70657-8

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No. 70657-8-I

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

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Respondent,

v.

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

Defendants/Appellants.

REPLY OF APPELLANTS

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1. INTRODUCTION & SUMMARY OF REPLY

When City of Shoreline (City) made a CR 68 Offer of Judgment to the O'Neills to resolve this long-running Public Records Act (PRA) lawsuit, the offer was silent on what legal rules of procedures would apply to the O'Neills' motion for attorney fees. In the face of such silence in an agreement, courts presume the parties intended existing law to apply. Thus, courts interpreting CR 68 agreements have repeatedly applied existing law to resolve claims for attorney fee awards.

The Court should apply this principle to the interpretation of the Judgment of Offer and Acceptance that the trial court entered on October 9, 2012, and hold that the civil rules governed the resolution of the attorney fee issue.

As the City demonstrated in its opening brief, the Judgment on Offer and Acceptance was a "judgment" as defined in CR 54(a) and was entered on October 9, 2012, pursuant to the requirements of CR 58. This triggered CR 54(d)(2)'s 10-day deadline. The O'Neills did not comply with this deadline and filed the attorney fee motion two weeks late. Moreover, they failed to comply with CR 6(b)(2) by filing a motion for an extension supported by a showing of excusable neglect and instead argued that there was no judgment that complied with RCW 4.64.030. This was a legal error that had already been rejected by the Supreme Court and therefore cannot qualify as excusable neglect.

Now, for the first time on appeal, the O'Neills assert that they did not have to comply with CR 54(d)(2) because the Offer of Judgment did

not state that CR 54(d)(2) applied. This ignores the presumption that existing laws – here the civil rules – apply. The parties' silence was acquiescence to this presumption, not a justification to ignore it.

This is not a dispute over whether the O'Neills had a substantive right to attorney fees. Nor was there a defect in the City's offer that caused the O'Neills to abandon their right to attorney fees. Rather the abandonment resulted from their own legal error in determining that they did not have to comply with CR 54(d)(2), the specific procedure for obtaining an attorney fee award imposed by the Supreme Court. They then failed to employ CR 6(b)(2) and move for an extension or show excusable neglect. Ever since the adoption of the first civil rules in 1925, the Supreme Court has recognized that the failure to comply with these procedures can result in a loss of a substantive right. *Nudd v. Fuller*, 150 Wash. 389, 390, 273 P. 200 (1928) (party waived substantive right to appeal by missing deadline).

Despite this non-compliance with the procedural rules, the trial court accepted the O'Neills' untimely motion for attorney fees over the City's objection. While CR 6(b)(2) gives courts some discretion to extend a missed deadline, the O'Neills did not comply with that rule. Thus, the trial court abused its discretion by accepting the late attorney fee motion.

This Court should vacate that award and rule that as a matter of law, the O'Neills abandoned their right to attorney fees.

2. RESPONSE TO THE O'NEILLS' STATEMENT OF THE CASE

The underlying dispute between the City and the O'Neills is not relevant in the current case and can be found in the two published opinions in this case and is accurately summarized in the City's opening brief. A few points are worth emphasizing however.

2.1 The O'Neills Did Not Have a Right to Attorney Fees Until the Court Entered the Judgment on Offer and Acceptance on October 9, 2012

The trial court's August 2, 2013 partial summary judgment order was not a final judgment and only ruled the O'Neills were entitled to attorney fees on one claim, leaving five other claims for further resolution. CP 27-19; Br. of Respondent at 2 (noting the partial ruling did not resolve the O'Neills' claims that records had not been produced in response to five separate requests).

In contrast, the trial court's October 9, 2012 Judgment on Offer and Acceptance was a final judgment on all claims. Because it resolved all claims, it did not just implement the August 2 ruling. See Br. of Respondents at 4-5 (describing the broader effect of the offer of judgment). This was the final judgment as defined by CR 54(a) and it was entered on October 9, 2012, when it was delivered to the Clerk. CP 55-64; CP 514 (citing court docket).

2.2 The Parties Intended to Require the O'Neills to File a Motion to Enforce Their Right to Attorney Fees

By making an offer of judgment, the City knew if accepted, it would entitle the O'Neills to attorney fees. Thus, the parties both intended

the Judgment on Offer and Acceptance to give the O'Neills a substantive right to those fees. The objective evidence, however, demonstrates that the parties also intended to require the O'Neills to file a motion to enforce that right.

The first indication comes before the offer of judgment, in the language the O'Neills drafted in their proposed order on partial summary judgment, which was adopted by the trial court in its August 2 order:

> The Court HEREBY Orders that pursuant to RCW 42.56.550(4) Plaintiffs shall be awarded reasonable attorney's fees and all costs incurred in this action to date, and statutory penalties, to be determined after subsequent briefing and argument. Plaintiffs shall be entitled to an award of reasonable attorney's fees and all costs incurred in connection with such **fee and penalty motions**, the amounts of which shall be determined by the Court in conjunction with the **fee and penalty motions**.[1]

Second, the actions and statements of the O'Neills demonstrate that they knew that after accepting the offer of judgment, they still had to file a motion to enforce that right. When the O'Neills' attorney first emailed the City's attorney to accept the offer of judgment, she stated "We will prepare a fee and cost motion ...." CP 371. The O'Neills then filed their untimely request, which they entitled "Motion for Determination of Amount of Fee and Cost Award." CP 336. In the declaration accompanying that motion, counsel for the O'Neills stated that this was the "motion" contemplated by the agreement on penalties. CP 70.

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[1] CP 28-29 (emphasis added). Though not a final "judgment," the order shows as a past practice, that the parties used briefing and motion interchangeably.

Even when responding to the City's CR 54(d)(2) objection, the O'Neills continued to acknowledge the Judgment on Offer and Acceptance required that they file "a fee and cost motion[.]" CP 454; see also CP 461 (Second Earl-Hubbard Declaration referring to attorneys fees incurred in filing the "Motion" for attorney fees).

2.3 The Parties' Actions Demonstrate that They Intended the Civil Rules to Apply to the O'Neills' Attorney Fee Motion

Throughout the case, the O'Neills have repeatedly asserted (correctly) that the court procedures in the civil rules govern the resolution of Public Records Act cases. *See, e.g.*, Respondents' Answer to Petition for Discretionary Review[2] at 14-15 (arguing that the civil rules define the procedures for resolving PRA cases).

The O'Neills used the civil rules to their advantage when they noted their Motion for Determination of Amount of Fee and Cost Award pursuant to King County Local Rule 7 for only six days out, refusing to allow the City any more time than provided under that rule to file the City's opposition. See Br. Of Respondent at 10-11 (acknowledging court rules governed motion), CP 423 ("Further, fee and cost motions in King

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[2] A copy of this brief is available on the Washington Courts website on the "Supreme Court Briefs" section, which is at: http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08). See excerpt, Appendix Ex. A.

Counsel for the O'Neills has also made this assertion that the procedures of the Civil rules govern in other cases. See, e.g., *Neighborhood Alliance v. Spokane County*, Brief of Amicus Curiae Allied Daily News et al., at page 1) (arguing discovery was allowed because "the civil rules apply" in PRA cases) (also available in the "Supreme Court Briefs section). See excerpt, Appendix Ex. B.

County are noted as six court day motions, so the Defendants' [sic] have no right to demand more time to respond."). Thus, with the exception of their failure to file a timely fee motion, the O'Neills' actions show they believed the civil rules applied.

2.4 The City's Discovery Request Did Not Interfere with the O'Neills' Ability to File a Timely Attorney Fee Motion

The O'Neills make the factually baseless claim that the City's discovery requests prevented them from meeting the CR 54(d)(2) 10-day deadline. Specifically, the O'Neills claim:

- "From September 28, 2012, to October 29, O'Neills prepared discovery responses related solely to the upcoming proceeding to determine the amount of the fee and cost award."[3]
- "The O'Neills and their counsel spent many hours searching for responsive materials and researching whether or not such records could lawfully be provided."[4]
- "As the defendants knew it would, the discovery put a hault [sic] to the documentation and briefing being prepared up through the day discovery was served and the documentation and briefing was not able to be filed until after discovery responses were timely produced 30 days later."[5]

The billing records the O'Neills submitted demonstrate these assertions are deceptive and misleading. Between September 28 and October 16, Attorney Earl-Hubbard did not bill one single hour on

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[3] Respondent's Br. at 27

[4] Respondent's Br. at 8

[5] Respondent's Br. at 43; see also 41 (characterizing discovery as "extensive and burdensome"); 42-43 (general characterization of discovery)

discovery or any other task in the O'Neill case. CP 196. Ultimately, she spent less than 12 hours preparing the discovery responses. CP 196-97

Attorney Brennan only billed 1.5 hours prior to October 16 and spent less than 7 hours total. CP 366. Moreover, as he candidly admitted, he waited until November 1 (after the discovery was due) to prepare his billing entries, even though the City had requested those entries as part of its discovery. CP 480-81.

2.5 The Record Does Not Support the O'Neills' Characterization of the Trial Court's Reasoning

In their brief, the O'Neills repeatedly claim that it was "clear" the trial court adopted the O'Neills' reasoning when it rejected the City's argument regarding CR 54(d)(2). But the trial court gave no indication of its reasoning, and the court's orders (which are based on the O'Neills' proposed orders) do not address CR 54(d)(2) or CR 6. The Court stayed silent when it summarily denied the City's motion for reconsideration, filed in an attempt to get a ruling on CR 54(d)(2). Thus the O'Neills' claims about the trial court's reasoning are unsupported speculation.

This lack of any record concerning the trial court's justification does not, however, require remand because as demonstrated below and in the City's opening brief, the three arguments offered by the O'Neills to excuse their noncompliance with CR 54(d)(2) all fail as a matter of law.

3. ARGUMENT

In entering into an agreed Judgment on Offer and Acceptance, the parties intended that the O'Neills would have to comply with the rules of

civil procedure to enforce their right to attorney fees. That judgment resolved all of the claims in the lawsuit, it was signed by the judge and it was filed with the clerk on October 9. Therefore it was a final judgment, and CR 54(d)(2) required the O'Neills to file their motion for attorney fees within 10 days. The O'Neills never filed a motion seeking to extend that deadline and as a matter of law their failure was not caused by excusable neglect. Accordingly, the trial court erred in awarding attorney fees.

3.1 The O'Neills Cannot Raise Their Contract-Based Argument for the First Time on Appeal

The rule authorizing appellate courts to affirm erroneous trial court rulings are alternate grounds is not absolute; rather it is conditioned on the alternative ground being supported by "the pleadings and the proof." *Niven v. E.J. Bartells Co*, 97 Wn. App. 507, 513, 983 P.2d 1193 (1999). Furthermore, if the alternate ground involves questions of fact, it cannot be used to sustain an erroneous ruling when the record below was not adequately developed. *Niven*, 97 Wn. App. at 413.

The O'Neills did not make their contract argument below and concede that the intent of the parties is a question of fact. Thus, it cannot serve as an alternative ground for affirming the trial court's erroneous decision to ignore CR 54(d)(2).

3.2 The Parties Intended the Civil Rules to Govern the Trial Court's Enforcement of the O'Neills' Right to Attorney Fees.

Even if the O'Neills' contract argument were properly before the Court, the record below only allows the Court to reach one reasonable

conclusion – in the CR 68 agreement, the parties intended that the O'Neills would have to comply with procedures in the civil rules when they sought to enforce their right to attorney fees.

As the O'Neills correctly indicate, a court enforcing an agreed judgment should use contract principles to determine the intent of the parties if the court is later called on to resolve a dispute. Moreover, the O'Neills are correct that the parties intended the O'Neills to have a substantive right to attorney fees as a result of the agreed Judgment on Offer and Acceptance, based on RCW 42.56.550.

But the parties also intended that the civil rules would govern the procedures for enforcing that right. The O'Neills' argument erroneously characterizes the court-imposed procedures as an unintended limitation on their substantive right to attorney fees. The default presumption with CR 68 judgments (and any contract) is that the parties intend existing law to apply to the contract unless they expressly provide for a different rule of law to apply. *Wagner v. Wagner*, 95 Wn.2d 94, 98-99, 621 P.2d 1279 (1980) (general contract law); *Wash. Greensview Apartment Assoc. v. Travelers Prop. Cas. Co.*, 173 Wn. App. 663, 680, 295 P.3d 284 (2013) (holding parties entering into agreed judgment resulting in a CR 68 Offer of Judgment are presumed to have intended existing law to govern that agreement, including the court rules and cases interpreting those rules). Minor word variations between existing law and a contract do not indicate an intent to apply an alternate rule of law when the court can construe the

contract's wording consistently with existing law. *Wagner*, 95 Wn.2d at 98-99.

The offer of judgment provided no alternate rule of law governing procedures for enforcement. And while a court can look beyond the contract at the objective manifestations of intent, it cannot import one party's unstated subjective intent into the contract, and Washington courts have long applied this principle to offers of judgment to resolve attorney fee disputes arising after judgment is entered. *See, e.g., Wash. Greensview*, 173 Wn. App. at 679-80.

Thus, on one hand, when the language of the offer does not provide for an alternate rule to govern, courts have applied existing law. *Wash. Greensview*, 173 Wn. App. at 673 (offer did not provide for alternative rule so "underlying authority" controlled); *Lietz v Hansen Law Offices*, 166 Wn. App. 571, 586, 271 P.3d 899 (2012) (offer did not provide for alternative rule so "underlying statute" controls); *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 281, 131 P.3d 910 (2006) (same).

On the other hand, when the parties include alternative rules, the courts have applied those alternative rules. *See, e.g., Johnson v. Dep't of Transportation*, -- Wn. App. --, 313 P.3d 1197 (2013) (offer did not include award of any attorney fees incurred after it was accepted, even though plaintiff would normally have been entitled to fees incurred

litigating over the amount of the fee award, because offer stated it included fees "incurred up to the date/time of the offer").[6]

Here, the only reasonable interpretation is that the parties intended the rules of civil procedure to govern the O'Neills' enforcement of their right to attorney fees. This includes compliance with CR 54(d)(2).

If the parties had intended other procedural rules to govern the O'Neills' motion for attorney fees, they would have identified those procedural rules in the Judgment on Offer and Acceptance. They did not, and therefore under *Wagner* and the CR 68 cases above, the Court must presume the parties intended the existing law –the civil rules –to apply. This conclusion is reinforced by the parties' objective manifestations of intent summarized in sections 2.2 and 2.3 above.

Based on the absence of any language governing procedures, the O'Neills assert on appeal the offer of judgment showed the City "agreed without qualification to pay the O'Neills their attorney fees." Br. Of Respondent at 22 (emphasis added). If this were true, it would mean the O'Neills could have waited years to file their motion, the motion itself could have totaled 100 pages, and the O'Neills could have noted it for the following day. It also would mean that their non-compliance with any

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[6] *See also Hodge v. Devel. Serv. of Am.*, 65 Wn. App. 576, 828 P.2d 1175 (1992) (where offer was silent on attorney fees and existing law made attorney fees part of costs, offer included attorney fees and plaintiff's "acceptance" that attempted to reserve the plaintiff's right to seek attorney fees was a counter-offer (and rejection), rather than an acceptance); *McGuire v. Bates*, 169 Wn. 185, 191, 234 P.3d 205 (2010) (settling "all claims" "pursuant to RCW 4.84.250-.280" was not silent as to fees but expressly showed defendant intended to include fees as one of the claims sought and therefore plaintiff who accepted the offer was not entitled to a separate award).

other court rules, such as RAP 18.1, would not waive their right to attorney fees. The O'Neills have invoked and complied with RAP 18.1, showing even they know their right to attorney fees, like any other right, is subject to procedures required by law.

The O'Neills' claim of a right to fees "without qualification" is similar to the claim this Court rejected in *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005). There, after the plaintiff accepted an offer of judgment and became entitled to attorney fees, the plaintiff asserted that the defendant, by making the offer of judgment, was "prohibit[ed] ... from challenging the amount of those fees." *Do*, 127 Wn App. at 190. This Court disagreed and held that even when a party has a right to a fee award, existing procedures for determining the amount of the award still applied. *Do*, 127 Wn. App. at 190.

If the O'Neills wanted other procedures to apply, such as more than 10 days to file their motion for attorney fees, they should have included that qualification in their acceptance or otherwise bargained for more time. Alternatively, they could have filed a motion for an extension as authorized by CR 6(b). If they had filed that motion before the 10-day deadline had expired, the trial court could have granted it based on a showing of cause, rather than the much higher standard of excusable neglect.

But the burden was not on the City to identify what procedures *did* apply unless the City had wished to change those procedures. *See e.g., Wash. Greensview*, 173 Wn. App. at 680 (parties to a CR 68 agreement

are presumed to know the law and intend to incorporate the law into the contract unless they unambiguously indicate otherwise). Under O'Neills' approach, every offer of judgment would require a lengthy restatement of all applicable state and local rules in order to protect the offering party from unrestrained liberties taken by the accepting party after acceptance. *See Seaborn*, 132 Wn. App. at 272 ("CR 68 offer need not be a laundry list of everything that the offer includes").[7]

Thus, the intent of the parties, as demonstrated by the language in the offer of judgment and the parties objective manifestation of their intent, leads to only one conclusion – the parties intended that the O'Neills would have to comply with the civil rules and file a motion to enforce their right to attorney fees. These would include CR 54(d)(2).

3.2.1 **The O'Neills confuse substantive rights and procedural requirements.**

The City has never claimed that the O'Neills did not have a substantive right to attorney fees after the Court entered the Judgment on Offer and Acceptance. See, e.g., CP 443 (acknowledging right). Rather the City has argued that the O'Neills were still required to follow the

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[7] Although the O'Neills do not claim otherwise, neither the term "subsequent" nor "briefing" used in the Offer of Judgment indicate the parties intended to apply some alternate set of procedures. Both these terms can be read harmoniously with the presumption that the parties intended the civil rules to apply, including CR 54(d)(2). *See Wagner*, 95 Wn.2d at 99 (alternative wording did not indicate intent to apply alternative rule of law); *Lietz*, 166 Wn. App. at 591-92 (use of alternative term "settlement" in CR 68 offer of judgment did not indicate an intent to apply an alternative rule of law). Moreover, as demonstrated in section 2.2 above, the parties used "briefing" and "motion" interchangeably. This is consistent with King County Local Rule 7(b)(5)(B), which effectively eliminates the distinction between a motion and briefing by combining them. See also CR 7 (requiring a "motion" to obtain affirmative relief from the trial court).

procedures in the civil rules to enforce that right, and by failing to do so, the O'Neills abandoned that right.

A similar argument was rejected by the court in *Corey v. Pierce County*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010). There, the plaintiff argued that the statutory grant of a right to attorney fees immunized the right from the CR 54(d)(2)'s 10-day deadline. The court affirmed that the statute "entitled [the plaintiff] to her attorney fees" and even awarded fees on appeal. *Corey*, 154 Wn. App. at 773. But for the fees incurred in the trial court, the court found that the plaintiff had abandoned her right to fees by not complying with CR 54(d)(2)'s 10-day deadline. *Corey*, 154 Wn. App. at 773-74.[8]

When a statute such as RCW 42.56.550 provides for attorney fees when certain conditions are met, this creates a substantive right to attorney fees. *Pennsylvania Life Ins. Co. v. State*, 97 Wn.2d 412, 414, 645 P.2d 693 (1982). While courts cannot alter the rules vesting substantive rights, courts are authorized to promulgate procedure rules for enforcing rights. *State v. Templeton*, 148 Wn.2d 193, 213, 59 P.3d 632 (2002); *see also*

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[8] While *Corey* did not involve an offer of judgment, the Washington cases interpreting CR 68 make it clear judgments based on CR 68 do not immunize a party from a disappointing attorney fee result. Moreover, courts from other jurisdictions have ruled that a plaintiff entitled to attorney fees after accepting a rule 68 offer of judgment must still comply with the time limitations in rule 54(d). *See, e.g., King v. Midland Credit Management, Inc.*, -- Fed. Appx. --, 2013 WL 6439682 (10th Cir. 2013) (unpublished but citation authorized by Fed. R. App. P. 34.1 and CR 14.1) (holding plaintiff who accepted rule 68 Offer of Judgment waived attorneys fees by not filing motion within 14 days are required by rule 54(d)(2)) (Appendix Ex. C); *Gardner v. Catering by Henry Smith*, 205 F. Supp. 2d 49 (E.D.N.Y. 2002) (rejecting claim that 14-day time limit in federal rule did not apply because the judgment stemmed from a CR 68 offer of judgment).

RCW 2.04.190-.200 (legislation granting courts the power to adopt procedural rules and providing that court-adopted procedural rules trump legislation governing procedures). A party failing to comply with these procedures may therefore abandon and loose a substantive right.

The Supreme Court illustrated this distinction in *Nudd v. Fuller*, 150 Wash. 389, 390, 273 P. 200 (1928) soon after the legislature granted the Court the right to adopt court rules of procedure. Prior to the adoption of those rules, statute provided 90 days to file an appeal, but the new rules required an appeal to be filed within 30 days. The Court acknowledged that the right to appeal is a substantive right that "cannot be taken away by the rule-making power of the court[.]" *Nudd*, 150 Wash. at 390. The Court went on to hold a party can, however, abandon that substantive right by failing to meet a deadline in a procedural rule, such as the new 30-day time limit for filing an appeal. *Nudd*, 150 Wash. at 390.[9]

Similarly, Division II ruled that a party abandoned its right to attorney fees granted by statute by failing to comply with procedural requirements in local court rules, including the 14-day deadline for seeking those fees. *Smukalla v. Barth*, 73 Wn. App. 240, 243-44, 868

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[9] Federal courts have repeatedly noted this distinction when ruling that the failure to comply with the deadline under CR 54(d)(2) justified denying a party's motion for attorney fees. *See, e.g., Silvanch v. Celebrity Cruise, Inc.*, 333 F.3d 355 367 (7th Cir. 2002) ("substantial rights may be ... forfeited if they are not asserted within time limits established by law"); *44 Liquoremart, Inc. v. Rhode Island*, 940 F. Supp. 437, 441 (D.R.I. 1996) ("'In general, rules limiting the time within which fee claims may be filed are enforceable according to their tenor.'") (*quoting Witty v. Dukakis*, 3 F.3d 517, 519 (1st Cir.1993)).

P.2d 888 (1994), overruled on other grounds by *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 70 P.3d 1154 (2003).

The O'Neills are making an argument similar to the arguments rejected in *Nudd* and *Smukalla*. The City has not claimed the O'Neills had any less than the complete substantive right to attorney fees created by RCW 42.56.550. But the O'Neills, like any other party who obtained a right to attorney fees, were required to follow the civil rules to enforce that right in court.

As a result of their confusion regarding substantive rights and procedural rules, the O'Neills cite to a series of objective events as evidence that the parties intended to grant the O'Neills a substantive right to attorney fees "without qualification." Nothing in this evidence, however, suggests either party intended to allow the O'Neills to ignore the procedural requirements when seeking to enforce that right.

First, the O'Neills say the City's silence shows the City did not intend the civil rules to apply. But this claim ignores the presumption that the civil rules apply. Moreover, the City had no reason to think the O'Neills were unaware of the CR 54(d)(2) deadline.[10] The City did not know the O'Neills' attorneys had decided to halt all work on the case for two week until October 16. And when O'Neills' counsel contacted the City on the 16, it was reasonable for the City to presume that the O'Neills

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[10] Even if the City knew the O'Neills were unaware of the 10-day deadline, the City did not have any obligation to speak. See *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313 (2000) ("Plaintiff's counsel was not legally obligated to bring [the defendant's] mistake, if any, to [the defendant's] attention.").

were preparing to file their motion and discovery together by the October 19 deadline. Thus, nothing in the silence of the City's attorneys qualifies as evidence of a subjective intent to have other rules of procedure apply.

Second, the City's issuance of discovery pursuant to the civil rules in no way suggests that the City believed the civil rules did not apply. Nothing in the City's discovery requests suggests the O'Neills could ignore CR 54(d)(2) or that they had to respond to discovery before filing their motion for attorney fees. At the time, that 10-day clock had not started so no conflict was apparent. Moreover, the requests said responses should be filed "within" 30 days, suggesting the O'Neills could have filed responses sooner. And while CR 54(d)(2)'s 10-day deadline and the 30-day discovery deadline will sometimes conflict as they ended up conflicting here, this could have been resolved by the O'Neills seeking an extension of the 10-day deadline pursuant to CR 6(b) or providing the responses in less than 30 days. Thus, the issuance of discovery was not an objective manifestation of the City's intent that the O'Neills could ignore CR 54. The O'Neills' arguments regarding discovery are more thoroughly addressed in sections 3.4 and 3.5 below.

Finally, the O'Neills cannot credibly claim the City's request for an extension of time to file the City's opposition to the fee motion manifested an intent that CR 54(d)(2) does not apply. First, the letter containing that request reaffirms the City's position on CR 54(d)(2). Second, by asking for an extension, the City is manifesting its intent that

the civil rules do apply, just as the O'Neills enforcement of the deadline shows they intended the civil rules to apply.

At most, the O'Neills alone did not think CR 54(d)(2) applied. This subjective intent was kept to themselves and cannot be used to interpret the agreement. *See Seaborn*, 132 Wn. App. at 270-71 (appellant's sincere belief was not relevant because "that intention was not expressed in the contract"). Thus, even if the O'Neills have properly raised this contract argument for the first time on appeal, it does not justify the trial court's failure to enforce CR 54(d)(2).

3.2.2 The O'Neills were required to file a motion after Judgment on Offer and Acceptance to obtain an attorney fee award

The O'Neills' argument that the partial summary judgment order made any motion unnecessary is baseless. Even when a right to attorney fees is established, a party must still file a motion pursuant to CR 54(d)(2) to determine what amount is reasonable. 4 WASH. PRAC. CR 54 §15.[11] Even that order required the O'Neills to file a motion for attorney fees.

Moreover, the trial court's order granting partial summary judgment only resolved one claim and it set a case schedule for the resolution of the O'Neills' remaining claims. CP 39-40. Therefore, it was not an enforceable judgment and the award of attorney fees in the order did not cover fees incurred pursuing the unresolved claims. CR 54(a); *Jensen v. Arntzen*, 67 Wash.2d 202, 209-10, 406 P.2d 954 (1965) (attorney

[11] In PRA cases, a trial court must award successful plaintiff attorney fees but the court has discretion to determine the amount of that award. *Sanders v. State*, 169 Wn.2d 827, 867, 240 P.3d 120 (2010).

fee award could not be enforced until the final judgment was entered). Moreover, because it was not a judgment, the order, including the award of attorney fees, was "subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties." *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992)

In contrast, the scope of the Offer of Judgment was much broader because it offered $100,000 in penalties to resolve all claims, not just the one claim addressed in the partial summary judgment order. The O'Neills acknowledge the broader scope of the offer, noting by accepting it they had to forego any right "to pursue the other four PRA requests" that they assert would have entitled them to penalties beyond $100,000. Br. of Responded at 4.[12] Accordingly, while the partial summary judgment order only addressed attorney fees for the one claim it resolved, the O'Neills right to attorney fees after accepting the offer of judgment was broader, covering all of the claims. Because this right was broader, the O'Neills' reliance on the August 2 order is misplaced.

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[12] The O'Neills cite to self-serving language in the July 17, 2013 document they entitled "final judgment" to support their claim that the August 2, 2012 partial summary judgment order fully resolved the attorney fee claims. The City timely objected to that document (CP 522-26) and the self-serving language cannot change legal distinction between the issues covered by the partial summary judgment and the offer of judgment. Moreover, because the October 9 Judgment was a final judgment that triggered the 10-day time limit, the court could not revive the missed deadline by filing a new document called final judgment. *See Pybas v. Pailino*, 73 Wn. App. 393, 400-01, 869 P.2d 427 (1994) (holding trial court could not circumvent need to excusable neglect by simply re-issuing a final judgment); *Witty v. Dukakis*, 3 F.3d 517, 520 (1st Cir.1993) (party cannot "resurrect" its right to attorney fees after missing a deadline by asking the court to enter a new "judgment" that simply "to confirm what the court has already done").

3.3 The Trial Court Entered Judgment and thus Triggered the CR 54 10-Day Deadline on October 9

As demonstrated in Section 4.1 of the City's opening brief, the trial court's Judgment on Offer and Acceptance qualified as a "judgment" as defined in CR 54(a) because it resolved all of the claims in the lawsuit and that judgment was "entered" pursuant to CR 58 when the Court delivered it to the clerk on October 9. The court rules (specifically CR 54(d)(2) and RAP 2.4(g)) contemplate the existence of a final judgment even though attorney fees have not yet been awarded. Thus, the O'Neills claim that the October 9 order was not final simply because it did not resolve the issue of attorney fees is specious.[13]

One argument the O'Neills raise does need to be addressed – their disingenuous claim that the Supreme Court's decision in *Bank of America v. Owens*, 173 Wn.2d 40, 266 P.3d 211 (2011) does not apply the meaning of "judgment" in CR 54(d)(2). To accept the O'Neills' argument, the Court would have to find that the meaning of the term "judgment" in CR 54(d)(2) was controlled by RCW 4.64.030 rather than CR 54(a). No fair reading of *Owens* could lead to that absurd result.

Judgment was entered on October 9, giving the O'Neills until October 19 to file their attorney fee motion. While they could have

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[13] Because the O'Neills signed the proposed judgment and waived presentment (CP 56), their complaints about the absences of a "filed" stamp and 2-day delay in receipt of that judgment are red herrings. *See, e.g, Metz v. Sarandos*, 91 Wn. App. 357, 957 P.2d 795 (1998) (10-day deadline for filing motion for reconsideration ran from date order was signed and delivered to the clerk, not from date received by the parties). Moreover, the O'Neills conspicuously ignore the fact that they cashed the City's $100,000 check on October 16, showing they thought a final judgment had been entered. CP 496.

avoided this 10-day deadline in a variety of ways, once they missed it, they were required to comply with CR 6(b)(2) to excuse the missed deadline. As explained in the next section, the O'Neills did not and cannot comply with the requirements of that rule.

3.4 The O'Neills Have Not Established and Cannot Demonstrate Excusable Neglect

Once the O'Neills missed the 10-day deadline, CR 6(b)(2) limited the trial court's authority to excuse the missed deadline. *See Metz v. Sarandos*, 91 Wn. App. 357, 957 P.2d 795 (1998) (holding extension of time to file motion for reconsideration improper where it was not authorized by CR 6(b)). As demonstrated in the City's opening brief, the O'Neills' legal error in relying on RCW 4.64.030 to determine the Judgment on Offer and Acceptance was not a "judgment" cannot, as a matter of law, amount to excusable neglect. See City's Opening Brief Section 4.2; *see also Pybas v. Pailino*, 73 Wn. App. 393, 400-01, 404, 869 P.2d 427 (1994) (reversing trial court's effort to excuse missed deadline because otherwise deadline would become "a dead letter" and "attorney's ignorance of the law does not constitute excusable neglect").

The City's decision to issue discovery cannot support a finding of excusable neglect. First, it did not cause the O'Neills to miss the CR 54 deadline – their legal error was the cause. Second, discovery did not in fact interfere with their ability to file a timely motion. After discovery was served, the billing records show one of the O'Neills' attorneys did absolutely no work on the case for over two weeks after the discovery was

issued and their other attorney only worked for 1 ½ hours. CP 196, 366. This two-week vacation from the case shows the discovery did not cause the O'Neills to file their motion two weeks late.

Third, as a matter of law, the courts have rejected efforts by litigants to blame their failure to comply with deadlines on other parties or the court. *See, e.g., Doolittle v. Small Tribes*, 94 Wn. App. 126, 971 P.2d 545 (1999) ("it is not the responsibility of the court or the remaining parties to notify the dismissed party of entry of final judgment" and thus party's failure to file request for costs within 10 days after entry of judgment waived right to costs); *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313 (2000) (missed deadline waived right to appeal multi-million dollar judgment). Thus, if the trial court relied on the City's discovery request to support a finding of excusable neglect, then that was an error.

Finally, the court rules cannot be "interpreted" to excuse the O'Neills' failure to comply with CR 54(d)(2)'s deadline.[14] The trial court's discretion to excuse a deadline in the civil rules is granted and constrained by CR 6(b). Thus, while a request for an extension before a deadline has passed does not require a motion and may be granted merely for cause, once the deadline has based, CR 6(b)(2) limits the court's

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[14] *Mitchell v. W.S.I.P.P.*, 153 Wn. App. 803, 225 P.3d 280 (2009) addressed an extreme situation where a litigant defrauded the court by submitting fake cost bills and does not justify excusing an attorney's simple legal error. Nor can the Court rely on the comments of the drafter of CR 54(d)(2) to justify ignoring the 10-day deadlines. First, the drafters' intent cannot override the plain language of the rule. Second, CR 6(b) already gives the trial court the authority to extend a deadline, such a dramatic re-writing is neither necessary nor warranted.

discretion by requiring the party seeking the extension to file a motion and prove excusable neglect. The Court would make CR 6(b)(2) meaningless if it were to rule the trial court could excuse the O'Neills' failure to comply with the 10-day deadline absent a motion and excusable neglect.[15]

3.5 The Ethical Allegations Made Against the City's Attorneys Are Baseless and Frivolous

There is no support in the record that supports the O'Neills' accusation that the City issued "sham" discover or that its attorneys acted unethical in any way. The O'Neills unethical/sham discovery accusation ignores the following uncontested facts:

- Prior to the offer of judgment, the City had contested the O'Neills' right to attorney fees and thus the City had no reason to conduct such discovery prior making the offer of judgment.
- When the City issued its discovery, the trial court had not yet entered the Judgment on Offer and Acceptance. It was entirely possible that the court would not enter the Judgment before discovery responses could be used for response to a timely CR 54(d)(2) motion. Even if the Judgment was entered immediately, the O'Neills could have sought an extension of the 10-day deadline if it chose to accommodate the City's discovery. Thus, nothing in timing of the discovery suggests the City did not issue it in good faith.
- The City offered uncontested evidence providing its logical good-faith reason for seeking discovery, based on past experience.
- Nothing prohibited the O'Neills from filing their responses to the discovery in less than 30 days.

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[15] While the O'Neills may consider the enforcement of the rules as harsh, it is worth noting that the O'Neills argued that the City's attorneys "must be held to know" the civil rules and because they were unaware that every courtroom was recorded in King County, this appeal should be dismissed. See Reply Br. at 3-4, filed in support of the O'Neills motion regarding the statement of arrangements.

- The O'Neills' failure to comply with CR 54(d)(2) was caused by their erroneous legal determination that they did not have to comply with that rule, not any conduct by the City.

- The billing records discussed above show that the discovery requests did not interfere with the O'Neills' ability to comply with CR 54(d)(2). O'Neill attorneys worked less than 20 hours and filed the motion, coincidentally, two weeks late.[16]

Finally, to suggest Ms. Earl-Hubbard could be tricked into missing a deadline is itself ridiculous. As attested to in her declaration, Ms. Earl-Hubbard is an experienced PRA litigator who has been awarded attorney fees on many occasions. CP 74-77. It would have never even entered the minds of the City's attorneys that a routine request for discovery would have such an improbable outcome. (And of course she was not tricked – rather it was her legal error that caused the O'Neills to miss the deadline.)

4. CONCLUSION

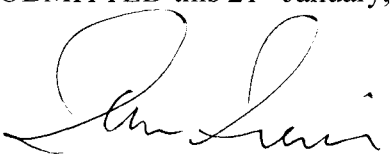
The civil rules are meant to allow for the orderly resolution of disputes without any of the hidden pitfalls that characterized litigation in an earlier day. Here, the rules were unambiguous and known to the O'Neills' attorney. Judgment is clearly defined in CR 54(a) and the 10-day deadline is clearly stated in CR 54(d)(2). The O'Neills' attorney has cited to the *Corey* case in her chapter on privacy in the WSBA's Public Records Act Deskbook (ch. 13, at SU-13-2 (2010 Supp.)). She was even informed by the Supreme Court that CR 54 applied to PRA claims in a prior case. *See BIAW v. McCarthy*, 152 Wn. App. 720, 732 n.6, 218 P.3d 196 (2009). Any "pitfall" posed by CR 54(d)(2) was thus known, open

[16] It is ironic that the O'Neills rely on misleading statements regarding the alleged effect of discovery to support their allegation of ethical violations

and obvious, making it easy to avoid. Moreover, CR 6(b) provided a safety ladder for deadlines imposed by the civil rules.

Had the O'Neills' attorneys not been so sure in their legal interpretation and instead made a meaningful effort to meet their deadline, they would not have filed their motion two weeks late. Thus, the relief the City seeks on appeal does not require a harsh or draconian ruling – the O'Neills' predicament is entirely of their own making. On the other hand, if the Court condones the O'Neills' failure to comply with CR 54(d)(2) when they did not move for an extension and cannot show excusable neglect, it will undermine the deadlines in the civil rules. Accordingly, the Court should vacate the attorney fee award and rule as a matter of law that the O'Neills abandoned their right to attorney fees due to their legal error.

RESPECTFULLY SUBMITTED this 21st January, 2014



Ian Sievers, WSBA #6723
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APPENDIX

EXHIBIT 1

82397-9

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners

v.

DOUG AND BETH O'NEILL,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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ATTORNEYS FOR RESPONDENTS

ORIGINAL

Id., at 1285.

Here the *O'Neill* Court held that Beth O'Neill did not ask for the metadata portion of the email until the third time she clarified her request to "see that email" by writing out that she wanted "Complete transmission/forwarding chain AND ALL metadata pertaining to this document." *Dec. O'Neill*, at Exh. G, (double underline in original). In view of the law as it is evolving, Ms. O'Neill request to "see that email" should have put the Petitioners on notice that she wanted to see the metadata associated with the email too.

2. Should a plaintiff's loss at an optional show cause proceeding deprive that plaintiff of their statutory right under the PRA to further discovery and a trial?

The Court of Appeals essentially resolved that a citizen who does not prevail in a show cause proceeding may have their case dismissed *in toto*, without any real opportunity through discovery and other procedural devices to prove the defendants wrong. *O'Neill v. City of Shoreline*, 145 Wn.App. 913, 938, 187 P.3d 822, 833 (2008). The Court seems to have based its decision on *Wood v. Thurston Cy.*, 117 Wn.App. 22, 27 (2003, Div. II), an unappealed Division II case that relied on the same erroneous assumptions about the nature of PRA litigation as did Division III in its 2004 decision of *Spokane Research and Defense Fund v. City of Spokane*, 121 Wn.App. 584 (2004, Div. III) ("*SRDF*").[8] The *Wood* court held that RCW 42.17.340 specifically outlined the

[8] *SRDF* held that a plaintiff who failed to follow the show cause procedure outlined at RCW 42.17.340, instead opting for the summary judgment procedure of CR 56, could not recover attorney's fees and penalties upon proving a violation of the PDA. The Court of Appeals held that "[t]he statutory procedure serves the purpose of the PDA, and the trial court acted properly in denying relief outside the PDA's procedural framework." *Id.*, at 591. It concluded that such an interpretation was "consistent with the general rule that a civil rule

course of proceeding under the PDA action, so that RCW 2.28.150 did not apply. Importantly, both *Wood* and *SRDF* predated *Spokane Research and Defense Fund v. City of Spokane,* 155 Wn.2d 89 (2005) (en banc) (*"SRDF II"*), the appeal from *SRDF* resulting in reversal. In *SRDF II,* this Court concluded that the show cause proceeding of RCW 42.17.340 is optional. "Fees, costs, and penalties are awarded for 'any action in the courts.' RCW 42.17.340(4). The language allows for any kind of civil action." *SRDF II,* at 104. Directly challenged was the assumption by the *SRDF* court that the show cause procedure of RCW 42.17.340 operated to the exclusion of the civil rules governing all civil proceedings. *SRDF II* clearly found that the show cause procedure was not the type of special proceeding identified in CR 81. *Id.* The court added:

> ¶ 31 The civil rules "govern the procedure in the superior court in all suits of a civil nature ... with the exceptions stated in rule 81." CR 1. There is only one form of a civil action. CR 2. CR 81 states the civil rules govern to all civil proceedings "[e]xcept where inconsistent with rules or statutes applicable to special proceedings." CR 81. ...
>
> ¶ 32 **All of these proceedings are statutorily defined, whereas actions under the PDA are not. The statute simply does not define a special proceeding exclusive of all others. When a statute is silent on a particular issue, the civil rules govern the procedure.** *King County Water Dist. v. City of Renton,* 88 Wn.App. 214, 227, 944 P.2d 1067 (1997). **Thus, normal civil procedures are an appropriate method to prosecute a claim under the liberally construed PDA.**

Id., at 104-105 (emphasis added). In finding that the show cause procedure outlined at RCW 42.17.340(1) was not a statutorily defined proceeding sufficient

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will not apply if it is inconsistent with a special statutory proceeding. CR 81(a); (citations omitted)." *Id.*

to exclude application of the civil rules, it follows that *Wood* is implicitly overruled along with *SRDF*.[9] After all, if the show cause procedure is optional under *SRDF II*, then it cannot be a mandatory "course of proceeding" that is "specifically pointed out by statute." Accordingly, the *Wood* court was wrong in holding that RCW 2.28.150 did not apply in providing a right to trial on disputed facts. In *SRDF II*, the court rejected *SRDF*'s view that intervention by a PDA claimant was improper. In dismissing *SRDF*'s interpretation that the PDA outlined a specific course of proceeding to the exclusion of all others, the Supreme Court applied CR 24 in light of the PDA's silence. *SRDF II*, at 105. The purpose of the show cause mechanism is to provide an expedited means by which to obtain injunctive relief (viz., delivery of the records), without needing to wait over a year for a trial date. *SRDF*, at 591 ("The purpose of the PDA is to ensure speedy disclosure of public records.")

As in the case of intervention (CR 24) and motions for summary judgment (CR 56), since the PDA says nothing about the right to trial (under CR 38 and CR 39), it follows that implying such a right to the extent allowed by the civil rules is equally proper. While RCW 42.17.340(1) (and its successor, RCW 42.56.550(1)) does appears to provide a more favorable burden of persuasion than CR 56 by forcing the defendant to show cause, the fact that a plaintiff should elect to follow the show cause procedure over CR 56 should not cause them to forfeit all other remedies provided by the civil rules, including trial. If that were the case, then RCW 42.17.340 would need to (a) expressly indicate

[9] Such civil rules include CR 57 (Declaratory Judgments, noting that the right to jury trial may be demanded under the circumstances and in the manner provided by rules 38 and 39); CR 38 (Jury Trial of Right); and CR 39 (Trial by Jury or by the Court); as well as all discovery rules CR 26-CR 36.

that it was the only statutorily prescribed course of proceeding, and (b) that if the plaintiff lost the hearing, the suit would be dismissed with prejudice. RCW 42.17.340/RCW 42.56.550(1) does not state either of these propositions. Rather, *SRDF II* held that failing to statutorily define the show cause proceeding rendered CR 81's exception inapplicable. This meant that plaintiffs could still recover reasonable attorney's fees and statutory penalties through summary judgment or trial, not solely by show cause. RCW 42.17.340(4); *SRDF II,* at 104.

SRDF II's interpretation comports with the "strongly worded mandate" for expressly liberal construction of the Act as a whole. *Telford v. Thurston County Bd. of Comm'rs,* 95 Wn.App. 149, 158, 974 P.2d 886, *review denied,* 138 Wash.2d 1015, 989 P.2d 1143 (1999); RCW 42.17.010. It would be inconsistent with the statutory purpose of the PRA, a citizen-driven initiative, to deny PRA requesters the same rights given to all other civil litigants and harshly restrict them to a live-or-die expedited, summary proceeding. No other show cause proceeding known to the Respondents purports to operate in such a punitive fashion.[10]

Even civil litigants losing on their motions for summary judgment are not precluded from re-noting CR 56 motions on new evidence or legal authority, as the O'Neills might have done upon consulting with a qualified forensics computer expert, or trying their case to a judge or jury. Their case is not

[10] In all other circumstances, if the movant for injunctive relief (e.g., civil litigants seeking writs of replevin, restitution, attachment, or garnishment) loses at the show cause hearing, they do not forfeit their entire case and right to a trial on disputed facts. Rather, instead of receiving immediate relief, they must bide their time until full adjudication at trial.

dismissed simply by losing their initial dispositive motion.[11] Had the O'Neills brought a losing CR 12 motion on the pleadings or a losing CR 56 motion for summary judgment, their claims would still stand unless the defendants succeeded on their own dispositive motions or prevailed at trial. In this case, neither defendant filed a dispositive motion, and indeed, they only requested the case be dismissed in a response brief. As stated above, it is easier for a party to show probable cause than to prevail on the party's own summary judgment motion.

Importantly, the special unlawful detainer proceeding referenced by *SRDF II* does not eliminate the right to a trial where the plaintiff loses at the summary show cause hearing. Trial on disputed facts is required. In *Housing Authority of City of Pasco and Franklin Cy. v. Pleasant,* 126 Wn.App. 382, 394 (Div. III, 2005), the Housing Authority argued that the tenants were not entitled to a trial because the show cause hearing was the only summary proceeding required under the statute. But the Court of Appeals rejected this contention, noting that, "[a] show cause hearing is not the final determination of the rights of the parties in an unlawful detainer action." *Id.,* at 394 (quoting *Carlstrom v. Hanline,* 98 Wn.App. 780, 788 (2000)).

A similar right to trial applies in replevin proceedings. While a plaintiff may seek a show cause hearing for a right to possession pending trial, there is no question that even if the plaintiff loses at the show cause hearing that she is

[11] See CR 56(d) (if only partial summary judgment be granted, the court shall ascertain undisputed and disputed facts for resolution at trial); CR 56(b) (judgments presumed tentative where multiple claims or multiple parties involved and not all issues resolved on motion for summary judgment; leave must be obtained to certify as final a partial judgment, whether for or against the movant).

DATED this 24th day of November, 2008.

/s/ Michael G. Brannan
Michael Brannan, WSBA #28838
Michele Earl Hubbard, WSBA #26454
Of Attorneys for Respondents

EXHIBIT 3

--- Fed.Appx. ----, 2013 WL 6439682 (C.A.10 (Colo.))
(Cite as: 2013 WL 6439682 (C.A.10 (Colo.)))

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Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
Sonya KING, Plaintiff–Appellant,
v.
MIDLAND CREDIT MANAGEMENT, INC.,
Defendant–Appellee.

No. 13–1225.
Dec. 10, 2013.

Background: Plaintiff sued defendant under Fair Debt Collection Practices Act (FDCPA). The United States District Court for the District of Colorado entered judgment on parties' **settlement** of claim in plaintiff's favor, awarded plaintiff $2,500 in reasonable attorney fees, and then denied plaintiff's supplemental motion for attorney fees, 2013 WL 2236934. Plaintiff appealed.

Holdings: The Court of Appeals, Gregory A. Phillips, Circuit Judge, held that:
(1) supplemental motion for attorney fees not filed within 14 days of judgment was untimely;
(2) supplemental motion for attorney fees incurred in responding to defendant's objections to award of attorney fees did not relate back to initial motion for attorney fees; and
(3) magistrate's recommendation to award plaintiff requested $3,810 in attorney fees was not "judgment" that triggered new 14-day period governing supplemental motion.

Affirmed.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⇨398

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk398 k. Proceedings to Impose; Evidence. Most Cited Cases

Plaintiff was not entitled to award of supplemental attorney fees in responding to defendant's objections to plaintiff's attorney fee request, in context of settlement of plaintiff's claim under Fair Debt Collection Practices Act (FDCPA), where supplemental motion was not filed within 14 days of district court's judgment for plaintiff on claim, plus reasonable costs and attorney fees, despite plaintiff's claims that she could not have known whether defendant would have filed response to motion or how long it would take her attorney to review response and caselaw, and that any amount of fees would be attacked by defendant, where plaintiff was required only to provide fair estimate in first motion, which was not insurmountable obstacle. 15 U.S.C.A. § 1692e; Fed.Rules Civ.Proc.Rule 54(d)(2)(A), (B)(i, iii), 28 U.S.C.A.

[2] Antitrust and Trade Regulation 29T ⇨398

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk398 k. Proceedings to Impose; Evidence. Most Cited Cases

Supplemental motion for attorney fees incurred in responding to defendant's objections to award of attorney fees in defendant's settlement of plaintiff's

claim under Fair Debt Collection Practices Act (FDCPA) did not relate back to initial motion for attorney fees, for purposes of 14-day limitations period governing motion, where supplemental motion was for fees for new work previously unmentioned. Fed.Rules Civ.Proc.Rule 54(d)(2)(A), (B)(i), 28 U.S.C.A.; 15 U.S.C.A. § 1692e.

[3] Antitrust and Trade Regulation 29T ⚿398

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk398 k. Proceedings to Impose; Evidence. Most Cited Cases

Magistrate's recommendation to award plaintiff requested $3,810 in attorney fees incurred settlement of her claim against defendant under Fair Debt Collection Practices Act (FDCPA) was not "judgment" that triggered new 14-day period governing supplemental motion for attorney fees in which plaintiff sought to recover additional fees incurred in responding to defendant's objection to magistrate's recommendation. 15 U.S.C.A. § 1692e; Fed.Rules Civ.Proc.Rule 54(d)(2)(A), (B)(i), 28 U.S.C.A.

David Michael Larson, Englewood, CO, for Plaintiff–Appellant.

Joseph Lico, Adam Plotkin, Adam L. Plotkin, P.C., Denver, CO, for Defendant–Appellee.

Before KELLY, TYMKOVICH, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT[FN*]

GREGORY A. PHILLIPS, Circuit Judge.

***1** This is an appeal from the district court's order denying plaintiff Sonya King's supplemental motion for attorney's fees as untimely. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

Sonya King ("King") filed suit against Midland Credit Management, Inc. ("Midland") under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692–1692p. Shortly after suit was filed, Midland served an offer of judgment for $1,001 that King accepted. The district court entered judgment against Midland for that amount, plus King's reasonable costs and attorney's fees, on December 28, 2011.

The parties stipulated as to costs, but could not agree as to attorney's fees. On January 11, 2012, King filed a timely motion in which she requested $3,810 in fees already incurred "plus ... any additional amounts as determined by the Court." Aplt.App. at 50. Midland timely filed a response claiming the fee request was unreasonably high. As part of her reply brief filed on February 16, King asked for an additional $780 in fees for time spent reviewing Midland's response and drafting and filing her reply. *See id.* at 110.

The fee dispute was assigned to the magistrate judge, who recommended that King's motion be granted. Notably, however, the magistrate judge did not address the reply request for the additional $780. Midland objected to the magistrate judge's recommendation and King filed a response thereto.

In an August 20, 2012 order, the district court determined that Midland's objections had merit and lowered the magistrate judge's recommended fee award to $2,500. Like the magistrate judge, the district court did not address the request for attorney's fees contained in King's reply brief.

On August 30, 2012, King filed a supplemental motion for an additional $1,475 in fees. This request once again included time spent in drafting and filing her reply,[FN1] plus time spent on work performed after the magistrate judge had issued his recommendation. She also requested an unknown amount for future fees including those "expended by Plaintiff in reviewing the Defendant's response to this Motion, if any, and to Reply to the

Defendant's Response, if any." *Id.* at 197. The court denied the supplemental motion as untimely, and King now appeals that determination. She also seeks fees for time spent on this appeal.

Discussion

"We review a district court's decision on whether to award attorney fees for abuse of discretion, but we review de novo the district court's application of the legal principles underlying that decision." *Scottsdale Ins. Co. v. Tolliver,* 636 F.3d 1273, 1276 (10th Cir.2011) (internal quotation marks omitted).

Federal Rule of Civil Procedure 54 informs our decision in this case. The rule provides, among other things, that a request for attorney's fees "must be made by motion, ... [and][u]nless a statute or a court order provides otherwise, the motion must[ ] be filed no later than 14 days after the entry of judgment." Rule 54(d)(2)(A) & (B)(i). Under the rule, motions for attorney's fees must also "state the amount sought or provide a fair estimate of it ." Rule **54(d)(2)(B)**(iii).

***2** [1] It is beyond dispute that King filed her supplemental motion for attorney's fees well past the 14–day deadline imposed by Rule 54(d). As stated, the district court entered judgment in this case on December 28, 2011 and King did not file her supplemental motion for attorney's fees until August 30, 2012—approximately eight months later. There was no statute or court order extending the time for filing. Accordingly, King's supplemental motion for attorney's fees was untimely under the rule, as found by the district court.

King advances several excuses for her late filling in arguing for reversal. First, she argues that she "had no way of estimating what her future attorneys [sic] fees would be in the case as of the date she filed her initial Motion for Attorneys [sic] Fees." Aplt. Opening Br. at 6. She lists several unknowns, including whether Midland "would file a Response to the Motion, how detailed the Response would be and/or how long it would take Plaintiff's counsel to review the Response and the caselaw [sic] cited therein, if any," and prepare a reply. *Id.* She also speculates that "[a]ny amount that [she] had listed in her Motion as an estimate of her future fees ... would be ... attacked by the Defendant in its Response as not 'fair' or not a 'fair estimate.' " *Id.* at 7.

We reject this argument. Rule **54(d)(2)(B**)(iii) requires only a "fair estimate"—not a precise number. As the district court explained, "[p]arties are clearly capable of foreseeing the need to defend fee motions ... [and] [t]hey are also often capable of estimating the expense of doing so especially where, as here, their attorneys have handled an extremely high number of remarkably similar cases." Aplt.App. at 244–45. Simply put, King did not face an insurmountable obstacle in providing an estimate in her first motion. Moreover, even if certain work was unforeseeable, King provides no authority for her position that a district court must accept a late-filed motion for additional fees under such circumstances. We agree with the district court and Midland that courts would "tumble down the rabbit hole" if every fee request could be supplemented by ever-more fee requests. *Id.* at 245.

[2] Next, King argues her supplemental motion was in fact timely for two reasons. First, she claims her supplemental motion should relate back to her initial motion for fees. She claims it was not a new motion, but merely, as titled, a "supplement" to her first. Yet this argument obviously fails because King's supplemental motion sought fees for new work previously unmentioned.

[3] Alternatively, King argues the clock did not begin to run under Rule 54(d) until long after the district court's entry of judgment. She relies on *Bernback v. Greco,* Nos. 05–4642, 05–4643, 2007 WL 108293, at *2 (3d Cir. Jan, 16, 2007) (unpublished), in which the court held that a motion for attorney's fees filed more than 14 days following entry of the underlying judgment was timely because the fees were incurred in the

successful opposition of post-judgment motions and an appeal. There, the court found that "the relevant event for purposes of a motion for supplemental fees is the entry of judgment that required the prevailing party to incur the additional fees"—not necessarily the district court's entry of judgment following resolution of the case on the merits. *Id.* Yet even if we were inclined to apply this approach here, we would still find King's supplemental motion untimely. In this case, the only post-judgment event that required King to incur additional fees (beyond those requested in her first motion) was Midland's objection to the magistrate judge's recommendation. This is not a "judgment."

Conclusion

***3** For the foregoing reasons, we find no merit to King's arguments on appeal. The judgment of the district court is therefore affirmed.

We deny King's request for attorney's fees associated with her appeal.

> FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.
>
> FN1. King lowered her request for this work to $600 in order to reflect the court-ordered hourly rate. King also deducted .1 hour for the actual filing of her reply.

C.A.10 (Colo.),2013.
King v. Midland Credit Management, Inc.

--- Fed.Appx. ----, 2013 WL 6439682 (C.A.10 (Colo.))

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EXHIBIT 2

NO. 84108-0

THE SUPREME COURT OF WASHINGTON

NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY,
a non-profit corporation,

Petitioner,

v.

SPOKANE COUNTY,
a political subdivision of the State of Washington

Respondent.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE SEATTLE TIMES, TACOMA NEWS TRIBUNE, AND TRI-CITY HERALD

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B. The PRA Does Not Require Specialized Discovery Rules.

1. Relevancy and the Civil Rules provide the necessary boundaries on discovery

Plainly, "the civil rules apply to all lawsuits of a civil nature." See O'Connor v. Washington State Dept. of Social and Health Services, 143 Wn.2d 895, 25 P.3d 426 (2001).[1] Parties may obtain discovery regarding **any matter, not privileged, which is relevant to the subject matter** of the pending action. ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. CR 26(a), (b)(1). This principle is mirrored in ER 402: "Evidence which is not relevant is not admissible." See also Houck v. University of Wash., 60 Wn. App. 189, 201-02, 803 P.2d 47 (1991); ER 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). While there has been a great deal of debate over the scope of discovery in a PRA action, CR 26 when coupled with the PRA to determine relevancy, provides all the guidance courts and litigants need.

[1] See also CR 1 (stating the Civil Rules "govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81)

Defense Fund v. City of Spokane, 155 Wn.2d 89, 103, 117 P.3d 1117 (overruling prevailing party standard utilized in **Daines** and holding that causing disclosure is not necessary to prevail under the PRA and "nowhere in the PDA is prevailing party status conditioned on causing disclosure.") The County denied any responsive records existed to the earlier request and has never corrected this earlier denial. The fact that the County produced records months later in response to a broader request – which could not clearly be determined by NASC to be responsive to the earlier request – does not excuse the earlier improper silent withholding or preclude NASC's ability sue for that PRA violation.[3]

IV. CONCLUSION

The Court should uphold the appellate court's finding that a failure to adequately search for records is a violation of the PRA, but should refuse to place artificial constraints upon the scope of discovery in a PRA action when the civil rules constitute sufficient boundaries for the scope of allowable discovery.

Respectfully submitted this 28th day of December, 2010.

Allied Law Group LLC

By: /s/ Michele Earl-Hubbard
Michele Earl-Hubbard, WSBA #26454
Chris Roslaniec, WSBA #40568

[3] The question of "prevailing relates to the legal question of whether the records should have been disclosed on request" **Spokane Research**, 155 Wn.2d at 103.

CERTIFICATE OF SERVICE

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

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Executed at Shoreline, Washington, this 21st day of January, 2014.

Darcy Greenleaf