No. 48375-1-II

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

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

On August 9, 2013, former defense attorney, Morgan Wais (Wais) conceded in open court that he never communicated with his purported client, the Respondent Heather Hoffenburg (Hoffenburg). CP 979; CP 583.

In Hoffenburg's response brief, current defense attorney Paul Crowley (Crowley) concedes that he has not had communication with his purported client, Hoffenburg:

> Retained counsel for Ms. Hoffenburg was unable to establish communication with her during the course of litigation, but appeared on her behalf and mounted a successful defense to the claims brought by Tori Kruger-Willis. Br. of Respondent at 1 ¶2.

Without communication from Hoffenburg, the defense attorneys are unable to show that they had Hoffenburg's authority to appear in this action and to act on her behalf, as required under RCW 2.44.030.

Furthermore, in Hoffenburg's response brief, the defense now admits that under RCW 4.84.250, Hoffenburg was the "prevailing party" entitled to an award of reasonable attorney fees and costs:

> Because the jury found for Heather Hoffenburg, she was the "prevailing party" within the meaning of RCW 4.84.250, and the court entered an award in her favor, providing for costs and attorney's fees expended in the course of litigation. Br. of Respondent at 1 ¶3.

Based upon the foregoing admission by the defense, the numerous post-mandate proceedings after the first appeal in this action were brought in bad faith because the defense moved the trial court to order Kruger-Willis to pay the prevailing party attorney fees and costs not to

Hoffenburg, "the 'prevailing party' within the meaning of RCW 4.84.250," but to: (1) GEICO; (2) then to Mary E. Owen & Associates; (3) and then to Lockner & Crowley, Inc., P.S. Br. of Respondent at 1 ¶3; CP 890-91; CP 978; CP 1016; CP 67; CP 978; CP 135.

II. REPLY TO STATEMENT OF THE CASE

Kruger-Willis makes the following corrections to Hoffenburg's recitation of the Statement of Facts in her response brief, as follows:

Hoffenburg consistently states that this action arose out of a motor vehicle collision that occurred on February 1, 2008. Br. of Respondent at 1 ¶1; CP 914. This action arose out of a motor vehicle collision that occurred on February 21, 2008. CP 914.

Kruger-Willis' counsel did not specifically invoke RCW 4.84.250 prior to trial. Br. of Respondent at 1 ¶3; CP 256. Wais invoked the provisions of RCW 4.84.250 when he made Kruger-Willis an offer of judgment without Hoffenburg's knowledge or her consent. CP 256.

Kruger-Willis appealed the trial court's award to Hoffenburg of reasonable attorney fees and costs under RCW 4.84.250, alleging that Wais represented the interests of GEICO and not that of his purported client, Hoffenburg. Br. of Respondent at 2 ¶1; CP 256. This Court rejected Kruger-Willis's argument with respect to GEICO's standing in the matter when it came to affirming the trial court's order of June 27, 2011, awarding Hoffenburg reasonable attorney fees and costs. CP 256. The defense, however, omits that in disputing Kruger-Willis' argument

regarding GEICO's standing is that in the first appeal, Wais never informed this Court, the trial court, or Kruger-Willis that he had not had any contact whatsoever with Hoffenburg; that he did not know her whereabouts and that he could not find her; and that she has never been involved in the defense of the case against her. CP 256.

On remand, Wais moved the trial court to enter judgment for reasonable attorney fees and costs not for his purported client, Hoffenburg, but for his employer, GEICO. Br. of Respondent at 2 ¶1; CP 257. In Wais' motion, he stated that "Ms. Hoffenburg has *never* been involved in the defense of the case against her (emphasis added)." CP 257. This statement alone served as the basis for Kruger-Willis' motion under RCW 2.44.030 for defense counsel to prove the authority under which he appeared. CP 257. Kruger-Willis did not move to disqualify the defense attorneys. CP 257.

The defense states that "the trial court rejected Ms. Kruger-Willis' argument that defense counsel lacked authority to appear on behalf of Heather Hoffenburg, but made no formal findings of fact." Br. of Respondent at 2 ¶2, 3 ¶1. The trial court did not reject Kruger-Willis' argument that defense counsel lacked authority to appear on behalf of Hoffenburg. CP 257. The trial court summarily denied Kruger-Willis' motion without addressing its findings of fact and conclusions of law with respect to the issue of authority. CP 257.

In the second appeal in this matter, the Court held that "when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears." Br. of Respondent at 3 ¶2; CP 641. The Court reversed the trial court's ruling and remanded for further proceedings consistent with its opinion, but it did not instruct the trial court to issue findings "regarding the same." Br. of Respondent at 3 ¶2; CP 642.

On remand, Kruger-Willis renewed her motion under RCW 2.44.030. Br. of Respondent at 3 ¶3; CP 739-749. From the trial court's memorandum of decision, the court found that:

> [D]efense counsel had authority to represent Ms. Hofferbert under the omnibus clause in Mr. Lebeda's insurance policy; an omnibus clause was required to be present in Mr. Lebeda's policy under RCW 46.29.490(2)(b); defense counsel did not surrender any of Ms. Hofferbert's substantial rights; and Ms. Hofferbert ratified defense counsel's actions after the fact. CP 468.

After the trial court denied Kruger-Willis' renewed motion under RCW 2.44.030, Kruger-Willis filed an appeal. Br. of Respondent at 4 ¶1; CP 242-252. Kruger-Willis has never sought to retroactively disqualify defense counsel. CP 254-55. Kruger-Willis moved the trial court for Wais and Crowley to prove their authority under RCW 2.44.030. CP 254-55. Kruger-Willis does not seek to return this case to the trial court for a new trial. Br. of Respondent at 4 ¶1. Kruger-Willis' request for relief is addressed in her opening brief. Br. of Appellant at 59.

Kruger-Willis notes that at pages 4 ¶2-5 ¶2, the defense provides argument rather than a statement of facts, so Kruger-Willis provides no reply to the defense's argument in this section of its reply brief. Br. of Respondent at 4 ¶2-5 ¶2.

III. REPLY TO ARGUMENT

A1. Authority to Act

The defense does not provide any references to the record supporting its argument regarding authority. Br. of Respondent at 5-16. A party must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). *See also* RAP 10.3(a)(5). We will not consider arguments that are not supported by any reference to the record or by citation of authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We are not required to search the record to locate the portions relevant to a litigant's arguments. *Mills v. Park*, 61 Wn.2d 717, 721, 409 P.2d 646 (1966).

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review.

On appeal, courts do not address arguments unsupported by citations to the record. RAP 10.3(a)(6); *State v. Thomas,* 150 Wn.2d 821, 874, 83 P.3d 970, *abrogated in part on other grounds, Crawford v.*

Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Puget Sound Plywood, Inc. v. Mester,* 86 Wn.2d 135, 142, 542 P.2d 756 (1975). Arguments not presented to the trial court will generally not be considered on appeal. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Allegations of fact without support in the record will not be considered by an appellate court. *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993); *see also Lewis v. Mercer Island*, 63 Wn. App. 29, 31-32, 817 P.2d 408, *review denied*, 117 Wn.2d 1024, 820 P.2d 510 (1991) (matters not urged at the trial level may not be urged on appeal). Argument not raised before the trial court will not be considered on appeal. *Re v. Tenney,* 56 Wn. App. 394, 399-400, 783 P.2d 632 (1989).

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

In the first appeal, Kruger-Willis argued to the Court that GEICO was not an aggrieved party and it lacked standing to file a request for a trial de novo and similarly, it could not be considered the prevailing party entitled to reasonable attorney fees under RCW 4.84.250. CP 847. On February 21, 2013, this Court affirmed the trial court, holding that Kruger-Willis "does not succeed in showing that the trial court erred in awarding Defendant Hoffenburg reasonable attorney fees and costs." CP 975-76; CP

895-900. In reaching that decision, however, the Court had no knowledge that Wais never had any communication with Hoffenburg because Wais failed to advise the Court that he had never spoken to her; did not know her whereabouts; and she was not involved in the defense of the case against her. CP 257; CP 583.

In 2013, after remand in the first appeal, Wais moved the trial court to enter judgment for the reasonable attorney fees and costs not for his purported client, Hoffenburg, but for his employer, GEICO. Br. of Respondent at 5; CP 257. In Wais' motion, he stated that "Ms. Hoffenburg has *never* been involved in the defense of the case against her (emphasis added)." CP 257. The foregoing statement alone served as the basis for Kruger-Willis' motion under RCW 2.44.030 for defense counsel to prove the authority under which he appeared. CP 257. Thereafter, Wais conceded in open court that he never communicated with Hoffenburg. CP 979; CP 583.

The trial court did not affirm defense counsel's authority to act. Br. of Respondent at 5-6. CP 257. The trial court summarily denied Kruger-Willis' motion without addressing its findings of fact and conclusions of law with respect to the issue of authority. CP 257. Kruger-Willis appealed the trial court's denial of her motion under RCW 2.44.030. CP 649-650.

As Kruger-Willis' counsel argued to the trial court on Kruger-Willis' renewed motion under RCW 2.44.030:

First of all[,] with respect to the first appeal, we did address the issue of standing 'cause there was always the presumption that Mr. Wais was proceeding without the defendant. But without getting into attorney/client relationship or anything like that, we couldn't discover that he'd never had communications with his client...In order to support his argument that Geico was entitled to the attorney's fees, he had to admit that the defendant had never been involved in the defense of the case against her...And then when we made this motion under RCW 2.44.030, Mr. Wais went on the record in open court and stated I have never spoken to my client. So here we go through all [these] proceedings and through the appeal and Mr. Wais's position at the appeal was oh, I'm here to defend the [defendant], Geico has nothing to do with this. They're not the de facto client. And that's a misrepresentation because he knew he had never spoken to his client. He had a duty to tell – a duty of candor to the tribunal, and fairness to the opposing party[,] that he had never spoken to his client. But he maintained his position that Geico was never a party in interest to this case. And it wasn't until he couldn't cash that check that he had to take a whole new position the we're (Geico) entitled to these fees because the defendant has never been involved in the case against her[;] I've never spoken to the defendant, I don't even know her right name. You know, she's been gone all this time and I've been [diligent] in my actions to try to locate her, which we know that's not true. That's all misrepresentations to the Court...RP 9-11.

And you can't go back after the fact and get a document from a [defendant] that says okay, I'm aware of all of this now, but that was seven years ago. This is an attorney that tracks down a defendant in another State when we supplied in our initial brief that Ms. Hofferbert was in this area up to 2012. And the defense could have contacted her (Hoffenburg) way before then. They've represented to this Court and to the appellate court, that despite [diligent] efforts on our part to contact Ms. Hofferbert, we haven't been able to do so. But if the Court looks at what the plaintiff submitted[,] according to Ms. Hofferbert's case file, she's been in court quite frequently since 2008 through 2012, and they could have located her had she been relevant to the case. She was not relevant to the case because Geico was proceeding – or Geico['s] attorney was proceeding on Geico's behalf. And we argued this before the Court; they were the de facto defendants in this matter. RP 5; CP756-759.

Kruger-Willis did not state that in the second appeal in this matter, the Court accepted or rejected the parties' arguments regarding the issue of authority or that the issue has been resolved by this Court. Br. of Respondent at 6; Br. of Appellant at 17-20. Kruger-Willis merely quoted the Court's holding, which was:

> We hold that when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears.

Br. of Appellant at 17; CP 641.

In the second appeal, the defense argued in its response brief that the defense attorneys had authority to appear and to act on behalf of the client under the terms of the insurance policy. CP 617-21. Despite the defense's reliance on the insurance policy as a basis for the defense attorneys' authority, this Court still reversed and remanded rather than affirm the trial court's denial of Kruger-Willis' motion under RCW 2.44.030. Br. of Appellant at 17-20; CP 636-642. An appellate court can affirm on any basis supported by the record, whether or not the trial court considered that basis. *Amy v. Kmart of Wash. LLC*, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009). RP 20-21.

Kruger-Willis' counsel argued to the trial court on Kruger-Willis' renewed motion under RCW 2.44.030:

> Here[,] what the appellate court focused on was the relationship between the attorney and the defendant. There was none. Mr. Wais went on record stating he has never had communications with his client. He didn't know where she was located. She's never been involved in the defense of the case against her. So it's very simple.

> If he doesn't have communications with his client, there's no authority there...you need to speak to your client in order to get authority. RP 4-6.

Furthermore, Kruger-Willis' counsel argued to the trial court on Kruger-Willis' motion for reconsideration of the court's denial of her renewed motion under RCW 2.44.030:

> So where our motion for reconsideration comes in is that the focus that the Court – this Court should have addressed was not the insurance contract itself, but it should have focused on the communication aspect between the defense attorney and the client...[b]ecause Division II specifically looked for the communication between an insurance defense attorney – and that's one of the factors that the Court of Appeals addressed, an insurance defense attorney. Implicit in that is there is an insurance contract. And okay, just because there's an insurance contract[] doesn't mean that the defense attorney can just act without communication. The defense counsel still has to have communication with his client. And there [were] three factors[:] communication with the client; defense counsel admitted he didn't have communication; and he works for an insurance company. Those were the three factors that the Court considered...So I didn't see in the memorandum of decision where the Court addressed that. And I think until the Court addresses that, plaintiff, of course, is going to appeal the decision again. And then it's going to wait another year, year-and-a-half, and come back here and the Court's going to have to address that again. RP 22-23.

> So maybe if we can get some clarification from the Court, we can probably save everybody time and probably the Court['s] judicial resources too, if we can just expend a little bit of time now. And if it has to go to the Court of Appeals again, at least we have a basis for the Court of Appeals to make a determination as to how this Court addressed the issue of communication, and then how this Court came to the decision that in the absence of communication, that still, the insurance contract confers authority on the defense attorney to act on behalf ...of the defendant. RP 23.

Again, Kruger-Willis has never sought to retroactively disqualify defense counsel. Br. of Respondent at 7; CP 254-55. Kruger-Willis moved the trial court for Wais and Crowley to prove their authority under RCW 2.44.030. CP 254-55. If an attorney's appearance is shown to be unauthorized, any judgment or order based on it would be voidable and subject to being vacated on motion. *State ex rel Turner v. Briggs,* 94 Wn. App. 299, 302, 971 P.2d 581 (1999). CP 659-60.

Kruger-Willis will rely upon her opening brief regarding the distinction between the duties of an attorney under RCW 2.44.030 and RPC 1.2(f) and the duties of an insurance company to its insured under Washington case law. Br. of Appellant at 17-25.

The defense argues that "[i]f Washington State were to adopt Appellant's legal theory, the carrier's 'duty to defend' would remain, but the ability of that duty to be effectuated would be extinguished in those cases in which counsel's ability to communicate with the client is disrupted." Br. of Respondent at 16.

First of all, the defense concedes that the "duty to defend" belongs to the carrier. *Id.* An attorney is not an insurance carrier, even by virtue of employment. Furthermore, as Kruger-Willis' counsel stated to the trial court: "I'm not making law, your Honor. I'm asking that the Court apply the law, the law as it is in Washington." RP 32-33.

In Washington, an attorney (as opposed to an insurance carrier) requires authority "on behalf of the party for whom he or she assumes to

appear." RCW 2.44.030. Without any communication whatsoever with Hoffenburg, the defense attorneys cannot show that they had Hoffenburg's authority to appear for her in this matter.

3. The Insurance Contract

The defense does not provide any references to the record supporting its argument regarding this issue. Br. of Respondent at 16-19. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

If Wais truly believed that he had authority to appear and to act on Hoffenburg's behalf under the insurance contract, then there was no need for him to not disclose this fact at the outset of litigation. CP 456. Rather than act like he was in frequent contact with Hoffenburg, Wais could have informed Kruger-Willis' counsel, this Court, and the trial court that he never had contact with Hoffenburg; he does not know her whereabouts;

but that he was proceeding in this matter under the authority to appear and to act on her behalf pursuant to the duty to defend clause of the insurance policy. CP 456; CP 453-54. Instead, Wais pretended to be in contact with Hoffenburg because he knew that this case should have been dismissed because he lacked the authority to appear on Hoffenburg's behalf without any communication whatsoever with her. CP 456. Only when his authority was challenged did Wais intentionally obfuscate the law by claiming that his authority was granted under the terms of an insurance policy. CP 456-57. Based on the foregoing facts, due to Wais' conduct from the outset of litigation, the jury verdict that was rendered on Hoffenburg's behalf was obtained by Wais' intentional misrepresentations to the trial court and to the opposing party. CP 457.

4. The Insurance Defense Perspective

The defense does not provide any references to the record supporting its argument regarding this issue. Br. of Respondent at 19. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

The argument of Crowley provided to the Court is relevant and material to the issue of authority in that the defense consistently fails to address the requirements of RCW 2.44.030 and the RPCs, arguing instead that Kruger-Willis attempts to make new law, which Kruger-Willis denies. RP 32-33. Notably, Crowley admits that:

> [W]hen the client is unavailable, when the client is uncooperative, when the client is gone...if that means that I have to get by without some of the assistance of my client that I would like to have, that's what I do...I consider that to be not only a fulfillment of the contract, but also a fulfillment of my ethical obligation to protect them, sometimes protect them from themselves. RP 27-30.

The insurance defense perspective of Crowley ignores the fact that "[i]n Washington it is clear that legally and ethically the client of the lawyer is the insured (emphasis added)." Washington State Bar Association (WSBA) Advisory Op. 195 (1999) (*citing Tank v. State Farm,* 105 Wn.2d 381, 715 P.2d 1133 (1986); *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960)).

The RPCs, as they apply to this matter and to the insurance defense perspective, will be addressed in the following section.

5. The Rules of Professional Conduct

The defense does not provide any references to the record supporting its argument regarding this issue. Br. of Respondent at 19-22.

Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

As stated in the foregoing section, "[i]n Washington it is clear that legally and ethically the client of the lawyer is the insured (emphasis added)." Washington State Bar Association (WSBA) Advisory Op. 195 (1999) (*citing Tank v. State Farm,* 105 Wn.2d 381, 715 P.2d 1133 (1986); *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960)).

RPC 1.2(f) provides: "A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order." CP 743; RP 25.

Further, a lawyer retained by an insurance company must have contact with the client before he or she has authority to act on the client's

behalf. CP 743. See WSBA Advisory Opinion 928 (1985) (insurance defense attorney had no contact with client; thus, no authority to act as lawyer for client). CP 738.

RPC 5.4(c) provides that "a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The WSBA provides guidance on the foregoing issue:

> [A] lawyer representing an insured client must follow the instructions of the client, and not the insurance carrier. Therefore, a lawyer could bring a motion for summary judgment at the request of the insurance carrier only if it was in the client's interest to do so *and the client consented after full disclosure* (emphasis added).

WSBA Advisory Opinion 974 (1986). CP 262; RP 25.

From Crowley's admission in the foregoing section, it is clear that he does not consider the insured his client, legally or ethically, by failing to communicate with the insured or by obtaining the insured's consent with respect to litigation:

> [W]hen the client is unavailable, when the client is uncooperative, when the client is gone...if that means that I have to get by without some of the assistance of my client that I would like to have, that's what I do...I consider that to be not only a fulfillment of the contract, but also a fulfillment of my ethical obligation to protect them, sometimes protect them from themselves. RP 27-30.

As Kruger-Willis' counsel argued to the trial court:

> RPC 5.4(c)...states that a lawyer cannot permit a person who pays him to – to regulate the professional judgment of the lawyer. And the Washington State Bar provides guidance on that, that a lawyer cannot bring a motion at the request of an insurance carrier, even if

> it's in the client's best interest to do so until the client consents after full disclosure. RP 25.
>
> Here[,] we don't have that. We don't have consent. We don't have even acknowledgement...[W]hat the Bar is saying is that before an attorney can act...they have to first talk to the client...RP 25-26.
>
> So as a matter of law, if you read the RPCs with the RCW, it seems that it's consistent; that you have to have the client's authorization before you file anything [] [a]nd it's not a matter of where you can just do whatever you want, engage in this, go through arbitration, a trial, two appeals, and then ask for ratification later. I mean that's just like a child...engaging in some misconduct and then asking for forgiveness later. RP 26.

By not complying with RPC 1.2(f) and RPC 5.4(c), Crowley's conduct in failing to communicate with Hoffenburg before he appeared in this action and before he acted without her authority is a violation of the rules of professional conduct. "[W]hether an attorney's conduct violates the relevant rules of professional conduct is a question of law." *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992) (footnote omitted). RP 25. We review questions of law de novo. *Rainier View Court Homeowners Ass'n Inc. v. Zenker*, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010) (citing *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

From Crowley's admissions made before the trial court regarding his perspective as an insurance defense attorney, the Court should find as a matter of law that Crowley's conduct in this matter, as well as on a continuing basis, of acting on behalf of the insured "when the client is unavailable, when the client is uncooperative, when the client is gone..." and "...sometimes protect them from themselves..." violates the rules of professional conduct. RP 27-30.

A2. Ratification

The defense does not provide any references to the record supporting its argument regarding this issue. Br. of Respondent at 22. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

The defense states that "the question of ratification is irrelevant and immaterial to this case." Br. of Respondent at 22. Furthermore, it declares that it "does not intend to rely upon the Declaration of Heather Hoffenburg, and relies instead upon the legal issues outlined above." Br. of Respondent at 22.

Kruger-Willis does not object to the defense's waiver of the Declaration of Heather Hoffenburg as evidence under RCW 2.44.030 of the defense attorneys' authority to act on her behalf. Kruger-Willis does, however, note that the question of ratification is relevant and material to

this case insofar as the trial court found, *sua sponte,* that Hoffenburg "ratified" the authority of the defense attorneys after the fact by way of her alleged declaration. CP 468.

"*Ratification is one's affirmance of a* ***prior unauthorized act***, done or purportedly done on his account but not originally binding on him, and which is later given effect as to some or all persons as if originally authorized (emphasis added)." *Atlas Bldg. Supply Co., Inc. v. First Independent Bank of Vancouver*, 15 Wn. App. 367, 370, 550 P.2d 26 (1976) (citing *National Bank of Commerce v. Thomsen*, 80 Wn.2d 406, 495 P.2d 332 (1972); Restatement (Second) of Agency § 82 (1958)).

For the trial court to apply the doctrine of ratification with respect to the Declaration of Heather Hoffenburg, the trial court could only find that the defense attorneys did not have authorization from Hoffenburg to act on her behalf for seven years (2008 through November 16, 2015[1]). Thus, despite the trial court's holding that the defense attorneys had authority to represent Hoffenburg under the omnibus clause in Lebeda's insurance policy (CP 462-68), the trial court also found that the defense attorneys acted without authorization from Hoffenburg when it applied, *sua sponte*, the doctrine of ratification in denying Kruger-Willis' renewed motion under RCW 2.44.030.

[1] The date the trial court denied Kruger-Willis' renewed motion under RCW 2.44.030 for defense counsel to prove the authority under which he appeared.

A3. Substantial Right

The defense does not provide any references to the record supporting its argument regarding this issue. Br. of Respondent at 22-23. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis replies as follows:

The defense argues that it did not surrender a substantial right of Hoffenburg's because she "was the prevailing party at a jury trial, with Tori Kruger-Willis left owing her reasonable attorney fees." Br. of Respondent at 22-23. The defense fails to mention that when the jury verdict was obtained, Wais actively deceived the opposing party regarding his "communications" with Hoffenburg. CP 453-54.

Furthermore, the defense takes issue with the "cases" cited by Kruger-Willis regarding the issue of "substantial rights." Br. of Respondent at 22. Kruger-Willis cited one case regarding the issue of

substantial rights, which was *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980), because the trial court found that under the foregoing authority, the defense attorneys did not surrender any of Hoffenburg's substantial rights. CP 468; Br. of Appellant at 35.

A4. Law of the Case Doctrine

The defense cites no relevant authority or record evidence supporting its argument regarding this issue. Br. of Respondent at 23. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis relies upon her opening brief. Br. of Appellant at 36-37.

B1. Motion for Reconsideration

The defense cites no relevant authority or record evidence supporting its argument regarding this issue. Br. of Respondent at 23. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis relies upon her opening brief. Br. of Appellant at 37-44.

C1. Entry of Judgment

The defense cites no relevant authority or record evidence supporting its argument regarding this issue. Br. of Respondent at 23-24. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis relies upon her opening brief. Br. of Appellant at 44-48.

D1. Motion for Reconsideration

The defense cites no relevant authority or record evidence supporting its argument regarding this issue. Br. of Respondent at 24. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Without the defense providing any references to the record in support of its argument regarding this issue, Kruger-Willis is unable to determine if the defense is raising this argument for the first time on review. Kruger-Willis relies on the authorities previously cited when a party fails to reference the record in support of its argument.

Since the defense failed to provide references to the record, the Court should not consider its argument. However, if the Court is inclined to consider the defense's argument regarding this issue, Kruger-Willis relies upon her opening brief. Br. of Appellant at 48-54.

III. REPLY TO REQUEST FOR ATTORNEY FEES

The defense requests attorney fees under RAP 18.1 and RCW 4.84.250, however, it neglects to provide argument as to how it believes it is entitled to such fees under the foregoing authorities. See RAP 18.1(b); Br. of Respondent at 25.

As Crowley has never communicated with Hoffenburg and is unable to locate her, presumably, the defense moves this Court to award attorney fees to Crowley or to his law firm. Kruger-Willis found no Washington case law on point that permits a court to award costs and

reasonable attorney fees to any party other than to Hoffenburg, however, Kruger-Willis consulted federal law and found cases which held that under a fee-shifting statute, like RCW 4.84.250, the costs and reasonable attorney fees are payable only to the prevailing party (CP 664-69):

> RCW 4.84.250 provides for the allowance of reasonable attorney fees and costs to the *prevailing party* and not to the *prevailing party's attorney.* Unless the statute specifies payment to the prevailing party's attorney, payment goes to the prevailing party. In *United States of America v. $186,416.00 in U.S. Currency*:[2]
>
> Direct payment to the attorney is the exception, not the rule. "The Supreme Court has made it clear that, in general, statutes bestow fees on parties, not upon attorneys." *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment,* 89 F.3d 574, 577 (9th Cir. 1996). Unless the statute specifies payment to the litigant's attorney, payment to the attorney is not assumed.

United States of America v. $186,416.00 in U.S. Currency, 642 F.3d at 756. CP 665-66.

There being no authority for Crowley to appear and to act on behalf of Hoffenburg because he has never communicated with her, he is not entitled to attorney fees; otherwise, the Court would place the parties in the same position that they have been litigating since 2013, which is, in a nutshell, GEICO or its agents (the defense attorneys' law firm) will be unable to negotiate a check made payable to Hoffenburg as the prevailing party because there has been no communication by the defense attorneys with Hoffenburg and her whereabouts are unknown.

IV. CONCLUSION

For the reasons stated in her opening brief, Kruger-Willis requests that this Court reverse the trial court's denial of her motion under RCW

[2] *United States v. $186,416.00 in U.S. Currency,* 642 F.3d 753, 757 (9th Cir. 2011).

2.44.030 and find that the defense attorneys do not and did not have the authority under RCW 2.44.030 to appear for Hoffenburg in this matter; to remand to a *different trial court* for proceedings under RCW 2.44.020 for the defense attorneys to "repair the injury" from their unauthorized appearance; to find that the trial court erred when it entered judgment against Kruger-Willis and to remand to a *different trial court* for proceedings under CR 60(b)(6) for relief from the judgment order; and for an award of attorney fees on this appeal with a request to reserve for a later date a ruling on attorney fees under RCW 2.44.020 for appeal Nos. 42417-7-II and 45593-5-II.

With respect to Kruger-Willis' request that this Court remand to a different trial court the relief she seeks, if the appearance of fairness doctrine is violated, the Court may order that a cause be assigned to a different judge on remand. *E.g., State v. A.W.*, 181 Wn. App. 400, 414, 326 P.3d 737 (2014)).

RESPECTFULLY submitted this 30th day of June, 2016.

ALANA BULLIS, PS

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CERTIFICATE OF SERVICE

I certify that on June 30, 2016, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following by legal messenger.

Counsel for Respondent:

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

/s/ Alana K. Bullis
Alana K. Bullis