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COURT OF APPEALS  
DIVISION II

2017 MAY -2 AM 11:33

STATE OF WASHINGTON

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NO. 49150-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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MIRIAM HALL,

Plaintiff/Respondent

vs.

VIRGINIA CARSON,

Defendant/Appellant

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APPEAL FROM THE SUPERIOR COURT

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THE HONORABLE SCOTT COLLIER

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AMENDED REPLY BRIEF

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**Table of Contents**

Introduction.....1

Argument.....1

    I.    The Cost Bill Was Not Timely Filed.....1

    II.   Fees for the CR 35 Exam and Dr. Wilson’s Trial  
          Preparation Cannot Be Awarded.....4

Conclusion.....7

Appendix of Rules.....8

**Table of Authorities**

**Cases:**

*Allahyari v. Carter Subaru*, 78 Wn.App. 518, 897 P.2d 413 (1995).....3

*Andersen v. Gold Deal Vineyards*, 81 Wn.2d 863, 505 P.2d 790 (1973)...3

*Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418,  
869 P.2d 14 (1994).....3

*Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628,  
201 P.3d 346 (2009).....3

*Kraft v. Wachovia SBA LendinG, Inc.*, 165 Wn.2d 481,  
200 P.3d 683 (2009).....3

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).....6

*State ex rel. Schillberg, v. Everett District Justice Court*,  
90 Wn.2d 794, 585 P.2d 1197 (1978).....2

*Walji v. Candyco., Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990).....3

**Statutes:**

RCW 4.84.015.....4

RCW 4.84.030.....5

RCW 4.84.190.....4, 5

**Court Rules:**

CR 41(a)(1)(B).....3, 8

CR 41(d).....1, 2

CR 54(d)(1).....1, 8

## INTRODUCTION

This brief will address points made in Appellant's Reply Brief and Opposition to Cross Appeal (Brief) related to Ms. Hall's cross appeal. Generally speaking, it will not reiterate arguments made in the Brief of Respondent or discuss arguments previously made that the Brief has not addressed or refuted.

## ARGUMENT

### I. The Cost Bill Was Not Timely Filed.

The trial court erred by entering the Order of Defendant's because the defense filed its cost bill more than ten days after the first action was dismissed. In response, the defense argues that CR 54(d)(1), the rule that requires a cost bill to be filed within ten days of any judgment or decree, does not apply to dismissals without prejudice. This argument is based on an incorrect interpretation of CR 41(d).

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The defense claims that the right to costs after a dismissal without prejudice is triggered by the filing of a new lawsuit and, apparently, can be made at any time.<sup>1</sup> Brief, p. 18 The argument is based on CR 41(d). That rule reads as follows:

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Court rules are construed as are statutes. They are given their plain meaning and are read as a whole to give effect to all of it. *State ex rel. Schillberg, v. Everett District Justice Court*, 90 Wn.2d 794, 797, 585 P.2d 1197 (1978) The plain meaning of CR 41(d) does not give any right to assess costs. By its terms, it allows the Court in the second action only to make arrangements for the payment of the taxable costs of the previously dismissed action. It envisions the taxable costs being awarded or at least reserved by the judge dismissing the first action.

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<sup>1</sup> The order dismissing the first suit was entered on June 19, 2015. (CP 53) The second suit was filed on June 23, 2015. (CP 1) The cost bill was filed on July 7, 2015. This more more than ten days after the first suit was dismissed and also more than ten days after the second suit was filed.. (CP 23-31)

The defense's argument also runs afoul of the maxim that a statute—and therefore a court rule—must not be interpreted to reach an absurd result. *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994) If the filing of the second action is the trigger for an award of costs, then a defendant could not move for costs or attorney's fees of an action dismissed without prejudice until and unless that action was refiled. Under the defense's argument, a plaintiff facing exposure for attorney's fees and costs if unsuccessful, and seeing that his or her case was not going well, could avoid having to pay attorney's fees altogether by dismissing without prejudice before resting. We know that the law is otherwise. A plaintiff who dismisses without prejudice pursuant to CR 41(a)(1)(B) is liable for attorney's fees and costs if such an award is authorized by a contract or statute.<sup>2</sup> *Andersen v. Gold Deal Vineyards*, 81 Wn.2d 863, 505 P.2d 790 (1973); *Walji v. Candyco., Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990); *Allahyari v. Carter Subaru*, 78 Wn.App. 518, 897 P.2d 413 (1995) The defense's argument must be rejected for this reason as well.

The defense supports its argument by stating that the defendant in *Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628, 201 P.3d 346

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<sup>2</sup> This rule does not apply, however, when the right to attorney's fees stems from a contractual provision allowing attorney's fees to only one of the parties. *Kraft v. Wachovia SBA Lending, Inc.*, 165 Wn.2d 481, 200 P.3d 683 (2009)

(2009), was “forced” to seek costs after the second action was filed. Brief, p. 19. In that case, the order dismissing the first case—an order entered apparently without any objection from the defendant—stated that “taxable costs of this action should be imposed on plaintiff” if he refiled. 148 Wn.App. at 631-32. In other words, the “force” stemmed from the language of the order as opposed to requirements of the Civil Rules. There was no such limitation in the order dismissing Ms. Hall’s first action against Ms. Carson. (CP 53) Therefore, the defense was free to submit its cost bill and was required to do so within ten days of the entry of the dismissal order by CR 54(d)(1).

## II. Fees for the CR 35 Exam and Dr. Wilson’s Trial Preparation Cannot Be Recovered.

In this case, the trial court awarded fees for a CR 35 examination conducted by Dr. Wilson and also sums he charged the defense for trial preparation. The defense claims that the trial court’s decision is supported by RCW 4.84.190, which provides as follows:

In all actions and proceedings other than those mentioned in this chapter (and RCW 4.48.100), where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court.

By its terms, this statute is applicable only to actions not “mentioned in this chapter,” meaning not mentioned in RCW 4.84. Ms. Hall’s suit

sought to recover money only. Such actions are mentioned in RCW

4.84.015(1) as follows:

In any civil action for the recovery of money only, the plaintiff will be considered the prevailing party for the purpose of awarding costs, including a statutory attorney fee, if: (a) the defendant makes full or partial payment of the amounts sought by the plaintiff prior to the entry of judgment; and (b) before such payment is tendered, the plaintiff has notified the defendant in writing that the full or partial payment of the amounts sued for might result in an award of costs.

They are also mentioned more broadly in RCW 4.84.030 as follows:

In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursement; but the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of the district court when commenced in the superior court.

Ms. Hall's claim was "mentioned" in other statutes within RCW

4.84. Therefore, RCW 4.84.190 does not apply.

The defense goes on to argue that the trial court's award was within its discretion. That is not the case because an award of the costs of a CR 35 exam and trial preparation costs for an expert witness cannot be awarded as discussed in the Brief of Respondent, pps. 47-50. Even if the costs of a CR 35 exam could be recovered when a plaintiff dismisses an action without prejudice—which it cannot be, awarding such costs here was an abuse of discretion. Discretion is abused when a decision is

manifestly unreasonable, is made on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*; 79 Wn.2d 12, 26, 482 P.2d 775 (1971) Presumably the costs awarded in this case were based on the notion that the activities for which the fees were incurred would have to be repeated and would have no other value. The defense did not claim that the CR 35 exam would have to be repeated. (CP 26-31) In fact, it was not. Dr. Wilson testified concerning the exam. (RP 546-47) In other words, the defense received value from this exam by presenting its results to the jury. Awarding costs for it under these circumstances was manifestly unreasonable for that reason, and therefore an abuse of discretion.

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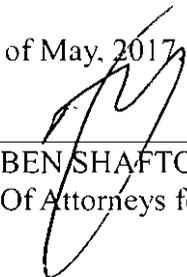
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CONCLUSION

The arguments made by the defense in this case have no merit. The judgment based on the jury verdict in this matter should be affirmed. The Order on Motion which assessed costs of \$4,900.00 should be reversed, however.

DATED this 1 day of May, 2017

  
\_\_\_\_\_  
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APPENDIX OF RULES

CR 41(a)(1)(B)

Subject to the provision rules 23(e) and 23.1, any action shall be dismissed by the court:

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case.

CR 54(d)(1)

Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).