

64042-9

64042-9
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

BRIEF OF APPELLANT

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STATE OF WASHINGTON
COURT OF APPEALS DIV. I
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TABLE OF CONTENTS

A. APPELLANT'S ASSIGNMENT OF ERROR

Assignment of Error No. 1: The Superior Court erred in making several legal conclusions which precluded the Superior Court from reaching the merits of Attorney Russell's motion for attorneys fees and costs he incurred in the defense of Safeco's frivolous action against him..... p. 1, 9

B. ISSUES PRESENTED FOR REVIEW p. 1

C. STATEMENT OF THE CASE: p. 2
1. Statement of Facts..... p. 2
2. Procedural History p. 5

D. STANDARD OF REVIEW p. 6

E. SUMMARY OF ARGUMENT p. 7

F. ARGUMENT ON THE MERITS..... p.9-21

Issue No. 1: Did the Superior Court err in concluding there was no finding supporting Attorney Russell's claim for attorney fees under CR11 and RCW 4.84.185?..... p. 10

Issue No. 2: Did the Superior Court err in concluding Attorney Russell's counterclaim for attorney fees was not preserved on appeal?..... p. 11

Issue No. 3: Did the Superior Court err in concluding Attorney

Russell did not prevail on his counterclaim?..... p. 12

Issue No. 4: Did the Superior Court err in concluding there is no basis upon which to award attorney’s fees on the Superior Court appeal?..... p. 15

Issue No. 5: Is Attorney Russell entitled to attorneys fees on Safeco’s motion for reconsideration and Safeco’s Superior Court Appeal? p. 15

Issue No. 6: Is Attorney Russell entitled to attorneys fees on Appeal? p. 19

H. CONCLUSION..... p. 21-24

I. APPENDIX

1. Copy of Defendants’ Notice of Cross-Appeal
2. Copy of ABC Messenger Slip -- Proof of Service
3. Copy of King County District Court Docket

C. TABLE OF AUTHORITIES

Table of Cases

<u>Biggs v. Vail</u> , 124 Wn.2d 193, 876 P.2d 448 (1994)	23
<u>Bowers v. Transamerica Title Insurance Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983)	19
<u>Chuong Van Pham v. Seattle City Light</u> , 159 Wn.2d 527, 151 P.3d 976 (2007)	19
<u>Council House v. Hawk</u> , 136 Wn.App. 153, 147 P.3d 1305 (2006)	19
<u>Escude v. King County Public Hospital District No. 2.</u> , 117 Wn.App. 183, 69 P.3d 895, (2003)	14
<u>Ethridge v. Hwang</u> , 105 Wn.App. 447, 20 P.3d 958 (2001)	7
<u>Fluke Capital and Management Services Co., v. Richmond</u> , 106 Wn.2d 614, 724 P.2d 356 (1986)	20
<u>Hawk v. Branjes</u> , 97 Wn.App. 776, 986 P.2d 841 (1999)	19
<u>Leen v. Demopolis</u> , 62 Wn.App. 473, 815 P.2d 269 (1991)	18
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 956 P.2d 632 (1998)	20
<u>Manteufel v. Safeco Insurance Co.</u> , 117 Wn.App. 168, 68 P.3d 1093 (2003)	24
<u>Seattle First National Bank v. Kawachi</u> , 91 Wn.2d 223, 588 P.2d 725 (1978)	13
<u>Veach v. Culp</u> , 92 Wn.2d 570, 599 P.2d 526 (1979)	7

<u>Wachovia sba Lending, Inc., vs. Kraft,</u> 165 Wn.2d 481, 200 P.3d 683 (2009).	14
<u>Walji v. Candyco, Inc.,</u> 57 Wn.App. 284, 787 P.2d 946 (1990)	19
<u>Zink v. City of Mesa,</u> 137 Wn.App. 271, 152 P.3d 1044 (2007), Review denied, 162 Wn.2d 1014, 178 P.3d 1033 (2008)	20
<u>WA STATUTES</u>	
RCW 4.84.....	13,
14, 21	
RCW 4.84.330.....	14
RCW 19.86.010 et seq. The Consumer Protection Act	14, 19
RCW 4.84.185.....	3, 9,
14, 17, 20, 22	
<u>WA COURT RULES</u>	
CRLJ 11	3,10,17, 22, 23
CRLJ 12	3, 17
CRLJ 12(b).....	22
CR41(a)(1)	18
RAP 18.1.....	23

A. APPELLANT'S ASSIGNMENT OF ERROR

Assignment of Error No. 1: The Superior Court erred in making several legal conclusions which precluded the Superior Court from reaching the merits of Attorney Russell's motion for attorneys fees and costs he incurred in the defense of Safeco's frivolous action against him.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in concluding there was no finding supporting Attorney Russell's claim for attorney fees under CR11 and RCW 4.84.185?

2. Did the Superior Court err in concluding Attorney Russell's counterclaim for attorney fees was not preserved on appeal?

3. Did the Superior Court err in concluding Attorney Russell did not prevail on his counterclaim?

4. Did the Superior Court err in concluding there is no basis upon which to award attorney's fees on the Superior Court appeal?

5. Is Attorney Russell entitled to attorney's fees on Safeco's Motion for Reconsideration and Safeco's Superior Court Appeal?

6. Is Attorney Russell entitled to attorney's fees on

Appeal?

C. STATEMENT OF THE CASE

1. Facts.

Plaintiff Safeco Insurance Company of Illinois, (hereinafter "Safeco"), filed its Complaint against Mr. Ken Buretta, Mrs. Carol Buretta and Attorney Brian P. Russell, in King County District Court on or about May 27, 2008, alleging that Mr. Ken Buretta was involved in a motor vehicle accident; that Safeco provided automobile insurance to Mr. Buretta, and that Safeco paid personal injury protection benefits to Mr. Buretta in connection with a motor vehicle accident. Safeco claimed an equitable right of reimbursement from Mr. Buretta in a sum of the total benefits paid by Safeco to Mr. Buretta. Safeco pursued the tortfeasor's insurer Allstate directly on its reimbursement claim. Scott Beltrani Declaration, Exhibit E. CP 328, 329. Additionally, Safeco named as an individual Defendant, Brian P. Russell, Attorney at Law, who represented Mr. and Mrs. Buretta in connection with the motor vehicle accident. Safeco Complaint, Brian P. Russell Declaration, Exhibit A, CP 251-254.

The only claims against Attorney Russell in the Complaint are found in two Paragraphs both identified as Paragraph 1.4. These paragraphs allege that Mr. Russell, as an Attorney at Law,

represented Ken Buretta as a Plaintiff involved in a motor vehicle accident. Paragraphs 1.4 also stated Attorney Russell maintains a law office in King County, Washington. Safeco prayed for judgment against all Defendants in the amount of \$4,055.58, plus an award of reasonable attorney fees incurred in the litigation. Safeco Complaint, Brian P. Russell Declaration, Exhibit A, CP 251-254.

Attorney Russell as an individual defendant, filed and served his Answer, Affirmative Defenses and Counterclaim. Russell Answer, Brian P. Russell Declaration, Exhibit B, CP 255-258. Among other defenses, Attorney Russell asserted that Safeco's Complaint failed to state a claim against Attorney Russell as the Defendant pursuant to CR 12. Attorney Russell asserted that Safeco's Complaint claims against Attorney Russell had no basis in fact or in law. Further, Attorney Russell asserted that the action in naming him personally was frivolous, an abuse of process and defamation. Attorney Russell sought dismissal with prejudice of the action in Seattle District Court and with an award of attorney fees and costs pursuant to CR11, RCW 4.84, and The Consumer Protection Act, RCW 19.86.010 et seq. Russell Answer, Brian P. Russell Declaration, Exhibit B, CP 255-258.

Subsequent to Safeco's filing and service of its lawsuit,

Attorney Russell had discussions with Safeco counsel requesting dismissal from the lawsuit. Safeco conditioned dismissal of Attorney Russell upon his signing a stipulation which required him to take a position against his clients, Mr. and Mrs. Buretta, and which was factually incorrect and contrary to law. Brian P. Russell Declaration, Exhibit C, CP 259-263.

Attorney Russell filed a motion to dismiss and for sanctions against Safeco in King County District Court, with a hearing date of October 20, 2008. Safeco filed its response to Attorney Russell's Motion to Dismiss. On October 20, 2008, Judge Peter Nault of the King County District Court entered an Order on Attorney Russell's motion, finding that Safeco Insurance Company's Complaint and claims against Attorney Russell were frivolous and advanced without reasonable cause. Judge Nault further ordered that Safeco's claims against Attorney Russell were dismissed with prejudice. Finally, Judge Nault ordered Safeco to pay Attorney Russell's fees in the sum of \$5,600.00. October 20, 2008, Judge Nault Order, Brian P. Russell Declaration, Exhibit D, CP 264-266.

Safeco brought its Motion for Reconsideration of the Order Dismissing Russell and Granting Attorney Fees. By Order dated December 15, 2008, Judge Peter Nault denied Safeco's Motion for

Reconsideration and denied Attorney Russell's request for an award of reasonable attorney fees incurred on the Motion for Reconsideration. December 15, 2008, Judge Nault Order, Brian P. Russell Declaration, Exhibit E., CP 267-269.

2. Procedural History

Safeco filed a Notice of Appeal to the Superior Court on January 16, 2009, in which it appealed the Order Denying Safeco's Motion for Reconsideration entered on December 15, 2008, and appealed the Order Granting Dismissal of Attorney Russell dated October 20, 2008. Safeco's Notice of Appeal, CP 1-6. On January 20, 2009, Attorney Russell filed his Notice of Cross Appeal of the Order Denying Attorney's Fees on Reconsideration. Russell Notice of Cross Appeal, Stephanie Ries Declaration Exhibit 9, CP 431-433, Appendix 1, Brian P. Russell Declaration, CP 277-279.

Safeco and Attorney Russell appeared at the Mandatory Readiness Conference on May 1, 2009. At the Readiness Hearing on May 1, 2009, Safeco made a Motion for Dismissal of Appeal. Attorney Russell informed the Superior Court of his Counter Claim in the underlying action as well as his Cross-Appeal, to seek attorney fees and costs, both on Safeco's Motion for Reconsideration and on Safeco's King County Superior Court Appeal. Judge Teresa Doyle

entered an Order dismissing Safeco's Appeal, but provided in the Order that Attorney Russell was allowed to file a motion for his attorney fees and costs before the King County Superior Court Chief Civil Judge. May 1, 2009, King County Superior Court Order Dismissing Appeal, Brian P. Russell Declaration, Exhibit H, CP 280-282.

Safeco executed and entered in King County District Court, a Stipulation and Order of Dismissal with prejudice of its lawsuit against the Burettas and Attorney Russell on June 26, 2009. District Court Stipulation and Order of Dismissal, Brian P. Russell Declaration, Exhibit I, CP 283-285.

Subsequent to Safeco's dismissal of its King County Superior Court Appeal and its dismissal of its King County District Court lawsuit against the Burettas and Attorney Russell, Attorney Russell filed in the King County Superior Court before the Chief Civil Judge a Motion for Order Granting Attorney Fees on Safeco's Motion for Reconsideration and on Safeco's Appeal to Superior Court. By Order dated July 23, 2009, Judge Paris Kallas denied Attorney Russell's motion for awarding fees and costs. Judge Paris Kallas Order dated July 23, 2009, CP 373-375.

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D. STANDARD OF REVIEW

When reviewing an award of attorney fees the court must first determine whether the petitioning party was entitled to fees, and second, if there is an entitlement to attorney fees, whether the award sought is reasonable. Ethridge v. Hwang, 105 Wn.App. 447, 20 P.3d 958 (2001). Whether an attorney is entitled to attorney fees is an issue of law which is reviewed de novo. Ethridge, 105 Wn.App, at 460, 20 P.3d 958. Whether the amount of the fees is reasonable is reviewed for an abuse of discretion, Ethridge, 105 Wn.App, at 460, 20 P.3d 958. A trial court's conclusions of law are reviewed de novo. Veach v. Culp, 92 Wn.2d 570, 573, 599, P.2d 526 (1979). Here, the trial court determined that Attorney Russell was not entitled to attorney fees which is an issue of law which is reviewed de novo.

E. SUMMARY OF ARGUMENT

Safeco's sole claim against Attorney Russell, stated in its Complaint was that he represented Mr. and Mrs. Buretta as plaintiffs involved in a motor vehicle accident. Judge Peter Nault of the Seattle District Court properly dismissed Attorney Russell as a defendant in the Safeco lawsuit and awarded reasonable attorney fees in defending a frivolous action.

Safeco, unsatisfied with the dismissal of Attorney Russell as a personal defendant, first sought reconsideration of Judge Nault's Order of Dismissal which was denied on December 15, 2008. Again, unsatisfied with dismissal of Attorney Russell as a personal Defendant, Safeco appealed Judge Nault's Order to the King County Superior Court. Attorney Russell filed his cross appeal of the Order denying fees on the reconsideration. CP 431-433, 277-279.

Safeco dismissed all claims in the Seattle District Court against Attorney Russell and Mr. and Mrs. Buretta. Safeco later dismissed its appeal of Judge Nault's Order in the Superior Court.

Safeco's actions in its litigation against Attorney Russell required him to incur attorney fees in responding to and dismissing a frivolous action and required him to respond to Safeco's subsequent Motion for Reconsideration and its Appeal to Superior Court. Justice requires that Safeco pay the attorney fees of Attorney Russell incurred in defending a frivolous action.

If Safeco is responsible for the fees incurred by Mr. Russell in defending a baseless lawsuit filed in District Court, is it not also responsible for the fees incurred by Attorney Russell in responding to Safeco's Motion for Reconsideration and fees incurred in

responding to Safeco's Superior Court Appeal?

After Safeco dismissed its District Court lawsuit and dismissed the Superior Court Appeal, the October 20, 2008, Order of Judge Nault finding that Safeco's complaint and claims against Attorney Russell were frivolous and advanced without reasonable cause, became the law of the case. With the finding of a frivolous action against Attorney Russell, Attorney Russell is entitled to his fees in responding to Safeco's Motion for Reconsideration and Safeco's King County Superior Court appeal.

F. ARGUMENT ON THE MERITS

Assignment of Error No. 1

The Superior Court made several conclusions of law which formed the basis for denying Attorney Russell's Motion for Order Granting Attorney Fees. The Superior Court never reached the merits of the attorney fee request because of these legal conclusions. Those legal conclusions were interlineated onto the Order as follows: "Although attorney fees were awarded below pursuant to findings under RCW 4.84.185, no such findings (regarding frivolousness) have been entered on RALJ appeal. Nor have findings been entered that the RALJ appeal violated CR11. Absent such findings, there is no basis upon which to award

attorney fees on appeal. And while Russell contends that his counterclaim is going forward (challenging denial of fees in conjunction with Motion to Reconsider), the docket doesn't so indicate. More importantly, until Russell prevails on his counterclaim, there is no basis upon which to grant such fees."

Issue No. 1: Did the Superior Court err in concluding there was no finding supporting Attorney Russell's claim for attorney fees under CR11 and RCW 4.84.185?

In the Order Granting Dismissal of Attorney Russell, dated October 20, 2008, the court found that Safeco's complaint violated CRLJ 11 and RCW 4.84.185, specifically stating that Safeco's Complaint and claims against Defendant Russell are frivolous and advanced without reasonable cause. Based on this finding, the court dismissed Safeco's claims against Attorney Russell with prejudice. There was in fact a finding that Safeco's Complaint against Attorney Russell was frivolous supporting an imposition of sanctions under CR11 and RCW 4.84.185.

Upon dismissal of Safeco's King County District Court lawsuit against the Burettas and Attorney Russell and upon Safeco's dismissal of its King County Superior Court appeal, the October 20, 2008, Judge Nault Order, became the law of the case.

An unchallenged conclusion of law becomes the law of the case. King Aircraft Sales v. Lane, 68 Wn.App. 706, 716, 846 P.2d 550 (1993). Attorney Russell's motion for attorney fees in the Superior Court was brought after dismissal of both the underlying District Court lawsuit and dismissal of Safeco's appeal in Superior Court. Therefore, at the time of the motion for attorney fees before the Superior Court, the District Court order finding the lawsuit against Attorney Russell was frivolous and was not based upon reasonable cause, was binding on the Superior Court. There was a finding that Safeco's action against Attorney Russell was frivolous supporting an award of attorney fees, both under CR11 and RCW 4.84.185.

Issue No. 2: Did the Superior Court err in concluding Attorney Russell's Counterclaim for attorney fees was not preserved on appeal?

There are two separate claims for attorney fees by Attorney Russell. First, is the claim for attorney fees in the District Court after entry of the order of dismissal on October 20, 2008. Secondly, Attorney Russell makes a claim for attorney fees in the Superior Court incurred in defending Safeco's appeal which was subsequently dismissed. The claim for attorney fees in the District Court was preserved for appeal to the Superior Court when

Attorney Russell filed his Notice of Cross Appeal in the District Court. The issue of attorney fees in the District Court was properly before the Superior Court on the motion for attorney fees filed subsequent to dismissal of the District Court action and the Superior Court appeal. Russell Notice of Cross Appeal, Stephanie Reis Declaration, CP 431-433 and Appendix 1, Brian P. Russell Declaration, CP 277-279.

Issue No. 3: Did the Superior Court err in concluding Attorney Russell did not prevail on his counterclaim.

Attorney Russell filed his Answer and Affirmative Defenses and Counterclaim in response to the Safeco Complaint. Declaration of Brian P. Russell, Exhibit B, CP 255-258. In his Counterclaim, Attorney Russell asserted that Safeco's claim against him had no basis in fact or in law, Paragraph 3.1, and that the action naming Attorney Russell as a Defendant was frivolous and abuse of process and constitutes defamation, Paragraph 3.2. In his counterclaim, Attorney Russell requested that the complaint be dismissed with prejudice and that he be awarded attorney fees and costs under CR11 and RCW 4.84, and the Consumer Protection Act. In the Order dated October 20, 2008, the Seattle District Court granted the relief requested by Attorney Russell in his

counterclaim. Brian P. Russell Declaration, Exhibit D, CP 264-266. Since this Order is now the law of the case, Attorney Russell, in fact prevailed on his counterclaim and specifically received the relief requested which was dismissal of the lawsuit with a finding that the action was frivolous. Due to Safeco's dismissal of its Superior Court appeal, Attorney Russell, in fact, did prevail on his counterclaim.

Safeco's Order of Voluntary Dismissal of its appeal entered herein on May 1, 2009, coupled with its Stipulation and Order of Dismissal of the underlying Seattle District Court action, pursuant to the Order entered on June 26, 2009, is a final judgment, dismissing all claims it has against Attorney Russell and Defendants Buretta. As such, at the time of the voluntary dismissal herein, and the Order of Dismissal in the Seattle District Court, Defendant *Russell has prevailed on his counterclaim and is the prevailing party* for purposes of attorney's fees. The general rule, as stated in *Hawk*, is that the Defendant is the prevailing party when the Plaintiff attains an Order of Voluntary Dismissal. *Hawk* at p. 781. In *Hawk*, the Court found that an award of attorney's fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding. *Hawk* at p. 782. "As a result, the Court retains

jurisdiction for the limited purposes of considering a Defendant's motion for fees. Any other result would permit a party to voluntarily dismiss an action to evade an award of fees under the express terms of a statute or agreement." Hawk at p. 783. An award of attorney fees after a voluntary dismissal under CR11 and RCW 4.84.185, is within the discretion of the trial court. Escude v. King County Public Hospital District No. 2, 117 Wn.App. 183, 69 P.3d 895, (2003), at p. 193.

In the Escude case, Fleming abandoned its challenge to the trial Court's Order by dismissing its appeal. The court found that while Fleming abandoned its appeal, Hart Crowser was necessarily required to appear and defend any claim Fleming alleged under its Notice of Appeal. Therefore, Hart Crowser was entitled to an award of attorney fees under CR11. Escude, 117 Wn.App. 194, 195.

The Washington Supreme Court visited the issue of attorney fees in a voluntary dismissal in Wachovia sba Lending, Inc. vs. Kraft, 200 P.3d 683 (2009). The Court reviewed attorney fees in civil actions under the various provisions of RCW 4.84. The Court distinguished an award of attorney fees to the prevailing party in a Voluntary Dismissal and one upon entry of a Final Judgment. Wachovia, 200 P.3d at p. 688. Wachovia can be distinguished from

the present case. Here, the basis for the award of attorney fees is not a contractual provision, or the reciprocal attorney fees provisions of RCW 4.84.330. The claim for attorney fees here is based upon the District Court's Order of October 20, 2008, finding that the action prosecuted against Defendant Russell was frivolous and without merit, providing a basis for an award of fees under CR11, RCW 4.84.185, and RCW 19.86.

The District Court Order became a final judgment for purposes of determining the prevailing party and awarding attorney fees after the Order to Dismiss the Appeal was entered in May 1, 2009, and the Order to Dismiss with Prejudice the underlying King County District Court lawsuit was entered June 26, 2009.

Issue No. 4: Did the Superior Court err in concluding there is no basis upon which to award attorney's fees on appeal?

The District Court October 2008 Order finding Safeco's action against Attorney Russell was frivolous and brought without reasonable cause provides a proper basis for an award of attorney fees at the Superior Court. The legal basis for attorney fees is found in CR11 and RCW 4.84.185.

Issue No. 5: Is Attorney Russell entitled to attorneys fees on Safeco's motion for reconsideration and Safeco's Superior Court

Appeal?

Safeco now has conceded its lawsuit against Attorney Russell was made without any basis in fact or in law. Safeco belatedly accepted the Order entered by Judge Peter Nault dated October 20, 2008, in which he found Safeco's Complaint against Attorney Russell and claims stated therein were frivolous and advanced without reasonable cause. Safeco has conceded that the lawsuit filed against Defendant Russell should be dismissed with prejudice. Safeco likewise, now accepts the Court's award to Attorney Russell of attorney fees through October 20, 2008, of \$5,600.00.

If the findings of the Court and the Order as of October 20, 2008, are correct, they not only support, but mandate an award of fees and costs incurred subsequent to October 20, 2008. CR 11 requires Safeco and its attorneys to certify that at the time they file their lawsuit against Attorney Russell, their claims were well-grounded in fact; were warranted by existing law or a good faith argument for extension or modification of existing law; were not interposed for an improper purpose; and that the denials of factual conditions are warranted based upon the evidence or are reasonably based on a lack of information or belief. CR 11.

Here, the only claims made against Attorney Russell are

contained in its Complaint, Paragraphs 1.4. Safeco alleges that Attorney Russell represented Defendant Ken Buretta and maintained a law office in Normandy Park, Washington. There is no claim made nor basis of a claim for relief against Attorney Russell. Safeco failed to state a claim upon relief may be granted as required by CR 12 and CR 11.

Attorney Russell also sought an award of attorney fees against Safeco based on RCW 4.84.185. This statute provides that in any civil action, upon written findings by the Judge in the action, that the action was frivolous and advanced without reasonable cause, the Court may require the non-prevailing party to pay the reasonable expenses incurred in opposing such action. Here, Judge Nault in the October 20, 2008, Order clearly found that the conditions of RCW 4.84.185 had been met. Judge Nault specifically found that the action against Attorney Russell was frivolous and advanced without reasonable cause. Either or both CR11 and RCW 4.84.185 support Attorney Russell's claims for an award of additional attorney fees. An award of attorney fees subsequent to October 20, 2008, in this instance, is clearly warranted.

CR11 is intended to deter baseless filings and curb abuses of our judicial system. Whether an attorney has conducted a

reasonable inquiry into the factual and legal basis of the claim is judged by an objective standard as of the time when the pleading was submitted. Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994). Equity dictates that at a minimum Safeco should be required to pay the reasonable expenses and reasonable time incurred by Attorney Russell in defending and seeking dismissal of baseless claims.

An attorney fee award to an attorney who represented himself pro se should include compensation for the attorney's own time spent on the litigation. Leen v. Demopolis, 62 Wn.App. 473, 815 P.2d 269 (1991). In Leen the Court stated:

“The better reasoning supports an award of attorney fees to lawyers who represent themselves. As reasoned in the Winer case, lawyers who represent themselves must take time from their practices to prepare and appear as would any other lawyer. Furthermore, overall cost may be saved because lawyers who represent themselves are more likely to be familiar with the facts of their cases.” Leen at p.487.

Here, Attorney Russell filed his motion for attorney fees after both the District Court lawsuit and the Superior Court appeal were dismissed.

Following the entry of an Order of Voluntary Dismissal under CR41(a)(1), a trial court retains jurisdiction for the purpose of considering a motion for attorney fees pursuant to a statute or contractual provision. *Hawk vs. Branjes*, 97 Wn.App. 776, 986 P.2d 841 (1999); *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 787, P.2d, 946, (1990); and *Council House v. Hawk*, 136 Wn.App. 153, 147 P.3d, 1305, (2006). Here, the award of attorney fees is appropriate under CR11, RCW 4.84.185, and RCW 19.86.010 et seq.

Issue No. 6: Is Attorney Russell entitled to attorneys fees on Appeal?

Attorney Russell sought a Lodestar multiplier of the attorney fees incurred in the District Court and Superior Court proceedings and/or sanctions in addition to attorneys fees. Washington Courts apply the Lodestar approach in determining attorney fees. *Bowers v. TransAmerica Title Insurance Company*, 100 Wn.2d 581, 675, P.2d 193 (1983). To determine the appropriate attorney fees, the trial court begins by figuring out the Lodestar, which is the total number of hours reasonably expended multiplied by the reasonable hourly rate of compensation. After the Lodestar is calculated, the Court may consider a contingency adjustment based on additional factors. *Van Pham v. Seattle City Light*, 159 Wn.2d 527 151 P.3d 976 (2007). In

Bowers, the Court established a two-step method for computing the attorney fees. First, the Lodestar fee is determined. Second, the Lodestar is adjusted up or down to reflect factors such as the contingent nature of success in the lawsuit, the contingent nature of the attorney fees, or the quality of the legal work. The trial court should have an objective basis for the award. A trial Court must sufficiently explain the basis for its fee award for potential appellate review and enter Findings in support of the decision. Mahler v. Szucs, 135 Wn.2d, 398, 957 P.2d, 632 (1998.)

A trial court has discretion under RCW 4.84.185 to impose both sanctions for frivolous litigation and to determine the reasonable amount of attorney fees. Fluke Capital and Management Services Co., v. Richmond, 106 Wn.2d 614, 724 P.2d 356 (1986); and Zink v. City of Mesa, 137 Wn.App. 271, 152, P.3d 1044 (2007), Review denied, 162 Wn.2d 1014 178 P.3d 1033 (2008). Here, both sanctions for frivolous litigation and attorney fees with a Lodestar multiplier are appropriate. An attorney requesting fees must provide only “reasonable documentation of the work performed, and the documentation need not be exhaustive or in minute detail.” Bowers, 100 Wn.2d at Page 597. Here, a Lodestar multiplier is appropriate because of the contingent nature of payment of any attorney fees.

Here, where Attorney Russell is named as a personal Defendant, representing himself, the payment of any fees was contingent upon his successful dismissal of the action and obtaining attorney fees from Safeco for filing the frivolous and baseless action. Sanctions are appropriate here under RCW 4.84.185, and CR 11, in naming Attorney Russell as a personal Defendant in what was a dispute between Safeco and its insureds, the Burettas.

H. CONCLUSION

It's clear that Safeco should not have filed and served a baseless lawsuit naming Attorney Russell as an individual defendant. In discussions with Attorney Russell, Safeco should have agreed to dismissal but refused Attorney Russell's request for a dismissal, forced Attorney 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 Attorney Russell to respond. Instead of accepting the Order denying reconsideration, Safeco continued frivolous prosecution of unwarranted claims by filing an *Appeal*. Safeco's unreasonable actions required Attorney Russell to defend and respond to the Appeal.

Attorney Russell's Motion for Award of Attorney Fees against Safeco pursuant to CR11, 12(b), and RCW 4.84.185, should be granted. Attorney Russell should be compensated by Safeco for his attorney fees incurred in defending actions by Safeco that were factually and legally baseless.

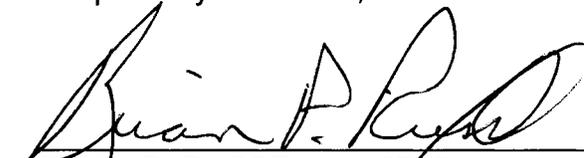
The Superior Court's order denying Russell's Motion for Attorney fees was based upon multiple erroneous legal conclusions. The Superior Court never reached the merits of Russell's motion for attorney fees. The request and issue of attorney fees both at the District Court and on the Superior Court appeal was preserved and properly before the Superior Court in Russell's motion for attorney fees. Safeco was certainly aware of Russell's cross appeal for attorney fees at the Superior Court at the time of Russell's motion for attorney fees subsequent to dismissal of Safeco's appeal. Stephanie Ries Declaration, Exhibit 9, CP 431-433. The October 20, 2008 Order found the lawsuit against Russell was frivolous. Safeco's continuing pursuit of this frivolous action through reconsideration and appeal to the Superior Court required a response and defense by Attorney Russell. The attorney fees and costs necessarily incurred in defending this frivolous action should be awarded. Attorney Russell afforded Safeco plenty of opportunity to dismiss the lawsuit against

him prior to his filing of the motion to dismiss. In each instance Safeco conditioned the dismissal on Russell's cooperation in the action by Safeco against his clients, Mr. and Mrs. Buretta. Safeco further conditioned the dismissal of Russell on his taking a position against his clients, that the Burettas had been fully compensated. After the lawsuit was filed and the counterclaim was asserted by Attorney Russell, Safeco had an opportunity to re-evaluate the legal basis of its claims against Mr. Russell, but instead filed its answer to Attorney Russell's counterclaim denying any CR 11 violations. Safeco's Answer to counterclaim. After determining that sanctions are appropriate, a trial court should award attorney fees in a reasonable amount expended to respond to sanctionable claims. Biggs v. Vail, 124 Wn.2d 193, 876 P.2 448 (1994). Here, the court determined that Safeco's actions were sanctionable. Therefore, Attorney Russell should be awarded all fees incurred in reasonably responding to not only Safeco's original lawsuit, but its continuing pursuit of frivolous claims through its motion for reconsideration and subsequent appeal. Likewise, attorney fees are appropriate on appeal. RAP 18.1.

Mr. Wathen, counsel for Safeco in this lawsuit, is fully aware of the requirements of CR11 and filing frivolous lawsuits, and has been

successful in prosecuting such claims. Manteufel v. Safeco Insurance Co., 117 Wn.App. 168; 68 P.3d 1093 (2003). Mr. Wathen and Safeco knew its claims against Russell were frivolous having been a party to a frivolous action against an attorney representing his client.

Respectfully submitted,



BRIAN P. RUSSELL #10715
Attorney for Appellant

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IN THE WEST DIVISION OF KING COUNTY DISTRICT COURT
STATE OF WASHINGTON

SAFECO INSURANCE COMPANY OF ILLINOIS)	NO. 84-007180
)	DEFENDANT RUSSELL'S NOTICE OF
)	CROSS APPEAL
Plaintiff,)	
vs.)	
)	
KEN BURETTA and CAROL BURETTA)	
Husband and wife, and BRIAN P.)	
RUSSELL, an individual,)	
)	
Defendants.)	

TO: Clerk of Court

TO: Rick J. Wathen, Attorney at Law, Masaki J. Yamada, Attorney at Law,
Counsel for Plaintiff Safeco Insurance Company of Illinois,

TO: Defendants Ken Buretta and Carol Buretta

AND TO: Plaintiff Safeco Insurance Company of Illinois.

Defendant Brian P. Russell hereby gives notice of Cross Appeal, pursuant to RALJ 2.1(b), RALJ 2.5(c), RALJ 2.6, KCLRALJ 2.6 to the Washington King County Superior Court, regarding the following decisions:

1. Defendant Russell appeals Paragraph 2, that portion of the Order Denying Plaintiff's Motion for Reconsideration dated December 15, 2008, wherein the court denies Defendant Russell's request for reasonable attorney fees and damages.

DEFENDANT BRIAN RUSSELL'S NOTICE
OF CROSS APPEAL - 1

BRIAN P. RUSSELL
ATTORNEY AT LAW
17820 FIRST AVENUE SOUTH, SUITE 102
NORMANDY PARK, WA 98148
PHONE: 206-244-3200
FAX: 206-248-2023

WEST DIVISION OF DISTRICT COURT IN KING COUNTY IN THE STATE OF WASHINGTON

Safeco Insurance Company of Illinois,

NO. 84-007180

Plaintiff,

DECLARATION OF SERVICE

v.

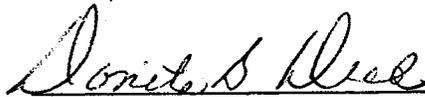
Ken Buretta and Carol Buretta, Husband and
wife, and Brian P. Russell, an Individual,

Defendants.

DONITA DECK hereby declares under the laws of the State of Washington as follows:

That on the 16th day of January, 2009, the undersigned sent via US Mail, the following documents in regard to the above-captioned matter: Defendant Russell's Notice of Cross Appeal, Declaration of Service to the parties whose names and addresses are known to the undersigned, as follows:

Rick J. Wathen, Attorney for Safeco
Masaki J. Yamada, Attorney Safeco
Cole, Lether, Wathen & Leid, P.C.
1000 Second Ave Ste 1300
Seattle, WA 98104-1082



Donita G. Deck

DECLARATION OF SERVICE

BRIAN P. RUSSELL
Attorney at Law
17820 1ST AVENUE S., #102
NORMANDY PARK, WA 98148
PHONE: 206-244-3200



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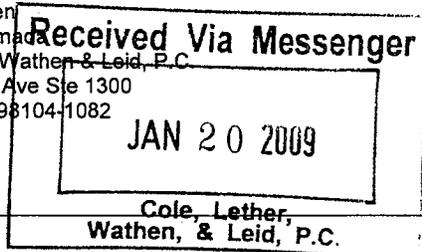
MESSANGER SERVICE LAST DAY	FIRM NAME Brian P. Russell	PHONE 206-244-3200	EXT.#	EMAIL (SECRETARY) bpriaw@comcast.net
DATE/TIME 01/20/09 PM	ADDRESS 17820 1st Avenue South, #102, Normandy Park, WA 98148	ATTY bpr	SECRETARY Donita	
	CASE NAME Safeco v. Buretta and Russell	YOUR ABC ACCT. NO 37073		
	CAUSE NO. DC West Division 84-007180	CLIENT MATER # Ken Buretta	DATE 1/20/2009	

DOCUMENTS
 Defendant Russell's Notice of Cross Appeal

SIGNATURE REQUIRED ON DOCUMENTS	<input checked="" type="checkbox"/> RETURN CONFORMED ABC SLIP ONLY	RETURN CONFORMED COPY	CONFORM ORIGINAL DO NOT FILE
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OTHER INSTRUCTIONS

1 Original to: Originals and Judge's Work copies to: KC District Original to: Original to: King County District Court Clerk Seattle Division E-327 King County Courthouse 516 Third Ave Seattle Wa 98104	3 Copy to: Rick J. Wathen Masaki J. Yamada Cole, Lether, Wathen & Leid, P.C. 1000 Second Ave Ste 1300 Seattle, WA 98104-1082
2	4



FILING	COUNTY	SUPERIOR COURT	DISTRICT COURT (INDICATE DISTRICT)	AUDITOR	APPEALS		FEDERAL COURT		SEA	TAC	STATE SUPREME COURT	SEC STATE CORP.
	King		West Div., Seattle		I-SEA	II-TAC	CIVIL	BANKRUPTCY				

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 KING COUNTY
 DISTRICT COURT
 SEATTLE DIVISION

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					I-SEA	II-TAC	CIVIL	BANKRUPTCY				
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D0031I End of Docket DD1000PU
 D1174W Case is closed DD1000PU 09/11/09 13:55:37
 DD1000MU Case Docket Update (CDK) KING COUNTY DISTRICT BDD
 Case: 84-007180 CV Csh: Pty: StID:
 Name: NmCd:
 Title: SAFECO INSURANCE COMPANY OF ILLINOIS VS BURETTA/BURETTA

Note: **superior court # 09-2-03734-5 SEA**
 Case: 84-007180 CV Civil Print: N (Y/N)

06 30 2009	FILED: SAFECO'S NOTICE OF VOLUNTARY DISMISSAL AND ORDER	BDD
	DISMISSING APPEAL	BDD
08 26 2009	FILED: LETTER FROM SUPERIOR COURT	BDD
09 01 2009	ORIGINAL STIP AND ORDER OF DISMISSAL FILED 05/21/09 AT	PXK
	SEATTLE WEST DIVISION AND FORWARDED TO SOUTH DIVISION KENT	PXK
	RETURNED TO PLA	PXK
09 10 2009	LETTER FROM ATD FILED	BDD
09 11 2009	ATD'S LETTER FOWARDED TO JUDGE EILER	BDD
	PER JUDGE EILER, GIVE ATD RUSSELL A COPY OF THE DOCKET -	BDD
	IT SHOULD PROVE TO SUPERIOR COURT THAT WE SENT THE APPEAL	BDD
	DOCKET SCREEN-PRINT W/DOCKET MAILED TO ATD RUSSELL	BDD

4-© 1 Sess-1 206.194.129.5 FTCP3283 22/15

Kindly view docket attached - see highlighted 1/20/09 entry.

