

# WASHINGTON CASE UPDATE

## Tick-Tock: A Tardy Attorney Fee Petition May Still Be Accepted by the Court

**From the desk of Kyle Riley: What happens when a plaintiff fails to timely file their claim for attorneys' fees and costs? Is the claim waived? Washington's Division One Court of Appeals takes up this very issue and draws important conclusions about a number of other civil rule time requirements.**

**Claims Pointer: Absent a showing of prejudice by the defendant, plaintiffs will be awarded costs and fees even when they file their claim in an untimely manner. According to Washington's Division One Court of Appeals, this rationale applies to all of the civil rule time requirements, except those specifically excluded from enlargement by CR 6(b).**

case in point...

O'Neill v. City of Shoreline, 332 P.3d 1099 (2014)

Beth and Doug O'Neill brought suit against the City of Shoreline and its deputy mayor (collectively, "the City") for violations of the Public Records Act. At trial, partial summary judgment was awarded in favor of the O'Neills. The court's order included a provision stating that the O'Neills would be awarded reasonable attorneys' fees and costs. The City made an offer of judgment and the trial court entered a stipulated judgment on the offer and acceptance, noting that the amount did not include costs or attorneys' fees, incurred to date, which would be awarded in an amount to be determined by the court after subsequent briefing and argument. The O'Neills accepted the offer of judgment and the court entered final judgment on the offer.

Approximately three weeks after the court had entered final judgment on the offer, the City sent the O'Neills a letter stating that, pursuant to CR 54(d)(2), the O'Neills were required to submit their claim for attorneys' fees within 10 days of the final entry of judgment. According to the City, because the O'Neills did not file their claim for attorneys' fees within the allotted timeframe, the claim was waived and the court would deny any subsequent filing as untimely. The O'Neills then moved for a determination of the fees and costs award, which the court granted, without making a finding of excusable neglect, and awarded the O'Neills nearly \$440,000. The court denied the City's motion for reconsideration and the City appealed.

On appeal, the City argued that the trial court was required to make a finding of excusable neglect before hearing the O'Neills' untimely motion for fees and costs. Furthermore, after failing to meet the time requirements of CR 54(d)(2), the O'Neills never filed a motion to enlarge time for excusable neglect under CR 6(b). Under the City's argument, the O'Neills had waived their claim.

controlling authority is *Goucher v. J.R. Simplot Co.*, a Washington Supreme Court case. In *Goucher*, the defendant filed a motion in limine in violation of the CR 6(d) time requirement. The Washington Supreme Court rejected the plaintiff's argument that it had erred in considering the defendant's motion and the Court stated that reversal requires a showing of prejudice: "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to provide countervailing oral argument and submit case authority."

Division One could not identify any meaningful distinction between the time requirements of CR 6(d), as addressed in *Goucher*, and the time requirements of CR 54(d)(2). Furthermore, as CR 6(b) identifies certain time requirements that cannot be enlarged, The Court of Appeals concluded that *Goucher* applies to all other time civil rule time requirements. Division One held that because the city did not demonstrate prejudice to the trial court, even though the O'Neills failed to comply with the applicable time requirement, the O'Neills did not waive their claim.

According to the Court of Appeals, however, the



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