

64042-9

64042-9

NO. 640429

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KEN BURETTA, et al

Petitioner,

v.

SAFECO INSURANCE OF ILLINOIS,

Respondent,

BRIEF OF RESPONDENT

COLE, LETHER, WATHEN & LEID, P.C.
Rick J Wathen, WSBA 25539
Eric J. Neal, WSBA #31863
Attorneys for Respondent
SAFECO Insurance Company of Illinois

ORIGINAL

1000 Second Avenue, Suite 1300
Seattle, WA 98104
(206) 622-0494

2010 JAN 15 PM 3:17
FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	STATEMENT OF THE CASE	1
	A. Overview	1
	B. Background Facts	3
	C. Procedural History	6
	1. Initial Pleadings	6
	2. SAFECO's Proposed Stipulated Dismissal and Russell's Motion to Dismiss	6
	3. SAFECO's Second Proposed Stipulated Dismissal	8
	4. Russell's Motion to Dismiss Hearing	10
	5. SAFECO's Motion for Reconsideration ...	11
	6. SAFECO's RALJ Appeal and Russell's Cross- Appeal and Motion for Attorney Fees	12
IV.	ARGUMENT	16
	A. Standard of Review	16
	B. SAFECO's Suit Against Russell Was Well Grounded in Fact and Law	17
	C. Russell's Other Theories Are Without Merit	23
	1. Washington Consumer Protection Act	23
	2. Lodestar	23

3.	No Concession	24
V.	CONCLUSION	24

TABLE OF CASES AND AUTHORITIES

Washington Cases

<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 217, 829 P.2d 1099 (1992)	18, 19
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001)	17
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 784-85,719 P.2d 531, (1986)	22
<i>Hicks v. Edwards</i> , 75 Wn. App. 156, 163, 876 P.2d 953 (1994), review denied, 125 Wn.2d 1015 (1995)	18
<i>Highland School Dist. No. 203 v. Racy</i> , – Wn. App. –, 202 P.3d 1024 (2009)	24
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	2, 5, 19, 20
<i>MacDonald v. Korum Ford</i> , 80 Wn. App. 877, 884, 912 P.2d 1052 (1996)	18, 19
<i>Madden v. Foley</i> , 83 Wn. App. 385, 390, 922 P.2d 1364 (1996)	19
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.3d 707 (2004)	16
<i>Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 784-85,719 P.2d 531, (1986)	20
<i>Truong v. Allstate</i> , 151 Wn. App. 195, 198, 211 P.3d 430 (2009)	20

Wagner Dev. v. Fidelity & Deposit, 95 Wn. App. 896, 906, 977 P.2d 639 (1999) 18

Winters v. State Farm, 144 Wn.2d 869, 31 P.3d 1164 (2001) 20, 21

Court Rules

CR 11 1, 2, 3, 12, 15, 16, 17, 18, 19, 22, 23

Statutes and Regulations

RCW 4.84.185 15, 16, 19, 23

RCW 4.84.250 12

RCW 19.86 23

I. ASSIGNMENTS OF ERROR

Respondent, SAFECO Insurance Company of Illinois (hereinafter, "SAFECO"), does not assign error to any ruling of the Superior Court.

For purposes of Appellant Russell's appeal, SAFECO submits the following Issues Pertaining to Russell's Assignments of Error:

Whether the Superior Court abused its discretion in ruling that Russell was not entitled to recovery of fees and costs pursuant to CR 11 considering that (1) SAFECO's RALJ Appeal was not frivolous or interposed for any improper purpose, (2) the underlying rulings of the District Court denying Russell's sanction requests were within the discretion of that court, and (3) Russell waived his right to seek fees when he consented to the voluntary dismissal of the RALJ appeal.

For these reasons, this Court must find that the Superior Court was acting within its discretion in denying the fee requests and must therefore Affirm.

II. STATEMENT OF THE CASE

A. Overview

This appeal arises from a dispute with the attorney for a SAFECO insured, Appellant Russell, who failed to protect SAFECO's subrogation rights in resolving an underlying tort action. SAFECO's insured, Ken Buretta, was injured in a car accident occurring on May

26, 2005. SAFECO paid Mr. Buretta \$4,055.58 in Personal Injury Protection (PIP) benefits after the accident. Mr. Russell filed a lawsuit on behalf of Mr. Buretta for the damages sustained in the accident and resolved that case in a settlement. SAFECO's lawsuit against the Burettas and Mr. Russell arises out of Mr. Russell's failure in securing SAFECO's subrogation claims in the amount of the \$4,055.58 PIP payment, which he was obligated to protect. While Mr. Russell pursued and settled the underlying cause of action on behalf of Mr. Buretta, Mr. Russell was obligated to protect SAFECO's subrogation lien, but failed to do so. See, *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

In a district court action in King County, SAFECO alleged that Buretta and Russell were jointly and severally liable for repayment of SAFECO's subrogation interest. The District Court, Judge Peter Nault, dismissed the causes of action against Russell and awarded terms pursuant to CR 11. Judge Nault admitted that he had not read SAFECO's responsive briefing when he awarded the terms. As a result, he did not evaluate the elements of a CR 11 violation.

SAFECO filed a motion for reconsideration on the award of terms and Russell responded asking for further sanctions. Judge

Nault denied both SAFECO's motion and Russell's request. Thereafter, SAFECO appealed the District Court's ruling on the original CR 11 award to the Superior Court. Russell cross-appealed the district court's denial of additional sanctions on the Reconsideration motion.

In the Superior Court, the parties voluntarily withdrew their appeals. Thereafter, Russell filed a motion with the Superior Court seeking CR 11 sanctions for not only the expenses of the Appeal, but also for all fees that he incurred at the District Court level as well. The Superior Court denied the fee petition. Russell appeals from this denial.

B. Background Facts

As early as June 29, 2005, SAFECO advised Mr. Buretta in a letter of SAFECO's right to recover payments for PIP benefits. CP 158-159. The letter advised Mr. Buretta of the following provision of Mr. Buretta's insurance policy:

OUR RIGHT TO RECOVER PAYMENT

- A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
 - 1. Whatever is necessary to enable us to

- exercise our rights; and
2. Nothing after the loss to prejudice them.

- B. If we make payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
 1. Hold in trust for us proceeds of the recovery; and
 2. Reimburse us to the extent of our payment.

CP 158.

On August 4, 2005, SAFECO began to pay Mr. Buretta PIP benefits for the wage loss he incurred as a result of the accident. On October 20, 2005, Mr. Russell provided SAFECO with notice of representation for Mr. Buretta and requested a copy of Mr. Buretta's PIP ledger. CP167. SAFECO sent Mr. Russell a PIP ledger and subsequently sent Mr. Russell updated PIP ledgers. CP 168,170,173,175.

On June 23, 2006, Mr. Russell filed a lawsuit on behalf of Mr. Buretta in Snohomish County Superior Court under cause number 06-2-09283-8. CP 296.

SAFECO was under the reasonable belief, from correspondence and discussions over the phone with Mr. Russell, that Mr. Russell would protect SAFECO's subrogation interest while

pursuing a lawsuit on behalf of the insured. CP 308. In fact, all Subrogation Update letters that SAFECO sent to Mr. Russell contained the following language:

In the event of settlement, please forward payment to:
Safeco Insurance Company of Illinois, **Attention:**
Subrogation Cashier, P.O. Box 461, St. Louis, MO
63166.

Beltrani Dec., ¶9, Ex. G.

On April 16, 2008, Mr. Russell's office informed SAFECO that the underlying lawsuit had settled and the funds were disbursed to all the parties. CP 331-338. Mr. Russell's office also advised SAFECO that Mr. Russell would not abide by *Mahler* (*Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998)) and that SAFECO must collect any PIP proceeds directly from Mr. Russell's clients. CP 308. Thus, Mr. Russell failed to inform SAFECO as to the status of the underlying litigation, then proceeded to enter into a settlement agreement that effectively extinguished SAFECO's subrogation rights.

On May 14, 2008, SAFECO advised Mr. Russell that SAFECO had retained counsel to recover SAFECO's PIP subrogation lien. In addition, SAFECO advised Mr. Russell that SAFECO would file suit unless Mr. Russell and his clients complied with *Mahler*. CP 178. Mr.

Russell did not respond, and SAFECO filed suit. CP 177; 252-254.

C. Procedural History

1. *Initial Pleadings*

SAFECO filed its complaint on May 27, 2008. CP 252-254. Mr. Russell answered the complaint and filed counterclaims against SAFECO. CP 256-258. Thereafter, SAFECO filed its Answer to Mr. Russell's Counterclaims and denied all of Mr. Russell's claims and request for relief. CP 393-394.

2. *SAFECO's Proposed Stipulated Dismissal and Russell's Motion to Dismiss*

During the week of August 25, 2008, SAFECO called Mr. Russell to discuss a stipulation to dismiss Mr. Russell from the case. CP 91. At that time, SAFECO explained to Mr. Russell that SAFECO had named Mr. Russell in the lawsuit because Mr. Russell had represented to SAFECO that Mr. Russell would protect SAFECO's subrogation interests. CP 91. SAFECO further explained that there was no way for SAFECO to determine whether Mr. Russell had retained the benefit of the settlement of the underlying lawsuit or Mr. Buretta had retained the payments. CP 92. Furthermore, there was no way for SAFECO to determine whether Mr. Russell had advised the Burettas of their obligation to pay PIP subrogation to SAFECO.

CP 92. This was the case because Mr. Russell never responded to any of SAFECO's correspondence or phone calls prior to SAFECO filing the lawsuit. CP 92. Mr. Russell responded that he indeed had advised the Burettas of their obligation to pay PIP subrogation to SAFECO after settlement of the underlying lawsuit and that Mr. Russell would be willing to look at a stipulation to dismiss him from the case. CP 92.

On September 5, 2008, SAFECO sent Mr. Russell a correspondence that confirmed the telephone conference and enclosed the proposed stipulation and dismissal. CP 92; 95-97. The stipulation proposed that Mr. Russell agree to state that the Burettas were made whole from the settlement and that Mr. Russell advised his former clients of their obligations to pay SAFECO back for PIP benefits received. CP 95-97.

On September 9, 2008, Mr. Russell wrote SAFECO a correspondence that disagreed with the interpretation of the phone conversation. CP 98. In addition, Mr. Russell did not sign the proposed stipulation. Mr. Russell did not suggest any changes to the proposed stipulation and order of dismissal or call to discuss the proposed stipulation. CP 92. Instead, Mr. Russell served SAFECO with a note for motion and a motion for dismissal. The motion for dismissal was noted for September 29, 2008. CP 185. On

September 18, 2008, SAFECO filed a response to Mr. Russell's motion for dismissal. CP 185-193.

3. SAFECO's Second Proposed Stipulated Dismissal

In another attempt to resolve this matter amicably and because Mr. Russell did not call to discuss the initial proposed stipulation and order of dismissal, SAFECO's conducted a telephone conference with Mr. Russell on September 25, 2008.

During that conference, SAFECO once again advised Mr. Russell that SAFECO was willing to dismiss him out of the lawsuit once he or the Burettas provided SAFECO with evidence that the Burettas would not claim that Mr. Russell was liable for their obligations to pay SAFECO for the subrogation lien. CP 92. SAFECO explained that it must keep Mr. Russell as a party to the lawsuit until it was clear that the Burettas would not claim that Mr. Russell was liable for the subrogation obligation because without such evidence the Burettas could claim an "advice-of-counsel" defense and/or claim that Mr. Russell was liable for the subrogation obligation. CP 103. SAFECO further advised that its attorneys had previously obtained a judgment against an attorney representing an insured when that attorney did not protect the PIP subrogation interests of the

insurer in King County Superior Court. CP 103.

Mr. Russell advised that he was not permitted to inform SAFECO of any discussions between him and his former clients, the Burettas, because of attorney-client privileges. CP 103. Thus, as an alternative, SAFECO proposed another stipulation and order of dismissal that would permit Mr. Russell to be dismissed without prejudice and brought back into the lawsuit if co-defendants Burettas asserted the "advice-of-counsel" defense or otherwise claimed Mr. Russell was a liable party. CP 103.

Mr. Russell agreed to take a look at the second proposed stipulation and order of dismissal, and he also suggested that SAFECO send discovery to his former clients regarding this issue. CP 103. In the event that the second proposed stipulation and order were not satisfactory, then SAFECO also requested that Mr. Russell provide SAFECO with the necessary time to conduct the proposed discovery with the Burettas prior to arguing Mr. Russell's motion to dismiss in Court. CP 103. Accordingly, Mr. Russell agreed to continue his motion for dismissal to accommodate his review of the stipulation, as well as the discovery with the Burettas, if it became necessary. CP 104.

The same day of the phone conference, September 25, 2008, SAFECO sent Mr. Russell the second proposed stipulation and order of dismissal. CP 99-101. With no response from Mr. Russell regarding the second proposed stipulation and order of dismissal, SAFECO served the Burettas with interrogatories and requests for production on October 8, 2008, as requested by Mr. Russell. CP 346. On October 9, 2008, SAFECO sent Mr. Russell a courtesy copy of the Buretta discovery requests. CP 341.

Thus, SAFECO made several attempts to dismiss Mr. Russell from the lawsuit while preserving its rights and protecting itself from any potential defenses the Burettas could raise with the dismissal of Mr. Russell. Mr. Russell agreed to continue his motion for dismissal until the matter was resolved. Mr. Russell agreed to give SAFECO time to conduct discovery with his former clients to resolve this issue before proceeding with his motion to dismiss.

4. Russell's Motion to Dismiss Hearing

Instead of continuing the motion to dismiss as promised, on October 20, 2008, Mr. Russell appeared and obtained an Order to dismiss and judgment for attorney's fees. CP 396-397. SAFECO did not appear at the hearing because SAFECO understood that Mr.

Russell had agreed to continue the hearing. Although inexcusable, due to clerical reasons, SAFECO's counsel's firm received Mr. Russell's reply and letter indicating his decision to *not* continue the hearing, but SAFECO's counsel did not.

At the dismissal hearing, the recorded court proceedings regarding the motion reflect that the Court dismissed SAFECO's complaint after admitting that the Court did not read SAFECO's opposition motion and exhibits. CP 439. However, the record reflects that the District Court in fact, had received working copies of SAFECO's opposition. CP 444-448.

5. SAFECO's Motion for Reconsideration

On October 22, 2008, SAFECO filed a motion for reconsideration with the District Court. CP 398-409. The motion was scheduled to be heard on November 3, 2008. One week prior to the hearing, the Burettas provided their responses to SAFECO's discovery requests. CP 410-424. The responsive documents revealed that Mr. Russell actually had the Burettas sign a release that would hold him harmless of any liability that Mr. Russell might have with respect to hospitals, insurers, creditors, etc. as a result of the settlement of the underlying lawsuit. CP 412-413. As a result, at the

motion for reconsideration hearing, SAFECO agreed to dismiss Mr. Russell from the lawsuit.

However, at the hearing SAFECO argued that it should not be sanctioned pursuant to CR 11 or RCW 4.84.250. CP 398-409. SAFECO further argued that the District Court did not make any investigative finding that SAFECO's lawsuit was frivolous or advanced on unreasonable grounds. CP 398-409. In fact, SAFECO argued that if the Court did investigate the matter by reading the pleadings set forth in opposition to Mr. Russell's motion to dismiss, the Court would have certainly found that SAFECO had a good faith belief in filing the complaint. CP 398-409. Nevertheless, the District Court denied SAFECO's motion for reconsideration. CP 425-426. The District Court did not award Mr. Russell any additional attorney fees with respect to the Motion for Reconsideration. CP 425.

6. SAFECO's RALJ Appeal and Russell's Cross-Appeal and Motion for Attorney Fees

On January 12, 2009, SAFECO filed a Notice of Appeal of the District Court's Order Denying SAFECO's Motion for Reconsideration. CP 427-429. On January 20, 2009, Mr. Russell filed a Notice of Cross-Appeal of the District Court's Order Denying Defendant

Russell's request for Attorney's Fees with respect to the Motion for Reconsideration. CP 431-433. SAFECO and Mr. Russell appeared at a mandatory readiness conference with respect to the RALJ Appeal on May 1, 2009. At such readiness conference, SAFECO presented a Notice of Voluntary Dismissal and Order Dismissing Appeal, which Judge Theresa Doyle signed that day. CP 436-437. Mr. Russell acknowledged that the order applied to his cross-appeal, but indicated that he would file a Motion for Attorneys Fees and Costs before the Chief Civil Judge. May 1, 2009, RP 4.

Thereafter, in a correspondence dated May 7, 2009, SAFECO's counsel advised Mr. Russell of the following:

This letter will follow our recent discussions concerning SAFECO's agreement to voluntarily dismiss the subject appeal and pay the amount of the judgment in this matter. Pursuant to our agreement, I have calculated the amount of the judgment as set forth below...Based upon an interest rate of 12% per annum, we calculate the total amount of interest accrued to date as being \$345.47. This figure is based upon a daily interest rate of .00032% for 193 days. As a result, we believe the total amount of the judgment should be \$5,945.47. Payment of this amount should be sufficient to allow you to enter a full satisfaction with the court...

CP 451.

In a correspondence dated May 18, 2009, Mr. Russell advised

SAFECO that he calculated the interest on the attorney fees award to be \$366.38, for a total of \$5,966.38, and that upon receipt of payment for this judgment he would provide SAFECO with a Satisfaction. CP 454. Mr. Russell further advised that he agreed to sign SAFECO's Stipulation and Order of Dismissal, but that he was striking the provision stating that each party would bear their own costs. He further advised that he intended to make another motion for his attorney fees. CP 454. Once again, Mr. Russell's attorney's fees were already adjudicated by the District Court and SAFECO agreed to pay the Ordered attorney's fees award, with interest.

Nonetheless, Mr. Russell did, in fact, file a motion for attorney's fees on July 8, 2009, more than 60 days after the RALJ Appeal was dismissed. CP 237-246. Russell's motion restates the same arguments that he made to the District Court, claiming that SAFECO did not have a good faith basis in law or fact to name him as a defendant in the underlying suit. CP 237-246. Despite the fact that the Appeal from the District Court had been dismissed, Russell sought his fees not only incurred in the RALJ Appeal, but also in the District Court. CP 237.

SAFECO opposed Russell's motion based on the following:

- The award of reasonable fees was fully adjudicated by the District Court.
- Russell's fees could have been avoided if he had produced documentation to SAFECO or agreed to a stipulated dismissal.
- The addition of the underlying tort attorney in a PIP subrogation action is well grounded in fact and law.
- Russell waived his right to seek fees from the underlying district court action when he agreed to the dismissal of the RALJ appeal.

CP 294-305.

Russell's motion was denied by the King County Chief Civil Judge, Honorable Paris Kallas. CP 378-379. In the Order Denying Russell's Motion, Judge Kallas wrote in the following language:

Although attorney fees were awarded below pursuant to findings under RCW 4.84.185, no such findings (regarding frivolousness) have been entered in RALJ appeal. Nor have findings been entered that the RALJ appeal violates CR 11. 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 (challenges) denial of fees in conjunction with motion to reconsider), (sic) the docket does not so indicate. More importantly, until Russell prevails on his counterclaim, there is no basis upon which to grant such fees.

CP 374.

SAFECO submits that Russell's appeal is without merit as the

Superior Court was clearly acting within its discretion in denying Russell's motion for fees. Not only was the Superior Court correct, but Russell's appeal also fails to identify how the District Court could have abused its discretion in not awarding sanctions on the motion for reconsideration.

Because the rulings of both the District and Superior Courts were clearly discretionary, and because neither court abused that discretion, SAFECO asks that the Superior Court be affirmed.

IV. ARGUMENT

A. Standard of Review

At the outset, it should be pointed out that Russell's position on Appeal is fundamentally flawed in that it is based upon an erroneous statement as to the standard of review. Russell's entire appeal is based on the flawed premise that the Superior Court's ruling on a motion for CR 11 sanctions is reviewed *de novo*. Russell has not set forth the correct standard.

Attorney fees under wither CR 11 or RCW 4.84.185 are discretionary with the trial judge. Our inquiry is "whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons."

Skimming v. Boxer, 119 Wn. App. 748, 82 P.3d 707 (2004) (internal

citations omitted).

Washington law is clear on the standard of review for an award of fees as a sanction for allegedly filing an improper action. Russell cites to a single case in support of his *de novo* argument. However, that case deals with the review of a lease to determine which party was the “prevailing party” under the lease for purposes of the fee provisions. See *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958 (2001). This is clearly not the case herein.

As a result, in reviewing the Superior Court’s denial of Russell’s motion for fees, this Court reviews for a determination as to whether the Superior Court’s decision was “manifestly unreasonable” or based upon untenable grounds. Because the Superior Court was clearly acting within its discretion, and because it based its decision on tenable grounds, the Court should be affirmed.

B. SAFECO’s Suit Against Russell Was Well Grounded in Fact and Law.

Civil Rule 11 reads in relevant part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party’s or attorney’s knowledge, information, and belief, formed after reasonable inquiry it is ***well grounded in fact and***

is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, ***and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*** . . .

CR 11 (emphasis added).

The purpose of CR 11 is to deter baseless filings, not filings which may have merit. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (citing *Bryant v. Joseph Tree*, 119 Wn.2d at 220). CR 11 deals with two types of filings: baseless filings in that they lack factual or legal basis, and filings made for improper purposes. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). A filing is “baseless” when it is not well grounded in fact, not warranted by existing law, or not warranted by a good faith argument for the alteration of existing law. *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994), *review denied*, 125 Wn.2d 1015 (1995).

In Washington, a court may not impose sanctions for a baseless filing unless it finds that the attorney who signed and filed the pleading failed to conduct a reasonable inquiry into the factual and legal basis of the claims. *Bryant*, 119 Wn.2d at 219-20. When

reaching its decision, the court applies an objective standard, asking whether a reasonable attorney could believe his or her actions to be factually and legally justified. *Bryant*, 119 Wn.2d at 220. See also, *Madden v. Foley*, 83 Wn. App. 385, 390, 922 P.2d 1364 (1996); *MacDonald*, 80 Wn. App. at 883.

Similarly, RCW 4.84.185 is a statutory provision which allows for the shifting of costs in favor of the prevailing party where the claim was “frivolous and advanced without reasonable cause.”

Regardless of whether assessed under CR 11 or under the statute, the fact of the matter is that the Superior Court did *not* abuse its discretion. The Superior Court did not find that SAFECO’s action was frivolous or advanced without reasonable justification and the *facts*, as opposed to Mr. Russell’s bare allegations, support the Superior Court’s determination.

SAFECO’s complaint was well-grounded in fact. Mr. Russell was the attorney for insured Buretta who received PIP benefits, and he negotiated a settlement without protecting SAFECO’s right to recover subrogation of the PIP proceeds.

SAFECO’s Complaint was also well grounded in existing law. Public policy and the court decisions of *Mahler v. Szucs* and its

progeny impose a duty upon a plaintiff's counsel to adequately protect the subrogation claim of an insurance carrier. 135 Wn.2d 398, 957 P.2d 632 (1998).

This Court recently addressed the importance of an insured's responsibility to reimburse his insurer for any payment of PIP benefits:

A claimant who receives personal injury protection benefits after being involved in a car accident must reimburse his insurer after he has been fully compensated for actual losses suffered. Settling with the tortfeasor is evidence of full compensation, and the claimant cannot defeat the insurer's right to reimbursement with conclusory allegations that he settled for less than his actual damages because he was partially at fault.

Truong v. Allstate, 151 Wn. App. 195, 198, 211 P.3d 430 (2009).

In these cases, it is common practice for plaintiff's counsel to put the subrogated insurer on notice that he will be seeking recovery, including recovery of the subrogation claim and seeking attorney's fees pursuant to *Mahler*. *Id.*; and see, *Winters v. State Farm*, 144 Wn.2d 869, 31 P.3d 1164 (2001). When the plaintiff's attorney so notifies the insurance carrier, then that attorney has a duty to secure the subrogation claim of the insurance carrier. When the attorney fails to do so, then the attorney is liable for damages that flow from the failure to protect the subrogation claim on behalf of the carrier. *Id.*

Moreover, SAFECO's undersigned attorney of record, Mr. Wathen, has personally filed a previous lawsuit on behalf of an insurance company against an attorney representing an insured when that attorney failed to secure the carrier's subrogation claim. CP 105-106. In King County Superior Court Cause No. 04-2-07176-3 SEA, Mr. Wathen received a judgment in favor of General Insurance Company against a law firm for failure to protect the carrier's subrogation claims after the attorney had agreed to do so. *Id.* In the *Carr* case, attorney Carr similarly filed a motion for attorney's fees against General Insurance for filing a frivolous lawsuit. The King County Superior Court denied Mr. Carr's summary judgment motion to dismiss, denied his claim for attorney's fees, found that he owed a duty to the insurance carrier, and as a result, found judgment against Mr. Carr and even awarded attorney's fees. CP 105-106.

The facts and law in the *Carr* case and the present case are identical. The *Carr* case was a lawsuit that Mr. Wathen personally filed in King County, and as a result, Mr. Wathen had a good faith belief that the present lawsuit was well-grounded in fact and existing law.

Furthermore, SAFECO did not name Mr. Russell in the lawsuit

simply to harass him. Rather, SAFECO's failure to name Mr. Russell could have exposed SAFECO to an affirmative defense from the Burettas that SAFECO failed to name a necessary party.

Finally, there is no dispute that Mr. Russell settled the underlying lawsuit on behalf of the Burettas. As a result, there was a reasonable belief that SAFECO's subrogation interests were not protected because after several attempts to contact Mr. Russell about the PIP reimbursement, Mr. Russell failed to respond or simply advised that SAFECO should pursue subrogation from his former clients.

In light of the above and contrary to Mr. Russell's contention in his moving papers, it is clear that SAFECO's lawsuit did not violate CR 11. SAFECO does not and has never conceded this point. As a result, in order to protect its interests, SAFECO had the right and the obligation to appeal the District Court's improper ruling on Russell's Motion to Dismiss. See, Rules for Appeal of Decisions of Courts of Limited Jurisdiction ("RALJ") 2.2(a)(1)-(2) and 9.1(a).

However, in an effort to avoid continued litigation over \$4,055.58 in PIP payments and a \$5,600 attorney fees award, SAFECO simply agreed to try to resolve this matter and issue

payment in accordance with the District Court's award. Nothing about SAFECO's conduct violated CR 11 or RCW 4.84.185. As a result, the Superior Court acted within its discretion when it denied Russell's fee motion. The Superior Court should be affirmed.

D. Russell's Other Theories Are Without Merit

1. *Washington Consumer Protection Act*

Russell claims at page 19 of his brief that fees should have or could have been awarded under the Washington CPA, RCW 19.86, *et. seq.* This argument is completely without merit. First, Russell did not assert a cause of action under the CPA. CP 256-258. The parties did not litigate the CPA in the District or the Superior Courts. The CPA was not addressed in Russell's District and Superior Court motions.

Finally, Russell has not begun to prove the five elements of a CPA cause of action as announced in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531, (1986).

2. *Lodestar*

Russell also claims that he was somehow entitled to a *Lodestar* increase to the fees that he was requesting. However, the *lodestar*

method is not applicable. Court's utilize the lodestar method in determining prevailing party attorney's fees in the context of contingency fees. *Highland School Dist. No. 203 v. Racy*, – Wn. App. – , 202 P.3d 1024 (2009). Russell's discussion of the method of calculation makes no sense.

3. No Concession

At page 14 of his brief, Russell states without citation to anything in the record, that SAFECO has conceded that the lawsuit against him was not well grounded in fact or law. This is clearly not the case. Self-serving and conclusory statements are not sufficient to establish that the Superior Court somehow abused its discretion.

V. CONCLUSION

Based on the foregoing, SAFECO submits that the Superior Court did not abuse its discretion in denying Russell's fee motion. As a result, the Superior Court should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of January, 2010.

COLE, LETHER, WATHEN, & LEID, P.C.



Rick J Wathen, WSBA #25539

Eric J. Neal, WSBA #31863

Attorneys for Respondent