

Court of Appeals No. 68878 2 I
King County Superior Court No. 11 2 32517 2 SEA

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

REPUBLIC CREDIT ONE, LP

Plaintiff/Appellant/Petitioner,

v.

QUEEN ANNE BUILDERS, LLC, et al.

Defendants/Respondents,

REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS

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COME NOW, Cory and Geneanne Burke, Greg and Jill Blunt, and Crown Development Inc., Respondents/Cross-Appellants (hereinafter "the Burkes") and pursuant to RAP 10.1(b) submit the following brief in strict reply supporting reversal of the lower court's erroneous interpretation of CR 54(d)(2) and CR 54(b) in denying attorney fees and costs to the Burkes.

1. A Separate Brief On Cross-Appeal Is Not Required

The Burkes' cross-appeal does not require a separate opening brief. Appellant, Republic Credit One, LP (hereinafter "Republic") cites no authority for its assertion that the Burke's cross-appeal should be denied because the Burkes did not file a separate brief on the issue "as required by the rules."¹ In fact, Republic's premise is contrary to the court rules. RAP 10.1 provides in pertinent part:

(b) Briefs Which May Be Filed in Any Review. The following briefs may be filed in any review: (1) a brief of appellant or petitioner, (2) a brief of respondent, and (3) a reply brief of appellant or petitioner.

(c) Reply Brief of Respondent. If the respondent is also seeking review, the respondent may file a brief in reply to the response the appellant or petitioner has made to the issues presented by respondent's review.

¹ Reply Brief of Plaintiff/Appellant, Republic Credit One, LP at p. 9 and n. 2.

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(f) Briefs in Cases Involving Cross Review . . .

The following briefs may be filed in cases involving cross review: (1) brief of appellant, (2) brief of respondent/cross appellant, (3) reply brief of appellant/cross respondent, and (4) reply brief of cross appellant.

RAP 10.1 does not provide for a separate opening Brief of Cross-Appellant. Republic's assertion is baseless and the Burke's cross-appeal should not be stricken.

2. CR 54(b) Is Controlling

CR 54(b) specifically and explicitly applies to Republic's multi-defendant action and Republic offers no argument or authority to the contrary. Interpretation of court rules is a question of law reviewed de novo. State v. Schwab, 163 Wash.2d 664, 671, 185 P.3d 1151 (2008) (citation omitted). Court rules are interpreted by using the rules of statutory construction as though the court rules had been drafted by the Legislature. City of Seattle v. Guay, 150 Wn.2d 28, 300, 76 P.2d 231 (2003). The court gives the plain and ordinary meaning to the words of the text within the context where the text is found and the scheme as a whole. State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

Where the timeliness requirement of CR 54(d)(2) only applies upon entry of a judgment, Corey v. Pierce County, 154 Wn. App. 752, 779, 225 P.3d 367, 379 (2010), the tension between CR 54(a) and CR 54(b) is at the heart of the Burkes' cross-appeal. First, the plain language of the rules must be construed in harmony when possible. In re Piercy, 101 Wn.2d 490, 492, 681 P.2d 223 (1984). Accordingly, the "rights of the parties" in CR 54(a)(1)² should be interpreted to mean all the parties in the action. Otherwise, CR 54(a) would conflict with CR 54(b), which provides that a determination for "fewer than all the parties shall not terminate the action as to any of the claims or parties . . ." CR 54(b).

However, to the extent the rules may conflict, the more specific CR 54(b) prevails. A more specific statute prevails over a general one when a conflict exists. Joy v. Department of Labor and Industries, 170 Wn. App. 614, 627, 285 P.3d 187 (2012); *citing* Flight Options, LLC v. Dep't of Revenue, 172 Wn.2d 487, 504, 259 P.3d 234 (2011). While CR 54(a) is a general rule of judgments, CR 54(b) specifically deals with a multi-party action like Republic's. Under CR 54(b), the Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke (hereinafter "the Summary Judgment Order") which does not adjudicate

² CR 54(a)(1) defines a judgment as "the final determination of **the rights of the parties** in the action . . ." (Emphasis Added).

all the rights of all the parties to the action is not a final judgment commencing the time to seek attorney fees under CR 54(d)(2). The lower court erred in finding the Burke's motion for attorney fees untimely.

3. There Is No Basis To Avoid CR 54(b).

Republic offers no authority for its contention that CR 54(b) is inapplicable. In its attempt to manufacture a final judgment from the Summary Judgment Order, Republic erroneously string cites several cases that do not concern orders for less than all the parties and, therefore, have no application to CR 54(b). The matter of Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 P. 92 (1901) involved vacating a plaintiff's judgment against all defendants after a trial where none of the defendants had notice or appeared. In Exchange Nat'l Bank of Spokane v. Pantages, 74 Wash. 481, 133 P. 1025 (1913), the appellate court reversed the demurrer and dismissal of an action by a single bank against a single defendant, the alleged owner of a chain of theaters. Again in Mitchell v. Cunningham, 8 F.2d 813 (9th Cir. 1925), the Federal court found that a decree quieting title for a bankruptcy trustee against a single debtor was a final judgment for res judicata purposes. In St. Germain v. St. Germain, 22 Wn.2d 744, 157 P.2d 981 (1945) the court found an interlocutory order and the final decree of divorce were final judgments for purposes of

garnishment rights. None of these cases implicates the CR 54(b) rule for multi-party actions.

While several parties were involved in State ex rel. Lynch v. Pettijohn, 34 Wn.2d 437, 209 P.2d 320 (1949) and Billias v. Panageotou, 193 Wash. 523, 76 P.2d 987 (1938), neither supports Republic's argument. In Pettijohn, the Appellate Court found that an "opinion" of the court read into the record and deciding the complete petition of aggrieved tax payers³ was an appealable "decision" and "final order." Unlike Pettijohn, the Summary Judgment Order that Republic drafted and the lower court entered does not decide the complete case because it does not decide the rights of other defendants. Republic's reliance on Billias is even more unclear. There, the demise of a partnership resulted in two separate actions with several of the same parties being joined in one trial. After entering judgment in only one action, the court reconsidered by granting a motion for a new trial. On review, the Appellate Court upheld the new trial and dismissed the appeal as to the second action where no judgment was entered. Neither action involved CR 54(d)(2).

For the same reason, Republic's attempt to distinguish Corey v. Pierce County, 154 Wn. App. 752, 225 P.3d 367 (2010) also fails. There,

³ Pettijohn, 34 Wn.2d at 440.

Corey did not dispute that the jury verdict was a judgment⁴ and that her request for attorney fees was untimely under CR 54(d). Corey, 154 Wn. App. at 773. Rather, the court rejected Corey's argument that CR 54(d) did not apply to her RCW 49.48.030 wage claim. Id. at 774.

The record also does not support Republic's claim that "after summary judgment was entered for the Bargreens and for Respondents . . . the case was over, pending appeal." Republic provides no cite to the Clerk's Papers for this contention because nowhere is there any adjudication of the claims against other defendants Queen Anne Builders, LLC, Seattle Signature Homes, Inc., or Andy and Renee Ryssel. Although these defendants have never appeared or answered, Republic has never sought default or judgment against them. To this day, the case remains unadjudicated as to these defendants and, absent default, these defendants could appear and defend at any time.

4. The Reasonableness of Attorney Fees Is An Issue For the Lower Court

The Burke's cross-appeal seeks remand for the lower court to determine the award of reasonable attorney fees and costs, and Republic's challenge to the reasonableness of attorney fees is misplaced. The amount of reasonable attorney fees to award is within the discretion of the trial

⁴ While Corey did sue multiple defendants, nowhere does the opinion suggest that the jury verdict did not decide the case for all parties.

court, and the Appellate Court reviews such an award for manifest abuse of discretion. Boguch v. Landover Corp., 153 Wn. App. 595, 224 P.3d 795 (2009). Here, the trial court erroneously denied the Burkes' request for attorney fees as untimely and exercised no discretion to determine the reasonableness of those fees. Without the exercise of the discretion, there is nothing for this court to review for abuse.

Notwithstanding, Republic's challenges to the Burkes' reasonable fees is unavailing. Like its earlier opposition, Republic simply asserts without any authority that it is unreasonable for the Burkes' lead attorney to draft documents. Additionally, Republic repeats its effort to frame this matter as a "plain and simple" suit on personal guaranties of a promissory note requiring "only that skill of basic business litigation law practice."⁵ This is an oversimplification that ignores the "claim splitting" and res judicata issues. Republic also misreads time entries to claim inappropriate billing "'reviewing' the appeal."⁶ The dates of these entries in June and July 2012⁷ unquestionably apply to Republic's initial appeal of the Bargeen Summary Judgment and the subsequent amendment while, as noted above, the action remained pending as to the Burkes and other defendants. In the event this court entertains the reasonableness of the

⁵ Reply Brief of Plaintiff/Appellant, Republic Credit One, LP at p. 16.

⁶ Reply Brief of Plaintiff/Appellant, Republic Credit One, LP at p. 19.

⁷ CP at 890.

Burkes' requested attorney fees, Republic's limited challenges should be rejected.

CONCLUSION

The lower court erred when it disregarded the specific and explicit requirement of CR 54(b) to find that the Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke was a final determination of the rights of the parties for purposes of the time to seek attorney fees under CR 54(d)(2). Absent required findings under CR 54(b), the Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke "shall not terminate the action as to any of the claims or parties." The Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke was not final, but subject to revision, and the Burke's application for attorney fees was timely. The lower court's Order Denying Defendants' Crown Development, Blunt & Burke's Motion for Entry of Judgment with Award of Attorneys' Fees and Costs should be reversed, and the matter remanded for a determination by the lower court of an award to the Burkes of reasonable attorney fees and costs.

Respectfully submitted this 14th day of January, 2013.

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CERTIFICATE OF SERVICE

I, Mary Johnson, certify under penalty of perjury of the laws of the State of Washington that, by agreement between the parties, a true and correct copy of this Reply Brief of Respondent/Cross Appellants was provided to counsel of record for Appellant, Republic Credit One, LP via electronic mail on this day.

SIGNED in Bellevue, WA this 14th day of January, 2013.



Mary Johnson, Legal Assistant