ORIGINAL

No. 90797-8

Court of Appeals No. 70657-8-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Respondent,

v.

CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Defendants/Petitioners.

PETITION FOR REVIEW OF COURT OF APPEALS DECISIONS

CITY OF SHORELINE
Julie Ainsworth-Taylor, WSBA No. 36777
Ramsey Ramerman, WSBA No. 30423
Attorneys for Petitioner City of Shoreline
17500 Midvale Avenue North
Shoreline, WA 98113
Telephone: (206) 801-2223
Facsimile: (206) 546-2200

Table of Contents

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

Rules

1. IDENTITY OF THE PETITIONER

The City of Shoreline ("City"), a municipal corporation, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

2. COURT OF APPEALS DECISION

Shoreline seeks review of the published Court of Appeals decision, *Beth and Doug O'Neill v. The City of Shoreline and Deputy Mayor Maggie Fimia,* No. 70657-8-I (August 18, 2014) attached as Appendix A. This decision affirmed the King County Superior Court's award of attorneys fees and costs (June 28, 2013) and that Court's subsequent denial of the City's motion for reconsideration (July 17, 2013), both attached as Appendix B.

3. ISSUE PRESENTED FOR REVIEW

A single issue is presented for the Supreme Court's consideration:

> Absent a finding of excusable neglect, based on Court Rule (CR) 54(d)(2), does a trial court have the legal authority to enter an order awarding fees and costs when a party filed their request for this relief more than ten (10) days after the court entered judgment on the offer for damages and its acceptance when no motion to extend the time was filed pursuant to CR 6(b)?

4. STATEMENT OF THE CASE

The facts in this case are described in detail in prior opinions[1] but for the purposes of this appeal, there are only a few relevant facts.

After the trial court entered a judgment on offer and acceptance awarding the O'Neills $100,000 in penalties, the O'Neills failed to file a motion for attorney fees within 10 days, as dictated by CR 54(d)(2). When the City noted this failure, the O'Neills filed their motion for attorney fees approximately two weeks late, but did not file a motion for an extension of time or making a showing of excusable neglect, both of which are mandated by CR 6(b)(2).[2]

The City moved to strike the attorney fee request as untimely, but trial court failed to address the issue of the untimely motion in any manner. Instead it awarded over $400,000 in attorney fees and costs. The City filed a motion for reconsideration, again urging the court to rule on

---

[1] In addition to the most recent opinion additional facts are described in this court's 2010 decision: *O'Neill v. City of Shoreline,* 170 Wn.2d 138, 240 P.3d 1149 (2010).

[2] CR 6(b) provides:

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

the issue of the untimely filing, but the trial court denied the motion without comment.

The City filed an appeal, asserting the trial court abused its discretion by accepting the untimely filing without addressing the City's arguments regarding the untimeliness of the motion.

Approximately one week before oral argument, the Court of Appeals contacted the parties and asked them to address how *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 663, 709 P.2d 774 (1985) related to the issue of compliance with CR 6(b)(2). *Goucher* holds that a ruling shortening time under CR 6(d)[3] would be upheld absent a showing of prejudice.

Neither party had cited to *Goucher* or argued that a mere lack of prejudice would support upholding the trial court's actions.

Without addressing any of the parties arguments, the Court of Appeals affirmed the trial court's ruling on August 18, 2014, finding that because the City has not shown the delay caused prejudice, *Goucher* controlled.

---

[3] CR 6(d) provides:
(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

5. GROUNDS FOR REVIEW

The Court of Appeals affirmed the trial court's award of attorney fees and cost by finding that this case was controlled by *Goucher v. J.R. Simplot Co.*, which holds that a court's decision under CR 6(d) to allow a motion to be heard in less than five (5) days was not a reversible error if there was no showing of prejudice. This conclusion by the Court of Appeals was error because the issue in this case was whether the trial court erred in allowing the Plaintiffs to file a motion for attorney fees and costs after they missed the deadline expressly stated in court rules; a deadline which is controlled by CR 6(b)(2), not CR 6(d). The plain language of CR 6(b)(2) uses very different language to grant a court less discretion to forgive a missed deadline than the court has to shorten the five-day notice requirement under CR 6(d).

In this case, there was not motion to extend the missed deadline, there was no showing of excusable neglect to justify an extension, and the trial court never even ruled on the issue, even after the defendants filed a motion for reconsideration seeking a ruling. If a missed deadline can be ignored simply because a party cannot show prejudice, a trial court will have unlimited discretion with regards to deadlines, making those deadlines almost meaningless. Moreover, if a court ever decides to enforce a deadline when no prejudice is shown, it will evidence the type of

arbitrary enforcement the civil rules were meant to prevent. In this case, no motion was made to extend the deadline,

Federal courts, applying the parallel federal rule,[4] have repeatedly held that a trial court abuses its discretion by forgiving a missed deadline pursuant to Rule 6(b) based solely on a showing of "no prejudice." Washington courts have likewise held, when considering missed deadlines not covered by CR 6(b)(2), that a lack of prejudice alone cannot justify forgiving a missed deadline. *See, e.g.*, *Pybas v. Paulino*, 73 Wn. App. 393, 869 P.2 347 (1994) (ruling party lost right to seek trial de novo when it missed the filing deadline by one day despite no prejudice); *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313 (2000) (dismissing appeal of multi-million dollar judgment based on late notice of appeal despite no prejudice).

By conflating the standards for the two rules, the Court of Appeals has not just made the language in CR 6(b)(2) meaningless, it has undermined the very purpose of the civil rules, which are supposed to limit arbitrary decisions of trial courts to ensure the just, speedy and inexpensive resolution of disputes. *See,* CR 1. Because neither party

[4] Washington courts look to federal decisions when applying many of the civil rules, including CR 6(b)(2) and CR 6(d). *See Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973) (adopting the no prejudice rule for CR 6(d) from federal authority); *Keck v. Collins*, -- Wn. App. --, 325 P.3d 306 (Div. 3, 2014) (adopting 8-part test from federal authority to determine if trial court erred in determining whether excusable neglect justified accepting an untimely filing under CR 6(b)(2).)

considered CR 6(d) case law relevant, the City never had the opportunity to address this issue in its briefing.

The most obvious problem with the Court of Appeals' reliance of the no-prejudice rule in *Goucher* is that it violates one of the most fundamental tenants of statutory construction by rendering the very specific language in CR 6(b)(2) meaningless.[5] This is made clear when the language in CR 6(d) is compared to the language in CR 6(b)(1) and (b)(2). CR 6(d) authorizes a court to shorten the five day notice requirement "for cause" and does not require the request to be made by motion.

CR 6(b) governs the court's authority to extend deadlines in the civil rules. CR 6(b)(1) applies before a deadline has passed and gives the court the authority to extend a deadline "with or without a motion" based only on a showing of "cause." It is thus very similar to CR 6(d). But after the deadline has passed, CR 6(b)(2) adds two additional requirements. First, the party must file a motion. Second, in addition to a showing of cause, the party must show that its failure to meet the deadline was cause by "excusable neglect." By applying the "no prejudice" standard, the court has made the two additional requirements in (b)(2) meaningless,

[5] *Hudson v. Hapner*, 170 Wn.2d 22, 239 P.3d 579 (2010) (holding court was required to reject interpretation of court rule that would have made part of the court rule meaningless, even though this interpretation resulted in party losing its right to appeal).

allowing an extension without a motion and without a showing of excusable neglect.

The Court of Appeals' ruling ignores extensive authority that rejects the "no prejudice" standard for missed deadlines. First, the courts have held that an extension should not be granted without at least substantial compliance with the "motion" requirement.[6] Second, numerous federal decisions have rejected assertions that "no prejudice" alone justifies granting an extension under Rule 6(b)(2). *See, e.g., 44 Liquor Mart v. Rhode Island*, 940 F.Supp. 437 (D.R.I. 1996) (rejecting late-filed motion for attorney fees, despite lack of prejudice, because no showing of excusable neglect was shown); *Morisseau v. DLA Piper*, 255 F.R.D. 127 (S.D.N.Y. 2008) (same).

This rejection of the "no prejudice" rule is consistent with cases in Washington and the federal system interpreting other rules that also require a showing of "excusable neglect." Thus, in *Pybas*, 73 Wn. App. 393, the court rejected a claim that a showing of no prejudice met the excusable neglect standard for an untimely motion for a trial de novo after a mandatory arbitration award. The court rejected this standard noting that

---

[6] *Colorado Structures, Inc. v. Blue Mountain Plaza LLC*, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) (trial court properly refused to accept untimely filing where no motion was made; no need to consider issue of prejudice absent a motion); *Lujan v. Nat. Wildlife Fed.*, 497 U.S. 871 (1990) (holding that a "request" for a court to accept an untimely filing did not meet the "motion" requirement in Rule 6(b)(2), because otherwise this would make the difference between (b)(1) and (b)(2) meaningless.

when a deadline is only missed by a short amount of time, "the responding party can rarely show actual prejudice," but the real prejudice caused by a missed deadline was to the court system as a whole. *Id.* (citing federal authority).

The illogic of allowing for a finding of excusable neglect based solely on no prejudice was well articulated by the Fifth Circuit in *Helicki v. Louisiana Casino*, 151 F.3d 465, 469 n.4 (5th Cir. 1998):

> Halicki argues that granting an extension would cause no prejudice to Casino Rouge. Given this showing alone, however, the district court was justified in finding that counsel's misconstruction of the rules was not "excusable" neglect: "The word 'excusable' would be read out of the rule if inexcusable neglect were transmuted into excusable neglect by a mere absence of harm."

Finally, the Court of Appeals' ruling ignores the different purposes of CR 6(d) and 6(b)(2), and ends up interpreting CR 6(b)(2) in a way that undermines the very purposes of the civil rules, which is to ensure the just, speedy and inexpensive resolution of cases. The purpose of CR 6(d) is limited – it imposes a five day requirement to ensure a party has an opportunity to respond to a motion. Thus, if a motion is heard on less than five days' notice, but the responding party is able to make a full response, the rule has served its purpose and strictly enforcing the five-day requirement serves no purpose.

The purpose of CR 6(b)(2), however, is to ensure the orderly resolution of disputes by limiting the trial court's discretion to forgive missed deadlines. The requirement of a motion and showing of excusable neglect prevents courts from making arbitrary decisions when a deadline is missed.[7] Based on the Court of Appeal's ruling, giving the trial court such authority would make the just, speedy and inexpensive resolution of a case solely within the whims of the trial court.

While prejudice is relevant in the excusable neglect standard, "the excuse given for the late filing must have the greatest weight."[8] One factual scenario makes this absolutely clear – when a party misses a deadline because of a deliberate decision. If the "no prejudice" standard applied, then a court could still forgive the missed deadline even in this situation. But in *Little v. King*, 160 Wn. 2d 696, 161 P.3d 345 (2007), the Washington Supreme Court held that court ruled that a party's intentional decision not to comply with a deadline in a court rule can never be inexcusable neglect. The Court of Appeals' decision in this case is a rejection of that standard, especially given that the Plaintiffs made the deliberate decision not to file a motion for an extension.

---

[7] *See Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 367-68 (2d Cir. 2003) (emphasizing importance of limits in Rule 6(b)(2)).

[8] *Graphic Comm. v. Quebecor Printing*, 270 F.3d 1 (1st Cir. 2001)

6. CONCLUSION

The City of Shoreline respectfully request that review be granted because the Court of Appeals decision is contrary to adopted Court Rules which establish filing deadlines and procedures for altering those deadlines. The Court Rules were adopted to ensure the efficient, timely administration of the judicial system so as to provide just, speedy and inexpensive resolution of disputes. The Court's decision will ensure these rules are enforced so as to achieve that purpose.

RESPECTFULLY SUBMITTED this 17st September, 2014

Julie Ainsworth-Taylor, WSBA No. 36777
Ramsey Ramerman, WSBA No. 30423
Attorneys for Petitioner City of Shoreline

this appeal was not frivolous or brought for purposes of delay and deny the O'Neills' request for sanctions.

CONCLUSION

Because the City shows no prejudice from the O'Neills' alleged failure to comply with the time requirement in CR 54(d)(2), we affirm. We award the O'Neills costs and attorney fees on appeal, subject to their timely compliance with RAP 14.4(a) and 18.1.

Leach, J.

WE CONCUR:

Ian, J.

Schindler, J.

CERTIFICATE OF SERVICE

I, Darcy Forsell, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows:

Michael Brannan
Law Office of Michael Brannan
1333 N Northlake Way Ste E
Seattle, WA 98103-8900
Via E-mail mgbrannan@seanet.com

Michele Earl-Hubbard
Allied Law Group LLC
6351 Seaview Avenue NW
Seattle, WA 98107
Via Legal Messenger and E-mail Michele@alliedlawgroup.com

Judith A. Endejan
Garvey Schubert Barer
1191 2nd Ave., 18th Floor
Seattle, WA 98101
(206) 464-3939
Via Legal Messenger and E-mail jendejan@gsblaw.com

Executed at Shoreline, Washington, this 17th day of September, 2014.

Darcy Forsell

Darcy Forsell

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BETH AND DOUG O'NEILL, individuals,	)	
	)	No. 70657-8-I
Respondents,	)	DIVISION ONE
v.	)	
THE CITY OF SHORELINE, a municipal agency and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,	)	PUBLISHED OPINION
Appellants.	)	FILED: August 18, 2014

LEACH, J. — The city of Shoreline and Deputy Mayor Maggie Fimia (collectively City) appeal a trial court decision awarding costs and attorney fees to Beth and Doug O'Neill under the Public Records Act.[1] The City claims that the O'Neills lost their right to this recovery because they filed their fee request more than 10 days after the court entered a stipulated judgment on their damage claim. Because the City fails to show prejudice from the O'Neills' failure to file their fee request within the time required by CR 54(d)(2), we affirm.

[1] Ch. 42.56 RCW.

FACTS

In 2006, the O'Neills sued the City, alleging violations of the Public Records Act.[2] On August 2, 2012, on remand from our Supreme Court, the trial court granted partial summary judgment in favor of the O'Neills. In its order, the court 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. Plaintiffs shall be entitled to an award of reasonable attorney's fees and all costs incurred in connection with such fee and penalty motions, the amounts of which shall be determined by the Court in conjunction with the fee and penalty motions.

The court denied the City's motion for reconsideration.

On September 18, 2012, the City made an offer of judgment to the O'Neills. This offer stated,

> The Defendants, pursuant to CR 68, offer to allow judgment to be entered against them in this matter for $100,000.00 (One Hundred Thousand Dollars and Zero Cents) for daily penalties. This amount does not include costs, including attorneys' fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument.

The O'Neills accepted this offer on September 27, 2012.

On October 9, 2012, the trial court entered a stipulated judgment on the offer and acceptance, which stated,

> This matter came before the Court for entry of judgment under CR 68 on the O'Neills' acceptance of the City of Shoreline's and Maggie Fimia's offer of judgment for $100,000.00 (One Hundred Thousand Dollars and Zero Cents) for daily penalties only. True copies of the offer, acceptance and proof of service of the same are attached as Exhibit A.

---

[2] O'Neill v. City of Shoreline, 170 Wn.2d 138, 144, 240 P.3d 1149 (2010).

> Based on the offer of judgment and acceptance, Judgment is entered against the City of Shoreline and Maggie Fimia for $100,000.00 (One Hundred Thousand Dollars and Zero Cents) for daily penalties. This amount does not include costs, including attorneys' fees, incurred to date, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument.

On September 28, 2012, after the O'Neills accepted the City's offer of judgment but before the court entered its judgment on the offer, the City sought discovery about the amount of attorney fees. The O'Neills responded to the City's discovery requests on October 29, 2012. On November 1, the City sent a letter to the O'Neills stating,

> You accepted the offer of judgment on September 24, 2012, the court entered the final judgment on October 8, 2012 [sic] and a copy of the signed order was provided to you on October 11, 2012. King County Superior Court Rule 54(d)(2) required you to submit your claim for attorneys' fees no later than 10 days after entry of the judgment, i.e., October 18, 2012. An alternative deadline is not provided by the court's October 8, 2012 order or the Public Records Act. Thus, it is the City's and Fimia's position that you have waived any claim for attorneys' fees and any subsequently filed request must be denied by the court as untimely. See Corey v. Pierce County, 154 Wn. App 752, 225 P.3d 367 (2010) (despite successful recovery of a judgment for wages and salary owed, plaintiff's request for attorney's fees was properly denied due to her failure to file her attorney's fees request within the 10 day time limitation under CR 54(d)(2)).
>
> Therefore, although your discovery responses are deficient, issues regarding production of records responsive to the discovery requests appear to be moot.

On November 5, 2012, the O'Neills moved for determination of the amount of the fee and cost award. On November 6, they responded to the City's letter, asserting, "Defendants had no intention of pursuing the completely improper discovery requests they issued. Defendants clearly issued it solely to delay any filing of a fee motion so they could make the argument the fee motion was waived." In response, the City argued that the O'Neills waived their right to attorney fees because they failed to comply

with the 10-day time limit in CR 54(d). The O'Neills replied that the 10-day time limit did not apply, contending that the court's judgment on the offer and acceptance was not a judgment for the purposes of CR 54(d) because it did not contain a judgment summary, as RCW 4.64.030(2)(a) required. The O'Neills also asserted that the City made its discovery request "to delay a fee motion filing" and claimed that if the 10-day limit applied, they had demonstrated excusable neglect. The City filed a surreply asking the court to strike the fee motion as untimely on the basis that the O'Neills failed to file a CR 6 motion to excuse their failure to meet the 10-day deadline and find that they had not shown excusable neglect.

At a hearing on the O'Neills' fee motion, the court told the City, "I'm not concerned about the 54 issue, so let's just talk about your rates." The record contains no finding of excusable neglect. The court granted the O'Neills' motion.

On June 28, 2013, the trial court entered an order awarding the O'Neills $428,966.18 for fees and $9,588.79 for costs. The court denied the City's motion for reconsideration.

The City appeals.

STANDARD OF REVIEW

The parties ask us to determine if, in the absence of a finding of excusable neglect, the trial court had the legal authority to enter an order awarding fees and costs when the O'Neills filed their request for this relief more than 10 days after the court

entered judgment on the offer for damages and its acceptance. We review this question of law de novo.[3]

We review the denial of a motion for reconsideration for abuse of discretion.[4] A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds.[5]

ANALYSIS

The City contends that the trial court erred by considering the O'Neills' motion for determination of the amount of fees and costs because they filed it more than 10 days after the court entered a stipulated judgment for damages in their favor. The City asserts that the trial court must, but did not, make a finding of excusable neglect before it could consider the O'Neills' untimely motion. We disagree.

CR 54(d)(2) requires a party seeking attorney fees and expenses to file a claim by motion "no later than 10 days after entry of judgment." CR 6(b) provides procedures for enlarging the time specified in this rule.[6] CR 6(b) specifically prohibits extending the

---

[3] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (citing Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 908, 154 P.3d 882 (2007)).

[4] Brinnon Grp. v. Jefferson County, 159 Wn. App. 446, 485, 245 P.3d 789 (2011) (citing Lilly v. Lynch, 88 Wn. App. 306, 321, 945 P.2d 727 (1997)).

[5] State v. Emery, 161 Wn. App. 172, 190, 253 P.3d 413 (2011) (quoting State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)).

[6] CR 6(b) states,

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

time for taking action under rules 50(b), 52(b), 59(b), 59(d), and 60(b). The O'Neills never filed a motion to enlarge time. The City claims that this omission resulted in the O'Neills' waiver of any right to recover fees and costs.

Neither party cited in its briefing what we consider to be the controlling authority, Goucher v. J.R. Simplot Co.[7] In Goucher, the defendant filed a motion in limine the first day of trial, in violation of the time requirements of CR 6(d).[8] Our Supreme Court rejected the plaintiff's contention that the trial court erred in considering the motion, stating, "'CR 6(d) is not jurisdictional, and that reversal for failure to comply requires a showing of prejudice.'"[9] A party establishes prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority."[10]

The City has offered no meaningful distinction between the time requirements of CR 6(d) and CR 54(d)(2), and we see none. The identification in CR 6(b) of specific

---

not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

[7] 104 Wn.2d 662, 709 P.2d 774 (1985).

[8] Goucher, 104 Wn.2d at 664-65. CR 6(d) states,

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

[9] Goucher, 104 Wn.2d at 665 (quoting Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 364, 617 P.2d 704 (1980)); Loveless v. Yantis, 82 Wn.2d 754, 759-60, 513 P.2d 1023 (1973).

[10] Zimny v. Lovric, 59 Wn. App. 737, 740, 801 P.2d 259 (1990) (citing Goucher, 104 Wn.2d at 665; Loveless, 82 Wn.2d at 759-60).

time requirements in rules that cannot be enlarged strongly supports the conclusion that Goucher applies to the other time requirements of the civil rules. Here, the City conceded at oral argument that it demonstrated no prejudice to the trial court. Therefore, even if the O'Neills failed to comply with the 10-day time limit, they did not waive their right to recover fees.

The City cites Corey v. Pierce County in support of its position. But Corey merely affirmed a trial court's exercise of discretion to enforce the time requirements of CR 54(d)(2) and did not address whether a court must enforce them.[11]

In view of our resolution of the City's claim, we need not, and do not, resolve the O'Neills' assertion that the stipulated judgment for damages was not a judgment for purpose of CR 54(d)(2). However, we do address two matters that arose in this case and occur with disturbing frequency—statements of additional authorities and motions to strike.

At the direction of the panel deciding this case, a case manager contacted counsel for the parties and asked them to be prepared to discuss a case not cited in their briefing, Goucher v. J.R. Simplot Co. Shortly afterward, the O'Neills filed a statement of additional authorities listing Goucher, two cases cited in Goucher, and two other cases. This filing provided no new information and wasted the time of the court. RAP 10.8 allows parties to file statements of additional authorities. We view this rule as being intended to provide parties an opportunity to cite authority decided after the

[11] Corey, 154 Wn. App. at 774.

completion of briefing. We do not view it as being intended to permit parties to submit to the court cases that they failed to timely identify when preparing their briefs.

The City moved to strike a sentence in the O'Neills' brief, stating, "While there exist unpublished authority, post dating [sic] 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." The City also asks us to impose sanctions on the O'Neills for citing unpublished authority.

GR 14.1(a) prohibits a party from citing as authority an unpublished opinion of the court of appeals. Although the O'Neills refer to "unpublished authority," they do not rely on any unpublished decisions to support their arguments. Rather, they made the quoted statement as part of their claim that no authority supports the City's waiver argument. The City provides no basis to strike the cited sentence from the O'Neills' brief or to impose sanctions. We deny the City's motion and request for sanctions.

Because of the frequency with which litigants file motions to strike portions of briefs we quote two pertinent authorities: "Motions to strike sentences or sections out of briefs waste everyone's time."[12]

> No one at the Court of Appeals goes through the record or the briefs with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial. So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.[13]

---

[12] Redwood v. Dobson, 476 F.3d 462, 471 (7th Cir. 2007).

[13] Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959, review denied, 175 Wn.2d 1004 (2012).

The O'Neills request attorney fees on appeal under RAP 18.1 and RCW 42.56.550(4), which permits a prevailing requester in a Public Records Act action to recover all costs, including reasonable attorney fees, incurred in connection with the action. To determine the reasonableness of attorney fees, the court calculates a lodestar figure.[14] This requires the court to determine the number of hours reasonably expended in the litigation.[15] The court limits the lodestar to hours reasonably expended and therefore discounts hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.[16]

A party in Public Records Act litigation may recover attorney fees only for work on successful issues.[17] When a party may recover fees on only some of its claims, the award must reflect a segregation of the time spent on the varying claims.[18] The court separates time spent on theories essential to the successful claim from time spent on theories related to other claims.[19] But "[i]f the court finds that claims are so related that segregation is not reasonable, then it need not segregate the attorney fees."[20]

RCW 42.56.550(4) "shall be liberally construed to promote . . . full access to public records."[21] It provides for a more liberal recovery of costs than does RCW

---

[14] Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

[15] Bowers, 100 Wn.2d at 597.

[16] Bowers, 100 Wn.2d at 597.

[17] Sargent v. Seattle Police Dep't, 167 Wn. App. 1, 26, 260 P.3d 1006 (2011) (citing Sanders v. State, 169 Wn.2d 827, 868, 240 P.3d 120 (2010)), rev'd in part on other grounds, 179 Wn.2d 376, 314 P.3d 1093 (2013).

[18] Dice v. City of Montesano, 131 Wn. App. 675, 690, 128 P.3d 1253 (2006) (citing Hume v. Am. Disposal Co., 124 Wn.2d 656, 672, 880 P.2d 988 (1994)).

[19] Dice, 131 Wn.2d at 690 (citing Hume, 124 Wn.2d at 673).

[20] Dice, 131 Wn.2d at 690 (citing Hume, 124 Wn.2d at 673).

[21] Former RCW 42.17.010 (1975), recodified as RCW 42.17A.001.

4.84.010, the statute that governs recovery of costs generally.[22] The liberal allowance for cost recovery furthers the policy of the public's right to access public records.[23] Here, the O'Neills prevail upon an argument that they did not advance. In recognition of the strong public policy underlying the Public Records Act, we award the O'Neills reasonable attorney fees and costs on appeal, subject to the foregoing limitations.

The O'Neills also ask that we impose sanctions against the City under RAP 18.9(a), which permits an appellate court to impose sanctions on a party or counsel "who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." The O'Neills allege, "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." They assert, "This appeal and the Defendants' arguments to void their contractual obligations have no merit."

An appeal is not frivolous or brought for purposes of delay if it involves "'debatable issues upon which reasonable minds might differ.'"[24] Because the City presented debatable arguments about the applicability of CR 54(d)(2), we conclude that

---

[22] Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503, 95 Wn. App. 106, 117, 975 P.2d 536 (1999)

[23] Blaine, 95 Wn. App. at 117.

[24] Olsen Media v. Energy Sciences, Inc., 32 Wn. App. 579, 588, 648 P.2d 493 (1982) (quoting Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980)).

this appeal was not frivolous or brought for purposes of delay and deny the O'Neills' request for sanctions.

CONCLUSION

Because the City shows no prejudice from the O'Neills' alleged failure to comply with the time requirement in CR 54(d)(2), we affirm. We award the O'Neills costs and attorney fees on appeal, subject to their timely compliance with RAP 14.4(a) and 18.1.

Leach, J.

WE CONCUR:

Ann, J.

Schindler, J.

APPENDIX B

SUPERIOR COURT FOR THE STATE OF WASHINGTON

FOR

KING COUNTY

BETH AND DOUG O'NEILL
Plaintiff,

vs.

THE CITY OF SHORELINE
Defendant.

NO. 06-2-36983-1

ORDER DENYING MOTION FOR RECONSIDERATION

Clerk's Action Required

The above-entitled Court, having heard defendants motion for reconsideration of this Court's ruling dated June 28, 2013;

It is herby ordered that the motion for Reconsideration is Denied.

Done 12th day of July, 2013.

Monica J. Benton
Superior Court Judge

The Honorable Monica Benton
Noted for Hearing with Oral Argument: June 28, 2013, 9:00 a.m.

6/21

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

BETH AND DOUG O'NEILL, Plaintiffs, vs. THE CITY OF SHORELINE, a Municipal Agency and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity, Defendants.	No. 06-2-36983-1 SEA ORDER GRANTING PLAINTIFFS' MOTION FOR DETERMINATION OF AMOUNT OF FEE AND COST AWARD ~~[proposed]~~

This matter came before the court on Plaintiff Doug and Beth O'Neill's Motion for Determination of Amount of Fee and Cost Award. The Court has reviewed the files and records herein, including:

1. O'Neills' Motion for Determination of Amount of Fee and Cost Award;
2. Declaration of Michele Earl-Hubbard in Support of Motion for Determination of Amount of Fee and Cost Award;
3. Declaration of Judith Endejan in Support of Motion for Determination of Amount of Fee and Cost Award;
4. Declaration of Michael Brannan in Support of Motion for Determination of Amount of Fee and Cost Award;

ALLIED LAW GROUP
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)

5. Defendants' Response to Plaintiffs' Motion for Determination of Amount of Fee and Cost Award;

6. Declaration of Ian R. Sievers in Support of Defendants' Response to Plaintiffs' Motion for Determination of Amount of Fee and Cost Award;

7. Declaration of Flannary P. Collins in Support of Defendants' Response to Plaintiffs' Motion for Determination of Amount of Fee and Cost Award;

8. Declaration of Darcy J. Greenleaf in Support of Defendants' Response to Plaintiffs' Motion for Determination of Amount of Fee and Cost Award;

9. Plaintiffs' Reply Re: Motion for Determination of Amount of Fee and Cost Award;

10. Second Declaration of Michele Earl-Hubbard in Support of Motion for Determination of Amount of Fee and Cost Award;

11. Declaration of Beth O'Neill in Support of Motion for Determination of Amount of Fee and Cost Award;

12. Declaration of Michael G. Brannan in Support of Plaintiffs' Reply;

13. Defendants' Sur-Reply to Plaintiff's Reply;

14. Second Declaration of Flannary P. Collins with Sur-Reply and attachments thereto;

15. Documents and records in the Court file;

And being otherwise fully advised in the matter,

THE COURT HEREBY FINDS 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.

The Court HEREBY GRANTS Plaintiffs' Motion for Determination of Amount of Fee and Cost Award. The Court accepted statement number 4321 from Allied Law Group at the hearing updating the fees and costs of Allied Law Group for fees and costs incurred between November 14, 2012 and June 27, 2013, adding an additional 14.3 hours for Michele Earl-Hubbard at a rate of $410 per hour and a total value of $5,863.00, and additional costs of $70.65;

ALLIED LAW GROUP
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)

NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiffs and their attorneys are awarded reasonable attorney's fees of ~~$446,734.50~~ $428,966.18. MH

IT IS FURTHER ORDERED that Plaintiffs are awarded all costs incurred in this litigation in the amount of **$11,392.44** less the $1803.65 awarded by the Supreme Court Clerk for a total cost award of **$9,588.79.**

The total fee and cost award to Plaintiffs and their attorneys is ~~$456,313.29~~ $438,554.97. (This is in addition to the $100,000.00 statutory penalty award to which the parties had previously stipulated.) MH

DONE IN OPEN COURT this 25 day of June, 2013.

MONICA BENTON
King County Superior Court

Submitted by:

MICHELE EARL-HUBBARD, WSBA# 26454
MICHAEL G. BRANNAN, WSBA# 28838
Attorneys for Plaintiffs

Approved as to Form:

FLANNARY P. COLLINS
Attorney for City of Shoreline

IAN SIEVERS

ALLIED LAW GROUP
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)

Attorney for City of Shoreline

RAMSEY RAMERMAN
Attorney for Maggie Fimia

ALLIED LAW GROUP
P.O. Box 33744
Seattle, WA 98133
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)