No. 85075-0

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

ERIC HOOD,

Appellant,

v.

CITY OF LANGLEY,

Appellee.

RESPONDENT'S OPPOSITION TO MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

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I. INTRODUCTION

Appellant Eric Hood has filed yet another baseless motion with this Court. Again, the City of Langley must respond. His latest motion is based on false claims of fact and an unjustifiable request that this Court allow him to further delay conclusion of this lawsuit. Because Mr. Hood failed to timely file a petition for discretionary review pursuant to RAP 13.4(a) and there are no "extraordinary circumstances" *and* there will be no "gross miscarriage of justice" pursuant to RAP 18.8(b), this eight-and-a-half-year-old lawsuit finally should be concluded. "[T]he desirability of finality of decisions outweighs" Mr. Hood's baseless claims here. RAP 18.8(b).

II. PROCEDURAL HISTORY

On July 1, 2024, this Court unanimously affirmed the trial court's exercise of its broad discretion to set Public Records Act penalties pursuant to *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3 735 (2010). Mr. Hood is represented in this appeal by attorney Bill Crittenden who

signed the appeal briefs and presented oral argument to this Court on Mr. Hood's limited appeal.

On July 21, 2024, Mr. Hood filed with this Court a Motion for Reconsideration "pro se." At the direction of this Court, the City of Langley filed its opposition to the reconsideration motion. The City of Langley noted in that brief:

> **II. MR. HOOD MAY NOT FILE A *PRO SE* MOTION.**
>
> Mr. Hood is represented here by a PRA lawyer. His lawyer has neither withdrawn nor signed on to the motion. Mr. Hood was not permitted to file that motion *pro se*. *State v. Romero*, 95 Wn. App. 323, 325-26, 975 P.2d 564 (1999); *In re B.R.*, 25 Wn. App. 2d 1012, 2023 WL 142180, *3 n.3 (Jan. 10, 2023) (unpublished).

10/7/24 Decl. of Jessica L. Goldman in Opposition to Hood Motion, Ex. 1 at 2. The City of Langley served its brief on both Attorney Crittenden, as required, and on Mr. Hood. *Id.* at final page.

RAP 18.3(b) requires that an attorney notify this Court of his intent to withdraw as counsel of record. To date, Mr. Crittenden has not withdrawn and remains counsel of record for Mr. Hood in this appeal.

On August 26, 2024, this Court issued its Order Denying Motion to Reconsider and, as required, served the Order on Mr. Hood's counsel of record, Mr. Crittenden. 10/7/24 Decl. of Jessica L. Goldman in Opposition to Hood Motion, Ex. 2. The Court Administrator/Clerk advised all counsel of record that "[w]ithin 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, **counsel** files a petition for review in this court." *Id.* (emphasis added). RAP 13.4 required that Mr. Crittenden "must" file any petition for review by September 25, 2024.

Mr. Crittenden did not file a petition for review by September 25, 2024.

Mr. Hood represents to this Court that he did not learn of the Court's August 26 Order until October 6, 2024, when "Mr.

Crittenden forwarded to Hood for the first time this Court's *Order Denying Motion for Reconsideration*[.]" Hood Mot. at 2. Of course, the Court's service on Mr. Hood's counsel of record of that Order was service on Mr. Hood. Moreover, Mr. Hood's statement is false. He **did not** "bec[o]me aware of" this Court's denial of reconsideration "for the first time on October 6, 2024." *Id.*

On September 26, 2024, the City of Langley filed its opposition to another *pro se* motion Mr. Hood filed with this Court in another baseless appeal. 10/7/24 Decl. of Jessica L. Goldman in Opposition to Hood Motion, Ex. 3. In that brief, served directly on Mr. Hood, *id.*, the City specifically noted that this Court had rejected the reconsideration motion in the case at bar:

> There is no meritless motion that Mr. Hood will not file before the Island County Superior Court or this Court to draw out his unsuccessful lawsuits against the City of Langley. ***See, e.g.*, Order Denying Motion for Reconsideration, No. 857075-0-I** (Div. I. Aug. [2]6, 2024)[.]

Id. at 2 (emphasis added).

Mr. Hood waited an additional 10 days to file his current motion and to make his false statement to this Court.

III. ARGUMENT

A. Nothing this Court did "terminated Mr. Crittenden's representation of Hood."

Mr. Hood contends that "[t]his Court's 7/1/24 *Opinion* terminated Mr. Crittenden's representation of Hood." Hood Mot. at 3. In support of this proposition, he cites: Nothing. Indeed, nothing supports this contention. *See* RAP 18.3(b).

B. Mr. Hood has not articulated any "extraordinary circumstances" justifying reopening this concluded appeal.

Mr. Hood does not so much as acknowledge that he must show "extraordinary circumstances" pursuant to RAP 18.8(b), let alone meet that heavy burden. *State v. Moon*, 130 Wn. App. 256, 260, 122 P.3d 192 (2005) ("The burden is on" the appellant "to provide 'sufficient excuse for [his] failure to file a timely notice of appeal' and to demonstrate 'sound reasons to abandon the [judicial] preference for finality.'") (quoting

Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993)).

In *Reichelt v. Raymark Industries, Inc.*, this Court rejected a request to re-open the appeal period 10 days after the 30-day appeal deadline had run. 52 Wn. App. 763, 765, 764 P.2d 653 (1988). The Court noted that RAP 18.8(b):

> severely restricts this court's authority to grant [appellant's] motion to extend time to file its notice of appeal. RAP 18.8(b) permits such an extension "only in extraordinary circumstances to prevent a gross miscarriage of justice" and clearly favors the policy of finality of judicial decisions over the competing policy of reaching the merits in every case.

Id. This Court found that "[t]his rigorous test has rarely been satisfied" and that where it had been satisfied "the moving party actually filed the notice of appeal within the 30-day period but some aspect of the filing was challenged." *Id.* "In each case, the defective filings were upheld due to 'extraordinary circumstances,' *i.e.*, circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Id.* In other words,

the appeal had been faulty despite the "appellant's reasonably diligent conduct." *Id.* at 766. Negligence or the lack of reasonable diligence does not satisfy the extraordinary circumstances test of RAP 18.8(b). *State v. Hand*, 177 Wn.2d 1015, 308 P.3d 588, 589 (2013) (affirming denial of RAP 18.8(b) motion).

Moreover, "[a]pplication of this rule does not turn on prejudice to the opposing party, since if it did the court would rarely deny a motion for extension of time." *Id.* "Even if the appeal raises important issues, it would be improper to consider those issues absent sufficient grounds for granting an extension of time." *Id.*[1] "The court will ordinarily hold that the interest in finality of decisions outweighs the privilege of a litigant to obtain an extension of time." *Id.* "In light of this policy, the standard set forth in RAP 18.8(b) is rarely satisfied." *Id.* "[T]he prejudice of granting such motions would be to the appellate

[1] Of course, Mr. Hood *already* has had his appeal.

system and to litigants generally, who are entitled to an end to their day in court." *Reichelt*, 52 Wn. App. at 766 n.2.

In *Reichelt*, this Court ruled that a mistake by the appellant's attorney resulting in a 10-day delay did not satisfy RAP 18.8(b)'s rigorous test. *Id.*; *accord Shumway v. Payne*, 136 Wn.2d 383, 396-97, 964 P.2d 349 (1998) (RAP 18.8(b) not satisfied where appellant's attorney may have told her that it was not necessary to ask the Supreme Court for review, though it was necessary); *Laguna Creek Cal. Partners, LLC*, 17 Wn. App. 2d 1042, 2021 WL 1854330, *6 (Div. I May 10, 2021) (unpublished) (denying RAP 18.8(b) motion), *rev. denied*, 198 Wn.2d 1014, 495 P.3d 840 (2021); *Matter of Marriage of Tims*, 10 Wn. App. 2d 1037, 2019 WL 4934702, *2 (Div. I Oct. 7, 2019) (unpublished) (denying RAP 18.8(b) motion filed two weeks after appeal deadline). Likewise, in another case, this Court concluded that even

> [a]ssuming [appellant's] bare allegation that his attorney failed to communicate to him his right of appeal, [appellant] has failed to indicate extraordinary circumstances

> here. His attorney's failure to communicate information about K.L.P's adoptive placement is not an extraordinary` circumstance.

In re Dependency of K.L.P., 190 Wn. App. 1020, 2015 WL 5690594, *6 (Div. I Sep. 28, 2015) (unpublished).

In *Bostwick v. Ballard Marine, Inc.*, this Court rejected a motion to extend the appeal deadline where the trial court did not advise the appellant of the entry of the underlying order. 127 Wn. App. 762, 775, 112 P.3d 571 (2005). This Court noted that the appellant "failed to make any inquiry as to the status of pending orders. Its lack of diligence in monitoring entry of an order on a pending motion does not amount to 'extraordinary circumstances.'" *Id.* at 776; *accord Diemond v. King Cnty.*, 19 Wn. App. 2d 1006, 2021 WL 3910280, *4 (Div. I Aug. 30, 2021) (unpublished) (appellant's lack of knowledge that judgment was entered was not reason to grant RAP 18.8(b) motion), *rev. denied*, 198 Wn.2d 1040, 502 P.3d 855 (2022).

Likewise, the Court of Appeals in *Beckman v. State Department of Social and Health Services*, found there were no

extraordinary circumstances where the State untimely appealed a $17.76 million jury award against the State which included substantial punitive damages. 102 Wn. App. 687, 11 P.3d 313 (2000). The Court rejected the State's argument that the failure of plaintiffs' counsel to give the State notice of entry of judgments was sufficient to satisfy RAP 18.8(b). "Plaintiffs' counsel gave the State notice of presentation of the proposed judgments. This was all Plaintiffs' counsel was required to do; the State was then obligated to monitor the actual entry of the judgments." *Beckman*, 102 Wn. App. at 695. Likewise, the Court held that the failure of the State's lawyer to act with reasonable diligence in ensuring that the notice documents were timely routed to the responsible attorneys in the Attorney General's Office also did not arise to "extraordinary circumstances." *Id.* "Negligence, or the lack of reasonable diligence does not amount to extraordinary circumstances." *Id.* (quotation marks & citations omitted).

Nothing here comes close to satisfying RAP 18.8(b): not Mr. Crittenden's negligent failure to keep his client apprised of the rulings of this Court and not Mr. Hood's failure to monitor the Court's docket knowing he had improperly filed a motion "pro se" while his attorney remained counsel of record.

Mr. Hood's baseless RAP 18.8(b) motion should be denied.

IV. SANCTIONS

Mr. Hood's latest motion is frivolous just like his reconsideration motion. Each of these frivolous motions required the City of Langley to respond further to a lawsuit that should be concluded. Pursuant to RAP 18.9(a), the City moves for an award of attorney's fees incurred to respond to his baseless motion which further delayed resolution of this lawsuit.

V. CONCLUSION

The City of Langley, again, respectfully requests that this Court reject a baseless motion from Eric Hood and award the City attorney's fees pursuant to RAP 18.9(a).

This document contains 1,839 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of October, 2024.

Respectfully submitted,

SUMMIT LAW GROUP, PLLC

By *s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
jessicag@summitlaw.com

Attorneys for City of Langley

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ***via electronic service*** on the following:

William John Crittenden, WSBA #22033
12345 Lake City Way NE, #306
Seattle, WA 98125
bill@billcrittenden.com

DATED this 7th day of October, 2024.

s/ Sharon K. Zankich
Sharon K. Zankich, Legal Assistant
sharonz@summitlaw.com

No. 85075-0

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

ERIC HOOD,

Appellant,

v.

CITY OF LANGLEY,

Appellee.

DECLARATION OF JESSICA L. GOLDMAN IN OPPOSITION TO MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

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Attorneys for City of Langley

I, Jessica Goldman, hereby declare:

I am counsel of record for The City of Langley in the above-referenced matter and over the age of 18. I make this declaration based on personal knowledge.

1. Attached hereto as **Exhibit 1** is a true and correct copy of the City's August 16, 2024 Answer to Motion for Reconsideration filed with this Court along with the Transmittal Information from the Court showing service on Mr. Crittenden and Mr. Hood.

2. Attached hereto as **Exhibit 2** is a true and correct copy of the August 26, 2024 email from the Court to Mr. Crittenden and me appending the Clerk's Cover Letter and the Court's Order Denying Motion for Reconsideration.

3. Attached hereto as **Exhibit 3** is a true and correct copy of the electronic notification of the filing of the City of Langley's September 26, 2024 Opposition to Mr. Hood's Motion in Appeal No. 86686-9, along with that brief, which the City served on Mr. Hood that same day.

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

EXECUTED this 7th day of October, 2024, in Seattle, Washington.

s/ Jessica L. Goldman
Jessica L. Goldman, WSBA #21856

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ***via electronic service*** on the following:

William John Crittenden, WSBA #22033
12345 Lake City Way NE, #306
Seattle, WA 98125
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DATED this 7th day of October, 2024.

s/ Sharon K. Zankich
Sharon K. Zankich, Legal Assistant
sharonz@summitlaw.com

EXHIBIT 1

No. 85075-0

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

ERIC HOOD,

Appellant,

v.

CITY OF LANGLEY,

Appellee.

RESPONDENT'S ANSWER TO MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Appellant Eric Hood, now *pro se*, moved for reconsideration of this Court's affirmance of the trial court's discretionary assessment of Public Records Act ("PRA") penalties. This Court rejected the sole issue he raised on appeal – his claim that the trial court was required, as a matter of law, to find the City of Langley acted dishonestly based on a subsequent case and, based on that claimed error of law, to undo the court's comprehensive penalty assessment.

Having failed to overturn the trial court's assessment based on his lone assignment of error, he seeks another bite at the apple. Now he would like to challenge some of the trial court's unappealed findings of fact, all of which are verities on appeal, and based on these new claims asks this Court to undo the trial court's discretionary assessment.

Because Mr. Hood's "reconsideration" motion requests that the Court consider for the first time his arguments regarding unappealed fact findings and because this Court's

review *still* is limited to the legality of the trial court's approach and the overall reasonableness of its selected remedy, his frivolous motion should be rejected.

II. MR. HOOD MAY NOT FILE A *PRO SE* MOTION.

Mr. Hood is represented here by a PRA lawyer. His lawyer has neither withdrawn nor signed on to the motion. Mr. Hood was not permitted to file that motion *pro se*. *State v. Romero*, 95 Wn. App. 323, 325-26, 975 P.2d 564 (1999); *In re B.R.*, 25 Wn. App. 2d 1012, 2023 WL 142180, *3 n.3 (Jan. 10, 2023) (unpublished).

III. PROCEDURAL HISTORY

On January 5, 2016, Mr. Hood requested records from the City which the trial court, in an **unappealed** finding of fact, held was "fairly characterized as seeking everything but the kitchen sink related to" a former mayor. CP 2300. Ten days later he sent another email which the trial court, in an **unappealed** finding of fact, held the City reasonably believed to have narrowed his January 5 request to records referring to

him. CP 2434. Following his first appeal, the City produced to him the former mayor's calendar which included no mention of him. CP 1532.

Over more than eight years of litigation, Mr. Hood abandoned many baseless arguments. The issues remaining were whether the City violated the PRA by concluding that he only sought any mention of himself in the calendar and, if so, what penalties the trial court should assess.

In an **unappealed** finding of fact, the trial court ruled that:

> in its judgment, the City's initial response to Mr. Hood's January 5 [request] was adequate: the City identified Mayor McCarthy's laptop as well as the physical responsive documents in its initial response, communications between City Clerk Mahler and Mr. Hood suggest that he could have an opportunity to review the contents of the laptop himself once City Clerk Mahler had time to supervise him, the City's later denial of that opportunity was expressly based on the City's understanding that Mr. Hood had narrowed his original request by his email of January 15, 2016, and this Court expressly finds that understanding to have been reasonable until its receipt of Mr. Hood's March 1, 2016 email[.]

CP 1274-1275.

In another **unappealed** finding of fact, the court held that the Clerk:

> offer[ed] to search for electronic records about Mr. Hood himself and asked for a written request, which Mr. Hood provided on January 15th. The City then searched both the laptop and the City's computer system, using the same terms that had been used to identify Mr. Hood in the settlement agreement that resolved his PRA case. On January 27th [], City Clerk Mahler provided Mr. Hood with the results of his January 15, 2016 request, and the adequacy of that search is not at issue.

CP 1270.

The trial court further held, in an **unappealed** finding of fact, that "[u]nder the circumstances, it was reasonable for City Clerk Mahler to regard her conversation with Mr. Hood on January 15, 2016, during the hours-long sessions of tangible document production as a clarification and/or modification of his initial public records request." CP 1392.

In another **unappealed** finding of fact, the court held that the City denied his demand to review the former mayor's laptop

which accessed his calendar "expressly based on the City's understanding that Mr. Hood had narrowed his original request by his email of January 15, 2016, and this Court expressly finds that understanding to have been reasonable until its receipt of Mr. Hood's March 1, 2016 email[.]" CP 1395.

In an **unappealed** finding of fact, the trial court held that "the City had no reason to know that Mr. Hood had a different idea, or would come to have a different idea, than Ms. Mahler about the significance of his January 15, 2016 email as an initial matter." CP 1272-1273.

In another **unappealed** finding of fact, the court ruled it was:

> mindful that the significance of Mr. Hood's March 1, 2016 email may at the time simply have been overlooked or fairly regarded as a minor point: from this backward-looking vantage point, it appears to this Court that the principal bone of contention between the parties in the 2017 summary judgment briefing was the production (and destruction) of Mayor McCarthy's personal journals.

CP 1273.

In an **unappealed** finding of fact, the trial court ruled:

> [T]he Court has spent most of a judicial day reviewing the record in this case to confirm its impression that the former mayor's daily appointment calendars were simply not the principal object, or among the principal objects, of Mr. Hood's efforts before this case went on [the first] appeal.

CP 2433.

The court, in another **unappealed** finding of fact, held that after March 1, 2016, based on the later *O'Dea* decision,[1] the City would be deemed to have known that Mr. Hood intended (at least in retrospect) to make two separate public records requests. CP 2297. So, the trial court, in an **unappealed** finding of fact, held that the City violated the PRA for 1,063 days, beginning five days after March 1, 2016, by not providing the calendar. CP 2297.

Mr. Hood claimed that a $100 daily penalty, the top of the statutory range, was "necessary," CP 1987, based on myriad

[1] *O'Dea v. City of Tacoma*, 19 Wn. App. 2d 67, 493 P.3d 1245 (2021).

arguments to the trial court. CP 1986-2002; CP 2003-2101. Among the many arguments he pressed was that "the City of Langley, through its insurance-defense attorneys, has been intentionally withholding the calendars and lying to this Court for six years." CP 1987. He argued that "the City itself is liable for the conduct of its attorney, Jeff Myers," whom Mr. Hood alleged made false statements and knew that Mr. Hood had "not narrowed his request." CP 1988.

In detailed findings of fact based on the *Yousoufian* framework,[2] the trial court rejected Mr. Hood's factual assertions. In an **unappealed** finding of fact, the court held:

> The City promptly responded, followed up with, and was helpful to Mr. Hood. The City complied with the PRA's five-day response requirement. [] In fact the City responded within three days of Mr. Hood's January 5, 2016 request. The City notified Mr. Hood that all of the records responsive to his request were available for his review, to wit: "6 boxes, 25 binders and on a laptop located at Langley City Hall." This response was proper under the PRA.

[2] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010).

> *Hoffman*, 4 Wn. App. 2d at 499 (The County "responded within five working days[.] While the response of the sheriff's office to Hoffman's initial PRA request was incomplete, that was not an independent aggravating factor. It is instead what caused the PRA violation in the first place[.] No further enhancement was required based on lack of timely compliance.")[.]

CP 2298.

In another **unappealed** factual finding, the trial court held:

> When Mr. Hood emailed the City with follow-up questions on January 10, 2016, the City responded the next day. When he visited the City's offices and inspected the voluminous hard copy records responsive to his request, the City's Clerk copied the records he identified for copying.

CP 2298.

The trial court further held, in an **unappealed** finding of fact, that "[o]n January 27, 2016, within less than a month, the City completed its response to Mr. Hood's narrowed January 5, 2016 request and so advised him." CP 2299

Continuing its assessment of the *Yousoufian* factors, the court, in an **unappealed** finding of fact, held:

> The City acted with good faith and honesty and complied with the PRA's procedural requirements. "When determining the amount of the penalty to be imposed the existence or absence of [an] agency's bad faith is the principal factor which the court must consider." *Yousoufian*, 168 Wn.2d at 460. The evidence amply demonstrates the City's good faith and honesty in responding to Mr. Hood's initial January 5, 2016 request and his January 15, 2016 email.

CP 2299.

In another **unappealed** finding of fact, the trial court confirmed its rejection of Mr. Hood's claim:

> that the City's first litigation counsel, Jeffrey S. Myers (who defended the case from its filing to some point after the appellate court decision was issued) was dishonest. But this Court has already determined that the City reasonably believed that Mr. Hood had narrowed his request for electronic records on January 15, 2016.

CP 2434.

The court, in an **unappealed** finding of fact, further ruled:

> Mr. Myers was not the only one who was on notice that, at least as of March 1, 2016, that Mr. Hood wanted all of the public records responsive to his January 5, 2016 email to which he

> was entitled: so was Mr. Hood himself. But Mr. Hood did not base his opposition to the City's 2017 motion for summary judgment on the proposition that his March 1, 2016 email made what did or did not occur on January 15, 2016 irrelevant: he based it on the proposition that he did not, in fact, narrow his request on January 15th.

CP 2434.

In another **unappealed** finding of fact, the trial court held:

> The City promptly brought in a lawyer to assist. *West*, 168 Wn. App. at 190 (approving the trial court's finding that "the County demonstrated adequate training and supervision of the County's personnel with respect to PRA requests because the County assigned the responsibility to respond to Mr. West's PRA request to a licensed, practicing attorney who has specific knowledge of the issues presented in" the case) (quotation marks & brackets omitted). The City engaged a PRA lawyer to look at the January 15, 2016 email and provide Clerk Mahler advice.

CP 2299-2300.

In yet another **unappealed** finding of fact, the court held:

> It was not agency dishonesty for Mr. Myers to defend this case based on the City employee's understanding of what happened on January 15, 2016, and not on Mr. Hood's assertions about it more than a month

> afterwards rather than anticipating an appellate court opinion in a different case that did not yet exist.

CP 2434-2435.

In an **unappealed** finding of fact, the trial court ruled that "[h]ad Mr. Myers denied receipt of Mr. Hood's March 1, 2016 email or otherwise misrepresented facts to the Court, that would be a basis for a finding of agency dishonesty." However, the court found:

> Mr. Myers does not deny receiving the March 1, 2016 email: indeed, an email string that he attached to his declaration referred to it repeatedly. What Mr. Myers declared was that Mr. Hood never responded to the request that he specify what electronic records he was still looking for. The February 19, 2016 letter expressly advised Mr. Hood that the City employee regarded the January 15th discussion as his narrowing of the scope of his request and asked him to confirm that she was correct. Although Mr. Hood's March 1, 2016 email to the litigation counsel was not a model of clarity, this Court has already determined that it was sufficient to put the lawyer on notice that Mr. Hood did not, at least then, agree with the City employee's characterization of the January 15th discussion. But the February 19, 2016 letter also asked that, if the City employee's understanding was not correct, Mr. Hood identify the specific records that he was seeking and his

> request. And, despite the Court's renewed search, the Court has not found any response from Mr. Hood specifying the records that he was still seeking: which appears to have been the point of Mr. Myers' reply declaration. There is certainly no indication from the March 1, 2016 email that what Mr. Hood was requesting in particular was the former mayor's daily calendars.

CP 2435.

In its next **unappealed** finding of fact, the court held:

> the City's explanation for noncompliance before March 1, 2016 eminently reasonable. [] "Mr. Hood's January 5, 2016 public records request is fairly characterized as seeking everything but the kitchen sink related to Mayor McCarthy." [] "[I]t was reasonable for City Clerk Mahler to regard her conversation with Mr. Hood on January 15, 2016, during the hours-long sessions of tangible document production as a clarification and/or modification of his initial public records request." [] "[T]his Court also finds that the City had no reason to know that Mr. Hood had a different idea, or would come to have a different idea, than Ms. Mahler about the significance of his January 15, 2016 email as an initial matter." [] *See also Hood v. S. Whidbey School Dist.*, 2016 WL 462649, No. 73165-3-I, 195 Wn. App. 1058, *17 (unpublished) (Sept. 6, 2016) (approving the trial court's finding that the agency's "explanations for particular oversights in its searches and productions were 'reasonable and fully understandable in light of the numerous broad and overlapping

> requests with which it was faced'"), *review denied*, 187 Wn.2d 1020 (2017). This Court also recognized that in March 2016 and thereafter, the former mayor's calendar was "fairly regarded as a minor point" as "the principal bone of contention between the parties in the 2017 summary judgment briefing was the production (and destruction) of Mayor McCarthy's personal journals," [] issues on which Mr. Hood lost in this lawsuit.

CP 2300.

The trial court held in another **unappealed** finding of fact:

> The calendar was of no public importance. The calendar was of no foreseeable public importance. "An agency should not be penalized under this factor, however, unless the significance of the issue to which the request is related was foreseeable to the agency." *Yousoufian*, 168 Wn.2d at 462; *see also Hood v. S. Whidbey School Dist.*, 195 Wn. App. 1058 at *17 (approving the trial court's finding that there was no public importance as "'the overwhelming majority of Hood's requests were directly related to his personal challenge to his nonrenewal as a teacher,'" the very issue that drove Mr. Hood to make his January 5, 2016 PRA request to the City about former Mayor McCarthy, the individual who long ago fired him at South Whidbey School District).

CP 2301.

The court further held, in an **unappealed** finding of fact:

> Mr. Hood did not experience any foreseeable personal economic loss as a result of the delay in receiving the calendar. The delay in Mr. Hood's receipt of the calendar caused him no personal economic loss. Moreover, an agency should "be penalized for such a loss only if it was a foreseeable result of the agency's misconduct. In short, actual personal economic loss to the requestor is a factor in setting a penalty only if it resulted from the agency's misconduct and was foreseeable." *Yousoufian*, 168 Wn.2d at 461-62; *accord Zink*, 4 Wn. App. 2d at 126 ("compensating a plaintiff should be a factor in increasing a penalty only if an economic loss to the requestor was a foreseeable result of the agency's misconduct"). There was no foreseeable economic loss here.

CP 2301.

Based on voluminous evidence, the court also held in an **unappealed** finding of fact: "The City did not act with negligence, recklessness, wantonly or in bad faith, nor did it intentionally fail to comply with the PRA. The City was not intransigent." CP 2301.

In setting the daily penalty, the court further held in an **unappealed** finding of fact:

> No penalty above the lower end of the statutory range is necessary to deter future misconduct considering the City's size and the facts of this case. "[T]he PRA penalty is intended to discourage improper denial of access to public records and to encourage adherence to the goals and procedures dictated by the statute." *Zink*, 4 Wn. App. 2d at 123-24 (quotation marks, brackets & citations omitted). In the case of a small city, the "trial court does not abuse its discretion by treating the ninth 'deterrence' *Yousoufian* aggravating factor as the most important aggravating factor[.]" *Id.* at 123. The Supreme Court has "explicitly recognized that an agency's smallness and limited resource can matter." *Id.* at 126 (citing *Yousoufian*, 168 Wn.2d at 462-63); *see also id.* at 129 ("The trial court did not err or abuse its discretion in concluding that the penalty amount needed to deter the city is not the same as that presented in the cases involving Washington jurisdictions or agencies with much larger budgets and resources."). Courts "cannot lose sight of the fact that public records penalty awards are ultimately paid with taxpayer dollars." *O'Dea*, 19 Wn. App. 2d at 86.

CP 2301-2302.

Further, the court in an **unappealed** finding of fact held:

> The sole PRA violation here arose from Mr. Hood's unclear communications with the City (or his after-the-fact interpretations of those communications), not with the City's process for responding to PRA requests. The City responded to the request nearly seven years ago by way

> of a City Clerk who long ago left her job with the City. *Hoffman*, 194 Wn.2d at 232 (This factor mitigated the penalty because the problem was attributed solely to an employee who had retired and that employee's "negligence was due to her idiosyncratic understanding of a particular PRA provision rather than to systemic lapses in training, supervision, or work flow."); *Hoffman*, 4 Wn. App. 2d 489, 499, 422 P.3d 466 (2018) ("When it comes to liability, an agency's weakest link can cause a PRA violation. But because the question of penalty is guided by an overarching concern for deterrence, it is appropriate for a trial court to consider an agency's overall level of culpability, not just the culpability of the worst actor.") (citation omitted), *aff'd*, 184 Wn.2d 217 (2019). Moreover, while "it is appropriate to increase penalties as a deterrent where an agency's misconduct causes a requestor to sustain actual personal economic loss," *Yousoufian*, 168 Wn.2d at 461-62, Mr. Hood has sustained no loss whatsoever.

CP 2302.

The trial court held, in an **unappealed** finding of fact:

> Langley is a small City with only 1,147 residents and the penalty needed to deter a small city and that necessary to deter a larger public agency is not the same. *Id.* at 463; *Hoffman*, 194 Wn.2d at 232 (penalty assessed cost $0.34 per county resident); *Yousoufian*, 168 Wn.2d at 470 (penalty assessed cost $0.19 per resident); *O'Dea*, 19 Wn. App. 2d at

> 86 (reversing penalty that amounted to almost $12 per resident).

CP 2303.

In another **unappealed** ruling, the trial court held: "[T]he Court's determination as regards an appropriate penalty was based on the City's culpability for what it knew and reasonably should have known[.]" CP 2435.

Mr. Hood moved for reconsideration of the trial court's penalty assessment. CP 2320. The motion re-argued his view that the City's prior lawyer must be held to have acted with dishonesty. CP 2321-2325. Mr. Hood complained that the court "failed to assign any culpability to, or find any *Yousoufian* aggravating factors for, the conduct of the City's attorney, Jeff Myers, in willfully ignoring Hood's email dated March 1, 2016 which, as this Court has found, gave the City notice that Hood had not narrowed his request." CP 2329. He challenged the court's findings of fact, claiming that the court "erroneously failed to consider Hood's evidence of the City's post-litigation misconduct in awarding penalties." CP 2329.

The trial court again rejected these factual arguments. CP 2430. And then, he abandoned these arguments on appeal. He did not appeal any of the findings of fact. Slip op. at 2 ("Neither party challenges the trial court's factual findings in this matter.").

IV. ARGUMENT

A. This appeal is limited to assigned errors.

Pursuant to RAP 10.3(a)(4), an appellant must identify "each error a party contends was made by the trial court" **in his opening brief**. "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g).

The assigned errors confine the issues to which the appellee must respond, and which the court will adjudicate. "In reviewing findings of fact," appellate courts "will review only those facts to which error has been assigned." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *accord Escude v. King*

Cnty. Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error."); *Strout v. McGee*, No. 84883-6-I, 2024 WL 1718813, *13 (Div. I Apr. 22, 2024) (unpublished) ("given her failure to assign error to this issue," this Court would not address it). For this reason, arguments raised for the first time in appellant's reply brief are too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("the assignment of error is waived").

Moreover, RAP 10.3 is not satisfied if the opening brief merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to

why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. *In re Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

B. Mr. Hood assigned error to one issue.

He appealed one issue of law – abandoning the factual arguments he unsuccessfully pressed below. In his opening brief a year ago, he assigned one error "of law" challenging the trial court's ruling "that there was no aggravating 'agency dishonesty' in this case because *O'Dea* was decided after the City finally produced the calendars[.]" Brf. of Appellant at 4-5. He reminded the Court repeatedly that he isolated one issue for appeal. *Id.* at 22-23 (the "legal issue that Hood raises in this Court [is] whether the trial court erred in finding no 'agency dishonesty' because *O'Dea, supra*, was issued after the City finally produced the calendars"); *id.* at 29 ("Hood wants this Court to focus this appeal on the important legal issue of properly applying *O'Dea*, *supra*, to the resulting PRA penalty award to establish agency dishonesty in this case."); *id.* at 30

("Hood challenges only the trial court's refusal to apply *O'Dea* [] retroactively, which is an error of law that this Court reviews *de novo*."); *id.* at 30-31 ("In this appeal Hood challenges only the trial court's error of law in failing to find the aggravating factor of 'agency dishonesty' in this case because *O'Dea*, *supra*, was issued after the City finally produced the mayor's calendars").

In his reply brief nine months ago, he reaffirmed the solitary issue of law challenged on appeal: "[T]he issue presented in this appeal is whether the trial court erred as a matter of law in refusing to apply *O'Dea* retroactively on an issue of penalties." Reply Brf. of Appellant at 8; *accord id.* at 16 ("the sole legal issue in this appeal is whether *O'Dea* should apply retroactively to require a larger penalty in this case"); *id.* at 28 ("the sole legal issue presented by this appeal [is] whether the trial court's refusal to follow *O'Dea* in finding agency dishonesty was erroneous as a matter of law"). He stated that

the sole issue he appealed was "***not*** a question of fact," but a question of law. *Id.* at 30 (emphasis original).

He challenged the court's ruling on one *Yousoufian* factor – agency dishonesty – based solely on his argument that the City should have been found to have acted dishonestly because of *O'Dea*. Brf. of Appellant at 35 ("The trial court's ruling that the City could not have anticipated the *O'Dea* decision was erroneous."); *id.* at 42 ("Ignorance of the law has never been a defense against PRA liability or a justification for willfully withholding records in violation of the PRA."); *id.* at 46 ("In sum, the trial court's refusal to follow *O'Dea* [] because that case was issued after the City produced the calendars is erroneous as a matter of law.").

And that is the issue the parties briefed, and this Court resolved. This Court correctly noted that "[n]either party challenges the trial court's factual findings in this matter. **Therefore, the factual findings set forth in the trial court's rulings are verities on appeal**." Slip op. at 2 (citing *Hoffman*,

194 Wn.2d 217, 219-220, 449 P.3d 277 (2019)) (emphasis added). This Court properly noted that, "when an appellant 'does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.'" *Id.* (quoting *Hoffman v. Kittitas Cnty.*, 4 Wn. App. 2d 489, 498, 422 P.3d 466 (2018), *aff'd*, 194 Wn.2d 217, 449 P.3d 277 (2019)).

This Court resolved the singular issue appealed. *Id.* at 1 ("Hood challenges only the court's application of law to one out of the nine penalty factors that the court considered in imposing the lower-end penalty."). As required by the Supreme Court, this Court "decline[d] Hood's request to engage in piecemeal de novo review of a single Yousoufian II factor." *Id.* at 9.

For "guidance only," this Court noted that the trial court "did not err in its application of O'Dea." *Id.* at 10 n.4. "[T]he trial court properly reasoned that, prior to the O'Dea decision,

the City could not have reasonably known that it was the state of the law that an e-mail from Hood occurring in the context of litigation constituted a clarification of the scope of his public records request." *Id.* (emphasis added). "Thus, in determining that there was an absence of 'agency dishonesty' in this matter, in reliance on O'Dea, the trial court did not incorrectly apply the law." *Id.*

C. Mr. Hood does not seek reconsideration of the sole issue appealed.

Mr. Hood now improperly asks this Court to consider findings of fact he never appealed and which were never briefed to this Court. RAP 10.3(a)(1); RAP 10.3(g); *Hill*, 123 Wn.2d at 647; *Cowiche*, 118 Wn.2d at 809; *Escude*, 117 Wn. App. at 190 n.4; *Strout*, 2024 WL 1718813 at *13.

D. Mr. Hood did not assign error to any of the issues he wishes to have "reconsidered."

Having abandoned the *O'Dea* argument, his only assigned error, Mr. Hood now requests "reconsideration" of his newly minted challenge to the trial court's **unappealed** factual

findings that the City acted honestly. *See supra* § III. These new issues of fact that he wishes the Court to address in his suggested re-do have been waived.

1. The "trial court misquoted mitigating factor (3)" and thus made erroneous findings of fact. Mot. at 3. He claims for the first time on reconsideration that the "omission" of the words "timely," "strict," and "all" made the trial court's finding "inaccurate." *Id.* In addition to being a brand-new challenge to a verity on appeal, he offers no legal support for his contention. *Hoffman*, 194 Wn.2d at 227 (The *Yousoufian* factors "may overlap, *are offered only as guidance*, may not apply equally or at all in very case, and are not an exclusive list of appropriate considerations.") (quotation marks & citation omitted).

2. The "trial court altered" "aggravating factor (5)" resulting in an (unexplained) erroneous finding of fact. Mot. at 4. This brand-new challenge to a verity on appeal also is not supported by any legal basis.

3. This Court "inaccurately found that trial court findings were 'amply supported'" and therefore "rested on unsupported facts." *Id.* at 5. The trial court's findings of fact are unchallenged verities on appeal. *See supra* § III; Appellant's Reply at 26 ("neither party has appealed the trial court's determinations on those penalty factors"); slip op. at 11 ("When an appellant 'does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.'") (quoting *Hoffman*, 4 Wn. App. 2d at 498).

4. The "[t]rial court improperly assessed City's initial response to Hood's January 5, 2016 PRA request." Mot. § IV.B. He says now: "trial court's penalty assessment omitted or misinterpreted facts regarding City's initial response[.]" *Id.* at 14. For the first time on appeal, he claims that the trial court erred in its findings of fact regarding other

Yousoufian factors: "Penalty assessment #18," "Penalty assessment #19," and "Penalty assessment #24." *Id.* at 16-17.

But Mr. Hood told the trial court that "[t]he City's actions prior to March 1, 2016 are irrelevant to penalties in this case," CP 1989, and did not appeal the court's factual assessment of the City's initial response. *See* Appellant's Brf. § II.

All the unappealed findings of fact are verities. Brf. of Appellant at 28-29 (Mr. Hood's lawyer averred that "Hood could have appealed from the trial court's refusal to find as a matter of fact that Hood never narrowed his January 5, 2016 PRA request," but he did not.); *id.* at 34 ("the trial court's un-appealed ruling establishes" that "the City had not violated the PRA ***before*** March 1, 2016"); Reply Brf. of Appellant at 4-5 ("The undisputed facts as found by the trial court on remand are that: Prior to March 1, 2016 the City's staff reasonably believed that Hood's second PRA request narrowed Hood's first PRA request on January 5, 2016."); *id.* at 14-15 ("prior to March 1,

2016" "the clerk had reasonably believed that Hood's second PRA request was a narrowing of the first request"); *id.* at 18 ("Neither party has appealed the trial court's determination that there was no meeting of the minds prior to March 1, 2016.").

5. The "trial court improperly assessed City's response after January 15, 2016." Mot. § IV.C. For the first time, Mr. Hood contends that the trial court was "mistaken" in finding that the City properly brought in a lawyer to advise it and that the City (and its lawyer) did not know that Mr. Hood's January 15, 2016 email was meant to be treated as a brand new public records request. *Id.* at 18.

But he did not appeal the trial court's factual assessment of the City's initial response. Appellant's Brf. § II. These unchallenged findings also are verities.

E. Mr. Hood still is not entitled to *de novo* review of the trial court's *Yousoufian* analysis.

Mr. Hood says that this Court should reconsider its decision declining to conduct a *de novo* review of the trial

court's penalty assessment. Mot. at 32. He has pivoted from his *legal argument* regarding the finding of agency honesty – the one to which he assigned error – to an *unappealed factual* challenge to the trial court's finding of agency honesty. Not only does his motion improperly challenge unappealed findings of fact, but he still is wrong on the law.

Citing *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 398, 314 P.3d 376 (2013), he now says for the first time that the trial court did not conduct its analysis within the *Yousoufian* framework. Mot. at 31. *Sargent* does not support this new argument. In *Sargent*, the Supreme Court faulted the trial court for not even "mention[ing] *Yousoufian*" "or engag[ing] in any sort of balancing analysis, but instead focused exclusively on whether the SPD acted in bad faith to calculate a penalty." 179 Wn.2d at 398. The Court reaffirmed that, under the *Yousoufian* "framework," "not all factors may apply in every case" and "'no one factor should control[.]'" *Id.* "These factors should not infringe upon the considerable

discretion of trial courts to determine PRA penalties." *Yousoufian*, 168 Wn.2d at 468. In assessing a trial court's exercise of discretion, the reviewing court does not "weigh conflicting evidence even though we may disagree with the trial court[.]" *In re Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017) (quotation marks & citation omitted).

The trial court below assessed penalties according to the *Yousoufian* framework and Mr. Hood chose not to assign error to any of the court's findings of fact. Moreover, his contention now that "[b]ecause agency dishonesty founded [the] City's entire response, it was not necessary for Hood to ask the court to review other penalty factors," Mot. at 32, is contrary to law. *Sargent*, 179 Wn.2d at 398 ("Although bad faith is an important consideration under *Yousoufian 2010*, it cannot be the only consideration.").

Based on a single legal argument, Mr. Hood fully pressed his challenge to the trial court's analysis of one *Yousoufian* factor: the City's honesty. This Court rejected his challenge.

> Because the legislature has conferred considerable discretion to trial courts when determining Public Records Act penalties, because our Supreme Court has repeatedly emphasized that such a determination must be reviewed holistically for its overall reasonableness and that no one penalty factor should control appellate review of any such determination, and because a holistic review of the trial court's determination in this matter reveals that no abuse of discretion occurred, Hood's assertion fails.

Slip op. at 5. That remains the case today as Mr. Hood asks the Court to consider for the first time his challenge to several unappealed findings of fact. *Hoffman*, 194 Wn.2d at 223-24.

Even had he appealed the factual claims he made to the trial court but abandoned on appeal, his challenge to only one of the *Yousoufian* factors would have warranted the same result. "[A]n appellate court's function is to review claims of abuse of trial court discretion with respect to the imposition or lack of imposition of a penalty, not to exercise such discretion ourselves." *Yousoufian*, 152 Wn.2d at 430 (quotation marks & citation omitted). "[A] trial court abuses its discretion by focusing exclusively on bad faith" – as Mr. Hood urges now –

"without considering either the remaining *Yousoufian II* factors or any other appropriate considerations." *Hoffman*, 194 Wn.2d at 282. "Engaging in de novo review of the bad faith factor would risk distorting its role as one piece of a holistic, discretionary determination of the appropriate penalty amount." *Id.* The task for an appellate court "is to review the trial court's overall penalty assessment for abuse of discretion." *Id.* "The abuse of discretion standard is extremely deferential." *Hoffman*, 4 Wn. App. 2d at 495.

V. SANCTIONS

Mr. Hood's reconsideration motion is frivolous and, as set forth above, he failed to comply with the Rules of Appellate Procedure that would justify his purported request for *re*consideration of issues never considered. Pursuant to RAP 18.9(a), the City moves for an award of attorney's fees incurred to respond to his baseless motion which further delayed resolution of this lawsuit.

VI. CONCLUSION

Because Mr. Hood did "'not challenge any of the factual findings underlying the trial court's penalty assessment," this Court's "'review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.'" Slip op. at 11 (quoting *Hoffman*, 4 Wn. App. 2d at 498). Nothing in his motion overcomes this Court's finding of "legality" and "overall reasonableness."

His motion should be denied.

This document contains 5,999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 16th day of August, 2024.

Respectfully submitted,

SUMMIT LAW GROUP, PLLC

By *s/ Jessica L. Goldman*
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Attorneys for City of Langley

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing ***via electronic service*** on the following:

William John Crittenden, WSBA #22033
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DATED this 16th day of August, 2024.

s/ Sharon K. Zankich
Sharon K. Zankich, Legal Assistant
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SUMMIT LAW GROUP

August 16, 2024 - 8:17 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85075-0
Appellate Court Case Title:	Eric Hood, Appellant v. City of Langley, Respondent
Superior Court Case Number:	16-2-00107-1

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- 850750_Answer_Reply_to_Motion_20240816081635D1019474_2067.pdf
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Respondent's Answer to Motion for Reconsideration

Sender Name: Sharon Zankich - Email: sharonz@summitlaw.com
Filing on Behalf of: Jessica L. Goldman - Email: jessicag@summitlaw.com (Alternate Email: sharonz@summitlaw.com)

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EXHIBIT 2

From: Wise, Laurel
To: bill@billcrittenden.com; Jessica Goldman
Cc: SUP DL - REPORTER
Subject: 85075-0 Eric Hood, Appellant v. City of Langley, Respondent
Date: Monday, August 26, 2024 9:56:51 AM
Attachments: - 850750 - Public - Letter - Cover Letter - 8 26 2024 - Order.pdf
- - 850750 - Public - Order - Motion for Reconsideration - 8 26 2024 - - - Dwyer, Stephen.pdf
Importance: High

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals of the *State of Washington*

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Seattle, WA 98101-4170
(206) 464-7750

Attached is a copy of a document in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail.

Any documents filed with this Court should be submitted via our E-filing Portal: https://ac.courts.wa.gov/

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The Court of Appeals
of the
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Case #: 850750
Eric Hood, Appellant v. City of Langley, Respondent
Island County Superior Court No. 16-2-00107-1

Counsel:

Enclosed please find a copy of the Order Denying Motion to Reconsider entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Lea Ennis
Court Administrator/Clerk

law

c: Reporter of Decisions

FILED
8/26/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ERIC HOOD, an individual,

Appellant/Cross-Respondent,

v.

CITY OF LANGLEY, a public agency,

Respondent/Cross-Appellant.

DIVISION ONE

No. 85075-0-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant/cross-respondent having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied. Respondent/cross-appellant's request for an award of sanctions is also denied.

For the Court:

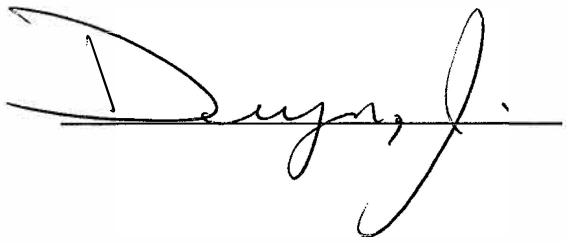

EXHIBIT 3

From:	DoNotRespond@courts.wa.gov
To:	Jessica Goldman; Sharon Zankich; Sharon Zankich
Subject:	Electronic Filing - Document Upload for Case 866869 - Confirmed
Date:	Thursday, September 26, 2024 10:57:29 AM
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Case Number: 86686-9
Case Title: Eric Hood, Appellant v. City of Langley, Respondent
From: Sharon Zankich
Organization: Summit Law Group
Filed on Behalf of: Jessica L. Goldman

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No. 86686-9

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

ERIC HOOD,

Appellant,

v.

CITY OF LANGLEY,

Respondent.

RESPONDENT'S OPPOSITION TO "MOTION TO FILE OVERLENGTH BRIEF, JUDICIALLY NOTICE RELEVANT PUBLIC RECORDS, STAY, AND SEPARATELY ARGUE WHETHER PRO SE LITIGANTS IN PRA CASES SHOULD RECEIVE ATTORNEY FEES"

Jessica L. Goldman, WSBA #21856
SUMMIT LAW GROUP, PLLC
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Attorneys for Respondent City of Langley

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I. INTRODUCTION

Appellant Eric Hood makes his living suing small public agencies alleging violation of the Public Records Act ("PRA") in the hope of extracting settlements.[1] By his own account, he has collected a "small fortune" through these lawsuits.[2] However, his favored target, the tiny City of Langley where he lives, has successfully defended itself from multiple Hood lawsuits, including the one at bar. *See also, e.g.*, *Hood v. City of Langley*, No. 875075-0-I, 2024 WL 3252978 (Div. I. July 1,

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[1] *See, e.g.*, https://www.sequimgazette.com/news/school-district-agrees-to-40k-settlement-over-public-records-dispute/ (last visited 9/24/24); https://www.yahoo.com/news/3-years-recall-records-lawsuit-120000669.html (last visited 9/24/24); https://www.wastatejournal.org/story/2022/04/27/justice/school-district-working-to-settle-public-records-lawsuit/453.html (last visited 9/24/24); https://www.ptleader.com/stories/ptsd-settles-lawsuit-over-public-records,73426 (last visited 9/24/24); https://sanjuanislander.com/news-articles/32282/san-juan-island-phd-settles-eric-hood-s-claim-for-15k (last visited 9/24/24); https://komonews.com/news/local/mount-vernon-school-district-settles-public-records-lawsuit (last visited 9/24/24).

[2] *See* https://www.heraldnet.com/news/south-whidbey-public-records-advocate-blasts-cities-responses/ (last visited 9/24/24).

2024) (unpublished) (rejecting Hood appeal). But defending these lawsuits has proven expensive and endless. There is no meritless motion that Mr. Hood will not file before the Island County Superior Court or this Court to draw out his unsuccessful lawsuits against the City of Langley. *See, e.g.*, Order Denying Motion for Reconsideration, No. 857075-0-I (Div. I Aug. 6, 2024) (the City was required to respond to the baseless reconsideration motion). The pending motion represents the latest such effort.

This motion for further delay and other improper relief comes in the narrowest possible appeal. Mr. Hood has appealed only the trial court's denial of his baseless CR 60(b) motion.[3] This is a ruling that will "not be overturned on appeal unless the [trial] court manifestly abused its discretion." *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 820,

[3] Mr. Hood was represented by a lawyer throughout the proceedings before the trial court until the day Mr. Hood filed his CR 60(b) motion. 2/8/24 Notice of Withdrawal.

490 P.3d 200 (2021) (quotation marks & citation omitted). Only the Superior Court, not an appellate court, is permitted to weigh the evidence or the credibility of the witnesses. *Dalton v. State*, 130 Wn. App. 653, 656, 124 P.3d 305 (2005).

Particularly in light of this narrow appeal, Mr. Hood's baseless motion should be denied and this case finally brought to closure.[4] *First*, there is no basis to take "judicial notice" of long-existing "new" evidence on appeal. *Second*, there is no justification here for an overlength brief. *Third*, further delay should not be allowed beyond the continuance he already was granted. And *fourth*, there should be no "separate" briefing regarding a frivolous request for *pro se* "attorney fees."

[4] The City of Langley does not here respond to Mr. Hood's baseless claims regarding the merits of his appeal.

II. ARGUMENT

A. This appeal is narrow and none of the relief Mr. Hood seeks in his motion is warranted.

Mr. Hood has appealed only the trial court's denial of the CR 60(b) motion he filed 360 days following the judgment issued in favor of the City of Langley. CP 2329-2332. Vacation of a judgment is an extraordinary remedy, *Dalton*, 130 Wn. App. at 665, and CR 60 is a limited procedural tool. *Fireside Bank v. Askins*, 195 Wn.2d 365, 375, 460 P.3d 157 (2020). "A CR 60(b) motion is not a substitute for appeal and does not allow a litigant to challenge the underlying judgment." *Winter v. Dep't of Social & Health Servs.*, 12 Wn. App. 2d 815, 830, 460 P.3d 667 (2020). Furthermore, CR 60 may not be used to set aside a judgment where the moving party "slept on [his] rights" because doing so "would clearly undermine the salutary purpose served by finality of judgments." *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). Finally, the decision to grant or deny a motion to vacate a judgment under CR 60(b) is addressed to the sound

discretion of the trial court. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013) (affirming denial of CR 60(b) motion that was "an attempt to get a second bite of the apple after [the city's] strategic choices proved unwise") (quotation marks omitted).

Mr. Hood's motion is made in the context of this narrow appeal and none of the relief he requests is appropriate.

B. Mr. Hood's request that this Court take judicial notice is unwarranted.

In review of a trial court's ruling for abuse of discretion, this Court recently held that it is "require[d] to look at the evidence before the [trial] court when it made the decision" and, so, has "decline[d] to take judicial notice" of new facts asserted on appeal. *Matter of Harris & Brimlow*, No. 84501-2-I, 2024 WL 3252219, *8 n.6 (Div. I July 1, 2024) (unpublished). The same result should follow here.

For the first time in this three-year-old lawsuit, following briefing on the merits, judgment, and denial of his CR 60(b) motion, Mr. Hood asks this Court to take "judicial notice" of an

email he received *three years ago* as well as every single document associated with yet another PRA lawsuit he filed against the City two years *before* the one at bar.

In his CR 60(b) motion, Mr. Hood asked the trial court to consider four "new" pieces of evidence *distinct* from the other "new" evidence he wishes this Court to "judicially notice" for the first time in its review of the trial court's discretionary ruling. In support of his CR 60(b) motion, he asked the trial court to consider for the first time only:

> (1) an email from "Microsoft Support" stating that there was no "restriction preventing [Hood] from receiving emails from records@langleywa.org," CP 2193;
>
> (2) his report about his conversation with an unnamed person at Whidbey Telecom, CP 2162-2163;
>
> (3) the opinion of Cody Breuning in Texas confirming that the delay messages the City

received regarding its May 7, 2020 email to Mr. Hood informed the City that the email had been "delayed" and "could lead one to believe that if the Whidbey mail server never returned the email then it went through," CP 2224-2225; and (4) an email string he received in response to yet another public records request ("PRR") to the City of Langley *in 2023* of an attorney-client privileged (and hence redacted) exchange between City staff and an outside lawyer in 2020. CP 2210-2212.

This Court should not take "judicial notice" of any of the yet further "new" evidence identified in Mr. Hood's motion.

1. The 2021 E-mails.

Mr. Hood asks this Court to take "judicial notice" of an email which *he received* from a City lawyer nearly three years ago. 9/16/24 Hood Decl., Ex. 1. To the degree this email had any possible bearing on any possible issue in this lawsuit, Mr. Hood long ago abandoned any right to seek this Court's

review of the email. It would have been improper to offer such "new" evidence had he appealed the trial court's judgment, which he did not. But we are here now on an even more slender appeal where "new" – long-available – "evidence" should not be considered.[5]

Mr. Hood's sole justification for asking for "judicial notice" now is his false claim that the City only argued at the hearing on the CR 60(b) motion that Mr. Hood had in fact received emails from the City's records@langleywa.org email account because he finally paid the fees set forth in those emails. Mot. at 14. But this statement too is wrong. The City made this same argument in its brief in opposition to the CR

[5] In his convoluted description of some of his long-ago communications with the City's former attorney, Mr. Hood says that the "City's direct communications with Hood" "violated a court order that City not 'communicat[e] directly' with Hood,) CP 79-80, paragraphs 4-5." Mot. at 13. As is evident from CP 79-80, the order directed only *Mr. Hood* to submit "future requests Plaintiff makes pursuant to Chapter 42.56" to "Defendant's counsel[.]"

60(b) motion, citing to the emails from this same email account which informed him of the amounts due:

> As the City proved without any dispute, it sent many other emails to Mr. Hood **from records@langleywa.org** (and other langleywa.org emails) thereafter. 11/18/22 McDivitt Decl., Exs. 30-31, 33, 35-36, 38-40. Mr. Hood did not – and cannot – dispute that he received these emails from records@langleywa.org "after March 18, 2020," CR 60 Mot. at 12:1-5, **because he responded to them** by paying to the City the amounts requested in those emails. 11/18/22 McDivitt Decl., Exs. 34, 38-50.

CP 2267 (emphasis original); *see also* CP 2256, 2278, 530, 547, 566, 951, 568, 949, 305, 313, 322. If his Exhibit 1 "emails support Hood's argument that the City's misrepresentations persuaded the trial court to rule that the City did not violate the PRA," Mot. at 16, there was nothing stopping him from offering them to the trial court. But he did not. His new Exhibit 1 is not part of the record this Court reviews to test for abuse of discretion.

2. The 2019 Lawsuit.

Next, Mr. Hood asks this Court to take "judicial notice" of the entire record in his *prior* lawsuit (filed in 2019) in this narrow appeal based on his contention that "the adequacy of [the] City's search" was at issue in both lawsuits. *Id.* at 8. Of course, the two lawsuits concerned different records requests and different records. The earlier 2019 lawsuit concerned Mr. Hood's July 2018 PRR. *Id.* at 6. The lawsuit at bar concerned his distinct January 2020 PRR. CP 1-3.

Mr. Hood wisely concedes that "this [2021] case 'is independent and separate'" from his 2019 case. Mot. at 14. But he offers no authority for the proposition that this Court, in reviewing the trial court's exercise of discretion, may for the first time take judicial notice of the trial court records in an entirely separate lawsuit. Instead, he cites only to a case in which the Court of Appeals affirmed *the trial court's* judicial notice of public documents in ruling on a CR 12(b)(6) motion. *Id.* at 15 (quoting *Rodriguez v. Loudeye Corp.*, 144 Wn. App.

709, 725-26, 189 P.3d 168 (2008)). That is a far cry from his request that this Court take judicial notice of the entirety of the trial court record in a separate lawsuit.

While none of this "new" evidence would make the trial court's reasoned decision an abuse of discretion, the point now is simply that there is no basis for Mr. Hood to parachute this "new" evidence about which he has long known into the appeal of a CR 60(b) motion denial.

C. Mr. Hood should not be allowed to file an overlength merits brief.

None of Mr. Hood's arguments regarding the "new" evidence he wishes to have judicially noticed – and about which he says he already has used "approximately 1251 words," Mot. at 16 – can justify increasing the length of his merits brief in this narrow appeal. He hints that there are other, undisclosed facts regarding other, undisclosed "misrepresentations," which require a longer merits brief. *Id.* These unexplained hints prove nothing other than his consistent effort to prolong his lawsuits and further burden the City of

Langley whose lawyer must travel down every rabbit hole Mr. Hood imagines.

His request for any additional words – let alone 5,000 words, representing more than 40% over the RAP 18.17(c)(2) limit – should be rejected.

D. No stay is warranted.

As he always does in every appeal, Mr. Hood already has sought and obtained a continuance of his merits brief. He requested a 45-day delay because, *inter alia*, of his vacation schedule and his need to pick vegetables in his garden. 8/20/24 Mot. to Extend Time to File Opening Brf. at 3. The Court Administrator granted that motion, requiring Mr. Hood to file his opening brief, in ***his*** appeal, in ***his*** lawsuit, by October 17, 2024. 8/27/24 Ltr Ruling.

Mr. Hood now asks this Court to stay this narrow appeal while the appeal of a separate case is adjudicated. He does not say *why* or *how* "the adequacy of [the] City's search in this case will be impacted by this Court's conclusions in *Hood v.*

Langley (2019)[.]" Mot. at 18. He has identified no possible legal or factual connection between the two cases because none exists. The fact that he continues to sue the City of Langley does not provide the missing link.

No further delay can be justified. The City of Langley is entitled to closure of this lawsuit, finally. It would most definitely "be prejudiced," *id.*, by yet another effort to prolong this baseless lawsuit.

E. Mr. Hood should not be allowed to "separately" brief his baseless claim for *pro se* "attorney fees."

Mr. Hood is not entitled to "attorney fees" for the work he has performed since his lawyer quit. A *pro se* litigant "incur[s] no attorney fees and is not entitled to them under RCW 42.56.550(5)." *Mitchell v. Wash. State Dep't of Corrections*, 164 Wn. App. 597, 608, 277 P.3d 670 (2011); *accord West v. Thurston Cnty.*, 168 Wn. App. 162, 195, 275 P.3d 1200 (2012).

Mr. Hood knows this is the law because Division III of the Court of Appeals just told him so. *Hood v. City of Prescott*, No. 39618-5-III, 2024 WL 1883967, *4 (Div. III Apr. 30, 2024) (unpublished). And he also knows this because this Court previously told him so: "[N]onlawyers litigating PRA actions pro se incur no attorney fees and are not entitled to fee awards under RCW 42.56.550(4)." *Hood v. City of Nooksack*, 18 Wn. App. 2d 1050, 2021 WL 3291749, *7 n.10 (Div. I Aug. 2, 2021) (unpublished). This Court further explained to him that the only time "Washington courts have awarded attorney fees to pro se litigants" is "when those litigants were themselves attorneys[.]" *Id.* Division II of the Court of Appeals likewise has held that "a nonlawyer litigating a PRA action incurs no attorney fees and is not entitled to a fee award under RCW 42.56.550(4)." *Zellmer v. Dep't of Labor & Indus.*, 14 Wn. App. 2d 1034, 2020 WL 5537007, *6 (Div. II Sep. 15, 2020) (unpublished), *rev. denied*, 196 Wn.2d 1044, 481 P.3d 551

(2021); *accord Benitez v. Skagit Cnty.*, 13 Wn. App. 2d 1019, 2020 WL 1917453, *12 (Div. I Apr. 20, 2020) (unpublished).

Notably, Mr. Hood based his argument that he should be allowed to "separately" brief his claim to *pro se* attorney fees on a motion he filed with the Supreme Court in which he "previously argued this issue. Appendix 1." Mot. at 18. However, he neglected to advise this Court that the Chief Justice of the Supreme Court, for the Court, rejected his "previous argu[ment]" along with each of the various other ways Mr. Hood sought to improperly delay conclusion of that lawsuit.

IT IS ORDERED:

> That the petition for review is denied. The Petitioner's "Motion for Extension of Time to File Reply to Respondent's Answer," the Petitioner's "Motion for Additional Evidence on Review," and "Second Motion for Additional Evidence on Review" also are denied. The Deputy Clerk's motion to strike the reply to the answer to the petition for review is granted.

Hood v. Centralia College, Supreme Court No. 101464-3, Order (Mar. 8, 2023).

Not only should Mr. Hood not be allowed to "separately brief" this issue but raising it at all is frivolous and should subject him to sanctions.

III. CONCLUSION

For each of these reasons, the City of Langley respectfully requests that this Court deny Mr. Hood's unfounded "Motion to File Overlength Brief, Judicially Notice Relevant Public Records, Stay, and Separately Argue Whether Pro Se Litigants in PRA Cases Should Receive Attorney Fees." The Supreme Court has emphasized "the importance of speedy review of PRA claims." *Kilduff v. San Juan Cnty.*, 194 Wn.2d 859, 871, 453 P.3d 719 (2019). The City asks that this important guidepost be enforced here.

This document contains 2,596 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 26th day of September, 2024.

Respectfully submitted,

SUMMIT LAW GROUP, PLLC

By *s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
jessicag@summitlaw.com

Attorneys for City of Langley

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing RESPONDENT'S OPPOSITION TO MOTION TO FILE OVERLENGTH BRIEF, JUDICIALLY NOTICE RELEVANT PUBLIC RECORDS, STAY, AND SEPARATELY ARGUE WHETHER PRO SE LITIGANTS IN PRA CASES SHOULD RECEIVE ATTORNEY FEES ***via electronic service*** on the following:

Eric Hood, *pro se*
ericfence@yahoo.com
PO Box 1547
Langley, WA 98260

DATED this 26th day of September, 2024.

s/ Sharon K. Zankich
Sharon K. Zankich, Legal Assistant
sharonz@summitlaw.com

SUMMIT LAW GROUP

September 26, 2024 - 10:57 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86686-9
Appellate Court Case Title:	Eric Hood, Appellant v. City of Langley, Respondent
Superior Court Case Number:	21-2-00226-0

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Opposition to Motion to File Overlength Brief, Judicially Notice Relevant Public Records, Stay, and Separately Argue Whether Pro Se Litigants in PRA Cases Should Receive Attorney Fees

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Superior Court Case Number:	16-2-00107-1

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