No. 43764- 3- II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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THE FILLIPINO AMERICAN LEAGUE,

Plaintiff, Respondent

v.

LUCENA CARINO,

Defendant, Petitioner.

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# APPELLANT'S REPLY TO RESPONDENT'S RESPONSE

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### 1. An Award of Attorney Fees is Not Available When No Offer of Settlement or Notice of Consequences is Made At All.

Respondent The Filipino American League (hereinafter "FAL") steers clear of responding to a pivotal element of this dispute when it offers no response to the fact that it Failed to Provide Any Settlement Offer or Notice of Consequences At All. FAL completely avoids discussing why fees should be allowed even when those essential conditions precedent are lacking. Respondent's effective argument is that per the statutory scheme when the initial trial ends in a default judgment fees are proper in strict liability as a bludgeon of punishment to unwary, even justifiable but unsuccessful appellants.

The Court may ask: why are attorney fees not awarded to all small claim plaintiffs against unsuccessful appellants? The answer is plain; the legislature did not authorize that policy.

Award of attorney fees is not favored in Washington State where each party in a civil action must bear its own attorneys' fees. ***Cosmopolitan Eng'g Grp., Inc. v. Ondeo Degremont, Inc.***, 159 Wn.2d 292, 296, 149 P.3d 666 (2006). Award of attorney fees under Washington law is based on a statute, a contract, or a recognized ground in equity.

***Gander v. Yeager***, 167 Wn.App. 638, 645, 282 P3d 1100 (Div. 2 2012). Under the small claim statutory scheme of RCW 4.84.250-.290, a necessary factor to enable the award of attorney fees is the offer of a settlement. RCW 4.84.280. According to that statute the offer of settlement does not depend upon a defendant responding to a summons and complaint or appearing in Court. RCW 4.84.280. The scheme clearly specifies the enabling requirements allowing fees to be awarded:

> 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.
>
> RCW 4.84.280

A court award of attorney fees is enabled by first serving the offer of settlement on the opposing party at least ten days prior to trial, and second communicating that offer of settlement to the trier of fact after judgment. This procedure is required regardless of whether that judgment is a result of a trial on the merits, or a default award; it makes no difference. The manner of adjudication of the small claim action is irrelevant to the plaintiff making a good faith effort of settlement *pre-trial.*

The fact in this case that the actual adjudication was by a default judgment is irrelevant to the clear fact that plaintiff made no effort at all to reach out to the defendant with an offer of settlement, let alone doing so pre-trial. Were such an effort made, defendant would have indisputably been on notice of the small claim action ensuring the defendant's appearance or providing further justification of a default judgment for failing to appear. What is more, the plaintiff would then have satisfied the conditions to enable RCW 4.84.250, and could be awarded attorneys' fees for the trial.

Eliciting an award of attorneys' fees under RCW 4.84.250 is a condition precedent to the possibility of such an award under RCW 4.84.290.

> ...if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.
>
> RCW 4.84.290

An award of fees under RCW 4.84.290 is an "additional amount" to that already awarded under RCW 4.84.250. RCW 4.84.290 is not a stand-alone provision providing independent authority. That was precisely demonstrated in ***Williams v. Tilaye*** where a good faith settlement offer was made, but after the initial trial. The Court found that

settlement offer inadequate to enable the statutory scheme at all. ***Williams v. Tilaye***, 174 Wn.2d 57, 64, 272 P.3d 235 (Wash. 2012). No award of attorney fees was possible because there was no offer of settlement made at least 10 days before the initial trial. So much more are fees impermissible if as in the present circumstance no offer of settlement or notice of consequence was made at all. Petitioner was never placed on notice that she was at risk for attorney fees on appeal, and never afforded the opportunity to weigh her options before choosing whether or not to appeal.

## 2. FAL Makes a Series of Misleading Characterizations and Statements Distracting Attention From the Argument

Rather than argue its failure to provide an offer of settlement or notice of consequences, FAL diverts attention by offering a series of misleading characterizations and statements.

Misleading Characterization: Unjustifiable resistance. FAL heavily relies upon the concept of "unjustifiable resistance" to a small claims judgment citing the issue no less than 10 times in its Response. (pgs. 3, 8, 9, 10, 12, 13, 14, 15, 16, 17). Yet, FAL fails to cite any record of unjustifiable resistance existing in the present case. And for good reason, it did not

exist in this case. An unsuccessful result is far from defining unjustifiable resistance. In clear fact, since FAL's own pleadings offer clear evidence that no less than one-third of FAL's claim of missing funds remain in its own possession (CP 10, pgs 2-3; CP 20), Ms. Carino's appeal was entirely meritorious.

Misleading statement: FAL requested attorney's fees and costs as the prevailing party on the motion to vacate. FAL Response, p. 6. Fact: FAL requested review of the order denying fees for contraversion of garnishment; a request that was again denied on appeal.

Misleading statement: Both FAL's Cross-Appeal and Response Brief included requests and briefing on an award of attorney's fees... FAL Response, p. 6. Fact: FAL's cross appeal included pleading only on contraversion of garnishment. A request denied at trial and on appeal. No request was made or any mention made at all in its Superior court pleading requesting attorney fees related to appeal. CP 13. FAL cites no reference for any pleading regarding a request for attorney fees associated with appeal because none was made so no citation is possible. The Judge himself introduced exploring attorney's fees on other basis than contraversion of garnishment associated with defending an appeal. RP p9, ¶19-23

Misleading statement: Neither FAL nor Petitioner elected to file additional briefings [in response to the court's solicitation of briefings on the issue of fees on appeal]. FAL Response, p. 7 and 21. Fact: FAL is well aware that Petitioner, Ms. Carino, timely submitted a Response regarding attorneys' fees on appeal providing argument and authority. CP 25. FAL neglected to provide a pleading offering only a Declaration of Counsel in Support of Attorney's Fees on May 4, 2012. CP 24. The Declaration cited a shotgun of 4 possible bases for attorney's fees including RCW 4.84.250, all advanced for the first time and all failing to cite any authority. Id.

Misleading Statement: FAL had no opportunity for a pre-trial offer of settlement. FAL Response, pgs. 9, 10, 14, and 19. Fact: As stated above the procedure for making an offer of settlement is specified in RCW 4.84.280: "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." The court rule in this case is CRLJ 5(b)(1), that states in pertinent part:

> Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve.
>
> CRLA 5(b)(1)

In the show cause hearing and Superior court appeal FAL relied upon its argument that it was able to make personal service of its summons and complaint. FAL is disingenuous to argue now that it had no opportunity to serve an offer of settlement in person or by mail. FAL relies upon ***Martin v. Johnson***, 141 Wn.App. 611, 622-23, 170 P.3d 1198, 1204 (2007), for its contention of inability to submit an offer of settlement. FAL Response, p. 14. Such reliance is baseless. That case involved a large dollar settlement offer of $81,928.63, where the question to the Court was the reasonableness of the settlement, not whether or not service was possible. ***Martin v Johnson*** provides no authority at all for the application of the statutory scheme at issue in this case.

## 3. Replies to FAL's Arguments

### 3 A. The Standard of Review is De Novo Because the Questions for Review Involve an Initial Decision Whether There is a Legal Basis Upon Which to Grant or Deny Attorney Fees.

FAL properly recognizes that statutory interpretation questions are questions of law that are subject to review de novo. FAL Response, pg. 8. It then argues the standard of review is abuse of discretion without any explanation of the resulting apparent conflict (FAL Response, pg. 10).

Washington Court of Appeals, Division 2, recently reviewed the apparently conflicting standards of review under which a Court reviews a trial court's initial decision whether there is a legal basis upon which to grant or deny attorney fees. ***Gander v. Yeager***, 167 Wn.App. 638, 645, 282 P3d 1100 (Div. 2 2012). Accordingly this Court found that the cases involving whether to award attorney fees agree that the trial court's threshold determination on whether there is a statutory, contractual, or equitable basis for attorney fees is a question of law that it reviews de novo. ***Id.***, p. 646. The Court reviews the reasonableness of an award for attorney fees for abuse of discretion. ***Id.*** p. 645 and 647.

The questions raised in this action involve interpretation of the statutory scheme of RCW 4.84.250-.290. The questions involve whether the scheme authorizes award of attorney fees under the circumstances of this matter, not how much to award. These are questions of law to be reviewed de novo.

FAL offers five cases as authority for its assertion of review under a standard of abuse of discretion. None of these cases involve interpretation of law and whether attorney fees are authorized under a statute.

A) ***Déjà vu-Everett-Federal Way, Inc. v. City of Federal Way***, 96 Wn.App. 255, 979 P.2d 464 (Div. 1 1999). This case reviewed whether or not a law suit was indeed frivolous effecting attorney fees under RCW 4.84.185 and CR 11.

B) ***Tribble v. Allstate Property and Casualty Insc. Co.***, 134 Wn.App. 163, 139 P.3d 373 (Div. 1 2006). This case argued if the court had discretion to apply a multiplier to the lodstar fee calculation of attorney fees. The issue was remanded without judgment based upon an interpretation of law by the court. ***Id.*** p. 172.

C) ***Teter v. Deck***, 174 Wn.2d 207, 274 P.3d 336 (Wash. 2012). This case does not involve the award of attorney fees at all.

D) ***Boeing Co. v. Sierracin Corp.***, 108 Wn.2d 38, 738 P.2d 665 (Wash. 1987). This case reviewed how much should be awarded in attorney fees under RCW 19.108.040, attorney's fees in the case of misappropriations of trade secrets, for a defendant found liable of such misappropriations. ***Id.*** p. 64.

E) ***In re Estate of Stevens***, 94 Wn.App. 20, 971 P.2d 58 (Div. 2 1999). This case involves review of a court order vacating a default judgment and does not consider attorney fees at all. ***Id.*** p. 30.

Of the cases cited by FAL, only one, ***Tribble v. Allstate Property and Casualty Insc. Co.***, involved interpretation of law; and in that case the question was whether a multiplier was properly applicable, not if fees were awardable as a matter of law. The other citations that involve attorney fees all involve questions of discretion.

The present action involves a threshold question as to whether the statutory scheme of RCW 4.84.250-.290, allows attorney fees under the circumstances of this case. As determined in ***Gander v. Yeager***, the threshold question if a statute allows award of attorney fees is a question of law determined de novo.

### 3 B. Because FAL was Twice Denied Attorney Fees For Contraversion of Garnishment, Lacks a Statutory Basis For Any Other Award, and Failed to Plead Any Other Basis for Fees; Being the Prevailing Party is Insufficient For an Award of Attorney Fees

FAL properly cites under Washington law, a court may only grant attorney fees if the request is based on a statute, a contract, or a recognized ground in equity. ***Gander v. Yeager***, p. 645. FAL improperly asserts that it had no affirmative judgment entered against it. FAL Response p. 13. Rather, FAL was denied its one and only pleaded request for attorney fees

which it made on the basis of contraversion of garnishment. RP p7, ¶11-12.

FAL is also mistaken regarding the sufficiency of a basis for an award of attorney fees. It is insufficient for the award of attorney fees to be the prevailing party. FAL Response, p. 13. Fees must both be authorized by statute, and properly pled. Neither condition exists in this case.

### 3 C. Because the Requirements For Making an Offer of Settlement Are Simple and Clearly Specified, FAL's Assertion That A Proper Offer of Settlement Was Not Possible is Meritless.

FAL's principal argument is that an offer of settlement was not possible because Ms. Carino failed to appear in the initial trial. However, FAL offers no authority for this assertion and fails to consider the guidelines provided in the statutory scheme itself. In fact according to RCW 4.84.280, all that is required to make an offer of settlement is service of that offer according to the court rules. See pages 5-7 of this Reply for a full discussion.

FAL was easily able to make an offer of settlement and notice of the consequences of not accepting that offer; both necessary events to

activate the statutory scheme. Doing so would have given notice to Ms. Carino of the pending action and provided the necessary conditions for her to weigh the value of proceeding with an appeal. However, she was not afforded that notice, knowledge or opportunity; and therefore the very purpose of the scheme, to encourage pre-trial settlements, was not available and the scheme was not activated.

### 3 D. Applying The Small Claim Statutory Scheme As A Strict Liability After A Default Judgment Is An impermissible Expansion To The Amount Of Punishment Intended By A Default Judgment

FAL mistakenly argues that a validly obtained default judgment does not touch upon any constitutional rights. FAL offers no authority for its assertion. Default judgments do indeed touch upon the constitutional right not to be deprived of property without due process of law. A relatively immutable principal in American jurisprudence is that when the reasonableness of judicial action against an individual depends upon fact finding the individual must have a fair opportunity to show that it is not true. ***Greene v. McElroy***, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). In 1907 the U.S. Supreme Court recognized that "The right

to sue and defend in the courts is the alternative of force." ***Chambers v. Baltimore & Ohio Railroad Co.***, 207 U.S. 142, 148 (1907).

A default judgment is a punishment that allows the court to balance the right to defend with the court's need to maintain respect of the judicial system by defendants failing to appear when apparently properly served. ***Griggs v. Averbeck Realty, Inc.***, 92 Wn.2d 576, 599 P.2d 1289 (Wash. 1979), citing ***Widucus v. Southwestern Elec. Cooperative, Inc.***, 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960). Default judgments are drastic actions not preferred by the Court. ***Id.*** at 582.

The policy question FAL fails to address is if the small claim statutory scheme is a permissible expansion to the amount of punishment incurred by a default judgment? Does the occurrence of a default judgment alone instigate the penalties of the statutory scheme regardless that the required conditions precedent of RCW 4.84.280 do not exist? The answer is plainly "no."

RCW 4.84.280 describes how the policy outcomes sought by the statutory scheme are achieved. In particular the policy outcomes are achieved through promoting settlement and the penalties that can ensue for failure of that attempt. The scheme requires an attempt by the plaintiff to engage in settlement dialogue demonstrated through making an initial

settlement offer. This attempt is to be made pre-trial, without regard and without affect by the manner in which the action is adjudicated.

As a policy the Court offers a variety of grounds to vacate a default judgment. CRLJ 55(c), CRLJ 60(b). There is no authority showing that the legislature intended that the statutory scheme of RCW 4.84.250-.290 become a further impediment to contest a default judgment. Defendants are already required to pay their own attorney fees and to post a bond in the amount of the judgment as conditions required to proceed with an appeal. RCW 12.36.020(2). The statutory scheme is not intended to impose strict liability for appealing a default judgment. Rather the intention of the scheme is to promote pre-trial settlements and inhibit unjustifiable resistance of parties that do not improve their position from that of a settlement offer when notice was provided of the risk that fees could be imposed.

FAL relies on ***Beckmann v. Spokane Transit Auth.***, 107 Wash.2d 785, 788, 733 P.2d 960 (1987), for the assertion that imposing attorney fees without an offer of settlement or notice of consequences does not expand the scope of the statutory scheme. FAL Response, p. 17. The ***Beckmann*** court was asked when in the timeline of an action a settlement offer and notice of consequences is required to be made under the small claim statutory scheme; and specifically if such notice is required to be

pled in the original complaint. ***Beckmann v. Spokane Transit Auth.***, p. 788. The Court concluded that compliance with RCW 4.84.280, the statute governing settlement offers, will offer sufficient notice. ***Id.*** p. 790. ***Beckmann*** is authority for the proposition that the overriding purpose of the statutory scheme allowing settlement requires defendants to be put on notice in a timely manner prior to trial. ***Id.***

If, as FAL suggests, the penalties under the statutory scheme are permitted to be applied without any settlement offer or notice at all; the scope of the scheme would be expanded not to promote settlement, but simply to punish justifiable appeals. It would open the door to a type of strict liability, and a seed of a gatekeeping inhibition to redress of default judgments and appeal not intended by the legislators.

### 3 E. The Award of Attorney Fees On Appeal is Governed By Mandatory Civil Procedures Not Followed By FAL

FAL confuses notice requirements under the small claim statutory scheme and pleading requirements for a request of attorney fees on appeal. What is curious is that FAL's citations of authority on notice requirements pertain to the essential requirements for proper notice; authority that conflicts with the remainder of FAL's Response.

FAL neglects to provide any authority pertaining to pleading requirements for a request of attorney fees on appeal. As such FAL fails to respond at all to Ms. Carino's argument. This kind of response is predictable because there is no simple contrary argument; pleading requirements for attorney fees on appeal are consistently recognizes in case law and statute. The Court expects a section of the appellate brief to be devoted to the request for fees. RALJ 11.2, RAP 18.1. The pleading requires more than a bald request for attorney fees. ***In re Marriage of Coy***, 160 Wn.App. 797, 808, 248 P.3d 1101 (Wash.App. Div. 2 2011), see ***Phillips Bldg. Co., Inc. v. An***, 81 Wash.App. 696, 915 P.2d 1146 (1996). Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. ***Austin v. U.S. Bank of Wash.***, 73 Wash.App. 293, 313, 869 P.2d 404, review denied, 124 Wash.2d 1015, 880 P.2d 1005 (1994). ***Stiles v. Kearney***, 168 Wn.App. 250, 267, 277 P.3d 9 (Wash.App. Div. 2 2012). ***Just Dirt, Inc. v. Knight Excavating, Inc.***, 138 Wash.App. 409, 157 P.3d 431 (2007).

Just as in ***In re Marriage of Coy***, where a bald request for attorney's fees was inadequate to merit an award, so much more in our case where other than the twice denied request on contraversion of garnishment no request was made at all, the post-hearing bald request

without citing any authority should be overturned. Just as in ***Austin v. U.S. Bank of Wash***, where argument and citation to authority were required to advise the court of the appropriate grounds for an award of attorney fees and costs, in our case where RCW 4.84.250 – 290 was not cited at all in any appellate brief let alone with argument and citation to authority, the award of fees was improper. For these reasons the award of attorney's fees should be overturned.

## IV. CONCLUSIONS

The Standard of Review for this matter is de novo because the questions for review involve an initial decision whether there is a legal basis upon which to grant or deny attorney fees.

RCW 4.84.250-.290, the small claim statutory scheme, permits attorney fees only upon the plaintiff serving upon the defendant an offer of settlement per the terms of RCW 4.84.280. The fact that FAL provided no offer of settlement at all requires the grant of attorney fees to be reversed.

The requirements for making an offer of settlement itemized in RCW 4.84.280 are simple and clearly specified. FAL's assertion that a proper offer of settlement was not possible is meritless.

Further, FAL was twice denied attorney fees for contraversion of garnishment, the only request pled for fees at all. FAL lacks a statutory basis for any other award, and failed to plead any other basis for fees. As such its assertion of being the prevailing party is insufficient for an award of attorney fees.

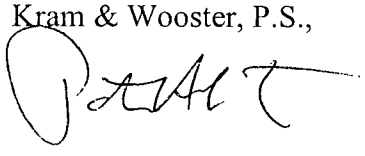
From the perspective of public policy, applying the small claim statutory scheme as a strict liability after a default judgment is an impermissible expansion to the amount of punishment intended by a default judgment.

And finally the award of attorney fees on appeal is governed by mandatory civil procedures not followed by FAL.

For all of these reasons an award of attorney fees in this case was improper and that award should be reversed.

RESPECTFULLY SUBMITTED this 12 th day of June, 2013.

Kram & Wooster, P.S.,



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## CERTIFICATE OF SERVICE

I, Patrick Hollister, hereby certify that I am over the age of 18 years and counsel to a party in this action; my business address is and I am employed by Kram & Wooster, P.S., 1901 South I Street, Tacoma, Washington 98405. On the 12th day of June, 2013, a true and correct copy of each of the following documents: Appellant's Reply, was delivered to:

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by the following method:

[ ] Depositing same postage prepaid in the United States Mail addressed to the person(s) identified above.

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

DATED this 12th day of June, 2013.

KRAM & WOOSTER, P.S.

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## CERTIFICATE OF SERVICE

I, Patrick Hollister, hereby certify that I am over the age of 18 years and counsel to the Petitioner in this action; my business address is and I am employed by Kram & Wooster, P.S., 1901 South I Street, Tacoma, Washington 98405. On the 12th day of June, 2013, a true and correct copy of each of the following documents: Appellant's Reply to Respondent's Response (2 copies), was delivered to:

Washington State Court of Appeals
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[ ] Delivery by transmission of facsimile. [DSHS Board of Appeals]

[ X ] Delivery in person

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

DATED this 12th day of jUNE, 2013.

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