

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 80081-2

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COURT OF APPEALS NO. 57112-5
DONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

OFFICE OF RON SIMS, KING COUNTY EXECUTIVE, a subdivision
of KING COUNTY, a municipal corporation; THE KING COUNTY
DEPARTMENT OF FINANCE, a subdivision of KING COUNTY, a
municipal corporation; and THE KING COUNTY DEPARTMENT OF
STADIUM ADMINISTRATION, a subdivision of KING COUNTY, a
municipal corporation,

Petitioner

v.

ARMEN YOUSOUFIAN,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER KING COUNTY

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ORIGINAL

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I. OVERVIEW

The Washington State Legislature, in adopting a penalty provision for failure to comply with the Public Disclosure Act, mandated that the appropriate per-day penalty shall be determined at the discretion of the trial court. RCW 42.17.340(4), *recodified at* RCW 42.56.550(4). Such a legislative grant of discretion has always been understood to mean that the trial court's decision will not be overturned on appeal simply because the reviewing court disagrees with the conclusion of the court below.

In this case, the Court of Appeals failed to adhere to this basic principle and thus erred in two fundamental ways. First, by adopting and retroactively imposing new and binding penalty "guidelines," the appellate court improperly rewrote and limited the Legislature's broad grant of discretion to the trial court. Second, in applying the "guidelines" the appellate court failed to apply the abuse of discretion standard of review and improperly substituted its judgment for that of the trial court. The Court of Appeals decision below should be reversed and the trial court's penalty order on remand reinstated.

II. STATEMENT OF ISSUES

King County incorporates by reference the Issues Presented for Review as set forth in King County's Petition for Review, pages 1-3.

III. BACKGROUND

The factual and procedural background of this case is set forth in the prior court decisions and the briefing submitted by the parties and will not be repeated.¹ This is particularly appropriate because all but one of the primary issues in dispute have been resolved.² The only remaining issue is the validity of the \$15 per day penalty – which was multiplied by 8,252 days, for a total penalty award of \$123,780 – imposed by the trial court.

In determining whether the trial court abused its discretion in setting the per-day penalty, the question is whether the trial court based its decision on adequate and proper (i.e., not “untenable”) grounds. Thus, the relevant factual inquiry does not directly involve the merits of specific allegations relating to the County’s failure to produce records in a timely manner – which in any event King County no longer disputes – but whether these issues were fully presented to, and considered by, the trial

¹ In chronological order, the decisions below are: Judge Learned’s *Findings of Fact and Conclusions of Law*, dated 9-21-2001 (CP 29-59); *Yousoufian v. Office of Ron Sims, et al.*, 114 Wn. App. 836, 60 P.3d 667 (2003), *rev’d in part*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian I*); *Yousoufian v. Office of Ron Sims, et al.*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian*); Judge Hayden’s *Order on Remand*, dated 8-25-2005 (CP 123-128); *Yousoufian v. Office of Ron Sims, et al.*, 137 Wn. App. 69, 151 P.3d 243 (2007) (*Yousoufian II*). Additional background can be found in the briefing to the Court of Appeals and in King County’s Petition for Review and the Response and Reply thereto.

² The following issues are no longer in dispute: whether the PDA requires a penalty for each record, the trial court’s ability to group records, whether the trial court can reduce the penalty days based on unreasonable delays by the requester, and the appropriateness of the attorney fee award. *See generally Yousoufian*, 152 Wn 2d 421 (2004).

court. As the following excerpts from the trial court's *Order on Remand* make clear, Judge Hayden had a complete and nuanced understanding of the facts surrounding this dispute:

Although Judge Learned[']s] decision has been reversed in part, her factual findings were either unchallenged or affirmed on appeal and therefore form the basis for this court's ruling today.

...

Judge Learned was highly critical of the County's conduct throughout its response to the petitioner's PDA request. She concluded that the County had failed to demonstrate "a good faith effort... to read, understand and respond to Mr. Yousoufian's letter in a timely, accurate manner..." but she declined to find that the County had engaged in "intentional nondisclosure". She also concluded that the County had demonstrated a "complete lack of coordination... and effective oversight of this PDA request" and, finally, that the County was "negligent at every step of the way, and this negligence amounted to a lack of good faith."

The Court of Appeals agreed with Judge Learned that there was no suggestion that the County had intentionally withheld incriminating documents as had occurred in prior PDA cases. The Court concluded "that the County's violation of the PDA was due to poor training, failed communication and bureaucratic ineptitude rather than a desire to hide some dark secret contained within its files."

Additionally, the Court [of Appeals] found that the "factual and legal misrepresentations the County made were grossly negligent" and attributed the finding to Judge Learned's "characterization" of the County's conduct although the term "gross negligence" does not appear in the trial court order.

Order on Remand (CP 124-125) (citations omitted).

IV. ARGUMENT

A. **The Court of Appeals penalty “guidelines” are inconsistent with the PDA’s grant of discretion to the trial courts and with the case law.**

1. The legislature granted trial courts the discretion to determine the per-day penalty rate for PDA violations.

The primary responsibility of the courts in interpreting a statute is to discern and effectuate legislative intent. Doing so here is not difficult because the Legislature explicitly stated that it intended the per-day penalty rate to be determined at the discretion of the trial court:

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. In addition, *it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.*

RCW 42.17.340(4), *recodified at* RCW 42.56.550(4) (emphasis added).

The cases that have interpreted RCW 42.17.340(4) – prior to the Court of Appeals decision below – have respected this statutory language and refrained from imposing standards or criteria that limit the discretion of the trial courts. Instead, the appellate courts have appropriately chosen to enumerate factors that the trial court *may* weigh in deciding the penalty to be imposed. The principal, but not exclusive, factor is bad faith by the

agency in withholding a record. *See, e.g., Yousoufian II*, 137 Wn.2d at 429; *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 825 P.2d 324 (1992).

2. The Court of Appeals adoption of culpability “guidelines” undermines the grant of discretion to the trial courts.

Notwithstanding the fact that in *Yousoufian* this Court declined to impose criteria directing or limiting the trial court’s discretion, the Court of Appeals proposed a set of culpability “guidelines” (based on the Washington Pattern Instructions) intended to “provide trial courts the guidance they need to locate an agency’s conduct within the PDA penalty range.” *Yousoufian II*, 137 Wn.2d at 79-80. These “guidelines” are fundamentally inconsistent with the grant of legislative grant of discretion to the trial courts and with this Court’s prior rulings.

Most obviously, the PDA contains nothing remotely resembling the “guidelines” proposed by the Court of Appeals. Had the Legislature wanted or intended there to be a multi-tiered penalty grid for PDA violations, based on well-known principles of culpability, it could have easily enacted a statute that accomplished that result. It did not do so and the “guidelines” – however well-intended – are inconsistent with the existing statutory scheme.

Perhaps recognizing that it was infringing into the legislative realm, the Court of Appeals used the term “guidelines” and also “declined to attach a firm dollar amount” to its proposed degrees of culpability. Nevertheless, the Court of Appeals reversed the trial court because it relied on prior case law that had not considered the proposed “guidelines.” *Yousoufian II*, 137 Wn. App at 80-81. Clearly, the “guidelines” are not simply discretionary factors for the trial court.

Moreover, over time the proposed “guidelines” will necessarily become rules or mandates binding on the trial courts. Consider, for example, what might happen if the trial court on remand imposes a per-day penalty that the Court of Appeals does not believe satisfies its proposed “guidelines.” Applying the rationale of *Yousoufian II*, the appellate court will presumably remand until the dollar amount it deems “correct” is reached. The dollar amount that is ultimately approved will inevitably become the *de facto* standard (for example, all cases involving gross negligence must have at least a \$20 per day fine). This approach is fundamentally flawed because it creates and imposes standards not found in the statute. It also is an implicit holding that the trial courts do not have the discretion to impose the per-day penalty fee that they deem fit; but must comport with the Court of Appeal’s culpability “guidelines.”

The proposed “guidelines” are also inconsistent with this Court’s prior rulings (and indeed with the approach taken by all other courts on this issue). A review of *Yousoufian* makes it clear that the majority rejected the suggestion that it should impose any additional factors – let alone mandatory standards or guidelines – on the trial court. This is most clearly seen in the majority’s unwillingness to adopt even the specific factors offered by Justice Sanders in his dissent. The “guidelines” are not consistent with *Yousoufian*’s holding that the trial court has discretion to set the per-day penalty rate. See *Yousoufian*, 152 Wn.2d at 430-31, 436-35, 438-39.

In fact, the Court of Appeals misinterpreted *Yousoufian* in seeking justification for adopting the “guidelines.” *Yousoufian* held that the principal factor for the trial court to consider was *bad faith*. *Yousoufian*, 152 Wn.2d at 435-36. Instead of focusing on bad faith, the Court of Appeals focused on the term “culpability” – which was used in passing by the Court in discussing a different issue.³ See *King County’s Petition for Review*, p 14-16. *Yousoufian* certainly did not endorse a new “guideline” scheme along the lines of that adopted by the Court of Appeals.

³ Bad faith and culpability as defined by the Pattern Jury Instructions are not the same. For instance, a party may act with deliberate intent to withhold a record, while also acting in good faith. The Court of Appeals “guidelines” offer no help in resolving this discrepancy.

The Court of Appeals also contended that it was free to adopt its own “guidelines” because it was not adopting the specific factors proposed in Justice Sanders dissenting opinion.⁴ *Yousoufian II*, 137 Wn. App at 77-78. But it does not follow that because the majority rejected certain factors that the adoption of a different set of factors is appropriate. The courts have wisely refrained from imposing limits on the discretion of the trial courts to set penalties under the PDA and should continue to do so.

3. Legislative acquiescence to the Yousoufian decision confirms the broad grant of discretion to the trial courts.

The doctrine of legislative acquiescence provides evidence that the Legislature did not intend to limit the trial court’s discretion to determine PDA penalties.⁵ *Yousoufian* was finalized on January 25, 2005. Shortly

⁴ These factors included: “(1) the extent of any intent to withhold documents the agency knows are subject to disclosure, (2) the agency’s failure to adopt and maintain a reasonable indexing system to ensure prompt compliance with the PDA’s requirements, (3) the degree of public concern affected by the disclosure of the documents, (4) the need to deter future violations, (5) whether the agency acted in good faith relying on an exemption to the PDA’s requirements or the extent of the agency’s diligence to comply with the PDA request, and (6) any economic loss suffered by the litigant. *Yousoufian*, 152 Wn.2d at 446-47 (J. Sanders dissenting in part).

⁵ Pursuant to the established principle of “legislative acquiescence,” the legislature is presumed to be familiar with judicial decisions that interpret its enactments. *In re King County for the Foreclosure of Liens for Delinquent Real Property Taxes v. King County*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991). This rule of statutory construction provides that “the Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision.” *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988); see also *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) (“legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction”).

thereafter, the Legislature amended the PDA penalty provision, effective July 24, 2005, adopting a one-year statute of limitations for claims under the PDA. *See* Laws 2005 c 483 § 5; *former* RCW 42.17.340(6) (2005). This was a clear response to the *Yousoufian* Court's holding that the only limit on the number of penalty days was the five-year statute of limitations. *Yousoufian*, 152 Wn.2d at 433.

Significantly, the Legislature chose *not* to amend the PDA to incorporate the penalty factors proposed by the plaintiffs (and endorsed in Justice Sanders' dissent). Likewise, the Legislature did not seek to reverse or modify the Court's holding that the appellate courts should not subject penalty awards to *de novo* review or that the proper standard of review was abuse of discretion.

Given that the Legislature amended the PDA to correct what it perceived as a post-*Yousoufian* problem, it is significant that it did not reject the Court's other holdings. The Legislature could have adopted additional standards to guide the trial courts, legislatively changed the abuse of discretion and *de novo* review standards, made the penalty award a percentage of the agency budget, required the trial court to use \$52.50 as the starting point for all penalty awards, or even done away with the specific grant of discretion to the trial courts altogether. The fact that the

Legislature did not do so is evidence that it fully intended to leave the discretion to determine penalty awards with the trial courts.

4. The Court should adopt a holding that recognizes the trial courts' broad discretion to determine PDA penalties.

King County requests that this Court adopt a holding that reflects the broad grant of discretion given by the Legislature to the trial courts to determine per-day penalties under the PDA. While the appellate courts may from time to time choose to enumerate factors that the trial courts may consider, it should remain the responsibility of the trial court to determine which factors are relevant, and what relative weight to assign to each factor under the facts in a given case.

The Legislature has chosen *not* to impose specific standards, factors, guidelines, or rules (other than the minimum and maximum per-day penalty) governing the trial court's discretion to set the penalty rate. The Legislature appropriately recognized that there are many possible factors that, in any given case, might be relevant in determining a penalty award. Rather than try to enumerate these factors – tying the hands of the trial court and creating additional potential grounds for appellate review – the Legislature elected to leave the factors to be considered to the trial court's discretion. This Court should embrace the same approach.

The Court should reject the suggestion that the trial courts need any more guidance in setting penalty rates. Trial courts are routinely granted discretion in addressing a wide-variety of issues and are competent and capable of handling this responsibility. Trial courts already understand what is meant by bad faith; requiring that they also consider principles of culpability adds little, if anything, to the analysis.

Significantly, leaving discretion in the hands of the trial court is *neutral* as regards future penalty awards. Engaging in a guessing game as to which factors might be “good” or “bad” in future cases is futile. It is impossible to predict whether the imposition of a certain standard or factor will benefit or hurt a party. Leaving the question of which factors to apply, and which to ignore, to the sound discretion of the trial court is the only way to ensure that fair, case specific penalties will be imposed.

The determination of the appropriate penalty rate *should focus on facts and actions, not labels*. Indeed, a basic shortcoming of the proposed “guidelines” is that an after-the-fact label (such as negligence, gross, negligence, reckless, or intentional) will substitute for a careful evaluation of the evidence. Once the trial court has evaluated the “myriad” of possible facts – some of which involve culpability and some of which do

not – and established an appropriate penalty award, putting a culpability label on the result adds nothing to the analysis.

The futility of the “labeling” approach is amply demonstrated by Yousoufian’s latest argument that King County’s actions should be described as “wanton” and the penalty award increased. The proposed labels only add another issue to be resolved on appeal; they do not change the facts upon which the trial court must exercise its discretion. Moreover, the culpability labels invite the appellate court to second-guess the decision below and introduce factors (including a host of legal standards) that are not found in the PDA.

Should this Court desire to provide additional guidance to trial courts to determine PDA penalties, it can do so by enumerating additional factors for consideration, not by accepting the categorical “guideline” approach of *Yousoufian II*. Almost invariably, when the Legislature or appellate courts provide guidance for trial courts to exercise discretion, they do so by enumerating factors for the trial court to consider.⁶ A

⁶There are far too many examples for King County to provide a complete listing here. For a partial illustration, see, e.g., *In re Marriage of Rockwell*, 141 Wn. App. 235, 255, 170 P.3d 572 (2007) (distribution of marital property); *State v. Halsey*, 140 Wn. App. 313, 326, 165 P.3d 409 (2007) (sentencing decisions in criminal cases); *TMT Bear Creek Shopping Center, Inc. v. Petco Animal*, 140 Wn. App. 191, 200-201, 165 P.3d 1271 (2007) (setting aside default judgments); *In re Hegney*, 138 Wn. App. 511, 529 note 8, 158 P.3d 1193 (2007) (juvenile court transfers of jurisdiction); *Sales v. Weyerhaeuser*, 138 Wn. App. 222, 230, 156 P.3d 303 (2007) (determination of proper forum); *In re Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993) (child placement).

factor-based analysis has been used for penalty decisions under the PDA since at least 1992. *See Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992). There is no compelling reason to change this approach.

In sum, the Legislature understood that there are a myriad of factors that go into a penalty award and that the trial court is in the best position to determine which factors are relevant, and the weight to be given to each in a given case. There is no need to graft new judicially-created penalty “guidelines” onto the PDA and doing so only undermines the Legislative intent:

B. The Court of Appeals failed to apply the abuse of discretion standard and improperly substituted its judgment for that of the trial court.

1. The proper standard of review is abuse of discretion.

The proper standard of appellate review of a per-day penalty imposed under RCW 42.17.340(4) is whether the trial court abused its discretion. This was clearly established in *Yousoufian*:

[T]he PDAs penalty provision clearly grants the trial court “discretion” to determine the appropriate per day penalty, and this grant of discretion is only meaningful if appellate courts review the trial courts imposition of that penalty under an abuse of discretion standard of review.

Yousoufian, 152 Wn.2d 421 at 430-31 (emphasis added). The Court went on to analyze *King County v. Sheehan* with approval:

[In] *Sheehan* . . . the Court of Appeals held that under RCW 42.17.340(4) an appellate courts “function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, *not to exercise such discretion ourselves.*” There the court reasoned that the PDA “grants discretion to the trial court, not to this appellate court, to set the amount of the penalty within the minimum and maximum ranges.”

....

We agree with the analysis the Court of Appeals set forth in *Sheehan* and conclude, therefore, that the trial courts determination of appropriate daily penalties is properly reviewed for an abuse of discretion.

Yousoufian, 152 Wn.2d 421 at 430-31 (emphasis added) (citing *King County v. Sheehan*, 114 Wn. App. 325, 350-51, 57 P.3d 307 (2002)).

The test for abuse of discretion is not whether the appellate court might or even would have ruled the other way. *Coggle v. Snow*, 56 Wn. App. 499, 506-07, 784 P.2d 554 (1990). In numerous contexts the courts have defined the abuse of discretion standard as follows: An abuse of discretion is present only if there is a clear showing that the exercise of discretion was *manifestly unreasonable, based on untenable grounds, or based on untenable reasons.* See, e.g., *Coggle v. Snow*, 56 Wn. App. at 506-07 (custody hearing), *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (contempt rulings); *Schumacher v. Watson*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000) (child support); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (prior misconduct evidence).

One commentator has had the following to say about the general topic of judicial discretion:

If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, *it is the idea of choice*. To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another....

.... [Discretion] can usefully be referred to as *primary* and *secondary*.

When an adjudicator has the primary type, he has decision-making discretion, *a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process....*

The other type of discretion, the secondary form, has to do with hierarchical relations among judges... Specifically, it comes into full play when *the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision*. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal.

Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L.REV. 635, 636-37 (1971) (emphasis added).⁷

2. The Court of Appeals did not apply the abuse of discretion standard.

The Court of Appeals failed to apply the abuse of discretion standard. Instead, the court reversed on the following grounds:

⁷ This article has been quoted with approval in a number of Washington cases. *See, e.g., In re Jannot*, 110 Wn. App. 16, 19, 37 P.3d 1265 (2002), which contains an excellent overview of the function and purpose of judicial discretion.

In reaching its decision, the trial court relied heavily on a prior decision from this court, *ACLU v. Blaine School District No. 503*. However, *Blaine did not apply the approach we set forth here*. Here, the Court of Appeals and the Supreme Court characterized King County's conduct as grossly negligent. In light of this finding, a penalty at the low end of the statutory range is unsustainable. We thus reverse and remand to the trial court for a determination of an appropriate penalty that is consistent with this opinion.

Yousoufian II, 137 Wn. App. 69 (footnotes omitted, emphasis added).

This is not applying the abuse of discretion standard. Rather, it is reversing under a new standard of review: whether the trial court complied with "guidelines" not previously articulated by the appellate courts. At no point did the Court of Appeals analyze the grounds on which the trial court had based its penalty award and find them "untenable." Nor did the Court of Appeals analyze the trial court's reasoning, which flowed from an analysis of previous appellate decisions, and conclude that it was flawed (except to summarily state that the previous decisions did not follow the newly-minted "guidelines").

At best it appears that the Court of Appeals simply felt the trial court's per-day award was inadequate. If the Court of Appeals concluded that the penalty award was "manifestly unreasonable" it should say so. But absent a more detailed analysis, this Court of Appeals appears to have simply substituted its *de novo* judgment for the trial court's judgment. As

this Court recognized in *Yousoufian*, this is not the proper function of the appellate courts on review. *Yousoufian*, 152 Wn.2d at 430-31. Absent a proper finding that the trial court abused its discretion, the Court of Appeals decision should be reversed.

3. The trial court did not abuse its discretion in setting the per-day penalty rate at \$15.

The trial court established a penalty rate of \$15 per day. Multiplying this by 8,252 days (the number required by *Yousoufian*) the trial court obtained a total penalty award of \$123,780. While King County generally relies on its briefing and below to support its position that this rate was appropriate, a few key points are highlighted here.

First, while there is an ongoing dispute about whether “gross negligence” is the law of the case, this issue is effectively moot because the trial court clearly understood that it was applying the gross negligence standard.⁸ On remand, Judge Hayden explicitly stated that the appellate courts had characterized the County’s actions as grossly negligent and that this was the standard he had to apply. CP 124-25. Indeed, it was Judge

⁸ Judge Learned, in her original findings, was careful never to conclude that King County was grossly negligent. That characterization was subsequently made on appeal and the Court of Appeals concluded it is the “law of the case.” As noted in prior briefing, the appellate court’s determination on this question is not binding when it is clearly erroneous and works a manifest injustice to King County and should be set aside. See RAP 2.5(c)(2); *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

Hayden who pointed out that, in determining the penalty rate, it was appropriate to use the definition of gross negligence as set forth in the Washington Pattern Instructions. *Yousoufian II*, 137 Wn. App. at 78.⁹ Judge Hayden, in exercising his discretion to set the penalty rate, was applying the gross negligence standard assumed by the appellate courts. In doing so he complied with the appellate court's directive and was not abusing his discretion.

Second, the trial court has the discretion to modify the per-day penalty award to mitigate for delays in bringing a claim under the PDA that created an exceptionally long penalty period. In *Yousoufian*, this Court stated unequivocally that while the "PDA does not contain a

⁹ This point was clearly made in the Court of Appeals opinion, which stated:

On remand, the trial court correctly pointed out that missing from the opinions of the appellate courts was a definition of what gross negligence was and suggested *that such a definition would be a logical place to start in determining King County's degree of culpability*. The trial court stated:

I think before you start telling us that the Court of Appeals was wrong in recharacterization, we ought to look at the definitions of what gross negligence is.

If we're going to say the finder of fact misapplied the evidence to the law, then what was the law they were dealing with in terms of the definition of gross negligence?

Court of Appeals didn't address it, Supreme Court didn't address it. Certainly, if this had been a jury trial, and I was asking a jury to apply the law to the facts, I would tell them what the law is, including the definition of gross negligence.

The trial court then suggested that the Washington Pattern Jury Instructions (WPI) might be a good place to find a definition of gross negligence.

Yousoufian II, 137 Wn. App. at 78 (emphasis added).

provision granting the trial court discretion to reduce the penalty period. . .
*the trial court could utilize its discretion by decreasing the per day penalty
during the period...*” *Yousoufian*, 152 Wn.2d at 437 (emphasis added).

To the extent that the trial court concluded that Yousoufian waited delayed
in filing his claims, it had the discretion to lower the per-day penalty rate
accordingly.

Finally, the law of the case – binding on the trial court – was that
the principal factor it had to consider was whether King County acted in
bad faith. The original trial court found that the County had *not* acted in
bad faith, a point reiterated in *Yousosufian*. CP 45-47; *Yousoufian*, 152
Wn.2d at 426-27. After reviewing the evidence, the trial court imposed
what was then the largest penalty in the history of the PDA. The award
was made to a requester who showed no economic loss and in the absence
of any tangible evidence of harm to the public. CP 55. In these
circumstances, the trial court’s decision to impose a penalty award of
\$123,780 is not manifestly unreasonable.

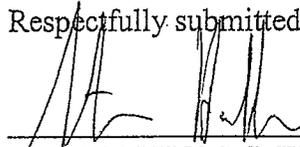
V. CONCLUSION

For the foregoing reasons, King County respectfully requests that
this Court reverse the decision of the Court of Appeals and reinstate the
decision of the trial court on remand.

DATED this 8th day of February, 2008.

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Respectfully submitted



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