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DIVISION ONE

NO. 67879-5-I

JUN 05 2012

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

WASHINGTON GREENSVIEW APARTMENT ASSOCIATES,
a California Limited Partnership,

Appellant,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
(f/k/a THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS), a
foreign insurance company, TRAVELERS EXCESS AND SURPLUS
LINES COMPANY, a foreign insurance company,

Respondents.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Greensview received a judgment in its favor in a lawsuit in which it was suing Travelers for breaching an insurance contract. Notwithstanding what Travelers claims *would have happened* had Greensview *not* accepted Travelers' offer, that judgment made Greensview the prevailing party for purposes of Olympic Steamship.¹ Olympic Steamship fees are distinct from "costs."² Thus, because Travelers' CR 68 offer did not expressly and unambiguously address Greensview's reasonable attorney fees, Seaborn³ and Lietz⁴ required the trial court to award Greensview its fees. Moreover, extrinsic "evidence"—assuming what Travelers cites could even be considered that—is not admissible to *contradict* what Seaborn and Lietz have already said an offer like Travelers' means: "[E]xtrinsic evidence may not . . . be used to 'vary, contradict, or modify' the written terms"⁵ This Court

¹ Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991); *see, e.g.*, Delta Air Lines, Inc. v. August, 450 U.S. 346, 363, 101 S. Ct. 1146 (1981) ("A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party.") (Powell, J., concurring).

² *See* Panorama Village Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 26 P.3d 910 (2001).

³ Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 131 P.3d 910 (2006).

⁴ Lietz v. Hansen Law Offices, P.S.C., 166 Wn. App. 571, 271 P.3d 899 (2012).

⁵ Hearst Communications, Inc. v. Seattle Times Co., 120 Wn. App. 784, 791, 86 P.3d 1194 (2004).

should therefore reverse that portion of the trial court's order denying Greensview's fee petition.

II. ARGUMENT

A. **GREENSVIEW WAS THE PREVAILING PARTY, SO A FEE AWARD WAS MANDATORY**

Travelers first claims that although Greensview received a judgment in its favor, Greensview did not really prevail for purposes of Olympic Steamship because Travelers supposedly *would have* won on the parties' coverage dispute had Travelers not confessed to a judgment. The problem is: Travelers did confess to a judgment. And at the time judgment was entered against Travelers, Greensview was suing Travelers for breach of contract, *i.e.*, "to obtain the benefit of [its] insurance contract."⁶ Thus, the parties are now in the same position they would have been in had the judgment resulted from a jury trial. And nothing in Olympic Steamship says that fees are recoverable only when the policyholder obtains its judgment based upon a verdict. Moreover, this Court does not weigh evidence or make factual findings.⁷ If Travelers was

⁶ McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 289-90, 951 P.2d 798 (1998) (explaining Olympic Steamship rule applies where insureds "are compelled to assume the burden of legal action to obtain the benefit of their insurance contract").

⁷ *See State v. Walker*, 153 Wn. App. 701, 708, 224 P.3d 814 (2009) ("Appellate courts do not make factual findings. . . . This court simply is not in a position either to take evidence or to weigh contested evidence and make factual determinations.").

so sure Greensview “lost on coverage,”⁸ then Travelers should have asked the trial court to enter a finding to that effect⁹—or withheld its CR 68 offer and tried the case.

Citing Smith v. Okanogan,¹⁰ Travelers also claims that Greensview is not the prevailing party because “[i]f both parties prevail on major issues, there may be no prevailing party.”¹¹ But that rule is inapplicable when (like here) the defendant is not asserting a counterclaim:

[I]f both parties prevail on major issues, an attorney fee award is not appropriate. . . . These general principles, however, do not address situations in which a defendant has not made a counterclaim for affirmative relief, but merely defends against the plaintiff’s claims.¹²

⁸ *Respondent’s Brief*, at 18.

⁹ See People’s Nat’l Bank v. Birney’s Enters. Inc., 54 Wn. App. 668, 670, 775 P.2d 466 (1989) (party must “procure formal written findings supporting its position” or “abide the consequences of their failure to do so”).

¹⁰ Smith v. Okanogan County, 100 Wn. App. 7, 994 P.2d 857 (2000).

¹¹ *Respondent’s Brief*, at 20.

¹² Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490-92, 200 P.3d 683 (2009).

Nor does Marassi’s “proportionality approach” apply. See Marassi, 71 Wn. App. at 917 (“We hold that *when the alleged contract breaches* at issue consist of several distinct and severable claims, a proportionality approach is more appropriate.”) (emphasis added). Courts apply that rule in RCW 4.84.330 cases because the right to fees is *bilateral* (*i.e.*, the defendant gets a fee award on a claim it successfully *defends*). See, *e.g.*, Wachovia, 165 Wn.2d at 489 (“[T]he purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral.”). Here, by contrast, Greensview’s right to fees was *unilateral*. See McGreevy, 128 Wn.2d at 37-38 (noting Olympic Steamship fees are “available to only the insured”). Thus, when applying Olympic Steamship, as opposed to RCW 4.84.330, a court simply determines whether the policyholder received a judgment in its favor.

Smith and the other cases that Travelers relies upon are also distinguishable because the defendant in those cases *actually* prevailed—either a court or jury ruled in the defendant’s favor.¹³ Thus, Smith would at most apply when a defendant *in fact* prevails—not when it claims it was *going to* prevail.

After Greensview had already accepted Travelers’ offer of judgment, the trial court in this case issued an interlocutory order in favor of a *different* defendant regarding a *distinct* claim on *another* insurance policy. That does not mean Travelers was going to prevail, much less that it had prevailed.

Travelers also mistakenly claims that because Olympic Steamship is an equitable rule, the trial court had discretion *whether*¹⁴ to award Greensview its attorney fees. Thus, Travelers implies, review in this case is under the “abuse of discretion” standard.¹⁵ That argument fails for at least three reasons.

¹³ See Smith, 100 Wn. App. at 24 (refusing to award fees on appeal because Court of Appeals *ruled* in favor of both parties on appeal); Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 767, 772, 115 P.3d 349 (2005) (*ruling* following bench trial in favor of defendant on “concrete slab issue”); Allstate Ins. Co. v. Huston, 123 Wn. App. 530, 536, 94 P.3d 358 (2004) (jury verdict in favor of defendant on claim that defendant burned house).

¹⁴ Greensview does not dispute that the trial court would have had discretion as to the *amount* of fees to award.

¹⁵ See *Respondent’s Brief*, at 21 (“There was no abuse of discretion in denying an equitable award of attorney fees here.”).

First, it is well-settled that a “[a] party’s *entitlement* to attorney fees is an issue of law.”¹⁶ Only “[i]f a legal basis exists for an award” does the Court then “review the trial court’s determination of the *amount* of fees awarded under the abuse of discretion standard.”¹⁷

Second, the Supreme Court already decided that a fee award in this situation was mandatory: “[A]n award of fees is *required* in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract”¹⁸ The Olympic Steamship rule may be equitable, but it is not discretionary.

Third, Seaborn also made an award of fees mandatory. According to Seaborn, if an offer does not unambiguously say it includes the offeree’s attorney fees, and the authority for the fee award does not define them as a type of costs, then the trial court “must” award the offeree its fees:

If attorney fees are defined as separate from costs under the [authority that creates the right to fees], then the court *must* award those fees in addition to the amount of the offer.¹⁹

¹⁶ Axess Int’l Ltd. v. Intercargo Ins. Co., 107 Wn. App. 713, 720, 30 P.3d 1 (2001) (emphasis added).

¹⁷ Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993) (emphasis added).

¹⁸ Olympic Steamship, 117 Wn.2d at 53 (emphasis added).

¹⁹ Seaborn, 123 Wn. App. at 267 (emphasis added).

Thus, the trial court here had no discretion *whether* to award Greensview its attorney fees.

This Court should also reject Travelers’ “prevailing party” arguments because they undermine the whole point of CR 68. “The purpose of CR 68 is to encourage settlement before trial.”²⁰ Parties to a settlement recognize that continued litigation presents risk. They make and accept CR 68 offers to avoid that risk—to settle before “the next card flips.” Allowing a party to change an agreement based on what happened *after* formation of that agreement would sabotage that process. No litigant would accept a CR 68 offer knowing that the opposing party could cite what happened *after* the settlement to change the parties’ agreement. Travelers’ argument—that this Court should interpret its offer based on how the trial court ruled after Greensview accepted it—is akin to changing a bet after the cards have already been turned over.

By accepting Travelers’ CR 68 offer, Greensview became the party in whose favor a judgment was entered. Greensview *in fact* prevailed, and what supposedly *would have* happened had Greensview not accepted the offer should be irrelevant.

Also troubling is the *manner* in which Travelers is attempting to second-guess the parties’ agreement. The sole “evidence” that Travelers

²⁰ Trotzer v. Vig, 149 Wn. App. 594, 613, 203 P.3d 1056 (2009).

presented below were two declarations disclosing what the parties allegedly discussed during settlement negotiations.²¹ Making those statements violated both ER 408²² and the mediation privilege in RCW 7.07.030.²³ One of those declarations—from Travelers’ lawyer—also described a confidential in-chambers conversation with the trial judge.²⁴ Apparently unable to relate what the trial judge actually said, the lawyer addresses what the judge supposedly “made clear” and “indicated.”²⁵

Citing that same lawyer declaration, Travelers now makes a series of statements in its Response Brief that are at best unsubstantiated and, at worst, simply false:

- “[Greensview] . . . has no evidence of Collapse damage during Travelers’ policy period [when it gives notice to Travelers].”²⁶ The sole “evidence” to support this statement is Travelers’ lawyer’s own declaration: “I, James T. Derrig declare

²¹ Noticeably absent from either declaration is any assertion by Travelers itself that it did not intend to pay Greensview’s attorney fees (though that subjective intent would have been irrelevant too). See *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (“Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties’ intentions.”).

²² “Evidence of conduct or statements made in compromise negotiations is . . . not admissible.”

²³ “[A] mediation communication is privileged”

²⁴ See CP 31; 92.

²⁵ CP 92:9 (“In chambers, the Court makes it clear”); CP 92:12 (“The Court also indicates”).

²⁶ *Respondent’s Brief*, at 5 (citing CP 87; 335).

[Greensview] ha[d] no evidence of Collapse damage during Travelers' policy period"²⁷

- “[Greensview] . . . has no evidence that any Collapse commenced during Travelers’ policy period [when it sues Travelers].”²⁸ Again, the only evidence to support this assertion is Travelers’ lawyer’s declaration.²⁹
- “After it has sued Travelers . . . , Greensview’s [sic] first attempts to contact ‘potential experts regarding rate of decay testimony[.]’ (CP 151).”³⁰ “CP 151” is a page from a summary of Greensview’s attorneys’ billing records and says nothing about anyone’s “first attempt” to contact an expert (nor does the document address whether the client itself contacted an expert before Greensview filed its lawsuit).
- “[A]t the time it filed the suit Greensview had no evidence . . . that any decay . . . commenced during Travelers’ policy period.”³¹ This statement has no citation.
- In describing a May 23, 2011 summary judgment motion during which the trial court supposedly “express[ed] doubt” about something, Travelers cites to a transcript of a hearing that occurred six months later.³²

The *admissible* evidence in this case discloses that Travelers made a CR 68 offer to Greensview that did not unambiguously address Greensview’s attorney fees. Greensview unequivocally accepted that

²⁷ CP 86:19; 87:17 (the other cited document, CP 335, is the claim letter itself).

²⁸ *Respondent’s Brief*, at 5 (citing CP 2, 88).

²⁹ See CP 88 (CP 2 is the Complaint).

³⁰ *Respondent’s Brief*, at 6.

³¹ *Respondent’s Brief*, at 6.

³² See *Respondent’s Brief*, at 7-8 (citing “RP 15-16”—a transcript of a November 1, 2011 hearing—to support assertion as to what trial court “expresse[d]” after granting a motion *in favor of* Greensview on May 23, 2011).

offer. Judgment was then entered in favor of Greensview in a lawsuit in which Greensview was suing Travelers for coverage. The trial court was therefore *required* under Olympic Steamship and Seaborn to award Greensview its fees.

B. EXTRINSIC EVIDENCE IS NOT ADMISSIBLE TO CONTRADICT A WRITING

Travelers next contends that the trial court properly refused to award Greensview its attorney fees because extrinsic “evidence” allegedly shows the parties had no “meeting of the minds.”³³ According to Travelers, this “evidence”—confidential settlement offers and what the trial judge supposedly “indicated” in chambers—demonstrates that Travelers did not intend to pay Greensview’s Olympic Steamship fees in addition to the judgment amount.³⁴

The problem with this argument is that extrinsic evidence is not admissible to *contradict* the terms of an offer:

In Berg v. Hudesman,³⁵ this court held extrinsic evidence is generally admissible to ascertain the intent of the parties to a contract. However, we made it clear in Berg that this rule, known as the “context rule,” authorizes the use of extrinsic evidence only to elucidate the meaning of the words of a contract, and “not for the purpose of showing intention independent of the instrument.” We emphasized,

³³ See *Respondent’s Brief*, at 22-26.

³⁴ See *Respondent’s Brief*, at 24-26.

³⁵ Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).

“[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written.” We accordingly held in Berg that *parol evidence cannot be used to* “add[] to, modify[], or *contradict[] the terms of a written contract*, in the absence of fraud, accident, or mistake.”³⁶

This rule is precisely why the Lietz court refused to consider evidence other than the written offer and acceptance.³⁷

This Court already decided in Seaborn what the agreement here means: a CR 68 offer that does not unambiguously address the offeree’s reasonable attorney fees does not include those fees. Thus, by citing settlement negotiations to attempt to prove the offer *did* include attorney fees, Travelers is seeking to use extrinsic evidence to *contradict* what this Court has already said an offer like Travelers’ means. This Court already said that Travelers’ offer means “X.” Travelers was trying to prove it means “not-X.” Travelers’ “evidence” was therefore inadmissible, even under Berg’s “context rule.”³⁸

³⁶ Matter of Marriage of Schweitzer, 132 Wn.2d 318, 326-27, 937 P.2d 1062 (1997) (emphasis added); *see also* Hearst Communications, Inc. v. Seattle Times Co., 120 Wn. App. 784, 791, 86 P.3d 1194 (2004) (“[E]xtrinsic evidence may not . . . be used to ‘vary, contradict, or modify’ the written terms, to show an intention independent of the contract, or to show a party’s unilateral or subjective intent as to the meaning of contract words or terms.”).

³⁷ *See* Lietz, 166 Wn. App. at 585 (noting “court may consider extrinsic evidence as an aid in interpreting a contract’s words, but it cannot import one party’s unexpressed, subjective intentions into the writing”).

³⁸ The parol evidence rule “is not a rule of evidence but one of substantive law.” Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). Thus, the rule precludes Travelers’ “evidence” even though Greensview did not formally object to

Travelers' argument also fails because according to Seaborn, the "evidence" in this case demonstrates that Travelers' offer did not in fact include fees. Like Travelers, the offeror in Seaborn claimed that fees were not recoverable because the parties lacked "mutual assent." In rejecting that claim, this Court first explained that mutual assent did exist because, like here, the offer was "unequivocally accepted":

Seaborn next contends that the offer of judgment is void, because Seaborn intended its offer to include attorney fees, and therefore there was no mutual assent. . . .

Seaborn . . . overlooks Hennessy v. Daniels Law Office,³⁹ which is more analogous to the present case In Hennessy, the defendant made an offer of judgment of \$1,000 ***that was accepted without reservation or qualification by the plaintiff***, who then moved for attorney fees. The Hennessy court agreed that the term "judgment" in the offer was ambiguous as to whether attorney fees were included, but construed that ambiguity against the drafter.

. . . .

An offer of judgment under this line of cases may be nullified if there was a rejection and counteroffer by the

it below. See, e.g., Cooley v. Hollister, 38 Wn. App. 447, 452, 687 P.2d 230 (1984) ("[R]egardless of whether, as here, it is admitted without objection, if the rule applies, the evidence is not competent and may not be considered as having probative value."); Reeder v. W. Gas & Power Co., 42 Wn.2d 542, 552-53, 256 P.2d 825 (1953) ("We have said that the parol evidence rule is a rule of substantive law, and that failure to object to oral testimony inconsistent with the written agreement does not constitute a waiver of the right to have inconsistent parol excluded.").

³⁹ Hennessy v. Daniels Law Office, 270 F.3d 551 (8th Cir. 2001).

offeree, but *it is valid if the offer is unequivocally accepted.* . . .⁴⁰

The Seaborn court then explained that five elements of “evidence”—four of which are equally present here—demonstrated the offer did not include attorney fees:

Also, Seaborn ignores a basic contractual interpretation rule. A court can consider extrinsic evidence as an aid to interpretation of the words of a contract, but it cannot import an unexpressed intention of one of the parties into the writing. Here, the extrinsic evidence indicates that the offer did not include attorney fees, considering: (1) the low amount of the offer; (2) the lack of any language indicating that attorney fees were included; (3) the offer did not dismiss the entire matter, but only the Glews’ counterclaims; (4) no subsequent attempt by Seaborn to clarify, revisit, or modify the offer until it was faced with a motion for attorney fees; and (5) a clear line of case law governing CR 68 offers and the issue of attorney fee provisions.⁴¹

The “clear line of case law” point is even more compelling today.

Seaborn has been on the books for six years. Given that, it was certainly not an “unreasonable burden” for Travelers to make its offer explicit:

[W]here the [authority for an award of fees] does not make attorney fees part of costs, it is incumbent on the defendant making a Rule 68 offer to state clearly that attorney fees are included as part of the total sum for which judgment may be entered if the defendant wishes to avoid exposure to attorney fees in addition to the sum offered plus costs.

⁴⁰ Seaborn, 132 Wn. App. at 268-70 (emphasis added); *see also* Lietz, 166 Wn. App. at 584 (rejecting mutual assent argument in part because offeree “unequivocally and unconditionally accepted [offeror’s] offer”).

⁴¹ Seaborn, 132 Wn. App. at 270.

We do not think this is an unreasonable burden . . . [D]efendants bear the brunt of uncertainty but easily may avoid it by making explicit that their offers do or do not permit plaintiffs to recover attorney fees.⁴²

C. TRAVELERS' OFFER DID NOT UNAMBIGUOUSLY ADDRESS GREENSVIEW'S ATTORNEY FEES

According to Seaborn and Lietz, if a CR 68 offer does not *unambiguously* say it includes the offeree's attorney fees, and the authority that allows the offeree to recover fees does not define them as a type of cost, then the trial court must award the offeree its attorney fees in addition to the offer of judgment amount.⁴³ Thus, because Travelers failed to unambiguously address Greensview's attorney fees in its offer, and Olympic Steamship considers fees distinct from costs, the trial court had to award Greensview its reasonable attorney fees. This has nothing to do with "magic words"⁴⁴; it is the holding of Seaborn and Lietz.⁴⁵

Apparently reconciled to this point, Travelers ultimately claims in Section C of its brief that its offer did unambiguously address

⁴² Nusom v. Comh Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997) (citations omitted).

⁴³ See Seaborn, 132 Wn. App. at 272 ("Any ambiguity in the lump sum offer of judgment is construed against Seaborn."); Lietz, 166 Wn. App. at 585 ("Hansen's offer of judgment did not *specifically* mention attorney fees . . .") (emphasis added).

⁴⁴ *Respondent's Brief*, at 38.

⁴⁵ See also Seaborn, 132 Wn. App. at 271 (agreeing with offeror that offer need not provide a "'breakdown' of what offer includes," but this did "not help [offeror's] case" because "a waiver or limitation on attorney fees must be clear and unambiguous," and a lump sum offer "[does] not constitute such a waiver").

Greensview's fees. This is true, Travelers claims, because the offer used the word "total," and because it incorporated RCW 4.84.010, which in turn addresses the \$250 "statutory attorney fee."

Regarding the first point, Travelers contends that "[n]o reasonable person" could read "total" to mean anything other than inclusive of attorney fees. Yet language elsewhere in the offer demonstrates a different meaning:

Pursuant to CR 68, defendants Travelers Property Casualty Company of America and Travelers Indemnity Company of Illinois offer to have judgment entered against the two of them for a ***total*** judgment amount of \$30,000 plus costs then accrued. ***This*** means a single \$30,000 payment on behalf of both defendants, not two \$30,000 payments.⁴⁶

As the word "this" discloses, "total" simply meant that Travelers was offering \$30,000 on behalf of both defendants, as opposed to \$30,000 each. Thus, a "reasonable person" would actually read "total" as precluding a principal judgment of \$60,000, not as a limitation on Greensview's ability to collect attorney fees.

The word "total" also fails to remedy the offer's ambiguity because attorney's fees are recoverable post-judgment. As CR 54(d)(2) confirms, fees are an "add-on" independent of the judgment amount itself.⁴⁷ Thus,

⁴⁶ CP 144-45.

⁴⁷ See CR 54(d)(2) ("Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion Unless otherwise provided by statute

saying what the “judgment amount” would be—“total” or otherwise—did not address whether Greensview could then seek its attorney fees *after* entry of that judgment.

This was precisely the point of Webb v. James⁴⁸:

The offer in Webb was “of judgment in the above captioned matter in the amount of Fifty Thousand Dollars (\$50,000).” It was unclear whether attorneys’ fees were included, since such fees are often sought as an add-on to the judgment. That is the basis of the rule that the judgment and the award of attorneys’ fees are separate appealable orders. In other words, “judgment” can mean either the substantive relief ordered (whether legal or equitable), or that plus attorneys’ fees. The defendants in Webb failed to indicate which they meant, and this made their offer ambiguous.⁴⁹

or order of the court, the motion must be filed no later than 10 days *after entry of judgment*.”).

CR 54(d) also helps explain why McGuire v. Bates, 169 Wn.2d 2d 185, 234 P.3d 205 (2010), is distinguishable. That case involved a settlement agreement, not an offer of judgment. The defendant offered to settle all claims in exchange for an amount of money. The Court held that because the offeree pled a claim for attorney fees, accepting the offer meant he also agreed to dismiss his claim for attorney fees. Here, by contrast, Travelers didn’t make a settlement offer; it offered to have a judgment entered against it. As CR 54 confirms, entry of a judgment—unlike a promise to dismiss a lawsuit—does not affect a party’s ability to *then* file a post-judgment motion for attorney fees.

⁴⁸ Webb v. James, 147 F.3d 617, 623 (7th Cir. 1998).

⁴⁹ Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390, 392 (7th Cir. 1999) (citations omitted). Travelers claims that “[b]y saying the total judgment amount is \$30,000 plus only one very specific ‘add on,’ Travelers foreclosed the notion that the total judgment amount could be increased with another ‘add on’ such as attorney fees.” *Respondent’s Brief*, at 32. That argument might make sense if the offer actually included the word “only.” But it doesn’t, and the offer therefore suffers from the same problem as in Seaborn—saying what the offer *does* include does not unambiguously explain what the offer *does not* include.

The offer's reference to RCW 4.84.010 is similarly irrelevant. According to RCW 4.84.010, a "statutory attorney fee" is simply another kind of "cost": "[T]here shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, *which allowances are termed costs*, including . . . [s]tatutory attorney and witness fees"⁵⁰ Thus, according to the Legislature, a reference to RCW 4.84.010 is a reference to "costs," not attorney fees. As Travelers' own Answer demonstrates, those are two different things: "PRAYER: . . . Travelers' costs and attorney fees."⁵¹

Moreover, *every* CR 68 offeree receives its costs (and thus a *statutory* attorney fee).⁵² If the right to a statutory attorney fee precluded an award of reasonable attorney fees, then no offeree would ever recover its reasonable attorney fees—a scenario that Seaborn and Lietz belie.

Any ambiguity in a CR 68 offer is construed against the drafter.⁵³ Thus, even if Travelers' reading of "total" and "RCW 4.84.010" were a reasonable interpretation, it is not the *only* reasonable interpretation. It

⁵⁰ RCW 4.84.010 (emphasis added).

⁵¹ CP 286; *see also* Nusom, 122 F.3d at 834 (where authority for fee award "does not make attorney fees . . . part of costs," express offer to also pay "costs" does not unambiguously foreclose fee award because offer could mean "costs without regard to attorney fees").

⁵² *See* CR 68 (offer must include "costs then accrued").

⁵³ *See* Seaborn, 132 Wn. App. at 272 ("Any ambiguity in the lump sum offer of judgment is construed against Seaborn."); Lietz, 166 Wn. App. at 580-81 ("[C]ourts must construe ambiguities in an offer of judgment against the drafter.").

follows that the trial court should have construed that ambiguity against the party who created it—Travelers.

D. THIS COURT SHOULD AWARD GREENSVIEW ITS ATTORNEY FEES ON APPEAL

Greensview has requested fees on appeal under RAP 18.1 and Olympic Steamship. Travelers responds that because the insurance contract is not at issue in this appeal, McGreevy precludes an award of Olympic Steamship fees.⁵⁴

But nothing in either of those cases says that coverage must *continue* to be at issue on appeal for a policyholder to be entitled to fees. “A party may recover attorney fees on appeal when permitted by applicable law.”⁵⁵ According to Olympic Steamship, “an insured is entitled to recover attorney fees if the insured is compelled to litigate an issue of coverage.”⁵⁶ Travelers refused to pay Greensview’s claim, so Greensview was compelled to sue Travelers over whether the claim was covered. Thus, fees are “permitted by applicable law,” and Travelers owes them on appeal as well.

⁵⁴ See *Respondent’s Brief*, at 39 (citing McGreevy, 90 Wn. App. at 289).

⁵⁵ Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co., 150 Wn. App. 1, 16, 206 P.3d 1255 (2009).

⁵⁶ Ledcor, 150 Wn. App. at 16.

Citing Marek v. Chesny,⁵⁷ Travelers also claims that Greensview's Olympic Steamship fees are not recoverable on appeal because "postoffer expenses generally are not part of the CR 68 equation."⁵⁸ Yet the Marek language Travelers relies on simply says that a court should not consider post-offer fees in deciding whether the offeree recovered more than the offer *at trial*. Marek says nothing about whether fees are recoverable on appeal if the offeree *accepts the offer* and then prevails on appeal. To the contrary, Lietz demonstrates that such a party can recover its fees on appeal: "Because employee Lietz prevails on appeal against his former employer, Hansen, he is entitled to attorney fees on appeal"⁵⁹ Thus, because Greensview was entitled to Olympic Steamship fees in the trial court, this Court should also award Greensview its fees on appeal.

III. CONCLUSION

If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying [law authorizing the fee award]. If the [authority] defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned. If attorney fees are defined as separate from costs under the [fee award authority], then the court must award those fees in addition to the amount of the offer.⁶⁰

⁵⁷ Marek v. Chesny, 473 U.S. 1, 7, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985).

⁵⁸ *Respondent's Brief*, at 39.

⁵⁹ Lietz, 166 Wn. App. at 596.

⁶⁰ Seaborn, 132 Wn. App. at 267.

Travelers' offer does not *expressly* and *unambiguously* state it includes Greensview's attorney fees. As the party in whose favor judgment was entered, Greensview was entitled to an award of Olympic Steamship fees, which Panorama Village defines as distinct from costs. Thus, under Seaborn and Lietz, the trial court had to award Greensview its attorney fees in addition to the offer of judgment amount.

Travelers' "evidence" contradicts what this Court and Lietz have already said an offer like Travelers' means, and that "evidence" at best illustrates Travelers' unexpressed, subjective intentions. Moreover, mutual assent did exist because Greensview unequivocally accepted Travelers' offer.

For these reasons, Greensview respectfully requests that this Court reverse that part of the trial court's order denying Greensview's motion for an award of attorney fees.

DATED this 5th day of June, 2012.

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COURT OF APPEALS
DIVISION ONE
H JUN 05 2012

NO. 67879-5-I

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

WASHINGTON GREENSVIEW APARTMENT ASSOCIATES,
a California Limited Partnership,

Appellant,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
(f/k/a THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS), a
foreign insurance company, TRAVELERS EXCESS AND SURPLUS
LINES COMPANY, a foreign insurance company, NATIONAL SURETY
CORPORATION, a foreign insurance company, and THE AMERICAN
INSURANCE COMPANY, a foreign insurance company,

Respondents.

CERTIFICATE OF SERVICE

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 ORIGINAL

The undersigned certifies that on Tuesday, June 05, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** and this **Certificate of Service** to be delivered in the manner indicated to the following counsel of record:

BY MESSENGER

James T. Derrig

Attorney at Law PLLC

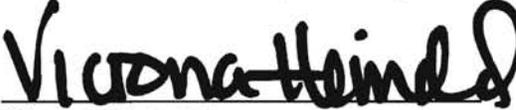
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of June 2012 in Seattle, Washington.


Victoria Heindel