

Appeals Court No. 64308-8-1

Court of Appeals, Division I
Of the State of Washington

In Re:

HELEN FEIGER, Respondent

and

TONY AND ANNA PRATT, Appellants

RESPONSE BRIEF OF HELEN FEIGER

Rob Trickler
WSBA #37125
Attorney for Helen Feiger
3801 Colby Ave
Everett, WA 98201
425-609-1876

~~RECEIVED
COURT OF APPEALS
DIVISION ONE~~

~~MAR 24 2010~~

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 24 PM 11:00

ORIGINAL

TABLE OF CONTENTS

Table of Authorities	ii
Issues/Motions	1
Relief requested on Motions	4
History and Statement of the Case	5
Standard of Review	24
Argument	26
CR 54	26
CR 68	33
Attorney Fees	42
Conclusion	46
Appendix	48
CR 6	48
CR 54	49
CR 68	51
RCW 1.16.050	52
Order Denying Appellant's Motion Under RAP 9.11	53

TABLE OF AUTHORITIES

Table of cases

<i>B & J Roofing, Inc. v. Board of Indus. Ins. Appeals,</i> 66 Wn.App. 871, 876, 832 P.2d 1386 (1992).....	26, 28
<i>Basha v. Mitsubishi Motor Credit of America, Inc.,</i> 336 F.3d 451, 453 (5th Cir. 2003).....	23, 24
<i>Curtis Lumber Co. v. Sorter,</i> 83 Wn.2d 764, 522 P.2d 822 (1974).....	31
<i>Du K. Do v. Farmer,</i> 127 Wn.App. 180, 110 P.3d. 840 (2005).....	39
<i>Dussault v. Seattle Public Schools,</i> 69 Wn. App. 728, 850 P.2d 581 (1993).....	27, 35, 36
<i>Hodge v. Development Services,</i> 65 Wn. App. 576, 828 P.2d 1175 (1992).....	34, 35, 37
<i>Housing Authority of City of Everett v. Carroll Kirby,</i> ___ P.3d ___, ___ Wn.2d ___ (2010), Docket Number 62052-5 (8 March 2010).....	44
<i>Morgan v. Kingen,</i> 210 P.3d 995, 166 Wn.2d 526, 539 (2009).....	25
<i>Pardee v. Jolly,</i> 163 Wn.2d 558, 566, 182 P.3d 967, 972 (2008).....	24, 25
<i>Seaborn Pile Driving Co., Inc. v. Glew,</i> 132 Wash. App. 261, 131 P.3d 910 (2006).....	25, 34, 39, 43

Statutes

RCW 1.16.050 Legal Holidays and Legislatively Recognized days.....21, 28, 48, 52

RCW 59.18.290.....43

Rules

Wash. Civil Rule of Procedure 6.....1, 26, 27, 28, 29, 31

Wash. Civil Rule of Procedure 54.....1, 2, 3, 20, 21, 22, 24, 26, 27, 28, 31, 41, 42, 46

Wash. Civil Rule of Procedure 68....1, 3, 4, 24, 25, 27, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43,
44, 46, 47

Treatises/Handbooks

Karl B. Tegland, Washington Practice Series vol 3A, CR 6
Authors Comments paragraph 7, 151 5th ed., Thompson West 2006.....31

Karl B. Tegland, Washington Practice Series vol 4, 2008 pocket parts CR 54
Drafters' Comment, 2007 Amendments, 32 5th ed., Thompson West 2008.....31

Karl B. Tegland, Washington Practice Series vol 4, CR 68
Authors Comments part 1. In General, 634 5th ed., Thompson West 2006.....33, 44

MOTIONS AND ISSUES

Motions:

1. Feiger moves this Court to find this appeal frivolous
2. Feiger moves this Court in limine to exclude portions of the appendix attached to Appellant's brief.
3. Feiger moves the Court for cost and fee for this appeal

Issues:

1. Has CR 54(d) been strictly complied with when the moving party has previously noted a motion to determine the reasonableness of contested hourly rates and that hearing was argued the same day the agreed settlement, order and judgment was entered?
2. Does CR 6 also apply to calculating time allowed under CR 54(d) when attorney fees cannot be properly calculated until a court has ruled on the reasonableness of contested hourly rates of the moving attorney and that attorney has timely moved the court to rule on those rates and the court has taken those arguments under advisement and does not set a specific date for presentation or ruling and that court's decision is made in excess of 10 days after the hearing, and the order is entered without any warning or notice to the parties and mailed to the parties the following day, again without warning or notice to the parties?

3. Under Civil Rule 54(d), does the court have the discretion to extend the time allowed for a party to move for attorney fees and costs?
4. If the Court does have discretion to extend time to comply with Civil Rule 54(d), did the Court Commissioner abuse her discretion in extending time when the motion for total fees was dependant on a order determining the base hourly rate of the moving party and that order was entered without notice or warning to the parties in excess of 10 days after the initiating hearing on motion and said order was mailed day after entry without notice or warning to the parties and the Defendant had necessitated the two motions by contesting the hourly rate of Plaintiff's attorney despite 3 previous court findings in the same matter in favor of the rates and the Defendants had been determined by multiple courts in the same action to have been evading proper discovery, including failure to comply with multiple court orders and judicial subpoenas and the Court Commissioner was aware the moving attorney was delayed due to the recent hit and run death of his daughter?
5. If the Court does not have discretion to extend a parties time to comply with CR 54(d), does the rule require strict compliance or is it a rule requiring substantial compliance?

6. If substantial compliance is sufficient then has Civil Rule 54(d) been substantially complied with when the moving party has timely brought one motion to determine reasonableness of contested hourly rates and the court's decision on that motion came by mail in excess of 10 days later and without prior notice to the parties, and the follow up motion to determine total fees based on the court approved hourly rate was noted 15 calendar days after said order and there is an intervening holiday?
7. Is a CR 68 offer properly calculated from the date of the entry of the agreed order and judgment when the Defendants written offer was allowed to expire by not answering within 10 days and when more than 10 days later a subsequent counter offer was made orally, in reliance on a court's ruling regarding reasonableness of the hourly rate of the Plaintiff's attorney, and the Defendant immediately opens litigation and discovery the following day to contest that court's ruling, and over the course of said litigation for the next 29 days neither party enters any order, judgment or offer into the record and 29 days later, upon the final hearing relating to the contested hourly rates, the Defendant again offers judgment orally and the parties then negotiate new language for the order, which is then hand written on an earlier proposed order and

judgment drafted by the Defendants and taken ad hoc from the Plaintiffs hearing exhibits and entered into the record by both parties that day?

8. Should ambiguities and contested interpretations of a CR 68 judgment and order be construed, using long standing contract law principals, in favor of the Plaintiff and not drafting party when the only written acceptance of the offer is the actually judgment and summary and order and that document was drafted by the Defendants and modified by handwritten language which is less restrictive than the original typed language and entered by the parties circa a month and a half after the Defendants original offer letter and the less restrictive handwritten language relates specifically to an issue that continued to be contested and litigated until the day the judgment and order was entered?

RELEIF REQUESTED ON MOTIONS

Feiger moves to dismiss this appeal as frivolous under RAP 18.9(c)(2). Feiger moves to exclude portions of Appellant's appendix to their brief which are not part of the record under RAP 10.3(a)(7), specifically page 33 and 35 of Appellants brief appendix. Feiger moves

the Court to grant Feiger costs and attorney fees associated with this appeal under RAP 18.1.

HISTORY/STATEMENT OF THE CASE

This matter began upon the service of a 3 Day Notice to Pay or Vacate on March 4, 2009, at 23119 99th Avenue West, Edmonds, Washington 98020, to Defendants Tony and Anna Pratt. The Pratts failed to pay the amount of back rent owing and, on March 11, 2009, they were served with a Summons and Complaint for Unlawful Detainer (CP 128-133). Mr. Pratt answered with a statement of payments made (CP 112-121). Subsequently, a Motion for an Order to Show Cause was presented to the court and an Order signed, setting a hearing for April 7, 2009. The Order to Show Cause was mailed to the Pratts on March 26, 2009. On Saturday, April 4, at 9:34 p.m., a telephone call from Attorney Scott Peterson was received by voice mail, directed at Counsel Rob W. Trickler, stating that a fax was being sent and that Peterson was requesting, on behalf of the Pratts, a verification of debt in this matter. The only fax that came into Mr. Trickler's office was a blank page (CP 595-597). The request was untimely and not written as required under Fair Debt Collection Practice Act but a validation was never the less prepared on

April 6, 2009. Despite counsel Petersons earlier involvement with the Pratts on this matter, a Notice of Appearance was not presented until the Show Cause Hearing of April 7, 2009 (CP 594). No offering of proof or documents intended as exhibits were made prior to the hearing.

During the Show Cause Hearing various arguments were heard by the court, and the court considered a large stack of alleged documents and/or receipts presented for the first time by the Defendants as an offering of proof. Defendants claimed they proved the Plaintiff owed the Defendant money. No copies of these alleged documents/receipts were ever provided to Plaintiff's counsel for review and the documents were not entered into the record. The Court set a trial date of May 7, 2009 (CP 590-593). The Defendants were required, by order of the Court Commissioner to deposit, into the Court Registry, \$1250.00 pending trial (CP 110).

Also at that hearing, in anticipation of further litigation, Plaintiff's Attorney served the Defendants and their attorney with Subpoenas in Deuces Tecum and Notices of Deposition. Neither the Defendants nor their counsel voiced any opposition to the dates or material demanded in the subpoenas and notices at that time (Trickler Declaration on Motion to Court of Appeals).

The Defendants failed to make the required deposit in the registry, and on April 9, 2009, the Court Commissioner signed a Writ of Restitution upon declaration of counsel for Helen Feiger (CP 103-109).

On April 9, 2009, counsel for Helen Feiger received a letter via facsimile from Mr. Peterson, in which he requested an agreement to provide each other requested documents via facsimile or email. Counsel for Feiger responded by fax and agreed only to exchanges by facsimile (CP 540-550 and CP 560-566). Counsel Peterson raised other issues in that same document, including a threat to move for CR 11 sanctions and appeal to the Supreme Court for relief, if counsel for Feiger did not remove the discovery request for information that Peterson would like withheld. Specifically documentation of when and how the attorney client relationship began between Defendants and their counsel and the extent of that privilege as allowed under civil rule (CP 560-566).

Prior to this on April 8, 2009, Pratts' attorney had filed a Motion to Shorten Time to hear a Motion for an Order to Quash certain portions of those Subpoenas in Deuces Tecum (CP 567-589). The protective order sought was limited to those documents which would determine the time at which the attorney client privilege began between the Pratts and Peterson. The motion to Quash did not seek to protect the documents presented and relied on by the defendants in their offering of proof during the Show

Cause Hearing nor did it prevent counsel for Feiger from taking depositions (CP 553-559 and 567-589).

In a subsequent series of communications counsel Peterson indicated that the Pratts would not be able to attend the deposition. Peterson relied on the claim that Tony Pratt would be too busy packing and that Anna Pratt would be involved with final exams for school that would conclude on 24 April 2009. An alternate date of 17 April 2009 was offered by Peterson for Mr. Pratt but rejected by counsel for Feiger due to the shortened 30 day period to trial (CP 560-566).

On April 14, 2009 the hearing on the Pratt's motion for the protective order was heard in front of the court commissioner and temporarily granted with respect to documents proving the initial contact time and initiating party but reserved for reconsideration by the trial court (CP 551-552). At the hearing Counsel Peterson indicated that his clients would not attend the deposition scheduled for that afternoon however the justification offered this day now changed from the need to pack to one of undefined and undisclosed medical reasons related to Tony Pratt. No new justification was offered for Anna Pratt's refusal to attend the deposition (Trickler Declaration on Motion to Court of Appeals). At the hearing counsel for Feiger asked the court if he was allowed to depose the Pratts as to, *et al*, when their attorney client privilege began with Peterson. The

•
•

Court answered in the affirmative (Trickler Declaration on Motion to Court of Appeals). Immediately after the hearing Peterson agreed to fax to counsel for Feiger the balance of the documents demanded in the Subpoena in Deuces Tecum but never did (Trickler Declaration on Motion to Court of Appeals).

The deposition was canceled as a result of the Pratts refusal to attend. Another series of facsimile communications between counsel was made in which counsel for Feiger provided three alternative dates to choose from for depositions. All of those dates provided as choices were dates previously provided by Pratt's counsel as dates of availability of his clients for deposition (CP 481-532 and 540-550 and 560-566). Counsel for the Pratts responded that he was not able to get in contact with his clients to choose a date because Mr. Pratt was in a medical procedure (CP 540-550). No reason was offered with respect to Mrs. Pratt. After counsel for Feiger informed counsel for the Pratts that if they did not choose a date and time counsel for Feiger would seek judicial subpoenas and choose one of the three dates for them. Counsel for the Pratts made no attempt to contact counsel for Feiger and failed to respond with a date and time for deposition (CP 481-532 and 536-537 and 540-550).

On 22 April 2009 counsel for Feiger obtained the court commissioners signature on subpoenas in Deuces Tecum and to appear for

deposition on 29 April 2009 at 1:00 pm. This was done ex parte with notice to opposing counsel and in front of the same commissioner who had heard Pratts motion to quash and the show cause hearing (CP 540-550). These subpoenas were immediately faxed to opposing counsel who responded by fax that he was not able to contact his clients to inform them of the subpoenas because counsel for Feiger had obtained a writ of restitution for the eviction, that he had no forwarding address and because his client's phone appeared to be disconnected (CP 30481-532). Counsel for Feiger, knowing the physical eviction had not taken place and that the Pratts had not yet moved had a registered process server go to the subject address where he met Mr. Pratt and was able to serve the subpoenas to Mr. Pratt (CP 538-539). At that time, in response to the process servers comment to the effect that he was lucky to find Mr. Pratt if his own attorney could not find him, Mr. Pratt indicated that he did not know why his attorney would say that, held up his cell phone and said that he and his counsel had just spoken that same morning (CP 462-464 and 481-532 and 533-535).

On 29 April 2009 the Pratts did not show up for deposition as ordered by the judicial subpoenas (CP 173-186). Counsel for the Pratts did attend to indicate that his clients would not attend because of some undefined medical responsibilities relating only to Mr. Pratt. No

justification was offered as to Mrs. Pratts failure to appear and be deposed (CP 533-535).

On 1 May 2009 an order shortening time and an order to compel the appearance of the Pratts for deposition and provide not only dates certain for depositions but proof of the alleged medical appointments that had allegedly prevented the deposition of Mr. Pratt and reserving terms and rule 11 sanctions (CP 478-537). The order was granted (CP 467-468 and 476-477).

Counsel for the Pratts then noted for 13 May 2009 a motion for revise of the court commissioner's 1 May 2009 decision granting the order to compel (CP 469-475).

On 5 May 2009 with no date certain for deposition provided and no proof of medical appointments provided, counsel for Feiger argued the motion to compel the Pratts attendance and participation in depositions and providing requested documents. The motion was heard in front of the same court commissioner who had heard all hearings in this matter to date. Counsel for the Pratts was present and offered only the excuse for his client's failure to abide by the judicial subpoenas and order to compel that his client Mr. Pratt "answered to a higher power." (Trickler Declaration on Motion to Court of Appeals). The Court found that the Pratts had been irresponsible at best in failing to maintain communication with their

attorney and ordered that the Pratts appear for a deposition the following day on 6 May 2009 given the trial scheduled for 7 May 2009 and ordered a minute entry that the Court would consider a \$200 per day fine per defendant for each day the Pratts failed to attend and participate in a deposition. The Court Commissioner left the issue of sanctions to the Trial Court as the trial was a mere two days later. Counsel for the Pratts then refused to go to the deposition if it was held at the office of Feiger's counsel. The Court Commissioner then instructed his court clerk to locate and secure an available courtroom for the deposition to take place. The Pratts did not appear at the court ordered deposition on 6 May 2009 (CP 465-468 and 9-58).

The morning of 7 May 2009 while waiting for the assignment to the Trial Court, counsel for the Pratts handed a motion to continue the trial to Feiger's counsel for the first time (CP 445-458). The Pratts did not appear for trial and counsel for the Pratts argued his motion to continue indicating that he had failed to fax the motion as agreed by the parties at the onset of the matter but had for some undisclosed reason, for the first time and against agreement, emailed the motion to Feiger's counsel the night prior to the trial after his clients had failed to appear for the court ordered deposition.

The Court granted a trial continuance noting that the matter was obviously not ready for trial given the failure of the Pratts to comply with the discovery orders and subpoenas and further ordered that no further medical appointments would be allowed as excuses short of hospitalization. The court also found that a short note provided for the first time that day in support of the motion to continue and purporting to be Mrs. Pratt's claim that Mrs. Pratt was not able to participate in trial that day due to school testing conflict was questionable (CP 459). The testing dates claimed were not consistent with the earlier dates claimed in the fax from the Pratts counsel (CP 445-458 and 560-566). Finally, the Court denied the request of Pratts counsel to arbitrarily reduce the hourly rates of Feiger's counsel to the same rates as his own of \$195/hour, finding that the rates were reasonable and a declaration would need to be submitted in that regard (CP 459).

Also in support of the Pratts motion to continue, counsel for the Pratts provided a document that he claimed was a list of appointments Mr. Pratt had at the VA hospital. The date range covered the previous period in question through 3 June 2009. Pratt's documents also showed his alleged 6 May appointment was a morning appointment of 30 minutes, which did not conflict with the afternoon deposition time (CP 445-458). The last appointment was dated for 3 June 2009 but the day prior of 2 June

2009 had no appointments scheduled. Counsel for Feiger asked for and was granted judicial subpoenas in deuces tecum and for deposition, which included the original language which had been the subject of Pratts motion for protective order for that uncommitted day. The subpoena required the Pratts to appear for deposition for 2 June 2009 (CP 445-459). Those subpoenas were served on Pratts through their counsel at that time (CP 442-444).

On 13 May 2009 the Pratts motion for revision was heard by the Honorable Judge Krese and denied (CP 437-439). Judge Krese found the issue mute and that the statements made by Tony Pratt to the process server, which contradicted Peterson's faxed claim that he could not reach his clients to inform them of the judicial subpoenas, were admissible as a statement of a party opponent.

At circa 10:15 pm On 30 May 2009, Heather Trickler, the 15 year old daughter of counsel for Helen Feiger was killed in a hit and run while walking home along the Highway 2 trestle in Everett Washington (Trickler Declaration on Motion to Court of Appeals).

On the morning of 2 June 2009 counsel for Helen Feiger waited for two hours at the designated place with another court reporter for the court ordered fourth attempt at depositions. Neither the Pratts showed up nor their counsel (CP 202-207). No notice in any form or medium of any kind

was given to counsel for Feiger that Pratts or their counsel would not show (Trickler Declaration on Motion to Court of Appeals).

On 4 June 2009, unknown to either counsel, the Honorable Judge Larry McKeeman ordered all Snohomish County Judges recused and ordered pre-assignment to Skagit County due to a potential conflict with one of the witnesses (CP 99-101). Neither counsel was informed of this.

On 22 June 2009 counsel for Feiger moved for the issuance of bench warrant for each of the Pratts and for entry of judgment for cost and fees associated with the motion (CP 368-436). The hearing was held on 25 June 2009 in Snohomish County in front of Commissioner Pro Tem D. Senter. At the beginning of the hearing counsel for both parties learned for the first time of the recusal order. Not knowing how the letter would be interpreted with respect to a hearing in front of a Snohomish County Pro Tem Commissioner, the sitting Commissioner Pro Tem D. Senter heard argument and entered an order subject to Judge McKeeman's decision on whether a pro tem in Snohomish County would be required to be recused (CP 97-98 and 367). In the hearing and order the Court found that the hourly rate for Feiger's counsel was reasonable. The Court further ordered that the Pratts would attend and participate in a deposition on 1 July 2009 or the bench warrants would issue (CP 97-98 and 367).

Counsel for the Pratts then sent a fax indicating that his client would not be available on 1 July 2009 for the 5th attempt at deposition and requested the morning of 2 June 2009 as an alternative date. Counsel for Feiger answered with a denial do to the complexity of last minute schedule modifications.

On 1 July 2009 the Pratts failed to show for the scheduled deposition (CP 187-201). Also on 1 July 2009 counsel for Feiger entered a notice of unavailability for certain dates in July 2009 in order to return his daughters remains to Colorado for memorial (CP 366). On that same day counsel for Feiger contacted Snohomish County Court administration and determined that Judge McKeeman intended that pro tems in Snohomish County would not be allowed to hear motions in this matter (CP 364-365). Counsel for Feiger then called the Skagit County Superior Court Administrator regarding noting a hearing regarding the reasonableness of the hourly rates of counsel for Feiger and request for bench warrants for the Pratts to be heard on shorten time in front of the visiting judge for 7 July or 8 July 2009. The Court Administrator got counsel for the Pratts on the phone who agreed to 8 July 2009 for a hearing on shorten time. Counsel for Feiger then obtained an agree order shortening time from Skagit County Superior Court (CP 92-94 and 362-365).

Finally, on 1 July counsel for Feiger, in one last ditch effort at discovery rearranged his schedule and scheduled yet another deposition for the following morning, 2 July 2009, on the date and time previously requested by the Pratts. The deposition would be 9:00 am 2 July 2009 at the office of counsel for Feiger. This information was faxed to counsel for the Pratts several hours before the end of business to counsel for the Pratts, who had indicated in his motion to continue the trial on 7 May 2009 that his faxes are all forwarded to his smart phone. No reply was received.

On 2 July 2009 at approximately 15 minutes before the beginning of the scheduled deposition, counsel for the Pratts called and indicated that he would only attend the deposition if Mr. Tom Joehnck was not present in the office. Counsel for the Pratts was told the Mr. Joehnck was not present despite the irrelevant nature of this demand. Counsel for the Pratts then indicated he would attempt to contact his clients and get them to the deposition. At *circa* 8:55 am, 5 minutes before the scheduled start time, counsel for the Pratts then called back and claimed that his clients were actually with him but that he would not attend unless we immediately changed the venue (CP 333-334). While this call was taking place the office manager, who knows counsel for the Pratts, saw counsel for the Pratts driving by the deposition location in front of the office of counsel for the Pratts, in his white pickup truck while talking on his cell. The

Pratts were not with him. Counsel for Feiger refused to make the court reporter relocate or attempt to secure a new location 5 minutes before the scheduled start time and neither the Pratts nor their counsel attended the sixth deposition attempt (CP 208-255).

On 8 July 2009, a hearing was held in front of The Honorable Skagit County Superior Court Judge Rickert. The motion brought by counsel for Feiger was to find the hourly rates of counsel for Feiger reasonable, in place of the previous order of the Snohomish County Pro Tem, and for bench warrants for the Pratts to compel discovery (CP 360-361 and 333-334 and 351-355). At that hearing counsel for Feiger presented two declarations in support the reasonableness of the hourly rates. The declarants were counsel Mike Walsh and counsel Robert Getz (CP 357-359 and 365). At the hearing an oral agreement was made on the record to accept an offer of judgment made by the Pratts to surrender 100% of what was plead in the complaint so no warrants were issued (CP 95-96 and 138-172). The court further ruled that the hourly rates were reasonable based on the Courts experience and orally confirmed that a motion for sanctions against the Pratts may still be brought as sanctions are intended to be punitive *et al* (CP 95-96 and 138-172). Based on resolution and ruling of the hourly rates of Feiger's counsel and of the availability to bring a motion for sanctions, Feiger's counsel orally agreed

to a settlement that was expected to bring the matter to an end (CP 95-96 and 138-172). It was ruled by the Court that with no further conflict the matter should be moved back to Snohomish County for any further motions (CP 91 and 138-172).

The following day on 9 July 2009, counsel for the Pratts, who was involved in a lawsuit against Mike Walsh used counsel Walsh's declaration in support of the hourly rates of counsel for Feiger to subpoena all of counsel Walsh's 2009 billing records. Walsh objected to the subpoenas as being for an inappropriate purpose (CP 315-332). By that time counsel for the Pratts requested and received information from Washington State Bar Association relating to a disciplinary action against declarant Robert Getz 7 years earlier for a completely unrelated matter and one that took place 3 years before counsel for Feiger was in practice (CP 300-306 and 315-332). On 13 July 2009 counsel for the Pratts faxed a letter to the office of counsel for Feiger which attempted to extort the striking of the declaration of Robert Getz by threatening a bar complaint (CP 315-332). Days later counsel used both declarations that he is maligning in support of his own motion for attorney fees in Federal case No. 2:CV-09-0331-JLR despite his allegations of their perjury (CP 227-298).

On 24 July 2009 trial was stricken based on the Pratt's 100% surrender. With no further need of the conflicting witness, the matter was moved back to Snohomish County (CP 91).

On 27 July 2009 counsel for Feiger noted a motion on the Judges Civil Motion Calendar to strike the declaration of Mike Walsh in order to protect his billing records from the improper subpoena of counsel for the Pratts. The motion was also to find the reasonableness of the hourly rates of counsel for Feiger given the return of the case to Snohomish County and in compliance with CR 54(d)(2). (CP 315-332).

On 29 July 2009, without having issued his own subpoena, counsel for the Pratts made an ex parte appearance for motion requesting a judicial subpoena requiring declarant Robert Getz to appear for testimony at the hearing of 5 August 2009 in front of the Honorable Judge Appel (CP 307-314). The motion was denied finding that it was premature due to counsel for the Pratts not having even tried to serve his own subpoena or even knowing if Judge Appel would take testimony at the scheduled hearing (CP 299). On or about this same day counsel Robert Getz learned that counsel for the Pratts had filed a grievance with the bar despite having used that same declaration to his own financial advantage, nearly a week after obtaining the details of the unrelated and irrelevant disciplinary action (Trickler Declaration on Motion to Court of Appeals).

On 5 August 2009 the hearing was held. Judge Appel took the matter of the reasonableness of the hourly rates of counsel for Feiger under advisement and ruled against the striking of the declaration of Mike Walsh for lack of precedent (CP 90 and 226). Also on 5 August 2009 written judgment was entered by agreement on the offer of judgment for 100% of what was plead in the complaint, after having resolved the issue of language on attorney fees, for the order (CP 87-89).

On 24 August 2009 Judge Appel entered an order without a hearing for presentation finding the hourly rates to be reasonable (CP 86). The order was mailed to counsel for the parties on 25 August 2009 and indicated on the postal stamp on the envelope (CP 72-85). The date of mailing was never contested (CP7-8 and, 59-64).

7 September 2009 was Labor Day and as a holiday recognized by Washington State Law the courts were closed (RCW 1.16.050). On 8 September 2009 counsel for both parties noted motions related to cost and fees (CP 65-85).

On 16 September 2009 the motions to establish and award cost and fees was heard before the Superior Court Commissioner Honorable Susan Gaer. Counsel for Feiger argued that CR 54 had been strictly complied with when the reasonableness of the rates was noted for 5 August 2009 hearing, the same the written judgment was entered, accepting the

settlement in writing. Counsel for Feiger also argued that, in the alternative, strict compliance is not required and substantial compliance had been achieved given all the circumstances on the record. Counsel for Feiger also argued that CR54 allows for modification of the time allowed by court order and that given the notice of the order in favor of the hourly rates having been mailed that one extra day was appropriate, with ample statutory analogies and that nothing in the rule or otherwise prevented said court order from being *post facto* (CP 72-85).

Counsel for the Pratts argued that the Court was not entitled to modify the time allowed for any reason but did not address the arguments that strict compliance had been achieved when the motion was noted in front of Judge Appel for the determination of reasonableness of the hourly rates. Counsel for the Pratts also failed to argue against CR 54 being satisfied by substantial compliance. Counsel for the Pratts argued that the court may not take into consideration the personal tragedy of the hit and run death of the daughter of counsel for Feiger (CP 59-64 and 67-69). The Court found that the date of the mailing of the order was uncontested and that at least one extra day for mailing was appropriate given the circumstances and awarded 100% of the cost and fees requested by declaration, which included an entire ledger (CP 5-8 and 72-85).

After the hearing of 16 September 2009 counsel for the Pratts bragged to counsel for Feiger that Feiger would not be able to stop an appeal by the Pratts with a motion to revise because counsel for Feiger had won everything he had requested then claimed that it was in Feiger's best interest to vacate the judgment for cost and fees because counsel for the Pratts never lost in the Court of Appeals and his clients were judgment proof where Feiger was not (Trickler Declaration on Motion to Court of Appeals).

On 13 October 2009 counsel for the Pratts filed his notice of appeal (CP 3-4).

Despite the bar disciplinary board noting that counsel for the Pratts should have withdrawn his use of the declaration of Getz if he found it problematic, as recently as 11 November 2009 counsel for the Pratts continues, for his own financial gain, to use the declarations he claimed contained perjury in favor of his own declarations for his own hourly rate, which has now jumped to \$250/hour. Peterson is obviously comfortable enough with both declarations to file them in actions as part of his own declarations despite foreknowledge and warning from the bar disciplinary board (Trickler Declaration on Motion to Court of Appeals).

STANDARD OF REVIEW

The Appellant offers Washington cases to support the standard of review but Federal cases on point and cited in *Basha v. Mitsubishi Motor Credit of America Inc.* better distinguish where the line between legal interpretation or conclusions of law and factual findings diverges with respect to civil rules. An interpretation of Rule 68 and 54 are issues of law reviewed De novo however the Court Commissioners “finding” that Feiger was entitled to one day mailing is a factual matter not a conclusion of law as is her interpretation of the contractual agreement evidenced only by the agreed order and judgment. Factual matters and circumstances are reviewed for clear error.

An interpretation of Rule 68 is an issue of law, and is reviewed de novo. See, e.g., *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 333 (5th Cir. 1995). De novo review is appropriate to determine whether defendant’s offer of judgment, plaintiff’s acceptance or rejection of offer, and the judgment following the trial satisfied the requirements of Rule 68. See *Simon v. Intercontinental Transp. (ICT) B.V.*, 882 F.2d 1435, 1439 (9th Cir. 1989). The district court’s findings regarding the factual circumstances under which Rule 68 offers and acceptances are made, however, are reviewed under the clear error standard. See, e.g., *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 439 (5th Cir. 2002); *Herrington v. County of Sonoma*, 12 F.3d 901, 906 (9th Cir. 1993)(“[I]ssues involving construction of Rule 68 are reviewed de novo, [while] disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error.”).

Basha v. Mitsubishi Motor Credit of America, Inc., 336 F.3d 451, 453 (5th Cir. 2003). With respect to interpretation of contractual matters the case of *Pardee v. Jolly* confirms the same distinction.

Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Id.* at 879-80, 73 P.3d 369. Questions of law are reviewed de novo. *Id.* at 880, 73 P.3d 369. The parties' intentions are questions of fact, while the legal consequences of such intentions are questions of law. *Id.*

Pardee v. Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

“Issues involving construction of [CR] 68 offers are reviewed de novo, [while] disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error.” *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wash. App. 261 at 266, 131 P.3d 910 (2006).

The amount that the trial court awards for attorney fees is reviewed under the abuse of discretion standard.

We review the amount of a fee awarded by a trial court for an abuse of discretion. The amount will be overturned only for manifest abuse. *Bowers v. Transamerica Title Ins. Co.*,

100 Wash.2d 581, 597, 675 P.2d 193 (1983). As such, we must give deference to the trial court's decision.

Morgan v. Kingen, 210 P.3d 995, 166 Wn.2d 526, 539 (2009). If this Court finds that the Court Commissioner did modified the time allowed under CR 54 and that the Court Commissioner had to find excusable neglect to modify the time pursuant to CR 6(b)(2) then the proper standard of review is for abuse of discretion. *B & J Roofing, Inc. v. Board of Indus. Ins. Appeals*, 66 Wn.App. 871, 876, 832 P.2d 1386 (1992)

ARGUMENT

CR 54:

On 27 July 2009 Feiger achieved strict compliance with Civil Rule 54(d)(2) by bringing a motion argued 5 August 2009 to determine reasonableness of the contested hourly rate of Feiger's attorney (CP 315-332). It is axiomatic that fees cannot be determined until the issue of contested hourly rates is resolved. This motion was timely under CR 54 as it was argued the same day the agreed judgment was entered by both parties (CP 87-89). Even assuming *arguendo* that this first hearing did not strictly comply with CR 54(d)(2), if the Court had ruled on the rates that day, a cost bill could have been generated within 10 days but the Courts

order was not entered until 19 days later making that impossible as noted by the Court Commissioner (CP 86 and RP p. 21, lines 1-10) and mailed to the parties on the 20th day after the hearing (CP 867-69 and RP p. 19 line to p. 20 line 14). CR 6(c) makes it clear that no part of a proceeding should fail for want and waiting on a court's decision. This first motion to determine the reasonableness of the hourly rates either strictly satisfied CR 54(d)(2) in and of itself or CR 6(c) requires that the time limit cannot begin until the Court's decision is rendered given the necessity of this decision in determining fees.

Even if this Court were to find that the first motion was not sufficient to satisfy the time requirement and that the CR 54(d)(2) clock reset itself and started ticking again after Judge Appel ruled on rates then the remaining CR 6 still applies. Application of CR 6 in considering other rules such as CR 68 show this to be true. For example, in *Dussault v Seattle Public Schools* the court applied CR 6 with respect to extending the 10 day time limit by 3 days for an offer mailed. *Dussault v. Seattle Public Schools*, 69 Wn. App. 728 at 731, 850 P.2d 581 (1993).

CR 6(c) and (e) make it clear that no part of a proceeding should fail for want and waiting on a court's decision and that an additional 3 days is allowed when papers triggering a time limit are mailed

respectively. This arguably includes orders that are mailed and when the papers start some clock ticking. Nothing in CR 54(d)(2) precludes the application of CR 6 and CR 6 does not preclude its application to orders that are mailed.

On 5 August 2009 the Court took the motion regarding the hourly rates under review without setting a deadline for the Court's order/decision nor date for presentation (CP 226). The Court then entered its order on 24 August 2009 (CP 86) and mailed the order the following day on 25 August 2009 (CP 67-69 and RP p. 19 line to p. 20 line 14). 7 September 2009 was a legal holiday under RCW 1.16.50 so even if the time is counted from the day of the order rather than the day it was mailed, the application of CR 6(e) makes Feiger's motion for fees on 8 September 2009 (CP 67-69) timely and in strict compliance.

Even if strict compliance was not achieved with respect to timing, the Court Commissioner was well within her discretion to allow additional time. CR 54(d)(2) on its face allows a court order to adjust the time allowed. *“***Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment”* (emphasis added).

When a court has discretion to modify a deadline, that court is given wide latitude and is overturned only for abuse of discretion *B & J Roofing, Inc. v. Board of Indus. Ins. Appeals*, 66 Wn.App. 871, 876, 832 P.2d 1386 (1992). *B & J Roofing, Inc. v. Board of Indus. Ins. Appeals* does not directly indicate the standard of review but makes it clear that the expansion of time under CR 6(2)(b) is discretionary for the court.

The Court Commissioner made a finding not a conclusion of law that Feiger was entitled to an extra day:

THE COURT: I—I—I found number one, that I believe he is entitled to at least a day for mailing. Number two, I would find that given the circumstances outlined, that it was reasonable in any event for that amount of time. Okay? Thank you.

(RP p. 25, lines 19-23).

The Appellants evasion of discovery and dragging out litigation against declarants in support of reasonableness of the rates of Trickler's hourly rate causing the determination of fees to be in bifurcated hearings was alone enough but the Court Commissioner was also well aware of the recent hit and run death of Heather Trickler, daughter of counsel for Fieger. Peterson was also aware and acknowledged that the Court

Commissioner was aware by his casual dismissal of the fact in his motion (CP 72-85). Later, in this appeal, Peterson has missed nearly every deadline set in the Rules of Appellate Procedure and ultimately Peterson requested and was granted by this Court's discretion, his own extension of time to file his brief based on his own alleged family problems. The problems cited by Peterson in requesting this extension for time to file based on family turmoil betray the insincerity of Peterson's arguments against extra time for Rob Trickler when Peterson argued that the Court Commissioner could not take family tragedy into consideration (CP 72-85) and when Peterson argued Rob Trickler could have been at the courthouse every day checking for new entries into the record when waiting on the necessary decision of Judge Appel (RP p. 20 lines 15-20).

Rob Trickler's family tragedy was common knowledge among the Snohomish County Bar and the staff at the Snohomish County Courthouse as further evidenced by the declaration of Rob Trickler to this Court earlier in this appeal, on motion to deny discretionary appeal, where the crime stopper and Trickler family fliers that were being posted on the courthouse bulletin boards and passed out at the bar office at the courthouse were provided. Several of the Snohomish County Court Commissioners and Staff attended the memorial. It cannot reasonably be said that the Court Commissioner abused her discretion to allow counsel

for Feiger a bit more time assuming the extra time for mailing was not applicable.

Even failing strict compliance, CR 54 still only requires substantial compliance.

If a deadline imposed by a statute or court rule is missed, the court may forgive the error if counsel has substantially complied with the applicable rule. “Substantial compliance” with procedural rules is tolerated because delay and even the loss of lawsuits should not be occasioned by “unnecessarily complex and vagrant procedural technicalities.” *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 522 P.2d 822 (1974).

Karl B. Tegland, Washington Practice Series vol 3A, CR 6 Authors Comments paragraph 7, 151 5th ed., Thompson West 2006. Tegland further notes in the same paragraph, “The trial court has considerable discretion in administering the rule. *In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980).” The purpose of the 2007 amendment to CR 54 adding section (d) is “to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted.” Karl B. Tegland, Washington Practice Series vol 4, 2008 pocket parts CR 54 Drafters’ Comment, 2007 Amendments, 32 5th ed., Thompson West 2008. Given that any delay in noting Feiger’s motion was well before any appeal, and in fact noted and argued on the

•
•

same days as Pratts motions were noted and argued, the intent of the rule was certainly not violated.

Feiger further maintains that if strict compliance was not met and substantial compliance is within the discretion of the Court then it cannot tenably be argued that the Court Commissioner abused her discretion in allowing a small extension of time given the history of this case. Feiger's attorney promptly began the discovery process on the day of the show cause when the Appellants presented a stack of documents that were used in an offering of proof but not provided to Feiger or the record. This was followed by months of intentional discovery evasion and abuse by the Appellants, through which Feiger's attorney continued to diligently pursue despite the hit and run homicide of his daughter. Despite an apparent agreement to settle, Appellant then reopened litigation by contesting hourly rates (CP 227-298 and 307-332) that had been ruled reasonable on 3 separate occasions (CP 97-98 and 367 and 459-461, and CP 165 lines 1-16), violating the intent of CR 68. Under all the circumstances Feiger's motion was arguably prompt and the Court Commissioner was within her discretion.

CR 68:

The purpose of CR 68 was to create the incentive to settle and avoid litigation by introducing the motivation of a fee shifting mechanism that take effect when offers are refused and subsequently go to trial. More precisely, “The purpose of CR 68 is to promote fair settlement and avoid lengthy litigation. *Wallace v. Kuehner*, 111 Wn.App. 809, 46 P.3d 823 (2002).” Karl B. Tegland, Washington Practice Series vol 4, CR 68 Authors Comments part 1. In General, 634 5th ed., Thompson West 2006

CR 68 offer was served on Feiger by the Pratts on 25 June 2009 and allowed to expire. CR 68 does not say that after 10 days the offer may expire the rule says in part “...An offer not accepted *shall* be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs...” Wash. R. Civ P. 68 (emphasis added). This was allowed to expire intentionally because of fear it would prohibit a motion for sanctions (CP 148 line 20 through CP 149, line 5; and CP 150 line 7 through CP 151 line 19; and CP 153 lines 2-23). Peterson acknowledges this himself at hearing on 16 September 2009 to the Court Commissioner (RP p. 9, lines 15 *et sec*). No creativity of application of the rule need be applied to find that the offer expired and a subsequent settlement does not date back to that expired offer.

The rule also says in part, "...The fact that an offer is made but not accepted does not preclude a subsequent offer." Wash. R. Civ P. 68. At best, this offer was made again by Pratt's counsel at the hearing of 7 July 2009 but Peterson's own language at the hearing makes that ambiguous (CP 155 line 15 through CP 156 line 4). Peterson clearly argued that the original offer could not be refused if allowed to expire but that is not consistent with Washington's rule when an offer may be made again after expiration. The Court disagreed (CP 157 line 18 through 158 line 8). There is an ambiguity that must be taken in light most favorable to the non-offering and non-drafting party and that is Feiger.

Ambiguities are construed against the offering and drafting party. *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wash. App. 261, 131 P.3d 910 (2006). See also *Hodge v. Development Services* where this Court determined,

*"The purpose of CR 68 is to promote fair settlements. 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 *** 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."* (emphasis added).

Hodge v. Development Services 65 Wn. App. 576 at 584.

Further, Peterson's own subsequent actions in contesting Judge Rickert's ruling on rates also do not support the contention that Peterson was making the same offer that Feiger was accepting. The very purpose of CR 68 is being circumvented if a settlement is entered to end litigation in reliance, in part, on a Court's finding that hourly rates are reasonable and no longer in contention (CP 165 lines 1-16) yet the very next day the offering party strikes up litigation again in direct attack of the Court's pre-settlement ruling (CP 207-332 and 227-298). Again, this is an ambiguity that must be taken in light most favorable to the non-offering and non-drafting party and that is Feiger, *Seaborn* and *Hodge*.

Feiger contends that the exchange at the hearing on 7 July 2009 was a counter offer by Feiger given the demand that the Pratt's offer of judgment must not preclude Feiger from bringing a motion for discovery sanctions (CP 164 lines 1-7; and CP 166 line 17; and CP 165 line 17 through CP 166 line 17; and CP 167 line 22 through CP 168 line 2). This Court has determined that a counter offer serves to deny an offer of judgment. In *Dussault* the Court clarified *Hodge* to mean that, "there can be no acceptance under CR 68 when the terms of acceptance differ from those of the offer. *Dussault v. Seattle Public Schools*, 69 Wn. App. 728 at

734. See also *Hodge v. Development Services* 65 Wn. App. 576, 828 P.2d 1175 (1992). This offer was not unequivocally accepted but was accepted believing the terms of the hourly rates was settled. That turned out not to be the case. Further, Peterson's response was as inaudible at the hearing as on the transcript of the recording and is not certain (CP 169 line 3).

Importantly, this court has determined that the acceptance of an offer must be in writing. *Dussault v. Seattle Public Schools*, 69 Wn. App. 728 at 733. No writing that can be taken for an acceptance of the offer was entered for 29 days until the parties finally had dispositive resolution pending on the hourly rates of Feiger's counsel and entered an agreed judgment on 5 August 2009 (CP 87-89). The reading of an offer into the record is not a written acceptance and it is not an order despite the Appellants attempt in their brief to stretch it into one (Appellants Brief p. 16 – 18 argument #3). The Court did not consider it as such (CP 163 line 2-10; and CP 164 lines 9-10; and CP 168 lines 3-5). Peterson acknowledges this also at the 16 September 2009 hearing to the Court Commissioner (RP p. 17, lines 17-19).

The parties did ultimately settle and Feiger accepted in writing only when an agreed order, that had been drafted by the Pratts attorney, was pulled out from Plaintiff's exhibits for the 5 August 2009 hearing, and

modified by handwritten language that is less restrictive and more ambiguous than the typed document, signed by counsel for both parties on that same day 5 August 2009 and entered by the parties (CP 87-89). This is the first writing that can be called an acceptance and handwritten changes to a document have higher standing than the type in the case of conflicting terms or ambiguities.

Because the written acceptance was the judgment and order as modified by hand and entered nearly a month after the oral exchange at the Skagit County hearing and because the Appellants had stoked up additional unanticipated litigation contesting Judge Rickert's ruling of the reasonableness of the hourly rates (CP 314-332 and CP 227-298) and because, to allow that ambiguity to favor the offering party, the Appellants, the only proper interpretation of the confused chain of events is to find that the first and only time each of the elements required by CR 68 were all met was 5 August 2009 when the Appellants again made an offer of judgment and that it was finally accepted in writing by Feiger and entered as an agreed order (CP 87-89). This interpretation is one that requires nothing be read into CR 68 and relies on the rule as written on its face.

Even if there had been an offer 29 day prior, it had long since expired without a written acceptance and the confusion and ambiguity that followed must be interpreted in favor of the non-offering and non-drafting party, *Seaborn* and *Hodge*. That is in favor of Feiger. Most importantly, Feiger's position is the only one that is both consistent with the intent of CR 68 and meets all of the rules elements without having to reinvent the rule. The Court Commissioner properly calculated the cost and fees going through 4 August 2009 when the offer and acceptance came the following day. For that matter it would have been proper for Feiger to include the 5 August 2009 hearing despite not having done so and the offer and settlement came later that day.

From a contract perspective, counsel for Feiger had no reasonable expectation to anticipate that Peterson would ignore Judge Rickert's ruling regarding the reasonableness of the hourly rates and begin new litigation in opposition to that ruling the next day (CP 314-332 and CP 227-298). Despite Judge Rickert's ruling, the third such court to find the same in this matter (CP 97-98 and CP 367 and CP 459-461, and CP 165 lines 1-16), counsel for Pratts subpoenaed the entire 2009 billing history of one declarant who offered a declaration in support of those fees the very next day (CP 315-332). This was shortly followed by a demand, in the nature of extortion, requiring counsel for Feiger to move to strike a second

•
•

declarant's declaration in support of said fees lest Peterson file a bar complaint against that declarant (CP 300-306 and CP 315-332). That complaint ultimately being filed by Peterson despite Peterson's own personal use of that same declaration for his own benefit 6 days later (CP 227-298). This was then followed by Peterson's unsuccessful ex parte motion for judicial subpoena ordering that declarant Getz appear for testimony at the hearing noted for 5 Aug 2009, despite not having issued his own subpoena prior to (CP 299) or even knowing if Judge Appel would take testimony.

None of these events were anticipated as part of the agreement made immediately after the third ruling that the fees were reasonable (CP 97-98 and CP367 and CP 459-461 and CP 165 lines 1-16). That is assuming *arguendo* that the agreement was even reached 7 July 2009 rather than when re-offered, drafted and entered 5 August 2009. This is arguably a mistake of fact or hidden intent that should render the contractual agreement void and certainly an ambiguity drafted against the offering party *Seaborn Pile Driving Co. v. Glew* 131 P.3d 910 at 269.

Further, if the Court finds that the CR 68 was accepted on 7 July 2009, *Du K. Do v. Farmer*, 127 Wn.App. 180, 110 P.3d. 840 (2005) supports Feiger's position that even if a judgment entered under CR 68

•
•

says the attorney fees amount says \$0.0 fees may still be sought. The same logic may be properly extended to this situation. It is Feiger's contention that regardless of what the judgment and attachments thereto say (CP 87-89), fees sought by the accepting party may appropriately deviate from what the CR 68 agreement indicated when the deviation is regarding, what amounts to, additional forthcoming fees for litigation, the imminence of which were hidden from the Plaintiff at the time of the offer. Defendants knew certainly knew they would bring additional litigation regarding a matter and knew they had made an offer to settle under a rule intended to end litigation. The Plaintiff had every reason to believe was settled specifically the hourly rate of counsel for Feiger.

All of the taxable costs that were listed on the cost bill (ledger) tendered by Rob Trickler between the days of 8 July 2009 and 5 August 2009 were transcription cost that were incurred prior to 8 July 2009 and were simply recorded at the time that the invoices were received by Rob Trickler. Therefore, even if this Court were to find that period in question should be excluded from the judgment entered by the Court Commissioner on 16 September 2009, those costs should properly remain. The hourly total of billed hours for those same days totals 15.1 hours. All of which associated with the necessity of defending Judge Rickert's ruling, and two other Courts (CP 97-98 and CP367 and CP 459-461 and CP 165 lines 1-

16), of the reasonableness of the hourly rate. Although Feiger contends that the appropriate fees should run up to the time of the offer and acceptance argued for by Feiger, 5 August 2009, in the alternative any change in fees should be limited to these days and totals.

In any event, CR 68 was never intended to be used to allow the offering party to stop litigation that may be compensated by an award for attorney fees and costs as far as the Plaintiff is concerned, yet allow the Defendant and offering party to then start litigation anew and radically run up costs and fees for the Plaintiff that cannot be compensated. That type of behavior is precisely what the amendment to CR 54 adding (d) in 2007 was intended to prevent. That intent of that amendment, brought by the courts, certainly has merit with respect to this particular circumstance and set of facts and the identical abuse it was meant to prevent.

In the cases cited by the Appellants, and in every case on point, any fee shifting involves only those matters that went to trial subsequent to an offer under CR 68. From a strictly construed perspective of this rule, this matter settled and did not go to trial and thus has nothing to do with fee shifting.

From an equitable perspective and tanking into consideration the intent of the drafters of the rule, allowing the Pratts to say they have used

CR 68 to halt Feiger's ability to collect any attorney fees, but then allowing the Pratts to circumvent the intent of CR 68 and CR 54(d) by allowing them to bring unchecked litigation (CP 307-332 and CP 227-298), contesting an issue already ruled on (CP 97-98 and CP367 and CP 459-461 and CP 165 lines 1-16), cannot be reconciled.

Attorney Fees:

Counsel for the Pratts argues that they should be awarded fees based on a document that was neither part of the settlement nor part of the record. Peterson specifically, but unsuccessfully, moved this Court 25 January 2010 to admit and supplement the record with the alleged amendment to the parties lease (Appellants Brief, Appendix p. 34). His motion to this Court to supplement the record with this un-authenticated, un-admitted document which, further, has no signature other than the Appellants, was denied (see this Appendix p. 53), Never the less, Peterson blatantly ignores this Court's decision and puts the document in his brief and argues it none the less.

Attorney fees were awarded to Feiger based on an agreed order that Pratt's counsel Peterson drafted and both parties entered. The CR 68

offer entered into the record 5 August 2009, is the only document relevant for the Court Commissioner to evaluate what exactly was the nature and specifics of the agreed judgment and order. Using long standing principals of contract law that document must be construed against the offering party and against drafting party, the Pratts in both cases and thus in favor of Feiger.

That agreement, at its earliest *arguendo*, was entered into on the 7 July 2009, in front of the Skagit County Superior Court Judge immediately after the Judge had ruled the hourly rates of Feiger's counsel were reasonable and did not anticipate or address the additional litigation brought on by the Pratt's continued litigation. Again, an ambiguity or mistake of fact but construed against the Pratts, *Seaborn Pile Driving Co. v. Glew* 131 P.3d 910 at 269..

This case was started under but not decided under landlord tenant law nor did it go to trial after the CR 68 offer of 5 August 2009 was accepted. If it had RCW 59.18.290 allows for the substantially prevailing party to be awarded cost and reasonable attorney fees and this offer of judgment surrendered 100% to Feiger thus making Feiger the prevailing party. If this Court finds RCW 59.18.290 applicable in this appeal if this Court were to rule against Feiger in any part it would still be this Courts

discretion to determine which party is the substantially prevailing party and rule on cost and fees for the appeal.

Further, Feiger did not ultimately receive a judgment less than the amount offered so no fee shifting is appropriate, “The cost-shifting mechanism in CR 68 operates only when the plaintiff receives a judgment for some amount of money, which is less than offered by the defendant. Karl B. Tegland, Washington Practice Series vol 4, CR 68 Authors Comments part 1. In General, 634 5th ed., Thompson West 2006.

Using this Courts rational in the recently published decision in *Housing Authority of City of Everett v. Carroll Kirby*, ___ P.3d ___, ___ Wn.2d ___ (2010), Docket Number 62052-5 (8 March 2010), the Pratts are not entitled to fees for this appeal but Feiger is. There are no mechanisms other than this agreed judgment allowing for fees. In that judgment Feiger is the prevailing party.

Counsel for Pratts seems to also argue for fees based on equitable reasons. He has acknowledged that he is working Pro Bono and as such a motion to revise would have been cost free to his clients, the Pratts. While a motion to revise would not afford Pratt’s counsel the opportunity to be published, it could have a far more economical approach to resolve these

issues at counsel's pro bono expense rather than risking further judgment against the Pratts via an appeal.

Perhaps this was a decision of the Pratts, never the less, if counsel for the Pratts is arguing on equity, it would be an affront to public policy to allow the Pratts to benefit after their long and deliberate pattern of discovery abuse and evasion, only to surrender in an agreed order intended to end litigation, then successfully undermine that agreed judgment by being granted fees for an unnecessary appeal. An appeal that Feiger contends is frivolous. An appeal based on issues, at any rate, that likely could have been resolved dispositively on a motion to revise. To the extent that equity is used as an argument for an award of cost and attorney fees for this appeal, they should be denied Pratts and awarded to Feiger.

In contrast, Feiger is entitled to attorney fees based on the agreed order and judgment drafted by the Pratts and interpreted in favor of the non-drafting party and as the substantially prevailing party.

CONCLUSION

This Court should dismiss this appeal as frivolous in that it is an attempt by the Appellant to undo an agreed settlement by ignoring obvious portions and clear intent and plain language of the civil rules, applying inapplicable rules, by trying to characterize the reading of an offer onto a record as a judicial ruling, and then arguing the Court Commissioner ruled against the mythic ruling.

In the alternative, this court should exclude and not consider the expired offer of judgment letter and the addendum to the lease which the Appellants inappropriately included in the appendix of their brief (Appellants Brief Appendix p. 34).

This Court should find that CR 54 was strictly complied with or in the alternative that it was substantially complied with and that the Court Commissioner was proper in denying the Pratts motion and in granting the motion of Feiger.

This Court should find that fee shifting under CR 68 does not apply when a subsequent CR 68 offer was entered and the matter never went to trial.

This Court should find that the summary of an offer read on the record by the Skagit Court does not constitute a ruling by that Court and that the Court Commissioner was not bound by that same record.

This Court should find that the CR 68 offer was allowed to expire and that the only time each element required of an offer and acceptance under CR 68 was met was on 5 August 2009 and that cost and attorney fees are appropriately awarded to Feiger through that day and uphold the Court Commissioners ruling.

This Court should find that the Court Commissioner properly interpreted ambiguities of a contractual settlement in favor of the non-drafting and non-offering party and that the Court Commissioner was proper in awarding fees through 4 August 2010.

This Court should deny the Appellant's request for cost and attorney fees associated with this appeal and award Feiger costs and fees for the same.

Respectfully submitted March 15th 2010

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Rob W. Trickler, WSBA #37125

APPENDIX

RULE 6 TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion,

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or,

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

(c) Proceeding Not To Fail for Want of Judge or Session of Court. No proceeding in a court of justice in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges or by the failure of a session of the court.

(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

RULE 54 JUDGMENTS AND COSTS

(a) Definitions.

(1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

(2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. 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 the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the

substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

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.

RCW 1.16.050

“Legal holidays and legislatively recognized days.”

The following are legal holidays: Sunday; the first day of January, commonly called New Year's Day; the third Monday of January, being celebrated as the anniversary of the birth of Martin Luther King, Jr.; the third Monday of February to be known as Presidents' Day and to be celebrated as the anniversary of the births of Abraham Lincoln and George Washington; the last Monday of May, commonly known as Memorial Day; the fourth day of July, being the anniversary of the Declaration of Independence; the first Monday in September, to be known as Labor Day; the eleventh day of November, to be known as Veterans' Day; the fourth Thursday in November, to be known as Thanksgiving Day; the day immediately following Thanksgiving Day; and the twenty-fifth day of December, commonly called Christmas Day.

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

February 1, 2010

Robin W Trickler ✓
The Law Offices of Rob W Trickler
3801 Colby Ave
Everett, WA, 98201-4912

Scott R. Peterson
Attorney at Law
648 S 152nd St Ste 7
Seattle, WA, 98148-1195

CASE #: 64308-8-1
Helen Feiger, Resp. vs. Tony & Anna Pratt, Apps.

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on January 29, 2010, regarding appellant's motion under RAP 9.11 for additional evidence upon review:

Denied. Appellant has not shown that relief under RAP 9.11 is appropriate.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

hek