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No. 707477

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAVALRY SPVI, LLC, Plaintiff, Respondent

v.

JAMES SWALWELL and DOE I, Defendant, Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON COUNTY OF KING

BRIEF OF APPELLANT JAMES SWALWELL

Attorney for Appellant:

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ORIGINAL

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I. STATEMENT OF ISSUES

1. Did the Trial Court err in denying Appellant's Motion for Attorney Fees under RCW 4.84.250?

II. STATEMENT OF THE CASE

Background factual information for the underlying case in the trial court is contained in the Motion for Attorney Fees on Plaintiff's Summary Judgment (CP 1-11) and the Declaration of David Napier (CP 29-45).

In summary, Plaintiff's case was in litigation for 1128 total days between service on April 11, 2010 and dismissal on May 14, 2013. During that time, Plaintiff brought four improper motions that were stricken or cancelled, one failed Summary Judgment, and a Motion for Voluntary Dismissal 20 days before trial.

Defendant brought a Motion for Attorney Fees pursuant to RCW 4.84.250 against Plaintiff subsequent to the dismissal. Plaintiff made no objection to, and both parties agree, that: RCW 4.84.250 applies in this case; the total value of the case was under \$10,000 as required by the statute; the Defendant is deemed the prevailing party where Plaintiff recovers nothing; Plaintiff received written notice of Defendant invoking RCW 4.84.250; and the hours/fees requested were reasonable and

necessary. (CP 46-50 and Verbatim Transcript, 7/19/13, 3:18-25, 4:1-10, and 5:6-16)

The only objection made by Plaintiff against Defendant's Motion for Fees, and the only issue that was before the Trial Court, was the mistaken belief that a voluntary dismissal under CR 41 precludes the finding of a prevailing party as no final judgment is entered (citing to Wachovia SBA Lending v. Kraft, 165 Wn. 2d 481, 200 P.3d 683 (2009) and claiming that it abrogated Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995)). The trial court agreed with Plaintiff's incorrect assertion, finding that a voluntary dismissal under CR 41 precluded attorney fees under RCW 4.84.250 on the basis that no final judgment was entered in the case.

III. ARGUMENT

Summary

The court in Allahyari v. Carter Subaru dealt with almost exactly the same factual scenario that we have in this case. Specifically, a request for attorney fees pursuant to RCW 4.84.250 made by Defendant after Plaintiff voluntarily dismissed his action under CR 41. The court in that case held, "we find no compelling reason not to deem a defendant a prevailing party for purposes of a fee award under RCW 4.84.250 when the plaintiff voluntarily dismisses its entire action. Under RCW 4.84.270, a

defendant's status as a prevailing party is determined by examining what, if anything, the plaintiff recovered. Where the plaintiff recovers nothing, the defendant is the prevailing party. When a plaintiff voluntarily dismisses its entire action, as here, the plaintiff recovers nothing. Therefore, for purposes of a fee award under RCW 4.84.250, the defendant under such circumstances is the prevailing party." 78 Wn. App. at 523. This standard and holding was provided to the Trial Court by Defendant in his request for fees.

Unfortunately, the Trial Court mistakenly applied the standard for prevailing party that is required under RCW 4.84.330 to the case at hand by the application of the holding in Wachovia v. Kraft, 165 Wn. 2d 481 (2009) (finding that CR 41 prohibited attorney fees due to a voluntary dismissal creating no final judgment and so no prevailing party). The standard required for RCW 4.84.330 is listed in the last line of the statute, requiring the prevailing party have a "final judgment" rendered in their favor. The request for attorney fees and costs in this case was made pursuant to RCW 4.84.250, which has a very different standard for prevailing party, found in RCW 4.84.270. The standard for RCW 4.84.250, as provided in .270, does not require a "final judgment." Under RCW 4.84.250 and .270, fees shall be awarded to the Defendant as prevailing party when the Plaintiff recovers nothing.

A voluntary dismissal pursuant to CR 41 does not preclude attorney fees under .250, even though it does preclude attorney fees under .330, as stated in Wachovia. The courts have referenced the statutes in both Allahyari v. Carter Subaru and in Wachovia SBA Lending v. Kraft, stating that due to the differing standards, a voluntary dismissal is sufficient for a finding of prevailing party under RCW 4.84.250 / .270 (Allahyari) but is not sufficient for a finding of prevailing party under RCW 4.84.330 (Wachovia). This Court should apply the proper standard as required by law and overturn the Trial Court's denial of Defendant's Motion for Attorney Fees.

The Trial Court Did Err in Denying Appellant's Motion for Attorney Fees Under RCW 4.84.250

There are many statutes that provide for attorney fees and the standard required to be entitled to those fees differs from one statute to another. The court in Wachovia v. Kraft recognized that situation stating, "However, "prevailing party" is not defined in the same manner in every attorney fees statute. *See* RCW 4.84.250-.330." 165 Wn.2d 481 at 488-489 (2009). Ironically, when citing an example that different standards apply, the court used the two statutes that we are dealing with here. The one that should apply (.250) and the one the Trial Court did apply (.330).

The parties here agree that attorney fees “shall be taxed and allowed to the prevailing party” in this action pursuant to RCW 4.84.250. The standard for determining when a Defendant is a prevailing party is set forth in RCW 4.84.270 stating, “The defendant...shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff...recovers nothing.” The statute includes no mention or requirement of having a final judgment rendered in Defendant’s favor.

Attorney fees requests pursuant to RCW 4.84.330 are a different factual situation than RCW 4.84.250 and are subject to a different standard for determining the prevailing party. Section .330 applies in claims where a contract or lease exists between the parties that includes a unilateral attorney fees provision. Defendant made no claim for fees in this matter subject to RCW 4.84.330 or that factual situation. Under .330, that unilateral provision is forced to become bilateral and entitles the prevailing party to fees. RCW 4.84.330 provides its own definition for prevailing party in the final line stating, “*As used in this section* “prevailing party” means the party in whose favor final judgment is rendered.” (emphasis added)

In defense of the motion leading to this appeal, Plaintiff attempted to use the standard from .330 by asserting that Wachovia v. Kraft applied in this case. (CP 46-50) In Plaintiff’s Response to the Motion for Fees, they

provided a citation attributed to Wachovia, stating that the holding in the case abrogated Allahyari v. Carter Subaru. (CP at 47 lines 16-23)

Unfortunately, the quote provided by Plaintiff does not actually appear in the holding of Wachovia and nowhere in the decision does it say that the holding of Allahyari is completely abrogated.

Andersen v. Gold Seal Vineyards, Inc. laid out the general rule that the defendant is regarded as having prevailed in voluntary nonsuits because the plaintiff “failed to prove [the] claim.” 81 Wn.2d 863, 865, 868, 505 P.2d 790 (1973). Wachovia did not alter the general rule of Andersen. Wachovia simply found that the general rule of Andersen did not apply where a specific statutory definition varied the general rule.

The holding of Wachovia did abrogate Marassi v. Lau, 71 Wn. App. 912, 918-19, 859 P.2d 605 (1993), which held the defendant to be the prevailing party after a voluntary dismissal under RCW 4.84.330. Wachovia, 165 Wn.2d at 490. Wachovia also stated that Allahyari v. Carter Subaru, 78 Wn. App. 518, 522-24, 897 P.2d 413 (1995), improperly discussed with approval the Marassi reasoning, although the ultimate holding of Allahyari was not questioned. Wachovia, 165 Wn.2d at 490-91.

If the Supreme Court intends to overrule a case, it will state so explicitly. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) (“We will not overrule such binding precedent sub silentio.”). Absent such a statement, Andersen and subsequent cases relying on it (such as Allahyari) are good law. Wachovia, 165 Wn.2d at 491. Plaintiff’s quote in its Response, that Wachovia abrogated Allahyari, is non-existent, incorrect, and unfounded. (CP at 47 lines 16-23) Allahyari has not been overruled or abrogated, is still good law, and is binding in this case as our facts match the factual situation of Allahyari almost exactly.

Accordingly, as no other objections were made, and that was the only issue before the Trial Court, this Court should overturn the Trial Court decision of July 19, 2013, apply the standard set forth in Allahyari v. Carter Subaru and RCW 4.84.270, and award Defendant the requested fees.

IV. ADDITIONAL ATTORNEY FEES

RCW 4.84.290 specifically deals with attorney fees as costs in actions of \$10,000 or less that are taken up on appeal. It states, “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. As the

Defendant/Appellant is entitled to attorneys' fees for the underlying case under RCW 4.84.250 and Allahyari v. Carter Subaru, he is also entitled to attorneys' fees as the prevailing party on this appeal pursuant to RCW 4.84.290.

Accordingly, as required by RAP 18.1, Appellant respectfully requests that this Court award additional attorney fees and costs above and beyond the fees and costs requested and denied by the Trial Court. Upon filing of the decision in this matter, if Appellant prevails, an Affidavit of Fees and Expenses shall be submitted by counsel within the time required by RAP 18.1(d).

V. CONCLUSION

Both of the parties agree to all of the necessary points for an award of fees under RCW 4.84.250 except the one issue of "final judgment" being required or not for a finding of prevailing party. Both parties agree that: RCW 4.84.250 applies in this case; the total value of the case was under \$10,000 as required by the statute; the Defendant is deemed the prevailing party where Plaintiff recovers nothing; Plaintiff received written notice of Defendant invoking RCW 4.84.250; and the hours/fees requested were reasonable and necessary. (CP 46-50 and Verbatim Transcript, 7/19/13, 3:18-25, 4:1-10, and 5:6-16)

Plaintiff's only defense/objection to the Motion for Fees was the claim that a CR 41 dismissal precluded an award based on the mistaken belief that Wachovia SBA Lending v. Kraft abrogated Allahyari v. Carter Subaru. That belief is incorrect, the quote provided by Plaintiff does not exist, and Allahyari v. Carter Subaru has not been overturned or abrogated. It is still valid and binding law in Washington State, and it does apply specifically to this case and factual scenario.

Accordingly, Appellant requests that this Court overturn the Trial Court decision of July 19, 2013, apply the standard set forth in Allahyari v. Carter Subaru and RCW 4.84.270, and award Defendant the requested fees.

DATED this 25th day of October, 2013.

NAPIER & GEORGE, PS

A handwritten signature in black ink, appearing to read "David A. Napier", written over a horizontal line.

David A. Napier, WSBA #37520
Attorney for Appellant James Swalwell

CERTIFICATION OF SERVICE

I certify that I mailed a copy of the foregoing Appellate Brief to Peter R. Osterman of Bishop, White, Marshall & Weibel, PS, Attorney for Respondent, at 720 Olive Way, Suite 1201, Seattle, WA 98101, postage prepaid, on October 25, 2013.

NAPIER & GEORGE, PS

A handwritten signature in black ink, appearing to read "David A. Napier", written over a horizontal line.

David A. Napier, WSBA #37520
Attorney for Appellant James Swalwell