

No. 65657-1-I

(King County Superior Court No. 00-2-09581-3 SEA)

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

ARMEN YOUSOUFIAN,

Appellant,

vs.

THE OFFICE OF RON SIMS, King County Executive,
et al.,

Respondents,

and

DAVID ALLEN and LESLIE MILLSPAUGH,

Respondents.

BRIEF OF APPELLANT

Charles A. Klinge, WSBA No. 26093
Brian D. Amsbary, WSBA No. 36566
Samuel A. Rodabough, WSBA No. 35347
Attorneys for Appellant

GROEN STEPHENS & KLINGE LLP
11100 NE 8th Street, Suite 750
Bellevue, WA 98004

Telephone: (425) 453-6206

ORIGINAL

2010 NOV 19 11:10:20
COURT OF APPEALS
STATE OF WASHINGTON

30

Table of Contents

| | |
|--|----|
| INTRODUCTION | 1 |
| ASSIGNMENT OF ERROR | 2 |
| ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... | 2 |
| STATEMENT OF THE CASE..... | 3 |
| A. Yousoufian’s Public Records Request and the County’s Response. | 4 |
| B. First Trial Court Proceeding and Appeal. | 5 |
| C. Second Trial Court Proceeding and Appeal..... | 7 |
| D. Recent Trial Court Proceedings Following Mandate..... | 9 |
| ARGUMENT | 11 |
| A. This Court Applies <i>De Novo</i> Review to the Trial Court’s Denial of the Motion for Post-Judgment Interest | 11 |
| B. When Applicable, an Award of Post-Judgment Interest Is Mandatory | 12 |
| C. Post-Judgment Interest Must Be Awarded Retroactively Where the Appellate Court Leaves No Discretion to the Trial Court, Including Mere Mathematical Problems..... | 14 |
| D. Yousoufian Is Entitled to Post-Judgment Interest Because the Supreme Court Left No Discretion to the Trial Court in Modifying the Judgment..... | 15 |
| 1. <i>Sintra, Inc. v. City of Seattle</i> : an appellate mandate that leaves the trial court with no discretion on remand supports post-judgment interest running from the date of the original judgment. | 18 |

| | | |
|----|--|----|
| 2. | <i>Fisher Properties</i> : an appellate mandate that leaves discretion with the trial court on remand will not support post-judgment interest running from the date of the original judgment. | 21 |
| 3. | This case is controlled by <i>Sintra</i> | 23 |
| E. | The County Is Not Shielded By Sovereign Immunity From Paying Post-Judgment Interest Under RCW 4.56.100..... | 23 |
| F. | Yousoufian Is Entitled to Attorneys Fees on Appeal and for the Motion in the Trial Court. | 27 |
| | CONCLUSION..... | 29 |

Table of Authorities

CASES

| | |
|--|--------|
| <i>Amren v. City of Kalama</i> , 131 Wn.2d 25 (1997)..... | 28 |
| <i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592 (2004)..... | 24, 25 |
| <i>Coulter v. Asten Group, Inc.</i> , 155 Wn. App. 1 (2010)..... | 11 |
| <i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826 (1986)..... | 22 |
| <i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364 (1990)..... | passim |
| <i>Fulle v. Boulevard Excavating, Inc.</i> , 25 Wn. App. 520 (1980)..... | 15 |
| <i>Hutton v. Martin</i> , 41 Wn.2d 780 (1953)..... | 25 |
| <i>Jenkins v. Department of Social and Health Services</i> , 160 Wn.2d 287 (2007)..... | 24, 25 |
| <i>Kelso v. City of Tacoma</i> , 63 Wn.2d at 913 (1964)..... | 25 |
| <i>Sintra, Inc. v. City of Seattle</i> , 119 Wn.2d 1 (1992) (<i>Sintra I</i>)..... | 18 |
| <i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640 (1997) (<i>Sintra II</i>)..... | 18, 19 |
| <i>Sintra, Inc. v. City of Seattle</i> , 96 Wn. App. 757 (1999) (<i>Sintra III</i>)..... | passim |
| <i>Wilson v. City of Seattle</i> , 122 Wn.2d 814 (1993)..... | 26 |
| <i>Womack v. Von Rardon</i> , 133 Wn. App. 254 (2006)..... | 12, 13 |
| <i>Yarno v. Hedlund Box & Lumber Co.</i> , 135 Wash. 406 (1925)..... | 15 |
| <i>Yousoufian v. Office of King County Executive</i> , 114 Wn. App. 836 (2003) (<i>Yousoufian I</i>)..... | 6 |

| | |
|--|---------------|
| <i>Yousoufian v. Office of King County Executive,</i> 152 Wn.2d. 421 (2004) (<i>Yousoufian II</i>)..... | 6, 16, 17, 28 |
| <i>Yousoufian v. Office of Ron Sims,</i> 137 Wn. App. 69 (2007)(<i>Yousoufian III</i>) | 7, 8 |
| <i>Yousoufian v. Office of Ron Sims,</i> 165 Wn.2d 439 (2009)(<i>Yousoufian IV</i>) | 8 |
| <i>Yousoufian v. Office of Ron Sims,</i> 168 Wn.2d 444 (2010) (<i>Yousoufian V</i>)..... | passim |

STATUTES

| | |
|---------------------------------|--------|
| RCW 4.56.100..... | 23 |
| RCW 4.56.110 | passim |
| RCW 19.52.020 | 12 |
| (Former) RCW 42.17.340(4) | 28 |
| RCW 42.56.010 | 27 |
| RCW 42.56.030..... | 2, 26 |
| RCW 42.56.550(4)..... | passim |

INTRODUCTION

More than a decade removed from submitting a routine request to King County for public records, Appellant Armen Yousoufian (Yousoufian) still seeks justice for the regrettable manner in which the County handled that request. In this appeal, Yousoufian seeks reversal of the trial court's entry of an Order Denying Plaintiff's Motion for Post-Judgment Interest (Order), dated June 7, 2010. Clerk's Papers (CP) 300.

This latest round of trial court proceedings was precipitated by a landmark decision in which the Supreme Court imposed a penalty of \$371,340 against the County for its egregious violation of the Public Records Act (PRA), chapter 42.56 RCW. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 470 (2010) (*Yousoufian V*). The Supreme Court's decision modified a lesser penalty imposed by an order of the trial court in 2005. *Id.* at 457-58.

On remand to the trial court, Yousoufian filed a Motion for Post-Judgment Interest requesting post-judgment interest on the modified penalty amount awarded by the Supreme Court retroactive to the trial court's earlier 2005 order. CP 237. Per relevant jurisprudence, post-judgment interest will accrue from the date of the original judgment even when an appellate court reverses in part, "where the appellate court, in reversing, merely modifies the trial court award and the only action

necessary in the trial court is compliance with the mandate.” *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 763 (1999). In this case, rather than remanding to the trial court for a re-determination of the appropriate penalty, the Supreme Court set the penalty itself, leaving the trial court with no discretion to do anything other than comply with the mandate. *Yousoufian V*, 168 Wn.2d at 470. As such, an award of post-judgment interest was mandatory. The County contends that it is immune from post-judgment interest due to its inherent sovereignty, but that argument is belied by the relevant case and the Public Records Act itself, which declares that: “The people of this state do not yield their sovereignty to the agencies that serve them.” RCW 42.56.030. Accordingly, Yousoufian respectfully requests reversal of the Order Denying Plaintiff’s Motion for Post-Judgment Interest, dated June 7, 2010. CP 300.

ASSIGNMENT OF ERROR

The trial court erred in entering the Order Denying Plaintiff’s Motion for Post-Judgment Interest, dated June 7, 2010. CP 300.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is Yousoufian entitled to post-judgment interest running from the date of the trial court’s 2005 decision, where the Supreme Court’s decision modifying that decision left the trial court with no discretion on remand?

The determination of the applicability of post-judgment interest is a question of law that this Court reviews *de novo*. *Sintra*, 96 Wn. App. at 761.

2. Does sovereign immunity shield the County from an award of post-judgment interest?

3. Is Yousoufian entitled to an award of attorneys fees for both prosecuting this appeal and for the motion in the trial court?

STATEMENT OF THE CASE

A brief summary of the factual and procedural history of this case is necessary in order to illustrate Yousoufian's entitlement to post-judgment interest running from the date of trial court's 2005 judgment. Many of the underlying facts presented herein were previously determined by the trial court nearly a decade ago, in findings of fact issued on September 21, 2001. CP 12-42 (Findings of Fact and Conclusions of Law). Since that time, this case has been the subject of five separate appellate decisions.

In its most recent decision in this matter, the Supreme Court correctly observed that these findings of fact were never challenged by the County and, therefore, remained controlling in all successive stages of this litigation. *Yousoufian V*, 168 Wn.2d. at 450 ("The facts found by the trial judge who originally heard this action and which were relied on by the

trial court judge on remand are unchallenged and therefore are verities on appeal.”).

A. Yousoufian’s Public Records Request and the County’s Response.

On May 30, 1997, Yousoufian submitted a request for public records to King County pursuant to the Public Records Act, chapter 42.56 RCW. CP 13. During the succeeding months, and after multiple follow-up communications between the County and Yousoufian, the County produced documents responsive to the public records request in piecemeal fashion. CP 14-21. Unfortunately, notwithstanding Yousoufian’s follow-up communications and additional, but unnecessary, clarifications, the County’s response at that time could only be fairly characterized as “incomplete” as well as “untimely and unreasonable.” CP 14 (“King County was untimely and unreasonable in its interpretation of and response to Mr. Yousoufian’s [public records] requests.”).

After a frustrating period of over seven months unsuccessfully wrangling with the County to obtain all of the records responsive to his PRA request, Yousoufian was compelled to hire legal counsel. CP 21. Viewing litigation as a last resort, Yousoufian’s legal counsel originally employed various means with the County in an attempt to obtain all of remaining records sought by Yousoufian. CP 21-23. By March of 2000,

however, those means had been exhausted and were largely unsuccessful.

CP 23. In fact, by that time the County had defiantly written in correspondence that it had no further responsive documents. CP 21.

However, it was very clear to Yousoufian at that point that the County was unlawfully withholding records that were responsive to his PRA request.

B. First Trial Court Proceeding and Appeal.

On March 30, 2000, Yousoufian filed suit against the County, alleging a violation of the Public Records Act. CP 3 (Complaint for Violation of the Public Disclosure Act). In response to the lawsuit, the County finally produced additional previously-undisclosed documents that were responsive to Yousoufian's original public records request. CP 23-24. Specifically, responsive records were finally disclosed by June 8, 2001, more than four years after Yousoufian's original public records request and more than one year after filing the lawsuit. CP 24.

Following a trial in superior court, the trial court entered Findings of Fact and Conclusions of Law. CP 12-42. Although the trial court concluded that the County eventually produced the requested documents, it concluded that "there was not a good faith effort by the involved county staff to read, understand, and respond to Mr. Yousoufian's [public records request]." CP 28-29. Next, the court concluded that the County demonstrated a "lack of good faith...[via] misrepresentations made in

correspondence to Mr. Yousoufian.” *Id.* at 29. Additionally, the court concluded that “the County was negligent in the way it responded to Mr. Yousoufian’s [public records] request at every step of the way, and this negligence amounted to a lack of good faith.” *Id.*

The trial court determined that the appropriate penalty period for a violation of the Public Records Act was 5,090 days and, despite a finding of lack of good faith, imposed the statutory minimum penalty of \$5 per day, producing a total penalty of \$25,440. CP 38, 42. Yousoufian appealed. CP 48 (Notice of Appeal).

On review, this Court employed a deferential abuse of discretion standard to review the trial court’s penalty award. *See Yousoufian v. Office of King County Executive*, 114 Wn. App. 836, 847 (2003) (*Yousoufian I*). Nonetheless, this Court determined that the trial court abused its discretion in awarding the statutory minimum penalty of \$5 per day in light of the County’s “gross negligence.” *Id.*

The Supreme Court thereafter granted discretionary review and also employed a deferential abuse of discretion standard to review the trial court’s penalty award. *Yousoufian v. Office of King County Executive*, 152 Wn.2d. 421, 429-31 (2004) (*Yousoufian II*). The Court affirmed in part and reversed in part this Court’s decision in *Yousoufian I*. *Id.* at 425. Specifically, the Supreme Court held that both the penalty period and per

day penalty were inadequate in light of the County's gross negligence. *Id.* at 440. The Supreme Court fixed the penalty period at 8,252 days, but remanded to the trial court for the imposition of penalties above the statutory minimum penalty of \$5 per day. *Id.* Noteworthy for purposes of this appeal, no particular per day penalty was prescribed—*i.e.*, full discretion was afforded the trial court: the Supreme Court simply “remand[ed]... to the trial court for the imposition of penalties above the statutory minimum for each day that Yousoufian was denied access to the requested records.” *Id.*

C. Second Trial Court Proceeding and Appeal.

On August 23, 2005, the trial court imposed a per day penalty of \$15 in its Order on Remand. CP 138-43 (Order on Remand). Combined with the Supreme Court's prescribed penalty period of 8,252 days, this produced a total penalty of \$123,780. CP 142. Yousoufian appealed. CP 144-51 (Plaintiff's Notice of Appeal to Court of Appeals, Division One).

On appeal, this Court once again employed a deferential abuse of discretion standard to review the trial court's penalty award. *Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 76 (2007) (*Yousoufian III*). Nonetheless, this Court determined that the trial court had, yet again, abused its discretion in awarding a penalty at the low end of the minimum statutory range. *Id.* at 80. Accordingly, this Court remanded to the trial

court for a determination of a more appropriate per day penalty. *Id.* at 81.

The County again successfully sought discretionary review before the Supreme Court. *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 451 (2009) (*Yousoufian IV*). The Supreme Court issued an opinion largely affirming this Court's decision in *Yousoufian III*. *Yousoufian IV*, 165 Wn.2d at 452 (2009). However, the Supreme Court subsequently recalled the mandate for that opinion. CP 199 (Order); *see also Yousoufian v. Office of Ron Sims*, 164 Wn.2d 444, 458 (2010) (*Yousoufian V*).

On March 25, 2010, the Supreme Court issued a new opinion that still largely affirmed the Court of Appeals. *Yousoufian V*, 168 Wn.2d 444 (2010). It too concluded that the trial court abused its discretion in awarding a penalty at the low end of the minimum statutory range. *Id.* at 463 ("We hold the trial court on remand abused its discretion in imposing a penalty of \$15 per day."). This represented the fifth time in as many decisions that an appellate court concluded that the trial court had abused its discretion in setting the per day penalties under the PRA.

Critical for purposes of this appeal, however, rather than remanding and leaving it to the discretion of the trial court to determine a more appropriate per day penalty (as it did in the first appeal), the Supreme Court took the unusual step of fixing the per day penalty itself:

Where an appellate court holds that a trial court abused its discretion in awarding a PRA penalty, the usual procedure is to remand to the trial court for imposition of the appropriate penalty. **Nevertheless, in light of the unique circumstances and procedural history of this case, we are inclined to set the daily penalty amount in order to bring this dispute to a close. We hold based upon the aforementioned factors the appropriate penalty is \$45 per day.**

Id. at 468-69. As recognized by the Court, the imposition of a \$45 per day penalty for 8,252 days produced a total penalty of \$371,340.

In conclusion, we affirm but modify the Court of Appeals' decision. Because of the unique circumstances of this case, **we do not remand to the trial court for redetermination of the penalty. Instead, we set the penalty at \$45 per day for 8,252 days.** We accordingly award Yousoufian a total PRA penalty of \$371,340 plus reasonable attorney fees and costs incurred in connection with this appeal.

Id. at 470 (emphasis added). In other words, the Court left no discretion to the trial court regarding the amount of the judgment to be entered following issuance of the mandate.

D. Recent Trial Court Proceedings Following Mandate

The case was mandated back to the trial court on April 22, 2010 for further proceedings consistent with the Supreme Court decision. CP 201 (Mandate). On May 25, 2010, Yousoufian filed Plaintiff's Motion for Post-Judgment Interest (Motion). CP 237-83 (Plaintiff's Motion for Post-

Judgment Interest); CP 292-99 (Plaintiff's Reply in Support of Motion for Post-Judgment Interest). The Motion sought the imposition of post-judgment interest on the aforementioned modified penalty amount awarded by the Supreme Court retroactive to the trial court's 2005 Order on Remand. CP 237. The County opposed the motion on various legal grounds. The County did not, however, dispute the calculation of the amount of retroactive post-judgment interest. CP 284-91 (King County's Response to Plaintiffs' Motion for Post-Judgment Interest).¹

The Motion was considered without oral argument. *Id.* On June 7, 2010, the trial court issued a brief Order Denying Plaintiff's Motion for Post-Judgment Interest. CP 300. The Order did not provide any rationale or analysis explaining the trial court's ruling. *Id.* ("Plaintiff's motion is DENIED.").

On July 7, 2010, Yousoufian filed a timely appeal, which was assigned Case No. 65657-1-I. CP 302 (Notice of Appeal or for Discretionary Review). For purposes of clarifying and/or perfecting Yousoufian's right to appeal, the trial court entered a final judgment per

¹ The remaining amount due was calculated at \$142,780.02 as of May 22, 2010 (the day after the County's most recent deposit into the court registry) plus \$46.96 per day. CP 246-47. Because the County did not dispute the amount below, this appeal includes no issue regarding the proper amount. This appeal involves only the legal right to retroactive post-judgment interest, which if decided in favor of Yousoufian, would then require a likely consensual proceeding below to calculate the final amount along with trial court attorney's fees for the motion that was denied.

Civil Rule 54(b) on August 4, 2010 (Final Judgment). CP 309 (Final Judgment – Less Than All Claims and Parties). As a purely precautionary measure, another timely appeal was filed following entry of the CR 54(b) judgment on August 12, 2010. CP 315 (Notice of Appeal). Per the ruling of the Court Administrator/Clerk dated August 25, 2010, the latter Notice of Appeal was accepted as an amended notice of appeal under the existing cause number.

ARGUMENT

A. This Court Applies *De Novo* Review to the Trial Court’s Denial of the Motion for Post-Judgment Interest

In contrast to the body of Washington law regarding awards of prejudgment interest, which is based entirely on common law, awards of post-judgment interest are governed by statute. Specifically, an award of post-judgment interest is governed by RCW 4.56.110. As such, the entitlement to post-judgment interest is a function of statutory interpretation, which is a question of law that this Court reviews *de novo*. *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 761 (1999). *See also Coulter v. Asten Group, Inc.*, 155 Wn. App. 1, 14 (2010) (“We review *de novo* the trial court’s application of [the post-judgment interest statute] to a given set of facts.”).

B. When Applicable, an Award of Post-Judgment Interest Is Mandatory

Yousoufian contends that the plain meaning of the relevant statute is that post-judgment interest is mandatory and retroactive. As indicated, an award of post-judgment interest is governed by RCW 4.56.110, which reads in relevant part as follows:²

Interest on judgments **shall accrue** as follows:

....

(4)...In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is **wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.**

RCW 4.56.110 (emphasis added). Several aspects of this statute are noteworthy for purposes of this appeal.

First, the introductory phrase to RCW 4.56.110 provides that “[i]nterest on judgments **shall accrue** as [set forth therein].” *Id.* (emphasis added). Inasmuch as the statute uses the term “shall,” it is not surprising that an award of “[p]ost-judgment interest, unlike prejudgment interest, is **mandatory** under RCW 4.56.110.” *Womack v. Von Rardon*, 133 Wn.

² RCW 4.56.110(4) states that judgments, with exceptions not relevant here, “shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.” The maximum rate under RCW 19.52.020 is 12 percent per annum.

App. 254, 264 (2006) (emphasis added). Thus, although the trial court did not provide any explanation for its denial of Plaintiff's Motion for Post-Judgment Interest, to the extent that it may have been based upon perceived trial court discretion to disallow such an award, the trial court would have clearly erred.

For clarification, in setting the per day penalty amount under the PRA, "it shall be within the **discretion** of the court to award...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 42.56.550(4) (emphasis added). In light of this discretionary language, each of the five appellate decisions in this matter has employed an abuse of discretion standard to review the trial court's imposition of penalties under RCW 42.56.550(4). The issue presented in this appeal, however, concerns an award of post-judgment interest under RCW 4.56.110 based upon a Public Records Act award, and not a Public Records Act award itself under the discretionary standard of RCW 42.56.550(4). As such, unlike prior appeals, this case does not involve the exercise of any discretion by the trial court.

Second, RCW 4.56.110(4) sets the conditions when retroactive post-judgment interest is available following a remand from an appellate court review of a trial court judgment. In particular, post-judgment

interest shall be awarded “[i]n any case where a court is directed on review to enter judgment on a verdict or in any case where **a judgment entered on a verdict is wholly or partly affirmed on review.**” *Id.* (emphasis added). Thus, in cases wholly or partly affirmed on appellate review, post-judgment interest shall be imposed. Additionally, the statute unequivocally indicates that such interest is **retroactive** to the earlier trial court judgment: “interest on the judgment or on that portion of the judgment affirmed **shall date back** to and **shall accrue from the date the verdict was rendered.**” RCW 4.56.110 (emphasis added). Again, by using the term “shall,” the application of **retroactive** post-judgment interest is mandatory. As explained in further detail herein, this statutory language and the jurisprudence interpreting this language are fully satisfied by the facts of this case.

C. Post-Judgment Interest Must Be Awarded Retroactively Where the Appellate Court Leaves No Discretion to the Trial Court, Including Mere Mathematical Problems

Relevant case law has further clarified the manner in which RCW 4.56.110 is applied for those cases in which retroactive post-judgment interest is available following a remand from an appellate court review of a trial court judgment.

In particular, post-judgment interest will accrue from the date of the original judgment *even when an appellate court reverses in part,*

“where the appellate court, in reversing, merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate.” *Sintra*, 96 Wn. App. at 763 (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373-74 (1999)). In that situation, “[w]here an appellate court leaves the trial court on remand with a mere mathematical problem mandated by the appellate court, interest runs from the date of the original judgment.” *Sintra*, 96 Wn. App. at 763 (citing *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 408-09 (1925)).

Additionally, the mandatory nature of RCW 4.56.110 means that retroactive post judgment interest must be awarded regardless of whether the judgment is adjusted upwards or downwards by the appellate court. *See, e.g., Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 521-23 (1980) (holding that post-judgment interest ran to date of original judgment, despite the fact that court of appeals **increased** the judgment from \$31,587 to \$99,820); *Yarno*, 135 Wash. at 408-09 (1925) (holding that post-judgment interest ran to date of original judgment, where Supreme Court **reduced** the amount of judgment from \$22,310 to \$19,057).

D. Yousoufian Is Entitled to Post-Judgment Interest Because the Supreme Court Left No Discretion to the Trial Court in Modifying the Judgment

Yousoufian is entitled to post-judgment interest on the modified

penalty amount awarded by the Supreme Court retroactive to the trial court's earlier 2005 order. In *Yousoufian V*, the Supreme Court was unequivocal in stating that it was "not remand[ing] to the trial court for redetermination of the penalty." 168 Wn.2d at 470. Instead, rather than remanding and leaving it to the discretion of the trial court to determine a more appropriate per day penalty (as it did during the first appeal, *Yousoufian II*), the Supreme Court took the unusual step of fixing the per day penalty itself:

Where an appellate court holds that a trial court abused its discretion in awarding a PRA penalty, the usual procedure is to remand to the trial court for imposition of the appropriate penalty. **Nevertheless, in light of the unique circumstances and procedural history of this case, we are inclined to set the daily penalty amount in order to bring this dispute to a close. We hold based upon the aforementioned factor the appropriate penalty is \$45 per day.**

Yousoufian V, 168 Wn.2d at 468-69 (emphasis added).

In order to be clear that it was not leaving any discretion to the trial court regarding the amount of the penalty, the Supreme Court summarizes its ruling as follows:

In conclusion, we affirm but modify the Court of Appeals' decision. Because of the unique circumstances of this case, **we do not remand to the trial court for redetermination of the penalty.** Instead, we set the penalty at \$45 per day for 8,252 days. We accordingly award Yousoufian a total

PRA penalty of \$371,340 plus reasonable attorney fees and costs incurred in connection with this appeal.

Id. at 470 (emphasis added).

By contrast, in its first decision in this case, the Supreme Court left the per day penalty amount to the trial court's discretion, so long as the amount was above the statutory minimum of \$5 per day: "we affirm in part, and reverse in part the Court of Appeals' decision, and remand this case to the trial court for the imposition of penalties above the statutory minimum for each day that Yousoufian was denied access to the requested records." *Yousoufian II*, 152 Wn.2d. at 440. This contrast explains why it is proper to award post-judgment interest running from the date of the trial court's 2005 decision, but not from the date of the earlier 2001 judgment. This also explains why Yousoufian is not seeking post-judgment interest back to 2001, but only back to 2005.

Two contrasting cases further illustrate how the courts have awarded post-judgment interest under RCW 4.56.110: *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 763 (1999) (*Sintra III*) and *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364 (1990). These cases also demonstrate why *Yousoufian* is entitled to post-judgment interest.

1. ***Sintra, Inc. v. City of Seattle*: an appellate mandate that leaves the trial court with no discretion on remand supports post-judgment interest running from the date of the original judgment.**

In *Sintra*, a developer sued the city on several grounds, including a takings claim. 96 Wn. App. at 759. Similar to the present case, the litigation in *Sintra* consisted of two separate sets of trial court proceedings and two rounds of appeals (including two decisions by the Supreme Court)³ before remand to the trial court for a third set of proceedings. *Id.* And, like the present case, the second Supreme Court decision in *Sintra* modified the trial court judgment, but left nothing to the discretion of the trial court on remand in that regard. *Id.* at 760. Accordingly, the prevailing developer was entitled to post-judgment interest running from the date of the original judgment. *Id.* at 763.

The specifics of *Sintra* are as follows. Plaintiff originally filed suit in 1988. *Sintra I*, 119 Wn.2d at 10. The first trial court proceeding eventually concluded with summary judgment being entered for the City. *Sintra III*, 96 Wn. App. at 759. The Supreme Court subsequently reversed. *Id.* (citing *Sintra I*).

In 1994, after trial on remand, the developer was awarded (among other things) just compensation for a temporary taking. *Id.* In addition,

³ See *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1 (1992) (*Sintra I*), and *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640 (1997) (*Sintra II*).

the developer was awarded prejudgment interest on the amount of just compensation, calculated at twelve percent compound interest through the date of the judgment after the trial on remand (*i.e.* the second trial court proceeding). *Id.* The City did not appeal the just compensation award, and paid that amount into the court registry. *Id.* It did, however, appeal the prejudgment interest award and did not pay that amount into the registry. *Id.*

On appeal, the Supreme Court reversed and remanded for a revised judgment. The reversal effectively reduced the amount of the judgment by holding that the award of prejudgment interest was proper, but that it should be computed via simple interest rather than compound interest. *Id.* at 760 (citing *Sintra II*). The Court remanded to the trial court to calculate the proper amount of prejudgment interest, which required nothing more than a basic mathematical calculation. *Id.*

On remand, in 1998, the trial court adjusted the prejudgment interest award accordingly. *Id.* In turn, the developer requested post-judgment interest on the prejudgment interest award retroactive to the original 1994 judgment. *Id.* The City, citing RCW 4.56.110, argued that the developer was not entitled to post-judgment interest retroactive to the original 1994 judgment because the Supreme Court did not affirm the prejudgment interest award on review. *Id.* at 763. Rather, the City

argued, the Supreme Court reversed the prejudgment interest award to the extent that it was based on compound interest and not simple interest. *Id.* The trial court agreed with the City and held that post-judgment interest would accrue only from the date of its revised 1998 judgment. *Id.* at 760. The developer appealed.

On appeal, this Court reversed. Specifically, after acknowledging the rule of RCW 4.56.110, this Court held that:

While awards reversed on review ordinarily do not bear interest, there is an exception to this rule where the appellate court, in reversing, merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate... Where an appellate court leaves the trial court on remand with a mere mathematical problem mandated by the appellate court, interest runs from the date of the original judgment.

Id. at 763. Thus, the developer was entitled to post-judgment interest running from the date of the original 1994 judgment because, during the second appeal,

the Supreme Court found no error in the trial court's decision to include interest as an element of just compensation. The Court did reverse and remand to determine the amount of the award at simple rather than compound interest, **but this direction did not require new factfinding or the exercise of discretion by the trial court.** The only action necessary was compliance with the mandate to calculate simple interest on the compensation award . . . over a fixed period of time. The calculation of simple interest was merely a mathematical problem.

Id. (emphasis added). Accordingly, because the Supreme Court's decision left the trial court with no discretion regarding the amount of the prejudgment interest award, but instead presented a mere mathematical calculation, this Court concluded that the developer was entitled to post-judgment interest on that award running from the date of the original 1994 judgment, and not merely the 1998 judgment.

For obvious reasons, *Sintra* applies here. Here, the trial court entered a judgment in 2005. Like the original judgment in *Sintra*, that judgment was subsequently reviewed by the Supreme Court, which resulted in a modification of that judgment requiring no discretion of the trial court on remand. Therefore, Yousoufian, like the plaintiff in *Sintra* is entitled to retroactive post-judgment interest.

2. *Fisher Properties: an appellate mandate that leaves discretion with the trial court on remand will not support post-judgment interest running from the date of the original judgment.*

The result in *Fisher Properties, Inc.* provides an instructive contrast to *Sintra*. In that case, Fisher sued Arden for violating the terms of a commercial lease. 115 Wn.2d. 364, 366. In 1983, following a trial, the trial court awarded Fisher (the landlord) various damages, including the costs of restoring the premises to their original condition per the terms of the lease, and attorney's fees. *Id.* a 367.

On appeal, the Supreme Court affirmed most of the damages award, but reversed the award of restoration costs and attorney's fees because the trial court employed the wrong measure in determining the amounts of these awards. *Id.* (citing 106 Wn.2d 826 (1986)). The Supreme Court remanded to the trial court for a reassessment of restoration damages and attorney's fees. *Id.* Critically, however, the court provided two possible measures of restoration damages, depending on the trial court's findings. *Id.*

On remand, in 1988, the trial court entered new findings and awarded restoration damages and attorney's fees in accordance with the Supreme Court's decision. *Id.* at 367-68. The court further awarded post-judgment interest on the restoration damages and attorney's fees running from the date of the original 1983 judgment. *Id.* at 368.

Arden appealed and the Supreme Court again accepted review. The Court, recognizing the discretion that it had left to the trial court on remand in its first decision, reversed the award of retroactive post-judgment interest running from the date of the original judgment. *Id.* at 374. The Court explained the considerable discretion left in the trial court's hands on remand as follows:

This court left it in the trial court's hands to determine damages in accordance with its decision concerning diminution and cost of repair and restoration. The

mandate necessitated new findings and a new judgment, not a simple mathematical computation.

Id. Finally, the Court distinguished the situations where no discretion was afforded to the trial court and ordered that post-judgment interest on the restoration damages and attorney's fees run only from the date of the modified 1988 judgment, not the original 1983 judgment. *Id.*

3. This case is controlled by *Sintra*

This case plainly falls within the scope of *Sintra*, and not *Fisher Properties*. Unlike *Fisher Properties*, nothing beyond simple mathematical calculations were left to the trial court by the Supreme Court's decision in *Yousoufian V*; no new findings were required, and there was no discretion to alter the amount of the penalty. The penalty was definitively set by the Supreme Court. Instead, as in *Sintra*, all that was left for the trial court was compliance with the mandate, which simply required the trial court to increase the penalty award from \$123,780 to \$371,340 with no discretion. Then, also consistent with *Sintra*, the trial court should have calculated the post-judgment interest back to the 2005 decision. Therefore, the trial court erred in denying Plaintiff's Motion for Post-Judgment Interest.

E. The County Is Not Shielded By Sovereign Immunity From Paying Post-Judgment Interest Under RCW 4.56.100

In the trial court, in response to Plaintiff's Motion for Post-Judgment

Interest, the County claimed that it was shielded by sovereign immunity from paying post-judgment interest under RCW 4.56.100. CP 285 (King County's Response to Plaintiff's Motion for Post-Judgment Interest). The County's argument relied for its support exclusively on *Jenkins v. Department of Social and Health Services*, 160 Wn.2d 287 (2007). CP 285-286. Again, inasmuch as the trial court did not provide any rationale or analysis explaining its Order Denying Plaintiff's Motion for Post-Judgment Interest, it is not known whether the trial court agreed with the County's sovereign immunity argument. CP 300. Regardless, the County's claim to sovereign immunity lacks merit.

The problem with the County's assertion is plain: the County's sovereign immunity is far more limited than it claims. In *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592 (2004), property owners brought a successful class action against the City of Ocean Shores for a refund of unlawful sewer charges. The trial court awarded post-judgment interest. *Id.* at 600, 615. On appeal, the Court of Appeals upheld the award of post-judgment interest and observed the following with respect to alleged municipal immunity from post-judgment interest:

Municipal corporations enjoy their immunity...only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon, or permitted to, them *solely for their*

*own benefit in their corporate capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. **They are only sovereign and only immune in so far as they represent the state. They have no sovereignty of their own, they are in no sense sovereign per se.***

Carrillo, 122 Wn. App. at 615 (italics in original, bold added) (quoting *Kelso v. City of Tacoma*, 63 Wn.2d at 913 (1964) and *Hutton v. Martin*, 41 Wn.2d 780 (1953)).

Working from this principle, the *Jenkins* case relied upon by the County is readily distinguishable: *Jenkins* involved a state agency (DSHS), whereas this case does not.

Carrillo demonstrates the significance of this distinction. Specifically, the court reasoned that the City was liable for post-judgment interest because the imposition of the illegal sewer tax was not an activity “engaged in...on behalf of the state.” *Id.* at 616. The *Carrillo* court explained that immunity only applied to state agencies or other entities that were directly implementing state programs.

The same conclusion applies here. A local jurisdiction’s response (or lack thereof) to a public records request can in no way be deemed an activity engaged in on behalf of the state. Further, the Public Records Act itself explicitly states the exact opposite—specifically, the Public Records Act rejects sovereignty of public agencies on the subject of public records:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. **This chapter shall be liberally construed** and its exemptions narrowly construed **to promote this public policy and to assure that the public interest will be fully protected.** In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030 (emphasis added). The Supreme Court recognized the importance of this provision in its most recent decision in this matter.

Yousoufian V, 168 Wash. 2d at 444.

This explicit rejection of sovereignty in the Public Records Act precludes the County's contention of sovereign immunity here. The strong wording of this statute—the people do not yield sovereignty and liberal construction required—is much more direct than the statute found to waive local government sovereign immunity in *Wilson v. City of Seattle*, 122 Wn.2d 814 (1993). The Supreme Court in *Wilson* recited the general rule, that the city had only “so much immunity as it derives from the sovereign,” and then concluded that a statute authorizing a new cause of action waives sovereign immunity. *Id.* at 824. Considering the specific references in RCW 42.56.030, the same is true here: sovereign immunity—the concept

that the King Can Do No Wrong and can't be sued in his own courts—does not apply to an action based on the Public Records Act. As such, public policy is also strongly in favor of awarding post-judgment interest on PRA awards. Accordingly, the County is not immune from liability for post-judgment interest.

F. Yousoufian Is Entitled to Attorneys Fees on Appeal and for the Motion in the Trial Court.

Pursuant to RAP 18.1, Yousoufian requests that the Court award attorneys fees for prosecuting this appeal. Specifically, RAP 18.1(a) authorizes the court to grant attorneys fees “[i]f applicable law grants to a party the right to recover reasonable attorneys fees or expenses.” RAP 18.1(a).

This case has been, and always will be, a case with a single cause of action under the Public Records Act. CP 3-7 (Complaint for Violation of the Public Disclosure Act). Specifically, RCW 42.56.550(4) provides for an award of attorneys fees as follows:

Any person who prevails against an agency^[4] 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**

⁴ Under the PRA, an “agency” includes all “local agencies.” RCW 42.56.010(1). In turn, “local agencies” are defined to include “every county, city, town, municipal corporation, or special purpose district.” *Id.*

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 42.56.550(4). By employing the term “shall,” this provision has been construed by Washington courts to be mandatory. *See, e.g., Amren v. City of Kalama*, 131 Wn.2d 25, 35 (1997) (“the statute is very clear that the court ‘shall’ award attorney’s fees to a person who prevails against an agency in an action seeking the disclosure of public records” (citing former RCW 42.17.340(4), *recodified as* RCW 42.56.550(4))).

Accordingly, Yousoufian should be awarded fees here on appeal, as has occurred in the previous appellate decisions issued in this matter.⁵

Finally, pursuant to RCW 42.56.550(4), Yousoufian also requested attorney’s fees for his motion in the trial court. CP 237 (“If this motion is granted, Yousoufian will seek attorney’s fees and costs associated with this motion by stipulation or by later motion.”). If this court reverses the trial court Order Denying Plaintiff’s Motion for Post-Judgment Interest, the case should be sent back for final calculation of post-judgment interest

⁵ *See, e.g., Yousoufian II*, 152 Wn.2d at 439 (“We, therefore, award Yousoufian reasonable attorney fees and costs for this appeal and remand to the trial court for a determination of the amount of such fees and costs.”); *Yousoufian V*, 168 Wn.2d at 444 (“Because we hold that Yousoufian prevails in his appeal of the trial court’s decision on remand to set the PRA penalty at \$15 per day, he is entitled to recover reasonable attorney fees and the costs he has incurred on appeal.”).

and for the determination of the modest amount of attorney fees expended on that motion.

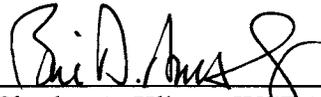
CONCLUSION

For the foregoing reasons, Yousoufian respectfully requests reversal of the Order Denying Plaintiff's Motion for Post-Judgment Interest, dated June 7, 2010. Yousoufian also requests that this Court award attorneys fees on appeal. The Court should order a remand to calculate final post-judgment interest and attorney's fees incurred in trial court.

RESPECTFULLY SUBMITTED this 18th day of November, 2010.

GROEN STEPHENS & KLINGE LLP

By:



Charles A. Klinge, WSBA No. 26093
Samuel A. Rodabough, WSBA No. 35347
Brian D. Amsbary, WSBA No. 36566
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
(425) 453-6206

DECLARATION OF SERVICE

I, Brian D. Amsbary, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On November 18, 2010, I caused a true copy of Brief of Appellant to be served on the following persons via the following means:

Shawn Timothy Newman
Attorney At Law Inc., P.S.
2507 Crestline Drive NW
Olympia, WA 98502
newmanlaw@comcast.net

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

Rand F. Jack
Brett & Coats
1310 10th Street, Ste 104
PO Box 4196
Bellingham, WA 98227-4196
jwagner@brettlaw.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

Michael G. Brannan
Law Offices of Michael G Brannan
555 Dayton Street, Ste H
Edmonds, WA 98020-3601
mabbrannan@seanet.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

David Allen
Attorney at Law
600 University Street, Ste. 3020
Seattle, WA 98101
david@ahmlawyers.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

Brian J. Waid
Waid Law Office
4847 California Ave SW, Ste 100
Seattle, WA 98116
bjwaid@waidlawoffice.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

John R. Zeldenrust
David Eldred
King County Prosecuting Attorney's
Office
King County Courthouse, Rm. W554
516 Third Avenue
Seattle, WA 98104-2362
john.zeldenrust@kingcounty.gov
david.eldred@kingcounty.gov

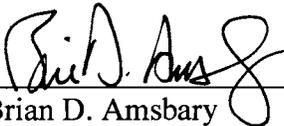
- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

James H. Clark, Jr.
Oseran Hahn Spring Straight &
Watts, P.S.
10900 NE 4th Street, Suite 850
Bellevue, WA 98004-5808
jclark@ohswlaw.com

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

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

Executed this 18th day of November, 2010 at Bellevue,
Washington.



Brian D. Amsbary