

COA No.350363

(Spokane County Superior Court No. 16-2-00428-2)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

T&B WASHINGTON, INC., DBA
COLDWELL BANKER TOMLINSON
SOUTH,

Interpleader Plaintiff

vs.

VIRGINIA DULLANTY,

Appellants,

vs.

GARY SAWYER and SANDRA SAWYER, individually and/or as
Trustees of the GARY AND SANDRA SAWYER REVOCABLE
TRUST,

Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. Argument	1
A. Substantive Issues	1
1. <u>None of the parties requested damages against each other in this matter</u>	1
a. The contract did not provide the earnest money could be “liquidated damages” to the Purchaser, Defendants Sawyer.....	3
b. Defendant Sawyers did not ask for damages under breach of contract, but merely for a return of the money they had put in as a deposit.....	3
2. <u>Respondents are wrong that there was notice of the application of attorney fees under RCW 4.84.250</u>	5
a. The Interpleader complaint cannot be a basis for notice that attorney fees apply under RCW 4.84.250.....	6
b. The March 21, 2016 e-mail is not notice that fees are being sought under RCW 4.84.250.....	7
c. The summary judgment pleadings are not notice of attorney fees being sought under RCW 4.84.250....	9
3. <u>Defendant Sawyers were not the prevailing party under RCW 4.84.250</u>	11
a. Defendants Sawyer has not responded to or supported why they were a prevailing party under RCW 4.84.250 through RCW 4.84.260.....	12
b. RCW 4.84.250 is a statutory basis for the award of attorney fees, and cannot be compared to a contractual provision for award of attorney fees that were in play in <i>Koncicky v. Sekac</i>	13
4. <u>No judgment for damages was issued here, and that is still a bar to recovery</u>	14
B. Procedural issues response	16

1.	<u>Defendant Dullanty did raise the issues of damages, prevailing party, and no final judgment below the trial court</u>	17
a.	Defendant Dullanty did raise the issue of damages to the trial court.....	17
b.	The issue of whether or not Defendant Sawyers were the prevailing party was before the lower court.....	19
c.	The issue of judgment was raised before the trial court.....	20
2.	<u>Findings of fact- Whether or not they were properly stated and challenged</u>	20
3.	<u>Defendant Dullanty is not estopped by “judicial admissions” in the pleadings</u>	21
C.	Response to Defendant Sawyers’ argument for attorney fees on appeal	23
D.	Response on Defendant Dullanty’s request for attorney fees for having to fight the contract request	24
II.	Conclusion	24

Table of Cases

AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn.2d 389, 396, 325 P.3d 904, 908 (2014)..... 15, 20

Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988)..22

City of Seattle v. Turner, 29 Wash. 515, 526, 69 P. 1083, 1087 (1902).....4, 15

Davy v. Moss, 19 Wn. App. 32, 34, 573 P.2d 826, 827 (1978). 4

Elliott Bay Adjustment Co., Inc. v. Dacumos, 75215-4-I, 2017 WL 3587374, at *2 (Wash. Ct. App. Aug. 21, 2017).....15

Hanson v. Estell, 100 Wn. App. 281, 290, 997 P.2d 426, 432 (2000).....12, 13

Hogenson v. Serv. Armament Co., 77 Wn.2d 209, 214, 461 P.2d 311, 314 (1969).....22

In re 1992 Honda Accord, 117 Wn. App. 510, 523, 71 P.3d 226, 233 (2003).....4, 5

In re Estate of Tosh, 83 Wn. App. 158, 166, 920 P.2d 1230, 1234 (1996).....6, 7

Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672, 679 (1957).....20, 21

Kathryn Learner Family Tr. v. Wilson, 183 Wn. App. 494, 498, 333 P.3d 552, 554 (2014).....1, 5, 6, 21

Key Design Inc. v. Moser, 138 Wn.2d 875, 893, 983 P.2d 653, 664 (1999), amended, 993 P.2d 900 (Wash. 1999).....22, 23

Koncicky v. Sekac, 103 Wn. App. 292, 293, 12 P.3d 645, 646 (2000).....11, 13, 14

Lay v. Hass, 112 Wn. App. 818, 821, 51 P.3d 130, 132 (2002).....9, 10

Schmerer v. Darcy, 80 Wn. App. 499, 510, 910 P.2d 498, 504(1996)....6, 7

<i>Smith v. Dement Bros. Co.</i> , 100 Wash. 139, 147, 170 P. 555, 557 (1918).....	1, 15
<i>Smith v. Saulsberry</i> , 157 Wash. 270, 275, 288 P. 927, 930 (1930).....	22
<i>Target Nat. Bank v. Higgins</i> , 180 Wn. App. 165, 173, 321 P.3d 1215, 1219 (2014).....	5, 8, 10, 13, 21, 24
<i>Wallace Real Estate Inv., Inc. v. Groves</i> , 124 Wn.2d 881, 884, 881 P.2d 1010, 1012 (1994).....	3
<i>White v. Kent Med. Ctr., Inc., P.S.</i> , 61 Wn. App. 163, 168, 810 P.2d 4, 8 (1991).....	9, 18
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 394, 730 P.2d 45, 49 (1986).....	21

Statutes, Administrative Rules and Constitution

RCW 4.84.250.....	2, 5, 6, 7, 8, 9, 10,11, 13, 14, 16, 17, 18, 19, 23, 24
RCW 4.84.260.....	11,12,14, 19
RCW 4.84.270.....	14, 19
RCW 4.84.280.....	12, 13, 14, 20
RCW 4.84.290.....	24
RCW 64.04.....	8

I. ARGUMENT

Defendant Sawyer's response starts with procedural objections in sections A and B, and then tries to address the substantive issues in section C of its analysis. Whether or not there is a basis to award attorney fees is reviewed de novo. *Kathryn Learner Family Tr. v. Wilson*, 183 Wn. App. 494, 498, 333 P.3d 552, 554 (2014). Because of the de novo review, this brief will first address the substantive issues raised in C of Defendant Sawyers' brief first, then respond to the procedural issues Defendant Sawyers' raise in A, and B of their analysis, and finally respond to sections D and E.

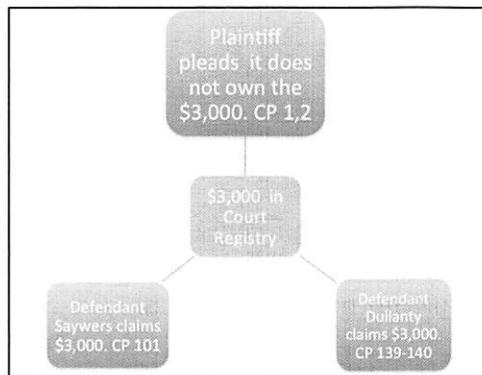
A. Substantive Issues

1. None of the parties requested damages against each other in this matter.

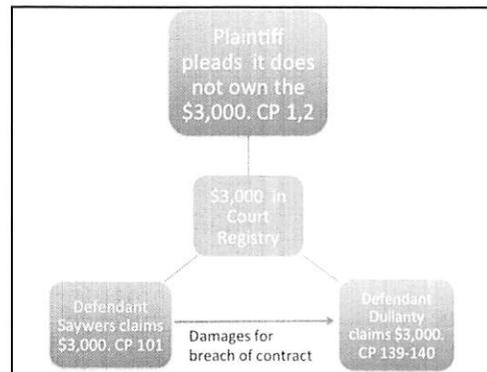
Defendant argues in section C that when it sought the return of its \$3,000, it was seeking damages. However, this was solely an interpleader action for the court to decide who owned \$3,000, which is equitable in nature. *Smith v. Dement Bros. Co.*, 100 Wash. 139, 147, 170 P. 555, 557 (1918). All the parties asserted differing claims of ownership on the money pled into the court, and no one sought a judgment of damages

against another party. Had damages been pled then there would have at least been one claim “of the traditional plaintiff defendant” relationship that troubled the trial court on November 7, 2016. CP 370. The lack of a damages claim was the whole confusion in applying RCW 4.84.250.

The following diagrams show the claims as they were, and how they would have looked if Defendant Sawyers had claimed damages against Defendant Dullanty like they now state.



Claims as they were



Claims as they would have looked with damages pled

Defendant Sawyers try to argue they did raise damages though in two ways: (a) the \$3,000 was liquidated damages to the Sawyers, and (b) by raising contract issues as a reason for resolution, then this was damages. Both of these are incorrect. More problematic though is there are no actual pleadings under the Civil Rules that claim “damages” against Defendant Dullanty, despite the arguments of Defendant Sawyers.

a. The contract did not provide the earnest money could be “liquidated damages” to the Purchaser, Defendants Sawyer

The statute argued by Defendant Sawyers, RCW 64.04.005, allows a contract to make earnest money “liquidated damages” for the seller, if the buyer breaches the contract. The case cited by Defendants Sawyer speaks to earnest money being a common liquidated damage for the seller should the buyer default. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 884, 881 P.2d 1010, 1012 (1994). The contract itself only allows the earnest money to be remedy for the seller, not to the buyer. CP 9. Defendant Sawyers were the buyer. There is no legal basis for Defendant Sawyers, as buyers, to get the \$3,000 as “liquidated damages.”

The sole basis for return of the \$3,000 to Defendant Sawyers is what they claimed in summary judgment that the contract was properly rescinded and the earnest money should be “returned” to them. CP 64-65.

b. Defendant Sawyers did not ask for damages under breach of contract, but merely for a return of the money they had put in as a deposit.

Defendant Sawyer claims that they sought the damages though based on paragraph b’s language that refusing to authorize the return of

the money was a breach. As shown by the diagrams above, this is not true. Defendant Sawyers never requested relief damages against Defendant Dullanty, but solely wanted their money returned.

Defendant Sawyers could have pled claims for a wrongful withholding of the money. Despite Defendant Sawyers misunderstanding of the Opening Brief, Defendant Dullanty does not admit or agree Defendant Sawyers “suffered damages due to her breach of the agreement.” (Defendant Sawyers brief p. 13). Defendant Dullanty pointed out that Defendant Sawyers could have cross claimed damages, like was done in *City of Seattle v. Turner*, 29 Wash. 515, 526, 69 P. 1083, 1087 (1902).

Asking for your deposit money or property back is not “damages.” Damages are compensation for injury or wrong done. *Davy v. Moss*, 19 Wn. App. 32, 34, 573 P.2d 826, 827 (1978). If the injury or wrong done was not authorizing the return of the money when it should have been authorized, as defined by paragraph b (CP 7), then the damages would be something beyond the \$3,000 deposit withheld. It would be the lost use of that \$3,000 or interest. Defendant Sawyers did not seek more than the \$3,000 they had put in, and because of that the \$3,000 cannot be damages.

In re 1992 Honda Accord, 117 Wn. App. 510, 71 P.3d 226 (2003) is on point that asking for money returned is not damages. Defendant

Sawyers improperly try to distinguish this case, but the case is clear, asking for a refund of money paid is not damages. *Id.* at 523. Important to *1992 Honda Accord* is that the plaintiff could have asked for damages beyond the return of his fees and chose not to. *Id.* In the same way Defendant Sawyers could have asked for damages beyond the \$3,000 and chose not to ask for damages. This means there are no damages for the Small Damages Claim Statute to apply.

2. Respondents are wrong that there was notice of the application of attorney fees under RCW 4.84.250

“Common law has consistently required that the party from whom attorney’s fees are sought receive notice before trial that it may be subject to fees under the pertinent statute.” *Target Nat. Bank*, 180 Wn. App. at 174, emphasis added. Requesting fees is not enough, but you must also put a party on notice of the basis in law for the request. *Kathryn Learner Family Tr.*, 183 Wn. App. at 499.

While the court conclusions of law that notice of the attorney fees came in three ways, (a) the complaint, (b) the March 21, 2016 e-mail, and (c) the motion for summary judgment and attorney fees filed on July 27, 2016, this is an incorrect application of law. Whether or not this needs to be challenged as a specific finding of fact will be addressed later. The

application of law to the (a) complaint, (b) March 2016 e-mail, and (c) the summary judgment motion is reviewed de novo. *Kathryn Learner Family Tr.*, 183 Wn. App. at 498.

a. The Interpleader complaint cannot be a basis for notice that attorney fees apply under RCW 4.84.250

Defendant Sawyers argues because the complaint was asked the court to decide ownership of less than \$10,000, this was notice that Defendant Dullanty would be subject to attorney fees under RCW 4.84.250. Appellate brief p. 15. Defendant Sawyers rely on two cases to make this point. However, both cases pled by Defendant Sawyers do not stand for the fact that when a plaintiff interpleads funds less than \$10,000, the named defendants face RCW 4.84.250. Both cases cited by Defendant Sawyer involve looking at the party making the claim for damages to see if they intended a claim for damages of less than \$10,000.

In re Estate of Tosh, 83 Wn. App. 158, 920 P.2d 1230, (1996) started with the dispute of a trust, and included claims for damages against one of the defendants, Security Benefits. *Id.* at 161. In *Tosh* it was the plaintiff who pled damages under \$10,000 and therefore knew that RCW 4.84.250 applied if they did not succeed. *Id.* at 165.

Schmerer v. Darcy, 80 Wn. App. 499, 510, 910 P.2d 498, 504

(1996) involved a third party complaint for damages if a lien was enforced. The *Schmerer* court looked at the amount of damages claimed, and determined the plaintiff pled more than \$10,000 in damages and therefore RCW 4.84.250 did not apply.

In contrast to *Tosh* and *Schmerer* the Plaintiff (T & B Washington, Inc.) in this matter has claimed no damages. Quite the opposite, the Plaintiff in this matter disclaims the interest in a defined amount of money that is then deposited in the court registry. CP 3-5. This cannot be notice that this is an action for damages under \$10,000 since the Plaintiff does not claim damages, and any party could have claimed damages, including in excess of \$10,000, by bringing cross or counter claims.

Defendant Sawyers put forward no case law supporting the fact that any controversy under \$10,000, regardless of it involving claims for damages or whether it sounds in equity like this matter, triggers RCW 4.84.250. As such, this would be a matter of first impression. Therefore, if the court agreed that RCW 4.84.250 applied, the complaint cannot be notice the basis of law that fees were being sought under that statute. No damages were pled.

b. The March 21, 2016 e-mail is not notice that fees are being sought under RCW 4.84.250

There is no doubt that Defendant Sawyers did not communicate they were seeking fees under RCW 4.84.250 in the March 21, 2016 e-mail. So on its face, the e-mail cannot be the notice that Defendant Dullanty is subject to fees under RCW 4.84.250, or that RCW 4.84.250 is the legal basis of the fees sought. However, Defendant Sawyers argues that the *Target* court holds that anytime a party notifies the other side it will seek attorney fees this creates the requisite notice. Respondents' brief p. 16-17. However, the *Target* case involved different facts, and did not create the fees by ambush approach Defendant Sawyers now argue.

The *Target* case involved a creditor seeking damages of \$2,052.37. The *Target* court noted that Target was the "master of its claim" and as such was on notice that Target's claim was subject to RCW 4.84.250 if the defendant was successful under RCW 4.48.270. *Target Na. Bank.*, 180 Wn. App. at 181.

Unlike the plaintiff in *Target*, Defendant Dullanty was not the "master" of this interpleader case. As admitted in the Respondent Brief, Defendant Dullanty did not see any basis for attorney fees, even under the contract. This is a stark difference from the *Target* case where the party on notice is the party pleading the small damages. It is also in stark contrast to *Target* where the party pleading damage was aware that attorney fees were allowed under the contract. The legal theory of RCW

4.84.250 is not conveyed in the March 21, 2016 e-mail, and definitely not imputed by the same facts as the *Target* court found. Based on this, the legal application of the March 21, 2016 e-mail cannot be notice that attorney fees are applicable under RCW 4.84.250.

c. The summary judgment pleadings are not notice of attorney fees being sought under RCW 4.84.250

The original summary judgment motion filed on July 27, 2016, and used for the court's conclusion of law that notice existed did not raise RCW 4.84.250 as a basis for attorney fees. CP 70-71. RCW 4.84.250 was raised for the first time in Defendant Sawyers reply, and as such was not part of the summary judgment motion. A party cannot raise new issues in its reply brief and expect them to be part of the summary judgment motion. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4, 8 (1991). Because of this, there was no actual pleading of RCW 4.84.250 in the summary judgment motion.

Defendant Sawyers argue that *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002) allowed their reply to be this notice of RCW 4.84.250 applying. However, *Lay* is distinguishable for two reasons. First, the plaintiff in *Lay* requested damages relief beyond the equitable relief of determining ownership of property. *Id.* at 825. Defendant Sawyers did

not do that in any brief before the court, but only requested the court resolve the ownership of the \$3,000 and the return of that money to them.

Secondly, the reply brief requesting attorney fees under RCW 4.84.250 was first submitted on September 20, 2016, and the court ruled on the summary judgment motion on September 23, 2016. CP 200; 268 (Defendant Sawyer's stated in their memorandum requesting attorney fees that the court ruled on the matter on September 23, 2016). Key to the *Lay* court's analysis is that there was more than 10 days between the notice of RCW 4.84.250 pleading and the summary judgment hearing. *Target Nat. Bank*, 180 Wn. App. at 180-181. Here there is only 2 days notice between the pleading of RCW 4.84.250 as a legal basis for fees, and the summary judgment motion hearing.

Since the reason for attorney fees under RCW 4.84.250 was not raised in a proper time or notice, then this does not satisfy notice. If the purpose of RCW 4.84.250 is to encourage settlement of small claims, then a party should know it applies. The evidence is clear that no party thought RCW 4.84.250 applied until it was first raised in Defendant Sawyer's reply on summary judgment. CP 198.

What we have here is the application of attorney fees by ambush. Notice of the legal basis for fees is a prerequisite to the due process that justifies changing the American Rule and awarding them against a party.

3. Defendant Saywers were not the prevailing party under RCW 4.84.250

When the trial court asked Defendant Sawyers why they were a prevailing party under the statute, they claimed they were a prevailing party under RCW 4.84.260, since they requested relief. CP 370-371; 382-385. This was briefed against in Defendant Dullanty's opening appellant brief, and the Defendants have now replied that they were the prevailing party in an "interpleader action" under *Koncicky v. Sekac*, 103 Wn. App. 292, 293, 12 P.3d 645, 646 (2000), which awarded fees based on a contract versus under RCW 4.84.250. Defendants have (a) not shown any basis to be a prevailing party under RCW 4.84.260 like they claimed to the trial court, and (b) applying the prevailing party under a contract provision is not the same as applying the prevailing party standard required under the statutory requirements of the Small Damages Claims Fee Statute. Because of this, Defendant Sawyers are not a prevailing party under the statute.

a. Defendants Sawyer has not responded to or supported why they were a prevailing party under RCW 4.84.250 through RCW 4.84.260.

In Appellant's opening brief it was argued that Defendant Sawyers were not the prevailing party as defined by RCW 4.84.260. RCW 4.84.260 requires a prevailing party to make an appropriate offer under RCW 4.84.280, and the party must meet or beat that offer. See Appellant's opening brief p. 26-28. Defendant Sawyers' response does not argue they made an appropriate offer to be the prevailing party under RCW 4.84.260 like Defendant Sawyers argued to the trial court.

As pointed out in the Appellants opening brief, the only "offer of settlement" made by Defendant Sawyers in this matter occurred in the March 21, 2016 e-mail. That e-mail could not be an appropriate offer under RCW 4.84.260 because Defendant Sawyers had filed no claim for relief when it made this offer. This is a violation of RCW 4.84.260 since that requires an offer be made after 30 days of filing service of the summons and complaint requesting the relief. See RCW 4.48.280. Because Defendant Sawyers had not claimed relief for what it now says is damages 30 days prior to the March 21, 2016 e-mail, this is not a proper offer of settlement.

As also pointed out in the Appellant's opening brief, this March 21, 2016 e-mail was submitted to the trial court before a final judgment and therefore cannot be an offer of settlement per RCW 4.84.280. As a matter of law *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426, 432

(2000) says an offer disclosed prior to a final judgment cannot be an offer under RCW 4.84.280. Defendants do not dispute this and do not brief or argue *Hanson*. As such it is undisputed that the March 21, 2016 e-mail is not an offer of settlement.

Since there is no offer of settlement, Defendant Sawyer cannot be the prevailing party based on making “claims” to the \$3,000 like Defendant Sawyer argued to the trial court. This means they are not a prevailing party under RCW 4.84.250 and not entitled to fees, and is detrimental to any such award under the statute.

b. RCW 4.84.250 is a statutory basis for the award of attorney fees, and cannot be compared to a contractual provision for award of attorney fees that were in play in *Koncicky v. Sekac*

Contractual attorney fees are different and applied differently than fees under RCW 4.84.250. *Target Nat. Bank*, 180 Wn. App. at 172. “In Washington, attorney's fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity.” *Target Nat. Bank*, 180 Wn. App. at 173. These are three distinct theories, and each should be tested for its legal basis solely upon the theory advanced.

Koncicky v. Sekac award fees based solely on the contract, or private agreement theory that authorized attorney fees. *Koncicky*, 103 Wn.

App. at 297, (“A court may award reasonable attorney fees based on the parties' contract”). Because that contract award fees to any party who prevailed “if a dispute arises regarding [the] transaction,” the *Koncicky* court was deciding prevailing party under that contract. That was a much broader provision than the contract in this current matter, which only allowed fees if the buyer or seller brought suit. CP 9, paragraph q. It was within that context of a broader contract provision that *Koncicky* found the party succeeding on the prevailing party also succeeded under the contract. *Koncicky*, 103 Wn. App. 297-298.

In direct contrast to *Koncicky*, RCW 4.84.250 requires that party be defined as prevailing under RCW 4.84.260 or RCW 4.84.270. The private agreement of *Koncicky* may have defined prevailing party differently, but the intent of the parties to the contract in *Koncicky* should not be used to change the language as laid out in RCW 4.84.260.

A prevailing party under the legislature must make an appropriate offer under RCW 4.84.280 and meet or beat that offer. RCW 4.84.260. Not making that offer, and prevailing under a “private agreement” that apparently the *Koncicky* parties agreed with, but the current parties did not, does not change the statute. *Koncicky* is irrelevant to this matter.

4. No judgment for damages was issued here, and that is still a

bar to recovery

There is no doubt that an interpleader action is equitable in nature. *Smith v. Dement Bros. Co.*, 100 Wash. 139, 147, 170 P. 555, 557 (1918). It is not an action for damages, although damages can be pled in the case and further decided. *City of Seattle v. Turner*, 29 Wash. 515, 526, 69 P. 1083, 1087 (1902). It is without dispute that no judgment for “damages” was entered here, but rather the only order was the equitable decision of who owned the \$3,000.

Defendant Sawyers misunderstands the importance of a “judgment for damages.” While it is true there is a final ruling from the trial court, this is not a damages judgment against Defendant Dullanty. Instead it is a court order directing the clerk to pay \$3,000 out to Defendant Sawyers. CP 363. Had the trial court entered a judgment against Defendant Dullanty, this would be an action for damages. No judgment for damages is the problematic item, not whether or not a decision was final on the merits.

Since the filing of Appellant’s opening brief the case of *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 391, 325 P.3d 904, 905 (2014) was distinguished by the appellate case of *Elliott Bay Adjustment Co., Inc. v. Dacumos*, 75215-4-I, 2017 WL 3587374, at *2 (Wash. Ct. App. Aug. 21, 2017). In light of *Dacumos*, the fact there was

no final judgment against Defendant Dullanty prior to the attorney fee entry is a little more ambiguous. However, the point still remains, the judgment entered by the trial court is an equitable one telling the clerk of the court what to do, and not one that Defendant Dullanty must pay damages. That is crucial to this matter, and RCW 4.84.250. Fees should not be awarded on that basis alone.

Defendant Sawyers provide no substantive analysis that allows this to be an action for damages to which RCW 4.84.250 applies, and that they were the prevailing party as defined by the statute. This case was one that sat in equity as an interpleader action, and Defendant Sawyers should have pled damages less than \$10,000 if they wanted RCW 4.84.250 to apply.

B. Procedural issues response

Defendant Sawyers have raised three procedural issues of why this Court should not hear the arguments raised by Defendant Dullanty. These are (1) that Defendant Dullanty did not raise certain issues at the trial court, (2) that not challenging the trial court's findings of fact prohibits certain arguments, and (3) that using the term "damages" in the trial briefs admitted that damages were being sought by Defendant Sawyers. Each of these is incorrect, and will be rebutted accordingly.

1. Defendant Dullanty did raise the issues of damages, prevailing party, and no final judgment below the trial court

Defendant Dullanty did raise these issues to the trial court. Unfortunately for the trial court, most of the briefing focused around contract attorney fees because until Defendant Sawyers' summary judgment reply brief, the contract was the only legal basis raised by Defendant Sawyer. Because of this, several of these issues were briefed as well as they could have been had the RCW 4.84.250 been on the front of this litigation. However, the briefing will show that (a) Defendant Dullanty did raise the issue of damages as it related here, (b) Defendant Dullanty and the trial court raised the issue of prevailing party, and (c) the issue of the entry of a judgment was always prevalent since that went back to the ultimate problem of why RCW 4.84.250 was even applicable.

a. Defendant Dullanty did raise the issue of damages to the trial court

"In the instant interpleader complaint there is no action for damages. No damages were sought in the complaint itself." CP 339. This sentence alone shows the issue was before the trial court. However, the context of the litigation will show that Defendant Sawyers did not push

this issue to be well briefed, and instead the whole confusion of the litigation ultimately revolved around the issue of trying to apply the equitable proceedings of interpleader to a statute that only allowed fees on damages.

Defendant Sawyers raised the issue of the application of RCW 4.84.250 for the first time in the reply brief for summary judgment. CP 270-271. Since rules did not allow Defendant Dullanty to respond to the reply brief, Defendant Dullanty could not raise the issue of damages due to RCW 4.84.250, versus contract damages that were responded to. See *White v. Kent Med. Center., supra.*

After the summary judgment hearing that orally granted Defendant Sawyers relief, Defendant Sawyers put in a motion for attorney fees. CP 266-275. Defendant Sawyers requested relief based on both the contract and RCW 4.84.250. CP 269-272. Defendant Sawyers' trial court brief speaks a fair amount about notice that amount of the interpleader action was under \$10,000 and that Defendant Sawyers was seeking attorney fees, but does not address the issue of whether or not this was an "action for damages."

Defendant Dullanty's first response on RCW 4.84.250 was in this motion. In that response Defendant Dullanty stated that fees were not awardable under RCW 4.84.250, in particular because there was no

answer by Defendant Sawyers and had an answer been filed then the damages sought could exceed the minimal requirement of RCW 4.84.250. CP 337-339. While not articulating it the same as this appeal, that the interpleader was an action for equity that did not raise damages, Defendant Dullanty did raise the issue that the complaint, which was the basis of this action, did not raise an issue of damages. CP 339. Defendant Dullanty also raised the fact that RCW 4.84.250 has never been applied to interpleader actions, which in essence raises the issue of this being a claim for “damages” as shown in the opening brief. CP 396. It is clear that the issue of damages was raised.

b. The issue of whether or not Defendant Sawyers were the prevailing party was before the lower court

The evidence is clear that the trial court itself was concerned about how to define a “prevailing party” under the statute. CP 370. In particular, the trial court wanted to apply RCW 4.84.270 to find out if Defendant Sawyers was the prevailing party, but wanted briefing on whether or not this could be applied “defendant to defendant.” *Id.*

In response to the trial court Defendant Sawyers claimed to be the prevailing party under RCW 4.84.260 since they were a “party seeking relief.” CP 382-385. RCW 4.84.260 requires a offer be made under RCW

4.84.280 and the recovery be as much or more than that offer. Prior to this, Defendant Dullanty had maintained the March 21, 2016 e-mail was not a proper offer under RCW 4.84.280. CP 339. Defendant Dullanty raised this issue again of in her memorandum to the trial court. CP 397. This shows the issue of prevailing party were raised to the trial court.

c. The issue of judgment was raised before the trial court

While not framed as an issue of the “judgment entered” like it is framed here, the issue of the judgment was raised to the trial court in Defendant Dullanty’s response to the trial court’s question on the prevailing party. Defendant Dullanty raised the issue when it cited the *AllianceOne Receivables Mgmt., Inc. v. Lewis* case, which was the whole basis of the “judgment for damages” issue raised in the opening brief. CP 396.

All three issues raised in Defendant Dullanty’s opening brief were raised before the trial court.

2. Findings of fact- Whether or not they were properly stated and challenged.

A party does not have to cite a finding of fact or challenge it if it is mislabeled and is actually a conclusion of law. *Kane v. Klos*, 50 Wn.2d

778, 788, 314 P.2d 672, 679 (1957). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45, 49 (1986). This matter is reviewed de novo, so any findings of fact are irrelevant to this matter. *Kathryn Learner Family Tr.*, 183 Wn. App. at 498.

Finding of fact 19, which talks of notice, is clearly a conclusion of law. As shown in the *Target* case, where the trial court found no notice, the application of legal principles to find notice is a conclusion of law, and is reviewed de novo. *Target Nat. Bank*, 180 Wn. App. at 172-173.

Along with this, assigning error to a finding of fact when the issue is reviewed de novo would be a waste of and effort. Defendant Dullanty asks this Court not to require a useless act, when this court is reviewing the basis to award attorney fees, which is clearly de novo. *Kathryn Learner Family Tr.*, 183 Wn. App. at 498.

3. Defendant Dullanty is not estopped by “judicial admissions” in the pleadings.

Defendant Sawyers argues that Defendant Dullanty’s use of the term “damages” in a previous brief was a judicial admission that \$3,000 was damages. This is the wrong application of the judicial admission doctrine, as well as a misinterpretation of Defendant Dullanty’s argument

to the trial court.

Defendant Sawyers argue a federal procedure application of the judicial estoppel doctrine which is not based on Washington law. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Under federal procedure statements in a complaint, answer or pretrial order are judicial admissions. However, if the statement is made in a brief, then the trial court may choose to apply judicial admissions depending on how the statement was made. In particular, inadvertent facts in a summary judgment brief are not judicial admissions. Under federal rules of procedure a statement in a brief may be a judicial admission, but only if the court so rules. *Id.*

In Washington the rule is that pleadings such as a complaint, answer, by which a party goes to trial are “judicial admissions.” *Smith v. Saulsberry*, 157 Wash. 270, 275, 288 P. 927, 930 (1930). Judicial admissions are stipulations of the parties, and is an express waiver made with the intention of conceding an alleged fact. *Key Design Inc. v. Moser*, 138 Wn.2d 875, 893, 983 P.2d 653, 664 (1999), amended, 993 P.2d 900 (Wash. 1999), J. Madsen dissent/concurrence, emphasis added. However, a statement by an attorney is only binding on its client if it is distinct and formal, and made for the express purpose of dispensing with the formal proof of some fact at trial. *Hogenson v. Serv. Armament Co.*, 77 Wn.2d

209, 214, 461 P.2d 311, 314 (1969). It is also questionable whether or not judicial admissions can remove a legal issue, since it is directed at facts and cannot waive certain issues of law. See *Key Design Inc.*, 138 Wn.2d at 884 (Removing the statute of frauds from the doctrine of judicial admissions).

Defendant Dullanty argued that by not putting in an answer, Defendant Sawyers did not define the scope of their claims, including which if any were for damages. CP 337-339. In this argument Defendant Dullanty does state that there was no “action for damages” until the summary judgment motion, and later talks of the buyers seeking something other than damages. CP 338. However, Defendant Dullanty later goes on to state “[i]n the instant interpleader complaint there is no action for damages.” CP 339. Included in this argument is that if Defendant Sawyers were required answer, they could have pled damages that exceeded \$10,000. CP 338. Taken as a whole, Defendant Dullanty’s argument to the trial court was not an intentional and express action to remove the issue of “damages” on RCW 4.84.250 from the issues before the court.

C. Response to Defendant Sawyers’ argument for attorney fees on appeal

Since RCW 4.84.250 should not apply to this matter at all, for the multiple reasons already briefed, Defendant Sawyers should not be allowed attorney fees on appeal. RCW 4.84.290 only applies if RCW 4.84.250 applies.

D. Response on Defendant Dullanty's request for attorney fees for having to fight the contract request

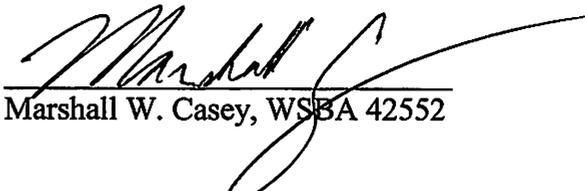
It is clear that the basis for attorney fees under a contract is different than the basis for attorney fees under RCW 4.84.250. See *Target Nat. Bank, supra*. As pointed out, Defendant Sawyers pursued contract attorney fees throughout this case, and the trial court did not award them. It is on that basis that Defendant Dullanty requests attorney fees on appeal.

II. CONCLUSION

Attorney fees are only allowed in limited suits. This is not one of those. Even the trial court acknowledged there were issues applying RCW 4.84.250 to the equitable action of interpleader. Because the statute should not be applied to this matter, Defendant Dullanty asks that it be reverse.

Respectfully submitted this 27th day of September, 2017

M Casey Law, PLLC


Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 27th day of September, 2017, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following court reporter and counsel of record:

<u>Counsel for Defendant:</u> Mr. Swindler 103 E Indiana Avenue, Ste A, Spokane, WA 99207	SENT VIA: <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Eastern WA Attorney Services <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Mr. Balch Layman Law Firm, PLLP; 601 S. Division St. Spokane, WA 99202	<input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Eastern WA Attorney Services <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

Dated this on 27 of September, 2017.


~~Larisa Yukhno - Legal Assistant~~
M CASEY LAW, PLLC

M CASEY LAW

September 27, 2017 - 2:42 PM

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