

No. 66052-7-1

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

CITY OF BOTHELL,

Appellant,

v.

ROBERT WALLACE,

Respondent.

2011 JAN 24 PM 1:42

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller, Judge

BRIEF OF RESPONDENT

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A. ISSUES

1. Does a ruling in the Court of Appeals denying a party appellate¹ attorney fees due to the party's non-compliance with RAP 18.1 preclude the trial court from later awarding that party non-appellate attorney fees?

2. Given the permissive language in RALJ 11.2, did the trial court err when awarding respondent attorney fees?

3. Was the appellant unduly prejudiced by the awarding of fees?

4. Pursuant to RCW 69.50.505(6) and RAP 18.1, is respondent entitled to attorney fees incurred on this appeal?

B. STATEMENT OF THE CASE

On April 27, 2006, the Bothell Police Department seized and impounded respondent Robert Wallace's car. CP 3. Wallace contested the forfeiture of his car under RCW 69.50.505. CP 2. The City of Bothell (the City) prevailed at the administrative and superior court levels. CP 2. On February 22, 2010, however, this

¹ Unless otherwise stated, respondent's use of the word "appellate" or the phrase "on appeal" is intended to refer to circumstances in which there is an appeal before the Court of Appeals or the Supreme Court.

Court reversed those rulings, holding the seizure of Wallace's car was unlawful. CP 2-10.

As the prevailing party, Wallace was entitled to attorney fees under RCW 69.50.505(6).² He submitted a request for attorney fees in a cost bill. CP 89-91. The cost bill not only included a request for appellate fees and costs, but it also erroneously included a request for non-appellate fees.³ CP 89-90.

Commissioner William Ellis denied the request, explaining:

A party must request attorney fees a[s] provided in RAP 18.1 and a commissioner will award fees only if here is a decision awarding a party the right to fees. RAP 18.1(d). A request for fees is not appropriate in a cost bill. Because the decision in this case does not award Wallace the right to attorney fees, no such fees will be awarded.

² RCW 69.50.505(6) provides:

In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

³ See, RAP 18.1(a) (granting a party the right to recover reasonable attorney fees only incurred "on review before either the Court of Appeals or Supreme Court").

CP 87. Wallace was awarded only costs pursuant to RAP 14.3(a).

Id.

On June 11, 2010, this Court mandated the case to the Superior Court “for further proceedings in accordance with the attached true copy of the decision.” CP 1. The mandate did not address attorney fees, awarding only costs. CP 1.

On June 21, 2010, Wallace moved the trial court for an award of those fees incurred outside the context of his appeal. CP 28-44, 93-101. In response, the City argued Wallace was precluded from obtaining fees at any level as a consequence of the Commissioner’s ruling. CP 80-81. The trial court disagreed. CP 103. It found the Commissioner’s ruling only pertained to appellate fees and did not preclude Wallace from recovering non-appellate fees. CP 103.

The City also argued Wallace was barred from recovering fees because he did not follow the procedures set forth in RALJ 11.2. CP 82. Again, the trial court disagreed. RP 104. It found, despite Wallace’s failure to comply with the rule, he still could be awarded attorney fees because the rule is permissive, not mandatory. CP 104.

The trial court awarded Wallace \$15,000 for non-appellate fees. CP 102-05. The City appeals. CP 109-116.

C. ARGUMENT

I. THE COMMISSIONER'S DENIAL OF APPELLATE ATTORNEY FEES DID NOT PRECLUDE THE TRIAL COURT FROM AWARDING NON-APPELLATE FEES.

The City claims the trial court erred when it awarded Wallace attorney fees incurred at the administrative and superior court levels. Brief of Appellant (BOA) at 3-6. It argues the Commissioner's ruling precluded Wallace from recovering any fees, not just appellate fees. Id. The City misinterprets the scope of the Commissioner's ruling.

After winning his previous appeal, Wallace would have been entitled to appellate attorney fees under RCW 69.50.505(6) had he followed the procedures set forth in RAP 18.1. See, Guillen v. Contreras, __ Wn.2d __, 238 P.3d 1168 (2010) (holding RCW 69.50.505(6) must be construed liberally in favor of the claimant and entitles claimant to fees whenever he prevails). The Commissioner denied Wallace's request, however, because Wallace did not address the issue in his briefing as required by RAP 18.1. CP 87.

The Commissioner expressly predicated his ruling on the fact Wallace had failed to comply with RAP 18.1. Id. He did not address any other potential grounds for denial. Id. Thus, the scope of his ruling is determined by scope of RAP 18.1. If RAP 18.1 applies to all fees, not just those incurred on appeal, then the Commissioner's ruling bars Wallace from recovering any fees. If RAP 18.1 applies only to appellate fees, however, Wallace is entitled to recover fees incurred at the administrative and superior court levels.

"RAP 18.1 sets forth the procedure that a party must follow to obtain attorney fees incurred on appeal to the Court of Appeals or Supreme Court." Hedlund v. Vitale, 110 Wn. App. 183, 185, 39 P.3d 358 (2002) (emphasis added); see also, Thompson v. Lennox, 151 Wn. App. 479, 484-87, 212 P.3d 597 (2009). Indeed, RAP 18.1(a) expressly limits its scope to appellate fees, providing:

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

Emphasis added.

Accordingly, courts applying RAP 18.1 have limited its application to appellate fees. See, e.g., Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 535 n. 13, 79 P.3d 1154 (2003). Malted Mousse argued -- for the first time in its motion for reconsideration -- it was entitled to reasonable attorney fees under MAR 7.3.⁴ Id. Because Malted Mousse failed to comply with the procedures set forth in RAP 18.1, the Washington Supreme Court denied its request for attorney fees incurred on appeal. Id. The Supreme Court explained, however, Malted Mousse was not precluded from seeking reasonable attorney fees incurred outside the appellate context. Hence, the Supreme Court recognized RAP 18.1 applies only to fees incurred on appeal. Id.; accord, Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 503, 210 P.3d 308 (2009); Hedlund, 110 Wn App. at 190-91.

Given the express language of RAP 18.1 and the authority cited above, the Commissioner's ruling only barred Wallace from recovering appellate fees and did not preclude him from recovering

⁴ MAR 7.3 provides:

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. ...

attorney fees incurred at the administrative and superior court levels. The City cites no authority to the contrary. The only case cited by the City is Phillips Bldg. co., Inc v. An, 81 Wn. App. 696, 704, 915 P.2d 1146 (1996). BOA at 4. Not only does Phillips fail to support the City's position, it includes language expressly limiting the denial of attorney fees under RAP 18.1 to "attorney fees on appeal." Phillips, 81 Wn. App. at 705. Phillips, therefore, supports respondent's reading of RAP 18.1.

Because the Commissioner's ruling applies only to appellate attorney fees, the trial court did not err when awarding Wallace non-appellate fees. Thus, the order and judgment should be affirmed.

II. STRICT COMPLIANCE WITH RALJ 11.2 IS NOT REQUIRED.

The City claims the trial court erred when it awarded Wallace attorney fees because he failed to strictly comply with RALJ 11.2. As shown below, however, the procedure set forth in that rule is permissive, not mandatory.⁵

RALJ 11.2(a) provides:

⁵ There is currently no published case addressing whether the procedure set forth in RALJ 11.2 is mandatory or discretionary.

If applicable law grants to a party the right to recover reasonable lawyer's fees or expenses, the party should request the fees or expenses as provided in this rule.

Emphasis added. The rule also states the requesting party "should" devote a section of the brief to the request for fees, "should" serve and file an affidavit detailing the fees, and "should" make a request for fees during oral argument. RALJ 11.2(c)-(e).

The City claims the procedure set forth in RALJ 11.2 is mandatory. The express language of the rule does not support the City's position.

When the language of a provision is clear and unequivocal, reviewing courts must assume it means exactly what it says and apply the provision as written. Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). The use of the term "should" generally denotes discretion and should not be construed as "must" or "shall." Norman J. Singer, Sutherland Statutory Construction (5th ed.1992), § 57.03, Vol. 3, p. 7; see also, e.g., Falkler v. Lower Windsor Tp. Zoning Hearing Bd., 988 A.2d 764, 768 (Pa. 2010) (holding the term "should" is expressly and plainly permissive).

If the Supreme Court had intended to require a party to request attorney fees strictly in accordance with the procedures set

forth in RALJ 11.2, it would have drafted the rule accordingly. It did not. The Supreme Court used the permissive word “should” instead of the mandatory word “must.” Compare, RALJ 11.2, with, RAP 18.1(a). The Supreme Court included no provisions indicating that the term “should” denotes anything other than discretion. Compare, RAP 1.2(b).⁶ In fact, RALJ 1.2(b) expressly states “issues will not be determined on the basis of compliance or noncompliance with the rules.” These provisions clearly undercut the City’s claim that the procedure’s set forth in RALJ 11.2 are mandatory.

Because RALJ 11.2 is permissive, it was well within the trial court’s authority to award Wallace attorney fees. This Court should, therefore, affirm the order and judgment.

III. THE CITY WAS NOT UNDULY PREJUDICED BY THE TRIAL COURT’S AWARDING OF FEES.

The City claims it was unfairly prejudiced by the trial court’s award of fees. BOA at 7-9. It appears the City strategically decided not to seek review of this Court’s previous decision based

⁶ RAP 1.2(b) provides in relevant part: “Should’ is used when referring to an act a party or counsel for a party is under an obligation to perform.”

partly on its belief Wallace would not be entitled to attorney fees.⁷

Id. The City suggests it justifiably relied on its reading of the Commissioner's ruling and RALJ 11.2 when it decided not to seek review and, thus, it was fundamentally unfair for the trial court to award fees after the mandate had been issued. Id. The City's reliance on its belief Wallace would not be entitled to any fees was not justified.

When the City made its strategic decision not to seek further review, it should have known it was potentially exposed to an order awarding Wallace attorney fees. Wallace was unquestionably entitled to attorney fees as the prevailing claimant in a forfeiture proceeding. RCW 69.50.505(6). Although Wallace was precluded from recovering appellate fees due to his non-compliance with RAP 18.1, the express language of RAP 18.1 and the cases law interpreting it put the City on notice that Wallace might still recover non-appellate fees.⁸

⁷ The City does not cite any place in the record where these facts have been established. As such, these facts are outside of the record and can not be considered on direct appeal. See, State v. McFarland, 127 Wn.2d 322, 335, 338 n. 5, 899 P.2d 1251 (1995).

⁸ See argument in section I of this brief.

Likewise, the City should have been aware RALJ 11.2 is not mandatory. Not only does the plain language of RALJ 11.2 put a party on notice the rule is permissive,⁹ but there is also an unpublished case alerting parties to the substantial possibility that the RALJ will be interpreted permissively.¹⁰ Thus, the City had reasonable notice Wallace might recover fees even though he did not comply with RALJ 11.2.

Given the information available to it, the City had no legitimate expectation that Wallace would not seek, or be awarded, attorney fees incurred outside the context of his previous appeal. Hence, this Court should find the City's claim that the trial court's ruling violated the principle of fundamental fairness to be without merit.

IV. PURSUANT TO RCW 69.50.505(6) AND RAP 18.1, RESPONDENT REQUESTS ATTORNEY FEES INCURRED ON THIS APPEAL

⁹ See argument in section II of this brief.

¹⁰ See, Nepa Pallet & Container Co., Inc. v. Chep USA, 116 Wn. App. 1076 (2003). Pursuant to GR 14 and RAP 10.4, respondent does not cite this case as authority; instead, he cites it only for the purpose of demonstrating what information was available to the City.

Wallace is statutorily entitled to attorney fees under RCW 69.50.505(6). See, Guillen v. Contreras, __ Wn.2d __, 238 P.3d 1168 (2010). He, therefore, requests this Court grant attorney fees and expenses incurred in responding to the City's appeal. RAP 18.1.

D. CONCLUSION

This Court should affirm the Order Granting Motion for Attorneys Fees. Additionally, respondent should be awarded fees and expenses pursuant to RCW 69.50.505(6) and RAP 18.1.

Dated this 24th day of January, 2011.

Respectfully submitted

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