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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE FILIPINO AMERICAN LEAGUE,

Plaintiff, Respondent

v.

LUCENA CARINO,

Defendant, Petitioner.

APPELLANT'S BRIEF

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I. TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3-5
Assignment of Errors	6
Issues Related to Assignment of Error	6, 7
Statement of the Case	7-9
Argument	10
a. Standard of Review	10
b. Applying RCW 4.84.250 – 290 Post-default is Improper Because Doing so Disenfranchises Defendants From Existing Provisions to Redress Default by Establishing an Inordinate Risk to the Defendant.	10-15
c. Applying RCW 4.84.250 – 290 Post-default is Improper Because Expanding the Scope of the Statutory Scheme to Do So Requires The Court to Put Itself in the Place of the Legislature Establishing Statutory Mechanisms Necessary for Its Implementation	16-19
d. Awarding Attorneys Fees is Improper in This Case Because Their Award Is Predicated on Pre-Trial Pleading That Did Not Occur.	19-22
Conclusion	22, 23

II. TABLE OF AUTHORITIES

Table of Cases

Austin v. U.S. Bank of Wash., 73 Wash.App. 293, 313, 869 P.2d 404, review denied, 124 Wash.2d 1015, 880 P.2d 1005 (1994) 20, 21

Beckmann v. Spokane Transit Auth., 107 Wn.2d 785, 788, 733 P.2d 960 (1987) 12, 13

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907) 13

Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) 11

Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (Wash. 1979) 13

Hertz v. Riebe, 86 Wn.App. 102, 107, 936 P.2d 24 (Wash.App. Div. 3 1997) 16, 17

In re Marriage of Coy, 160 Wn.App. 797, 808, 248 P.3d 1101 (Wash.App. Div. 2 2011) 20, 21

In re the Matter of the 1992 Honda Accord, 117 Wn.App. 510, 524, 71 P.3d 226 (Wash.App. Div. 3 2003) 11

Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wash.App. 409, 157 P.3d 431 (2007) 21

Kalich v. Clark, 215 P.3d 1049 (Wash.App. Div. 3 2009) 17

Lay v. Hass, 112 Wn.App. 818, 824, 51 P.3d 130 (Wash.App. Div. 2 2002) 17

Phillips Bldg. Co., Inc. v. An, 81 Wash.App. 696, 915 P.2d 1146 (1996) 20

State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003) 10

State v. Wentz, 149 Wash.2d 342, 346, 68 P.3d 282 (2003) 10

Stiles v. Kearney, 168 Wn.App. 250, 267, 277 P.3d 9 (Wash.App. Div. 2 2012) 21

Thweatt v. Hommel, 67 Wash.App. 135, 148, 834 P.2d 1058, review denied, 120 Wash.2d 1016, 844 P.2d 436 (1992) 20

Toyota of Puyallup, Inc. v. Tracy, 63 Wn.App. 346, 353-4, 818 P.2d 1122 (Wash.App. Div. 2 1991) 11, 17, 18

Valley v. Hand, 38 Wn.App. 170, 173, 684 P.2d 1341 (Wash.App. Div. 3 1984) 16

Widucus v. Southwestern Elec. Cooperative, Inc., 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960) 13

Williams v. Tilaye, 174 Wn.2d 57, 61, 272 P.3d 235 (Wash. 2012) 10, 14, 17

Constitutional Provisions

Fourteenth Amendment of the U.S. Constitution 11

Article 1, Section 3 of the Washington State Constitution 11

Statutes

RCW 12.40.120 13

RCW 4.84.250 11, 12, 15, 16

RCW 4.84.260	12
RCW 4.84.280	12
RCW 4.84.290	12, 15, 16
RCW 4.84.250 - .290	10, 11, 12, 15, 19, 21

Regulations and Rules

CRLJ 55(c)	14
CRLJ 60(b)	14
RALJ 11.2	19
RAP 18.1	20

III. ASSIGNMENT OF ERROR

1. The trial court erred by applying the statutory scheme of RCW 8.24.250 - .290 for the first time post-default judgment in violation of the policy intent of the scheme and in conflict with other public policy. CP 27

2. The trial court erred by awarding Plaintiff attorney's fees under RCW 8.24.290 without Plaintiff qualifying for an award under RCW 8.24.250. CP 27

3. The trial court erred by awarding attorney's fees under RCW 8.24.290 without Plaintiff ever making a settlement offer or providing Defendant notice of the consequences of declining the offer. CP 27

4. The trial court erred by awarding attorney's fees based on a statute not pleaded, argued, or with cited authority. CP 13

Issues related to assignment of error

1. Can the statutory scheme under RCWs 4.84.250-.290 be properly applied for the first time post-default judgment when doing so creates an unintended and inordinate risk to defendants discouraging access to the courts and disenfranchising them from use of existing provisions enacted to redress default judgments?

2. Under RCWs 4.84.290 are attorneys' fees on appeal permitted when the Plaintiff does not qualify for an award under RCW 4.84.250?

3. Under RCWs 4.84.250-290 are attorneys' fees on appeal permitted for a party that neither made an offer of settlement nor provided notice of the consequences for rejecting an offer of settlement?

4. Under RALJ 11.2(c) and RAP 18.1 is a party on appeal entitled an award of attorneys' fees when the basis for those fees was not an issue on appeal, was not pleaded, was not argued, and was not cited with authority in the appellate brief?

IV. STATEMENT OF THE CASE

Respondent/Plaintiff, The Filipino American League (hereafter "FAL"), was awarded a default judgment of $5,079.00 in small claims court against Petitioner/Defendant Lucena Carino for allegedly misappropriating funds. CP 6. Ms. Carino obtained an order to show cause and requested the judgment to be set aside. CP 6. This motion was heard and denied September 15, 2011, in the Thurston County District Court without findings of fact or conclusions of law. CP 6. In its answer to the Motion to Show Cause filed the day before the hearing, FAL provided documentation directly identifying some of the alleged misappropriated funds were within FAL's possession. CP 10, p1-2. Ms. Carino had no opportunity to review this material prior to trial and was unable to argue its significance. CP 10, p5, ¶12.

Ms. Carino timely filed a notice of appeal on October 10, 2011, to Superior Court on the basis that evidence in the Plaintiff's own District Court filing demonstrated the funds were not misappropriated. CP 4. FAL responded on February 27, 2012, and filed a Motion to Strike Portions of Appellant's Appeal alleging that its submissions to the District Court should not be permitted as evidence on appeal. CP 4. This motion was granted leaving no evidence available to either support or deny the alleged misappropriation ever occurred. CP 22.

The appeal of the District Court decision itself was heard and the lower court decision upheld on April 16, 2012. CP 6. To this point the only request for attorney's fees was associated with alleged contraversion of garnishment. RP p7, ¶11-12. That request was denied in the District Court and again on appeal in Superior Court. Id.

After final judgment was orally announced by the 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 p9, ¶19-23. The Judge offered to entertain new claims and arguments for attorney's fees. RP p9, ¶24 – p10, ¶4.

Appellant, FAL, submitted a Declaration of Counsel in Support of Attorney's Fees on May 4, 2012. CP 24. The Declaration cited a shotgun

of 4 possible bases for attorney's fees including RCW 4.84.250, all advanced for the first time and citing no case authority for any. Id. Appellant, Ms. Carino, submitted her Response to Respondent's Request for Attorney's Fees on Appeal, on May 10, 2012. CP 25.

The court issued a Letter Opinion granting attorney's fees selectively for arguing the appeal on June 13, 2012. CP 33. The Letter Opinion cited as the basis for granting fees RCW 4.84.290, concluding that the otherwise required notice to the opposing party was not necessary in this case because as a default judgment there was never a time or opportunity for the Plaintiff to provide notice to the Defendant. CP 27.

The Order and Judgment on Appeal was issued July 16, 2012. CP 33. Ms. Carino timely filed her Notice of Appeal in Division Two of the Washington State Court of Appeals on July 26, 2012. CP 34. After the Notice of Appeal was rejected by the Case Manager as not appealable as a matter of right, and the subsequent Motion to Modify was also denied, Ms. Carino submitted her Motion for Discretionary review September 6, 2012. This motion was approved January 18, 2013.

V. ARGUMENT

a. Standard of Review

The issues in this appeal involve statutory interpretation. Statutory interpretation is a question of law reviewed de novo. ***State v. Wentz***, 149 Wash.2d 342, 346, 68 P.3d 282 (2003). Interpreting statutes requires the court to discern and implement the legislature's intent. State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003). ***Williams v. Tilaye***, 174 Wn.2d 57, 61, 272 P.3d 235 (Wash. 2012) citing ***State v. Wentz***, 149 Wash.2d 342, 346, 68 P.3d 282 (2003). Interpreting statutes requires the court to discern and implement the legislature's intent. ***Id.*** citing ***State v. J.P.***, 149 Wash.2d 444, 450, 69 P.3d 318 (2003).

b. Applying RCW 4.84.250 – 290 Post-default is Improper Because Doing so Disenfranchises Defendants From Existing Provisions to Redress Default by Establishing an Inordinate Risk to the Defendant.

i. The Public Policy of RCW 4.84.250-.290, is to Encourage Pre-trial Settlements By Placing Parties at Risk for Paying Opposing Party Attorney's Fees

The Washington Supreme Court recently re-affirmed that the public policy fostered by RCW 4.84.250-.290, is to encourage pre-trial settlements in cases where the amount in controversy is $10, 000 or less. ***Williams v. Tilaye***, 174 Wn.2d 57, 58, 272 P.3d 235 (Wash. 2012). This objective is achieved through a party making an offer of settlement at least

10 days prior to the initial hearing. ***Id.*** at 59. The offer of settlement is required to place the other party on notice that it would seek attorneys' fees if the offer were not accepted. ***Toyota of Puyallup, Inc. v. Tracy***, 63 Wn.App. 346, 353-4, 818 P.2d 1122 (Wash.App. Div. 2 1991). See ***In re the Matter of the 1992 Honda Accord***, 117 Wn.App. 510, 524, 71 P.3d 226 (Wash.App. Div. 3 2003)(Plaintiff cannot recover fees because he did not give notice of his intent to seek fees under RCW 4.84.250).

ii. The Interest of Encouraging Pre-trial Settlements Requires Cautions Application Because It Also Works to Deter Access to the Courts

The Fourteenth Amendment of the U.S. Constitution holds that no state shall deprive any person of life, liberty, or property, without due process of law. Article 1, Section 3 of the Washington State Constitution likewise states that no person shall be deprived of life, liberty, or property, without due process of law.

In American jurisprudence certain principles are relatively immutable. One such principle is that when the reasonableness of judicial action against an individual depends upon fact finding the individual must have a fair opportunity to show that it is not true. ***Greene v. McElroy***, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). The principle is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be

perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. ***Id.***

Against this principal of allowing a defendant to argue the truth of alleged facts, Washington recognizes a balancing interest. Particularly in actions involving small dollar claims the state seeks to encourage out-of-court settlements to promote judicial efficiency, penalize parties who unjustifiably bring or resist small claims, and enable a party to pursue a meritorious small claim without seeing the award diminished by legal fees incurred through defending an appeal. ***Beckmann v. Spokane Transit Auth.***, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). The balancing interest regarding small claims is the policy intent of RCW 4.84.250-.290 (hereinafter "the statutory scheme"). ***Id.***

Accordingly the prevailing party in a small claim action is entitled to attorney's fees (RCW 4.84.250) should that party recover more than it offered in settlement (RCW 4.84.260), which offer was at least ten days prior to trial (RCW 4.84.280). In addition, if on appeal the prevailing party would be entitled to fees under RCW 4.84.250, the court shall also allow fees for defending the appeal. RCW 4.84.290.

iii. Application of RCW 4.84.250 - .290 to Cases Post-Default Judgment Creates An Unintended and Inordinate Risk to Defendants Discouraging Access to the Courts and

Disenfranchising Them From Use of Existing Provisions Enacted to Redress Default Judgments

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . ."
>
> ***Chambers v. Baltimore & Ohio Railroad Co.***,
> 207 U.S. 142, 148 (1907).

Default judgments are recognized as one of the most drastic actions a court may take to punish disobedience to its commands. ***Griggs v. Averbeck Realty, Inc.***, 92 Wn.2d 576, 599 P.2d 1289 (Wash. 1979), citing ***Widucus v. Southwestern Elec. Cooperative, Inc.***, 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960). The punishment of a default judgment allows a plaintiff with a faulty memory or a perjurer or person motivated by malice, vindictiveness, intolerance, prejudice, or jealousy to prevail without a defendant having argued the alleged facts. ***Beckmann v. Spokane Transit Auth.***, at 788. Rather the policy of law desires that controversies be determined on the merits rather than by default. ***Griggs v. Averbeck Realty, Inc.***, at 582.

The legislature and the court established a separate scheme to mitigate the potential harsh results of a default judgment. Washington codified the right for a defaulting party in District Court to seek to have that judgment set aside on appeal. RCW 12.40.120. For good cause

shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b). CRLJ 55(c). CRLJ 60(b) specifies no less than 11 reasons for which the court might set aside a default judgment. Id.

Application of the small claims statutory scheme beyond its limited intended scope is improper because it creates unintended incentives affecting legal rights. In ***Williams v. Tilaye*** an unsuccessful plaintiff made a settlement offer after mandatory arbitration and prior to a trial de novo contending that the statutory scheme should apply. ***Williams v. Tilaye***, 174 Wn.2d 57, 64, 272 P.3d 235 (Wash. 2012). The Court disagreed stating that such an application would compromise the scheme's intent by increasing the incentive for an unsuccessful plaintiff to appeal. Then under the threat of legal fees that may be greater than the underlying claim a prevailing defendant would have an inordinate incentive to settle. ***Id.***

Though the fact pattern in ***Williams*** is not precisely on point, the case is precisely on point to illustrate the unintended incentives created by expanding the scope of the statutory scheme. Attempting to apply the statutory scheme post default judgment directly confronts the separate statutory provision to redress default judgments. Just like in ***Williams***

where expanding the statutory scope created an inordinate and unintended risk for the defendant, so too application of the scheme after a default judgment would create an inordinate risk for the defendant considering redress of the default judgment. Under this circumstance a defaulting defendant considering appeal is already liable to post a bond, and pay their own attorneys fees for trial. If the statutory scheme were expanded to include post default appeals, the defaulting defendant would also need to consider the risk of paying opposing party fees.

The statutory scheme was intended to promote pre-trial settlement. Expanding the scope to attempt to motivate party behavior post trial, even in the limited case of default judgments, creates secondary incentives affecting legal rights not intended to be affected by the statutory scheme.

Because a post-default application of RCW 4.84.250 - .290, creates an unintended and inordinate risk to defendants, discouraging access to the courts and disenfranchising them from use of existing provisions enacted to redress default judgments, its application in this case should be overturned.

c. Applying RCW 4.84.250 – 290 Post-default is Improper Because The Necessary Expansion of the Scope of the Statutory Scheme Requires The Court to Put Itself in the Place of the Legislature Establishing Statutory Mechanisms Necessary for Its Implementation.

i. Recovery Under RCW 4.84.290 Requires as a Pre-requisite a Party's Entitlement to Recovery Under RCW 4.84.250.

The award of attorney's fees on appeal of a small claim is governed by RCW 4.84.290. Accordingly a prevailing party on appeal of a small claim is entitled to attorney's fees *if the prevailing party* on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250. RCW 4.84.290. Qualifying for attorney's fees under RCW 4.84.250 is a pre-requisite to consideration of fees under RCW 4.84.290. Id.

This understanding was precisely the rule of ***Hertz v. Riebe***, 86 Wn.App. 102, 107, 936 P.2d 24 (Wash.App. Div. 3 1997). In that case the court was confronted by its earlier rule in ***Valley v. Hand*** where it determined that since RCW 4.84.290 made no mention of an offer of settlement such an offer was unnecessary to recover fees. ***Valley v. Hand***, 38 Wn.App. 170, 173, 684 P.2d 1341 (Wash.App. Div. 3 1984). In the ***Hertz*** case the court specifically overruled ***Valley v. Hand*** on that point stating that recovery under 4.84.290 was available only if the prevailing party would be entitled to recovery under 4.84.250. ***Hertz v. Riebe***, at 107.

ii. Recovery Under RCW 4.84.250 Requires That Prior to Trial a Party Make an Offer of Settlement AND Give Notice of the Consequences of Declining That Offer

Under RCW 4.84.290 a party is entitled to attorney's fees on appeal from a small claim judgment only if that party made an offer or otherwise notified the opposing party of his intent to seek legal fees prior to the initial trial. ***Kalich v. Clark***, 215 P.3d 1049 (Wash.App. Div. 3 2009). In the case of ***Kalich***, the plaintiff did in fact prior to trial make an offer of settlement and place the defendant on notice that it would pursue attorney's fees if it was required to appeal. Mr. Kalich did appeal and was awarded attorney's fees under RCW 4.84.290.

The case record addressing this statutory scheme consistently recognizes the essential pre-requisite to implicate the statutory scheme: 1) an offer of settlement, and 2) notice of the impact of declining that offer, both made prior to trial. ***Hertz v. Riebe***, 86 Wn.App. 102, 936 P.2d 24 (Wash.App. Div. 3 1997), see ***Williams v. Tilaye***, at 64 (noting "Our Courts of Appeal have been careful to limit each statutory scheme for prevailing party attorney fees to its appropriate application"), see ***Lay v. Hass***, 112 Wn.App. 818, 824, 51 P.3d 130 (Wash.App. Div. 2 2002) (noting common law requires that the party from whom attorney fees are sought receive notice Before trial that it may be subject to fees under the statute).

In ***Toyota of Puyallup, Inc., v. Tracy***, a defendant made a settlement offer prior to trial but failed to notify the plaintiff of the

consequences of not accepting the offer. ***Toyota of Puyallup, Inc., v. Tracy***, 63 Wn.App. 346, 818 P.2d 1122 (Wash.App. Div. 2 1991). Because knowledge of the risk of not accepting an offer is a required pre-requisite to implicate the statutory scheme, the failure of the defendant to provide that notice defeated his claim for fees. ***Id.***, at 354.

iii. Enforcing Recovery After a Default Judgment Would Require The Court To Read Into the Statutory Language a Requirement of a Post-Trial and Pre-Appeal Offer of Settlement And Notice of Consequences of Not Accepting That Offer

The intent of the statutory scheme is to encourage out-of-court settlements. Without the provision of notice the application of the scheme would be no more than a bludgeon to punish the unwary. Thus even if the court can accept the unintended incentives created by broadening the scope of the statutory scheme, fostering the legislative intent would require the court to read into the statutory scheme the requirements otherwise required pre-trial. The court would need to read into the statutory scheme a requirement for a party to provide the other party with a post trial and pre-appeal settlement offer and notice of the consequences of declining that offer.

Reading such terms into the statutory scheme would be a stretch. If the legislature intended to encourage out-of-court settlements in lieu of

appeal, it could have written a statutory scheme to directly promote that outcome, and do so in an environment including deliberative consideration of the inevitable indirect consequences. The existing scheme is intended to encourage out-of-court settlements prior to the initial trial. If that opportunity is moot, the statutory scheme is not applicable.

Because applying RCW 4.84.250 – 290 post-default expands the scope of the statutory scheme to an extent that requires the court to put itself in the place of the Legislature to establish the statutory mechanisms necessary for its implementation, the application is improper, and its application in this case should be overturned.

Further, under any construction of the statutory scheme a pre-requisite for application is an offer of settlement and notice of the consequences of declining that offer. Neither of these pre-requisites was ever made in this case, and as such upholding the award would effectively make the statutory scheme a bludgeon for the unwary. For these reasons as well the award of attorney's fees was improper and should be overturned.

d. **Awarding Attorneys Fees is Improper in This Case Because Their Award Is Predicated on a Pre-Trial Pleading That Did Not Occur.**

Awarding of attorney's fees on appeal of a judgment from a court of limited jurisdiction is governed by RALJ 11.2. That rule reads in pertinent part as follows:

> (c) Argument in Brief. **The party should devote a section of the brief to the request for the fees or expenses**.
>
> RALJ 11.2

The rule for awarding attorney's fees on appeal to courts of general jurisdiction is nearly identical.

> (b) Argument in Brief. **The party must devote a section of its opening brief to the request for the fees or expenses**. ... In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.
>
> RAP 18.1

This issue has been thoroughly litigated. The Rule [RAP 18.1] governing attorney fees and expenses requires more than a bald request for attorney fees on appeal. ***In re Marriage of Coy***, 160 Wn.App. 797, 808, 248 P.3d 1101 (Wash.App. Div. 2 2011), see ***Phillips Bldg. Co., Inc. v. An***, 81 Wash.App. 696, 915 P.2d 1146 (1996). A request for appellate attorney fees requires a party to include a separate section in her or his brief devoted to the request. RAP 18.1(b). This requirement is mandatory. ***Phillips Bldg. Co. v. An***, at 705. The rule requires more than a bald request for attorney fees on appeal. ***Thweatt v. Hommel***, 67 Wash.App.

135, 148, 834 P.2d 1058, review denied, 120 Wash.2d 1016, 844 P.2d 436 (1992). Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. ***Austin v. U.S. Bank of Wash.***, 73 Wash.App. 293, 313, 869 P.2d 404, review denied, 124 Wash.2d 1015, 880 P.2d 1005 (1994). ***Stiles v. Kearney***, 168 Wn.App. 250, 267, 277 P.3d 9 (Wash.App. Div. 2 2012). ***Just Dirt, Inc. v. Knight Excavating, Inc.***, 138 Wash.App. 409, 157 P.3d 431 (2007).

The only request the Filipino American League made for attorney's fees in any of its pleadings, let alone its appellate brief, was associated with its claim of contraversion of garnishment. That request was denied in both the lower court and the Superior court. It made no further request for attorney's fees. No other request was pleaded or argued in any pre-judgment hearing.

Just as in ***In re Marriage of Coy***, where a bald request for attorney's fees was inadequate to merit an award, so much more in our case where other than the twice denied request on contraversion of garnishment no request was made at all, the post-hearing bald request without citing any authority should be overturned. Just as in ***Austin v. U.S. Bank of Wash***, where argument and citation to authority are required

to advise the court of the appropriate grounds for an award of attorney fees as costs, in our case where RCW 4.84.250 – 290 was not cited at all in any brief let alone with argument and citation to authority, the award of attorney's fees should be overturned.

VI. CONCLUSIONS

Because a post-default application of RCW 4.84.250 - .290, creates an unintended and inordinate risk to defendants, discouraging access to the courts and disenfranchising them from use of existing provisions enacted to redress default judgments, its application in this case should be overturned.

Because applying RCW 4.84.250 – 290 post-default expands the scope of the statutory scheme to an extent that requires the court to put itself in the place of the Legislature to establish the statutory mechanisms necessary for its implementation, the application is improper, and its application in this case should be overturned.

Because under any construction of the statutory scheme a pre-requisite for application is an offer of settlement and notice of the consequences of declining that offer. Neither of these pre-requisites was ever made in this case, and as such upholding the award would effectively make the statutory scheme a bludgeon for the unwary. For these reasons

as well the award of attorney's fees was improper and should be overturned.

Because a bald request for attorney's fees is inadequate to merit an award of attorney's fees, and RCW 4.84.250 – 290 was not cited at all in any brief let alone with argument and citation to authority, the award of attorney's fees should be overturned.

RESPECTFULLY SUBMITTED this 4th day of March, 2013.

Kram & Wooster, P.S.,

Patrick Hollister, WSBA # 41492
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Patrick Hollister, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Kram & Wooster, P.S., 1901 South I Street, Tacoma, Washington 98405. On the 3rd day of January, 2013, a true and correct copy of each of the following documents: Appellant's Brief (2 copies), was delivered to:

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Division II
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[X] Delivery in person

I hereby certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2013.

KRAM & WOOSTER, P.S.

Patrick Hollister

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