

King Co. Superior Court No. 07-2-23856-5 SEA

2010 OCT 10 11:56 AM  
COURT OF APPEALS  
JG

No. 66052-7-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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City of Bothell, Appellant

v.

Robert Wallace, Respondent

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BRIEF OF APPELLANT

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Joseph N. Beck, WSBA #26789  
Paul Byrne, WSBA #41650  
Attorneys for the City of Bothell, Appellant  
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 ORIGINAL

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## **A. Assignments of Error**

1. The trial court erred by awarding attorney fees, in violation of RAP 12.2, which states in relevant part, that a “decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court” because the trial court’s decision challenged an issue already decided by this Court.

2. The trial court, even if it did have the jurisdiction to award attorney fees, erred by ignoring both RALJ 11.2 and the principles of fundamental fairness in awarding attorney fees, when the claimant utterly failed to comply with RALJ 11.2(c), (d), or (e), thus failing to give the City any notice of his intent to seek attorney fees and resulting in extreme prejudice to the City.

## **B. Statement of the Case**

### **Procedural History**

On June 14, 2007, a forfeiture hearing was held under authority of RCW 69.50.505. After hearing testimony and considering evidence, the hearing examiner, John W. Rusden, determined that the seized property was subject to civil forfeiture. The claimant timely filed an appeal in King County Superior Court. The court upheld the forfeiture, and the claimant timely appealed to this court for review.

In an unpublished opinion issued on February 10, 2010, this court reversed the order of forfeiture and remanded the case for further proceedings consistent with this decision. On February 22, 2010, the City filed a motion to reconsider. On March 4, 2010, the claimant filed a cost bill and request for attorney fees, which the City opposed. In a ruling entered on March 22, 2010, Commissioner William Ellis declined to award attorney fees noting that “the decision in this case does not award Wallace the right to attorney fees”. (Emphasis added.) See Commissioner’s Ruling attached herewith as Exhibit A.

On March 29, 2010, this court denied the City’s motion for reconsideration. On or about April 28, 2010, the City became time-barred from petitioning the Washington Supreme Court for review. On June 11, 2010, the mandate for this case was filed.

Then, on June 21, 2010, the claimant filed a motion for attorney fees with the trial court.

### **C. Summary of the Argument**

The trial court erred in awarding attorney fees (1) because this Court had already decided the issue, and, pursuant to RAP 12.2, the trial court lacked jurisdiction to make such an award, and (2) because the

claimant failed to follow key rules under RALJ 11.2, which resulted in extreme prejudice and fundamental unfairness to the City

#### **D. Argument**

1. THE TRIAL COURT LACKED JURISDICTION TO AWARD ATTORNEY FEES PURSUANT TO RAP 12.2 BECAUSE THE ISSUE OF ATTORNEY FEES WAS ALREADY DECIDED BY THIS COURT AND IS BINDING ON ALL SUBSEQUENT PROCEEDINGS IN ANY COURT.

RAP 12.2 states in relevant part that, “[u]pon issuance of the mandate of the appellate court as provided by rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court...” (Emphasis added.)

In reaching its decision not to award attorney fees in this case, the Court of Appeals court commissioner noted that “[a] party must request attorney fees at [sic] provided in RAP 18.1 and a commissioner will award fees only if there is a decision awarding a party the right to fees.”<sup>1</sup> (Emphasis Added.) See Commissioner’s Ruling, supra.

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<sup>1</sup> It should be noted that while RCW 69.50.505(6) governs whether or not the claimant is entitled to attorneys’ fees, nothing in plain language of that statute indicates (1) that a party with such an entitlement may bypass the procedures set forth in RAP 18.1 and/or RALJ 11.2 in making a claim to collect any fees to which a party may be entitled, or (2) that a court must award such fees even in the absence of a procedurally valid request for fees.

RAP 18.1(b) states that a “party must devote a section of its opening brief to the request for the fees or expenses.” Case law indicates that this request must be more than a bald request for attorney fees on appeal. Phillips Bldg. Co., Inc v. An, 81 Wn. App. 696, 704, 915 P.2d 1146 (1996) (Citations omitted). Further, both argument and citation to authority are required under this rule. Id. at 704. Because Phillips Bldg. Co., Inc. sought to be awarded attorney fees on appeal without any argument or citation to authority in its brief, the court of appeals properly denied its request for attorney fees. Id.

In this case, the claimant also failed to devote any portion of his opening brief at the court of appeals to argument or citation to authority on the issue of attorney fees. As a result, this court did not authorize attorney fees in its opinion, and the commissioner, as in Phillips, properly declined to award claimant any attorney fees that were requested. It should be noted that after this court’s February 10, 2010 ruling, the claimant for the first time requested attorney fees as part of a cost bill and provided an itemized list of those attorney fees totaling \$17,370, which included fees for the administrative hearing, the appeal in superior court, and the appeal to the Court of Appeals. See Exhibit B attached herewith.

The request encompassed all levels of the judicial process in this case, and the commissioner’s ruling is binding on those levels. Because

RAP 12.2 clearly states that the decision of the Court of Appeals governs all subsequent proceedings in the action in any court, it was clear error for the trial court to have allowed the claimant to cherry pick his way back down through the lower courts in search of a different result. (Emphasis added.)

RAP 12.2 further states that “[a]fter the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.” (Emphasis added.)

The court of appeals had already decided the issue of attorney fees. “The decision in this case does not award Wallace the right to attorney fees.” See Commissioner’s Ruling, *supra*. Further, the ruling of the commissioner was to award no attorney fees. *Id.* Because the claimant’s motion in superior court challenged this court’s decision, RAP 12.2 clearly states that not even the trial court has the authority to hear or decide this issue.

Moreover, the court of appeals was in possession of an itemized list of attorney fees for the administrative hearing, superior court review, and court of appeals. This court denied the request for all levels of these proceedings. Its decision should therefore be binding. Even further, this

court is authorized under RAP 18.1(i) to direct that fees and expenses be determined by the trial court. This also did not happen. There is absolutely no indication that this court intended to remand the issue of attorney fees to superior court for a determination of attorney fees for the superior court and administrative hearing. On the contrary, this court specifically ordered that the case be remanded for decisions consistent with the opinion. This court's awarded no such fees. Awarding attorney fees to the claimant when (1) the court of appeals opinion grants no such entitlements, and (2) when the commissioner of this court denied the request for attorney fees is, therefore, wholly inconsistent with this court's opinion.

**2. THE TRIAL COURT ERRED IN EXCUSING THE CLAIMANT'S COMPLETE AND UTTER FAILURE TO COMPLY WITH RALJ 11.2 AND VIOLATED THE PRINCIPLE OF FUNDAMENTAL FAIRNESS, RESULTING IN NO NOTICE TO THE CITY OF THE CLAIMANT'S INTENT TO SEEK ATTORNEY FEES AND INEXCUSABLE PREJUDICE TO THE CITY.**

Pursuant to RALJ 11.2(c), a party requesting attorney fees should devote a section of the brief to the request for the fees or expenses. Further, RALJ 11.2(d) states that at or before oral argument, the party should serve and file an affidavit in the superior court detailing the expenses incurred and the service performed by counsel. (Emphasis

Added.) Finally, under RALJ 11.2(e), a party should include in oral argument a request for the fee or expenses and reference to the affidavit on file. The claimant has failed to follow any of the aforementioned procedures.

The City had absolutely no notice of the claimant's request for attorney fees. The request was not made in any manner, in writing or orally, at the administrative hearing, nor during the appeal to the superior court, nor at the court of appeals.

As a result, the City was significantly prejudiced. The City disagreed with this court's February 10, 2010 decision to reverse and remand. In response, the City filed a Motion to Reconsider, which this court denied on March 29, 2010. In the interim, the claimant's request for attorney fees was also denied, and in a ruling dated March 22, 2010, Commissioner William Ellis of this Court ordered costs in the amount of \$726.41. The claimant never appealed the commissioner's ruling. After receiving notice of this court's denial of the City's motion to reconsider, the City's legal department met and made a strategic decision: that although it disagreed with this court's decision and felt that the City has a strong foundation upon which to seek review to the Washington Supreme Court, it would better serve the overall interests of the City in terms of

time, money, and human resources, not to seek review by the Supreme Court, pay the \$726.41 in costs, and return the claimant's vehicle.

On or about April 28, 2010, thirty days after the decision by the court of appeals to deny the City's motion for reconsideration was filed, the City became time-barred from appealing to the Supreme Court. On June 21, 2010, the claimant filed a motion for attorney fees with the trial court.

There is no published case law regarding the court's interpretation between the mandatory language, "shall," found in RAP 18.1 and "should," found in RALJ 11.2. However, the City argues that even if this Court should find that the "strict compliance" under RAP 18.1 is not required for RALJ 11.2, that, in the interest of justice, "some compliance" should be required. RALJ 11.2 is, after all, a "rule" and should be accorded some substance and meaning.

Here, there was absolutely no compliance with any provision of RALJ 11.2(c), (d), or (e), despite significant briefing and argument. The claimant had multiple opportunities to write one sentence regarding attorney fees in its briefing, to file an affidavit with one detail regarding attorney fees, or to make one statement during any of the oral arguments. Given every opportunity, the claimant failed to do anything that would have given the City notice of its intent to make such a claim.

Further, because the claimant never gave notice to the City until after its opportunity to file an appeal had long passed, the City suffered significant prejudice. Had the claimant made its motion or appealed the denial of fees by the Court Commissioner within the thirty-day window before the City's right to appeal became time-barred, the City could have filed an appeal or litigated claimant's appeal and preserved the opportunity to seek reversal by the Supreme Court. Instead, the claimant waited until June 21, 2010, almost two months after the City's right to appeal had expired, before giving notice of his intent to claim attorney fees. The City was denied its right to make an informed decision regarding whether to continue to pursue this matter. Instead, the City is being forced to defend against an untimely and unreasonable request for attorney fees. This court should not allow the claimant to benefit from side stepping procedures intended to provide both fair notice and the opportunity for fully developed argument prior to the disposition of the case.

#### **E. Conclusion**

The trial court erred by awarding attorney fees to the claimant. In doing so, it (1) ignored a decision made by this court, which was effective and binding on the parties to the review and which governed all subsequent proceedings in the action in any court; and (2) challenged an

issue already decided by this court that was inconsistent with this court's decision.

As a result, the City of Bothell respectfully requests that the trial court's award of attorney fees be vacated.

Dated this 9<sup>th</sup> day of December, 2010.

  
Joseph N. Beck, WSBA No. 26789  
Bothell City Attorney

  
Paul R. Byrne, II, WSBA No. 41650  
Bothell Associate City Attorney

# Exhibit A

*The Court of Appeals  
of the  
State of Washington*

RICHARD D. JOHNSON,  
Court Administrator/Clerk

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

March 22, 2010

Jeffrey Steinborn  
Jeffrey Steinborn PLLC  
3161 Elliott Ave Ste 340  
Seattle, WA, 98121-1015

Rhonda Giger  
City of Bothell  
18410 101st Ave NE  
Bothell, WA, 98011-3455

**RECEIVED**

**MAR 23 2010**

**BOTHELL PROSECUTOR**

CASE #: 62734-1-I  
Robert Wallace, Appellant v. City of Bothell, Respondent

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on March 22, 2010:

Robert Wallace prevailed on appeal and has submitted a "Cost Bill and Request for Attorney Fees" seeking a total of \$18,206.41. Bothell has filed an objection.

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

Costs are allowed as provided in RAP 14.3(a). Of the costs listed in the cost bill, there is no recovery under RAP 14.3(a) for the superior court filing fee. The remaining costs will be awarded as requested.

The costs will be taxed against the City of Bothell.

Now, therefore, it is hereby

ORDERED that Robert Wallace is awarded costs on appeal of \$726.41.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

LLS

# Exhibit B

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

MAR 04 2010

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

MAR 04 2010

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

CITY OF BOTHELL,	)	No. 627341-I
Respondent,	)	
	)	COST BILL AND
v.	)	REQUEST FOR
	)	ATTORNEYS FEES
1982 MERCEDES BENZ 240,	)	PURSUANT TO
LICENCE NO. 532TOP, VIN	)	R.C.W. 69.50.505(6)
WDBAB23AXCB334543,	)	
Defendant In Rem,	)	
	)	
ROBERT WALLACE,	)	
Claimant/Appellant.	)	

ROBERT WALLACE, Claimant/Appellant, by and through his attorney JEFFREY STEINBORN PLLC, asks that the following costs be awarded pursuant to RCW 69.50.505(6) and RAP 14.3. They are reasonable attorneys fees reasonably incurred by the Claimant and expenses actually incurred which were reasonably necessary for review. The Claimant is the substantially prevailing party in the above-entitled action. Costs should be paid to JEFFREY STEINBORN PLLC.

- Attorney's fees Admin hearing-preparation inclg legal research and prepar. of briefs, attend hearing (8 hours @ \$300/hour) \$ 2,400.00

2.	Attorney's fees Appeal to Superior Court - prepare pre-hearing memo & post-hearing memo, prep for hearing, attend hearing (14 hours @ \$300/hour)	\$ 4,200.00
3.	Attorney's fees Appeal to COA - prepare briefs, argument in Court of Appeals Steinborn (35.9 hours @ \$300/hour)	\$ 10,770.00
4.	Preparation of original and one copy of report of proceedings/Appellant	\$ 270.00
5.	Copies of Clerk's Papers - COA	\$ 82.50
6.	Transmittal of record on review - COA	\$ 25.00
7.	Copy of disc with admin hearing recording	\$ 25.00
8.	Transcription of disc of admin hrng	\$ 59.50
7.	Charges for reproduction of briefs and motions for the court	\$ 14.41
8.	Filing Fee in Superior Court	\$ 110.00
9.	Filing Fee in Court of Appeals	\$ 250.00
	TOTAL	\$18,206.41

Respondent should be ordered to pay the above costs.

DATED this 04 day of March, 2010.

Respectfully submitted,

JEFFREY STEINBORN, PLLC

*For*   
Jeffrey Steinborn, #1938  
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

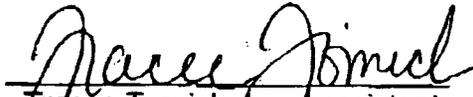
Today I deposited in the mail of the United States of America, postage prepaid, first class, a properly stamped and addressed envelope to:

Attorney for Plaintiff/Appellant  
Rhonda Giger, Prosecuting Attorney/City of Bothell  
18410 – 101<sup>st</sup> Avenue NE  
Bothell, Washington 98011

Claimant/Appellant  
Robert Wallace  
20 Cutty Lane  
Sequim, Washington 98382-8580

containing a copy of the Cost Bill in COA # 627341-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Tracee Tomich, legal assistant

3/4/10  
DATE

No. 66052-7-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

---

City of Bothell, Appellant

v.

Robert Wallace, Respondent

---

DECLARATION OF SERVICE

---

I, Paul Byrne, declare under penalty of perjury under the laws of the State of Washington that the enclosed copy of the City of Bothell's Brief of Appellant in the above-referenced case was served on this date, December 9<sup>th</sup>, 2010 on the following party:

Jeffrey Steinborn  
3161 Elliott Avenue, Suite 340  
Seattle, WA 98121  
United States

DATED this 9<sup>th</sup> day of December, 2010, at Seattle, Washington.

JOSEPH BECK  
Bothell City Attorney

  
Paul Byrne, WSBA # 41650  
Associate City Attorney