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## **ASSIGNMENTS OF ERROR**

1. The trial court erred in continuing Respondent's motion for costs and reasonable attorney fees. RP 12-13.
2. The trial court erred in granting Respondent's second motion for costs and reasonable attorney fees. CP 76.
3. The trial court erred in determining the amount of reasonable attorney fees awarded to the Respondent. CP 76.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether a third party insurance company is an aggrieved party under MAR 7.1?
2. Whether a third party insurance company can be considered a prevailing party under RCW 4.84.250?
3. Whether the trial court erred when it granted Respondent's untimely motion for costs and attorney fees?
4. Whether the trial court erred in awarding Respondent's reasonable attorney fees prior to the request for a trial de novo?

## **STATEMENT OF THE CASE**

This action arises out of a motor vehicle collision that occurred on February 1, 2008. Ms. Kruger-Willis' 2003 Chevrolet K1500 Suburban was legally parked and unoccupied on the side of the street outside of her place of employment in Shelton, Washington. The Respondent, Heather Hoffenburg, was the driver of Derek Lebeda's 2005 Chevrolet Pickup truck. Ms. Hoffenburg was traveling southbound on the 300 block of North 6<sup>th</sup> Street near West Pine Street when she crashed into Ms. Kruger-

Willis' vehicle, thereby causing substantial property damage to Ms. Kruger-Willis' vehicle. Ms. Hoffenburg left the scene of the collision without attempting to locate the owner of the vehicle she had just hit and without notifying law enforcement. Subsequently, Ms. Hoffenburg was identified by witnesses at the scene of the collision and she admitted to law enforcement that she was distracted by her falling purse while she was driving and she hit Ms. Kruger-Willis' vehicle. CP 2.

Ms. Kruger-Willis filed a claim for diminished value of her vehicle after the repairs to it were complete. Ms. Hoffenburg's insurance company, GEICO, offered Ms. Hoffenburg \$397.48 for the diminished value of her vehicle. Ms. Kruger-Willis declined GEICO's offer because her independently retained property damage appraiser determined that the diminished value of her vehicle greatly exceeded the amount offered by GEICO. Ms. Kruger-Willis then commenced this action in Mason County Superior Court. As Ms. Kruger-Willis was seeking only monetary damages under \$50,000.00, this matter was transferred to Mandatory Arbitration. CP 2, 74.

On February 23, 2010, the arbitration hearing took place before arbitrator Laurel Smith. Ms. Smith made an award in favor of Ms. Kruger-Willis in the amount of \$5,044.00. CP 25. Thereafter, GEICO timely filed a request for a trial de novo. CP 27. Ms. Hoffenburg has never disputed that it was GEICO and not she who requested the trial de novo. CP 62, 65, 67, 70, 74, RP 6-11. Nearly a year later, on February

15, 2011, Ms. Hoffenburg presented Ms. Kruger-Willis with an Offer of Judgment in the amount of \$1,000.00, which Ms. Kruger-Willis declined. CP 62, 65, 70, 74.

This case proceeded to a three day trial on April 26, 2011. On April 28, 2011, the jury rendered a verdict for Ms. Hoffenburg. CP 60. On May 26, 2011, Ms. Hoffenburg filed a motion for Defendant's Costs and Reasonable Attorney's Fees. CP 62. Ms. Kruger-Willis opposed the motion because it was not timely filed. CP 65. On June 6, 2011, the trial court heard oral argument from the parties' counsel regarding the motion and it continued the hearing to allow Ms. Hoffenburg's counsel to submit by declaration the time he expended on the case under the lodestar method. RP 13. At the hearing, it was not disputed that GEICO requested the trial de novo. RP 6-11. The trial court did not address whether excusable neglect existed on Ms. Hoffenburg's behalf to warrant the delay in making the request for judgment and in making the request for costs and for attorney's fees. RP 1-13.

Thereafter, on June 15, 2011, Ms. Hoffenburg filed a second motion for costs and reasonable attorney's fees. CP 70. Ms. Kruger-Willis opposed the second motion on the basis that as the third party insurance company, GEICO was not an aggrieved party and lacked standing to file a request for a trial de novo and similarly, it could not be considered the prevailing party entitled to reasonable attorney's fees. CP 74. On June 27, 2011, the trial court granted Ms. Hoffenburg's motion for

costs and for reasonable attorney's fees in the amount of \$11,490.00,  
which represented attorney's fees from the beginning of the case and not  
those incurred after a request for a trial de novo was filed. CP 76.

## ARGUMENT

### I. STANDARD OF REVIEW

Whether a particular statutory provision authorizes attorney fees is a question of law. *Gray v. Pierce County Hous. Auth.*, 123 Wn. App. 744, 760, 97 P.3d 26 (2004); *see also N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 643, 151 P.3d 211 (2007) ("Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion.") (footnote omitted). We review questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

### II. THE RESPONDENT'S MOTION FOR COSTS AND FOR REASONABLE ATTORNEY'S FEES WAS NOT TIMELY AND THE TRIAL COURT ERRED WHEN IT CONTINUED THE RESPONDENT'S MOTION TO PERMIT RESPONDENT'S COUNSEL ADDITIONAL TIME TO COMPUTE HIS LODESTAR

In her motion for statutory costs and reasonable attorney fees, Ms. Hoffenburg relies on RCW 4.84.250 because Ms. Kruger-Willis' action sought monetary damages of \$10,000.00 or less. RCW 4.84.250 provides in relevant part:

In any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a

reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250. CP 62, 65.

Since Ms. Kruger-Willis recovered nothing with respect to damages after a three day jury trial, Ms. Hoffenburg would be considered the prevailing party under RCW 4.84.270, which provides:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280. CP 62, 65.

Ms. Hoffenburg timely served Ms. Kruger-Willis with an offer of settlement in the amount of \$1,000.00 under RCW 4.84.280 after her request for a trial de novo. Ms. Kruger-Willis rejected the offer of settlement. RCW 4.84.280 provides:

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250. CP 62, 65.

In order to recover her costs and attorney's fees under RCW 4.84, Ms. Hoffenburg was required to comply with the time provisions of CR 54(d)(1) and (2). CP 65.

CR 54(d)(1) provides:

Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of judgment, the clerk shall tax costs and disbursements under CR 78(e). CP 65.

Ms. Kruger-Willis did not dispute that Ms. Hoffenburg, as the prevailing party by statute in this action, was entitled to costs under CR 78(e), which are: (1) the statutory attorney fee; (2) the clerk's fee; and (3) the sheriff's fee. CP 65.

CR 54(d)(2) provides:

Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after the entry of judgment. CP 65.

Ms. Hoffenburg did not move the trial court for costs and fees until 28 days after the jury returned its verdict in her favor. CP 62. At issue before the trial court at the hearing on Ms. Hoffenburg's motion for costs and fees was whether a judgment had been entered in the action. RP 1. Ms. Hoffenburg's counsel conceded that the entry of judgment was an afterthought. RP 1. "...a judgment hasn't been entered, so let's go ahead and do that as well. So, the judgment was kind of an afterthought, and the primary purpose of the motion was for entry – or, rather for costs and attorney's fees." RP 1. The trial court determined that judgment had not been entered in the action and entered judgment at the hearing on July 6, 2011. RP 11-12. Thereafter, the trial court ordered Ms. Hoffenburg's

counsel to submit a declaration of his billable hours in the matter. RP 12-13. Rather than submitting a declaration of his billable hours, Ms. Hoffenburg's counsel filed on July 15, 2011, a second motion for costs and reasonable attorney's fees. CP 70. On July 27, 2011, a brief telephonic hearing was held among the trial court and the parties' counsel on Ms. Hoffenburg's second motion for costs and for attorney's fees. The trial court granted the relief requested by Ms. Hoffenburg in her second motion. CP 76.

The trial court erred when it continued Ms. Hoffenburg's hearing on her motion for costs and for attorney's fees because the motion was untimely and the trial court should have denied the relief sought by Ms. Hoffenburg for reasonable attorney's fees.

Absent excusable neglect or any reason for delay in making the fee request, the trial court can properly deny a fee award provided by statute. *Corey v. Pierce County*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010). In *Corey*, the plaintiff was a deputy prosecuting attorney who sued her employers for wrongful termination, among other claims. A jury rendered a verdict in her favor. Plaintiff moved for attorney's fees under RCW 49.48.030. The trial court denied the plaintiff's motion as untimely under CR 54(d)(2) because the plaintiff did not file the fee request within the 10 day requirement set out in CR 54(d)(2). The appellate court affirmed the denial of the fee request as untimely. "Absent excusable neglect or any reason for delay in making the fee request, the trial court can properly

deny a fee award provided by statute.” *Corey*, 154 Wn. App. at 774. CP 65.

As Ms. Hoffenburg was the prevailing party at trial, her attorney of record was required to prepare a proposed form or order of judgment not later than 15 days after the entry of the verdict or the decision. CR 54(e). CR 54(e) provides:

The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

Ms. Hoffenburg’s attorney of record failed as required under CR 54(e) to prepare and to present a proposed form of order or judgment within 15 days after the entry of the jury’s verdict. RP 1.

While the language of CR 54(d)(2) and (e) provides for discretion of the trial court to enlarge the time to file a motion for costs and for fees,<sup>1</sup> and CR 54(e) provides for discretion of the trial court to enlarge the time for presentation of the judgment<sup>2</sup>, the trial court’s discretion is limited by CR 6(b). CR 6(b) provides:

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or

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<sup>1</sup> “Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after the entry of judgment.” CR 54(d)(2).

<sup>2</sup> “The attorney for the prevailing party shall prepare and present a proposed form of order not later than 15 days after the entry of the verdict or the decision, or at any other time that the court may direct.” CR 54(e).

within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

CR 6(b).

By its language, CR 6(b) permits the trial court, at its discretion, to enlarge the time for presentation of the judgment, it was required to find that the failure to prepare and to present the order of judgment was a result of excusable neglect. CR6(b)(1) required Ms. Hoffenburg to move to enlarge the time to prepare and to present the order of judgment, thereby triggering the 10 day period in which she could then move for costs and for fees, before the expiration of 15 days after the entry of the jury's verdict. Ms. Hoffenburg failed to do so and she has demonstrated no excusable neglect or reason for the delay. RP 1-13.

CR6(b)(2) permits the trial court, at its discretion, to enlarge the time after the expiration of 15 days after the entry of the jury verdict only upon a finding of excusable neglect. The trial court abused its discretion when it entered judgment over 30 days after the entry of the jury's verdict because it made no finding that Ms. Hoffenburg's delay to prepare and to present the order of judgment was due to excusable neglect and Ms. Hoffenburg has demonstrated no reason for delay in preparing and in presenting the order for judgment. CP 67, RP 1-13. For these reasons, the trial court's decision to grant Ms. Hoffenburg's motion for costs and for

reasonable attorney's fees was an abuse of discretion and the trial court must be reversed.

**III. AS THE INSURANCE COMPANY FOR THE RESPONDENT, GEICO LACKED STANDING TO MOVE FOR COSTS AND FOR REASONABLE ATTORNEY'S FEES**

This issue on appeal appears to be an issue of first impression: Whether a third-party insurance company may file a request for a trial de novo, and if it is the prevailing party at trial, is it entitled to costs and reasonable attorney's fees?

**A. GEICO WAS NOT AN AGGRIEVED PARTY UNDER MAR 7.1 AND COULD NOT FILE A REQUEST FOR A TRIAL DE NOVO**

This case was previously arbitrated on February 23, 2010. The arbitrator rendered an award in favor of Ms. Kruger-Willis in the amount of \$5,044.00. CP 25. Thereafter, GEICO timely filed a request for a trial de novo. In Ms. Kruger-Willis' opposition to Ms. Hoffenburg's first motion for costs and for fees, Ms. Kruger-Willis asserted that GEICO filed the request for the trial de novo. Ms. Hoffenburg has not disputed that GEICO filed the request for the trial de novo. CP 65, 67, 70, and RP 6-11. GEICO was not a named party to this action. CP 2, 65.

Under MAR 7.1, "any aggrieved party not having waived the right to an appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing the case." "MAR 7.1 not only specifically requires an aggrieved party to file within 20 days, **but it also**

**requires the party seeking review to be named in the notice for trial de novo.”** *Wiley v. Rehak*, 143 Wn.2d 339, 345, 20 P.3d 404 (2001) (emphasis added). GEICO’S name was not listed in this case and it was not listed in the notice for a trial de novo. CP 27. Ms. Hoffenburg is the aggrieved party, she is a single woman, and only she was authorized under MAR 7.1 to file a request for a trial de novo. As the insurance company for Ms. Hoffenburg, GEICO lacked standing to file a request for a trial de novo on her behalf. CP 74, RP 6-11.

**B. GEICO IS NOT A NAMED PARTY TO THIS ACTION AND IT CANNOT BE THE PREVAILING PARTY UNDER RCW 4.84.250**

This case was a damage action of \$10,000.00 or less and Ms. Hoffenburg would be considered the prevailing party because the jury returned a verdict in her favor. Therefore, under RCW 4.84.250, Ms. Hoffenburg would be entitled to attorney’s fees. CP 74. RCW 4.84.250 provides:

In any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorney’s fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250.

Under RCW 4.84.250, Ms. Hoffenburg would be entitled to costs. “In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements...” RCW 4.84.030.

However, since GEICO was not a named party to this action; was not an aggrieved party under MAR 7.1; it cannot be the prevailing party under RCW 4.84.250 and therefore, it is not entitled to costs and to fees under the statute. CP 74.

Ms. Hoffenburg has been absent during this entire proceeding and her attorney of record was unable to locate her after initial contact. RP 6. Ms. Hoffenburg's counsel of record has not disputed this assertion by Ms. Kruger-Willis. CP 65, 67, 70, RP 6-11. The trial court erred when it granted Ms. Hoffenburg's motion for costs and for attorney's fees when it did not address whether GEICO had standing to move for costs and for reasonable attorney's fees when it was not a named party to the action.

In *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 392-95 715 P.2d 113 (1986), the plaintiffs sued State Farm and PEMCO insurance companies as third party claimants for the bad faith handling of their personal injury claims. The court held that third parties have no direct cause of action in this context against insurance companies. *Tank v. State Farm Fire & Cas. Co.*, at 392, 395. Under the holding in *Tank*, if a third party has no direct cause of action against an insurance company, it should follow that an insurance company has no direct cause of action against a third party claimant. Therefore, GEICO, as the third party insurance company in this matter should not be able to request a trial de novo and should not be awarded costs and reasonable attorney's fees because it was not the prevailing party at trial.

**IV. THE TRIAL COURT ERRED WHEN IT AWARDED ATTORNEY'S FEES PRIOR TO THE REQUEST FOR A TRIAL DE NOVO**

After the arbitrator filed an award in favor of Ms. Kruger-Willis, GEICO timely filed a request for a trial de novo. CP 25, 27, 65, 67. In granting Ms. Hoffenburg's second motion for costs and for reasonable attorney's fees, the trial court awarded Ms. Hoffenburg \$11,490.00, which represents the costs and attorney's fees for defending the case in its entirety. CP 62, 67, 76. MAR 7.3 provides in relevant part: "Only those costs and reasonable attorney's fees incurred **after** a request for a trial de novo is filed may be assessed under this rule." MAR 7.3 (emphasis added).

The trial court erred in awarding Ms. Hoffenburg costs and reasonable attorney's fees from the beginning of the case, rather than the costs and reasonable attorney's fees incurred after GEICO requested a trial de novo. Therefore, the trial court's decision regarding the amount of costs and fees awarded must be reversed.

**CONCLUSION**

The trial court erred when it granted Ms. Hoffenburg's untimely second motion for costs and for reasonable attorney's fees without addressing whether excusable neglect existed in moving for the costs and reasonable attorney's fees. Furthermore, the trial court erred when it awarded Ms. Hoffenburg costs and reasonable attorney's fees prior to the request for the trial de novo. Finally, the trial court erred when it failed to address whether a third-party insurance company may be considered a

prevailing party entitled to receive costs and attorney's fees. Therefore, the trial court's order granting Ms. Hoffenburg costs and reasonable attorney's fees should be reversed.

RESPECTFULLY submitted this 13<sup>th</sup> of January, 2012.

ANDERSEN BULLIS, PLLC



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Alana K. Bullis, WSBA No. 30445  
Attorney for Appellant

COURT OF APPEALS  
DIVISION II

12 JAN 23 PM 2:19

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND  
JOHN DOE HOFFENBURG,

Respondent.

NO. 42417-7-II

**AMENDED CERTIFICATE OF  
SERVICE**

I, Alana K. Bullis, certify that on January 13, 2012, I caused a true and correct copy of the Appellant's Opening Brief to be served via ABC Legal Messenger on the following:

Morgan Wais  
Mary E. Owen & Associate  
One Union Square  
600 University Street, Suite 400  
Seattle, WA 98101

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

DATED this 23<sup>rd</sup> day of January, 2012.



Alana K. Bullis