

No. 73134-3-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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CHRISTA MCKILLOP, an individual,

*Respondent/Cross-Appellant,*

v.

PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E.  
CARPINE, a deceased individual,

*Appellant/Cross-Respondent.*

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**BRIEF OF RESPONDENT/CROSS-APPELLANT**

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## I. INTRODUCTION

The trial court correctly determined that Respondent/Cross-Appellant Christa McKillop (“McKillop”) is the prevailing party on the trial de novo pursuant to RCW 4.84.260 because she improved her position from the arbitration, and the jury award of \$8,500.00 is more than the amount of her settlement offer, exclusive of costs. McKillop is the prevailing party on appeal under RCW 4.84.290 because the award of \$8,500.00, exclusive of costs, was more than the amount she offered in settlement on the underlying claim, exclusive of costs. The trial court erred in considering and relying on the arbitrator’s (erroneous) denial of her motion for fees and costs, as a basis for deducting \$35,297.93 in attorneys’ fees and costs incurred leading up to and including the arbitration. Because McKillop was the prevailing party on appeal, she is entitled to attorneys’ fees and costs under RCW 4.84.290 for the arbitration, and the various stages of appeal in the Superior Court and in the Court of Appeals.

Appellant Personal Representative of the Estate of Robert E. Carpine (“Carpine”) contends that he is a prevailing party under RCW 4.84.270 at both the arbitration and on appeal, because he made a lump sum CR 68 offer of judgment in the amount of \$10,000, inclusive of attorneys’ fees and costs. However, by including undenominated sums for

“costs and attorneys’ fees” in his lump sum settlement offer, Carpine never made a qualifying settlement offer under RCW 4.84.270, and thus he cannot establish he is a prevailing party and entitled to an award of attorneys’ fees and costs pursuant to RCW 4.84.250. Furthermore, Carpine never filed an appeal of the trial court’s decision denying his motion for attorneys’ fees and costs and his appeal of that decision is untimely. Lastly, Carpine never filed an opposition to McKillop’s motion for attorneys’ fees and costs, and he is not entitled to raise any new arguments and issues in opposition to the motion for the first time on appeal.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in considering and relying on the arbitrator’s erroneous decision denying McKillop’s motion for an award of attorneys’ fees and costs as a basis for deducting \$35,297.93 of McKillop’s attorneys’ fees and costs on appeal. A trial court may not defer, consider, or analyze an arbitration award or decision when conducting a trial de novo under Chapter 7.06 RCW. Although the trial court correctly held that McKillop is the prevailing party on appeal pursuant to RCW 4.84.290, the trial court erred in denying McKillop her attorneys’ fees and costs leading up to and including the arbitration in the amount of \$35,297.93.

### III. STATEMENT OF THE CASE

On November 4, 2013, McKillop filed a Complaint against the Personal Representative of the Estate of Robert E. Carpine for her injuries and damages suffered as a result of an automobile accident that occurred on September 16, 2012. (CP 1-4). McKillop's Complaint specifically requested attorneys' fees and costs pursuant to RCW 4.84.250. (CP 1-4). On January 3, 2014, McKillop served Carpine with her Statement of Damages which identifies her general damages as \$7,227.94 and her special damages as \$2,772.06, for a total of \$10,000 in economic and noneconomic damages. (CP 100-103.)

On April 18, 2014, McKillop made a settlement offer to Carpine pursuant to RCW 4.84.250 which separately denominated the amounts being offered on her underlying claim, which was \$2,600.00 in economic damages and \$2,400.00 in non-economic damages, exclusive of costs. (CP 236-238.) Defendant did not accept McKillop's settlement offer.

On April 18, 2014, McKillop received via U.S. Mail a copy of Carpine's "Offer of Judgment" made pursuant to CR 68 in the total amount of \$10,000.00, *inclusive of all claims for damages and all costs and attorneys' fees incurred.* (CP 109-112.)

The case was assigned to mandatory arbitration. On July 16, 2014, the arbitration hearing took place. On July 29, 2016, the arbitrator ruled in

favor of McKillop and awarded her economic damages of \$2,722.06 and non-economic damages of \$2,500.00 for a total arbitration award of \$5,272.06. (CP 11-12.)

On July 31, 2014, McKillop served the arbitrator with a motion for an award of her attorneys' fees and costs under RCW 4.84.250 in the amount of \$33,005.43. (CP 117-150.). On August 13, 2014, McKillop served the arbitrator with a Supplemental Declaration in Support of Plaintiff's Motion for an Award of Attorney's Fees and costs under RCW 4.84.250, requesting a total of \$35,297.93 in attorneys' fees and costs. (CP 153-159.) Although McKillop was clearly the prevailing party under RCW 4.84.260, on August 12, 2014, the arbitrator issued a Supplemental Arbitration Award awarding no attorneys' fees and costs to any party. (CP 18-19.).

On August 25, 2014, McKillop timely filed a trial de novo pursuant to MAR 7.1. (CP 22-23.) On September 8, 2014, Carpine file a jury demand. (CP 356-358). On November 6, 2014, McKillop filed a motion for partial summary judgment on liability. (CP 359-361; CP 362-370; CP 371-399.) On November 14, 2014, the court granted McKillop's motion for partial summary judgment ruling that Carpine violated RCW 46.61.190(2) and that his negligence was the sole cause of the motor vehicle accident that occurred on September 16, 2012, and is liable to

McKillop for any damages awarded to her that are proximately caused by the motor vehicle accident. (CP 400-401.)

A jury trial of this matter was held on January 5, 6 and 7, 2015. On January 7, 2015, the jury entered a verdict finding that Carpine's negligence was a proximate cause of injury to McKillop, and entered a verdict in favor of McKillop in the amount of \$2,772.06 in economic damages, and \$5,727.94 in non-economic damages, for a total verdict of \$8,500.00. (CP 24.) McKillop clearly improved her position on the trial de novo under MAR 7.3, and is the prevailing party under RCW 4.84.250 through RCW 4.84.290.

On January 16, 2015, McKillop filed a motion for an award of attorneys' fees and costs pursuant to RCW 4.84.290. (CP 37-39; CP 25-36; CP 40-216.) McKillop argued that she was the prevailing party on appeal because the jury verdict of \$8,500 is more than her settlement offer on the underlying claim of \$5,000, exclusive of costs. (CP 25-36.) Carpine never filed any opposition to McKillop's motion for attorneys' fees and costs. Carpine is now improperly attempting to raise new arguments in opposition to the motion for the first time on appeal.

On January 20, 2015, Carpine filed his own motion for attorneys' fees and costs pursuant to RCW 4.84.290. (CP 217-228.) Carpine argued that he was the prevailing party at the arbitration because the arbitration

award of \$5,272.06 was less than his lump sum CR 68 Offer of Settlement of \$10,000, inclusive of attorneys' fees and costs. (CP 219-222.) Carpine also argued that he was the prevailing party on the trial de novo because the jury's verdict of \$8,500.00 is less than his lump sum CR 68 Offer of Judgment of \$10,000, inclusive of attorneys' fees and costs. (CP 219-222.) Carpine's contention is that a lump sum settlement offer that does not separately denominate the amount being offered in settlement of the underlying action and includes payment for costs and attorneys' fees can accurately be compared in the context of RCW 4.84.250 through RCW 4.84.300 against a jury verdict which is exclusive of attorneys' fees and costs. (CP 219-222.)

On January 23, 2015, McKillop filed an Opposition to Defendant's Motion for Attorneys' Fees Pursuant to RCW 4.84.290. (CP 285-295.) McKillop argued that Carpine never made a qualifying settlement offer under RCW 4.84.270 because his lump sum settlement offer did not separately denominate the amount being offered in settlement of the underlying action, exclusive of attorneys' fees and costs, and cannot be accurately compared against the jury verdict which is exclusive of attorneys' fees and costs. (CP 285-295.) Because Carpine did not make a proper qualifying offer, he cannot demonstrate that he was a prevailing

party and is not entitled to an award of attorneys' fees and costs pursuant to RCW 4.84.250 through RCW 4.84.300. (CP 285-295.)

On February 2, 2015, the Court entered a Judgement on Verdict in favor of the McKillop in the amount of \$8,500.00, plus attorneys' fees and costs in the amount of \$65,000.00, for a total judgment of \$73,500.00. (CP 306-307.)

On February 24, 2015, Carpine filed a Notice of Appeal seeking an appeal of only Paragraph 6 of the Judgment on Verdict, awarding attorneys' fees and costs to McKillop of \$65,000.00. (CP 338-342.)

On February 5, 2015, McKillop filed a Notice of Presentation of Findings of Fact and Conclusions of Law. (CP 308-321.) On February 27, 2015, the trial court entered Findings of Fact and Conclusions of Law Re: Award of Attorney's Fees. (CP 343-346.) The trial court's conclusions of law state at Paragraph 32 that "Plaintiff is the prevailing party under RCW 4.84.260 and RCW 4.84.250." (CP 346.) The trial court's conclusions of law also state at Paragraph 35:

35. The Court is deducting \$35,297.93 in fees and costs incurred for the work leading up to, and including, the arbitration. The arbitrator denied both sides their motions for fees and costs on August 12, 2014. (CP 346.)

Carpine did not appeal the trial court's findings of fact and conclusions of law entered on February 27, 2015, or the trial court denial

of his motion for attorneys' fees and costs under RCW 4.84.270. Carpine specifically excluded the merits of these decisions from his appeal.

On March 3, 2015, McKillop filed a Cross-Appeal of the trial court's Judgment awarding her only \$65,000 in attorneys' fees and costs, and the trial court's findings of fact and conclusions of law deducting from the award her attorneys' fees and costs of \$35,297.93 for work leading up to an including the arbitration. (CP 347-355.)

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

Resolution of this case requires interpreting a statute and court rule granting reasonable attorney fees and costs under certain circumstances. Because interpretation of statutes and court rules are questions of law, this court's review is de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Whether a statute applies to a particular set of facts is a question of law, and review is de novo. *Mackey v. America Fashion Inst. Corp.*, 60 Wn. App. 426, 429, 804 P.2d 642 (1991).

##### **B. ATTORNEY FEES FOR CLAIMS OF \$10,000 OR LESS UNDER RCW 4.84.250-.300**

McKillop sought an award of attorneys' fees and costs under RCW 4.84.290. Carpine admits that the amount pleaded by McKillop is \$10,000 or less and that RCW 4.84.250 applies. The statutory scheme in RCW 4.84.250-.300 authorizes a trial court to award attorneys' fees, under

certain circumstances, in disputes of \$10,000 or less, exclusive of costs. Under RCW 4.84.250, a trial court shall award the prevailing party attorneys' fees and costs if the statutory requirements are satisfied. *Davy v. Moss*, 19 Wn. App. 32, 33-34, 573 P.2d 826 (1978).

RCW 4.84.250 provides as follows:

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.

The reference to the amount pleaded refers only to the plaintiff's basic claim for damages, and does not include interest, costs, or attorneys' fees. *Northside Auto Services, Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 607 P.2d 890 (1980). Even if the Complaint requests attorneys' fees, it is not treated as an element of damages, thus raising the "amount pleaded" above the \$10,000 maximum of RCW 4.84.250. *Mackey v. American Fashion Institute Corp.*, 60 Wn.App. 426, 804 P.2d 642, 644-45 (1991).

Under RCW 4.84.260, a plaintiff is the prevailing party if the plaintiff offers to settle at least 10 days before trial, the offer is rejected, and the plaintiff's recovery, *exclusive of costs*, is as much as or more than

the amount offered in settlement by the Plaintiff. *See* RCW 4.84.250-300.

RCW 4.84.260 provides as follows:

**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 4.84.260 (italics ours).

Under RCW 4.84.270, the defendant is considered the prevailing party if the plaintiff recovers nothing, even if the defendant made no settlement offer, or, if a settlement offer is made, and the award, *exclusive of costs*, is the same or less than the amount offered in settlement by the defendant. RCW 4.84.070 (italics ours). In the context of RCW 4.84.250 through RCW 4.84.300, “attorneys’ fees” are defined as “costs.” RCW 4.84.250.

The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. *Williams v. Tilaye*, 174 Wn.2d 57, 62, 272 P.3d 235 (2012). The obvious legislative intent is to enable a party to pursue a meritorious small claim without seeing her award diminished in whole or in part by legal

fees. *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 492, 607 P.2d 890 (1980).

RCW 4.84.250 is the starting point for determining which party, if any, is entitled to attorney fees in small claim actions. *AllianceOne Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 394, 325 P.3d 904 (2014). The prevailing party in a small claims action may request attorney fees “[n]otwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060.” RCW 4.84.250. RCW 4.84.260 states that a plaintiff is the “prevailing party” and eligible for attorney fees when “the recovery, *exclusive of costs*, is as much as or more than the amount offered in settlement by the plaintiff.” (emphasis added.) Under RCW 4.84.270, a defendant receives fees “if the plaintiff ... recovers nothing, or if the recovery, *exclusive of costs*, is the same or less than the amount offered in settlement by the defendant.” (emphasis added.)

Under RCW 4.84.250 through RCW 4.84.300, “attorneys’ fees” are defined as “costs.” Thus in determining whether a party is the prevailing party and entitled to an award of attorneys’ fees, the trial court, after entry of judgment, is required to compare the amount recovered, exclusive of costs, against the amount of the party’s settlement offer, exclusive of costs. RCW 4.84.250, .270, .280; *see also AllianceOne*

*Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014).

RCW 4.84.290 governs the award of attorney fees on appeal in cases subject to RCW 4.84.250. RCW 4.84.290 provides that:

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

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

The unambiguous language of RCW 4.84.290 authorizes an award of attorneys' fees and costs on appeal where the party is eligible for an award under RCW 4.84.250.

**1. McKillop is The Prevailing Party Under RCW 4.84.290**

A plaintiff, such as McKillop, becomes the prevailing party for purposes of RCW 4.84.250 by recovering, excluding costs, "as much as or more than the amount" she offered in settlement. McKillop separately denominated the amount being offered in settlement of her underlying claim for economic damages of \$2,600.00 and noneconomic damages of \$2,400.00, which is less than the \$8,700.00 jury award. McKillop is the prevailing party on appeal under RCW 4.84.290 because the jury verdict,

exclusive of costs, was more than the amount of her settlement offer on the underlying claim, exclusive of costs.

Contrary to Carpine's argument, the trial court does not compare the arbitration award and jury award, which is exclusive of attorneys' fees and costs, with McKillop's settlement offer on her underlying claim, *inclusive* of attorneys' fees and costs then accrued. The trial court is required to compare the amount recovered on the underlying claim, exclusive of costs, to the amount of the party's settlement offer on the underlying claim, exclusive of costs. To compare an arbitration award or jury verdict, which is exclusive of attorneys' fees and costs, with a settlement offer of the underlying claim, inclusive of attorneys' fees and costs then accrued, would be like comparing apples to oranges. McKillop is the prevailing party on appeal and RCW 4.84.290 mandates an award of attorneys' fees and costs to McKillop for the arbitration and on appeal.

## **2. The Trial Court Erred in Denying McKillop Her Attorneys' Fees and Costs For the Arbitration**

Although the trial court correctly determined that McKillop is the prevailing party on appeal pursuant to RCW 4.84.290, the trial court erred in considering and relying on the arbitrator's decision denying her motion for attorneys' fees and costs at the arbitration, and deducting \$35,297.93 in

her attorney fee award for the costs leading up to and including the arbitration.

A mandatory arbitration proceeding is treated as the original trial when applying RCW 4.84.290. The trial de novo is the appeal. *Thomas–Kerr v. Brown*, 114 Wn. App. 554, 558, 59 P.3d 120 (2002). When an offer of settlement is made prior to arbitration and plaintiff prevails, the offer does not lapse for purpose of awarding attorney fees upon a trial de novo. The sole way to appeal an erroneous ruling from a mandatory arbitration is through a trial de novo. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003). The trial court should have treated McKillop’s trial de novo request as an appeal. Chapter 7.06 RCW provides the statutory authorization for superior court to require arbitration for small claims. A party aggrieved by an arbitrator’s decision in mandatory arbitration “may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact.” RCW 7.06.050. Once a party requests a trial de novo, the clerk must seal the arbitration award. MAR 7.1(a). The trial de novo is then “conducted *as though no arbitration proceeding had occurred.*” MAR 7.2(b)(1) (emphasis added). The relief sought by the parties at the trial de novo is unrestricted by prior arbitration proceedings or decisions. MAR 7.2(c).

The trial de novo process is exactly what the rule says it is: a trial that is conducted as if the parties had never proceeded to arbitration. The entire case begins anew. The arbitration proceedings and award become a nullity, and it is relevant solely for purpose of determining whether a party has failed to improve his or her position under MAR 7.3, in which case attorneys' fees and costs are mandatory. A trial court should not defer, consider, or analyze an arbitration award at all when conducting a trial de novo under Chapter 7.06 RCW. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003).

The first paragraph of the statute directs the court to apply RCW 4.84.250 (which requires reference to RCW 4.84.260 and .270) to determine the prevailing party. RCW 4.84.290 provides that if the case is appealed, the prevailing party on appeal shall be considered the prevailing party for purposes of applying the provisions of RCW 4.84.250. Attorney fees are awarded for the lower court proceeding if a party is the prevailing party on appeal and is the prevailing party within the meaning of RCW 4.84.260 or .270. RCW 4.84.290. The prevailing party on appeal, then, is the one which substantially prevails in the action. *American Federal Savings & Loan Assn. of Tacoma v. McCaffrey*, 107 Wn.2d 181, 195, 728 P.2d 155 (1986). The trial court looks to what the parties have achieved on appeal in making this determination. Here, McKillop improved her

position on appeal with respect to the arbitrator's decision, and the jury award of \$8,500 on the underlying claim is more than the \$5,000 offered in settlement, exclusive of costs. Because McKillop is the prevailing party on appeal pursuant to RCW 4.84.290, she is entitled to an award of all of her attorney fees and costs for the various stages of her appeal (*i.e.*, arbitration, Superior Court, and to the Court of Appeals).

The trial court erred in considering and relying on the arbitrator's denial of McKillop's motion for attorneys' fees and costs as the sole basis for denying her, as the prevailing party, a total of \$35,297.93 in attorneys' fees and costs incurred for work leading up to and including the arbitration. The trial court was not allowed to consider or rely on the arbitrator's decision as a basis for denying any attorneys' fees and costs to McKillop as the prevailing party under RCW 4.84.290. McKillop is the prevailing party under RCW 4.84.290 and is entitled to an award of all of her attorneys' fees and costs incurred, which total \$103,602.30.

**C. CARPINE FAILED TO APPEAL THE TRIAL COURT'S DENIAL OF HIS MOTION FOR ATTORNEYS' FEES AND COSTS, AND FAILED TO FILE AN OPPOSITION TO MCKILLOP'S MOTION FOR ATTORNEY'S FEES AND COSTS, AND IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S DECISIONS ON APPEAL**

Carpine argues for the first time on appeal that McKillop is not the prevailing party because (1) he offered \$10,000 in settlement, inclusive of

attorneys' fees and costs, which is less than the \$5,272.06 arbitration award, exclusive of costs, and the \$8,500.00 jury award, exclusive of costs; (2) that RCW 4.84.250-300 are conflicting and that RCW 4.84.270 is controlling; (3) CR 68 supersedes RCW 4.84.250; and (4) McKillop's settlement offer is not a settlement offer under RCW 4.84.250 and is only a counteroffer only.

First, Carpine failed to file an opposition to McKillop's motion for attorneys' fees and costs, and cannot challenge the trial court's decision for the first time on appeal. RAP 2.5(a). Second, Carpine's Notice of Appeal sought an appeal of only Paragraph 6 of the Judgment on Verdict, awarding attorneys' fees and costs to McKillop of \$65,000.00. Carpine did not appeal the trial court's denial of his motion for attorneys' fees and costs under RCW 4.84.250, or the trial court's findings of fact and conclusions of law entered on February 27, 2015. Carpine's appeal of the decision to deny him an award of attorneys' fees and costs is untimely.

**1. Carpine Never Filed an Opposition to McKillop's Motion for Attorneys' Fees and Costs**

An appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a). A litigant may not raise a legal issue for the first time on appeal when it has failed to do so in the lower court. *Id.*; see *Karlberg v. Otten*, 167 Wn. App. 522, 531-32, 280 P.2d 1123 (2012) ("A

failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived. While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.” (*citing Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967); *see also Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983) (“Failure to make such a motion when it would enable the trial court to correct its error precludes raising the error on appeal, unless the error was pointed out at some other point during the proceedings.”); *see also Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1186 (9th Cir. 1997) (“Before an argument will be considered on appeal, the argument must be raised sufficiently for the trial court to rule on it ...”).

Carpine never filed an opposition to McKillop’s motion for an award of attorneys’ fees and costs. Thus, Carpine has waived his right to raise issues and arguments in opposition to McKillop’s motion for an award of attorneys’ fees and costs.

**2. Carpine Never Appealed the Trial Courts’ Decision Denying His Motion for Attorneys’ fees and Cost and He Never Made a Qualifying Settlement Offer Anyway**

Carpine argues that the trial court erred in denying his request for attorneys’ fees and costs under RCW 4.84.250. However, Carpine’s Notice of Appeal sought an appeal of only Paragraph 6 of the Judgment on

Verdict, awarding attorneys' fees and costs to McKillop of \$65,000.00. Carpine did not appeal the trial court's denial of his motion for attorneys' fees and costs under RCW 4.84.250, or the trial court's findings of fact and conclusions of law entered on February 27, 2015.

A timely appeal must be filed within 30 days of the trial court's decision. RAP 5.2(a). Under RAP 2.4(a), the appellate court will review the decision or parts of the decision designated in the notice of appeal. RAP 2.4(b) states that a timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision. The plain words of the rule show that Carpine's appeal of only Paragraph 6 of the Judgment on Verdict awarding McKillop prevailing party's attorneys' fee and costs pursuant to RCW 4.84.250 does not bring up for review the trial court's decision denying his own motion for attorneys' fees and costs. Carpine did not appeal the decision denying his motion for fees and costs, or the Findings of Fact and Conclusions of Law establishing the legal basis for an attorney fee award to McKillop within 30 days of entry of the Judgment. Thus, Carpine's appeal of the decision to deny him an award of attorneys' fees and costs is untimely.

Even assuming Carpine had not waived his right to appeal, Carpine's arguments are clearly contrary to the plain wording of the statute and Washington case law. Carpine contends that he is the prevailing party under RCW 4.84.290 because the \$5,272.06 arbitration award and \$8,500 jury verdict on the trial de novo were less than his CR 68 offer of judgment of \$10,000.00, inclusive of costs and attorneys' fees. In determining whether a party is a prevailing party under RCW 4.84.250 and entitled to an award of attorneys' fees, the trial court, after entry of judgment is required to compare the amount recovered, *exclusive of costs*, against the amount of the party's settlement offer, *exclusive of costs*. RCW 4.84.250, .270, .280. "Exclusive of costs," in this context, means "exclusive of attorneys' fees and other taxable costs." A lump sum settlement offer that purports to include payment for "costs and attorneys' fees," but does not separately denominate the amount being offered in settlement of the underlying action, *exclusive of costs*, cannot be utilized by the trial court to determine whether a party is a "prevailing party" within the meaning of RCW 4.84.270. A settlement offer which is *inclusive* of attorneys' fees and costs cannot be accurately compared against a recovery which is *exclusive* of attorneys' fees and costs.

In this case, Carpine made a lump sum settlement offer to McKillop in the amount of "\$10,000, inclusive of all claims for damages

and all costs and attorneys' fees incurred." Because Carpine included undenominated sums for "costs and attorneys' fees" in his settlement offer, it was impossible for the trial court to properly determine whether he was a "prevailing party" pursuant to RCW 4.84.270, and entitled to an award of costs (including attorneys' fees) pursuant to RCW 4.84.250. Carpine never made a qualifying offer and can never demonstrate he was a "prevailing party" and entitled to an award of fees on appeal under RCW 4.84.290.

**3. RCW 4.84.290 Governs the Award of Attorneys' Fees and Costs on Appeal in Cases Subject to RCW 4.84.250**

Carpine argues for the first time on appeal that RCW 4.84.260 and RCW 4.84.270 are "conflicting" and that RCW 4.84.270 is controlling because it is later in order of statutory position than RCW 4.84.260. Even assuming this argument has any merit, Carpine never raised this argument to the trial court and has waived any right to raise this argument for the first time on appeal. RAP 2.5(a).

Furthermore, these statutes are not "conflicting" and the unambiguous language of RCW 4.84.290 authorizes an award of fees and appeal where the party is eligible for an award under RCW 4.84.250. Pursuant to RCW 4.84.260 and .270, whether a party is prevailing for the purposes of RCW 4.84.250 depends on a comparison of the amount

offered in settlement, exclusive of costs, to the amount obtained in recovery, exclusive of costs. RCW 4.84.250 and RCW 4.84.270 required Carpine to make a qualifying offer of settlement to become a prevailing party. Carpine never made a qualifying settlement offer to McKillop which separately denominated the amount being offered in settlement of the underlying action, exclusive of costs. Because Carpine never made a qualifying settlement offer pursuant to RCW 4.84.270, he cannot be a prevailing party under RCW 4.84.250. RCW 4.84.260 and RCW 4.84.270 are not ambiguous or conflicting, but convey precise and sensible meaning to give effect to the Legislature's statutory intention. The plain language of RCW 4.84.260 and RCW 4.84.270 makes it clear that Carpine is not a prevailing party.

**D. CR 68 DOES NOT SUPERSEDE RCW 4.84.250 THROUGH RCW 4.84.300**

Carpine argues for the first time on appeal that his CR 68 Offer of Judgment supersedes and controls over McKillop's offer of settlement under RCW 4.84.260. Carpine never raised this argument to the trial court and has waived any right to raise this argument for the first time on appeal. RAP 2.5(a). Furthermore, this argument is without merit. Carpine concedes that RCW 4.84.250 through RCW 4.84.300 applies to McKillop's action. However, he now claims that his lump sum settlement

offer made pursuant to both CR 68 and RCW 4.84.250 somehow supersedes and controls over McKillop's settlement offer made only pursuant to RCW 4.84.250.

A court may award reasonable attorney fees to the prevailing party as provided by private agreement, statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). McKillop brought her action on the basis of RCW 4.84.250 through RCW 4.84.300, which govern whether a party is the prevailing party for the purpose of awarding attorneys' fees pursuant to RCW 4.84.250. CR 68 sets forth a procedure for defendants to offer to settle cases before trial. The rule achieves this objective by shifting any post-offer of judgment costs of litigation to a plaintiff who rejects a defendant's CR 68 offer and does not achieve a more favorable result at trial. *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 272, 131 P.3d 910 (2006). CR 68's use of the term "costs," accrued before and after the offer of judgment, may or may not include attorney fees depending on the underlying statute. *Hodge v. Development Services of America*, 65 Wn. App. 576, 580, 828 P.2d 1175 (1992). If a statute or contract provision defines "attorney fees" as "costs," then the court reads the offer of judgment as including attorney fees even though the offer of judgment

does not expressly mention them. *Seaborn*, 132 Wn. App. at 267, 131

P.3d 910. As Division One has explained in *Seaborn*:

The cases that follow *Marek* make one principle abundantly clear: [A]lthough a CR 68 offer need not be a laundry list of everything that the offer includes, a wise offeror will expressly state that the offer includes attorney fees. If not, and if the underlying statute or contract does not define attorney fees as part of the costs, the offeree can seek those fees in addition to the amount of the offer. *Seaborn*, as the maker of the offer [of judgment here], should have availed itself of the chance to contravene the CR 68 default rule. Any ambiguity in the lump sum offer of judgment is construed against *Seaborn*.

*Seaborn*, 132 Wn. App. at 272, 131 P.3d 910 (citations omitted).

Under CR 68, Carpine would not be entitled to attorneys' fees as "costs" unless an underlying statute allows for attorneys' fees as "costs." Under CR 68, in the absence of a statutory definition, including attorneys' fees as part of "costs", a defendant is not entitled to an award of attorneys' fees. The flaw in Carpine's argument is that he is seeking attorneys' fees and costs under RCW 4.84.250 because "costs" under RCW 4.84.250 include attorneys' fees. Even in the context of a CR 68 offer, a trial court comparing a verdict to a CR 68 offer should 'compare comparables'. . . . In other words, a CR 68 offer that includes attorney fees should be compared with a verdict that also includes attorney fees if the prevailing party is entitled to attorney fees. *Magnussen v. Tawney*, 109 Wn. App.

272, 275-278, 34 P.3d 899 (2001). In the context of a Civil Rule 68 offer of judgment, the *Magnussen* court addressed this point directly:

[T]he trial court erred by failing to add the accrued fees and costs to the verdict before deciding whether the Magnussens had improved their position over the offer. ... In sum, when comparing comparables, the court should have determined the Magnussens' reasonable pre-offer attorney fees and costs and added that figure to the verdict. This final judgment could then be compared to the Edwards' CR 68 offer to determine if the Magnussens had improved their position at trial. In *Eagle Point*, . . . the court reasoned the plaintiffs were the prevailing party because they were awarded a judgment. *Eagle Point*, 102 Wash.App. at 709-10, 9 P.3d 898. And, as the prevailing party, they were entitled to their attorney fees pursuant to the statute. *Id.* at 710, 9 P.3d 898. **Under *Eagle Point*, the correct way to determine a plaintiff's final judgment is to add the attorney fees (here, the pre-offer amount) to the damages awarded and compare this figure to the CR 68 offer. *Id.***

Although the *Eagle Point* court was concerned with attorney fees provided by statute instead of a contract, its reasoning is persuasive. CR 68 was intended to provide an incentive for parties to settle, and a disincentive to protracted, needless litigation. The incentive and disincentive is provided by granting a defendant post-offer costs when a plaintiff's position at the time of the offer is not improved at trial. In order to make this comparison the court must first determine the plaintiff's position at the time of the offer.

*Magnussen v. Tawney*, 109 Wn. App. 272, 275-278, 34 P.3d 899 (2001).

However, in comparison, RCW 4.84.250 - .280 mandate that an offer of settlement separately denominate the amounts being offered on

the underlying claim. There can be no doubt of the meaning of the words “... the recovery, exclusive of costs ...” RCW 4.84.270. This excludes costs from the equation. The only way for a trial court to determine which party is the “prevailing party” under RCW 4.84.250 is to compare the recovery, exclusive of costs, with the offer of settlement, exclusive of costs. Carpine’s CR 68 lump sum Offer of Judgment for \$10,000, inclusive of costs and attorneys’ fees, cannot be compared against the jury award, which is exclusive of attorneys’ fees and costs. Any other result would be contrary to the plain wording of the statute. 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 through RCW 4.84.300. Under CR 68, an offer of judgment could be a lump sum and all inclusive offer of settlement. On the other hand, the unambiguous language of RCW 4.84.250 does not allow a lump sum offer of settlement, inclusive of attorneys’ fees and costs.

Moreover, there is no conflict between RCW 4.84.260 and RCW 4.84.270. RCW 4.84.260 provides that the “party seeking relief” is the prevailing party if he recovers, “exclusive of costs,” “as much or more than the amount offered in settlement” by that party. Contrary to Carpine’s argument, the trial court does not compare the award on McKillop’s underlying claim, which is exclusive of attorneys’ fees and

costs, with McKillop's settlement offer which separately denominates the amount being offered in settlement of the underlying action, and then adds McKillop's attorneys' fees and costs. The trial court is required to compare the amount recovered on the underlying claim, exclusive of costs, to the amount of the party's settlement offer on the underlying claim, exclusive of costs. To compare a raw verdict to McKillop's settlement offer, inclusive of attorneys' fees and costs, would be like comparing apples to oranges.

The intent of RCW 4.84.250 is to penalize parties who unjustifiably resist small claims, and allow a party to pursue a meritorious small claim without seeing their award depleted by attorney fees. *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). This purpose would be stood on its head if this court were to allow Carpine to force McKillop to expend thousands of dollars to prosecute her case, and then submit a settlement offer which effectively prevents her from a right to an award of attorneys' fees and costs. To allow a party submitting a settlement offer that is inclusive of attorney fees and costs to have that settlement offer compared to just the award of damages, which is exclusive of attorneys' fees and costs, creates a comparison of apples to oranges, and would gut the purpose of RCW 4.84.250 – 290 and deny McKillop her right to an award of attorney fees.

Carpine had the option of presenting a settlement offer that separately denominated the amounts being offered on the underlying claim, but chose not to. It would be a substantial disincentive in litigating small but meritorious claims if the defendant could disable the plaintiff from recovering attorney fees and costs simply by making an offer for what the underlying claim is worth (\$10,000.00), but also make the offer inclusive of attorneys' fees and costs.

The trial court correctly determined that McKillop is the prevailing party pursuant to RCW 4.84.260 because she received a jury verdict in her favor for \$8,500.00, which is more than her settlement offer of \$5,000 on the underlying claim. Therefore, McKillop is the prevailing party under RCW 4.84.290 and is entitled to an award of attorneys' fees and costs incurred in this action.

**E. CARPINE CANNOT CHALLENGE THE REASONABLENESS OF THE FEE AWARD FOR THE FIRST TIME ON APPEAL**

Carpine argues for the first time on appeal that the fee award of \$65,000 is unreasonable in light of McKillop's \$5,000 settlement offer on the underlying claim. Once again, Carpine never raised this argument to the trial court and has waived his right to raise this argument for the first time on appeal. RAP 2.5(a).

Carpine does not specifically dispute the hours or wage of McKillop's attorney, the number of hours she expended, the difficulty of the case, or her quality of representation. Carpine's only argument regarding excessiveness on appeal is that the attorneys' fees awarded were unreasonable in relation to the amount offered by McKillop in settlement of the underlying claim.

A reviewing court will not overturn a decision to grant or deny attorneys' fees absent a showing of a manifest abuse of discretion. *Mackey v. Am. Fashion Inst. Corp.*, 60 Wn. App. 426, 429, 804 P.2d 642 (1991). Washington courts hold that the size of the controversy must not be considered when fees are awarded under RCW 4.84.250. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 184, 321 P.3d 1215 (2014). Taking into account the size of the dispute conflicts with the purposes behind RCW 4.84.250. *Id.* Decisions under RCW 4.84.250 permit fee awards disproportionate to the amount in dispute. *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002). Even outside the context of RCW 4.84.250, when a party seeks an award of fees disproportionate to an award, courts readily grant the request when documentation supports a reasonable expenditure of time on tasks performed by counsel. *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 279 P.3d 972 (2012); *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006); *Mayer v. City of*

*Seattle*, 102 Wn. App. 66, 10 P.3d 408 (2000); *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 937 P.2d 1148 (1997).

In determining the amount of a fee award, the court must consider the purpose of the statute allowing for attorneys' fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993). The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims." *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). *Beckmann's* use of the word "penalize" is important, since the civil law rarely seeks to penalize a litigant. Another purpose is to enable a party to pursue a meritorious small claim without seeing her award diminished in whole or in part by legal fees." *Lay v. Hass*, 112 Wn. App. 818, 824, 51 P.3d 130 (2002). These purposes demand ignoring the amount in controversy when judging the reasonableness of attorneys' fees under RCW 4.84.250. Considering the amount in issue is an anathema to the essence of the statute.

*Lay*, 112 Wn. App. 818, 51 P.3d 130, illustrates the purpose behind the small claims settlement statute. A property line dispute arose between the Lays and the Hasses when the Hasses erected a fence on the Lays' property. The Lays sued and filed a summary judgment motion for nominal damages and attorneys' fees. The trial court granted the Lays'

motion and awarded the Lays \$360 for the trees and shrubs the Hasses removed and \$73 for the Hasses' occupation of their land. The trial court also awarded the Lays \$13,545.05 in attorneys' fees. On appeal, the Hasses challenged the reasonableness of the fees. The Hasses' only argument regarding excessiveness on appeal was that the attorneys' fees awarded were 31 times the case's actual value. The appeals court affirmed the award, without any mention that the amount involved should be considered. The court emphasized that the policy of RCW 4.84.250 is to punish parties who resist small claims.

Here, the amount offered in settlement on the underlying claim must not be considered when fees are awarded under RCW 4.84.250. Carpine has not met his burden of demonstrating that the court abused its discretion in awarding McKillop \$65,000 in attorney fees.

**F. MCKILLOP IS ENTITLED TO INTEREST ON THE UNPAID PORTION OF THE JUDGMENT**

A Judgment on Verdict was entered in favor of McKillop on February 2, 2015 for a total of \$73,500.00. Carpine partially satisfied the Judgment by paying McKillop a total of \$8,700.00. McKillop is entitled to post judgment interest on the unpaid portion of the Judgment of \$65,000. Judgment principal accrues post judgment interest until it is paid in full. *State v. Trask*, 98 Wn. App. 690, 696, 990 P.2d 976 (2000). The

Judgment states that the total judgment shall bear interest at 5.25% per annum. The governing statute for post judgment interest is found in RCW 4.56.110. The relevant provisions state:

Interest on judgments shall accrue as follows:

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.

Post-judgment interest is mandatory due to RCW 4.56.110. *Womack v. Von Rardon*, 133 Wn. App. 254, 264, 135 P.3d 542 (2006); *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 551–53, 114 P.3d 1182 (2005). Here, McKillop is entitled to post-judgment interest on the unpaid portion of the Judgment of \$65,000 at a rate of 5.25% from February 2, 2015.

**G. MCKILLOP IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS ON APPEAL UNDER RAP 18.1**

RAP 18.1 provides that this court may award attorneys' fees "[i]f applicable law grants to a party the right to recover reasonable attorneys' fees or expenses on review before either the Court of Appeals or Supreme Court." McKillop is entitled to attorneys' fees on appeal under RCW 4.84.290. RCW 4.84.290 provides in part as follows:

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

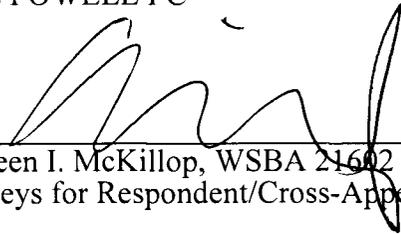
The Court should rule that McKillop is the prevailing party on this appeal, and is entitled to an award of her attorneys' fees and costs on appeal.

## V. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decision and judgment denying McKillop an additional \$35,297.93 in attorneys' fees and cost for work leading up to and including the arbitration because McKillop is the prevailing party on appeal pursuant to RCW 4.84.290. The court should remand this matter to the trial court to enter a Judgment in favor of McKillop for a total award of attorneys' fees and costs of \$103,602.30, plus prejudgment interest on the unpaid portion of the Judgment award of \$65,000 at a rate of 5.25% from February 2, 2015, plus her attorney's fees and costs on appeal. The court should also hold that Carpine is not the prevailing party and is not entitled to an award of attorneys' fees in this action.

DATED this 2nd day of June, 2015.

LANE POWELL PC

By: 

Eileen I. McKillop, WSBA 21602  
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I, Denise A. Campbell, hereby certify under the penalty of perjury of the laws of the State of Washington that on June 2, 2015, I caused to be served a copy of the foregoing **BRIEF OF RESPONDENT/CROSS-APPELLANT** to the following counsel of record in the manner indicated below at the following address:

Robert A. Richard	<input type="checkbox"/>	by <b>CM/ECF</b>
Eric L. Lewis	<input checked="" type="checkbox"/>	by <b>Electronic Mail</b>
Law Office of Robert A. Richards, PS	<input type="checkbox"/>	by <b>Facsimile Transmission</b>
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