at hand is whether or not the County could preclude production of invoices generated by attorneys representing the County in various legal actions. The County produced its records for in camera review of the court. The County also provided the Court its requested redactions.

...

5. Respondent asserts entitlement to an award as prevailing party. Respondent did not have any motion for affirmative relief before the court 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. Rather, **Respondent opposed exemption or redaction.**

6. Plaintiff has prevailed with respect to the request to selectively redact. Mr. Eggleston requested penalties and fees as the prevailing party: documents had to be produced. **The Court denied the request, holding that since redactions were allowed, Mr. Eggleston did not prevail.**

...

CP44-45. (Emphasis added.)

Mr. Eggleston brought a Motion for Reconsideration (*CP90-100*) which was denied by the Court. *CP103*.

This appeal followed.

SUMMARY OF ARGUMENT

Attorney fees are to be awarded to a prevailing party in any action in the courts seeking the right to inspect or copy any public record. The County brought a petition seeking an order allowing the County to withhold the invoices, or in the alternative to “heavily redact” them. Mr. Eggleston successfully defended his right to inspect or copy the records: the result of the action was that the County had to disclose and produce records. As the prevailing party, Mr. Eggleston was entitled to an award of attorney fees, proper consideration and award of penalties, and attorney fees on appeal.

ARGUMENT

A. Standard of Review

"Judicial review of all agency actions taken or challenged under [the statute] shall be de novo." RCW 42.17.340(3). On appeal, when there were no witnesses nor production of evidence (except through affidavits, documentary evidence and memoranda of law), the appellate court stands

in the same position as the trial court. On a de novo review, the court is not bound by the trial court's findings. *Progressive Animal Welfare Society v Univ. Of Washington (PAWS II)*, 125 Wash.2d 243, 252, 884 P.2d 592 (1994).

But on the issue of an award of attorney fees, the standard is abuse of discretion. *Progressive Animal Welfare Society v Univ. Of Washington (PAWS I)*, 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990). A trial court is given discretion to decline to award fees that are deemed unreasonable; however the denial of fees to a prevailing party is an abuse of discretion as the award of attorney fees to a prevailing party is mandatory.

Therefore, in the case at bar, the standard is *de novo* for determining the prevailing party and failing to consider penalties and *abuse of discretion* regarding the issue of denial of attorney fees.

B. As the prevailing party, Mr. Eggleston should have been awarded attorney fees

The basic policy of the Public Records Act - prompt access to non-exempt public records and penalizing an agency failing to do so - has been used by the courts interpreting [the Public Records Act]. '[P]ermitting a liberal recovery of costs' for a requestor in a PRA enforcement action, 'is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records.' [citations omitted.]

Public Records Act Deskbook: Washington's Public Disclosure and Open

Public Meetings Laws, §18.2, (WSBA 2nd Edition, 2014)

In Washington, attorney fees are to be awarded to the prevailing party. The award of attorney fees is not discretionary; the statute says they “shall” be awarded:

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

RCW 42.56.550(4)

The mandatory nature of attorney fees has been upheld by Washington courts: “it is very clear that the court ‘shall’ award attorney fees to a person who prevails against an agency in an action seeking the disclosure of public records.” *Amren v City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997).

The agency may not avoid the attorney fees by claiming good faith.
Id. at 35.

The statutory formula is simple: i) any person, ii) who prevails, iii) in any action in the courts seeking the right to inspect or copy, iv) any

public record, v) shall be awarded all costs including reasonable attorney fees.

i. Any Person

Mr. Eggleston is a person. Washington case law further stands that a “person” need not be a natural person, even a corporation may be awarded attorney fees. *See: Cowles Publishing Co. v City of Spokane*, 69 Wn. App. 678, 686, 849 P.2d 1271, *review denied*, 122 Wn.2d 1013 (1993).

ii. Who Prevails

To obtain attorney fees, one only must be a “prevailing party.” Our appellate courts have adopted various formulae for the determination of “prevailing party”. In *Spokane Research & Defense Fund v City of Spokane (Spokane Research IV)*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005), the Supreme Court held that the requester was the prevailing party because the agency had wrongfully withheld the records and the requestor was required to file suit. The court stated, “prevailing party” “relates to the legal question of whether the records should have been disclosed on request.” *Spokane Research*, at 103.

An alternative, and equally applicable test to determine the “prevailing party” was provided by Division 2 in *Tacoma Pub. Library v. Woessner*, 90 Wn.App. 205, 951 P.2d 357 (1998), amended on recons., 972 P.2d 932 (1999) (citing PAWS I, 114 Wn.2d at 684), wherein they stated: “A party who wins disclosure of some, but not all, information sought, is a ‘prevailing party’ for purposes of awarding attorney fees and costs under the PRA.”

Under either test, Mr. Eggleston was the prevailing party and should have been awarded his attorney fees: he made a valid request for public records; the County sued Mr. Eggleston in an attempt to withhold the records; he successfully defended his right to inspect or copy the records: at the conclusion of the legal matter the County had to produce the records (with redactions). Mr. Eggleston prevailed.

The trial court’s error is patent. After correctly noting, in each of the two rulings that “[t]he issue at hand is whether or not the County could preclude production of invoices generated by attorneys ...”(CP42, 44), the trial court then erred at Finding No. 5 “Respondent asserts entitlement to an award as prevailing party. Respondent did not have any motion for affirmative relief before the court seeking the right to inspect or copy

Rather, Respondent opposed exemption or redaction.” This finding has key errors and legally irrelevant.

Mr. Eggleston did object to a complete WITHHOLDING of the documents (what the County requested in their motion). In contrast he set out the law about exemptions and redactions and he encouraged any proper redactions based on valid exemptions. (*See i.e.: CP30, 33, 36; see also: RP 7, ll. 22 - 25: “We’re asking that if there are any legitimate work product or attorney/client confidences that are disclosed in those, let them be redacted, but the rest of the record must be presented”; RP 8, ll. 10-15: “Your Honor, Mr. Eggleston has just asked me to also remind the Court that the simple way to have handled all of this would have been to redact those issues they believed were properly attorney/client privilege and provide a withholding log. That’s within the law, and it would have saved everybody a lot of time and money.”*) The trial court’s finding that the Respondent opposed redaction is unsupported by evidence, and is clear error. The trial court also erred with Finding No. 6: “Plaintiff has prevailed with respect to the request to selectively redact.” (*CP45*) This finding is also contrary to the facts and irrelevant to the law.

As the trial court TWICE noted in its rulings, the issue in this case was “whether or not the County could preclude production of invoices generated by attorneys” (CP42, 44) The trial court initially read the County’s Motion correctly: “The County moves the Court for an order allowing the County [to] withhold the invoices the County has paid to outside counsel” CPI. Even the County’s alternative request is at odds with this finding: “[i]n the alternative, the County requests **heavy redaction ...**” (CPI) as compared to the Finding’s “selective[] redaction”.

Further BOTH Finding 5 and 6 are legally irrelevant, as will be shown next.

iii. in any action in the courts seeking the right to inspect or copy

It matters not at all who initiated the action. “Any 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, including reasonable attorney fees. ... It is immaterial who hauls whom into court, because the requester who prevails in any court action over the release of public records is entitled to attorney fees.” *Soter v Cowles Publishing Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007) (citing *Soter v Cowles Publishing Co.*, 131 Wn.App. at 907) (emphasis in original).

This was an “action in the courts” dealing with a requester’s “right to inspect or copy.” Specifically, in the matter at bar the agency was attempting to interfere with or cut-off a requester’s right to inspect or copy.

The difference between an agency seeking an injunction and losing (which results in attorney fees to the requester) and a third party seeking an injunction and losing (which does NOT result in attorney fees to the requester) is highlighted in *Robbins, Geller, Rudman & Dowd, LLP v Office of Attorney General*, 179 Wn. App. 711, 328 P.3d 905 (Div. 2, 2014). Therein, the court holds:

The PRA requires the trial court to award attorney fees and costs to a party who prevails against an agency, which occurs when an agency wrongfully withholds documents. *Gronquist v. Dep’t of Licensing*, 175 Wn.App. 729, 756, 309 P.3d 538 (2013). Here, the AGO was willing to produce the protected information but was prevented from doing so by a court order. As previously discussed, even if Gresham succeeds in overturning the injunction, Gresham will not have prevailed over the AGO for purposes of awarding costs, attorney fees, and penalties under RCW 42.56.550(4). *Bainbridge Island Police Guild*, 172 Wn.2d at 421 n.14. Accordingly, we deny his request for attorney fees, costs, and penalties against the AGO even though we vacate most of the trial court's permanent injunction order.

Robbins, Geller, at 737-38. Applying this standard to the instant case we see that herein it was the AGENCY that sought to prevent the disclosure, Eggleston prevailed over the AGENCY in that they were not willing to

produce the records until the Court ordered it over their motion to withhold them; and it was the AGENCY that should have disclosed the records in a timely basis and did not.

The agency brought an action; Mr. Eggleston prevailed: he successfully defended his rights in a court action.

iv. any public record

There is no challenge to the fact that these are public records.

v. shall be awarded all costs including reasonable attorney fees.

And this is the reason behind the appeal, the trial court erred by refusing to award reasonable attorney fees (and failed to consider penalties) to the person who prevailed in an action in the courts seeking the right to inspect or copy any public record.

The trial court's error can simply be reduced to failing to understand who the prevailing party is: the County sought to withhold the invoices; the County had to produce them to Mr. Eggleston. Under the *Woessner* test, Mr. Eggleston has prevailed: A party who wins disclosure of some, but not all, information sought, is a 'prevailing party' for purposes of awarding attorney fees and costs under the PRA. *Woessner*, 972 P.2d 932. (See also: *Limstrom v Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869

(1998), “[i]f the trial court determines that documents within the prosecutor’s files are subject to disclosure, then Mr. Limstrom is entitled to an award of attorney fees”.)

Mr. Eggleston is the prevailing party under the *Spokane Research* test: the term prevailing party “relates to the legal question of whether the records should have been disclosed upon request.” As the trial court ruled, “IT IS NOW ORDERED [] [t]hat the requested invoices, as redacted, be provided to Respondent.” (CP46) The County should have redacted and disclosed the records upon Mr. Eggleston’s request.

Mr. Eggleston is the prevailing party who obtained an affirmative ruling (two of them): “it is incumbent upon the county to provide the Court its requested redactions so that a determination can be made as to whether or not they are justified as work product or privileged information. In the alternative, the County may waive redaction and authorize the disclosure in its entirety.” (CP42) “The requested invoices, as redacted, [are ordered to] be provided to the Respondent.” (CP46).

As the prevailing party, Mr. Eggleston must be awarded his attorney fees. This Court should remand with instructions to award attorney fees and apply the Lodestar method of calculating them.

C. Penalties

As with the award of attorney fees, a party is entitled to an award of penalties of between \$0 and \$100 per day if the requesting party prevails in the litigation. RCW 42.56.550(4). The courts use the same standard for determining whether a party is a prevailing party for the award of penalties as they do for attorney fees.

The trial court's failure to recognize the requester as the prevailing party, and to conduct a proper analysis to determine what amount of penalties should be awarded is reversible error. This Court should remand with instructions.

D. Attorney Fees

Appellant hereby requests attorney fees pursuant to RAP 18.1 and RCW 42.56.550(4); which provides for an award of all costs and reasonable attorney fees to the prevailing requester.

The Washington Supreme Court has held that in a PRA case there is no difference between prevailing on appeal and at trial. *Sanders v State*, 169 Wn.2d 827, 870, 586 P.2d 1201 (1978). (See also: *Progressive Animal Welfare Society v Univeristy of Washington (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990); Deskbook, at §18.4). Mr. Eggleston should be

awarded his attorney fees at the trial court level, AND his attorney fees at the appellate level.

CONCLUSION

The reason the Public Records Act has a provision for prevailing requester to get attorney fees is to prevent public agencies from being able to raise the cost so high that a requester can't afford to request records. The games of hiding public records ended the day the Public Records Act was passed.

RP, p. 7, ll 13-18.

Mr. Eggleston made a simple request for records. The County chose to initiate litigation in an attempt to keep public records out of the hands of the public; and in the end was still required to disclose the records. The records should have been disclosed (with proper redactions) upon request; Mr. Eggleston prevailed in the court action by successfully defending his right to obtain the records.

The PRA mandates that the prevailing party be awarded "all costs, including attorney fees, incurred in connection with such legal action." The trial court erred in refusing to do so. The trial court must be reversed and this matter remanded with instructions to properly award attorney fees.

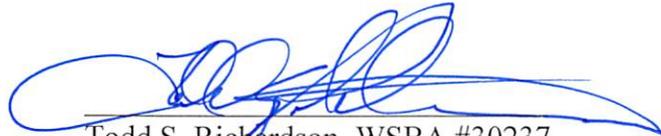
The PRA authorizes penalties for "each day that [the requester] was denied the right to inspect or copy said public record." The trial court

refused to consider the proper amount of an award. This matter should be remanded with instructions to consider the factors regarding penalties and make a determination about the proper amount of penalties that should be awarded.

For all of, and each of the foregoing reasons, this court must reverse the trial court and enforce the Public Records Act.

Respectfully submitted this 3rd day of May, 2018.

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