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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT BATES; B&H CONSTRUCTION
SERVICES, INC., a Washington corporation;
and BANNER BANK (Bellingham),
Bond Acct. #3540233253,

Appellants,

vs.

JULIANNE McGUIRE,
Respondent.

APPELLANTS' BRIEF

ROLF BECKHUSEN
Attorney for Appellants

2014 Iron Street
Bellingham, Washington 98225
(206) 671-6900

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I. INTRODUCTION

This case raises the issue whether a party may later assert a claim for attorney fees, costs and interest where the party previously accepted a settlement offer for a sum of money in settlement of “all claims” between the parties. Assuming (for argument’s sake) that the compromise and settlement did not bar a later claim for attorney fees, costs and interest, there remains the question of whether the party, by settling all claims before trial, was entitled to such fees, costs and interest under the statute they relied upon. The statute required as a pre-condition that they be a “prevailing party in an action for breach of contract by a party to a construction contract.”

For ease of reference, Appendix A sets forth true and correct copies of the documents relevant to a compromise and settlement between the parties; namely, the “Settlement Offer by Defendant Robert Bates and B & H Construction Services, Inc.”, dated February 22, 2007, and the “Acceptance of Settlement Offer” dated February 27, 2007. (CP 46-47, 49) Appendix B contains the statutes which may be relevant to the discussion of the issues: RCW 4.84.250-280, RCW 18.27.030 and RCW 18.27.040.

II. ASSIGNMENTS OF ERROR

1. The court erred in entering any Finding of Fact and/or Conclusion of Law which alleged that Plaintiff McGuire was entitled to any attorney fees, costs, or any other relief pursuant to RCW 18.27.030. (Findings of Fact 7; Conclusions of Law 1, 2, 3, 4 and 5) (CP 10,11)

Assuming that McGuire intended to cite "RCW 18.27.040(6)" instead of "RCW 18.27.030", Defendant Bates makes the following additional assignments of error:

2. The court erred in finding and concluding that McGuire had not made a claim for attorney fees or costs prior to Plaintiff's acceptance of the settlement offer where McGuire included a claim for them in her Complaint. (Findings of Fact 5 and Conclusions of Law 2) (CP 11)

3. The court erred in finding that attorney fees and costs became a claim by McGuire only after the McGuire accepted Bates' offer. (Finding of Fact 5) (CP 10)

4. The court erred in finding and concluding that the language of Defendant's offer of settlement which included settlement of "all claims" between the parties did not include further claims, future claims, attorney fees, costs and/or prejudgment interest. (Finding of Fact 6) (CP10)

5. The court erred in finding and concluding that the compromise and settlement between the parties only pertained to the “plaintiff’s underlying claim” and not to their fees, costs and interest as well. (Finding of Fact 8) (CP 10)

6. The court erred in concluding that the McGuire became a prevailing party after communication of the acceptance of the offer to Bates and from “the point of acceptance forward” could make a claim for McGuire’s attorney fees, costs of suit and prejudgment interest pursuant to RCW 18.27.030 or RCW 18.27.040. (Finding of Fact 7, Conclusions of Law 2, 3 and 5) (CP 10, 11)

7. The court erred in its recital of public policy wherein it concludes that “a person who prosecutes their case to conclusion” can do so by entering into a settlement such as the one in this case. (Conclusions of Law 4) (CP 11)

8. The court erred in entering a judgment based upon defective Findings of Fact and Conclusions of Law (CP 10, 11)

9. The court erred in entering a judgment against the Defendant, Robert Bates, individually, rather than against the defendant B&H Construction Services, Inc. only. (CP 7, 8)

10. The court erred in entering a judgment for \$2,180.00 against Bates for damages without any supporting Findings of Fact or

Conclusions of Law which indicate there was a breach of contract by Bates as a required predicate to such an award under RCW 18.27.040(6).

III. STATEMENT OF THE CASE

Plaintiff/Respondent, Julianne McGuire (hereafter McGuire), is a resident of Whatcom County. (CP 83) On May 26, 2005, she accepted a proposal to make a number of interior improvements tendered by Robert Bates of B&H Construction Services, Inc., a Washington corporation (hereafter "Bates"), doing business in Bellingham, Washington. (CP 86, 83) Among other improvements, Bates agreed to "build and install pantry and cabinets" (CP 86) and with respect to the cabinets, the proposal stated:

Cabinets: Western Maple (Select) some very small (1/4" or less) knots are allowed. This is real wood and will vary in color and texture. Finish will be water resistant lacquer (satin finish). (CP 86)

After the cabinets and backsplash were installed, Ms. McGuire claimed that they "began to crack, split and lost their finish". (CP 84) Bates admitted that the backsplash and drip edge lost their finish but denied any knowledge of other problems and denied responsibility for the damage to the backsplash and drip edge. (CP 80) McGuire allegedly hired another contractor, Grain and Shine Woodworking, to make repairs for the sum of \$2,166.00. (CP 84, 87)

No factual disputes to this point were ever determined by the court. There was never a trial, nor any dispositive motion (e.g., summary judgment) through which the court ever resolved the issues relating to the alleged breach of contract.

McGuire initially represented herself and served an Amended Summons and Complaint on Bates on March 17, 2006. Bates appeared on April 3, 2006. (CP 27) Respondent McGuire filed her Second Amended Complaint on June 30, 2006, through her attorney, Joseph Pemberton. (CP 83) The Second Amended Complaint commences, "PLAINTIFF, for her claim states:".

She claimed \$2,166.00 for the costs of repair. (CP 83, 84) She also made a claim for pre-judgment interest of 12% "from payment until the entry of the judgment herein" on the \$2,166.00 and "\$750.00 in accrued attorney's fees for bringing this action and more if contested further by Defendants". (CP 84) She also made an additional claim for "attorney's fees and costs of suit". In the body of her Second Amended Complaint, McGuire also states that she is "entitled to attorney's fees and costs pursuant to RCW 18.27.040(6)". (CP 85)

During the pendency of the action, there were a number of settlement offers. (CP 33-39). The first three were all not accepted. The

first offer, dated October 3, 2006, was made by Bates through their attorney and states:

I have been authorized by my client Robert Bates to make a pre-trial offer of the sum of Fifteen hundred and fifty dollars (\$1,550.00) to settle all claims against him pursuant to cause no. 06-2-00535-6. This offer is made pursuant to RCW 4.48.250-280 and RCW 18.27.040.

The second offer dated December 8, 2006, is made by Ms. McGuire through her attorney and states:

My client would like to try to settle this case before the end of the year. Ms. McGuire is willing to accept \$1,550 for the damage. But Mr. Bates would also have to pay my attorney's fees and costs on this case, pursuant to RCW 18.27.040(6). It's worth noting that my client's actual damages are \$2,166, which she has already paid. At this time, my fees are \$1,975 and my costs are small at \$20. To sum it up, my client will settle her case for \$3,545. This offer is open until 5 pm on December 15, 2006.

The third offer is made by Defendant Bates on December 15, 2006, and states:

Your offer to settle your \$2,166 claim for \$3,545.00 is rejected. My client has authorized me to amend his previous offer of settlement on all claims against him to \$1700.00. This offer is made pursuant to RCW 4.48.250-280 and RCW 18.27.040.

All of the foregoing offers were not accepted. A stipulated order transferring the case to arbitration was entered January 5, 2007. (CP 81-82)

The fourth settlement offer (see Appendix A) was made by defendant Bates dated February 22, 2007. The "Settlement Offer by Defendant Robert Bates and B & H Construction Services, Inc." states:

COMES NOW the Defendants Robert Bates and B&H Construction Services, Inc. and makes the following offer in settlement of all claims between the parties:

Pursuant to RCW 4.84.250-280, we offer to pay Plaintiff the sum of \$2,180.00 in settlement of all claims against the Defendants. Said offer is open to acceptance for ten (10) days from the date hereof; if not accepted it shall be withdrawn. (CP 46-47)

This offer was followed by plaintiff's pleading entitled "Acceptance of Settlement Offer" dated February 27, 2007. The purported acceptance states:

Plaintiff Julianne McGuire by and through her attorney Joseph T. Pemberton of Pemberton & Hoogestraat, P.S., hereby accepts Defendants' Settlement Offer dated February 22, 2007. (CP 49)

The matter was scheduled for an MAR hearing on March 6, 2007. (CP 41) No trial or other comprehensive factual resolution took place before the arbitrator. The only matter discussed was Plaintiff's Motion for

an Award of Attorneys' fees where the offers of settlement were considered. (CP 63) The arbitrator entered the following award:

The Plaintiff's Motion for an Award of Attorney's (sic) Fees must be denied. All claims were settled by Offer and Acceptance prior to to (sic) the hearing. (CP 78)

Thereafter, McGuire, on March 27, 2007, filed and served a Request for Trial DeNovo. (Resp CP 3-4). A trial date was scheduled for July 10, 2007. (RP 5) McGuire prepared another Motion for Entry of Judgment and for Attorney Fees and Costs Pursuant to RCW 18.27.040 dated June 18, 2007. (Resp. CP 2) This motion was heard on June 29, 2007.

In response to plaintiff's motion, Bates filed Defendant's Objection to Motion for Attorney Fees dated and filed June 26, 2007. (CP 53-57) Bates objected to a hearing on the motion because a trial had been set and the motion entailed an impermissible discussion of an arbitration award and settlement offers before trial. Further, neither party could be declared a prevailing party without there first being a final judgment entered after trial. (CP 13-14) Additionally, the discussion of settlement offers would probably result in the judge having to disqualify himself. (CP 14-15)

The court was unconcerned about any of the issues raised by Bates. (RP 1-6) The trial date of July 10 was bumped by the court so that Bates could respond to the issues raised by the settlement itself. (RP 5, 6)

The motion for entry of judgment and for attorney fees and costs was heard on July 20, 2007, without any trial or any opportunity by Bates to have the issue of the defendants' liability for breach of contract to be considered by the court. (RP 2-10) The court entered its oral decision followed by the entry of its final Findings of Fact, Conclusions of Law and Judgment on August 17, 2007. (CP 7-12)

IV. ARGUMENT

A. The Appellants made an offer of settlement to the Respondent which complied with all statutory and case law procedural requirements.

It may make little difference to the ultimate resolution of this case whether the offer of settlement and acceptance was made pursuant to RCW 4.84.250-280, RCW 18.27.040(6) or any statute at all. As the ensuing discussion will hopefully clarify, in order for a party to be a "prevailing party" under either RCW 4.84.250-280 or RCW 18.27.040(6) (and hence be eligible for fees, costs and interest), a party must be the successful party in a trial or other final disposition.

This section (A) only attempts to explain why Bates made an offer of settlement pursuant to RCW 4.84.250-.280. Further, Bates must demonstrate that his offer of settlement met the requirements of a valid offer under those sections; i.e., that the proper procedure was followed.

10A Washington Practice #68.28 contains a suggested “Defendant’s Offer of Settlement in Action for Ten Thousand Dollars or Less”. It reads:

Defendant [name] offers to settle the plaintiff’s claim against him for [specify]. This offer is subject to the provisions of RCW 4.84.250-280.

RCW 4.84.250-280 are set forth in Appendix B for the reader’s convenience.

Bates attempted to improve on this form by insuring that the Plaintiff/Respondent understood that the amount offered was for the settlement of “all claims between the parties”, whether they be labeled damages, fees, costs, interest, pre-judgment interest or whatever. (CP 42) All McGuire’s claims in this case were stated in the Second Amended Complaint. (CP 83-87)

The Defendant made an offer of settlement dated February 22, 2007. The offer of settlement stated:

COMES NOW the Defendants Robert Bates and B & H Construction Services, Inc. and makes (sic) the following offer in settlement of all claims between the parties:

Pursuant to RCW 4.84.250-280, we offer to pay Plaintiff the sum of \$2,180.00 in settlement of all claims against the Defendants. Said offer is open to acceptance for ten (10) days from the date hereof; if not accepted, it shall be deemed withdrawn. (Emphasis added) (CP 46, 47) (See Appendix A)

RCW 4.84.250-280, the so-called "small claims fee provision", applies "in any action for damages" where the consequential damages ("amount pleaded, excluding costs") claimed are \$10,000.00 or less. See RCW 4.84.250. The total consequential damages requested in the Plaintiff's Second Amended Complaint were \$2,166.00. (CP 84).

All statutory procedural requirements precedent to a valid settlement offer under RCW 4.84.250-280 were followed. These are set forth in RCW 4.84.280. They are:

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 completion of the service and filing of the Summons and Complaint.

This fourth offer of settlement was served on the McGuire on February 22, 2007 by personal delivery to McGuire's attorney. (CP 41, 46) The MAR arbitration hearing was scheduled for March 6, 2007. (CP 41) This offer was thus tendered thirteen (13) days before the trial scheduled before the arbitrator. (CP 31)

“Some type of notice” of an intent to seek fees under RCW 4.84.250-280 is required, “so the parties can settle the claim before they incur the risk of paying the prevailing party’s attorney fees.” Lay v. Hass, 112 Wn. App. 818, 824, 51 P.3d 130 (2002); In re 1992 Honda Accord, 117 Wn. App. 510, 524, 71 P.3 226 (2003). An offer of settlement is a prerequisite. A comparison between the settlement offer and the damages awarded at trial determines which party is the “prevailing party” for purposes of the fee award. RCW 4.84.250-280.

In this case, McGuire received actual notice of the settlement offer that the “small claims fee provision applies”. A party need not plead RCW 4.84.250-280 for it to apply. Beckman v. Spokane Transit Auth., 107 Wn.2d 785, 789, 733 P.2d 960 (1987), which adds: “it is sufficient that the charged party receive actual notice of the statute prior to trial”. The court in Estate of Toth, 83 Wn. App. 158, 165, 920 P.2d 1230 (1996) adds:

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 and the Beckman notice requirement is satisfied.

A party is entitled to attorney fees under RCW 4.84.250-280 only if the proper procedure is followed. Hertz v. Riebe, 86 Wn.2d 102, 107, 936 P.2d 24 (1997).

B. The acceptance by McGuire of the offer of settlement without any reservation, exception or counteroffer resulted in a compromise and settlement of all claims between the parties.

McGuire's attorney prepared a pleading entitled Acceptance of Settlement Offer (CP 49). It was signed on February 27, 2007, and states:

Plaintiff JULIANNE McGUIRE, by and through her attorney, Joseph T. Pemberton of PEMBERTON & HOOGESTRAAT, P.S., hereby accepts Defendants' Settlement Offer dated February 27, 2007.

The acceptance contains no reservation, exception or counteroffer. The acceptance is also not a partial acceptance. There were no discussions, negotiations or questions from either party about the terms of either the offer or the acceptance or the parties' intent before acceptance.

Settlement agreements are a type of contract and therefore are governed by contract law. 15A Am. Jur. 2d Compromise and Settlement 49; Litho Color, Inc. v. Pacific Employers Ins. Co., 98 Wn. App. 286, 991 P.2d 638 (Div 1, 1999). In this case, the settlement agreement was, after a fashion, included in the Findings of Fact, Conclusions of Law and the Judgment. It is Bates' position that the court largely disregarded and/or misinterpreted the agreement.

The intention of the parties derived from the language used by the parties in the agreement controls the interpretation of the order. As stated in Martinez v. Miller Industries, Inc., 94 Wn. App. 935, 942, 974 P.2d 1261 (1999),

When a court order incorporates an agreement between parties, the “meaning of the order is the same as the meaning objectively manifested by the parties at the time they formed the agreement”.

Quoting from Interstate Prod. Credit Ass’n. v. MacHugh, 90 Wn. App. 650, 654, 953 P.2d 812 (1998):

Since an accord and satisfaction is a new contract, complete in itself, its enforceability does not depend on the validity of the antecedent claim. Each party’s promise in the new agreement is supported by an entirely new consideration – the return promise of the other. N.W. Motors, Ltd. v. James, 118 Wn.2d 294, 305, 822 P.2d 280 (1992). And so the accord is enforceable as a contractual agreement in its own right. Perez v. Pappas, 98 Wn.2d 835, 843, 659 P.2d 475 (1983).

In this case, there is little extrinsic evidence on the record which would assist the court in interpreting the settlement contract. Prior to the offer and acceptance, the parties did not negotiate or converse regarding the terms or their intentions. Nevertheless, the parties arrived at almost totally opposite conclusions regarding the meaning of the agreement.

The court in this case is being requested to interpret provisions of RCW 4.84.250-280, RCW 18.27.040(6) and the language of the agreement, including “all claims”. Determining the legal consequences flowing from a contract term involves a question of law. Denny’s Restaurants, Inc. v. Security Union Title Ins. Co., 71 Wn. App. 194, 201, 859 P.2d 619 (1993). Questions of law are reviewed de novo. Kuipschild v. C.J. Recreation, Inc., 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

Words in a contract should be given their ordinary meaning. Corbray v. Stevenson, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. Moyer v. Pierce County Med. Bureau, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). But a contract provision is not ambiguous merely because the parties suggest opposite meanings. Moyer, supra, “Ambiguity will not be read into a contract where it can reasonably be avoided.” McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

There was thus an offer and acceptance of a settlement of “all claims” between the parties for a sum of money.

C. Where Bates made an offer of settlement of “all claims between the parties” which was accepted by McGuire without reservation, modification or exception, the respondent waived her right to seek

attorney fees, costs and pre-judgment interest after acceptance regardless of the provisions of RCW 4.84.250-280 or RCW 18.27.040(6)

1. All claims of the Plaintiff are set forth in her Second Amended Complaint.

The Second Amended Complaint in this action begins, “PLAINTIFF for her claim states:”. (Emphasis added) (CP 83)

CR 8(a) is entitled, “Claims for Relief”. The section states regarding complaints:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. (Emphasis added)

This is consistent with the purpose of a complaint which, according to Black’s Law Dictionary (8th Ed. 2004) is “[t]he initial pleading that starts a civil action and the basis for the court’s jurisdiction, the basis for the plaintiff’s claim and the demand for relief..” (Emphasis added)

Black’s Law Dictionary (8th Ed. 2004) defines the word “claim” as “A demand for money, property or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.” The dictionary adds: “Also termed claim for relief.”

The "PLAINTIFF, for her claim" as set forth in Plaintiff's Second Amended Complaint (hence also included in the phrase "all claims") includes the following:

- 1) B and H is indebted to Plaintiff in the amount of \$2,166.00 for repairs made.
- 2) Plaintiff has incurred attorneys' fees and costs for having to bring this action.
- 3) Plaintiff is entitled to attorneys' fees and costs pursuant to RCW 18.27.040(6).
- 4) For pre-judgment interest of 12% from payment until entry of the judgment herein...
- 5) For attorneys fees and costs of suit; and
- 6) For such other and further relief as the Court deems just and equitable. (CP 84-85)

Under the facts of this case, as part of the compromise and settlement, the Plaintiff agreed to waive all of this/these claim(s) in return for a sum of money.

2. Dictionary definition of "all claims".

The word "all" is defined by Black's Law Dictionary (5th Ed.) as "the whole number or sum of" and the court in Perkins Coie v. Williams, 84 Wn. App. 733, 737, 929 P.2d 1215 (Div. 1, 1997), adopts the definition in American Heritage Dictionary of the English Language (3rd Ed. 1992), saying:

The plain and ordinary meaning of that word is “being or representing the entire or total number, amount or quantity.”

The word has been held synonymous with the words “any”, “every”, “total” and “whole”. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 145, 247 P.2d 787 (1952), 3A CJS “All” (1989) Webster’s Encyclopedia Unabridged Dictionary of the English Language (2001) defines “all” as,

...the whole of ... the whole number of (used in referring to individuals or particulars, taken collectively)...; every...; ...any; anywhatever...

3. Authority both in Washington and elsewhere indicates that the acceptance of a settlement offer by a party in exchange for the release of “all claims” bars a later claim by either party for fees or costs.

In Mutual of Enumclaw Ins. Co. v. State Farm Mut. Auto Ins., 37 Wn. App. 690, 682 P.2d 317 (1984), the parties entered into a written release of claims stemming from an automobile accident. The stipulated Order of Dismissal stated that, “all claims in this action shall be dismissed with prejudice and without costs”. Based upon a recital of the policy encouraging the private settlement of suits, the court at page 694 states:

...there is a presumption that a general settlement agreement embraces all existing claims of the parties arising from the underlying incident.

The Mutual of Enumclaw court dismissed an indemnity claim brought by one insurance company against another after entry of the release and order of dismissal because at page 694, “absent an express reservation of rights in the final settlement document,” the insurance company is “presumed to have waived its claim”. To overturn the presumption that the parties have considered and settled every existing difference, the courts have required,

...testimony so clear and convincing that the court can free the transaction from all doubt as to the interest of the parties.

Burrows v. Williams, 52 Wash. 278, 287, 100 P. 340 (1909), cited by Or. Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 414, 36 P. 3d 1065 (2001).

The Mutual of Enumclaw court at page 694 cites the court in Wm. H. Heinemann Creameries, Inc. v. Milwaukee Auto Ins. Co., 270 Wis. 443, 71 N.W. 2d 395, 72 N.W. 2d 102 (1955) with approval for the following rule:

We consider the better rule to be that the making of the original settlement without any express reservations of rights by the settler constitutes a complete accord and satisfaction of all claims of the immediate parties to the settlement arising out of the same accident.

In accord is Plancich v. Progressive Am. Ins. Co., 134 Wn. App. 453, 142 P. 3d 173 (2006) where the injured party in an auto accident sought her attorney fees under a UIM claim where she had

previously agreed to fully release the insurance company, "from any and all claims, actions, causes of action, demands, rights, damages [and] costs resulting from the automobile accident". The court states at page 545-46:

The language of the settlement agreement could not be clearer. Plancich released Progressive from all claims stemming from her April 23 automobile accident. (Emphasis is the court's)

Also in accord is Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn. 2d 178, 189, 840 P.2d 851 (1992) where an injured passenger's claim for UIM coverage was denied because he had signed a prior general release of his action against the driver. The general release released Nationwide from "any and all claims...of any kind or nature whatsoever, and particularly on account of all injuries to Mark Watson, known or unknown...from an accident which occurred on or about the 8th day of April, 1984...". The court at page 189 states:

Petitioner Nationwide and Respondent Watson may have had different subjective intentions, but the words employed in the general release signed by respondent on December 14, 1987, clearly constitute a release of all claims.

In Roberts v. Bechtel, 74 Wn. App. 685, 875 P.2d 14 (Div. 3, 1994), a plaintiff driver was struck in the rear by the following vehicle driven by the defendant. The parties settled; after the defendant paid the plaintiff a sum of money, plaintiff agreed to release the defendant, "from

any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever” stemming from the accident. Plaintiff later brought a claim for her attorney fees to defend a frivolous counterclaim by the defendant under RCW 4.84.185. The court reversed the order awarding attorney fees and states at page 687:

The language of the release is plain and unambiguous; Ms. Roberts released Ms. Bechtel from any and all claims resulting or developing from the accident.

There are cases based on Offers of Judgment made under Fed. R. Civ. P 68 and its state progeny which are distinguishable from settlement offers based on other rules or no rules at all. The Washington version, CR 68, is typical and provides that a party may make an “offer to allow judgment to be taken against him for the money or property...with costs then accrued”. Depending somewhat on the facts of each case, where an underlying claim, statute or contract on which a claim is based, does not distinguish between attorneys fees and costs, a court may sometimes award attorneys fees as “part of costs then accrued”. See e.g., Morels v. Chesny, 473 U.S. 1, 105 S. Ct. 3013, 87 L. Ed. 2d 1 (1985).

Those cases and situations are clearly distinguishable from RCW 4.84.250-280 where the determinative “amount pleaded” is “exclusive of costs”. Further, the Editorial Commentary to CR 68 indicates that under

Washington law, “costs” do not include attorneys’ fees unless expressly provided by statute or contract, citing Magnusson v. Tawney, 109 Wn. App. 272, 276, 34 P.3d 899 (2001).

Cited in 15A Washington Handbook on Civil Procedure 81.2, the court in The Real Estate Pros v. Byers, 2004 Wy. 58, 90 P.3d 110 (Wyo. 2004) reasoned that if the underlying statute or contract in a CR 68 offer of judgment is silent as to whether attorneys fees are included in costs, the court can consider the “all claims” language of the offer. The court held that an accepted offer to settle which refers to “all claims” of the plaintiff against the defendant was not ambiguous and states at page 115:

...can only mean one amount for settlement of all claims made by the plaintiff, including the claims for attorney’s fees. The lack of the exact words “attorney fees” in [defendant’s] offer does not render it ambiguous when it is considered in its entirety.

(Citing Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390 (7th Cir. 1999) in support.)

In Burnbal v. Smith, 165 P.3d 844 (Colo. App. 2007), the plaintiff, after accepting a settlement in which the defendant conditioned his offer as an “offer to settle all claims with plaintiff”, sought a determination that she was entitled to a recovery of attorney fees and costs in addition to the settlement amount based upon a consumer protection statute.

The court first applied contract principles to the interpretation of the settlement agreement. It found the term “all claims” to be unambiguous and adopted at p. 845 the definition of “claim” from Black’s Law Dictionary (8th Ed. 2004) which is:

...an interest or remedy recognized at law; the means by which a person can obtain a privilege, possession or enjoyment of a right or thing; cause of action.

The court found at 845-46 that the plaintiff “presented each of her claims for relief in the original complaint” and that,

Therefore, “all claims” in the offer of settlement encompassed all relief sought on the basis of a claim in the original complaint.

In conclusion, the court holds that by accepting defendants’ offer as to “all claims”, plaintiff waived any further right to seek attorney fees and at p. 846,

We agree with the Seventh and Eleventh Circuits and the Wyoming Supreme Court that an offer of settlement as to “all claims” unambiguously includes attorney fees where the only claim for attorney fees appears in the complaint. (Citing Real Estate Pros., *supra*, Nordby, *supra*, and Util. Automation 2000, Inc. v. Choctawhatche Elec. Co-op, 298 F.3d 1238 (11th Cir. 2002).

The offer and what was accepted were equally clear and unambiguous in our case.

D. In order to be a prevailing party under RCW 18.27.040(6), a court must have awarded the party a final judgment in its favor after finding that a breach of contract occurred.

The court in Conclusion of Law #2 states: “After acceptance of Defendants’ offer of settlement, Plaintiff became the prevailing party under RCW 18.27.030.” RCW 18.27.030 does not provide for an award of fees or costs. Assuming that the appellant intended to cite RCW 18.27.040(6), that statute in relevant part states:

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.

RCW Chapter 18.27 does not define “prevailing party”. The construction contract is silent as to any award of fees or costs to a party. (CP86)

As stated in Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 164, 795 P.2d 1143 (1990), “A prevailing party is generally one who receives a judgment in its favor.” In accord, Soccolo Construction v. City of Renton, 158 Wn.2d 506, 521, 145 P.3d 371 (2006) and IBF, LLC v. Heuft, ___ P.3d ___ (Wash. App. Div. 1, 2007).

Washington follows the American rule in awarding attorney fees. Panorama Vill. Condo. Owners Ass’n. Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Under this rule,

...a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute or recognized ground of equity providing for fee recovery.

City of Seattle v. McCoy, 112 Wn. App. 26, 30, 48 P.3d 993 (2002) quoting Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

In Kennedy v. Martin, 115 Wn. App. 866, 873, 63 P.3d 866 (2003), the court held that under a condemnation statute (RCW 84.24.030), the court could make an award of fees to a potential condemnee where the condemnor abandoned the action. The statute permitted an award of fees “in any action” and did not require a judgment beforehand. The court cites extensively from Beckman v. Wilcox, 96 Wn. App. 355, 997 P.2d 890 (1999) review denied 139 Wn.2d 1017 (2000) and states at page 872:

... a party need not prevail in a condemnation action to be awarded attorney fees under RCW 8.24.030...RCW 8.24.030 is unlike other attorney fees statutes which allow attorney fees only to a prevailing party...A prevailing party cannot exist until there is an entry of judgment...But under RCW 8.24.030, an entry of judgment is not required before attorney fees can be awarded. ...In other words, there does not need to be a successful condemnation before the awarding of attorney fees, only an action.

Thus, the plaintiff cannot be a prevailing party after a full settlement of all claims between the parties. A “full settlement” defined in Black’s Law

Dictionary (8th Ed. 2004) as “a settlement and release of all pending claims between the parties.” (Emphasis added) A “judgment” on the other hand is defined in CR 54(a)(1) as “the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies”. Clearly, no appeal may be taken from the compromise and settlement agreement. There was no determination by the court of the merits of the Defendants’ case.

RCW 18.27.040(6) also requires that for a party to be entitled to fees, costs and interest, they must be the “prevailing party” in an action “for breach of contract by a party to a construction contract”. The court did not enter a finding or conclusion that indicates that the Appellant breached the contract in question.

The Plaintiff, thus, may not recover fees and costs under RCW 18.27.040(6). Plaintiff does not meet two pre-conditions required by the statute.

V. CONCLUSION

This case should be reversed and remanded to the trial court for entry of a judgment consistent with the terms of the compromise and settlement entered between the parties on February 27, 2007, which provided for the settlement of all claims between the parties for an agreed sum of money to be paid to the Plaintiff McGuire.

Respectfully submitted this 26th day of February, 2008.

A handwritten signature in cursive script, appearing to read "Rolf Beckhusen".

ROLF BECKHUSEN (WSBA #5037)
Attorney for Appellants.

APPENDIX A

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5 FEB 22 2007

6 PEMBERTON & HOOGESTRAAT, PS
7

8
9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
10 IN AND FOR THE COUNTY OF WHATCOM.

11 JULIANNE MCGUIRE,)
12)

13 Plaintiff,)

NO. 06-2-00535-6

14)
15 v.)

SETTLEMENT OFFER BY
DEFENDANTS ROBERT BATES
AND B&H CONSTRUCTION
SERVICES, INC.

16 ROBERT BATES; B&H CONSTRUCTION)
17 SERVICES, INC., AND BANNER BANK)
(Bellingham), BOND ACCT. #3540233253,)

18 Defendants.)
19

20 TO: JULIANNE MCGUIRE

21 AND TO: JOSEPH PEMBERTON, her attorney

22 COMES NOW the Defendants Robert Bates and B & H Construction Services,
23 Inc.-and makes the following offer in settlement of all claims between the parties:

24 Pursuant to RCW 4.84.250-280, we offer to pay Plaintiff the sum of \$2180.00, in
25 settlement of all claims against the Defendants. Said offer is open to acceptance for ten
(10) days from the date hereof; if not accepted it shall be deemed withdrawn.

ROLF BECKHUSEN
ATTORNEY AT LAW
2014 Iron Street
Bellingham, WA 98225
(360) 671-6900

1.
2. DATED THIS 22nd DAY OF FEBRUARY, 2007.
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7. Rolf Beckhusen (5037)
8. Attorney for Defendants Bates and B&H
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ROLF BECKHUSEN
ATTORNEY AT LAW
2014 Iron Street
Bellingham, WA 98225
(360) 671-6900

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The Honorable Charles Snyder

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

JULIANNE MCGUIRE,

Plaintiff,

vs.

ROBERT BATES; B&H CONSTRUCTION
SERVICES INC, a Washington Corporation;
and BANNER BANK (Bellingham), Bond
Acct. #3540233253,

Defendants.

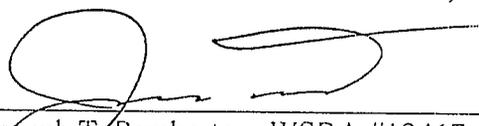
NO. 06-2-00535-6

ACCEPTANCE OF
SETTLEMENT OFFER

PLAINTIFF JULIANNE MCGUIRE by and through her attorney Joseph T. Pemberton
of PEMBERTON & HOOGESTRAAT, P.S. hereby accepts Defendants' Settlement Offer
dated February 22, 2007.

DATED: February 27, 2007

PEMBERTON & HOOGESTRAAT, P.S.



Joseph T. Pemberton, WSBA #12467
Attorney for Plaintiff.

APPENDIX B

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.

[1984 c 258 § 88; 1980 c 94 § 1; 1973 c 84 § 1.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

Effective date -- 1980 c 94: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect May 1, 1980." [1980 c 94 § 6.]

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.

[1973 c 84 § 2.]

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.

[1980 c 94 § 2; 1973 c 84 § 3.]

Notes:

Effective date -- 1980 c 94: See note following RCW 4.84.250.

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.

[1983 c 282 § 1; 1980 c 94 § 3; 1973 c 84 § 4.]

Notes:

Effective date -- 1980 c 94: See note following RCW 4.84.250.

RCW 18.27.030**Application for registration — Grounds for denial and suspension.**

(1) An applicant for registration as a contractor shall submit an application under oath upon a form to be prescribed by the director and which shall include the following information pertaining to the applicant:

- (a) Employer social security number.
- (b) Unified business identifier number, if required by the department of revenue.
- (c) Evidence of workers' compensation coverage for the applicant's employees working in Washington, as follows:
 - (i) The applicant's industrial insurance account number issued by the department;
 - (ii) The applicant's self-insurer number issued by the department; or
 - (iii) For applicants domiciled in a state or province of Canada subject to an agreement entered into under RCW 51.12.120(7), as permitted by the agreement, filing a certificate of coverage issued by the agency that administers the workers' compensation law in the applicant's state or province of domicile certifying that the applicant has secured the payment of compensation under the other state's or province's workers' compensation law.
- (d) Employment security department number.
- (e) State excise tax registration number.
- (f) Unified business identifier (UBI) account number may be substituted for the information required by (c) of this subsection if the applicant will not employ employees in Washington, and by (d) and (e) of this subsection.
- (g) Type of contracting activity, whether a general or a specialty contractor and if the latter, the type of specialty.
- (h) The name and address of each partner if the applicant is a firm or partnership, or the name and address of the owner if the applicant is an individual proprietorship, or the name and address of the corporate officers and statutory agent, if any, if the applicant is a corporation or the name and address of all members of other business entities. The information contained in such application is a matter of public record and open to public inspection.

(2) The department may verify the workers' compensation coverage information provided by the applicant under subsection (1)(c) of this section, including but not limited to information regarding the coverage of an individual employee of the applicant. If coverage is provided under the laws of another state, the department may notify the other state that the applicant is employing employees in Washington.

(3)(a) The department shall deny an application for registration if: (i) The applicant has been previously performing work subject to this chapter as a sole proprietor, partnership, corporation, or other entity and the department has notice that the applicant has an unsatisfied final judgment against him or her in an action based on work performed subject to this chapter or the applicant owes the department money for penalties assessed or fees due under this chapter as a result of a final judgment; (ii) the applicant was an owner, principal, or officer of a partnership, corporation, or other entity that either has an unsatisfied final judgment against it in an action that was incurred for work performed subject to this chapter or owes the department money for penalties assessed or fees due under this chapter as a result of a final judgment; or (iii) the applicant does not have a valid unified business identifier number, if required by the department of revenue.

(b) The department shall suspend an active registration if (i) the department has determined that the registrant has an unsatisfied final judgment against it for work within the scope of this chapter; (ii) the department has determined that the registrant is a sole proprietor or an owner, principal, or officer of a registered contractor that has an unsatisfied final judgment against it for work within the scope of this chapter; or (iii) the registrant does not maintain a valid unified business identifier number, if required by the department of revenue.

(c) The department may suspend an active registration if the department has determined that an owner, principal, partner, or officer of the registrant was an owner, principal, or officer of a previous partnership, corporation, or other entity that has an unsatisfied final judgment against it.

(4) The department shall not deny an application or suspend a registration because of an unsatisfied final judgment if the applicant's or registrant's unsatisfied final judgment was determined by the director to be the result of the fraud or negligence of another party.

[2007 c 436 § 3; 2001 c 159 § 2; 1998 c 279 § 3; 1997 c 314 § 4; 1996 c 147 § 1; 1992 c 217 § 1; 1988 c 285 § 1. Prior: 1987 c 362 § 2; 1987 c

111 § 9; 1973 1st ex.s. c 153 § 3; 1963 c 77 § 3.]

Notes:

Finding -- Intent -- 1998 c 279: See note following RCW 51.12.120.

Conflict with federal requirements -- Severability -- Effective date -- 1987 c 111: See notes following RCW 50.12.220.

RCW 18.27.040**Bond or other security required — Actions against — Suspension of registration upon impairment.**

(1) Each applicant shall file with the department a surety bond issued by a surety insurer who meets the requirements of chapter 48.28 RCW in the sum of twelve thousand dollars if the applicant is a general contractor and six thousand dollars if the applicant is a specialty contractor. If no valid bond is already on file with the department at the time the application is filed, a bond must accompany the registration application. The bond shall have the state of Washington named as obligee with good and sufficient surety in a form to be approved by the department. The bond shall be continuous and may be canceled by the surety upon the surety giving written notice to the director. A cancellation or revocation of the bond or withdrawal of the surety from the bond automatically suspends the registration issued to the contractor until a new bond or reinstatement notice has been filed and approved as provided in this section. The bond shall be conditioned that the applicant will pay all persons performing labor, including employee benefits, for the contractor, will pay all taxes and contributions due to the state of Washington, and will pay all persons furnishing material or renting or supplying equipment to the contractor and will pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business. A change in the name of a business or a change in the type of business entity shall not impair a bond for the purposes of this section so long as one of the original applicants for such bond maintains partial ownership in the business covered by the bond.

(2) At the time of initial registration or renewal, the contractor shall provide a bond or other security deposit as required by this chapter and comply with all of the other provisions of this chapter before the department shall issue or renew the contractor's certificate of registration. Any contractor registered as of July 1, 2001, who maintains that registration in accordance with this chapter is in compliance with this chapter until the next renewal of the contractor's certificate of registration.

(3) Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section may bring suit against the contractor and the bond or deposit in the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had. The surety issuing the bond shall be named as a party to any suit upon the bond. Action upon the bond or deposit brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first. Action upon the bond or deposit brought by any other authorized party shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within one year from the date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first. Service of process in an action filed under this chapter against the contractor and the contractor's bond or the deposit shall be exclusively by service upon the department. Three copies of the summons and complaint and a fee adopted by rule of not less than fifty dollars to cover the costs shall be served by registered or certified mail, or other delivery service requiring notice of receipt, upon the department at the time suit is started and the department shall maintain a record, available for public inspection, of all suits so commenced. Service is not complete until the department receives the fee and three copies of the summons and complaint. The service shall constitute service and confer personal jurisdiction on the contractor and the surety for suit on claimant's claim against the contractor and the bond or deposit and the department shall transmit the summons and complaint or a copy thereof to the contractor at the address listed in the contractor's application and to the surety within two days after it shall have been received.

(4) The surety upon the bond shall not be 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. The liability of the surety shall not cumulate where the bond has been renewed, continued, reinstated, reissued or otherwise extended. The surety upon the bond may, upon notice to the department and the parties, tender to the clerk of the court having jurisdiction of the action an amount equal to the claims thereunder or the amount of the bond less the amount of judgments, if any, previously satisfied therefrom and to the extent of such tender the surety upon the bond shall be exonerated but if the actions commenced and pending and provided to the department as required in subsection (3) of this section, at any one time exceed the amount of the bond then unimpaired, claims shall be satisfied from the bond in the following order:

- (a) Employee labor and claims of laborers, including employee benefits;
- (b) Claims for breach of contract by a party to the construction contract;
- (c) Registered or licensed subcontractors, material, and equipment;
- (d) Taxes and contributions due the state of Washington;
- (e) Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover. The surety is not liable for any amount in excess of the penal limit of its bond.

A payment made by the surety in good faith exonerates the bond to the extent of any payment made by the surety.

(5) The total amount paid from a bond or deposit required of a general contractor by this section to claimants other than residential homeowners must not exceed one-half of the bond amount. The total amount paid from a bond or deposit required of a specialty contractor by this section to claimants other than residential homeowners must not exceed one-half of the bond amount or four thousand dollars, whichever is greater.

(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 the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.

(7) If a final judgment impairs the liability of the surety upon the bond or deposit so furnished that there is not in effect a bond or deposit in the full amount prescribed in this section, the registration of the contractor is automatically suspended until the bond or deposit liability in the required amount unimpaired by unsatisfied judgment claims is furnished.

(8) In lieu of the surety bond required by this section the contractor may file with the department an assigned savings account, upon forms provided by the department.

(9) Any person having filed and served a summons and complaint as required by this section having an unsatisfied final judgment against the registrant for any items referred to in this section may execute upon the security held by the department by serving a certified copy of the unsatisfied final judgment by registered or certified mail upon the department within one year of the date of entry of such judgment. Upon the receipt of service of such certified copy the department shall pay or order paid from the deposit, through the registry of the superior court which rendered judgment, towards the amount of the unsatisfied judgment. The priority of payment by the department shall be the order of receipt by the department, but the department shall have no liability for payment in excess of the amount of the deposit.

(10) Within ten days after resolution of the case, a certified copy of the final judgment and order, or any settlement documents where a case is not disposed of by a court trial, a certified copy of the dispositive settlement documents must be provided to the department by the prevailing party. Failure to provide a copy of the final judgment and order or the dispositive settlement documents to the department within ten days of entry of such an order constitutes a violation of this chapter and a penalty adopted by rule of not less than two hundred fifty dollars may be assessed against the prevailing party.

(11) The director may require an applicant applying to renew or reinstate a registration or applying for a new registration to file a bond of up to three times the normally required amount, if the director determines that an applicant, or a previous registration of a corporate officer, owner, or partner of a current applicant, has had in the past five years a total of three final judgments in actions under this chapter involving a residential single-family dwelling on two or more different structures.

(12) The director may adopt rules necessary for the proper administration of the security.

[2007 c 436 § 4; 2001 c 159 § 3; 1997 c 314 § 5; 1988 c 139 § 1; 1987 c 362 § 6; 1983 1st ex.s. c 2 § 18; 1977 ex.s. c 11 § 1; 1973 1st ex.s. c 153 § 4; 1972 ex.s. c 118 § 2; 1967 c 126 § 1; 1963 c 77 § 4.]

Notes:

Unpaid wages by public works contractor constitute lien against bond: RCW 39.12.050.