

No. 67879-5-I

COURT OF APPEALS, DIVISION I
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 CO. OF ILLINOIS), a foreign
insurance company, TRAVELERS EXCESS AND SURPLUS LINES
COMPANY, a foreign insurance company

Respondents,

Respondent's Brief

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I. INTRODUCTION

1. Greensview was not the prevailing party. *Olympic Steamship* is an equitable rule that applies when the insured is the prevailing party on a question of coverage under an insurance contract. There is no evidence in the record that Greensview prevailed on an insurance coverage question. In the court below, Greensview successfully obtained a finding that Travelers violated the Consumer Protection Act when Travelers lost and thus failed to respond to a notice letter. Greensview, however, concedes that it is not entitled to attorney fees under the Act. Greensview brought its insurance contract claims without any evidence supporting a dispositive coverage issue—that the alleged “collapse” damage commenced during a Travelers policy period. After the trial court orally informed Greensview that summary judgment would be entered against it on the contract claim, Greensview accepted Travelers’ Offer of Judgment and unilaterally declared itself to be the prevailing party not only under the Consumer Protection Act (which it was), but on the coverage claim (which it was not). This is not a situation where equity demands that Greensview be awarded attorney fees for prevailing on insurance coverage, and the trial court did not abuse its equitable discretion to award fees.

2. There was no meeting of the minds. Contrary to the situation in *Lietz v. Hansen Law Offices, P.S.C.*, ___ Wn. App. ___, 271 P.3d 899, 906-7 (2012), ample extrinsic evidence supports the trial court's observation that there was no agreement regarding an award of fees. The trial court had heard several dispositive motions, was familiar with the status of settlement negotiations, and carefully questioned both party's counsel regarding the circumstances surrounding the Offer of Judgment. The evidence showed that neither party really believed Travelers was offering to pay *Olympic Steamship* fees.

3. Even if inquiry is limited to the 4 corners of the document, Travelers' Offer of Judgment did not allow a separate award of attorney fees. Travelers offer was very explicitly limited to "a total judgment amount of \$30,000 plus costs then accrued[.]" (CP 144) This cannot mean "\$30,000 plus costs then accrued, plus attorney fees, plus litigation expenses." By telling plaintiff what the total was, Travelers necessarily established that the total could not be something more.

4. Finally, if the magic words "attorney fees" absolutely have to be found somewhere in an Offer of Judgment, they were. Travelers' Offer incorporated RCW 4.84.010, which includes a \$250 attorney fee award. The plaintiff was told exactly what the total amount of the judgment would be, and what amount of attorney fees would be paid.

II. STATEMENT OF ISSUES

1. Is a plaintiff entitled to an equitable award of *Olympic Steamship* attorney fees when (a) it accepts an Offer of Judgment only after it is orally informed that summary judgment is likely to be entered against it on its insurance contract claims, and (b) other than defendant's settlement offer in the form of an Offer of Judgment, the plaintiff presents no evidence that it prevailed on an issue of coverage under an insurance contract?

2. Did the trial court properly consider and apply extrinsic evidence to reach a conclusion that there was no meeting of the minds on the issue of whether Travelers was offering to pay *Olympic Steamship* attorney fees?

3. Is an offer to pay "a total judgment amount of \$30,000 plus costs then accrued" ambiguous so as to allow entry of judgment for \$30,000, plus costs, plus attorney fees, plus litigation expenses?

4. If the words "attorney fees" must appear in an Offer of Judgment in order to preclude an award of fees to a prevailing party, did Travelers incorporate those words by reference when it specifically defined "costs" as referring to RCW 4.84.010, which uses the words "attorney fees" and limits fees to \$250?

III. STATEMENT OF THE CASE

This appeal involves an Offer Of Judgment stating:

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. The term “costs” is defined in the same manner as in RCW 4.84.010.

(CP 144)

To understand why the trial court ruled like it did, one must be aware of the same facts the trial court was aware of. These are discussed chronologically.

1. **May 15, 2001-April 22, 2003:** This is the coverage period for the policies issued by the two Travelers entities. (CP 086) The policies define “collapse” as follows:

Collapse of buildings meaning an abrupt falling down or caving in of a building or substantial portion of a building with the result being that the building or substantial portion of a building cannot be occupied for its intended purpose.

(CP 086-87)

A Collapse, as defined above, is covered only when it is caused by “[d]ecay or insect or vermin damage that is hidden from view[.]” (CP 087) No claim for rot or decay damage is made during the policy periods. (CP 087) No records of such damage are made during that time.

(Id.) No witness sees any such damage during that time. (Id.) Each Travelers policy also states in pertinent part:

Under this policy, the Company will cover loss or damage that commences during the policy period as specified in the Declarations, and, except as otherwise specifically provided, within the Policy Territory.

(CP 087)

2. **August 2009:** Although it has been over 6 years since the last Travelers policy terminated, and although it has no evidence of Collapse damage during Travelers' policy period, Greensview sends a notice of claim to Travelers. (CP 087, 335) The letter is mislaid and Travelers does not respond to the notice.¹ (CP 337 line 1)

3. **February 1, 2010:** Greensview files the present lawsuit. (CP 2, 88) Although it has no evidence that any Collapse commenced during Travelers' policy period, plaintiff nevertheless alleges such damage. (Id.) The Complaint alleges claims for declaratory relief, breach of contract, negligence, and "Violations of Washington's Unfair Claims Practices Regulations, Violations of Washington's Consumer Protection Act and Bad Faith." (Id.)

4. **February 11, 2010:** To prove its coverage case, Greensview has to prove which alleged Collapse conditions commenced

¹ Against all odds, defendants National Surety Corporation and The American Insurance Company, two Fireman's Fund entities, also managed to mislay their notice letter and they failed to respond.

during Travelers policy period.² After it has sued Travelers alleging there was a Collapse during Travelers' policy periods, Greensview's first attempts to contact "potential experts regarding rate of decay testimony[.]" (CP 151) The expert would be asked to time presently observed rot back into Travelers' policy period. In other words, at the time it filed the suit Greensview had no evidence, not even opinion testimony, that any decay (much less Collapse) commenced during Travelers' policy period.

5. **May 6, 2010:** Travelers files a summary judgment motion, arguing there is no insurance coverage for "substantial impairment of structural integrity" as alleged in the Complaint. (CP 88)

6. **June 4, 2010:** As a result of the summary judgment motion, Greensview's counsel stipulates to dismissing all claims against Travelers for "substantial impairment of structural integrity," thereby limiting the contract claim against Travelers to the restrictive definition of Collapse in the policy. (CP 89)

7. **September 14, 2010:** Greensview, Travelers, Fireman's Fund and one other insurance carrier (Farmers) attend mediation. (CP 89) Greensview submits a claim for \$1,855,000 and demands 17% of this amount-\$315,000-from Travelers. (Id.) Plaintiff's counsel claims 40 areas were "Collapsed," but offers no proof. (Id.) The plaintiff's last move at the mediation is to offer a "bracket" in which if Travelers would

² See, *Mercer Place Condominium Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 605, 17 P.3d 626 (2000).

offer \$100,000 then plaintiff would offer \$200,000. (CP 29) Travelers' last move at the mediation is to give the mediator a "blind" offer of \$40,000, which the mediator can reveal to the plaintiff only if the mediator knows it will be accepted. (Id.) No acceptance is forthcoming. (Id.)

8. **September 28, 2010:** Greensview and Travelers renew settlement negotiations. (CP 89-90) Travelers extends a \$15,000 offer and tells plaintiff that if it will counter at less than \$100,000, the case might settle. (CP 90) Greensview declines. (Id.)

9. **November 10, 2010:** At a 30(b)(6) deposition, plaintiff's witness identifies \$7,380 in alleged, additional investigation expenses incurred because Travelers and Fireman's lost the notice letters. (CP 90) No other damages attributed to the lost notice letters are ever identified by the plaintiff. (Id.)

10. **March 2, 2011:** On the issue of decay timing, plaintiff uses Daniel Say, a structural engineer. (CP 90) He claims to be able to determine when decay first became extensive enough to create a Collapse as Travelers defines it, and claims that 16 such conditions commenced during Travelers' policy period. (CP 90)

11. **May 23, 2011:** The Court grants Greensview's motion for partial summary judgment, establishing all defendants violated claims regulations when they lost plaintiff's August 2009 notice letters. (CP 329) Proximate cause and damages remain as issues for trial and the

court expresses doubt as to whether plaintiff can prove either. (RP 15-16).

12. **July 6, 2011:** Plaintiff files a Disclosure of Possible Primary Witnesses that includes Dr. Robert Edmonds, a University Of Washington forest pathologist, as an expert on rot timing. (CP 90)

13. **July 15, 2011:** In response to defendants' demand for Dr. Edmond's deposition, Greensview files an amended witness disclosure removing him from the witness list. (CP 91) This leaves structural engineer Daniel Say as plaintiff's sole witness on rot timing. (Id.) Mr. Say's opinion testimony is the only "evidence" ever produced by plaintiff that a Collapse took place during Traveler's policy period. (Id.)

14. **July 21, 2011:** To re-open settlement discussions, Travelers makes an opening offer to Greensview of \$5000. (CP 91) Greensview does not respond until 2 months later. (Id.)

15. **September 19, 2011:** Travelers moves for partial summary judgment, contending Mr. Say's testimony does not meet the *Frye* standard for novel scientific evidence and plaintiff has no other evidence of a Collapse during the policy period.³ (CP 91) Plaintiff files its own motion for partial summary judgment, contending the phrase "abrupt falling down or caving in" is ambiguous and a caving in need not be abrupt. (CP 91)

³ See generally, *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, __ Wn. App. __, 272 P.3d 249 (2011)(same issue in "collapse" coverage case).

16. **September 22, 2011:** Greensview sends Travelers a settlement demand for \$420,043.87. (CP 91)

17. **September 30, 2011:** Travelers responds to Greensview's settlement demand as follows:

As I stated before the offer was made, there is no chance of Travelers settling for six figures. Travelers is at \$5000 and Greensview is at \$420,043.87. No reasonable stair stepping can take place between these extremes. As tempting as it is to simply say "no" to Greensview's offer, Travelers prefers to leave the negotiation door open at least a crack, and not to create an "I won't bid against myself" psychology. Therefore, Travelers offers \$6000 in full and complete settlement of the lawsuit and all claims against it. This offer is contingent on plaintiff's execution of a formal release with terms acceptable to Travelers.

(CP 91)

1. **October 11, 2011** Plaintiff has never responded to Travelers' last settlement offer. (CP 92) Concerned that the jury could award a nominal amount as Consumer Protection damages, and that plaintiff might use such an award as a lever for obtaining attorney fees, Travelers serves an Offer Of Judgment in an amount it believes to be more than sufficient to cover the damages and fees reasonably attributable to the CPA claim. (CP 92)

2. **October 17, 2011:** The summary judgment hearing is held. (CP 92, 328) The Court decides to schedule a *Frye* hearing before deciding Travelers' motion. (Id.) The Court then invites counsel back to chambers and makes it clear that unless the evidence at the *Frye* hearing departs significantly from what has been offered so far, the engineer's rot

timing testimony would be excluded, Travelers motion would be granted, and plaintiff's coverage claims would be dismissed. (CP 92) The Court also indicates that it agreed with Traveler's that the phrase "abrupt falling down or caving in" was not ambiguous and means plaintiff will have to show any "caving in" took place abruptly. (Id.)

3. **October 20, 2011:** After the judge has bluntly informed the plaintiff that it is about to lose on the coverage issues, plaintiff accepts Travelers' Offer Of Judgment. (CP 147)

4. **October 21, 2011:** Plaintiff moves for attorney fees on the ground that it prevailed on coverage and the Offer included an offer to pay *Olympic Steamship* attorney fees. (CP 268)

November 1, 2011: The attorney fee motion is heard. The trial court almost immediately expresses concern over the lack of communication over the terms of the Offer. The court started by questioning Greensview:

THE COURT: To the extent that you felt that the judgment, if accepted, opened the door for the recovery or at least the argument for the recovery of reasonable attorney fees, why not ask Travelers' or make it clear that you're accepting, subject to motion for attorney fees. or simply asking them is this inclusive or exclusive of attorney fees?

MR. HAYES: Two reasons, Your Honor. First of all, we didn't feel it was Greensview's obligation. As the cases indicate, Travelers' had the power of the pen. It could have written an offer that said inclusive of attorney's fees if it wanted that. It didn't do that. So Greensview is entitled to,

under the case law. and, I don't know, this isn't new case law.

THE COURT: Well, I recognize that. But isn't part of the issue here, you know, it comes to me in the context of we have an agreement. They've made an offer of judgment, and we have accepted it. It's a fete [sic] accompli, and now we're requesting attorney fees. And that gets my question back to the fundamental issue of was there ever an agreement? Was there a meeting of minds? Because it's coming to me in the posture of we're obviously entitled to reasonable attorney fees, and here's our computation for \$192,000 in addition to the \$30,000 judgment. And Travelers' is saying no, wait. we made reference to costs to include attorney fees and thought we were explicit in indicating a total judgment of \$30,000 plus those costs, which I think the parties seem to be in agreement on, total up to less than \$500. Those are the costs enumerated under the statute.

I recognize the same argument can be raised or question of Travelers' why not be more explicit in your offer of judgment, but it seems to me if there's a fundamental disagreement about nearly \$200,000 in compensation in relation to a \$30,000 judgment, why not inquire so that it's clear whether there is or isn't a meeting of minds?

MR. HAYES: The second reason, the second answer I was going to give to that question is the case law makes clear when you're dealing with offers of judgment it's take it or leave it. You can't send back a letter that says I accept your offer, but I read it this way. Or I accept your offer, but here's some additional conditions. And I don't recall the cases that say that off the top of my head, but it's clear that when you get an offer of judgment, the way we read the case law. you're not allowed to inquire about the terms. It's either accept it or don't accept it.

THE COURT: Well, I'd be interested in having some authority to that. It seems to me that offers of judgment are akin to settlement discussions and settlement offers. And

there's nothing that prohibits you from seeking clarification of what are the terms of this offer of judgment? That's essentially the inquiry that I raise to see whether or not you're on the same page. Because if you're not on the same page, then you have the very dispute that I'm being asked to arbitrate here.

(RP 5-7)

Later, during Travelers' presentation, the court expressed concern that it was not seeing a true meeting of the minds, but a piece of "sharp practice":

THE COURT: . . .When I was in practice, sometimes we referred to this sort of thing as sharp practices. It's not wrong. It's not illegal. It's just trying to get a little advantage in some fashion in the way that an agreement or document or contract or something else may be written up where both sides can accept it because both sides have a different interpretation of what's really at issue at the core here.

And that's troubling to me to be asked to either dismiss a claim for \$190,000 in accrued attorney fees or --

MR. DERRIG: Or shove it down their throats.

THE COURT: Either way.

MR. DERRIG: And I think the answer, Your Honor, is Travelers' would be more than happy to rescind the whole thing and withdraw the offer because, as you've ascertained, obviously, at least subjectively, when this offer was made, there was absolutely no intent to pay reasonable attorney's fees and certainly not \$190,000 of attorney's fees on top of a \$30,000 judgment. Only part of which can be allocated to the claim under which they're

making attorney's fees requests for. So clearly that was not the intent.

The question becomes do you, nevertheless, have offer that must be deemed accepted regardless of what the subjective intent is? I think their position will be since they obviously got the better of the situation is you have to do it. All I can tell you is, sure great, let's go back to square one. This isn't what we intended. And if they didn't intend it, that's fine with us, we'll just withdraw it.

But I think they're really fixated on this idea that they're going to get all their attorney's fees, and I don't think they're [sic]⁴ going to get anything but a push back from them.

THE COURT: Well, I can get back into that. Just because I'm also a little bit unclear with the offer of judgment, was it your intent that that would -- because I've made it clear that they have prevailed on some consumer protection claims. albeit I haven't addressed an issue of damages which would be for the jury. And I think I shared my view that the extent of those damages is certainly suspect, even though there is a CPA claim that I think they prevail on.

(RP 14-16)

In the end, the Court addressed Greensview as follows:

THE COURT: . . . All right. Well, we often have cases of CR 2(a) agreements, typically in family law matters, where the parties both come in, read it into the record, believe they have an agreement. But when we get through it, we find there really wasn't a meeting of the minds.

They haven't addressed all of the issues. Perhaps they resolve a Parenting Plan but didn't deal with the issue of child support. Any number of cases in which the

⁴ So in transcript, but should be "you're."

agreement really wasn't an agreement because there was no meeting of minds on many of the fundamental issues that perhaps would have had to be resolved at the time of trial.

This, it seems to me, is no different in those cases in that there's a fundamental issue of attorney fees about which there was no agreement. But if you prefer to hang your hat on the notion that there is a claim that you wish to proceed with, notwithstanding my view that Travelers tried to be clear in limiting its exposure to judgment of \$30,000 plus costs which includes to statutory attorney fees, then that's how I choose to interpret this offer of judgment which you accepted

If you accept [sic]⁵ it on the premise that the costs included costs but not attorney fees and, thus, left the door open for a claim for reasonable attorney fees which Travelers' is obviously disputing. And, therefore, there's no meeting of the minds. I would also agree with that position, if you choose to take that position, and simply find that there has been no agreement because there's no meeting of minds and have the case proceed to trial or other settlement where that ambiguity may be resolved.

MR. HAYES: Again, Your Honor, I think that there's been an offer, there's been an acceptance. The way I read the case law, there's no discretion. The judgment has to be entered. So if --

THE COURT: Well, what I'm saying exercising discretion. If you want to say there's no discretion, we can't rescind this, and I'd be bound by the \$30,000 plus the costs and attorney fees and take my case to the appellate court, I'm willing to allow that.

MR. HAYES: O.K.

⁵ So in transcript, but should be "accepted."

THE COURT: But if you're saying there's enough at issue here that I'd rather go back to the drawing board because that wasn't how I interpreted this offer of judgment, what I'm saying is I will also rescind that offer or find that there was no meeting of minds. So there wasn't a settlement of the case and simply unwind things to put you back in the same position before this offer was extended.

MR. HAYES: Understood, Your Honor

(RP 21-23)

Apparently less than enchanted with the prospect of actually having to prove the coverage case upon which it now claims to have “prevailed,” Greensview declined the Court’s offer to rescind. Instead, Greensview filed a proposed order entering judgment pursuant to the Offer, but denying the motion for attorney fees. (CP 8) The order was signed on November 7, 2011 and Greensview drafted its Notice of Appeal the same day. (CP 2, 11)

Meanwhile, the case proceeded against the remaining defendants. The *Frye* hearing was held and plaintiff’s rot timing evidence was excluded for exactly the reasons Travelers had previously argued in its motion for summary judgment. (CP 318) In fact, the trial court’s oral opinion incorporated Travelers’ summary judgment reply brief by reference. (CP 320) Since the plaintiff had no other evidence of “collapse” during any relevant time period, the coverage case against the remaining defendants was dismissed. (CP 309 line 20)

IV. ARGUMENT

A. PLAINTIFF DID NOT PREVAIL FOR PURPOSES OF AN EQUITABLE ATTORNEY FEE AWARD

In *McGuire v. Bates* 160 Wn.2d 285, 234 P.3d 205 (2010) the plaintiff accepted a statutory settlement offer under RCW 4.84.250 and received a judgment thereon. *Id.* at 188. Pointing to her judgment, she argued she was the prevailing party. The court remarked:

McGuire makes the additional but related argument that because she accepted Bates' settlement offer, she is the prevailing party under RCW 18.27.040(6). Bates responds that . . . McGuire is not entitled to prevailing party status merely on the basis that she accepted Bates' offer to settle.⁴ Arguably, there is merit to Bates' claim that a positive *settlement* for a plaintiff does not necessarily mean that a plaintiff prevailed, but we need not reach that issue

169 Wn.2d at 191, 234 P.3d at 208 (italics in original).

That issue may be reached here. Sometimes the issue is irrelevant, because the attorney fee award is based on a statute and the statute absolutely mandates attorney fees whenever "judgment" is entered. *See, e.g.*, RCW 49.48.030 ("In any action in which any person is successful in recovering judgment . . . reasonable attorney's fees . . . shall be assessed").

The present appeal, however, involves a judge-made equitable rule rather than an absolute statutory mandate:

In Washington, absent a contract, statute, or recognized ground in equity providing for fee recovery, a court has no power to award attorney fees. *Dayton v. Farmers Ins. Group*, 124 Wash.2d 277, 280, 876 P.2d 896 (1994). *Olympic Steamship* recognized one such equitable ground: an insured that successfully sues an insurer to obtain coverage may recover reasonable attorney fees that the insured necessarily incurred in the litigation. *Olympic S.S.*, 117 Wash.2d at 52–53, 811 P.2d 673. The court specifically held, “An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.” *Olympic S.S.*, 117 Wash.2d at 54, 811 P.2d 673.

Community Ass’n Underwriters of Amer. v. Kalles, 164 Wn. App. 30, 38, 259 P.3d 1154, 1159 (2011); *see, Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 795, 189 P.3d 777, 799 (2008).

“Washington follows the American rule in awarding attorney fees.” *Dayton v. Farmers Ins. Group*, 124 Wash.2d 277, 280, 876 P.2d 896 (1994). Under the American rule, a court may award fees “only if authorized by contract, statute, or recognized ground in equity.” *Bowles v. Department of Retirement Sys.*, 121 Wash.2d 52, 70, 847 P.2d 440 (1993) (quoting *Painting & Decorating Contractors, Inc. v. Ellensburg Sch. Dist.*, 96 Wash.2d 806, 815, 638 P.2d 1220 (1982)). A narrow exception to that rule is carved out in *Olympic S.S.* where the court held that insureds are entitled to attorney after they are compelled to assume the burden of legal action to obtain the benefit of their insurance contract.

McGreevy v. Oregon Mut. Ins. Co., 90 Wash. App. 283, 289-90, 951 P.2d 798, 802 (1998)(underline added).

To be entitled to an *Olympic Steamship* attorney fee award, the claimant must demonstrate that the insurer denied benefits owing under the policy. “*Olympic Steamship* stands for the proposition that ‘[w]hen insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys’ fees.’ ” *Butzberger v. Foster*, 151 Wash.2d 396, 414, 89 P.3d 689 (2004) (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 687 n. 15, 15 P.3d 115 (2000)).

Little v. King, 147 Wn. App. 883, 890-1, 198 P.3d 525, 528 (2008)(underline added).

Where, in the present record, is the demonstration that Travelers denied benefits owing under the policy? Where is the evidence that Greensview successfully prevailed on *a coverage issue under the insurance contract* as opposed to the Consumer Protection Act (on which partial summary judgment was obtained)? Where is the equitable basis for applying the “narrow exception” to the American attorney fee rule? *McGreevy*, 90 Wn. App. at 289.

The only evidence Greensview can point to is Travelers’ settlement offer. But the uncontroverted facts are (1) when plaintiff accepted the offer, it had been orally advised by the trial court, after the summary judgment hearing, that Travelers’ summary judgment motion on coverage likely would be granted, and (2) plaintiff eventually lost on coverage for the very reasons Travelers had set forth in its reply brief in

support of its summary judgment motion.⁶ It would not be equitable, in these circumstances to pretend that Travelers had wrongfully denied coverage and to deem Greensview to be the prevailing party for *Olympic Steamship* purposes.

Greensview's own conduct below shows that it did not believe it had or could prevail on the insurance contract. The court gave Greensview the opportunity to unwind the settlement and move forward with formally proving its contract claim against Travelers. Greensview declined the opportunity.

Greensview's trial court filings did not deny that the judge told plaintiff that it was about to lose on coverage, nor did Greensview controvert Traveler's explanation of the settlement negotiations. Rather, Greensview contended it prevailed because "the claim was pending on the day Travelers made its offer and on the day Travelers offer was accepted." (CP 19 line 16) The fact that Greensview's claim was pending at the time would support the legal requirement of consideration for a contract. Under *Olympic Steamship*, however, the court sits in equity not in law. The fact that a claim was pending, that a settlement offer was made, and that it was accepted, does not prove the plaintiff

⁶ The trial court's oral opinion after the *Frye* hearing incorporated that reply brief by reference. (CP 320)

prevailed on a coverage claim so as to be entitled to an equitable attorney fee award.

Greensview might cite the general rule that for purposes of a fee or cost award, the prevailing party is the one who receives a judgment in its favor. *See, Smith v. Okanogan County*, 100 Wash. App. 7, 24, 994 P.2d 857, 867-68 (2000). The problem in this case is that Greensview had more than one claim. It clearly prevailed under the Consumer Protection Act, but concedes that Travelers' Offer precludes a fee award under that statute. (Opening brief, p.10 n.5) This opens the door for the result that the Greensview prevailed only on one claim, not the other. "If both parties prevail on major issues, there may be no prevailing party." *Id.*; *see, also, Crest Inc. v. Costco Wholesale Corp.*, 128 Wash. App. 760, 772, 115 P.3d 349, 355 (2005); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 545, 94 P.3d 358, 366 (2004). Thus, the simple fact that Greensview holds a judgment does not prove it prevailed on an insurance coverage issue as opposed to other issues in the suit.

Normally, the question of whether a party is entitled to attorney fees is an issue of law. *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wash. App. 283, 289, 951 P.2d 798, 802 (1998). Because *Olympic Steamship* is an equitable rule, however, it must be subject to the general proposition that a trial court in equity has broad discretion to fashion a remedy to do

substantial justice. *See, Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wash. App. 384, 390, 220 P.3d 1259, 1262 (2009). When attorney fees are sought on equitable grounds, the decision on whether to award fees is discretionary. *See, MacKenzie v. Barthol*, 142 Wash. App. 235, 242, 173 P.3d 980, 983 (2007); *In re Estate of Moi*, 136 Wash. App. 823, 835, 151 P.3d 995, 1001 (2006); *accord, Andersen v. Gold Seal Vineyards, Inc.*, 81 Wash. 2d 863, 866, 505 P.2d 790, 792 (1973).

There was no abuse of discretion in denying an equitable award of attorney fees here. The trial court knew it had recently told Greensview that it likely would not prevail on its contract claims. (CP 92) The court had discretion to call out Greensview's position for what it was: An attempt to turn a settlement offer into a "prevailing party" argument, on an issue for which Greensview had, so far, failed to produce any evidence. The court did not abuse its equitable discretion and its ruling may be affirmed on that basis.

B. THE EXTRINSIC EVIDENCE DEMONSTRATED THERE WAS NO MEETING OF THE MINDS.

1. THE CONTEXT RULE OF *BERG v. HUDESMAN* APPLIES AND SUPPORTS THE TRIAL COURT'S RULING.

When, despite the existence of a written offer and acceptance, there actually was no mutual agreement on a material term of the contract, there was no meeting of the minds and no contract was formed. *See, Swanson v. Holmquist*, 13 Wn. App. 939, 943, 539 P.2d 104, 107 (1975); *see, also, State v Nason*, 96 Wn. App. 686, 691, 981 P.2d 866, 868-9 (1999).

Washington follows the “context rule” of contract construction, in which extrinsic evidence of intent can be considered even if the written document is not technically ambiguous. *See, Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). The context rule opens up the possibility that, after considering the extrinsic evidence, a court will conclude there actually was no agreement at all. *See, e.g., Nason*, 96 Wn. App. 692, 981 P.2d at 869.

The context rule applies to CR 68 offers of judgment:

The “ ‘usual rules of contract construction’ ” apply to offers of judgment. *Nusom*, 122 F.3d at 833 (quoting *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir.1995)); *see also McGuire*, 169 Wash.2d at 188–89, 234 P.3d 205 (applying contract principles to settlement agreements generally). A valid contract requires mutual

assent, which generally takes the form of offer and acceptance. *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wash.2d 371, 388–89, 858 P.2d 245 (1993). Washington follows the “objective manifestation test” for contract formation. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998).

Applying this “objective manifestation test,” a court determines the parties’ intent by focusing on their objective manifestations as expressed in the agreement. *McGuire*, 169 Wash.2d at 189, 234 P.3d 205 (citing *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005)). A 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. *Seaborn*, 132 Wash.App. at 270, 131 P.3d 910 (citing *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990)).

Lietz v. Hansen Law Offices, P.S.C., ___ Wn. App. ___, 271 P.3d 899, 906-7 (2012)(footnote omitted).

Under the context rule, a court first considers extrinsic evidence and resolves ambiguities against the drafter only if the extrinsic evidence is insufficient to resolve the issue. See, *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171-2, 110 P.3d 733, 737 (2005).

That is what happened in *Lietz, supra*. The defendant failed to offer any substantial, objective evidence, and only offered its previously unexpressed, subjective intention not to pay attorney fees. *Id.*, 271 P.3d at 907-8. Likewise, *Greensview* cites *Kirkland v. Sunrise Opportunities*, 200 F.R.D. 159, 162 (D. Maine 2001), but that court characterized the

defendant's extrinsic evidence as "nothing more than speculations." *Id.* at 162.

Here, in contrast, the trial court had ample extrinsic evidence to consider, including:

1. Travelers had never, at any time in the litigation, previously offered more than \$40,000 total to settle the entire case.

2. Travelers' last settlement offer before the Offer of Judgment was \$6000, i.e., the settlement value had decreased. In the offer, Travelers' counsel said "there is no chance of Travelers settling for six figures." (CP 91)

3. Greensview had never responded to Travelers' \$6000 offer. (CP 92). The next move was Travelers' Offer of Judgment. (*Id.*) Greensview thus was arguing that without any effort or negotiation on Greensview's part, and despite Traveler's prior proclamation that it would never settle for 6 figures, Travelers suddenly offered to settle for \$222,000⁷, which was 37 times Travelers' prior offer and 450% more than Travelers had ever previously offered to pay.

⁷ \$30,000 plus \$192,000 in attorney fees.

4. Travelers wasn't running scared: It had previously obtained summary judgment in another case on a similar insurance coverage issue, and Greensview's attorneys new about it. (CP 88 lines 5-12)

7. The reasonableness of the parties' respective positions is one consideration when applying the context rule. *See, Berg, supra*, 115 Wn.2d at 667, 801 P.2d 222, 228. Greensview's position made no sense. Essentially, Greensview argued that although Travelers did not intend to pay attorney fees in connection with the only issue upon which Greensview had previously prevailed (the Consumer Protection Act), Travelers nevertheless intended to pay fees on an issue that Greensview never had evidence to support (insurance coverage). The inherent illogic in Greensview's position supported a finding that the position did not reflect the mutual intent of the parties.

5. Although they were asking for \$192,000 in attorney fees on top of a \$30,000 judgment, and were arguing the Offer was ambiguous, Greensview's attorneys never undertook the simple task of contacting Travelers to clarify the ambiguity. (RP 5, line 11)

6. "A lawyer does not expunge his legal training and experience upon ascending the bench." *Hecomovich v. Nielsen*, 10 Wash. App. 563, 572, 518 P.2d 1081, 1087-88 (1974). The trial court specifically mentioned a concern about "sharp practice" of the sort he encountered in

private practice.⁸ After questioning counsel for both sides and considering the other extrinsic evidence, he could validly conclude, on the key issue of mutual intent, that Greensview's attorneys knew perfectly well that Travelers did not intend to pay *Olympic Steamship* fees, and were only attempting to take advantage of a perceived legal technicality rather than to implement a true, mutual intent.

2. **FEDERAL CASES NOT APPLYING THE
CONTEXT RULE SHOULD NOT BE RELIED UPON
AND THEIR REASONING IS INAPPOSITE TO
THIS CASE.**

“Due to its ambiguity, Rule 68 often creates more uncertainty, and more burdensome litigation, than it resolves.” Shelton, *Rewriting Rule 68, Realizing The Benefits Of The Federal Settlement Rule By Injecting Certainty Into Offers Of Judgment*, 91 Minnesota Law Rev. 865, 867 (2007). Rather than considering extrinsic evidence, many federal courts have followed the exact course of action the context rule is designed to avoid: A sterile semantic analysis, with only a passing consideration of the surrounding circumstances, that fails to discern the parties' intent or

⁸ “When I was in practice, sometimes we referred to this sort of thing as sharp practices. It's not wrong. It's not illegal. It's just trying to get a little advantage in some fashion in the way that an agreement or document or contract or something else may be written up where both sides can accept it because both sides have a different interpretation of what's really at issue[.]” (VRP 14)

lack of intent. *Id.* at 868 (“the case law is replete with instances in which judges have construed Rule 68 offers as something very different from what the parties intended to offer or accept”).

Here, Greensview proposes a counterintuitive resolution of a purported ambiguity in which the alleged absence of the phrase “attorney fees” is turned into an affirmative promise to pay attorney fees. The result is doubly counterintuitive because under the black letter law of contracts, silence is not acceptance. *See, Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wash. App. 361, 370, 44 P.3d 929, 935 (2002). It is a strange situation indeed when silence becomes an offer.

When the trial judge asked Greensview why, with \$192,000 in attorney fees on the line and an offered amount of only \$30,000, it didn’t take the simple step of asking Travelers if the Offer included paying attorney fees on top of the \$30,000, Greensview argued that it wasn’t engaging in “sharp practice,” because the case law prevented it from asking. (VPR 7 lines 1-3) This argument stems from a highly debatable observation made by some federal courts:

Indeed, Rule 68 places the offeree in a most unusual posture in the landscape of settlement contracts. While an offeree can respond to an ordinary settlement offer through a counteroffer or seek to clarify or modify its terms, a Rule 68 offeree is at the mercy of the offeror's choice of language and willingness to conform it to the understanding of both parties.

Utilities Automation 2000, Inc. v. Choctawhatchee Elec. Co-op., Inc., 298 F.3d 1238, 1244 (11th Cir. 2002).

The underlying rationale behind the above statement is that once a CR 68 offer is made, the plaintiff is automatically exposed to the statutory consequences of not accepting the offer. *Id.*

With all due respect to the 11th Circuit, this *dictum* is simply wrong, especially in a “context rule” jurisdiction. First, it fails to understand that an inquiry by one party as to the meaning of an offer, in and of itself, is admissible, extrinsic evidence on the issue of mutual intent. Even if the defendant declines to respond, the plaintiff can offer the inquiry as evidence that the agreement was ambiguous and thus could not support a meeting of minds. In other words, the inquiry is an objective manifestation relevant to contract interpretation. *Berg, supra*. As the trial court observed, there simply is no rule precluding communications between the parties as to what an Offer means. (RP 18 line 20)

Second, the 11th Circuit failed to understand the true nature of CR 68. The consequences of not accepting a settlement offer will be there whether CR 68 exists or not. The right to costs and attorney fees is not *created* by CR 68. The right is separately created by contract, statute, or recognized ground of equity. *McGreevy, supra*, 90 Wash. App. at 289,

951 P.2d at 802. In any case were a reciprocal right exists, if a plaintiff declines a settlement offer, proceeds to litigate, and loses, then the defendant will have prevailed and will be entitled to costs.

CR 68 does not create the plaintiff's dilemma. It just changes the threshold at which that dilemma exists. Previously the threshold was \$0, but now it becomes the amount in the CR 68 offer. While that is a change in a circumstance of the case and provides an incentive to consider whether further litigation will be cost effective, it hardly provides a reason for dumping the context rule or pretending that plaintiffs can't seek to clarify an offer's terms.

The rational is especially weak in this case, because regardless of the CR 68 offer, there was no reciprocal right to attorney fees and Greensview's exposure thus was limited to a change in the threshold at which statutory costs could be awarded. When the basis for an attorney fee award is reciprocal, such as when a statute or contract awards attorney fees to whomever is the prevailing party, then a CR 68 offer might signal a significant shift in the economic landscape, as the plaintiff could nominally win but CR 68 could nonetheless make the defendant the prevailing party for a significant attorney fee award. *See generally, Marek v. Chesny*, 473 U.S. 1, 30-31, 105 S.Ct. 3012, 3028, 87 L.Ed.2d 1 (1985)(Brennan, J. dissenting)

No such reciprocity exists here. The Consumer Protection Act only awards attorney fees to a prevailing plaintiff. *Boules v. Gull Indus., Inc.*, 133 Wash. App. 85, 88 n.4, 134 P.3d 1195, 1196 (2006). Likewise, the *Olympic Steamship* rule only awards fees to prevailing insureds, not prevailing insurance companies. *McGreevy, supra*, 90 Wash. App. at 289-90, 951 P.2d at 802 (1998). Thus, Travelers could not obtain fees regardless of where the “prevailing party” threshold was set.

In this case, Travelers’ statutory costs would have been less than \$500. (RP 6 line 11) A change in the threshold at which \$500 in costs might be awarded was not going to affect Greensview’s evaluation of its case. The notion that Greensview was paralyzed with fear, with a gag over its mouth, unable to inquire and terrified of the potential consequences if it did not accept the Offer, is ludicrous.

C. THE OFFER WAS NOT AMBIGUOUS AND WAS LIMITED TO A TOTAL OF \$30,000 PLUS STATUTORY ATTORNEY FEES.

1. WASHINGTON IS NOT A “MAGIC WORDS” JURISDICTION

Greensview’s “silent as to attorney fees” argument is based on a mechanical and incorrect reading of the case law. The issue is not whether the Offer uses the magic words “attorney fees.” The issue is

whether the Offer is ambiguous as to whether it includes an offer to pay fees. “All of the post-*Marek* cases . . . have addressed Rule 68 offers from the perspective of whether or not those offers have some greater or lesser degree of ambiguity or perceived ambiguity.” *McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561, 564-65 (6th Cir. 2004); *see, The Real Estate Pros, P.C. v. Byars*, 90 P.3d 110, 112 (Wyo. 2004).

Here, Travelers offer unambiguously (1) terminates all litigation as to Travelers, (2) explicitly caps the total judgment amount at \$30,000 plus costs, and then (3) specifically defines what attorney fees can be recovered, which is only a \$250 statutory attorney fee.

No reasonable person could read “total judgment amount of \$30,000 plus costs then accrued” as somehow meaning “\$30,000 plus costs then accrued, plus attorney fees, plus litigation expenses.” Total means total, and the total is comprised of only two amounts: \$30,000 and “costs” as defined in the Offer.

Greensview’s cases involve CR 68 offers which only mention a lump sum and fail to give any indication about what that sum might be comprised of. Courts have reasoned that when an offer only mentions a lump sum and is otherwise silent, the lump sum amount might only be referring to the principal judgment amount, i.e. damages, and not to additional sums that would be added on through post-trial motions. *See,*

Hennessy v. Daniels Law Office, 270 F.3d 551, 552-3 (8th Cir. 2001). If these “add ons” are not mentioned, then the offer could be ambiguous as to whether they are included in the lump sum or can be awarded separately.

Travelers’ Offer cannot be read as failing to address post-judgment “add ons” and as leaving that question open. Costs, after all, are a post-judgment “add on” and are *included* in Travelers definition of the total judgment amount: The Offer is for “a total judgment amount of \$30,000 plus costs then accrued.” By 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.

The *Seaborn* case does not hold otherwise. In *Seaborn* the plaintiff served an offer stating:

Seaborn Pile Driving, Inc., as the party defending the counterclaims of defendants Glew, submits this offer to have judgment to be taken against it for the sum of Four Thousand Five Hundred Dollars (\$4,500), and tenders payment of said sum contemporaneous with this offer.

This offer is made pursuant to Superior Court Civil Rule 68.

Seaborn Pile Driving Co., Inc. v. Glew 132 Wash. App. 261, 265, 131 P.3d 910 (2006).

There were several problems with Seaborn's offer. First, the offer said nothing about the "add ons" and thus left that question open. Second, the offer would not terminate the litigation, only Glew's counterclaims. There was a contract provision governing attorney fees, and Glew could have accepted the offer, gone to trial purely as a defendant, and still have been entitled to fees as the prevailing party. The third problem with Seaborn's offer was that it put no cap on Seaborn's liability, i.e., an offer to have a judgment entered for \$4500 on the counterclaims was not clearly identified as the total amount Glew could recover.

Lietz, supra, is the same. In that case the offer expressly applied to only a portion of the litigation and did not attempt to settle all claims. 271 P.3d at 910.

Admittedly, some federal cases have absolutely required that the words "attorney fees" appear in the offer. This position cannot be reconciled with Washington authority. In *McGuire v. Bates*, 169 Wash.2d 185, 234 P.3d 205 (2010) the defendant offered to settle "all claims," but did not mention attorney fees. The plaintiff claimed a right to attorney fees under RCW 4.84.250. Citing *Seaborn*, the Court of Appeals said the plaintiff was entitled to fees because the settlement offer was silent as to attorney fees. Reversing, the Washington court held:

However, the Court of Appeals misapplied *Seaborn* in the instant case when it analogized Bates' settlement offer to an offer of judgment that is silent on attorney fees under CR 68. We say that because the settlement offer that was accepted by McGuire settled "all claims" and one of the claims was for attorney fees. The settlement offer, thus, was not silent regarding attorney fees.

169 Wash.2d at 190-191 (underline added). *See, The Real Estate Pros, supra*, 90 P.3d at 114 ("even if an offer is silent as to whether it includes attorneys' fees, other circumstances in the case may make it clear that the offer does include attorneys' fees").

Although the *McGuire* defendant did not use the magic words "attorney fees," the offer was not silent on the subject because it unambiguously included "all claims" in the lump sum being offered. Likewise, Travelers' offer is not silent because it expressly caps the total judgment at \$30,000 plus costs which are limited to a statutory attorney fee.

Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390 (7th Cir. 1999) is almost on point. In that case, the defendant served an offer for "judgment in the amount of \$56,003.00 plus \$1,000 in costs as one total sum as to all counts of the amended complaint." 199 F.3d at 392 (underline added). This remarkably similar to Travelers' offer of a "total judgment amount" of a lump sum plus costs. Although the *Nordby* offer did not use the words "attorney fees," the court found the offer was

sufficiently clear to prevent the plaintiff from adding on an attorney fee award:

Granted, the contract-law analogy is just that, an analogy, for the reason stated earlier: the consequences of rejecting a Rule 68 offer are more serious than those of rejecting an ordinary contract offer. But the appropriate adjustment is to insist that the Rule 68 offer be completely unambiguous, not that it use the magic words “attorneys’ fees.”

199 F.3d at 392 (underline added); *see, also, Real Estate Pros, supra*, 90 P.3d at 115 (same holding).

Because Washington is a context rule jurisdiction, another “appropriate adjustment” is to consider extrinsic evidence of intent and to use *contra proferentum* only when that evidence fails to resolve the ambiguity. *See, Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171-2, 110 P.3d 733, 737 (2005).

McGuire, Nordby and *Real Estate Pros* all involved situations where the defendant’s offer did not use the words “attorney fees,” but used the phrase “all claims” or “all counts.” *See, also, McCain, supra*, 378 F.3d at 564 (“all claims and causes of action”). One might attack Travelers offer on the ground that it does not use the words “all claims.” The first problem with any such attack is it just substitutes one set of magic words--“attorney fees”--for another set—“all claims.”

The second problem is that under the context rule, the subsequent acts and conduct of the parties are relevant to determining their mutual understanding and intent. *See, Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 502, 115 P.3d 262, 266 (2005). Neither party had any trouble understanding that Travelers' Offer applied to "all claims" against it. After all, Greensview's Complaint included 4 separate causes of action. (CP 337-9) If Greensview believed the Offer was ambiguous as to which claims the Offer involved, why didn't Greensview "cherry pick" which claims it deemed to be settled? For example, it could have said the Offer only involved the negligence claim (CP 339) and not the Consumer Protection Act claim. (Id.) Or that the Offer only involved treble damages under the Consumer Protection Act and not damages covered by the contract.

Nobody thought Travelers' Offer was a piecemeal, partial settlement attempt. Far from believing that it was, Greensview even applied for a final judgment and CR 54(b) certification based on the Offer. Greensview's order said:

The Court therefore concludes that no just reason exists for delaying a final judgment against Travelers notwithstanding the pendency of Plaintiff's claims against the non-Travelers Defendants.

(CP 6)

Greensview thus has invoked the present court's jurisdiction on that basis that the CR 68 Offer and judgment applies to all claims. RAP 2.2(d). Greensview is in no position to argue it was misled about the Offer's scope.

2. **IF THE WORDS "ATTORNEY FEES"
ABSOLUTELY MUST APPEAR IN THE OFFER,
THEY APPEARED THROUGH INCORPORATION
BY REFERENCE**

Greensview's argument equates "silent as to attorney fees," with the absence of the phrase "attorney fees" in the Offer's text. However, if Travelers entire Offer is read, it is not silent at all and expressly mentions fees. The offer states:

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. The term "costs" is defined in the same manner as in RCW 4.84.010.

(underline added)

When the referenced statute is consulted, it states:

**Costs allowed to prevailing party--Defined--
Compensation of attorneys**

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or

implied, of the parties, but there 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, in addition to costs otherwise authorized by law, the following expenses:

....

(6) Statutory attorney and witness fees . . .

RCW 4.84.010

When a contract clearly and unequivocally incorporates a statute into the offer, that statute becomes part of the contract. *See, Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 801, 225 P.3d 213, 225 (2009).

If Travelers' contract needed magic words, the words were there. By offering "a total judgment amount of \$30,000 plus costs then accrued," Travelers told the plaintiff exactly what it would get: \$30,000 plus statutory attorney fees. There is no other, reasonable way to read the Offer.

Greensview complains that a CR 68 offer automatically includes an offer to pay "costs then accrued," so a reference to a particular cost statute cannot be a reference to *Olympic Steamship* attorney fees. This argument ignores the fact that Travelers told Greensview what the total judgment would consist of. If the words "attorney fees" have to be in the offer, then Greensview was told exactly what those fees would be: \$250.

The argument also indulges in the equivocation fallacy. Travelers' Offer did not use the word "costs" as that term is used in CR 68. If Travelers had, Greensview would have been entitled to attorney fees under the Consumer Protection act, which defines fees as part of "costs." RCW 19.86.090. Travelers specially defined the term, as used in its offer, to exclude "costs" under the Act and to include only statutory costs. Travelers' offer thus did not simply restate the CR 68 formula.

D. AN ATTORNEY FEE AWARD ON APPEAL IS NOT APPROPRIATE.

Greensview argues that if it prevails on appeal it is entitled to a further award of *Olympic Steamship* fees. The argument contains at least two flaws.

First, this appeal concerns an argument about the interpretation and application of CR 68, not an insurance contract. The insurance policy is not even part of the record on appeal, and no error is assigned with respect to an issue of insurance contract interpretation or application. *Olympic Steamship* is a narrow exception to the usual American rule and no rule awards attorney fees for arguments about CR 68. *See, McGreevy, supra*, 90 Wn. App. at 289.

Second, postoffer expenses generally are not part of the CR 68 equation—the fees available are the fees expended up to the time the case

“settled” through acceptance of the Offer. After that point, the controversy no longer is about the merits of the case, but about the merits of the settlement. *See, Marek v. Chesny*, 473 U.S. 1, 7, 105 S.Ct. 3012, 3015-6, 87 L.Ed.2d 1 (1985).

V. CONCLUSION

The trial court correctly denied attorney fees and should be affirmed because:

1. The trial court did not abuse its equitable discretion under the circumstances of this case, where the plaintiff accepted the Offer of Judgment only after being told it would not prevail on coverage, and where the trial court even gave the plaintiff the opportunity to back out of the settlement and attempt to actually prevail on coverage.

2. The trial court correctly concluded, based on the extrinsic evidence, that there was no meeting of the minds.

3. By offering to pay only a total judgment amount of \$30,000 plus costs, and by defining costs to mean only those costs in RCW 4.84.010, Travelers unambiguously excluded the possibility of additional amounts being added. The parties understood the Offer was to completely settle all claims, not just a portion of them.

4. If the magic words “attorney fees” absolutely have to be in the Offer, Travelers used them through incorporation by reference.

DATED this 19th day of April, 2012.

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APPENDIX OF STATUTES AND
COURT RULES

West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
8. Provisional and Final Remedies (Rules 64-71)

Superior Court Civil Rules, CR 68

RULE 68. OFFER OF JUDGMENT

Currentness

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.

Notes of Decisions (32)

Current with amendments received through 11/15/11

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.84. Costs (Refs & Annos)

West's RCWA 4.84.010

4.84.010. Costs allowed to prevailing party--Defined--Compensation of attorneys

Currentness

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there 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, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees;

(2) Fees for the service of process by a public officer, registered process server, or other means, as follows:

(a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;

(3) Fees for service by publication;

(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

Credits

[2009 c 240 § 1, eff. July 26, 2009; 2007 c 121 § 1, eff. July 22, 2007; 1993 c 48 § 1; 1984 c 258 § 92; 1983 1st ex.s. c 45 § 7; Code 1881 § 505; 1877 p 108 § 509; 1869 p 123 § 459; 1854 p 201 § 367; RRS § 474.]

Notes of Decisions (166)

Current with all Legislation from the 2011 2nd Special Session and 2012 Legislation effective through April 6, 2012

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West's Revised Code of Washington Annotated
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.090

19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities

Currentness

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

Credits

[2009 c 371 § 1, eff. July 26, 2009; 2007 c 66 § 2, eff. April 17, 2007; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

Notes of Decisions (397)

Current with all Legislation from the 2011 2nd Special Session and 2012 Legislation effective through April 6, 2012

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NO. 67879-5-I

COURT OF APPEALS
DIVISION I
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 CO.
OF ILLINOIS), a foreign insurance
company, TRAVELERS EXCESS
AND SURPLUS LINES
COMPANY, a foreign insurance
company,

Respondents,

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 20 PM 1:47

I certify that on April 20, 2012, service of a true and complete
copy of Respondents' Brief was made on following attorneys of record:

Mr. Todd C. Hayes
Harper Hayes PLLC
600 University Street, Suite 2420
Seattle, WA 98101

by causing the same to be delivered by hand to counsel's address of
record.

CERTIFICATE OF SERVICE- 1
JD

DATED this 20th day of April, 2012.

JAMES T DERRIG ATTORNEY AT LAW
PLLC

/s/ James T Derrig

James T. Derrig, WSBA 13471
Attorney for Respondents