

71195-4

71195-4

No. 71195-4-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

DOUGLAS AND REBECCA SLATER, HUSBAND AND WIFE,

*Appellants/Cross Respondents*

v.

JOHN AND MICHELLE BABICH, HUSBAND AND WIFE

*Respondents/Cross Appellants*

---

CROSS-APPELLANTS' REPLY BRIEF TO RESPONSE BRIEF OF  
APPELLANT

---

Patrick M. Hanis, WSBA No. 31440  
Hanis Irvine Prothero, PLLC  
6703 S. 234th Street Suite 300  
Kent, Washington 98032  
(253) 520-5000  
Attorneys for Respondents/Cross Appellants  
John and Michelle Babich, husband and wife

2014 OCT 24 PM 11:03



**TABLE OF CONTENTS**

**I. REPLY.....1**

**II. CONCLUSION.....4**

## TABLE OF AUTHORITIES

### CASES

|   |      |
|---|------|
| <i>Lietz v. Hansen Law Offices, P.S.C.</i> ,<br>166 Wash. App. 571, 581, 271 P.3d 899 (2012).....   | 3, 4 |
| <i>Magnussen v. Tawney</i> ,<br>109 Wash. App. 272, 275, 34 P.3d 899 (2001).....  | 3    |
| <i>Marek v. Chesny</i> ,<br>473 U.S. 1, 33, 105 S. Ct. 3012 (1985).....   | 2, 3 |
| <i>Real v. Continental Group, Inc.</i> ,<br>653 F.Supp. 736 (N.D. Cal. 1987).....   | 1, 2 |
| <i>Reiter v. MTA New York City Transit Authority</i> ,<br>457 F.3d 224, 231 (2006).....   | 2    |
| <i>Trotzer v. Vig</i> ,<br>149 Wash. App. 594, 612, 203 P.3d 1056 (2009).....   | 3    |
| <i>Washington Greensview Apartment Assoc. v. Travelers Property Cas. Co.<br/>of America</i> ,<br>173 Wash. App. 663, 295 P.3d 384 (2013)..... | 4    |

### STATUTES/RULES

|                               |   |
|-------------------------------|---|
| Washington Civil Rule 68..... | 1 |
| Federal Civil Rule 68.....    | 1 |

## I. REPLY

The trial court found that the "Offer of Judgment was served on Plaintiffs by Defendants on August 19, 2013, and the offer was not accepted." CP 39, CP 11-13. After reviewing the Offer of Judgment in relation to the judgment, the trial court found, "The offer made is slightly more favorable than the judgment finally obtained following trial". CP 39. CR 68 compels payment of "costs incurred after the making of the offer."

The Slaters cite *Real v. Continental Group, Inc.*, to argue that only the financial aspect of an offer should be reviewed. *653 F. Suppl. 736 (N.D.Cal. 1987); Response Brief, pg. 8*. The Washington Civil Rule is seemingly broader than the Federal Rule. The Federal Rule provides in part, "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." *Federal Rules of Civil Procedure, Rule 68*. The Washington Civil Rule 68 provides in part, "a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." *Underlining added*.

The opinion in *Real* was concerned with the application of a statutory attorneys fee provision in an employment age discrimination case

and relies upon the dissent in *Marek v. Chesny*, 473 U.S. 1, 33, 105 S. Ct. 3012 (1985). The dissent in *Marek* was concerned with "how the Court intends judges to go about quantifying the 'value' of the plaintiff's success" especially when looking at injunctive or declaratory relief. *Id.* Under this reasoning, if the only comparison is monetary, then the Babichs are still entitled to fees and costs since they offered twenty-thousand dollars in their offer of settlement and no damages were awarded by the trial court. *CP 1-15.*

Another Federal appeals court specifically disagreed with the *Real* opinion. "However, we are not convinced that the difficulty of comparing a monetary offer and judgment that includes non-monetary elements means that Rule 68 should not be applied in such cases. Nothing in the language of Rule 68 suggests that a final judgment that contains equitable relief is inherently less favorable than a Rule 68 offer that contains monetary relief." *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 231 (2006).

The majority in *Marek* also addressed the issue of considering an offer of judgment when it found, "To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates." *Id at 11.*

Case law gives significant guidance to trial courts in reviewing a CR 68 offer versus the judgment obtained. "[A] trial court comparing a verdict to a CR 68 offer should 'compare comparables.'" *Magnussen v. Tawney*, 109 Wash. App. 272, 275, 34 P.3d 899 (2001). In *Trotzer v. Vig*, a CR 68 offer of judgment was made and not accepted. The plaintiff later amended the complaint to add a quiet title action. 149 Wash. App. 594, 612, 203 P.3d 1056 (2009). The plaintiff received a monetary judgment for less than the CR 68 offer of judgment and the trial court awarded costs to the defendant. On appeal, the court found that the offer of judgment expired with the addition of the quiet title action when the defendant did not renew their offer of judgment to reflect the additional claim. *Id.* Under *Trotzer*, the failure to address a non-monetary claim in an offer of judgment would render the offer deficient. In this matter, each of the Slaters' claims were addressed in the Babichs' offer of judgment.

Case law provides guidance to trial courts on how to "compare comparables" on issues such as ambiguities in an offer, and unexpressed subjective intentions versus objective manifestations in an offer. *See for example, Lietz v. Hansen Law Offices PSC*, 166 Wash. App 571; 271 P. 3d 899 (2012) (ambiguities in an offer); *Washington Greensview Apartment Associates v. Travelers Property Cas. Co of America*, 173

*Wash. App. 663, 295 P.3d 384 (2013) (Objective versus subjective manifestations).* Where those issues exist, a trial court may decline to find the offer was more favorable than the judgment received.

In this case, the Slaters do not identify any ambiguities, or issues with the intention or manifestation of the offer. The Slaters haven't even argued that the offer of judgment was less favorable than the judgment obtained but rather appear to concede that is the case.

## **II. CONCLUSION**

The Slaters presumably did "think very hard" about whether continued litigation is worthwhile" and are now dissatisfied with the result. Had the Slaters accepted the offer of judgment, a significant amount of time, fees, costs, and now an appeal, would have been avoided. They would have been in a better position than they ultimately found themselves following trial. This is a consequence of the decision they made.

The Babichs' appropriately applied Civil Rule 68 and are entitled attorneys fees and costs, already found reasonable by the trial court, together with their attorneys fees and costs on appeal.

Respectfully submitted this 23rd day of October, 2014.

**HANIS IRVINE PROTHERO, PLLC**

A handwritten signature in black ink, appearing to read 'Patrick M. Hanis', written over a horizontal line.

Patrick M. Hanis, WSBA No. 31440  
Attorneys for Respondents/Cross-Appellants  
John and Michelle Babich

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be mailed two true copies of this document, to the Court of Appeals, as follows:

Court of Appeals  
Division I  
Attn: Court Clerk  
One Union Square  
600 University Street  
Seattle, Washington 98101-4170

with a copy to:

Matthew Ryan King  
Law Offices of Matthew R. King PLLC  
1420 5th Ave Suite 2200  
Seattle, Washington 98101-1346

DATED this 23<sup>rd</sup> day of October, 2014, at Kent, Washington.



Patrick M. Hanis, WSBA #31440

