170 Wash.App. 1018

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

CENTER FOR JUSTICE, a non-profit corporation, Appellant,

v.

ARLINGTON SCHOOL DISTRICT, a Public Agency, Respondent.

No. 67263–1–I.
|
Sept. 4, 2012.

Appeal from Snohomish Superior Court; Hon. Ellen J. Fair, J.

Attorneys and Law Firms

Greg Overstreet, Moneytree, Inc., Tukwila, WA, for Appellant.

David Todd Hokit, Andrea Schiers, Curran Law Firm, Kent, WA, for Respondent.

UNPUBLISHED OPINION

DWYER, J.

***1** Center for Justice (CFJ) appeals from the superior court's order denying its claim that the Arlington School District's (the District) school board study sessions violated the Open Public Meetings Act of 1971, chapter 42.30 RCW, (OPMA), and from the trial court's order awarding CFJ attorney fees for its work on different claims upon which it prevailed. CFJ contends that the District violated the OPMA by providing notice of its study sessions according to the OPMA requirements for "special meetings," rather than its requirements for "regular meetings." However, because an applicable statute defines "regular meetings" as recurring meetings with dates fixed by law or rule and study sessions were not fixed by rule, they were properly characterized as special meetings for the purposes of the OPMA. CFJ also asserts that the trial court incorrectly calculated the award of attorney fees and requests that this court correct the award. Although the trial court abused its discretion by making an arithmetic error in calculating its award of attorney fees, this court does not substitute its judgment for that of the trial court. Remand to the trial court to appropriately exercise its discretion, as it sees fit, is the proper remedy. Accordingly, we affirm in part and reverse in part.

I

CFJ is a nonprofit organization, self-described as a public interest law firm. The District is a public agency located in Arlington, Washington.

The District's Board of Directors (Board) held regular bi-monthly meetings, termed "business meetings," between March 2006 and May 2008, the period relevant to this lawsuit. These meetings were properly noticed under the OPMA and are not at issue. In addition, the Board frequently held "study sessions" immediately preceding these business meetings (prior to 43 of 46 business meetings during the relevant period).[1] The Board's meeting policies are described in its official "Board Policy" documents, which are available on-line. The Board Policy contains the schedule for regular meetings and describes the notice procedure for special meetings, but does not mention study sessions. The District provided notice of the study sessions by sending agenda to Board members and to members of the media who had requested notification of special meetings.

1 Regular "business meetings" were held on the second and fourth Mondays of each month, with the meeting moving to a Tuesday if the Monday fell on a holiday. Between March 2006 and December 2006, the Board held these regular meetings 15 times according to the established schedule, but also held "study sessions" immediately preceding 14 of these 15 regular meetings. Between January 2007 and December 2007, the Board held study sessions immediately preceding 21 of 22 regular meetings. The Board also held study sessions immediately preceding eight of nine regular meetings conducted between January 2008 and May 2008.

The Board also held numerous executive sessions (closed proceedings within meetings), between 2006 and 2008. Prior to May 2007, the Board's practice for holding executive sessions on dates when it also held other meetings was to convene in executive session first, before beginning the study session or regular meeting. In May 2007, the Washington State Auditor's Office informed the District in an audit report

that its executive session protocol did not conform to OPMA standards because the Board's executive sessions did not commence in an open session. It also recommended that the Board contemporaneously provide detailed information explaining the purpose of entering into executive session. The State Auditor's Office's files supporting its audit report specify that, in all other respects, the District complied with the OPMA. Beginning in July 2007, the Board started commencing its executive sessions in open meetings.

***2** In March 2008, CFJ brought suit alleging various violations of the OPMA by the District.[2] In its amended complaint, CFJ alleged that the Board violated the OPMA by not providing proper notice of 38 study sessions occurring between March 2006 and February 2008. CFJ further alleged that the Board was continuing to hold improperly noticed study sessions at the time the action was commenced. CFJ also alleged that, during 2006 and 2007, the Board failed to conduct its executive sessions in compliance with the OPMA because the Board did not begin the sessions in open public sessions and did not publicly announce proper purposes for the closed sessions. CFJ asserted that the District committed both violations on 21 occasions on which executive sessions were held during this period. CFJ relied on the State Auditor's Office report to identify most of these violations, using the report to identify actions in which the District failed to comply with the OPMA during the period covered by the audit. CFJ further alleged that the District continued its violations of the OPMA even after the Board amended its policy on executive sessions.

2 In addition to the executive sessions and study sessions at issue on appeal, CFJ's amended complaint alleged that one Board dinner and two Board retreats held during 2006 and 2007 did not comply with the OPMA. CFJ's claims regarding the dinner and retreats were voluntarily dismissed following the trial court's rulings on the parties' cross-motions for summary judgment.

In its amended answer, the District admitted to the violations identified in the Auditor's report, but denied others. The 21 executive sessions allegedly involving OPMA violations corresponded to the compliance problems detected in the Auditor's report. The District did not contest either that it had not begun the 21 challenged executive sessions in open session or that it had not publicly announced a proper purpose for those closed meetings. In contrast, the District denied that it had failed to provide adequate notice of study sessions, alleged violations that were not identified in the Auditor's report.

The parties filed cross-motions for summary judgment.[3] In its motion for summary judgment, CJF argued that the Board's study sessions were in fact regular meetings or, in the alternative, that they were special meetings but that proper special meeting notice had not been provided. The District maintained that it considered the Board's study sessions to be special meetings and had, accordingly, provided proper notice pursuant to the OPMA's requirements.

3 After the trial court ruled on these motions, CJF voluntarily dismissed all remaining claims.

Problematically, CFJ alleged a number of violations in its motion for summary judgment that had not been asserted in its amended complaint. In its motion for summary judgment, CFJ asserted that the District violated the OPMA during 33 executive sessions, with up to three distinct violations per session: (1) failure to begin in an open public meeting prior to convening into an executive session; (2) failure to announce a proper purpose for convening to executive session; and (3) failure to announce an anticipated ending time prior to convening in executive session. It contended that 31 sessions involved all three violations and that two sessions involved two of the three types of violations. CFJ also listed more dates upon which it alleged that the District held improperly noticed study sessions, raising the number of study sessions at issue to 43. Overall, CFJ alleged 144 distinct OPMA violations for meetings held on 53 different dates between March 2006 and May 2008.[4]

4 CFJ's motion for summary judgment references "Attachment A," a "Violation Chart" detailing each Board meeting that it alleges violated the OPMA. The chart includes alleged violations for executive sessions (up to three types of violations per session), study sessions, dinners, and retreats.

***3** The trial court granted the District's motion for summary judgment on the study session claims, holding that the study sessions were special meetings and that the District provided adequate notice pursuant to the OPMA requirements for special meetings.[5]

5 CFJ has not appealed the trial court's finding that the District satisfied the notice requirements for special meetings. Rather, it maintains that the study sessions qualify as regular meetings, making the special meeting notice procedures improper.

The trial court granted CFJ's summary judgment on the claims related to executive session violations alleged in the amended complaint, but not for the additional claims set forth for the first time in CFJ's summary judgment motion. Pursuant to applicable statute, the trial court awarded attorney fees to CFJ premised upon the executive session violations upon which it prevailed. To calculate a reasonable award of attorney fees, the trial court utilized the lodestar method, multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. The trial court multiplied the lodestar value by CFJ's "degree of success" in its attempt to reduce the amount of the award to reflect CFJ's limited success. The trial court calculated "degree of success" as being the number of claims won out of the total number of claims alleged, using executive session meetings as the unit for the numerator (21 executive session meetings for which CFJ prevailed), but using the total number of alleged violations as the unit for the denominator (144 total alleged violations in the motion for summary judgment). This resulted in a "degree of success" of 14.6 percent, which was then multiplied against the lodestar to determine the appropriate award of attorney fees.

CFJ appeals.

II

CFJ's primary contention is that the trial court erred by determining that the District complied with OPMA requirements by providing special meeting notice of study sessions. We disagree. Because the statute treats "regular meetings" as meetings held according to a schedule fixed by law or rule and expresses no preference for the holding of regular meetings, CFJ's contention is unavailing.

Appellate review of the granting or denial of a motion for summary judgment is de novo, requiring the same inquiry as the trial court. *Michak v. Transnation Title Ins. Co.,* 148 Wn.2d 788, 794, 64 P.3d 22 (2003). A trial court should grant summary judgment if the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Michak,* 148 Wn.2d at 794–95. Additionally, the interpretation and construction of the OPMA is a question of law subject to de novo review. *Wood v. Battle Ground Sch. Dist.,* 107 Wn.App. 550, 558, 27 P.3d 1208 (2001).

The OPMA requires that "[a]ll meetings of the governing body of a public agency [are] open and public." RCW 42.30.030. The OPMA is intended to facilitate the transparency of government decision-making. RCW 42.30.010; *Cathcart v. Andersen,* 85 Wn.2d 102, 107, 530 P.2d 313 (1975). As such, it must be "liberally construed." RCW 42.30.910. Under the OPMA, the scheduled day and time of "regular meetings" held by the governing body of a public agency must be provided by "ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body." RCW 42.30.070. "Special meetings" may be held at any time and noticed by the delivery of written notice to each member of the governing body and to members of the media who have filed written requests to be notified of such meetings. Former RCW 42.30.080 (2005).

***4** The OPMA defines "meetings" as "meetings at which action is taken." RCW 42.30.020(4). An "action" is the "transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). In the section describing notice requirements for regular meetings of public agencies, the OPMA does not explicitly define "regular meetings." RCW 42.30.070. "Regular meetings" are, however, defined in a different section that applies only to *state* agencies.[6] According to RCW 42.30 .075, state agencies that hold regular meetings must file the time and place of the meetings with the Washington state register. The provision states: "For the purpose of this section 'regular' meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule." RCW 42.30.075.

6 Not all public agencies are state agencies. *See* RCW 42.30.020.

Courts interpret the OPMA by first looking to the language of the statute, giving effect to its plain meaning. *West v. Wash. Ass'n of Cnty. Officials,* 162 Wn.App. 120, 130, 252 P.3d 406 (2011); *Wood,* 107 Wn.App. at 558. Courts do not engage in statutory construction if a statute's language is plain and unambiguous. *Cerrillo v. Esparza,* 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Wood,* 107 Wn.App. at 558. Our Supreme Court has held that "[a] statute is ambiguous if it is 'susceptible to two or more reasonable interpretations', but 'a statute is not ambiguous merely because different interpretations are conceivable.' " *Cerrillo,* 158 Wn.2d at 201 (internal quotation marks omitted) (quoting *Agrilink Foods, Inc. v. Dep't of Revenue,* 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)).

Neither party disputes the material facts of this case. Several circumstances necessary for a violation of the OPMA's notice requirements are undisputed.[7] The parties agree that the Board was a governing body of a public agency and that the study sessions were meetings at which actions were taken. The sole point of disagreement regarding study sessions is whether the notice provided by the District satisfied the OPMA requirements. CFJ has not appealed the trial court's ruling that the District provided proper special meeting notice of the study sessions. Instead, CFJ contends that the trial court erred by finding that study sessions were special meetings, rather than regular meetings, and permitting the study sessions to be noticed as special meetings.

7 *Cf. Wood,* 107 Wn.App. at 558. In *Wood,* the court held that a claim for civil penalties under former RCW 42.30.120(1) (1985) requires that a plaintiff show (1) that a "member" of a governing body (2) attended a "meeting" of that body (3) where "action" was taken in violation of the OPMA, and (4) that the member had "knowledge" that the meeting violated the OPMA. *Wood,* 107 Wn.App. at 558. The fourth factor, knowledge of the violation by the member, is not required in order for a court to award attorney fees. *Eugster v. City of Spokane,* 110 Wn.App. 212, 226–27, 39 P.3d 380 (2002). Here, CFJ does not allege that study sessions involved knowing violations and thus does not seek the imposition of civil penalties upon Board members.

Study sessions are regular meetings, not special meetings, CFJ asserts, because the study sessions occurred immediately before nearly every regular meeting held during the relevant period. Thus, CFJ avers, these meetings must also have been "regular" meetings.

CFJ's assertion is flawed for several reasons. Although the OPMA provides specific notice requirements for "regular meetings," *see* RCW 42.30.070, it does not define regular meetings in that section. While CFJ notes that a term left undefined in a statute can be given its ordinary dictionary definition, *see State v. Sullivan,* 143 Wn.2d 162, 174–75, 19 P.3d 1012 (2001), the preferred canon is that a statute's plain meaning should be determined in light of the entire statutory scheme, *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9–12, 43 P.3d 4 (2002); *West,* 162 Wn.App. at 130.

***5** Viewed in the context of the entire statute, "regular meetings" is not ambiguous. RCW 42.30.060(1) states that

> [n]o governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at *a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter.*

(Emphasis added.) This provision suggests that the OPMA envisions two kinds of meetings: meetings with dates fixed by law or rule, and other meetings with notice requirements described in the chapter. RCW 42.30.070 specifies that "[t]he governing body of a public agency *shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.*" (Emphasis added.) Under this section, regular meetings are noticed by means of the type of rule the governing body employs in its routine rule-making. Other than regular meetings, the only other meeting types are special meetings, former RCW 42.30.080, and emergency meetings, RCW 42.30.070, neither of which has a schedule fixed by rule. Regular meetings, then, are the only type of meetings that have dates "fixed by law or rule." Reading the OPMA's provisions in conjunction, the statute defines regular meetings as those that have fixed dates according to law or rule.

Contrary to CFJ's assertions, the Attorney General Opinion cited by the District directly supports this interpretation. It states:

> In essence, [RCW 42.30.070] (along with [RCW 42.30.060]) defines a regular meeting as one 'the date of which is fixed by law or rule' ([RCW 42.30.060]) and with regard to which the governing body has provided '... the time for holding ... by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of the business by that body....'

Wash. AGO 1971 No. 33 (some alterations in original).

Fundamentally, the OPMA distinguishes meetings only by the type of notice that the agency provides. Nothing in the OPMA specifies time, location, or periodicity considerations for determining the type of notice. The OPMA thereby permits a public agency to choose the meeting type and the corresponding notice requirements as it wishes, so long as the agency provides some type of notice in accordance with the Act. Thus, the term "regular meetings" is not ambiguous in the context of other provisions of the statute.

CFJ argues that the definition of "regular meetings," applicable to state agencies, in RCW 42.30.075 should inform

this court's interpretation of the term "regular meetings," as applicable to public agencies. That provision explicitly defines "regular meetings" as "recurring meetings held in accordance with a periodic schedule *declared by statute or rule.*" RCW 42.30.075 (emphasis added). CFJ focuses on the fact that study sessions are "recurring" meetings to advance its contention that study sessions are regular meetings. In doing so, however, CFJ ignores that part of the definition specifying that regular meetings are "declared by statute or rule." In fact, using this provision to identify the plain language meaning of "regular meetings" for public agencies bolsters the interpretation that regular meetings are those —and only those—that have been officially declared by whatever rule the governing body employs to conduct its business.

***6** CFJ proposes resort to additional canons of construction to aid in identifying the intended meaning of "regular meetings," as applicable to public agencies. However, in the absence of ambiguity, we need not engage in further statutory construction. *Cerrillo,* 158 Wn.2d at 201. As noted above, the term "regular meetings" for public agencies is not ambiguous because it is not susceptible to more than one reasonable meaning. Because this language, viewed in the context of the entire statutory scheme, is unambiguous, our inquiry ends. *Cerrillo,* 158 Wn.2d at 205.

CFJ's reliance on various guides, reports, and manuals is also misplaced. Contrary to CFJ's argument, the Washington State School Directors Association's School Board Guide does not mandate that regularly scheduled study sessions be noted in school boards' regular meeting policies. Rather, it concludes that, "[i]f the board has regularly scheduled study sessions, those *should* be noted in the board's regular meeting policy, *so the district need not go through* special meeting notices each time the study session is held." (Emphasis added.) The School Board Guide merely suggests that school boards can avoid the more burdensome notice requirements applicable to special meetings by providing the times of study sessions in their regular meeting policies. It does not purport to mandate that this be done nor does it purport to declare that such a mandate exists elsewhere in the law.

CFJ also points to a Municipal Research and Services Center (MRSC) Report in support of its position. The MRSC Report states that "special meetings are not held according to a fixed schedule." Neither the report, nor the OPMA itself, stipulates how often special meetings may be held or otherwise limits their frequency. Further, the fact that the Board did not establish a schedule for study sessions *fixed* by rule is actually consistent with the MRSC Report's definition. As the trial court noted, given that study sessions are not fixed by a Board rule, their regularity could only be determined in hindsight.

Finally, contrary to CFJ's assertion, the Attorney General's Open Government Internet Manual does not require *regular meeting notice* of study sessions, but merely states that *notice* must be given for study sessions ("The OPMA does not allow for 'study sessions', 'retreats', or similar efforts to discuss agency issues without the required notice. Notice must be given just as if a formally scheduled meeting was to be held."). Thus, if study sessions were special meetings and the District provided special meeting notice, notice was in fact "given just as if a formally scheduled meeting was to be held."

In summary, the District correctly asserts that neither the statute nor the sources cited by CFJ suggest that the OPMA requires public agencies to hold regular meetings or prohibits agencies from holding special meetings frequently, or even exclusively.

***7** CFJ's second line of reasoning relies on a policy argument centered on the adequacy of special meeting notice. Special meeting notice is inappropriate for regularly recurring study sessions, CFJ asserts, because study sessions occur predictably enough to be listed as regular meetings in the Board Policy, and doing so would provide better notice to the public.[8] However, CFJ's contention that regular meeting notice better accomplishes the OPMA's policy goals fails to acknowledge the legislature's apparent conclusion that regular and special meeting notice are equivalently sufficient.

8 CFJ argues that the District should have given the public constructive notice of the meetings by including study sessions in the regular meeting schedule contained in the Board Policy. In response, the District states that CFJ's "constructive notice" argument was not brought to the trial court's attention and should be disregarded under RAP 2.5(a). While CFJ's motion for summary judgment did not contain an explicit reference to "constructive notice," it argued that, because policy favors openness and public accessibility, the OPMA should be liberally construed in favor of public notice, such as that provided for regular meetings. Because the substance of this argument was properly raised in the trial court, CFJ's failure to use the term "constructive notice" does not prevent consideration of CFJ's policy argument.

The notice requirements for special and regular meetings have different benefits, simply reflecting two sets of alternatives that the legislature considered adequate. CFJ asserts that the public receives more notice of regular meetings because their schedule is published well in advance, whereas special meetings require only a minimum of 24 hours' notice.[9] As noted by the District and the trial court, however, the higher burdens and more specific requirements necessary for special meeting notice indicate that greater notice may be provided, because "each and every one of them had to go out in the newspaper and to all Board members as opposed to just being contained in the policies of the District." Moreover, notice of special meetings must include the business to be transacted at the meeting, and final actions cannot be taken on any other matter. Former RCW 42.30.080. In this way, although the public arguably receives less notice of the time at which special meetings will be held, it receives more notice of the specific topics to be discussed.

9 Curiously, our Supreme Court has stated that special meetings require "no public notice" because the agency need only inform board members and members of the media that have already requested notification of special meetings. *Estey v. Dempsey,* 104 Wn.2d 597, 604, 707 P.2d 1338 (1985). It is more usual to view notice to the media as a form of public notice.

More importantly, the OPMA expresses no preference for either form of notice. It imposes no requirement on public agencies to hold regular meetings, nor does it provide any penalty for failing to hold regular meetings. Wash. AGO 1971 No. 33. The statute, apparently in recognition of the broad range of needs of public agencies, provides two legally sufficient means of providing notice. Special meeting notice is sufficient for meetings that a governing body does not declare by rule. Given that the legislature thought this notice to be sufficient when provided once, there is no reason why, in the absence of statutory requirements for regular meetings, special meeting notice would be insufficient when provided 43 times. Whatever imperfections exist in the notice procedures, courts "[do] not subject an unambiguous statute to statutory construction" and should not " 'add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.' " *Cerrillo,* 158 Wn.2d at 201 (quoting *Kilian v. Atkinson,* 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). Concerns about the sufficiency of notice requirements should be addressed by the legislature, not by a judicial rewriting of the statute.[10] *Wood,* 107 Wn.App. at 561–62.

10 In fact, the legislature has since modified the notice requirements for special meetings, effective June 2012. Second Substitute S.B. 5355, 62nd Leg., Reg. Sess. (Wash.2012). Under the new version of RCW 42.30.080, aside from a few exceptions, special meeting notice requires that the time and location of special meetings be provided: (1) to all members of the governing body; (2) to newspapers and television or radio stations that have requested notification of special meetings; (3) on the agency's website; and (4) on prominently placed signs at the agency's principal location and meeting site.

Because the District's study sessions were not fixed by statute or rule, the trial court did not err by ruling that study sessions were special meetings and that the District complied with the OPMA by providing special meeting notice.

III

***8** CFJ next asserts that the trial court abused its discretion by incorrectly calculating CFJ's degree of success when formulating its award of attorney fees. Because the trial court based its award on an untenable ground, CFJ is correct.

The standard of review of an award of attorney fees is abuse of discretion. *In re Recall of Pearsall–Stipek,* 136 Wn.2d 255, 265, 961 P.2d 343 (1998). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *In re Marriage of Littlefield,* 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). Specifically,

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Littlefield, 133 Wn.2d at 47.

The preferred method of calculating an award of attorney fees is the lodestar method. *Mahler v. Szucs,* 135 Wn.2d 398, 433, 957 P .2d 632, 966 P.2d 305 (1998). Under the lodestar method, reasonable attorney fees are measured by multiplying a reasonable hourly rate by a reasonable number of hours for the legal work performed. *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The trial court may increase or decrease the lodestar amount according

to various factors, such as the complexity, necessity, and efficiency of the work. RPC 1.5(a); *Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 114 Wn.2d 677, 689–90, 790 P.2d 604 (1990); *Bowers,* 100 Wn.2d at 597; *Deep Water Brewing LLC v. Fairway Res. Ltd.,* 152 Wn.App. 229, 282, 215 P.3d 990 (2009). Here, the trial court sought to do so by reducing the award to reflect its view of CFJ's limited "degree of success."

In this case, CFJ contends that the trial court made a mathematical error when calculating CFJ's degree of success for use in determining its award of attorney fees for the claims upon which CFJ prevailed (the executive session claims). In its order on attorney's fees, the trial court stated that the "successful claims were 21 out of 144 claims, constituting a degree of success of 14.6% ." The trial court then used this degree of success to reduce the lodestar value and arrive at an amount it considered reasonable. In order to obtain the number of successful claims (numerator), the trial court used the 21 executive session *meetings* involving OPMA violations alleged in CFJ's amended complaint. The trial court apparently used the total number of *violations* for all meetings that CFJ alleged in its motion for summary judgment[11] in order to identify the total number of "claims" (denominator), even though the 144 violations *were based on multiple violations per meeting.* According to the approach utilized by the trial court, CFJ's actual degree of success should have been based on either the number of meetings with violations *or* the number of alleged violations, but should not have been based on the *combination* of these units, the approach utilized by the trial court.

11 The total number of violations was apparently derived from the violation chart CFJ referenced in its motion for summary judgment.

***9** The District suggests that the trial court merely adjusted the award to reflect CFJ's minimal legal work and limited success. Although the trial court has discretion to determine a reasonable award of attorney fees, it must have a tenable basis for the award made. *Progressive Animal Welfare Soc'y,* 114 Wn.2d at 689–90. Here, the trial court attempted to use CFJ's degree of success in calculating the award of attorney fees. However, because the numbers reported in the order on attorney's fees do not reflect a valid calculation of CFJ's relative success, the trial court based its calculation on an untenable ground.[12]

12 This use of an untenable basis *may* have led to a result outside the range of acceptable choices, precluding affirmance on this alternative basis.

CFJ further contends that the trial court is required to use the number of distinct violations as the unit of measure in calculating its award of attorney fees under former RCW 42.30.120(2) (1985).[13] CFJ is wrong. CFJ implicitly relies upon an interpretation of the statute that incorrectly equates attorney fees with penalties or punitive damages. However, contrary to CFJ's assertions, the statute does not mandate that courts award attorney fees on the basis of the number of separable violations. Rather, it requires the trial court to award attorney fees "incurred in connection" with successful legal action against a public agency to the extent that the fee award is *reasonable.* Former RCW 42.30.120(2). Trial courts have discretion to determine a reasonable award of attorney fees based on the necessity of the work performed and excluding time for duplicative, wasteful, or unsuccessful hours. *Progressive Animal Welfare Soc'y,* 114 Wn.2d at 689–90; *Bowers,* 100 Wn.2d at 597; *Deep Water Brewing,* 152 Wn.App. at 282. The trial court's assessment of reasonableness need not accommodate a "per violation" award.

13 The District suggests that CFJ's argument is not supported by authority and should therefore be ignored according to RAP 10.3(a)(6) and *Saviano v. Westport Amusements, Inc.,* 144 Wn.App. 72, 84, 180 P.3d 874 (2008). CFJ's argument, however, is based on statutory interpretation using the statute as the authority.

In addition, given that a separate provision exists establishing civil penalties for individuals who violate the OPMA, former RCW 42.30.120(1), it is clear that the legislature did not intend an attorney fee award to serve a punitive function. The underlying purpose of a statute authorizing an award of attorney fees is central to its calculation. *Brand v. Dep't of Labor & Indus.,* 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). When a statute "differentiates among the relief it provides, specifically distinguishing 'costs', 'attorney fees', and the discretionary 'award', it appears that the three awards were intended to serve different purposes." *Yacobellis v. City of Bellingham,* 64 Wn.App. 295, 304, 825 P.2d 324 (1992), *abrogated in part on other grounds by Amren v. City of Kalama,* 131 Wn.2d 25, 37 n. 10, 929 P.2d 389 (1997), *and King County v. Sheehan,* 114 Wn.App. 325, 352 n. 6, 57 P.3d 307 (2002).

Comparison to courts' interpretations of the Public Records Act, chapter 42.56 RCW, is instructive.[14] Courts have used the distinct purposes of the penalty and attorney fee provisions of the Public Records Act as guidance in their application. We have held that the recovery of costs (including reasonable attorney fees) furthers policy goals "by making it financially feasible for private citizens to enforce the public's right to access public records." *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503,* 95 Wn.App. 106, 115, 975 P.2d 536 (1999). The penalty provision in the Public Records Act, on the other hand, serves to " 'discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.' " *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 444, 459–60, 229 P.3d 735 (2010), (alteration in original) (internal quotation marks omitted) (quoting *Yousoufian v. Office of Ron Sims,* 152 Wn.2d 421, 429–30, 98 P.3d 463 (2004). In *Yacobellis,* we rejected attempts to treat uncompensated attorney fees as economic damages in order to incorporate them into penalty calculations under the Public Records Act. 64 Wn.App. at 304. Here, CFJ cannot use a similar strategy to package penalties as attorney fees. It is not entitled to a mandatory "per violation" amount.

14 The OPMA is similar to the Public Records Act in that both were enacted to promote governmental transparency and both include provisions establishing civil penalties and attorney fee awards. *Compare* RCW 42.30.010, *with* RCW 42.56.030; *and* RCW 42.30.120, *with* RCW 42.56.550(4).

***10** Because the trial court based its award on an untenable ground, we remand the matter to the trial court for redetermination of the award. *See Progressive Animal Welfare Soc'y,* 114 Wn.2d at 690 (remanding to the trial court for redetermination of its award of attorney fees that was based on an untenable ground). CFJ requests that we "correct the lower court's flawed calculation." However, this court does not "substitute [its] judgment for that of the trial court," and, on remand, the trial court "retains full authority to exercise its discretion in determining the appropriate" award. *Green v. Normandy Park Riviera Section Cmty. Club, Inc.,* 137 Wn.App. 665, 700, 151 P.3d 1038 (2007). Where a statute merely permits an award of attorney fees, the trial court has the discretion to deny the request for an award of attorney fees altogether, even where a party prevails on the majority of its claims. *Roats v. Blakely Island Maint. Comm'n, Inc.,* 169 Wn.App. 263, 279 P.3d 943, 953–54 (2012). However, an award of reasonable attorney fees is mandatory for violations of the OPMA. Former RCW 42.30.120(2). Thus, an award must be made. Nevertheless, the trial court retains discretion to limit the award to arrive at an amount it considers reasonable. This may, or may not, include the use of a numerical calculation of CFJ's degree of success, as the trial court sees fit. Numerous approaches are extant in the case law and they are all available to the trial court on remand.

IV

Both parties request an award of attorney fees on appeal. Although the District prevails on the study session claims, it is not entitled to an award of attorney fees because CFJ's action is not frivolous. On the other hand, CFJ is entitled to an award of attorney fees for work done on its claim that the trial court abused its discretion in awarding attorney fees at trial.

The District requests an award of attorney fees incurred on appeal pursuant to RAP 18.9(a).[15] Courts may award a party attorney fees incurred in responding to a frivolous appeal. RAP 18.9(a). An appeal is frivolous when it presents "no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Streater v. White,* 26 Wn.App. 430, 434, 613 P.2d 187 (1980). Because we resolve doubts against finding an appeal frivolous, *Streater,* 26 Wn.App. at 435, and the interpretation of the OPMA is at least debatable,[16] CFJ's appeal is not frivolous. Therefore, the District's request for an award of attorney fees on the study session claims is denied.

15 A public agency may be awarded reasonable expenses and attorney fees for prevailing on an OPMA action upon "final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause." Former RCW 42.30 .120(2). No such award was granted by the trial judge.

16 The trial court did not grant the District's request for CR 11 sanctions, finding that it "[could not] say that no one could advance [CFJ's legal theories] or could find the regular versus special aspect of it even cognizable."

CFJ requests attorney fees pursuant to RAP 18.1. An award of attorney fees on appeal is permitted if supported by applicable law. RAP 18.1. Courts must award costs, including reasonable attorney fees, to any person who prevails against a public agency in any action based on meetings that are improper under the OPMA. Former RCW 42.30.120(2); *Eugster v. City of Spokane,* 110 Wn.App. 212, 228, 39 P.3d 380 (2002). The prevailing party may recover attorney fees on appeal

when attorney fees are allowable at trial. RAP 18.1; *Scheib v. Crosby,* 160 Wn.App. 345, 353, 249 P.3d 184 (2011). CFJ properly requested an award of attorney fees and costs incurred in connection with this appeal. RAP 18.1(a). Because CFJ prevails on its appeal of the trial court's award of attorney fees, it is also entitled to an award of fees for work done in relation to that issue. This amount may be determined either by an appellate court commissioner or clerk, RAP 18.1(f), or by the trial court on remand, RAP 18.1(i). Here, we direct the trial court to determine the appropriate amount of attorney fees to be awarded to CFJ for work done in that court and on appeal of its meritorious issue. The trial court is best positioned to evaluate and account for duplicative efforts. The award of attorney fees on appeal should be limited to work done on the claim that the trial court abused its discretion by basing the award on an untenable ground, and should not include work done on the requested remedy—that this court determine the amount of the award—because that remedy is legally unwarranted. While work done on the former aspect of the attorney fee issue is subject to award, the latter component is not compensable.

***11** We affirm the trial court's determination that study sessions were special meetings for the purposes of the OPMA. We reverse and remand the trial court's award of attorney fees. We grant CFJ's request for an award of attorney fees, incurred in appealing the trial court's award, and direct the trial court to determine the appropriate amount of the award on remand.[17]

17 Cost bills, if any, seeking an award of costs other than the attorney fees, should be submitted for consideration by our commissioner, as per rule RAP 14.6(a).

Affirmed in part, reversed in part.

We concur: SPEARMAN, A.C.J., and ELLINGTON, J.

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