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No. 97494-2

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CHRISTOPHER DENNEY,

Petitioner,

v.

CITY OF RICHLAND,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the City of Richland (the “City”). The City is also the defendant in a lawsuit brought by plaintiff/petitioner Christopher Denney.

II. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in finding that a notice of appeal was untimely because it was filed by Mr. Denney more than 30 days after the entry of a summary judgment order dismissed all claims, even though the issue of costs was reserved for a future proceeding.

III. COUNTERSTATEMENT OF THE CASE

In 2017, Mr. Denney sued the City for allegations based on the Public Records Act, Ch. 42.56 RCW. The parties filed cross-motions for summary judgment in January 2019. Following a hearing on February 8, 2019, Benton County Superior Court Judge Alex Ekstrom granted the City's motion for summary judgment and denied Mr. Denney's motion for summary judgment.

The order on the parties' cross-motions for summary judgment states:

Based on the foregoing IT IS ORDERED, ADJUDGED AND DECREED:

1. Defendant City of Richland's motion for summary judgment is GRANTED;
2. Plaintiff Mr. Denney's motion for summary judgment is DENIED;
3. All claims and causes of action alleged by the plaintiff in this matter are DISMISSED WITH PREJUDICE; and
4. Defendant City of Richland is the prevailing party herein and may present judgment accordingly.

(See Appellant's Motion for Discretionary Review (herein "Appellant's Motion"), Appendix at 6).

A final judgment awarding costs in the amount of \$200 in favor of the City was entered on March 14, 2019. Mr. Denney filed a notice of appeal on April 1, 2019.

The parties were notified that Mr. Denney's appeal would be noted on the Court of Appeals Commissioner's docket of May 15, 2019, on the Court's motion to dismiss for failure to timely file a notice of appeal. On May 17, 2019, the Commissioner ruled that the appeal was untimely and dismissed it. (See Appellant's Motion, Appendix at 2-3).

Mr. Denney moved to modify the Commissioner's ruling. On July 17, 2019, the Court of Appeals entered an order granting in part and denying in part Mr. Denney's motion. (See Appellant's Motion, Appendix

at 1). The Court affirmed the Commissioner's ruling to the extent of its dismissal of the appeal of the February 12, 2019, order as untimely. The Court allowed the appeal to proceed on the limited scope of the \$200 cost award. (*Id.*).

IV. LEGAL STANDARD

Discretionary review of interlocutory decisions of the Court of Appeals will be accepted by the Supreme Court only:

- (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
- (2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
- (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court. RAP 13.5(b)(1)-(3).

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals applied settled law to undisputed facts. Its decision that Mr. Denney's appeal of the February 12, 2019, summary judgment order was untimely was compelled by court rule and controlling

authority. Mr. Denney cannot demonstrate obvious or probable error. The Court of Appeals' decision to modify the Commissioner's ruling neither substantially changed the status quo nor limited the freedom of any party to act. The present facts do not justify extending the time for filing an appeal. RAP 18.8(b) (only available for "extraordinary circumstances" and "gross miscarriage of justice.").

A. Review is not warranted under RAP 13.5(b)(1) because the Court of Appeals' decision is consistent with court rule and case law authority.

Common law has long defined a final judgment for purposes of appeal as one that disposes of all issues as to all parties. *See, e.g., Collins v. Miller*, 252 U.S. 364, 369 (1920). This has been the case in Washington for at least 40 years. *See Seattle-First National Bank v. Marshall*, 16 Wn. App. 503, 507, 557 P.2d 352 (1976) ("A summary judgment in an action involving neither multiple parties nor multiple claims is a final appealable judgment."). Courts will look to the content of the instrument, not its title, to make this assessment. *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994).

A well-known treatise warns that a final judgment that reserves a determination of an award of attorneys' fees or costs is nevertheless appealable. 14A Douglas J. Ende, *Washington Practice, Civil Procedure* § 34.26 (2019). According to this source, a key point of the 2002

amendment of RAP 2.2 was to confirm that an appeal cannot be delayed pending a decision on costs or attorneys' fees. *Id.* at n.19. According to the drafters' purpose statement accompanying the amendment to RAP 2.2, the rule "makes clear that a party may, and indeed should if review on the merits is desired, appeal from a final judgment whether or not an award of attorney fees or costs is reserved for future determination." RAP 2.2 Drafters' Comment, 2002 Amendment.

As one authority has put it: "[t]he practical lesson is clear— counsel should appeal from the judgment on the merits, even if the issue of attorney fees is still pending." 2A Karl B. Tegland, *Washington Practice, Rules Practice RAP 2.4* (2019).

B. The February 12, 2019, summary judgment order was a final, appealable order.

Appeals originate with "decrees and orders" issued by superior courts. *See* CR 54(a)(1) (defining "judgment" to include "any decree and order from which an appeal lies"). A notice of appeal must be filed no later than "30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed." RAP 5.2(a). The February 12, 2019, summary judgment order was a final, appealable order. *See Carrara, LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007) (holding that a summary judgment order dismissing

plaintiff's claims with prejudice was a "final, dispositive judgment" for purposes of appeal).

Mr. Denney explains that he delayed filing a timely notice of appeal of the February 12, 2019 summary judgment order because he did not wish to divest the Superior Court "of jurisdiction to enter the final judgment it had asked for and the City had presented[.]" (Appellant's Motion, at 6) This argument is a poor explanation because the law is clear that trial courts retain the authority to award attorney fees and litigation expenses even after appellate review has been accepted. RAP 7.2(d).

Mr. Denney does no better by claiming that language in the proposed judgment justified his inaction. (Appellant's Motion, at 5). The proposed judgment recited that the earlier summary judgment order "granted dismissal to the City, [and] denied Mr. Denney's motion for summary judgment, and designated the City the prevailing party herein." (Appellant's Motion, Appendix, at 11). The text of the summary judgment order made it plainly subject to appeal because it disposed of all claims in the case. While most all judgments are appealable, many other trial court decisions are final orders and must be appealed in a timely manner if review is sought. RAP 2.2(a). The reservation for future determination of costs does not prevent an otherwise final ruling from being an appealable final judgment. RAP 2.2(a)(1).

Mr. Denney is wrong to suggest that the Superior Court Clerk's "understand[ing]" or "belief" has any bearing on the issue. (Appellant's Motion at 6, 9). The fact that the Clerk did not enter the summary judgment order on the execution document was proper because the order did not contain the requirements of a judgment summary prescribed by RCW 4.64.030. This is irrelevant as a matter of the finality of the summary judgment order for appeal purposes. RAP 2.2(a)(1).

The truth of the matter is that Mr. Denney was unaware of the applicable rules and their operation in this context.

But even if Mr. Denney was uncertain over the proper course of action, he withheld filing a notice of appeal at his own peril. Sometimes a litigant must resolve uncertainties in determining when to file a notice of appeal. The rules provide for this. A premature notice of appeal (if Mr. Denney indeed believed he was placed on the horns of a dilemma) would have been "treated as filed on the day following the entry of the decision." RAP 5.2(g). A premature appeal is not fatal. Assuming Mr. Denney had an intention to appeal the summary judgment ruling, his delay cannot be justified by his inexplicable choice to wait to file his notice of appeal.

C. The reservation of costs did not affect the finality of the summary judgment order.

Mr. Denney's untimely appeal cannot be explained away by uncertainty over the proper course of action when the issue was squarely

addressed in *Carrara LLC v. Ron & E Enterprises, Inc.*, 137 Wn. App. 822, 155 P.3d 161 (2007). The trial court in *Carrara* issued an order granting the appellee's motion for summary judgment on July 8, 2005, which was similar to the summary judgment order issued by the trial court in this case:

It is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Defendant Ron & E Enterprises, Inc.'s Motion for Summary Judgment of All Claims is GRANTED.
2. Plaintiff Carrara, LLC's claims against Defendant Ron & E Enterprises, Inc. are dismissed with prejudice.

Id., at 826. The trial court subsequently issued an order granting the appellee attorneys' fees on August 8, 2005, and then entered a judgment in favor of the appellee on September 22, 2005. *Id.*, at 824.

The appellant filed a notice of appeal on October 21, 2005. *Id.* The appellee moved to dismiss because the notice of appeal was filed more than three months after the July 8 order granting the motion for summary judgment. *Id.*, at 825. Finding that the July 8 order was a "final, dispositive judgment," the court ruled that the appellant had until August 8 to file a notice of appeal. *Id.*, at 826. Because the appellant did not do so, "its appeal of the summary judgment [was] untimely." *Id.*

The same result is appropriate in this case. The reservation of a future determination of costs in the present case does not distinguish *Carrara*. RAP 2.2 makes the reservation irrelevant as to the finality of a judgment.

D. The Court should decline to grant discretionary review pursuant to RAP 13.5(b)(2).

RAP 13.5(b)(2) authorizes discretionary review of an interlocutory decision of the Court of Appeals in cases of “probable error” where the decision “substantially alters the status quo or substantially limits the freedom of a party to act[.]” This language tracks that in RAP 2.3 governing discretionary review of trial court decisions. *See* RAP 2.3(b)(2). The Task Force Comment to RAP 13.5 explains that the considerations governing discretionary review under RAP 13.5(b)(2) are identical to those under RAP 3.2(b)(2). *See* 3 Karl B. Tegland, *Washington Practice, Rules Practice RAP 13.5* (8th ed. 2018 update).

RAP 13.5(b)(2) was likely intended to apply only when an interlocutory order has immediate effect outside the courtroom. *See* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986) (discussing identical language in RAP 2.3(b)(2)); *also* Judge Stephen J. Dwyer, Leonard J. Feldman & Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed*

Framework for Clarity, 38 Seattle U. L. Rev. 91, 93 (2014) (arguing that discretionary review under RAP 2.3(b)(2) “should be granted only in the context of a court order having immediate effects outside the judicial process, such as a preliminary injunction, an order requiring disclosure of privileged communications, or an order to divulge a trade secret or other confidential information.”).

The Court of Appeals’ decision merely defined the scope of Mr. Denney’s pending appeal and has no effect beyond the existing lawsuit.

E. The Court of Appeals’ decision did not substantially alter the status quo.

The Court of Appeals’ decision did not substantially alter the status quo. The term “status quo” is defined as “the existing state of affairs.” *Webster’s New Collegiate Dictionary* (1981). Mr. Denney had 30 days from entry of the Superior Court’s February 12, 2019 summary judgment order to appeal. His failure to do so precluded appellate review of that decision. *See* RAP 5.2(a). The Court of Appeals’ ruling on July 17, 2019, like the Commissioner’s ruling before it, affirmed the status quo that has existed in this case since the summary judgment order was entered on February 12, 2019. It did not alter the status quo in any way.

F. The Court of Appeals' decision did not substantially limit Mr. Denney's freedom to act.

Washington appellate courts have interpreted the phrase “substantially limits the freedom of a party to act” in RAP 2.3(b)(2) to focus on conduct outside the courtroom. *State v. Howland*, 180 Wn. App. 196, 207-08, 321 P.3d 303 (2014). In *Howland*, the Court of Appeals held that discretionary review under RAP 2.3(b)(2) was not appropriate because “[w]hile the decision arguably limited the manner in which Howland can conduct the litigation regarding her conditional release, it has no effect beyond the immediate litigation.” 180 Wn. App. at 207.

The only action of Mr. Denney constrained by the Court of Appeals' decision is his ability to appeal the trial court's February 12, 2019 summary judgment order. Because the decision merely alters the status of the litigation itself, and does not limit Mr. Denney's ability to act on any matter outside of the present lawsuit, discretionary review is inappropriate under RAP 13.5(b)(2).

G. The Court of Appeals properly declined to enlarge the time for filing a notice of appeal.

Mr. Denney did not file a motion with the Court of Appeals to enlarge the time for an appeal pursuant to RAP 17.1(a). The Court of Appeals did not err in declining to enlarge the time for an appeal. As a

matter of discretionary review, Mr. Denney has no proper basis to seek enlargement of time before this Court.

The time in which to file an appeal will be extended “only in extraordinary circumstances and to prevent a gross miscarriage of justice[.]” RAP 18.8(b). This language embodies a “public policy preference for the finality of judicial decisions over the competing policy of reaching the merits of every case.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

“Extraordinary circumstances” include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control. *Shumway*, 136 Wn.2d at 354 (citation omitted). A lack of prejudice to the responding party is irrelevant. *Reichart v. Raymark Indus., Inc.*, 52 Wn. App. 763, 766 n. 2, 764 P.2d 653 (1998) (noting that the prejudice “would be to the appellate system and to litigants, generally, who are entitled to an end to their day in court.”).

Extraordinary circumstances are, of course, uncommon. They were found to exist in *Scannell v. State*, 128 Wn.2d 829, 833, 912 P.2d 489 (1996), where a *pro se* litigant was confused by a recent rule change. *Scannell*, 128 Wn.2d at 833 (describing a recent change to the rules as “present[ing] a trap for the unwary” that “leads the unsophisticated *pro se*

litigant to believe that RAP 15.2(a) has some kind of delaying effect on the 30 day notice of appeal deadline...”).

The circumstances of this case are not comparable. Mr. Denney is represented by experienced counsel. Mr. Denney has not identified any recent changes to the rules governing when a notice of appeal must be filed. To the contrary, caselaw teaches that an appeal of an order on summary judgment that dismisses all claims in a lawsuit must be filed within 30 days. *Seattle-First National Bank*, 16 Wn. App. at 507; *Carrara LLC*, 137 Wn. App. at 826.

VI. CONCLUSION

The motion for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 9th day of September, 2019.

MENKE JACKSON BEYER, LLP

/s/Kenneth W. Harper
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Attorneys for Respondent
City of Richland

DECLARATION OF SERVICE

I hereby declare that on the day set forth below, I electronically filed the foregoing ANSWER TO MOTION FOR DISCRETIONARY REVIEW with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

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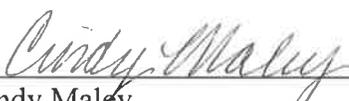
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Cindy Maloy

MENKE JACKSON BEYER, LLP

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