

64308-8

64308-8

No. 64308-8-I

Court of Appeals, Division I  
of the State of Washington

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In Re:

HELEN FEIGER, Respondent

and

TONY AND ANNA PRATT, Appellants

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BRIEF OF APPELLANT

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### **Assignments of Error**

1. The trial court erred in denying the Pratts' motion requesting that the clerk of the court be ordered to tax costs and disbursements.  
(RP 25, lines 15-18)
2. That the trial court erred when it awarded Feiger \$21,282 in attorney's fees. (CP 7)
3. The trial court erred when it awarded Feiger \$1,621.65 in costs. (CP 7)
4. The trial court erred in finding that "plaintiff is entitled to at least one day for mailing of an order" by a judge. (CP 7)

5. The trial court erred in finding or concluding that “Judge Apples [sic] order was mailed on 25 Aug 09 making this motion timely.” (CP 7)
6. That the trial court erred in ordering that attorney’s fees should be awarded through August 5, 2009. (CP 7)

### **A. Summary of Argument**

This case involves a tenant that made a CR 68 offer of judgment to limit potential liability for attorney's fees that were starting to increase to levels far higher than the wrongfully requested judgment amount.

This is a very important issue for the Court of Appeals because a current tactic of landlords, through eviction attorneys and eviction services, is to make an inflated request in the complaint for rental payments greater than actually owed; then, if a tenant contests that wrongfully inflated amount, the tenant faces liability for increased attorney's fees that far exceed the wrongfully requested amount.<sup>1</sup>

The Pratts argue that the purpose of a CR 68 offer is to encourage settlement; however, if trial courts fails to follow CR 68 and instead allow attorney's fees to accumulate past the agreed upon date in the accepted CR 68 offer, then the trial court has effectively defeated the purpose of CR 68.

Here, a Skagit County Judge accepted the Tenants' offer and Landlord's acceptance of a previous CR 68 Offer of Judgment that limited attorney's fees to the offer date of June 25, 2009. Later, the

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<sup>1</sup> The Respondent's request for relief prays for "\$400.00 if no defense is interposed by Defendants, and such greater sum as the Court deems reasonable if this matter is contested."

Landlord sought attorney's fees to the date of entry of the acceptance of offer of judgment. Subsequently, the Landlord failed to bring a timely motion for attorney's fees and costs, and the Snohomish County Court Commissioner inexplicably extended the CR 54 time limit for the prevailing party to bring an attorney's fees and costs motion by creating an unspecified "mailing" rule for the entry of an order.

Thus, this case involves the interpretation of CR 54 and what is meant by "within 10 days after the entry of judgment." Both parties and the commissioner agreed that the motion must be brought within 10 days, but there is disagreement as to when the 10 day limitation starts to accrue. Here, a Court Commissioner ruled, without any case law precedent whatsoever, that an order is actually entered at least one day after mailing of the order, instead of being entered when filed with the Clerk of the Court.

This Court should publish its opinion. It appears that there are two issues of first impression: (1) whether attorney's fees on a CR 68 offer of judgment accrue through the agreed upon date of offer or the date of acceptance; and, (2) whether the CR 5 "mailing rule" applies to the date of entry of an order under CR 54.

The unprecedented volume of appeals from Snohomish County unlawful detainer matters indicates that there is much uncertainty among

the judiciary on how to apply the civil rules to unlawful detainer matters. While the Pratts was lucky enough to obtain *pro bono* legal representation, most tenants must navigate the legal system without legal representation. If a represented tenant has difficulty in getting the courts to follow the civil rules and case precedents, it is extremely unlikely that an unrepresented *pro se* tenant could articulate his position better than experienced counsel. Publication of this opinion in an easy to understand manner will greatly assist tenants throughout the state.

#### **B. Statement of the Case**

On March 4, 2009, Feiger caused a statutory notice for non-payment of rent to be served upon Pratt. CP 132-33. On March 10, 2009 this action was initiated through signing of the summons and complaint. CP 128-33. On March 11, 2009, the summons and complaint were served on the Pratts. CP 122-27. The summons and complaint were not filed with the court. CP 122, 124 (note difference between date served and date filed). The Pratts' response deadline was on March 19, 2009. CP 122. On an unknown date, the Pratts submitted what was labeled an "Answer" to Feiger's counsel. CP 112-21. This answer included a copy of an addendum to the lease agreement. CP 118. Attachment 3. The attorney's fees provision in the lease addendum states that "[a]ll of the

costs for vacating the property, eviction costs, or other legal or court costs will be borne by the Pratts.”

On March 26, 2009 Feiger filed the summons and complaint with the court. CP128, 130.

On April 7, 2009, a show cause hearing was held. CP 111. Court Commissioner Lester H. Stewart set the matter trial regarding possession, but stated that Feiger could obtain a writ of restitution if the Pratts did not post April 2009’s rent in the court registry by 3:00 p.m. on April 8, 2009. CP 110, 111.

On June 4, 2009, after “[a]ll Snohomish County Judges and Commissioners” recused themselves, “Skagit County Judges . . . agreed to handle motions and trial in the above-referenced matter.” CP 99. The parties were instructed that “[a]ny contested motions in this case will be heard in Skagit County.” CP 101.

On June 19, 2009, despite this recusal, Commissioner Stewart held a contested hearing, but continued it to June 26, 2009. CP 375, 436.

On June 25, 2009, the Pratts made a CR 68 Offer of Judgment to Feiger. CP 279, 89. Appendix 2.

On June 26, 2009, again despite this blanket recusal, Commissioner *pro tem* Donald Senter signed an order setting reasonable attorney’s fees for the work of Rob Trickler at two hundred thirty dollars

(\$230.00) CP 97-98, 61. At this hearing before Commissioner Senter, the Plaintiff told the Commissioner about the CR 68 offer of judgment. CP 156, lines 18-24.

On July 7, 2009<sup>2</sup>, a hearing was held before Skagit County Judge Michael Rickert. CP 93. This date is validated by the client ledger of Rob W. Trickler. CP 79.

At this hearing, Judge Rickert got both parties to agree that there was an offer to settle, an acceptance of that settlement offer, and that the terms included a monetary judgment for rent; with the remaining issues of reasonable attorney's fees, costs, and sanctions to be brought by motion of Feiger. CP 167, line 22 to CP 169, line 7.

On August 5, 2009, the trial court entered an Entry of Judgment on CR 68 Offer of Judgment. CP 87-89. Appendix 4. The original July 25, 2010 offer of judgment was attached to this entry of judgment. CP 89. This judgment stated that "Pursuant to the attached Offer of Judgment the Plaintiff's attorney will seek an award of attorney fees, costs and sanctions in amount to be determined by the court, a separate judgment will be entered after the attorneys fee motion is brought." CP

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<sup>2</sup> The exact date of this hearing was July 7, 2009. Judge Rickert's clerk, Becky, noted that the hearing was held on July 2, 2009. The transcripts state that the hearing was July 1, 2008. CP 139. But, the Order shortening time set the hearing for July 7, 2009. CP 362.

89. Attachment 3. On August 24, 2009, Judge George F.B. Appel entered and filed an Order Determining Reasonableness of Attorney Fee Rate, setting the reasonable fees for Mr. Trickler's services at \$230.00. CP 86.

On September 8, 2009, the Pratts filed a motion requesting that the court direct the clerk of the court under CR 54(d)(1) to tax costs and disbursements pursuant to CR 78(e). CP 67-69. Later that same day, Feiger filed a motion to determine attorney fees. CP 72-85.

On September 16, 2009, Snohomish County Court Commissioner Susan C. Gaer heard both the Feiger motion for attorney's fees and costs, and the Pratts' motion for an order directing the clerk to tax costs and disbursements. After hearing, the Commissioner awarded \$21,282.00 in attorney's fees and \$1,631.85 in costs on the Feiger motion. CP 7, 8. The Commissioner denied the Pratts' motion. RP 25, lines 15-18. The Commissioner specifically found that "the Plaintiff is entitled to at least one day for mailing of an order, and that Judge Apples [sic] order was mailed on 25 Aug 09 making this motion timely." CP 7. Commissioner Gaer also found that "[t]his is attorney fees through Aug. 5, 2009." CP 7

On October 13, 2009, the Pratts timely appealed the September 16, 2009 Order of Commissioner Gaer. CP 3-4.

### **C. Standard of Review**

When the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo. *Housing Auth. v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997); *Laffranchi v. Lim*, 146 Wn.App. 376, 381, 190 P.3d 97 (2008).

Findings of fact are reviewed under the substantial evidence rule. A finding of fact will not be overturned if it is supported by substantial evidence. *In re Discipline of Poole*, 156 Wn.2d 196, 209 n. 2, 125 P.3d 954 (2006). *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

A trial court's conclusions of law are reviewed de novo. *City of Seattle v. Megrey*, 93 Wn. App. 391, 393, 968 P.2d 900 (1998).

### **D. Argument**

#### **1. Feiger is bound by the oral acceptance of the CR 68 Offer of Judgment in open court.**

Because Feiger orally accepted a CR 68 Offer of Judgment in open court, she should be bound to that acceptance and the terms of the

offer as verified by Skagit County Judge Michael E. Rickert, despite not reducing the acceptance to writing.

Under CR 68, “a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money . . . with costs then accrued . . . [i]f within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted . . . the court shall enter judgment . . .” CR 68, appendix 3.

“General contract principles should be applied to CR 68 only where such principles neither conflict with the rule nor defeat its purpose. *Hodge v. Development Services*, 65 Wn. App. 576, 584, 828 P.2d 1175 (1992). *Dussault v. Seattle Public Schools*, 69 Wn. App. 728, 733, 850 P.2d 581 (1993).

“The purpose of CR 68 is to promote fair settlements.” *Hodge v. Development Services*, 65 Wn. App. 576, 584, 828 P.2d 1175 (1992).

“This is best accomplished by eliminating uncertainty and any possible unintended consequences for either party in connection with the making, accepting, or rejecting of CR 68 offers.” *Hodge* at 584; in accord *Brader v. Minute Muffler*, 81 Wn. App. 532, 536, 914 P.2d 1220 (1996).

The court then went on to say:

Accordingly, it would be prudent practice and we strongly recommend that where a defendant intends that his offer shall include any attorneys’ fees provided for in

the underlying statute he expressly so states. His offer should say, “costs include attorneys’ fees” or words to that effect. A defendant knows what he intends and fair dealing requires that he manifest that intention to the other party. If the underlying statute is unclear, such an offer will at least make the defendant’s interpretation clear. This is a slight burden and it is fairly placed on the defendant who is seeking to terminate his liability for attorneys’ fees at the time of settlement.”

*Hodge* at 584.

With *Hodge* in mind, on June 25, 2009, the Pratts followed this “prudent practice” and made a settlement offer “[p]ursuant to the provisions of CR 68, RCW 4.84.250 and RCW 4.84.270 [for judgment] . . . plus court costs and reasonable attorney’s fees incurred in this action as of the date of this offer, as determined by the court.” CP 89, 279. Appendix 2. The date of the offer was June 25, 2009. CP 89, 279. The timing of this offer of judgment was documented in the time records of Rob W. Trickler (Jun 25/2009 13931 Telephone call to client Re offer of judgment not including waivers and results of todays [sic] hearing). CP 78.

On July 7, 2009, there was a hearing in Skagit County.<sup>3</sup> After much discussion on the CR 68 Offer of Judgment, the following discussion took place:

MR. TRICKLER: . . . I believe I have the authority to accept [the CR 68 Offer of Judgment from June 25, 2009] --

THE COURT: Okay. . . Well, lets put that on the record then so we have what – what – what you’ve got so every – so it’s very clear since there’s been some confusion.

Mr. Peterson, on behalf of his clients, the Pratts, is offering to settle this in the amount of \$3750 . . . [details not relevant to appeal of attorney’s fees] . . . The issues that are still on the table that could be pled or can be argued and reserved for further ruling are court costs, reasonable attorney’s fees incurred in this action to the date of the offer which is June 25<sup>th</sup>, and the issue of sanctions whether or not those are applicable or not. Is that under – gentlemen, is that what we’re agreeing on?

MR. TRICKLER: I would accept that offer on behalf of my client, Your Honor.

THE COURT: Okay. Mr. Peterson?

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<sup>3</sup> As previously discussed, this hearing was on July 7, 2009, despite conflicting information on the transcript of proceedings.

MR. PETERSON: (No audible answer).

THE COURT: It's been accepted. So that's the amount – the judgment amount is just a matter of a computation and this can be set for further hearing on reasonable attorney's fees, costs and sanctions.

CP 167, line 22 to CP 169, line 7.

At this hearing both parties orally accepted, or should be estopped from denying: (1) that there was a valid CR 68 offer by the Pratts on the table; (2) that Feiger orally accepted that offer in open court; (3) that Skagit County Judge Rickert verified that there was an offer and acceptance; and, (4) that Judge Rickert verified the remaining issues (reasonable attorney's fees through June 25, 2009, costs, sanctions).

Here, the Pratts made a written CR 68 offer, as required under CR 68. CP 89, 279. Later, Judge Richter put on the record that the Pratts were offering to settle this under the CR 68 offer. CP 168, lines 6-7. The Pratts never objected to Judge Richter's characterization of the CR 68 offer being still open when asked "[o]kay. Mr. Peterson?" CP 169, line 2. Feiger accepted the offer when her counsel stated "I would accept that offer on behalf of my client." CP 168, line 25, to CP 169, line 1. When Judge Richter announced "[i]t's been accepted," neither

party objected to Judge Richter stating that the offer was accepted. CP 169, line 4 through end of transcript. Thus, the only requirement of accepting a CR 68 offer of judgment that was not met was the requirement that the “adverse party serves written notice that the offer is accepted.” CR 68.

This is a case of first impression as in the only precedent dealing with settlement in the courtroom, the acceptance was reduced to writing. *Dussault v. Seattle Public Schools*, 69 Wn. App. 728, 731, 850 P.2d 581 (1993). In *Dussault*, after jury selection commenced and recessed at noon, the parties reported to the courtroom at 1:30 p.m. and “plaintiff’s counsel served the Court and the School District with a document entitled “Acceptance of Offer of Judgment,” that stated “the plaintiff . . . accepts the Offer of Judgment . . . and requests that the Court enter judgment accordingly.” *Dussault* at 731.

This Court should hold that oral acceptance of a CR 68 offer in open court meets the requirement that “written notice” of acceptance be served. To hold otherwise would be contrary to the CR 68 purpose of promoting fair settlements. To hold otherwise would also increase uncertainty and create a trap for the unwary. An attorney could orally offer to accept a CR 68 offer in open court, and opposing counsel without legal research resources in the courtroom could accept that offer,

not realizing the acceptance would not be binding. This trap to the unwary would not promote fair settlements and it would increase uncertainty in the very setting that fairness and certainty should be present – the courtroom.

This Court should enforce the CR 68 agreement. Enforcement includes limiting “reasonable attorney’s fees incurred in this action to the date of the offer which is June 25<sup>th</sup>, and the issue of sanctions whether or not those are applicable or not.”

**2. An offer of judgment in the full judgment amount requested by Feiger deprives the court of jurisdiction to do anything but enter judgment and determine attorney’s fees and costs to the date of the offer.**

If this Court holds that the CR 68 offer of judgment was not properly accepted, it should determine that the case be ended and judgment entered for the full amount requested in the complaint, and that attorney’s fees and costs be calculated through the date of the CR 68 offer. This appears to be a case of first impression. As such, it is requested that this decision be published. This conclusion of law should be reviewed *de novo*.

“In the absence of state authority it is appropriate to look to the federal interpretation of the equivalent rule.” *Hodge v. Development*

*Services*, 65 Wn. App. 576, 580, 828 P.2d 1175 (1992). “CR 68 . . . is patterned after the federal rule.” *Brader v. Minute Muffler*, 81 Wn. App. 532, 535, 914 P.2d 1220 (1996).

Under the Federal Rules of Civil Procedure, “[i]t is settled that if a Rule 68 offer of judgment is made for the full amount of relief sought or the full amount of the recovery authorized by statute, the case is ended.” Federal Civil Rules Handbook, page 1247 (2009). Federal Courts only differ as to whether the plaintiff should simply be forced to accept the offer<sup>4</sup>, or whether the outcome is mandated by the resulting disappearance of subject matter jurisdiction for a lack of case or controversy.<sup>5</sup>

In the present matter, the parties have agreed as to the full amount of the monetary judgment for the rent to be \$4,916.76. CP 87. This agreement was imposed by Judge Rickert who realized the calculation of the damages was mechanical, that is, \$3,750.00 for rent through the end of March 2009, plus \$41.67 per day based upon the date vacated on the sheriff’s return on the writ of restitution.

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<sup>4</sup> *Wilner v. OSI Collection Services, Inc.*, 198 F.R.D. 393, 395 (S.D.N.Y. 2001).

<sup>5</sup> *Abrahms v. Interco Inc.*, 719 F.2d 23, 32-33 (2d Cir. 1983).

Given that the public policy behind encouraging CR 68 offers of judgment is to promote fair settlements and increased certainty, this Court should hold that a Plaintiff is required to accept a CR 68 offer of judgment if it is full the full amount claimed plus costs and reasonable attorney's fees as allowed by contract or statute.

Now, this Court may feel this offer of judgment is unnecessary as a tenant could merely fail to answer and allow a default judgment to be entered. But, this presents two problems. First, a CR 68 offer of judgment can be made after an answer and only need be made at least ten days prior to trial. A tenant, such as the Pratts, should be allowed to make a CR 68 offer of judgment when they realize that the litigation tactics of the landlord will result in the attorney's fee judgment far exceeding any reduction in the judgment amount that the tenant believes is appropriate.

Second, there is a pattern in Snohomish County of the Superior Court granting judgments in excess of that allowed by statute. *Leda v. Whisnand*, 150 Wn. App. 69, 86-87 and fn7, 207 P.3d 468 (2009) (Attorney's fees awarded without findings of fact and conclusions of law to support attorney's fees reasonableness; process server fees awarded

for unregistered process servers); *Jahed v. Miller*<sup>6</sup>, 61557-2-I (2009) (attorney’s fees awarded without findings of fact and conclusions of law to support reasonableness); *Row v. Barringer*<sup>7</sup>, 64101-8-I (pending, trial court awarded costs for unregistered process server). While it appears that a tenant should be able to accept a default and have a judgment entered for appropriate attorney’s fees and costs, in practice the Snohomish County courts routinely approve unsupported attorney’s fee and costs requests by Landlords as shown by the facts in both published and unpublished cases.

In conclusion, a tenant such as the Pratts should be allowed to “surrender” and make a CR 68 Offer of Judgment for the full amount of the requested judgment. The Plaintiff should be required to accept this “surrender” and stop the ever increasing attorney’s fee award as of the time of the offer.

**3. The ruling of a visiting Skagit County Superior Court Judge cannot be overruled or disregarded by a Snohomish County Court Commissioner.**

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<sup>6</sup> This case is being cited not for its authority value, but for its fact value. Clearly, citing this case for its authority value would violate GR 14(a) which states that “[a] party may not cite as an authority an unpublished opinion of the Court of Appeals.

<sup>7</sup> This case is currently before the Court of Appeals and will be heard at approximately the same time as this matter.

This Court should not allow an agreement reached with the assistance of a Skagit County Judge be overruled by a Snohomish County Court Commissioner. The Court Commissioner's order should be reviewed *de novo* based on the records and transcripts in this matter.

The powers of a court commissioner are enumerated in RCW 2.24.040. A "court commission shall have power, authority, and jurisdiction, concurrent with the superior court and the judge thereof" in fifteen (15) particular situations. RCW 2.24.040 (1)-(15). None of the particular situations includes revision or reconsideration of a judge's ruling that occurred over a month previously.

Under Snohomish County Local Rule (SCLR) 7(b)(1)(A), "when a motion has been ruled upon in whole or in part, the same motion may not be later be presented to another judge." Further, if there is a "subsequent motion is made upon alleged different facts, the moving party must show by affidavit what motion was previously made, when and to which judge, what order or decision was made on it, and what new facts are claimed to be shown." SCLR 7(b)(1)(B). "For failure to comply with this requirement, the subsequent motion may be stricken, any order made upon such subsequent motion may be set aside, or provide such other relief as the court deems appropriate." SCLR 7(b)(1)(B).

“[T]he terms ‘judge’ and ‘court’ include commissioners.” SCLR 0.02(b).

“If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e). CR 54(d)(1).

“Claims for attorney’s fees and expenses, other than costs and disbursements, shall be made by motion . . . filed no later than 10 days after entry of judgment.” CR 54(d)(2). The motion for attorney’s fees can be brought after 10 days by “order of the court.” CR 54(d)(2).

In the present matter, on July 7, 2009, the Skagit County Judge ruled that “[t]he issues that are still on the table that could be pled or can be argued and reserved for further court ruling are court costs, reasonable attorney’s fees incurred in this action to the date of the offer which is June 25<sup>th</sup>, and the issue of sanctions whether or not those are applicable or not.” CP 168, lines 18-23. The Court did not order that the ten day period under CR 54(d)(1) or (2) to bring a motion for costs or fees be extended.

On August 5, 2009, entry of judgment was made on the CR 68 offer of judgment. CP 67-69. The offer of judgment reflected that it included “court costs and reasonable attorney’s fees incurred in this

action as of the date of this offer . . .” CP 69. The wording of the offer allowing attorney’s fees through the offer date (June 25, 2009) was the same as the Skagit County Judge’s statement that it included “reasonable attorney’s fees incurred in this action to the date of the offer which is June 25<sup>th</sup>.” CP 168, lines 20-22. As the Skagit County Judge stated, the judgment reflected that the motion for attorney’s fees would be brought later. Nothing was ever ordered by the court to allow the costs or attorney’s fees motion to be brought outside the 10 day time limit of CR 58.

As of August 17, 2009 (the Monday following the tenth day after entry of the August 5, 2009 judgment), Feiger did not file a motion for attorney’s fees or costs.

On August 24, 2009, Snohomish County Judge George F.B. Appel entered an order setting reasonable attorney’s fees at \$230.00 per hour. CP 86. As of September 3, 2009 (the tenth day after entry of Judge Appel’s order setting reasonable attorney’s fees at \$230.00 per hour), Feiger did not file a motion for attorney’s fees or costs.

On September 8, 2009, at 3:31 p.m., the Snohomish County Clerk recorded Pratt’s motion for an order to direct the Clerk of the Court to tax costs and disbursements under CR 54(d)(1). CP 67-69.

Later that same day, after Feiger was served with the motion and order, at 4:25 p.m. Feiger filed a motion to determine attorney's fees.

September 8, 2009 was thirty-four (34) days after entry of judgment. September 8, 2009 was fourteen (14) days after entry of Judge Appel's order determining \$230.00 to be a reasonable hourly rate for Feiger's counsel.

The Pratts assert not only that the Snohomish County Commissioner cannot overrule a decision made by the visiting Skagit County Judge, but that the decision of Judge Richter to limit attorney's fees to the June 25, 2009 date of the CR 68 Offer of Judgment, as stated in the offer of judgment, makes good public policy. If the attorney's fees were allowed to keep accruing until Feiger's acceptance, it would encourage plaintiffs to incur additional, unnecessary, fees and costs after receiving such an offer before accepting it. A plaintiff who continues to incur those fees and costs, after receiving a CR 68 offer limiting attorney's fees and costs to the date of the offer, should be the one to bear the risk that those fees and costs will not be recoverable if the offer is accepted. The Defendant who makes that offer certainly should not bear the risk that the Plaintiff will run up additional fees before accepting. CR 68 loses its value if defendants have to face the risk of the plaintiff running up fees after the offer was made.

In conclusion, there is sound public policy behind limiting attorney's fees to the date of the CR 68 offer of judgment, as stated in the offer of judgment in this matter. Skagit County visiting Judge Rickert's ruling to limit attorney's fees to the date of the CR 68 offer was appropriate, and makes good public policy. The Snohomish County Commissioner's subsequent ruling to allow attorney's fees through the date of acceptance of the CR 68 offer does not make good public policy and only encourages a plaintiff to incur additional attorney's fees and to delay in accepting the offer, or to delay putting the agreed upon settlement in writing, as was done in this matter.

**4. There is no mailing rule on Orders or Judgments of the trial court**

Without any rule or case law supporting her decision, a Snohomish County Commissioner wrongly held that there is "at least one day" allowed after entry of an order setting the amount of attorney's fees before the CR 54 requirement time limitation to bring an attorney's fees motion begins to toll. This conclusion of law should be reviewed *de novo*.

If this Court holds that the ten day period to bring a motion for attorney's fees under CR 54 (d)(2) does not begin with entry of judgment, but instead with entry of a Judge's order setting a reasonable hourly rate, then it must address the issue of when a judge's order is

entered for purposes of the ten day limitation for bringing an attorney's fee motion under CR 54.

On August 24, 2009, Judge George F.B. Appel signed and entered with the Clerk of the Court an Order Determining Reasonableness of Attorney Fee Rate. CP 86. Feiger alleged, although no findings of fact were entered on this factual issue, that Judge Appel did not mail the order until August 25, 2009. CP 73, lines 11-12. Fourteen (14) days later, on September 8, 2009, Feiger brought an attorney's fee motion.

To decide when the ten day period for a party to bring a motion for attorney's fees, this Court must determine what event triggers the ten day time limitation. The answer is found within CR 54 itself. CR 54 (d)(2) states that "[c]laims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion . . . no later than 10 days after entry of judgment." Feiger argues that this 10 day period is initiated by entry or mailing of the August 24, 2009 order of Judge Appel; the Pratts argue that the 10 day period was initiated by the August 5, 2009 Entry of Judgment on CR 68 Offer of Judgment.

Then, within the definitions section of CR 54 itself, it says "[e]very direction of a court or judge, made or entered in writing, not included in a judgment, is an order." In the present matter, Judge Appel

properly denominated the August 24, 2009 decision on attorney's fees an "Order."

On the other hand, a judgment is defined as "the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." CR 54(a)(1). Further, "[a] judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58." "Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge earlier permits the judgment to be filed with him as authorized by rule 5(e).

Here, Judge Appel clearly denominated the August 24, 2009 ruling an "Order." Assuming, *arguendo*, that the August 24, 2009 ruling was actually a "Judgment." then the August 24, 2009 Order must be "filed forthwith" by the judge as provided in CR 58. CR 54(a)(1). CR 58 then states that "[j]udgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing . . . " CR 58(b) Judge Appel's August 24, 2009 Order was recorded as "FILED" at 11:18 a.m. on August 24, 2009. CP 86. Because the effective date of this August 24, 2009 "Judgment" "for all procedural purposes" is August 24, 2009, then under the rules of civil procedure require a motion for attorney's fees within 10 days, or by September 3,

2009. CR 54(d)(2). Filing a motion for attorney's fees on September 8, 2009 from an August 24, 2009 order does not comply with the 10 day limitation for bringing that motion.

But here, the proper time frame to bring an attorney's fees motion is 10 days from entry of judgment on August 5, 2009. The August 5, 2009 Entry of Judgment on CR 68 Offer of Judgment is the final determination of the rights of the parties. Neither party appealed the August 5, 2009 Entry of Judgment, and in fact it was presented by Feiger's counsel and agreed to by the Pratt's counsel. CP 88. Thus, Feiger's deadline to seek attorney's fees and costs under CR 58 was 10 days after August 5, 2009, or August 17, 2009 (August 15 is a Saturday, so a party has until the following Monday).

In conclusion, under either Feiger's theory that the ten day period to seek attorney's fees starts with entry of the August 24, 2009 Order by Judge Appel, or under the Pratt's theory that the ten day period begins with entry of judgment on August 5, 2009, Feiger's motion for attorney's fees and costs under CR 54 was untimely.

**5. The Snohomish County Court Commissioner wrongfully failed to order the clerk to tax the costs and disbursements under CR 54 after the party awarded costs failed to file a cost bill within 10 days of entry of judgment.**

This Court should reverse the Snohomish County Court Commissioner's decision to deny the Pratt's motion to direct the clerk to tax costs and disbursements. The Snohomish County Court Commissioner's decision to deny this motion to tax costs and disbursements should be reviewed *de novo* based on the written record in this matter.

CR 54 requires that a motion for attorney's fees and costs be brought within 10 days of entry of judgment. CR 54(d)(1) and (2). Further, if the party awarded costs does not file a cost bill within 10 days of entry of judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

CR 78(e) requires that "[i]f no cost bill is filed by the party to whom costs are awarded with 10 days after the entry of the judgment . . . the clerk shall proceed to tax the following costs and disbursements, namely: (1) The statutory attorney fee; (2) The clerk's fee; and, (3) The Sheriff's fee."

In the present matter, judgment was either entered on August 5, 2009 (Pratts' position) or August 24, 2009 (Feiger's position). Under either position, ten days expired from entry of judgment, and the clerk failed to tax costs and disbursements under CR 78. After more than 10 days expired, on September 8, 2009, the Pratts filed a motion asking the

Court Commissioner “to direct the Clerk of the Court to comply with CR 54(d)(1) and tax and disbursements pursuant to CR 78(e).” CP 67.

This motion was denied in the following exchange:

MR. PETERSON: Just for clarification. My [proposed] order was denied and there’s –

THE COURT: Your [proposed] order was denied, counsel.

RP p. 25, lines 15-18.

Because more than ten days expired after entry of judgment under CR 54(d)(1) and (2), then under CR 78, the clerk should have taxed the costs and disbursements. The clerk failed to do so, and the Court Commissioner wrongly denied the Pratt’s motion for the court to direct the clerk to tax those costs and disbursements.

This Court should reverse this Snohomish County Commissioner decision and remand this matter to the Superior Court to direct the Clerk of the Court to tax the statutory attorney fee, the clerk’s fee, and the sheriff fee.

#### **E. Attorneys’ fees on appeal**

The Appellant requests an award of attorney fees under RAP 18.1. To avoid the uncertainties associated with seeking an attorney’s fee award, the Appellant requests an attorney’s fee award only for work

before the Court of Appeals; however, if this matter is remanded to the trial court for the attorney's fee award, the Appellant requests attorney's fees for work related to opposing the offer of judgment attorney's fee award for fees after June 25, 2009 and for work before the Court of Appeals.

Under an addendum to the lease, all "eviction costs, other legal or court costs will be borne by the Pratts." Appendix 3.

RCW 4.84.330<sup>8</sup> applies since (1) this unlawful detainer action was "on a ...lease", (2) the lease contained a unilateral attorney fee provision, and (3) Appellants Pratt are the "prevailing party." RCW 4.84.330.

The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute's first two requirements. *Labriola v. Pollard, Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Here, the parties agree the Lease contains a unilateral attorney fee provision. CP 118. Attachment 3. The Lease contains an attorney fee provision which allows only the Landlord the right to an

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<sup>8</sup> RCW 4.84.330 provides that if a lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.\*\*\*As used in this section "prevailing party" means the party in whose favor final judgment is rendered. RCW 4.84.330.

attorney fee: all “eviction costs, other legal or court costs will be borne by the Pratts.”

The lease provision does not require a judgment for a reasonable attorney fee to be owed, but merely requires the Landlord to either retain an attorney related to “eviction costs, other legal or court costs”.

Acceptance of the CR 68 Offer of Judgment resolved all legal issues involving the eviction. The subsequent issue is not eviction related, but instead is contractual in nature and involves Feiger claiming more in attorney’s fees than allowed by her acceptance of the CR 68 Offer of Judgment. If this Court remands this matter to the trial court to award attorney’s fees only up until June 25, 2009, as agreed upon by the parties, then the Appellant is the prevailing party on this appeal – the eviction matter was previously settled and this appeal involves the Respondent seeking greater relief than allowed under the agreement. Thus, this Court should award attorney’s fees to the Appellant as the prevailing party on the only issue before this Court – the issue of whether attorney’s fees for legal work performed after June 25, 2009 should be allowed and whether the Respondent timely sought costs and attorney’s fees.

## **F. Conclusion**

In a case of first impression, this Court should hold a plaintiff is bound by an oral acceptance of a CR 68 offer of judgment made in open court, and to the conditions agreed to in that offer of judgment.

Specifically, Feiger should be held to the agreement that attorney's fees be limited to those incurred as of June 25, 2009.

In another case of first impression, this Court should hold that a plaintiff should be required by the court to accept a CR 68 offer of judgment if that offer of judgment includes all relief sought by the plaintiff.

This Court should not allow a ruling made by a Skagit County Superior Court Judge to be overruled by a Snohomish County Commissioner. Not only is there no statutory or constitutional authority for such a ruling by a Court Commissioner, but it violates the Snohomish County local rules. Visiting Judge Rickert of Skagit County correctly ruled that attorney's fees should be limited to those incurred through June 25, 2009, and this ruling should be upheld by this Court.

This Court should not impose a "mailing rule" upon orders or judgments filed or entered by judges. The civil rules are clear that a judgment is effective upon entry, through filing, for all procedural matters.

This Court should reverse the decision of Court Commissioner Susan C. Gaer to award attorney's fees and costs through the date of acceptance of the offer of judgment (August 5, 2009) and remand this matter with directions for the trial court to direct the clerk of the court to tax costs and disbursements only for the filing fee, statutory attorney's fees, clerks fees, and the sheriff's fee.

Finally, this Court should award the Pratt's attorney's fees under the attorney's fees addendum to the lease. The Pratt's incurred "other legal or court costs" to ensure that the previously agreed upon conditions of the accepted offer of judgment be enforced. Feiger sought to incur attorney's fees beyond what was agreed upon, and that wrongful demand caused the Pratts to incur "other legal or court costs," including this appeal. Good public policy dictates that the Pratts be awarded attorney's fees that were incurred after the offer of judgment was accepted in court – the fees that became necessary to enforce the previously reached agreement. An award of fees will stop future plaintiffs from accepting an offer of judgment and then seeking greater relief than agreed upon in accepting that offer of judgment.

Respectfully submitted February 12, 2010

A handwritten signature in cursive script that reads "Scott Peterson". The signature is written in black ink and is positioned above a horizontal line.

Scott Peterson, WSBA #22923  
Attorney for Appellant

/s Gerald F. Robison

Gerald F. Robison, WSBA #23118  
Attorney for Appellant

RULE 68  
OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. 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 fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH**

HELEN FEIGER,  
Plaintiff,  
vs.  
TONY AND ANNA PRATT, ET AL,  
Defendants.

NO. 09-2-03951-6  
**OFFER OF JUDGMENT**

TO: Helen Feiger, Plaintiff  
AND TO Rob W. Trickler, The Law Office of Rob W. Trickler PLLC  
Pursuant to the provisions of CR 68, RCW 4.84.250 and RCW 4.84.270, Defendants  
Tony Pratt and Anna Pratt offer to allow judgment to be entered against them in the amount  
of \$3,750.00 for rent through the end of March, 2009, plus \$41.67 per day thereafter until the  
premise was vacated, plus court costs and reasonable attorney's fees incurred in this action as  
of the date of this offer, as determined by the court. This offer of judgment includes all relief  
requested in the prayer for relief.

DATED this 25th day of June, 2009.

  
Scott Peterson, WSBA #22923  
Attorney for Tony and Anna Pratt



**FILED**  
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH**

**HELEN FEIGER,**  
**Plaintiff,**  
  
**vs.**  
**TONY AND ANNA PRATT, ET AL,**  
**Defendants.**

NO. 09-2-03951-6

**ENTRY OF JUDGMENT ON CR 68  
OFFER OF JUDGMENT**

- A. Judgment Creditor Helen Feiger
- B. Judgment Debtor Tony and Anna Pratt
- C. Principal judgment amount: \$4,916.76  
\$3,750.00 plus \$41.67 per day times  
28 days after March 31, 2008, \$1,166.76
- D. Interest to date of judgment zero
- E. Attorneys fees ~~00.00~~ ~~Reserve~~ ~~Out~~ *7-8-09 Sp list*
- F. Costs ~~30.00~~ ~~Reserve~~ ~~Out~~
- G. Other recovery amount none
- H. Principal judgment shall bear interest at 12% per annum.
- I. Attorneys fees, costs and other recovery amounts shall bear interest at 12% per annum.
- J. Attorney for Judgment Creditor Rob Trickler
- K. Attorney for Judgment Debtor Scott Peterson

IN OPEN COURT on July 7, 2009, in front of a visiting Skagit County Judge, at the Skagit County Courthouse, the Plaintiff, Helen Feiger, by and through her attorney, Rob Trickler, accepted the attached offer of judgment, dated June 25, 2009. This Judge stated that

JUDGMENT ON CR 68 OFFER OF  
JUDGMENT  
page 1.

Scott Peterson  
648 S. 152nd St., Suite 7  
Seattle, WA 98148  
(206) 391-0372

1 the remaining issues in this matter would be referred back to the Snohomish County Superior  
3 Court as this reason the matter was sent to a visiting judge (Plaintiff's witness was related to a  
5 Snohomish County Court Administration employee) is no longer relevant.

7 It is requested that this court approve the clerk of the court entering a judgment of  
9 Four Thousand Nine Hundred Sixteen Dollars and Seventy-Six Cents (\$4,916.76) in favor of  
11 Helen Feiger against defendants Tony and Anna Pratt. Pursuant to the attached Offer of

13 Judgment the Plaintiff's attorney will seek an award of attorney fees, costs, and sanctions in

15 an amount to be determined by the court, a separate judgment will be  
entered after the attorneys fee motion is brought.

17 DATED this 8th day of July, 2009.

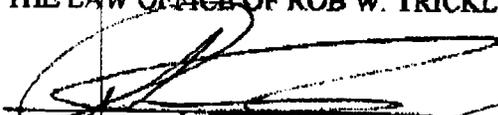
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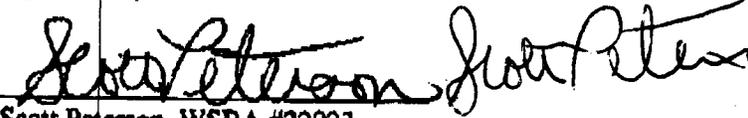
25 THE LAW OFFICE OF ROB W. TRICKLER

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29 Robbin W. Trickler, WSBA #37125  
Attorney for Helen Feiger

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33 Agreed to by:

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37 Scott Peterson, WSBA #22923  
Attorney for Tony and Anna Pratt

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH**

HELEN FEIGER,

Plaintiff,

vs.

TONY AND ANNA PRATT, ET AL,

Defendants.

NO. 09-2-03951-6

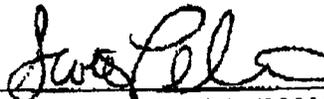
**OFFER OF JUDGMENT**

TO: Helen Feiger, Plaintiff

AND TO Rob W. Trickler, The Law Office of Rob W. Trickler PLLC

Pursuant to the provisions of CR 68, RCW 4.84.250 and RCW 4.84.270, Defendants Tony Pratt and Anna Pratt offer to allow judgment to be entered against them in the amount of \$3,750.00 for rent through the end of March, 2009, plus \$41.67 per day thereafter until the premise was vacated, plus court costs and reasonable attorney's fees incurred in this action as of the date of this offer, as determined by the court. This offer of judgment includes all relief requested in the prayer for relief.

DATED this 25th day of June, 2009.

  
\_\_\_\_\_  
Scott Peterson, WSBA #22923  
Attorney for Tony and Anna Pratt

OFFER OF JUDGMENT  
page 1

Scott Peterson  
648 S. 152nd St., Suite 7  
Seattle, WA 98148  
(206) 391-0372

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

HELEN FEIGER,  
Respondent,  
vs.  
TONY AND ANNA PRATT,  
Appellant.

Trial Court No. 09-2-03951-6

Appeal No. 64308-8-1

PROOF OF SERVICE OF BRIEF  
OF APPELLANT

I declare:

1. At the time of service I was at least eighteen years of age, and not a party to this cause.
2. I mailed to Rob Trickler of Law Office of Rob Trickler: the following documents:
  - a. Brief of Appellant
  - b. Proof of Service of Brief of Appellant
3. Manner of Service: mailing
4. Date: February 12, 2010
5. Comments: Placed in Everett Main post office box at approximately 10:30 pm
6. Address where document(s) were mailed:
 

3801 Colby Ave.  
Everett, Washington 98201

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

Date: February 12, 2010  
Signed at Everett, Washington.

  
\_\_\_\_\_  
Scott Peterson

FILED  
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STATE OF WASHINGTON  
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