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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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, an unmarried person,

Defendant Seller, -APPELLANT

and

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

Defendant Buyers- RESPONDENT

APPELLANT'S OPENING BRIEF

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I. Introduction

The trial court improperly awarded attorney fees in this case, by applying RCW 4.84.250, a statute that allowed fees under an action for damages. No party raised any claims for damages, either in tort or in contract. This action starts from the Plaintiff (the escrow agent) pleading into court the earnest money from a purchase and sale agreement. Both the seller (Defendant Dullanty) and the buyers (Defendant Sawyer) were named as defendants in order to resolve the competing claims to the earnest money.

About two months after the matter started Defendant Sawyer sent over a demand that Defendant Dullanty back out of the case, or else Defendant Sawyer would never settle again unless their attorney fees and costs were paid. Defendant Dullanty responded that attorney fees were not allowed under the contract for an interpleader action. Defendant Sawyer did not respond by adding any claims for damages.

Defendant Sawyer then moved for summary judgment, solely requesting relief two items for relief (1) that the earnest money Defendant Sawyer paid be returned to them, and (2) attorney fees based upon the contract. Defendant Dullanty put in answer requesting that the earnest money belonged to her because Defendant Sawyer had failed to complete

the purchase without a legally justifiable excuse. Neither party raised any claims against the other, and all parties merely disputed the ownership of the earnest money. Instead, Defendant Sawyers only requested their earnest money payment back, and as *In re 1992 Honda Accord*, 117 Wn. App. 510, 523, 71 P.3d 226, 233 (2003) states, this is not a request for damages relief.

Defendant Sawyers raised RCW 4.84.250-280 (hereafter, “Small Damages Fee Statute”) for the first time in its summary judgment reply. This reply maintained the previous request on contract, but added equitable claims as a basis for attorney fees along with the Small Damages Fee Statute.

The trial court determined the ownership of the earnest money at summary judgment, directing the clerk of the court to pay the earnest money to Defendant Sawyer. The trial court reserved the question of attorney fees, asking for additional briefing on whether or not attorney fees could be awarded in a “defendant” versus “defendant” action such as interpleader under the Small Damages Fee Statute. Following the briefing, the trial court awarded Defendant Sawyer their attorney fees as a judgment against Defendant Dullanty solely based on the Small Damages Fee Statute. This judgment contains no other relief against Defendant Dullanty than attorney fees and costs.

A court can only award attorney fees when private agreement, a statute, or a recognized ground of equity authorizes those fees. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 173, 321 P.3d 1215, 1219 (2014). However, the Small Damages Fee Statute only applies to “an action for damages where the prevailing party has pled an action for damages under [\$10,000].” RCW 4.85.250.

This brief will show that the trial court abused its discretion by awarding fees under the Small Damages Fee Statute because (1) no one requested relief of damages, (2) the trial court erred in finding that Defendant Sawyer was a prevailing party under RCW 4.84.260, and (3) the trial court erred in finding Defendant Dullanty had notice of Small Damages Fee Statute. Because of these errors the award of attorney fees should be overturned.

Defendant Dullanty believes the basis for the trial court’s summary judgment could have been appealed. Defendant Dullanty had maintained that Defendant Sawyer had continued to communicate that Defendant Dullanty should move out by December 11, 2015 and Defendant Dullanty did this based on Defendant Sawyer’s communications. Defendant Sawyer should have communicated intent to not perform prior to the closing date of November 30, 2015 in order to have that right to not perform. The trial court however ruled that when a wind storm destroyed

Defendant Dullanty's home, this breached the contract and justified the Defendant Sawyer backing out of the purchase after the closing date; thus the earnest money was to be returned to Defendant Sawyer. Defendant Dullanty has not raised the ownership of earnest money on appeal because that issue pales in relationship to the improperly imposed \$36,310.75 judgment. Defendant Dullanty wants the improper attorney fees judgment to be the sole focus of this appeal

II. Assignment of Error

- A. The trial court erred by applying The Small Damages Fee Statute to this case since no party requested any relief for damages. CP 409
- B. The trial court erred (both a misapplication of law and not based on sufficient facts) to determine that Defendant Sawyers were the prevailing under RCW 4.84.250 for attorney fees.

1. No judgment for damages (outside the final one for attorney fees only which is not allowed under statute to count as damages) was ever entered against Defendant Dullanty, and “[w]ithout an entry of judgment by the court, there is no recovery and there can be no prevailing party under RCW 4.84.250 and .270.” *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904, 908 (2014); See Conclusions of Law 1, 3. CP 421-422.

2. Even if the earnest money could be found as damages Defendant Sawyer could not be a prevailing party since they made no offer of settlement under RCW 4.84.260, which Defendant Sawyer claimed to be the prevailing party as a “party claiming relief.” See Conclusions of Law 1, 3. CP 421-422.

C. The trial court erred (both a misapplication of law and not based on sufficient facts) when it found that Defendant Dullanty had notice that she would be liable for attorney fees and costs under RCW 4.84.250. See Conclusions of Law 2. CP 421.

III. Statement of the Case

A. Substantive Facts of this matter

Defendant Sawyer offered to purchase Defendant Dullanty’s home, and Defendant Dullanty accepted. CP 6. The purchase and sale agreement provided that Defendant Sawyer pay \$3,000 earnest money to either the Defendant Dullanty’s Broker or the Closing Agent. CP 7. This earnest money was provided to the Plaintiff, T&B Washington, Inc. CP 4.

The purchase and sale agreement provided that if there were conflicting claims to the earnest money then it was to be pled into court as an interpleader action. CP 7, paragraph **b**. If either party failed to authorize the release of the earnest money when they were required to do

so, then that party is in breach of the agreement. *Id.*

The purchase and sale agreement also provided that the seller could keep the earnest money as a remedy for a default, seek an action for actual damages, bring suit for specific performance, or pursue any other rights or remedies available at law. CP 9, paragraph **p ii**.

The house was supposed to close on November 30, 2015. CP 6. There was an agreement for Ms. Dullanty to retain possession for 12 days after the closing date. CP 24.

On November 11, 2015 the home received a satisfactory home inspection. CP 42, paragraph 5. On November 17, 2015 a storm partly destroyed the home and Defendant Dullanty had to move into a hotel for eight days. CP 135; CP 418. Following this the insurance company agreed to fix some of the issues, but were giving push back on fixing foundational issues and wanted another inspection, but would not give a time frame for this. CP 44, paragraph 11.

Defendant Dullanty packed up her home and prepared to move out by December 11, 2015, which was right before the end of 12 days from closing allowed by the extension. CP 136. On December 10, 2015 Defendant Sawyer gave notice that they wished to rescind the purchase and sale agreement. CP 48. Defendant Sawyer's broker stated:

The Sawyers really liked the house and if the storm hadn't happened I know we would have made it to close. The Dullantys were great to work with but we felt that it was going to be an uphill battle with the insurance company. The foundation on the north end of the house was defiantly damaged from the storm and the Sawyers insurance company was unwilling to insure the house with the large tree on the north end of the house still there. CP- 134.

Following this both parties disputed the disbursal of the earnest money. Defendant Sawyers requested rescission with the earnest money returned to Defendant Sawyers, and Defendant Dullanty agreed with the rescission but requested earnest money be paid to Defendant Dullanty. CP 48; 98. Following this the Plaintiff, as holder of the earnest money, the Plaintiff, pled this matter into Spokane County Superior Court as an interpleader action. CP 1-5

B. Procedural Facts

This action was started as an interpleader under CR 22, with money deposited with the court pursuant to RCW 4.08.170, which statute specifically only applies to actions commenced under RCW 4.08.160. CP 2, paragraph 4. This action was contemplated by the purchase and sales contract in paragraph **b**. CP 7. The contract also adopts RCW 64.04, of which, RCW 64.04.220 specifically addresses how to handle earnest money, and allows for attorneys fees to the plaintiff in such action but

makes no such provision for the defendants to the action. CP 7, paragraph **b**; RCW 64.04.220(9). The summons issued by the plaintiff is the summons authorized by RCW 64.04.220(10). CP 1-2.

The relief sought by the Plaintiff was:

- That the Court adjudicate who is entitled to the earnest money.
- That the Court award Plaintiff its reasonable attorney fees and costs.

CP 4.

On March 21, 2016 Defendant Sawyers' counsel sent Defendant Dullanty's counsel an e-mail on settlement. The relevant part on attorney fees reads:

If my clients have to defend the interpleader action to obtain refund of the earnest money deposit, they will request attorney fees and costs, and the court will award those fees and costs when my client prevails. Your client can avoid these fees if you will agree to stipulate to an Order in which the court directs the clerk to deliver the interpleaded amount to the Buyer. I will wait two days for your reply. If I do not hear from you by Wednesday, March 23, 2016, my clients will proceed to answer the Complaint, and, in that event, the only way my clients will agree to settle this matter without going to court will be if your client pays the attorney fees and costs they have incurred in this matter.- CP 126, last paragraph.

Following the commencement of the action, Defendant Sawyer and the Plaintiff stipulated to the assignment of a judge in this matter CP

26-27. Following this assignment of a judge, Defendant Sawyer did not answer the complaint, but instead instigated a summary judgment action requesting the following relief:

- Directs the Clerk of the Court to disburse the \$3,000.00 deposited into the registry of the Court by Plaintiff to Defendant Sawyer.
- Awards Defendant Sawyer its reasonable attorney's fees and expenses incurred in the action.

CP 101-102.

In the summary judgment memorandum the requested attorney fees based solely on the contract language “[I]f Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorneys' fees and expenses.” CP 70. In response Defendant Dullanty pointed out the contract language only allowed for attorney fees if the “Buyer or Seller institutes suit,” and since neither party instituted suit the contract did provide for attorney fees. CP 114. Along with this Defendant Sawyer’s rebutted this argument, again only asserting a claim for attorney fees based on the contract. CP 113-115. It was at this time that Defendant Sawyer disclosed to the court the offer e-mail of March 21, 2016 prior to the trial court hearing this matter. CP 123-126.

For the first time in Defendant Sawyer’s summary judgment reply they raised two new bases for attorney fees. These were:

1. The equitable power of the court to punish Defendant Dullanty for “obdurate or obstinate conduct necessitating this legal action” or prolonging this litigation;¹ and
2. The Small Damages Fee Statute under RCW 4.84.250 noting that it applies to “any action for damages” where the amount pled by the prevailing party is less than \$10,000.

CP 197-198.

The trial court heard oral argument on Defendant Sawyers’ summary judgment motion on September 23, 2016. CP 361.

Following the summary judgment hearing Defendant Sawyer entered in a new memorandum for attorney fees under both the Small Damages Fee Statute, and under the contract. CP 266-273. In the response Defendant Dullanty raised the fact that this was not an action for damages under the Small Damages Fee Statute (RCW 4.84.250) and based on Defendant Sawyer filing a lis pendens this was more likely an action for property ownership. CP 336-339.

The trial court entered summary judgment ordering the clerk to disburse the money from the registry to Defendant Sawyers. CP 367. At the entry of summary judgment the trial court reserved the issues of attorney fees, taking them under advisement. CP 369.

¹ While Defendant Sawyers break this into two, they are ultimately the same type of claim of punishment due to a party’s actions so Defendant Dullanty has combined them.

During the time of advisement, the trial court issued a letter to Defendant Sawyer asking them to address the problems with applying the Small Damages Fee Statute to a non-traditional case such as this. CP 370. In particular the trial court showed concern of the Small Damages Fee Statute's application with the following statement:

First, the small claims attorneys' fees cases cited by Defendant Sawyer all involve a traditional plaintiff suing a traditional defendant. They do not involve two defendants who are the subject of an interpleader civil action. The cases support either actual or constructive notice as satisfying the notice requirement when a defendant recovers fees from a plaintiff. Herein, both defendants had notice of the small amount in dispute in several ways, including the interpleader complaint. In *Target National Bank v. Higgins*, 180 Wn. App. 165, 173-74, 180-81 (2014), Division III of the Court of Appeals recognizes that a defendant is not required to make an offer of settlement to be the prevailing party under RCW 4.84.250 and RCW 4.84.270 and recover attorneys' fees. However, what I need is the Sawyers analysis and revised findings and conclusions for why this applies as between two defendants, and not simply a traditional plaintiff and defendant. CP 370.

The trial court asked Defendant Sawyer for briefing on this matter, and allowed Defendant Dullanty to respond. CP 371.

Defendant Sawyer maintained in briefing that under RCW 4.84.260 any party seeking relief may be deemed a prevailing party if they offered that settlement according to RCW 4.84.280. CP 383. Defendant Sawyer maintained they "sought relief in interpleader" in regards to the "conflicting claims" and were therefore the prevailing party. *Id.*

In response Defendant Dullanty pointed out that the court had asked for briefing on RCW 4.84.270, a defendant as a prevailing party. In particular Defendant Dullanty noted that a defendant cannot “non-suit” and avoid the Small Claims Fee Statute like a plaintiff under RCW 4.84.260 may choose to do. CP 395, 397.

Following this briefing the trial court applied the Small Damages Fee Statute to award Defendant Sawyers’ attorney fees, requiring them to be paid by Defendant Dullanty. CP 399-407. A judgment was issued against Defendant Dullanty in the amount of \$36,510.75. CP 408-409. From this judgment Defendant Dullanty entered this appeal. CP 413-414.

IV. Argument

The Small Damages Fee Statute only applies “in any action for damages where the amount pleaded by the prevailing party... exclusive of costs, is [\$10,000] or less.” (A) The basis of an award of attorney fees is to be reviewed de novo. (B) The Small Claims Fee Statute only applies to actions for damages, and there was no action for damages in this matter. (C) Defendant Sawyer was not a “prevailing party” under the three part test for the Small Claims Fee Statute. (D) There was no notice to Defendant Dullanty that the Small Damages Fee Statute applied to this action. Because of these items, Defendant Dullanty asks this Court to

overturn the trial court's ruling to grant attorney fees.

A. Standard of Review

This Court reviews the legal basis for an award of attorney's fees de novo. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 172, 321 P.3d 1215, 1219 (2014). This matter also includes the interpretation of the Small Damages Fee Statute, and interpretation of a statute, including the purpose of the statute, is to be reviewed de novo. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 393, 325 P.3d 904, 906 (2014).

B. Since this is not an action for damages the Small Claims Fee Statute does not apply

The Small Damages Fee Statute is clear that it applies only to “actions for damages where the amount pled by the prevailing party” is less than \$10,000. RCW 4.84.250. (1) The case law has refused to apply the Small Damages Fee Statute to decisions on the ownership of property or money, unless a party also asks for a separate and additional claim for damages. (2) The evidence in this action will show that (a) there were no pleadings requesting damages against any party, (b) under the contract the action for the return of the escrow money under interpleader is a different

action from one for damages, and (c) Defendant Sawyer never pled a claim for damages, nor did Defendant Sawyer plead relief for damages against Defendant Dullanty.

1. The Small Damages Fee Statute cannot apply to a request for money back, or for property unless there is a further claim for damages

The plain language of RCW 4.84.250 applies it to “any action for damages.” The term “damages” here was analyzed by *Davy v. Moss*, 19 Wn. App. 32, 34, 573 P.2d 826, 827 (1978). The *Davy* court looked to Am.Jur to find the term damages was defined as:

the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a *wrong sustained* as a consequence either of a breach of a contractual obligation or a tortious act.

Id., underlining emphasis added.

An interpleader action is not an action for damages, but is rather equitable in nature that alone, without other claims does not allow for an action of damages. *Kobza v. Tripp*, 105 Wn. App. 90, 95-96, 18 P.3d 621, 623-624 (2001); *Smith v. Dement Bros. Co.*, 100 Wash. 139, 147, 170 P. 555, 557 (1918). It is designed to determine the superior right to funds or property pled into the court. *Id.* at 144; RCW 4.08.160. Similar to

interpleader's equitable action, our courts have held that that when the sole relief requested is to determine property ownership in a quiet title action, the trial court lacks authority to even award damages without a separate request and claim for damages relief. *Kobza*, 105 Wn. App. at 95-96. These rulings show that a pure interpleader action, without some other request for relief cannot be an action for damages under the Small Damages Fee Statute.

It has also been found that merely requesting money back is not an action for damages. *In re 1992 Honda Accord*, 117 Wn. App. 510, 523, 71 P.3d 226, 233 (2003). The plaintiff in the *1992 Honda Accord* case asked solely for a return of fees he had paid on impound. Because the plaintiff did not also request relief for damages, the court found that the plaintiff did not "file an action for damages." *Id.* at 523. While the failure to make an offer was also fatal to the plaintiff's request under the Small Damages Fee statute, it is a perquisite to a case being on damages that a party request compensation for harm done, rather than just money back. *Id.*, citations omitted, ("As the City aptly notes, Mr. Becerra did not file an action for damages. Rather, he contested the impoundment of his vehicle and requested refund of the fees incurred in connection with that action.")

This distinction between damages, and return of money for the application of the Small Damages Fee Statute is highlighted in two cases

below that do allow for attorney fees because they contain both a request for the ownership of property and separate claims for damages. In both these cases part of the dispute is for property or money ownership that would exceed the Small Damages Fees Statute, but each case also contains a separate damages claim that is less than \$10,000. The courts look solely at the damages requests to apply the Small Damages Fees Statute.

In the case of *Lay v. Hass*, 112 Wn. App. 818, 821, 51 P.3d 130, 132 (2002) the plaintiff brought both a quiet title action and an action for damages. The trial court decided the issue in the favor of the plaintiff; awarding the property plus \$433 in damages to property. Without considering the value of the property that was quiet titled, and solely on the \$433 in damages the trial court applied the Small Damages Fee Statute. *Id.* at 822-823. The appellate court upheld the award of fees, finding that the defendant was aware of the small damages claimed. *Id.* at 825. Key to *Lay* is that it relied on *Kobza, supra*, to determine that the quiet title and interest in land was a separate request than one for damages that satisfied the Small Damages Fee Statute. *Lay*, 112 Wn. App. at 825.

In *Tosh* one of the parties requested the return of \$137,000 to them against another party. *In re Estate of Tosh*, 83 Wn. App. 158, 166, 920 P.2d 1230, 1234 (1996). Along with this one of the parties brought a damages complaint of conspiracy against a third party defendant that was

apparently under \$10,000. *Id.* at 164. The *Tosh* court determined the application of the Small Damages Fee Statute by solely looking at the amount of damages claimed against the third party, and did not consider any of the requested return of money by a different party against another. *Id.*

All these cases show that when a court applies the Small Damages Fee Statute, it does so by solely looking at claims for “damages.” Claims for the settlement of property, or return of money are not damages. This is further shown by the fact that asking a court to determine the ownership of \$3,000, that is in the hands of the court clerk, is not recompense for an injury or wrong done, live *Davy* defines. Instead it is an equitable decision on the ownership of that particular money, and has been since *Smith* in 1918.

2. The facts show that the trial court misapplied the law and had no basis in fact to find that there was a request for relief of damages

There are no facts that support this being an action for damages under the case law and statute. (a) The Plaintiff never pled an action for damages, and no defendant brought a cross claim for damages against the other defendant. (b) Along with this, the contract of the parties

distinguishes between an interpleader action and an action for damages.

(c) Defendant Sawyer could have raised a claim for damages if they believed Defendant Dullanty had wrongfully withheld consent to return the \$3,000, but Defendant Sawyer chose not to do this.

a. Under the pleadings this is not an action for damages

The pleadings in this case consist of a summons and complaint by the plaintiff, an answer by Defendant Dullanty, and a summary judgment motion by Defendant Sawyer. In none of these pleadings does anyone request damages relief against any other party.

The sole basis of the complaint is that Defendant Dullanty and Defendant Sawyer both have conflicting “claims to the money.” CP 4, paragraph 3. The Plaintiff in this action disclaims its interest in the earnest money, and requests the court to “adjudicate who is entitled to the earnest money.” CP 4, request for relief 1. This action further pleads in RCW 4.08.170, which is solely based on a conflict of property claims under RCW 4.08.160. CP 4, paragraph 5; RCW 4.08.170. RCW 4.08.160 and RCW 4.08.170 by themselves have no provision for a judgment or any right beyond the assertion of a claim upon the particular property money or funds interpled. *City of Seattle v. Turner*, 29 Wash. 515, 526, 69 P. 1083, 1087 (1902)

The Plaintiff's summons is similar in nature. The notice of the summons is "[i]n order to protect any right you have in the money described in the Complaint, you must file a response to the Complaint and serve a copy of your response on the other Defendant..." CP 1. In contrast, an action for damages under CR 4 warns that a "default judgment" may be entered if the defendant does not answer the complaint.

Under CR 8(a) the complaint must contain the requested relief. *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 304–05, 492 P.2d 596, 599 (1972)(Denying relief to a bond partially because that relief was not requested in the complaint). If a party fails to raise a request for relief, and thus does not put the other side on notice of such requested relief then the party cannot get the relief. *Id.*

Despite being an interpleader action, any party could have claimed an action for damages against another by cross-claim. A party is allowed to claim additional relief of cross-claims and relief for damages when they are part of an interpleader action. CR 13, 18. CR 22 supplements joinder rather than limiting it. While RCW 4.08.160 does not provide for relief beyond the claimed property, it does not stop a party from pleading in damages relief allowed by the civil rules that is beyond the statute. *Turner*, 29 Wash. at 526.

The pleadings show that at no time did either of the defendants

cross-claim relief against the other party. In Defendant Dullanty's answer she requested no relief against Defendant Sawyer, and specifically raised no cross-claim for damages. CP 139-140. Likewise, Defendant Sawyer claims no relief for damages in its summary judgment motion, but solely requests the court disburse the money to them. CP 101.²

All the pleadings and relief requested is for the trial court to decide who is the owner of the \$3,000. No party asks for "damages." Since no pleadings asked for damages, the trial court either made this ruling without sufficient evidence of "an action for damages," or misapplied the law to make this an action for damages.

b. Under the contract this was not an action for damages

Not only do the pleadings fail to make this an "action for damages," the contract and intention of the parties shows an interpleader alone is not an action for damages. The purchase and sales contract anticipates two types of actions, one for the ownership of earnest the money and a separate one for damages. The action for the ownership of earnest money is contained in paragraph **b** of the contract; whereas an action for damages is contained in paragraph **p** of the contract. CP 7; 9.

² Defendant Dullanty ignores the requested relief for attorney fees here since that could not be damages under the statute. RCW 4.84.050 says "exclusive of costs."

The action for the ownership of earnest money, in hands of the closing agent works as follows:

- The closing agent delivers a form to each party releasing the earnest money to the other buyer;
- If a party refuses to sign the release then the a party may make a written demand to the closing agent;
- If the party refusing to sign the release objects to that release then the closing agent shall start an interpleader action to decide the ownership of the property;

CP 7, lines 20- 33.

Section b does give one possible action for damages under breach of contract if one party fails to authorize the release of earnest money when they are required to do so. CP 7. (“If either party fails to authorize the release of the Earnest Money to the other party when required to do so under this Agreement, that party shall be in breach of this Agreement.”) However, this appears to be a separate claim authorized under section b that is beyond the earnest money interpleader action.

In direct contrast to the action for ownership of earnest money, the contract allows the seller to bring an action for damages. Paragraph p ii gives the Seller, here Defendant Dullanty, the right to accept the earnest money as liquidated damages, bring suit against the buyer for actual

damages, bring suit for specific performance, or any other remedy at law or equity. CP 9, lines 163-166.

The Small Claims Fee Statute is clear that it only applies to an action for damages. It is clear that the contract authorized one action for the ownership of the money in paragraph **b**, and a separate action for damages in paragraph **p**. This action was done under the contract paragraph **b**, and not under an action for damages under paragraph **p**. Because this was not an action for damages under the contract it is the Small Damages Fee Statute cannot apply.

c. Defendant Sawyer specifically chose not to raise an action for damages under the Small Claims Fee Statute

One of the issues raised by the trial court was that the case law did not address the application of the Small Damages Fee Statute to “two defendants who are subject to an interpleader action.” CP 370. The reason this raises a logical issue to the application of the Small Damages Fee Statute here is that Defendant Sawyer could have raised a claim for damages. Defendant Sawyer chose not to raise claims for damages, but still asked the trial court to apply the Small Damages Fee Statute.

As pointed out above, Defendant Sawyer could have asked the court to find breach of contract for Defendant Dullanty failing to authorize

the return of the earnest money when Defendant Dullanty was required to do so. CP 7. CR 13 allowed for the joinder of this cross-claim had Defendant Sawyer chosen to answer the complaint and plead damages. Instead Defendant Sawyer avoided any such cross-claim for damages.

Not only is purposefully not pleading damages fatal to Defendant Sawyer's request for the Small Damages Fee Statute's application, but it is also inequitable. By not pleading damages, Defendant Sawyer was not putting themselves at risk for the Small Damages Fee Statute if Defendant Sawyer, now as a plaintiff for damages, failed to prevail on the damages claim. This failure to plead any damages, and then asking the trial court to award fees for damages that were neither pled nor awarded makes Defendant Sawyer's claim for damages untenable. Defendant Sawyer could have pled damages, and then the court would have no question of the application of the Small Damages Fees Statute, instead Defendant Sawyer asked the trial court to award fees based on a dispute of ownership without damages. Because there was no pleading of damages, this is fatal to Defendant Sawyer being awarded attorney fees under the Small Damages Fee Statute.

C. Defendant Sawyer was not a prevailing party under the

Small Damages Fee Statute and it was abuse of discretion to so find

In order to be a prevailing party the party must show “(1) the damages sought were equal to or less than \$10,000, (2) he[/she] was deemed the prevailing party, and (3) there was an entry of judgment.” *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 398, 325 P.3d 904, 909 (2014). Defendant Sawyer claimed to be the prevailing party based on the fact they requested relief and were therefore the prevailing party under RCW 4.84.260. Defendant Sawyer cannot be a prevailing party because (1) they never requested relief for damages as discussed above, (2) they never made an appropriate offer under RCW 4.84.280 as they were required to do, and (3) no judgment was entered against Defendant Dullanty for damages.

1. Defendant Sawyers never requested relief for damages

Defendant Sawyers claimed to be the prevailing party by relying on RCW 4.84.260. CP 383. This statute allows a plaintiff, or party claiming relief, to be a prevailing party if they meet or beat a settlement offer made under RCW 4.84.280. The first problem with Defendant Sawyers claiming to be prevailing based on their claim of relief is that, as discussed previously, Defendant Sawyer never sought relief for damages.

Since RCW 4.84.260 is specifically for a party seeking relief, rather than a party resisting relief like RCW 4.84.270, the party seeking relief must be the one seeking damages under RCW 4.84.250. Without such a requirement, any party requesting equitable relief is entitled to Small Damages Fee Statute attorney fees, regardless of it only applying to “any action for damages.” Because Defendant Sawyers did not seek damages relief, they are not a party seeking relief under RCW 4.84.260.

This is best highlighted by the Defendant Sawyer’s own brief starting on page 2, line 17. CP 383. In that paragraph Defendant Sawyer acknowledges that their request for relief is solely based on the “interpleader complaint” for the conflicting claims to the earnest money. The sole relief Defendant Sawyer seeks is “by claiming the earnest money.” As discussed previously, this is a claim of equity for the court to decide the ownership of property. At best it is similar to the *In re 1992 Honda Accord, supra*, case where the plaintiff asked for his own money back but no more. Just like *In re 1992 Honda Accord* was not a case for damages, so to Defendant Sawyer has asked for money it paid to be given back and no more. This is not evidence of requested relief for damages.

2. Defendant Sawyers never made an appropriate offer under RCW 4.84.280

In order to prevail under RCW 4.84.260 a party must make a request for settlement and beat that settlement request. *Filipino Am. League v. Carino*, 183 Wn. App. 122, 129, 332 P.3d 1150, 1153 (2014). The sole “offer” of settlement in the record is the March 21, 2016 e-mail. CP 126. While this “offer” has multiple equity problems, including the fact that it is only open for 2 days, it fails to be an offer of settlement under RCW 4.84.280.

This March 21, 2015 e-mail violates RCW 4.84.280 on two main bases. First, it was made before Defendant Sawyer requested any relief. The statute requires this offer to be made after 30 days of the summons and complaint being served on the opposing party. While technically the summons and complaint were served here, that was for relief claimed by a wholly different party and not a request for damages. As of March 21, 2015 Defendant Sawyer had filed no pleadings and requested no relief that made them a plaintiff or party seeking relief under RCW 4.84.260. Thus, they could not make any offer of settlement under RCW 4.84.280.

Equally important in making the March 21, 2015 e-mail not an offer is that Defendant Sawyer violated RCW 4.84.280 by disclosing it to the trial court before the judgment. *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426, 432 (2000). The record shows that Defendant Sawyer filed the March 21, 2015 e-mail with the court on September 6, 2016. CP

116-126. However the trial court did hear the summary judgment issue until September 23, 2016, did not enter the order until October 20, 2016. CP 365; 369. No judgment was entered until much later. However one interprets “[o]ffers of settlement shall not be filed or communicated to the trier of the fact until after judgment,” this was clearly violated here. This makes the March 21, 2016 e-mail not an offer under RCW 4.84.280. Since no other “offer” is in the record, it was an abuse of discretion to find Defendant Sawyer a prevailing party under RCW 4.84.260.

3. No judgment was entered against Defendant

Dullanty for damages

An award of attorneys' fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding, and can therefore be done after an entry of a judgment. *Condon v. Condon*, 177 Wn.2d 150, 158, 298 P.3d 86, 90 (2013). In this action the sole judgment or award against Defendant Dullanty is one for attorney fees and costs. CP 367; 406.

“Only after the judgment can a court assess whether the plaintiff or defendant meets the definition of a ‘prevailing party’ by examining a recovery after judgment and comparing it to settlement offers.” *Lewis*, 180 Wn.2d at 395. Recovery can only be determined in relation to a

“final judgment.” *Id.* at 396. Under the statute recovery cannot be the judgment of attorney fees and costs. RCW 4.84.250, 260. One of the reasons for the final judgment requirement is because “the adversarial system is designed to allow a plaintiff the discretion to file a meritorious claim, conduct discovery, and then decide if the claim is worth taking to trial.” *Lewis*, 180 Wn.2d at 397.

Prior to December 15, 2016 the trial court had solely made an order disposing of money that was never in the hands of Defendant Dullanty. CP 367. Defendant Dullanty was named as a possible owner with rights to the money, and as such could not dismiss the case like the plaintiff in *Lewis* could. Defendant Dullanty also could not offer to settle with an offer of judgment as provided by the court rules under CR 68 (see RCW 4.84.270), since no claims for damages were directly against her.

In this situation there was no “final judgment” against Defendant Dullanty on December 15, 2016 when the court determined that Defendant Sawyer was a prevailing party. The sole order was for the clerk of the court to disperse money to Defendant Sawyer based on Defendant Sawyers claims solely against the Plaintiff. While this may seem technical in nature, this is the ultimate problem of the trial court using the Small Damages Fee Statute in this matter. Since Defendant Sawyer never claimed damages against Defendant Dullanty, there was no “final

judgment” against Defendant Dullanty upon which to declare Defendant Sawyer the “prevailing party.” Without such damages judgment in the record Defendant Sawyer cannot be a prevailing party.

D. Defendant Dullanty was not on notice that the Small Damages Fee Statute applied in this matter

“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 v. Higgins*, 180 Wn. App. 165, 174, 321 P.3d 1215, 1219–20 (2014). The trial court concluded that Defendant Dullanty was on sufficient notice because of three items, each of which is an error of law because it is a misapplication of the facts to the actual law. CP 404-405.

1. It was an error of law to conclude “[t]he interpleader complaint put [Defendant Dullanty] on notice that RCW 4.84.250 attorney fees would apply. In re Estate of Tosh, 83 Wn. App. 158, 165, 920 P.2d 1230 (1996).”

The interpleader complaint does not put any party on notice of an action for damages under \$10,000 that is required by case law. As addressed above, an interpleader is not an action for damages. The

difference in the action for damages versus a claim for the return of property is actually established in the *Tosh* case cited by this court.

In *Tosh* the court considered several claims of the right to property ownership under a trust, the right to the return of \$137,000, and a claim against one party that was apparently under \$10,000. The *Tosh* court held that because one party (Willis) claimed conspiracy to exert undue influence and damages less than \$10,000 that was sufficient notice to the party making the claim that the Small Damages Fee Statute applied. *Id.* If *Tosh* stood for the proposition that a claim for property ownership against a different party could also be notice of a claim for damages, then the total of that claim would have exceeded \$10,000. In contrast, *Tosh* focused on the amount of the damages claim between the parties attorney fees were award on, and not the \$137,000 property claim also included in the suit.

Since the interpleader complaint in the current matter was solely to decide the ownership of certain property or money, it could not be notice of damages less than \$10,000. The interpleader complaint, not claiming damages, could not be notice of damages less than \$10,000 regardless of the amount.

2. It was an error of law to determine “[t]he Sawyers’ settlement email demand of March 21, 2016, stated they would seek

attorney fees from Mrs. Dullanty if she did not accept their offer.

Target National Bank v. Higgins, 180 Wn.App. 165, 181,321 P .3d 1215 (2014).”

While the e-mail may have claimed Defendant Sawyers would seek attorney fees if they did not settle, it certainly did not provide a basis for such a right to the fees under the Small Damages Fees Statute.

Target stands for the principal that a plaintiff who brings a claim under \$10,000 should be aware that they are subject to RCW 4.84.250 if they lose and the defendant has demanded payment of fees as part of the settlement demand. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 182, 321 P.3d 1215, 1224 (2014). Important to the *Target* decision is the following passage:

[Defendant’s] counsel should have, as a matter of precaution, but did not cite the statute in his settlement demand. Nevertheless, [the plaintiff], as the master of its claim, knew that the suit was limited to \$2,052.37. [The plaintiff] would know that any party will ask for fees under whatever grounds are available and the small claims settlement statute would apply.

Id. at 181, emphasis added.

Important to the equities of the *Target* courts finding of notice for a plaintiff, is that the plaintiff is a master of his/her own claim. A plaintiff has an unfettered right to dismiss their claim under CR 41(a)(1)(B) at any

time prior to resting their case, or for summary judgment at any time prior to oral arguments. If the plaintiff does dismiss the case prior to judgment, the plaintiff will not be liable for attorney fees under RCW 4.84.250. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 399, 325 P.3d 904, 909 (2014).

In direct contrast to the principals in *Target*, that a plaintiff bringing a small claim for damages is on notice of the Small Damages Fee Statute applying, this is not the same for a defendant in solely an interpleader action where our law has not applied the Small Damages Fee Statute unless there is a separate and additional claim for damages. Even the trial court was not sure that the Small Damages Fee Statute should apply here according to its letter out to the parties asking for briefing on applying this to defendants in interpleader. *Target* was based on long precedent of plaintiffs knowing that a defendant will seek fees under the Small Damages Fee Statute.

Since there is no such legal history of applying the Small Damages Fee Statute³ to two defendants in an interpleader action, it was an abuse of discretion to use *Target*, and its long legal history, to apply here. That is neither supported by facts in the record nor is this a proper application of law.

³ Most likely because it violates the “action for damages” as discussed in section B.

3. It was an error of law to determine “[t]he Sawyers’ motion for summary judgment and attorney fees filed on July 27, 2016. *Lay v. Hass*, 112 Wn.App. 818, 824, 51 P.3d 130 (2002)” put Ms. Dullanty on notice.

The *Lay* case specifically contradicts this ruling of law. *Lay* involved both a claim for property ownership and quiet title, and a claim for damages. The notice in *Lay* was that the “[plaintiff] requested damages total[ing] \$433, an amount in controversy less than \$10,000.” *Lay v. Hass*, 112 Wn. App. 818, 825, 51 P.3d 130, 134 (2002), emphasis added.

In contrast, the sole notice here was that Defendant Sawyer was requesting the court to “[d]irect the Clerk of the Court to disburse the \$3,000.00 deposited into the registry of the Court by Plaintiff to Defendant Sawyer.” CP 101-103. This is not notice of requesting damages less than \$10,000. The *Lay* court did not find the determination of the property ownership to be part of the “damages” request, but rather only looked at the amount of damages claimed due to trespass to find notice under RCW 4.84.250. It is an error of law to look solely at the request to determine the ownership of money is notice of a damages claim.

Outside these three errors of law though, Defendant Dullanty was

on no notice that RCW 4.84.250 was applicable to interpleader claims for property ownership under Washington law. In fact even Defendant Sawyer did not assert RCW 4.84.250 in their opening summary judgment or attorney fee requests. CP 70-72; 113-114. It was not until their reply summary judgment pleadings that the Defendant raised the application of the Small Damages Fee Statute. CP 198. If notice of the application of the fee shifting statute, either actual or constructive, is required for due process then none existed here until it was too late. It is obvious that no one, neither the Plaintiff nor either of the Defendants thought the Small Damages Fee Statute could apply until new counsel joined the case. Even then the trial court showed concern by asking for additional briefing since no case law supported this unique application.

Because notice is basic to due process, and this is a matter of first impression there was no notice to Defendant Dullanty that she was subject to the Small Damages Fee Statute. It has never been applied to claims for the ownership of money or property, nor was it even contemplated by the parties until the last minute briefing. The basic due process requirement of common law is missing.

E. Defendant Dullanty actually has the claim for attorney fees per the contract and RCW 4.84.330

Defendant Sawyer relied on the contract from March 21, 2016 to the entry of summary judgment in October as the basis of attorney fees. Defendant Dullanty was forced to litigate this portion of the contract, and eventually won this matter since the court did not find the contract to be a basis of attorney fees. In a case cited by Defendant Sawyer's opening summary judgment brief, mutuality of remedy, the principle underlying RCW 4.84.330, is a well recognized ground of equity that can support an award of attorney fees where a party prevails by establishing that a contract is unenforceable. *Almanza v. Bowen*, 155 Wn. App. 16, 24, 230 P.3d 177, 180 (2010).

Here Defendant Dullanty proved the contract was not an appropriate remedy for fees. As such she is entitled to fees under RCW 4.84.330 and the equitable principles therein. Defendant Dullanty asks for them per RAP 18.1(a),(b).

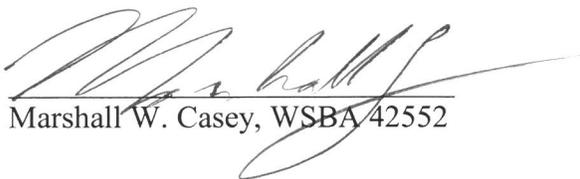
V. Conclusion

The Small Damages Fee Statute can only be applied to actions for damages. The evidence is clear that no party sought damages against any other, and in particular Defendant Sawyer never claimed damages against Defendant Dullanty that allowed Defendant Sawyer to be a prevailing party under the statute. Washington law is clear, unless there is a basis in

the private agreement of the parties, statutes, or equity, each party must bare their own attorney fees. Without a case for damages, RCW 4.84.250 cannot be this basis for attorney fees. Since no one, not even Defendant Sawyer asked for damages, the trial courts application of the Small Damages Fee Statute was in error, and Defendant Dullanty requests it be overturned.

Respectfully submitted this 29 day of June, 2017

M Casey Law, PLLC

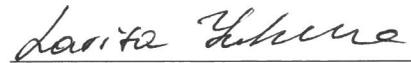

Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 29th day of June, 2017, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsels of record:

<u>Counsel for Defendant:</u> Geoff Swindler Law Office of Geoffrey D. Swindler 103 E. Indiana Ave. Suite A Spokane, WA 99207 (509) 326-7503-Fax gds@swindlerlaw.com-E-mail	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
<u>Counsel for Defendant:</u> Brian Balch Layman Law Firm PLLP 601 S. Division Street Spokane, WA 99202	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

Dated this on 29th of June, 2017.



Larisa Yukhno-Legal Assistant
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