

No. 71052-4-I

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CEDAR GROVE COMPOSTING, INCORPORATED,

Respondent/Cross-Appellant,

v.

CITY OF MARYSVILLE, Appellant/Cross-Respondent.

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL
OF RESPONDENT/CROSS-APPELLANT
CEDAR GROVE COMPOSTING, INCORPORATED

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TABLE OF CONTENTS

I.	REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL	1
	A. The trial court abused its discretion in making a 40 percent across-the-board reduction after reducing counsel’s hourly rates and the compensable hours.....	1
	B. The trial court’s findings do not support its 40 percent across- the-board fee reduction.	5
II.	CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014) 2, 3

Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665 (1987)..... 7

Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 272 P.3d 827 (2012), *cert. denied*, 133 S. Ct. 199 (2012) 4

Davis v. Fid. Techs. Corp., 180 F.R.D. 329 (W.D. Tenn. 1998)..... 7

Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 9 P.3d 898 (2000)..... 6

Fiore v. PPG Indus., 169 Wn. App. 325, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012) 7

Gates v. Deukmijian, 987 F.2d 1392 (9th Cir. 1992)..... 5

Progressive Animal Welfare Soc. v. Univ. of Washington, 114 Wn.2d 677, 790 P.2d 604 (1990)..... 1, 6, 8

Sargent v. Seattle Police Dept., 167 Wn. App. 1, 260 P.3d 1006 (2011), *rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013)..... 9

Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993)..... 3

STATUTES

RCW 42.56.550(4)..... 2, 5, 11

RULES

RAP 18.1..... 11

I. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

The Public Records Act’s “mandate for liberal construction includes a liberal construction of the statute’s provision for award of reasonable attorneys’ fees.” *Progressive Animal Welfare Soc. v. Univ. of Washington*, 114 Wn.2d 677, 683, 790 P.2d 604 (1990). The City of Marysville’s response to Cedar Grove’s cross-appeal ignores this fundamental principle, citing a host of non-PRA (and therefore inapposite) cases to support the trial court’s arbitrary across-the-board 40 percent reduction – a reduction made *after* the trial court had already reduced both counsel’s hourly rates and the number of reasonable hours under the lodestar method. The trial court’s comparison of the work performed by Cedar Grove’s counsel to that performed by Marysville (but not its non-attorney staff) and its belief that the bulk of Cedar Grove’s legal work was performed after it had established a right to fees lack support in the record and, in any event, do not justify its arbitrary reduction. This Court should reverse and remand because the 40 percent reduction was manifestly unreasonable and based on untenable grounds.

A. The trial court abused its discretion in making a 40 percent across-the-board reduction after reducing counsel’s hourly rates and the compensable hours.

Marysville cites no Washington authority that supports the trial court’s 40 percent reduction, again, a second reduction imposed *after* it

had already reduced Cedar Grove's fee request by knocking down the hourly rates of its Seattle lawyers and reducing the number of hours for what it deemed to be unproductive time. The cases cited by Marysville instead illustrate that the trial court failed to justify this fee reduction, particularly in light of the remedial purpose of the PRA's fee shifting statute, RCW 42.56.550(4).

Marysville first chides Cedar Grove for failing to cite *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014), for its "comprehensive discussion of the application of the lodestar methodology." (Reply Br. 29.) Marysville's argument ignores the fact that the holding of *Berryman* has no application to the facts or issues actually relevant in this case. *Berryman* instead involved an appeal of a trial *de novo* soft tissue case in which the attorney fee award was nearly four times the underlying judgment and did not involve any of the public interest factors that underlie the rationale for attorney fee awards in PRA cases. In fact, the *Berryman* Court expressly indicated that "the purpose of the fee-shifting provision in the mandatory arbitration statute is different from the purpose of fee-shifting provisions in remedial statutes," such as the PRA, which "serve public policy goals so important that private attorneys must be given incentives to bring them." 177 Wn. App. at 674.

Moreover, the *Berryman* Court specifically called out several examples of unproductive hours, excessive time, and confusing billing entries, and on remand suggested the trial court prepare a table for each attorney listing the hours reasonably performed for each task. 177 Wn. App. at 663-64. Here, in contrast, the trial court had *already* followed *Berryman's* lodestar analysis and reduced Cedar Grove's counsel's hourly rates and compensable hours to account for items that it deemed unnecessary to the result achieved, such as Cedar Grove's only partially successful first summary judgment motion. The trial court made these initial lodestar reductions *before* imposing the additional 40 percent across-the-board reduction at issue on appeal. CP 4-5. Thus, Marysville's reliance on *Berryman* ignores the fact that Cedar Grove challenges not the trial court's discretion to reduce the number of hours spent on specific tasks but this additional across-the-board 40 percent reduction. Again, the trial court pointed to no examples of specific tasks that it found to be unproductive, excessive, or unnecessary to the result achieved by Cedar Grove in support of this additional 40 percent reduction. That failure constituted error.

Second, Marysville cites to the case of *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993) (Reply Br. 31). *Scott* is similarly inapposite because, in contrast to the liberal mandate to award fees in

furtherance of the public interest under the PRA, only those fees incurred with the motion to dismiss under the long arm statute were recoverable in that case. The Supreme Court examined the invoices and parsed out the hours actually spent on the compensable motion. *Id.* at 152-53. Here, by contrast, the trial court did not find any particular tasks to be unreasonable or unnecessary to the result achieved, and it did not undertake to specifically differentiate which tasks or hours would be recoverable.

Third, Marysville fails to provide any support for its claim that “appellate courts have routinely approved percentage reductions” like that employed by the trial court here. (Rep. Br. 31) In fact, appellate courts have authorized the trial court’s use of a percentage to allocate time between successful and unsuccessful claims, but not to make a wholesale across-the-board reduction *after* already eliminating time for unsuccessful arguments or non-compensable claims as the trial court did here. For instance, in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012), *cert. denied*, 133 S. Ct. 199 (2012) (Rep. Br. 31), the prevailing seaman was entitled to fees on his maintenance and cure claim, but not on other claims. The Court held that “[a]ppellate courts, however, have permitted the use of a percentage reduction in segregating fees and costs when, as here, the specifics of the case make segregating actual hours difficult.” 174 Wn.2d at 82, ¶ 24. There was no such issue present here,

as the trial court had already reduced the lodestar amount and was not forced to engage in further segregation in awarding fees under the liberal standard of RCW 42.56.550(4).

In fact, one of the cases cited by Marysville, *Gates v. Deukmijian*, 987 F.2d 1392, 1399-1402 (9th Cir. 1992) (Rep. Br. 31-32), actually supports Cedar Grove's argument that the trial court erred in imposing a 40 percent across-the-board cut to the lodestar amount. The *Gates* court reversed and remanded because "the district court . . . failed to articulate a 'concise but clear' explanation" for a 10 percent across-the-board reduction. 987 F.2d at 1400. *Gates* is consistent with the Ninth Circuit's consistent holding that when a district court imposes a percentage reduction greater than 10 percent, it "must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013). No such explanation is present in the record here and the trial court erred for that reason.

B. The trial court's findings do not support its 40 percent across-the-board fee reduction.

The trial court's findings here fail to provide a sufficient justification for its 40 percent across-the-board reduction. It is not enough to invoke the mantra that the trial court has discretion in making a fee

award, as Marysville repeatedly does. Instead, this Court must be able to determine the precise basis upon which that discretion has been exercised. When it cannot do so because, as here, “the trial court simply announced a number,” the proper remedy is reversal and remand. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715–16, 9 P.3d 898 (2000).

First, the trial court’s 40 percent reduction was arbitrary. There is no support in the record for the amount of that reduction.

Second, the trial court’s findings – that the hours billed by Cedar Grove’s counsel exceeded those of Marysville’s attorneys and that Cedar Grove billed a “large number of hours” after prevailing on summary judgment – do not support its conclusion that a 40 percent reduction was appropriate. The “trial court’s determination regarding attorneys’ fees utilizing an improper criteria or method requires correction.” *PAWS v. Univ. of Washington*, 114 Wn.2d at 690.

Third, Marysville’s contention that the comparison between its counsel’s fees and Cedar Grove’s counsel’s fees was proper misses the mark entirely. Cedar Grove explained below and in its briefing on appeal that it was inappropriate to reduce the fee award based on a comparison of hours spent by the two parties’ attorneys because Cedar Grove’s counsel had to complete many more tasks as plaintiff’s counsel than Marysville’s attorneys (*e.g.*, filing a motion to compel against third party Strategies

360, drafting two briefs – opening and reply – instead of one for the motions filed in the underlying litigation, reviewing the thousands of documents belatedly produced by Strategies, etc.).

In response to this argument, Marysville cites to a case in which a comparison of hourly rates of counsel was deemed appropriate, *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65-66, 738 P.2d 665 (1987) (affirming trial court’s decision to discount the hourly rate of plaintiff’s attorneys, taking into account rate of defendant’s attorneys), and to another in which the court compared the amount of time opposing counsel spent performing the same task. See *Fiore v. PPG Indus.*, 169 Wn. App. 325, 354, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012) (“[w]here a defendant, challenging a plaintiff’s attorney fee petition, contends that the request includes unnecessary or excessive charges, the amount of time expended by defense counsel in performing the same task ‘may well be the best measure of what amount of time is reasonable for this task’”) (emphasis added) (quoting *Davis v. Fid. Techs. Corp.*, 180 F.R.D. 329, 332 (W.D. Tenn. 1998)). These cases do not support the trial court’s comparison of the time performed by counsel in obtaining disclosure of documents with that spent by the government opposing the request.

Fourth, the trial court’s comparison of the requestor’s fees and the government’s fees also undermined the liberal purpose of the PRA and

“requires correction.” *PAWS v. Univ. of Washington*, 114 Wn.2d at 690. As explained in Cedar Grove’s opening brief, the fact that Cedar Grove was the moving party on most of the motions, in addition to the fact that Cedar Grove had to perform tasks (such as reviewing the Strategies documents) that Marysville did not have to perform, resulted in significantly more time expended by Cedar Grove. An overall comparison of hours is not, in fact, a comparison of time spent performing the same task. Indeed, Marysville’s outside counsel hours are further reduced by the fact that Marysville’s salaried employees provided valuable assistance to its lawyers in defending the City, while Cedar Grove’s attorneys and paralegals billed their client on an hourly basis for all of the work on the case.

Fifth, equally unsupported in the record is Marysville’s attempt to justify the trial court’s reduction by parroting back the trial court’s finding that Cedar Grove billed a large number of hours after Cedar Grove’s successful summary judgment motion and the City’s assertion that Cedar Grove’s counsel “loaded up on time after the trial court determined that fees should be allowed” after the April 2013 summary judgment motion

(Reply Br. 33).¹ Indeed, Marysville’s argument ignores the fact that *all* of the time spent and *all* of the tasks engaged in by Cedar Grove’s counsel after April were necessary to secure the final ruling in Cedar Grove’s favor below, a fact highlighted by Marysville’s failure to point to a single task that was allegedly unnecessary to the successful outcome eventually secured by Cedar Grove’s counsel. For example, the time spent on the motion to compel the Strategies documents occurred after April 2013 (*see* CP 378-80), as did the review of the documents produced as a result of that motion (*see* CP 380-81), and as did the drafting and argument on the August 2013 penalties motion. *See* CP 375-77, 380-82.

Sixth, Marysville fails to distinguish *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 25, 260 P.3d 1006 (2011), *rev’d in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013). This Court held in *Sargent* that “it was an abuse of discretion to exclude fees related to successful issues simply because the fees were incurred after” the trial

¹ Marysville misunderstands Cedar Grove’s argument in footnote 25 of Cedar Grove’s opening brief. Cedar Grove filed summary judgment motions in April 2013 and August 2013, and it seemed apparent to Cedar Grove that the trial court’s finding regarding “the large number of hours billed after Cedar Grove was successful on its summary judgment motion” (CP 5) referred to the April 2013 motion, since only five percent of Cedar Grove’s claimed fees were incurred after the August 2013 motion. *See* CP 384-85, CP 382 (September 2013 fees totaled only \$11,369.00, which is less than five percent of the total fee request of \$271,711.00). Cedar Grove was clearly not claiming that the entirety of the fees incurred after April 2013 were only five percent of its total fees.

court ruled in the plaintiff's favor at the show cause hearing. (Reply Br. 33). The same principle is applicable here: it was an abuse of the trial court's discretion to exclude fees related to successful issues (the nineteen documents and the 173 Strategies documents) simply because those fees were incurred after the trial court had ruled in Cedar Grove's favor on the fifteen documents originally withheld for privilege.

In summary, there is simply no evidence in the record to support the trial court's finding that a 40 percent reduction was warranted here, a fact highlighted by Marysville's complete failure to identify any such evidence on appeal or any legitimate findings in support of that arbitrary reduction. There is also no evidence that Cedar Grove's attorneys spent more time on these post-April 2013 tasks than they would have if the April motion had not been successful, a fact highlighted by the trial court's failure to identify any of the specific tasks performed by Cedar Grove's counsel after April 2013 as allegedly unreasonable or unnecessary. Basing the 40 percent reduction on this untenable and unsupported ground when the post-April 2013 work was necessary to prevail on the merits of the PRA claims was an abuse of discretion.

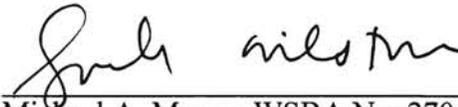
II. CONCLUSION

The PRA is clear that a prevailing plaintiff shall be awarded all reasonable attorney fees incurred in connection with the legal action.

RCW 42.56.550(4). Here, the trial court's across-the-board 40 percent reduction was an abuse of discretion, as each one of the bases purporting to support the reduction was untenable and manifestly unreasonable. This Court should affirm the trial court's orders with respect to the PRA violations and penalties findings, but should reverse the trial court's fee award and remand for further consideration on this sole issue. This Court should also award Cedar Grove costs and fees on appeal pursuant to RAP 18.1 and RCW 42.56.550(4).

RESPECTFULLY SUBMITTED this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondent/Cross-Appellant Cedar Grove Composting, Incorporated herein.

2. On this 4th day of August, 2014, I caused the document to which this certificate is attached, Reply Brief of Respondent/Cross-Appellant Cedar Grove Composting, Incorporated, to be filed with the Clerk of the Washington State Court of Appeals, Division I, and served upon counsel of record in the manner indicated below:

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

DATED this 4th day of August, 2014 at Seattle,
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Mary Beth Dahl

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