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Supreme Court No. 803188
Court of Appeals No. 347414-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

WACHOVIA SBA LENDING, INC, Respondent

v.

DEANNA D. KRAFT, Petitioner

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MEMORANDUM OF AMICUS CURIAE HAROLD T. HARTINGER IN SUPPORT OF PETITION FOR REVIEW

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MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW

A. IDENTIFICATION OF AMICUS CURIAE

Harold T. Hartinger, Amicus Curiae (hereafter "Amicus,") is now and since 1954 has been authorized to practice law in the State of Washington. A brief summary of his legal experience is set out in Appendix F, *infra* at 27. Amicus represents no party, person, or entity having an interest in the issues presented for review. He has received no contributions to defray expenses incurred.

B. CITATION TO COURT OF APPEALS DECISION

Division II of the Court of Appeals filed its opinion in *Wachovia SBA Lending v. Kraft,* 138 Wn. App.854, 158 P.3d 1271 (2007), on May 30, 2007. App. A, *infra* at 11. Petitioner Kraft's Petition for Review was filed with the Court of Appeals and transferred to the Supreme Court with a filing date of July 5, 2007.

C. ISSUES FOR REVIEW

FIRST ISSUE: Did the Court of Appeals err by reading the terms "final judgment" in RCW 4.84.330 as a statutory mandate to deny prevailing party status to defendant Kraft after plaintiff Wachovia voluntarily dismissed its action against her pursuant to CR 41(a)(1)(B)?

SECOND ISSUE: Did the Court err by ruling that final judgments entered "without prejudice" by virtue of CR 41(a)(1)(B) can never be a

basis for awarding attorney fees to defendant Kraft, absent an act of the legislature?

D. STATEMENT OF THE CASE

Wachovia SBA Lending sued Deanna Kraft to recover the balance due on a note signed by her former husband. Its action included a claim for attorney fees under the terms of note for the unilateral benefit of the holder. Kraft's answer in response denied Wachovia's claims and asserted a reciprocal right to attorney fees under RCW 4.84.330 (App. B, *infra* at 22).

Wachovia moved for summary judgment. After its motion was denied, it elected to dismiss its case "without prejudice" pursuant to CR 41(a)(1)(B) (App. D, *infra* at 24).

The trial judge denied Kraft's motion that the court retain jurisdiction to hear and decide her claim for an award of attorney fees. Kraft appealed.

The Court of Appeals ruled that Kraft, prevailing party upon dismissal of Wachovia's lawsuit, was barred from asserting her reciprocal right to attorney fees under RCW 4.84.330, absent a "final judgment *on the merits*". However, the Court had this say about its ruling:

> We note the purpose behind RCW 4.84.330 is remedial -- unilateral attorney fee provisions are to be applied bilaterally. *Quality Food Ctrs. [v. Mary Jewell T],* 134 Wn. App. [814] at 817 [2006]. Kraft's argument is eminently compelling -- that, given this purpose, a plaintiff should not be permitted to avoid

> attorney fee reciprocity after having tested his or her claim against summary judgment and causing the defendant to incur costs and attorney fees for naught. But given the definition of "final judgment," we cannot say that the legislature intended a suit dismissed without prejudice to yield a "prevailing party" under *RCW 4.84.330*.[9] Accordingly, under the plain language of the statute, Kraft's request for attorney fees is misplaced, and we must affirm, although on other grounds, the trial court's refusal to reserve the attorney fee issue.[10]
>
> ---
>
> 9. We note that it is for the legislature to correct any injustice that its *RCW 4.84.330* language may have inadvertently created.
>
> 10. Whether Kraft can seek reimbursement for attorney fees if Wachovia refiles its action is not before us.

Wachovia SBA Lending v. Kraft, App. A, *infra* at 20.

E. ARGUMENT IN SUPPORT OF SUPREME COURT REVIEW

The Court of Appeals erred by reading the terms "final judgment" in RCW 4.84.330 as a statutory mandate to deny prevailing party status to Kraft after Wachovia voluntarily dismissed its action pursuant to CR 41(a)(1)(B).

RCW 4.84.330 was enacted to prevent unfair or oppressive use of one-sided attorney fee clauses. It achieves its purpose by creating a "mutuality of remedy" by granting *identical statutory* rights to the party or parties that would otherwise have no claim to for attorney fees. *Herzog Aluminum v. General Am. Window Corp.,* 39 Wn. App. 188, 189-193, 195-197, 692 P.2d 867 (1984).

Kraft's *statutory right* to an award of attorney fees is coextensive with the *contractual right* asserted by Wachovia in this action. Kraft has the statutory right to enforce the unilateral attorney fee clause in her

former husband's note as if it had been written as a bilateral clause. *Western Stud Welding v. Omark Indus.,* 43 Wn. App. 293, 716 P.2d 959 (1986); *Herzog Aluminum,* 39 Wn. App. at 195-197.

I.

RCW 4.84.330 was enacted in 1977 as an almost word-for-word copy of Oregon Rev. Stat. § 20.096 (1971). *See,* App. C, *infra* at 23. Therefore, pre-Oregon Supreme Court decisions are "persuasive evidence of our Legislature's intent" on the issue addressed by the Court of Appeals in this case. *Herzog Aluminum*, 39 Wn. App. at 195. The third paragraph of the Oregon act, ORS 20.096(3), defined *"final judgment or decree"* in these words:

> As used in this section "prevailing party" means the party in whose favor final judgment or decree is rendered.

The Washington Legislature adopted the identical words as the definition of *"final judgment"* in the third paragraph of RCW 4.84.330. *See,* App. D, *infra* at 24.

In three cases predating the enactment of RCW 4.84.330, the Oregon Supreme Court ruled that "a judgment or decree of dismissal without prejudice ... is a "final determination of the rights of the parties [for purposes of appeal]," *and is also a "final judgment or decree" for the purpose of the allowance of attorney fees under ORS 20.096(3)."* *Sackett v. Mitchell,* 264 Ore. 396, 505 P.2d 1136 (1973) (emphasis supplied); *accord: Ferrell v. Leach,* 268 Ore. 299, 520 P.2d 357 (1974);

Dean Vincent, Inc. v. Krishell Laboratories, Inc., 271 Ore. 356, 532 P.2d237 (1975).

II.

Wachovia SBA Lending v. Kraft cites with approval three decisions by Division I of the Court of Appeals: *Walji v. Candyco, Inc.,* 57 Wn. App. 284, 787 P.2d 946 (1990); *Hawk v. Branjes,* 97 Wn. App. 776, 986 P.2d 841 (1999). *Cf. Marassi v. Lau,* 71 Wn. App. 912, 859 P.2d 605 (1993).

In each case, Division I recognized the prevailing defendant's *contractual right* to attorney fees following a plaintiff's voluntary dismissal of its case pursuant to CR 41(a)(1)(B) by a "final judgment *without prejudice.*" It follows, therefore, that Kraft's *statutory right* to enforce a unilateral attorney fee clause cannot be burdened by a "final judgment *on the merits*" when Wachovia's contract right does not require a final judgment on the merits.

Assume, for example, that Kraft had sued Wachovia to establish the unenforceability of Wachovia claims; that she filed the unsuccessful motion for summary judgment; that she moved for the voluntary nonsuit; and that Wachovia sought an award of attorney fees under the unilateral provision of the note. Wachovia would prevail by citing *Walji,* 57 Wn. App. 284; *Hawk,* 97 Wn. App. 776, and *Marassi,* 71 Wn. App. 912.

This anomalous result exists because Wachovia's claims to attorney fees exist as a contract right, a right not affected by RCW 4.84.330. Unfortunately, the Court of Appeals failed to see that the

contractual attorney fee provisions benefiting Wachovia are the measure of Kraft's *statutory right* to enforce the note provisions. Its assumption that all final judgments are on the merits is not self-evident and is clearly not the case as the decisions in *Walji, Hawk,* and *Marassi* demonstrate.

The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *In re Petition of Seattle Popular Monorail Auth.,* 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). Courts must resort to statutory construction when a statute can be reasonably read in more than one way. *Public Util. Dist. v. N. Am. Foreign Trade Zone Indus.,* 159 Wn.2d 555, 566-67, 151 P.3d 176 (2007).

The public policy expressed by RCW 4.84.330, and recognized by *Herzog Aluminum,* 39 Wn. App. 188, and *Western Stud Welding,* 43 Wn. App. 293, can only be implemented by interpreting the last paragraph of the statute to include "final judgments *without prejudice"* as well as "final judgments *with prejudice."*

The Court of Appeals erred by ruling that its decision can be remedied only by an act of the Legislature. If the Court's ruling stands, it creates a conflict between RCW 4.84.330 and CR 41(a)(1)(B), but provides no basis for denial of Kraft's entitlement to attorney fees.

A conflict between the procedural mandate created by Court of Appeals decision, and the procedural rule fundamental to a voluntary dismissal "without prejudice," is not a matter answered by dictionary

definitions. If the Court of Appeals final judgment rule is accepted, that acceptance calls for an answer to the question whether RCW 4.84.330 deprives courts of jurisdiction to an award of attorney fees to Kraft.

CR 41(a)(1)(B) creates a procedural right that works as a safety-valve for the plaintiff that commences a lawsuit but finds itself unprepared or unable to establish it claims any time before concluding its opening case at trial. *See,* App. D, *infra* at 24. The rule in its present form was adopted by the Supreme Court in 1967.

RCW 4.84.330 was enacted in 1977. The first two paragraphs of the statute establish the public policy for the state: Unilateral contractual attorney fee provisions in contracts and leases shall be enforced as bilateral (or multilateral) attorney fee provisions, and the parties that benefit from the statute cannot waive their rights.

The Court of Appeals interprets the final paragraph of the statute as an inadvertent legislative restriction of the prior paragraphs. It also deems that final paragraph as a legislative bar to the award of attorney fees to Kraft that can only be eliminated by an act of the legislature.

Even if one accepts the Court's final judgment on the merits holding, RCW 4.84.330 is no bar to a court award of attorney fees to petitioner Kraft. The statute imposes no jurisdictional bar to a court award of award of attorney fees. Its jurisdiction is preserved by statute and court rule, and also as a matter of general statutory interpretation.

I.

A court's jurisdiction to enter a final judgment without prejudice, and to award attorney fees to the prevailing party defendant, is statutorily protected. RCW 2.04.200, enacted in 1925, is a legislative measure that precludes the Court of Appeals jurisdiction limiting interpretation of RCW 4.84.330. It reads as follows:

> **RCW 2.04.200. Effect of rules upon statutes**
> When and as the rules of courts herein authorized[1] shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

Furthermore, CR 81, App. E, *infra* at 25, precludes an interpretation of RCW 4.84.330 that curtails a court's authority to award attorney fees following a voluntary nonsuit pursuant to CR 41(a)(1)(B). The statute did not create a special proceeding that escapes the reach of the CR 81.[2]

II.

The preceding argument for Kraft's right to recover reasonable attorney fees is justified by well-settled canons of construction.

RCW 4.84.330 is a general law applicable to all contracts and leases (1) executed in accordance with Washington law[3] or (2) enforced in Washington courts[4], (3) provided the contract or lease contains a

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[1] The reference is to RCW 2.04.190. See, App. E., *infra* at 25.

[2] *Cf. Spokane Research v. City of Spokane,* 155 Wn.2d 89, 104-105, 117 P.3d 1117 (2005).

[3] See, e.g., *Dopps v. Alderman,* 12 Wn.2d 268, 273-274, 121 P.2d 338 (1942).

[4] The law of the forum applies when reasonable attorney fees are recoverable as costs. 29 Am. Jur. 2d *Costs* § 8 (1995).

unilateral attorney fee provision. CR 41(a)(1)(B) creates a special court proceeding for terminating a lawsuit by a final judgment that does not decide the merits of the plaintiff's case. Consequently, if the Court of Appeals definition of "final judgment" in RCW 4.84.330 requires a judgment on the merits, the statute and the court rule are in irreconcilable conflict, and that conflict must be resolved by reading an implied exemption to the statute for the benefit of the special court proceedings.

The implied exemption recognizes the general rule that a special law[5] ordinarily reflects legislative intent to give special attention to a matter exception to the general law that might otherwise be applicable. See, *e.g., Pearce v. G.R. Kirk Co.,* 22 Wn. App. 323, 589 P.2d 302 (1979), and *Port Townsend Sch. Dist. v. Brouillet,* 21 Wn. App. 646, 587 P.2d 555 (1978).

The Supreme Courts opinion in *Wark v. Wash. Nat'l Guard,* 87 Wn.2d 864, 557 P.2d 844 (1976), provides a succinct statement of the rule and illustrates its application, *Wark,* 87 Wn.2d at 867:

> It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment. If it was passed before the general statute, the special statute will be construed as remaining an exception to its terms, unless it is repealed by express words or by necessary implication. *People v. Breyer,* 139 Cal. App. 547, 34 P.2d 1065 (1934); 2A C. Sands, [Statutes

[5] Court rules are interpreted as though they were drafted by the Legislature and are construed consistent with their purpose. *Wiley v. Rehak,* 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

and Statutory Construction § 51.05 (4th ed. 1973)]; 82 C.J.S. Statutes [§ 369 (1953)].

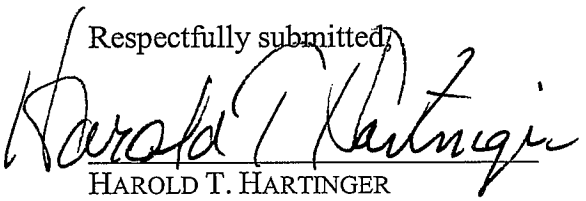
The issue in *Wark* was whether the state's waiver of tort immunity allowed a militiaman's suit against the state for an injured caused by the negligence of a fellow militiaman. The Court ruled that a statute limiting the militiaman's tort claims was unaffected by a later law that allowed tort claims against the state.

F. CONCLUSION

For the reasons stated above, the Supreme Court should grant review, reverse *Wachovia SBA Lending v. Kraft,* and remand the case to the trial court with directions to enter judgment in favor of Petitioner Deanna D. Kraft (1) for costs and reasonable attorney fees incurred in Superior Court and upon appellate review; and (2) to grant such further relief as may be just and equitable.

DATED: August 25, 2007.

Respectfully submitted,



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Appendix A – Opinion: ***Wachovia SBA Lending v. Kraft***

Wachovia SBA Lending, ***Respondent,*** **v.**
Deanna D. Kraft, ***Appellant.***

No. 34714-8-II

COURT OF APPEALS OF WASHINGTON,
DIVISION TWO

138 Wn. App. 854; 158 P.3d 1271; 2007 Wash. App. LEXIS 1339

May 30, 2007, Filed

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A lender sought to recover a deficiency balance on the sum owed under a promissory note from a guarantor of the note after a foreclosure sale of property securing the loan failed to produce sufficient proceeds to satisfy the debt.

Superior Court: After the lender unsuccessfully moved for summary judgment, the Superior Court for Pierce County, No. 05-2-11846-1, Linda CJ Lee, J., on March 20, 2006, granted the lender's motion to dismiss the complaint without prejudice. The trial court declined to award attorney fees and costs to either party.

Court of Appeals: Holding that the trial court properly denied attorney fees and costs to the defendant, the court *affirms* the trial court's order.

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Statutes -- Applicability -- Question of Law or Fact -- Standard of Review. The applicability of a statute to a particular set of facts is a question of law that is reviewed de novo.

[2] Costs -- Attorney Fees -- Statutory Provisions -- Review -- Standard of Review. When the meaning of an attorney fee statute is at issue, a trial court's decision to award or not award attorney fees to a requesting party is reviewed de novo as a question of law.

[3] Costs -- Attorney Fees -- Statutory Provisions -- Application -- Question of Law or Fact -- Review. Whether a statute authorizes an award of attorney fees is a question of law that is reviewed de novo.

[4] Costs -- Attorney Fees -- Review -- Standard of Review. Where a trial court has the discretion to award attorney fees or costs, its decision to grant or deny an award is reviewed for an abuse of discretion. Review for an abuse of discretion looks at whether the trial court's decision is based on tenable grounds or reasons.

[5] Contracts -- Costs -- Attorney Fees -- Contractual Right -- Statutory Provisions -- Elements. *RCW 4.84.330* authorizes an award of attorney fees in an action if (1) the action is on a contract or a lease, (2) the contract or lease contains a unilateral attorney fee or cost provision, and (3) there is a prevailing party. The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the first two requirements of the statute.

[6] Contracts -- Costs -- Attorney Fees -- Contractual Right -- Prevailing Party -- Defendant -- In General. For purposes of *RCW 4.84.330*, which entitles a prevailing party in an action on a contract containing an attorney fee provision to an award of reasonable attorney fees, a defendant prevails generally by successfully defending a contract action.

[7] Statutes -- Construction -- Legislative Intent -- In General. A court's primary goal in interpreting a statute is to ascertain and give effect to the legislature's intent and purpose. The court must consider the statute as a whole and give effect to all of its language. The court may review related statutes as a means of identifying legislative intent. The court will resort to statutory construction only if the statute can reasonably be interpreted in more than one way.

[8] Statutes -- Construction -- Meaning of Words -- Absence of Statutory Definition -- Resort to Dictionary -- Unambiguous Term.

The meaning of an unambiguous statutory term that the statute does not define may determined by resort to a dictionary.

[9] Dismissal and Nonsuit -- Voluntary Dismissal -- Effect. The effect of a voluntary dismissal is to render the proceedings a nullity and to leave the parties as if the action had never been brought.

[10] Contracts -- Costs -- Attorney Fees -- Contractual Right -- Statutory Provisions -- Remedial Purpose. *RCW 4.84.330*, which entitles a prevailing party in an action on a contract containing an attorney fee provision to an award of reasonable attorney fees, has the remedial purpose of making unilateral attorney fee provisions enforceable bilaterally.

[11] Contracts -- Costs -- Attorney Fees -- Contractual Right – Prevailing Party -- Judgment -- What Constitutes. For purposes of *RCW 4.84.330*, which entitles a prevailing party in an action on a contract containing an attorney fee provision to an award of reasonable attorney fees and which defines "prevailing party" as the party in whose favor final judgment is rendered, "final judgment" means a court order having preclusive effect.

[12] Contracts -- Costs -- Attorney Fees -- Contractual Right – Prevailing Party -- Judgment -- Voluntary Dismissal Without Prejudice. A voluntary dismissal without prejudice does not constitute a "final judgment" within the meaning of *RCW 4.84.330*, which entitles a prevailing party in an action on a contract containing an attorney fee provision to an award of reasonable attorney fees and which defines "prevailing party" as the party in whose favor final judgment is rendered. Where a plaintiff in an action on a contract containing an attorney fee provision takes a voluntary dismissal of the action without prejudice, the defendant is not entitled to an award of attorney fees in the action under *RCW 4.84.330*.

[13] Appeal -- Disposition of Cause -- Affirmance on Other Grounds -- In General. An appellate court may affirm a judgment on any grounds supported by the record.

[14] Costs -- Dismissal and Nonsuit -- Voluntary Dismissal -- Attorney Fees and Costs -- Statutory Costs -- Denial -- Basis -- Exposure to Costs Upon Refiling of Action. A trial court's citation to

CR 41(d) is a tenable basis for denying a defendant's request for costs and attorney fees under *RCW 4.84.010*, .060, and .080 in an action in which the plaintiff has taken a voluntary dismissal without prejudice. Under *CR 41(d)*, the trial court may tax the plaintiff for the costs of the dismissed action if the action is refiled.

COUNSEL: Douglas N. Kiger (of *Blado Kiger, P.S.*), for appellant.

Alexander S. Kleinberg (of *Eisenhower & Carlson, P.L.L.C.*), for respondent.

JUDGES: **[***1]** Houghton, C.J. We concur: Armstrong, J., Hunt, J.

OPINION BY: HOUGHTON

OPINION
[1272]**

[*856] ¶1 Houghton, C.J. -- Deanna Kraft appeals the trial court's refusal to award her attorney fees under *RCW 4.84.330* and costs under *RCW 4.84.010*, *.060*, and *.080*. We affirm.

Facts

¶2 In June 1997, Kraft's husband (now her former husband) took out a Small Business Administration loan from Wachovia SBA Lending, Inc., d/b/a Wachovia Small Business Capital, in order to purchase a home and an in-home veterinary business. Kraft's husband executed a Small Business Administration promissory note (Note), secured by a deed of trust on Kraft and her husband's North Carolina home. Kraft did not sign the Note. Kraft executed a Small Business Administration guaranty (Guaranty) in connection with the Note. Wachovia claims to hold **[**1273]** the Guaranty signed by Kraft and secured by the deed of trust on the North Carolina home.

[*857] ¶3 By the terms of the Guaranty, the debtor agreed to pay all sums owed to the holder of an underlying Note, which Wachovia also claims to hold. The Note requires the debtor to pay "reasonable attorney's fees and costs" incurred in satisfaction of the debt.[1] Clerk's Papers (CP) at 32. The Note does not require the holder to pay the debtor's **[***2]** attorney fees or costs. Thus, the Note and Guaranty, if enforceable, require Kraft to pay Wachovia's attorney fees and costs but do not require Wachovia to pay Kraft's attorney fees or costs.

1 Specifically, the Note states, "The undersigned shall pay all expenses of any nature, whether incurred in or out of court ... including but not limited to reasonable attorney's fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the indebtedness." Clerk's Papers at 32.

¶4 Under the deed of trust, Wachovia foreclosed on Kraft's former residence in North Carolina. Wachovia then sued Kraft on the Note and Guaranty in Pierce County Superior Court, seeking a deficiency balance of $ 78,196.77. [2] Kraft answered that she was the guarantor, but she pleaded North Carolina law and, among others, the affirmative defense of choice of remedy.

2 Wachovia also alleged unjust enrichment. But it does not explain how, if at all, that action bears on the present appeal. Accordingly, we do not consider it. *See RAP 10.3(b)*; *State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).*

¶5 Wachovia unsuccessfully moved for summary judgment. Over Kraft's objection, Wachovia then **[***3]** sought leave to dismiss its complaint without prejudice, which the court granted. *See CR 41(a)(1)(B), (a)(4).* Kraft asked the trial court to reserve the issue of attorney fees and costs. The trial court apparently refused to reserve the issue of attorney fees because "it may hang out there for eternity if the parties do decide to settle and go away and never inform this Court."[3] Report of Proceedings at 12. The trial court **[*858]** declined to award attorney fees and costs to either party. Kraft appeals.[4]

3 The parties dispute whether the trial court refused to reserve the issue or instead decided Kraft was not entitled to attorney fees. Our review of the record indicates the trial court did not rule on the award of attorney fees but rather refused Kraft's motion to reserve the issue. Our understanding is bolstered by the fact that the motion before the trial court was for the reservation of the issue.

4 Kraft appealed the order dismissing Wachovia's suit without prejudice, a nonappealable order under *RAP 2.2(a)(3). See Am. States Ins. Co. v. Chun, 127 Wn.2d 249, 254, 897 P.2d 362 (1995)*; *Munden v. Hazelrigg, 105 Wn.2d 39, 42-44, 711 P.2d 295 (1985).* Our commissioner properly allowed the appeal **[***4]** to proceed

only to the extent Kraft claims attorney fees under *RCW 4.84.330. See Allahyari v. Carter Subaru, 78 Wn. App. 518, 521 n.2, 897 P.2d 413 (1995).*

Analysis

¶6 Kraft relies on *RCW 4.84.330*[5] and argues the trial court erred in failing to reserve the attorney fees issue and allowing her to show her prevailing party attorney fees and costs. She urges de novo review.

5 *RCW 4.84.330* provides:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment **[***5]** is rendered.

¶7 Wachovia argues *RCW 4.84.330* will not support an award of attorney fees because a voluntary dismissal without prejudice is not a "final judgment" within the statute's meaning. Resp't's Br. at 10-12. Wachovia asserts that where the plaintiff takes a voluntary dismissal without prejudice, we must review the denial of attorney fees for manifest abuse discretion. Thus, we first identify the appropriate standard of review.

[1-4] ¶8 The applicability of *RCW 4.84.330* is a question of law. *Quality Food Ctrs. v.* **[**1274]** *Mary Jewell T, L.L.C., 134 Wn. App.*

814, 817, 142 P.3d 206 (2006). We review questions of law de novo. *Mohr v. Grant, 153 Wn.2d 812, 823, 108 P.3d 768 (2005).*

¶9 Wachovia is correct that we review an award of attorney fees for abuse of discretion, that is, whether it was **[*859]** based on tenable grounds or reasons. *Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006).* But where the meaning of an attorney fee statute is at issue, we review the decision to award or not award attorney fees de novo as a question of law.[6] *Keystone Masonry, Inc. v. Garco Constr., Inc., 135 Wn. App. 927, 936-37, 147 P.3d 610 (2006)* (attorney fees on change of venue under *RCW 4.12.090*).

6 Moreover, **[***6]** where *RCW 4.84.330* applies, awarding attorney fees is mandatory. *Singleton v. Frost, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987)* ("[a]n interpretation allowing the trial court to deny recovery of reasonable attorney's fees at its discretion or whim would render the statute meaningless"); *Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217, 130 P.3d 892 (2006).*

Attorney Fees

[5] ¶10 For *RCW 4.84.330* to apply: (1) the action must be "on a contract or lease," (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a "prevailing party." *RCW 4.84.330.* The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute's first two requirements. *Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).* Here, the parties agree the Note contains a unilateral attorney fee provision incorporated into the Guaranty. The narrow question remains whether the trial court's dismissal without prejudice is within *RCW 4.84.330*'s "prevailing party" language.

[6] ¶11 Under *RCW 4.84.330*, the defendant generally prevails by successfully defending a contract action. *Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn. App. 64, 68, 975 P.2d 532 (1999).* The defendant **[***7]** also generally prevails where the plaintiff voluntarily dismisses its action under *CR 41. Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973)*[7] (construing former *RCW 4.28.185* **[*860]** (1959)); *Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 193, 69 P.3d 895 (2003)* (construing *RCW 4.84.185*); *Marassi v. Lau, 71 Wn. App. 912, 918-19, 859 P.2d 605 (1993)* (construing *RCW 4.84.330*); *W. Stud Welding, Inc. v. Omark Indus., Inc., 43 Wn. App. 293,*

295-96, 716 P.2d 959 (1986) (construing *RCW 4.84.330*). But the applicability of *RCW 4.84.330* to a *CR 41* dismissal without prejudice is a matter of first impression.

> 7 More specifically, *Anderson* applied the long-arm statute, former *RCW 4.28.185* (1959). *81 Wn.2d at 868*. That statute then and now provides attorney fees for the out-of-state defendant who "prevails in the action," but it does not define "prevail." *RCW 4.28.185(5)*. *Escude*, *Marassi*, and *Western Stud Welding* considered *CR 41* dismissals *with* prejudice. *Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (2003)*; *Marassi v. Lau, 71 Wn. App. 912, 914, 920, 859 P.2d 605 (1993)*; *W. Stud Welding, Inc. v. Omark Indus., Inc., 43 Wn. App. 293, 295, 716 P.2d 959 (1986)*. **[***8]** It is not clear whether the *Anderson* court considered a dismissal with or without prejudice. *81 Wn.2d at 864*.

[7] ¶12 "The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." *In re Petition of Seattle Popular Monorail Auth., 155 Wn.2d 612, 627, 121 P.3d 1166 (2005)*. We must consider the statute as a whole and give all its language effect. *Seattle Popular Monorail Auth., 155 Wn.2d at 627*. We review related statutes as a means of identifying legislative intent. *Seattle Popular Monorail Auth., 155 Wn.2d at 627*. We resort to statutory construction only if the statute can reasonably be interpreted in more than one way. *Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., L.L.C., 159 Wn.2d 555, 566-67, 151 P.3d 176 (2007)*.

[8-13] ¶13 The statute defines "prevailing party" as "the party in whose favor final judgment is rendered." *RCW 4.84.330*. The statute does not define "final judgment." *RCW 4.84.330*. The term "final judgment" is facially unambiguous--it refers to any court order having preclusive effect. Thus, we refer to *Webster's Third New International* **[**1275]** *Dictionary*. *See Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007)* (where a statute **[***9]** is unambiguous, resorting to dictionary is appropriate). "Final," in its legal sense, means

> ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding but not precluding an **[*861]** appeal--used of a court order, decision, judgment, decree, or sentence; compare

> interlocutory ... : being a court finding that is conclusive as to jurisdiction and precluding the right to appeal to or continue the case in any other court upon the merits.

Webster's Third New International Dictionary 851 (2002).

¶14 "Judgment," in its legal sense, means "a formal decision or determination given in a cause by a court of law or other tribunal." Webster's, *supra*, at 1223. *Black's Law Dictionary* similarly defines "final judgment" as "[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 859 (8th ed. 2004).

¶15 As we have previously stated in the attorney fee context, "the effect of a voluntary dismissal 'is to render the proceedings a nullity and leave the parties as **[***10]** if the action had never been brought.'" *Beckman v. Wilcox, 96 Wn. App. 355, 359, 979 P.2d 890 (1999)* (internal quotation marks omitted) (quoting *Bonneville Assocs., Ltd. P'ship v. Barram, 165 F.3d 1360, 1364 (Fed. Cir. 1999))*. In *Beckman*, we held a condemnee to be the prevailing party under *RCW 8.24.030* where the condemnor took a voluntary dismissal without prejudice. *96 Wn. App. at 358, 365-66*. But we reasoned that the statute at issue did not predicate attorney fees on the entry of judgment. *Beckman, 96 Wn. App. at 361-62*. In contrast, the statute does precisely that--expressly requiring a "final judgment" before we may deem either party a "prevailing party."[8] A voluntary dismissal **[*862]** without prejudice is not a final judgment because it is not "a formal decision or determination" "leaving nothing further to be determined by the court." Webster's, *supra*, at 1223, 851; *accord State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003)* (dismissal without prejudice is not "final"). Wachovia is free to file a new action against Kraft, leaving final judgment on their dispute for a future day.

> 8 The legislature does not explain, nor can we divine, its intent and purpose in so limiting *RCW 4.84.330*. **[***11]** The only other statute that defines "prevailing party" in terms of "final judgment" is *RCW 49.44.135*. That statute, adopted eight years after *RCW 4.84.330*, allows attorney fees in actions alleging an employer's violation of *RCW 49.44.120* (general prohibition on employers requiring that employees take lie detector tests). Under *RCW*

49.44.135(3), a court may, under *RCW 4.84.185* (reasonable expenses for frivolous claims), "award any prevailing party against whom an action has been brought for a violation of *RCW 49.44.120* reasonable expenses and attorneys' fees *upon final judgment* and written findings by the trial judge that the action was frivolous and advanced without reasonable cause." (Emphasis added.) But the same statute allows a court to award "reasonable attorneys' fees and costs to the prevailing employee or prospective employee" without any such limitation. *RCW 49.44.135(2)*. The clear purpose of chapter 49.44 RCW is to protect employees and potential employees from unfair labor practices. It follows that employers should be required to meet a more restrictive standard for attorney fees. No similar policy rationale apparently underlies *RCW 4.84.330*. Indeed that statute, as written, **[***12]** permits a contract containing a unilateral attorney fee provision to be tested against summary judgment and later dismissed without the legislature's reciprocal purpose coming due. But "[t]he reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has 'prevailed' as things stand at that point." *Walji v. Candyco, Inc., 57 Wn. App. 284, 289, 787 P.2d 946 (1990)*.

¶16 We note the purpose behind *RCW 4.84.330* is remedial--unilateral attorney fee provisions are to be applied bilaterally. *Quality Food Ctrs., 134 Wn. App. at 817*. Kraft's argument is eminently compelling--that, given this purpose, a plaintiff should not be permitted to avoid attorney fee reciprocity after having tested his or her claim against summary judgment and causing the defendant to incur costs and attorney fees for naught. But given the definition of "final judgment," we cannot say **[**1276]** that the legislature intended a suit dismissed without prejudice to yield a "prevailing party" under *RCW 4.84.330*.[9] Accordingly, under the plain language of **[***13]** the statute, Kraft's request for attorney fees is misplaced, and we must affirm, although on other grounds, the trial court's refusal to reserve the attorney fee issue.[10]

9 We note that it is for the legislature to correct any injustice that its *RCW 4.84.330* language may have inadvertently created.

10 Whether Kraft can seek reimbursement for attorney fees if Wachovia refiles its action is not before us.

[14] ¶17 Kraft also argues the trial court erred in refusing to award her statutory costs, including the nominal attorney fees provided under *RCW 4.84.010*, *.060*, and *.080*. **[*863]** But the trial court correctly noted that *CR 41(d)* allows it to impose costs on further action by the plaintiff. The trial courts have discretion to award statutory costs after a plaintiff's voluntary dismissal. *Anderson, 81 Wn.2d at 865*. On this point, the trial court ruled on a tenable basis. Kraft does not show the trial court abused its discretion. Therefore, we affirm the trial court's denial of statutory costs and attorney fees.

Attorney Fees on Appeal

¶18 Both parties request attorney fees on appeal, relying on *RAP 18.1*. That rule authorizes the award of attorney fees on appeal where "applicable law grants to a **[***14]** party the right to recover reasonable attorney fees." *RAP 18.1(a)*. Here, the applicable law is *RCW 4.84.330*, which under our holding does not permit either party to recover attorney fees where the plaintiff takes a *CR 41* dismissal without prejudice. Accordingly, neither party is awarded attorney fees on appeal.

¶19 We hold a *CR 41* voluntary dismissal without prejudice is not a "final judgment" within the meaning of *RCW 4.84.330*'s "prevailing party" language and affirm the trial court.

Armstrong and Hunt, JJ., concur.

Appendix B – RCW 4.84.330. Actions on Contract or Lease

RCW 4.84.330. Actions on contract or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of parties -- Prevailing party entitled to attorney's fees -- Waiver prohibited

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

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

[1977 ex.s. c 203 § 1; effective September 21, 1977]

Appendix C - ORS 20.096. Reciprocity of Attorney Fees and Costs in Proceedings to Enforce Contract

ORS 20.096. Reciprocity of attorney fees and costs in proceedings to enforce contract.

(1) In any action or suit on a contract, where such contract specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, at trial or on appeal, shall be entitled to reasonable attorney fees in addition to costs and necessary disbursements.

(2) Attorney fees provided for in a contract described in subsection (1) of this section shall not be subject to waiver by the parties to any such contract which is entered into after September 9, 1971. Any provision in such a contract which provides for a waiver of attorney fees is void.

(3) As used in this section prevailing party means the party in whose favor final judgment or decree is rendered.

(4) As used in this section contract includes any instrument or document evidencing a debt.

NOTE: Appendix C is the original version of the statute enacted as Oregon Laws of 1971, Ch. 2002, § 1, as reported in Webb v. Culver, 265 Ore. 467, 472, 509 P.2d 1173 (1973).

The amendments to the statute in 1981 and prior years, see below, retained paragraph (3) as a part of Oregon law.

The measure was amended by Oregon Laws of 1975, Ch. 623, § 3; Laws of 1979, Ch. 735, § 1; Laws of 1981, Ch 898, § 20; Laws of 1983, Ch. 527, § 1; and Laws of 2001, Ch. 542, §§ 3, 3a.

Appendix D – CR 41(a). Dismissal of Actions

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal.*

(1) *Mandatory.* Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) *By stipulation.* When all parties who have appeared so stipulate in writing; or

(B) *By plaintiff before resting.* Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) *Permissive.* After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) *Counterclaim.* If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) *Effect.* Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(CR 41(a) was adopted May 5, 1967, effective July 1, 1967. 71 Wn.2d xvii (1967). CR 41(b) was adopted June 5, 1997, effective Sept. 1, 1997.)

Appendix E – Other Court Rules and Related Statutes

RCW 2.04.190. Rules of pleading, practice, and procedure generally
The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits. *(RCW 4.04.190. originally enacted in 1925, was subsequently amended by Washington Laws of 1987, Ch. 202 § 101.)*

RCW 2.04.200. Effect of rules upon statutes
When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect. *(RCW 2.04.200 was enacted as Washington Laws of 1925 Ex. Sess, Ch. 118 § 2.)*

CR 81. Applicability in general

(a) *To what proceedings applicable.* Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. Where statutes relating to special proceedings provide for procedure under former statutes applicable generally to civil actions, the procedure shall be governed by these rules.

(b) *Conflicting statutes and rules.* Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict. *(CR 81 was adopted May 5, 1967, effective July 1. 1967.)*

APPENDIX F – Amicus Curiae

Harold T. Hartinger, Amicus Curiae, is now and since 1954 has been authorized to practice law in the State of Washington.

While on active duly with U.S. Army (1954 to 1956), he served overseas in Germany as legal advisor to a regimental commander.

In January 1957 Mr. Hartinger was appointed an Assistant Attorney General for the State of Washington. From the time of his appointment to its termination in February 1986, he served as Chief Counsel for the Commissioner of Public Lands and for each state entity for which he was the administrative head (*e.g.,* the Department of Public Lands and the Department of Natural Resource, its successor) and for each state agency of which he was administrative head or a member (*e.g.,* the Harbor Line Commission, the State Capitol Committee, the State Oil and Gas Commission, the Bureau of Surveys and Maps, and a number of other agencies).

In March 1968 Mr. Hartinger joined Conrad, Kane, & Vandeberg, a Tacoma law firm, and remained a member of the firm and its successor, the present Tacoma-Seattle law firm of Vandeberg Johnson & Gandara. He retired from the active practice of the law as a member of the Vandeberg firm early this year and currently undertakes independent legal research and occasional legal writing. He does not accept new clients but he continues pro bono representations that commenced prior to retirement.

Mr. Hartinger is now and for more than 40 years has been admitted to practice before the United States. Supreme Court, the U.S. Circuit Court of Appeals for the Ninth Circuit, and the U.S. District Courts for the Western and Eastern Districts of Washington.

He has served as lead counsel for parties asserting or defending lawsuits filed in state superior courts, the federal district courts for Washington, the Ninth Circuit Court of Appeals, and the United States Supreme Court.

A list of published decisions in which he has prepared and presented oral argument on behalf of his client is available upon request.