Supreme Ct. No. 97433-1
Ct. of Appeal No. 78121-9-I

SUPREME COURT OF THE STATE OF
OF THE STATE OF WASHINGTON

In re the Estate of: SASSAN SANAI,MD Deceased.	**REPLY TO ANSWER TO MOTION FOR SANCTIONS PURSUANT TO RAP 18.9(a) AND MOTION TO FILE ANSWER TO REQUEST FOR ATTORNEY FEES IN ANSWER.**

Petitioner filed a motion requesting an order imposing monetary sanctions on Astrid Sanai and her attorney, Philip Talmadge, for filing a motion to strike a reply and for sanctions (a) based on the manifestly false contention that her Answer requested "sanctions", when it in fact requested attorney fees under RCW 11.96A.150 and RAP 18.1 and (b) admitting she violated of RAP 18.1(j) and RAP 17.1(a) by including a request for attorney fees in her Answer that did not meet the prerequisite of RAP 18.1(j)—obtaining an award of fees in the Court of Appeals—and thus which was required to be made by motion under RAP 17.1(a) to the extent it could be made at all.

Petitioner also requested, "if necessary," an order allowing filing of an

opposition to Astrid's request for attorney fees in her Answer so that if this Court decided that the Reply to the Answer to the Petition for Review was not properly filed, Petitioner would nonetheless have the opportunity to oppose the request for fees. In filing the motion, Petitioner was explicitly guarding against the likelihood that Astrid, having violated Rule 18.1, would flip positions again and argue that she in fact did not request sanctions in her Answer to the Petition for Review, but was in fact requesting attorney fees under RCW 11.96A.150, which she had been denied by both the trial court and the Court of Appeals. Astrid's position, citing case law characterizing a motion to strike a portion of a brief as a "waste of time", argues that a request for attorney fees must be put in a "brief or other document." She is only correct about the first part and for the wrong reason; the obligation to put a request for attorney fees in the brief (with the narrow exception of RAP 18.1(j) is set out, explicitly, in RAP 18.1(a)-(b).

III. RAP 18.1 SETS OUT THE EXCLUSIVE PROCEDURE FOR REQUESTING ATTORNEY FEES IN THE APPELLATE COURTS (EXCLUDING SANCTIONS).

RAP 18.1 sets out the exclusive procedure for requesting attorney fees on appeal, in relevant part as follows:

> (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, **the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.**
>
> (b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. **Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j).** The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.
>
> …..

> (j) Fees for Answering Petition for Review. **If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.** A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review…..

RAP 18.1(a)-(b), (j).

Rule 18.1 is clear and unambiguous. If Astrid wanted fees in the Court of Appeals, she had to request them in the brief. RAP 18.1(b). She did so, and she was denied on the merits. If review was granted by this Court, she could, but was not obliged to, request the fees in her BRIEF, as a "[r]equests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j)." Section (j) sets up a narrow exception to the requirement the attorney fees (other than sanctions): "[i]f attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

> Sanctions at the appellate level are awarded differently:
> (a) Sanctions. The appellate court …. **on motion of a party** may order a party or counsel…. 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.

RAP 18.9(a) (bold emphasis added).

RAP 18.1 bars a party from requesting attorney fees in any document other than the brief, with the narrow exception of RAP 18.1(j). Astrid included a request for attorney fees in her Answer to the Petitioner for Review, which

violated RAP 18.1(j) and RAP 18.1(a)-(b).

Her attorney's argument is that:

> Cyrus cites no authority for his contention that sanction requests must be made by separate motion, nor does RAP 18.9(a) state that a sanction request must be made by separate motion. To the contrary, courts have warned litigants against filing separate motions, where a party has an opportunity to include a request within a brief or other filing. *E.g., O'Neill v. City of Shoreline,* 183 Wn. App. 15, 24, 332 P.3d 1099 (2014) (discussing motions to strike portions of a brief and a request for sanctions) ("So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials-not a separate motion to strike.").

Reply in Support of Motion to Strike at 3.

Amusingly enough, it appears that Astrid's counsel did not read the *O'Neill* opinion because it supports Petitioner's position. The opinion does not state that motions to strike should not be made separately, but that a motion to strike "wastes everybody's time" and should be replaced with comments as to improperly considered materials. Astrid's motion is such a waste of time—even if the Reply to the Answer to the Petition for Review were the wrong document, Petitioner was entitled to make the exact same arguments in the proposed Answer to a request for attorney fees. *O'Neill* also states that sanctions (which appear also to have been made by separate motion) should not be imposed where an appeal presents debatable issues, and here, the constitutional infirmities pointed out by Petitioner are conceded; it did not address whether sanctions should be requested by separate motion or not.

Astrid's attorney also either did not read, or cannot refute, the authority cited by Petitioner that sanctions requests must be made by separate motion, the plain language of the Rules of Appellate Procedure:

> Astrid's attorney cited to RAP 18.1 and RCW 11.96A.150 as the sole grounds for awarding fees in the Answer. If Astrid was requesting review of the denial of fees by the Court of Appeals, then the she could properly include this new issue for review in the

> Answer, but such fees could only be granted if review was granted. However, RAP 18.1(j) explicitly barred her from requesting fees in the Answer premised on a denial of review unless she had been awarded fees in the Court of Appeals, as it allows attorney fee requests in the answer only "[i]f attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals." RAP 18.1(j). **If the request for relief is unrelated to consideration of the merits, RAP 17.1 requires that the request for fees be made by motion: "A person may seek relief, other than a decision of the case on the merits, by motion as provided in Title 17." RAP 17.1.**

Petitioner's Motion for Sanctions at 11 (bold emphasis added).

Requests for fees under TEDRA clearly fall under RAP 18.1(a). Accordingly, they were governed not by RAP 17.1, but rather RAP 18.1. Astrid violated that rule.

IV. RAP 18.1(A) AND RAP 18.19(J) PROHIBIT REQUESTING FEES IN THE ANSWER TO A PETITION FOR REVIEW UNLESS THE RESPONDING PARTY WAS AWARDED FEES.

Astrid was restricted to requesting attorney fees under RCW 11.96A.150 in her OPENING BRIEF under RAP 18.1(b) ("The party must devote a section of its opening brief to the request for the fees or expenses….except as stated in section (j).") This procedure is mandatory and exclusive for requesting attorney fees to the Court of Appeal and this Court, other than sanctions. RAP 18.1(a) ("If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, **the party must request the fees or expenses as provided in this rule**….."")(bold emphasis added).

Contrary to the dishonest misrepresentation of Astrid's attorney, nowhere did Petitioner argue that the request for fees under RCW 11.96A.150 should be made by separate motion. Petitioner's solely argued, as set out in the quoted passage above, that a request for sanctions, **or any other relief unrelated to the**

merits of the case, must be made by separate motion under RAP 17.1(a). A request for fees under RCW 11.96A.150 is governed by RAP 18.1 as conceded by Astrid's attorney, who cited to it in her Answer to the Petition for Review.

Astrid sets up a straw man argument that Petitioner contended attorney fees must be requested by separate motion:

> Finally, Cyrus argues that a fee request had to be made by separate motion. Ans. to mot. at 4-5. Again, this is incorrect. Cyrus cites no authority for his contention that sanction requests must be made by separate motion, nor does RAP 18.9(a) state that a sanction request must be made by separate motion. To the contrary, courts have warned litigants against filing separate motions, where a party has an opportunity to include a request within a brief or other filing. *E.g., O'Neill v. City of Shoreline,* 183 Wn. App. 15, 24, 332 P.3d 1099 (2014) (discussing motions to strike portions of a brief and a request for sanctions) ("So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials-not a separate motion to strike.").

Reply to Motion to Sanctions at 4.

Astrid conflates requests for fees under RCW 11.96A.150, which must be made exclusively under the procedure of RAP 18.1—the request for fees she actually did make in her Answer to the Petition for Review—with a request for sanctions under RAP 18.9(a), which must be made by separate motion, and which request Astrid did not make in the Answer to the Petition for Review. Because Astrid flip-flops repeatedly about the basis for her request for fees in her Answer to the Petition for Review, this Petitioner must repeatedly argue against what she actually did—cite to but violate RAP 18.1—and what she dishonestly purports to have done but did not do, which is request sanctions under RAP 18.9. Astrid's refusal to acknowledge that she only requested fees under RCW 11.96A.150 and RAP 18.1 in her Answer to the Petition for Review in itself merits sanctions. It's a brazen lie.

IV. FEES CANNOT BE AWARDED TO A RESPONDENT UNDER RCW 11.96A.150 WHO WAS NOT AWARDED FEES BY THE COURT OF APPEAL UNLESS THE COURT GRANTS REVIEW ON THAT ISSUE

Petitioner filed his Reply to Astrid's Answer to the Petition for Review because he interpreted her request for fees under RCW 11.96A.150 as a request for review of that issue. Astrid's motion to strike is premised on the contention that this Court can award fees to a respondent who lost on that issue in the Court of Appeals, without granting review on that issue, so as she tells it the Reply to the Answer to the Petition for Review must be stricken as no new issues for review were raised. The premise of Astrid's motion is barred under the RAP and by principles of fundamental due process.

The RAP bars this because RAP 18.1(a)-(b) states that a request for fees must be made in the brief, with two exceptions; first a statute requires that the request be made to the trial court; second, under the situation identified under RAP 18.1(j). These rules do not allow a LOSER on the issue of fees under RCW 11.96A.150 in the Court of Appeals to even request fees before this Court prior to review being granted. Accordingly, this Court, as a matter of policy when it adopted the RAP, has barred a LOSER on the issue of fees under RCW 11.96A.150 from requesting such fees unless a request for review of that issue granted.

The second reason that fees cannot be awarded under RCW 11.96A.150 as contemplated by Astrid is due process. The position of Astrid is that a request for fees under RCW 11.96A.150 can be awarded by this Court, after losing the issue in the Court of Appeal, without Petitioner having a right to be heard on the issue. Astrid finally concedes that some kind of response *might* have to be allowed:

> In this case the Estate's answer was an appropriate place to include

> a request for fees for time spent answering Cyrus's baseless petition for review. Even if this Court deems that Cyrus should have had an opportunity to respond to the Estate's two-page argument on fees, he did not have the right to submit an 18-page reply repeating his baseless arguments on the merits of the case.

Reply in Support of Motion to Strike at 4.

What are the reasons, Astrid asserts, that can be considered by this Court for granting fees? In the previous page of her Reply her attorney states that:

> Appellate courts have broad discretion to award such fees in TEDRA cases, and "may consider whatever factors [the court] deem[s] appropriate, including an appeal's merits or lack thereof." *In re Estate of Muller,* 197 Wn. App. 477,490,389 P.3d 604 (2016).

Reply in Support of Motion to Strike at 4.

Astrid's position is that having lost on the issue of an award of fees, she can request fees at the petition for review stage based on her assertions of lack of merit in her Answer to the Petition for Review, but Petitioner has no right to respond! Thus she contends that she can accuse Petitioner of improperly raising the constitutional issue at this stage, but he is not be allowed to respond by citing *Conner v. Universal Utils.,* 105 Wash.2d 168, 171, 712 P.2d 849 (1986), where this Court approved precisely the same conduct. Under Astrid's own characterization of the law, this Court can consider any factors in awarding or not awarding fees; under what concept of due process does the opposing party not have the right to answer accordingly?

The RAP blocks this defenestration of basic due process. If Astrid wants fees under RCW 11.96A.150 after being a two-time loser at the trial court and Court of Appeals, she can only present that argument in her BRIEF under RAP 18.1(a)-(b). She only gets to file an opening brief before this Court if it grants review. Accordingly Astrid's request for attorney fees under RCW 11.96A.150 was a request for review of that issue, and the Reply was properly filed.

IV. THE PROPOSED ANSWER TO THE REQUEST FOR FEES NEED BE FILED ONLY IF THE REPLY TO THE ANSWER TO THE PETITION FOR REVIEW IS NOT CONSIDERED.

Astrid multiplied the pleadings in this case by filing a request for fees under RCW 11.96A.150 and RAP 18.1 in the Answer to the Petition for Review that can only be granted if review was granted, because Astrid lost on this question twice in the Court's below. When this was pointed out, she argues that notwithstanding having lost twice, this Court can award fees under RCW 11.96A.150 without granting review and without Petitioner having any right to respond. That argument is based on the refusal of Astrid's counsel to acknowledge the plain language of RAP 18.1(a), RAP 18.1(b) and RAP 18.1(j) or basic principles of due process

Once Astrid made the request for fees in her Answer to the Petition for Review, Petitioner had a right to address the merits of the Petition and describe his broader legal strategy of foreclosing *Pullman* abstention, because, as Astrid concedes, "[a]ppellate courts have broad discretion to award such fees in TEDRA cases, and "may consider whatever factors [the court] deem[s] appropriate, including an appeal's merits or lack thereof."" Reply in Support of Motion to Strike at 4. Petitioner's Reply to the Answer to the Petition for Review was filed 15 days after that Answer was served, and so was timely. RAP 13.4(d). No separate Answer to the request for fees was filed, because this Court and Petitioner did not recognize any motion being made.

The proposed Answer to the imputed motion for fees is a back-up if the Reply to the Answer to the Petition for Review is not considered. Accordingly, the proposed Answer to the request for fees is proposed as an alternative to the Reply to the Answer to the Petition for Review, and need not be filed or read if the Reply to the Answer to the Petition for Review is considered by this Court.

VI. CONCLUSION.

The gravamen of this Petition for Review and the motions arising from the Reply to the Answer to the Petition is due process, as applied from rules, statutes, and constitutional principles. The trial court and the Court of Appeals interpreted Washington's statutes to allow a personal representative to conceal her address for service, omit the identity of the agent for service of process, and omit the deadlines for response in notices to heirs. This procedure violates the Fourteenth Amendment. The constitutional issues were not raised until the Court of Appeals had authoritatively interpreted the statutes. Raising the constitutional issue at this stage was proper under *Connor, supra.* In the dozens of pages filed by Astrid, she has not raised a single argument that the constitutional argument is anything but completely correct; instead, she is furious that Petitioner has described his strategy to have this issue decided in federal court if this Court does not decide this issue. Her refusal to address the validity of the constitutional due process issue is a concession that it is meritorious. Petitioner has given this Court the opportunity to address the constitutionality of these procedures; if this Court does not want to do so, then the constitutional issue alone will be decided by federal court not only as to Petitioner but every person in the past or future who was denied proper notice.

Astrid's motion to strike Petitioner's unrefuted demonstration that Astrid's arguments that the petition for review is "baseless" are, as described in *O'Neill,* a "waste of time"; combined with her violation of RAP 18.1, they call out for the imposition of damages and terms on her and her attorney for violating RAP 18.1 and forcing the filing of multiple other documents due to her "waste of time" motion to strike.

Dated this 25th day of October, 2019

Cyrus Sanai

CYRUS SANAI - FILING PRO SE

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