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I. INTRODUCTION

Sometimes traffic infractions raise big issues. *See e.g., State v. Moreno*, 147 Wn.2d 500, 505, fn 1, 58 P.3d 265 (2002). A commissioner of this Court granted discretionary review after determining that this case raises two issues of public importance. RAP 2.3(d)(3), This Court's decision in *State v. Weaver*, 248 P.3d 1116 (2011) disposes of one of them.¹

At issue in this case is whether a facsimile-filed notice of appeal was proper under GR 17 to properly trigger review under the Rules on Appeal for Courts of Limited Jurisdiction (RALJ). The Lakewood Municipal Court determined that Respondent, Anthony Cheng committed a traffic infraction. Mr. Cheng appealed to Superior Court. The municipal court received two notices of appeal. The first notice of appeal was received on the thirty-first day after it issued its judgment – one day too late under RALJ 2.5. A week and a half later, it received a second notice of appeal. When the City moved to dismiss Mr. Cheng's RALJ appeal as untimely, he claimed he sent a *third* notice of appeal.² In this one, he claims that he faxed it to the Lakewood Municipal Court, at 4:02 p.m. on

¹ The other issue on which this Court granted review related to whether RCW 46.61.210 was violated and applies to those, such as Mr. Cheng, who fail to stop for a police vehicle attempting to pull them over. In *Weaver*, this Court recently held that RCW 46.61.021, not RCW 46.61.210, governs such conduct.

² All three documents are attached as Appendixes to this brief.

the final day to appeal. The municipal court has no record of any such filing. Mr. Cheng also lacks a complete copy of this document. The City maintains that any notice of appeal was either untimely or improperly filed. The Pierce County Superior Court disagreed.

II. BACKGROUND

On April 10, 2009 at approximately 2:00 a.m., a Lakewood Police Officer was on patrol, stopped at a red light on 84th Street South in Lakewood.³ Opposite him, Anthony Cheng was awaiting the same red light. When the officer's light turned green, the officer had a green arrow giving him the right of way to turn left onto northbound Tacoma Mall Blvd. Despite the fact that Mr. Cheng's light was red, he proceeded into the intersection, nearly causing a collision with the officer. The officer activated his emergency equipment to stop Mr. Cheng's vehicle, but Mr. Cheng proceeded northbound. Mr. Cheng ultimately turned into the middle turn lane, and then into a parking lot located on the left side of the road, without yielding for the officer. When contacted, the respondent claimed he did not know that he ran the red light in front of the officer.

Mr. Cheng was cited with two traffic violations, failure to stop for a steady red signal in violation of RCW 46.61.055(3) and failure to yield to the right of an emergency vehicle, in violation of RCW 46.61.210. Mr.

³ The facts set forth in this paragraph are taken solely from Officer Andy Hall's narrative report. (CP 128-129).

Cheng requested a hearing to contest these infractions. At this hearing, Mr. Cheng claimed that because he was the vehicle which the officer was attempting to stop, RCW 46.61.210 did not apply to him.⁴ (CP 33-36). On June 15, 2009, the Lakewood Municipal Court determined that this infraction was committed. (CP 5).

Mr. Cheng appealed, claiming that he filed a total of three notices of appeal. His first known notice of appeal was faxed to the municipal court, and received on the morning of July 16, 2009 – the thirty-first day following the entry of judgment. (CP 3). He also filed a second notice of appeal on July 27, 2009. (CP 1). The City moved to dismiss his appeal as untimely. (CP 7). In response, Mr. Cheng produced a Transmission Verification Sheet and claimed that he faxed a third notice of appeal to the municipal court at approximately 4:02 p.m. on July 15, 2009. (CP 30). Both parties agree: the municipal court has no record of this filing. (CP 12; 5). Mr. Cheng's copy is incomplete; by his own admission, his counsel's file copy "does not contain the bottom portion of the document which was faxed." (CP 12). The superior court denied the City's motion. (CP 27-28).

⁴ The municipal court deferred entry of findings on the red light violation and it is not at issue on appeal. *See*, RCW 46.63.070(5).

On the merits, Mr. Cheng argued that RCW 46.61.210(1) does not apply to a “target” vehicle, and the superior court agreed, and reversed the municipal court’s decision. (CP 138).

The City of Lakewood obtained discretionary review of (1) the denial of its motion to dismiss; and (2) the superior court’s decision on the merits. The City of Lakewood requests that this Court reverse the decision of the Pierce County Superior Court and reinstate the decision of the Lakewood Municipal Court.

III. ASSIGNMENTS OF ERROR

The City of Lakewood assigns error to the following decision of the Pierce County Superior Court:

Assignment of Error No. 1: The Superior Court erred in denying the City’s Motion to Dismiss.

IV. ISSUES RELATING TO ASSIGNMENT OF ERROR

Issue No. 1: Supported solely by a Transmission Verification Report, Mr. Cheng claims that he fax-filed a notice of appeal to the Lakewood Municipal Court on the final day to appeal an adverse infraction decision. RALJ 2.5; RALJ 2.6. The Lakewood Municipal Court has no record of this filing. Mr. Cheng did not retain either the original or any copy of this notice of appeal. A presumably-altered version of this purported filing however exists. Assuming that he could have fax-filed

the notice of appeal, he did not tender the filing fee until six weeks later. Was GR 17 satisfied, thereby rendering his appeal timely?

V. ARGUMENT

A. The Notice of Appeal Was Untimely Filed. The Superior Court Lacked Appellate Jurisdiction.

Mr. Cheng's did not properly file a notice of appeal. His appeal was received by the Lakewood Municipal Court after the timeframe for seeking review had expired. Because (1) the Lakewood Municipal Court did not receive any notice of appeal until after the appellate timeframe lapsed; and (2) Mr. Cheng waited another six weeks before tending the appellate filing fee, Mr. Cheng's appeal is untimely. Mr. Cheng's facsimile filing on July 15 does not render his appeal timely; that notice of appeal did not comply with GR 17, therefore did not satisfy the requirements for seeking timely appellate review under RALJ 2.5 and RALJ 2.6. Regardless of the comparative amount of the underlying judgment, the remedy for the untimely filing of a notice of appeal is dismissal of the appeal. *See generally, Beckman v. DSHS*, 102 Wn. App. 687, 11 P.3d 313 (2000).

RALJ 2.5(a) and 2.4(a) impose the sole requirement for appealing a decision of a court of limited jurisdiction. The timely filing of a notice of appeal is the only jurisdictional requirement to appeal. RALJ 2.4(a).

The notice of appeal must be filed “within 30 days after the date of entry of the final decision which the party filing the notice seeks to appeal.” RALJ 2.5(a). The municipal court entered its decision on June 15, 2009. Therefore, July 15, 2009 was the last day to file a notice of appeal.

In this case, there is no dispute that Mr. Cheng fax-filed a notice of appeal on July 16, 2009, and filed a second one on July 27, 2009. (CP 1, 3). Even if a valid filing, it is at least one day too late. RALJ 2.4(a); RALJ 2.5(a). In response to the City’s motion to dismiss, he produced a transmission sheet and claimed he faxed a third notice of appeal on July 15 at 4:02 p.m. to the municipal court. (CP 30). The Lakewood Municipal Court has no record of this filing. (CP 12; 5). Only an excerpt of this document has ever been produced. Thus, if Mr. Cheng’s July 15, 2009 notice of appeal was properly filed, his appeal is timely. Resolution of this issue turns on whether this “filing” complied with GR 17. Because GR 17 dictates that this was not a proper filing, Mr. Cheng’s appeal is untimely. It should have been dismissed.

Despite being originally enacted in 1993, no published Washington case has examined GR 17. And only one published case even cites to GR 17. *See State v. Robinson*, 104 Wn. App. 657, 668-669, 17 P.3d 653 (2001). Indeed, noting the “ubiquity of facsimile filing, and the growth of electronic filing, of court documents ... these issues regarding the filing

date of a facsimile transmission are issues of public interest,” a commissioner of this Court granted discretionary review. (Spindle, Ruling Granting Review at p. 4).

Fairly stated, in order for a facsimile filing to be valid, several conditions must be met. First, the court is not required to even accept fax filings; rather it *may* accept for filing documents via facsimile. GR 17(a)(1); *see also* Lewis H. Orland and Karl B. Tegland, 2 Wash. Practice: Rules Practice at p. 32 (5th Ed., West 1997)(citing drafter’s purpose statement)(“the rule provides that the clerks *may* accept documents, thus delegating the final decision to the clerks”). Absent prior clerk’s approval, certain documents which includes, working copies (i.e., “bench copies”), documents requiring filing fees and original wills and negotiable instruments, may not be filed. GR 17(a)(6). Second, in order for the filing to be valid, the document must be accompanied by a fax transmittal sheet containing various details including case caption, case number, sender’s name and contact information. GR 17(b)(2). The rule also requires that the original document be retained by the sender. GR 17(a)(1). The document must also be marked as being a facsimile filing. *Id.* Of import to this case, a fax filing is deemed “received at the time the clerk’s fax machine electronically registers the transmission of the first page.” GR

17(b)(3). If the transmission is not complete, the document is not considered received. *Id.*

Under a plain reading of GR 17, assuming that the court clerk authorizes such filings, facsimile filing is complete when the clerk's facsimile machine registers receipt of the document *and* the filing fee (if any) is paid. Mr. Cheng did neither in a timely manner. The appeal is therefore untimely.

The validity of the filing is determined where it was "received at the time the *clerk's fax machine* electronically registers the transmission of the first page." GR 17(b)(3)(Emphasis added). Mr. Cheng claimed, based solely on a Transmission Verification Report, with a date/time stamp of 4:02 p.m. on July 15, 2009, that he timely filed the notice of appeal. (CP 30). Although this may be the time in which he sent the notice of appeal, it is not necessarily the time when the clerk received the notice of appeal. Nor should it be the standard by which the propriety of a facsimile filing is measured. The correct evaluation of when a document is filed is when the document actually comes out of the facsimile machine on the clerk's end of the transmission. *See also* Orland & Tegland, *supra*, at p. 32 ("[t]he rule is designed with the clerk's office in mind[.]"). Because the municipal court clerk has no evidence of receipt of this document, and by

implication, neither does the “clerk’s fax machine,” there is no valid filing on July 15th.

There are good reasons for this test. Although facsimile and electronic filing may become more commonplace in state courts, it is still a departure from the traditional hand-to-filing box method employed by many clerk’s offices. The traditional rule can be succulently summarized, “[f]iling occurs when the papers are *filed with* the clerk of the court, not when papers are *sent to* the clerk of the court.” *State v. McLean (In re Carlstad)*, 150 Wn.2d 583, 592, 80 P.3d 587 (2003)(Emphasis added). GR 17(b)(3) appears to embody this rule. (“A document transmitted directly to the clerk of the court shall be deemed *received at the time the clerk’s fax machine* electronically registers the transmission of the first page”)(Emphasis added). Measuring compliance by the clerk’s end of the transmission is consistent with traditional practice and existing case law.

Measuring facsimile filing by what the sender receives by way of a facsimile transmission report is not a meaningful long-term answer. An unscrupulous filer could change the settings on their machine, alter the date and time stamps, and when challenged maintain that the document in question was timely filed.⁵ Similarly, either the sender or receiver may not have properly configured their machine for the date and time (i.e.,

⁵ To be clear, the City has no reason to believe that Mr. Cheng altered any equipment settings in this case.

leave the default factory settings or fail to adjust it for the transitions to and from daylight savings time), eliciting an erroneous date/time of sending or receipt.

Although there may be instances where a clerk simply loses or misfiles a document, GR 17 has built-in safeguards to avoid these circumstances. GR 17(a)(4) authorizes clerks to charge reasonable fees for the filing of facsimile transmissions. Thus, the clerk would not only process the filing (as they ordinarily would) but would also perform those additional administrative steps necessary to receipt any fees. GR 17(b)(2) requires a sender to specifically include a transmittal sheet notifying the clerk of a fax filing. This step places the receiving clerk on-notice that the document is a court filing and therefore should be filed. Moreover, GR 17 expressly requires the original document to be retained, so that the would-be filed document can be examined. GR 17(a)(1). Should a party allege the rare circumstance of a lost filing, this claim can be supported by affidavit or declaration, and include copies of these transmission documents and proof of payment. But Mr. Cheng did not undertake any additional steps to substantiate his claim.

Compliance with GR 17, and the ensuing safeguards which the rule self-reinforces, would have alleviated many of the concerns in this case. Neither Mr. Cheng nor the municipal court have a complete copy of

the July 15th notice of appeal. A comparison of the excerpt of the July 15 and July 16 notices of appeal *suggest* that the July 16 notice of appeal is a handwritten-altered version of the July 15 notice of appeal, changing the courts and the plaintiff. His July 15th transmission sheet appears to be a one-page document with the fax number simply handwritten at the top of the margin. There is no cover page. Even assuming that it came out of the municipal court's fax machine, it gives no indicia that it should be processed as a notice of appeal.⁶

Indeed, this Court has already recognized in an analogous context the importance which attaches to the actions of a court clerk when they file documents,

Given the multitude of statutes of limitation and other filing deadlines contained in our statutes and court rules, any county clerk who failed to regularly file-stamp incoming documents on the day they are received in the clerk's office would soon come to the unfavorable attention of the judges of the superior court in that county. ... Filing means filing with the clerk under CR 5(e). A document is filed with the clerk when it is delivered to the clerk. The clerk's filing stamp is evidence of the time and date of delivery but it is not the act of delivery in and of itself.

Robinson, 104 Wn.App. at 668.

⁶ And, although someone took to time to make these handwritten alterations, Mr. Cheng's counsel somehow neglected to sign the July 16th notice of appeal. CRLJ 11. Assuming these are the same documents, and the handwritten fax machine number at the top of the July 15th transmission sheet, which is absent from the July 16th notice of appeal, does call such an assumption into question, one could surmise that any July 15th filing also lacked a signature.

The July 15th Notice of Appeal did not comply with GR 17 because there is no record of the municipal court clerk ever receiving it. Although the verification sheet might serve as “evidence of the time and date of delivery ... it is not the act of delivery.” *Robinson*, 104 Wn.App. at 668.

The foregoing also presupposes that a notice of appeal in a civil case can be filed via fax at all. Under GR 17(a)(5) documents requiring filing fees cannot be fax-filed. An appeal from an infraction case requires a filing fee. RCW 36.18.020(2)(b). The municipal court did not receive any filing fee until early September 2009. (CP 5-6). Although current case law recognizes that the failure to pay the filing fee is not itself jurisdictional, the failure to timely pay the fee should be considered in whether to permit the appeal to proceed, *State v. Ashbaugh*, 90 Wn.2d 432, 583 P.2d 1206 (1978); GR 17(a)(5)’s plain language mandates otherwise, “facsimile transmission is not authorized ... for those documents for which a filing fee is required.” Because a filing fee was required for the notice of appeal and GR 17 forecloses fax filings in these circumstances, the Superior Court should have disregarded Mr. Cheng’s July 15 notice of appeal.

Mr. Cheng had until July 15, 2009 to seek review by the Superior Court. There is no valid notice of appeal which was filed by that date.

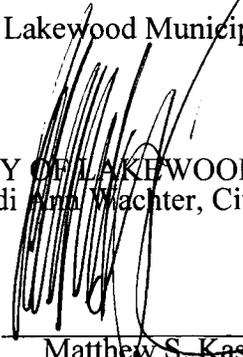
The superior court therefore lacked appellate jurisdiction to entertain Mr. Cheng's appeal and erred by failing to dismiss his appeal for failing to timely file the notice of appeal.

CONCLUSION

For the foregoing reasons, the City of Lakewood requests that this Court reinstate the decision of the Lakewood Municipal Court.

DATED: May 17, 2011.

CITY OF LAKEWOOD,
Heidi Ann Wachter, City Attorney

By: 

Matthew S. Kaser, WSBA #32239
Associate City Attorney

FILED
COURT OF APPEALS
NOV 10 2011

CERTIFICATE OF SERVICE

11 MAY 19 PM 4:18

STATE OF WASHINGTON

BY _____
TIMOTHY

I hereby certify that I served this Brief of Petitioner on:

Timothy Coogan
Attorney at Law
233 St. Helens Avenue
Tacoma WA 98402

By the following indicated method:

ABC Legal Messenger Service, delivery confirmation requested

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 17th day of May, 2011.



CYNTHIA WRIGHT, Paralegal
Lakewood City Attorney's Office

TRANSMISSION VERIFICATION REPORT

TIME : 07/15/2009 16:02
NAME : TIMOTHY COOGAN
FAX : 2532728609
TEL : 2532725505
SER.# : BROJ8J868394

DATE, TIME 07/15 16:02
FAX NO./NAME 5122267
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IN THE SUPERIOR COURT IN AND FOR
PIERCE COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,) DISTRICT COURT
Plaintiff) CASE NO. IN 116852
)
Vs.) SUPERIOR COURT
) CASE NO.
ANTHONY CHENG,)
Defendant) NOTICE OF APPEAL
_____)

The Apellant (*Please Print Your Name*) ANTHONY CHENG seeks review by the Pierce County Superior Court of the decision rendered in Lakewood Municipal Court under Case No. IN 116852 entered on June 15, 2009 in the above named Court.

Type of Case Appealed:

Criminal (RALJ) _____
(include charge description)

Civil (RALJ) Infraction (RALJ) Small Claims (DE NOVO)

Appendix 1

POOR QUALITY ORIGINAL

FILED

JUL 16 2009

LAKEWOOD MUNICIPAL COURT

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IN THE SUPERIOR COURT IN AND FOR
PIERCE COUNTY, STATE OF WASHINGTON

CITY of LAKEWOOD,)	LAKEWOOD
Plaintiff)	MUNICIPAL COURT
)	CASE NO. IN 116852
Vs.)	SUPERIOR COURT
)	CASE NO.
ANTHONY CHENG,)	
Defendant)	NOTICE OF APPEAL

The Appellant (Please Print Your Name) ANTHONY CHENG seeks review by the Pierce County Superior Court of the decision rendered in Lakewood Municipal Court under Case No. IN 116852 entered on June 15, 2009 in the above named Court.

Type of Case Appealed:

Criminal (RALJ) _____
(include charge description)

Civil (RALJ) Infraction (RALJ) Small Claims (DE NOVO)

Designate each decision to be reviewed:
The Court misinterpreted the statute in this case.

Appellant or Attorney for Appellant Name: <u>TIMOTHY COOGAN</u> Address: <u>233 ST. HELENS AVE</u> <u>TACOMA, WA 98402</u> Bar No: # <u>16308</u> Telephone: <u>(253) 272-5505</u>	Attorney for Respondent Name: _____ Address: _____ Bar No. _____ Telephone: _____
--	---

Respondent or
Your address (if not provided above): _____

NOTICE OF APPEAL

Appendix 2

LAW OFFICES OF
TIMOTHY PATRICK COOGAN
233 St. Helens Avenue
Tacoma, Washington 98402
(253) 272-5505
fax (253) 272-8609

FILED
IN COUNTY CLERK'S OFFICE

AM. NOV 10 2009 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

FILED

JUL 27 2009

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PIERCE COUNTY DISTRICT COURT NUMBER ONE
PIERCE COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Plaintiff,)	MUNICIPAL CASE NO. IN 116852
)	SUPERIOR CASE NO.
Vs.)	NOTICE OF APPEAL TO
)	SUPERIOR COURT
ANTHONY CHENG,)	
Defendant.)	

- Appellant ANTHONY CHENG (plaintiff) (defendant) seeks Superior Court review of the Lakewood Municipal Court decision dated 06/15/09 on the above case.
- Appellant requests the following decisions be reviewed (RALJ 2.6(a)): committed finding

- Within 14 days the appellant shall file with the Clerk of Lakewood Municipal Court and serve all other parties a designation of the part of the record that needs to be transmitted to the Superior Court. Clerk of Lakewood Municipal Court. One shall prepare the record within 14 days after the designation has been filed and shall notify each party that the record is ready to transmit and the amount to be paid by each party. Appellant shall pay the \$40.00 cost of preparing the record to the Clerk of Lakewood Municipal Court within 10 days of notification by the Clerk that the record is ready unless payment has been waived by District Court (RALJ 6.2(a)).

- Appellant shall transcribe the tape recording of proceedings in accordance with RALJ 6.3A, and shall file the transcript of the record with the Superior Court Clerk.

- The appeal is designated as (Check one of the following):
 A criminal appeal for which no filing fee is required. (RCW 10.10.060)

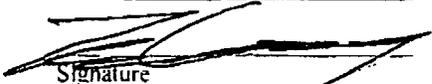
(Charges/Description)

A civil, infraction, parking or contempt appeal for which a filing fee must be paid before the notice of Appeal will be accepted for filing (RALJ 2.4(b)).

A civil, infraction or parking appeal for which an In Forma Pauperis Petition has been granted and filing fee is waived. (RCW 36.18.022)

Dated: 11-26-09

Clerk: _____


Signature

Signature

TIMOTHY COOGAN # 16508
107 TACOMA AVE. N
TACOMA, WA 98403
Name, Address, Bar #/Attorney for Appellant

ANTHONY CHENG
7318 S. AINSWORTH
TACOMA, WA 98408
Name & Address of Appellant

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Attorney for Respondent, Bar #

Appendix 3