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

NO. 53163-1-II

ARMSTRONG MARINE, INC.

Plaintiff/Respondent

vs.

MICHAEL P. WILEY, JR.,

Defendant/Appellant

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Michael P. Wiley, Jr. (Appellant) has requested this Court to reverse the Order Denying Award of Attorney's Fees and Entry of Judgment, which was entered April 19, 2019, following Appellant's motion. CP 08-10.

The Respondent argues for the following points:

1. Respondent intimates, while citing no authority, that the standing of a movant is determined at the moment a motion is filed rather than at the time of the hearing. (Resp. p. 4, ¶ 1).
 - a. Respondent uses the "strawman" of the standing issue and rails against it instead of the primary issue of whether Appellant prevailed when Respondent gave up and quit prosecuting its case.
 - b. Respondent to remains silent as to the ripeness of the counterclaim for attorney's fees to the prevailing party (whether prior to, or after, the dismissal).
2. Respondent contends, without citing authority, that all arguments as to who is the "prevailing party" must be made before a case is dismissed. (Resp. p. 11, ¶ 3; p. 12, ¶ 2).
3. Respondent argues that the Declaration of Michael Wiley entered below which stated that the motion for attorney's fees was made

on his behalf was “an attempt to cure” the standing issue, but not an actual cure. (Resp. p. 4, point 6; Resp. p. 12, ¶ 3). No citation supports this position either.

This reply brief, therefore, is submitted to highlight the logical pitfalls of the response, and highlight the merit of Appellant’s claim on appeal.

B. ARGUMENT

1. Respondent’s Statement of Facts Lacks a Foundation of Authentication Within the Record Below.

Respondent attempts to repaint the Appellant as guilty of the charges alleged in the original complaint it filed against him. In so doing, the effort is to sway opinion towards a single notion: That Armstrong Marine, Inc. was justified in:

- A) Suing a day-laborer for tens of thousands of dollars;
- B) Forcing him to rack up his fees with his attorney, and then
- C) Quitting the case and leaving the defendant with the costly defense bill without consideration whatsoever to its own contractual guarantee to pay for the attorney’s fees if it did not prevail on “any demand” for costs related to alleged noncompete/confidentiality violations. CP 156.

The response states: “Defendant would not be able to pay an award of sanctions much less satisfy the liquidated damages that likely would be

awarded against him,” as justification for giving up the fight and failing to prosecute. (Resp. pp. 5-6). This statement is unsupported in the record by an authenticating fact witness or citation to discovery materials. It is counsel’s own statement without foundation.

Therefore, it is equally as likely that, based on the evidence on the record, Respondent knew it could not prevail on its claim and would rather take its chances quitting while it was ahead.

2. Appellant’s Motion was Properly Before the Court

There existed a justiciable controversy prior to the Court’s denial of attorney’s fees. A justiciable controversy requires:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement. *To-Ro Trade Shows*, 144 Wn.2d at 411.

The City of Longview v. Wallin, 174 Wn.App. 763, 777-778, 301 P.3d 45, 53 (Div. 2 2013) (internal citations omitted) (citing *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)).

In order to have standing:

First, a party must be within the 'zone of interests to be protected or regulated by the statute' in question. Second, the party must have suffered an 'injury in fact.

The City of Longview, 174 Wn.App. at 778, 301 P.3d at 53.¹

A. Appellant Had Standing Prior to Entry of the Order.

The first section of Appellant's original motion for fees was entitled "1. Attorney's Fees to the Prevailing Party." CP 32. Appellant can argue that his attorney had standing pursuant to the Attorney Lien statute (*infra.*), but that issue is moot when the client, Appellant, specified to the Court that the motion was his and his attorney represented him in the motion. CP 11.

Appellant was within the zone of interests to be protected because he was an actual party to the Agreement that Respondent failed to prosecute in its original action. Appellant suffered an injury in fact because he is liable for the fees that the Agreement recognized would be generated by its "demand" for compensation. CP 159, ¶ 12. Therefore, he had standing prior to entry of the Court's order, notwithstanding the claims under the Attorney Lien Statute.

¹ The issue of whether an attorney can move for fees and be the judgment creditor after a case is fully litigated is moot, but discussed briefly in the last section below in case the court requests further briefing.

B. Appellant’s Claim Was Not Ripe Until After the Dismissal.

An issue is ripe once it is an “actual, present, and existing dispute.”

Lewis County v. State, 178 Wn.App. 431, 436, 315 P.3d 550, 553 (Div. 2 2013). Further,

We have said that in determining whether a claim is ripe for review, we consider if the issues raised are primarily legal, and do not require further factual development, and if the challenged action is final. We also consider the hardship to the parties of withholding court consideration. *First Covenant Church v. City of Seattle*, 114 Wash.2d 392, 399-400, 787 P.2d 1352 (1990), adhered to on remand, 120 Wash.2d 203, 840 P.2d 174 (1992)

Jafar v. Webb, 177 Wn.2d 520, 525, 303 P.3d 1042, 1044 (2013).

Here, whether Appellant was the “prevailing party” was a legal question after dismissal. The underlying questions regarding the merits of the case were moot once Respondent’s complaint was dismissed.

Until Respondent’s complaint was dismissed for lack of prosecution, the cause of action was not final. Therefore, the issue of attorney’s fees to be awarded the prevailing party could not be raised or considered. One could only speculate whether Defendant was the “prevailing party” until Respondent forfeited the complaint to dismissal by the Clerk.

Thus, Respondent's contention that "Michael Wiley perhaps should have made" a claim of entitlement to the fees before the case was finalized places the cart before the horse.

3. Respondent Fails to Assert How Plaintiff is *Not* the Prevailing Party as a Matter of Law.

Respondent argues, without citing authority, that Appellant should have argued that he was the prevailing party before he actually prevailed. However, the response fails to analyze whether Appellant was or *was not* the prevailing party based upon the case law cited in Appellant's opening brief. Awards of fees granted to defendants who enjoyed an early dismissal of their cases are a matter of historical record.

Appellant is the "prevailing party" because Respondent was "denied recovery." (Open.Brf. p 15, ¶ 2) (citing *Soper v. Clibborn*, 31 Wn.App. 767, 769, 644 P.2d 738, 739 (Div. 1 1982) (Citing *Gile v. Nielsen*, 20 Wn.3d 1, 13, 145 P.2d 288, 294 (1944))).

A voluntary nonsuit is enough to render the opposing party a prevailing party. *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790, 790 (1973). "[W]here no judgment is entered against a defendant in an action at law, he is entitled to his costs." *Id.* at 865-866, 505 P.2d at 792. "Where there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party." *Id.* at 867, 505 P.2d at 793.

Respondent quibbles over the citation to *Vaughn v. Chung*, 119 Wn.2d 273, 830 P.2d 668 (1992). That case illustrates the prior iteration of the applicable rule of dismissal for lack of prosecution (versus the current one) and to discuss the proper interpretation of “cost” under the rule and the limited scope of that language. (Open.Brf., pp. 23-24). The rest of the case does not deal with our current issues. Only the language of the rule is discussed. Respondent does not engage the interpretation debate. The silence is telling.

Here, Respondent “failed to prove [its] claim,” just as the plaintiff in *Andersen*, and thus the Appellant is entitled to the award guaranteed in the Agreement, as the defendant in *Andersen* was by the statute of that case.

Respondent does not indicate why or how a contractual guarantee to pay attorney fees is distinguishable as a matter of law from a statutory sanction. Both guarantee the same award. The Agreement controls here, and where Respondent’s complaint failed, it is contractually obligated to pay the other party’s attorney fees. CP 159. After all, Respondent’s filing of its complaint forced Appellant to incur attorney fees, and that complaint’s dismissal, or failure to achieve the relief sought, is addressed explicitly in the parties’ contract.

4. Respondent Admits Again to Voluntary Nonsuit by Forfeit.

As below, Respondent admits in its brief that it made a strategic decision to voluntarily end its litigation, after forcing Appellant to incur attorney fees. CP 18-19 (Resp., pp. 5-6, “Rather than pursue the matter...Plaintiff allowed the case to be dismissed for lack of prosecution.”). The record is silent as to why.

Ultimately, the ‘why’ doesn’t matter. By failing to prosecute its claim, Appellant is the prevailing party in the contract dispute.

5. Respondent Misstates the Holding of *AllianceOne v. Lewis*, 180 Wn.2d 389, 325 P.3d 904 (2014).

Respondent contends that a dismissal by the clerk “leaves the parties as if the action had never been brought,” by citing “generally” *AllianceOne v. Lewis*, 180 Wn.2d 389, 398-399, 325 P.3d 904 (2014). However, this is not in fact the precise holding of the case. Rather, the case deals specifically with the unique proviso of attorney fees related to dismissal pursuant to RCW 4.84.250 and .270, what’s known as a “small claim action” of under ten thousand dollars and where preconditional offers of settlement are exchanged. In that particular statutory framework (and only in that particular statutory framework), a final judgment on the merits is required to trigger the right to claim attorney’s fees as the “prevailing party.”

RCW 4.84.250 is the starting point for determining which party, if any, is entitled to attorney fees in small claim actions. The prevailing party in a small claims action may request attorney fees "[n]otwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060." RCW 4.84.250. RCW 4.84.260 states that a plaintiff is the "prevailing party" and eligible for attorney fees when " the *recovery*, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff." (Emphasis added.) Under RCW 4.84.270, a defendant receives fees "if the plaintiff ... *recovers nothing*, or if the *recovery*, exclusive of costs, is the same or less than the amount offered in settlement by the defendant." (Emphasis added.) Under RCW 4.84.280, settlement offers must be made at least 10 days before a trial begins and may not be conveyed to the judge until *after* final judgment is rendered. Only after the judgment can a court assess whether the plaintiff or defendant meets the definition of a " prevailing party" by examining a recovery after judgment and comparing it to settlement offers. This contextual interpretation presents a plain language reading of the complete statutory scheme and is a logical analysis of a statute designed to promote settlement and avoid trials.

AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 394-395, 325 P.3d 904, 907 (2014) (emphasis in original).

" [A] 'voluntary dismissal' is not a final judgment. A voluntary dismissal leaves the parties as if the action had never been brought." And as discussed above, without an entry of judgment, there can be no "prevailing party" under RCW 4.84.250 and .270, so the second factor would also not be satisfied if the plaintiff voluntarily dismisses the case.

Id. at 399, 325 P.3d at 909.

This unique proviso of a final judgment on the merits is not contained in the other statutes at issue in *Soper*, and *Anderson* noted above. That is why, in those cases, a dismissal was sufficient to render the defendant the prevailing party. This proviso does not apply to the parties' Agreement, here.

6. Ratification is Well Supported in Precedent.

Respondent contends that a party in interest may not be able to ratify a motion by his attorney for accrued fees to the prevailing party. (Resp. p. 12, ¶ 3).

Ample authority exists that a real party in interest can ratify prior statements made by an attorney. Karl Tegland, in his *Washington Handbook on Civil Procedure*, elucidates this process. §30.4, p. 339 (2015-2016 ed.). “The term ratification refers to the situation in which an action is commenced by a party other than the real party in interest, but the real party in interest authorizes the continuation of the action and agrees to [be] bound by the result.” *Id.* Thus, the “real party in interest is said to ratify, or validate, the action, thereby satisfying” the standing requirement. *Id.* (citing, among others, *Riverview Comm. Grp. v. Spencer & Livingston*, 173 Wn.App. 568, 295 P.3d 258 (Div. 3 2013)). “Because the remedial provisions of CR 17(a) are intended to expedite litigation, the courts will not permit technicalities or narrow constructions to interfere with the

merits of legitimate controversies.” *Id.* (citing *In re Crane’s Estates*, 9 Wn.App. 853, 515 P.2d 552 (Div. 2 1973); *Fox v. Sackman*, 22 Wn.App. 707, 591 P.2d 855 (Div. 3 1979). “**Thus, even informal attempts at ratification are ordinarily deemed sufficient.**” *Id.* (emphasis added).

CR 17 deals with parties in interest at the outset of litigation, and thus is not a controlling rule for motion practice. Even so, Appellant contends that it is nonbinding authority illustrating the Court’s approach to ratification of a party in interest to prior statements made by others, including attorneys for that party in interest.

Here, Appellant told the court, in essence, that there is no standing issue. CP 11. He stated that the motion for fees as the prevailing party was brought by his attorney on his behalf. *Id.* Thus, his ratification of the motion related back and settles the issue of standing.

Appellant has the right to make the attorney the named Judgment Creditor because he had a property interest in the prevailing party’s award of attorney fees guaranteed by the contract Respondent sued upon. RCW 60.40.010.

7. Brief Discussion of a Moot Issue: Whether an Attorney May be the Judgment Creditor and Move for Attorney Fees When Litigation Has Already Ceased and the Issue is One of Law not Fact.

The issue that Respondent is fixated on in the response is whether an attorney can move unilaterally for a personal award of fees when all the

fact-finding is over, and a case is concluded. This issue ought to be considered at some point at the appellate level. The issue likely only comes about when an attorney has withdrawn from a case (due to any number of ways or circumstances), and remains unpaid, and yet the party goes on to win a case that carries with it an award of fees to the prevailing party. That's the situation here.

Aiken, St. Louis & Siljeg, PS, v. Linth, 195 Wn.App. 10, 380 P.3d 565 (Div. 2 2016), is applicable, but not controlling under the current procedural posture. There, the litigating attorneys were not paid out of a settlement in an ongoing trust dispute. *Id.* at 13, 380 P.3d at 568. So, they attempted to hijack their client's case in the middle of the trust's administration, tried to "step into the shoes of their client as a beneficiary of the Trust, remove the trustee, and compel the sale" of trust real estate. *Id.* at 17, 380 P.3d at 570. (It was much discussed here in Port Angeles.) Ultimately, the Court disagreed, clarifying that RCW 60.40.010 does not permit an attorney "to control the underlying litigation to satisfy the attorney's [property] interest" in the client's settlement or judgment. *Id.* at 19, 380 P.3d at 571.

However, *Aiken, St. Louis & Siljeg*, does not speak to a case that is no longer being litigated, and where a determination of the prevailing party can be rendered as a matter of law based on the nature of the

conclusion of the matter. Logically, the “property right” enshrined by RCW 60.40.010 springs forth at that time. If the party for whom a withdrawn (but as yet unpaid) attorney worked for “prevails,” then arguably a property interest in an available award of fees is triggered by that conclusion of law, thus vesting in that attorney. This would allow an attorney who has worked on a case to be able to recoup his or her fees without conflict with the former client, and without controlling or “commandeering” the now-concluded litigation.

It might be argued that RCW 60.40.010, if not controlling, nonetheless indicates as a matter of policy that a presently realized property interest exists the moment litigation has ceased, and where a “prevailing party” determination will shift the contractual or statutory burden of paying the fees from between the attorney and client, to the attorney and the non-prevailing party with prior notice. Thus, the attorney can be the Judgment Creditor and foreclose on the fee lien.

However, the issue is moot in case at hand, in any event. This court may request briefing if it determines it is an issue of compelling public interest.

8. Attorney’s Fees on Appeal Uncontested.

In the opening brief, Appellant argued for fees on appeal. Respondent failed to address this issue in response. This Court should

award Appellant fees, as agreed by Respondent in the Agreement it sought to enforce, both in the matter below and on appeal.

C. CONCLUSION

Respondent set up, then attacked a strawman. That strawman is the standing issue as it relates to the filing of the motion. The real issue is standing at the time of the hearing after ratification of the motion by Appellant, the prevailing party in interest. Respondent has not argued whether Appellant is in fact the prevailing party, nor applied the Agreement to its analysis, and should be taken as a verity, therefore.

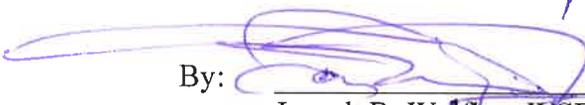
Appellant's claim for fees was justiciable. He was personally engaged in ratifying the motion, and the issue of fees was only ripe once the case was dismissed. Respondent has argued nothing to the contrary.

Appellant, therefore, should be awarded his costs and fees both in the underlying matter as well as on appeal to compensate him for the costs and fees the lawsuit against him generated to his detriment.

DATED this 12th day of September, 2019.

Respectfully submitted,

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