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ORIGINAL

NO. 640429

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

SAFECO INSURANCE COMPANY OF ILLINOIS,

Plaintiff/Respondent,

v.

KEN BURETTA AND CAROL BURETTA, husband and wife, AND
BRIAN P. RUSSELL, an individual,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
THE HONORABLE PARIS KALLAS

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT

This case was not and is not a case about subrogation. The claims made in Safeco's Appellate Brief are not found in Safeco's Complaint against Russell filed in the King County Seattle District Court, (hereinafter "District Court"). There is no claim in Safeco's Complaint that Russell had a subrogation or reimbursement obligation to Safeco. This case is about Safeco's attempt to obtain leverage against its insureds, The Burettas, by naming the insured's attorney as a party to a lawsuit, where Safeco only had contractual claims of reimbursement between it as insurer and its insureds, the Burettas. These are the only claims expressed in the Complaint filed by Safeco. CP. 229-231. This case is more importantly about Safeco's refusal, when given the opportunity, to dismiss Russell from the lawsuit without strings attached.

This case also is not about what Safeco could have pled as claims against Russell, but what it actually pled in its Complaint filed in District Court. The actual Complaint filed by Safeco simply stated that Defendant Russell is an attorney practicing law in King County, Washington, and represented Mr. and Mrs. Buretta. In argument, both in the lower courts and now on appeal, Safeco asserts various claims and theories, none of which is contained in

its Complaint. At no time did Safeco, instead of contesting dismissal, actually move to amend its Complaint to assert some legally cognizable claim against Russell.¹

Likewise, Safeco could simply have paid the costs of an improperly and poorly pled Complaint in the District Court. It could have dismissed and refiled doing a better job in its pleadings of asserting the claims that are now being made on appeal. Instead, Safeco elected to contest dismissal, move for reconsideration and appeal the District Court's decision to dismiss a Complaint it has now conceded was without merit. The risk and cost of this approach is that Safeco must stand ready to pay the cost of its continued litigation and appeal if it is not successful in convincing a court it stated a proper legal claim against Russell initially.

The District Court Order of October 20, 2008, found the lawsuit against Russell was frivolous. CP18,19. Safeco's continuing pursuit of a frivolous action by contesting dismissal, through a Motion for Reconsideration and an appeal to the Superior Court required a response and defense by Russell. The fees and costs

¹ The Appellant and the author of the briefing is Brian P. Russell, and instead of referring to him in the first person, will be designated as Russell, or Attorney Russell throughout this Reply.

necessarily incurred in defending initially the frivolous action, and subsequently the continued litigation of the dismissal should be awarded to Russell.

Russell afforded Safeco the opportunity to dismiss the lawsuit against him prior to filing his Motion to Dismiss. CP 46, 47-49. In each instance Safeco conditioned its dismissal on Russell's cooperation in an action by Safeco against his clients Mr. and Mrs. Buretta and further required Russell to take positions against his clients' interests. CP 47-49. Yamada Declaration in Support of Reconsideration, Exhibit A, Stipulation and Order of Dismissal of Russell. CP 96, 97. The stipulation proposed by Mr. Yamada provides a statement that "The Burettas were made whole by the settlement with Defendants in the underlying lawsuit."

A more onerous condition on Safeco's offer to dismiss Russell is contained in Paragraph 3 of its proposed stipulation in which it insisted that Russell stipulate that he had advised Burettas that they contractually and equitably owed reimbursement to Safeco. CP 96. After the filing and service of this lawsuit against Russell and Russell's Counterclaim against Safeco, Safeco had the opportunity to re-evaluate the legal basis of the claims that it

asserted against Russell due to Russell's Counterclaim, but instead, filed an Answer to Russell's Counterclaim denying any CR 11 violation. Safeco opposed Russell's Motion to Dismiss. After determining that sanctions were appropriate, the District Court awarded attorney fees to Russell in a reasonable amount found by the court to have been expended in responding to sanctionable claims. Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994).

Safeco's Motion for Reconsideration and its subsequent appeal to the Superior Court of the Order dismissing its frivolous action, caused Russell to incur additional legal fees and costs in defending against a frivolous lawsuit on reconsideration and subsequently on appeal. Manteufel v. Safeco Insurance Co., 117 Wn.App. 168, 68 P.3d 1093 (2003). Mr. Wathen, who represented Safeco in the underlying action and Safeco knew that the claims asserted against Attorney Russell were frivolous, having been a party to a frivolous action against an attorney. Mantefuel, supra.

II. REPLY TO ASSIGNMENTS OF ERROR

Safeco submits three issues in support of its Appellate Response. First, Safeco claims that an abuse of discretion standard applies to whether Russell was entitled to recover attorney fees and costs under CR11. Secondly, Safeco contends its appeal was not

frivolous or interposed for any improper purpose. Finally, Safeco contends Russell waived his right to seek fees when he consented to the voluntary dismissal of the RALJ appeal.

Whether a party is entitled to an award of attorney fees is a question of law that the Appellate court reviews de novo. Bloor v. Fritz, 143 Wn.App. 718, 747, 180 P.3d 805 (2008); Tradewell Group v. Mabis, 71 Wn.App. 120, 126; 857 P.2d 1053 (1993). The amount of an attorney fee award is reviewed for abuse of discretion. Mahler v. Szucs, 135 Wn.2d 398, 435; 957 P.2d 632, 966, P.2d 305 (1998). Here, the court is not asked to review the amount of the award of attorney fees by the Superior Court, but review is requested of the Superior Court's decision that Russell was not entitled to any attorney fees. Secondly, Safeco's original Complaint against Russell was found to be frivolous and was interposed for an improper purpose by the District Court. The improper purpose was to coerce Russell into signing a stipulation to be used against the Burettas on Safeco's reimbursement claim. CP 47-48. Safeco's RALJ Appeal was frivolous in that it was further litigation of the action which had been found by the District Court to be frivolous. Finally, Russell did not waive fees by consenting to Safeco's Voluntary Dismissal of its RALJ appeal. Russell had no authority to contest Safeco's Voluntary

Dismissal of its RALJ Appeal. Russell specifically argued and requested that the Order of Dismissal reflect preservation of his claim for attorney fees on the RALJ appeal. Russell did not move for nor consent to dismissal of his cross appeal. Nor did the RALJ dismissal order reflect dismissal of the cross appeal. CP 233, 234.

III. REPLY TO SAFECO'S STATEMENT OF THE CASE

Safeco states in its overview a Safeco insured's attorney failed to protect Safeco's subrogation interest in an underlying tort action. This case has nothing to do with Safeco's subrogation or reimbursement interest which is a contractual matter between it and its insureds, Mr. and Mrs. Buretta. In fact, this case is about Safeco's poor pleading and the use of litigation to coerce the insured's attorney into assisting in collection of a PIP reimbursement. Safeco claims its lawsuit against Russell was because he failed to protect Safeco's reimbursement interests which he had an obligation to do. Respondent's Brief, Page 2. Mahler v. Szucs, supra.

The parties never reached the issue of whether Russell was obligated to protect Safeco's contractual claim of reimbursement. Nor did the trial court, because it was never pled by Safeco in its Complaint. CP 229-231. Nor does Mahler v. Szucs supra, hold that

an insured's attorney is personally liable for an insurer's claim of reimbursement against its insured. There is no such right for Safeco to recover from Russell under Mahler v. Szucs, supra. Safeco states it alleged that Buretta and Russell were jointly and severally liable for repayment of its subrogation interest in District Court. Respondent's Brief, Page 2. No such claim was before the District Court. The only allegations related to Russell in the Complaint were that he is an attorney at law, represented Ken Buretta as a Plaintiff involved in a motor vehicle accident and that he maintains a law office in King County, Washington. CP 229-231. There is no allegation that Buretta and Russell were jointly and severally liable, nor any allegation that Russell owed any repayment of Safeco's subrogation interest in the Complaint. In fact, the Complaint claimed a right of reimbursement from the Defendant in the singular, referring to Mr. Buretta. Safeco further claims that Judge Nault dismissed the Complaint against Russell without reviewing Safeco's response nor did he evaluate the elements of CR 11. There is no citation to the record supporting these claims. Certainly on reconsideration, Judge Nault considered Safeco's Response to the Motion to Dismiss, its Motion for Reconsideration and Safeco's arguments on the necessary elements for CR 11 Sanctions. CP 29-44.

Safeco's background facts are primarily not relevant and not accurate. Safeco claims it was under the reasonable belief that Russell would protect its subrogation interest. This belief was not well-founded. CP 135, 136-139; CP 129-131. CP 74, 75. Safeco argues that Russell would not abide by Mahler and failed to advise Safeco of the underlying litigation and settlement. Respondent's Brief, p. 5. Although these factual claims are disputed, this case is not about subrogation or Safeco's claim for subrogation against its insureds, the Burettas. Safeco made a claim and filed a lawsuit against the Burettas in the District Court seeking reimbursement of PIP payments. It later dismissed the lawsuit and claim against the Burettas with prejudice. CP 129-131.

A. **Safeco's proposed stipulated dismissals.**

Russell did not agree to represent Safeco on its PIP claim. CP 129-131. Almost a month before Russell's Motion to Dismiss, and after it had received Russell's Counterclaim, Safeco knew Russell should be dismissed from the lawsuit. It proposed two Stipulations and Orders of Dismissals, both with unacceptable conditions for dismissal of Russell.

In August 2008, Safeco's attorney, Mr. Yamada, admitted that Russell should not be in the lawsuit. CP 46, 47. Safeco's first

attempted stipulated dismissal asked Russell to stipulate that he had advised the Burettas that they owed Safeco a subrogation reimbursement and that the Burettas had been made whole by their settlement. This was not only objectionable, but untrue. CP 47, 95-97. Russell responded and corrected Mr. Yamada's misrepresentations. CP 98. Mr. Yamada responded with a second Stipulation and Order of Dismissal of Russell. CP 47-49. This stipulation was also unacceptable because it allowed Russell to be brought back into the lawsuit and it attempted to restrict defenses that could be asserted by Russell's clients, The Burettas. CP 48, 49, 99-101.

Russell initially filed his Motion for Dismissal with a hearing date of September 29, 2008. CP 185. Russell agreed to Safeco's request to continue the hearing to October 20, 2008. CP 49. Safeco's factual discussions of its multiple attempts to dismiss Russell acknowledges that Russell should not have been a party to its lawsuit against Buretta.

B. Russell's Motion to Dismiss.

On October 20, 2008, Russell appeared at the hearing for the Motion to Dismiss. An Order was entered dismissing him from the lawsuit and awarding attorney fees. CP 396, 397. Safeco claims that

it believed that the motion was continued. Mr. Yamada and Safeco made misrepresentations to the District Court regarding the October 20, 2008, hearing. Safeco states that it believed that the hearing would be continued. Actually, Safeco originally denied receiving any pleadings indicating that the Motion to Dismiss would be heard on October 20, 2008. When shown proof that they were actually served with Russell's Reply to Safeco's Response to the Motion to Dismiss, a Note for Motion indicating the hearing date of October 20, 2008, a letter from Russell dated October 15, 2008, indicating its intent to go forward with October 20, 2008 hearing and Russell's Declaration for Attorney Fees and Costs, Safeco now claims a clerical error. CP 49-71.

C. Safeco's Reconsideration

Safeco contends it agreed to dismiss Russell at the reconsideration hearing. There is no evidence cited. In fact, Safeco's Motion for Reconsideration would indicate that it argued against both the Order dismissing Russell, as well as the court's award of attorney fees. At the reconsideration hearing, it was a little too late to be agreeing to dismissal of Russell since the court had granted dismissal on October 20, 2008. CP 18, 19. Safeco alleges the District Court made no findings the lawsuit against Russell was

frivolous or advanced for unreasonable grounds. Respondent's Brief, p. 12. In the Order Granting Dismissal of Russell, the District Court found that Plaintiff Safeco Insurance Company's Complaint and claims against Defendant Russell were frivolous and advanced without reasonable cause. CP 18. Safeco states that a reading of Safeco's Response to the Motion to Dismiss would demonstrate its good faith in filing the Complaint against Russell. Safeco's self-serving statements of good faith are unpersuasive. The District Court had Safeco's Response to the Motion to Dismiss and all of its pleadings in support of its Motion for Reconsideration when it denied Reconsideration on December 15, 2008. CP 16, 17. The District Court's review of Safeco's Response to the Motion to Dismiss and its Motion for Reconsideration did not demonstrate or show good faith, but only confirmed the lack of merit in its Complaint against Russell.

D. Safeco RALJ Appeal/Russell Cross Appeal

Safeco appealed the Order of Dismissal. Russell Cross Appealed the Order Denying Fees on Reconsideration. On May 1, 2009, at the Readiness Hearing, Safeco voluntarily withdrew its appeal. CP 233-234. The dismissal order does not also dismiss Russell's Cross Appeal. Not only did Russell not agree that the dismissal affected his cross appeal, but specifically requested that he

be allowed to continue his request for attorney fees. Superior Court Theresa Doyle at the time of entering the Order included the interlineation on the Order that Russell will file a Motion for Attorney Fees and Costs before the Chief Civil Judge. Russell agreed to the dismissal of Safeco's Appeal, but not his cross appeal.

After dismissal of Safeco's RALJ Appeal, it proposed payment of the underlying District Court Judgment. No payment was tendered and no satisfaction was provided. After Safeco's RALJ appeal was dismissed, Safeco proposed a Stipulation and Order of Dismissal of the District Court action against the Burettas. Russell advised Safeco that he would allow dismissal, provided that language was stricken requiring all parties to bear their own fees, allowing him to proceed with his motion for attorney fees. CP 454.

Russell proceeded pursuant to the May 1, 2009, Order with a Motion for Attorney Fees before the Chief Civil Judge, Paris Kallas. CP 235-293. Safeco opposed the Attorney fees on RALJ appeal, claiming that Russell's attorney fees could have been avoided if he had agreed to dismissal. Safeco also argued that naming the attorney in a PIP subrogation is well grounded in fact and law, and that the case had been fully adjudicated in District Court. CP 294-305.

Russell's attorney fees could have been avoided had Safeco never filed its frivolous Complaint, or had agreed to dismissal of Russell without unreasonable strings attached, or had accepted the first Order of Dismissal by the District Court. Russell's attorney fees could also have been avoided had Safeco not filed its Motion for Reconsideration of the Dismissal, or if Safeco had not filed a RALJ appeal.

On July 23, 2009, King County Superior Court Judge Paris Kallas denied Russell's request for fees on his cross appeal of the reconsideration motion, on his counterclaim and on the RALJ appeal. Judge Kallas made no findings only concluding as a matter of law, that Russell had no right to fees on appeal. On the more important issue, Russell in fact prevailed on his Counterclaim when Safeco dismissed its District Court Complaint against both the Burettas and Russell, and dismissed its RALJ Appeal with prejudice.

IV. REPLY TO SAFECO ARGUMENT

A. Standard of Review.

A ruling by the Superior Court that Russell is not entitled to an award of attorney fees is a question of law which is reviewed de novo. *Bloor v. Fritz*, 143 Wn.App. 718, 747, 180 P.3d 805 (2008); *Tradewell Group v. Mabis*, 71 Wn.App. 120, 126; 857 P.2d 1053

(1993).

B. Safeco's Suit against Russell was well grounded in fact and law.

Safeco clearly argues issues that are not found in its Complaint. Maybe the issues argued in its Respondent's Brief are what it wished it had pled and maybe they apply to a different case, but they do not apply to the Complaint Safeco filed against Russell. The court must look to the Complaint filed by Safeco to determine what facts are alleged that were warranted by existing law and which would provide sufficient law and facts that would entitle Safeco to recover against Russell. What law supports Safeco's claim that simply by practicing law and representing the Burettas in a motor vehicle accident claim, Russell owes a duty and is liable to Safeco for damages. CR 11 is designed to deter baseless filings which lack a factual or a legal basis. The District Court found the Complaint filed by Safeco was baseless, and apparently Safeco agrees, having dismissed all claims against Russell after a great deal of litigation. There is no legal basis stated in the Safeco Complaint for any claims against Russell. Safeco alleges its Complaint was well grounded in fact. Respondent's Brief, p. 19. The claims of the Respondent's Brief and the issues and facts Safeco is now arguing are found nowhere in

its Complaint. Safeco contends that its Complaint against Russell is supported by existing law, citing Mahler v. Szucs, supra. Mahler does not hold an insured's counsel has a personal duty and has liability owed to an insurer. Mahler deals with the insurer's right to recover payments made to an insured or payments made on behalf of an insured. Russell is counsel to the Burettas, but is not Safeco's insured.

Safeco discusses Truong v. Allstate, 151 Wn.App. 195, 211 P.3d 430 (2009), at p. 20 of its brief. The Truong case again discusses a claimant's obligation to reimburse payments. The Truong case dealt with Allstate's action against its insured on a claim of reimbursement.

Safeco, on appeal claims Russell has a personal obligation for Safeco's PIP reimbursement claim against the Burettas, although in their initial proposed Stipulation and Order of Dismissal of Russell, Safeco proposed to stipulate that it would not, that it does not and will not seek any judgment and reimbursement from Defendant Brian Russell. CP 97. Safeco argues it is common practice for an insured's attorney to put the insurer on notice that it's seeking recovery, including the subrogation, and that he will be seeking fees under Mahler. This did not factually happen with

respect to the Burettas. Russell provided no notice to Safeco that he would be seeking recovery, including the subrogation claim, and thereafter, would be seeking attorney fees pursuant to Mahler.

Safeco pursued the tortfeasor's insurer, Allstate, directly on its reimbursement claim. CP 74; Scott Beltrani Declaration, Exhibit E; CP164, 165, 181. Safeco argues that when a Plaintiff's attorney so notifies the insurance carrier, he has a duty to secure the subrogation claim of the insurance carrier. Safeco further argues that when the attorney fails to do so, he is liable in damages for failure to protect the subrogation claim of the carrier. Safeco cites Mahler and Winters v. State Farm, 144 Wn.2d 869, 31 P.3d 1164, (2001), for support of this contention. Neither Mahler or Winters stands for the proposition that the Plaintiff's attorney owes a duty to secure the subrogation claim of the insurance carrier. Neither case holds the attorney liable in damages for failure to protect the subrogation claim of the insured.

Safeco has spent several pages reviewing Mahler v. Szucs id.; Winters v. State Farm and Truong v. Allstate, all discussing an insurer's claim for reimbursement of PIP benefits from an insured. This is a great discussion but it has very little to do with the issues involved on this appeal. This appeal is not about Safeco's lawsuit against its insureds, the Burettas, to recover PIP payments. Safeco

dismissed with prejudice its lawsuit against the Burettas seeking reimbursement.

Safeco claims that Russell was named in the Buretta lawsuit not simply to harass him. It appears that Safeco's decision to name Russell as a party to the lawsuit was intended to coerce him into providing evidence detrimental to the Burettas' defense of Safeco's reimbursement claim. After the lawsuit was filed, and Russell asserted his Counterclaim, Safeco immediately recognized that Russell should be dismissed. Safeco proposed two stipulations for dismissal which conditioned dismissal on unacceptable terms in placing Russell in a position against his clients, the Burettas. CP 47-49, 95-99, 100, 101. Safeco contends that it had reason to believe that its subrogation interests were not protected and therefore it filed a Complaint against Russell, making no allegation against Russell, but simply making a reimbursement claim against the Burettas. CP 229-231. Safeco in fact pursued its own subrogation interest with the tortfeasor's insurer, Allstate, directly. CP 74, 164, 165, 181.

C. **Safeco Conceded.**

Safeco states it did not concede it violated CR 11. After the District Court denied Safeco's reconsideration, Safeco appealed. Upon Safeco's dismissal of its RALJ appeal, the District Court's Order

finding Safeco had violated CR11 became the law of the case. Safeco's voluntary dismissal of its RALJ appeal conceded the holding of the District Court Order finding it in violation of CR11. This ruling became the law of the case. An unchallenged conclusion of law becomes the law of the case. King Aircraft Sales, Inc. v. Lane, 68 Wn.App 706, 716, 846 P.2d 550, (1993). Whether Safeco considers the District Court's finding that it was in violation of CR11 was an issue or claim, Safeco is precluded from re-litigation of that issue on this appeal. Collateral estoppel prevents re-litigation of an issue after the party estopped has had a full and fair opportunity to present its case. Barr v. Day, 124 Wn.2d 318, 879 P.2d 912 (1994). Once Safeco withdrew its appeal of the District Court Order finding it in violation of CR11, it may not now raise that issue.

Safeco claims it had the right and the obligation to appeal the District Court's dismissal of Russell and finding of CR11 sanctions. Safeco certainly had the right to move for reconsideration and appeal, but that right also comes with risk. If Safeco was not justified in bringing its lawsuit against Russell initially, its continued litigation of the dismissal through reconsideration and appeal also is without merit.

D. Consumer Protection Act

Safeco contends that Russell should not be able to argue violation of the Washington Consumer Protection Act, since Russell did not assert a cause of action under the CPA. Respondent's Brief, p. 23. Russell, in fact, in his Answer and Counterclaim to Safeco's lawsuit asserted a claim for an award of attorney fees and costs under CR 11, RCW 4.84 and the Consumer Protection Act. RCW 19.86. CP 212.

V. CONCLUSION

The King County Superior Court ruled as a matter of law that Russell was not entitled to attorney fees on his cross appeal of the denial of fees on reconsideration, on his counterclaim or on Safeco's dismissed appeal of the District Court Order of dismissal. The Superior Court erred in finding that Russell did not preserve his claim for attorney fees on reconsideration; that Russell did not prevail on his counterclaim and that there is no basis to grant fees unless Russell prevails on his counterclaim. The superior court also erred in finding that there is no basis for an award of attorney fees on appeal without findings on appeal that the RALJ was frivolous.

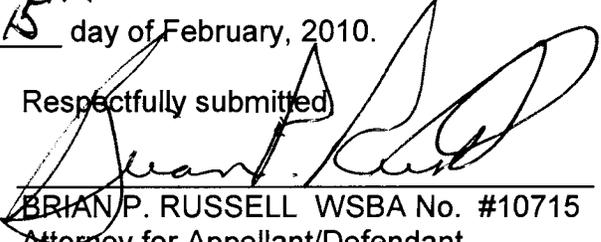
It's clear that Safeco should not have filed and served a baseless lawsuit naming Brian P. Russell as an individual. Safeco

should have agreed to dismissal but refused Russell's request for a dismissal, forced Russell to bring a motion to dismiss, and then opposed the motion to dismiss. Safeco should have accepted dismissal by Judge Nault's October 20, 2008, Order, but instead further pursued an untenable claim by *seeking reconsideration*, forcing Russell to respond. Instead of accepting the Order denying reconsideration, Safeco continued frivolous prosecution of unwarranted claims by filing an *Appeal*. Again, Safeco's unreasonable actions required Russell to defend and respond to the Appeal.

The Superior Court's Order of July 23, 2009, denying Russell's request for attorney fees on reconsideration, on his counterclaim, and on the RALJ appeal should be reversed. Russell's Request for Award of Attorney Fees against Safeco pursuant to CR11, RCW 4.84.185, RCW 19.86.010 et seq., and RAP 18.2 should be granted. Russell should be awarded judgment against Safeco for his attorney fees incurred in defending actions by Safeco that were factually and legally baseless.

DATED this 15th day of February, 2010.

Respectfully submitted


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