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NO. 96365-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent / Cross-Petitioner,

v.

PHILLIP NUMRICH,

Petitioner.

REPLY BRIEF OF RESPONDENT / CROSS-PETITIONER

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A. ARGUMENTS IN REPLY

1. THE STATE DID NOT ENGAGE IN CONDUCT TANTAMOUNT TO BAD FAITH

As discussed in more detail below, this Court’s decision in State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012), controls here. Under Gassman, a trial court can impose sanctions against the State for the “untimely” filing of a motion to amend only if it finds that the State acted in “bad faith” or engaged in conduct “tantamount to bad faith.” Id. at 201-11. The State engages in conduct “tantamount to bad faith” if it uses “willfully abusive, vexatious, or intransigent tactics designed to stall or harass.” Id. at 211 (citing Chambers v. NASCO, Inc., 502 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Here, the State sought to amend the charges against Numrich when it appeared that interlocutory appellate review might de facto bar the greater charge due to the running of the statute of limitations. This was not abusive, vexatious, or intransigent, and was not designed to stall or harass.

a. Amending To Prevent The Statute Of Limitations From Running On An Alternative Charge Was Not Conduct Tantamount To Bad Faith

The State has repeatedly explained the timing of its motion to amend.¹ CP 475-483, 607-09, 430-42; RP 84-90, 102-05; State’s Motion for

¹ The facts surrounding the State’s amendment to add first-degree manslaughter are relevant both to the State’s challenge to the trial court’s order imposing sanctions and Numrich’s challenge to the trial court’s order granting the motion to amend. In prior briefing, the parties have discussed these procedural facts in sections dedicated to both issues. As a result, in this brief the State will—of necessity—cite to portions of prior briefing labelled as ostensibly being about the propriety of the trial court’s decision to grant the motion to amend.

Discretionary Review at 2-7;² State’s Brief of Respondent/Cross-Petitioner at 26-38.³ The motion to amend was brought because interlocutory review would potentially foreclose additional action by trial court, thereby threatening the State’s ability to amend the Information before the statute of limitations ran. It was not brought to retaliate against Numrich for seeking discretionary review, to gain advantage in the appellate litigation, or for any other improper purpose. CP 475, 609. This is supported by both the State’s explanation and a reasonable reading of the procedural history of the case.

In granting the motion to amend, the trial court essentially accepted the State’s explanation, finding that State’s counsel had been candid with the court and that there was no evidence that the State’s actions were vindictive or otherwise improper. CP 470-72. In the litigation following the granting of the motion to amend, Numrich accused the State of engaging in conduct tantamount to bad faith and/or of misleading the trial court. CP 870-77. In denying Numrich’s motions to reconsider and/or dismiss, the trial court did not disturb its earlier findings regarding the State’s explanation of events. CP 976-77. As a result, there is no basis to conclude that the State engaged in “willfully abusive, vexatious, or intransigent tactics designed to stall or harass” or did anything else that would constitute conduct tantamount to bad faith.

² The State’s Motion for Discretionary Review and Statement of Grounds for Direct Review was filed with this court on March 22, 2019 under Supreme Court cause no. 96566-8.

³ Hereinafter “State Resp. Br.”

b. Numrich’s Arguments That The State Engaged In Conduct Tantamount To Bad Faith Are Not Persuasive

Despite the above, in his Reply Brief of Petitioner/Cross-Respondent,⁴ Numrich argues that the record demonstrates that the State’s conduct in moving to amend was tantamount to bad faith. Pet. Rep. Br. at 21-29, 33-34, 40-42. However, Numrich’s entire argument is premised on three overarching assertions that are not supported by the record.

i. The State did not intentionally withhold notice of its intent to amend

Numrich asserts that the State engaged in conduct tantamount to bad faith by intentionally withholding notice of its intent to amend. Pet. Rep. Br. at 42. But this argument either misapprehends or mischaracterizes the record. The State has consistently indicated that it believed from the beginning that there was probable cause to charge Numrich with first-degree manslaughter, but decided not to file that charge initially and to reserve the decision on whether to add it later. CP 476; RP 84-90, 102-05. Numrich claims that this means both that the State always intended to actually amend the charges and that it consciously withheld that information from the defense and the court.⁵ But that is not what the State said, nor is it a reasonable interpretation of the State’s explanation.

⁴ Hereinafter “Pet. Rep. Br.”

⁵ See Pet. Rep. Br. at 22 (“According to the State, it always contemplated amendment if the case proceeded to trial....Despite this, the State intentionally withheld notice...”; Pet. Rep. Br. at 29 (“But the State has never offered a credible explanation for why – if it knew about the amendment at the time of filing – it withheld this information from the defense and the court.”) (emphasis in original); Pet. Rep. Br. at 32 (“[T]he State has never explained why it intentionally withheld notice...”; Pet. Rep. Br. at 42 (“The State elected not to tell the defense or the court about its...amendment...”))

The State was not intentionally or consciously withholding information about its decision because the decision to amend had not been made and was not a foregone conclusion. The State ultimately decided to amend when it did out of concern that it could lose the option of amending due to the running of the statute of limitations if it did not. RCW 9A.04.080(1)(i); CP 476, 480-81. The State made this point in its briefing and argument on the motion to amend and in the numerous motions that followed before the trial court. CP 430-42; RP 84-90, 102-05.

The argument Numrich makes to this Court is virtually identical to the one he made in the trial court in both responding to the State's motions and in bringing his own motions in the aftermath of the trial court's decision to grant the amendment but impose sanctions. There he argued that the State's explanation of events was either a falsehood that was contradicted by the record or established that the State had intentionally withheld its intent to amend and that—either way—this constituted evidence of vindictive prosecution, governmental mismanagement, and/or conduct tantamount to bad faith. CP 870-98. However, the trial court implicitly rejected these arguments when it denied his motions to dismiss and/or reconsider the amendment. CP 976-77. Numrich fails to show that the trial court erred in reaching that conclusion. Nor is there any basis to support the assertion that the State has changed its explanation on this point. To the contrary, the State's explanation has remained the same throughout the proceedings. CP 233-245, 430-42, 475-85, 607-09, 927-44, 952-69, 1133-43; RP 84-90, 102-05.

ii. *The State did not mislead the court or the defense*

Numrich argues—at least implicitly—that the State engaged in conduct tantamount to bad faith by misleading the court and the defense. Pet. Rep. Br. at 28, 33-34. Numrich’s arguments on this point are virtually identical to ones he made in the trial court.⁶ The trial court—having heard all of the arguments and reviewed all of the facts—rejected Numrich’s accusations and did not disturb its finding regarding the credibility of the State’s explanation of events. CP 976-77.

Despite the above, Numrich argues that the trial court erred in reaching that conclusion. His arguments are not persuasive.

First, Numrich asserts that the trial court’s finding that the State “was candid with the Court in admitting that he did not consider the amendment until very late in the appellate process”⁷ indicates that it was misled because:

[b]y the prosecutor’s own admission, the prosecutor *did not first* consider the amendment until very late in the pending appellate process. Quite to the contrary, the prosecutor advised the court in his sworn declaration that the State had contemplated the amendment from the time of filing.

Pet. Rep. Br. at 33-34 (emphasis in original). But this argument oversimplifies both the State’s point and the trial court’s finding and is ultimately a strawman. The State never claimed that it *first* considered the amendment late in the pending appellate process. Nor was that the trial

⁶ For example, Numrich accused the State of misleading the trial court in various ways in his response to the State’s motion to reconsider the imposition of sanctions. CP 878-987. In its reply, the State explained at length how this was not the case. CP 927-44. Numrich made a virtually identical accusation in his motions to dismiss/reconsider and the State again explained in its response. CP 870-71, 876, 953-57.

⁷ CP 470

court's finding. Rather, the State was clear and unambiguous with the trial court as to when the possibility of a later amendment was first considered (at the time of filing) versus when it was next considered (after Numrich's motion for discretionary review had been filed) and why the State did not consider it in between. CP 430-42, 607-09; RP 84-90. Nor was the trial court confused on this point. During the hearing on the motion to amend, the trial court's questions to the State establish that the court understood the procedural history of the case and what the State was considering at various points in time. RP 84-90. In this context, the trial court's conclusion that the State had been candid with the court was clearly based on an accurate understanding as to how and why the motion to amend came about when it did.

Second, Numrich accuses the State of misleading the court and defense into believing that it would not seek to amend the charges. As an initial matter, Numrich argues that the State misled the defense and the trial court into believing that the decision on his motion to dismiss the count of second-degree manslaughter would be dispositive regarding any possible felony manslaughter charges. Pet. Rep. Br. at 22, 34. But the State did no such thing. Here, Numrich brought a motion to dismiss one of the counts charged in the original Information. The State simply opposed that motion and it was briefed and litigated. Nowhere in that process did the State offer any assurance that the court's ruling would be dispositive of any issues beyond those specifically raised by Numrich's motion or necessarily resolved by the court's decision.

Nor was Numrich ever “misled” as to the possibility that the charges might be amended. Rather, defense counsel simply failed to consider the possibility that the State would seek such an amendment. Pet. Rep. Br. at 29. The specific issue of possible amendments to the charges was never discussed by the parties one way or the other. CP 475-83. However, the State certainly never did anything to indicate that it was foreclosing the possibility that it might—consistent with its long-standing policy and practice—move to amend the charges at a later date. CP 475-83. The facts giving rise to the first-degree manslaughter charge are readily apparent in the discovery.⁸ The State has no obligation remind defense counsel of the legal implications of those facts, nor must the State set a timeframe for amending to higher charges. Against this backdrop, the defense apparently made an incorrect assumption about what the State might do and pursued a litigation strategy based on that assumption. But the fact that the State did not act as the defense expected does not mean that the State misled the defense. And defense counsel’s failure to anticipate greater charges is not misconduct by the State.

Finally, Numrich argues that the State’s entire explanation for the reason for the amendment is misleading. Pet. Rep. Br. at 28. Numrich asserts that the State “argued below that Mr. Numrich advanced novel arguments about Gamble⁹ for the first time in his September 2018 motion

⁸ Indeed, the first-degree manslaughter charges arises from the same nexus of facts as the original charges and is essentially identical to the second-degree manslaughter charge except that it requires proof of a higher level of *mens rea*.

⁹ State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)

for discretionary review.” Pet. Rep. Br. at 28. In support of this assertion, Numrich plucks isolated passages from the State’s written briefs and oral arguments and presents them out of context. Pet. Rep. Br. at 28. Numrich’s argument is based on a characterization of the State’s position that is incorrect. Despite Numrich’s assertions to the contrary, the State has never claimed that Numrich’s arguments about Gamble were not raised until his motion for discretionary review. Indeed, the State has *always* acknowledged that Gamble was raised and argued during the course of Numrich’s substantive motion to dismiss the charge of second-degree manslaughter. CP 477-78; RP 86-90. Nor has the State downplayed the extent to which Gamble was discussed.¹⁰

Even if Numrich’s assertions were correct, they are still irrelevant to the State’s point regarding Gamble. Gamble was at issue in the litigation before the trial court. Pet. Rep. Br. at 24-26. The State has not asserted to the contrary. Rather, the State has simply noted that it did not fully

¹⁰ Numrich asserts that the State has claimed “that the discussion of Gamble and first-degree manslaughter was limited to two sentences and a footnote in a single brief.” Pet. Rep. Br. at 28. But that was not what the State said in the passage Numrich cites to. What the State actually said was: “*In this brief*, the defendant asserted that Gamble only applies to first degree manslaughter....However, this is done as two sentences and a footnote as part of a much larger overall reply to the State’s argument.” (emphasis added). CP 478. In other words, the State correctly made a point about the extent to which Gamble was addressed *in a specific brief*. CP 118-140. Despite Numrich’s assertion to the contrary, the State did not claim that discussion of Gamble was confined to a single brief.

appreciate the legal consequences of Numrich arguments regarding Gamble until receiving Numrich's briefing to this Court. CP 479-80; 1138-39; RP 87-90.

Nor was this inexplicable or unreasonable. Throughout the litigation in this case, the State has focused on addressing the specific issue raised in the specific context in which it was raised. In the trial court, the relevant issue was whether the State could proceed on the filed charges and Numrich's argument that it could not was partially based on the assertion that Gamble did not apply to second-degree manslaughter. CP 118-40, 477-78, 509-13, 537; RP 87-90. That argument was raised and litigated in the context of a motion to dismiss an existing charge. Id. This did not trigger the State to consider the possibility of amendment because whether the State amended to add first-degree manslaughter was not relevant to whether it could proceed on second-degree manslaughter.

In his motion for direct discretionary review in this Court, however, the relevant issue and applicable context were different. At that point, one of the specific issues was whether discretionary review was appropriate under RAP 2.3(b)(4). CP 479. In that context, it appeared to the State that Numrich's argument regarding Gamble was such that he had effectively conceded that his "general-specific rule" argument would not apply to first-degree manslaughter. CP 479-80; 1138-39; RP 87-90. As a result, the consequences of Numrich's arguments in his motion for direct discretionary review triggered a consideration of the amendment because even the

possibility of such an amendment would potentially impact whether interlocutory review was appropriate.¹¹ Id.

iii. The trial court's statements of preference do not equate to a finding of conduct tantamount to bad faith

In its Brief of Respondent/Cross-Petitioner, the State pointed out that sanctions were particularly inappropriate in this case given that the trial court had never identified any actual wrongdoing on the part of the State. State Resp. Br. at 51-52. In response, Numrich asserts that various statements by the trial court constituted findings of wrongdoing and—by extension—served as basis to conclude that the State had engaged in conduct tantamount to bad faith. Pet. Rep. Br. at 42 n.18. This argument fails.

The fact that a trial court articulated why it imposed sanctions does not in and of itself establish that the sanctions were appropriate. For the sanctions to be proper, the trial court must also have the authority to impose them. Under Gassman, a trial court cannot sanction the State merely because the court would have preferred that the State act differently. Rather, as noted above, sanctions are only warranted if the State did something inappropriate that rose to the level of engaging in conduct tantamount to bad faith.

¹¹ To be clear—that does not mean that the State amended the charges as an appellate tactic. Rather, Numrich's argument is what triggered the State to consider amendment and its possible consequences. CP 479-80. That, in turn, led to the State noting the statute of limitations issues and concluding that a motion to amend could not be delayed further without likely foreclosing even the possibility of proceeding on first-degree manslaughter. CP 479-80.

Here, the trial court never identified any court rule, statute, case, or order setting forth a legal prohibition that the State violated or a legal obligation that it failed to meet. Indeed, the trial court found essentially the opposite, ruling: that the State unquestionably had the right to amend the charges when and how it did, that there was no prejudice to Numrich's rights or any other basis to deny the motion, and that the State's motion was not vindictive. CP 470-72, 976-77. Against this backdrop, the statements that Numrich points to indicate that the trial court clearly would have *preferred* if the State had acted differently. But such an expression of preferences does not equate to a finding of wrongdoing, let alone a finding of conduct tantamount to bad faith warranting the imposition of sanctions.

2. NUMRICH'S ATTEMPT TO DISTINGUISH GASSMAN IS UNPERSUASIVE

The trial court granted the State's motion to amend, but also imposed terms against the State because it concluded that the State's motion should have been brought sooner. CP 470-72. As the State pointed out in its Brief of Respondent/Cross-Petitioner, this was improper given this Court's decision in Gassman. As noted above, under Gassman, a trial court can only impose sanctions against the State for the "untimely" filing of a motion to amend if it finds that the State acted in "bad faith" or engaged in conduct "tantamount to bad faith." 175 Wn.2d at 201-11. This Court's holding in Gassman is straightforward and the trial court erred in failing to follow it.

Numrich attempts to distinguish Gassman on the basis that defense counsel made concessions in that case, but not here. Pet. Rep. Br. at 41-42.

But this misreads the import of those facts. The concessions made by the defense attorney in Gassman were relevant given the procedural posture of the case and the lack of clarity in the record on appeal. 175 Wn.2d at 212-13. In addition, they were part of this Court’s analysis in reaching the conclusion that the record did not support a finding of conduct tantamount to bad faith in that particular case. Id. But Numrich fails to explain how the concessions alter the basic, simple, and straightforward rule of Gassman—that sanctions are only appropriate for an untimely amendment if the State acted in bad faith or engaged in conduct tantamount to bad faith. Id.

When the actual rule from Gassman is applied to the facts of this case, it is apparent that sanctions were not appropriate or permissible. Here, the trial court imposed sanctions despite explicitly finding both that there was no basis to deny the State’s motion to amend and that there was no evidence that the motion was vindictive and not finding bad faith or any other basis to deny the State’s motion. CP 470-472. And, despite Numrich’s arguments to the contrary, as discussed above the State did not act in bad faith or engage in conduct tantamount to bad faith. As a result, the trial court abused its discretion when it applied the wrong legal standard and imposed sanctions based on its subjective feeling that the State should have brought the motion earlier.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE AMOUNT OF HOURS CLAIMED WAS REASONABLE

In the litigation before the trial court regarding the amount of attorneys' fees, the State raised significant questions about the adequacy of the billing records provided by Numrich and pointed to numerous specific billing entries that appeared problematic. CP 992-1008. In his reply, Numrich argues that he submitted detailed timesheets, that the trial court is not required to provide a detailed analysis of each expense claimed, and that the trial court's findings were sufficient to demonstrate that it had adequately considered these issues. Pet. Rep. Br. at 43-46. He also asserts that the State never argued that the time he claimed was actually unreasonable and opines that the State spent a similar amount of time. *Id.* at 46. His arguments are unpersuasive.

First, Numrich's argument ignores the caselaw and overstates the analysis that the trial court actually conducted. While it may be true that, as Numrich argues, the "determination of the fee award should not be an unduly burdensome proceeding,"¹² courts are still required to take an "active role" in assessing the reasonableness of the hours claimed. *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). And that active role must be reflected in the trial court's findings and conclusions. *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). While a trial court "does not need to deduct hours here and there just to prove...that it has taken an active

¹² Pet. Rep. Br. at 44, quoting *Steele v. Lundgren*, 96 Wn. App. 773, 786, 982 P.2d 619 (1999).

role,” it *is* required to enter findings that show how it resolved disputed issues and conclusions that explain its analysis. Id. Even where a trial court enters findings and conclusions, it still commits reversible error when they are so conclusory that they fail to do this. Id. at 658-59.

Here, despite Numrich’s claim to the contrary, there is no indication that the trial court adequately considered the State’s various objections to the billing entries. For example, in its briefing on the issue of fees, the State challenged the hours claimed by Numrich and explained how numerous specific billing entries should have been excluded or reduced because they were block-billed and appeared to be duplicative and overstaffed; spent on tasks that were clerical, secretarial, or ministerial in nature; were unreasonable, unproductive, and excessive; and/or were spent on work that was outside the scope of what the trial court had ordered should be included in the fee petition. CP 1001-07. Numrich asserts that the trial’s order setting the amount of fees adequately addressed these issues. Pet. Rep. Br. at 45-46. But the trial court’s sole finding on this point consisted of a mere two sentences: “This was a reasonable amount of time given the novelty of the issues presented, the complexity of the litigation, the forum, and the importance of the consequences to Mr. Numrich. The work was not duplicative or unproductive.” CP 1131. This finding did not even address half of the issues raised by the State. And, for the issues the trial court did ostensibly address, it did not provide any explanation of its analysis or how it had resolved the disputed issues.

Numrich also points to the one sentence that the trial court added to his proposed order as evidence that the court “clearly engaged with the fee petition.” Pet. Rep. Br. at 46. But this argument inflates the import of that sentence. In its handwritten addition, the trial court stated: “The Court has reviewed all of [the] extensive pleadings, the time billings [in] the case, and declines to re-review any [of] its earlier decisions.” CP 1132. In context, this statement merely serves as a *pro forma* list of what the trial court reviewed.¹³ It says nothing about how the court analyzed the case, resolved disputed issues, or reached its decision.

Given all of above, while the trial court entered findings that the hours claimed were reasonable, these findings are conclusory in the extreme, do not show how the court resolved disputed issues of fact, and do not provide any of the court’s analysis in arriving at that decision. CP 1131-32. Rather, the trial court essentially adopted without question the hours claimed in the fee affidavits from Numrich’s counsel. *Id.* In short, this was exactly the sort of order that is so perfunctory and conclusory as to constitute reversible error because it fails to establish that the court took the required “active role” in assessing the reasonableness of the hours claimed. *Mahler*, 135 Wn.2d at 434-35; *Berryman*, 177 Wn. App. at 658-59.

Second, Numrich asserts that the State never argued that the hours he claimed were actually unreasonable and opines that the State likely spent a

¹³ The portion of this sentence indicating that the trial court declined to re-review its earlier decisions is essentially a nullity vis-à-vis this issue. At the time it entered this order, the trial court had not made any previous decisions regarding the reasonableness of either the hours worked or hourly rate claimed by Numrich.

similar amount of time. Pet. Rep. Br. at 46. But this ignores the fact that it was Numrich who bore the burden of establishing that the hours claimed were reasonable, not the State's burden to prove that they were not. Berryman, 177 Wn. App. at 661-64. As a result, it is irrelevant that the State couched its argument in terms of Numrich failing to meet his burden of proving reasonableness rather than itself asserting and proving unreasonableness.

4. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT THE HOURLY RATE CLAIMED WAS REASONABLE

Numrich has never provided any evidence as to the reasonableness of his attorneys' hourly rates aside from the repeated—but unsupported—assertion of one of those attorneys that they were. CP 749-55, 924-26, 978-91, 1127-30. In its Brief of Respondent/Cross-Petitioner, the State pointed out that the trial court's decision to accept the claimed hourly rate ignored controlling case law holding that the proof of the reasonableness of the hourly rate must consist of something beyond the mere declaration of the counsel whose rate is in question. State Resp. Br. at 53-54. Numrich makes three arguments in response. None is persuasive.

First, Numrich asserts that the cases cited by the State do not establish that the proof of the reasonableness of the hourly rate must consist of something beyond the declaration of that counsel. Pet. Rep. Br. at 49. But this is incorrect. Clear case law holds that the party requesting fees bears the burden of establishing the reasonableness of the claimed hourly rate. Berryman, 177 Wn. App. at 657. And clear case law also holds that

courts cannot rely solely on the attorney's fee petition in ruling on the reasonableness of a fee request. See, e.g., Mahler, 135 Wn.2d at 434-35 (“Courts should not simply accept unquestioningly fee affidavits from counsel.”); SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014) (“In determining an award of attorneys’ fees, the trial court may not rely solely on counsel’s fee affidavits.”). Putting those holdings together, it is apparent that a trial court cannot rely solely on the attorney’s fee petition to find that the hourly rate was reasonable.

Second, Numrich asserts that a trial court can find an attorney’s hourly rates reasonable based on its own status as an “expert on the question of the value of legal services.” Pet. Rep. Br. at 47-48. However, the only Washington case cited by Numrich in support of this proposition is a 1992 Court of Appeals case¹⁴ that appears inconsistent (at least on this point) with this Court’s subsequent decisions in Mahler and SentinelC3. Pet. Rep. Br. at 47. Moreover, even if a trial court could find that an attorneys’ rates were reasonable based on its own “expertise” as to the value of legal services, there is no indication that that is what the trial court did in this case. The trial court’s findings contain no reference to any familiarity with Numrich’s attorneys or their general reputation within the legal community, nor is there anything to indicate that it relied on any such familiarity in reaching its decision. CP 976-77, 1131-32. Rather, the trial court appears to have simply adopted the cursory language proposed by Numrich and made a finding

¹⁴ Brown v. State Farm Fire & Cas. Co., 66 Wn. App. 273, 831 P.2d 1122 (1992)

based solely on the unsupported affidavit of his attorney. CP 1131-32.

Third, Numrich asserts that the “State has never argued that the rates are unreasonable.” Pet. Rep. Br. at 48. But, as with the issue of the number of hours billed, this ignores the fact that it is Numrich who bears the burden of establishing that his attorneys’ hourly rates were reasonable, not the State’s burden to prove that they were unreasonable. Berryman, 177 Wn. App. at 661-64. As a result, it is irrelevant that the State couched its arguments in terms of Numrich failing to meet his burden of proving reasonableness rather than itself asserting and proving unreasonableness.

B. THERE IS NO BASIS FOR THIS COURT TO IMPOSE FEES ON APPEAL

Numrich argues that this Court should award him attorneys’ fees on appeal. Pet. Rep. Br. at 49-50. This request should be denied.¹⁵

Under RAP 18.1(a), a party may request fees on appeal “if applicable law grants the party the right to recover reasonable attorney fees or expenses on review.” It is not enough for a party to simply prevail on appeal. Nor is it in and of itself sufficient that the prevailing party had to expend time and resources to defend a monetary award. Rather, in order to receive an award of fees on appeal, “a party generally must prevail on appeal *and qualify for an award under a contract, statute, or recognized ground in equity.*” State Bar Association, Washington

¹⁵ Numrich is requesting fees on appeal stemming specifically from one of the issues as to which he is the Cross-Respondent. Pet. Rep. Br. at 49-50. It is unclear under RAP 18.1 whether the State should respond to this request in its Reply Brief of Respondent/Cross-petitioner or in a separate response filed later. Given this lack of clarity, the State will provide a response here so as to avoid waiving the issue.

Appellate Practice Deskbook § 17.6 at 17-9 (4th ed. 2016) (emphasis added). Here, Numrich has not identified any contract, statute, or recognized ground in equity that grants him the right to recover attorneys' fees. Nor is the State aware of any. The two Washington cases cited by Numrich as supporting his request¹⁶ deal with the propriety of additional fees on appeal when the initial fees being reviewed were imposed pursuant to fee shifting *statutes* that explicitly or implicitly contemplated the awarding of appellate fees. Costanich v. Washington State Dep't of Soc. & Health Servs., 164 Wn.2d 925, 933, 194 P.3d 988 (2008); Fisher Properties, Inc., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 378, 798 P.2d 799 (1990). But there is no such fee shifting statute that applies to this case. Nor is there an applicable contract or recognized ground in equity that grants a criminal defendant the right to be awarded appellate fees in this context. As a result, even if he prevails, Numrich is not entitled to recover additional attorneys' fees on appeal.

C. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to vacate the trial court's order imposing sanctions against the State in any amount. In the alternative, the order imposing sanctions in the amount of \$18,252.49 should be vacated and the trial court should be ordered to conduct further proceedings where Numrich's fee petition is held to the appropriate legal standard and the reasonableness of the fees requested are

¹⁶ Pet. Rep. Br. at 50

properly evaluated. The State also asks this Court to deny Numrich's requests for further fees on appeal.

DATED this 11th day of May, 2020.

Respectfully submitted,

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