

DIVISION ONE
OF THE STATE OF WASHINGTON

Andrew Gillespie and Katherine
Ward,

Respondents,

v.

Paul Drinkwine,

Appellant

NO. 82452-0

APPELLANT'S
MOTION TO MODIFY
COMMISSIONER'S
RULING ON
SANCTIONS

I. INTRODUCTION

Appellant Paul Drinkwine respectfully moves to modify the Commissioner's ruling on sanctions entered after Respondents' Andrew Gillespie and Katherine Ward filed their Fifth Motion for Extension of Time to file their Brief of Respondent. Not only was the fifth motion for extension filed without good cause and used for purposes of delay, Respondents have now *violated* the Commissioner's order without explanation or comment.

Given the circumstances, including the lack of respect for this process demonstrated by Respondents and their counsel,

Drinkwine requests the unusual sanction of denying Respondents the ability to file a brief in this appeal.

In the alternative to denying Respondents the ability to file a brief, Drinkwine asks this Court to impose, without further notice, monetary sanctions higher than the \$250 the Commissioner ruled “may” be imposed against Respondents. Drinkwine also asks this Court to impose sanctions in the form of an order that Gillespie and Ward pay Drinkwine’s reasonable attorney fees incurred in preparing (1) his Objection to the Fifth Motion for Extension (that the Commissioner denied) and (2) the present Motion to Modify.

II. RELEVANT FACTS

Drinkwine filed his corrected Opening Brief of Appellant on September 23, 2021. As of today, Respondents have had *almost six months* to prepare the Brief of Respondent, but have not filed it. Gillespie and Ward’s brief was originally due on October 23, 2021. Gillespie and Ward’s counsel, Phillip Ornstil, filed his first request for extension on October 8, 2021, and

requested an extension to December 8. First Motion for Extension at 3. He listed his many work obligations, and also stated that he needed this additional time because, *inter alia*, he had personal volunteering commitments, including to the “KBTC Association” and “West Seattle Baseball.” *Id.* at 4. Drinkwine did not object to this extension of time.

Mr. Ornstil’s second request for extension, filed December 6, asked for a new due date of January 7, 2022. Second Motion for Extension at 2. He stated that he needed that additional month because, *inter alia*, he was having “Christmas vacation in Massachusetts.” *Id.* at 4. Drinkwine did not object to this second extension of time.

Mr. Ornstil’s third request for extension was filed January 5, 2022 and requested a new due date of February 8, 2022. Third Motion for Extension at 2. He stated that he needed that additional month because of an unspecified family emergency that occurred while he was on vacation (presumably the aforementioned Massachusetts vacation):

...a family a [sic] vacation that turned into a family emergency that has required my attention for longer than expected. I am back in the office, however, additional time is necessary to file Appellee's [sic] Response.

Id. Mr. Ornstil did declare on January 5th that he was “back in the office”, and therefore presumably able to finally complete on the brief. Drinkwine did not object to this third extension of time.

Mr. Ornstil's fourth request for extension, filed February 4, requested a “brief” additional extension to March 1, 2022. Fourth Motion for Extension at 2. Unlike in his prior motions, he did not specify what work he had that took precedence over his work on this case. He stated he was “simply” too busy:

An extension to March 1, 2022 is requested and necessary as I simply have not been able to completely catch up from having an unplanned absence coupled with active litigation files at the trial level and responding to discovery requests. A *brief* additional time is necessary to file Appellee's Response, and Petitioner is not prejudiced as a result of this request.

Id. (emphasis added).

Regarding this final statement in the motion that Drinkwine was “not prejudiced” by Mr. Ornstil’s request, it is false. Drinkwine is prejudiced by this delay, because he is challenging an unlawful anti-harassment order obtained by his neighbors, Gillespie and Ward, that currently restricts his First Amendment rights. The order is not stayed, and his free expression is chilled *in the very home where he resides*. However, Drinkwine still did not object to this fourth extension request.¹

In its order granting Mr. Ornstil’s fourth extension request, this Court noted that “further extensions will not be granted without good cause or imposition of sanctions.” Feb. 7, 2022 Commissioner’s Notation Ruling.

¹ It is not a customary practice for the undersigned counsel to object to extensions of time. Such motions are common in appellate practice and are rarely abused in this manner. That tendency, and perhaps an overactive sense of collegiality, is what caused the undersigned counsel to avoid objecting sooner.

Despite the Commissioner's admonition about "good cause" in the ruling granting his fourth request for extension, Mr. Ornstil filed a fifth request for extension of time "one last time." Fifth Motion for Extension at 2. He filed it at 9 p.m. the day before his brief was due. As the "good cause" he cited a single unrelated matter, a February 25 mediation, implying but not stating that his time throughout February was completely consumed with "communication leading up to the mediation." *Id.*

On March 1, Drinkwine filed an objection to Gillespie and Ward's fifth request for extension, citing the above procedural history and the prejudice he experiences from the delay. He requested that the Commissioner ordered them to file their brief immediately and pay sanctions, both to the Court and in the form of Drinkwine's attorney fees incurred in preparing the objection. Objection to Respondent's Fifth Motion for Extension.

Gillespie and Ward filed no reply in support of their fifth motion for extension.

Eleven days after Drinkwine’s objection was filed, the Commissioner granted Gillespie and Ward’s Fifth Motion for Extension in part. Although the Commissioner ruled that (1) Drinkwine’s objection was “well-taken,” (2) the single unrelated February mediation did not constitute “good cause” for the fifth extension, (3) the delay in preparing and filing the Brief of Respondent was “significant”, and (4) Gillespie and Ward did not bother to file a reply in support of their motion, the Respondents received their fifth extension. Commissioner’s March 11, 2022 Letter Ruling. They were granted until March 15 to file their brief. *Id.* The Commissioner noted that if they failed to file on that date, “sanctions of \$250 *may* be imposed against counsel without further notice.” *Id.* (emphasis added).

March 15 came and went. Not only was the brief not filed, but Gillespie and Ward did not communicate with the Court about why the Commissioner’s ruling was ignored. Now, three days later, the Commissioner’s ruling is still being flouted without explanation.

III. ARGUMENT

A. This Court should order that the Brief of Respondent should not be allowed to be filed.

Given these unusual circumstances, this Court should order that Gillespie and Ward are not allowed to file a Brief of Respondent, and set this matter for consideration based upon the trial court record and the Brief of Appellant. In addition to the current disrespect they have shown to the Commissioner's order and this Court's authority, it is now clear that Respondents and Mr. Ornstil have been abusing this Court's rules to delay the processing of this case. Mr. Ornstil's last two declarations provided no specificity as to why he could not meet the prior deadlines. He just generally stated that he was too busy with other matters to meet his professional obligations to this Court. And his current motion did not meet this Court's previously imposed standard of "good cause" for an extension. Handling one mediation was not "good cause" for why he could not complete his brief in January and February, or indeed for the last five months and three weeks.

Also, it should be noted that the delay cannot be explained by the need to review a lengthy appellate record. The Clerk's Papers are only 230 pages, and the hearing transcript is 34 pages. And Mr. Ornstil is very familiar with the record, having represented Gillespie and Ward in the superior court proceedings.

The Respondents and their Counsel have demonstrated complete disrespect for this Court's authority, rules, and process. They have prejudiced Drinkwine by intentionally delaying the processing of this case. They have taken advantage of this Court's generous extension rules and have now simply ignored this Court's authority. They do not think it is important to participate in this appeal in good faith; they should be denied a Brief of Respondent.

B. In the alternative, this Court should impose sanctions against REspondents and their counsel for abusing the appellate rules for purposes of delay. The sanctions must be more than \$250, because the threat of that sanction clearly was not enough to persuade them to obey the Commissioner’s ruling.

This Court has authority to sanction parties who abuse the Appellate Rules for purpose of delay. RAP 18.9. Far from feeling the need to justify their continued delay, Respondents and Ornstil have apparently been emboldened by this Court’s generous extensions of time. The initial requests for extension at least attempted to itemize Mr. Ornstil’s time constraints, but the last two vaguely assert family or professional commitments that do not justify the delay.

It appears from the recent requests that Respondents and their counsel have been using the appellate rules to delay disposition of this case as long as possible, so that they can continue to benefit from the unlawful and unconstitutional order imposed against Drinkwine. They are presumably aware that this Court will not set this matter for consideration until the Brief of

Respondent is filed. Their actions are prejudicial to Mr. Drinkwine.

When the Commissioner ruled that \$250 “may” be imposed without further notice, that potential sanction did not concern Mr. Ornstil. If this Court does not want to deny Respondents the opportunity to file a brief, then Drinkwine respectfully suggests that the monetary sanction must be imposed immediately, and that sanction must be more than \$250.

Drinkwine requests that this Court impose the following monetary sanctions against Gillespie, Ward, and/or their counsel Mr. Ornstil: (1) \$5,000 as a sanction to be paid to the Court, and (2) reasonable attorney fees and costs in the amount of \$2,025 for having to prepare the objection to their motion for extension (\$1200) and this motion to modify (\$825).

IV. CONCLUSION

Respondents and their counsel have abused this Court’s rules and shown no respect for its authority. They have prejudiced Drinkwine, who is seeking to vacate an

unconstitutional order that he lives under every day. The Court should order that they may not file their Brief of Respondent and set this case for immediate consideration or impose serious monetary sanctions that will vindicate this Court's authority and compensate Drinkwine for having to bring these motions.

This document contains 1,765 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 18th day of March, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By /s/ Sidney C. Tribe
Sidney C. Tribe, WSBA No. 33160
Attorneys for Respondent Paul Drinkwine

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 18th day of March, 2022.

S/ Patti Saiden

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