No. 101085-1
SUPREME COURT
OF THE STATE OF WASHINGTON

CONSUELO ROSALES SOLANO,

Petitioner,

v.

ERICA KELLY,

Respondent.

RESPONDENT ERICA KELLY'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

Snohomish County Superior Court No. 16-2-20507-31
Court of Appeals, Division I, No. 83042-2-I

Alicia Kikuchi
WSBA #40613
Alicia Kikuchi Law Firm, PLLC
144 Railroad Avenue, Suite 220
Edmonds, WA 98020
206-249-7610
alicia.kikuchi@gmail.com
Co-Counsel for Respondent

Shannon M. Kilpatrick,
WSBA #41495
PO Box 219 – PMB 187
Duvall, WA 98019
206-457-3052
shannon@stritmatter.com

TABLE OF CONTENTS

Table of Authorities

CASES

STATUTES

RULES

I. IDENTITY OF RESPONDENT

Respondent Erica Kelly opposes Petitioner Consuelo Rosales Solano's petition for review.

II. INTRODUCTION

This case involves the straightforward interpretation of CR 68 and what costs can be collected by a defendant who makes an offer of judgment to the plaintiff higher than the judgment ultimately received.

Erica Kelly suffered injuries in three rear-end collisions in 2015 and 2016. Kelly sued the drivers of the three vehicles. In 2020, Consuela Rosales Solano made a CR 68 offer of judgment to Kelly, who did not accept it. At trial in March 2021, the portion of the jury verdict attributed to Solano fell just below Solano's offer of judgment. CR 68 requires an unsuccessful plaintiff to pay the defendant's "costs incurred after the making of the offer."

After trial, Solano argued she could collect from Kelly all $93,000+ litigation costs, including expert fees, incurred after

the offer of judgment and not just traditional costs available under RCW 4.84.010. The trial court denied that motion and awarded Defendant Solano $354 in statutory costs.

The Court of Appeals held that because Solano provided no additional statutory or contractual authority allowing recovery of attorney fees, expert witness fees, or other litigation expenses, the trial court did not abuse its discretion.

In her petition, Solano failed to address the existing case law that specifically holds that CR 68 allows the prevailing party to recover costs as provided in RCW 4.84.010, that there are no grounds for awarding expert witness fees as cost, and that costs have historically been very narrowly defined by the courts. In reality, Solano seeks to change the meaning of the word "costs" rather than properly interpreting the term using the standard rules of court rule interpretation.

The Court of Appeals' unremarkable decision does not implicate any of the RAP 13.4(b) factors the Court uses to consider whether review is appropriate. Contrary to Solano's

position, there is no conflict with published decisions, as the court's decision is based on long-standing case law on the issue. In fact, Solano could prevail only if the court overlooked established law. While the interpretation of court rules in general is an issue of public interest, there is nothing about the issue in this particular case that makes it an issue of substantial public interest. The Court of Appeals followed established law and did not err.

III. RESTATEMENT OF THE ISSUES

1. CR 68 provides: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The Court of Appeals held that Solano's cost recovery under CR 68 was limited to those costs allowed under RCW 4.84.010, as there was no additional statutory or contractual authority allowing the expansion of costs. Did the Court of Appeals err in limiting Solano's costs? [No.]

2. Solano also made a policy argument to expand the definition of costs in CR 68, which the Court of Appeals held was not supported by the plain language of the rule. Did the Court of Appeals err in failing to expand the meaning of costs under CR 68? [No.]

IV. RESTATEMENT OF THE CASE

A. Erica Kelly was injured in three rear-end collisions.

Erica Kelly was injured when she was rear-ended in three collisions between 2015 and 2016. In December 2016, Kelly sued the drivers of all the at-fault vehicles, plus the owners of the vehicles, in a single lawsuit. CP 355–360. Solano was the driver who rear-ended Kelly in the second collision. CP 306 ¶ 1, 357. Prior to trial, Kelly settled with Joanne Brothers, the driver in the third collision, and dismissed her from the case. CP 246 ¶ 2, 321 n. 1.

B. Solano served two CR 68 offers of judgment.

In August 2020, Solano served an offer of judgment to Kelly for $15,000. CP 130–133. The next month, Solano served

another offer of judgment to Kelly for $25,000. CP 135–138. The owner of the Solano vehicle, Hugo Alvarez, was voluntarily dismissed from the case in early 2021. CP 320–322.

C. Kelly failed to beat Solano's offer of judgment at trial.

In March 2021, the case proceeded to trial Solano and the Nguyen Defendants (the cause of the first collision). The jury awarded Kelly $67,200 in damages, apportioned 80% to Nguyen, and 20% to Solano. CP 353–354. Solano's portion was $13,440. CP 22.

After trial, Kelly moved for entry of judgment against Nguyen and Solano, including statutory attorney fees and recoverable costs under RCW 4.84.010 of $535.00. CP 343–352. Nguyen paid their portion of the jury verdict and were dismissed from the case. CP 1–3 (dismissal); CP 20–21 (satisfaction of jury verdict). They were not a party to this appeal.

D. Solano opposed entry of judgment and instead sought recovery of all of her litigation costs and entry of judgment against Kelly.

Solano cross-moved for entry of judgment against Kelly for all her litigation costs incurred after the offer of judgment—not just those allowed by RCW 4.84.010—for failing to beat her offer of judgment, which totaled $84,078.31. CP 281-334. Solano then provided additional invoices totaling $9,396.04 in expert, messenger, and interpreter fees she claimed that were recoverable. CP 150–60. That brought the total costs Solano sought to recover to more than $93,000. CP 122. Solano provided no authority to support their recovery, nor any explanation for these costs.

Kelly opposed Solano's cross motion. CP 186–205. She argued RCW 4.84.010 is the only applicable statute. CP 199–201. Defendant failed to explain how the invoices submitted fell into those categories. CP 199–201. Finally, Plaintiff argued that RCW 4.84.010 does not allow for the recovery of expert witness fees. CP 202.

E. The trial court held a hearing and requested more information from Solano about her costs.

Snohomish County Superior Court Judge Anita Farris held a hearing on Kelly's motion for entry of judgment and the dispute over fees and costs. RP at 1; CP 120. Solano argued that the purpose of CR 68 was to encourage settlement, so full costs should be awarded, including expert costs. RP at 3. The trial court questioned if some of the costs incurred were reasonable. RP at 11-20. Solano was allowed an additional two weeks to provide the trial court with supplemental information about the specifics of the costs and the depositions used. CP 120; RP at 25-26. Solano provided more invoices, but little detail about why the costs were incurred and whether they were necessary for the result. CP 39–119.

Judge Farris issued a memorandum and order, rejecting Solano's argument she could recover all litigation costs, including expert costs CP 22– 23. Further, since Solano did not try to identify or apportion out the traditional statutorily

allowed costs, Judge Farris could only award the cost of service on two witnesses, plus the statutory attorney fees, which amounted to $354. CP 23. Judgment was entered against Solano, consistent with that order. CP 16–19. Solano appealed. CP 5–15.

F. The Court of Appeals affirmed.

The Court of Appeals affirmed the trial court. Solano now petitions the Court of review, arguing review should be accepted under RAP 13.4(b)(2) and RAP 13.4(b)(4) because the Court of Appeals' decision conflicts with Court of Appeals decisions and involves issues of substantial public importance.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Solano argues that the Court of Appeals' opinion conflicts with a published Division II Court of Appeals' decision – *Wallace v. Kuehner*, 111 Wn. App. 809, 823, 46 P.3d 823 (2002) – and that it involves an issue of substantial public interest. She is wrong on both counts. The Court of Appeals did nothing more than apply the plain language

analysis used to interpret court rules. Solano made policy arguments urging the reversal of the trial court, but those argument could not (and did not) override the plain language of CR 68. If the Court intended to permit recovery under CR 68 for more than just statutory costs, then it would have said so expressly when the rule was written.

Solano cannot point to any case that indicates anything more than statutory costs should be awarded under CR 68. Rather, Solano ignores the existing case law that says the opposite. For this reason, there is no issue of substantial public interest–the issue has already been correctly resolved by the courts. The petition should be denied, and Respondent should be awarded costs.

A. The Court of Appeals' decision follows clear, long-standing principles of plain language analysis.

The Court of Appeal looked to the plain language of CR 68 to determine that costs are limited to those allowed under RCW 4.84.010—and not litigation costs or expert fees. Court

rules are interpreted like statutes, using the same tools of statutory construction. *State v. Otton*, 185 Wn.2d 673, 681, 374 P.3d 1108 (2016). The "fundamental objective is to ascertain and carry out" legislative intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The starting place is "the rule's plain language and ordinary meaning." *Banowsky v. Backstrom*, 193 Wn.2d 724, 735, 445 P.3d 543 (2019).

If the meaning of the court rule is plain on its face, the court must give effect to that meaning. *Campbell & Gwinn*, 146 Wn.2d at 10. Plain meaning can be determined "from the ordinary meaning of the language at issue, the context of the statute that includes the provision, related provisions, and the statutory scheme as a whole." *Hernández v. Edmonds Memory Care, LLC*, 10 Wn. App. 2d 869, 874, 450 P.3d 622 (2019).

Without express language authorizing more, Washington courts recognize the term "costs" has a specific, narrowly defined meaning in the law. There is no need to interpret the

term "costs" or rely on a non-legal dictionary definition when the courts have already defined it. Courts have historically narrowly defined costs. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 674, 880 P.2d 988 (1994). This Court has said explicitly that without express authority, a party is not entitled to more than those costs in RCW 4.84.010. *Id*.

Solano ignores the long-standing history of how the courts interpret the term "costs" and encourages this Court to do the same. She argued that the phrase "the costs" in CR 68 should be interpreted to mean all costs, including litigation and expert expenses, which highlights why her plain language argument fails. The courts are "presumed to know the rules of statutory construction." *Khandelwal v. Seattle Mun. Court*, 6 Wn. App. 2d 323, 332, 431 P.3d 506 (2018). One rule is that "a court may not read into a statute those things that it conceives the legislature may have left out," a rule that also applies when construing court rules. *In re Det. of Lane*, 182 Wn. App. 848,

854, 332 P.3d 1042 (2014). If this Court intended the term "costs" to mean "all costs" it would have said so expressly.

Solano also cannot point to the express language that authorizes an award of expanded costs—whether in a statute or court rule. Instead, she argues the fact the rule itself was enacted is the authority. She says this is so because the purpose of CR 68 is to encourage settlements; as a result all litigation costs must be awardable. No court in this state has ever adopted that argument.

For support, Solano cites to various committee reports and minutes from the federal Advisory Committee on Civil Rules. These reports and minutes concern the federal rules, not the state rules. And they also demonstrate why Kelly's argument is correct—because not even the *federal* rules are currently interpreted as Petitioner argues CR 68 should be interpreted. The reports and minutes instead discuss why a language change might be needed, which would be done

through rulemaking, not by case law. The Court of Appeals correctly rejected Petitioner's argument.

B. The Court of Appeals' decision follows earlier decisions on the meaning of "costs" in CR 68 and does not conflict with other decisions.

All three divisions of the Court of Appeals have held CR 68 does not permit a prevailing defendant to recover more than the costs in RCW 4.84.010.

In *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 238, 580 P.2d 642 (1978), Division I held that a prevailing defendant may not recover attorney's fees and expert witness fees under CR 68. Citing *Fiorito*[1], the court noted that "[t]he term "costs" has been interpreted as not including attorney's fees and expert witness fees." *Sims*, 20 Wn. App. at 238. The court emphasized that if the rule is to be expanded to permit recovery of other litigation costs and fees, it must be done by statute or amendment to CR 68. *Id*.

[1] *Fiorito v. Goerig*, 27 Wn.2d 615, 179 P.2d 316 (1947).

In *Jordan*, Division I reversed an award of costs made under CR 68 because it contained "certain fees."[2] *Jordan v. Berkey*, 26 Wn. App. 242, 245, 611 P.2d 1382 (1980). The court held that though the defendant was entitled to costs because his offer of judgment exceeded what plaintiff recovered, "the costs awarded are limited to those" in RCW 4.84. *Id*.

In *Estep*, Division III of the Court of Appeals reversed an award for expert witness fees the trial court awarded under CR 68 and RCW 4.84.010. *Estep v. Hamilton*, 148 Wn. App. 246, 263, 201 P.3d 331 (2008). Citing *Fiorito*, the court held that expert witness fees could not be awarded as costs under RCW 4.84.010 and so could not be awarded under CR 68. *Id*.

While not directly addressing the same issue presented here, Division II held that under CR 68, a defendant who made an offer of judgment larger than what plaintiff ultimately recovered is entitled to "costs and disbursements," also known

[2] The nature of the fees is not explained in the opinion.

as statutory attorney fees and costs. *Tippie v. Delisle*, 55 Wn. App. 417, 421, 777 P.2d 1080 (1989).

The courts reached these results because whether used in a statute or court rule, the term "costs" without more has a universal legal definition as only those costs allowed by RCW 4.84.010. Without express language authorizing an expanded award of costs, courts may not award more than traditional statutory costs.

Further, *Wallace v. Kuehner* does not conflict with this case. In *Wallace*, the Court of Appeals held that an offer of judgment could not be served by fax. *Wallace v. Kuehner*, 111 Wn. App. 809, 823, 46 P.3d 823 (2002). In that case, because the offer of judgment was served by fax, it was ineffective and Defendant was not permitted to recover costs. *Id.* at 823-24. There was no discussion of what costs could have been collected. Nor was there any discussion about the meaning of the word "costs" in CR 68. There is nothing about this case that conflicts with the decision made by the Court of Appeals here.

C. Solano provided no evidence this case is of substantial public interest.

To qualify for review under RAP 13.4(b)(4), Solano is required to show the case "involves an issue of substantial public interest that should be determined by the Supreme Court." Solano has failed to meet this showing. While encouraging settlement is important, Solano has failed to explain why the Court of Appeals' interpretation of the plain language of CR 68 requires review, especially where the court followed settled case law on the issue. Solano correctly asserts that the Court has never interpreted the terms "costs" under CR 68. However, this is because of the plain meaning of the word – there is no need to interpret a term that is clearly defined to all except Solano.

Solano focuses most of her argument on the fact that *Fiorito* was decided before CR 68 was initially adopted and eventually amended. The Court of Appeals did not find Solano's argument compelling. As previously noted, if this

Court truly believed there was confusion on the definition of costs and wanted to ensure the interpretation found in CR 68 differed from that provided in *Fiorito*, it would have explicitly done so in the rule.

Further, the federal authority cited by Solano also reinforces the incorrect nature of her arguments. While the minutes of the federal committee discuss reasons why the court rule should be changed, that simply means the current federal version of rule 68 is not interpreted as Solano argues it should be. If Solano wants to see the language of the rule changed, she should pursue a change through this Court's rulemaking process.

VI. CONCLUSION

Solano's petition for review should be denied. The Court of Appeals' decision that CR 68 allows only recovery of statutory costs to prevailing parties complies with long-standing principles of plain language interpretation and earlier decisions on the meaning of "costs" under CR 68. Petitioner fails to point

to any cases to show why the Court of Appeals' analysis was incorrect. Petitioner likewise fails to meet its burden of showing how this dispute over the standard definition of "costs" under CR 68 rises to the level of being an issue of "substantial public interest" given the long-standing case law. The petition should be denied, and Respondent should be granted costs pursuant to RAP 18.1.

I certify this document contains 2,860 words, exclusive of the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, in compliance with RAP 18.17(b).

RESPECTFULLY SUBMITTED this 9th day of August 2022.

LAW OFFICE OF SHANNON KILPATRICK

s/ Shannon M. Kilpatrick
Shannon M. Kilpatrick, WSBA #41495
PO Box 219 – PMB 187
Duvall, WA 98019
(206) 457-3052
Shannon@stritmatter.com
Co-counsel for Respondent Erica Kelly

ALICIA KIKUCHI LAW FIRM, PLLC

s/ Alicia Kikuchi

Alicia Kikuchi, WSBA# 40613
144 Railroad Ave., Suite 220
Edmonds, WA 98020
(206) 249-7610
alicia.kikuchi@gmail.com
Co-counsel for Respondent Erica Kelly

DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury of under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Shannon M. Kilpatrick, WSBA #41495 PO Box 219 – PMB 187 Duvall, WA 98019 (206) 457-3052 Shannon@stritmatter.com Co-Counsel for Respondent ☐ U.S. mail postage prepaid ☐ Fax ☐ Hand delivery ☒ Email ☒ Supreme Court EFiling Portal	Gordon Klug Narmina Sharifova Smith Freed Eberhard 1215 Fourth Ave., Suite 900 Seattle, WA 98161 (206) 576-7549 gklug@smithfreed.com nsharifova@smithfreed.com Counsel for Appellant ☐ U.S. mail postage prepaid ☐ Fax ☐ Hand delivery ☒ Email ☒ Supreme Court EFiling Portal

DATED this 9th day of August 2022.

/s/ Alicia Kikuchi
Alicia Kikuchi, WSBA #40613

ALICIA KIKUCHI LAW FIRM, PLLC

August 09, 2022 - 3:34 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,085-1
Appellate Court Case Title:	Erica Kelly v. Consuelo Rosales Solano
Superior Court Case Number:	16-2-20507-9

The following documents have been uploaded:

- 1010851_Answer_Reply_20220809153110SC899528_9437.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Respondents Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- aalexander@hwslawgroup.com
- gklug@smithfreed.com
- jblegalva@gmail.com
- jmendel@hwslawgroup.com
- nsharifova@smithfreed.com
- shannon@dawson-brown.com
- shannon@stritmatter.com
- wlarson@smithfreed.com

Comments:

Sender Name: Alicia Kikuchi - Email: alicia.kikuchi@gmail.com
Address:
144 RAILROAD AVE STE 220
EDMONDS, WA, 98020-4121
Phone: 206-249-7610

Note: The Filing Id is 20220809153110SC899528