

NO. 65052-1-I

King County Superior Court Cause No. 09-2-18636-7 SEA

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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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WOODINVILLE ASSOCIATES, LLC,  
a Washington limited liability company  
Plaintiff/Appellant

v.

CITY OF WOODINVILLE,  
a Washington municipal corporation,  
Defendant/Respondent

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REPLY BRIEF OF APPELLANT  
WOODINVILLE ASSOCIATES, LLC

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**I. THE KING COUNTY LOCAL RULE  
ARGUMENT IS A RED HERRING**

The local rules for the King County Superior Court begin with the following caption:

**“LOCAL RULES CONFORMING TO CR RULES AS  
REQUIRED BY CR 83”**

CR 83 allows local rules only to the extent they are “. . . not inconsistent with these [civil] rules.” The City of Woodinville maintains that King County Local Rule 7(b)(5)(C) by its very language is consistent with CR 54. This contention does not withstand scrutiny.

Contrary to the arguments of the City of Woodinville, the local rule does not provide for any form of notice of signing and entry of a judgment or order from which an appeal may be taken (CR 54(a)(1)). The City of Woodinville contends that the local rule provides advance notice of a judgment or order which the court may sign and enter in the future. This is true. However, CR 54 requires notice of presentation before signing and entry:

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: . . . (CR 54(f)(2)).

There is no identical or even similar procedure called out for in the King County Local Rule. In order to maintain consistency with CR 83, and with its stated intention of doing so, the King County Local Rule must be read only to apply to entry without the presentation required by CR 54 of non-appealable orders. Non-appealable orders are not covered by the requirements of CR 54 (CR 54(a)(1)). The City of Woodinville contends that appealable orders or judgments are also within the requirements of KCLR 7, however, they point to no provision in the local rule that complies with the notice requirements in advance of signing and entry as required by CR 54.

At the top of page 7 of its response, the City of Woodinville argues that submission of proposed orders applies to all motions in King County Superior Court. That is true. However, the requirement for submission of pre-addressed stamped envelopes only applies to non-appealable motions (“for motions without oral argument . . . , . . . the moving party shall also provide the court with pre-addressed stamped envelopes. . . .” (KCLR 7(b)(5)(C))). There is nothing inconsistent with CR 54 notice requirements in the treatment by the Superior Court rule of non-appealable motions. There is a direct inconsistency with the notice requirements of CR 54 if

the local rule is interpreted to eliminate the notice requirements prior to signing and entry contained in CR 54(f)(2). There is nothing in the Local Rules that evidences an intention of the King County Superior Court judges to ignore the strictures of CR 83, and the language of KCLR 7(b)(5) can be logically read to avoid that result.

Also at page 7, the City of Woodinville argues that there is notice of a proposed order when it is given as a part of the motion papers under the local rule. That is true, of course, if the court signs the order exactly as submitted, without interlineations or deletions. It is not true, however, that the proposed order included with the motion papers gives any form of notice of signing and entry of the order unless it is done in open court with counsel present at the time of the hearing or done through the notice provisions of CR 54(f)(2). The argument on page 7 by the City of Woodinville simply makes no sense in terms of the express requirements of CR 54 as to notice before signing and entry, as compared with simply establishing an awareness on the part of counsel and the court of what the party seeks in the form of a proposed order.

The fallacy of this argument is demonstrated on page 9 of the response brief with the City of Woodinville contending:

In this case, Appellant had adequate notice – more than 5 days’ notice – of the contents of all proposed orders submitted to the court.

This is true as far as it goes. However, not even the City of Woodinville contends that the submission of proposed orders gives notice of the date of signing and entry of that order if it is done outside of open court in chambers as was the case here. CR 58 requires entry of judgments “immediately after they are signed by the judge” and it would be inconceivable that a judgment signed by a judge would be entered any later than the following day after signing should the Clerk’s office not be open at the time the order is signed. Signing and entry of a judgment by rule are virtually co-extensive. Simply submitting a proposed order, without any notification to the parties of the date of its signing and entry does not and cannot comply with the letter the intent and the spirit of CR 54. It is absurd to argue as the City of Woodinville does on pages 9 and 10 of its brief that notice of signing of an appealable order does not give notice of its entry. CR 58(a) answers this argument completely. Moreover, the provisions of CR 54(f)(2) require at least 5 days’ advance notice of signing and entry (“no order or judgment shall be signed or entered until. . .”). The City of Woodinville is simply grasping to try and

extend the scope of the King County Local Rule and still make it consistent with CR 54 requirements.

At the bottom of page 10 of its response, the City of Woodinville argues that the “sole” purpose of CR 54 is to provide notice of the contents of proposed orders. Nothing could be further from the truth. The contents of the proposed order are not even the subject of CR 54(f). It is the signing and entry that are the subject of the rule. The importance of these dates on appealable orders is because of the importance placed by the court on timely filing of notices of appeal. Due process requires that there be notice of an action that has such significant consequences if deadlines are not met based on the timing of the action. If the rules allowed for the “stealth” signing and entry of appealable orders, and then the courts steadfastly held to the 30-day limit for appeal from those “secret” appealable orders, it would be impossible to justify such a practice under ordinary principles of due process of law.

CR 54 is intended to provide a “bright line” against which the 30-day appeal period can begin, and to provide counsel with exact notification in advance of when that appeal period will begin. When CR 54 is complied with, the court is fully justified in applying the stern requirements of RAP

18.1 – when it is not, there is no justification for imposing the deadline on appeal (compare, *Beckman v. State DSHS*, 102 Wn. App. 687, 695-6, 11 P.3d 313 (2000) with *Seattle v. Sage*, 11 Wn. App. 481, 482-3, 523 P.2d 942 (1974) and *Burton v. Ascol*, 105 Wn.2d 344, 346, 17 P.2d 110 (1986)).

## **II. THE RESPONDENT’S LAW OF THE CASE ARGUMENT IS WITHOUT MERIT**

The law of the case requires identity of, among other things, issues. In the prior proceeding in the Court of Appeals, the appellant Woodinville Associates, filed a motion pursuant to RAP 18.1 for leave to proceed with an appeal filing that was one day late. This was a motion, not an appeal as the Court of Appeals had rejected the notice of appeal based on untimely filing. The issue before the court in the prior proceeding was strictly that of RAP 18.1 (although Woodinville Associates raised and argued CR 54 compliance as well). In its written decision in the prior proceeding, the court refers only to RAP 18.1 as the basis for its rejection of the motion seeking leave to file an untimely appeal. CR 54 is nowhere mentioned in the decision nor is any analysis of CR 54 apparent from the decision. The decision relies solely on the standards of RAP 18.1 in declining to allow the appeal.

Therefore, the law of the case doctrine cannot apply where the issue upon which the court decided the prior case is not at all the issue upon which this appeal is based.

In the present case, an appeal is presented to the Court of Appeals as a matter of right seeking review of the decision of the Superior Court not to vacate its judgment by reason of violation of CR 54(f) in the entry of the initial judgment sought to be vacated by Woodinville Associates. The motion to vacate pursuant to CR 60 had not even been presented to the Superior Court until after the Court of Appeals made its decision declining the one-day late appeal filing requested by Woodinville Associates. Woodinville Associates let the motion practice in the Court of Appeals complete itself before immediately filing the CR 60 motion in the Superior Court. Had the Court of Appeals motion practice been successful, there would have been no need, obviously, to pursue the motion to vacate in the Superior Court. Only after it was unsuccessful at the Court of Appeals level, did Woodinville Associates determine to ask the Superior Court to vacate its initial order dismissing the complaint with prejudice.

In seeking vacation of the order of dismissal with prejudice, Woodinville Associates was following the procedure recommended in *Seattle v. Sage, supra, Burton v. Ascol, supra, Soper v. Knafllich*, 26 Wn. App. 678, 681, 613 P.2d 1209 (1980) and *State v. Napier*, 49 Wn. App. 783, 785, 746 P.2d 832 (1987).

The law of the case doctrine is discretionary not mandatory. *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988). RAP 2.5(c)(2) “codifies” the discretionary nature of the rule in regard to subsequent appeals. Reconsideration of an identical legal issue in a subsequent appeal can be based upon “clearly erroneous” guidelines where the application of the doctrine “would result in manifest injustice.” (*Id.*)

Not only did the court not decide the same issue in the earlier motion decision, the issue of the obligation of the court to vacate its judgment by reason of violation of CR 54 was not even present at that time since no motion to vacate had been presented to the Superior Court. The motion for leave to file late appeal was in part based on the violation by the Superior Court of CR 54 in signing and entry of the order, however, the appellate court did not base its decision at all on CR 54 and did not even cite that rule in its decision, relying exclusively on RAP 18.1. The

law of the case doctrine simply cannot apply since the law on CR 54 issues was not established by the prior appellate court decision.

**III. THE CITY OF WOODINVILLE ARGUMENT  
THAT THE LOCAL RULE IS CONSISTENT  
WITH CR 54(f)(2) HAS NO MERIT**

In what only can be described as legal alchemy, the City of Woodinville argues that the provisions of KCLR 7(b)(5)(C) are not inconsistent with CR 54(f)(2) if applied to appealable decisions. This cannot be true.

The fundamental premise behind the appellate court's very limiting permission for late appeals found in RAP 18.1 is that the parties to a Superior Court action are given a clear "bright line" date upon which the 30-day appeal period begins to run through the provisions of CR 54(f)(2). CR 54(f)(2) is mandatory and applies to all appealable decisions (CR 54(a)(1)). The requirements of formal written notice of presentation before signing and entry of an appealable decision justify the aggressive enforcement by the appellate courts of RAP 18.1.

If, on the other hand, the only notice required was that provided in RAP 7(b)(5)(C), then, as conceded by the City of Woodinville, it would be incumbent on counsel to constantly monitor the docket of the King County

Superior Court Clerk to determine when an appealable decision was actually signed and entered to know when the 30-day appeal period begins to run. Nothing in CR 54(f)(2) justifies such an unwieldy method for establishing the “bright line” of the appeal filing deadline. The King County Superior Court Local Rules expressly state that they are to supplement the Civil Rules, not rewrite them. It goes against the express language, and the underlying purpose of CR 54(f)(2), to substitute for that very definitive procedure one that justifies the strict enforcement of RAP 18.1.

The *Beckman v. State Department of Social & Health Services*, 102 Wn. App. 687, 11 P.3d 313 (2000) decision, demonstrates the necessity of the formal procedures required by CR 54(f)(2). In *Beckman*, the formal procedures were followed by the successful plaintiff through giving notice of presentation of the proposed entry of a judgment against the State of Washington, DSHS. The State, through mistake, failed to show up at the presentation and the adverse judgment was entered. The State of Washington then sought to file an appeal from the judgment but was barred from doing so because the Rules had been followed and RAP 18.1

did not justify excusing the State from its internal office neglect of the formal notice of presentation required by CR 54(f)(2).

Obviously, the facts are different here. There was no formal notice of presentation required by CR 54(f)(2) before signing and entry of the judgment. *Beckman* not only does not justify or support the argument of the City of Woodinville that the local rule supersedes the requirements of CR 54(f)(2), it demonstrates the importance of CR 54(f)(2) to the process of establishing finality of the entry of judgments and the specificity of the 30-day appeal deadline from those judgments.

#### **IV. THERE IS NOTHING TO “DOCKET” ABOUT A LETTER MEMORANDUM DECISION OF THE SUPERIOR COURT**

The City of Woodinville criticized the office of Woodinville Associates’ counsel for not “docketing” or logging in the Memorandum Decision letter of the Superior Court. It should hardly require argument to demonstrate that a letter from a judge is not a docketable item. A letter from a judge is just that – a letter. There are no deadlines established by receipt of a Memorandum Decision, and it certainly does not constitute notice that the court will be entering a judgment *sua sponte* based on that Memorandum Decision even before the parties have received the letter

itself in the mail (in this case the judgment was entered July 1, 2009 and the letter from the court not received until July 6).

The Memorandum Decision from the court in this case did not even refer to the entry of a judgment, and certainly did not indicate to counsel receiving the letter that the judgment itself was in the same envelope. The letter is totally silent about the fact that on the same day the letter was sent a judgment had been signed and entered by the court. There is nothing to docket or log in at counsel's office because there was nothing noted for hearing and nothing that required scheduling.

To bootstrap its argument, the City of Woodinville finds fault with the fact that counsel for Woodinville Associates failed to look for a judgment having already been entered in a letter Memorandum Decision from the court. The response is this – why would counsel even consider looking for a signed and entered judgment in the same envelope as a three-page Memorandum Decision. The assumption would be that since the court took the time to render a Memorandum Decision, the court expected the parties to follow the procedures of CR 54 in formulating a judgment of dismissal with prejudice based upon the Memorandum Decision. If the court intended to enter a judgment, why the Memorandum Decision at all?

All counsel are aware of the rule that says that Memorandum Decisions of the Superior Court are not turned to by the appellate courts except in case of ambiguity or uncertainty about the Superior Court decision. In this case, how could there be any ambiguity or uncertainty about the language of “dismissed with prejudice”?

**V. THE PURPOSE OF CR 54(f)(2) IS MORE THAN SIMPLY GIVING NOTICE OF THE CONTENTS OF A PROPOSED APPEALABLE JUDGMENT OR ORDER**

The City of Woodinville argues at page 10-11 of its response that the “sole purpose” of CR 54(f) is to give notice of the contents of proposed orders. Nothing could be further from the truth. CR 54(f) clearly is intended to provide notice of the date of signing and entry of appealable orders or judgments, otherwise why would the rule be so specific as to the requirement that the notice of presentation be given in advance of those two specified actions by the court and the clerk?

The City of Woodinville argument falls flat for another reason – it is almost universal that the orders presented to a court for entry prior to the hearing are modified by the court by interlineations or elision in the hand of the court. Providing proposed orders in advance of hearing or in advance of decision where no hearing is held, would not give notice of the

interlineations. The Local Rule provides no mechanism for the procedure to be followed by a judge in making modifications to proposed orders before signing and entry but without further notification to the parties or counsel.

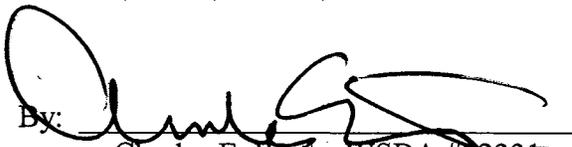
If the “sole” purpose of CR 54(f)(2) was to give notice of the contents of an order, why would the Rule be silent as to the word or “contents” and be specific as to “signing and entry”?

#### VI. CONCLUSION/RELIEF SOUGHT

Woodinville Associates, LLC asks the court to reverse the trial court’s denial of the CR 60 motion to vacate, order the judgment entered on July 1, 2009 vacated, and order the case remanded for re-entry of the same judgment upon following the required procedures of CR 54(f)(2), thereby providing Woodinville Associates, LLC with its very important right of appeal of the underlying action.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of July, 2010.

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

By: 

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Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned, Joy Griffin, certifies that on the 8<sup>th</sup> day of July, 2010, she caused to be served a copy of the attached Reply Brief of Appellant to the following via e-mail and regular US Mail:

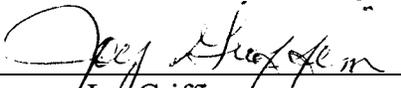
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I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 8<sup>th</sup> day of July, 2010 in Bellevue, Washington.

  
\_\_\_\_\_  
Joy Griffin