NO. 96424-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOEL ZELLMER,

Appellant,

v.

KING COUNTY,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

None of the issues in Zellmer's petition for review justify further consideration under the criteria found in RAP 13.4. The Court of Appeals' unpublished opinion is not in conflict with existing case law and no significant public interest is implicated.

II. STATEMENT OF THE CASE

Joel Zellmer has been an inmate at the Washington State Penitentiary in Walla Walla since 2010 as a result of his conviction for second degree murder. CP 28.

Zellmer's PRA Requests

On September 29, 2015, the King County Prosecuting Attorney's Office (PAO) received a public records request from Zellmer asking for "All photographs taken of the inside of the home that was done on December 6, 2005." After an extensive search, the PAO provided Zellmer with 35 photographs. CP 29, 30-31, 34, 55, 56, 59, 71. Of these, 31 photographs had a "date modified" of 12/6/05 and four photographs had a "date modified" of 12/7/05.[1] CP 29-31, 68-69.

On February 5, 2016, the PAO received another public records request from Zellmer asking for "All photographs taken on

[1] The four photographs dated 12/7/05 were provided by mistake. CP 80.

December 7, 2005 of the inside of the home that was searched. Please include anything that was not produced in the photograph request previously for December 6, 2005." CP 30, 38. The PAO re-reviewed its records and provided Zellmer with 24 photographs with a "date modified" of 12/7/05. CP 30-31, 42-44, 46, 56-57, 73.

After this lawsuit was filed, in an abundance of caution the PAO reviewed its records again to make sure that responsive records had not been missed. CP 31, 80. As a result of that review, the PAO identified 294 photographs that could be of the inside of the home, and that could have been taken on December 6 or December 7, 2005. CP 80.

These 294 photographs included (a) the 35 photographs that the PAO sent in response to the 2015 request, (b) the 24 photographs that the PAO sent in response to the 2016 request, and (c) 235 photographs with a "date modified" and a "date created" of December 9, 2005, and April 20, 2007. CP 80-81, 275-81. The PAO sent these 294 photographs to Zellmer on June 30, 2016. CP 81, 83.

On August 23, 2016, the PAO made a CR 68 offer of judgment for this case that was not accepted. *See* Appendix A.

Zellmer's Attorney Previously received the 235 Photographs at Issue

The PAO previously provided the 235 photographs at issue in this case to Zellmer's attorney, at Zellmer's request, in response to another PRA request from Zellmer. On January 18, 2015, the PAO received a public records request from Zellmer for particular Bates numbered records from his criminal case. CP 57, 75-76. In that request, Zellmer specifically asked the PAO to send any discs with those Bates numbers to his attorney, Nancy Collins. *Id*. In response, the PAO sent nine discs to Ms. Collins on April 29, 2015. CP 57, 78.

Of the nine discs that were sent to Ms. Collins in April 2015, two discs contained the 235 photographs, which the PAO provided to Zellmer on June 30, 2016, as part of the group of 294 photographs. CP 31, 57, 78, 81, 90-91.

Court of Appeals Decision

The appellate court overturned the trial court's decision that the PAO did not violate the PRA and found that the PAO's search was inadequate. *Zellmer v. King Cty.*, No. 76825-5-I, slip op. at 5, 52018 WL 3447740 (Wash. Ct. App. July 16, 2018) (unpublished). The court noted that the PAO used methodology to sort responsive

from non-responsive photographs that was inherently unreliable because the “date modified” and “date created” do not accurately reflect the date a photograph was taken. *Id*. at 5.

However, the appellate court affirmed the trial court’s summary judgment ruling that PAO did not act in bad faith when it responded to Zellmer’s PRA requests. *Id*. at 6. The Court of Appeals did not award Zellmer attorney fees or costs because he did not request them. *Id*.

After briefing from both parties, the court of appeals denied Zellmer’s motion for reconsideration on the issues of attorney fees and bad faith. Zellmer’s petition for review followed.

III. ARGUMENT

A. Zellmer’s Arguments for Attorney Fees Do Not Warrant Review.

The majority of Zellmer’s petition focuses on the Court of Appeals’ decision not to award him attorney fees. Neither of his arguments justify further review by this Court.

1. No case law conflict.

First, Zellmer erroneously asserts a case law conflict that does not exist regarding the Court of Appeals’ application of well-established case law. Zellmer's attorney failed to comply with the

rules governing a demand for fees and he is now trying to fashion his mistake as one made by the Court of Appeals.

The PRA provides that a prevailing party to an action "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action." RCW 42.56.550(4). However, Zellmer's petition ignores that the right to recover attorney fees in PRA suits must be effected through the procedural mechanisms in the Rules of Appellate Procedure.

Substantive law creates, defines, and regulates primary rights. *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). In contrast, procedural rules involve the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 984, 216 P.3d 374 (2009).

"[T]he power to prescribe rules for procedure and practice" is an inherent power of the judicial branch that flows from article IV, section 1 of the Washington Constitution." *State v. Gresham*, 173 Wn.2d 405, 428-29, 269 P.3d 207 (2012). The legislature recognized the court's power in RCW 2.04.190 (rules of pleading, practice, and procedure generally) and RCW 2.04.200 (all laws in conflict with court rules shall be of no force or effect). *Id*.

RAP 18.1 sets forth the mechanical operations that a party must perform to recover attorney fees. In particular, RAP 18.1(a) states

> If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court. (emphasis added).

Further, a "party must devote a section of its opening brief to the request for the fees or expenses" and "[t]he request should not be made in the cost bill." RAP 18.1(b).

When amendments to RAP 18.1 were proposed in 1990, they were accompanied by the following relevant drafter's comment:

> Section (b) retains the requirement that a section of the brief is to be devoted to the request for fees or expenses; again the operative word is strengthened from "should" to "must." The amendment also adds a provision for requesting fees and expenses in a motion on the merits.

3 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE: RAP 18.1, at 9-10 (8th ed. 2018) (quoting Drafter's Comment, 1990 Amendments).

The language of RAP 18.1 is compulsory and it is well settled that failure to comply with the rule's procedural requirements

results in the denial of attorney fees. *See Gardner v. First Heritage Bank*, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013)(in a foreclosure proceeding, merely stating that if the party "prevails on appeal, it is entitled to additional attorney fees and costs under RAP 18.1" in the conclusion of a party's response brief does not comply with RAP 18.1); *Osborne v. Seymour,* 164 Wn. App. 820, 866, 265 P.3d 917 (2011)(in a claim under 42 U.S.C. §1983, compliance with the requirements of RAP 18.1(b) is mandatory); *Thweatt v. Hommel,* 67 Wn. App. 135, 148, 834 P.2d 1058 (1992) (in a dispute between a creditor and debtor, "RAP 18.1(b) requires more than a bald request for attorney fees on appeal."); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 363 n.12, 110 P.3d 1145 (2005) (in a construction defect dispute involving equitable indemnity, a request for fees "on same grounds as below" was insufficient); *Dep't of Labor & Indus. of State v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 788, 48 P.3d 324, 333 (2002) (in a suit against employee's former employer no fees were awarded where a party referenced RAP 18.1 but did not explain grounds for an award of fees).

Contrary to Zellmer's contention, this Court's precedents apply the requirements in RAP 18.1 in the context of the PRA. In *Gendler v. Batiste*, 174 Wn.2d 244, 274 P.3d 346 (2012), this Court held that the State Patrol improperly withheld records in response to Gendler's PRA request. 174 Wn.2d at 264-65. The opinion notes "[t]o be awarded attorney fees or expenses on review before this court, the party must make the request in its opening brief" under RAP 18.1(b). *Id*. at 264. Since Gendler "specifically requested his attorney fees and costs in his opening brief at the Court of Appeals," he was awarded reasonable attorney fees and costs. *Id*.

In contrast, Zellmer's opening brief did not devote a section to recovery of attorney fees or costs as required by RAP 18.1. Rather, in the conclusion he asked the appellate court to "reverse the lower court's order of summary judgment, and to provide any other relief this Court deems just and equitable under these circumstances." Opening Brief at 37. Contrary to Zellmer's contention that the Court of Appeals "on its own initiative, went beyond the relief requested," in his opening brief Zellmer's expressly made an open-ended request for "any" relief that the appellate court found appropriate. Petition at 11-12.

By its terms, RAP 18.1(i) gives appellate courts discretion to direct the trial court to determine fees and expenses ("The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.") In his brief, Zellmer acknowledges that the PRA is not among the statutes that directs a request for fees to the trial court, yet throughout his petition Zellmer argues that he was improperly denied an opportunity to ask the trial court for fees. Petition for Review at 14.

Moreover, in a case deciding criteria for awarding attorney fees under RCW 42.17, the former public disclosure act, this Court held:

> We may either remand for such a determination or ourselves determine the fees without remand. PAWS' attorney has submitted the required affidavits as well as time sheets to support its request for attorneys' fees on appeal and has otherwise complied with RAP 18.1.

Progressive Animal Welfare Soc. v. Univ. of Washington, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). There is no support for the claim that an appellate court does not have authority to decide an award of fees, without remand, if the court determines that no further information is necessary. Zellmer's contention amounts to a disagreement with the court of appeals' ruling, but this bare assertion does not create a case law conflict. In any event, Zellmer

would not recover the vast majority of the fees he incurred in this case due to the PAO's CR 68 offer.

Despite his best efforts to identify an error by the appellate court, the court faithfully applied precedent and the RAPs in reaching its decision. Zellmer's attorney caused the result of which he now complains, not the court. Zellmer's claim that the appellate court's decision violates longstanding case law is misleading and does not warrant review.

2. No substantial public interest.

Second, Zellmer incorrectly asserts that the Court of Appeals' decision not awarding him attorney fees involves an issue of substantial public interest. The court declining to grant an award applies solely to Zellmer as an individual under this particular set of facts. Far from a matter of vital public interest, the court's decision was a result of the unique circumstances in this case and the error of Zellmer's counsel. Simply stated, an attorney's failure to adhere to the rules of appellate procedure is neither an error that should be attributed to a reviewing court nor a matter of vital and substantial public interest.

B. Review of Zellmer's Bad Faith Argument is Not Warranted.

The PAO conducted a thorough search for photographs of the inside of the home, and provided all of the photographs which were labeled with a date of December 6 or 7, 2005. CP 80, 274-75. None of the 235 photographs provided after the lawsuit was filed had dates that matched Zellmer's request. CP 274-75, 277-78, 280-81. Further, the PAO had previously sent the 235 photographs at issue to Zellmer's former attorney, Nancy Collins, in response to a prior PRA request from Zellmer. CP 78, 80-81, 274.

There is neither a conflict in case law nor a substantial public interest justifying review of the appellate court's finding of no bad faith. Without any evidentiary support, Zellmer falsely asserts that the PAO is still withholding records responsive to his PRA requests. Petition for Review at 8, 15. His arguments regarding the appellate court's finding of no bad faith amount to a factual disagreement with the appellate court's application of PRA case law. Indeed, in the body of his brief Zellmer does not explain how the PAO acted in bad faith and he does not include any citation to the record to support his assertion of bad faith. Review of this issue is likewise not warranted.

IV. CONCLUSION

The Court of Appeals' decision is in accordance with this Court's precedents and does not implicate a substantial public interest. Therefore, no further action should be taken on this case. The PAO respectfully requests that Zellmer's request for further review be denied.

DATED this 5th day of December, 2018.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

I, Natalie Brown, hereby certify and declare under penalty of perjury under the laws of the State of Washington that a true and correct copy of the foregoing RESPONDENTS' ANSWER TO PETITION FOR REVIEW was sent via the electronic filing system of the Supreme Court of Washington to the following:

Andrew R. Corsberg
Andrew@corsberglaw.com

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

DATED this 5th day of December 2018 at Seattle, Washington.

By: Natalie Brown
Natalie Brown, Paralegal

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JOEL ZELLMER, Plaintiff, vs. KING COUNTY ET. AL. Defendant.	No. 16-2-11607-8 SEA DEFENDANT'S OFFER OF JUDGMENT

Defendant King County offers to allow judgment to be entered against it in this matter in the amount of $1,010, plus (1) costs, including reasonable attorney fees, accrued prior to the date of this offer, in an amount to be set by the court, and (2) reasonable attorney fees for time spent establishing the amount of costs, including attorney fees, described in the preceding subpart (1), in an amount to be set by the court.

This offer is made pursuant to Washington CR 68.

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DATED this 23rd day of August, 2016, at Seattle, Washington.

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