70657-8

70657-8

NO. 70657-8-I

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

BETH and DOUG O'NEILL,

Plaintiffs/Respondents

v.

CITY OF SHORELINE and MAGGIE FIMIA

Defendants/Appellants

CORRECTED BRIEF OF RESPONDENTS BETH AND DOUG O'NEILL

Michele Earl-Hubbard
WSBA No. 26454
Allied Law Group LLC
Attorneys for Respondents
Beth and Doug O'Neill
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)

ALLIED LAW GROUP

ORIGINAL

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I. COUNTER STATEMENT OF THE CASE

A. Introduction

This is a Public Records Act ("PRA") case pursuant to Chapter 42.56, RCW. It dealt with five separate PRA requests made by the O'Neills to the Defendants the City of Shoreline ("Shoreline") and its former Deputy Mayor Maggie Fimia ("Fimia") in 2006. It has been in litigation since 2006. It has been appealed three times—once by the Plaintiffs/Respondents Beth and Doug O'Neill ("O'Neills"), successfully, to this Court, once unsuccessfully by Defendants to the Washington State Supreme Court by Defendants City of Shoreline ("Shoreline") and former Deputy Mayor Maggie Fimia ("Fimia") (collectively Defendants), and now, following remand, and an agreed resolution and agreed order in the trial court, Defendants now appeal to this Court seeking to be let out of a significant aspect of the agreed order they drafted and the resolution they bargained for and accepted.

As they did on remand, the Defendants seek to repeat arguments that failed in the previous appeals and failed below, and to discuss matters and seek to avoid findings and holdings they have chosen not to appeal. The Defendants' characterizations of this litigation and appeals are inaccurate, and the appellate decisions and trial court's orders provide the clear, and unchallengeable, findings of fact and conclusions of law

underlying the broader litigation. Those findings, holdings and judicial actions flowing therefrom have not been appealed by Defendants, nor could they be. The sole issue for this Court, now, after more than seven years of litigation, is the meaning of the agreed order the Defendants drafted and negotiated in September 2012, to end this litigation that was ultimately signed by the trial court in October 2012, and the proper enforcement of that agreed order. None of the other matters they raise are properly before this Court and their discussion of those matters and mischaracterizations of the broader litigation should be ignored.

B. <u>August 2, 2012, Order</u>.

This case was remanded to the King County Superior Court on January 3, 2011. CP 1-26. In June 2012, all parties moved for summary judgment. The O'Neills submitted a motion for partial summary judgment dealing with just one of their five PRA requests in this lawsuit. CP 745-763. Defendants submitted a motion for complete summary judgment. CP 549. On August 2, 2012, the Honorable Monica Benton granted partial summary judgment to the O'Neills (CP 27-29) and denied summary judgment to Shoreline and Fimia. CP 549. The O'Neills' had moved only for a partial summary judgment as they still possessed claims that additional records requested had not been produced in response to their five separate PRA requests at issue in the litigation, but Defendants

refused to respond to discovery necessary for those claims until the Defendants' summary judgment was addressed. CP 745-746. O'Neills' partial summary judgment motion had included a request for an award of attorney's fees, costs and statutory penalties the amounts of which would be decided by the trial court after the trial court set a briefing schedule to determine the amounts of the fee, cost and penalty awards if the parties could not agree on those amounts. CP 763, 549. The trial court's partial summary judgment Order declared the O'Neills the prevailing party and found that "the City of Shoreline and Maggie Fimia failed to conduct an adequate search of Maggie Fimia's computer hard drive, resulting in the permanent loss of the requested public record" and that Shoreline and Fimia "violated their statutory duty to provide Plaintiffs the fullest assistance in handling their records requests." CP 28. The Order further declared O'Neills the prevailing party in the action and stated:

> The Court HEREBY Orders that pursuant to RCW 42.56.550(4) Plaintiffs shall be awarded reasonable attorney's fees and all costs incurred in this action to date, and statutory penalties, to be determined after subsequent briefing and argument. Plaintiff shall be entitled to an award of reasonable attorney's fees and all costs incurred in connections with such fee and penalty motions, the amounts of which shall be determined by the Court in conjunction with the fee and penalty motions.

CP 28-29. The Order set a new case schedule for the remaining issues in the case including the additional records the O'Neills alleged they had

been denied—and attached an Order Amending Case Schedule with dates for witness disclosure starting in January 2013 and dispositive motions in May 2013 and a trial date of June 10, 2013. CP 39-40.

O'Neills' counsel's time records reveal that on August 7, 2012, five calendar days after the Order declaring O'Neills entitled to penalties, fees and costs, that she began gathering materials for the "subsequent briefing" on the amount of fees and costs to be awarded thus far. CP 195.

C. Offer and Acceptance By Parties and Contractual Agreement.

On Tuesday, September 18, 2012, at 4:21 p.m. Defendants issued an "Offer of Judgment" to O'Neills setting the statutory penalty portion of an award for all five of their PRA requests at $100,000. The Offer stated "This amount does not include **costs, including attorney's fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument**." CP 43 (emphasis added); CP 422. Acceptance of the Offer meant the O'Neills would give up their rights to pursue the other four PRA requests for which records had not been fully provided and would forgo the right to any additional penalties beyond the $100,000 for the more than six years they had been denied these other records, at least one of which the Defendants admitted had been destroyed after it was requested and could never be

produced. The Offer agreed that attorney's fees and costs incurred to date would be awarded with the trial court to determine the amount after "subsequent briefing and argument," but the Offer did not allow the O'Neills to pursue the additionally withheld records or to achieve another judicial ruling that the Defendants had violated the PRA with respect to these other four PRA requests.

After spending their life savings and undergoing more than six years of litigation, including appeals to the Court of Appeals and State Supreme Court, O'Neills decided to accept the Offer and compromise their claims to limit their recovery to the $100,000 penalty award and award of attorney's fees and costs incurred to date, as the Offer promised. See CP 474-478; see also CP 471-473. A press release issued by Shoreline revealed that the Offer was meant to "remove the incentive for the O'Neills to extend the clock on penalties and perform more attorney hours to build a larger award." See CP 474.

On September 24, 2012, O'Neills' counsel emailed Defendants' counsel Flannary Collins and her co-counsel Ian Sievers and Ramsey Ramerman stating:

> We accept.
>
> We will prepare the fee and cost motion for determination of the amount of the fees and costs to be awarded in

> additional to the $100K penalties as your offer contemplates.
>
> We do not see the value to either side of spending money on a fee mediation given such effort will be just as costly as if not more so than briefing the fee issue for the trial court, and our judge is in a better position to decide the subject than a mediator.

CP 371.

On September 27, 2012, O'Neills served Defendants with an "Acceptance of Offer of Judgment" for the penalty portion of the award. The Acceptance mirrored the Offer and stated "This amount does not include costs, including attorney's fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument." CP 41.

The August 2, 2012, Order declared the O'Neills entitled to "reasonable attorney's fees and all costs incurred in this action to date, and statutory penalties, to be determined after subsequent briefing and argument" and "reasonable attorney's fees and all costs incurred in connections with such fee and penalty motions" (CP 38) and the Offer and Acceptance dealt with the penalty portion of the award, and agreed the O'Neills would receive their fees and costs with determination of the amount "after subsequent briefing and argument." CP 55-56.

On Thursday, September 27, 2012, Defendants sent O'Neills' counsel a proposed order confirming the offer and acceptance. The document was drafted entirely by Defendants and captioned by Defendants as "Judgment on Offer and Acceptance". It contained no Judgment Summary or any material commonly contained in a Judgment. It stated it was solely for "daily penalties" and stated like the Offer and Acceptance that "This amount does not include **costs, including attorney's fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument**."

At Defendants' request, counsel signed the proposed order and emailed it back to Collins for submission to the Court.

O'Neills' counsel's time records show she worked on the briefing for the determination of the amount of the fee and cost award on September 27, 2012, and September 28, 2012. CP 196.

On Friday, September 28, 2012, at 4:21 p.m. Collins served O'Neills with nine pages of discovery requests for material and information to be provided prior to the briefing for the determination of the amount of the fee and cost award. CP 373-382. The requests sought information from the O'Neills as well as their "current and former attorneys" from any of the three law firms that had represented them on

this matter (CP 375), and asked for communications between the O'Neills and any of these lawyers or between co-counsel but also for fee agreements for any clients by any lawyer at any of the three law firms, all fee requests, opposition papers and court orders for any fee requests from any of the lawyers from any of these three firms over the past six years, any fee agreements for any client by any lawyer within these three firms "where litigation was involved", all fees discounted from any fee request to a court for any client by any lawyer from the three firms over the past six years and the basis for the discount, among other subjects. See CP 379-381. As the discovery requests indicated, responses to such requests were due within 30 days, on Monday, October 29, 2012. CP 374-375; CR 26, 33, and 34.

O'Neills had been represented in the litigation since 2008 by the law firm of Allied Law Group, since 2007 by Law Offices of Michael Brannan, and from 2006 to 2007 by Davis Wright Tremaine, and thus the Defendants' requests addressed records related to thousands of other clients from hundreds of lawyers located in numerous states and one foreign country, and sought to invade privileged material of current and former clients of those firms. The O'Neills and their counsel spent many hours searching for responsive materials and researching whether or not such records could lawfully be provided.

On Thursday, October 11, 2012, at 4:31 p.m., 13 days into the 30 day response period for the discovery, Defendants' emailed O'Neills' counsel a signed copy of the Order memorializing the Offer and Acceptance as to the penalty amount. CP 383-385. The document contained no file stamp reflecting filing with the Court. CP 384 The signed version, like the proposal confirmed the amount was just for the penalties and **"This amount does not include costs, including attorney's fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument**." CP 55-56 (emphasis added). As before, Defendants did not state any deadline or time period for this "subsequent briefing" to be filed. CP 383.

On Tuesday, October 16, 2012, at 9:59 a.m., 18 days into the 30 day response period for the discovery, O'Neills' counsel emailed Collins stating: "Hi there. We are working on our answers to your discovery but need a word version so we can just type in the answers and not have to re-type everything. Can you email that to us? Thanks." CP 394.

At 11:17 a.m. on October 16, 2012, Collins emailed O'Neills' counsel a Microsoft Word version of the discovery. CP 394. Again, no mention of a deadline for the "subsequent briefing" was made. **Id.**

On Monday, October 29, 2012, the O'Neills timely served Defendants with answers to Defendants' discovery requests. CP 404-417. They offered to produce certain privileged records with a protective order and asked Defendants to negotiate such an agreement with them.

Collins waited three days—until Thursday, November 1, 2012—to respond, and then had an email sent at 4:43 p.m. saying Defendants contended the briefing for the determination of the amount of the fee and cost award had been due on October 18, 2012, (seven days after the Order was sent to O'Neills) and so "Therefore, although your discovery responses are deficient, issues regarding production of records responsive to the discovery requests appear to be moot." CP 418, 423.

O'Neills' counsel spent 8.9 hours on November 2, 2012, 6.0 hours on November 4, 2012, and 10.0 hours on November 5, 2012, on the briefing for the determination of the fee and cost award, filing and serving it on Monday, November 5, 2012—four calendar days and two business days after Defendants acknowledged they did not actually wish answers to the discovery they had issued. CP 197, 418. Pursuant to the court's local rules, the matter was noted for hearing on November 14, 2012, six court days and nine calendar days later as November 12, 2012, was a court holiday.

On November 6, 2012—despite arguing that O'Neills' briefing should have been submitted within 10 days of signing of the Agreed Order and prior to production of any discovery—Collins complained that she needed more time to respond to the O'Neills' briefing and demanded the O'Neills delay the hearing of the issue an additional two weeks into the future to give her more time to respond. CP 419-421.

On November 6, 2012, O'Neills' counsel responded reciting the chronology of events and stating she could not delay as Defendants were now claiming delay merited a denial of fees and costs Defendants had previously agreed would be paid. CP 422-424.

Defendants filed a Response and supporting materials on November 9, 2012, raising their timeliness argument. CP 438-443. O'Neills filed a Reply and supporting declarations on November 13, 2012, addressing the Defendants' timeliness argument and arguing the time limit had not applied to the agreed order but requesting an extension of time if such a time period had applied and establishing grounds for findings excusable neglect. CP 453-488. O'Neills submitted declarations and briefing establishing excusable neglect based on the Defendants' issuance of discovery, lack of judgment summary or any indication the agreed order was intended to trigger a 10 day deadline, and the Defendants' apparent issuance of discovery as a "sham" to delay the filing of the briefing. **Id.**

On November 14, 2012, the Defendants' filed a Sur-Reply responding to the O'Neills' arguments. CP 489-503.

D. Trial Court's Enforcement of Agreed Order.

Due to a conflict in the judge's schedule and a family leave, the hearing of the matter did not occur until June 28, 2013. RP. At the hearing, the Defendants again presented their arguments regarding the alleged untimeliness of the briefing. RP at 1-8 After hearing from Defendants, the trial judge indicated she was "not concerned about the 54 issue" so to skip the waiver arguments and focus instead on the issue of rates and hours and proposed reductions of the award. RP at 17. This was a clear indication the trial judge had heard the arguments, considered them, considered the meaning of the agreed order at issue, and determined that order and the evidence presented merited the court's determination of the amount of the fees and costs as promised in the agreed order. There is no evidence the judge was confused or lacked an understanding of the arguments Defendants had made. RP at 1-17. It was further clear the court understood O'Neills to have requested an extension of time if a time limit was deemed to have lapsed and put forth evidence showing excusable neglect based on Defendants' filing of discovery to delay the filing of the briefing and Defendants' wording of the Agreed Order to hide

any alleged intention that briefing had been due in 10 days and a lack of any indication a 10 day deadline had been imposed in the Agreed Order.

Following a lengthy hearing, the trial judge indicated she would review the records and authority again and determine the reasonableness of hours based on arguments discussed by the parties (See, e.g., RP at 29), and her ultimate Order signed later that day reduced the fee award by $17,583.20. CP 506.

The Order Granting Plaintiffs' Motion for Determination of Amount of Fee and Cost Award held that:

> the rates requested by Plaintiffs' counsel are reasonable and that the amount of hours expended on this litigation are reasonable. Defendants have failed to meet their burden to justify deviating from the lodestar figures proposed by Plaintiffs.

CP 505.

On July 11, 2013, after timely Notice of Presentation, the trial judge signed a Final Judgment which contained a Judgment Summary and a narrative summary of the court's holdings. The summary stated in relevant part:

> ...and awarded Plaintiffs their reasonable attorney's fees, all costs, and a statutory penalty – all of which to be determined by the Court after subsequent briefing and argument if the parties did not reach an agreement as to the amounts. The parties thereafter reached an agreement as to the amount of statutory penalties memorialized in an

> October 8, 2012, order awarding Plaintiffs $100,00.00 in statutory penalties. The parties did not reach an agreement as to the amount of the award of fees and costs, and the Plaintiffs filed a Motion for Determination of Amount of Fee and Cost Award on November 5, 2012, which was heard in open court on June 28, 2013. In a June 28, 2013, Order Granting Plaintiffs' Motion for Determination of Amount of Fee and Cost Award, the Court awarded Plaintiffs' attorneys' fees of $428,966.18 and costs of $11,392.44 (which include $1,803.65 earlier awarded on November 9, 2010, by the Washington State Supreme Court on appeal).

CP 535-536. Defendant Fimia did not object to entry of the Final Judgment. Defendant Shoreline objected to the Final Judgment prior to entry not based on any of its wording but instead arguing the trial court should not sign a Final Judgment of any kind alleging the October 8, 2012, order was the only "judgment" the case required and the only judgment "legally allowed". CP 523. The trial court disagreed and signed the Final Judgment described above. CP 535-536.

II. LEGAL AUTHORITY AND ARGUMENT

A. Defendants Have Not Appealed Findings That The Rates And Hours Were Reasonable Or That Defendants Violated The PRA And O'Neills Are The Prevailing Party And Entitled To An Award Of Fees, Costs And Penalties.

On June 28, 2013, the trial court held that

> the rates requested by Plaintiffs' counsel are reasonable and that the amount of hours expended on this litigation are

> reasonable. Defendants have failed to meet their burden to justify deviating from the lodestar figures proposed by Plaintiffs.

CP 505. Defendants have not challenged those holdings and have not assigned error to the amount of fees and costs awarded, merely the decision to award any fees and costs based on an allegedly untimely filing. Thus, Defendants cannot challenge in the appeal or on Reply the lodestar calculation or the trial court's determination of the reasonableness of the award or argue for any reduction of the award other than a complete vacation of any right to an award solely based on their alleged timeliness argument.

Defendants have further not appealed the August 2, 2012, Order, finding the Defendants violated the PRA and that O'Neills were the prevailing party and were entitled to an award of penalties, fees and costs.

Although they appear to try, Defendants cannot re-litigate the issues addressed by the Washington State Supreme Court that led to the remand and the eventual proceedings and holdings Defendants chose not to appeal and to resolve through an Offer of Judgment and Agreed Order.

The only issue in this appeal is the trial court's interpretation of an Agreed Order, the intention of the parties in entering such agreement and the legal effect of that Order in light of the record in this case.

B. Appellate Court Can Affirm Trial Court Based on Any Basis.

As will be discussed below, there are numerous bases on which this Court could affirm the trial court's decision to determine the amount of fees and costs to award O'Neills. This Court can uphold the trial court's ruling on any permissible basis, whether or not it contends the trial court ruled as it did for that reason. **Olson v. Scholes,** 17 Wn. App. 383, 563 P.2d 1275 (1975); **Niven v. E.J. Bartells Co.**, 97 Wn. App. 507, 983 P.2d 1193 (1999). Appellate courts do not remand to trial courts to state why they did something an appellate court finds would be acceptable under the standard of review at issue in the appeal. **Id.**

Defendants have only challenged the timeliness of the November 5, 2012, filing and have thus abandoned all arguments related to the reasonableness of the hours or rates or overall amount. All findings of the trial court not addressed in Defendants' Brief of Appellant as an "error" are a verity on appeal. Defendants have placed all their eggs in one basket and argue for all or nothing limiting this appeal solely to the timeliness argument.

O'Neills address the many bases this Court could uphold the decision to accept and rule upon the November 5, 2012, submission.

Under any reading of the record in this case, it is clear what occurred. First, the trial court agreed based on the Agreed Order that the "subsequent briefing" was not required to be filed within 10 days of the Agreed Order's signing, that the Defendants agreed in such Order to pay the O'Neills their fees and costs to be determined by such "subsequent briefing" and there was no basis to allow Defendants to void that part of the agreement based on their belated, and previously unstated, 10 day time limit argument. Second, the trial court determined that even if the Agreed Order could be read to contain a 10 day time limit for filing of the "subsequent briefing" that the trial court properly granted O'Neills an extension to file such briefing if an extension was required and found the O'Neills to have shown excusable neglect. The end result of both reasonings is the same – the trial court properly chose to determine the amount of the fee and cost award.

C. The Agreed Order is a Contract and Must be Enforced Pursuant to its Clear Terms and Based on the Parties' Intent.

The October 2012, Order was an Agreed Order. It was based on an Offer and an Acceptance and was drafted by Defendants and captioned by Defendants as a "Judgment on Offer and Acceptance."

Stipulated judgments or other orders entered by stipulation or consent of the parties are contractual in nature. **State v. R.J. Reynolds**

Tobacco Co., 151 Wn. App. 775, 783, 211 P.3d 448 (2009), **review denied**, 168 Wn.2d 1026, 228 P.3d 18 (2010) ("**R.J. Reynolds**"); **Martinez v. Miller Indust., Inc.**, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999); **Balmer v. Norton,** 82 Wn. App. 116, 121, 915 P.2d 544 (1996). When interpreting a contract, the Court's primary objective is to discern the parties' intent. **Tanner Electric Coop. v. Puget Sound Power & Light,** 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); **Martinez**, 94 Wn. App. at 942. When a court order incorporates an agreement between parties, the meaning of the order is the same as the meaning objectively manifested by the parties at the time they formed the agreement. **R.J. Reynolds**, 151 Wn. App. at 783; **Martinez**, 94 Wn. App. at 942, **Interstate Prod. Credit Assoc. v. MacHugh**, 90 Wn. App. 650, 654, 953 P.2d 812 (1998) ("**MacHugh**"); **see also In re Marriage of Boisen**, 87 Wn. App. 912, 920, 943 P.2d 682 (1997).

> [P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed.... It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes no further than to show the situation of the parties and the

> circumstances under which the instrument was executed, then it is admissible.

Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).[1] **See also Hearst Commc'ns, Inc. v. Seattle Times Co.,** 154 Wn.2d 493, 503, 115 P.3d 262 (2005); **Martinez**, 94 Wn. App. at 942; **R.J. Reynolds**, 151 Wn. App. at 783.

> The intent of the parties in reducing an agreement to writing may be discovered from the actual language of the agreement, as well as from the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Martinez, 94 Wn. App. at 942; **see also Tanner**, 128 Wn.2d at 674. "Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions." **Lynnott v. Nat'l Union Fire Ins. Co.**, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Extrinsic evidence cannot be used to show an intention independent of the instrument or to vary, contradict, or modify the written word. **Hearst Commc'ns, Inc.**, 154 Wn.2d at 503; **R.J. Reynolds**, 151

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[1] The **Berg** court specifically rejected "the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible." 115 Wn.2d at 669. Extrinsic evidence is admissible to "illuminate[ ] what was written, not what was intended to be written." **Nationwide Mut. Fire Ins. Co. v. Watson**, 120 Wn.2d 178, 189, 840 P.2d 851 (1992).

Wn. App. at 783.

Determining a contractual term's meaning involves a question of fact and examination of objective manifestations of the parties' intent. **Martinez**, 94 Wn. App. at 943; **Denny's Restaurants, Inc. v. Security Union Title Ins. Co.**, 71 Wn. App. 194, 201, 859 P.2d 619 (1993).

> If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented.

MacHugh, 90 Wn. App. at 654; **Martinez**, 94 Wn. App. at 943. "When a question of fact exists as to meaning, the trial court must identify and adopt the meaning that reflects the parties' intent; the appellate court reviews the trial court's decision for substantial evidence." **Martinez**, 94 Wn. App. at 943; **Boisen**, 87 Wn. App. at 921.

> Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.

Tanner, 128 Wn.2d at 674. Determining the legal consequences flowing from a contract term involves a question of law. **Martinez**, 94 Wn. App. at 943; **Denny's**, 71 Wn.App. at 201. Appellate courts review de novo such questions of law. **Martinez**, 94 Wn. App. at 944; **Knipschield v. C–J Recreation, Inc.**, 74 Wn.App. 212, 215, 872 P.2d 1102 (1994).

1. Ambiguity

Words in a contract should be given their ordinary, usual and popular meaning. **Corbray v. Stevenson**, 98 Wn.2d 410, 415, 656 P.2d 473 (1982); **R.J. Reynolds**, 151 Wn. App. at 783. "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." **Mayer v. Pierce County Med. Bureau**, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). But a contract provision is not ambiguous merely because the parties suggest opposite meanings. **Martinez**, 94 Wn. App. at 944; **Mayer**, 80 Wn. App. at 421. "[A]mbiguity will not be read into a contract where it can reasonably be avoided[.]" **McGary v. Westlake Investors**, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

Defendants argue that while the Agreed Order mandated that Defendants would pay O'Neills their "costs, including attorney's fees incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument" that this Agreed Order meant the Defendants agreed to pay these costs and fees and that the costs and fees "shall" be awarded only if O'Neills filed their briefing within 10 days after the Court signed the Agreed Order. Defendants seek to import words not stated into the Agreed Order. In the alternative, Defendants could belatedly argue that the word "subsequent"

as in "after subsequent briefing and argument" instead meant briefing filed within 10 days of the court signing the Agreed Order and subsequent argument—again terms not written in the Agreed Order.

A fair reading of the Agreed Order and the Defendants' agreement—the only permissible reading based on the Order's words—is that Defendants agreed without qualification to pay the O'Neills their fees and costs incurred to date and that the O'Neills would mandatorily be awarded those fees and costs in an amount to be determined by the trial court after further briefing and argument. There was no time limit or definition for when "subsequent" briefing was to occur, nor was there any "out" or right for Defendants to void their agreed obligation to pay the fees and costs if O'Neills filed their briefing more than 10 days after the Order was signed.

"Subsequent" is defined as "following in time; coming or being later than something else" by Blacks' Law Dictionary and by the Merriam-Webster Dictionary as "happening or coming after something else" or "following in time, order, or place" (available at http://www.merriam-webster.com/dictionary/subsequent). Here, the O'Neills filed their briefing on November 5, 2012, which was 28 calendar days after the court signed the Agreed Order, 25 days after such Order was served on O'Neills, seven calendar days after O'Neills timely served

Defendants with responses to the discovery Defendants had issued the day after the agreement had been reached, and four calendar days after Defendants stated they did not want answers to such discovery and contended the briefing was past due. November 5, 2012, "followed in time" the October 11, 2012, Order, and was a "subsequent" event. There was thereafter a hearing on the briefing and argument from both sides, meaning "subsequent" argument was also provided.

Subsequent was not defined by the parties and the word does not carry any designated time period other than that it will come after another event. The O'Neills fulfilled their part of the agreement by submitting briefing for a determination of the amount of their fee and cost award and resolving their penalty claim for $100,000 and not pursuing the records denied under their other four PRA requests. O'Nells could have realistically achieved a far higher penalty amount had they litigated further as records were denied for six years, destroyed after requested, and can never be provided due to the illegal destruction during litigation.

The Defendants did not preface their agreement to pay "costs, including attorney's fees incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument" only if O'Neills filed their briefing within 10 days after the Court signed the Agreed Order. Nor did the Defendants preface their

agreement that such fees "**shall be awarded** in an amount to be determined by the Superior Court after subsequent briefing and argument" on the O'Neills' filing this "subsequent briefing" within 10 days of the Agreed Order being signed.

Agreed Orders such as this are not subject to modification once entered absent a showing the agreement was obtained by want of consent, fraud, collusion, or mutual mistake. **Haller v. Wallis**, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978). Defendants make no claim the Agreed Order was so obtained. It would be impossible for them to make such a showing given that the exact wording of the agreement originated with Defendants who presented the Offer and wrote the Agreed Order. (Defendants further cannot claim they understood their promise to pay fees and costs would self destruct and be voided if O'Neills responded to Defendants' discovery and did not file briefing within 10 days of the Agreed Order although such deadline was not stated in the Order. To do so suggests improper and unethical conduct on the part of the attorneys who negotiated the agreement and could subject those attorneys individually to discipline by the Washington State Bar Association as well as sanction by this Court).

The Agreed Order and contract of the parties is clear and not ambiguous in that it confirmed the Defendants' agreement to pay fees and costs incurred during the more than six years of litigation based on the

court's determination of the amount, did not place any time limit on the briefing for the amount determination, and did not afford Defendants any right to avoid paying those fees and costs based solely on an unstated time period allegedly understood only by Defendants to exist in the agreement.

2. Impact of Extrinsic Evidence

When the court is asked to determine the "meaning of what is written, and not what was intended to be written[,]" extrinsic evidence is admissible to determine the parties' intent. **Berg**, 115 Wn.2d at 669 Here, every piece of extrinsic evidence illustrates that O'Neills never intended to resolve their dispute without payment of attorney's fees and costs or to allow Defendants an "out" from paying such fees and costs based on a technical deadline argument based on CR 54(d)(2). All of the extrinsic evidence, in fact, suggests that both parties understood briefing would be submitted in the future but that neither party believed briefing had to be filed in as few as 10 days. Defendants issued discovery carrying a 30-day response time the day after the agreement was reached and the proposed Agreed Order submitted to the court. O'Neills contacted Defendants' counsel asking for a Word version of such discovery, which was provided without comment as to a deadline for the briefing, and the O'Neills prepared and timely served Defendants responses to such discovery. Defendants did not mention the alleged time limit until three days after

discovery was served, and then when O'Neills did file their briefing for a determination of the amount of the fee and cost award Defendants' counsel complained she needed more time to respond and demanded the matter be delayed an additional two weeks (a request that was denied).

None of the extrinsic evidence supports a reading that what was written included a 10 day deadline or the right to avoid paying any fees or costs if briefing was not filed within 10 days of signature. While extrinsic evidence cannot be used to show what Defendants claim they intended to write, see **Berg**, none of the extrinsic evidence supports Defendants' claimed intent in any event. Defendants waited nearly two years after remand and 57 days after the trial court ordered that fees and costs would be awarded to O'Neills to issue discovery related to the fee and cost award. Defendants waited until the day after negotiating the proposed Agreed Order and submitting it to the court to issue the discovery knowing the discovery would carry a 30-day response time. Defendants never expressed a different deadline for responding to the discovery or any deadline for filing the briefing for award determination. They remained silent as to any deadline when O'Neills' counsel said she was preparing the briefing for filing with the Court, asked for a Word version of discovery to provide responses, and when Defendants were provided with discovery responses. Several days after receiving discovery, Defendants'

counsel for the first time claimed a deadline had been secretly and silently imposed in the Agreed Order and that discovery responses were not desired after all. Thus, either Defendants (1) issued discovery they had no interest in having answered designed solely to delay filing of the briefing, (2) intended an undisclosed term in the contract they had negotiated and had reduced to an Agreed Order, or (3) thought up the deadline argument belatedly and now fraudulently ask this Court to read this meaning into the Agreed Order. Any of those events are fatal to Defendants' plea to overturn the trial court's award. The latter two are support for the contract interpretation meaning there was not a 10 day deadline or right of Defendants to avoid paying fees or costs they had agreed to pay. The former is evidence of the permissibility of any extension of any deadline and a finding of excusable neglect, as will be discussed in a later section.

Defendants do not argue O'Neills intended that the "subsequent briefing" would carry a 10 day deadline. Rather, Defendants argue O'Neills and their counsel were unaware of the requirement but that this ignorance or mistake is irrelevant. See Br. of App.

From September 28, 2012, to October 29, 2012, O'Neills prepared discovery responses related solely to the upcoming proceeding to determine the amount of the fee and cost award. See, e.g., CP 196-197. On October 29, 2102, O'Neills timely served those discovery responses on

Defendants and asked Defendants to negotiate a protective order so certain privileged materials could be produced. CP 197. On November 5, 2012, O'Neills submitted their briefing and declarations and sought the court's determination of the amount of its fee and cost award. CP 67-367. These "subsequent acts" by O'Neills, a party to the stipulated order, are admissible to show intent of that order. **See Harris v. Ski Park Farms Inc.**, 120 Wn.2d 727, 746, 844 P.2d 1006 (1993); **Martinez**, 94 Wn. App. at 947.

In light of all of the evidence contradicting Defendants' alleged belief that the Agreed Order carried a 10 day deadline and afforded Defendants an out to avoid paying any fees and costs if such unstated deadline was not met, such a belief, even if actually held, would not be "reasonable." **See Tanner**, 128 Wn.2d at 674; **Martinez**, 94 Wn. App. at 947. The record shows unequivocally that the parties did not intend a 10 day deadline for the "subsequent" briefing and the parties did not intend a means for Defendants to avoid payment of any fees and costs if a 10 day deadline was not met. The record shows an unwillingness by O'Neills to resolve the lawsuit without payment of fees and costs and the intent, and subsequent effort, to present such briefing to the court for a court determination.

This Court should hold that the trial court did not err in accepting

the briefing for the fee and cost determination or in determining that the right to fees and costs had not been waived by filing the briefing more than 10 days after the signing of the Agreed Order. Defendants have not shown and cannot show the contractual agreement intended to allow Defendants to avoid paying fees and costs if the briefing was not filed within 10 days of the signing of the Agreed Order.

The Agreed Order is a confirmation of a settlement contract in which the parties agreed the O'Neills would receive their reasonable fees and costs in an amount determined by the trial court after subsequent briefing and argument. The trial judge enforced the parties' expectations and agreed terms—that the O'Neills would receive their reasonable fees and costs as determined by the trial court—and Defendants' efforts belatedly to eviscerate that part of the agreement was properly rejected by the trial court and should be rejected by the appellate court here.

The Defendants under the Agreed Order could have appealed and challenged the trial court's determination of the reasonableness of an amount awarded—something Defendants chose not to do here and have not done here—but they were not entitled to avoid their agreement to pay fees and costs based solely on a claim the briefing for the award determination was filed more than 10 days after the agreed order was signed.

3. The Corey Case Did Not Involve a Stipulated Judgment

Defendants rely on the sole case of **Corey v. Pierce County**, 154 Wn. App. 752, 225 P.3d 367 (2010), for their waiver argument. **Corey** did not involve an agreed judgment. It thus did not involve a contract or a requirement to determine the parties' intent. **Corey** involved a jury verdict finding liability and damages and a trial court's judgment on the jury's verdict. Plaintiff belatedly filed a motion asking for the right to fees and costs and made no effort to prove excusable neglect for her belated motion requesting a right to fees. The trial court declined to grant fees and costs due to the untimely filing.

Here, the trial court had already ruled in its summary judgment order of August 2, 2012, that O'Neills were entitled to an award of penalties and a separate award of fees and costs incurred to date and fees and costs for the far-in-to-the-future briefing and hearing on the amount of the fee, cost and penalty awards if the parties could not reach an agreement as to the amounts. See CP 29, CP 549. Notably, Defendants do not argue that the August 2, 2012, summary judgment order triggered a CR 54(d)(2) filing deadline. Defendants then, unlike **Corey**, agreed to settle the case and made an Offer of Judgment agreeing to pay the O'Neills $100,000 in penalties and their fees and costs incurred to date

and agreeing that the fees and costs "shall be awarded" by the court with the amount to be determined by the Superior Court "after subsequent briefing and argument." The authorities cited in Sections C.1 and C.2 above apply in a contract and agreed order setting, not **Corey**. Not one case has been cited by Defendants supporting the right of a party to avoid a clear promise to pay fees in a stipulated judgment based on an unstated deadline to submit the amount of fees. None is believed to exist. In fact, no appellate case is believed to exist where an appellate court allowed a party that had agreed to pay fees in a stipulated judgment to avoid fees based on an argument pursuant to CR 54(d)(2). Appellate courts, like trial courts, interpret agreed orders and stipulated judgments as contracts and honor the parties' clear intent in enforcing those agreements, as the above precedent requires. While there exist unpublished authority, post dating **Corey,** rejecting Defendants' CR 54(d)(2) waiver claims in a stipulated judgment context, there is no known case, published or otherwise, accepting the arguments Defendants make here in the stipulated judgment context. In a case such as this a party that agrees to pay fees is bound by that promise and the amount of those fees should be determined and ordered paid regardless of whether the material for the determination is submitted in 10 days or 25 days, particularly where, as here, there was no stated time period in the agreement for the submission.

D. 10 Day Limit Did Not Apply

CR 54(a)(1) defines a "judgment" as "the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies...." CR 54(a)(1). "Whether an order constitutes a judgment is determined by whether it finally disposes of a case and was intended to do so." **Bank of American v. Owens**, 173 Wn.2d 40, 51, 266 P.3d 211 (2011) ("Owens"). The October 11, 2012, Order confirming the offer and acceptance for the $100,000 penalty did not "finally dispose of the case" nor was it "intended to do so." Rather, the Order makes clear it declared the amount of only one part of the relief ordered by the August 2, 2012, summary judgment Order – the penalty award – and declaring again as the August 2, 2012, order had done that the O'Neills were to receive their fees and costs with the amount to be determined by the court after "subsequent briefing and argument." In its August 2, 2012, summary judgment Order the trial court had already declared O'Neills entitled to the fees and costs it had incurred over the more than six years of litigation.

As the trial confirmed in the case summary in the Final Judgment, the Court in its August 2, 2012, Order

> ...awarded Plaintiffs their reasonable attorney's fees, all costs, and a statutory penalty – all of which to be determined by the Court after subsequent briefing and

> argument if the parties did not reach an agreement as to the amounts. The parties thereafter reached an agreement as to the amount of statutory penalties memorialized in an October 8, 2012, order awarding Plaintiffs $100,000 in statutory penalties. The parties did not reach an agreement as to the amount of the award of fees and costs, and the Plaintiffs filed a Motion for Determination of Amount of Fee and Cost Award on November 5, 2012, which was heard in open court on June 28, 2013. In a June 28, 2013, Order Granting Plaintiffs' Motion for Determination of Amount of Fee and Cost Award, the Court awarded Plaintiffs' attorneys' fees of 428,966.18 and costs of $11,392.44 (which include $1,803.65 earlier awarded on November 9, 2010, by the Washington State Supreme Court on appeal).

CP 535-536. The August 2, 2012, Order anticipated that the parties would attempt to agree on amounts of penalties, fees and costs, and would present those matters to the court for resolution if the parties could not reach an agreement as to amount. The October 11, 2102, Order addressed the penalty portion of the award but reserved determination of the amount of the fee and cost portion of the award "**which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument**." CP 55-56 (emphasis added). Thus, the October 11, 2012, Order was not intended to dispose of the case and did not dispose of the case as additional briefing was to be filed and another hearing held to obtain the Court's determination of the reasonableness of the fees and costs sought.

Defendants further make no excuse for why the alleged "judgment" contained none of the typical criteria mandated by RCW 4.64.030. RCW 4.64.030(2)(a) makes clear a "judgment does not take effect" until the judgment has a summary in compliance with RCW 4.64.030. The **Owens** case on which Defendants rely does not change this fact. **Owens** dealt with the priority of liens on proceeds of real property and whether certain orders – all of which designated sums certain to be awarded to husband – were valid judgments to create liens even though they did not contain all of the provisions of the judgment summary. First, the **Owens** case did not deal with a claim that fees had to be brought within 10 days of the documents pursuant to CR 54(d)(2) so its weight in the CR 54(d)(2) context is doubtful. Further, the documents in **Owens** awarded the husband specific monetary amounts or specific enumerated property, not merely the right to receive fees and costs the amount of which would be determined after subsequent briefing and argument, the deadline for which was not stated. So the opinion's determination that certain of those documents were sufficient to create a lien and take priority over other judgments does not suggest that in the CR 54(d)(2) context every time a party slaps the word "Judgment" on an agreement to pay an undetermined amount of fees and costs that this creates an effective judgment triggering a 10 day deadline to submit the issue for the

determination of the amount of the award or forever lose the right to enforce the agreement to pay them. As with **Corey** Defendants seek to prove too much from a case that did not deal with a stipulated agreement, nor even the issue of deadlines and applicability of CR 54(d)(2).

E. Even if 10 Day Period Had Applied, Trial Court Had Discretion to Award Fees and Costs.

"Application of a court rule to a particular set of facts is a question of law reviewed de novo." **Corey**, 154 Wn. App. at 773. Courts interpret court rules using the rules of statutory construction. **Wiley v. Rehak**, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). If the meaning is plain, courts follow that plain meaning. **Dep't of Ecology v. Campbell & Gwinn, LLC**, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). If the language has more than one reasonable interpretation, it is ambiguous (**State v. Roggenkamp**, 153 Wn.2d 614, 621, 106 P.3d 196 (2005)) and courts employ various rules of statutory interpretation to discern the drafters' intent. **Whatcom Cnty. v. Bellingham**, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Courts construe a rule so as to effectuate that intent, avoiding a literal reading if it would result in unlikely, absurd, or strained consequences. **Id.**

CR 54(d)(2) states:

> 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 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

CR 54(d)(2).

O'Neills included their claim for attorney's fees and costs in their motion for partial summary judgment filed in June 2012. The August 2, 2012, order granting summary judgment to O'Neills declared them the prevailing party entitled to their penalties, fees and costs and merely that the amounts would be determined after subsequent briefing and argument, and as revealed by the Final Judgment, with such subsequent briefing only required if the parties did not reach an agreement as to the amounts. The October 2012, "Judgment on Offer and Acceptance" confirmed O'Neills were awarded their fees and costs the amount of which would be determined after "subsequent briefing and argument." Thus the August 2, 2012, summary judgment Order and the October 2012, Agreed Order already declared O'Neills awarded their fees and costs and did not require a "motion" to secure such rights, only documentation to allow for a determination of amounts. The Orders further allowed for a time period other than 10 days for such submission. CR 54(d)(2) specifically provides the court with discretion to enlarge the 10 day time frame.

CR 6(b) addresses the court's discretion to extend such deadlines and provides rules for which the court may not enlarge such deadlines. CR 6(b). CR 54(d) is not one of those rules. CR 6(b).

Further, the 10 day limit under CR 54(d)(2) is "intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted." 4 Karl B. Tegland, Washington Practice: Rules Practice § 54, Supp. 40 (5th ed. 2006 & Supp. 2010) (drafters' comment on 2007 amendment to CR 54(d)(2)). The drafters also note the intent to harmonize the language of the applicable civil rules with each other and with the relevant statutes (particularly RCW 4.84.010, .030, .090). **Id.** It is unlikely the Washington Supreme Court contemplated the 10 day time limit as a means of denying the prevailing party the remedy to which they were entitled. **See Mitchell v. Wash. State Inst. of Public Policy,** 153 Wn. App. 803, 823, 225 P.3d 280 (2009) (discussing CR 78(e)) (absent clear language to the contrary, court would not apply rule mechanically to deprive a litigant of costs to which he is justly entitled or to enrich a litigant with costs he has unjustly secured), **review denied**, 169 Wn.2d 1012, 236 P.3d 205 (2010). When parties enter into a stipulated agreement wherein they agree to pay fee and costs as part of a stipulated judgment, no "motion" is necessary under CR 54(d)(2) as merely enforcement of the agreement is

necessary. It is unbelievable that the Washington State Supreme Court intended for CR 54(d)(2) to be used to allow parties to a stipulated judgment to avoid their contractual obligations if one side delayed more than 10 days submitting documentation of the fee and cost amount to the court.

Defendants argue a trial court cannot extend a time period without a separate written motion for extension filed and noted in accordance with CR 6(b). CR 54(d)(2) itself affords a court discretion to enlarge the 10 day time limit even if it applied (10 days "[u]nless otherwise provided by statute or order of the court"). CR 6(b) further confirms courts can enlarge a period of time for all but a few court rules. CR 6(b). CR 54(d)(2) is not among the list of rules for which a court cannot enlarge a period of time. CR 6(b).

Implicit in the trial court's ruling here is an extension of time to the extent required. First, the August 2, 2012, Order itself did not state a time period for the briefing and hearings for determinations of the fee, cost and penalty awards the Court stated the O'Neills were to be awarded. The August 2, 2012, Order stated only that the determination of the amount would be made after such "subsequent" briefing and argument.

The October 2012, Order also did not state a time period by which the briefing and hearing were to be held. It merely confirmed the Offer

and Acceptance language that such fees and costs would be awarded following such "subsequent briefing and argument."

In its Final Judgment in the summary laying forth the findings and summary of the events, the trial court made clear it had allowed time for the parties to reach an agreement as to the amounts of fees, costs and penalties and that briefing and hearing were to occur only if the parties could not reach an agreement as to amounts. The Court confirmed in the Final Judgment that the parties reached an agreement as to the amount of penalties but could not reach an agreement as to the amount of fees and costs and so the parties pursuant to the Court's October 2012, Order timely filed briefing for determination of those amounts.

Second, Defendants in their Response to the Motion for Determination of Amount of Fees and Costs argued the briefing was untimely and should be rejected, and O'Neills in their Reply requested an extension of time to file their briefing to the extent such an extension was deemed necessary and established excusable neglect and the reason for the delay. Defendants responded to this request and these arguments with a "Sur-Reply" and supporting declarations. Thus, even if an enlargement of time was deemed necessary by this Court, which the O'Neills contend it was not, the O'Neills adequately requested such an extension of time and proved excusable neglect. The trial court was afforded discretion to

enlarge the time for such submissions, and the trial court did not abuse its discretion agreeing to hear the matter or ruling for the O'Neills. The trial court heard the arguments of both parties and agreed to hear the matter and enforce the Agreed Order, rejecting the Defendants' plea to avoid their contractual obligations solely because the documentation was filed 25 days after the Agreed Order was signed rather than 10 days after the Agreed Order was signed.

Finally, a fees award was explicitly agreed to by the parties. Defendants' interpretation of the rule would result in failure of the settlement agreement and the Agreed Order. They seek only to avoid paying fees they agreed to pay, not to return the parties to the status quo before the settlement. CR 54 was not intended to enable such an inequitable result.

O'Neills filed their briefing 25 days after the Agreed Order was signed, seven days after timely answering discovery issued by Defendants the day after the agreement was reached, and four days after Defendants informed O'Neills they did not really want discovery responses and alleged the briefing was past due. Defendants were afforded a response and a Sur-Reply, months of preparation for oral argument and lengthy oral argument. RP. The O'Neills' submission did not evade the intent of CR 54(d)(2) nor prejudiced the Defendants in any way. There was no error in

accepting the briefing and making the fee and cost determination as the October 2012 Order required.

On September 28, 2012, the day after the Agreed Order was reached and submitted to the court for approval, Defendants issued several pages of extensive and burdensome discovery requiring responses prior to the determination of the amount of fees and costs to be awarded. Responses were timely provided on October 29, 2012, with a request that the parties negotiate a protective order to allow production of certain privileged materials. Defendants did not respond until nearly 5 p.m. on Thursday, November 1, 2012, stating they did not actually want answers and alleging documentation for the fee award was past due. O'Neills' counsel realized the discovery issued by Defendants on September 28, 2012, had been a sham and had been issued not because the Defendants actually believed they were entitled to any of the materials sought but instead to delay the O'Neills' filing of the documentation for determination of the amount of their fee and cost award. Less than four days later, on Monday, November 5, 2012, O'Neills filed their more than 300 pages of documentation and noted the matter for hearing. O'Neills asked the court to grant an extension of time for the filing in the event an extension was required and established excusable neglect. It was not a "mistake" as Defendants allege, but a clear intent of the parties that

Defendants would pay the fees and costs and that the court would determine the amount regardless of whether or not the documentation was submitted in 10 days or 25 days of the Agreed Order and a clear understanding based on Defendants' issuance of discovery the day after the Agreed Order was sent to the court that there was not a deadline for the "subsequent briefing" and certainly not a 10 day deadline. Although O'Neills contend in light of the fact this was a contractual agreement being interpreted without a 10 day deadline included, the O'Neills requested an extension to the extent one was needed and established excusable neglect. It would be contrary to binding case law regarding the interpretation and enforcement of agreed orders and stipulated judgment if Defendants were allowed to avoid their contractual obligations based on the CR 54(d)(2) arguments they have made here based on this record.

F. Defendants and their Counsel Engaged in Dishonest, Unethical and Fraudulent Behavior, and Plaintiffs' Delay to Respond to Discovery Was Proper and is Further Support if Necessary of Excusable Neglect.

The facts of this case make clear the discovery issued by Shoreline and attorneys Collins and Ramerman were a sham. The requests sought material no reasonable attorney could have expected was discoverable, and they sought information the issuing attorney surely knew would involve extensive time to locate and produce. The O'Neills had been

represented initially by the law firm of Davis Wright Tremaine, a law firm with offices in numerous states and one foreign country employing several hundred lawyers and representing likely tens of thousands of clients. The O'Neills were later represented by the Law Offices of Michael Brannan and then Allied Law Group, both of which also had numerous clients, and for Allied, a number of lawyers. Defendants' discovery requests sought all fee agreements with all clients by all lawyers of these three law firms at any time during the six plus years involved in this litigation, all fee motions, responses, replies and orders for all clients of these firms during this same six plus year period, and numerous other details of the law firms' representations and fee arrangements with all of their other clients.

O'Neills current counsel and the O'Neills spent significant time pouring over communications to determine if responsive records had been shared with the O'Neills by the law firms such that they might arguably be responsive, although likely still privileged.

As the Defendants knew it would, the discovery put a hault to the documentation and briefing being prepared up through the day discovery was served and the documentation and briefing was not able to be filed until after discovery responses were timely produced 30 days later. Three days after discovery was provided, Collins wrote to O'Neills stating discovery was no longer required and that Defendants contended the fee

documentation was now past due and the fee and cost award to which Defendants had agreed in the Agreed Order voided.

Defendants could have issued discovery at any time during the nearly two years the matter had been back at the trial court following remand, and certainly during the nearly two months time after the court granted summary judgment to O'Neills declaring them obliged to receive a fee and cost award. Defendants' claims they could not have submitted discovery any sooner than the day after submitting the Agreed Order to the court for approval is not credible or logical. Defendants clearly sought to negotiate a contract and Agreed Order they had no intention of performing. The facts of this case establish excusable neglect and a basis to enforce the Agreed Order and to have considered the November 5, 2012, submission. This appeal and the Defendants' arguments to void their contractual obligations have no merit. The appeal is but a waste of the parties' and court's resources and time.

This Court can assess the believability, or lack thereof, of the excuses given by Defendants for their delay in issuing discovery and their alleged interpretation of the contract they negotiated and its requirements. This Court can and should be troubled at the behavior of Defendants in their negotiation of the Agreed Order, dealings with the trial court, and now dealings with this Court. Counsels' conduct herein violates RAP

18.9 and merits an imposition of sanctions. Defendants' counsel further merit a referral to the Washington State Bar Association Disciplinary Counsel for investigation of their conduct and violations of the Rules of Professional Conduct in connection with this litigation.

G. Defendants Have Waived All Claims as to Amount of Fees or Costs, and Thus No Reduction is Proper.

Defendants have put all their eggs in one basket with this Court – arguing solely that the trial judge had no right to consider the November 5, 2012, submission or to determine the amount of fee and cost award she had already declared the O'Neills were entitled to receive. Defendants' sole basis for this waiver argument is their claim the "subsequent briefing and argument" stated in the Agreed Order meant within 10 days of the signing of the Order or the Agreement's provisions agreeing to pay fees and costs would be voided. Defendants have thus waived, and not appealed, any of their arguments for a reduction of hours in such award or a reduction of rates. Defendants cannot raise such issues on Reply, as they were not identified in their Brief of Appellant or in the Assignment of Error or Issues Relating to Assignment of Error. O'Neills fully briefed and documented their right to the amounts awarded with detailed time entries, statements of qualifications of counsel, and declarations of competitors regarding the quality of work and market rate of the rates

requested. Defendants did not below, and cannot now, establish any basis for a reduction of the lodestar amount awarded by Judge Benton.

H. O'Neills are Entitled to an Award of Fees and Costs under the PRA and as a Prevailing Party in this Appeal.

RCW 42.56.550(4) of the PRA provides:

> 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** [.]

(Emphasis added). Washington courts recognize that "[s]trict enforcement of this provision discourages improper denial of access to public records." **Spokane Research & Defense Fund v. City of Spokane**, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citation omitted). Moreover, "permitting a liberal recovery of costs" for a requestor in a PRA enforcement action, "is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access public records." **Am. Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503**, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) **("ACLU")**; see also WAC 44-14-08004(7) ("The purpose of [the PRA's] attorneys' fees, costs and daily penalties provisions is to reimburse the requester for vindicating the public's right to obtain public records, to make it financially feasible for

requestors to do so, and to deter agencies from improperly withholding records.") (citing **ACLU**).

Previous case law is clear that a person that prevails on appeal in a PRA case is entitled to attorneys' fees and costs. See **O'Connor v. Washington State Dept. of Social and Health Services**, 143 Wn.2d 895, 911, 25 P.3d 426 (2001); see also **Olsen v. King County**, 106 Wn. App. 616, 625, 24 P.3d 467 (2001).

The PRA does not allow for court discretion in deciding whether to award attorney fees to a prevailing party. **Progressive Animal Welfare Society v. University of Washington**, 114 Wn.2d 677, 687-88; 790 P.2d 604 (1990) **("PAWS")**; **Amren v. City of Kalama**, 131 Wn.2d 25, 35, 929 P.2d 389 (1997) . The only discretion the court has is in determining the amount of reasonable attorney's fees. **Amren**, 131 Wn.2d at 36-37 (discussing how statutory penalties combine with attorney's fees and costs under the PRA to comprise the statute's "punitive provisions") (citation and internal quotation marks omitted).

Should O'Neills prevail on appeal in any respect, they should be awarded their fees and costs for the appeal pursuant to RAP 18.1, 18.9 and the PRA..

III. CONCLUSION

The Court should uphold the October 2012, Agreed Order awarding O'Neills their fees and costs and the June 28, 2013, Order of the trial court determining the amount of those awards, and this Court should award additional fees and costs to O'Neills pursuant to RAP 18.1, RAP 18.9, and RCW 42.56.550 for the work on appeal.

Respectfully submitted this 30th day of December, 2013.

By: Michele Earl-Hubbard

Michele Earl-Hubbard, WSBA No. 26454
Allied Law Group LLC
P.O. Box 33744, Seattle, WA 98133
(206) 443-0200
Attorneys for Respondent

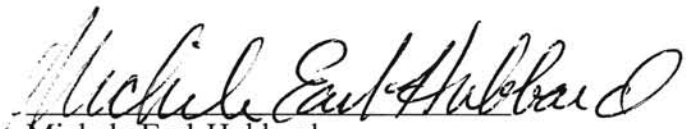
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 30, 2013, I delivered a copy of the foregoing Corrected Brief of Respondent by email pursuant to an electronic service agreement among the parties with back up by U.S. Mail to the following:

Ian Sievers
City of Shoreline
17500 Midvale Ave N.
Shoreline, WA 98133-4905
isievers@shorelinewa.gov

Ramsey Ramerman
2930 Wetmore Ave.,
Everett, WA 98201-4067
ramseyramerman@gmail.com

Dated this 30th day of December, 2013.



Michele Earl-Hubbard