

**FILED**

AUG 25 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 350363  
(SPOKANE COUNTY SUPERIOR COURT NO. 16-2-00428-2)

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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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 - RESPONDENTS

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RESPONDENTS' BRIEF

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LAW OFFICE OF GEOFFREY D. SWINDLER, P.S.  
Geoffrey D. Swindler, WSBA #20176  
103 E. Indiana Ave., Suite A  
Spokane, WA 99207

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT.....	5
A.	ALL FINDINGS OF FACT ARE VERITIES ON APPEAL BECAUSE DULLANTY FAILED TO ASSIGN ERROR TO THEM.....	4
B.	THE COURT OF APPEALS SHOULD NOT CONSIDER THE ISSUES DULLANTY FIRST RAISED ON APPEAL.....	6
	1. The Court should not consider assignment of Error A.....	7
	2. The Court should not consider assignment of Error B.....	9
	3. The Court should not consider assignment of Error B1.....	9
C.	THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES AND COSTS UNDER RCW 4.84.250.....	10
	1. RCW 4.84.250 APPLIES BECAUSE THE SAWYERS SOUGHT DAMAGES.....	10
	2. DULLANTY HAD NOTICE SHE WOULD BE LIABLE FOR ATTORNEY FEES.....	13
	3. THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS UNDER RCW 4.84.250 AS THE PREVAILING PARTY.....	17
	4. THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS UNDER RCW 4.84.250 BASED ON THE ORDER GRANTING SUMMARY JUDGMENT.....	19
D.	THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.....	21
E.	DULLANTY IS NOT ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.....	22
IV.	CONCLUSION.....	22

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>AllianceOne Receivables Management, Inc. v. Lewis</i> , 180 Wn.2d 389, 325 P.3d 904 (2014).....	19, 20
<i>Beckmann v. Spokane Transit Authority</i> , 107 Wash.2d 785, 788-89, 733 P.2d 960 (1987).....	14
<i>Brundridge v. Fluor Fed. Servs., Inc.</i> , 164 Wn.2d 432, 441, 191 P.3d 879 (2008).....	6
<i>Davies v. Holy Family Hosp.</i> , 144 Wn.App. 483, 183 P.3d 283 (2008).....	20
<i>Davy v. Moss</i> , 19 Wn.App. 32, 34, 573 P.2d 826 (1978).....	12
<i>Est. of Rose v. Fritz</i> , 104 Wn.App. 116, 120, 15 P.3d 1062 (2001).....	20
<i>In re 1992 Honda Accord</i> , 117 Wn.App. 510, 71 P.3d 226 (2003).....	12, 13
<i>In re Estate of Tosh</i> , 83 Wn.App. 158, 165, 920 P.2d 1230 (1996).....	14, 15
<i>In re Skylstad</i> , 160 Wn.2d 944, 949, 162 P.3d 413 (2007).....	20
<i>In re Washington Builders Benefit Trust</i> , 173 Wn.App. 34, 65, 293 P.3d 1206 (2013).....	5
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 780, 819 P.2d 370 (1991).....	6
<i>Koncicky v. Sekac</i> , 103 Wn.App. 292, 12 P.3d 645 (2000).....	17, 18
<i>Lay v. Hass</i> , 112 Wn.App. 818, 824, 51 P.3d 130 (2002).....	13, 16, 17, 21
<i>Riss v. Angel</i> , 131 Wn.2d 612, 633, 934 P.2d 669 (1997).....	18
<i>Schmerer v. Darcy</i> , 80 Wn.App. 499, 510, 910 P.2d 498 (1996).....	14
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 37, 666 P.2d 351 (1983).....	7
<i>Target National Bank v. Higgins</i> , 180 Wn.App. 165, 181, 321 P.3d 1215 (2014).....	15
<i>Wallace Real Estate Inv. v. Groves</i> , 124 Wn.2d 881, 884, 881 P.2d 1010 (1994).....	11

**FOREIGN CASES**

*American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226, 227 (9th Cir. 1988).....8

**COURT RULES**

RAP 2.5(a).....6, 7, 11

**WASHINGTON STATUTES**

RCW 4.84.250.....9, 10, 11, 13, 14, 15, 16, 17, 21  
RCW 4.84.260.....19  
RCW 4.84.270.....19  
RCW 4.84.29.....21  
RCW 64.04.005.....11

**OTHER AUTHORITIES**

Black's Law Dictionary, 8th ed. 2004.....20  
2 Kenneth Broun, McCormick on Evidence §254, 181 (6th ed. 2006).....8

## **I. INTRODUCTION**

Appellant Virginia Dullanty (“Dullanty”) breached her contract with Respondents Sawyers (“Sawyers”) when she refused to return their \$3,000.00 earnest money deposit. The Sawyers then notified Dullanty they would seek their attorney fees and costs if she refused to return their money. Dullanty still refused to refund their money.

The Sawyers prevailed on summary judgment. In a subsequent motion, the trial court properly awarded attorney fees and costs to the Sawyers under RCW 4.28.250. The Sawyers request this Court affirm the trial court’s decision and award attorney fees and costs to them on appeal.

## **II. STATEMENT OF THE CASE**

The parties entered into a Residential Real Estate Purchase and Sale Agreement (“Agreement”) on October 15, 2015, in which the Sawyers agreed to buy Dullanty’s home. CP 59. Per the Agreement, the Sawyers deposited \$3,000.00 in earnest money to Dullanty’s broker. CP 59. If a party defaulted, the earnest money was forfeited. CP 6, paragraph 8.

The Agreement provided “Seller shall maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession.” CP 8, paragraph f of Agreement. On November 17, 2015, a wind storm significantly damaged the Dullanty home. CP

59. As the damaged home was not in the same condition as it had been when the Sawyers signed the Agreement, Dullanty breached paragraph f of the Agreement. CP 53-56, 63-64.

After the home was damaged, the Sawyers executed a recession of the Agreement and requested Dullanty release the earnest money to them. Dullanty refused to release the earnest money. CP 55-57.

In refusing to release the earnest money, Dullanty breached the Agreement. The Agreement provided, "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." CP 7, Paragraph b.

Dullanty's refusal to refund the earnest money required the closing agent to file an interpleader on February 2, 2016. CP 3, 7, paragraph b. The interpleader complaint would determine which party breached the Agreement and who was entitled to the earnest money. CP 3-5.

Attempting to resolve the matter short of protracted litigation, on March 21, 2016, the Sawyers requested Dullanty return their \$3,000.00 earnest money to them. CP 126. The Sawyers' request twice clearly warned they would seek attorney fees and costs from Dullanty should she refuse their offer.

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. . . 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.

Dullanty brazenly rejected the offer. “I see no chance of your clients recouping attorney fees.” CP 125.

On July 27, 2016, the Sawyers moved for summary judgment. CP 101-02. The Sawyers’ summary judgment motion argued Dullanty breached paragraph f of the Agreement because she had failed to “maintain the Property in its present condition, normal wear and tear excepted, until the Buyer is entitled to possession.” CP 63, quoting the Agreement.

Their motion also requested the court award attorney fees and costs to them. CP 101-02.

The trial court granted the Sawyers’ motion for summary judgment that Dullanty had breached the Agreement and ordered the Court Clerk to disburse the \$3,000.00 earnest money to the Sawyers. CP 365-67.

Dullanty filed an amended answer on September 30, 2016. CP 252-52. In her amended answer, Dullanty admitted “The only issues in this case involve money.” CP 253. She also requested the court award the \$3,000.00 to her and “her reasonable attorney fees and costs.” CP 253.

After granting the Sawyers’ summary judgment, the trial court requested supplemental briefing on attorney fees. CP 370-01.

The trial court granted the Sawyers’ motion for attorney fees and costs. It entered findings of fact and conclusions of law on December 15, 2016. CP 399-407. The court awarded \$36,046.00 in attorney fees and \$264.75 in costs. The total judgment against Dullanty was \$36,310.75. CP 406.

The findings of fact establish the trial court acted properly in awarding attorney fees and costs. Finding #5 stated “Dullanty breached paragraph f of the Agreement.” CP 401.

Finding #11 states that “On March 21, 2016, the Sawyers made a settlement offer to Mrs. Dullanty to resolve this matter.” CP 401.

Finding of fact #19 establishes that Dullanty had notice she would be liable for attorney fees and costs. It states as follows:

19. Mrs. Dullanty was notified that she may be liable for attorney fees and costs several ways.

- a. The Sawyers' settlement email demand of March 21, 2016, provided notice to Mrs. Dullanty that she would be liable for their attorney fees costs.
- b. The Interpleader stating the amount at issue was \$3,000.00 notified Mrs. Dullanty that she would be liable for the Sawyers' attorney fees and costs.
- c. The Sawyers' motion for summary judgment and attorney fees filed on July 27, 2016, notified Mrs. Dullanty that she would be liable for the Sawyers' attorney fees and costs.
- d. The Agreement provided the earnest money was \$3,000.00.

CP 402-03; see also CP 102, 269-271.

The trial court properly awarded attorney fees and costs to the Sawyers. They request this Court affirm the trial court's ruling and award attorney fees and costs on appeal.

### III. ARGUMENT

#### A. ALL FINDINGS OF FACT ARE VERITIES ON APPEAL BECAUSE DULLANTY FAILED TO ASSIGN ERROR TO THEM.

Dullanty failed to assign error to any findings of fact.

"Unchallenged findings of fact are verities on appeal." *In re Washington Builders Benefit Trust*, 173 Wn.App. 34, 65, 293 P.3d 1206 (2013) (citation omitted).

Dullanty failed to assign error to finding of fact #19, which states

19. Mrs. Dullanty was notified that she may be liable for attorney fees and costs several ways.

- a. The Sawyers' settlement email demand of March 21, 2016, provided notice to Mrs. Dullanty that she would be liable for their attorney fees costs.
- b. The Interpleader stating the amount at issue was \$3,000.00 notified Mrs. Dullanty that she would be liable for the Sawyers' attorney fees and costs.
- c. The Sawyers' motion for summary judgment and attorney fees filed on July 27, 2016, notified Mrs. Dullanty that she would be liable for the Sawyers' attorney fees and costs.
- d. The Agreement provided the earnest money was \$3,000.00.

CP 402-03; see also CP 102, 269-271.

Dullanty failed to assign error to finding of fact #19. Yet her assignment of error C alleges she did not have notice she would be liable for attorney fees and costs. As she neglected to assign error to finding of fact #19, as a matter of law she had notice she would be liable for attorney fees and costs. CP 402-03.

**B. THE COURT OF APPEALS SHOULD NOT  
CONSIDER THE ISSUES DULLANTY FIRST  
RAISED ON APPEAL.**

Appellate courts do not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The court of appeals "will not consider a theory as ground for reversal unless ... the issue was first presented to the trial court." *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (*citations omitted*).

This rule affords the trial court the opportunity to correct errors and avoid unnecessary appeals. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

The Sawyers request this court not consider the following issues raised for the first time on appeal.

**1. The Court should not consider assignment of Error A.**

Assignment of error A states that “The trial court erred by applying The Small Damages Fee Statute for this case since no party requested any relief for damages.” (Dullanty brief, p. 5)

This court should not consider this assignment for two reasons. First, Dullanty failed to raise this issue in the trial court. Her failure to argue this issue at the trial level precludes her from arguing it now. RAP 2.5 (a).

Second, the record actually proves Dullanty admitted the Sawyers were seeking damages. In Dullanty’s memorandum in opposition to attorney fees, she admits the following:

In the instant case, no affirmative pleading was made since there was no answer. Until July 27, 2016 [the date the Sawyers moved for summary judgment and for attorney fees CP101] the only pleading was a notice of appearance. **Thus there was no action for damages by the [Sawyers] until then.** The court waived the requirement for an answer in its September 9, 2016 order. **Without an answer it was not possible to determine if [the Sawyers] were seeking something other than damages.** The lis pendens filed July 20, 2016 suggests that an action affecting

title might be filed. In such event attorney fees under RCW 4.84.250 would be inappropriate as it only applies to damage actions and the amount in controversy would exceed \$10,000.00.

CP 338.

Twice Dullanty admitted in her brief opposing attorney fees the Sawyers sought damages. Her admissions constitute judicial admissions that bind her and establish that the Sawyers sought damages.

Judicial admissions are not evidence.....Rather, they are formal concessions in the pleadings in the case or stipulations by a party or counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case.

2 Kenneth Broun, McCormick on Evidence §254, 181 (6th ed. 2006)

*(footnote omitted)*.

Courts have held admissions in briefing constitute judicial admissions.

For purposes of summary judgment, the courts have treated representations of counsel in a brief as admissions even though not contained in a pleading or affidavit.

...

**We agree and hold that statements of fact contained in a brief may be considered admissions of the party in the discretion of the district court.**

*American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226, 227 (9th Cir.

1988) *(citations omitted)*.

As Dullanty twice admitted the Sawyers sought damages, the court should treat her admissions as judicial admissions on that issue. Therefore, this Court should not consider her assignment of error A.

**2. The Court should not consider assignment of Error B.**

Dullanty's assigned of error B states "The trial court erred (both a misapplication of law and not based on sufficient facts) to determine that Defendant Sawyers were the prevailing party under RCW 4.84.250 for attorney fees." (Dullanty brief, p. 5).

Dullanty failed to make this argument at the trial level. Not even Dullanty's objections to the findings of fact and conclusions of law challenge the fact that the Sawyers were the prevailing party. CP 392-94. Thus, the Court should disregard assignment of error B.

**3. The Court should not consider assignment of Error B1.**

For the first time, on appeal, Dullanty alleges "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." (Dullanty brief, p. 5).

Dullanty's failure at the trial level to argue this issue precludes her assignment of Error B1.

**C. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES AND COSTS UNDER RCW 4.84.250.**

The trial court properly awarded attorney fees under RCW 4.84.250. In part, it provides “in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [ten thousand] 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.”

The Court should dismiss Dullanty’s arguments that RCW 4.84.250 does not apply for several reasons.

**1. RCW 4.84.250 APPLIES BECAUSE THE SAWYERS SOUGHT DAMAGES.**

Dullanty improperly alleges RCW 4.84.250 is inapplicable because the Sawyers did not seek damages. (Dullanty brief, p. 15). Dullanty is wrong for a number of reasons.

First, as established above, in her memorandum opposing attorney fees Dullanty admitted the Sawyers sought damages.

**Thus there was no action for *damages* by the [Sawyers] until then.** The court waived the requirement for an answer in its September 9, 2016 order. **Without an answer it was not possible to determine if [the Sawyers] were seeking something other than damages.**

CP 338.

Second, Dullanty waived the argument the Sawyers did not seek damages because she failed to make it at the trial court. RAP 2.5(a).

Third, the \$3,000.00 earnest money constitutes liquidated damages. RCW 64.04.005 is entitled “Liquidated damages-Earnest money deposit-Exclusive remedy-Definition” and proves earnest money constitutes damages.

RCW 64.04.005 defines “liquidated damages” in real estate transactions as:

“Liquidated damages” means an amount agreed by the parties as the **amount of damages** to be recovered for a breach of the agreement by the other and identified in the agreement as liquidated damages, and does not include other deposits or payments made by the purchaser.

RCW 64.04.005 (2)(b); *see also Wallace Real Estate Inv. v. Groves*, 124 Wn.2d 881, 884, 881 P.2d 1010 (1994) (earnest money is a type of liquidated damages).

As the \$3,000.00 earnest money constitutes liquidated damages, the Sawyers sought damages when they sought to recover their earnest money. Thus, RCW 4.84.250 applies to their claim.

Fourth, in discussing what constitutes damages, Dullanty admits that a motion for breach of contract constitutes a claim for damages. “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.” (Dullanty brief, pp. 23-24).

The Sawyers moved the court to find Dullanty breached paragraph b of the Agreement. “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.” (CP 7, paragraph b, CP 7). The Sawyer’s summary judgment motion was based on her breach of the contract. CP 63-64. Dullanty admits the Sawyers suffered damages due to her breach of the Agreement.

Fifth, Dullanty admits contract damages are a type of damage. Dullanty concedes damages are “a consequence either of a breach of a contractual obligation or a tortious act.” (Dullanty brief, p. 15, *quoting Davy v. Moss*, 19 Wn.App. 32, 34, 573 P.2d 826 (1978)).

The court granted the Sawyers’ breach of contract summary judgment motion and ordered the \$3,000.00 returned to the Sawyers. CP 365-67. As the Sawyers prevailed on their breach of contract claim and were awarded \$3,000.00, they suffered contract damages.

Sixth, Dullanty incorrectly alleges requesting money back does not constitute an action for damages. (Dullanty brief, p. 16, *citing In re 1992 Honda Accord*, 117 Wn.App. 510, 71 P.3d 226 (2003)). In *Honda*, after issuing a criminal complaint for driving with a suspended license,

the City of Warden impounded the owner's car. The owner filed an action to return the car and won. *Id.* at 523.

The *Honda* court refused to apply RCW 4.28.250 because the owner failed to provide the requisite notice he would see his attorney fees.

Assuming without deciding damages were an issue, [the car owner] did not give notice of his intent to seek fees under RCW 4.84.250, nor did he broach the possibility of settlement. . . . "Some type of notice" is required so the parties can settle the claim before they incur the risk of paying the prevailing party's attorney fees."

*Id.* at 524 (citing *Lay v. Hass*, 112 Wn.App. 818, 824, 51 P.3d 130 (2002)).

Unlike *Honda*, Dullanty had notice the Sawyers would seek attorney fees. Unchallenged finding of fact #19 proves she had notice. CP 402-03. Thus, *Honda* is inapplicable

For all the reasons stated, this Court should affirm that the Sawyers suffered damages under RCW 4.84.250.

## **2. DULLANTY HAD NOTICE SHE WOULD BE LIABLE FOR ATTORNEY FEES.**

Dullanty failed to assign error to finding of fact #19, which established that she had notice she would be liable for attorney fees and costs. CP 402. Therefore, Dullanty had notice she would be liable for attorney fees and costs.

Further, courts will award attorney fees under RCW 4.84.250 if one party provides any notice of either a demand for attorney fees or if the amount in controversy is under the \$10,000.00 threshold. However, the courts have not required a party to refer to or cite to RCW 4.84.250 to be entitled to attorney fees.

Notice under RCW 4.84.250 is sufficient if the losing party either knew the amount in controversy is less than \$10,000.00 or the prevailing party will seek attorney fees.

Clearly, these purposes require some type of notice so that the parties will “realize [that] the amount of the claim is small and that they should settle or else risk paying the prevailing party's attorney's fees.”

*Beckmann v. Spokane Transit Authority*, 107 Wash.2d 785, 788-89, 733 P.2d 960 (1987) (*citations omitted, emphasis added*).

Dullanty had notice she would be liable for attorney fees several times. First, the interpleader complaint stated the amount at issue was \$3,000.00, notifying her that RCW 4.84.250 attorney fees applied. CP 4.

**Where, as here, a plaintiff pleads a dollar amount less than the statutory maximum, all parties are put on notice that the small claim fee provision applies...**

*In re Estate of Tosh*, 83 Wn.App. 158, 165, 920 P.2d 1230 (1996) (*emphasis added*); *See Schmerer v. Darcy*, 80 Wn.App. 499, 510, 910 P.2d 498 (Div. 3, 1996) (finding the third-party complaint asking for more than

\$10,000.00 put the third-party defendant on notice attorney fees were unavailable under RCW 4.84.250).

Second, Dullanty knew the amount in controversy was the \$3,000.00 earnest money based on the Complaint. CP 4. Once a party knows the size of the dispute falls within RCW 4.84.250, she is on notice that she could be liable for attorney fees.

The settlement offer in Beckmann did not explicitly refer to either RCW 4.84.250 or attorney fees. The court nevertheless held that the settlement offer provided sufficient notice that RCW 4.84.250 applied. Thus, Beckmann does not require explicit, advance notice of a fee request, **but requires only notice of the size of the claim.**

*In re Estate of Tosh*, 83 Wn.App. 158, 165, 920 P.2d 1230 (1996).

Third, in addition to knowing the amount in controversy, the Sawyers notified Dullanty they would seek attorney fees. On March 21, 2016, the Sawyers offered to settle the case for the return of the earnest money. If Mrs. Dullanty refused to settle, the Sawyers warned her they would seek their attorney fees from her. CP 126. Thereafter, Mrs. Dullanty refused to compromise and forced the Sawyers to defend the interpleader.

Knowing the other side will seek attorney fees notifies the other party that it may be liable for attorney fees. *Target National Bank v. Higgins*, 180 Wn.App. 165, 181, 321 P.3d 1215 (2014). Target sued Higgins for her alleged failure to pay her Target credit card bill. The

complaint stated Target was seeking \$2,052.37. *Id.* at 169. Higgins sent a letter to Target offering to resolve the matter and requesting attorney fees.

While Higgins did not refer to RCW 4.84.250, the court of appeals held Target was liable for attorney fees under RCW 4.84.250.

Target, as the master of its claim, knew that the suit was limited to \$2,052.37. Target would know that any party will ask for fees under whatever grounds are available and the small claims settlement statute would apply. **Target's counsel protests that he did not know that Higgins would seek fees under the small claims settlement statute. He should have known after Higgins insisted on payment of fees as a condition of settlement.**

*Id.* at 181.

Likewise, the Sawyers told Dullanty her refusal to resolve the interpleader subjected her to attorney fees. Dullanty contested the interpleader and is now liable for the Sawyers' attorney fees.

Finally, filing a motion for attorney fees prior to trial constitutes notice under RCW 4.84.250. *Lay v. Hass*, 112 Wn.App. 818, 824, 51 P.3d 130 (2002). The Lays sued the Hasses but failed to disclose their damages in the pleadings. The Lays moved for summary judgment. Before the court ruled on their summary judgment motion, the Lays moved for attorney fees under RCW 4.84.250, which was the first time the Lays had disclosed their damages fell within RCW 4.84.250. *Id.* at 822-23.

The court of appeals affirmed the Lays properly notified the Hasses in their motion for attorney fees. "Here, the trial court determined

that the Lays satisfied the notice requirement under RCW 4.84.250 because they filed their motion for award of nominal damages and attorney fees before trial. . . . We agree.” *Id.* at 824.

Likewise, the Sawyers filed their motion for attorney fees before the March 6, 2017, trial date. When they filed their motion for summary judgment and attorney fees on July 27, 2016, they properly notified Mrs. Dullanty she would be liable for their attorney fees and costs. CP 102.

**3. THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS UNDER RCW 4.84.250 AS THE PREVAILING PARTY.**

A defendant in an interpleader action that recovers the earnest money from the other defendant is the prevailing party. *Koncicky v. Sekac*, 103 Wn.App. 292, 12 P.3d 645 (2000). *Koncicky* is remarkably similar to this current matter and is dispositive of any doubt that may remain as to whether the Sawyers are entitled to their attorney fees and costs as the prevailing party.

*Koncicky* represented West in his sale of real property to Sekac. Sekac made a \$3,000.00 earnest money deposit but then learned West materially misrepresented the property’s condition. Sekac cancelled the purchase and demanded the refund of his earnest money. West refused to refund the earnest money. *Id.* at 293-94.

Koncicky filed an interpleader action and named West and Sekac as defendants. Koncicky remained actively involved in the interpleader for reasons the court did not understand. *Id.* at 293-94. The earnest money agreement provided, “if a dispute arises regarding this transaction, the **prevailing party** . . . shall recover costs and reasonable attorney's fees, including those for appeals.” *Id.* at 294.

The court of appeals affirmed that Defendant Sekac was the prevailing party and ordered Defendant West and Plaintiff Koncicky to pay Sekac’s attorney fees. *Id.* at 296-97.

Likewise, the Sawyers are the prevailing party in this interpleader action because the trial court ordered their earnest money returned to them. CP 365-67. As the prevailing party, they are also entitled to their attorney fees and costs.

The Sawyers are the prevailing party because the court awarded \$3,000.00 to them. CP 367, 402. “In general, a prevailing party is one who receives an affirmative judgment in his or her favor.” *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)(*citation omitted*). Unchallenged finding of fact 12 states the Sawyers offered to settle for \$3,000.00. CP 401. The court awarded \$3,000.00 to the Sawyers. CP 367. Therefore, the Sawyers are the prevailing party.

The Sawyers are also the prevailing party under RCW 4.84.260. RCW 4.84.260 provides in part that the Sawyers are the prevailing party because their “recovery, exclusive of costs, is as much as or more than the amount offered.” The Sawyers recovered \$3,000.00 – the amount they had requested. CP 362, 401.

The Sawyers are the prevailing party because Dullanty requested the court award \$3,000.00 to her in her answer but recovered nothing. CP 253, 401. When a party that requests relief receives less than her request, the other party is the prevailing party. *See* RCW 4.84.270. Here, the Sawyers are the prevailing party because Dullanty received nothing.

**4. THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS UNDER RCW 4.84.250 BASED ON THE ORDER GRANTING SUMMARY JUDGMENT.**

Dullanty alleges the Sawyers are not the prevailing party because the court did not enter a “final judgment” before awarding attorney fees. (Dullanty brief, pp. 28-29). Dullanty fails to define “final judgment” but invites this Court to speculate about its definition.

Dullanty improperly relies on *AllianceOne Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 325 P.3d 904 (2014). *AllianceOne* proves the trial court acted properly in awarding attorney fees and costs to the Sawyers. The issue in *AllianceOne* was whether Lewis

was the prevailing party when AllianceOne voluntarily dismissed its case against Lewis. *Id.* at 391. Without a final adjudication of who prevailed, the court concluded no one was the prevailing party entitled to attorney fees. *Id.* at 391.

Here, the trial court granted the Sawyers' summary judgment motion that Dullanty breached the Agreement. CP 365-67. An order granting summary judgment is a final judgment.

A final judgment is an order that "adjudicat[es] all the claims, counts, rights, and liabilities of all the parties." It must be "in writing and signed by the judge and filed forthwith." It can be an order granting summary judgment if it meets these requirements.

*Est. of Rose v. Fritz*, 104 Wn.App. 116, 120, 15 P.3d 1062 (2001)

(*citations omitted*); *See also Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 183 P.3d 283 (2008)(an order granting summary judgment is a final judgment that may be appealed).

An order granting summary judgment is a "final judgment" even if the order does not resolve the issue of attorney fees. As one court noted, a "final judgment" is

"A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." Black's Law Dictionary 662, 859 (8th ed. 2004).

*In re Skylstad*, 160 Wn.2d 944, 949, 162 P.3d 413 (2007).

This summary judgment order was a final judgment because it resolved all issues except for attorney fees and costs. CP 365-67. Therefore, the trial court had the authority to award attorney fees and costs under RCW 4.84.250.

**D. THE SAWYERS ARE ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.**

The Sawyers are entitled to attorney fees and costs under RCW 4.84.290, which provides as follows:

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

As the prevailing party under RCW 4.84.250 in the trial court, the Sawyers are entitled to attorney fees under RCW 4.84.290 in the court of appeals. *Lay v. Hass*, 112 Wn.App. 818, 827, 51 P.3d 130 (2002)). Therefore, the Sawyers request their costs and attorney fees on appeal under RCW 4.84.290.

**E. DULLANTY IS NOT ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.**

Dullanty makes the strained allegation that she is entitled to attorney fees under the Agreement. Yet she fails to even quote or cite any part of the Agreement to support her contention. (Dullanty brief, p. 34).

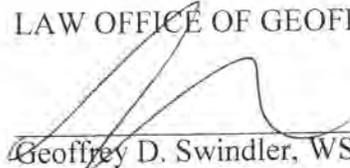
Further, her contention that the trial court found the Agreement “unenforceable” is not true. (Dullanty brief, p. 36). The court ruled she breached the Agreement. CP 365-67. Therefore, she has no basis for attorney fees.

**IV. CONCLUSION**

Dullanty gambled and lost. The Sawyers request the court affirm the trial court’s judgment and award attorney fees and costs to them on appeal.

DATED: This 21<sup>st</sup> day of August of 2017.

LAW OFFICE OF GEOFFREY D. SWINDLER, P.S.

  
Geoffrey D. Swindler, WSBA #20176  
Attorney for Respondents

CERTIFICATE OF SERVICE

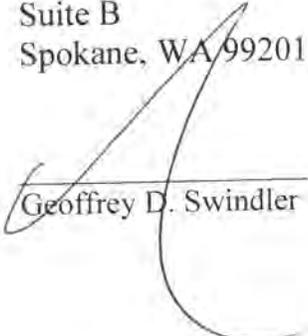
I do hereby certify that on August 25, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

Brian C. Balch  
Layman Law Firm, PLLP  
601 S. Division St.  
Spokane, WA 99202

Messenger Service

Marshall Casey  
M. Casey Law, PLLC  
1106 N. Washington  
Suite B  
Spokane, WA 99201

Messenger service

  
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Geoffrey D. Swindler