70657-8

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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 FIMIA, individually and in her official capacity,

Defendants/Appellants.

BRIEF OF APPELLANTS

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1. INTRODUCTION

The City of Shoreline ("City") made a technical error regarding the production of metadata and has already been held accountable for its mistake, even though it only resulted in the loss of purely technical information not apparent on the face of the email and not used by the City.[1] Because the Public Records Act mandates strict compliance,[2] the City has paid $100,000 in penalties for its mistake and that award is not at issue.

Instead, this appeal involves the O'Neills' legal mistake that they made after the trial court entered the agreed "Judgment on Offer and Acceptance" awarding the O'Neills $100,000. Once this judgment was entered, CR 54(d)(2) required the O'Neills to file their attorney fee motion "no later than 10 days after entry of judgment." The failure to meet this deadline serves to waive the party's right to attorney fees unless a motion is granted to extend that deadline after a showing of "excusable neglect".[3]

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[1] *See generally O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010) (*O'Neill II*) and *O'Neill v. City of Shoreline,* 145 Wn. App. 913, 187 P.3d 822 (2008) (*O'Neill I*), *aff'd* 170 Wn.2d 138 (2010).

[2] *Zink v. City of Mesa*, 140 Wn. App. 328, 340, 166 P.3d 738 (2007)

[3] *Corey v. Pierce County*, 154 Wn. App. 752, 773-74, 225 P.3d 367 (2010) (holding successful plaintiff in wrongful termination lawsuit waived the right to attorney fees by missing the 10-day deadline in CR 54(d)(2), when the failure was based on the attorney's erroneous legal determination that the court rule did not apply).

The O'Neills' mistake stemmed from their attorney's legal determination that the 10-day deadline did not apply, despite the plain language of CR 54(d)(2). Thus, they waited for over two weeks past the deadline to file their motion for fees. The City objected, but the O'Neills never sought an enlargement of time to file the late motion, and the trial court ignored the O'Neills' legal error and entered the attorney fee award.

In this appeal, the City seeks relief from this attorney fee award, based on the O'Neills' legal mistake made in the face of an unambiguous deadline in the court rules. This does not require a harsh interpretations of the court rules – unlike the PRA, the Court Rules have a mistake valve built in for missed deadlines, CR 6(b)(2). This rule gives a trial court limited discretion to extend a deadline after it has been missed, but only when the party files a motion and demonstrates "excusable neglect."

The O'Neills, however, never filed a CR 6(b)(2) motion and as a matter of law would not have been entitled to an extension even if they had sought one. This is because as a matter of law, their attorney's legal mistake cannot qualify as "excusable neglect." This is not only compelled by existing case law, but the conclusion is essential if the deadlines in the court rules are to have any meaning. If the trial court's ruling is allowed to stand, it will undercut all court deadlines any time an attorney asserts

the error was caused by a legal mistake, even one already rejected by the Supreme Court in a published opinion.

Thus, the City asks the Court to strike the attorney fee award and rule as a matter of law that the O'Neills' erroneous legal determination that they did not need to comply with the CR 54(d)(2) deadline results in a waiver of their right to attorney fees.

2. ASSIGNMENTS OF ERROR

2.1 The trial court erred by considering the O'Neills' attorney fee motion when the O'Neills missed the deadline for filing that motion and never filed a motion seeking to enlarge the time authorized for filing the motion.

2.2 The trial court erred in granting the award of attorney fees and entering judgment for those fees when the O'Neills did not file their attorney fee motion in a timely manner.

2.3 The trial court erred in granting the award of attorney fees and entering judgment for those fees when the O'Neills did not establish that excusable neglect justified an extension of time to file their attorney fee motion.

2.4 The trial court erred in determining the agreed "Judgment on Offer and Acceptance" was not a judgment that triggered CR 54(d)(2).

2.5 The trial court erred in not granting the City's motion for reconsideration and not vacating its attorney fee award.

3. STATEMENT OF THE CASE

3.1 Summary of the Underlying Dispute

3.1.1 Events Leading to Public Records Lawsuit

This dispute arose when former Shoreline City Councilmember Maggie Fimia received an unsolicited email sent to her personal email account on September 18, 2006.[4] This email forwarded another email sent on behalf of Beth O'Neill on September 14, 2006.[5] The email was sent via blind carbon copy to Ms. Fimia and others, including another Shoreline councilmember serving at the time, Janet Way.[6]

Although the email had been sent to her personal email account, Ms. Fimia chose to discuss the email at the city council meeting on the night of September 18.[7] The courts have agreed that this action made the email a public record, including its metadata.[8]

After Ms. Fimia mentioned this email, the plaintiff Beth O'Neill's asked to see a copy of that email.[9] On September 25, Ms. Fimia forwarded a "complete" and "unaltered" copy of the email to the City Attorney, and the City produced a printed copy of the unaltered email to

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[4] *O'Neill II*, 170 Wn.2d at 142.

[5] *O'Neill II*, 170 Wn.2d at 141-42.

[6] *O'Neill II*, 170 Wn.2d at 142.

[7] *O'Neill II*, 170 Wn.2d at 142.

[8] *O'Neill I*, 145 Wn. App. at 924; *O'Neill II*, 170 Wn.2d at 156 (Alexander, J., dissenting).

[9] *O'Neill II*, 170 Wn.2d at 142.

Ms. O'Neill that same day.[10] As the Supreme Court noted, by producing the full email string, the City then fully complied with Ms. O'Neill's oral request.[11]

After receiving the complete printed email, Ms. O'Neill made a new request on the 25th for the email "with metadata."[12] At some point prior to being informed about the request for metadata, Ms. Fimia had deleted her copy of the email.[13] Until they attempted to fulfill this request, neither Ms. Fimia nor the City employees processing the request were familiar with metadata and did not know that when an email is forwarded, it removes some computer generated metadata that is not otherwise apparent on the face of the email.[14] As a result, the complete unaltered email Ms. Fimia had forwarded to the City Attorney was in fact altered by the email programs that forwarded the email, and the City did not receive all of the original metadata when Ms. Fimia forwarded it to the City.[15]

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[10] *O'Neill II*, 170 Wn.2d at 143. The original oral request caused confusion, particularly because of the nature of string emails and the fact that the forwarded email had been edited to remove the "to" line before it was sent to Ms. Fimia. *See O'Neill I*, 145 Wn. App. at 927 (reprinting the full email header of both emails, demonstrating that the "to" line from the Hettrick Sept. 14 email had been removed before it was sent to Fimia).

[11] *O'Neill II*, 170 Wn.2d at 151-52.

[12] *O'Neill II*, 170 Wn.2d at 143.

[13] *O'Neill II*, 170 Wn.2d at 143.

[14] See *O'Neill II*, 170 Wn.2d at 146, 151-52; *O'Neill I*, 145 Wn. App. at 927.

[15] *O'Neill II*, 170 Wn.2d at 150-51.

Moreover, the City was not able to locate Ms. Fimia's deleted email copy on her personal computer.[16]

Nevertheless, because Councilmember Way had also received the same email, the City was able to provide O'Neill with the metadata associated with the Way copy of this same email.[17] This was deemed insufficient because the metadata differed in that it reflected that the email had been sent to Ms. Way rather than Ms. Fimia, as would be expected.[18]

The City also had the email resent by the original sender to Ms. Fimia and then produced the metadata associated with the re-sent copy.[19] This was also deemed insufficient because the metadata reflected that it had been resent on a different date and time than the original email, as would be expected.[20] Between these two copies of metadata and the printed version of the unaltered email, only hidden technical information was lost.[21]

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[16] *O'Neill II*, 170 Wn.2d at 150.
[17] *O'Neill II*, 170 Wn.2d at 151.
[18] *O'Neill II*, 170 Wn.2d at 151.
[19] *O'Neill II*, 170 Wn.2d at 151.
[20] *O'Neill II*, 170 Wn.2d at 151.
[21] *See O'Neill II*, 170 Wn.2d at 148.

3.2 Procedural Background

3.2.1 The Supreme Court Reverses the Dismissal of the O'Neills' Lawsuit

The O'Neills were dissatisfied and filed a PRA action against the City.[22] This was summarily dismissed by the trial court, which found the City had produced all public records that the City possessed that the O'Neills had requested.[23] The O'Neills appealed and eventually the Supreme Court reversed the trial court, pointing to the technical differences between the three versions of the email the City had produced and directed the City to search Ms. Fimia's personal computer for the original email.[24]

3.2.2 The City Makes an Offer of Judgment after Losing a Summary Judgment Motion

On remand, Ms. Fimia consented to a search of her computer hard drive, but no remnant of the deleted email was found. The parties then filed cross-motions for summary judgment. This resulted in a ruling that did not address the metadata issue at all, and instead found that the City had violated the PRA because it had not made a forensic copy of Ms. Fimia's personal computer upon the initial records request.[25] This

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[22] *O'Neill II*, 170 Wn.2d at 144.
[23] *O'Neill II*, 170 Wn.2d at 153.
[24] *O'Neill II*, 170 Wn.2d at 150-51.
[25] CP 27-29.

"error,"[26] the trial court ruled, mandated penalties under the PRA. The City sought review of this ruling[27], but at the same time on September 18, 2012 – six years after the city council meeting that gave birth to this dispute – the City made a CR 68 offer of judgment to the O'Neills for $100,000. CP 57. The offer expressly excluded attorney fees, noting that attorney fees would be decided by the court after subsequent briefing. CP 57.

The O'Neills accepted the offer, with their attorney serving the City with a formal signed "Acceptance of Defendants' Offer of Judgment" on September 27, 2012.[28] CP 61. The acceptance of this offer of judgment resolved all issues regarding the alleged violations of the PRA that were before the Court. The City and O'Neills executed the proposed "Judgment on Offer and Acceptance," which the City filed the same day. CP 55-56. The O'Neills waived presentment. CP 56.

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[26] This legal ruling is unsupportable, particularly in light of Ms. Fimia's Article I, Section 7 and Fourth Amendment rights. *See O'Neill II*, 170 Wn.2d at 155-56 (Alexander, J. dissenting) (noting councilmember's personal computer protected by constitutional right to privacy); *O'Neill II*, 170 Wn. at 150 n.4 (avoiding constitutional violation by noting the Court assumed councilmember would voluntarily allow city to search computer); *Forbes v. City of Goldbar*, 171 Wn. App. 857, 288 P.3d 356, 384 n.20 (2013) (noting constitutional issue, but not addressing it because persons agreed to search of personal computers and accounts). If the City had pursued this appeal and got the ruling reversed, it would put the City in the same position it had been when the case was first remanded by the Supreme Court. Accordingly, the City mooted the issue by making an offer of judgment avoid potential daily penalties from continuing.

[27] CP 30-40.

[28] The O'Neills' attorney sent an email on the 24th, a Friday, accepting the offer, but the signed acceptance was delivered the following Monday, the 27th.

On September 28, the day after the proposed judgment was filed, but prior to its entry by the Court, the City sought narrow discovery regarding the amount of attorney fees. CP 368, 495. The City sought discovery because from its past experience, attorneys filing fee motions often provide inadequate documentation, and when challenged in the response, documentation is submitted for the first time with a reply without opportunity to disprove or critique. CP 428. Discovery also put the O'Neills on notice of the quality of documentation the City expected to be filed with the fee motion. CP 428.

3.2.3 The Trial Court Enters the Agreed "Judgment on Offer and Acceptance"

On October 8, 2012, the Trial Court signed the agreed "Judgment on Offer and Acceptance" and delivered it to the clerk the next day for filing, in compliance with CR 58. CP 55-56, 514. The parties received a copy of the Judgment on October 11. CP 514. The City promptly mailed the O'Neills a $100,000 check that they cashed on October 16. CP 514.

On October 29, 2012, the O'Neills served written responses to the discovery requests, but they refused to provide substantive answers to some interrogatories, asserting the City could answer the interrogatories by reviewing the attorney fee bill. The O'Neills did not, however, produce those bills, asserting the bills were privileged and stating that the

bills would only be produced after a protective order was in place. CP 407.

3.2.4 The O'Neills Choose to Ignore CR 54(d)(2) and File an Untimely Attorney Fee Motion

The O'Neills then waited another full week to file their motion for fees on November 5, filing *after* the City notified the O'Neills of the missed deadline in a November 1 letter. CP 336-48, 418 Included with the untimely motion were copies of the O'Neills' attorney fees bills, which the O'Neills produced without a protective order, even though that they had refused to provide those same records one week earlier in response to the City's discovery. *Compare* CP 407 (October 29 discover responses where O'Neills refused to produced attorney fee bill absent a protective order) *with* CP 67-330 (declaration filed November 5 attaching all attorney fee bills without a protective order). Their motion did not address the missed CR 54(d)(2) deadline.

The City objected to the filing as untimely under CR 54(d)(2) in its opposition brief. CP 439-43. In their reply, the O'Neills finally explained that they had made the legal determination that the CR 54(d)(2) 10-day deadline did not apply because the agreed "Judgment on Offer and Acceptance" lacked an RCW 4.64.030 judgment summary and was thus not a "judgment." CP 454. The O'Neills therefore chose not to file a

motion seeking to extend the 10-day deadline. CP 454. The O'Neills failed to tell the trial court, however, that the Supreme Court had already rejected this same argument and held the definition of "judgment in CR 58" and not RCW 4.64.030 controlled the issue of what qualified as a judgment for applying the court rules.[29]

Finally, while continuing to assert that as a matter of law they did not need to meet the 10-day deadline,[30] the O'Neills claimed that the City's discovery requests would somehow justify their late filing. CP 455-56. As evidence, the O'Neills asserted the City "knew" it would not receive response in time to use the responses in its opposition had the O'Neills complied with CR 54(d)(2), and thus the discovery requests were a "sham." CP 455. This argument ignored the fact that the City had served the discovery 10 days[31] before the Court had entered the Judgment,

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[29] *See Bank of America v. Owens*, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) (rejecting claim that valid judgment must comply with RCW 4.64.030).

[30] Even when pointing the finger at the City, the O'Neills made it clear that they had determined that CR 54(d)(2) did not apply. See CP 455 ("The fee motion did not need to be filed by 10/18/12, but even if it had ..."). This shows that the O'Neills' legal determination, and not any action by the City, was the cause of the missed deadline. Because the discovery did not cause the the neglect, it cannot amount to excusable or inexcusable neglect.

[31] This was the earliest date the City could have sought discovery on attorney fees. Prior to the O'Neills' acceptance of the Offer of Judgment, only a partial summary judgment order had been entered, and the City had petitioned for discretionary review of that order. CP 30-40. The Supreme Court had vacated the earlier attorney fee award. *O'Neill II*, 170 Wn.2d at 152. Thus, until the Offer of Judgment was accepted, the City had consistently contested the O'Neills' right to fees and there was no reason or basis for the City seeking discovery on attorney fees.

when the City had no way of knowing whether it would receive responses in time, either because the entry of judgment was delayed or because the O'Neills could have provided their responses early.

3.2.5 The Court Awards Attorney Fees and Refuses to Address CR 54(d)(2)

The trial court held oral argument[32] on attorney fees and entered an award in favor of the O'Neills without addressing the CR 54(d)(2) 10-day deadline. CP 504-507. It was not clear whether the trial court agreed RCW 4.64.030 applied, or it just chose to ignore the deadline for some other reason. Thus, the City made a second request for a ruling on CR 54(d)(2) in a motion for reconsideration, but the Court summarily denied reconsideration. CP 513-521, 533.

The City subsequently filed this appeal. CP 537-550.

4. ARGUMENT

The O'Neills failed to file their motion for attorney fees within 10 days after the entry of the judgment, as mandated by CR 54(d)(2). This failure was the result of legal error, and no motion to extend was filed that demonstrated excusable neglect, so the trial court lacked the discretion to award attorney's fees.

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[32] The significant delay in holding this hearing resulted for postponement by the trial court.

This result does not require a harsh interpretation of the court rules. The drafters of the court rule sought to balance the risk of waiver with the importance of deadlines by the inclusion of CR 6(b). This rule grants the trial court the authority to extend deadlines, even after those deadlines have passed, subject to two limitations: the party must file a motion for a retroactive extension and demonstrate its failure to comply with the deadline was caused by "excusable neglect."[33] CR 6(b)(2). Thus, the rules themselves provide a process and standard for balancing equities that may arise, giving trial courts broad but not unlimited discretion to avoid defaults.[34]

To maintain that balance, this appeal requires the Court to vacate the attorney fee award. The O'Neills not only ignored the CR 54(d)(2) 10-day deadline, they elected not to file a motion to seek relief under CR 6(b)(2) because they had made the legal determination that the 10-day deadline did not apply. Moreover, even had a motion been filed relying

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[33] CR 6(b) provides:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

[34] The Rules of Appellate Procedure strike a different balance that gives the appellate courts broader discretion to forgive missed deadlines in the RAPs to avoid default but authorize the imposition of terms. RAP 1.2, 18.8.

on the proffered legal error, legal error cannot meet the standard of excusable neglect required for relief under CR 6(b).

Washington precedent and federal precedent both recognize that in situations such as this, which involve a mistaken legal interpretation of clearly worded rules and statutes, the failure to meet a deadline is inexcusable: "If a simple mistake made by counsel were to excuse an untimely filing, it would be hard to fathom the kind of neglect that we would not deem excusable." *Institute for Policy Studies v. CIA*, 246 F.R.D. 380, 383 (D.D.C. 2007) (quotations and alterations omitted); see *also Corey v. Pierce County*, 154 Wn. App. 2d 752, 773, 225 P.3d 367 (2010), review denied (successful plaintiff in employment actions waived right to attorney fees by missing 10-day deadline mandated by CR 54(d)(2)).

Here, the Court entered the agreed "Judgment on Offer and Acceptance" on October 9. Pursuant to CR 54(d)(2), the O'Neills had until October 19 to file their motion for attorney fees. They missed this deadline and waited an addition two weeks, until November 5, to file their motion for attorney fees. They did not seek a retroactive enlargement of time under CR 6(b)(2), nor did they make any showing of excusable neglect. Instead, their only argument demonstrates that they had made the

determination, contrary to settled case law, that the court's entry of judgment in this case did not trigger the 10-day deadline.

If the deadlines in the Court Rules are to have any meaning, this type of run-of-the-mill legal error cannot be excused. Any other conclusion would require courts to excuse any missed deadline based simply on the assertion that the attorney did not think the deadline applied.

4.1 Commencement of the 10-Day Deadline in CR 54(d)(2)

The commencement of the CR 54(d)(2) 10-day dealing for filing an attorney fee is governed by unambiguous court rules.

Under the Civil Rules, a "Judgment" is defined as "the final determination of the rights of the parties in the action …." CR 54(a)(1). It must be in writing and signed, but otherwise no particular form is required. *Bank of America v. Owens*, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) ("*Owen*"). "Whether an order constitutes a judgment is determined by whether it finally disposes of a case and was intended to do so." *Owen*, 173 Wn.2d at 51 (holding CR 54 and CR 58 control whether a judgment as been entered).

The Court Rules are unambiguous in defining when the parties should consider a judgment entered:

> Civil Rule 58. Entry of Judgment
>
> (a) When. Unless the court otherwise directs and subject to the provisions of rule 54(b), all judgments shall be entered immediately after they are signed by the judge.
>
> (b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing....

See Owens, 173 Wn.2d at 53 (providing that CR 58 controls when a judgment is "entered").[35]

Once judgment is entered, the plain language of CR 54(d)(2) provides a 10-day deadline for filing an attorney fee motion: "Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion .... Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment."

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[35] *See also Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 425, 526 P.2d 897 (1974) (same) (disapproved of on other grounds by *Norway Hill Preservation & Protection Association v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976)); *see also, e.g., Metz v. Sarandos*, 91 Wn. App. 357, 957 P.2d 795 (1998) (holding that when judge signed summary judgment order and delivered it to the clerk, this qualified as the "entry of judgment" and triggered the CR 59 10-day clock, making the motion for reconsideration untimely); *Carrarra LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App 822, 155 P.3d 161 (2007) (holding 30-day appeal clock ran from entry of summary judgment and entry of ruling on attorney fees did not extend that timeline); *see also Bushong v. Wilshbach,* 151 Wn. App. 373, 213 P.3d 42 (2009) (holding 30-day clock for appealing court ruling awarding fees ran from entry of the order, even though the amount of those fees had not yet been ruled upon).

4.1.1 Judgment was entered on October 9, 2012

Here, judgment was entered on October 9, when the Clerk received the agreed "Judgment on Offer and Acceptance" signed on October 8, from the trial court for filing. CP 55-56; 514. Neither that order, nor any other order of the trial court provided for any different timeline for filing a motion for attorney fees. Therefore, pursuant to CR 54(d)(2), the O'Neills had until October 19 to file their motion for attorney fees.

The agreed "Judgment on Offer and Acceptance" fully resolved the dispute between the parties and therefore was a CR 54(a) "judgment." This fact is inherent in the very nature of a judgment based on a CR 68 Offer of Judgment and is bolstered by the language of the judgment itself, by the original offer and by the acceptance. Finally, the O'Neills' conduct established that they considered it a Judgment.

The agreed "Judgment on Offer and Acceptance" resulted from the City making a CR 68 offer of judgment, which was formally accepted by the O'Neills. CR 68 provides that judgments entered pursuant to CR 68 offers of judgment are judgments:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may

> then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment.

CR 68 (emphasis added). Upon receipt of an accepted CR 68 Offer of Judgment, the trial court is required to enter the judgment. *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991).[36]

The entire purpose of a CR 68 Offer of Judgment, and the effect of the particular Offer of Judgment in this case, is to fully resolve the dispute and avoid lengthy litigation. *Wallace v. Kuehner*, 111 Wn. App. 809, 823, 46 P.3d 823 (2002); *Hodge v. Development Services*, 65 Wn. App 576, 584, 828 P.2d 1175 (1992); *Mallory*, 922 F.2d at 1277. Thus, once entered, a judgment on an offer and acceptance is considered a final judgment. *Mallory*, 922 F.2d at 1279-80.

The Offer of Judgment here settled all remaining claims in the case – specifically, the amount of daily penalties to be awarded against the City; all that remained was a determination of costs, including attorney fees, allowed to the O'Neills as the prevailing party.[37]

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[36] Federal Rule of Civil Procedure 68 is substantially similar to CR 68. Under these circumstances, Washington Courts will look to federal decisions for guidance. *Hodge v. Development Serv.*, 65 Wn. App. 576, 580, 828 P.2d 1175 (1992) (looking to federal law interpreting FRCP 68).

[37] The Public Records Act grants a prevailing party its costs, including attorney fees. RCW 42.56.550(4). To avoid any confusion that the $100,000 judgment included attorney fees, the offer specifically indicated attorney fees would be determined separately. This is consistent with the best practice identified by the Court of Appeals in *Hodge*, 65 Wn. App at 584 ("it would be prudent practice and we strongly recommend

The fact that the agreed "Judgment on Offer and Acceptance" was a "judgment" is emphasized by the language of that document and in the formal offer and the acceptance prepared by the parties. On September 18, 2012, the City served the O'Neills with a formal offer of judgment, which expressly offered "to allow judgment to be entered" against the defendant for $100,000 for penalties. CP 57. On September 27, 2012, the O'Neills served their acceptance on the City, which expressly indicated they agreed "to allow judgment" against the defendants for $100,000. CP 61.

The parties then prepared the proposed "Judgment on Offer and Acceptance," which attached both the formal offer and the formal acceptance and was filed by the City on that same day, September 27, 2012. See CP 55-64. This document, which the O'Neills' counsel stipulated to, signed and waived presentment, begins, "This matter came before the Court for entry of judgment ..." and goes on to provide, "Judgment is entered against the City ...." CP 55-56. Therefore, the plain language of this judgment demonstrated the intent of the trial court and the parties to fully resolve this dispute by the entry of this judgment.

The O'Neills' own conduct confirms that at the time they considered the "Judgment on Offer and Acceptance" to be a judgment.

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that where a defendant intends that his offer include any attorneys' fees provided for in the underlying statute he expressly so state.")

After it was entered on October 9 and delivered to the parties on October 11, the O'Neills cashed the City's $100,000 check on October 16. CP 514. Neither the O'Neills, nor their counsel objected to the delivery of the check on the grounds that no judgment had yet been entered. The City would not have had the legal authority to provide this check if there was not a judgment in place. See Wash. Const. Art. VIII, §7.

The fact that the agreed "Judgment on Offer and Acceptance" left the issue of attorney fees to be resolved by a later motion does not change this conclusion. *Carrarra LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App 822, 155 P.3d 161 (2007) (judgment final even though attorney fees had not been determined). The Civil Rules and the Rules on Appeal both make this clear. First, CR 54 itself recognizes that the issue of attorney fees will often be resolved after the entry of judgment. CR 54(d)(2) (requiring a motion for attorney fees to be filed within 10 days after the entry of judgment). RAP 2.4(g) provides that the entry of an attorney fee award may be appealed separately from the entry of a judgment but such appeal will not include the judgment. *See e.g.*, *Bushong v. Wilshbach*, 151 Wn. App. 373, 213 P.3d 42 (2009) (holding 30-day clock for appealing court ruling awarding fees ran from entry of the order, even though the amount of those fees had not yet been ruled upon).

Here, on October 8, the trial court signed the agreed "Judgment on Offer and Acceptance," and it was entered by the Clerk on October 9. CP 55-56. 514. Thus, the judgment was entered on October 9.

4.1.2 Under CR 54(d)(2), the O'Neills Had Until October 19 to File Their Attorney Fee Motion

Once the trial court signed the agreed "Judgment on Offer and Acceptance" on October 8, and the Clerk entered that judgment on October 9, CR 54(d)(2) required the O'Neills to file their motion for attorney fees "no later than 10 days after entry of judgment."[38] *See Corey*, 154 Wn. App. at 773 (party entitled to statutory attorney fees waived that right by failing to file a motion for fees within 10 days of the entry of judgment). Neither the judgment itself, nor any other rule or order enlarged the time for filing the fee motion. In fact, the judgment itself reminded the O'Neills they needed to file a separate motion for attorney fees without changing the CR 54(d) deadline. CP 55-56.

The facts regarding the attorney fee claim in *Corey* mirror the facts in this case. In *Corey*, a judgment for damages under RCW 49.48.030 was

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[38] As Washington Practice makes clear, "costs and disbursement" refers to costs covered in CR 78 and RCW 4.84.030. 4 WASH. PRAC. §CR 54.

filed on September 24, 2008, but the plaintiff did not file the motion for attorney fees until October 30, 2008.[39]

This Court held that the prevailing plaintiff had lost the right to seek fees by filing an untimely motion, even though the attorney fee provision at issue in RCW 49.48.030 is remedial – just like the attorney provision on the PRA – and "must be construed liberally in favor of the employee." *Corey*, 154 Wn. App. at 773. This Court ruled that applying temporal limitations like the 10-day deadline in CR 54(d) would not interfere with the remedial purposes of the statute. *Corey*, 154 Wn. App. at 774. Therefore, after rejecting a claim that RCW 49.48.030 provided an separate time for seeking fees, this Court held the attorney fee motion was properly struck as untimely because the employee had not made a showing of "excusable neglect" as required by CR 6(b)(2). *Corey*, 154 Wn. App. at 774.

The facts in the case at bar are very similar; both cases involve a statutory right and an attorney fee clause meant to be remedial. Both involve a plaintiff who prevailed on a statutory claim that authorized attorney fees and who then missed the CR 54(d)(2) deadline by filing an attorney fee motion weeks after the deadline passed. Finally, the party

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[39] See Br. Of Resp. at 55 & n15, Corey v. Pierce County, No. 62505-5-I. (available at http://www.courts.wa.gov/content/Briefs/A01/625055%20appellants.pdf).

seeking attorney fees in both cases had offered only erroneous legal arguments to claim CR 54(d)(2) did not control and made no showing of excusable neglect through a CR 6 motion.

4.1.3 The O'Neills' Reliance on RCW 4.64.030 Was a Legal Error

The O'Neills did not acknowledge their failure to comply with CR 54 in their attorney fee motion, even though they had been put on notice by the City days earlier that the deadline applied. See CP 336-48 (Fee motion); CP 418 (November 1 letter to O'Neills counsel indicated CR 54(d) applied). Instead, they waited until their reply brief to explain that they had determined that the deadline did not apply: "the 10/8/12 order is not a Judgment for the purpose of CR 54(d). RCW 4.64.030 makes clear a valid judgment requires a judgment summary." CP 454. In other words, the O'Neills failed to comply with the 10-day deadline because they made the legal determination that they did not have to comply. Evidently the trial court agreed with the O'Neills.

The O'Neills' reliance on RCW 4.64.030 was a legal error that had already been rejected by the Supreme Court.[40] In *Bank of America v. Owen*, the Supreme Court faced the same argument the O'Neills made,

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[40] The O'Neills failed to cite to the *Owen* case, which was particularly prejudicial given that they waited until their reply brief to make this argument. It was only the City's decision to file a sur-reply that prevented the court for being misled.

that a judgment did not count as a judgment because it did not contain a judgment summary described in RCW 4.64.030. In rejecting that argument, the Court noted RCW 4.64.030, when read in its entirety, made it "undeniably clear" that the statute only related to when a judgment was considered entered on a particular clerk's docket – for all other purposes CR 54 defined what was a "judgment" and CR 58 governed when that judgment was entered. *Owen*, 173 Wn.2d at 53-54.

Thus, the determination by O'Neills' counsel that the agreed "Judgment on Offer and Acceptance" was not a judgment because it lacked an RCW 4.64.030 judgment summary was an "undeniably clear" legal error.

This is further illustrated by the fact that the judgment summary described in RCW 4.64.030 requires inclusion of the attorney fee award. As demonstrated above, Washington court rules and case law make in unambiguously clear that a judgment can be filed (and therefore entered) without an attorney fee award.

4.2 The Trial Court Erred by Awarding Attorney Fees after the O'Neills Missed the 10-Day Deadline for Filing an Attorney Fees Motion

Because the agreed "Judgment on Offer and Acceptance" was a "judgment" and was "entered" on October 9, CR 54(d)(2) required the O'Neills to file their fee motion by October 19. The O'Neills never

sought an extension to file that motion before October 19, and no other order or rule provided for a different deadline.

Once the O'Neills missed the October 19 deadline, the Civil Rules provided an avenue for relief if the O'Neills filed a motion asking for an enlargement of time and demonstrated their failure to meet the deadline was caused by "excusable neglect." CR 6(b)(2).

The O'Neills never filed a CR 6(b)(2) motion, even after the City raised the CR 54(d)(2) deadline, because they did not consider the agreed "Judgment on Offer and Acceptance" a "judgment." The O'Neills' claim is wrong according to the plain language of CR 54(d)(2). Moreover, as a matter of law, this type of legal error cannot qualify as "excusable neglect." *See discussion in 4.2.2and 4.2.3 infra.*

Based on this missed deadline and lack of a motion for an extension or ground to grant such a motion, the trial court's grant of attorney fees must be reversed.

4.2.1 Under CR 6(b), a Trial Court Cannot Excuse a Missed Deadline Absent a Motion Demonstrating Excusable Neglect

Under CR 6(b), the trial court did not have the authority to consider the O'Neills' late-filed attorney fee motion absent a showing of "excusable neglect." This conclusion is mandated by the plain language of CR 54(d)(2) and CR 6(b).

The "interpretation of a court rule is a question of law that is reviewed de novo." *Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 772, 154 P.3d 189 (2007). The same rules of construction that apply to statutes also apply to court rules. *Seto*, 159 Wn.2d at 772. Thus, when a court rule is clear on its face, its meaning is derived from that language. *Seto* 159 Wn.2d at 772. Rules must be read in their entirety rather than focusing on isolated phrases. *Seto*, 159 Wn.2d at 774. Court rules should not be interpreted in ways that would "render a portion of a [rule] meaningless or superfluous" or lead to "unlikely or absurd results." *Seto*, 159 Wn.2d at 774 (quotations omitted).

The meaning of CR 54(d)(2) is unambiguous and can be derived from its plain language. "Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment." The O'Neills failed to comply with this deadline and therefore their attorney fee motion was untimely.

A court has discretion to consider an untimely filing under CR 6(b), which is also unambiguous:

> When by these rules ... an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified

> period, permit the act to be done where the failure to act was the result of excusable neglect ...

Here, CR 54(d)(2) requires or allows an act – the filing of a motion for attorney fees – to be done within a specified time – 10 days. Therefore CR 6(b) governs this situation. No motion was filed before the 10 days passed, and thus subsection (b)(1) does not apply. Subsection (b)(2), however, grants the trial court less authority to excuse the late filing. First, a motion seeking relief from the missed deadline is required. Second, the cause shown must also amount to "excusable neglect." *Compare* CR 6(b)(1) "with or without motion" *with* CR 6(b)(2) "upon motion"; *see also Colorado Structures, Inc. v. Blue Mountain Plaza LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) ("once a deadline has passed, courts can accept late filings only if a motion is filed explaining why the failure to act constituted excusable neglect.").

Here, once the O'Neills missed the 10-day deadline, the court rules only allowed the trial court to consider the O'Neills' attorney fee motion if they filed a motion seeking the extension and demonstrated excusable neglect justified the missed deadline. Any other conclusion would ignore the distinction in CR6(b) between motions made before and after a deadline and read the "excusable neglect" standard out of the rule.

4.2.2 A Legal Error Interpreting Plain Language of a Court Rule Cannot Be Excusable Neglect

When determining what qualifies as excusable neglect, the ancient Roman maxim still applies: *ignorantia juris non excusat* – ignorance of the law is not excusable neglect.[41] *Advanced Estimating Sys. v. Riney*, 130 F.3d 996, 999 (11th Cir. 1997) (citing maxim and ruling attorney's "misunderstanding of the law cannot constitute excusable neglect"); *see also Leschner v. Dep't of Labor and Indus.*, 27 Wn.2d 911, 185 P.2d 113 (1947) (applying this "universal maxim" as the basis for refusing to excuse worker's compensation claimant's late filing based on her assumption that her doctor was protecting her).

Washington courts have consistently ruled that simple negligence resulting in the failure to meet a clear deadline is not "excusable neglect." To be excusable neglect, the party must show it acted diligently. *Puget Sound Medical Supply v. DSHS*, 156 Wn. App. 364, 376, 234 P.3d 246 (2010). Challenges posed by discovery such as contacting expert witnesses or anticipating actions by opposing counsel are not excusable neglect. *Puget Sound*, 156 Wn. App. at 376. Nor will a "breakdown in internal office procedures" excuse the failure to comply with a court

[41] The phrase literally translates as "ignorance of the law excuses no one."

deadline. *Puget Sound*, 156 Wn. App. at 376 (citing numerous Washington cases).

Finally, Washington courts have ruled that missed deadlines caused by an attorney's legal error are not "excusable neglect." For example, in *M.A. Mortenson*, this Court ruled that an attorney's legal error in not recognizing a potential claim was not excusable neglect – instead it was "incompetence or neglect" that was not excusable. *M.A. Mortenson Co. v. Timerline Software Corp.*, 93 Wn. App. 819, 823, 970 P.2d 803 (1999). Similarly, in *Puget Sound*, the Court rejected a claim of legal confusion regarding when an appeal must be filed could amount to excusable neglect, even though the appeal was only filed one day late. *Puget Sound*, 156 Wn. App. at 376-78. The attorney claimed that the rules were unclear, because the administrative rule stated that the agency would use the provision of CR 60 as guidance, which allowed motions based on excusable neglect to be filed within a "reasonable time," but the administrative rule also provided a specific deadline for filing an appeal. The Court held that it was not excusable neglect for the attorney to rely on the court rule's "reasonable time" language in light of the more specific deadline in the administrative rule. *Puget Sound*, 156 Wn. App. at 377.

4.2.3 Extensive Federal Case Law Holds as a Matter of Law that Common Legal Errors Cannot Qualify as "Excusable Neglect"

The interaction between attorney legal errors and the "excusable neglect" standard is well developed in federal case law. Based on the similarity between CR 6(b)(2) and FRCP 6 (b)(2), these cases are instructive.[42] See, *e.g., Pybas v. Paolino*, 73 Wn. App. 393, 404, 869 P.2d 427 (1994) ("attorney's ignorance of the law does not constitute excusable neglect") (citing federal authority)[43]; *see generally Pioneer Inv. Serv. Co. v. Brunswick Associates*, 507 U.S. 380, 392 (1993) (noting that under FRCP 6(b), "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect").[44]

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[42] Washington State's CR 6(b) and FRCP 6 are nearly identical on the requirement to extend time after a deadline has passed and both require a showing of "excusable neglect." Washington Courts will look to Federal Court decision interpreting similar rules of procedure. *Hodges*, 65 Wn. App. at 580; *Pybas*, 73 Wn. App. at 402. The *Pioneer* case also notes that the term "excusable neglect" is used in other civil rules and thus cases interpreting "excusable neglect" in those other rules can be instructive when interpreting rule 6. *See, e.g.*, CR 13, CR 60; *but see Pybas*, 73 Wn. App. at 399-400 (noting courts will be more likely to find excusable neglect in motions to vacate default judgments, than they will for post-trial motions).

[43] *See also, e.g., Lane v. Brown & Haley*, 81 Wn. App. 102, 109, 912 P.2d 1040 (1996) (error of counsel not excusable neglect); *M.A. Mortenson Co. v. Timerline Software Corp.*, 93 Wn. App. 819, 970 P.2d 803 (1999) ("Generally, the incompetence or neglect of a party's own attorney" is insufficient to prove excusable neglect); *Webster v. Pacesetter, Inc.*, 270 F. Supp 2d 9, 12 (D.C.C. 2003) (recognizing the "long-standing principle that a mistake of law generally cannot form the basis of excusable neglect.");

[44] In *Pioneer*, the Supreme Court adopted a multifactor test for courts to use to determine if there should be a finding of excusable neglect, but the Court made it clear that under this test, generally "inadvertence, ignorance of the rules, or mistakes construing the rules" will not qualify. *Pioneer*, 507 U.S. at 392. Thus, however the other factors balance, a legal error interpreting a clear court rule can never be excusable neglect. See *Institute for Policy*, 246 F.R.D at 383 (no excusable neglect even though delay was short, it did not

Courts have ruled as a matter of law this type of legal error cannot amount to excusable neglect, even when every other factor weighs in favor of extending the deadline. As noted by the Fifth Circuit, a party's good faith mistake in construing the court rules cannot be excusable neglect, even when the delay is short, and did not cause prejudice – otherwise "the word "excusable" would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm." *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 & n.4 (5th Cir. 1998) (attorney's failure to do legal research not excusable neglect).

The Eleventh Circuit reversed the trial court's finding of excusable neglect based on a legal error and ruled "as a matter of law" that an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline." *Advanced Estimating Systems, Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997); *see also Midwest Employers Casualty Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998) (reversing trial court's finding of excusable neglect when attorney misconstrued plain language of court rule); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 367-68 (2d Cir. 2003) (reversing trial court

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cause prejudice and there was no showing of a lack of good faith); *Webster*, 270 F. Supp. 2d at 14 (legal error was not excusable neglect, even though short delay did not cause prejudice and was not in bad faith); *see also Pybas*, 73 Wn. App. at 403 (noting it will often be hard for the opposing party to demonstrate actual prejudice)

and ruling attorney's error construing court rule was in error – "the excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules"); *see also Pybas*, 73 Wn. App. at 402-03 (finding trial court abused its discretion in finding excusable neglect based on attorney error).

Likewise, even when an ambiguity in the plain language exists, a legal error cannot amount to excusable neglect when case law has already resolved that ambiguity. *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 404 (8th Cir. 2000) (where case law interpreting deadline at issue made the deadline clear, party should not show excusable neglect); *see also Puget Sound*, 156 Wn. App. at 376-77 (ruling alleged ambiguity was resolved by basic rules of statutory construction, and thus did not justify a finding of excusable neglect).

Finally, a litigant who misses a deadline cannot pass the blame onto the opposing party or the court when the rules at issue are clear. Thus, it was not excusable neglect when a party missed an appeal deadline by two days after relying on opposing counsel's incorrect statement regarding the relevant deadline. *Silivanch*, 333 F.3d at 368. Likewise, it is not excusable for a party to rely on the administrative law judge's statement regarding when he expected to have a decision ready. *Puget Sound*, 156 Wn. App. at 375.

In cases similar to the case at bar, federal courts have routinely refused to find excusable neglect based on legal errors regarding when a judgment was entered and when motions for attorney fees must be filed. For example, in *Webster*, the party missed the 10-day deadline for filing a motion for reconsideration, based on the erroneous determination of when the judgment was "entered" pursuant to FRCP 58. *Webster v. Pacesetter, Inc.*, 270 F. Supp 2d 9, 10 (D.C.C. 2003). The court rejected the assertion that the lack of precedent interpreting the rule somehow excused the error, it light of its plain language. *Webster*, 270 F. Supp. 2d at 10, 13.

In 44 *Liquor Mart v. Rhode Island*, 940 F. Supp. 437, 441-42 (D. R.I 1996), the court ruled a successful civil rights plaintiff waived its rights to attorney fees by missing the deadline in CR 54, and no excusable neglect justified an extension where the rule as clear. "Rule 54's time requirements are not onerous. The rule requires a prevailing party file a motion for attorneys' fees within fourteen days." *44 Liquor Mart*, 940 F. Supp. at 442.

In *Ramseur v. Barreto*, 216 F.R.D. 180, 182 (D.C.C. 2003), the court ruled an attorney's inadvertence in overlooking a deadline for filing the attorney fee motion in CR 54 could not amount to excusable neglect – otherwise "the standard would become meaningless."

In *Bender v. Freed*, 436 F.3d 747, 750 (7th Cir. 2006), the court held that a prevailing plaintiff's failure to file its attorney fee motion within the CR 54 deadline was not excused simply because the parties were "well aware" the plaintiff intended to file an attorney fee motion and in fact filed only two weeks after the deadline.

In *Quigley v. Rosenthal*, 427 F.3d 1232 (10th Cir. 2005), the court ruled that counsel's "mistaken conclusion that the amended final judgment entered by the district court did not qualify as a "judgment" for the purposes of Rule 54(d)(2)(B)" could not qualify as excusable neglect. Therefore, the party has lost the right to seek attorney fees.

4.2.4 The O'Neills Legal Error Relying on an Inapplicable Statute Cannot Amount to Excusable Neglect

The O'Neills never sought an enlargement of the time allowed by CR 54(d)(2) to file their attorney fee motion because they determined the agreed "Judgment on Offer and Acceptance" was not a judgment as it lacked a judgment summary. As demonstrated above, this was a legal error. Thus, even if they had sought an enlargement, the trial court should have been compelled as a matter of law to deny it because the court rules at issue are unambiguous and the O'Neills legal theory had already been rejected by the Supreme Court.

Nothing in CR 54(a), defining "judgment" and CR 58, defining the entry of judgment are ambiguous. The O'Neills' reliance to RCW 4.64.030 was unreasonable in this case, just as it was unreasonable in the *Owen* decision. Moreover, as recognized in that case, it was "undeniably clear" that the RCW 4.64.030 only applied in a limited circumstance and did not trump court rules. *Owen*, 173 Wn.2d at 54.

4.3 The Appropriate Remedy in this Case Is a Ruling that as a Matter of Law, the O'Neills Waived Their Right to Attorney Fees

As demonstrated above, the trial court's award of attorney fees must be vacated, either because the trial court erroneous found that RCW 4.64.030 applied or the trial court abused its discretion by granting an extension of the CR 54(d)(2) deadline without a motion or showing of excusable neglect. *See, e.g., Presidential Estates Apartment Ass. v. Barrett*, 129 Wn.2d 320, 325-27, 917 P.2d 100 (1996) (trial court abused its discretions in applying court rule to amend a judgment to correct judicial error when court rule did not grant the court that authority after judgment was entered); *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (trail court abused its discretion in applying court rule to vacate judgment when court rule only granted limited authority and defendant's factual showing was insufficient as a matter of law).

The appropriate remedy is for the Court to rule as a matter of law the O'Neills waived their right to attorney fees by making the legal error of concluding RCW 4.64.030 applied and therefore electing to ignore the 10-day deadline in CR 54(d)(2). *Cf. Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 518, 910 P.2d 462 (1996) (where record below allowed the Supreme Court to find a statutory violation "as a matter of law," then "remand is unnecessary"); *Presidential*, 129 Wn.2d at 325-27 (ruling as a matter of law that the court rules did not authorize the trial court to amend the judgment because it was done to correct judicial error); *Lamb*, 175 Wn.2d at 128 (ruling as a matter of law that defendant's basis for seeking to vacate his guilty plea was insufficient under the court rules). Remand would be useless because the O'Neills cannot now make up some new excuse for their failure to comply with CR 54(d)(2) that is not supported by the record on appeal.

This ruling does not require the Court to interpret the rules in an unduly harsh manner. In holding to the inexcusability of legal errors, courts have recognized that even the risk of the loss of substantial rights cannot justify excusing the failure to follow the law. *Silivanch*, 333 F.3d at 368. "Adherence to reasonable deadlines is critical" when the rules are

clear[45] – any other result would bog down the system in a "regimen of uncertainty in which limitations are not rigorously enforce – where every missed deadline was the occasion" for lengthy factual determinations.[46] If the failure to properly interpret a deadline in the court rules was excusable neglect, lawyers could simply "plead [their] inability to understand the law" every time a deadline was missed. *Midwest*, 161 F.3d at 879.

The only way to uphold the trial court's actions in this case would be to either ignore the unambiguous deadline in CR 54(d)(2), or ignore the limited discretion in CR 6(b)(2), eliminating the distinction between motions filed before and after a deadline, or find that any time an attorney misses deadline, the trial court must excuse that failure if the attorney claims it erroneously determined the deadline did not apply, even if that determination was based on a legal interpretation already rejected by the Supreme Court. This in unnecessary because the excusable neglect standard serves to protect those parties that act diligently to protect their own interest; thus litigants have the ability to avoid what they might think of as "harsh results." *Puget Sound*, 156 Wn. App. at 378.

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[45] *Institute for Policy*, 246 F.R.D. at 382

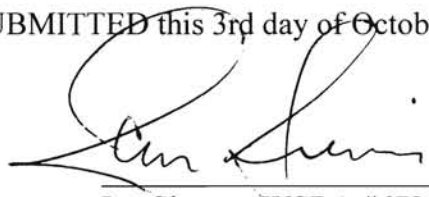
[46] *Silivanch*, 333 F.3d at 368.

5. CONCLUSION

In the dissent to the Supreme Court's decision in this case, Justice Alexander, writing for himself and three other justices, felt "compelled to point out that it seems fairly obvious [that the O'Neills' claim] has grown all out of proportion." *O'Neill II*, 170 Wn.2d at 156 (Alexander, J. dissenting). That obvious fact, however, did not relieve the City of the financial consequences of its technical error that resulted in the loss of meaningless metadata. The PRA mandates strict compliance and now the City has paid $100,000 for its error – a penalty that is "out of proportion" to the City's error.

Now that the O'Neills have made their own technical legal error, the significantly more forgiving Civil Rules require the O'Neills to face the consequences of their mistake. It is not "excusable neglect" to misinterpret the plain language of a clear court rule with an unambiguous deadline. The consequences that flow from this legal error – the loss of the right to obtain attorney fees –will not work an injustice, as ignorance of the law is no excuse. On the other hand, if the Court were to affirm the trial court's ruling and excuse the O'Neills' noncompliance with a clear and unambiguous deadline, it would render CR 6 and the excusable neglect standard meaningless, taking with it every court deadline.

RESPECTFULLY SUBMITTED this 3rd day of October, 2013



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APPENDIX

EXHIBIT 1

RCW 4.64.030
Entry of judgment — Form of judgment summary.

(1) The clerk shall enter all judgments in the execution docket, subject to the direction of the court and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action.

(2)(a) On the first page of each judgment which provides for the payment of money, including foreign judgments, judgments in rem, mandates of judgments, and judgments on garnishments, the following shall be succinctly summarized: The judgment creditor and the name of his or her attorney, the judgment debtor, the amount of the judgment, the interest owed to the date of the judgment, and the total of the taxable costs and attorney fees, if known at the time of the entry of the judgment, and in the entry of a foreign judgment, the filing and expiration dates of the judgment under the laws of the original jurisdiction.

(b) If the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment page number where the full legal description is included, if applicable; or the assessor's property tax parcel or account number, consistent with RCW 65.04.045(1) (f) and (g).

(c) If the judgment provides for damages arising from the ownership, maintenance, or use of a motor vehicle as specified in RCW 46.29.270, the first page of the judgment summary must clearly state that the judgment is awarded pursuant to RCW 46.29.270 and that the clerk must give notice to the department of licensing as outlined in RCW 46.29.310.

(3) If the attorney fees and costs are not included in the judgment, they shall be summarized in the cost bill when filed. The clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section. The clerk is not liable for an incorrect summary.

[2003 c 43 § 1; 2000 c 41 § 1; 1999 c 296 § 1; 1997 c 358 § 5; 1995 c 149 § 1; 1994 c 185 § 2; 1987 c 442 § 1107; 1984 c 128 § 6; 1983 c 28 § 2; Code 1881 § 305; 1877 p 62 § 309; 1869 p 75 § 307; RRS § 435.]

Notes:

Rules of court: Cf. CR 58(a), CR 58(b), CR 78(e).

RCW 42.56.550
Judicial review of agency actions.

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

[2011 c 273 § 1. Prior: 2005 c 483 § 5; 2005 c 274 § 288; 1992 c 139 § 8; 1987 c 403 § 5; 1975 1st ex.s. c 294 § 20; 1973 c 1 § 34 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.340.]

Notes:

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Application of chapter 300, Laws of 2011: See note following RCW 42.56.565.

RCW 49.48.030
Attorney's fee in action on wages — Exception.

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

[2010 c 8 § 12048; 1971 ex.s. c 55 § 3; 1888 c 128 § 3; RRS § 7596.]

EXHIBIT 2

CIVIL RULES

RULE 6
TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

(c) Proceeding Not To Fail for Want of Judge or Session of Court. No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court.

(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

RULE 13
COUNTERCLAIM AND CROSS CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims, or to claim credits against the State or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross Claim Against Coparty. A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of rules 19 and 20.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in rule 42(b), judgment on a counterclaim or cross claim may be rendered in accordance with the terms of rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) Setoff Against Assignee. The defendant in a civil action upon a contract express or implied, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, may set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him.

(k) Other Setoff Rules. (Reserved. See RCW 4.32.120 through 4.32.150 and RCW 4.56.050 through 4.56.075.)

RULE 54
JUDGMENTS AND COSTS

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or

decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

RULE 58
ENTRY OF JUDGMENT

(a) When. Unless the court otherwise directs and subject to the provisions of rule 54(b), all judgments shall be entered immediately after they are signed by the judge.

(b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge earlier permits the judgment to be filed with him as authorized by rule 5(e).

(c) Notice of Entry. (Reserved. See rule 54(f).)

(d) (Reserved.)

(e) Judgment by Confession. (Reserved. See RCW 4.60.)

(f) Assignment of Judgment. (Reserved. See RCW 4.56.090.)

(g) Interest on Judgment. (Reserved. See RCW 4.56.110.)

(h) Satisfaction of Judgment. (Reserved. See RCW 4.56.100.)

(i) Lien of Judgment. (Reserved. See RCW 4.56.190.)

(j) Commencement of Lien on Real Estate. (Reserved. See RCW 4.56.200.)

(k) Cessation of Lien--Extension Prohibited. (Reserved. See RCW 4.56.210.)

(l) Revival of Judgments. (Reserved.)

RULE CR 59
NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions

and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

RULE 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

RULE 68
OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

RULE 78
CLERKS

(a) Powers and Duties of Clerks. (Reserved. See RCW 2.32.050.)

(b) Office Hours. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays.

(c) Orders by Clerk. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Filing of Depositions. Upon the filing of a deposition transcript in any case pursuant to rule 5(i), the clerk shall forthwith endorse the date of the filing upon the envelope, and shall enter the same upon the case history docket.

(e) Entry of Judgments and Costs. The clerk shall enter judgment or decree pursuant to the provisions of rule 58 and the same shall then be entered for the sum found due or the relief awarded, with costs and disbursements, if any, to be taxed. Entry of judgment shall not be delayed for the taxing of costs. If no cost bill is filed by the party to whom costs are awarded within 10 days after the entry of the judgment or decree, the clerk shall proceed to tax the following costs and disbursements, namely:

(1) The statutory attorney fee;
(2) The clerk's fee; and
(3) The sheriff's fee.

If a cost bill is filed, the clerk shall enter as the amount to be recovered the amount claimed in such cost bill, and no motion to retax costs shall be considered unless the same be filed within 6 days after the filing of the cost bill.

For purposes of this subsection (e), "cost bill" also includes affidavit detailing disbursements.

(f) Bonds. The clerk shall at once upon the filing of a bond (except bond for costs) enter the same at large upon the journal. The clerk shall endorse upon every affidavit or undertaking filed to procure a writ of attachment, the day, hour, and minute of filing thereof.

[Amended effective September 1, 1988; September 1, 2007.]

FEDERAL RULES

(f) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) WAIVER OF PROTECTION OF IDENTIFIERS. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

(As added Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) EXTENDING TIME.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) MOTIONS, NOTICES OF HEARING, AND AFFIDAVITS.

(1) *In General.* A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

(2) *Supporting Affidavit.* Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) PLEADINGS. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 58. Entering Judgment

(a) SEPARATE DOCUMENT. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) ENTERING JUDGMENT.

(1) *Without the Court's Direction.* Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) *Court's Approval Required.* Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(c) TIME OF ENTRY. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) REQUEST FOR ENTRY. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) COST OR FEE AWARDS. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 59. New Trial; Altering or Amending a Judgment

(a) IN GENERAL.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) TIME TO FILE A MOTION FOR A NEW TRIAL. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

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bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

(As added Feb. 28, 1966, eff. July 1, 1966; amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 67. Deposit into Court

(a) DEPOSITING PROPERTY. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) INVESTING AND WITHDRAWING FUNDS. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 68. Offer of Judgment

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability

remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Rule 69. Execution

(a) IN GENERAL.

(1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) *Obtaining Discovery.* In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. §2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. §118, the judgment must be satisfied as those statutes provide.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 70. Enforcing a Judgment for a Specific Act

(a) PARTY'S FAILURE TO ACT; ORDERING ANOTHER TO ACT. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) VESTING TITLE. If the real or personal property is within the district, the court—instead of ordering a conveyance—may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) OBTAINING A WRIT OF ATTACHMENT OR SEQUESTRATION. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) OBTAINING A WRIT OF EXECUTION OR ASSISTANCE. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) HOLDING IN CONTEMPT. The court may also hold the disobedient party in contempt.

RAP

RULE 1.2
INTERPRETATION AND WAIVER OF RULES BY COURT

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

(b) Words of Command. Unless the context of the rule indicates otherwise: "Should" is used when referring to an act a party or counsel for a party is under an obligation to perform. The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified. The word "must" is used in place of "should" if extending the time within which the act must be done is subject to the severe test under rule 18.8(b) or to emphasize failure to perform the act in a timely way may result in more severe than usual sanctions. The word "will" or "may" is used when referring to an act of the appellate court. The word "shall" is used when referring to an act that is to be done by an entity other than the appellate court, a party, or counsel for a party.

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

References

Rule 18.8, Waiver of Rules and Extension and Reduction of Time, (b) Restriction on extension of time, (c) Restriction on changing decision; Rule 18.9, Violation of Rules.

RULE 2.4
SCOPE OF REVIEW OF A TRIAL COURT DECISION

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e) in the notice for discretionary review and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(b) Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(c) Final Judgment Not Designated in Notice. Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely post-trial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(d) Order Deciding Alternative Post-trial Motions in Civil Case. An appeal from the judgment granted on a motion for judgment notwithstanding the verdict brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the judgment notwithstanding the verdict, the appellate court will review the ruling on the motion for a new trial.

(e) Order Deciding Alternative Post-trial Motions in Criminal Case. An appeal from an order granting a motion in arrest of judgment brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the order granting the motion in arrest of judgment, the appellate court will review the ruling on a motion for new trial.

(f) Decisions on Certain Motions Not Designated in Notice. An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(g) Award of Attorney Fees. An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.

[Amended December 5, 2002; amended effective September 1, 2010]

RULE 18.8
WAIVER OF RULES AND EXTENSION AND REDUCTION OF TIME

(a) Generally. The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice, subject to the restrictions in sections (b) and (c).

(b) Restriction on Extension of Time. The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.

(c) Restriction on Changing Decision. The appellate court will not enlarge the time provided in rule 12.7 within which the appellate court may change or modify its decision.

(d) Terms. The remedy for violation of these rules is set forth in rule 18.9. The court may condition the exercise of its authority under this rule by imposing terms or awarding compensatory damages, or both, as provided in rule 18.9.