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NO. 637436-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife and the marital
community composed thereof, and MAMUYE A. AYELEKA d.b.a.
ORANGE CAB 485 and JANE DOE AYELEKA, his wife and the marital
community composed thereof,

Appellants,

v.

PATRICK A. WILLIAMS and ANDREA HARRIS, his wife, and
ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS, a
minor child, and JOSHUA HARRIS, a minor child,

Respondents.

**REPLY BRIEF OF APPELLANTS, AND
RESPONSE TO CROSS-APPEAL**

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I. ARGUMENT IN REPLY

A. Plaintiffs failed to cite any authority regarding the application of RCW 4.84.250.

Hertz v. Riebe, 86 Wn. App. 102, 936 P.2d 24 (1997), holds that a settlement offer made before an appeal but after the initial trial is insufficient to recover attorney fees under RCW 4.84.250. In *Singer v. Etherington*, 57 Wn. App. 542, 546, 789 P.2d 108 (1990), this Court held that the Arbitration is the trial for purposes of RCW 4.84.250 *et seq.* See *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 558, 59 P.3d 120 (2002). Plaintiffs acknowledge the numerous cases holding that a mandatory arbitration hearing is the initial trial and the trial de novo is the appeal (Brief of Respondent at 11), but argue *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2004) as implicitly overruling these cases. According to Plaintiffs, the *Malted Mousse* Court declared that the mandatory arbitration hearing is a complete nullity; therefore, the arbitration cannot be considered the initial trial for purposes of RCW 4.84.250 *et seq.* Their argument is incorrect.

1. *Malted Mousse* does not apply to this case.

Malted Mousse involved a plaintiff who pleaded in his Complaint, before the mandatory arbitration hearing, that his damages were less than \$10,000. His pleading invoked RCW 4.84.250. Defendants prevailed at

the mandatory arbitration hearing, and requested his attorney fees under RCW 4.84.250, which the arbitrator denied. The defendant later filed a motion in superior court for:

1) an order confirming arbitration award dated June 6, 2000 pursuant to RCW 7.04.150; 2) an order vacating amended arbitration award dated June 19, 2000; [and] 3) an order awarding defendant his reasonable attorney fees and costs herein pursuant to RCW 7.04.160(4) and CR 60 (b)(1), (5), and (11).

Malted Mousse, 150 Wn.2d at 523. The trial court denied the request, and the Supreme Court ruled that the trial court's decision was correct because "the trial de novo appeal process from mandatory arbitration ... is the sole method of seeking judicial review following a mandatory arbitration."

Malted Mousse, 150 Wn.2d at 521.

Plaintiffs cite passages in *Malted Mousse* where the Court distinguished between an appeal from a private arbitration conducted under chapter 7.04 RCW, and an appeal from a mandatory arbitration conducted under chapter 7.06 RCW. In discussing why the procedures for reviewing an arbitrator's decision under chapter RCW 7.04 (an arbitration conducted pursuant to contract) did not apply to the statutorily mandated arbitration of small claims, the Court paraphrased the language of chapter 7.06 RCW and the Mandatory Arbitration Rules: "While both acts deal with a form of alternative dispute resolution, they differ with respect to

how a party appeals when dissatisfied with the arbitral decision.” *Malted Mousse*, 150 Wn.2d at 526. The Court explained that, unlike an appeal from a private arbitration (pursuant to chapter RCW 7.04), which challenges *parts* of an arbitrator’s decision, an appeal from a statutory arbitration conducted under chapter 7.06 RCW requires “review of all issues of law and fact.” 150 Wn.2d at 530. Under MAR 7.1(a), when the arbitration award is appealed, the award is sealed by the clerk until the trial de novo (appeal) is completed, and the trial de novo:

is conducted as if the parties had never proceeded to arbitration. The entire case begins anew. The arbitral proceeding becomes a nullity, and it is relevant *solely* for purposes of determining whether a party has failed to improve his or her position, in which case attorney fees are mandated.

150 Wn.2d at 528 (italics in original.)

Based upon this description of the manner in which a trial de novo is conducted during the appeal process, Plaintiffs argue *Malted Mousse* implicitly overturns decisions such as *Singer v. Etherington*¹ that explain the application of RCW 4.84.250 *et seq.* to cases tried in arbitration and appealed by trial de novo. Their arguments are mistaken.

Malted Mousse did not overturn any of the case law analyzing the timeliness of invoking RCW 4.84.250. The cited statements explained

¹ 57 Wn. App. 542, 546, 789 P.2d 109 (1990).

why the procedure Mr. Steinmetz followed to challenge the attorney fee portion of the mandatory arbitration decision was not an authorized method for appealing from a chapter 7.06 RCW mandatory arbitration award.² The *Malted Mousse* Court's decision did not address the rule in *Singer v. Etherington* that when chapter 7.06 RCW applies to a case, the "trial" referred to in RCW 4.84.280 is the arbitration, and the subsequent proceedings are an appeal. See *Thomas-Kerr*, 114 Wn. App. at 558. This Court has not had difficulty harmonizing the *Malted Mousse* decision with the holding in *Singer*. For example, in *Hudson v. Hapner*, 146 Wn. App. 280, 284-85, 187 P.3d 311 (2008), *rev. granted*, 165 Wn.2d 1048 (2009),

² The Court specifically stated in *Malted Mousse* that "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Malted Mousse*, 150 Wn.2d at 531. Harris and Williams improperly suggest that Defense counsel violated RPC 3.3(a)(3) for not discussing the *Malted Mousse* decision in Appellants' opening brief, and assert that this appeal borders on frivolousness. RPC 3.3(a)(3) states that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Plaintiffs' reliance on *Malted Mousse* is misplaced, and their accusation is unfounded. *Malted Mousse* is not controlling legal authority for the issues presented in this appeal. And, even if that decision provided the basis for a decision in this case, RPC 3.3(a)(3) would not be implicated given that the case was disclosed in Harris' Respondent's Brief and was argued below. Plaintiffs have also not shown that this appeal is baseless or that it is not supported by rational or reasonable argument to cause it to be frivolous. Defendants maintain that the holding in *Malted Mousse* does not support Plaintiffs' position, and that this Court should grant their appeal.

the Court discussed the *Singer* holding that a trial de novo is treated as an appeal, while also citing *Malted Mousse* for the policy behind the mandatory arbitration rules of promoting finality and reducing court congestion of civil cases. 146 Wn. App. at 285. The *Hudson* court certainly gave no indication it viewed the decisions as inconsistent.

2. The mandatory arbitration hearing is still the initial trial.

Plaintiffs acknowledge that RCW 4.84.250 applies when the plaintiff's initial claim for damages is for \$10,000 or less. Brief of Respondent at 10. They also acknowledge that the statutory scheme must be invoked prior to the initial trial. *Id.* at 14. Their sole argument against the *Singer* rule is that, based on a statement in *Malted Mousse* about the manner in which an appeal from an RCW 7.06 arbitration is conducted, it now cannot be said that the mandatory arbitration was the initial trial under RCW 4.84.280. Brief of Respondent at 14.

Even if the dicta³ in *Malted Mousse* applied to this case in the manner argued by Plaintiffs, it would not impact whether the mandatory

³ In *Malted Mousse*, our Supreme Court held that (1) a party cannot partially appeal a decision under mandatory arbitration, including issues related to attorney fees, 150 Wn.2d at 528-29; (2) a request for a trial de novo is the exclusive method for appealing an arbitration award, *id.* at 532; and (3) failing to file such a request within 20 days precludes review of the arbitration award. *Id.* at 529. *Malted Mousse*, 150 Wn.2d at 531. Nothing in *Malted Mousse* addressed whether the pleading of small-claim

arbitration hearing was the initial trial. Plaintiffs state as much themselves. “There is no dispute that a trial de novo following an arbitration is an appeal.” The *Malted Mousse* court affirmed as much when it said that the sole way to appeal from mandatory arbitration is the trial de novo.” Brief of Respondent at 11. Even if the mandatory arbitration is considered a nullity for purposes of the trial de novo,⁴ that would still not render the trial de novo the initial trial. A case can only get to a trial de novo from mandatory arbitration via appeal, which necessarily means that the trial de novo is not the initial trial for applying RCW 4.84.280.

3. Plaintiffs did not cite any case law to address when RCW 4.84.250 must be invoked.

The attorney fee provision of RCW 4.84.250 only applies if the statute is invoked prior to the initial trial. *Hertz*, 86 Wn. App. at 107. The

damages required by RCW 4.84.250, or the pre-trial settlement demand specified in RCW 4.84.280, could be made after the trial, and before the Superior Court appeal conducted by trial de novo. *Malted Mousse* simply does not address the issues to be decided in the instant case.

⁴ While a timely appeal makes the decision made at the arbitration a nullity for purposes of the determination to be made at the trial de novo, the fact that the decision was made remains the event that requires the parties to decide whether to appeal by seeking a trial de novo. Sealing the arbitration decision does not mean a Court must ignore the fact that an arbitration occurred when evaluating claims for attorney fees under RCW 4.84.280. A court reviews the arbitration award and more in determining whether a party who appealed improved her position, under RCW 7.06.060(1).

trial de novo after an arbitration is an appeal, and the mandatory arbitration hearing is the initial trial. *Singer v. Etherington*, 57 Wn. App. 542, 789 P.2d 108 (1990). See *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002). Plaintiffs have not cited any authority to support their contention that RCW 4.84.250 can be invoked for the first time after the arbitration and prior to the trial de novo. As stated above, *Malted Mousse* does not speak to the issue.

The holding in *Hertz* clearly states that to recover attorney fees under RCW 4.84.250-.300, the offer of settlement needs to be made prior to the original trial. In *Hertz*, the Riebes prevailed on their action in the small claims department of district court and the Hertzses appealed to superior court. The Hertzses also appealed their loss in a separate small claims dispute with the Riebes, and the two matters were consolidated in Superior Court. The Riebes offered to settle the case *after* the small claims hearing but prior to the Superior Court trial de novo. Both parties prevailed on major issues, and the Court determined that the contractual provision to award attorney fees to the prevailing party did not allow either party to recover attorney fees in the circumstances. The Riebes also requested attorney fees under RCW 4.84.250–.300, arguing that they had made a settlement offer before the Superior Court trial de novo (but after the district court trial). The court held that in order for RCW

4.84.250-.300 to be invoked, “the Riebes must have made an offer of settlement for greater than the amount of the Hertzses’ recovery 10 days before the *district court trial*.” *Hertz*, 86 Wn. App. at 107 (emphasis added).⁵

4. Allowing Plaintiffs to invoke RCW 4.84.250 after the Arbitration decision goes against the public policy behind the statute.

Plaintiffs do not address Defendants’ public policy arguments; they merely contend that *Malted Mousse* makes the public policy arguments irrelevant. The statutory scheme of RCW 4.84.250 *et seq.* was designed to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). The statutes thus

⁵ This Court has previously analogized the appellate process from small claims court to that of mandatory arbitration hearings for purposes of RCW 4.84.250. *Singer v. Etherington*, 57 Wn. App. at 546. The original trial in *Hertz* was in the small claims department of the district court, where parties generally are not represented by attorneys, do not have a right to a jury trial, do not have the absolute right to appeal, and the amount of a plaintiff’s recovery is limited by statute. Nevertheless, offers of settlement under RCW 4.84.250 must be issued prior to a small claims district court hearing to invoke RCW 4.84.290 and allow attorney fees for the trial de novo in Superior Court. *Hertz*, 86 Wn. App. at 107. Because a purpose of the Mandatory Arbitration rules and statute is to reduce court congestion by increasing the finality of the arbitrator’s decision, *see Wiley v. Rehak*, 143 Wn.2d 339, 347, 20 P.3d 404 (2001), requiring a party to invoke RCW 4.84.250 before the arbitration (where a party may seek up to \$50,000 while represented by an attorney) makes at least as much sense as requiring the procedure in a district court small-claim case, as required in *Hertz*.

limit court congestion by giving both parties an incentive to settle claims of \$10,000 or less prior to the initial trial. The statutes that provide for the mandatory arbitration of cases, ch. 7.06 RCW, are designed to promote finality of decisions subject to mandatory arbitration (currently \$50,000), and thereby alleviate court congestion and delays. *Wiley v. Rehak*, 143 Wn.2d 339, 347, 20 P.3d 404 (2001).

Allowing a Plaintiff⁶ to delay invoking the \$10,000 settlement demand or pleading until after she has tried her hand at the larger prize (\$50,000) would have the perverse effect of encouraging a Plaintiff to delay making the smaller settlement demand until she has completed the arbitration and learned the result. This approach would only prolong the process of litigating many small claims.⁷ The arbitration “statute

⁶ Only a Plaintiff can invoke RCW 4.84.250 *et seq.* *Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998); *Pierson v. Hernandez*, 149 Wn. App. 297, 306, 202 P.3d 1014 (2009). Similarly, the Plaintiff generally controls, through the allegations of the claim, whether a case (especially a personal injury case) is subject to mandatory arbitration. RCW 7.06.020(1). By not requiring the Plaintiff to decide before the arbitration whether to invoke RCW 4.84.250, a plaintiff would truly be permitted to prosecute two completely separate actions for the same damages. That appears to be what the Plaintiffs argue is the consequence of the *Malted Mousse* court’s statement that “the entire case begins anew.” 150 Wn.2d at 528. But when that statement is read in the context of the whole decision, clearly the Supreme Court meant no such thing.

⁷ See *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984) (Allowing a party to avoid liability for attorney fees in an appeal from an arbitration award “where an appellant improves

contemplates, indeed intends, that a claimant who goes to trial in superior court after a disappointing arbitration award faces greater financial risk than a claimant who is allowed to go to trial without passing through arbitration.” *Fernandes v. Mockridge*, 75 Wn. App. 207, 212, 877 P.2d 719 (1994), *rev. denied*, 126 Wn.2d 1005 (1995). If the plaintiff does not plead damages or offer to settle for \$10,000 or less prior to the initial trial before the arbitrator, RCW 4.84.250 cannot be invoked in the appeal merely because the plaintiff is then willing to settle for \$10,000 or less. *Pierson v. Hernandez*, 149 Wn. App. 297, 306, 202 P.3d 1014 (2009). That is precisely what Plaintiffs have attempted to do in this case.

Attorney fees are not a matter of right in Washington. *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 297, 149 P.3d 666 (2006). RCW 4.84.250 is an exception to the general rule that each party pays her own attorney’s fees. The exception under RCW 4.84.250-300 is limited to cases in which the plaintiff pleads a claim for \$10,000 or less before trial, or offers to settle for \$10,000 at least 10 days before the initial trial. Plaintiffs have not cited any cases allowing a plaintiff to invoke RCW 4.84.250 after the

his overall position in the trial de novo solely because of a new claim brought for the first time at trial would be counter to the statutory purpose of deterring meritless appeals from mandatory arbitration awards. In fact, such an interpretation would reward bringing a new claim in a trial de novo after the arbitration”), cited in *Wiley v. Rehak*, 143 Wn.2d at 407.

initial trial or when the plaintiffs initially requested settlement in excess of \$10,000. And, RCW 7.06.050(1), as amended in 2002,⁸ provides a different manner of determining the availability of attorney fees after an appeal from an arbitration decision (Appendix A).

Plaintiffs offer an interpretation of RCW 4.84.250 that would also circumvent the policy behind RCW 7.06.050(1). RCW 7.06.050(1) allows a **non-appealing** party to serve an offer of compromise upon an appealing party that replaces the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has improved her position.⁹ The statute makes no provision for the party who filed the appeal to seek an award of attorney fees through a post-arbitration settlement demand. In this case, by not setting forth a pleading that stated their damages were \$10,000 or less, Plaintiffs each preserved their eligibility to receive up to \$50,000 at the mandatory arbitration hearing.

⁸ The *Malted Mousse* Court stated expressly stated that its decision was “not affected by nor will it affect [the construction of] *subsections (a)–(c)* of the new *RCW 7.06.050(1)*.” 150 Wn.2d at 527 n.6 (italics in original).

⁹ RCW 7.06.050(1) (a) and (b) provide: (a) Up to thirty days prior to the actual date of a trial de novo, a **non-appealing party may serve** upon the appealing party of a **written offer of compromise**. (b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

After their claims were rejected at arbitration, they requested a trial de novo, and attempted to invoke RCW 4.84.250. However, RCW 7.06.050 only authorizes non-appealing parties to affect the fee-shifting rules of RCW 7.06.060(1) (Appendix B) and MAR 7.3.

As amended in 2002, RCW 7.06.060(3) provides that the fee-shifting provisions set forth in chapter 4.84 RCW may apply to an appeal from an arbitration award as follows:

If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

The amended statute thus contemplates that when a case is subject to mandatory arbitration under ch. 7.06 RCW, efforts to invoke RCW 4.84.250 must take place before the arbitration. If a plaintiff could invoke RCW 4.84.250 for the first time after learning the arbitration result, RCW 4.84.280 would be used to circumvent the fee provisions of RCW 7.06.050 and RCW 7.06.060.

The position argued by Plaintiff is contrary to the statutory schemes of ch. 7.06 RCW and ch. 4.84 RCW. RCW 7.06.050(1) establishes that only the non-appealing party can make an offer of compromise that affects fee-shifting provisions in appeals from

arbitration. As Plaintiffs were the appealing parties, they may not modify the amount of recovery relevant for triggering an attorney fee provision for the post-arbitration appeal by trial de novo.

5. This Court has previously rejected the main argument of Plaintiffs regarding RCW 4.84.250.

Plaintiffs' main argument is that the trial de novo appellate process from mandatory arbitration hearings renders any offers of settlement, or the lack thereof, moot. If this interpretation of *Malted Mousse* is correct, then if they had made offers of settlement prior to the mandatory arbitration hearing, those offers of settlement would also be moot since the mandatory arbitration hearing was a nullity. However, this Court has ruled that offers of settlement for purposes of RCW 4.84.250 *et seq.* do not lapse for purposes of awarding attorney fees. *Singer*, 57 Wn. App. at 546. No appellate decisions after *Malted Mousse* have failed to apply RCW 4.84.250-.290 when invoked prior to a mandatory arbitration hearing.

6. RCW 4.84.250 controls regardless of the amount of Harris' recovery.

Respondent Harris is correct that the amount of her recovery does not determine whether RCW 4.84.250 applies, but the amount of her claim for damages does determine whether the statute applies. *Beckman v. Spokane Transit Authority*, 107 Wn.2d 785, 733 P.2d 960 (1987), allows a plaintiff to recover attorney fees under RCW 4.84.250 even if she requests

more than the statutory maximum at trial, but only if she timely invoked the statute. In *Beckman*, the Court overruled previous decisions that required the plaintiff to assert the damages of less than \$10,000 in the original complaint, pointing out that in a personal injury case damages are not alleged in the Complaint and that the statute governing settlement offers, RCW 4.84.280, was sufficient to notify a defendant that RCW 4.84.250 would apply. 107 Wn.2d at 789-90. *Beckman* is distinguishable from this case because Beckman submitted her offer of settlement prior to the original trial, the plaintiff in *Beckman* never asserted damages over \$10,000 prior to the trial, and the defendant in *Beckman* never requested the plaintiff to present any dollar amount of damages prior to trial.

Defendants requested information about Harris's damages, including a request that she specify her special damages well before trial.¹⁰ Harris responded that her bills totaled \$6,032, and did not specify any amount for future medical care (CP 781) or indicate she would be seeking future treatment. At trial, she offered the testimony of her chiropractor, Dr. De Lisle, over defendants' objection, that based upon her recent

¹⁰ Defendant issued the Court's Pattern Interrogatories for Automobile Tort Cases, as allowed by KCLR 26(d)(1)(A) and KCLR 33. CP 758-82. Because this was an appeal from an Arbitration Award, the Court did not issue a standard case schedule, and the case proceeded on an abbreviated schedule for the appeal by trial de novo.

undisclosed examination of Ms. Harris, Ms. Harris would need additional treatment at an estimated cost of \$4,800. And, Dr. De Lisle decided at that late date (February 24, 2009) that Ms. Harris had a spinal curvature caused by a side-impact auto collision on December 25, 2005. None of this information was supplied by Plaintiff before trial.¹¹

If Harris had properly supplemented her interrogatory responses pursuant to CR 26(e)(1), her claimed special damages would have been \$10,832, and RCW 4.84.250 could not apply.¹² Because she failed to assert RCW 4.84.250 before proceeding to arbitration, her offer to settle for less than \$10,000 after the unsuccessful arbitration merely indicated

¹¹ Ms. Harris contends she mentioned in her trial brief that future damages would be claimed. A party who does not plead a theory of recovery cannot finesse that issue by inserting the claim in a trial. *Shooting Park Ass'n v. Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). Mentioning the claim generally a few days before the second rescheduled trial date did not timely apprise defendants of the claimed damages. Moreover, Ms. Harris did not disclose the post-discovery chiropractic examination, expert opinion about current physical condition, or the chiropractor's opinion that the condition observed on February 24, 2009 was caused by the collision alleged to have occurred December 25, 2005. That information was first disclosed during Dr. De Lisle's testimony, which the Court received subject to a reserved ruling on the defendants' objections to the evidence. In the meantime, the parties had agreed to waive the jury to avoid another continuance of the trial date due to unavailability of jurors again (RP 13-14) (CP 409-11).

¹² See *Pierson v. Hernandez*, 149 Wn. App. 297, 306, 202 P.3d 1014 (2009); *Klein v. City of Seattle*, 41 Wn. App. 636, 640, 705 P.2d 806 (1985). See also *Reynolds v. Hicks*, 134 Wn.2d 491, 503, 951 P.2d 761 (1998); *Sherman v. Kissinger*, 146 Wn. App. 855, 876, 195 P.3d 539 (2008).

her willingness to settle for less than what she sought before the arbitration. *See Pierson*, 149 Wn. App. at 306.

7. If RCW 4.84.250 applies, Defendant Ayeleka is entitled to his attorney fees.

Defendants contend that RCW 4.84.250 does not apply to this case. However, if RCW 4.84.250 does apply, defendant Ayeleka is entitled to his attorney fees. Plaintiffs dismissed Ayeleka voluntarily on the first day of trial, over a year after the mandatory arbitration hearing. This Court held in *Allahyari v. Carter Subaru*, 78 Wn. App. 518, 819 P.2d 413 (1995), that for purposes of RCW 4.84.280, a defendant is the prevailing party if the plaintiff recovers nothing from the defendant. The Court reasoned that when the defendant was voluntarily dismissed from the case, the plaintiff recovered nothing.

Plaintiffs cite *Wachovia SBA Lending, Inc. v. Kraft*,¹³ for their contention that a prevailing party is one who obtains a favorable final judgment, and argue the voluntary dismissal did not result in a final judgment for Defendant Ayeleka. Brief of Respondent at 17. *Wachovia* held that a voluntary dismissal without prejudice does not result in the defendant being the prevailing party under RCW 4.84.330, reasoning that the Plaintiff could refile the case and nothing was resolved by the

¹³ 165 Wn.2d 481, 200 P.3d 683 (2009).

dismissal. But the plain language of RCW 4.84.330 specifically requires a final judgment for the defendant to be deemed the prevailing party.¹⁴ There is no such requirement for the defendant to be the prevailing party under RCW 4.84.270. As the *Wachovia* Court stated, “‘prevailing party’ is not defined in the same manner in every attorney fees statute. See RCW 4.84.250-.330.” 165 Wn.2d at 489.

The *Wachovia* Court’s analysis distinguished fee shifting statutes such as those in RCW 4.84.250-.290 from RCW 4.84.330’s provision making unilateral attorney fee provisions in contracts bilateral. The very point of the *Wachovia* Court’s distinction between the statutes was that RCW 4.84.330 had a different purpose, and contained the additional requirement of a final judgment. *Wachovia* did not change the rule in *Allahyari* that a plaintiff who invokes RCW 4.84.250 and then dismisses the case voluntarily is subject to attorney fees under RCW 4.84.270. Plaintiffs ‘recovered nothing’ from Defendant Ayeleka, which entitles him

¹⁴ “As used in this section, “prevailing party” means the party in whose favor final judgment is rendered.” RCW 4.84.330. By contrast, RCW 4.84.270 states that “The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages...., recovers nothing....” Moreover, in this case Plaintiffs’ dismissal of Mr. Ayeleka after expiration of the statute of limitations ended their claims against him.

to attorney fees under RCW 4.84.270 if RCW 4.84.250 applies to this case.¹⁵

B. The trial court erred by allowing Dr. De Lisle to testify regarding future treatment and damages.

Andrea Harris never supplemented her discovery responses to include the estimated cost of her future treatment. Over defendants' objections, Dr. Marisa De Lisle testified to the estimated cost of Harris' future treatment at the trial (RP 93; 149-51; 483-93). Harris argues that the testimony was properly allowed because there was no willful violation of a discovery order, because there was no discovery order¹⁶. Brief of

¹⁵ Once an arbitration has taken place, the Plaintiff does not have an absolute right to dismiss her claims voluntarily under CR 41. *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 562, 59 P.3d 120 (2002). Based upon the decision in *Thomas-Kerr*, it appears that when a Plaintiff seeks to dismiss her claims after filing a request for a trial de novo (as in this case), the request is treated as a permissive dismissal and RCW 7.06.060(1) makes the award of attorneys fees under that statute a matter of the trial court's discretion. If the dismissal is not considered a voluntary withdrawal of a request for trial de novo of the claims against Ayeleka, then RCW 7.06.060(1) mandates an award of attorney fees to Ayeleka because the Plaintiffs failed to improve their positions against him.

¹⁶ Because the appeal from the arbitration was not a new case, the Superior Court issued an abbreviated scheduling order, which does not contain some of the deadlines typically set-out in a case schedule for a standard trial. Nevertheless, the trial Court issues a Pre-Trial Order that required disclosures of witnesses and exhibits so that the kind of surprise that occurred in this case would not occur. CP 274-77. On April 28, 2009, the parties filed the Joint Statement of Evidence. CP 368-70. According to Plaintiffs, Dr. De Lisle informed counsel for Ms. Harris the very next day that she had re-examined Ms. Harris on February 24, 2009. Though the

Respondent at 19. Harris also argues that Tilaye could have filed a motion to compel to learn about Dr. De Lisle's opinions. Brief of Respondent at 25. However, Tilaye was not informed that there was any outstanding discovery to be compelled. Dr. De Lisle had previously testified regarding her treatment of Andrea Harris on three previous occasions¹⁷ without mentioning Harris' need for future treatment. At trial, Dr. De Lisle testified that her estimate of Andrea Harris' need for future treatment was based on a February 24, 2009 evaluation.¹⁸ Brief of Respondent at 23. (RP 170). Ms. Harris did not disclose her plan to offer testimony about the amount of future medical costs until the eve of trial, in her trial brief. Brief of Respondent at 23. Andrea Harris was re-evaluated by Dr. De Lisle on February 24, 2009 (RP 170), but opposing counsel did not

Joint Statement of Evidence made no mention of Dr. De Lisle's records from the February 24, 2009 examination, that examination formed the primary foundation for her testimony about Ms. Harris's condition; the cause of the condition; and the recommendation for future chiropractic treatments.

¹⁷ She provided a declaration before the arbitration; she testified during the arbitration; and she supplied a declaration in connection with Ms. Harris's motions in October 2008. CP 58-127; 232-35.

¹⁸ The abbreviated case schedule for the appeal set February 2, 2009 as the deadline to complete discovery before the rescheduled trial de novo. Trial had been scheduled to commence March 23. CP 272. The Pre-trial Order also required disclosures of witnesses, including expert witness testimony, as required by KCLR 4. However, because the case was an appeal and did not proceed on a standard trial track, the Superior Court did not issue the standard case schedule that requires detailed disclosures under KCLR 4 and KCLR 26.

disclose that evaluation until trial had begun. Counsel for Plaintiffs must concede there were numerous written and verbal communications with defense counsel after April 29, 2009, and before trial, without any mention of the February 24, 2009 medical examination.

Willful and intentional nondisclosure is grounds for the exclusion of testimony. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987). While counsel for Ms. Harris may not have had any corrupt motive in not disclosing the new medical evidence, the fact remains the information was withheld without justification.

Andrea Harris seems to argue both sides of the issue regarding prejudice to Defendant Tilaye. On one hand, Harris argues that the testimony should be allowed because there was no surprise to Defendant Tilaye because her discovery responses revealed that, in May 2006, she had received a recommendation for further treatment. On the other hand, counsel for Harris argues that the first time he obtained information regarding possible future care treatment was when he discussed Dr. De Lisle's trial testimony with her on April 27, 2009 – one week before trial. Brief of Respondent at 22. Ms. Harris explains that when her attorney asked about the possible cost and duration of her future care, Dr. De Lisle responded via e-mail on April 29, 2009 – 2 business days before trial.

Brief of Respondent at 23. Even then, the information was not disclosed to defendants. Defendant Tilaye's surprise regarding the testimony is warranted, given that Ms. Harris's attorney did not know about future care costs when he asked for information on April 27, 2009, and did not know Ms. Harris had received a recent examination until he received Dr. De Lisle's message on April 29, 2009. Dr. De Lisle had treated Andrea Harris from January through May 2006, and according to all the testimony and written discovery responses, had not provided any additional care after May 2006. When Ms. Harris moved for partial summary judgment regarding the medical costs and treatment of Andrea Harris in September 2008, Dr. De Lisle provided no estimates of any future treatment as part of her declaration. Ms. Harris never provided any supplemental written discovery responses to alert defendants of her claim, and not even her attorney knew she had returned to be examined by Dr. De Lisle. That new chiropractic evaluation on February 24, 2009 was more than three years after the alleged accident and nearly three years after Ms. Harris was last examined by Dr. De Lisle. The rescheduled discovery cutoff date for this case was on February 2, 2009. Dr. De Lisle admitted that her recommendations about Ms. Harris's present conditions, cause of the conditions, and recommended future costs were based on her most recent examination of Ms. Harris. Brief of Respondent at 23. It is incongruous

for Andrea Harris to argue that Defendant Tilaye was not prejudiced because he should have known of her need for additional treatment well in advance of trial and at the same time argue that she was not required to supplement her discovery responses because her counsel was unaware of the amount of necessary future treatment until shortly before trial.

Harris argues that Tilaye chose not to mitigate any potential prejudice by not deposing Dr. De Lisle and by not filing a motion to compel. Defendant Tilaye could not have mitigated against a situation he did not know existed. This argument unfairly places the burden of obtaining information necessary to evaluate the case on the party that is not in control of its disclosure. Tilaye was entitled to rely on the plaintiff providing proper responses to discovery, and disclosures regarding evidence and expert testimony. Based upon the information provided by plaintiffs, Defendants had no reason to depose Dr. De Lisle because her expected opinions were to be provided in response to interrogatories, she had already testified during the arbitration, and the plaintiffs provided her declaration testimony and her medical records regarding her treatment of Ms. Harris. Furthermore, Dr. De Lisle based her recommendation for Harris' future treatment on an examination that occurred after the discovery cutoff period. Deposing Dr. De Lisle prior to the discovery cutoff date would not have revealed her opinions that were based on a

subsequent evaluation. Similarly, Tilaye had no reason to file a motion to compel because he had no way of knowing that there was anything to be compelled. Even had Defendant Tilaye filed a motion to compel, it would not have produced medical records that were not yet extant. If opposing counsel did not know about the need for and the costs of Harris' future care until April 29, 2009, it is unreasonable to argue that Defendant Tilaye was not prejudiced upon learning of the testimony during trial.

The discovery rules were designed to prevent trial by ambush and to allow all parties to prepare for trial with all of the relevant information. *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003). While counsel for Ms. Harris might not have learned about the significant changes to Dr. De Lisle's testimony until April 29, 2009, he did not disclose the new information to defendants or the Court until trial had commenced.

Harris next argues that Tilaye was not prejudiced by the testimony regarding Harris' future damages. Tilaye was prejudiced by the testimony on two fronts. Tilaye was prejudiced by the outcome of the trial because the trial judge awarded Andrea Harris the costs for future damages as testified to by Dr. De Lisle. In addition, the evidence undoubtedly affected the Court's determination that the alleged collision caused injuries to the plaintiffs, and affected its decision about general damages.

See, e.g., Miller v. Stanton, 58 Wn.2d 879, 887, 365 P.3d 333 (1961). Tilaye was further prejudiced because he was not afforded the opportunity to present expert testimony regarding Andrea Harris' current and future condition and whether her present condition was caused by the accident.¹⁹ If Harris had informed opposing counsel of Dr. De Lisle's expected testimony or even if Harris had informed opposing counsel of the February 24, 2009 examination, Tilaye would have had the option of conferring with his clients about retaining an expert to contradict Dr. De Lisle's findings. The fact that defense counsel was allowed to cross-examine Dr. De Lisle about information first disclosed during trial was not sufficient when he did not have an opportunity to review her records and opinions from the February 24, 2009 examination prior to cross-examination or offer expert opinion to contradict her testimony. RP 149-54.

¹⁹ Dr. De Lisle's subsequent examination of Andrea Harris included objective findings of spinal curvature that she related to the accident. Dr. De Lisle's prior testimony involved only soft-tissue injuries.

C. The trial court erred in entering the findings of fact²⁰ objected to by Defendant Tilaye.

Andrea Harris admits that “none of the statements about which Tilaye complains were offered to prove the truth of the matter asserted. They were made in support of Harris’s request for attorney fees, and did not bear on the legal issues at trial.” Brief of Respondent at 29. Findings number 26, 27, 30 and 31 are not facts at all; rather the findings contain unsupported opinions that were not relevant to the trial of this matter. The remaining findings objected to by defense counsel should not have been entered because they do not support the conclusions of law and are not supported by substantial evidence. Consequently, the trial court erred in entering the findings of fact. *City of Tacoma v. State*, 117 Wn.2d 348, 816 P.2d 7 (1991).

²⁰ The Findings and Conclusions entered on behalf of Ms. Harris were attached to her Notice of Appeal in this matter. Ms. Harris also designated them as Clerk’s Papers, and supplied them as an Appendix to her Brief. The Findings entered for Plaintiff Williams are at CP 805-12.

II. ARGUMENT IN RESPONSE TO HARRIS' CROSS-APPEAL²¹

A. **The trial court did not abuse its discretion by not awarding a multiplier for attorney fees.**

Andrea Harris' argument on cross-appeal is that the trial court abused its discretion by not awarding a multiplier for her attorney fees. Inherent in her argument is that the trial court is obligated to award a multiplier award for attorney fees when a party is represented on a contingent basis, or has the type of claim that would be discouraged by the policies of RCW 4.84.250, *et seq.* and RCW 7.06.050-.060. There is no such mandate. Harris admits that "[t]he trial court has broad discretion in fixing the amount of attorney fees to be awarded," Brief of Respondent at 33, but argues that "the trial court exercised its discretion on untenable grounds or for untenable reasons." Brief of Respondent at 39.

A trial court abuses its discretion only when its decision is manifestly unreasonable, rests on untenable grounds or is based on untenable reasons. *Ryan v. State*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are

²¹ Defendants Tilaye and Ayeleka incorporate by reference the assignments of error for findings of fact entered by the trial court and the corresponding argument of their opening brief.

unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Ryan*, 112 Wn. App. at 899-900. After the case had been arbitrated unsuccessfully, Counsel for Andrea Harris took this case on a 40% contingency fee basis and offered to settle her claims for \$9,000 (FF 7, 9). Based on the offer of settlement, counsel for Andrea Harris would have received attorney fees of \$3,600. Even though this was an alleged minor soft-tissue case (FF 26), counsel for Andrea Harris requested and received fees of \$275 per hour. The trial court awarded Andrea Harris attorney fees of \$49,847.50 (FF 10), in addition to statutory attorney fees and costs. Assuming arguendo that Harris was entitled to attorney fees, not awarding Harris a multiplier was within the range of the trial court’s acceptable choices. *Bowers v. Transamerican Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). The trial court did not abuse its discretion by not awarding Harris a multiplier for her attorney fees.²²

²² And, in addressing whether the trial court abused its discretion, this Court should consider that the trial Court also exercised its discretion under RCW 7.06.060(1) to allow both Plaintiffs to avoid liability for defendant Ayeleka’s attorney fees after they dismissed their claims against him. Thus, the extraordinary, and improper, fee award already made by the trial court was made as part of the decision to deny the award of fees against Plaintiffs for not improving their positions after appealing the defense arbitration award in favor of Mr. Ayeleka.

B. Harris and Williams are not entitled to attorney fees on appeal.

RCW 4.84.250 does not apply to this case. Therefore, RCW 4.84.290 does not apply to Harris and Williams' appeal. *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997).

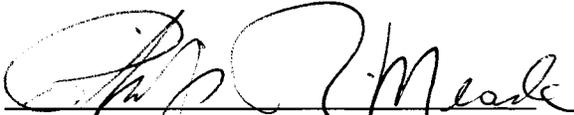
III. CONCLUSION

This Court has repeatedly held that a mandatory arbitration hearing is the original trial and the trial de novo is the appeal. RCW 4.84.250 only applies if invoked prior to the original trial. Harris and Williams did not invoke the statute prior to the arbitration hearing, and the trial court erred in awarding attorney fees under the statute. The trial court also erred in allowing Dr. Marisa De Lisle to testify regarding the future treatment and damages of Andrea Harris when the scope of and the basis for her testimony was not disclosed until the eve of trial. If RCW 4.84.250 does apply to this case, the trial court erred in not awarding attorney fees to Defendant Ayeleka. The trial court did not abuse its discretion by not awarding Harris a multiplier for her attorney fees. Neither party is entitled to attorney fees on appeal. This Court should hold that the trial court erred in awarding Harris and Williams attorney fees under RCW 4.84.250 and in allowing the testimony of Dr. De Lisle regarding Harris' future

damages and current medical condition. The Court should remand for entry of a judgment consistent with its holding.

RESPECTFULLY SUBMITTED this 11th day of February, 2010.

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APPENDIX A

RCW 7.06.050. Decision and award -- Appeals -- Trial -- Judgment

(1) Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

(a) Up to thirty days prior to the actual date of a trial de novo, a nonappealing party may serve upon the appealing party a written offer of compromise.

(b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

(c) A postarbitration offer of compromise shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo, at which time a copy of the offer of compromise shall be filed for purposes of determining whether the party who appealed the arbitrator's award has failed to improve that party's position on the trial de novo, pursuant to MAR 7.3.

(2) If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, a judgment shall be entered and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions.

APPENDIX B

RCW 7.06.060. Costs and attorneys' fees

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.