No. 96241-3

SUPREME COURT OF THE STATE OF WASHINGTON

No. 75440-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF TAYLOR GRIFFITH,
KENNETH and JACKIE GRIFFITH,

Petitioners,

v.

BRADLEY J. MOORE, et al.,

Respondents,

PERSONAL REPRESENTATIVE'S ANSWER TO PETITION (RAISING CONDITIONAL ISSUE FOR REVIEW)

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I. INTRODUCTION AND CONDITIONAL CROSS PETITION

Ken and Jackie Griffith (the "Griffiths") seek review of the Court of Appeals decision upholding the trial court's denial of their petition under TEDRA asking that Bradley Moore be removed as personal representative ("PR") of the estate of Taylor Griffith (the "Estate"). The only expert testimony submitted supported all of Mr. Moore's decisions, was not contradicted by contrary opinion, and was quoted at length by the Court of Appeals. The Harris respondents oppose the petition, and Mr. Moore joins in their arguments.

The trial court not only denied the Griffiths' TEDRA petition, but also used its broad authority under TEDRA to award Mr. Moore his reasonable fees and costs in defending against those claims. The Court of Appeals reversed the trial court's award of fees and costs to Mr. Moore.

This Court should deny review for the reasons stated by the Harris respondents. But in the unlikely event review is granted, the Court should also review and reverse the ruling on the fee award because the Court of Appeals misapplied controlling precedent and ignored CR 54's plain language.

II. RESTATEMENT OF THE CASE

The Harrises' opposition to the Griffiths' Petition summarizes the facts and procedural history of the case, and is incorporated herein by

reference. This answer provides additional detail about Mr. Moore's response to the Griffiths' TEDRA petition, as set forth in his extensive declaration. *See generally* CP 1344-1402.

This case has its genesis in an accident in August 2014, in which a car owned by the Griffiths and driven by their son, Taylor Griffith, hit that of Steven Harris and his wife head on. Taylor and Mr. Harris were killed, and Mrs. Harris was severely injured. When Travelers Insurance (Taylor's insurance company) refused to produce the policy, disclose limits, negotiate or settle in the face of clear liability, the Harrises sued the Estate, and Taylor's parents (the "Griffiths") for negligent entrustment and under the family car and agency principles. CP 32-37.

Travelers elected to retain one attorney, Michael Jaeger of the Lewis Brisbois firm, to appear and defend all defendants. In what became a constant theme of Travelers' defense, no one discussed joint representation or potential conflicts with the Estate, or sought (much less obtained) its conflict waiver. Nor could they have; neither Travelers (nor its retained defense attorney) ever sought to have a PR appointed for the Estate *for fifteen months* after Taylor died (long after the Harrises sued), much less within 40 days of his death.[1] Due to Travelers' inaction, there was no one to independently

[1] As a result of Travelers' inaction, the Griffiths lost statutory priority to be named as PR. *See* RCW 11.28.120(7) (time limit for priority appointment is 40 days from death); *Koloff v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 71 Wash. 543, 548, 129 P. 398 (1913)

consider what rights the Estate had against the Griffiths, waive potential conflicts of interest, or otherwise consent to joint representation.

In November, 2015, the Harrises' attorney, David Beninger, moved on their behalf to have a PR appointed for the Estate, as was their right as Estate creditors. The Harrises asked that Mr. Moore be appointed, who is a partner at the Stritmatter Kessler firm, and whose 24-year practice focuses on personal injury, nursing home liability, products liability, aviation injuries, class actions and – significantly in this context – insurance litigation (including representing insureds in coverage, bad faith, and Consumer Protection Act claims). CP 1344-45 ¶ 2. Upon hearing of the facts of the case, then less than two months before trial, Mr. Moore immediately recognized a potential conflict of interest between the Griffiths and the Estate, as well as the possibility of a contribution action against the Griffiths in the (likely) event of joint and several liability.[2]

Travelers' assigned counsel objected to Mr. Moore's appointment as PR, and instead asked that Kenneth Griffith – the Estate's codefendant – be appointed. CP 68. The primary objection, among others, was that Mr.

(next of kin waive right to administer estate if they fail to petition for appointment within 40-day statutory period); *In re Yarbrough's Estate*, 126 Wash. 85, 86, 216 P. 889 (1923), *aff'd*, 222 P.902 (1924) (same; even a widow stands in same position as a stranger for late appointment).

[2] Once appointed, Mr. Moore also consulted with a well-respected professor of legal ethics at Seattle University School of Law, John Strait, who confirmed the conflict of interest under the circumstances. CP 1345 ¶ 4.

Moore (like the Harrises' attorney) was a "plaintiff's lawyer" with whom Mr. Beninger had worked on a case decades earlier. CP 82-84; CP 97. The Harrises objected to Mr. Griffith as PR based on potential conflicts between him and the Estate. CP 78-81. Citing the potential for conflict and Mr. Moore's "unique qualifications to serve in this particular case," Commissioner Hudson appointed Mr. Moore as PR, authorizing him to "settle or assign claims on behalf of the Decedent's estate" among other powers. CP 230, 343, 536.[3]

Travelers' assigned counsel moved to revise the Commissioner's order to remove Mr. Moore as PR. CP 10 n. 16, 242, 1348, 1359, 1361. But neither Travelers' originally retained attorney, nor two additional firms it then appointed as co-counsel for the Griffiths and the Estate (i.e. Mr. Moore, as the duly appointed PR) moved to stay the order appointing him pending a ruling on the revision motion. With only a few weeks left before a trial, Mr. Moore did his best to maximize the Estate's assets *and* protect it from creditors. But the firms hired by Travelers impeded his efforts. They declined to provide their client (Mr. Moore) with an evaluation of the Estate's exposure based on having filed that motion. Nor did Travelers or its retained counsel ever seek Mr. Moore's input

[3] Neither Mr. Beninger nor anyone else has offered to compensate Mr. Moore for time spent or expenses incurred in discharging his duties as the PR, or reimbursed him for his time or for tens of thousands of dollars in fees and expenses he incurred hiring counsel to defend him from Travelers' and the Griffiths' attacks on his actions as PR. CP 1346 ¶ 6.

regarding how to respond to a pending motion for partial summary judgment against the Estate and the Griffiths. CP 1346-50 ¶¶ 8-16, CP 1356-66. Nor did Travelers (which controlled the defense) or its retained firms raise a defense based on the Harrises having failed to follow probate procedure – an omission which the same lawyers later argued was a breach of fiduciary duty by *Mr. Moore!* CP 1346-47 ¶ 8.

When trial began on January 4, and with the Estate having been previously found liable as a matter of law (and all affirmative defenses dismissed) for well over the policy limits, it appeared to Mr. Moore that the plethora of firms that Travelers had engaged were ill prepared to defend the Estate from what would almost certainly be a massive jury verdict.[4] Even the Court commented that Travelers' defense team had "sat on [their] hands" preparing for trial. CP 1351 ¶ 18. Having received no cooperation from Travelers' assigned attorneys, Mr. Moore sought to minimize the Estate's exposure by renewing a proposal (previously rejected by the Harrises) to arbitrate the remaining damages issue. His reasoning was sound: (1) it would buy time for Travelers' attorneys to

[4] Most significantly, it appeared that defense counsel would not be allowed to call certain witnesses for having failed to give required notice, and had no viable expert witnesses. Defense attorneys disclosed on the first day of trial that they wanted to call Alan Breen to rebut a Plaintiff's expert regarding Mrs. Harris' grief over the loss of her husband. But Breen is not a "grief counselor" and has no expertise in grief; he is a neuropsychologist. The only other expert hired by the defense, James Russo, M.D., supported Mrs. Harris' injury claims and the reasonableness and necessity of her crash-related injuries. The last of the three defense witnesses was Mrs. Harris' treating doctor, who the defense had not spoken to or deposed prior to trial. CP 1351 ¶ 18.

cure procedural objections related to calling witnesses, and otherwise be able to offer as competent a defense as possible; (2) Mr. Moore knew well Beninger's and his firm's reputation for large jury verdicts; (3) based on his own extensive experience Mr. Moore felt that arbitrators are far more likely to "split the baby"; (4) he wanted to avoid entry of judgment against the Estate; and (5) there is a strong public policy in favor of arbitration. CP 1351-53 ¶¶ 18-21, CP 1367.

The Harrises agreed to arbitrate on January 5, 2016, and selected former Washington Supreme Court Justice Faith Ireland from Mr. Moore's list of proposed arbitrators. The Harrises then nonsuited the Griffiths, so the Estate was the lone defendant facing a trial regarding only damages. CP 1351-52 ¶ 19, CP 454-55. But the firms Travelers had assigned to defend (and which had both entered appearances for) the Estate actively opposed their client's (Mr. Moore) direction to arbitrate. CP 468, 470-71, 1262, 152-58. On January 6, 2016, the trial court ordered arbitration "without delay" before Justice Ireland. CP 139.

A few weeks later on January 27, after withdrawing as counsel for the Estate, two of Traveler's assigned firms filed a TEDRA Petition to remove Mr. Moore as PR, based on allegations that he had breached his fiduciary duties by, among other things, agreeing to arbitrate the remaining damages claims, and considering claims over against the

Griffiths, the Estate's co-defendants. CP 1-23.[5] The petition included supporting evidence, although not by any expert testimony that Mr. Moore's actions breached any standard of care. CP 24-186. Mr. Moore and the Harrises filed separate responses to the Petition, also referenced supporting evidence. CP 526-63. The opposition materials included expert testimony supportive of all of Mr. Moore's actions as PR. The Griffiths never offered any expert rebuttal to these opinions. CP 1170-78. Finally, having been forced to invest his own time and resources in defending against the TEDRA action, Mr. Moore's opposition included a motion for an award of attorney fees and costs. CP 562. The Griffiths' TEDRA Petition and the responses by Mr. Moore and the Harrises formed the full record on which the trial court heard argument and ruled on the Petition.

On May 26, 2016, following oral argument based on a record that included only the petition and the responses by the Estate and the Harrises, the trial court denied the motion to revise the Commissioner's order (CP 923), denied and dismissed the TEDRA petition (CP 921), and lifted a prior order staying arbitration. CP 1443-44.[6] In its oral ruling on the

[5] The subsequent disqualification of those firms based on their violation of RPC 1.9 is the subject of a separate appeal in Cause No. 75246-4-I.

[6] By then Travelers had assigned William Spencer (Murray Dunham & Murray) to represent the Estate, after no less than four firms previously assigned by Travelers appeared and then withdrew. CP 1438-42. Spencer defended the Estate at the arbitration. On August 8, 2016, Justice Ireland awarded the Harrises $12,130,192.63 in further damages. Judgment was entered against the Estate on September 28, 2016. CP 977, 1432.

Petition, the trial court methodically rejected each ground raised by Travelers and the Griffiths as grounds to remove Mr. Moore as PR (RP 47-49). But as the trial court's order dismissing the TEDRA Petition did not address his motion for fees under TEDRA, Mr. Moore formally renewed his request for fees and costs in the approximate amount of $32,000 on August 2, 2016, which the trial court granted. CP 995-98, 1006-08. That ruling was on sound footing. With the efforts to unseat Mr. Moore directed and funded by Travelers, the Griffiths incurred no expense in putting Mr. Moore through the exercise of defending himself against baseless claims. TEDRA's discretionary fee and cost provision acts to safeguard the parties from the financial burdens of such gamesmanship, and enables a court to award costs, including reasonable attorneys' fees, to any party "***in its discretion***." RCW 11.96A.150(1) (emphasis added). The court may order costs "***in such amount and in such manner as the court determines to be equitable***." *Id* (emphasis added). In exercising that discretion, the court may consider any and all factors that it deems to be relevant and appropriate. *Id*. It was proper and entirely appropriate for the trial court to consider the personal time and expense Mr. Moore expended in defending against the barrage of motions funded by Travelers to remove him in favor of another PR – Mr. Griffith – who would be unlikely to pursue bad faith claims against Travelers.

III. ISSUE PRESENTED FOR CONDITIONAL CROSS-APPEAL

In addition to affirming the trial court's dismissal of the Griffiths' TEDRA petition (which ruling the Griffiths now ask that the Supreme Court review), the Court of Appeals reversed the award of fees to Mr. Moore. As discussed below, in reaching its decision the court ignored the plain language of CR 54(d)(2) and its own previously published decision in *North Coast Electric Co. v. Signal Electric, Inc.*, 193 Wn. App. 566, 373 P.3d 296 (2016). Solely in the event that this Court grants the Griffiths' petition, Mr. Moore asks that this Court also grant review of the ruling reversing the award of fees, as being "in conflict with a published decision of the Court of Appeals." RAP 13.4(b)(2).

IV. ARGUMENT

A. Mr. Moore Joins the Harrises in Opposition to the Griffiths' Petition.

Mr. Moore joins in and incorporates by this reference the Harrises' brief in opposition to the Griffiths' Petitions. His actions as PR were prudent and well justified, and supported by expert testimony in response to the Griffiths TEDRA petition, who did not even offer rebutting testimony. The trial court's dismissal of the Griffith's TEDRA Petition asking that Mr. Moore be removed is well supported, and the Court of Appeals properly affirmed it.

B. Should the Court Grant the Griffiths' Petition for Review, It Should Also Review the Court of Appeals' Ruling Reversing the Award of Fees to Mr. Moore.

1. Moore's Motion for Fees Was Timely Under CR 54.

In reversing the trial court's award of fees, the Court of Appeals held that Mr. Moore's motion was "not timely" because it was filed more than 10 days after the trial court entered judgment denying the Griffiths' TEDRA motion to remove him as PR of the estate. Thus, the Court of Appeals held that Mr. Moore's motion did not comply with CR 54(d)(2). Opinion at 24-26. The Court of Appeals was wrong.

In *North Coast Electric*, the Court of Appeals held that North Coast's request for fees and costs in its motion for summary judgment satisfied CR 54(d)(2) even though a separate motion for fees and costs was not filed until two months after the trial court granted North Coast's summary judgment motion. 193 Wn. App. at 569-71. The *North Coast* Court reasoned: "The rule states that the motion must be filed *no later than* 10 days after entry of judgment," but "***does not*** require the motion to be filed *within* 10 days *of* entry of judgment." *Id.* at 573 (bold emphasis added) (internal quotation marks omitted). Thus, North Coast complied with the plain language of CR 54(d)(2) by including its request for fees in its summary judgment motion "because it claimed attorney fees and expenses, was made by motion, provided the facts and law necessary for a court to make a determination, and

the motion was filed no later than 10 days after judgment was entered." *Id.*

That was the situation here. Mr. Moore requested an award of attorneys' fees and expenses by a motion in response to the TEDRA Petition on April 18, 2016. CP 562. That opposition provided the requisite legal and factual support for the court to make a determination of entitlement, and was filed no later than 10 days after judgment was entered. Indeed, it was filed well in advance of the May 26 judgment, thus satisfying the plain language of CR 54(d)(2). It is of no consequence that Mr. Moore filed a motion renewing his request for fees and costs under TEDRA in August, after the trial court dismissed the Griffiths' TEDRA petition, because ***he had already moved for fees several months earlier.***

The Court of Appeals accepted the Griffiths' strained attempt to distinguish *North Coast Electric*, commenting that "Moore's initial request for attorney fees and costs was not in a motion, it was in a pleading in opposition to the petition to remove and replace the personal representative." (Opinion at 26). In other words, the Griffiths and the Court of Appeals analogized a response to a TEDRA petition with a typical bare-bones answer denying the allegations of a complaint in a regular civil case, which it construed as a "pleading" distinct from the sort of developed legal analysis contained in a motion for summary judgment.

The Griffiths and the Court of Appeals profoundly mischaracterized the TEDRA process. TEDRA proceedings provide superior courts with plenary power to decide all matters involving trusts and estates. RCW 11.96A.020. It provides for special hearings with streamlined procedures to ensure that trust and estate matters are resolved quickly and efficiently. RCW 11.96A.090. A TEDRA action is commenced by the filing of a petition, which immediately triggers a hearing on the disputed issues. RCW 11.96A.100. A responsive opposition is not due until 5 days before the hearing, and reply brief is then due two days before the hearing. RCW 11.96A.100(5). Generally, there is no discovery. RCW 11.96A.115. The parties submit whatever evidence and testimony they would like to present by affidavit with their papers, and the hearing proceeds directly to resolve all disputed issues of fact and law. RCW 11.96A.100(7), (8).

In short, TEDRA is specifically designed to allow for the expeditious, complete and final resolution of all trust and estate disputes, and provides for what is essentially an accelerated summary judgment process. The initial "petition" is not like a civil complaint, which need only provide notice of the claims pursuant to CR 8. It is a fully developed brief, which includes all facts and legal authorities required to resolve the dispute, and supporting evidence. Opposition papers are of the same substance. Indeed, the papers submitted in the TEDRA action here illustrate this point. The Griffiths' Petition was a 20-

page document, filled with extensive references to documentary evidence, declarations, pleadings and legal authorities. CP 1-23. It contained all the sections (Relief Requested, Factual Summary, Evidence Relied On, Argument and Conclusion) one would expect to find in a summary judgment motion. *Id.* It included supporting evidence. CP 24-186. The opposition papers were similarly extensive. CP 526-562. These pleadings formed the entire records in which the trial court held a full hearing in which it heard argument, and ultimately denied the Griffiths' petition to remove Mr. Moore. CP 921. Thus, just as in *North Coast*, Mr. Moore requested fees and costs in the context of a dispositive motion, and thus filed his fees motion well within the 10-day time limit of CR 54. *North Coast* controls, and Mr. Moore's petition was timely.

2. The Trial Court Entered Adequate Findings of Fact and Conclusions of Law to Support the Fee Award.

In a brief footnote, the Court of Appeals stated that it "need not address the [Griffiths'] argument" that the fees award was invalid because the trial court failed to enter adequate findings of fact and conclusions of law. (Opinion at 26 n.9). Nevertheless, the Court "note[d]" that the "record is inadequate" under *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, *order corrected on denial of reconsideration*, 966 P.2d 305 (1998). *Id.* The Griffiths and the Court of Appeals were wrong about this as well.

The trial court's order expressly stated that it "considered the pleadings offered in support of and in opposition to the motion" and the full "record in [the] consolidated cases" and "*Harris v. Griffith, et al.*, King County Case No. 14-2-33004-9 SEA and *Harris v. Moore, et. al.*, U.S. District Court Case No. 2:16-CV-00496 (W.D. Wash.)." CP 995. The trial court itself interlineated that it considered the appellants' "Response in Opposition" which included all of the objections raised on appeal. CP 996. In granting the motion, the trial court further expressly found that the "fees and costs Mr. Moore has incurred in opposing the Griffiths' Motion for Revision and the TEDRA Petition are reasonable and necessary." *Id.* It awarded $28,380.62 – the amount Mr. Moore requested in his fee petition. *Id.*; *see also* CP 928, 931-32. In presenting the judgment for entry, Mr. Moore asked the trial court to consider the fees incurred in preparing a reply brief, support for which was submitted in conjunction with the reply. CP 968-80. Hearing no objection, the trial court included those fees in the final award of $31,910.62. CP 1006-08.

Were the fee issues more complicated, as they were in *Mahler*, perhaps more detailed findings and conclusions would have been needed. In that case, the trial court's fee award identified two different amounts from four different law firms to be paid: $56,354 under an insurance bad faith standard or "in the alternative," $32,694 under the mandatory arbitration

rules. The *Mahler* court noted that the trial court awarded two different, competing fee amounts, and it could not discern from the record (affidavits from four different attorneys) whether the trial court thought the services of different sets of attorneys were reasonable or essential to the successful outcome, whether it considered if there were any duplicative or unnecessary services, or whether it found the hourly rates reasonable. *Mahler*, 135 Wn.2d. at 430-34.

This case presented no such difficulty. First, the Griffiths did not dispute that the hourly rate charged by Mr. Moore's attorney was reasonable, so there was no need for any finding on that issue.[7] As to the reasonableness of time spent on particular tasks, Mr. Moore sought to recover fees incurred only in regard to one firm, not four. He requested only a lodestar calculation, not an enhanced fee. The trial court made only one award, not competing amounts "in the alternative." The order identifies the materials considered, including the Petrak Declaration which attached detailed time records reflecting the date and time billed for each separate task performed.

Thus, the trial court's orders satisfied *Mahler*, as they included findings that the time spent was reasonable and necessary. The documents the trial court expressly considered were more than sufficiently detailed to allow the Court of Appeals to conduct a critical review of the trial court's award.

[7] Nor did Travelers or the Griffiths object to the fees requested in preparing the reply.

Having expressly stated that it considered the appellant's responding materials, the fact that the trial court awarded all fees and costs requested reflects only that it did not find the objections to be persuasive.

V. CONCLUSION

For the reasons detailed above, should this Court grant the Griffiths' Petition for Review, it should also review the Court of Appeals' ruling reversing the award of fees and costs incurred by Mr. Moore in defending himself against the Griffiths' TEDRA petition. In so doing, the Court should also award Mr. Moore his fees on appeal, including in responding to the Griffiths' Petition for Review.

DATED this 28th day of September, 2018.

BYRNES KELLER CROMWELL LLP

By _____
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 28th day of September, 2018, a true copy of the foregoing was served on each and every attorney of record herein via email:

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

DATED in Seattle, Washington, this 28th day of September, 2018.

Keith D. Petrak

BYRNES KELLER CROMWELL LLP

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