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No. 92422-8

WASHINGTON STATE SUPREME COURT

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FOSS MARITIME COMPANY,

Respondent,

v.

JEFF BRANDEWIEDE and JANE DOE
BRANDEWIEDE, and the marital community comprised
thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Petitioners,

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN
DOE LONG, and the marital community comprised
thereof; FRANK GAN and JANE DOE GAN, and the
marital community comprised thereof,

Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Dean S. Lum

**PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR REVIEW**

Gregory M. Miller, WSBA No. 14459

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Attorneys for Appellant Brandewiede

 ORIGINAL

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I. INTRODUCTION

Respondent Foss' request for attorney's fees for responding to the petition for review should be denied because its request is inconsistent with the history of the case on appeal and the text of the rule.

II. REPLY ARGUMENT

Foss' Answer raises a new issue by its request for fees per RAP 14.2 and 18.1, citing the rules but providing no analysis. *See* Answer, § IV, pp. 15-16. It appears this argument is premised on its arguments in §§ I & III, to the effect that Brandewiede cannot seek review because he was not aggrieved by the Court of Appeals' decision since he prevailed and won a reversal of his counsel's disqualification (§ III), and could not raise the ER 502 waiver/loss of privilege issue because it had not been raised in the trial court (§ I). By this construction Foss seeks to claim it is the prevailing party for purposes of obtaining fees under the appellate rules. Foss' argument fails for at least three reasons.

First, even though Brandewiede prevailed in the Court of Appeals, he nevertheless was *also aggrieved* by the decision. Even though he won reversal of the disqualification order, he requested additional relief, as noted in the conclusions to both his opening and reply briefs, specifically requesting a ruling vacating the order excluding the Vorwerk evidence and providing that the Vorwerk evidence could be used at trial subject to restrictions other than

privilege (Opening Brief, p. 48, based on the waiver argument at OB pp. 26-28; RP p. 25), based on argument at RB 3-4 & 5-11). The fact the Brandewiede was still aggrieved in part in the Court of Appeals neither precludes his petition nor provides a basis for an award of fees to Foss for its answer.

Second, the issue of whether any proprietary or privileged information held by Mr. Vorwerk and provided to Brandewiede's counsel was properly protected or left unprotected (and thus the protections waived) was at issue and discussed in the trial court.¹ But even if there were a preservation issue, which there is not, this Court can address the waiver of loss of privilege through the loss of confidentiality where it is presented on appeal, even though there may be arguable procedural defects, for reasons of judicial economy and to address an important issue. RAP 1.2(a), (c). This assertion also undercuts Foss' request for fees for responding to the petition.

Third, the plain text of the rule rebuts Foss' request for fees. RAP 18.1(j) governs the award of fees on appeal. The predicate on which that section is based is the first phrase of the first sentence. It requires rejection of Foss' fee request by Foss' own admission that it was Brandewiede who prevailed at Division I, not Foss, and the fact

¹ See RP 29:22-30:3 (Foss trial counsel explaining to trial court he recognized Foss' duty to protect both proprietary and privileged information because "if we don't . . . protect that information it's no longer proprietary, it's no longer trade secrets."). Nor would unprotected privileged information be protected.

that the Court of Appeals did not award Brandewiede fees, even though he requested them as sanctions for Foss' discovery abuses which led to the appeal.² That sentence states:

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

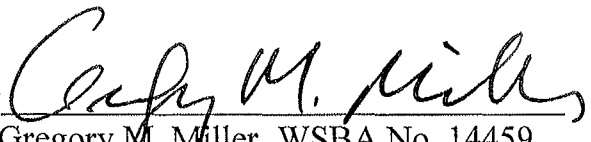
RAP 18.1(j) (emphasis added). Brandewiede prevailed in the Court of Appeals and was not awarded fees. There is no basis under the plain text of the appellate rules cited by Foss, or otherwise, for an award of fees to it for answering the petition for review.

III. CONCLUSION

Petitioners Brandewiede respectfully request the Court grant their petition for review, deny respondent's request for fees, and set the case for consideration at the earliest opportunity.

Dated this 7th day of December, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Attorneys for Petitioners Brandewiede

² See Brandewiede's Opening Brief, pp. 45-48 (arguing for sanctions given Foss' failure to produce the Vorwerk 38-page wrongful termination letter in redacted or any other form, which production would have obviated the appeal); Reply Brief, p. 25 (requesting award of monetary sanctions for Foss' discovery violations).

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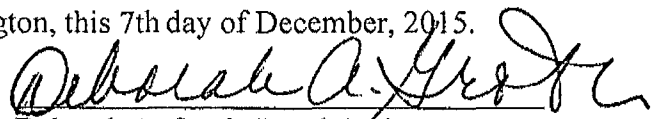
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DATED at Seattle, Washington, this 7th day of December, 2015.



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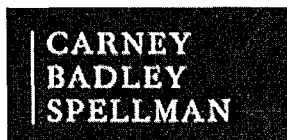
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