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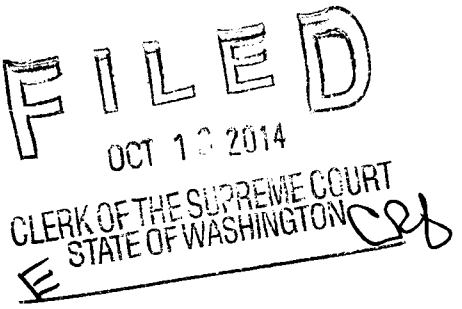

COA No. 43764- 3- II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE FILLIPINO AMERICAN LEAGUE,

Petitioner,

v.

LUCENA CARINO,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. RESPONSE OF RESPONDENT

COMES NOW Respondent, Lucena Carino, by and through her attorney of record, Patrick Hollister and Kram and Wooster, P.S., and hereby responds to Petitioner, the Filipino American League's motion for discretionary review.

II. STATEMENT OF THE CASE

This case began as a default award in small claims court and proceeded through a show cause hearing, appeal in Superior Court, and ultimately discretionary review in the Court of Appeals.

FAL's notice of small claim made no mention of seeking attorney fees. Up to and including the appeal argued in Superior Court the only request FAL advanced for attorney's fees was for contraversion of garnishment, a request repeatedly denied. RP p7, ¶11-12. Nor did FAL ever make an offer of settlement or make any effort to alert Carino to any intent to request fees.

After final judgment was orally announced in Superior Court, including denial of attorneys' fees on the basis of contraversion of garnishment, the judge himself introduced exploring attorney's fees on other basis associated only with defending an appeal. RP p.9, ¶19-23. FAL did not submit any argument in support of award of fees, choosing rather to submit a declaration indiscriminately citing 4 statutes without any

supporting argument. Ms. Carino submitted her response with citation to authority arguing that neither was pursuit of fees proper at this stage of the case, nor was there any statutory basis available to authorize fees. CP 25.

The Superior Court awarded fees under the authority of RCW 4.84.290. Citing ***Valley v. Hand***, 38 Wn. App. 170, 684 P.2d 1341 (Wash. App. Div. 3, 1984), the court concluded that the required offer of settlement and notice to the opposing party was not necessary in this case because as a default judgment in the small claims court there was never a time or opportunity for the Plaintiff to provide an offer of settlement or notice to the Defendant. CP 27. The Court of Appeals reversed the award of attorney fees finding that the unambiguous language of RCW 4.84.290 authorizes award of fees on appeal only where the party is eligible for an award under RCW 4.84.250, and for fees to be authorized under RCW 4.84.250 an offer of settlement is required. Since FAL failed to make an offer of settlement it is not authorized for fees under RCW 4.84.250, and therefore cannot be eligible for fees on appeal under RCW 4.84.290. The court further found that common law as cited in ***Lay v Hass***, 112 Wn. App. 818, 824, 51 P.3d 130 (2002), requires that the party from whom attorney fees are sought receive notice that it may be subject to attorney fees under the statute. This common law serves the purpose of RCW 4.84.250-.300 by ensuring the parties' awareness that the consequences of

not settling a small claim dispute may include award of attorney fees. ***Beckmann v. Spokane Transit Auth.***, 107 Wn.2d 785, 788-89, 733 P.2d 960 (1987). And no such notice was provided.

FAL now seeks discretionary review based on two theories: 1) by its assertion that it did not have any opportunity to make an offer of settlement the court of appeals erred in finding that an offer is required under RCW 4.84.250; and 2) that because RCW 12.40.105 authorizes attorney fees necessary for the collection of small claim court judgments, FAL is entitled to attorney fees under RCW 4.84.250-300 for defending an appeal.

III. ARGUMENT

1. Introduction - Reviewable issues of Court of Appeal decisions must be issues in controversy regarding that decision and generally must have been raised below.

The Supreme Court reviews a Court of Appeals decision that either conflicts with a decision of the Supreme Court or another division of the Court of Appeals; a decision that presents a significant question of constitutional interest; or a decision that presents an issue of substantial public interest that should be decided by this Court. RAP 13.5A(a)(1), (b); RAP 13.4(b). Review of a Court of Appeals decision is improper for

issues, however creative or interesting, that are not in controversy regarding that decision.

The Court generally does not review issues related to a decision that were not raised in the Court of Appeals or in turn raised at trial. ***Lindblad v. Boeing Co.***, 108 Wn.App. 198, 207, 31 P.3d 1 (2001). The reason is that a party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error and avoid unnecessary use of court resources. ***Smith v. Shannon***, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). ***Postema v. Postema Enters., Inc.***, 118 Wn.App. 185, 193, 72 P.3d 1122 (2003).

Because Petitioner's issues and arguments are not in controversy regarding the Court of Appeals decision, were raised for the first time in the petition for review, and in fact are not issues affecting the Petitioner at all, the Petition should be denied.

2. Because no issue regarding this decision remains in controversy the petition should be denied.

The unambiguous language of the statutory scheme, RCW 4.84.250-.300, requires a party to make a pre-trial offer of settlement to activate the scheme. This was recently emphasized by this Court in ***Williams v. Tilaye*** when even a settlement offer made long prior to appeal

but post trial was insufficient to activate the scheme. ***Williams v. Tilaye***, 174 Wn.2d 57, 58, 272 P.3d 235 (Wash. 2012).

The scheme was analyzed in the context of small claims court in ***Valley v. Hand***, relied upon by the Superior Court to justify activating the scheme for the petitioner in the present case. In ***Valley*** the court determined that a pre-trial offer was not necessary since RCW 4.84.290 made no mention of offers of settlement and such an offer has no merit after a judgment has already been entered. ***Valley v. Hand***, 38 Wn.App. 170, 173, 684 P.2d 1341 (Wash.App. Div. 3 1984). Division 3 acknowledged its error in a later appeal of a small claims court case ***Hertz v. Riebe***. In ***Hertz*** Division 3 recognized that RCW 4.84.290 allows activation of the scheme only for a "prevailing party" defined as the party entitled to attorney's fees under RCW 4.84.250. ***Hertz v. Riebe***, 86 Wn.App. 102, 107, 936 P.2d 24 (Wash.App. Div. 3 1997). Since RCW 4.84.250 requires a pre-trial offer of settlement any award under the scheme requires a pre-trial offer of settlement.

In fact it was the decision of the Superior Court in the present case that diverged from established authority. The Superior Court asserted that the Petitioner never had an opportunity to make an offer of settlement and therefore by the authority of ***Valley v. Hand*** is not required to make any offer. By overlooking ***Hertz v. Riebe*** and ***Williams v. Tilaye*** the Superior

Court acted in variance with established authority. And precisely that error was corrected by the Court of Appeals when it reversed the Superior Court decision.

An offer of settlement and notice of intent to pursue attorney fees are unambiguous requirements to activate the statutory scheme of RCW 4.84.250-.300. The petitioner may not like it, but any issue of public interest associated with this requirement is a legislative issue not judicial, and the petition should be denied.

3. **Red Herring issues not in controversy in this case and in fact not affecting Petitioner at all fall outside of reviewable categories and their review should be denied.**

    A. **Because the Petitioner voluntarily choose to avail itself of the conveniences and simplicity of small claims court there is no merit to its assertion that it is a victim of the associated limitations of that venue.**

The statutory scheme of RCW 4.84-250-.300 pertains to claims of ten-thousand dollars ($10,000) or less. RCW 4.84.250. These claims have been popularly coined as "small claims" for purposes of analyzing the statutory scheme. The statutory scheme itself makes no reference to the term "small claims."

Small Claim Courts in the state of Washington have jurisdiction over claims of as much as five thousand dollars ($5,000). RCW

12.40.040. As such, small claim courts have jurisdictions over certain claims that fall under the statutory scheme.

A party with a claim that meets the requirements of RCW 4.84.250-.300 and is of five thousand dollars ($5,000) or less has the option of filing their complaint in Superior Court, District Court or Small Claim Court. Venue for these claims is a choice, with each venue presenting benefits and restrictions.

The Petitioner filed a claim of five thousand dollars ($5,000) and choose to avail itself of the simplicity and convenience of the Small Claim Court venue. The Petitioner itself mentions some of these conveniences in its petition for review when referencing the shortened time to get to trial and the simplicity of obtaining a default judgment. Petitioner also relies in its petition on RCW 12.40.105; a statute providing unique protections for judgment beneficiaries in small claims court.

Now the Petitioner wants to claim as a matter of significant public interest the authority to waive the requirements of RCW 4.84.250-.300 because the conveniences it received in its choice of venue also include limitations. It is meritless now to suggest that the Petitioner is victimized by its own choice of venue. What is more likely is that the choice of venue is proof the Petitioner never had any intention of pursuing attorney fees under the scheme.

Because the statutory scheme makes no exceptions based on venue, Petitioner's choice of the Small Claims Court venue makes any suggestion of being a victim of the quality of that venue meritless and the petition should be denied.

B. **Petitioner's assertion that the procedures of Small Claim Court eliminate access to the scheme lacks merit because Petitioner acknowledges in its own petition that it had the opportunity and means to make an offer of settlement.**

As the Petitioner repeatedly represents the purpose of the scheme is to encourage settlements of claims of ten thousand dollars ($10,000) or less. Even, for the sake of argument, if an offer of settlement was not possible in a small claim court venue, the absence of an offer of settlement would negate the purpose of the scheme. Without an offer, there can be no settlement. The scheme unambiguously requires an offer, it does not guarantee the opportunity to make an offer.

However, in fact Petitioner in its own petition acknowledges that it had 16 days in which it did have the opportunity to make an offer of settlement prior to trial. Petition, page 6. Petitioner also acknowledges its ability to complete service on Ms. Carino. Id. According to RCW 4.84.280, offers of settlement shall be served on the adverse party in the manner prescribed by Court rules. Therefore the Petitioner by its own

assertions acknowledges it had opportunity and means of making an offer of settlement.

Since Petitioner acknowledges it had both the opportunity and the means of making an offer of settlement its assertions based upon lack of ability to make an offer are meritless and the petition should be denied.

C. **Petitioner's assertion that under the fee shifting scheme a judgment debtor may avoid the penalty of attorney fees by fostering a default judgment is nonsensical because it is an irrational inefficient and self-destructive choice.**

To Foster a default judgment in small claims court is to accept full liability under that judgment including any costs and fees associated with collection of the judgment. If the judgment debtor also choses to appeal that judgment they would incur their own legal fees and court costs while also having to post a bond of twice the value of the judgment. An irrational defendant intentionally choosing this course would not be a general concern of significant public interest let alone in this case where it was not an issue at all.

D. **Because the question before the Court of Appeals was whether the requisite foundation existed to activate the statutory scheme of RCW 4.84.250-.300 a theory involving the unrelated statute RCW 12.40.105 is not a proper question for review and should be denied.**

a. **RCW 12.40.105 was not relevant to the Court of Appeals decision.**

Supreme Court review of a decision of the Court of Appeals pertains to the decision of the Court of Appeals. In this case the question before the Court of Appeals was whether an offer of settlement and notice of intent to pursue legal fees are conditions precedent to activate the fee shifting scheme of RCW 4.84.250-.300. RCW 12.40.105, Increase of judgment upon failure to pay, was not in question and did not pertain to the decision.

Because RCW 12.40.105 does not pertain to the decision of the Court of Appeals, review based on that statute should be denied.

b. **RCW 12.40.105 was not raised on appeal by Petitioner mentioned in its appellate brief and not ever advanced in lower courts.**

The Court generally does not review issues related to a decision that were not raised in the Court of Appeals or in turn raised at trial. ***Lindblad v. Boeing Co.*** The reason is that a party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error and avoid unnecessary use of court resources. ***Smith v. Shannon.*** Petitioner raises RCW 12.40.105 as a basis for fees for the first time in its Petition. Because RCW 12.40.105 is not an issue in this case and is being raised for the first time in the petition for review, review based on this statute should be denied.

c. Collection of judgment is not even a complaint of the Petitioner.

RCW 12.40.105, Increase of judgment upon failure to pay; provides statutory authority for a small claim court judgment creditor to collect costs associated with collection of small claim court judgments. RCW 12.40.105. This issue is not in controversy in this case.

Defendants of small claim court judgments who seek appeal are required to post a bond in the amount of twice the sum of the judgment and costs. Not only was this bond deposited with the court, but the Petitioner collected on the bond all of the amounts it demanded including the full amount of the judgment plus collection fees plus interest. Petitioner has also already collected on the attorney fee award of the Superior Court. There are no outstanding judgments on which to collect.

Because RCW 12.40.105, Increase of judgment upon failure to pay, is not a controversy of this case or a complaint of the Petitioner the petition for review based on this statute should be denied.

IV. CONCLUSIONS

Is an offer of settlement and notice of intent to pursue legal fees essential to the legislative intent of the fee shifting scheme of RCW 4.84.250-.300? Regarding that question Petitioner makes no argument

that the Court of Appeals got the law wrong. Rather it asks the question – in the circumstance that an offer of settlement and/or notice are not possible should the scheme be applied in strict liability as a bludgeon of punishment to even an unwary and justifiable but unsuccessful appellant? The answer is plain; the legislature did not authorize that policy.

Rather than assert a conflict in judicial authority or a significant issue pertaining to the Court of Appeals decision, Petitioner offers assertions that are neither applicable to the decision on appeal nor in fact applicable to the Petitioner at all. There is no legal issue in conflict or controversy remaining regarding the decision. Because the statutory scheme makes no exceptions based on venue, Petitioner's choice of the Small Claims Court venue makes any its suggestions of being a victim of the quality of that venue meritless. Because the question before the Court of Appeals was whether the requisite foundation existed to activate the statutory scheme of RCW 4.84.250-.300 Petitioner's theory involving the unrelated statute RCW 12.40.105 is not a proper question for review. RCW 12.40.105 was not relevant to the Court of Appeals decision; was not raised on appeal by Petitioner mentioned in its appellate brief and not ever advanced in lower courts; and in fact Collection of judgment is not even a complaint of the Petitioner.

For all of these reasons Petitioner has failed to present a judicial conflict or an issue of the decision on appeal that involves a significant public interest and the petition should be denied.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

Kram & Wooster, P.S.,

Patrick Hollister, WSBA # 41492
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE FILIPINO AMERICAN LEAGUE, Petitioner, v. LUCENA CARINO, Respondent.	COA Case No. 43764- 3- II **DECLARATION SERVICE**

I, declare under penalty of perjury under the laws of the State of Washington, that on the date below, I served a copy of RESPONDENT'S **ANSWER TO PETITION FOR DISCRETIONARY REVIEW** by delivery in person the same, to:

Chad Ahrens
Smith Alling, P.S.
1102 Broadway Plaza, #403
Tacoma, Washington, 98402

Signed this 6th day of October, 2014, at Tacoma, Washington, Pierce County.

Patrick Hollister
WSBA #41492