NO. 96975-2

IN THE SUPREME COURT OF WASHINGTON

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II NO. 50235-6-II

THURSTON COUNTY SUPERIOR COURT NO. 17-2-00906-34

BRELVIS CONSULTING, LLC,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

REPLY TO STATE'S ANSWER TO BRELVIS CONSULTING, LLC'S PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to RAP 13.4(d) "[a] party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer."

In its Answer, the State has requested that this Court exercise its discretion to award the Attorney General's Office attorney fees for responding to the Petition for Review, pursuant to RAP 18.1(j), in the event that the Supreme Court does not accept review. Answer at 20. Because this is a new issue not raised in the Petition for Review, Brelvis submits this Reply on this issue only.

II. EVEN IF REVIEW WERE DENIED, THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO AWARD ATTORNEY FEES PURSUANT TO RAP 18.1(j) BECAUSE: (A) THE PETITION FOR REVIEW CONTAINS MERITORIOUS ISSUES OF FIRST IMPRESSION RAISED IN GOOD FAITH PURSUANT TO RAP 13.4(b); (B) THE STATE WAS NOT THE SUBSTANTIALLY PREVAILING PARTY IN THE COURT OF APPEALS; AND (C) RCW 19.86.080(1) DOES NOT AUTHORIZE ATTORNEY FEES WHERE NO SUBSTANTIVE CONSUMER PROTECTION ACT LAWSUIT HAS BEEN FILED OR ADJUDICATED AGAINST PETITIONER.

In Washington, the award of attorney fees on appeal is generally disfavored and is not considered a compensable element of damages in the absence of specific statutory authority therefor. *See City of Seattle v. McCready*, 131 Wn.2d 266, 274, 931 P.2d 186 (1997) (discussing

Washington State's adherence to the American rule in refusing to award attorney fees absent contract, statute, or one of four equitable exceptions); *see also Hall v. Cole*, 412 U.S. 1, 4, 93 S. Ct. 1943, 36 L. Ed. 702 (1973) (in the absence of statutory or contractual authorization, the American rule disfavors the allowance of attorney fees).

For at least the following three reasons, this Court should not exercise its discretion to award attorney fees pursuant to RAP 18.1(j) in the event that review is not accepted.

A. The Petition for Review Raises Several Meritorious Issues of First Impression.

This Petition for Review raises a number of meritorious issues of first impression in the Washington courts, which justify the acceptance of review pursuant to RAP 13.4(b). Indeed, in granting a stay pending this appeal of the enforcement order, the experienced trial judge agreed, finding that

> **the issues to be presented by the appeal are meritorious and debatable and that they may be issues of first impression.**

CP 354 (Dixon, J.) (emphasis added).

After hearing argument and considering the novel and meritorious nature of the claims, although requested to do so, the trial court did not award the Attorney General's Office attorney fees and costs for bringing the petition to enforce the CID. CP 172.

By way of example only, two of the key issues raised in this Petition for Review are also raised in a petition for certiorari from the Ninth Circuit Court of Appeals currently pending before the United States Supreme Court. *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018), *petition for cert. filed* (U.S. Feb. 13, 2019) (No. 18-1207). Although the government initially waived its right to respond, the Court has now called for the government to file an answer. *See Id.*, Response Requested (April 9, 2019).

All of the other issues raised in the Petition for Review are substantial, meritorious, and, with only one exception, are legal issues of first impression in Washington.

The presumption against the award of attorney fees should not be lightly discarded where parties in good faith raise meritorious and novel legal issues necessarily litigated to sustain fundamental constitutional rights under both the state and federal constitutions.

B. This Court Should Exercise Its Discretion Not to Award Fees Pursuant to RAP 18.1(j) Because the State Was Not the Substantially Prevailing Party in the Court of Appeals.

Even if review is not accepted, this Court should not award attorney fees pursuant to RAP 18.1(j) because the State was not the substantially prevailing party in the Court of Appeals.

In the trial court, Brelvis repeatedly argued that compliance with the CID interrogatories and requests for production would violate the privilege against self-incrimination protected by the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution, as well as RCW 10.52.090. *See, e.g.*, Brelvis's Response in Opposition to Petition to Enforce CID at 1 (CP 77) (compliance with the CID would violate rights "against self-incrimination protected by the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington Constitution."), 10–11 (CP 86–87), 16 (CP 92); Respondent's [Brelvis's] Motion for Reconsideration at 1 (CP 177) ("Responding to the Civil Investigative Demand (CID) would violate the rights against self-incrimination of Brelvis Consulting, LLC and Bruce Mesnekoff protected by the Fifth Amendment to the United States Constitution, Article I, section 9 of the Washington Constitution, and RCW 10.52.090."), 3 (CP 179), 8 (CP 184), 15 (CP 191).

The Attorney General's Office repeatedly took the position in the Superior Court and in the Court of Appeals that the constitutional privilege against self-incrimination did not apply to these interrogatories and requests for production in the context of a CID. *See, e.g.*, State's Response Brief to Appellant's Opening Brief at 2 ("Brelvis Consulting repeatedly raises arguments rooted in criminal law, but based upon its designation as a civil

investigative demand, the State's CID is a civil subpoena. . . . Thus, Brelvis Consulting's continued appeal to purported rights in criminal proceedings is futile."); 11 (stating that Mr. Mesnekoff does not have a "valid privilege against self-incrimination. . . . in this civil investigation").

The trial court adopted the Attorney General's position, finding that the Fifth Amendment was not implicated in the answering of interrogatories and requests for production pursuant to the CID. RP 24 ("The Court finds that the request for discovery being sought by the State does not implicate . . . the Fifth Amendment.")

Brelvis and Mesnekoff were forced to appeal in order to vindicate their rights against self-incrimination under the state and federal constitutions and obtain a ruling that the Fifth Amendment privilege does apply.

The Court of Appeals agreed with Brelvis and Mesnekoff that the Fifth Amendment was implicated in answering CID interrogatories under oath: "[W]here the interrogatories propounded by the AGO might tend to incriminate Mesnekoff in future criminal proceedings, the Fifth Amendment privilege against self-incrimination permits Mesnekoff to refuse to answer official questions asked in the context of the CID." Slip Op. at 6.

No other Washington state court has ever so held.

For this reason, it is unfair to award any attorney fees pursuant to RAP 18.1(j) to the Attorney General's Office. Brelvis and Mesnekoff substantially prevailed in this appeal on the principal issue presented—that "the Fifth Amendment privilege against self-incrimination permits Mesnekoff to refuse to answer official questions asked in the context of the CID."—and, indeed, were forced to prosecute a good faith and meritorious appeal in order to vindicate these important constitutional rights.

At the very least, Brelvis and Mr. Mesnekoff have now obtained a partial victory (Fifth Amendment applies to CIDs) and have raised substantial state and federal constitutional issues that are concededly of first impression. Order Granting Motion for Reconsideration at 2. ("No opinions have been cited to us holding whether article I, section 9 and the Fifth Amendment are coextensive with respect to a CID.")

Therefore, this is not a circumstance in which the presumption against attorney fees should be overcome and is not an instance where this Court should exercise its discretion to award attorney fees to the State under RAP 18.1(j).

C. This Court Should Not Award Attorney Fees to the Attorney General's Office Because the State Has Not Prevailed in "An Action To Restrain And Prevent The Doing Of Any Act Prohibited Or Declared To Be Unlawful" Under RCW 19.86.080(1), Since No Such Lawsuit Has Been Filed or Adjudicated Against Appellant.

This is an additional reason this Court should exercise its discretion and not award attorney fees under RAP 18.1(j). This rationale has been raised in the Petition for Review at Section "V.F." at page 18, and the referenced pleadings in the Court of Appeals, is hereby incorporated by reference, and will not be repeated here.

III. CONCLUSION

For at least these three reasons, even if review is not accepted, it is unfair to award attorney fees to the Attorney General's Office pursuant to RAP 18.1(j), and the Court should deny this request.

Dated this 28th day of May 2019.

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