

NO. 65197-8-I

COURT OF APPEALS DIVISION I

COUNG TRANLA and KHAI TRANLA
Husband and Wife, and the marital community thereof,

Appellant(s),

v.

Mr. AMADOR ZAMORA and JANE DOE ZAMORA,
and their mutual community thereof, d.b.a.
ATOMIC CONSTRUCTION;
AMERICAN CONTRACTORS INDEMNITY CO.
BOND No. 1002004,

Appellee(s).

APPELLANT'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT FOR
KING COUNTY

The Honorable John Erlick, Judge
Cause No. 08-2-05190-1 SEA

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A. ARGUMENTS IN REPLY

1. THE COURT SHOULD NOT DISMISS THE APPEAL OR AWARD ATTORNEY FEES.

a. The record provided was adequate.

In Zamora's response brief, he claims that Appellant failed to adequately provide a sufficient record to the Appellate Court or to himself. Specifically, Zamora claims that the designation of clerk's papers was insufficient due to the failure of Appellant in providing the findings of fact and conclusions of law of the Trial Court.

Zamora is correct, Washington Rules of Appellate Procedure ("RAP") 9.6(b)(1)(E), provides that the clerk's papers shall include any written opinion, findings of fact and conclusions of law. Appellant included the Final Judgment included the findings of fact and conclusions of law was included in the amended designation of clerk's papers filed on August 16, 2010, which is reflected on the court of appeals docket as filed on September 1, 2010. Additionally, for convenience, Appellant attached a copy of the findings of fact and conclusions of law to their appellate brief. The same amendment was mailed to Zamora's counsel.

RAP 9.6(b)(1)(E) does not require that Appellant designate any other documents other than those specifically called for in RAP 9.6.

Unlike Zamora's allegations, Appellant is not required to include Zamora's trial brief in the designation of clerk's papers.

Zamora also relies on *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 574, 1141 P.3d 1 (2006), to support his contention that the Court should dismiss Appellants appeal since Appellant had the burden to provide the designation of records, and had allegedly failed to provide the same.

In *Cowlitz*, the court ruled that it would not hear an issue on appeal, since the appellant failed to abide by RAP 9.6(a). The appellant in *Cowlitz* failed to provide the portions of the trial courts order or findings that supported one of the issues on appeal, the determination of the last injurious exposure rule. The appellant in *Cowlitz* merely "provided an order which directed the payment of loss compensation benefits...within the *facts of the law*." (Emphasis added). The court ruled that since no other information on the issues were presented and it had not used the rule in similar cases, it would not allow appellant to use the rule without a finding by the lower court to the same.

Unlike *Cowlitz*, Appellant in the present case provided the entire record in which it relied on to this Court and Zamora. Appellant not only designated the same, but Appellant also attached the findings of fact and

conclusions of law, which the issues for the appeal were based on, to their brief.

Finally, pursuant to RAP 9.6, any party or the court may supplement the designation of clerk's papers and exhibits. Additionally, pursuant to RAP 9.10, the appellate court has the power to correct or supplement the record on its own. *Heilman v. Wentworth*, 18 Wn. App. 751, 571 P.2d 963 (1977).

Zamora was provided the opportunity to supplement the clerk's papers, which he stood idle and chose not to supplement. Thereafter, subsequent to when his brief was finally filed, did Zamora make these allegations. Had Zamora wished to have additional items included in the designation of clerk's papers, he should have followed appropriate protocol by self-initiating the designation.

In *Heilman, supra*, the Court decided that it would not supplement the record to cure the failure of the appellant in which appellant failed to order the entire portion of the report of proceedings relevant to the issues presented and relied on by the Appellant. The Court recognized that rules of appellate procedure are liberal for correcting or supplementing a record, even though the court is not obligated to do the same. Finally, the court declined searching through an incomplete record in order to supplement the record.

In the present case, Appellant included all the necessary documents in its designation of clerk's papers and other documents submitted with the present appeal. Unlike *Heilman*, this Court would not need to aimlessly search through documents not submitted or designated by the Appellant.

Therefore, in spite of any alleged error in the designations by Appellant, the Court should through its power, use the liberal RAP and supplement the designation of clerk's papers as necessary, not dismiss the present appeal, thereby prejudicing the Appellant.

b. Appellant adequately assigned the errors, cited the record, and was not required to state the standard of review.

Zamora claims that Appellants brief is prejudicial since Appellate allegedly failed to assign the errors, cite to the record, or cite the standard of review for each issue for the errors appealed.

RAP 10.3(g) states that "a separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error

which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.”

Appellate assigned four errors with the Trial Courts ruling with numerous sub-errors. Appellant listed the errors as they were alleged from the Trial Courts findings of fact and conclusions of law. Appellant cited to the amended designated clerk’s papers (“CP”) 35 for each assignment of error, as this was where the errors could be found. While Appellant did not cite to the actual numbers, there was adequate reference to the Trial Courts findings of fact and conclusions to direct the Appellant to the CP and alleged errors by the Trial Court. Additionally, Appellant argued the errors in the order the Trial Court judge had ruled.

Next, Zamora claims that that Appellant failed to include citations to the record for the factual statements. Zamora presumably has failed to review Appellants amended brief.

Pursuant to RAP 10.3a (5), the statement of the case shall include “A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.”

Appellant presented what she believed to be a fair statement of the facts and procedure relevant to the issues presented for appeal and cited the facts presented to the record in the designation of clerk’s papers

and trial transcript. Throughout the Appellants amended appellate brief, Appellant referenced the clerk's paper, the trial exhibits, and trial transcripts. Appellate is unaware of any facts from the statement of the case which failed to reference the record in a way which would prejudice Zamora.

Pursuant to RAP 10.3a (6), the argument consists of "statement in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue."

Again, the Appellants argument referenced the record whether it is through the clerk's papers, trial exhibits, transcripts, or the additional exhibits attached to Appellants brief provided as a convenience for Zamora and the Court.

Finally, Zamora argues that because Appellant did not cite the standard of review, Appellants brief should be dismissed and that Zamora's counsel was forced to spend a substantial amount of time determining the standard of review. RAP 10.3 does not require the Appellant to designate the standard of review for the issues presented for appeal. While RAP 10.3 may suggest that the standard of review is

presented, no where do the rules require the standard of review to be presented in the appeal.

Therefore, many, if not all, of Zamora's allegations as they pertain to the designation of clerk's papers and citations to the record are unfounded and should not be entertained by this Court. While Appellant did not specifically reference the assignments of error by the numbers as they were provided in the Trial Courts findings of fact and conclusion of law, Appellant did provide adequate reference to the findings of fact and conclusions of law designated in the clerks papers, in order to direct Zamora and this Court to the errors of assignment without prejudicing Zamora.

c. Attorney fees and costs should not be granted.

Zamora claims in his brief that since Appellant allegedly did not comply with the RAP 9.6 and 10.3, he is entitled to attorney fees and dismissal of Appellants case. Zamora specifically cites RAP 18.9 (a) to support his claims for attorney fees.

Pursuant to RAP 18.9(a) "The appellate court on its own initiative or on *motion* of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules *for the purpose of delay*, files a *frivolous appeal*, or fails to comply with these rules to pay terms or

compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” (Emphasis added).

As stated above, RAP 18.9 (a) requires the party requesting relief under RAP 18.9 (a), to make such request in the form of a motion and not in a brief. Zamora did not request the attorney fees in the form of a motion; instead he requested them in his brief itself. This alone is sufficient for the denial of the fees requested by Zamora.

Further, as stated above, many of the allegations by Zamora as to inadequacy of the record, failure to provide the findings of fact and conclusions of law in the designation of clerk’s papers, and failure to cite the standard of review are false. As Appellant’s amended brief has shown, and the above arguments, that the records were cited, designations were proper, and discretionary standards not cited, were standards that *may* have been cited, not *shall*.

RAP 18.9(a) seems to be more of a punishment for failure to follow court rules, orders, and timing requirements. RAP18.9 (a) does not seem proper when Appellant followed the rules as set forth in RAP 9.6 and 10.3, other than the numerical numberings of the assignments of errors. Appellant in good faith provided an adequate record in order to show the assignments of error designated and Appellant numerically

followed the Trial Courts errors when they set forth the assignments in their amended brief.

Zamora's counsel claims that they were required to spend time in making the determination of what Appellants assignments of error and arguments consisted of. Zamora merely, claims that since the assignments of error were not referred to by the filing number, this Court should dismiss the appeal, even when the errors were referred to, they were included in the clerk's papers, and attached to the brief. Any appeal takes time to formalize a response to the issues presented and arguments against the same. The time expended by Zamora's counsel should not be a standard for the dismissal of the appeal or granting attorney fees.

Finally, Zamora's seems to request this Court implement a sanction against Appellate for allegedly failing to abide by RAP when Zamora himself failed to abide RAP 10.3. RAP 10.3 states that an Appellee's brief is due 30 days after the service of the Appellants brief. Appellants brief was filed September 2, 2010. Zamora's brief was due October 3, 2010. Zamora failed to file his brief timely and only filed his brief after a motion to dismiss his rights had been filed by this Court. See Appellate Courts Motion to dismiss for failure to file by Zamora dated October 11, 2010.

Zamora was provided with all of the documents filed by Appellant along with a copy of the Trial Courts transcript in a timely manner, yet now Zamora makes the allegations that since Appellant allegedly failed to abide by RAP 9 and 10, their appeal should be dismissed and attorney fees granted. Zamora appears to be requesting equity, when he himself failed to follow the RAP. Therefore, this Court should not grant Zamora's request for attorney fees since Zamora himself failed to follow RAP and his arguments for dismissal and fees are based on alleged failures of Appellant to properly follow RAP.

2. REMAINING ALLEGATIONS ARE COVERED BY THE APPELLANTS AMENDED BRIEF AND WILL NOT BE COVERED IN THIS REPLY BRIEF.

Other than that stated above and the arguments *supra*, Appellant wishes to have the Court take notice that the appropriate assignment of errors were submitted for each of the issues remaining based on the Trial Courts findings of fact and conclusions of law as referenced in the Appellants amended appellate brief.

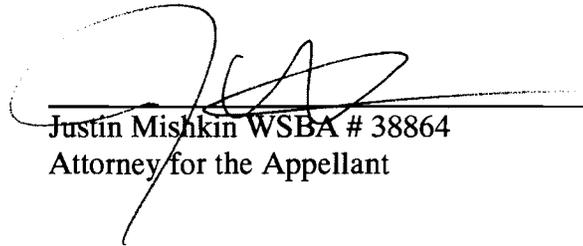
B. CONCLUSION

Based on the forgoing, Appellant respectfully requests this Court find that Appellant has provided an adequate record to move forward with their appeal and that dismissal of the appeal and awarding attorney fees is improper, since: (1) Zamora failed to properly bring a motion requesting

the attorney fees as provided by RAP 18.9 (a) and, (2) attorney fees are generally not granted or proper in the current appeal.

DATED this 4th day of January, 2010.

Respectfully submitted.



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