No. 42712-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN D. FRANCIS,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

SHAWN D. FRANCIS
Appellant, Pro se
Stafford Creek Corrections Center
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Aberdeen, WA 98520

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I. INTRODUCTION

Based upon the fact that November 11, 2011, was a National Holiday (Veteran's Day), for purposes of RAP 5.2, Appellant Francis concedes herein that DOC's motion for cross-appeal was timely filed.

Furthermore, in light of this Court's recent decision in West v. Thurston County, No. 41085-1-II, Appellant Francis concedes, herein, only to the portion of DOC's argument asserting that he is not entitled to pro se attorney's fees, or paralegal fees, on appeal. West v. Thurston County, No. 41085-1-II, 2012 VL 0000562 at ¶ 122 (Wash.Ct.App.Div. II, May 8, 2012);[1] Respondent/Cross-Appellant's Brief at 23-24, & 21-22.

These are the only two arguments, advanced by Respondent/Cross-Appellant Department of Corrections, in its briefing, to which Appellant Francis offers concession to.

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[1] "VL" hereinafter refers to Versus Law.

II. ARGUMENTS

A. The Trial Court Properly Exercised Its Considerable Discretion In Incorporating The Sixteen *Yousoufian* Factors Into Its Determination Of Bad Faith Under The PRA.

DOC alleges that the trial court improperly incorporated the Yousoufian factors into its determination of "bad faith". Respondent/Cross-Appellant's Brief at 11-15. However, Appellate Courts frequently set forth multifactor frameworks to provide guidance to trial courts exercising their discretion so as to render those decisions consistent and susceptible to meaningful appellate review. Yousoufian V, 168 Wn.2d 444, 229 P.3d 735 (2010), 2010 VL 0000390 at ¶ 53 (citing Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 595, 675 P.2d 193 (1983)(adopting an analytical framework to calculate reasonable attorney fees under the Consumer Protection Act, chapter 19.86 RCW); Glover v. Tacoma General Hospital, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)(identifying factors as proper considerations for trial judges to use in determining whether settlement agreements involving multiple defendants and contributory fault are "reasonable" under RCW 4.22.060)). Such frameworks are appropriate where a statute affords discretion to trial judges but fails to adequately guide how such discretion should be exercised. Yousoufian V, id., 2010 VL 0000390 at ¶ 53 (citing Bowers, 100 Wn.2d at 594 (noting the Consumer Protection Act "provide[d] no

specific indication of how attorney fees [were] to be calculated," but exorted to courts "to liberally construe the act.")).

It is well established that the Public Records Act ("PRA") is a strongly worded mandate which must be liberally construed in order to reach its intended purpose. RCW 42.56.030; RCW 42.56.100; see also Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); Progressive Animal Welfare Soc. v. University of Wash., 114 Wn.2d 677, 682, 790 P.2d 604 (1990); A.C.L.U. of Wash. v. Blaine School District, 86 Wn.App. 688, 693, 697-98, 937 P.2d 1176 (1997). Moreover, trial courts are given "considerable discretion" when considering factors that will aide in its decision to impose or deny penalties. Yousoufian V, 168 Wn.2d at 468.

"Bad faith" is a "principal" factor in a trial court's determination of agency culpability, and as such, is inherently inclusive in its determination whether or not to impose any penalty award at all.[2] Yousoufian V, id. at 460-63, 467. The broad discretion afforded to trial courts under the PRA allows the trial court to incorporate factors found from the circumstances of each case when making its own determination of "bad faith". See Neighborhood Alliance v. Spokane County,

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[2] In 2011, the Legislature removed the mandatory minimum $5 per-day penalty provision under the PRA; RCW 42.56.550(4), Laws of 2011, ch. 273, § 1.

172 Wn.2d 701, 719, 261 P.3d 119 (2011). It is not reflective of such "considerable discretion" to now ask this Court, as DOC requests, to limit the trial court in how it arrives at its determination of bad faith.

In its brief, DOC seems to suggest that the determination of bad faith and consideration of the Yousoufian factors should somehow be bifurcated. Respondent/Cross-Appellant's Brief at 12.[3] In support of their position, DOC proffers that the sixteen factors, outlined in Yousoufian, were designed exclusively for the "sole purpose" of determining *only* the *amount* of the penalty. Respondent/Cross-Appellant's Brief at 1, & 12. However, DOC provides no rationale, or authority, in support of their argument. West v. Thurston County, supra, 2012 VL 0000562 at ¶ 123 ("having citing no authority to support this argument, we do not further consider it."); see also Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290 (1998)("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). Nevertheless, DOC misreads into the intent of the Washington Supreme Court when they established the Yousoufian factors. "Bad faith" ultimately goes to the determination of *culpability*, of which penalties are meant to reflect. Neighborhood Alliance,

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[3] It should be noted that, in the instant case, the trial court first concluded its determination of bad faith before advancing to its penalty determination. RP 8-9.

supra, 2011 VL 0001292 at ¶ 40.

In setting these sixteen *non-exclusive* factors, the Supreme Court emphasized that they were "offered only as guidance", so that trial courts would have an idea as to the type of factors it should consider in its determination of an agency's culpability. Yousoufian V, 168 Wn.2d at 468. Furthermore, that these factors "should not infringe upon the *considerable discretion* of trial courts." Id. (emphasis added).

In offering its guidance, the Supreme Court did not limit the trial court to only those sixteen factors, nor did it limit each factor to its own separate definition. Id. (providing that factors may "overlap"). This would suggest that a trial court may properly determine many of the factors to be inherently encompassed within the meaning of eachother - i.e., that many of the aggravating factors would be included, or rooted, within a determination of bad faith.

In choosing to regard "bad faith" as a "principal" factor, the Yousoufian Court's intent is manifest - that the existence, or absence, of an agency's bad faith is synonymous with the issue of penalties. As such, "bad faith" is properly determined during the penalty assessment, and in consideration with the other Yousoufian factors. Yousoufian V, 168 Wn.2d at 460-63, 467; see also Amren v. City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997); West v. Thurston County, No. 41085-1-II, 2012 VL 0000562 at ¶ 101 (Wash.Ct.App.Div. II (2012).

In relying on the Yousoufian factors, the trial court, in the instant case, stated that "it gives the Court some *guidance* in determining what bad faith actually is." RP 4 (emphasis added). Therefore, in the absence of a definition of "bad faith", under the Public Records Act, the trial court here properly exercised its considerable discretion when adopting many of the Yousoufian aggravating factors in its determination of bad faith.

With liberal construction as a prominent theme of the Act, the mandate for liberal construction can be most fully implemented where matters are left to the discretion of the Court. Accordingly, this Court need not address DOC's embodied argument requesting this Court to impose a narrow and constricted interpretation of the term "bad faith".

B. The Public Records Act "Bad Faith" Provision Is Ambiguous, Therefore, The Technical Definition of "Bad Faith" Applies.

Washington case law provides little precedent for what constitutes "bad faith". Contrary to DOC's misleading claim, there exists no "historical definition" of "bad faith" under the Public Records Act. Respondent/Cross-Appellant's Brief at 2. In fact, the 2011 amendment to RCW 42.56.565(1), pertaining to inmate plaintiffs, fails to provide any definition for the term "bad faith", for purposes of the Act.

In the absence of such a definition, DOC improperly suggests that the recognized standard is to revert to the Federal Freedom of Information Act ("FOIA"), as well as to state cases outside the context of the PRA, for guidance in interpreting the Act's ambiguity regarding "bad faith". Respondent/Cross-Appellant's Brief at 14-15. However, in this case, DOC is incorrect.

1. The FOIA Has No Comparable "Bad Faith" Counterpart.

When attempting to interpret an ambiguous provision under the PRA, Washington Courts will often defer to judicial interpretations of the FOIA, so long as the statutory scheme is comparable. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 580 P.2d 246 (1978). However, often times what is relevant in a PRA

action will differ from that in an FOIA action, because a PRA action will involve issues not implicated by FOIA actions. Neighborhood Alliance, supra, 2011 VL 0001292 at ¶ 39. Therefore, when provisions of the PRA differ significantly from its FOIA counterpart, or if there simply is no comparable FOIA counterpart, Washington Courts will disregard FOIA cases when interpreting the Public Records Act. A.C.L.U. of Wash. v. Blaine School District, supra, 2012 VL 1067850 at ¶ 36-38 (1997); see also Kleven v. City of DesMoines, 111 Wn.App. 284, 44 P.3d 887 (2002), 2002 VL 0000602 at ¶ 28.

In the instant case, the FOIA is not analogous. The PRA includes both a statutory penalty provision, and a statutory requirement of "bad faith", whereas, the FOIA has neither. Neighborhood Alliance, supra, 2011 VL 0001292 at ¶ 39. Because the FOIA has no similar penalty provision, nor does it have a similar "bad faith" provision, the FOIA does not provide any guidance as to what constitutes "bad faith" under the PRA. See Hearst Corp. v. Hoppe, 90 Wn.2d at 129. Accordingly, the FOIA is inapposite.

2. Non-PRA State Cases Do Not Offer Proper Guidance In Interpreting The PRA.

DOC relies on state cases outside the context of the PRA in order to limit the definition of "bad faith". However,

because these cases fall outside the scope of the PRA, they are not comparable for similar reasons the FOIA is not comparable.

First, these non-PRA cases do not entail dispute over a mandatory provisional scheme regarding bad faith, and as such, there is no statutory definition embodied therein. Moreover, PRA cases are not subject to the level of scrutiny that may be required in non-PRA litigation, the PRA is subject to liberal interpretation in favor of the requestor. RCW 42.56.030.

Next, in attempting to offer precedent, DOC ignores the plain language of the PRA, and conflates the common and technical meanings of "bad faith". In its briefing, DOC proffers that "bad faith" misconduct can only be construed as acts of "improper motive", "[intentional] fraud", or "sinister motive". Respondent/Cross-Appellant's Brief at 13-14. With this, it appears as though DOC is merely cherry picking phrases in order to limit the definition of bad faith to their liking. In doing so, DOC relies on Wright, in which DOC refers to only *one* of three categories of conduct that federal courts have recognized as "bad faith", in the specific context of improper judicial practices. Respondent/Cross-Appellant's Brief at 13.[4] However, to the contrary, not one

[4] Wright cites Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn.App. 918, 927, 982 P.2d 131 (1999)(also cited in Respondent/Cross-Appellant's Brief at 13) which derives its guidance from federal case law regading attorney fees.

Washington Court has ever deferred to a non-FOIA case when interpreting a PRA statutory provision.

In a more sensible analogy, when defining "bad faith" in insurance litigation, Washington Courts have required the insured to show that the insurer's misconduct was either: (1) unreasonable, (2) frivilous, *or* (3) untenable. Matsyuk v. State Farm Fire & Casualty Co., 155 Wn.App. 324, 229 P.3d 883 (2010), 2010 VL 0000389 at ¶ 43 (citing Liberty Mutual Ins. Co. v. Tripp, 144 Wn.2d 1, 23, 25 P.3d 997 (2001)). In the instant case, DOC could not possibly expect that by failing to search areas where records are commonly known to be, this would, in fact, produce the records requested. Its counter-productive, you don't get lemonade without squeezing some lemons. DOC's actions clearly establish unreasonableness.

3. The Proper Standard For Defining "Bad Faith".

Should this Court deem it necessary to analyze the trial court's finding of bad faith in this case, and interpret the PRA's ambiguous "bad faith" provision, the proper standard of review is to give the undefined phrase its "plain, ordinary, and popular meaning." Boeing Company v. Aetna Casualty & Surety Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990)(internal quotations ommitted)(quoting Farmers Ins. Co. v. Miller, 87

Wn.2d 70, 73, 549 P.2d 9 (1976).

When determining the ordinary meaning of a statute's undefined term, courts will look to standard English language dictionaries. Id. However, when an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference, and has a well-accepted meaning with the industry, courts will turn to the technical, rather than general purpose, dictionary to resolve the word's definition. City of Spokane v. Dep't of Revenue, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002); Whidbey General Hospital v. Dep't of Revenue, 143 Wn.App. 620, 180 P.3d 796 (2008), 2008 VL 0000401 at ¶ 33-34. Therefore, in staying consistent with this Court's prior published and unpublished rulings, this Court should again turn to the *Black's Law Dictionary* in recognizing the numerous types of conduct that could qualify as "bad faith" under the PRA's ambiguous provision.

The *Black's Law Dictionary* provides an expanded definition of the term "bad faith", which explains:

> "A complete catalog of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, *lack of diligence and slacking off, willful rendering of imperfect performance,* abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

Black's Law Dictionary 149 (8th ed. 2004)(quoting Restatement (second) of Contracts § 205 cmt.d, (1979))(emphasis added).

Black's definition includes "lack of diligence and slacking off", as well as a "willful rendering of imperfect performance". In this case, Francis' request was shuffled through seven agency employees. Between all seven, less than 15 minutes of attention, in total, was accorded to Francis' request. Moreover, DOC's failure to search any of the 18 common record locations was knowing and willful. Even if DOC were to allege that their agents were not initially aware of these common record retrieval locations, that argument would fail, as they immediately became aware of such locations upon filling out the Routing Slip prior to providing Francis with their response. See Brief of Appellant, at 14-15, & Exhibit A. Adding insult to injury, while armed with this knowledge, DOC asserted that no responsive records existed, thereby, misleading Francis to assume that DOC had conducted a reasonable search for the records he requested.[5] Respondent/Cross-Appellant's Brief at 5 ("Mr. Lorentson had initially been informed that McNeil Island Corrections Center did not have responsive documents."). DOC contends that this informing was "[initial]", yet it took over a year before any significant search effort began. Moreover, this search effort only began after Francis was finally compelled to file suit in order to obtain the records he sought.

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[5] The *Public Disclosure Routing Slip* is signed, stating that a "thorough staff search" was conducted. Brief of Appellant at Exhibit A.

After filing suit, Mr. Lorentson attempted to appease Mr. Francis by sending him *revised* records, which, although they seemed similar to what Francis had requested, they were not the records he specifically sought. DOC's argument is misleading, in that, they suggest the documents Mr. Lorentson sent to Francis, on July 21, 2010, were "responsive", when in fact, they were not. Respondent/Cross-Appellant's Brief at 5; see also Brief of Appellant at 5. The documents sent by Mr. Lorentson on July 21, 2010 were created nearly one year after Francis submitted his June 19, 2009 request, and therefore, could not have been responsive. Respondent/Cross-Appellant's Brief at Appendix 56-66.

Francis then submitted formal discovery. On September 21, 2010, after DOC's response to Francis' first set of discovery, Francis sent an informal letter to DOC's attorney stating that they had "still not sent the MICC Operational Memorandum... that had been in effect at the time of Mr. Francis' [June 19, 2009] request."[6] DOC simply ignored this letter. After waiting nearly 5 more months for DOC to acknowledge his September letter, he was forced to file a second set of formal discovery.

Finally, nearly one year after filing this lawsuit,

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[6] When Respondent's attorney - Andrea Vingo (A.A.G.) - filed her Notice of Appearance in this matter, she directed Francis that any further correspondence with DOC was to be conducted through her. Moreover, the September 21, 2010 letter is not disputed by Respondent.

after two sets of formal discovery, after informal requests, and nearly two years after making his original request, did DOC finally provide Francis with the records he requested.

This is not a case of negligent oversight, DOC simply conducted no search for records prior to Francis filing suit. DOC initially treated Francis' request as some sort of bothersome inconvenience. In attempting to curtail their response efforts, DOC simply "rubberstamped" Francis' request and displayed total disregard for the duties required of them under the PRA. RP 6. Surely, DOC's actions exhibit a "willful" and "knowing" element, on numerous occasions, to circumvent the strict duties imposed upon them under the law. Although there may not exist any "sinister" motive or design, the PRA does not limit its bad faith provision so narrowly. DOC's conduct easily equates to a *"lack of diligence and slacking off"*, and also a *"willful rendering of imperfect performance"*, as defined under the *Black's Law Dictionary* technical definition of "bad faith". Supra.

In the absence, under the Public Records Act, of a definition of "bad faith", and because *Black's* provides a well accepted meaning of "bad faith", within the legal industry, this Court should adopt the *Black's* definition of "bad faith" for purposes of the Act's undefined provision. RCW 42.56.565(1); City of Spokane, 145 Wn.2d at 454.

Accordingly, in recognizing the liberal theme of the Act, this Court should decline to adopt DOC's constricted and narrow interpretation of bad faith for purposes of the PRA. Leaving interpretation of the Public Records Act to those at whom it was aimed would be the most direct cause to its devitalization. Does v. Bellevue School District #405, 129 Wn.App. 832, 120 P.3d 616 (2005), 2005 VL 0001550 at ¶ 81 (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978)).

C. The Low Per-Day Penalty For DOC's Bad Faith And Gross Negligence Does Not Properly Reflect Established Precedent.

With some apparent pride, DOC claims that their response, effortless as it was, was "prompt" and in "good faith". Respondent/Cross-Appellant's Brief at 19.[7] This claim is unfounded, considering that it took DOC two years before finally providing Francis with the responsive documents, and considering the trial courts finding of bad faith. Supra. Moreover, not once, in the trial court's findings, did the court mention the term "good faith" as being reflective of DOC's conduct prior to litigation. Supra. It was only after Francis filed this lawsuit, on June 30, 2010, did the wheels at DOC slowly begin to turn. At that point, DOC began to somewhat follow the procedure that could and should have been employed in 2009. Nothing in the record supports DOC's claim that their response was "prompt" or in "good faith". To the contrary, the trial court found "that there was a delayed response of the agency", and that there was "sufficient bad faith to award damages." RP 5; RP 8-9.

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7 DOC suggests that it acted in good faith by providing the documents to Francis "at no expense." Respondent/Cross-Appellant's Brief at 19. However, these documents were provided in response to formal discovery requests, and as such, discovery is not subject to pre-payment. DOC could not charge Francis as a prerequisite for compliance with the rules of discovery.

DOC further alleges that the record fails to indicate any attempt by DOC "to avoid the inconvenience of complying with the PRA", or to "inconvenience Mr. Francis". Respondent/ Cross-Appellant's Brief at 19. Once again, DOC neglects to accept responsibility for its willful failure to perform any sort of records search, and for dragging out Francis' request for two years. Would this not equate to a notable failure to comply,[8] moreover, a lengthy inconvenience to Mr. Francis?

Some of the aggravating factors, and many of the mitigating factors were not applicable to this case, in one way or the other. Yousoufian V, 168 Wn.2d at 468 ("factors... may not apply equally or at all in every case..."). The factors that were found by the trial court are listed below.

1. Mitigating Factors

In applying the Yousoufian mitigating factors here, the Superior Court found that: (1) there was no lack of clarity in Francis' request [9] (RP 8); (2) DOC was helpful by continuing a "constant dialogue" (RP 8); and (3) DOC did not provide any unreasonable explanation[10] (RP 6).

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8 The trial court found that "there was a lack of strict compliance by [DOC] with *all* the PRA requirements". RP 5 (emphasis added)

9 Francis posits that becuase the request was clear, this is an aggravator for purposes of penalty consideration.

10 It should be noted that DOC did not provide any explanation whatsoever for its non-compliance, therefore, this mitigator is not applicable to this case.

2. Aggravating Factors

In applying the Yousoufian aggravating factors here, the Superior Court found that: (1) "there was a delayed response" by DOC (RP 5); (2) DOC demonstrated a "lack of proper training" (RP 5,6); (3) DOC demonstrated a lack of supervision (RP 5,6); (4) DOC demonstrated "*gross* negligence in how they responded" (RP 6)(emphasis added); (5) "there was a lack of strict compliance with *all* the PRA requirements" (RP 5)(emphasis added); and (6) DOC demonstrated "bad faith" throughout its response (RP 8-9).

At issue here is whether the per-day penalty reflects DOC's level of culpability, as determined by the trial court. Prior to making its determination, the trial court recognized the "high standard established of bad faith." RP 3. Therefore, it is clearly established that, in finding the existence of bad faith, the trial court recognized DOC's culpability in this matter to be quite high.

In its briefing, DOC has not cited to a single case, in which a court found an agency's level of culpability to rise to that of bad faith, yet merited a low-end penalty scale assessment. In striking contrast, and in much less egregious circumstances, many courts have assessed higher penalties despite lower levels of agency culpability.

In a recent case, this Court upheld a PRA penalty award of $90 per-day in a case where the trial court failed to find the existence of bad faith against the liable agency. Bricker v. Dep't of L & I, 164 Wn.App. 16, 262 P.3d 121 (2011), 2011 VL 0001256. In Bricker, after finding the Department of Labor and Industries liable for violating the Public Records Act, during its penalty assessment, the trial court concluded that there didn't exist any bad faith, dishonesty, or intentional non-compliance by L&I, yet, it imposed a per-diem penalty of $90 for the untimely disclosure. L&I appealed the penalty award alleging that the trial court abused its discretion in setting the per-diem penalty so high absent a showing of bad faith. Id. This Court ultimately concluded that "the $90 per-diem penalty was not an abuse of discretion given Bricker's need to institute legal action before the agency adhered to its obligations under the law, furthermore, because the agency misconduct showed an absence of accountability." Bricker, 2011 VL 0001256 at ¶ 56.

Another striking example comes out of Division One, of the Court of Appeals, in its decision in West v. Port of Olympia, 146 Wn.App. 108, 192 P.3d 926 (2008), 2008 VL 0001041. In West, Division One upheld a trial court's award of $60 per-day holding that, acting contrary to the expressed purposes of the PRA, the Port of Olympia had improperly relied on exemptions in withholding documents, and therefore, the trial court did not

abuse its discretion in setting the per-day penalty at $60. Id. at 122, 2008 VL 0001041 at ¶¶¶ 16, 51, 52. Cases such as Bricker, West, and the many more, are indicative of what constitutes reasonably exercised discretion for purposes of an abuse of discretion analysis.

In the instant case, (1) Francis needed to institute legal action in order to motivate DOC to adhere with its obligations of disclosure under the law; (2) the absence of any agency accountability is evidenced by DOC's lack of any explanation for 626 days of non-compliance, as well as DOC's attempt to minimize culpability; and finally (3) there is a high level of culpability based upon the trial court's finding of "bad faith", "gross negligence", and the numerous other aggravating factors.[11] Based upon these facts, and other culpability comparable penalty assessments in other cases, a higher per-day penalty against DOC is warranted to preserve the integrity of the Act's intended purpose.

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[11] The trial court's significantly low penalty assessment draws the inference that future deterrence was not given its due consideration as a "principal" factor. Yousoufian V, 168 Wn.2d at 460-63.

D. The Trial Court Cannot Refuse To Award Costs To The Prevailing Party Under The PRA.

Francis does not request pro se attorney fees for litigation at the trial court level. See Respondent/Cross-Appellant's Brief at 19, & 21. Francis simply claims that the trial court committed error when refusing to award Mr. Francis any of his costs, as the prevailing party, pursuant to RCW 42.56.550(4). Brief of Appellant at 26-27.

1. The *Mitchell* Decision

Nothing in the PRA supports DOC's contention that inmate plaintiff's are not entitled to penalties, or that courts can properly decline costs to an inmate who prevails in a PRA action. Respondent/Cross-Appellant's Brief at 20. Numerous Washington Court decisions have held that reimbursement of costs are mandatory when the plaintiff prevails in a PRA action. Zink v. City of Mesa, 162 Wn.App. 688, 256 P.3d 384 (2011), 2011 VL 0000753 at ¶ 52; Kitsap County v. Kitsap County, 156 Wn.App. 110, 231 P.3d 219 (Div. II, 2010), 2010 VL 0000591 at ¶ 29; Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997); Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 686, 790 P.2d 604 (1990); see also RCW 42.56.550(4).

The only discretion allowed to courts, under the PRA's mandatory costs provision, is to limit the awarding of costs to only those costs actually incurred during a PRA litigation, and to determine which costs constitute actual "costs" under the wording of the statute. Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010), 2010 VL 0001219 at ¶ 148 ("... a court has the discretion to apportion an award of costs and fees so that it does not relate to any exempt documents."); see also Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04 & n. 10, 117 P.3d 1117 (2005)("The requestor should recover his costs, and the agency should be penalized, if the requestor has to resort to litigation..."). However, courts cannot decline, in whole, costs to the prevailing plaintiff in a PRA action.

In making its argument, DOC relies on this Court's decision in Mitchell v. Wash. State Inst. of Public Policy, 153 Wn.App. 803, 225 P.3d 280 (2009). Respondent/Cross-Appellant's Brief at 20. However, DOC misreads this Court's ruling, and application of law, as outlined in Mitchell.

In Mitchell, the trial court initially awarded Mitchell all of his costs as required under the plain language of the PRA. After ruling that Mitchell was entitled to all his costs as a matter of law, Mitchell timely submitted his cost bill. DOC later discovered that Mitchell's cost bill was fraudulent.

It was only after the trial court became aware of Mitchell's misconduct that it exercised its discretion in *limiting* Mitchell's costs. Such limitation, however, was not reflective of allowable limited costs under the PRA. The limiting of Mitchell's costs were imposed as a sanctioning tool, under CR 11, for Mitchell's submission of his fraudulent cost bill, only after the court awarded him all of his costs. Id.

In Mitchell, the trial court's imposition of sanctions was reviewed for an abuse of discretion. Id., 2009 VL 0001806 at ¶ 90. Mitchell deals with a separate determination, one which is independent of the PRA's statutory scheme. Accordingly, Mitchell does not create a discretionary clause, under the PRA's mandatory costs provision, to simply deny costs to inmate plaintiffs. Mitchell merely avers a courts discretionary authority to limit costs under CR 11.

Lastly, DOC's reliance on Mitchell is both baseless and questionable. In Mitchell, the plaintiff knowingly provided a fraudulent cost bill. Here, Francis committed no such misconduct, whatsoever, nor can DOC make such a claim. In the instant case, the trial court merely stated that, "based on the award that I'm giving, I'm not going to include costs in that." RP 11. Nowhere in its findings did the trial court attribute its refusal of costs to any malfeasance committed by Francis. DOC's argument here fails.

2. Cost Bills Or Declarations Are Not Required To Be Filed Prior To A Court's Ruling On A Request For Costs.

Contrary to DOC's argument, there exists no requirement, under statute or court rule, that a party seeking costs must pre-identify all costs, or provide a declaration of costs, prior to the court's ruling on a request for costs. Respondent/Cross-Appellant's Brief at 21. Without providing any supporting authority, DOC's argument suggests that Francis put the carriage before the horse.

In this case, Francis properly made a request to the trial court for reimbursement of his incurred costs, both in his Summary Judgment motion, and during his oral argument on Summary Judgment.[12] CP 66. Under the Superior Court Rules for Civil Procedure ("CR"), the prevailing party in a civil matter is provided with two options when claiming recoverable costs. A prevailing party can: (1) include their costs in the judgment at the time of entry; or (2) if the costs are not known until after entry of the judgment, the prevailing party can specify the amount of recoverable costs in a cost bill, which must be submitted within ten days after the judgment is entered. See CR 54; RCW 4.64.030; see also 15A Karl B. Tegland & Douglas J. Ende, Washington

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12 Even in the more strict RAP procedures, a party needs only to make a request for costs under RAP 18.1(b). The party is not required to submit Declarations or cost bills prior to the Appellate Court's ruling.

Practice: Washington Handbook on Civil Procedure: § 71.24, author's cmt. at 601 (2011-12). Any objections to a cost bill shall be made within six days after the cost bill is filed, otherwise, the claimed costs will be awarded to the prevailing party. Id.; 15A Wash.Prac. at §71.24, author's cmt. at 601-02; CR 78(e).

After denying Francis his request for costs, the trial court then set a presentation date for entry of its findings, pursuant to CR 54(f)(2). Since the trial court wrongfully determined that Francis was not entitled to any of his costs, there existed no reason for Francis to determine the amount of his incurred costs, nor to submit a cost bill or cost declaration, as DOC suggests. Respondent/Cross-Appellant's Brief at 21. Neither court rule, nor statute require a party make such submissions prior to entry of judgment.

DOC has failed to provide any supporting authority for either of their arguments regarding Francis' request for costs. Because Mr. Francis is the prevailing party, he is entitled to all costs which he incurred in this action prior to this appeal as a matter of law.

E. Costs On Appeal

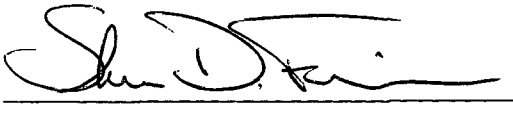
As stated in the Introduction herein, in light of this Court's recent decision in West v. Thurston County, supra, Francis hereby concedes that he is not entitled to attorney fees as a pro se litigant.

However, in his opening appellate brief, Mr. Francis requested reimbursement of all his costs incurred during the pendency of this appeal, in accordance with the requirements of RAP 18.1(b). Therefore, should this Court overturn any of the trial court's decisions for which Francis challenges in this appeal, Mr. Francis is entitled to all his costs on appeal.

III. CONCLUSION

For the reasons set forth above, and in Appellant's Opening Brief, Mr. Francis respectfully requests that this Court hold that: (1) The trial court properly exercised its considerable discretion in its determination of "bad faith", (2) that the *Black's Law Dictionary* offers the proper definition of "bad faith" for purposes of RCW 42.56.565(1), (3) that DOC's conduct rises to meet the technical definition of "bad faith" under *Black's*, (4) the trial court's imposition of a low per-day penalty does not accurately reflect the trial court's finding of bad faith, *gross* negligence, and numerous other aggravating factors, and as such, remand for imposition of a higher per-day penalty is necessary, (5) the trial court is to award Mr. Francis all of his costs incurred prior to this appeal, and lastly, (6) that Francis is entitled to all of his costs incurred during the course of this appeal.

Respectfully Submitted this 19th day of June, 2012.



Shawn D. Francis
Appellant, Pro Se
DOC #749717
Stafford Creek Corrections Center
191 Constantine Way; Unit: H-6-B-134
Aberdeen, WA 98520

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT on all parties or their counsel of record on the date below as follows:

X U.S. Mail, Postage Prepaid (deposited into the internal legal mail system at the Stafford Creek Corrections Center)

TO:

ANDREA VINGO
ASSISTANT ATTORNEY GENERAL
CORRECTIONS DIVISION
PO BOX 40116
OLYMPIA, WA 98504-0116

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 19th day of June, 2012, at Aberdeen, Washington.

SHAWN D. FRANCIS
Appellant/Cross-Respondent, Pro se

DECLARATION OF MAILING

I, Shawn D. Francis, declare that on the undersigned date I deposited the foregoing documents, or a copy thereof, into the internal legal mail system of the Airway Heights Corrections Center, U.S. Postage Prepaid, 1st Class Mail, to all parties listed below. I further declare under penalty of perjury under the laws of the State of Washington that that the foregoing is true and correct.

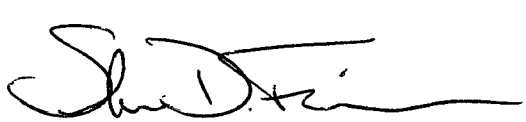
Documents

1- Reply Brief of Appellant/Cros-Respondent

Parties Served

Washington Court of Appeals, Division II
Office of the Clerk
950 Broadway; Suite 300
Tacoma, WA 98402-4454

DATED this 19th day of June, 2012.



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WASHINGTON STATE ATTORNEY GENERAL

June 28, 2012 - 2:16 PM

Transmittal Letter

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Case Name: Francis v. Dept. of Corrections
Court of Appeals Case Number: 42712-5

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The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
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- ◉ Motion: Other
- ○ Answer/Reply to Motion: ____
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- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
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- ○ Response to Personal Restraint Petition
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Comments:

No Comments were entered.

Sender Name: Katrina Toal - Email: katrinat@atg.wa.gov