Yousoufian v. Office of Ron Sims

No. 80081-2

OWENS, J. (dissenting) -- The Public Records Act (PRA), chapter 42.56 RCW,[1] penalty in this case was by all accounts the largest ever assessed under the PRA. Nevertheless, the majority considers this award so inappropriately low that it finds an abuse of discretion and triples the award. The proposition in this case is simple: either this court will respect the trial court's discretion or it will not. The trial court awarded a reasonable penalty of $15 per day based on sound legal authority and a careful examination of the facts. The majority finds an abuse of discretion. I respectfully dissent.

[1] In 2005, the provisions in chapter 42.17 RCW pertaining to public records were recodified at chapter 42.56 RCW. Laws of 2005, ch. 274, § 1.

Abuse of Discretion

The PRA puts penalty calculations squarely within the trial court's discretion: "[I]t shall be within the discretion of the court to award [the prevailing plaintiff] 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).

A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is manifestly unreasonable if it takes a view no reasonable person would take. *Id*. A decision rests on untenable reasons if it is the result of an incorrect standard or facts that do not meet the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The trial court in this case awarded a reasonable penalty of $15 per day based on sound legal authority and a careful examination of the facts. The trial court carefully considered three factors in reaching its judgment. First, the trial court considered *American Civil Liberties Union v. Blaine School District No. 503*, 95 Wn. App. 106, 975 P.2d 536 (1999) (*ACLU*). Clerk's Papers (CP) at 125-27. In *ACLU*, the defendant, Blaine School District, refused to mail copies of public documents to the ACLU, mischaracterized the size of the ACLU's document request and the time it would take to fulfill it, and even stated outright in a letter from its superintendent that

it did not want to help the ACLU prepare a legal case against the government. *Id*. at 112-14. Division One of the Court of Appeals assessed a $10 per day penalty against the school district. *Id*. at 115. In this case, the trial court considered *ACLU*'s ruling as a factor in its decision to assess a $15 per day penalty against King County. CP at 127 ("[T]his court does not regard the County's conduct to be significantly more egregious than that of the school district in [*ACLU*]."). The trial court acted reasonably in considering *ACLU* as a factor. The county's conduct in this case is not identical to the Blaine School District's conduct in *ACLU*, but neither is it overwhelmingly dissimilar: like the trial court in this case, the *ACLU* court found that the defendant school district did not act in good faith, *ACLU*, 95 Wn. App. at 115, even finding "startling evidence of the District's improper motives," *id*. at 113.

The majority quibbles with the extent to which *ACLU* is analogous to the present case, finding that the trial court should not have considered *ACLU* as a factor in assessing its penalty. Majority at 14. However, the majority should not exercise de novo review when the standard is abuse of discretion. The question here is whether a reasonable trial judge could properly consider *ACLU* as a factor. *See Mayer*, 156 Wn.2d at 684. The trial judge acted reasonably and that should be the end of the matter.

Second, the trial court reasonably considered Yousoufian's personal economic

loss and the public importance of the records request at issue. CP at 126-27. When considering economic loss, the trial court relied on *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997), but found that Yousoufian suffered no personal economic loss in this case. CP at 126. The majority agrees that the trial court properly considered this factor. Majority at 14-15. When considering the public importance of the records request, the trial court found that the request was of great public importance but de-emphasized this factor because there was no actual public harm. CP at 126-27. The trial court did this in part because there was no case law to guide it in any other direction. *Id*. The majority would have applied this factor differently if it were the trial judge. Majority at 15-16. But the majority is not the trial judge. The standard of review is abuse of discretion, not de novo. The trial judge did not act unreasonably in weighing personal economic loss and public importance and so there is no abuse of discretion.

Finally, the trial court based its judgment on a careful examination of the facts. In examining the facts, the trial court properly considered a factor the majority does not. The majority's main complaint about the trial court's penalty is that $15 per day is not proportionate to the county's "gross negligence." *Id*. at 16-17. But gross negligence is a finding of fact, *see Swartley v. Seattle School Dist. No. 1*, 70 Wn.2d 17, 23, 421 P.2d 1009 (1966), and the original trial court in this case never found gross

negligence. CP at 124-25. Rather, the original trial court found that the county was "negligent at every step of the way." *Id*. at 124. On appeal, the Court of Appeals characterized the county's conduct as grossly negligent without explicitly reversing the trial court's factual finding of ordinary negligence. *See Yousoufian v. Office of King County Executive*, 114 Wn. App. 836, 853, 60 P.3d 667 (2003), *aff'd in part and rev'd in part on other grounds*, 152 Wn.2d 421, 98 P.3d 463 (2004). This was a mistake. *See In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) ("On review, unchallenged findings of fact are verities on appeal."). This court never questioned the Court of Appeals' mistake. On remand, the trial judge was acutely aware that the appeals courts had treated negligence and gross negligence as one and the same. Transcript of Proceedings (TR) (Aug. 19, 2005) at 6-14, 32-39.

This is a mistake for two reasons. First, negligence and gross negligence are simply different concepts. "Negligence is the failure to exercise reasonable or ordinary care." *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967); *see* 6 Washington Practice: Washington Pattern Jury Instructions: Civil 10.01 (5th ed. 2005 & Supp. 2009) (WPI). In contrast, "gross negligence is the want of slight care" and is substantially greater than ordinary negligence. *Miller v. Treat*, 57 Wn.2d 524, 532, 358 P.2d 143 (1960); *see* 6 WPI 10.07. Second, it is incorrect to assume that negligence over a long period of time, or "negligen[ce] at every step of the

way," CP at 124, amounts to gross negligence in the PRA context. This assumption would penalize the county twice for the same conduct. If negligence over a long period of time is gross negligence, then the higher culpability of gross negligence would result in a higher per day penalty for the county. But the duration of the negligence is already factored into the county's penalty through the multiplier for number of days. Thus, the county would be penalized twice for the duration of its negligence. This is an unfair result. Negligence and gross negligence are different culpability levels, and it would be a mistake to treat them as the same.

On remand, the trial judge grilled counsel for both sides on the difference between ordinary and gross negligence. TR (Aug. 19, 2005) at 6-14, 32-39. Ultimately, he felt bound by the Court of Appeals' and the Supreme Court's characterizations and based his penalty award of $15 per day on a culpability of gross negligence. CP at 125, 27. However, he was cognizant of the original unchallenged finding of ordinary negligence. *Id*. at 125. We rely on trial courts to carefully examine facts. We should not find that they abuse their discretion simply by getting their facts right where higher courts get them wrong. Nor should we perpetuate a mistake simply because we did not catch it the first time around.[2] The trial court was

[2] "'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'" *State v. Daniels*, 165 Wn.2d 627, 629, 200 P.3d 711 (Sanders, J., dissenting) (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 93 L. Ed. 259 (1949) (Frankfurter, J., dissenting)), *cert. denied*, 130 S. Ct. 85 (2009).

cognizant of the original unchallenged finding of ordinary negligence in its culpability analysis and accordingly assessed a penalty of $15 per day. The majority might have found those facts differently or awarded a different penalty in its own discretion. But PRA penalties are not within this court's discretion. The trial court acted reasonably based on its examination of the facts and did not abuse its discretion.

After finding an abuse of discretion, the majority takes the largest PRA award in state history and triples it. This outsized award tramples the trial court's discretion. Further, the majority fails to provide any reasoning whatsoever to support its $45 per day award—failing even to apply its own 16-part test to the facts. In short, the majority creates a world of standards and then refuses to live in it. The majority's $45 per day award is a naked exercise of discretion. We should reject it and affirm the trial court.

Conclusion

The trial court made a reasonable penalty award of $15 per day based on the sound legal authority in *ACLU*, a consideration of personal economic loss and the public importance of the request, and a careful examination of the facts that revealed an unchallenged finding of ordinary negligence. The majority's reversal of the trial court might be proper under de novo review but that is not the standard in this case. The legislature put PRA penalties at the trial court's discretion, and we should second-

guess that discretion only when it is abused—not simply when we would have exercised it differently. I respectfully dissent.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Chief Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Karen G. Seinfeld, Justice Pro Tem.