No. 70657-8-I

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

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Respondent,

v.

CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIM IA, individually and in her official capacity,

Defendants/Appellants.

ANSWER TO AMICUS BRIEF

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1. INTRODUCTION

The Washington Coalition for Open Government (WCOG) correctly notes the importance of the right to attorney fees under the Public Records Act. WCOG also properly urges this Court to consider the future consequences of its ruling. But the relief the City of Shoreline seeks will not have any adverse impact on the ability of requestors in future PRA cases to obtain attorney fees. Rather, risk of precedential harm in this case will come if the trial court's decision to flaunt a clear deadline in the court rules is allowed to stand. And because the trial court's actions were governed by the unambiguous language in Civil Rules 6(b), which grants and govern a trial court's authority to extend deadlines, the harm will impact all future civil lawsuits. Such a ruling would circumvent the Supreme Court prior holding that the requirements and limitations in CR 6(b) on a trial court's authority to extend a deadline must be strictly enforced, even when it results in the loss of an important right.[1]

2. ARGUMENT IN ANSWER TO AMICUS

The Civil Rules are designed to allow for "the just, speedy and inexpensive determination in every action." CR 1. While courts will

[1] *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (dismissing appeal "raising many important issues, including an equal protection claim" as untimely because motion for reconsideration was untimely and CR 6(b)'s prohibition on extending deadline for motion for reconsideration would be strictly enforced).

strive to construe the rules to allow cases to be resolved on their merits when possible, case law is replete with decisions where the just, speedy and inexpensive mandate has required courts to enforce the procedural requirements by concluding a party has forfeited a right through noncompliance. In other words, to provide for the just, speedy and inexpensive resolutions of disputes, the Civil Rules must constrain a trial court's discretion.

The deadlines in the Civil Rules play an essential role in achieving two of the three mandates - the speedy and inexpensive resolution of disputes. But because the strict enforcement of deadlines can sometimes have unjust results, CR 6(b) gives trial broad but not unlimited authority to adjust those deadlines.

WCOG seeks to have the Court throw out the careful balance achieved in CR 6(b) by asking the Court to give trial courts the untrammeled authority to ignore court rule deadlines (and by implication all other restrictions) whenever those limitations work to the disadvantage of a PRA requestor. While such authority would undoubtedly benefit some requestors who chose not to follow court deadlines, such a ruling would undermine all of the goals the civil rules were enacted to achieve and therefore must be rejected.

Here, after the O'Neills missed the 10-day deadline for filing their motion for attorney fees and the City sought to strike the untimely motion, the trial court apparently concluded its authority was not constrained by CR 6(b) and ruled on the untimely motion without even addressing the 10-

day deadline or CR 6(b). This precedent, if upheld, will turn the CR 6(b) limits on court authority into a "dead letter,"[2] which will in turn undermine all deadlines in the civil rules. The results of such a ruling were described in a 2003 federal appeals court ruling that reversed a similar trial court decision that forgave a missed deadline without a showing of excusable neglect: absent rigorous enforcement of the excusable neglect standard, "the legal system would groan under the weight of a regimen of uncertainty[.]"[3]

Nor can the Court avoid causing significant harm by following WCOG's invitation to adopt a PRA-specific excuse for complying with the procedural requirements in Court Rules. This would of course contravene another Supreme Court ruling that PRA cases are governed by the "normal civil procedures[.]"[4]

Harm would not be limited to trial court proceedings. Under WCOG's reasoning, with missed deadlines for appeal under RAP 5.2 appellate courts would be asked to determine the equities for a PRA case, and be prohibited from enforcing RAP 18.1 in those cases, even when a requestor fails to "devote a section of its opening brief to the request for the fees or expenses." Not surprisingly, the Supreme Court, after ruling two successful requestors were entitled to attorney fees in the trial court,

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[2] *See Pybas v. Paolino*, 73 Wn. App. 393, 401, 404, 869 P.2d 427 (1994) (holding that authorizing a trial court to forgive a missed deadline simply by the court's order, where there was no showing of excusable neglect would turn the court rule's deadline into a "dead letter.")

[3] *Silvanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003).

[4] *SRDF v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005).

did not hesitate to find that one of the requestor's had waived its right to attorney fees on appeal for not complying with RAP 18.1.[5] Thus, the Supreme Court has already made it clear that there is no special PRA exception to compliance with procedural rules, even when it results in the loss of the right to attorney fees. Other statutes include an award of attorney's fees for equally laudable policy objectives, and the court should not create unwritten rules of preference in enforcing its procedures.

Apart from the consequences that would stem from affirming the trial court's actions, this Court will not create any unseen pitfalls for PRA requestors seeking attorney fees if it reverses the trial court. The 10-day deadline in CR 54(d)(2) is unambiguous and CR 6(b) already gives trial courts broad authority to extend the 10-day deadline. Prior to the expiration of the 10 days, the Court can extend the deadline simply for "good cause," with or without a motion. CR 6(b)(1). After the 10 days run, the trial court may still retain the discretion to extend the deadline, as long as the requestor files a motion and shows "excusable neglect." These are not onerous requirements and no injustice will stem from requiring PRA litigants to comply with them. Thus, none of the policy considerations cited by WCOG excuse the O'Neills from the consequences of their actions.

[5] *In re Rosier*, 105 Wn.2d 606, 617, 717 P.2d 1353 (1986), abrogated by statute on other grounds as recognized in *PAWS v. U.W.*, 125 Wn.2d 243, 258-59, 884 P.2d 592 (1994).

2.1 A Party's Substantive Rights Can Be Forfeited When the Party Fails to Comply with the Procedures in Place for Enforcing that Right

By claiming the importance of PRA attorneys' fees justified the trial court's actions, WCOG makes the same error the O'Neills have made on appeal by confusing substantive rights with procedures rules. Rights relate to substantive privileges and if a substantive right conflicts with a procedure, the right will prevail. But procedures are needed to enforce rights. *State v. Templeton*, 148 Wn.2d 193, 213-14, 59 P.3d 632 (2002) (reviewing numerous cases where the Supreme Court has rejected challenges to court procedures, after someone's failure to comply with those procedures resulted in the loss of a constitutional right). There is no conflict between a substantive right and a mandatory procedure the person seeking to exercise that right must follow. Therefore, in cases such as the one at bar, which only involves a statutory right, there is no bar on the Court concluding that the O'Neills forfeited their right to attorney fees by not complying with the procedural requirements.

2.2 The Court Rules Serve as a Check on the Trial Court's Inherent Authority and Cannot Be Ignored

Courts cannot interpret court rules in a manner that will make the rule or a portion of the rule meaningless. *Hudson v. Hapner*, 170 Wn.2d 22, 29, 239 P.3d 579 (2010). Moreover, the court rules serve as a check on the inherent authority of a trial court, so when the court rules provide for specific standards that limit the court's authority, the court abuses its discretion when it acts if those standards are not satisfied. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). Thus, in *Presidential Estates v.*

Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the Supreme Court found a trial court abused its discretion when it granted a motion to make a substantive amendment to a judgment under CR 60(a), because under the standards of that rule, only clerical amendments were allowed. Similarly, in *Lamb*, the Supreme Court held that "[t]he trial court abused its discretion because it did not use any of the legal standards applicable" under the court rule that governed the court's decision. *Lamb*, 175 Wn.2d at 128.

2.3 A Court's Authority to Extend Missed Deadlines Is Governed By CR 6(b)

Litigants who have missed a crucial deadline in the court rules have attempted to use a variety of rules to avoid the consequences of their error. But Courts have repeatedly only recognized one rule that allows a trial court to forgive a missed deadline: CR 6(b). Thus the Court has rejected attempts to use other rules when CR 6(b) does not authorize the extension. For example, if a litigant fails to file a timely appeal, the Court cannot use the court rules to vacate the judgment and then re-enter it to restart the appeal period. *Pybas*, 73 Wn. App. at 400-401. "If [a court could vacate and reenter a judgment] the law which limits the time within which an appeal must be taken would be a dead letter." *Pybas*, 73 Wn. App. at 401 (quoting *Cohn v. Stingle*, 51 Wn.2d 866, 322 P.2d 873 (1958)); *see also Witty v. Dukakis*, 3 F.3d 517, 520 (1st Cir. 1993) (party that missed Rule 54 deadline for filing a motion for attorney fees "cannot allow the time to lapse and then resurrect his right merely by asking the

court to reconsider or to confirm what the court has already done."). Likewise, where a party's legal messenger failed to file a request for trial de novo by the 20-day deadline, it would be an abuse of discretion for a court to use CR 60 to vacate the judgment on the arbitration award to allow a new trial. *Pybas*, 73 Wn. App. at 403-04 (reversing trial court and ruling that attorney error cannot satisfy excusable neglect standard); *see also, e.g., Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010) (refusing to allow party to use CR 60 to vacate arbitration award, where attorney failed to attend hearing because of sick parents).

Moreover, the Courts have strictly enforced the requirements and limitations in CR 6(b) and refused to allow deadlines to be extended if not authorized by CR 6(b). Thus, when a party failed to move to vacate a default judgment within 1 year, the Court ruled that it was bound by the prohibition in CR 6(b) from extending the CR 60(b)(1) deadline. *Suburban Janitorial Serv. v. Clarke American*, 72 Wn. App. 302, 307, 863 P.2d 1377 (1993) ("Case law supports the application of the rule [CR 6(b)] as written.").

The courts have refused to forgive missed deadlines absent authority under CR 6(b), even when it will result in the forfeiture of a valuable right. Thus, in *Schaefco, Inc.*, property owners seeking to challenge the imposition of harsh restrictions on the use of their property "raise[d] many important issues, including an equal protection claim," yet had a motion for reconsideration denied because they did not serve it until four days after the 10-day time limit. *Schaefco, Inc.*, 121 Wn.2d at 368.

The trial court did not rule the motion was untimely until over 30 days after its original ruling. Because it was untimely, however, the court's ruling did not toll the plaintiff's 30 days to file a notice of appeal. In doing so, the majority was not persuaded that the rules of construction in RAP 1.2, which dictate that the rules should be interpreted to reach the merits of a claim, justified ignoring the limitations in CR 6(b). *Schaefco, Inc.*, 121 Wn.2d at 370 (Guy, J, dissenting).

Rather than ignore rules to avoid a potential injustice by applying them, Judge Schindler demonstrated in her concurrence in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), what courts should do. In that case, the unanimous court first ruled that a party who files a request for trial de novo has the right to unilaterally withdraw that request. It then ruled that the other party, who also wanted a trial de novo but had not filed her own request assuming it was unnecessary, could not file a request past the 20-day deadline. *Thomas-Kerr*, 114 Wn. App. at 559-60. Although Judge Schindler thought this result was unfair, she still joined the court's opinion, but also added a concurrence to "urge the Supreme Court to amend the mandatory rules" to address the unfair result in this case. *Thomas-Kerr*, 114 Wn. App. at 563 (Schinder, J., concurring).

Thus, even if the trial court believed it would be unjust to enforce the 10-day deadline, the trial court was still bound by the standards of CR 6(b). This required a showing of excusable neglect, which could not be met because it was their attorney's legal error that caused them to miss the deadline.

2.4 CR 54(d)(2) Does Not Grant the Court the Untrammeled Authority to Extend the 10 Day Deadline.

In *Corey v. Pierce County*, 154 Wn. App. 752, 774, 225 P.3d 367 (2010), the Court held that a party who filed a motion for attorney fees after CR 54(d)(2) 10-day deadline had to show excusable neglect or the motion would be struck. In addition to excusable neglect, CR 6(b)(2) requires an actual motion seeking the extension. *Colorado Structures, Inc. v. Blue Mountain Plaza*, LLC, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) (holding court did not need to even evaluate whether excusable neglect justified a late filing when party failed to file a motion seeking an extension as mandated by CR 6(b)(2)); compare CR 6(b)(1) (authorizing court to extend a deadline "with or without a motion" before the deadline expires) with CR 6(b)(2) (authorizing court to extend deadline after it expired but only "upon motion" and with a showing of "excusable neglect").

Despite this clear holdings in *Corey* and *Colorado Structures*, and unambiguous language of CR 6(b)(2), WCOG argues that by including the qualification "[u]nless otherwise provided by statute or order of the court," CR 54(d)(2) granted the court independent authority to extend the deadline, even without a showing of excusable neglect. This argument would lead to the absurd result of finding the rule gave the court the authority to extend the deadline even without cause. This same argument was analyzed in detail and rejected by the Second Circuit Federal Court of Appeals, which found that the "order of the court" had to be an order of

general application in place at the time the deadline was missed. *Tancredi v. Metro Life Ins.*, 378 F.3d 220, 226-27 (2d Cir. 2004).

To reach this conclusion, the Court first noted that Rule 6(b) already gave a court the authority to extend the deadline in a particular case before the deadline expired simply for cause, so if the "order of the court" in CR 54(d) were meant to grant a court authority to extend a deadline in an individual case, it would only have meaning if it was interpreted as allowing the court to grant an extension of a deadline where no cause justified an extension. *Tancredi*, 378 F.3d at 226 (rejecting claim that rule gave trial court carte blanche authority). The Court went on to note that in the numerous federal decisions addressing the Rule 54(d) deadline, every court has required excusable neglect to forgive a missed deadline. *Tancredi*, 378 F.3d at 227. Moreover, one of the purposes of adopting the deadline in Rule 54(d) was to require attorney fee disputes to be resolved in a prompt, fair and efficient manner, a goal that would be undermined if the rule were interpreted to give a court the "untrammeled discretion" to excuse compliance with the deadline. *Tancredi*, 378 F.3d at 227. In contrast, applying the same "excusable neglect" standard to Rule 54(d) that applied to all other deadlines reached a fair balance by motivating compliance without dictating harsh results. *Tancredi*, 378 F.3d at 227.

Washington's court rules, like the federal rules, should be interpreted to allow for the just, speedy and inexpensive resolution of

cases. This requires strict enforcement of CR 6(b) any time a party seeks to excuse a missed deadline.

2.5 The O'Neills' Non-Compliance with CR 54(d)(2)'s 10-day Deadline Cannot Be Excused by the City's Actions

WCOG, like the O'Neills, seek to pass the blame for the O'Neills' legal error onto the City. But the City's actions in no way caused or justify the O'Neills' mistakes. *See Beckman v. State*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000) (refusing to excuse missed deadline in part because "Plaintiff's counsel was not legally obligated to bring the State's mistake, if any, to the State's attention.").

First, WCOG tries to argue that the O'Neills were justified in ignoring the deadline because of the language in the agreed Judgment on Offer and Acceptance that the offered amount "does not include attorney's fees incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument." CP 55-56. Even the O'Neills recognized that this language still required them to file a motion for attorney fees. CP 371 ("We will prepare the fee and cost motion ..."). Moreover, this Court has repeatedly recommended that parties include language addressing the issue of attorney fees in CR 68 offers to avoid confusion. *See, e.g., Hodge v. Development Services*, 65 Wn. App 576, 584, 828 P.2d 1175 (1992) ("it would be prudent practice and we strongly recommend that where a defendant intends that his offer shall include any attorneys' fees provided for in the underlying statute he expressly so state."). Following this best

practice does not show intent by the City to waive any procedural protections in the Civil Rules.

Moreover, CR 54(d)(2) provides the only procedure for obtaining a fee award. In addition, the O'Neills did not limit their fee request "to attorney fees incurred to date," but instead sought additional fees incurred after the date they accepted the judgment, so it is clear that they did not think the City's offer fully resolved the issue of their entitlement to fees. *Compare Johnson v. Dep't of Transportation*, 177 Wn. App. 684, 696-97, 313 P.3d 1197 (2013) (party was not entitled to fees incurred preparing attorney fee motion where offer of judgment only included fees "incurred up to the date/time of the offer").

Second, the City's discovery did not prejudice the O'Neills or otherwise interfere with the O'Neills' ability to comply with the 10-day deadline, much less to seek an extension before the 10 days expired. As demonstrated by the billing records, the O'Neills' attorney took a two week break from the case after the City sought discovery focusing solely on the attorney fee issue. CP 196-97. Finally, as this Court recently emphasized, "Washington courts do not consider it deceptive or unfair" for a party to remain silent when it had no duty to respond. *Trinity Universal Ins. Co. v. Ohio Casualty Ins. Co.*, 176 Wn. App. 185, 195-96, 312 P.3d 976 (2013). The City's attorneys had no reason to think the O'Neills' would miss the CR 54(d)(2) deadline. The only contact between the attorneys was a few days before the deadline ran, when the O'Neills' attorney asked for a "Word" copy of the discovery request. CP 373. This

suggested that the O'Neills were preparing the discovery responses and would file those responses with their timely motion. The City's attorneys had no way of knowing that, in fact, the O'Neills' attorney had done nothing on the fees motion for the prior two weeks. But even the City had suspected an oversight, absent a duty to speak, there would have not been any improper or unethical conduct that would justify a finding of inexcusable neglect. *See Trinity Universal*, 176 Wn. App. at 196-98 & n.6 (plaintiff's tactical decision to wait until after the 1-year deadline for filing a CR 60 motion to vacate a default judgment had passed before seeking to execute a default judgment not improper but rather was nothing more than a "strategic decision attorneys are permitted to make"). Even where opposing counsel had affirmatively stated an incorrect deadline in open court, a moving party could not claim they were mislead by the misinformation and excused from using a calendar themselves. *Silvanch*, 333 F.3d at 368-69 ("each party is responsible for knowing the pertinent procedural rules and principles and for taking such steps as are needed to protect its own interests").

In fact, the only dilatory conduct that created unfair prejudice in the trial court was caused the O'Neills' incomplete discovery responses. When the O'Neills responded, they refused to answer numerous interrogatories by asserting that the attorney fee bills would answer the requests, but then refused to provide those bills until a protective order was in place. CP 407-11. Nevertheless, when the O'Neills filed their attorney fee motion one week later, they produced those bills without any

such order in place. This shows that their demand for a protective order was a ruse, designed either to gain additional time to respond due to lack of attention or hamper the City's ability to respond.

This dilatory conduct deprived the City of a full week to review those bills, giving the City just four days to conduct the review and file their opposition. When the City tried to remedy the harm caused by the O'Neills by asking for additional time, the O'Neills magnified the prejudice by demanding compliance with the court rule deadline (in this case Local Rule 7).

3. CONCLUSION

Deadlines always create difficult cases on the margins. In lamenting a decision that a claim was barred by fairly unforgiving procedural deadline, a statute of limitations, Judge Learned Hand vividly described the dilemma deadlines can pose:

> They are often engines of injustice; their justification lies in furnishing an easy and certain method of solving problems which are often intrinsically insoluble, or soluble only with so much uncertainty and after so much trouble that in the long run the game is not worth the candle. Perhaps they are not justifiable at all; equity has always been too sensitive to their possible harshness to accept them. But where they do exist one must be prepared for hard cases, and it is no answer that this is one.[6]

To help avoid hard cases caused by deadlines, the drafters of the Civil Rules included CR 6(b). This rule strikes a balance by giving trial courts some discretion when a deadline is missed for an excusable mistake

[6] *Helvering v. Schine Chain Theaters*, 121 F.2d 948, 950 (2d Cir. 1941).

but puts limits in the rule to ensure litigants diligently strive to protect their own interest. This balance is critical if courts are to provide "just, speedy and efficient" resolutions of disputes. The "adherence to reasonable deadlines is critical"[7] for insuring just, speedy and efficient resolution of lawsuits. See CR 1.

For the excusable neglect standard to have any meaning, attorney error cannot qualify as excusable.[8] "If a simple mistake made by counsel were to excuse an untimely filing, it would be hard to fathom the kind of neglect that [a court] would not deem excusable."[9]

Nor will a ruling in the City's favor lead to unduly harsh or unfair decisions in future cases. As noted by Division II of this Court, when finding an attorney's excuse for missing a deadline was not excusable neglect and therefore waived a client's right to appeal: "We acknowledge that our conclusion seemingly affects a harsh result on a party who filed for review one day late. But we also note that a party ... may avoid such a harsh result by showing that ... it failed to timely respond due to 'excusable neglect.'"[10]

Any harshness in concluding the O'Neills forfeited their right to attorney's fees was of their own making. The rules were clear and unambiguous. The City did not hinder the O'Neills' ability to comply

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[7] *Institute for Policy Studies v. CIA*, 246 F.R.D. 380, 382 (D.C.D.C 2007).

[8] *Pybas*, 73 Wn. App. at 433.

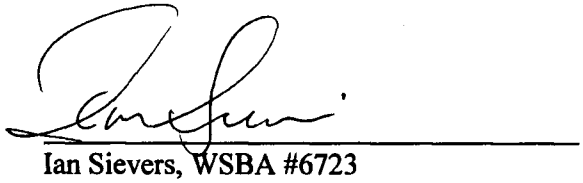
[9] *Institute for Policy*, 246 F.R.D. at 383.

[10] *Puget Sound Medical Supply v. State*, 156 Wn. App. 364, 278, 234 P.3d 246 (2010).

with the 10-day deadline or in any way suggest an intent to waive the procedural requirements of the civil rules. The O'Neills demanded compliance with those rules when it worked to their advantage. It does not undermine the policy objectives of the PRA (or any other statute that contains a fee award) because meeting deadlines in order to realize the fee is fully under the control of the plaintiff.

Thus, in considering how a ruling in the City's favor will affect future litigants, the Court should consider the undermining of all deadlines in the civil rules were the Court to affirm the trial court's blatant flaunting of the CR 54(d)(2) deadline in this case.

RESPECTFULLY SUBMITTED this 20st May, 2014



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