

No. 87445-0

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SUPREME COURT  
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AllianceOne Receivables Management, Inc.

v.

William Carl Lewis, Jr., et ux.

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REPLY BRIEF OF APPELLANT

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 ORIGINAL

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## ARGUMENT

- A. Compare RCW 4.84.260 with RCW 4.84.270, an offer of settlement is not required for a defendant to obtain fees in a small value case brought by the Plaintiff.

The Respondent, Alliance One Receivables Management, Inc., a collection agency, is almost exclusively a Plaintiff in state court. The Response brief is parochial, from a plaintiff's perception, ignoring completely the fundamental differences a defendant faces in litigation. *Only* a plaintiff has a right and a duty to decide whether to begin to engage in litigation. CR 11; see RCW 4.84.185. The defendant never has that choice. Only a Plaintiff has the right to a voluntary dismissal of the litigation it chose to file, at any time up to the closing of the presentation of the Plaintiff's case, CRLJ 41 (a)(1)(ii). The defendant never has that choice. Only the Plaintiff has the right (and the duty under CR 11) to continue the litigation or chose to dismiss.

The legislature recognized those differences in enacting two separate sections (one for Plaintiff and a different one for Defendant) to define "prevailing party" under RCW 4.84.250<sup>1</sup>. RCW 4.84.250; RCW 4.84.260 ("When *plaintiff* deemed prevailing party") and RCW

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<sup>1</sup> RCW 4.84.250 provides, [I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [\$10,000] 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.

4.84.270(“When *defendant* deemed prevailing party”). If Respondent were correct (that an offer of settlement is required) why would separate sections be necessary? Both sections allow an offer of settlement to set the stage for an attorney fee request. *RCW 4.84.260; RCW 4.84.270*. The *only* difference between the two sections is that a defendant can also be a “prevailing party” if the “plaintiff recovers nothing”. *RCW 4.84.250; RCW 4.84.270. Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 208, 289 P.3d 690, 698 (2012)(“ Under *RCW 4.84.270*, a defendant is entitled to an award of attorney fees “if the plaintiff ... recovers nothing.”)

Alliance One argues that without offers of settlement by a defendant, plaintiffs will force trials even when, as here, the Plaintiff collection agency knows it has brought a claim that it is unlikely to prevail. First, Plaintiff can make an offer of settlement to impose fees on a defendant. Second, CR 11 does not allow a Plaintiff to continue filing documents in a case that is no longer viable. Rule 11 applies to an attorney or party’s litigation activities to the extent that he or she chooses to pursue litigation after discovering that his/her claims have no merit. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884-85, 912 P.2d 1052, 1057 (Div. 2, 1996) (“ . . . we must determine whether a reasonable attorney, in like circumstance, could reasonably believe he was legally and factually

justified in pursuing this litigation after MacDonald made her damaging admissions in her deposition”). Third, the belief that it might have to pay attorney fees is a powerful reason for a plaintiff to settle pre-trial. The respondent’s view is that Plaintiff can be allowed to the end of the Plaintiff’s presentation of the case then if it does not go well, dismiss without facing fees discourages settlement. A Plaintiff, as here, that files beyond the statute of limitation can minimize and limit the attorney fees by an earlier voluntary dismissal. The continuing escalation of fees is another reason for the Plaintiff to dismiss and face the fees that it already caused. Allowing a defendant fees serves the purpose of forcing Plaintiff’s to properly evaluate their cases before filing, and at all stages of the case since the fees continue to grow. There is not an incentive to take a bad case to trial as the Respondent suggests since that just means more fees. The point of the legislation is who should bear the risk of fees in a case involving a small amount of money.

In this case the appellant was a defendant in litigation involving a very small amount of money pending for more than five years. He was forced to vacate a wrongful default, two of the three claims were barred by the statute of limitations. Nevertheless, he prepared and served written discovery and otherwise defended. The Collection agency, AllianceOne files and prosecutes thousands of cases each year. Who should bear the

risk of the cost of the defense of a Five Hundred Dollar (\$500.00) case?  
The Legislature wisely placed that burden on the party choosing to file the case (the Plaintiff/Respondent) and choosing to actively pursue the case until it became overwhelmingly apparent the collection agency would lose.

The Plaintiff's goal is to recover something. The Plaintiff must make an offer of settlement because it forced the defendant into low dollar value litigation by a choice that the Plaintiff made- a choice the defendant does not have (i.e. to avoid being sued). The Complaint frames the claim of the Plaintiff, but the Plaintiff can reduce its claim in an effort by making an offer to settle. RCW 4.84.260<sup>2</sup>. The defendant can agree he owes something and make an offer of settlement. RCW 4.84.270. But the defendant can also decide he does not owe anything to a collection agency bring a spurious claim and simply defend. Why should a defendant who has been wrongfully sued be required to make any offer to settle?

“Even where no settlement offer is made, a defendant is entitled to attorney's fees if the plaintiff recovers nothing. *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wn. App. 864, 868, 765 P.2d 27, 29 (1988) quoting *Lowery v. Nelson*, 43 Wn. App. 747, 752, 719 P.2d 594, *review denied*, 106 Wn.2d 1013 (1986), *appeal dismissed*, 479 U.S. 1024, 107

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<sup>2</sup> “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...” RCW 4.84.260.

S.Ct. 864, 93 L.Ed.2d 820 (1987). “Since Kingston Lumber's claim was dismissed and it recovered nothing, Puckett is a prevailing defendant and is therefore entitled to attorney's fees under RCW 4.84.250.” *Id.*; *Hertz v. Riebe*, 86 Wn. App. 102, 107, 936 P.2d 24, 27 (Div. 3, 1997)(“ The next two statutes, RCW 4.84.260 and .270, set out the requirements for a prevailing party for a plaintiff and a defendant. Both require offers of settlement *unless the plaintiff recovers nothing.*”

- B. “Recover” does not mean “Judgment,” but even if it did “recover nothing” would simply mean that the Plaintiff did not obtain a judgment.”

Respondent Alliance One seeks to equate the word “recover” with the word “judgment”. Then Alliance One argues the converse of the statutory language. RCW 4.84.270 does not require the defendant to “recover”, or as Alliance One argues obtain a “judgment”. Instead RCW 4.84.270 looks at whether the Plaintiff “recovers nothing”. The inquiry is on whether the Plaintiff “recovers” not whether the defendant obtained a judgment of dismissal. If one were to accept Alliance One’s argument that “recovers” means “judgment”, then under the wording of the statute the defendant has still prevailed since no judgment was entered.

Respondent focuses on a portion of a legalistic definition of “recovers nothing” rather than the common, simple, unambiguous

understanding that if Plaintiff chooses to bring a lawsuit, forces the defendant to incur attorney fees, but the plaintiff “recovers nothing”, then the Plaintiff must pay the attorney fees it caused due to the small amount in controversy. The legislature recognized the difficulty of defending as well as pursuing small claims. Under a common reading of RCW 4.84.270, if there was a settlement after filing the litigation, the Plaintiff would have recovered something and RCW 4.84.270 would not be applied. If the respondent’s definition were applied i.e. that “recover” necessarily means a “judgment” then in a settlement no judgment being entered means no recovery and Plaintiff would owe attorney fees even in a settlement situation- which is an absurd result. Plaintiff also fails to give any discussion to the full definitions of “recover” found in Black’s Law dictionary: “to obtain by judgment or *other legal process* (emp. added); “to succeed in a lawsuit”. A defendant has “succeeded” in a lawsuit if it is dismissed with or without prejudice because the Plaintiff has not succeeded in its goal of recovering something by verdict or settlement. “Succeed” means “to happen or terminate according to desire”. “Succeed.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language*, p. 1899 (1996). Print. You need only ask anyone who has ever been sued, a defendant desires not to be a defendant anymore, so has succeed once he is no longer a defendant.

When the legislature requires a “judgment” in order to become a prevailing party the legislature knows exactly how to say so. See RCW 4.84.330 (“As used in this section ‘prevailing party’ means the party in whose favor final judgment is rendered.”); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 494, 200 P.3d 683, 689 (2009). Compare that language to RCW 4.84.270 (“the defendant shall be deemed the prevailing party if the plaintiff recovers nothing”).

In any case, a defendant is entitled to a judgment with costs (RCW 4.84.250 defines reasonable attorney fees as costs) in District Court when the Plaintiff voluntarily dismisses a case. RCW 12.20.010 provides in relevant part that: “Judgment that the action be dismissed, without prejudice to a new action, may be entered, **with costs**, in the following cases:(1) When the **plaintiff voluntarily dismisses the action** before it is finally submitted. (emp. added).

Under RCW 4.84.185, the “prevailing party” is not defined but includes voluntary dismissal since “the determination [that the claim was frivolous and advanced without reasonable cause] shall be made on motion after a voluntary dismissal....”. RCW 4.84.185. *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn. 2d 863, 868, 505 P.2d 790, 793 (1973) (“RCW 4.28.185(5) was enacted to facilitate service upon out-of-state defendants, the legislature must naturally have had in mind that a

defendant who 'prevails' is ordinarily one against whom no affirmative judgment is entered.”).

In *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946, 948 (Div. 1, 1990) the court was interpreting a commercial lease with a bilateral attorney provision that allowed attorney fees to the “prevailing party”. The court refused to imposed the definition unique to RCW 4.84.330 upon the parties stating “At the time of a voluntary dismissal, the defendant has “prevailed” in the common sense meaning of the word ... There is no reason to believe that the parties intended to incorporate this statutory definition, which is not even the usual legal definition.”

#### C. Attorney Fee Request by Respondent.

The respondent Alliance One’s request for attorney fees pursuant to RCW 4.84.190 both highlights its misunderstanding of the statute and makes clear that the defending party feels a need for fees to defend a claim against it that it believes is wrong-just like every other defendant who is brought into proceedings. No offer of settlement was made in this case but the Respondent still feels entitled to fees. That is the need felt by defendants addressed by this law. But the Respondent was the Plaintiff, not the defendant and RCW 4.84.290 applies the same determination of prevailing party as RCW 4.84.260 and/or RCW 4.84.270. *Hertz v. Riebe*, 86 Wn. App. 102, 107, 936 P.2d 24, 27 (Div. 3, 1997). The plaintiff was

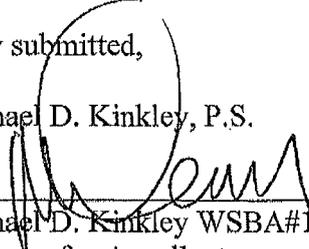
not the prevailing party in the action since the lawsuit it filed was dismissed. RCW 4.84.250, RCW 4.84.260.

D. Attorney fees on appeal.

Appellant is entitled to attorney fees on appeal because the Plaintiff recovered nothing. RCW 4.84.270. Attorney's fees and costs were due at the trial court level and therefore must be awarded for the appeal. RCW 4.84.290

Respectfully submitted,

Michael D. Kinkley, P.S.



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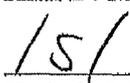
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| WILLIAM CARL LEWIS, JR., | ) |                        |
| Appellant                | ) | DECLARATION OF SERVICE |
| v.                       | ) |                        |
| ALLIANCEONE RECEIVABLES  | ) |                        |
| MANAGEMENT, INC.,        | ) |                        |
| Respondent.              | ) |                        |

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I, Lara A. Wilcox declare under penalty of perjury under the Laws of the State of Washington that on the 4<sup>th</sup> day of January, 2013, I caused to be served by U.S. Mail a true and correct copy of the Reply Brief of Appellant addressed to the following:

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Alliance One Receivables Management v. William Carl Lewis, Jr.  
Washington State Supreme Court, Case No. 87445-0

Good Evening,

Attached please find copies of the Reply Brief of Appellant and Declaration of Service in the above referenced matter. Copies have also been sent by U.S. Mail. If you have any questions, please feel free to contact us at 509-484-5611.

Thank you,  
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