

82659-5

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
AK

ROBERT BATES; B&H CONSTRUCTION SERVICES, INC., a
Washington corporation;
Petitioners,

v.

JULIANNE McGUIRE,
Respondent,

and

BANNER BANK (Bellingham), Bond Acct. #3540233253,
Defendant.

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STATE OF WASHINGTON
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SUPREME COURT NO. 82659-5
Court of Appeals No. 60463-5-I

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RESTATEMENT OF THE FACTS	2
III. ARGUMENT	3
1. THE DECISION BY THE COURT OF APPEALS IS BASED ON LONG-STANDING PRECEDENT, THE UNAMBIGUOUS LANGUAGE OF RCW 4.84.250-280 AND RCW 18.27.040, AND CONSEQUENTLY THE UNAMBIGUOUS LANGUAGE OF THE OFFER AND ACCEPTANCE IN THIS CASE.....	3
2. LAWYERS AND LAWYERING: BATES' ALLEGED PITFALLS (DILEMMAS) DO NOT STAND UP TO THE PLAIN LANGUAGE OF THE INVOLVED STATUTES, NOR TO BASIC LAWYERING SKILLS WHICH ARE STILL AVAILABLE TO PARTIES	10
3. PLAINTIFF IS THE "PREVAILING PARTY" & THEREFORE IS ENTITLED TO HER COSTS, INTEREST, AND ATTORNEY'S FEES UNDER RCW 18.27.040(6).....	14
4. RESPONDENT REQUESTS ATTORNEY'S FEES UNDER RAP 18.1.....	19
IV. CONCLUSION.....	20
V. APPENDIX.....	A

TABLE OF AUTHORITIES

Page

CASES

Allahyari v. Carter Subaru, 78 Wn.App. 518, 897 P.2d 413 (1995)
.....12

Anderson v. Gold Seal Vineyards, 81 Wn.2d 863, 505 P.2d 790
(1973).....14, 15

Dussault v. Seattle Public Schools, 69 Wn.App. 728, 850 P.2d 581
(1993).....7

Hodge v. Development Services, 65 Wn. App. 576, 828 P.2d 1175
(1992).....10

Mackey v. American Fashion Institute, 60 Wn.App. 426, 804 P.2d
642 (1991).....4, 5

Marek v. Chesny, 473 US 1 (1985)9

Martin v. Johnson, 141 Wn. App. 611, 170 P.3d 1198 (2007)16

McGuire v. Bates, slip op.4, 9

Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997)
..... 8, 11

Richter v. Trimberger, 50 Wn. App. 780, 750 P.2d 1279 (1988)
.....13, 16

Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 795 P.2d
1143 (1990).....14

Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383,
161 P.3d 406 (2007)16

State Farm Ins. Co. v. Avery, 114 Wn. App. 299, 57 P.3d 300
(2002).....6

United States Tobacco Sales & Marketing Co. v. Department of Revenue, 96 Wn. App. 932, 982 P.2d 652 (1999)6

Walji v. Candyco, Inc., 57 Wn. App. 284, 787 P.2d 946 (1990)...12

STATUTES

RCW 18.27.0402, 3, 8, 11, 12, 13, 15, 17

RCW 4.28.185(5)14, 15

RCW 4.84.2504, 7, 9, 10, 16, 17

RCW 4.84.2704, 7

RULES

RAP 13.4(b)(4)3

RAP 18.116

I. INTRODUCTION

This case involves a dispute between a contractor, Robert Bates and his corporation, B&H Construction Services, Inc. (hereinafter collectively referred to as "Bates") and a homeowner, Julianne McGuire (hereinafter referred to as "McGuire") over poor workmanship and the cost of repair. After nearly a year of litigation and within two weeks of the arbitration hearing, Bates made a settlement offer under RCW 4.84.250-280 for \$14 more than McGuire's actual damages. Under the RCW 4.84.250-280 scheme, it would have been impossible for McGuire to improve on Bates' offer and McGuire accepted said offer. After accepting Bates' offer, McGuire filed a motion for attorney's fees and costs with the arbitrator. The arbitrator denied McGuire's motion for fees and costs. McGuire timely requested a trial de novo in superior court. McGuire filed a motion for entry of judgment and for attorney's fees and costs. After extensive briefing by both parties, the trial court awarded attorney's fees, costs, and prejudgment interest to McGuire and entered judgment in McGuire's favor. Bates timely filed a notice of appeal. Division I of the Court of Appeals agreed with the trial court and affirmed the trial court's decision. McGuire hereby responds to Bates' petition for review as follows:

II. RESTATEMENT OF THE FACTS

Bates argues that the previous settlement offers and counteroffers are important to interpret or change the meaning of the final and binding offer and acceptance in this case. Of significance to our argument is the undisputed fact that Bates' prior offers were based on two statutes: "This offer is made pursuant to RCW 4.48.250-.280 and RCW 18.27.040." (10/3/06 offer from Bates; CP 34) and "This offer is made pursuant to RCW 4.48.250-.280 and RCW 18.27.040." (12/15/06 Counteroffer CP 36) The binding offer and acceptance which is the subject of this case eliminated any reference to RCW 18.27.040, and was solely "...pursuant to RCW 4.84.250-.280..." (CP 46 - 47)

It is important to note that the total amount recoverable on the underlying claim for breach of this contract was \$2,166.00. Bates' final offer, solely pursuant to RCW 4.84.250-.280 was exactly \$14.00 more than the full amount. The filing fee and service fees in this case were a total of \$220.00. (CP 91-92)

III. ARGUMENT

1. THE DECISION BY THE COURT OF APPEALS IS BASED ON LONG-STANDING PRECEDENT, THE UNAMBIGUOUS LANGUAGE OF RCW 4.84.250-280 AND RCW 18.27.040, AND CONSEQUENTLY THE UNAMBIGUOUS LANGUAGE OF THE OFFER AND ACCEPTANCE IN THIS CASE.

The only possible basis for review, and the sole prayer in Bates' Petition for Review, is under RAP 13.4(b)(4): "4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The Court of Appeals decision terminating review in this case is of no more substantial public interest than would be true in any case of statutory interpretation. There is no need for review by the Supreme Court, because the Court of Appeals simply applied the unambiguous statutory language contained in both RCW 4.84.250-.280 and RCW 18.27.040.

No additional dilemma for a defendant, such as Bates, has been added by the Court of Appeals in this case. Bates' alleged dilemma faced by counsel for defendants, and about which Bates complains, is a difficulty or confusion in "...crafting settlement offers for small claims." *Petition* at page 11. Instead of confusing this area, the Court of Appeals leaves intact the plain language of the pertinent statutes, and consequently

confirms the application of RCW 4.84.250-.280 as well as that of RCW 18.27.040.

RCW 4.84.250-.280 mandates that an offer of settlement cannot include costs. There can be no doubt of the meaning of the words "...the recovery, exclusive of costs..." (RCW 4.84.270), either exceeding or falling short of the "...amount offered in settlement..." This excludes costs from the equation. This is pivotal here: There is only one equation involved in the RCW 4.84.250 methodology, and that is to compare an offer to a result, neither of which may include costs. In this case, "costs" includes fees. See *Mackey v. American Fashion Institute*, 60 Wn.App. 426, 804 P.2d 642 (1991). Rather than confusion, the Court of Appeals states unequivocally that:

"Clearly the language shows that the legislature intended attorney fees be recovered as costs rather than as damages. The reference to the amount pleaded in RCW 4.84.250 includes only a plaintiff's basic claim for damages. An offer made pursuant to this statute is necessarily defined by the language contained in the statute. Since attorney fees are defined as costs, the use of the term "claim" refers only to McGuire's claim for damages." (*McGuire v. Bates*, slip op. at 3.)

Any party defending a claim under \$10,000 can see by simply reading the statutes that RCW 4.84.250 is not the avenue for a lump sum settlement offer. It is, rather, both a method to determine, at a later date, whether a

given party is responsible for reasonable attorneys' fees, and consequently an incentive to resolve smaller cases judiciously. Simply, Bates is urging us to "interpret the settlement offer" *Petition* at page 10, without following the clear language of the statutes. The settlement offer is as clear as one can be. What Bates is really suggesting is a re-writing of the statute:

"The *problem* is that attorneys' fees *are* a cost under this statute."
Petition at page 12. (Emphasis supplied)

McGuire agrees that "fees are a cost under this statute", but strongly disagrees that this is a "problem." After all, if we were to determine that fees are an element of damages, rather than a cost, we would be overruling substantial precedent. Such a turn-around in our case law would create more confusion than Bates is alleging occurs by following the statute's mandate. It would fly directly in the face of substantial authority cited in *Mackey*, supra. The statutory scheme contained in RCW 4.84.250-.280 is limited to amounts in controversy of \$10,000.00 and under. It is not a vehicle for offers or acceptances that go outside that parameter. Nor are they simply another way to make a lump sum offer. After all, "Where a statute defines key terms and uses plain language, it is not ambiguous." *United States Tobacco Sales & Marketing Co. v. Department of Revenue*, 96 Wn. App. 932, 938, 982 P.2d 652 (1999). There is no need to rely on

contractual interpretation rules when the only issue raised by this defendant is answered by reference to the statutory language. A similar question was raised in the case of State Farm Ins. Co. v. Avery, 114 Wn. App. 299, 57 P.3d 300 (2002). The Court was called upon to determine whether a settlement agreement could be “interpreted” by evidence extrinsic to the agreement itself. The Court declined this request:

The language of the settlement agreement here — a release negotiated by able counsel on both sides — does not depend on the credibility of extrinsic evidence. It is subject to a single interpretation. Unambiguously and appropriately, the agreement subjects payment of PIP to the “limitations and exclusions” of the policy. And that policy in turn includes both a dollar limit and a three-year time limit. Mr. Avery wishes to prove that the parties really meant to guarantee payment of medical expenses subject only to the dollar limit of the policy. The admission of extrinsic evidence would thus be for the purpose of varying the terms of the written agreement — not explaining it. The court correctly ruled such evidence inadmissible as a matter of law. Berg, 115 Wn.2d at 669-70. (Avery at page 311)

In this case, “unambiguously and appropriately” the offeror (Bates) made his offer of a precise sum “pursuant to RCW 4.84.250-280.” Similarly, McGuire accepted this unambiguous offer, without any editorial. Bates now wants to vary the “terms of the written agreement”, not merely “explain” it. Few offers and acceptances will be as short and to the point as that presently before this Court. The Court of Appeals was correct to let the offer and acceptance stand as written, and to apply

similarly unambiguous statutory language, of the statute cited by Bates, to that offer and acceptance.

Bates simply wants to change the statute. The only legal way to change a statute is to receive a modification from the source, the state legislature. It is not proper to ask any Court to “interpret” a statute directly opposite to the language of that statute. General principles of contract interpretation may only be applied when they do not conflict with or defeat the purpose of the statute or rule. Dussault v. Seattle Public Schools, 69 Wn.App. 728, 850 P.2d 581 (1993) at page 733.

Curiously, Bates also admits in his petition that an offer that “states” (as opposed to “leaves open the question”?) that the “...offer includes attorneys’ fees...” makes an application of RCW 4.84.270, for example, unworkable (“intractable”) Petition at page 11. In other words, Bates argues that fees in his offer should be included, but then admits he could not include fees and costs without running afoul of the statute. The Court of Appeals unequivocally states that there is no place for inclusion of attorneys’ fees in the 4.84 offer of settlement. Even more curiously, Bates takes the apparent opposite position in his petition, saying the Court of Appeals is “requiring counsel to include fees in offers under RCW 4.84.250” Petition at page 12. Bates then concludes that this

“requirement” “unnecessarily complicates determining who the prevailing party is.” *Petition* at page 12. Bates is allegedly confused, and feels that the Court of Appeals is suggesting that the RCW 4.84 parameters should be stretched to include a lump sum offer approach. There is no such suggestion in the decision. The Court of Appeals took the opposite approach, and has left no doubt on how to employ the statutory scheme of RCW 4.84.250-.280.

**2. LAWYERS AND LAWYERING: BATES’
ALLEGED PITFALLS (DILEMMAS) DO NOT STAND UP
TO THE PLAIN LANGUAGE OF THE INVOLVED
STATUTES, NOR TO BASIC LAWYERING SKILLS
WHICH ARE STILL AVAILABLE TO PARTIES**

In this case, at the virtual last minute, Bates tried to set McGuire up to pay attorneys’ fees to Bates, by offering a tiny bit more than the entire claim (\$2,180 for a claim of \$2,166). His hope apparently was that a failure to accept would eventually result in a “recovery” which would be \$14.00 less than the offer. In the alternative, with an acceptance, his hope was that RCW 4.84 would somehow eliminate McGuire’s rights to the fees mandated in RCW 18.27.040. This was in spite of long-standing case law that a waiver of fees must be clear and unequivocal *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997). *Nusom* was cited by the

Court of Appeals in this case. Slip op. at page 4. Bates should be required to live with his decision to change from (at least) an attempt to fashion a lump sum settlement offer, to an offer solely within the statutory framework of RCW 4.84.250. It is worth noting here that McGuire did not attempt to employ RCW 4.84.250. No reference was made to that statute in her complaint, nor did she make any RCW 4.84.250 offers of settlement. Bates was confronted with nothing exotic or confusing. The questions on how to state a lump sum settlement offer are everyday questions for all legal practitioners. In an interesting case examining in detail the consequences of a CR 68 offer, our Court points out that the burden for a clear offer (and consequently an educated “knowing” acceptance) is squarely on the shoulders of the offeror:

Marek does not require that a CR 68 offer specify that the "costs" include attorneys' fees. The court allows that result to flow as a matter of law from the terms of the underlying statute. However, as this case shows, the failure to do so may create uncertainty as to the exact meaning of the offer and could indeed be a trap for an unwary plaintiff.

Accordingly, it would be prudent practice and we strongly recommend that where a defendant intends that his offer shall include any attorneys' fees provided for in the **underlying statute he expressly so state**. His offer should say, "costs including attorneys' fees" or words to that effect. A defendant knows what he intends and fair dealing requires that he manifest that intention to the other party. If the underlying statute is unclear, such an offer will at least make the defendant's interpretation clear. This is a slight burden and it is fairly placed on the defendant who is

seeking to terminate his liability for attorneys' fees at the time of settlement. *Hodge v. Development Services*, 65 Wn. App. 576, 828 P.2d 1175 (1992) at page 584.

Our Courts have confirmed that the language of CR 68 allows an offering defendant to explain their offers of judgment pursuant to that rule. That is different than offers under RCW 4.84.250-280. In the appropriate CR 68 case, such an offer of judgment could be a lump sum and all-inclusive offer of settlement. On the other hand, in this case, the Court of Appeals confirms that the unambiguous language of RCW 4.84.250 does not. Bates always had open to him a simple lump-sum offer method, as old and tried as anything in the law: A simple letter with unequivocal language leaves no question as to the included or excluded elements of any suggested settlement. This is again nothing new or confusing, but rather the heart of what counsel for defendants and plaintiffs must do every day. Similarly, in any pending case, a typical offer to conclude the case with all-inclusive language would be an offer for a stipulation and order of dismissal, with prejudice and without an award of fees or costs to either or any party. Again, this is not confusing, and is always open to litigants in any case, whether of a small or large amount. As stated by the Ninth Circuit in the context of a CR 68 offer of judgment: "If there is any room for doubt about what is included, or excluded, when "costs" are offered,

the defendant can craft its offer to make clear the total dollar amount that it will pay.” Nusom v. Comh Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997) at page 833.

We presume it was Bates’ intent to set McGuire up for an award of attorney fees, given that Bates offered \$14 more than Ms. McGuire’s entire claim (\$2,166 vs. \$2180) (CP 46-47). Bates had known the amount of Ms. McGuire’s claim, ever since Bates received Plaintiff’s Second Amended Complaint (CP 83-87). However, the full offer on the underlying claim came only after approximately 17 months of litigation, and after Ms. McGuire had incurred approximately \$2,800 in attorney’s fees. (CP 58-63) Bates should be required to live with his strategy to employ only RCW 4.84.250-.280 for his final offer.

3. PLAINTIFF IS THE “PREVAILING PARTY” & THEREFORE IS ENTITLED TO HER COSTS, INTEREST, AND ATTORNEY’S FEES UNDER RCW 18.27.040(6)

The Court of Appeals approached the question of whether the trial court correctly awarded fees to McGuire under RCW 18.27.040 in the same fashion as their analysis of RCW 4.84.250-.280. The wording of the statute simply determines the outcome. The starting point is the mandatory language for an award. The relevant wording is that “The

prevailing party in an action...involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees." (Emphasis supplied). It is hard to imagine that McGuire has not "prevailed" in the action. After all, McGuire continued to press her case, after forcing Bates to answer, forcing Bates to respond to discovery requests, and finally pushing Bates to stipulate to arbitration. Only 13 days prior to the arbitration date, Bates finally offered more than the maximum amount McGuire could have received in her claim, albeit a small amount exceeding that maximum (\$14.00). Bates knew that the amount of his offer did not include fees, let alone statutory costs and pre-judgment interest recoverable under RCW 18.27.040.

The Court of Appeals cites both Allahyari v. Carter Subaru, 78 Wn.App. at 522-23 and Walji v. Candyco, Inc., 57 Wn. App. 284, 289, 787 P.2d 946 (1990) for the propositions that a party can "prevail" without a final judgment on the merits. The Court acknowledges that RCW 18.27.040 is similar to the statutes there, being non-restrictive. We agree with the Court of Appeals that the contractor's responsibility should not be eroded, or, as it would have been in this case, eliminated by requiring the plaintiff/customer to shoulder her own fees, costs and pre-judgment loss of use of her funds.

In Eagle Point Condo. Owners Assoc. v. Coy, 102 Wn.App. 697, 9 P.3d 898 (2000), the Court, after finding that the trial court had correctly identified the “prevailing party” under the Condominium Act went on to distinguish a line of cases raised by that appellant, and commented on the attempted use of a last-minute offer of judgment (CR 68) under such a circumstance:

...the condominium owners' complaints about the quality of the construction were not resolved by early agreement. They maintained their lawsuit at considerable expense... To impose the Richter result in these circumstances would be unjust. The attorney fees incurred in litigating small but meritorious consumer claims often exceed the value of the claim itself. It would be a substantial disincentive to making such claims if the defendant could disable the plaintiff from recovering attorney fees simply by waiting until the eve of trial to offer what the claim is worth. (Eagle Point, supra, at 709)

Bates advocates elevating RCW 4.84.250-.280 to the position of trumping small claims brought under consumer-protective statutes, such as RCW 18.27.040. This would sabotage the RCW 18.27.040(6) award for fees and costs, in the majority of cases that will be brought under that statute.

The Court of Appeals pointed out that under the long-arm statute, an out-of-state defendant “prevails” upon a dismissal of the case against them, and is entitled to fees regardless of whether a final judgment on the merits is entered. The lead case on this is Anderson v. Gold Seal

Vineyards, 81 Wn.2d 863, 505 P.2d 790 (1973). In Anderson, an out-of-state Defendant was awarded their defense costs and attorney's fees incurred, after the Cross-Plaintiff voluntarily dismissed their claims against the out-of-state Defendant. The relevant portion of the "long-arm" statute, RCW 4.28.185(5) provides that:

"In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees." (Emphasis supplied).

The initial question in Anderson (at page 865) was whether "...there can be no prevailing party unless an affirmative judgment is entered." After the Court's careful description of the evolution of the "general" rule:

"A prevailing party is generally one who receives a judgment in its favor." Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). (Emphasis supplied).

the Court simply reflects that:

"We did not state in any of these cases and it is not the law that there can be no prevailing party unless such a judgment is entered." Anderson at page 867.

The Court then looked at the purpose behind RCW 4.28.185(5), and determined that non-suits result in the finding that the Defendant has "prevailed." Anderson at page 868.

The Court held that the legislature “must” have had in mind that a Defendant who prevails would have no affirmative judgment entered against them. The holding in *Anderson* answers a key question in our case: Whether, under the language of RCW 18.27.040, one can be deemed a prevailing party without a judgment? This case is more compelling since a judgment was entered, albeit pursuant to an offer and acceptance. The all-important language, for this case is the use of the word “prevails” in RCW 4.28.185(5). Identically, the legislature used the word “prevailing” in RCW 18.27.040(6) to allocate attorney’s fees, costs, and interest responsibility. The identity becomes stronger yet when reviewing the legislative history of RCW 18.27.040(6). The above reasoning by the Court of Appeals was combined with recognition of the strong public policy behind the enactment of RCW 18.27.040.

The fact this case did not go to trial, resulted in McGuire obtaining more than her underlying claim. In other words, plain logic compels a determination of McGuire as “prevailing” in the action. After all, Bates was not pleased with the opinion of the Trial Court, and even to this day has not paid anything to McGuire. Just as McGuire had to fight to obtain the offer that exceeded her claim, she continues to fight to get paid

anything. The judgment entered in this action remains unsatisfied, including the initial settlement amount.

4. RESPONDENT REQUESTS ATTORNEY'S FEES UNDER RAP 18.1.

Respondent respectfully requests an award of reasonable attorney's fees under RAP 18.1, if she prevails on appeal. This request is based on the award below, and the law that a prevailing party on appeal who was entitled to an award of attorney's fees at the trial level, and subsequently prevails on appeal, is similarly entitled to attorney's fees on appeal. See *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007) at page 623-624:

RAP 18.1(a) permits us to award attorney fees and costs on appeal if applicable law grants a party the right to recover attorney fees or expenses. In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if it prevails on appeal. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, at 423, 161 P.3d 406 (2007) (citing *Richter v. Trimberger*, 50 Wn. App. 780, 786, 750 P.2d 1279 (1988)).

IV. CONCLUSION.

The decision by the Court of Appeals results in no confusion whatsoever and simply clarifies the unambiguous language of two statutes. In the case of RCW 4.84.250, an offer simply cannot ever include costs,

V. APPENDIX.

RCW 18.27.040(6)

(6) The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond is not liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction.

RCW 4.84.250 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — ALLOWED TO PREVAILING PARTY.

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.260 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — WHEN PLAINTIFF DEEMED PREVAILING PARTY.

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

RCW 4.84.270 ATTORNEYS' FEES AS COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS — WHEN DEFENDANT DEEMED PREVAILING PARTY.

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

**RCW 4.84.280 ATTORNEYS' FEES AS COSTS IN DAMAGE
ACTIONS OF TEN THOUSAND DOLLARS OR LESS — OFFERS
OF SETTLEMENT IN DETERMINING.**

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.