

No. 94503-9

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON CAPITAL MORTGAGE, INC.,
a Washington corporation,

Respondent,

vs.

EVAN BARIAULT,

Petitioner,

and

BRAVERN BUSINESSES, LLC,

Defendant.

REPLY ON
PETITION FOR REVIEW

Theron A. Buck, WSBA #22029
Karen L. Cobb, WSBA #34958
Evan D. Bariault, WSBA #42867
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
(206) 486-8000

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner
Evan Bariault

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. INTRODUCTION	1
B. ARGUMENT	1
C. CONCLUSION	3
Appendix	

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Advocates for Responsible Dev. v. W. Wash. Growth Mgmt.
Hearings Bd.*, 170 Wn.2d 577, 245 P.3d 764 (2010).....2
Bharti v. Ford, 145 Wn. App. 1034, 2008 WL 2640085 (2008).....3
Madden v. Foley, 83 Wn. App. 385, 922 P.2d 1364 (1996).....1
Watson v. Meier, 64 Wn. App. 889, 827 P.2d 311,
review denied, 120 Wn.2d 1015 (1992).....2

Codes, Rules and Regulations

RAP 13.4(d).....1

A. INTRODUCTION

Respondent Washington Capital Mortgage, Inc. (“WCM”) contends in response to Evan Bariault’s petition for review that it is entitled to an award of fees on appeal. Bariault provides this reply confined to that new issue raised in WCM’s answer and not asserted in the petition for review. RAP 13.4(d).

B. ARGUMENT

WCM is not entitled to an award of fees in connection with its answer to Bariault’s petition because no rule supports it.

WCM is not entitled to an award under RAP 18.1(j) because the Court of Appeals did not award WCM fees. Op. at 16. WCM *admits* RAP 18.1(j) disqualifies it from a fee award under those circumstances. Answer at 18-19.¹

WCM is also not entitled to a fee award under RAP 18.9(a). WCM seemingly contends that Bariault’s argument that he had a right to a hearing on CR 11 sanctions is frivolous. Answer at 19-20. WCM is wrong.

First, WCM is oblivious to its heavy burden to sustain a determination under RAP 18.9(a) that sanctions are merited. An appeal is

¹ There is not a little irony in WCM seeking sanctions under CR 11 and RAP 18.9(a) when it makes an argument that it *admits* is specifically disallowed by the RAP. *Madden v. Foley*, 83 Wn. App. 385, 922 P.2d 1364 (1996) (attorney sanctioned for pleading common law claim abolished in Washington).

frivolous under RAP 18.9(a) only if, considering the entire record, this Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of review being granted. All doubts as to whether the appeal is frivolous should be resolved in favor of a petitioner like Bariault. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). There, this Court held that the Court of Appeals erred in sanctioning a party under RAP 18.9(a) where the party raised one debatable issue on review. *Id.* at 580-81. Here, WCM *concedes* that the issue of whether Bariault should have been sanctioned under CR 11 by the trial court presents meritorious issue for this Court by not claiming otherwise in its answer at 19-20.

Further, with regard to the merits of the argument on the need for a hearing on the sanctions issue, WCM is mistaken in claiming the argument is “inconsonant with the overwhelming authority in the country.” Answer at 19. This Court can look to Washington precedent. In *Watson v. Meier*, 64 Wn. App. 889, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992), then Judge Alexander, writing for Division II, noted that hearings on CR 11 sanctions, although confined to “extraordinary circumstances,” might well be merited, citing with approval the factors developed by the Federal Advisory Committee on the federal counterpart to CR 11:

(1) the circumstances in general; (2) the type and severity of the sanction under consideration; (3) the judge's knowledge of the facts and whether there is need for further inquiry.

Id. at 900. Washington courts have conducted hearings on CR 11 sanctions. *E.g.*, *Bharti v. Ford*, 145 Wn. App. 1034, 2008 WL 2640085 (2008).


For the reasons articulated in Bariault's petition at 17-20, the trial court here failed to afford him an adequate opportunity to be heard on sanctions. The trial court never conducted a hearing where the facts and witness credibility that bore on sanctions were decidedly in dispute.

C. CONCLUSION

For the reasons set forth in Bariault's petition, this Court should grant review and reverse the trial court's CR 11 sanctions order. Even if the petition is denied, it should deny WCM's belated, and baseless, plea for an attorney fee award.

DATED this ~~14th~~ day of June, 2017.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Theron A. Buck, WSBA #22029
Karen L. Cobb, WSBA #34958
Evan D. Bariault, WSBA #42867
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101
(206) 486-8000
Attorneys for Petitioner
Evan Bariault

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Reply on Petition for Review* in Supreme Court Cause No. 94503-9 to the following:

Theron A. Buck
Karen L. Cobb
Evan D. Bariault
Frey Buck, P.S.
1200 Fifth Avenue, Suite 1900
Seattle, WA 98101

Richard L. McKinney
Law Office of Richard McKinney
2701 California Avenue SW
PMB 225
Seattle, WA 98116-2405

Francis G. Huguenin
Ally Legal, Inc. P.S.
1001 Fourth Avenue, Suite 3200
Seattle, WA 98154-1003

Richard L. Jones
Kovac & Jones, PLLC
1750 112th Avenue NE, Suite D151
Bellevue, WA 98004-3768

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 14, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

June 14, 2017 - 10:33 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94503-9
Appellate Court Case Title: Washington Capital Mortgage Inc. v. Evan Bariault
Superior Court Case Number: 14-2-29631-2

The following documents have been uploaded:

- 945039_Answer_Reply_20170614102848SC495913_0206.pdf
This File Contains:
Answer/Reply - Reply to Answer to Petition for Review
The Original File Name was Reply on Petition for Review.pdf

A copy of the uploaded files will be sent to:

- assistant@tal-fitzlaw.com
- ebariault@freybuck.com
- frank@carsonlawgroup.com
- kcobb@freybuck.com
- r_mckinney@qwestoffice.net
- rlj@kovacandjones.com
- tbuck@freybuck.com
- tom@tal-fitzlaw.com

Comments:

Sender Name: John Paul Parikh - Email: johnpaul@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20170614102848SC495913