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Court of Appeals No. 315754
OF THE STATE OF WASHINGTON

JEANETTE E. HIGGINS,

Petitioner,

vs.

TARGET NATIONAL BANK,

Respondent.

BRIEF OF RESPONDENT

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ROY A. UMLAUF, WSBA #15437
Attorneys for Respondent
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a credit card collection matter. Plaintiff Target National Corporation (“Target”) alleged that defendant Jeanette E. Higgins (“Higgins”) breached her credit card agreement. The total amount in controversy was \$2,052.37. The lawsuit was dismissed with prejudice after defendant Higgins’ Civil Rule (CR) 56 summary judgment motion was granted. The court found that Target had not presented sufficient admissible evidence to prove the credit card agreement. Target did not appeal this order of dismissal.

There is no need for direct review. This appeal does not involve a CR 41 voluntary dismissal of the lawsuit by plaintiff Target. Therefore, this Court need not concern itself with the question of whether a CR 41 voluntary dismissal of a lawsuit by a party plaintiff provides a proper basis for an attorneys’ fee award to a defendant under RCW 4.84.250 *et. seq.* Whatever inconsistency there may exist in Washington appellate cases involving a CR 41 voluntary dismissal and defendant’s request for attorneys’ fees under RCW 4.84.250 *et. seq.* is of zero consequence to the disposition of this matter involving a CR 56 involuntary dismissal.

Following the CR 56 dismissal granted in favor of defendant Higgins, Higgins moved for an award of attorneys’ fees and costs on two

different bases: (1) RCW 4.84.250 *et seq.*¹, and (2) “judicial estoppel” and RCW 4.84.330² based upon the attorneys’ fees clause in the Target credit card agreement. The Court awarded reasonable attorneys’ fees and costs under RCW 4.84.330 and Target paid the award with interest.

The exact same “reasonable” attorneys’ fees were recoverable by the prevailing party under either statute in this breach of contract dispute over approximately \$2,000 in credit card debt. Defendant requested more than eight times the amount in dispute, or approximately \$16,000, at the hearing on the motion for fees. Defendant then requested \$11,056.57 and \$11,076.88 and costs of \$35.57 in the April 13, 2012 Order which is the subject of this appeal. The court reduced the hours from the requested

¹ RCW 4.84.250 provides:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred 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**. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars. (Emphasis added.)

² RCW 4.84.330 provides, in pertinent part:

“In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to **reasonable attorneys’ fees in addition to costs and necessary disbursements**. (Emphasis added.)

51.85 hours to 25 hours at the rate of \$225/hr. The court awarded attorneys' fees of \$5,625 and costs of \$35.57, totaling \$5,660.57.³ Each statute authorized only the award of a "reasonable" amount of attorneys' fees, no matter how outrageous the amount requested by the prevailing party.

Since the court awarded reasonable attorneys' fees to defendant Higgins under RCW 4.84.330, it does not matter that the court did not award attorneys' fees under the "settlement statute" RCW 4.84.250 *et. seq.* Therefore, the only issue for determination on appeal is whether the 50% reduction of the total fees requested by Higgins, or approximately 5.5 times the total amount in controversy of \$2.052.37⁴, constituted a "manifest abuse of discretion." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). To prove this, Higgins must provide evidence demonstrating that the trial court "exercised its discretion on untenable grounds or for untenable reasons." *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Higgins has not provided any such evidence and the request for remand should be denied.

³ The order that is the subject of this appeal was drafted by counsel for defendant Higgins. CP 270-273: Judgment and Award of Attorneys' Fees and Costs.

⁴ There is a discrepancy in the amount of the attorneys' fees requested by defendant Higgins in the Order prepared by her attorney. Inexplicably, Higgins requested attorneys' fees in two different amounts, \$11,056.57 and \$11,076.88 in the same order. CP 272-273.

By way of this appeal, Higgins seeks the substitution of this court's discretionary judgment for that of the trial court. Judge Moreno reviewed the pleadings, presided over each motion hearing, and assessed the quality of the pleadings and attorney representation. In determining what amount, in the exercise of her discretion, constituted "reasonable" attorneys' fees under the facts and circumstances of this case, Judge Moreno also considered the time and money wasted by Higgins' counsel on irrelevant "consumer law", the simple contract issue involved, and the small amount in controversy.

The April 13, 2012 Superior Court Order awarding reasonable attorneys' fees and costs totaling **\$5,660.57** to defendant Higgins should be affirmed and the request for remand denied.

II. COUNTERSTATEMENT OF ISSUE ON APPEAL

Based upon the trial court's assessment of the pleadings, issues, quality of representation, wasted time, and the total amount in controversy of approximately \$2,000, did the award to defendant Higgins of reasonable attorneys' fees in the amount of \$5,660.57 pursuant to RCW 4.84.0330 and the Target attorneys' fees clause constitute a manifest abuse of discretion?

III. RESTATEMENT OF THE CASE

On **March 7, 2011**, plaintiff Target National Corporation ("Target") filed suit in Spokane County Superior Court for breach of a credit card agreement. CP 1-5. The only defendant was credit card

holder/debtor Jeanette E. Higgins (“Higgins”). CP 3-5. The total amount in controversy was \$2,052.37. Target did not seek interest. CP 5.

The Complaint alleged that: (1) Higgins was the primary obligor on a credit account, (2) Higgins made purchases or cash advances on this account, (3) Higgins had been indebted to Target in the principal amount of \$2,052.37 with 0% interest since September 5, 2008, (4) despite repeated requests, Higgins refused to make payment, and (5) Higgins was in default. CP 4.

The Target credit card agreement at issue included an attorneys’ fees clause⁵. CP 131-137; CP 137. Target requested an award of “reasonable attorneys’ fees” in paragraphs 5, 10 and the prayer of the Complaint. CP 4-5. The Complaint did not mention any statutory request for attorneys’ fees, including under RCW 4.84.250 *et seq.* CP 4-5.

Plaintiff filed an Answer, admitting only that, “Plaintiff at one time had an account with some Target-affiliated entity.” CP 6. In the prayer, Higgins requested “reasonable attorneys’ fees and costs” without reference to any statute, including RCW 4.84.250 *et seq.*

Thereafter, defendant Higgins filed a CR 56 motion for summary judgment in which she challenged Target’s ability to prove the credit card

⁵ “If we refer your Account to an attorney for collection, you must pay to us all costs and expenses of collection, **including attorneys’ fees**, to the extent not prohibited by law.” (emphasis added). CP 137.

agreement. CP 20-61. The motion for summary judgment contained boilerplate briefing regarding the summary judgment standard, consumer laws, and attacked the law firm that represented plaintiff Target (Patenaude & Felix, A.P.C.) as a "debt collection agency." CP 25-26. Higgins did not request an award of attorneys' fees in this dispositive motion, requesting only that "this Honorable Court grant this Motion for Summary Judgment and issue a judgment that Plaintiff shall take nothing by this action." CP 26.

Higgins' motion also addressed Target's burden of proof in establishing the terms of the credit card agreement between defendant Jeanette E. Higgins and plaintiff Target National Bank. CP 24-25. Ultimately, Higgins prevailed on this issue after the court rejected the Declaration of the Target Custodian of Records Denise Randall as legally deficient. CP 131-141; CP 175-176.

Defendant Higgins' summary judgment motion was based in large part on CR 36 requests for admissions that Higgins claimed were deemed admitted. CP 20-61. Based upon communications between counsel, Target contended that these requests were not admitted. CP 64-69; CP 101-104. After counsel for Higgins refused Target's request for additional time to serve responses, Target was forced to make a formal motion and

appear at a hearing to request additional time for Target to respond to the requests for admissions. CP 64-73; CP 115.

At the **October 21, 2011** hearing on Target's motion for an extension of time, the Court agreed that Target had shown "good cause" for an extension of time to serve responses to the requests for admissions. CP 115-116. This motion and hearing would have been unnecessary if Higgins had granted the additional time requested by Target after Higgins' summary judgment motion was filed. CP 64-72; CP 115-116. The court granted Target's request and also continued the summary judgment motion to **December 9, 2011**. CP 115-116.

On **November 18, 2011**, Target's motion for summary judgment was denied. CP 119. The Target motion did not include the Declaration of the Target Custodian of Records Denise Randall. CP 83-91. The court determined that "the plaintiff (Target) had produced no admissible evidence in support of its motion." CP 119.

In all the pleadings filed on behalf of defendant debtor Jeanette E. Higgins, both in support of her summary judgment motion and in opposition to Target's motion for summary judgment, Higgins never submitted a declaration or affidavit stating that: (1) she did not owe this credit card debt, (2) that she was not the Jeanette E. Higgins who resided

at 3614 W. Providence, Spokane⁶ to whom the Target credit card statements produced by Target were repeatedly sent, (3) she never received the Target statements, or (4) otherwise state that she did not owe this debt in the amount of \$2,052.37 as shown in the documents produced in discovery by Target. CP 6-8; CP 20-61; CP 77-82; CP 142-165; CP 167-171. Defendant's sole defense was the insufficiency of the Target submissions, including the November 21, 2011 Custodian of Records Declaration of Randall authenticating the Instant Credit Application, credit card statements and other documents produced by Target in discovery. CP 131-140.

On **November 30, 2011**, Higgins filed a "Reply Memorandum in Support of Defendant's Motion for Summary Judgment". CP 167-171. Higgins requested that the court: (1) "grant this Motion for Summary Judgment," (2) "dismiss the action," and (3) "issue a judgment that Plaintiff shall take nothing." CP 171. There was no request made for an award of attorneys' fees of any kind, including under RCW4.84.250 or any statute. CP 167-171.

On **December 9, 2011**, Judge Moreno granted Higgins' CR 56 summary judgment motion and entered an order of dismissal. CP 175-

⁶ This was the same address where the Summons and Complaint were served. Respondent Supplemental Designation of Clerk's Papers. Sub. No. 3.

176. The court determined that the Target Custodian of Records' Declaration was deficient because it did not contain an adequate foundation for the Target credit card agreement. RP (Dec. 9, 2011): 29:16-22.

The Order of Dismissal was prepared by Higgins' attorneys. It did not contain findings of fact or conclusions of law. CP 175-176. The Order provided that the "Court retain jurisdiction to determine the issue of the Defendant's attorneys' fees." CP 176. Target did not appeal.

On **December 14, 2011**, Higgins filed her "Motion for Attorneys' Fees and Costs for Defendant" and "Memorandum in Support of Defendant's Motion for Attorneys' Fees and Costs." CP 198; CP 187-197. Higgins specifically requested "an award of attorneys' fees and costs" and did not request that a "judgment" be entered for attorneys' fees and costs. CP 198. For the first time in any pleading, Higgins alleged in this motion that she was entitled to attorneys' fees pursuant to RCW 4.84.250 *et seq.* and the doctrine of judicial estoppel and RCW 4.84.330. CP 187-197. In the Complaint and Answer, and in all of the pleadings filed by either party prior to Higgins' motion for an award of attorneys' fees, there was never any mention of RCW 4.84.250 *et seq.*

Higgins' motion for attorneys' fees, like the other pleadings filed on behalf of defendant, was largely "boilerplate." Higgins erroneously

claimed in her Memorandum that Target had alleged in its Complaint a request for attorneys' fees "pursuant to contract/and or statute." CP 188. The Target Complaint does not so state at page 2 line 10⁷, nor is there any reference to the word "statute" or the Revised Code of Washington (RCW) in the Target Complaint. CP 3-5. This allegation may have been true in the motion or the brief from which this section of the Higgins' attorneys' fee motion was lifted, but the Target Complaint did not so allege. CP 3-5.

Originally, by way of the **December 14, 2011** motion for attorneys' fees, Higgins sought attorneys' fees (including legal assistant) and costs of **\$7,793.75**, or an amount almost four times the amount of the credit card debt in dispute. CP 196. In Higgins' motion for attorneys' fees, Higgins repeatedly informed the court that the only basis for Target's claim for attorneys' fees was the attorneys' fees clause in the credit card contract.⁸ CP 187-197. Higgins' counsel subsequently submitted an additional declaration requesting **\$9,369.07** in fees and costs. CP 227-233.

The **December 30, 2011** hearing on Higgins' motion for attorneys' fees was continued to **January 13, 2012** at the request of Target's counsel. There were problems with the Target opposition documents being timely

⁷ "Plaintiff established a credit account for Defendants' use." CP 4:11.

⁸ "Plaintiff Target National Bank, NA requested attorneys' fees based on a contract." CP 189:7-8.

filed and served due to a problem with ABC Legal Services. CP 235; CP 262-263. On **January 9, 2012**, counsel for Higgins submitted a Third Declaration, increasing the fee request to **\$10,143.50**, or approximately five times the amount in controversy. CP 242; CP 237-243.

Target counsel Matthew Leong provided a Declaration in which he stated that he was not notified by Higgins' counsel until after the court granted Higgins' motion for summary judgment (MSJ) that Higgins sought attorneys' fees pursuant to RCW 4.84.250, 4.84.270 and/or 4.84.330. CP 244-245. In response, Higgins' counsel filed a Fourth Miller Declaration, attaching a pre-MSJ letter dated **November 11, 2011** from Higgins' counsel to Target's counsel. In this letter, it was stated that Higgins would accept the sum of \$3,700 to resolve the lawsuit, which "amount reflects an approximation of my attorneys' fees⁹ incurred to date." CP 253-261; CP 256. There is no reference in this letter to RCW 4.84.250 *et seq.* or to any other statutory basis for an award of attorneys' fees to Higgins. CP 256. This letter confirmed the absence of actual notice to Target of any intent by defendant Higgins to seek attorneys' fees pursuant to RCW 4.84.250 *et seq.*

⁹ The meaning of "my attorneys' fees" in this letter was never clarified. Higgins never provided the court with a copy of the alleged Higgins' "contingency fee agreement" referenced in the motion for attorneys' fees. CP 196.

Higgins' motion for attorneys' fees was argued on **January 13, 2012**. CP 264. In its written submissions¹⁰ and at oral argument, Target counsel highlighted the time wasted by Higgins on unrelated issues, including in the superfluous, canned briefing submitted by Higgins on consumer laws and Target's law firm as a "collection agency." RP (Jan. 13. 2012): 19-21. By the time of the hearing, Higgins' counsel orally asked for an attorneys' fee award of **\$16,638.21**. RP (Jan. 13. 2012): 13:17-19, or approximately eight times the amount in controversy. However, the written proposed order actually submitted by Higgins requested fees in different amounts, \$11,056.57 and \$11,076.88. CP 272.

Following oral argument, based upon Higgins' failure to notify Target that she was seeking attorneys' fees under RCW 4.84.250 and 270, the court rejected the request for fees under RCW 4.84.250 *et seq.* RP (Jan. 13. 2012): 30:17-25; 31:1-9. However, this did not matter because the court ruled that Higgins was entitled to the same reasonable attorneys' fees under the Target contract and RCW 4.84.330. CP 270-273.

This ruling was based upon an appellate case discovered by the court, through its own independent research, which applied RCW 4.84.330 as a basis for an award of attorneys' fees when a defendant proved the

¹⁰ Target Supplemental Designation of Clerk's Papers: Sub. No. 58: Declaration of January Schwarze; Target Memorandum in Opposition to Defendant's Motion for Attorneys' Fees.

contract unenforceable.¹¹ RP (Jan. 13, 2012): 2-4. This outcome-determinative appellate case was not cited by Higgins' counsel. The court requested that each party submit a proposed order. CP 264.

Regardless of the legal basis for the fee award, the only attorneys' fees that Judge Moreno could ever have awarded the prevailing party under either statute (RCW 4.84.250 *et seq.* or RCW 4.84.330) were the exact same "reasonable" attorneys' fees. There is no mention of any statute other than RCW 4.84.330 in the **April 13, 2012** Order prepared by Higgins' attorney which is the subject of this appeal. CP 270-273. The court did not include written findings on Higgins' alternative request for fees under RCW 4.84.250 and 270 as it was not requested to do so in the proposed Order prepared by Higgins. CP 270-273¹².

The April 13, 2012 Order awarding Higgins reasonable attorneys' fees and costs pursuant to RCW 4.84.330 specifically cited at paragraph 11 Target's "objection to general categories of time submitted by Defendant's counsel". CP 272. The court struck out paragraph 9 regarding other Target lawsuits because there was no evidence submitted

¹¹ *Stryken v. Panell*, 66 Wn. App. 566, 832 P.2d 890 (1992). RP (Jan. 13, 2012): 31:8-25; 32:1-6.

¹² The April 13, 2012 Order references numerous documents considered by the court, including "Plaintiffs' two Response Memorandums." The second Target Opposition Memorandum dated January 9, 2012 was filed by the court with the Schwarze Declaration. Respondent Supplemental Designation of Clerk's Papers: Sub. No. 58.

to support this statement. CP 272. Furthermore, this paragraph contradicted the "information" Higgins attempted to orally provide to the court for the first time at the January 13, 2012 hearing. RP (Jan. 13. 2012): 12:5-12. 13:1-19.

This appeal involves nothing more than Higgins' quest to overturn the proper exercise of the trial court's discretion in awarding fees based upon a 50% reduction from 51.85 hours to 25 hours as the total number of hours reasonably expended in this small collection matter involving approximately \$2,000. CP 272. There was no reduction by the court in the rate claimed of \$225 per hour. CP 272.

Having reviewed the pleadings submitted and evaluated their quality, witnessed Higgins' attorney in court, considered the amount in controversy, conducted independent research on the attorneys' fees issue in order to come to a result the court deemed legally correct, the trial court made an independent determination that the number of attorney hours sought by Higgins' counsel (51.85 hours) in this small collection matter was not reasonable. CP 270-272. Therefore, in the proper exercise of its discretion, the trial court awarded reasonable attorneys' fees and costs (\$35.57) totaling **\$5,660.57**. CP 270-272.

IV. ARGUMENT

A. Standard of Review

A trial court may only award attorneys' fees where there is a statutory, contractual or recognized equitable basis for this award. *Riss v. Angel*, 80 Wn. App. 553, 912 P.2d 1028, *rev. granted; aff'd and remanded*, 131 Wn.2d 612, 934 P.2d 669 (1996). The standard of review for review of an award of reasonable attorneys' fees is manifest abuse of discretion. *Bowles v. Washington Dept. of Ret. Sys.*, 121 Wn.2d 52, 71-72, 847 P.2d 440 (1993); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). As stated in *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007), this narrow standard of review means that:

In order to reverse an attorneys' fee award, an appellate court must find the trial court manifestly abused its discretion. [citation omitted] That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. [citation omitted].

Pham v. City of Seattle, 159 Wn.2d at 538.

B. Defendant Higgins Was Required to Provide Actual Notice of the Intent to Seek Attorneys' Fees under RCW 4.84.3250, 270.

Although irrelevant to the issue of whether or not the trial court awarded "reasonable" attorneys' fees to Higgins, the court was correct in not awarding attorneys' fees under the small claim "settlement statute," RCW 4.84.250 *et seq.* Higgins did not prove the foundational fact necessary for an attorneys' fee award under this statutory scheme to

encourage settlement of small claims under \$10,000 because she did not produce evidence that she ever gave “actual notice” to Target of her intent to seek attorneys’ fees under RCW 4.84.250 or 270.

The issue for the trial court was never whether or not Higgins was a “prevailing party” under RCW 4.84.250 or 270 based upon the summary judgment dismissal. The court stated that, “The defendant is the prevailing party.” RP (Jan. 13, 2012): 22-23. The issue was the complete absence of any evidence of the required notice to Target prior to the CR 56 order of dismissal, in a pleading or otherwise, that Higgins sought attorneys’ fees and costs under RCW 4.84.250, 270.

Actual notice of a party’s intent to seek attorneys’ fees under the “settlement statute,” RCW 4.84.250 *et seq.*, is required in order to advance a principal purpose of this statutory scheme, to encourage the resolution of small claims. Although not specifically stated in RCW 4.84.250 or 270, common law requires that the party from whom the attorneys’ fees are sought receive actual notice before trial that, if it is not the prevailing party, it may be subject to fees under RCW 4.84.250. *Pub. Utils. Dist. No. 1 of Grays Harbor County v. Crea*, 88 Wn. App. 390, 393-94, 945 P.2d 722 (1997), *review denied*, 134 Wn.2d 1021, 958 P.2d 316 (1998).

Courts interpreting RCW 4.84.250 have held that it does not require the party seeking attorneys’ fees to specifically plead RCW

4.84.250 in the Complaint or the Answer so long as the other party receives actual notice, such as in a settlement demand referencing RCW 4.84.250, of the intent to seek attorneys' fees pursuant to this specific statute. *P.U.D. No. 1*, 88 Wn. App. at 394, 945 P.2d 722 (1997). Without actual notice, the statutory purpose to encourage the resolution of matters involving less than \$10,000 cannot be advanced.

In *Last Chance Riding Stable, Inc. v. Stephens*, 66 Wn. App. 710, 832 P.2d 1353 (1992), the court reversed an award of attorneys' fees in favor of the defendants who had prevailed in a small claims appeal because there was no notice given under RCW 4.84.250 *et seq.* The court stated:

Requiring an offer of settlement or other prior notice of intent to seek attorney fees under the facts presented here fulfills the purpose of RCW 4.84.250-300.... If attorney fees were awarded unsuccessful small claims defendants prevailing on appeal without requiring prior notice or a settlement offer, one of the purposes of RCW 4.84.290 and the purpose for small claims departments would be thwarted. A party should be allowed to pursue a meritorious small claim without fear that not only may a small claims judgment be reversed on appeal, the party may be held liable for attorney fees in an amount exceeding the small claims judgment without notice and the opportunity to settle.

Last Chance Riding Stable, Inc. v. Stephens, 66 Wn. App. at 713-714
[emphasis added].

The purpose of this statute was described in *Beckmann v. Spokane Authority*, 107 Wn.2d 785, 787, 733 P.2d 960 (1987), as follows:

The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. *Valley v. Hand*, 38 Wn. App. 170, 684 P.2d 1341, review denied, 103 Wn.2d 1006 (1984); *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 598 P.2d 404 (1979). Another appellate court referred to the statute's purpose as: "[t]he obvious legislative intent is to enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by legal fees." *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 492, 607 P.2d 890 (1980). **Clearly, these purposes require some type of notice so that parties would realize the amount of the claim is small and that they should settle or else risk paying the prevailing party's attorneys' fees.** However, it does not follow that such notice must be given at the original pleading stage.

Beckmann v. Spokane Transit Authority, 107 Wn.2d at 787 [emphasis added].

In *Beckmann*, the plaintiff served a written settlement offer on Spokane Transit Authority which explicitly stated that the offer was made pursuant to RCW 4.84.280. The court determined that this was "actual notice" to the defendant and served the same purpose as including a reference to the statute in a formal pleading.

In contrast, the Higgins' November 11, 2011 "settlement offer" letter made no reference of any kind to RCW 4.84.250 or to 270 or to any other statutory basis for the recovery of attorneys' fees. CP 256. Further, Target counsel Matthew Cheung explicitly stated in his Declaration that he

“was not notified that the defendant would seek attorneys’ fees pursuant to RCW 4.84.250, RCW 4.84.279 or RCW 4.84.330 until after the Court granted the defendant’s Motion for Summary Judgment.” CP 244-245. In the four declarations filed by Higgins’ counsel in support of defendant’s attorneys’ fees motion, he never provided a pleading, letter or sworn testimony which demonstrated actual notice to Target, including in defendant’s motion for summary judgment and the other submissions filed in support of that motion. In fact, the Higgins’ “offer of settlement” letter only confirmed the absence of actual notice to Target because there is no reference to any statute, including RCW 4.84.250 *et seq.* CP 256.

In conclusion, the foundational facts necessary for the application of RCW 4.84.250 and 270 as a basis for an award of attorneys’ fees were not proven by defendant Higgins. Regardless, Higgins was awarded the exact same reasonable attorneys’ fees and costs under RCW 4.84.330 and the Target credit card agreement attorneys’ fees clause. CP 270-272.

C. **The Trial Court Awarded Reasonable Attorneys’ Fees under RCW 4.84.330 and the Target Contract.**

Citing *Stryken v. Parnell*, 66 Wn. App. 566, 632 P. 2d 890 (1992), the trial court awarded attorneys’ fees and costs to Higgins pursuant to the attorneys’ fees clause in the Target credit card agreement and RCW 4.84.330, which made this clause reciprocal. Notably, the court found this dispositive appellate decision on its own, without any assistance from

Higgins. The foundational fact necessary for the application of RCW 4.84.330 was the Target credit card agreement with the attorneys' fees clause that Target "had alleged and asserted." RP (Jan. 13, 2012): 32:3.

After finding that Higgins was entitled to "reasonable" attorneys' fees and costs pursuant to RCW 4.84.330, Judge Moreno was then required to exercise her discretion in determining the amount of attorneys' fees to award since only "reasonable" fees are authorized. *Singleton v. Frost*, 108 Wn.2d 723, 729-30, 742 P.2d 1224 (1987). This is the same inquiry a court would conduct under any Washington statute authorizing an award of reasonable attorneys' fees to the prevailing party.

D. The Trial Court Properly Exercised Judicial Discretion in Determining the Amount of Attorneys' Fees to Award.

"The burden of proving the reasonableness of the fees requested is upon the fee applicant." *The Scott Fetzer Company v. Weeks*, 122 Wn.2d 141, 151-52, 859 P.2d 1210 (1993) (citing *Blum v. Stenson*, 465 U.S. 886, 897-900, 104 S. Ct. 1541, 1548-9 (1984) ("novelty and complexity of issues, skill of attorneys, and results obtained subsumed in determination of reasonable fee under lodestar method"). The amount in controversy is also important. "While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness." *The Scott Fetzer Company v. Weeks*, 122 Wn.2d at 150.

In *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 585, 597, 673 P.2d 193 (1973), a case involving a statutory fee award under RCW 19.86 (Consumer Protection Act), this Court outlined how a court should determine the “reasonable hours” expended as follows:

The application of the *Lindy* formula begins with the calculation of a lodestar figure. The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorneys’ who performed the work (*i.e.*, senior partner, associate, etc.). **The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.**

Bowers, 100 Wn.2d at 597. [emphasis added].

Higgins asks this court to substitute its judgment for that of the trial court which found the number of hours requested by Higgins’ attorney to be excessive. The April 13, 2012 Order demonstrates that the trial court considered all of the pleadings in ruling on Higgins’ motion for attorneys’ fees. In a case involving the Consumer Protection Act, RCW 19.86, the Supreme Court observed:

...the trial court, instead of merely relying on the billing records of the plaintiff’s attorneys’, should make an independent decision on what represents a reasonable amount for attorneys’ fees. The amount actually spent by the plaintiff’s attorneys’ may be relevant, but it is in no way dispositive.

Nordstrom v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

Having heard and ruled on the cross-motions for summary judgment, the trial court judge was well-versed in the facts and the law. Judge Moreno had first-hand knowledge of the simple dispositive contract issue and the quality of representation. She understood that there were no complex consumer laws requiring special expertise that were dispositive; this was a simple breach of contract matter involving about \$2,000. Judge Moreno had the opportunity to review Higgins' boilerplate submissions. In the exercise of her discretion, Judge Moreno determined that 25 hours was the number of hours reasonably expended by counsel for Higgins to defend this small collection matter.

In the Order Awarding Attorneys' Fees and Costs, Judge Moreno made note of the amount in controversy (\$2,052.37). CP 272. Consideration of the amount in controversy is specifically included as a proper factor for consideration in determining a reasonable attorneys' fee consistent with Rule 1.5 of the Rules of Professional Conduct. RPC 1.5 provides in pertinent part:

Title 1. Client-Lawyer Relationship

. . .

Rule 1.5 FEES

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable

amount for expenses. **The factors to be considered in determining the reasonableness of a fee include the following:**

- (4) **the amount involved and the results obtained;**(emphasis added)

Rule of Professional Conduct 1.5.

In deciding the reasonable amount of attorneys' fees to award to Higgins as the prevailing party in this matter, Judge Moreno had the benefit of having presided over each hearing.¹³ She had reviewed and digested the pleadings, heard Higgins' counsel in oral argument and understood that the dispositive issue on summary judgment was the simple question of the ability of Target to prove the credit card agreement with admissible evidence. No special expertise in consumer law of any kind was required. This was Contract 101.

The Order awarding fees cited the amount in controversy (\$2,052.37). Consideration of the amount in controversy is proper in determining a statutory award of reasonable attorneys' fees. *The Scott Fetzer Company v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (in fee dispute involving long-arm statute, "a lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment"); *CHD, Inc. v. Boyles*, 128 Wn. App. 131, 157 P.2d 415, *review denied*, 162

¹³ As previously discussed, the hearing on the motion to extend time to answer defendant's request for admissions could have been avoided with a simple extension.

Wn.2d 1022, 178 P.3d 1033 (2007) (trial court reduced attorneys' fees awarded pursuant to RCW 4.84.330 by 50%).

In accord with the provisions of RCW 4.84.330, the court followed well-settled law in exercising her discretion in determining the amount of reasonable attorneys' fees to be awarded Higgins following entry of the involuntary CR 56 dismissal. The trial court's exercise of discretion in rejecting Higgins' claim that it was reasonable to spend almost 52 hours at a rate of \$225/hr. on this small collection matter should be affirmed.

E. Attorneys' Fees Should Be Awarded Target Pursuant to RAP 18.9, 18.1 and the Target Attorneys' Fees Clause.

Higgins' claim that this appeal involves conflicting case law interpreting the effect of a CR 41 voluntary dismissal by a plaintiff on a defendant's request for attorneys' fees under RCW 4.84.250 *et seq* is frivolous. This appeal involves a CR 56 involuntary dismissal with the prevailing party Higgins seeking more in attorneys' fees than was reasonable in the exercise of the discretion of the trial court. The request for direct review by the Washington Supreme Court was frivolous. Target should be awarded its attorneys' fees for having to respond to the Petition for Direct Review and for having to address the CR 41 issue in this brief when the dismissal at issue was always a CR 56 dismissal. RAP 18.9(a).

Higgins has failed to demonstrate any debatable abuse of discretion by the trial court in awarding reasonable attorneys' fees and

costs totaling \$5,660.57 under the facts and circumstances of this matter. “An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.” *Johnson v. Jones*, 91 Wn. App. 127, 135, 955 P.2d 826 (1998). This is an appeal of a purely discretionary ruling, cloaked in another form by defendant Higgins which bears no relationship to the true facts of this case. The court properly exercised its discretion, even if Higgins disagreed with the total amount of attorneys’ fees awarded.

An award of reasonable attorneys’ fees is also requested pursuant to the attorneys’ fees clause in the Target credit card agreement. *Deere Credit, Inc. v. Cervantes Nurseries, LLC, et al.*, 288 P.3d 409 (Div. III, 2012) (“The contract here provided for fees. And the prevailing party is therefore entitled to fees. 4.84.330.”); *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 205, 813 P.2d 619 (1991) (RCW 4.84.330 and contractual provision for award of attorneys’ fees supports award on appeal under RAP 18.1). “A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.” *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). Judicial estoppel may also apply if Higgins now asserts that the attorneys’ fees

clause in the Target credit card agreement is not a basis an award of attorneys' fees. RAP 18.1.

V. CONCLUSION

It is undisputed that, prior to the entry of the CR 56 order of dismissal, Higgins did not provide actual notice to Target in any form that she was seeking attorneys' fees and costs under RCW 4.84.250 *et seq.* Therefore, the court could not award attorneys' fees to Higgins under that statute. Regardless, the exact same reasonable attorneys' fees and costs were awarded to Higgins under RCW 4.84.330. It does not matter under which statute the court awarded reasonable attorneys' fees. By way of this appeal, Higgins is simply trying to get an award that was unreasonable. Whereas the court properly exercised its discretion in awarding reasonable attorneys' fees of \$5,625 and costs of \$35.57 to defendant Higgins pursuant to RCW 4.84.330 and the Target contract attorneys' fees clause, the April 13, 2012 Order should be affirmed.

Target should be awarded its reasonable attorneys' fees because this was a frivolous appeal of a discretionary ruling and because attorneys' fees may be awarded to Target pursuant to the attorneys' fees clause in the credit card agreement. RAP 18.9(a); RAP 18.1.

DATED this 6th day of February, 2013.

FORSBERG & UMLAUF, P.S.

By: _____

A handwritten signature in black ink, appearing to be "Roy A. Umlauf", written over a horizontal line.

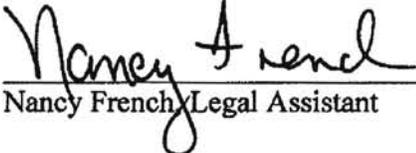
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Ann C. McCormick, WSBA #15832
Attorneys for Respondent
Target National Bank

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing Brief of Respondent upon the following persons:

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SIGNED this 6th day of February, 2013, at Seattle, Washington.



Nancy French Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: Nancy E. French [NFrench@forsberg-umlauf.com]
Sent: Wednesday, February 06, 2013 11:46 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ann C. McCormick
Subject: Jeanette E. Higgins v. Target National Bank
Attachments: Brief of Respondent.pdf; Supplemental Designation of Clerk's Papers.pdf

Re: Jeanette E. Higgins v. Target National Bank
Spokane County Superior Court Cause No. 11-2-00984-4
Supreme Court No. 87316-0
Our File No. 1523.0058

Dear Clerk: Attached for filing is the Brief of Respondent and Supplemental Designation of Clerk's Papers in the above matter. Thank you.

Nancy French | Forsberg & Umlauf, P.S.

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