

NO. 29231-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GAVIN DEFELICE,
Appellant,

v.

LAURA JONES and BRIAN JONES, wife and husband,
Respondents.

BRIEF OF SAFECO INSURANCE COMPANY OF ILLINOIS

BRIEF OF RESPONDENT

PETER J. JOHNSON, WSBA #6195
Attorneys for Safeco Insurance
Company of Illinois
Johnson Law Group
103 E. Indiana, Suite A
Spokane, WA 99207-2307
(509) 835-5000

NO. 29231-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GAVIN DEFELICE,
Appellant,

v.

LAURA JONES and BRIAN JONES, wife and husband,
Respondents.

BRIEF OF SAFECO INSURANCE COMPANY OF ILLINOIS

BRIEF OF RESPONDENT

PETER J. JOHNSON, WSBA #6195
Attorneys for Safeco Insurance
Company of Illinois
Johnson Law Group
103 E. Indiana, Suite A
Spokane, WA 99207-2307
(509) 835-5000

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. ARGUMENT 2

**A. DEFELICE IS APPEALING THE ORDER FOR
SANCTIONS. 2**

**B. THE SUBPOENA OF AUGUST 26, 2009, WAS
NOT SERVED ON SAFECO AND WAS
DEFECTIVE IN ITS CONTENT. 3**

**C. THE SUBPOENA SERVED ON SAFECO
ON OCTOBER 19, 2009, WAS DEFECTIVE
AS A MATTER OF LAW. 6**

**D. THE TRIAL COURT PROPERLY DENIED
THE MOTION FOR RECONSIDERATION. 8**

**E. SAFECO IS ENTITLED TO ATTORNEY
FEES AND COSTS FOR DEFELICE’S
FRIVOLOUS APPEAL. 9**

III. CONCLUSION 9

TABLE OF AUTHORITIES

Statutes

RCW 23B.15.100	5
RCW 4.28.080(7)	5
RCW Chapter 48.05	5
RCW 48.05.200	5
RCW 48.05.200(1)	4
RCW 48.05.210	5

Court Rules

Civil Rule 45	6, 7, 10
Civil Rule 45(a)(1)(C)	6, 7
Civil Rule 45(a)(1)(D)	3, 7
Civil Rule 45(a)(2)	7
Civil Rule 45(a)(3)	7
Civil Rule 45(c)(2)(A)	7
Civil Rule 45(h)	7
Rules of Appellate Procedure 18.1	9
Rules of Appellate Procedure 18.9	9

I. STATEMENT OF THE CASE

Appellant (hereinafter DeFelice) filed his lawsuit against Respondents (hereinafter Jones) on July 30, 2009. (CP 1-6.) On August 27, 2009, DeFelice's attorney served a subpoena duces tecum (hereinafter subpoena) on Andreas Van Workham (CP11-12) directed to "Safeco Insurance Company." (CP 50.) On September 3, 2009, Safeco Insurance Company of Illinois (Safeco) advised DeFelice's counsel that the subpoena was not valid and the reasons therefor. (CP 46-47.) On October 7, 2009, DeFelice filed several motions, one of which sought to "compel compliance with subpoena and for sanctions." (CP 52-53.)

Safeco entered a special notice of appearance (CP 63) and filed a memorandum (CP 75-78) and a declaration of Susan Ephron in opposition to the motion to compel compliance with the subpoena. (CP 73-74.) This motion was heard on October 16, 2009. (RP 1-2.) The trial court orally denied DeFelice's motion to compel compliance with the subpoena because Safeco had not been properly served. (RP 19-20.) On December 18, 2009, the trial court issued a letter awarding attorney fees with respect to the October 16, 2009, motions. (CP 164.)

On February 12, 2010, the trial court entered its written order denying DeFelice's motion to compel and granted Safeco sanctions. (CP 180-181.)

Prior to the entry of the court's written order, DeFelice filed a motion for reconsideration on November 25, 2009. (CP 146-147.) Upon the trial court's entry of its order denying DeFelice's several motions, the court set a briefing schedule on the motion for reconsideration. (CP 182.)

On February 25, 2010, Safeco filed its response to the motion for reconsideration. (CP 186-190.) On May 13, 2010, the trial court entered an order denying DeFelice's motion for reconsideration. (CP 214-215.) Subsequently, the trial court entered an order on June 5, 2010, dismissing the case with prejudice upon Jones' motion for summary judgment. (CP 221-222.)

II. ARGUMENT

A. DEFELICE IS APPEALING THE ORDER FOR SANCTIONS.

Although DeFelice's notice of appeal (CP 227) did not designate that he was appealing the trial court's order denying his motion to compel enforcement of the subpoena involving Safeco and awarding Safeco sanctions, a copy of that order was attached to the notice of appeal. (CP 233-234.)

Furthermore, although DeFelice's assignments of error do not include any assignment with respect to the order regarding Safeco, DeFelice's brief makes reference to the total amount of sanctions imposed by the trial court. (See Issues Pertaining to Assignment of Error No. 2, DeFelice Brief, pg.1.) In addition, DeFelice's brief contains several references to the subpoena. (See DeFelice's Brief, pp. 2-4, 6-7 and 10.)

B. THE SUBPOENA OF AUGUST 26, 2009, WAS NOT SERVED ON SAFECO AND WAS DEFECTIVE IN ITS CONTENT.

Assuming *arguendo* that DeFelice has preserved his right to appeal the trial court's order regarding the subpoena (CP 180-181), Safeco submits that the subpoena (CP 50) was never properly served in August 2009 and, when served in October 2009, it was still invalid pursuant to CR 45. (CP 156.)

DeFelice sought an order compelling Safeco, a non-party to this action, to respond to a defective and improperly served subpoena. The subpoena issued by DeFelice's counsel was defective on its face in two ways. First, the subpoena was directed to a non-legal entity. (CP 73-74.) Second, the subpoena failed to comply with CR 45(a)(1)(D). In addition to these defects in the subpoena, the subpoena was never properly served upon

Safeco. (CP 73-74.) DeFelice has never controverted the declaration of Susan Ephron.

DeFelice's attorney filed a declaration stating that he left the subpoena with a person at the Safeco claims office in Spokane, Washington. (CP 50.) DeFelice's attorney has offered his version of several conversations in which he purportedly addressed this subpoena with the attorney for Jones and with a paralegal employed in the Safeco corporate office. While the various statements offered by DeFelice's attorney concerning these conversations are subject to much dispute, the actual conversations are irrelevant to whether proper service was obtained.

Safeco is a foreign corporation domiciled in Illinois and properly licensed to transact business in the state of Washington. (CP 73-74.) RCW 48.05.200(1), prescribes that a foreign insurer authorized to conduct business in the State of Washington has appointed the Insurance Commissioner of the State of Washington to act as its attorney to receive service of all legal processes issued against it in this state. This section states that "Service of legal process against such insurer can be had only by service upon the commissioner, except actions upon contractor bonds...."

Further legislative support of this mandate is found in RCW 4.28.080(7) which states that any summons against a foreign or alien insurance company must be served in accordance with Chapter 48.05 RCW. RCW 48.05.210 sets forth the procedure for such service and requires either personal service or service by registered mail. RCW 48.05.200 contains very clear and simple instructions regarding the service of legal process or pleadings on a foreign insurer and mandates that said service can only be had by service upon the Insurance Commissioner.

DeFelice's attorney never provided any such proof. In fact, by virtue of his own declarations, he admits that the subpoena was not served upon the Insurance Commissioner or the registered agent for Safeco. Thus, even if the defects in the subpoena did not exist or could somehow be cured, Safeco was under no duty to respond until a subpoena was properly served. DeFelice's attorney failed to comply with these statutes when he left the subpoena at a claims office.

In addition to the mandatory statutory appointment of the Insurance Commissioner to receive service of legal processes issued to a foreign insurer, Safeco has appointed a registered agent upon whom service could be obtained in accordance with RCW 23B.15.100. (CP 73-74.) No such service

of the subpoena was made upon Safeco's registered agent in August 2009.
(CP 73-74.)

Furthermore, DeFelice's attorney completely disregarded the proper format of a subpoena as required under CR 45. CR 45(a)(1)(C) provides protection to a person when a party or an attorney responsible for the issuance and service of a subpoena has failed to take reasonable steps to avoid imposing an undue burden or expense on the person subject or entity to a subpoena. Rather than complying with the statutorily mandated process for service of the subpoena on a foreign insurer and the requirements contained in CR 45, DeFelice's attorney forced Safeco to retain counsel to respond to the motion to compel.

CR 45(a)(1)(C) contains a clear directive to a court. It states, "The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." Thus, the trial court was well within its discretion when it awarded sanctions against DeFelice.

C. THE SUBPOENA SERVED ON SAFECO ON OCTOBER 19, 2009, WAS DEFECTIVE AS A MATTER OF LAW.

In response to the trial court's oral decision of October 16, 2009, DeFelice served Safeco's registered agent with the same deficient subpoena

on October 19, 2009. (CP 118.) Although DeFelice properly served the registered agent of Safeco, the subpoena remained deficient and void on its face. (CP 115-116.) This subpoena did not comply with: CR 45(a)(1)(C); CR 45(a)(1)(D); CR 45(a)(2); CR 45(a)(3); CR 45(c)(2)(A); CR 45(h); and it was not served upon all parties in compliance with CR 45(b)(2). Under CR 45(a)(1)(C) a subpoena may command (1) testimony and/or (2) production of documents or tangible things in the person's possession, control, or custody. CR 45 mandates that a subpoena be issued in conformance with that rule. (CP 127-128.)

Notwithstanding the numerous deficiencies with respect to the subpoena, Safeco responded with a letter supported by a declaration of its custodian of records. (CP 120-121.) The declaration of the record custodian is succinct and clear. The record custodian declared that she provided all documents containing information in Safeco's possession that were responsive to the subpoena duces tecum. (CP 121.) The record custodian declared that the documents which were attached to her declaration, consisting of printouts, provided the last known addresses and phone numbers for Laura and Brian Jones and that these were all the documents

containing information known to Safeco in response to the subpoena. (CP 121.)

DeFelice has not challenged the validity of these statements. Instead, he has advanced an erroneous and groundless assumption that because Mr. and Mrs. Jones no longer lived at the address provided, Safeco lied to him. Other than the speculation of DeFelice's attorney, there are no facts to support his assumption.

D. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RECONSIDERATION.

On November 25, 2009, DeFelice filed a motion asking the court to reconsider its order denying enforcement of the original subpoena. (CP 146-147.) Although the motion for reconsideration and declaration of Peter D. Dahlin were filed with the trial court on November 25, 2009, these documents were never served on Safeco's counsel. (CP 191-192.)

DeFelice sought to have the trial court reconsider its decisions with respect to the two motions heard on October 16, 2009, one of which directly involved Safeco. The declaration filed in support of the motion for reconsideration contained several "allegations" which were not supported by any memorandum of authorities nor did the declaration identify any error of law or other appropriate basis under CR 59 for the trial court to change its

prior decision. (CP 148-156.) At no time did DeFelice challenge the factual recitations submitted by Jones or Safeco nor Safeco's legal authorities demonstrating that the subpoena was not properly served on August 26, 2009. At no time did DeFelice ever challenge the fact that the subpoena itself was defective on its face when served on October 19, 2009.

E. SAFECO IS ENTITLED TO ATTORNEY FEES AND COSTS FOR DEFELICE'S FRIVOLOUS APPEAL.

Insofar as it relates to the subpoena, this appeal has no merit factually or legally. Therefore, Safeco respectfully requests the appeal be dismissed with prejudice and that reasonable attorney fees be awarded to Safeco pursuant to RAP 18.1 and RAP 18.9.

III. CONCLUSION

The trial court's oral decision of October 16, 2009, and its supplemental letter of December 18, 2009, which were reduced to a formal order on February 12, 2010, were proper. The trial court's decision was properly premised upon an utter disregard by DeFelice's attorney for proper service, notwithstanding the patent deficiencies of the subpoena. These deficiencies are clearly identifiable on the face of the subpoena. Despite these deficiencies, DeFelice's attorney again ignored the clear mandate of CR45 and served Safeco's registered agent with the same deficient subpoena.

Notwithstanding these deficiencies, Safeco responded to this service and supplied the information known to it. (CP 120-121.) In response to a threatening email from DeFelice's counsel, Safeco filed a timely objection to the subpoena. (CP 111-113.)

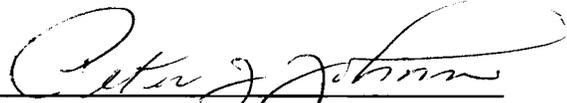
DeFelice's attorney's declaration did not provide the trial court with any factual or legal basis to change its decision. Instead, he continued to erroneously assume that Safeco had intentionally deceived him even though the claim representative on behalf of Laura and Brian Jones submitted a declaration indicating that she provided him the only information known to Safeco on August 3, 2009. (CP 94-95.) When Safeco's record custodian responded to the second subpoena on October 19, 2009, she provided all documents known and available to Safeco. (CP 120-121.) The fact that the addresses were the same as provided by the claim representative on August 3, 2009, is immaterial. This response contained the information known to Safeco.

Assuming the subpoena contained the mandatory requirements of CR 45, CR 45 only imposes upon the recipient an obligation to produce documents or tangible things in the recipient's possession, custody or control. Safeco did exactly that. In fact, the information provided in October 2009

contained phone numbers for both Mr. and Mrs. Jones. Safeco complied with its obligation even in the face of a totally deficient subpoena. Safeco had no obligation to seek out information not in its possession, custody or control.

DATED this 14 day of March, 2011.

JOHNSON LAW GROUP

By: 
PETER J. JOHNSON, WSBA # 6195
Attorney for Safeco Insurance
Company of Illinois

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2011, I caused to be served a copy of the foregoing by the method indicated below and addressed to the following:

Peter D. Dahlin
Attorney at Law
200 N. Mullan, Suite 202
Spokane, WA 99206
Phone: (509) 891-8596

- U.S. Mail
- Hand Delivery
- Facsimile
- Federal Express

Raymond Schutts
Law Offices of Raymond Schutts
22425 E. Appleway Avenue, Suite 12
Liberty Lake, WA 99019
Phone: (509) 944-2171

- U.S. Mail
- Hand Delivery
- Facsimile
- Federal Express



PETER J. JOHNSON