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RECEIVED
SUPREME COURT
STATE OF WASHINGTON

Supreme Court Cause No. 80328-83
Court of Appeal Cause No. No. 34714-8-II
BY RONALD R. CARPENTER

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CLERK

WACHOVIA SBA LENDING, INC., d/b/a WACHOVIA SMALL
BUSINESS CAPITAL, a Washington corporation,

Plaintiff/Respondent

vs.

DEANNA D. KRAFT, individually,

Defendant/Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STRICT REPLY ON PETITION FOR REVIEW

DOUGLAS N. KIGER, WSBA#26211
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A. Identity of the Petitioner.

Pursuant to RAP 13.4(d), Deanna Kraft provides the following strict reply to the new issue raised by Respondent in its Answer, specifically Wachovia's request for an award of attorney fees and costs by this Court.

B. Issue Presented.

Should Wachovia's request to this court for an award of fees and costs be denied where Wachovia has not been a prevailing party, where Wachovia has never been awarded fees or costs in this matter, and where no party has been awarded fees or costs in this matter?

C. Statement of the Case.

Ms. Kraft incorporates her statement of the case as set forth in her Petition for Review.

D. Argument.

Ironically, after arguing at the trial and appellate court level that Ms. Kraft should not be awarded her fees and costs as a prevailing party, Wachovia asks this court to dismiss Ms. Kraft's Petition for Review and award Wachovia its attorney fees and costs. The request conflicts with public policy in this state, and shines additional light on why Ms. Kraft's Petition for Review should be granted. *Mahler v. Szucs*, 135 Wn.2d 398,

426, 957 P.2d 632, *corrected on denial of reconsideration*, 966 P.2d 305 .
(1998); RCW 4.84.330. Wachovia's requests should be denied.

This request is particularly odd because the argument in support of it is that the rules applied so far to preclude Ms. Kraft's request for fees and costs do not apply to Wachovia. Wachovia argues, "These writings [, the Note, Deed of Trust, and Guaranty,] do not require Wachovia to obtain a 'final judgment' against Kraft for Wachovia to recover its costs and attorney's fees incurred in enforcing the terms of these obligations." Answer of Respondent, page 15. This is precisely why the trial court and court of appeals should have awarded fees to Ms. Kraft. In contrast, Wachovia has not been successful whatsoever, to this point in time, in, "...enforcing the terms of these obligations." Answer of Respondent, page 15. Wachovia is asking that this Court enforce Wachovia's one-way attorney fee provision, which would violate the public policy of this state. *Mahler v. Szucs*, 135 Wn.2d at 426; RCW 4.84.330.

Wachovia also argues Ms. Kraft should be liable for attorney fees and costs because Ms. Kraft's settlement offer expired prior to trial, which, "...caused Wachovia to dismiss the underlying lawsuit." There is no evidence in the record that Ms. Kraft's expired settlement offer

“caused” anything, and in fact it did not cause anything.¹ All this shows is that Wachovia was grossly unprepared for trial, which should have actually been a reason to award fees to Ms. Kraft. *In re the Guardianship of Freitas*, 58 Wn.2d 400, 363 P.2d 385 (1961); *Walji v. Candyco*, 57 Wn.App. 284, 288-289, 787 P.2d 946 (1990).

Next, Wachovia implies that Ms. Kraft’s Petition for Review is frivolous, referring to the fact that the issues submitted for review were clearly an issue of first impression. Although, as set forth in her Petition for Review, Ms. Kraft respectfully disagrees that these are issues of first impression, that is not a basis for finding that a petition is frivolous. In fact, if this is truly an issue of first impression in the state, it is wholly reasonable for Ms. Kraft to seek review of the decision by the Supreme Court if the other factors set forth in RAP 13.4(b) exist. *See* RAP 13.4(b)(4).

Finally, in its only citation to authority to support its request for an award of fees, Wachovia refers to RAP 18.1(a). This rule provides that fees are appropriate if authorized by other law. According to Wachovia, this other law is, “the attorney’s fees provisions in the subject loan and security documents, recognized grounds in equity, the procedural posture

¹ In fact, there is no evidence in the record of the settlement negotiations discussed at length by Wachovia, which (together with ER 408) gave rise to Ms. Kraft’s motion below to strike those portions of Wachovia’s brief.

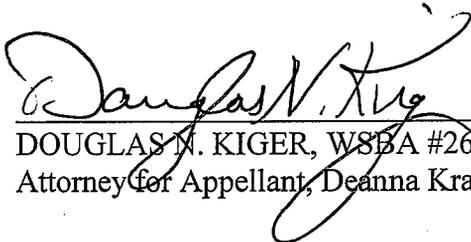
of this case, and the particular facts and circumstances....” Answer of Respondent, page 16. Wachovia’s request should be denied because Wachovia dismissed their claims specifically arguing each party should bear their own costs and fees (RP 11:13-23); because equity, the procedural posture of the case, and particular facts and circumstances of the case would actually support an award of fees and costs in favor of Ms. Kraft (*Wachovia SBA Lending v. Kraft*, 158 P.3d 1271, 1275 (2007)); and because the request to enforce Wachovia’s one-way attorney fee clause is contrary to Washington’s public policy (*Mahler v. Szucs*, 135 Wn.2d at 426; RCW 4.84.330).

E. Conclusion.

Wachovia’s request for an award of fees and costs should be denied, and the Court should grant Ms. Kraft’s Petition for Review.

RESPECTFULLY SUBMITTED this 2nd day of August, 2007.

BLADO KIGER, P.S.


DOUGLAS N. KIGER, WSBA #26211
Attorney for Appellant, Deanna Kraft

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

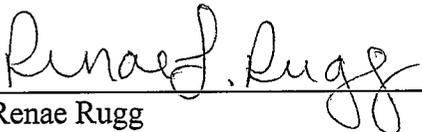
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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 3rd day of August, 2007, she placed with ABC Legal Messengers, Inc. an original of the Reply Brief of Ms. Kraft, to which this Certificate is attached, and this Certificate of Service for filing with the Supreme Court, and true and correct copies of the same for delivery to the following parties and their counsel of record:

PARTY	ATTORNEY FOR PARTY
Wachovia SBA Lending, Inc., d/b/a Wachovia Small Business Capital	Alexander S. Kleinberg Eisenhower & Carlson, PLLC 1201 Pacific Ave., Suite 1200 Tacoma, WA 98402

DATED this 3rd day of August, 2007, at Tacoma, Washington.

BLADO KIGER, P.S.


Renae Rugg