always Appealing A SCOWA Spring Preview When Should Appellate Courts Review a Multifactor Legal Test Decided on Summary Judgment for an Abuse of Discretion?

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Bar Bulletin Blog: General

By Jonathan Collins

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

After two clerkships and a few years in appellate practice, I have written the summary judgment standard of review more times than I can count. Surely, our esteemed Always Appealing readers could faithfully recite the chapter and verse like pious disciples in the Church of CR 56—”the standard of review is de novo, of course!”

But in Horvath v. DBIA Services,[1] Division One suggested maybe it's not—not always, at least. The Supreme Court granted a petition for review in the case and will weigh the issue this Spring.

Horvath focuses on whether a nonprofit managing certain services in downtown Seattle is functionally equivalent to an agency under the Public Records Act (PRA).[2]

Since 1999, Seattle has designated part of downtown—the Metropolitan Improvement District (MID)—as a "business improvement area" under ch. 35.87A RCW, which allows cities to partner with local businesses for "economic development and neighborhood revitalization."[3] The City contracted with a nonprofit, DBIA Services, to "manage the day-to-day operations" there.[4]

Years later, Steve Horvath requested public records about the MID, contacting both the City and the Downtown Seattle Association—DBIA's parent nonprofit organization. Horvath sued when the Association and DBIA declined to produce records; DBIA moved for summary judgment, arguing it isn't an "agency" under the PRA.[5]

Washington courts apply the Telford[6] factors to determine whether an entity is functionally equivalent to an agency under the PRA, considering: (1) whether the entity performs a government function, (2) the extent to which the government funds the entity's activities, (3) the extent of government involvement in the entity's activities, and (4) whether the entity was created by the government.[7]

The trial court held that neither the DBIA nor the MID itself are agencies subject to the PRA, and Division One affirmed summary judgment dismissal.[8]

On the surface, the substantive legal question in Horvath seems straightforward: Did Division One correctly apply the Telford factors in holding that neither the DBIA nor the MID are "agencies" under the PRA?

Far more consequential, though, is the discussion of the applicable standard of review. Before analyzing the Telford factors, Division One held that the summary judgment order should be reviewed for an abuse of discretion rather than de novo.[9]

Division One notes the Supreme Court has applied an abuse of discretion standard when reviewing summary judgment decisions before—albeit in narrow

circumstances, such as evaluating the scope of equitable relief granted on summary judgment.[10]

Quoting Borton & Sons, Inc. v. Burbank Properties, LLC,[11] Division One explains that "the summary judgment 'standard of review depends on the question presented.'"[12] Relying on examples in Borton, the court states that "appellate courts apply the abuse of discretion standard of review when considering a case decided on summary judgment when the trial court had discretion in making its determination."[13]

Further, the legislature conferred discretion to courts applying the PRA—requiring "that the enactment be broadly construed"—without providing "further guidance as to" how courts should wield that discretion.[14] Facing a similar problem in Yousoufian v. Office of Ron Sims (Yousoufian II), the Supreme Court adopted a "multifactor framework[ ]" to guide courts "exercising their discretion" in calculating PRA penalties.[15]

Analogizing the Telford factors to the discretionary multifactor analysis in Yousoufian II, Division One held "that abuse of discretion is the proper standard of review for a trial court's determination regarding whether a private entity is an 'agency' under the Public Records Act."[16]

While it is unusual to review summary judgment for an abuse of discretion, I can see where the Horvath court is coming from here.

Division Three once emphasized the "important principles" underlying the abuse of discretion standard by stressing that its "overriding purpose" is "the necessity of applying a general principle of law to a specific set of facts."[17] That describes the Telford factors, which trial courts must apply in light of "the totality of the circumstances"[18] in each case and "with respect to the particular defendant entity at hand[.]"[19] The Supreme Court has suggested that deferential appellate review may be appropriate when "a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis."[20]

On the other hand, appellate courts typically apply the abuse of discretion standard because the trial court is "in a better position" to resolve certain issues.[21] In contrast, when the record "consists entirely of written documents" and the trial court wasn't required to assess witness credibility or "weigh the

evidence," the appellate court stands in the same position as the trial court and de novo review is appropriate.[22]

An appellate court reviewing summary judgment—"performing the same inquiry"[23] on the same record—is no worse off than the trial court, and thus there is little reason for deference. Accordingly, the de novo standard applies to "all trial court rulings made [on] summary judgment," even otherwise discretionary ones—like evidentiary decisions—with rare exception.[24] As Horvath points out in his petition for review, Washington courts apply multifactor tests on summary judgment all the time in different contexts, none of which are reviewed for an abuse of discretion.[25]

In fact, the PRA expressly requires de novo review for "all agency actions taken or challenged[.]"[26] Thus, even on appeal following a bench trial, "whether an agency violated the PRA" and "whether particular records are exempt from disclosure" are still reviewed de novo.[27]

Division One ignores this provision due to Yousoufian II and other PRA cases where courts applied an abuse of discretion standard.[28] But those cases involve the calculation of PRA penalties, which a different PRA subsection provides "shall be within the discretion of the court[.]"[29] This calculation occurs after a PRA violation is established; at that point, "whether to award is mandatory but how much to award is discretionary."[30]

The Borton Court similarly explained that while a trial court exercises discretion in "fashioning" an equitable remedy on summary judgment, "the threshold question" of "whether equitable relief is appropriate is a question of law" reviewed "de novo."[31] Like the PRA,[32] the authority cited in Horvath distinguishes between whether a party is entitled to relief—a question of law—and whether the specific relief awarded was appropriate, which is discretionary.

One factor the Supreme Court might consider in deciding Horvath is when a different standard might produce different results.

The abuse of discretion standard recognizes that trial courts face decisions with a "range of acceptable choices" to resolve them.[33] But whether an entity is an "agency" under the PRA is a pure, binary choice; it is hard to imagine a set of facts that would present two "acceptable" but opposite choices about an entity's

PRA status. Moreover, such an approach would make government contracting unpredictable because any entity could theoretically be both subject to and exempt from the PRA depending on which judge decides the issue first—a kind of Schrodinger's agency.

Given the Telford analysis allows for two mutually-exclusive legal conclusions, an abuse of discretion standard may be no different than de novo review in practice. Because a trial court abuses its discretion by applying the incorrect legal standard or by misapplying the facts to the correct legal standard,[34] a trial court misapplying the Telford factors commits reversible error under either standard of review.

Even in Horvath, it's hard to discern how the standard of review affects the analysis. Division One acknowledged that the parties didn't dispute the underlying facts;[35] and it seems to agree with the trial court's analysis, concluding it "properly applied the law to [the] facts."[36]

As DBIA notes in answering Horvath's petition,[37] the only "error" Division One identifies is the trial court's conclusion "that the agency funding factor weighed in favor" of DBIA's alleged "agency" status.[38] In other words, Division One was even more confident than the trial court that DBIA isn't subject to the PRA.

If the same outcome would occur under either standard, why bring it up? That, too, isn't clear. Division One raised the issue on its own, noting both parties argued for de novo review instead.[39] Neither party advocated for a different standard,[40] nor did the issue come up during argument.[41]

If the Supreme Court follows Horvath's reasoning, it could provide guidance by explaining which aspects of the Telford analysis deserve deference and what that deference looks like in practice. The Court could also clarify the legal basis for adopting the abuse of discretion standard here, establishing a limiting principle to prevent expanding appellate review standards applicable to multifactor tests outside the PRA context.

Jonathan Collins has been an associate at Smith Goodfriend since 2019. He previously clerked for Judge Linda Lau in Division One and Chief Justice Mary

Fairhurst of the Washington State Supreme Court. Jon can be reached at jon@washingtonappeals.com.

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1 31 Wn. App. 2d 549, 551 P.3d 1053 (2024).

2 Ch. 42.56 RCW.

3 RCW 35.87A.010.

4 Horvath, 31 Wn. App. 2d at 555, ¶¶11-12.

5 Id. at 555-57, ¶¶13-17; see RCW 42.56.010(1), defining "agenc[ies]" that must comply with the PRA.

6 Telford v. Thurston Cnty. Bd. of Com'rs, 95 Wn. App. 149, 974 P.2d 886 (1999).

7 Fortgang v. Woodland Park Zoo, 187 Wn.2d 509, 518, ¶15, 387 P.3d 690 (2017).

8 See Horvath, 31 Wn. App. 2d at 564-74, ¶¶30-46.

9 Id. at 557-59, ¶¶20 & 22.

10 Id. at 557-58, ¶21.

11 196 Wn.2d 199, 471 P.3d 871 (2020).

12 Horvath, 31 Wn. App. 2d at 558, ¶21, quoting Barton, 196 Wn.2d at 206, ¶17.

13 Horvath, 31 Wn. App. 2d at 558, ¶21, citing Borton and related cases.

14 Id. at 559, ¶23.

15 Yousoufian v. Office of Ron Sims (Yousoufian II), 168 Wn.2d 444, ¶41, 229 P.3d 735 (2010).

16 Horvath, 31 Wn. App. 2d at 562, ¶26.

17 In re Jannot, 110 Wn. App. 16, 19, 37 P.3d 1265, aff'd, 149 Wn.2d 123 (2003).

18 Fortgang, 187 Wn.2d at 519, n.4 (quoted source omitted).

19 Id. at 523, ¶28.

20 State v. McCarthy, 193 Wn.2d 792, 802, ¶20, 446 P.3d 167 (2019) (quoted source omitted).

21 Id. at 772, ¶12 (quoted source omitted).

22 Dolan v. King Cnty, 172 Wn.2d 299, 310, ¶19, 258 P.3d 20 (2011) (quoted source omitted).

23 Freedom Found. v. Gregoire, 178 Wn.2d 686, 694, ¶9, 310 P.3d 1252 (2013).

24 Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

25 See Pet. for Review at 16-18, Horvath v. DBIA Servs., No. 103339-7 (Wash. Oct. 6, 2024).

26 RCW 42.56.550(3).

27 Citizen Action Defense Fund v. Wash. State Office of Fin. Mgmt., 31 Wn. App. 2d 633, 640, ¶12, 552 P.3d 341 (2024).

28 Horvath, 31 Wn. App. 2d at 561, n.15.

29 RCW 42.56.550(4).

30 Sanders v. State, 169 Wn.2d 827, 867, ¶93 (emphasis added).

31 Borton, 196 Wn.2d at 207, ¶¶19-20.

32 Compare, RCW 42.56.550(3) with RCW 42.56.550(4).

33 Horvath, 31 Wn. App. 2d at 572, ¶41.

34 State v. Dye, 178 Wn.2d 541, 548, ¶16, 309 P.3d 1192 (2013).

35 Horvath, 31 Wn. App. 2d at 564, ¶30 (“The parties do not dispute the trial court’s findings of fact on appeal.”).

36 Id. at 570, ¶36.

37 Ans. to Pet. for Review at 17, Horvath v. DBIA Servs., No. 103339-7 (Wash. Jan. 2, 2025).

38 Horvath, 31 Wn. App. 2d at 571, n.18 (emphasis added).

39 Id. at 557-58, ¶20.

40 Briefs are available via the public document portal on the Washington Courts website.

41 Division One Court of Appeals, Argument, April 19, 2024, available at: https://tinyurl.com/3rzh6bzx.