ORIGINAL

No. 43764-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

THE FILLIPINO AMERICAN LEAGUE,

Respondent/ Plaintiff,

v.

LUCENA CARINO,

Petitioner/Defendant.

RESPONSE TO PETITIONER'S OPENING BRIEF

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I. INTRODUCTION

This Court's discretionary review arises from the award of attorney's fees and costs to the Respondent, the Filipino American League ("FAL"), as the prevailing party, in Ms. Carino's ("Petitioner" or "Ms. Carino") RALJ appeal of the Thurston County District's Order Denying [Petitioner's] Motion for Relief from Judgment to the Thurston County Superior Court.

In considering the relief sought on review, it is important to note that a Smalls Claims Judgment of $5,079.00 underlies this matter. CP 6. Further, the record reflects that Ms. Carino failed to answer FAL's Small Claims Complaint or otherwise appear at the August 26, 2010 Small Claims Trial despite being duly served with process. CP 6. As a result, FAL obtained a Small Claims Judgment in the amount of $5,079.00. CP 6.

Nearly one year after the Small Claims Judgment was obtained and after FAL began executing on the Judgment (which it commenced only after attempting to settle the judgment with Ms. Carino by agreement), Ms. Carino filed her Motion for Relief from Judgment with the Thurston County District. CP 6. After reviewing the evidence on record, the Thurston County District Court denied Ms. Carino's motion.

In spite of the amount in controversy relative to the cost in proceeding, Ms. Carino timely filed a notice of appeal on October 10, 2011 and perfected her RALJ appeal. CP 4. Ms. Carino's RALJ appeal ultimately resulted in an Order and Judgment on Appeal entered by the Thurston County Superior Court on July 16, 2012. CP 33. The Order and Judgment on Appeal included an award of attorney's fees and costs to FAL, as the prevailing party, in an amount of $10,103.20.

After being defeated on both her Motion for Relief from Judgment and RALJ appeal, Ms. Carino now brings this appeal and postures her case as defendant deprived of due process and substantial justice in an effort to pray upon the equities of this Court and obtain a reversal of the Superior Court's judgment. Contrary to the case plead in Ms. Carino's brief, she has been afforded no less than two substantial opportunities in the lower courts (i.e. the District Court and the Superior Court proceedings) to establish that she had substantial evidence of a prima facie defense so as to warrant vacation of FAL's Small Claims Judgment. It should be noted that Ms. Carino availed herself of these opportunities after failing to take advantage of perhaps her most important opportunity – to attend trial and present her defense(s) in Small Claims Court. Ms. Carino is now effectively on her third appeal of the matter (inclusive of the Motion for

Relief) and her efforts indisputably come at great expense to the resources of the parties, their respective counsel, and the judicial system.

As argued and cited in her own Opening Brief, Ms. Carino apparently does not dispute the underlying purpose of RCW 4.84.250 *et seq.*, which is ultimately to "penalize parties who unjustifiably... resist small claims, and enabling a party to pursue a meritorious small claim ***without seeing the award diminished by legal fees.***"[1] *See* Opening Brief at p. 10-15. Ironically, in so proceeding in this appeal, Ms. Carino's actions are countervailing to her own argument – that the statutory scheme set forth in RCW 4.84.250 *et seq.* should not be extended and applied to the present situation at the risk of "compromis[ing] the scheme's intent by increasing the incentive for a an unsuccessful plaintiff to appeal." *Id.* at p. 14. Here, Ms. Carino essentially seeks this Court to "compromise the scheme's intent" by increasing the incentive for a small claims defendant to fail to respond to a complaint, have a default judgment entered, and

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[1] These statutes have multiple purposes of encouraging out-of-court settlements, penalizing parties who unjustifiably bring or resist small claims, and enabling a party to pursue a meritorious small claim without seeing the award diminished by legal fees. *See Williams v. Tilaye*, 174 Wn.2d 57, 62, 272 P.3d 235, 238 (2012) citing: *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987) (citing *Valley v. Hand*, 38 Wn. App. 170, 684 P.2d 1341 (1984); *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 492, 607 P.2d 890 (1980)).

then repeatedly appeal unsuccessful attempts to vacate the default judgment *without* risk of any paying the prevailing party's (not to mention judgment creditor's) attorney's fees and costs incurred. This result inherently involves the inequitable result of punishing the judgment creditor and rewarding the non-responsive judgment debtor by providing the judgment debtor with the means to avoid satisfying a default small claims judgment by causing the judgment creditor to incur attorney's fees and costs on appeal far in excess of the small claims judgment itself.

If this Court grants the relief requested by Ms. Carino in her appeal, its decision will have the unintended consequence of incentivizing small claims defendants to employ the strategy of filing appeals of small claims judgments in order to force the prevailing party to abandon its underlying judgment, e.g. the prevailing party would be faced with the decision to expend attorney's fees and costs greater than the judgment at issue in defending its position, as prevailing party, on appeal. Worse yet, as in the case of Ms. Carino, a small claims defendant could employ the strategy and (albeit risky) scheme to ignore the plaintiff's complaint entirely and then simply position themselves to avoid paying on the judgment entirely by driving up the judgment creditor's attorney's fees and costs with perpetual appeals. One might summarize Ms. Carino's position on appeal as: "Please interpret the applicable law and statutory

scheme(s) at issue so as to allow me to maintain the all too often held principle of 'I'd rather pay my attorney than pay them'". This position does nothing to serve judicial economy and, furthermore, it substantially compromises the small claims system of this state.

II. SUMMARY OF RELEVANT FACTS & HISTORY[2]

Ms. Carino was the former President of the Filipino American League, a local nonprofit organization ("FAL"). After FAL properly filed and served its Small Claims Complaint, Petitioner failed to appear at the Small Claims Trial on August 26, 2010. CP 6. After considering the affidavit of service on file and evidence submitted by FAL in support of its claim, the Small Claims Court awarded a default judgment in favor of FAL in the amount of $5,079.00 ("Judgment"). CP 6.

After again attempting yet failing to settle the Judgment with Petitioner, FAL engaged counsel to collect on its Small Claims Judgment. Shortly thereafter in January 2011, counsel for FAL garnished Petitioner's wages from her then employer, Madigan Army Hospital. Petitioner later retired from Madigan and, *nearly one year* from the entry of the Judgment, in August of 2011, after Petitioner's bank received a writ of garnishment, Petitioner filed a motion for relief from the Judgment. On her motion to

[2] Unless otherwise notated herein, all facts provided herein are derived from the records on file and designated as part of the Clerk's Papers for this Appeal.

vacate the Judgment, and for the first time since the filing of FAL's small claims matter, Ms. Carino presented argument in defense of the claims made by FAL. However, after considering the evidence presented by Petitioner and FAL and hearing oral argument, on September 15, 2011, the Thurston County District Court entered an Order Denying Defendant's Motion for Relief from Judgment.

Petitioner timely filed a Notice of Appeal to Superior Court on the order Denying Defendant's Motion for Relief. Likewise, FAL timely filed its cross-appeal on the issue of the order denying its request for attorney's fee and costs as prevailing party on the motion to vacate.

On April 16, 2012, after hearing oral argument the Superior Court upheld the denial of Petitioner's Motion for Relief and the denial of FAL's motion for fees and costs incurred in enforcing the Judgment. Both FAL's Cross-Appeal Brief and Response Brief included requests and briefing on an award of attorney's fees and costs as the prevailing party on appeal (as to the appeal on the motion for relief) to the Superior Court. Likewise, FAL presented oral argument on its requests for attorney's fees and costs.

By its April 16th Order Denying Appeal, the Superior Court expressly reserved the issue of FAL's request for attorney's fees on appeal. With the cooperation of counsel, the Court set a hearing date of

May 4, 2012 to allow both parties to provide additional briefing on the issue of attorney's fees and costs on appeal, if desired. Neither FAL nor Petitioner elected to file additional briefing. On May 4, 2012, FAL presented its Declaration in Support of Attorney's Fees and Costs on Appeal and corresponding proposed order. Despite her participation in scheduling the hearing, Petitioner did not attend or otherwise submit further argument to the Superior Court.

On June 16, 2012, after "considering the briefs and arguments of the parties and the applicable statues and case authority," the Superior Court issued a Letter Opinion awarding FAL $10,000.00 in attorney's fees and $103.20 in costs as the prevailing party on appeal. *See* CP 33 ("Judge Tabor's Opinion"). Accordingly, on July 16, 2012, on FAL's motion for presentment, the Superior Court entered FAL's Order and Judgment on Appeal for its attorney's fees and costs ("Award"). CP 33.

On July 26, 2012 Petitioner timely filed a Notice of Appeal with this Court. Petitioner now seeks to overturn discretionary review.

III. ARGUMENT AND AUTHORITY

Statutory interpretation questions are questions of law that is subject to review de novo. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wash.2d 912, 919, 215 P.3d 185 (2009). The Court's primary duty in interpreting the statute is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Statutory interpretation begins with the statute's plain meaning. *Id.* When the plain language is unambiguous, the legislative intent is apparent and we will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). To determine the intent of the legislature in adopting legislation, we read a statutory provision in context with the whole statutory scheme and related statutes. See *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11–12, 43 P.3d 4 (2002). Further, the plain meaning of a statute may be discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *State v. J.P., 149 Wn.2d 444.*

Reasonable attorney fees assessed against the party that appeals an arbitration award and fails to improve its position on appeal are meant to discourage meritless appeals of arbitration awards. *Williams v. Tilaye*, 174 Wn.2d 57, 272 P.3d 235 (2012)

The Award should be upheld under an abuse of discretion standard because the Superior Court's reasoning in issuing such an award is tenable and can be reconciled with applicable case law concerning RCW 4.84.290. As cited in Petitioner's Brief, one of the main underlying purposes of RCW 4.84.250-310 is to "'encourage out-of-court settlement of small claims, and to penalize parties who unjustifiably pursue or resist the claims.'" See *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 687, 598 P.2d 404 (1979). In the present case, where a default judgment is obtained, this purpose is not placed in jeopardy because, by definition, the parties never have an opportunity for an out-of-court settlement.

As in the present case, where a defendant fails to answer a complaint and a default is obtained, a denial of an award of attorney's fees and costs under RCW 4.84.290 allows a defendant to remain idle without penalty. In reversing FAL's Award, defendants in Petitioner's proverbial shoes would have little to no incentive to ensure their timely response to a complaint as they could rely on the right to appeal a small claims judgment without risk of attorney's fees and costs. On the other hand, plaintiffs in Petitioner's shoes would not have an opportunity for a pre-trial offer of settlement. While it is likely to be limited to a small number of cases, the end result is a small claim that is dragged on through an appeal process with attorney's fees and costs far exceeding the underlying

controversy. Indeed, in evaluating the present case, one could articulate a case that a reversal of the Superior Court's award would result in a penalty to FAL for obtaining a default because it could not avail itself of the benefit, i.e. attorney's fees and costs as prevailing party, under an offer pursuant to RCW 4.84.250-310 meanwhile Petitioner could use the appeal process to drastically increase FAL's cost to collect on its Judgment without the incentive to settle and avoid a potential award of attorney's fees and costs. The ultimate result in upholding Petitioner's argument is that defendants have less incentive to resolve small claims judgments taking by default.

A. The Superior Court Did Not Abuse Its Discretion in Awarding FAL's Attorney's Fee and Costs

A trial court's decision to grant or deny attorney fees will not be disturbed in the absence of an abuse of discretion. *Déjà Vu–Everett–Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 263, 979 P.2d 464 (1999). A trial court abuses its discretion if its decision is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " *Tribble v. Allstate Prop. & Cas. Ins. Co.*, 134 Wn. App. 163, 170, 139 P.3d 373 (2006) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices. *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336, 343 (2012). Generally, in

order to reverse a fee award, it must be shown that the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Accordingly, if a trial court's ruling is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Est. of Stevens*, 94 Wn. App. at 30, 971 P.2d 58 (quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)). Further, reasonable attorney fees assessed against the party that appeals an arbitration award and fails to improve its position on appeal are meant to discourage meritless appeals of arbitration awards. *Williams v. Tilaye*, 174 Wn.2d 57, 272 P.3d 235(2012).

Here, in awarding FAL its fees and costs on appeal, the Superior Court Judge did not abuse his discretion. In particular, the Superior Court Judge expressly articulated that the cases primarily relied upon by the Petitioner, *Williams v. Tilaye* and *Hertz v. Reibe*, were distinguishable from the present case in that both cases involved parties who sought or were awarded attorney's fees and costs on appeal ***after a trial***. *See Williams v. Tilaye*, 174 Wn. 2d 57, 272 P.3d 235, 237 (2012); *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24, 26 (1997) respectively; *See* CP 33. Contrary to those cases, where a party had an opportunity to tender a settlement offer "at least 10 days before trial," FAL obtained a default at Small Claims Court and had no such opportunity. RCW 4.84.250; *See* CP

33. Thus, Judge Tabor expressly reasoned that, even if it so desired, FAL could not avail itself of an offer of settlement because it obtained a default judgment against Petitioner. *See* CP 33.

This result seems particularly inequitable when considering the alternative, i.e. Petitioner, as defendant, makes no offer of settlement. In that case, Petitioner benefits as she can be the prevailing party where FAL recovers nothing. RCW 4.84.270.[3] If a defendant is able obtain its attorney's fees and costs by remaining idle with regard to settlement (other than plaintiff recovering zero), it seems equitable that a plaintiff would be entitled to its attorney's fees and costs on appeal where it has no opportunity to offer settlement prior to obtaining a default judgment.

RCW 4.84.250-330 involve multiple purposes of encouraging out-of-court settlements, penalizing parties who unjustifiably bring or resist small claims, and enabling a party to pursue a meritorious small claim without seeing the award diminished by legal fees. *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987) (citing *Valley v. Hand*, 38 Wn.App. 170, 684 P.2d 1341 (1984); *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn.App. 486, 492, 607 P.2d 890 (1980)). Consistent with the aforementioned purposes, the Superior

[3] As a prevailing party under RCW 4.84.270, a defendant would also be entitled to an award of its attorney's fees and costs on appeal under RCW 4.84.290.

Court's Award operates to "penalizing [Petitioner for] unjustifiably bring[ing] or resist[ing] small claims, and enabling [FAL] to pursue a meritorious small claim without seeing the award diminished by legal fees..." *Id.*

For the foregoing reasons, the Superior Court's Award did not involve an abuse of discretion and, therefore, must be upheld.

B. FAL Is Entitled to Attorney's Fees and Costs as Prevailing Party On The RALJ Appeal

A prevailing party is entitled to attorney fees if fees are authorized by contract, statute, or a recognized equitable ground. *Seattle First Nat'l Bank v. Siebol*, 64 Wn. App. 401, 409, 824 P.2d 1252, review denied, 119 Wn.2d 1010, 833 P.2d 386 (1992). The determination of the prevailing party is often reviewed quite closely on appeal, and at least one court has described it as a mixed question of law and fact to be reviewed under the error of law standard. *Sardam v. Morford*, 51 Wn. App. 908, 911, 756 P.2d 174 (1988). As a general rule, a prevailing party is one against whom no affirmative judgment is entered. *Andersen v. Gold Seal Vineyards*, Inc., 81 Wn.2d 863, 868, 505 P.2d 790 (1973). Here, FAL had no affirmative judgment entered against it. To the contrary, FAL's Judgment was upheld. FAL successfully defended Ms. Carino's RALJ Appeal and preserved its judgment. Thus, FAL is a prevailing party and should be entitled to its Award.

C. Settlement Before Default Judgment Was Not Possible.

Ms. Carino did not appear. Offer of settlement are impossible or futile when a default judgment is obtained because a party fails to appear in the case. Ms. Carino impliedly states that default judgments deprive persons of due process, and violate the judicial interest in encouraging settlement. Appellant's Brief at 11. Ms. Carino specifically argues, "The interest of encouraging pre-trial settlements requires cautions (sic) application because it also works to deter access to the courts. These arguments are misplaced, however, because the default judgment obtained in this case was only because of Ms. Carino's failure to appear. Even had the FAL sought to settle the matter with her, she was not present to do so until she appeared nearly a year later and attempted to unwind the default. While settlement is favored in the courts and Washington policy expressly encourages it, settlement was impossible here because Ms. Carino chose not to participate in the litigation against her. *Martin v. Johnson*, 141 Wn. App. 611, 622-23, 170 P.3d 1198, 1204 (2007) (citing *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997)).

Ms. Carino relies on *Beckmann v. Spokane Transit Auth.*, for the proposition that "the state seeks to encourage out-of-court settlements to promote judicial efficiency, penalize parties who unjustifiably bring or resist small claims, and enable a party to pursue a meretricious small claim

without seeing the award diminished by legal fees incurred through defending an appeal." Appellant's Brief at 12 (citing 107 Wn.2d 785, 788, 733 P.2d 960 (1987)). While this is the principle of *Beckmann* and the fee-shifting provision of RCW 4.84.250, Ms. Carino misapplies these principles to support that attorney's fees were unavailable to FAL. First, this provision is in direct opposition to Ms. Carino's position. *Beckmann* illuminated that RCW 4.84.250 has *two* motives: "(1) to encourage out-of-court settlements, *and* (2) to ***penalize parties*** who unjustifiably bring or ***resist*** small claims." *Id.* at 788. The encouragement of settlement is for the purpose of creating judicial efficiency. Furthermore, the holding of *Beckmann* was that the court declined "to follow the ... narrow construction of the pleading requirement in RCW 4.84.250," and permitted awarding attorney's fees even when not specifically pled. 107 Wn.2d 785 (1987). Both purposes of RCW 4.84.250 are accomplished by the award of attorney's fees in this matter: judicial efficiency by affirming a valid default judgment that was left unchallenged for nearly a year, and penalizing Ms. Carino for her inaction and unjustifiable resistance to the default judgment.

Default judgments when a party fails to appear, like settlements, do promote judicial efficiency. CR 55 permits the court to enter a default judgment when a party fails to appear, plead or otherwise defend an action

against them. So long as the party has received proper notice, as was done in this case, a default judgment encourages swift resolution of litigation rather than leaving cases at a stalemate until the defendant chooses to participate. Ms. Carino's failure to appear was held to be a valid basis for the default judgment in District Court and Superior Court. To hold otherwise invalidates these principles of judicial efficiency and contradicts the statute's purpose fee-shifting for unjustified resistance.

Given that (1) default judgments promote judicial efficiency; (2) RCW 4.84.250 promotes discouraging unjustifiable resistance to small claims; and (3) settlement was unavailable when Ms. Carino failed to appear until a year after the default judgment was obtained, the trial court properly awarded attorney's fees under RCW 4.84.250. The trial court's order of fees should be affirmed.

D. Awarding Attorney's Fees to FAL Does Not Risk Infringing Constitutional Rights.

A validly obtained default judgment does not infringe upon any constitutional rights and has no basis to prevent the award of attorney's fees permitted by statute. Again, Ms. Carino implies that as a general matter, default judgments violate due process, and disenfranchise litigants from using the courts. Appellant's Brief at 11; 13. Ms. Carino states, "Application of RCW 4.84.250 - .290 to cases post-default judgment creates an unintended and inordinate risk to defendants discouraging

access to the courts and disenfranchising them from use of existing provisions enacted to redress default judgments." *Id.* at 12-13. Ms. Carino continues to discuss the importance a right to sue or defend in court; that default judgments are drastic actions; and the ability of a party to seek appeal of a default judgment. *Id.* Yet, nowhere does Ms. Carino present how imposing attorney's fees after a default judgment is unsuccessfully appealed is an impairment on a person's constitutional rights. Similarly, no authority supports that an imposition of fees would disenfranchise any litigant, more than to the extent the legislature sought to do so by imposing a penalty on "unjustifiable resistance." *Beckmann*, 107 Wn.2d at 788.

FAL validly obtained a default judgment, and the District Court, and Superior Court determined that Ms. Carino was not prejudiced by the judgment when she failed to appear after being properly served. No litigant is disenfranchised from the courts when default judgment is entered because they simply failed to appear, despite adequate notice. Vacation from default judgment occurs under CR 60, which limits the reasons upon which the court can do so.

Furthermore, these arguments are made in effort to obfuscate the real issue: whether or not the trial court properly awarded attorney's fees. After the court determined that the default judgment was properly

obtained and denied relief from that judgment, arguments that default judgments are too harsh of a result become a side-show. It is correct to state that the court may provide relief from a default judgment under certain circumstances, but here, the court considered those circumstances, and determined that it was improper to vacate the default judgment when Ms. Carino had notice and failed to appear. These arguments loosely, if at all, relate to whether the court properly awarded attorney's fees.

Moreover, neither this holding, nor the award of attorney's fees to FAL expands the scope of the small claims statute, contrary to Appellant's contorted assertions. Appellant's Brief at 14. RCW 4.84.250 *et. seq.* permit the prevailing party to recover attorney's fees, and permitting attorney's fees on the appeal of a default judgment does not improperly expand this statute. Ms. Carino relies upon *Williams v. Tilaye* to support the proposition that fees in this case are unavailable due to such impermissible expansion. Appellant's Brief at 14. *Williams*, however, denied attorney's fees after the parties had already attended mandatory arbitration and appealed for a trial de novo. 174 Wn.2d 57, 272 P.3d 235 (2012). Both parties appeared and participated in the litigation. *Id.* The court there treated the mandatory arbitration as the original trial in the context of RCW 4.84.290, and required that any settlement offer come before the arbitration. *Id.* at 65-66. Here, however, as previously

discussed, there was no opportunity for an offer of settlement before the underlying trial because Ms. Carino did not appear. Furthermore, preventing attorney's fees in this case, and ignoring the fee-shifting provisions of RCW 4.84.250, causes more harm than any expansion of scope of these statutes. To prevent fees under this statute would create the same problem the court in *Williams* sought to avoid: "skew the incentives created by both statutory schemes and frustrate their purposes." *Id.* at 68.

Therefore an award of attorney's fees under RCW 4.84.250 in this case does not expand the scope of the statute, and the validly obtained default judgment should not preclude any award of attorney's fees. The trial court should be affirmed.

E. FAL Properly Requested and Argued For An Award of Fees and Costs

Contrary to Petitioner's Opening Brief, and as required by RALJ 11.2(c), FAL's and Response Brief included requests and briefing on an award of attorney's fees and costs as the prevailing party on appeal. A party need not specifically plead in the original complaint a request of attorney's fees to be awarded under RCW 4.84.250. *Beckmann*, 107 Wn.2d at 790.

Beckmann specifically rejected the lower courts' interpretation of RCW 4.84 that required a specifically pled complaint to put the defendant

on notice that fees were sought. *Id.* (rejecting *Tatum v. R & R Cable, Inc.*, 30 Wn. App. 580, 636 P.2d 508 (1981); *Warren v. Glascam Builders, Inc.*, 40 Wn. App. 229, 698 P.2d 565 (1985)). The cases that held that specifically pleading of fees was required were focused on the importance of giving notice at an early stage, but provided little justification for this requirement. *Beckmann*, 107 Wn.2d at 788. Even if the court were concerned with the amount of notice a party receives under RCW 4.84.250 as to the potential award of attorney's fees, Ms. Carino had adequate notice.

As the prevailing party on this appeal, FAL is entitled to an award of its reasonable attorney's fees pursuant to RALJ 11.2, RCW 6.27.230, RCW 12.40.105, and RCW 4.84.250, together with other applicable statute and in equity.[4]

Likewise, FAL raised the issue of RCW 4.84.290 via its Declaration and presented oral argument as to its request for attorney's fees and costs on appeal. In particular, as indicated above, the Superior Court allowed the parties until May 4, 2012 to present additional briefing

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[4] RALJ 11.2 provides: "If statute or applicable law gives a party the right to recover lawyer's fees or expenses, ***a party is entitled to fees and expenses for services on an appeal to the superior court***. (Emphasis added)

Further, RCW 12.40.105 provides: "If the ***losing party fails to pay the judgment*** within thirty days or within the period otherwise ordered by the court, ***the judgment shall be increased by... any other cost incurred by the prevailing party to enforce the judgment, including*** but not limited to ***reasonable attorneys' fees***..." (Emphasis added)

and/or argument on the issue of attorney's fees and costs. FAL referenced RCW 4.84 *et seq.* in its Declaration in Support of Attorney's Fees and Costs. To the contrary, Petitioner elected not to file or present any additional briefing and/or argument on the issue. FAL should not yet again be penalized by Petitioner's failure to act.

Lastly, Ms. Carino asserts that FAL made a bald request for attorney's fees. Appellant's Brief at 21. This argument overlooks FAL's Declaration of Counsel in Support of Attorney's Fees and Costs. CP 284-289. This Declaration gives a breakdown of the attorney's fees sought by the number of hours worked, and the hourly rates charged. CP 284-285. Furthermore, the declaration provides justification for the hourly rates, and presents the discounted rates given to FAL. CP 285. Lastly, attached to the declaration was a billing history for the services rendered. CP 286-289. This declaration and the supporting billing history greatly surpasses a "bald request for attorney's fees."

FAL adequately briefed the issue of attorney's fees, and provided the court with thorough explanation for the fees requested. For these reasons, this Court should affirm the trial court's award of attorney's fees.

F. FAL Is Entitled to An Award of Fees and Costs If Deemed the Prevailing Party In The Present Appeal

If this Court decides that FAL is the prevailing party on this Appeal, FAL should be awarded its reasonable attorney's fees and costs on Appeal. Rules of Appellate Procedure (RAP) 18.1(a) provides that a party may recover reasonable attorney fees on review if "applicable law" grants the party the right to recover such fees. *See Brand v. Dep't of Labor & Indus. of State of Wash.*, 139 Wash. 2d 659, 674, 989 P.2d 1111, 1118 (1999). In general, where a prevailing party is entitled to attorney fees in the trial court, they are entitled to attorney fees if they prevail on appeal. *Sharbono v. Universal Underwriters Ins. Co.* 139 Wash.App. 383, 161 P.3d 406, amended on denial of reconsideration, review denied 163 Wash.2d 1055, 187 P.3d 752 (2007). A prevailing party may recover attorney fees only if provided by statute, agreement, or equitable principles. *Tacoma Northpark, LLC v. NW, LLC*, 123 Wash.App. 73, 96 P.3d (2004). A party must prevail on the merits before being considered a prevailing party. See *Parmelee v. O'Neel*, 168 Wash.2d 515, 522, 229 P.3d 723 (2010) (" 'a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff' ") (citation omitted).

III. CONCLUSION

FAL respectfully requests the Court to deny the relief sought in Mrs. Carino's present appeal. FAL, as the prevailing party, further requests an award of its attorney's fees and costs incurred in this appeal. Accordingly, FAL respectfully request this Court to remand to Superior Court for a determination of reasonable attorney's fees and costs.

Respectfully submitted this 17th day of May, 2013.

SMITH ALLING, P.S.

By: _____

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CERTIFICATE OF SERVICE

I, Hilary Struthers, hereby certify that I am over the age of 18 years and am not a party hereto, and I have this 17th day of May, 2013, caused to be served a true and correct copy of: Respondent's Brief on Discretionary Review, via the method noted below, properly addressed as follows:

Counsel for Petitioner:

Patrick Hollister Kram & Wooster, P.S. 1901 South I Street Tacoma, WA 98405	X	Hand Delivery
		U.S. Mail (first-class, postage prepaid)
		Overnight Mail
		Facsimile
	X	Email
		ECF

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

DATED this 17th day of May, 2013, at Tacoma, Washington.

HILARY STRUTHERS