

Court of Appeals No. 315754

OF THE STATE OF WASHINGTON

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JEANETTE E. HIGGINS, PETITIONER,

v.

TARGET NATIONAL BANK, RESPONDENT.

RECEIVED  
SUPERIOR COURT  
STATE OF WASHINGTON  
13 JUN -7 AM 8:36  
BY RONALD R. CARRETER

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BRIEF OF APPELLANT

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## ASSIGNMENT OF ERROR

### Assignments of Error:

1. The Court erred in ruling that the Defendant is not entitled to reasonable attorney's fees and costs pursuant to RCW 4.84.250 as a prevailing party defendant pursuant to RCW 4.84.270.
  - a. The Court erred by determining that the defendant did not make an offer of settlement to the plaintiff.
  - b. The Court erred by determining that the defendant must make an offer of settlement to the plaintiff.
  - c. The court erred by determining that the defendant must give notice of an intention to seek reasonable attorney fees pursuant to RCW 4.84.250.
  - d. The court erred by determining that the defendant must give notice of an intention to seek reasonable attorney fees.
  - e. The court erred in reducing the number of hours based on the "amount in controversy" when RCW 4.84.250 always involves a limited amount in controversy since it applies only to cases under Ten Thousand Dollars (\$10,000.00).
  
2. The Court erred in reducing the reasonable number of hours for attorney's fees from fifty one and eighty five one hundredths (51.85) hours to twenty (25) hours.
  - a. When detailed time records were submitted, the court erred by failing to make any findings of fact or conclusion of law to support the reduction;
  - b. When opposing counsel did not object to any time entry

and could have dismissed the case at any time pursuant to CR 41(a); and

- c. When the only basis for the reduction in reasonable hours cited by the Court was “the amount in controversy”
3. The court erred in refusing to enter judgment in favor of the defendant for attorney’s fees and costs.

## STATEMENT OF THE CASE

### Nature of the Case and Course of Proceedings

On December 9, 2011, the Spokane County Superior court entered an “Order of Summary Judgment” dismissing this case with prejudice, but refused to enter the “Judgment of dismissal” proposed by the Defendant. *CP 175.*

On April 13, 2012, the Spokane County Superior court entered a written order granting in part and denying in part Defendant’s attorney fees. *CP 270-273.* The court refused to enter a “judgment” against the plaintiff for defendant’s attorney’s fees. *CP 273* (crossed out “enters judgment” and “judgment” and replaced with “rules”... and “awards”). The court refused to award any “costs”. *Id.* The court refused to award reasonable attorney fees as costs pursuant to RCW 4.84.250. *CP 187, CP 272-273.* The court’s award of fees was based upon RCW 4.84.330. *CP 272, paragraph 1.*

The plaintiff did not object to any discrete time entry or the hourly rate claimed by defendants counsel. *CP 272*. The court reduced the reasonable number of hours claimed by defendant's attorney from 51.85 hours to 25 hours, with no explanation. *CP 272*. The only reason cited by the court in its written order for the reduction of the amount of defendant's attorney fees was "the court also considered the amount in controversy-\$2052.37."

On December 5, 2010, was the defendant was served the Summons and Complaint (signed November 29, 2010). *CP 11, paragraph 2, lines 5-8*. On March 7, 2011, Target National Bank filed the Summons and Complaint. *CP 1-5*. The Complaint "prays for a judgment against the Defendant" of Plaintiff's "costs and ...reasonable attorney fees."

On July 13, 2011, Defendant Jeanette Higgins, through her attorney, filed an Answer to the Complaint. *CP 6-9*. The defendant requested an award of "reasonable attorney's fees and costs". *CP 7*.

On July 13, 2011, Defendant noticed a 30(b)(6) Deposition of the Plaintiff Corporation, and sent written Requests for Production, Defendant's First Set of Interrogatories, and Defendant's Requests for Admissions to the Plaintiff. *CP 45-58*. In a letter dated July 15, 2011, Plaintiff refused to attend the scheduled deposition or provide responses to the Requests for Admission. *CP 29*.

On September 27, 2011, Defendant moved the court for summary judgment based on the Request for Admissions deemed admitted and no admissible evidence produced by the plaintiff via discovery responses to support the plaintiff's case,. *CP 20-61; 62-63*. On October 5, 2011, plaintiff filed a Motion for Extension on Time to Respond to Defendant's Requests for Admission. *CP 64-71*. Plaintiff made no oral or written request to defendant's counsel for an extension of time to respond to the request for admission prior to filing and serving its motion. *CP 1-275*. Plaintiff noted its hearing for extension of time on October 21, 2011, one week before the date set for oral argument on Defendant's summary judgment motion. *CP 72-73*. On October 14, 2011, defendant filed her response to the plaintiff's motion for extension of time, pointing out in part to the Court and the Plaintiff, the Plaintiff's evidentiary deficiencies unrelated to the plaintiff's failure to respond to Requests for Admissions. *CP 83-92*. At the October 21, 2011 hearing on the plaintiff's motion for extension of time, the court granted Plaintiff one additional week to answer the defendant's Requests for Admissions and continued the motion for summary judgment until December 9, 2011. *CP 115-116; Verbatim Report of Proceedings (10/21/2011)*.

On October 17, 2011, prior to the hearing on plaintiff's motion for extension of time, plaintiff filed its own Motion for Summary Judgment

and noted the hearing on its motion's place on November 18, 2011. *CP 83-92; 113-114*. The October 21, 2012 order continuing the summary judgment motion did not specifically state whether one or both summary judgment motions were continued by the Court, however, at the November 18, 2011 hearing, the Court stated its understanding that both motions for summary judgment had been continued until December 9, 2011. *Verbatim Report of Proceedings (11/18/2011) 3-7*. The court nevertheless allowed the hearing on plaintiff's motion to take place on November 18, 2011 but refused to hear argument on the defendant's Motion for Summary Judgment. *Id.*

At the conclusion of oral argument, in denying the Plaintiff's Motion for Summary Judgment, the Court stated to the Plaintiff in its oral ruling "if you don't have the evidence to make this document admissible (indicating), I think you need to move on to other things". *Verbatim Report of Proceedings (11/18/2011) pg. 15*. In its order, the Court reiterated its finding that the Plaintiff had produced no admissible evidence in support of its Motion for Summary Judgment. *CP 119*.

On November 28, 2011, plaintiff filed an Amended Response to Defendant's Motion for Summary Judgment. *CP 121-141*. This document, however, was never served on the defendant prior to the December 9, 2011 hearing and the defendant moved to strike the un-served document.

CP 172. *Verbatim Report of Proceedings (12/9/2011) pg. 4.* On the morning of December 9, 2011, plaintiff also provided the court with a new declaration from its alleged business records custodian. *Verbatim Report of Proceedings (12/9/2011) pg. 5.* Defendants counsel moved to strike the new declaration as well. *Id.* plaintiffs' counsel moved the court to continue the hearing, once again, and the court initially agreed. *Id at Pg 10.* Rather than continue the case again, the defendant agreed to withdraw the motions to strike and argue off-the-cuff against documents filed or presented by the plaintiff that had not been reviewed until the day of hearing. *Id.* The court "consider[ed] everything that's in the court file" including the documents that were never served on the defendant. *Id.* At the conclusion of oral argument on December 9 2011, the Court granted summary judgment in favor of the defendant and dismissed the case, with prejudice. *Id at 30; CP 175-176.* In part of its oral ruling, the court stated that the business records declaration filed by the plaintiff "fails to support anything else that is being submitted to the court." *Id at 29.* The court also stated that "I don't even know what the actual contract is that would be enforced here." *Id at 30.* Despite delaying the ruling on the defendant's motion for summary judgment for over two months and a strong admonition from the court to the plaintiff nearly a month before to

"move on" the plaintiff could not produce any admissible evidence in support of its case. *See Id.*

On December 14, 2011, defendant filed her motion for attorney's fees and costs, setting the hearing on defendant's motion for December 30, 2011. *CP 198*. Defendant's motion was supported with a memorandum of law (CP 107-197) and detailed time records describing the work performed by defendant's counsel (CP 178-183). By the time of the December 30, 2011 hearing, plaintiff had filed no documents responsive to defendant's fee motion for served any such document on the defendant. *Verbatim Report of Proceedings (12/30/2011) pg. 8.*

At the December 30, 2011 hearing, appearance counsel for the plaintiff, attorney Michael Beyer, who had not filed or served any notice of appearance, complained to the court that he had only received the defendant's motion for attorney's fees and supporting documentation one day prior to the hearing from the Patenaude & Felix, A.P.C. law firm with which he associated and that he "didn't really get any opportunity at all to review anything". *Id* at 5. Plaintiff's counsel, Mr. Beyer, orally moved the court for a two-week so that he could prepare for oral argument. *Id* at 8.

The court, for the third time, continued the defendant's properly noted hearing in order to accommodate the plaintiff's failure to prepare

and comply with the court rules. *Verbatim Report of Proceedings (12/30/2011) pg. 11*. In its oral ruling, the court stated "I'm going to award attorney's fees, though, to Mr. Miller for having to come here today and to prepare." *Id.*

On December 19, 2011, plaintiff filed a Motion for Reconsideration. *CP 203-215*. Defendant was forced to write a responsive memorandum. *CP 220-224*. The court denied the plaintiff's motion for reconsideration on March 12, 2012. *CP 265*.

On January 13, 2012, the court heard oral argument on defendant's motion for attorney's fees. *Verbatim Report of Proceedings (1/13/2012)*. Plaintiff did not argue any specific objections to any of the defendants counsel's time entries. *Id.* The court found that the defendant was not entitled to attorney's fees pursuant to RCW 4.84.250 and 270 because the plaintiff was not provided adequate notice of defendants intend to seek reasonable attorney's fees under the statutes. *Id at 31*. The court, however, found that the defendant was entitled to attorney's fees pursuant to RCW 4.84.330. *Id at 31-32*.

On April 13, 2012, the court filed its written order on defendant's attorney's fees. *CP 270-273*. The court refused to enter judgment against the plaintiff for defendant's attorney's fees. *CP 273*. The court order notes that the plaintiff did not object to any discrete time entry or the hourly rate

claimed by defendants counsel. CP 272. The court reduced the reasonable number of hours claimed by defendant's attorney from 51.85 hours to 25 hours. CP 272. The only reason cited by the court in its written order for the reduction of defendants attorney's fees was "the court also considered the amount in controversy-\$2052.37." CP 272.

## ARGUMENT

### A. Summary of Argument

The defendant is asking this court to overrule certain cases<sup>1</sup>, to interpret RCW 4.84.270, and to clarify that a defendant is the "prevailing party" if the Plaintiff "recovers nothing", without more. Like most of RCW 4.84, an award of costs including an attorney fees as costs is made only to a "prevailing party"<sup>2</sup>. The Defendant in this case was the prevailing party because the plaintiff "recovered nothing". RCW 4.84.270 defines the defendant as the prevailing party if the Plaintiff "recovers nothing"<sup>3</sup>. Defendant did not make an offer of settlement to pay the

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<sup>1</sup> *Cork Insulation Sales Co., Inc. v. Torgeson*, 54 Wash. App. 702, 706, 775 P.2d 970, 973 (1989) ("No judgment was entered; thus, the statute was not triggered and the attorney fees and costs sought by Mr. Torgeson were properly denied"); *Hubbard v. Scroggin*, 68 Wn. App. 883, 890, 846 P.2d 580, 584-85 (1993).

<sup>2</sup> RCW 4.84 sets forth different definitions of "prevailing party" for different sections for the purpose of determining fees. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 200 P.3d 683 (2009) ("voluntary dismissal without prejudice was not a 'final judgment'" as required by RCW 4.84.330)

It is undisputed and indisputable that RCW 4.84.250 applies. Plaintiff pleaded a claim for damages under \$10,000 exclusive of costs. *February 27, 2006, Complaint, p. 2.*

Plaintiff, because he did not owe the alleged debt. The defendant did allege a right to attorney fees in the Answer. CP 7. The defendant did make an offer of settlement (\$3700.00) of an amount<sup>4</sup> the Plaintiff could pay defendant for attorney fees it had caused. CP 256. The court dismissed the case on Summary Judgment so the Plaintiff recovered nothing from the lawsuit. Defendants are entitled to attorney fees pursuant to RCW 4.84.270. The court reduced the attorney fees due to the “amount in controversy” but attorney fees awarded pursuant to RCW 4.84.250 always necessarily involve an amount in controversy of fewer than Ten Thousand Dollars (\$10,000.00).

B. Standard of Review

Statutory interpretation is a question of law reviewed de novo. *State v. Wentz*, 149 Wash.2d 342, 346, 68 P.3d 282 (2003). Whether a statute authorizes an award of attorney fees is likewise a question of law reviewed de novo. *McGuire v. Bates*, 169 Wash.2d 185, 189, 234 P.3d 205 (2010); *Niccum v. Enquist*, 175 Wash. 2d 441, 446, 286 P.3d 966, 968 (2012).

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<sup>4</sup> Defendant was awarded more in attorney fees than the amount offered. CP 272.

C. Statutory Interpretation

Interpreting statutes requires the court to discern and implement the legislature's intent. *State v. Wentz*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003); *Williams v. Tilaye*, 174 Wash. 2d 57, 61, 272 P.3d 235, 237 (2012). The primary objective in statutory interpretation “is to ascertain and give effect to the intent of the legislature.” *King County v. Taxpayers of King County*, 104 Wash.2d 1, 5, 700 P.2d 1143 (1985) (quoting *Janovich v. Herron*, 91 Wash.2d 767, 771, 592 P.2d 1096 (1979 “[T]he court should assume that the legislature means exactly what it says. Plain words do not require construction.” *City of Kent v. Jenkins*, 99 Wash.App. 287, 290, 992 P.2d 1045 (2000).

D. RCW 4.84.250 Applies

RCW 4.84.250 provides in relevant part that: “in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [ten thousand<sup>5</sup>] dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees<sup>6</sup>.” “These statutes have multiple purposes of encouraging out-of-court settlements, penalizing parties who unjustifiably bring or resist small

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<sup>5</sup> After July 1, 1985. RCW 4.84.250. The Complaint was filed February 27, 2006. *February 27, 2006, Complaint*

claims, and enabling a party to pursue a meritorious small claim without seeing the award diminished by legal fees”. *Williams v. Tilaye*, 174 Wash. 2d 57, 62, 272 P.3d 235, 238 (2012); *Beckmann v. Spokane Transit Auth.*, 107 Wash.2d 785, 788, 733 P.2d 960 (1987) (citing *Valley v. Hand*, 38 Wash.App. 170, 684 P.2d 1341 (1984); *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wash.App. 486, 492, 607 P.2d 890 (1980).

In order to determine under RCW 4.84.250 whether attorney’s fees are due, the court must make a determination of the “prevailing party”. A defendant is the prevailing party “if either the plaintiff recovers nothing or the defendant makes an offer 10 days or more before trial and the plaintiff recovers as much or less than that offer. *Williams v. Tilaye*, 174 Wash. 2d 57, 61-62, 272 P.3d 235, 238 (2012); RCW 4.84.270. In this case the defendant did not make an offer of settlement since he denied owing the alleged debt. Defendant did make an offer to settle the attorney’s fees for an amount less than the court ultimately awarded.

E. “Plaintiff ...Recovers Nothing” as used in RCW 4.84.270 is Unambiguous

The appellants, Higgins were the defendants in Spokane County District Court. On March 30, 2012, the court dismissed the lawsuit at the

request of the Plaintiff.<sup>7</sup> Since the case was dismissed the Plaintiff recovered nothing. RCW 4.84.270 provides that “the defendant...shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff ...recovers nothing....”

In *LRS Elec. Controls, Inc. v. Hamre Const., Inc.*, 153 Wash. 2d 731, 745, 107 P.3d 721, 728 (2005), this court recognized that the statutory language of RCW 4.84.270 unambiguously requires an award of attorney fees to the defendant if the Plaintiff “recovers nothing”. The court determined that since the Plaintiff in that case failed to satisfy a pre-claim notice requirement “Tyco will recover nothing. Therefore, under RCW 4.84.250–.290, Hamre's request for attorney fees is awarded as of right” *Id.*

In *Williams v. Tilaye*, 174 Wash. 2d 57, 61-62, 272 P.3d 235, 238 (2012) this court held that “ the defendant can be the prevailing party if either the plaintiff recovers nothing or the defendant makes an offer 10 days or more before trial and the plaintiff recovers as much or less than that offer” . RCW 4.84.270; *Williams v. Tilaye*, 174 Wash. 2d 57, 61-62, 272 P.3d 235, 238 (2012). *Williams v. Tilaye*, recognizes that the clear and plain meaning of the RCW 4.84.270 is that there are two possible

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<sup>7</sup> CR 41(a)(1)(ii) (“...shall be dismissed by the court...upon motion of plaintiff...”).

alternative mean for a defendant to be the prevailing party for the purposes of awarding attorney's fees pursuant to RCW 4.84.250.

In *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 867-68, 765 P.2d 27, 29 (1988), the court explained that “a defendant is considered a “prevailing party” for the purposes of RCW 4.84.250 if the plaintiff recovers *either* nothing *or* a sum not exceeding that offered by the defendant in settlement. RCW 4.84.270.”<sup>4</sup> . (emphasis in original). The Superior court dismissed the case for lack of service of process. “The Kingston Lumber's claim was dismissed and it recovered nothing, Puckett is a prevailing defendant and is therefore entitled to attorney's fees under RCW 4.84.250”.<sup>5</sup> Thus, even where no settlement offer is made, a defendant is entitled to attorney's fees if the plaintiff recovers nothing. *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 867-68, 765 P.2d 27, 29 (1988); *Lowery v. Nelson*, 43 Wash.App. 747, 752, 719 P.2d 594, *review denied*, 106 Wash.2d 1013 (1986), *appeal dismissed*, 479 U.S. 1024, 107 S.Ct. 864, 93 L.Ed.2d 820 (1987).

In *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, \_\_\_ Wash. App\_\_\_, 289 P.3d 690, 698 (Wash. Ct. App. 2012) the court succinctly held that “Under RCW 4.84.270, a defendant is entitled to an award of attorney fees ‘if the plaintiff ... recovers nothing’.” In *Realm, Inc. v. City*

of Olympia, 168 Wash. App. 1, 13, 277 P.3d 679, 685 review denied, 175 Wash. 2d 1015, 287 P.3d 10 (2012), the court found that the Plaintiff, “Realm has recovered nothing, making the city the prevailing party on appeal.” In *Allahyari v. Carter Subaru*, 78 Wash. App. 518, 523, 897 P.2d 413, 415 (1995) *abrogated*<sup>8</sup> by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 200 P.3d 683 (2009) the court 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.

*Allahyari v. Carter Subaru*, 78 Wash. App. 518, 523, 897 P.2d 413, 415 (1995) *abrogated* by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 200 P.3d 683 (2009).

In *Pub. Utilities Dist. 1 of Grays Harbor County v. Crea*, 88 Wash. App. 390, 393, 945 P.2d 722, 724 (1997), the court emphasizes the rule:

Under these statutes, when a plaintiff seeks less than \$10,000 in damages and **recovers nothing, the defendant is entitled to**

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<sup>8</sup> The court in *Wachovia* only rejected the dicta in *Allahyari* about RCW 4.84.330 since in *Allahyari* the fees were based on RCW 4.84.250 and .270 stating that “*Allahyari* lack facts that encompass RCW 4.84.330” *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d at 491, 200 P.3d at 687 (2009). This court may wish to correct the Thompson-West editors.

**attorney's fees**, regardless of whether an offer of settlement has been made by either party. *Lowery v. Nelson*, 43 Wash.App. 747, 719 P.2d 594 (1986).

*Pub. Utilities Dist. 1 of Grays Harbor County v. Crea*, 88 Wash. App. at 393, 945 P.2d at 724 (1997). Defendants are entitled to an award of reasonable attorney fees “taxed as costs”. RCW 4.84.250; RCW 4.84.270; CR 54(d); CR 54(d); RCW 4.84.060; RCW 4.84.010(6).

F. Defendant is entitled to a Judgment for Costs

RCW 4.84.060 provides that “In all cases where costs and disbursements are not allowed to the plaintiff, **the defendant shall be entitled to have judgment** in his or her favor for the same.” See also RCW 4.84.030 (“In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements”); RCW 4.84.010(6) (prevailing party entitled to “statutory attorney fee”); RCW 4.84.110.

RCW 4.84.250 defines attorney fees as costs providing that “there shall be taxed and allowed to the prevailing party **as a part of the costs of the action** a reasonable amount to be fixed by the court as attorneys' fees”...“Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060”. (emp added)

G. Findings and Conclusions required even when Attorney Fees are denied.

The Spokane County Superior Court erred by holding that “amount in controversy” as a reason for cutting the undisputed hours spent in half was a sufficient explanation of the reasons for the court’s action.

Although the amount in controversy is a factor that the court may consider in reducing attorney fee, it should not be the only factor used to cut an otherwise reasonable fee by more than half. When fees are awarded pursuant to RCW 4.84.250, the amount in controversy should rarely, if ever, be a significant factor for the court in deciding to reduce an attorney. Claims for attorney’s fees made pursuant to RCW 4.84.250 are small by definition. *Northside Auto Service, Inc. v. Consumers United Ins. Co.* (1980) 25 Wash.App. 486, 607 P.2d 890. The trial court must provide additional findings of fact to justify a substantial reduction.

In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). *Mahler* addressed the process by which trial courts should determine the reasonableness of an attorney fee award recognizing a long-standing rule of law in Washington that a trial court must make written findings of fact and conclusions of law in support of their decisions because the appellate courts need such a record to properly exercise their supervisory role. See *Mahler*, 135 Wn.2d at 433 (“the lodestar methodology affords . . .

appellate courts clear record upon which to decide if a fee decision was appropriately made.”).

“The appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds.” *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000), citing *Mahler v. Szucs*, 135 Wn2d 398, 434-35, 957 P.2d 632 (1998)).

Where a trial court fails to create the appropriate record, remand for entry of proper findings and conclusions is the appropriate remedy (*Mahler*, 135 Wn.2d at 435, 957 P.2d 632) because an appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994).

Thus, to avoid a remand, the trial court's conclusions of law must be supported by the findings of fact, and its findings of fact must be supported by substantial evidence. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)). Substantial evidence to support a finding of fact exists where there is sufficient evidence in the record “to persuade a rational, fair-minded person of the truth of the finding. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). An appellate court may not substitute its evaluation of the evidence for that

made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994).

A denial of attorney fees is a conclusion of law that, like any trial court decision, must be supported by findings of fact. Findings and conclusions that are entirely conclusory require remand for entry of findings and conclusions explaining the basis for the trial court's fee award. *See Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715-16, 9 P.3d 898 (2000).

Although the determination of whether there is a right to bring a motion for attorney fees is a legal question, the issue of whether the moving party falls within the scope of the statute or rule granting such a right is a question of fact, triggering the requirement that the trial court to make findings of fact and conclusions of law. Further, in circumstances where the award of attorney fees and costs is wholly discretionary, as with CR 37 and CR 11 sanctions, the Court must make findings regardless of whether it ultimately decides to awards attorney fees.

*See, e.g. View Ridge Park Associates v. Mountlake Terrace*, 67 Wn. App. 588, 594, 603, 839 P.2d 343, 346, 351 (Div. 1,1992) (trial court properly entered findings of fact and conclusions of law in support of its denial of a motion for attorney fees, but was reversed because its legal

conclusion was in error when applicable statutes provided the prevailing party the right to reasonable attorney fees and costs).

G. Attorney fees for appeal

Pursuant to RAP 18.1, Appellant requests attorney fees and costs pursuant to RCW 4.84.290, that allows for fee on appeal pursuant to RCW 4.84.250. *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 868, 765 P.2d 27, 29-30 (1988). RCW 4.84.080(2) allows an award of Two Hundred Dollars (\$200.00) in attorney fees.

CONCLUSION

Appellant respectfully requests that this case be remanded to the Superior Court for determination of reasonable attorney's fees pursuant to RCW 4.84.250 and RCW 4.84.270.

Respectfully submitted,

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