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No. 66800-5-I
COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Boris Petrenko, et al., Appellants

v.

TBF Financial, LLC, Respondent

APPELLANTS' JOINT REPLY BRIEF

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I. APPELLANTS' JOINT REPLY TO THE BRIEF OF THE RESPONDENT

A. TBF Financial Improperly Advances its Capacity to Sue Argument Based on the Former Language of the RCW, Not its Current Version That Significantly Differs.

The entire argument, advanced by the Respondent of TBF Financial, stating that it had the capacity to sue in the courts of this state, is nothing but trickery perpetrated on this Honorable Court for several reasons. TBF Financial based its argument on *Laliberte v. Wilkins*, 30 WnApp. 782, 786, 638 P.2d 596 (1981). In *Laliberte v. Wilkins* the former statutory language of the RCW 19.80.010 and RCW 19.80.040, significantly differs from the present version. In *Laliberte* the **former** language of the RCW 19.80.010 quoted at that time read:

“No person or persons shall hereafter carry on, conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the true and real name or names of the person or persons conducting such business or having an interest therein, unless such person, or all of such persons, conducting said business, or having an interest therein, shall file a certificate with the department of licensing, which certificate shall set forth the designation, name or style under which said business is to be conducted, and the true and real name or names of the party or parties ...”

Laliberte v. Wilkins, 30 WnApp. 782, 786, 638 P.2d 596 (1981), citing former version of the RCW 19.80.010.

However, the **current version** of the RCW 19.80.010 reads:

“Each person or persons who carries on, conducts, or transacts business in this state under any trade name must register that trade name with the department as provided in this section. (3) Foreign or domestic limited liability company: The registration must set forth the limited liability company name as filed with the office of the secretary of state.” (See RCW 19.80.010 current version).

Lastly, the RCW 19.80.005 Definitions are provided in the pertinent part:

“The definitions in this section apply throughout this chapter unless the context clearly requires otherwise. (3) “Person” means *any* individual, partnership, *limited liability company* or corporation conducting or having an interest in a business in the state.” (Emphasis added) (See RCW 19.80.040 (3)).

When this court interprets a statute, it looks first to the ordinary meaning of the words used by the legislature.¹ In such cases, this court’s primary duty is to ascertain and provide an effect to the intent and purpose

¹ *Anderson v. City of Seattle*, 123 Wash.2d 847, at 851, 873 P.2d 489 (1994) (citing *Sofie v. Fiberboard Corp.*, 112 Wash.2d 636, 668, 771 P.2d 711, 780 P.2d 206 (1989)).

of the legislature.² If the language is unambiguous, the plain wording of the statute controls.³

In this instance, the current version of the statute controls, not the former language of the statute cited and argued by the Respondent. Hence, TBF Financial's argument that it had the capacity to sue is not persuasive; under the present unambiguous language of the statute, TBF Financial lacks the capacity to sue in the courts of this state due to the failure to register as required by the RCW 19.80.010 (Also see RCW 19.80.040).

B. The Trial Court's Dismissal of the Appellants' Counterclaims Violated Their Constitutional Right to Trial Because the Existence of the Terms on Which TBF Relies are In Dispute.

TBF Financial misses the whole point of the Appellants argument in their opening briefs. The Appellants specifically challenge the existence of the very terms on which TBF Financial bases its response argument. (CP 19 and CP 27). TBF Financial made no showing to the trial court and there was no testimony demonstrating that the second pages of the two lease agreements were part of the original documents signed by the Appellants. Since the terms on the second pages of the two leases are in

² *Harmon v. Department of Social and Health Services, State of Washington*, 134 Wash.2d 523, at 530, 951 P.2d 770 (1998) (citing *State v. Hennings*, 129 Wash.2d 512, 522, 919 P.2d 580 (1996)).

³ *Id.*, at 851, citing *Geschwind v. Flanagan*, 121 Wash.2d 833, 841, 854 P.2d 1061 (1993).

dispute, TBF Financial cannot claim, under the disputed terms, that the Appellants “agreed that the right of the new owner will not be subject to any claims, defenses, or set-offs that the Appellants may have against Konica Minolta.” Since TBF Financial failed to offer any competent proof that the second pages were part of the two original lease agreements, Petrenko and Bogolyubov could prosecute their counterclaims against TBF Financial.

Furthermore, Bogolyubov had no contractual obligations of any kind in relation to the second lease agreement. (NRP 14 and CP 76-77). Consequently, the RCWA 62A.9A-403(b) should not shield TBF Financial against Bogolyubov’s counter-claims in tort. For these reasons, the trial court improperly dismissed Bogolyubov’s individual products liability counterclaim against TBF Financial.

Summary judgment procedure is not designed to deprive a litigant of a trial on the disputed issue of fact.⁴ If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied.⁵

⁴ *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874, 431 P.2d 216 (1967).

⁵ *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (2001).

The trial court's immediate dismissal of Petrenko and Bogolyubov's counterclaims was an abuse of discretion and a violation of the Appellants' constitutional right to trial.

C. The Trial Court Improperly Granted Partial Summary Judgment Against Appellants Bogolyubov and Petrenko.

Although TBF Financial states that the Appellants' argument against granting summary judgment resembles their argument against the dismissal of their counterclaims, the Appellants' advanced two different theories based on the claimed errors of the trial court. Thus, the Appellants first raised the constitutional issue of the violation of their right to trial by jury on all factual disputes. Secondly, the Appellants addressed the issue of the Respondent's failure to meet the requirements of the CR 56 since the Appellants presented a genuine issue of material fact, which precludes summary judgment and requires a trial.

Both Appellants continue to maintain their respective positions in their opening briefs in relation to the trial court's unconstitutionality, dismissing their counterclaims and improperly granting partial summary judgment.

D. TBF Financial's Evidence Presented to the Trial Court was Inadmissible in the Summary Judgment Proceeding.

1. The Exhibits Were not Properly Authenticated

In its Response Brief, TBF Financial confuses evidentiary issues addressed by the Appellants, failing to distinguish between Boehm's lack of personal knowledge of the facts and lack of authentication of the exhibits and summaries.

TBF Financial also claims that Boehm's declaration with attachments was admissible and that the trial court did not abuse its discretion in admitting such evidence. TBF Financial bases its argument on the interpretation of this Court's evidentiary rulings made in *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 87 P.3d 774 (Div. 1 2004). However, Bogolyubov and Petrenko disagree with such an interpretation of the case law by the Respondent.

The *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 87 P.3d 774 (Div. 1 2004) involved several evidentiary rulings by this Court. In their opening briefs, Bogolyubov and Petrenko discussed a specific portion of the *Int'l Ultimate* at 750 under the subheading of *St. Paul's Documents*, whereas the Respondent focused their argument on the other portion of the *Int'l Ultimate* at 744-176. The relevant portion of the *Int'l Ultimate*, on which Petrenko and Bogolyubov rely on their opening briefs, is quoted here verbatim:

“[15] Hayes does not claim the same degree of familiarity with the other documents. Although he explains that he reviewed the

documents, and made copies from the originals, he does not establish personal knowledge. Absent such knowledge, he cannot satisfy the prima facie showing of authenticity required for admissibility. Therefore, the trial court abused its discretion by admitting the email from Berger to Zeller, a faxed letter from the Dutch attorney to Zeller, a letter from Zeller to IUI's attorney, and a letter from an independent attorney Terry McCall to Zeller.”⁶

In our case, Boehm’s declaration recounts the facts of the two transactions in which Boehm was not a witness and could not have personal knowledge of the facts to which he testified. Moreover, Boehm was not a custodian of Konica Minolta’s, CitiCapital and CIT Technology Financing Services’ records. For this reason, Boehm could not authenticate the exhibits. In his declaration, Boehm did not testify that the copies of the documents were made from the originals. Boehm only testified “a true and correct copy is attached.” Since TBF Financial received the documents from its three predecessors, without any business record certifications from the custodians to authenticate the documents, Boehm could not make such an authentication to satisfy evidentiary requirements of both ER 602 and ER 901. Hence, the trial court abused its discretion by admitting Boehm’s declaration and attachments into evidence.

⁶ *Int’l Ultimate, Inc. v. St. Paule Fire & Marine Ins. Co*, 122 Wn.App. 730, 750, 87 P.3d 774 (2004) (citations omitted).

TBF Financial similarly misinterprets the Supreme Court's ruling in *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178-79, 727 P.2d 982 (1986). In *Guntheroth* the Supreme Court made the following verbatim ruling:

“CR 56(e) provides, “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Rodaway's affidavit does not contain facts showing that the alleged awareness and familiarity were based on personal knowledge. Therefore, the portion of the affidavit in question does not satisfy the requirements of CR 56(e).*”⁷ (Emphasis added).

Even so, the Supreme Court in *Guntheroth* said that it was a harmless error to admit such an affidavit into evidence.⁸

In our case, Petrenko and Bogolyubov brought evidentiary issues to the attention of the trial court and specifically pointed out that Boehm lacked personal knowledge, as required by ER 602, and could not authenticate exhibits attached to his declaration, as required by ER 901. (NRP 5-6). Because the Respondent did not satisfy the foundational requirements of ER 602 and ER 901, the trial court abused its discretion in admitting Boehm's declaration and attachments into evidence.

Lastly, the Respondent's argument regarding the admissibility of

⁷ *Guntheroth v. Rodway*, 107 Wn.2d 170, 178-79, 727 P.2d 982 (1986).

⁸ *Id.*, at 178.

its summaries is flawed and is not supported by the rules of evidence or case law. TBF Financial failed to cite any legal authorities in support of its position with regards to its summaries exhibits. (CP 26 and CP 34).

It is well established that summary evidence is admissible under Rule 1006 *only* if the underlying materials upon which the summary is based are admissible.⁹ (Emphasis added). However, Admission of summaries as substantive evidence is conditioned on the requirement that the evidence upon which they are based must be admissible.¹⁰ A proper foundation must establish the admissibility of the underlying materials and the accuracy of the summary.¹¹

The TBF Financial summaries were presented to the trial court without any documentation or statements supporting the basis for such calculations. (CP 26 and CP 34). If the exhibits were not voluminous, as the Respondent argues in their brief, then TBF Financial's summaries could not be presented to the court in the first place. Instead, TBF Financial would be required to provide original documents on which such calculations were based, since one of the several foundational requirements for admissible summaries is that the original documents

⁹ *U.S. v. Pelullo*, 964 F.2d 193, 204 (3d Cir.1992) (citations omitted).

¹⁰ *U.S. v. Johnson*, 594 F.2d 1253, 1255 (9th Cir. 1979).

¹¹ *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 403 (7th Cir. 1981), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 237 (1981).

must be voluminous.¹²

In summary, the gist of TBF Financial's argument is aimed at convincing this Court to eviscerate the necessary foundational requirements of the rules of evidence.

Since there was no showing made as to the accuracy of the Respondent's calculations presented in the form of summaries and the documents on which the summaries were based were not authenticated, the trial court abused its discretion in admitting TBF Financial's summaries for the purpose of the Summary Judgment hearing.

2. TBF Financial's Exhibits did not Meet ER 801 and 802 Business Records Exception.

While the Uniform Business Records Act is a statutory exception to hearsay rules, *it does not create an exception for the foundational requirements of identification and authentication.*¹³ (Emphasis added). A trial court's decision to admit records under the act is reviewed for a manifest abuse of discretion.¹⁴ A business record must be identified as authentic before it is admissible.¹⁵ The identification typically must be by

¹² 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, p. 453 (2003 Ed.).

¹³ *State v. DeVries*, 149 Wash.2d 842, 847, 72 P.3d 748 (2003) (citing 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 803.42, at 23 (4th ed. 1999)).

¹⁴ *Id.*, at 847, citing *State v. Ziegler*, 114 Wash.2d 533, 538-40, 789 P.2d 79 (1990).

¹⁵ 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, p. 379 (2003 Ed.).

someone connected with the business.¹⁶ The unauthenticated record is not competent evidence because it does not meet the requirements of the RCW 5.45.020 statutory provisions.¹⁷

The Respondent, supporting the position that TBF Financial's exhibits met the business record's exception to the hearsay rule, cited three cases: *Zillah Feed Yards, Inc. v. Carlisle*;¹⁸ *Cantrill v. Am. Mail Line*;¹⁹ and *Remington Invs., Inc. v. Hamedani*²⁰. However, all of the cited case laws by the Respondent address factual situations in which the records were authenticated by the custodians of the entities, prepared in the course of business.

In our case, unlike those cited by the Respondent, Boehm submitted records that passed through three different entities. Not one custodian from those entities submitted any certification to authenticate the records. Boehm was not connected with Konica, CitiCapital and CIT Technology Financial Services. Boehm's declaration was not adequate evidence of authenticity of the two agreements in dispute. In summary, TBF Financial failed to offer adequate evidence of authenticity of the

¹⁶ *Id.*, p. 379.

¹⁷ *State v. Weeks*, 70 Wash.2d 951, 953, 425 P.2d 885 (1967). Also see *U.S. v. Riley*, 236 F.3d 982, 984-85 (8th Cir. 2001); *Fonar Corp. v. General Elect. Co.*, 107 F.3d 1543 (Fed.Cir. 1997), cert. denied, 522 U.S. 908, 118 S.Ct. 266, 139 L.Ed.2d 192 (1997).

¹⁸ 72 Wn.2d 240, 243, 432 P.2d 650 (1967).

¹⁹ 42 Wn.2d 590, 608, 257 P.2d 179 (1953).

²⁰ 55 Cal.App.4th 1033, 1042, 64 Cal. Rptr.2d 376 (1997).

offered documents, which were disputed by the Appellants. Hence, the trial court abused its discretion in admitting the disputed agreements without requiring the Respondent to lay proper evidentiary foundations.

E. The Trial Court Abused Its Discretion in Awarding TBF Attorney's Fees and Costs.

1. Pursuant to RAP 2.4(g) and RAP 7.2(i) Petrenko is not Required to File a Separate Notice of Appeal of an Award of Attorney Fees.

TBF Financial's argument by its Respondent, stating that Petrenko appealed only to the trial court's summary judgment ruling and not the later award of fees and costs, is faulty for the following reasons.

RAP 2.4 provides in pertinent part:

“(g) Award of Attorney Fees. An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.” (See RAP 2.4(g)).”

Similarly RAP 7.2 similarly provides in pertinent part:

“(i) Attorney Fees, Costs and Litigation Expenses. The trial court has authority to act on clam for attorney fees, costs and litigation expenses. A party may obtain review of a trial court decision on attorney fees, costs and litigation

expenses in the same review proceedings as that challenging the judgment without filing a separate notice of appeal or notice for discretionary review.” (See RAP 7.2(i)).

In *Estep v. Hamilton*, the court said: “Client who filed notice of appeal from order granting summary judgment to attorney in legal malpractice action could also obtain appellate review of the trial court’s award of costs to the attorney, even though the costs award was entered after client filed the notice of appeal, and client did not amend her notice of appeal.” *Estep v. Hamilton*, 148 Wash.App. 246, 201 P.3d 331 (2008), reconsideration denied, review denied 166 Wash.2d 1027, 217 P.3d 336.

In this case, similar to prior occasions, the attorney for TBF Financial exhibited the tendency to overlook the Rules of Appellate Procedure. Thus under RAP 2.4(g) and 7.2(i), Petrenko timely filed his notice of appeal of the trial court’s summary judgment ruling. The same notice of appeal brought up an award for review of attorney fees as permitted by RAP 2.4(g) and RAP 7.2(i). Therefore, the issue of attorney fees awarded against Petrenko is properly before this Court for consideration.

2. Defendants’ Joint Objection Was Filed Timely with the trial Court

On May 13, 2011, TBF Financial initially filed Motion to Amend Judgment to Include Attorney's Fees and Costs. (CP 119-129).

On May 19, 2011, the Defendants' filed a joint response to TBF Financial's request for attorney fees, which was proper in light of the procedural error and the Respondent's non-compliance with CR 6. (CP 147-159). Specifically, Bogolyubov and Petrenko raised a valid issue regarding the attorney fees and costs when TBF Financial moved the trial court to amend judgment. (CP 119-129). The Respondent's motion was untimely because it was filed 96 days after partial judgment was entered and the Defendants made a proper response to TBF Financial's untimely motion. The trial court did not in fact grant TBF Financial's motion to amend judgment. Instead, the trial court bailed out TBF Financial by changing the Respondent's original motion to amend into supplemental judgment. (CP 168-170). The trial judge made specific handwritten changes on the document to read "Supplemental Judgment Re Award of Costs and Attorneys Fees and Denying Defendants' Motion to Strike." In the same document, the trial judge made changes to read "Ordered Adjudged and Decreed that judgment against defendants is not amended, but their supplemental judgment is entered to include an award of reasonable attorney fees in the amount of \$12,055.46 and costs in the amount of \$693.17." The trial judge found that "There was no objection

filed regarding either the hours charged or the hourly rates used” for imprecise reasons. Petrenko and Bogolyubov jointly filed such an objection on May 24, 2011. (CP 162-167). The trial court did not find Petrenko’s and Bogolyubov’s Joint Supplemental Reply, including the objection to attorney fees, to be unauthorized or filed untimely.

The Appellants’ timely filed Joint Supplemental Reply within the time permitted by the KCLCR 7(b)(4)(E), which reads: “(E) Reply. *Any documents in strict reply shall be similarly filed and served no later than 12:00 noon on the court day before the hearing.*”

Hence, TBF Financial’s argument that the Defendants filed an unauthorized brief, failed to file objections to the attorney fees and costs, and waived their objections are without merit and not based on actual procedural facts or law.

3. The Trial Court’s Award of Attorney Fees and Costs is in Fact Unreasonable.

In *Scott Fetzer Co. v. Weeks*, 122 Wn. 2d 141, 859 P. 2d 1210 (1993), the Supreme Court stated that “while the amount in dispute does not create an absolute limit on fees, that figure’s relationship to the fees requested or awarded is of vital consideration when assessing the reasonableness.”²¹ This is particularly true when a fee award “grossly

²¹ *Fetzer*, 150.

exceeds” the amount in controversy.²² In our instance, after the remaining issues were settled between the parties, TBF Financial submitted an inflated, possibly fabricated billing statement of its attorney fees in the amount of \$11,735.46, when the principal amount granted by the trial court was only \$5,714.08. TBF Financial’s argument, regarding reasonableness of its attorney fees, is implausible, in light of a grossly disproportionate principal amount of partial summary judgment.

In its response brief, TBF Financial makes fruitless attempts to explain the numerous doubtful entries in its billing statement. Notwithstanding such attempts, TBF Financial admits in its response brief that some of its entries are inaccurate, containing omissions and billing errors. Also, TBF Financial’s billing statement entries are not discernable to confirm the reasonableness of the charges for legal services.

The Appellants already pointed out to this Court that, although TBF Financial argues its pleadings must conform to the supervising attorney’s standards, it is unclear why, after several reviews, the two Summons issued against both Defendants named the STATE OF WASHINGTON as a party to this action. The only plausible explanation is that no one attempted to review these documents in the first place and that all of the charges are inflated. As already mentioned, the language of

²² *Fetzer*, 150.

the Summons is prescribed by the CR 4(b)(2) and form of the pleadings prescribed by CR 10. For this reason, it is unclear why a supervising attorney's standard imposes additional billing hours on the Defendants when there is one standard of pleading clearly set by the Civil Court Rules.

TBF Financial argues that it is entitled to recover attorney fees on Lease No. 2 against both Bogolyubov and Petrenko even though the guaranty claim against Bogolyubov was dismissed. In support of its position, TBF Financial cites *Ethridge v. Hwang*, 105 Wn.App. 447, 461, 20 P.3d 958 (1987). However, *Ethridge* is obviously misplaced in application to our case because *Ethridge* did not involve a second named party against whom a claim was dismissed. Our case, unlike *Ethridge*, involves two absolutely distinct claims arising from two absolutely different equipment lease agreements. That being said, the Plaintiff's first claim named Bogolyubov based on his personal guarantee signed on Lease No. 1. The Plaintiff's second claim made a baseless attempt to extend Bogolyubov's guarantee from Lease No. 1 to Lease 2. Bogolyubov was found contractually liable on Lease No. 1, but not on Lease No. 2. Consequently, the Plaintiff's position that both distinct claims arise from single fact pattern is self-serving and *non sequitur*.

In support of its claim for attorney fees based on contract, TBF

Financial cites *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App. 834, 855, 942 P.2d 1072 (1997), which is not applicable to Bogolyubov. The claim on Lease No. 2 was dismissed against Bogolyubov as well as Bogolyubov's non-contractual products liability counterclaim against TBF Financial, arising from an injury caused by a piece of equipment from Lease No. 2. It is unclear how Bogolyubov is still liable for attorney's fees on Lease No. 2, as well as to how Petrenko became liable for attorney's fees in TBF Financial's defense of Bogolyubov's non-contractual counterclaims. It appears that the sole reason Bogolyubov had to defend himself against TBF Financial's claim on Lease No. 2 is because he had no personal obligations on that lease. For this reason, it is not comprehensible as to how Petrenko became liable for attorney fees incurred by TBF Financial, prosecuting its frivolous claim of liability on Lease No. 2 against Bogolyubov.

TBF Financial failed to cite any legal authority to support its position regarding Bogolyubov's liability for attorney's fees on Lease No. 2 and regarding Petrenko's liability for attorney's fees related to Bogolyubov's non-contractual counterclaims. It is unclear as to how TBF Financial can shift on Petrenko Bogolyubov's tort claim as well as the claim that arose from the Petrenko's Lease No. 2 on Bogolyubov, and vice versa, when in fact Bogolyubov had no obligations on Lease No. 2.

The Respondent argues that Slip No. 160791, a six dollar parking fee as a cost, was improperly attacked by the Appellants and that the date of March 2, 2011 for such an expense was a mere error and must be entered as February 4, 2011. (CP 146). However, TBF Financial overlooked the fact that the billing reflects two parking charges for March 3, 2011, (entry No. 160791) and March 14, 2011, (entry No. 161373), which was not explained by the Respondent.

The Respondent also argues that redaction of billing records is appropriate when they include privileged subject matter and any blackened out entries are justified. In support of its position, TBF Financial cites *State v. Mendez*, 157 Wn.App. 565, 585-86, 238 P.3d 517 (2010). Again, TBF Financial misinterprets the case law. In *State v. Mendez*, the appellate court said: “the identity of an attorney's client and the fees charged for representation are not privileged information.”²³ Thus, no privilege attached to the billing records themselves.”²⁴ The appellate court further stated that “the trial court, working with defense counsel, can protect privileged information by redacting names and/or information

²³ *State v. Mendez*, 157 Wn.App. 565, 585, 238 P.3d 517 (2010) (citing *Seventh Elect Church in Israel v. Rogers*, 102 Wash.2d 527, 531–532, 688 P.2d 506 (1984); *R.A. Hanson Co. v. Magnuson*, 79 Wash.App. 497, 501–502, 903 P.2d 496 (1995), review denied, 129 Wash.2d 1010, 917 P.2d 130 (1996)).

²⁴ *Mendez*, at 585.

identifying the subject matter of privileged communications.”²⁵ In our case, unlike *Mendez*, TBF Financial already submitted redacted billings to the trial court without allowing any review as to the validity of its billing entries. Hence, TBF Financial’s argument that it is entitled to attorney fees for the redacted entries is without merit.

TBF Financial argues that its fees to collect judgment for a premature garnishment proceeding were justified, even though the case did not reach finality. However, this Court’s May 3, 2011 notation ruling that TBF Financial could not proceed with collections on its partial summary judgment is clear and specific. Hence, it is not Petrenko’s belief that governs, but procedural finality of the case, which was not reached at that time. Secondly, TBF Financial attempted garnishment based on its claimed “reasonable belief” that the U.S. Bank has Bogolyubov’s account when there were no such accounts and no apparent reason for the Respondent to believe so. TBF Financial fails to explain why it chose U.S. Bank as a garnishee defendant. TBF Financial could similarly go through all banks operating in this state, or other states, claiming that it acted on “reasonable belief”.

TBF Financial also argues that, in its holding, the *Pearson* court said, “fees under the lease may be awarded only for those services which

²⁵ *Id.*, at 585-86.

relate to the contract action; attorney fees are not awarded for tort actions.” *Pearson*, 52 Wn.App. at 723. However, Bogolyubov’s counterclaim involved tort action against TBF Financial, and the Respondent’s claim on Lease No. 2 was dismissed against Bogolyubov.

The Respondent argues that the only authority cited by the Appellants in support of their proposition, regarding segregation of time, is *Blair v. Washington State University*, 108 Wash.2d 558, 740 P.2d 1379 (1983), and that *Blair* instead supports TBF Financial’s position that no segregation was required in this case. However, the *Blair* court said: “if the claims are unrelated, the court should award only the fees reasonably attributable to the recovery.” *Blair*, 108 Wn.2d at 572, citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Furthermore, in *Blair*, the court found that the Plaintiffs had prevailed on many significant issues, and the evidence presented that attorney fees incurred for the successful and unsuccessful claims were inseparable. *Blair*, 108 Wn.2d at 572.

In our case, unlike *Blair*, the trial court made no precise finding that the Plaintiff’s successful or unsuccessful claims against Bogolyubov and Petrenko, on two separate leases, were inseparable. For this reason, TBF Financial’s request for attorney fees must be denied. The Supreme Court of Washington has held that a plaintiff can be required to segregate

its attorney fees between successful and unsuccessful claims that allow for the award of fees.²⁶

If TBF Financial is entitled to recover any fees and costs of this litigation, then TBF Financial must provide a billing in a discernable format to the Appellants for them to clearly understand the nature of the charges.

F. TBF is not Entitled to Attorney Fees and Costs on Appeal.

In support of its request for attorney fees, TBF Financial cites *Pumilite Tualatin, Inc. v. Cromb Leasing, Inc.*, 82 Wn.App. 767, 772, 919 P.2d 1256 (1996). However, in *Pumilite* Court of Appeals of Washington, Division 2, Appellant Pumilite attorney fees were awarded on appeal based on a written guarantee signed by the respondent Lord. The case did not involve non-contractual counterclaims or dismissed claims against the second named co-defendant. In this case, unlike *Pumilite*, TBF Financial's claim on Lease No. 2 against defendant Bogolyubov was dismissed. Hence, TBF Financial is not entitled to recover its costs and attorney fees against Bogolyubov, relating to Lease No. 2. For the same reason, TBF Financial cannot recover the costs and fees against Bogolyubov and

²⁶ *Kastanis v. Educational Employees Credit Union*, 122 Wash.2d 483, 501-502, 859 P.2d 26 (1993), amended, 122 Wn.2d 483, 865 P.2d 507 (1994) (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 743-44, 733 P.2d 208 (1987); *Blair v. WSU*, 108 Wash.2d 558, 572, 740 P.2d 1379 (1987)).

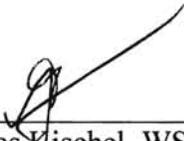
Consequently, TBF Financial is not entitled to attorney fees on non-contractual issues. TBF Financial must be required to segregate and differentiate its charges for legal fees and make proper recalculations.

II. CONCLUSION

Nothing in TBF Financial's response brief should dissuade this Court from reversing Judge Eadie's summary judgment and award of attorney fees.

This Court should reverse the trial court's judgment and remand the case to the trial court for a new trial before a different judge. At the least, this Court should reverse the attorney fees awarded to TBF Financial due to the fact that it is grossly disproportionate to the amount of principal judgment. TBF Financial is not entitled to a fee award. Costs on the appeal should be awarded to Petrenko and Bogolyubov.

Respectfully submitted this 18th day of April, 2012.



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Attorney for Appellants

**Court of Appeals, Division I
Of the State of Washington**

BORIS PETRENKO, ET AL., APPELLANTS,

vs.

TBF FINANCIAL, LLC, RESPONDENT.

No. 66800-5-I

**Certificate of Service
(by Mail)**

1. My name is Yana Belikova. I am 18 years of age or older and not the plaintiff or the defendant.
2. On April 18, 2012, I personally mailed the following documents via U.S. Postal Services, registered mail, proper postage attached and prepaid to the Respondent's attorney of record Schweet Rieke & Linde, PLLC, 575 South Michigan St., Seattle, WA 98108

- **Appellants' Joint Reply Brief (Cause No. 66800-5-I)**

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

Dated: April 18, 2012, at Bellevue, Washington.



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