

No. 45462-9

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROBERT EMERICK

Appellant/Cross-Respondent,

v.

CARDIAC STUDY CENTER, INC., P.S.

Respondent/Cross-Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
2014 MAR 14 PM 3:01  
BY [Signature]

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BRIEF OF CROSS-APPELLANT

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**TABLE OF CONTENTS**

I. SUMMARY OF ARGUMENT ..... 1

II. ASSIGNMENT OF ERROR ..... 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT ..... 7

    A. Standard of Review..... 7

    B. The Trial Court Erred as a Matter of Law When It  
    Denied Cardiac Its Attorney’s Fees Incurred on Appeal. .... 8

    C. Cardiac is Entitled to an Award of Prevailing Party  
    Attorney’s Fees on This Appeal. .... 13

V. CONCLUSION..... 13

**TABLE OF AUTHORITIES**

**CASES**

*Bank of New York v. Hooper*, 164 Wn. App. 295, 263 P.3d 1263 (2011).....7

*Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007).....9, 10

*Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. 248, 286 P.3d 689 (2012).....1, 5, 11

*Gander v. Yeager*, 167 Wn. App. 638, 282 P.3d 1100 (2012).....7, 8

*Landberg v. Carlson*, 108 Wn. App. 749, 33 P.3d 406 (2001).....9

*Satomi Owers Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009).....9, 10, 11

*Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 260 P.3d 915 (2011).....7

*Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).....8

**STATUTES**

RCW 4.84.330 .....6, 11, 13

**COURT RULES**

RAP 18.1..... *passim*

## I. SUMMARY OF ARGUMENT

After four years of litigation in this case Cardiac Study Center, Inc. (“Cardiac”) prevailed in enforcing a restrictive covenant contained in its Shareholder Employment Agreement with former shareholder Robert Emerick. The trial court determined that Cardiac was the prevailing party in this action and the trial court found that Cardiac’s attorney’s fees were reasonable. Despite these conclusions, the trial court denied Cardiac recovery of a portion of Cardiac’s attorney’s fees for work performed during the initial appeal of this case in *Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. 248, 286 P.3d 689 (2012), and for work done to successfully oppose Emerick’s petition for further review to the Washington Supreme Court.

The trial court’s decision was based almost exclusively on the conclusion that Cardiac was required to previously request its attorney’s fees incurred on appeal from the Court of Appeals and/or Washington Supreme Court, and that the trial court had no authority to determine whether a party before it could recover attorney’s fees incurred on a previous appeal. The trial court labored under a mistake of law when it reached this conclusion. Cardiac was not entitled to recover any reasonable attorney’s fees as the prevailing party in this action until the

trial court signed its September 11, 2013 Order granting summary judgment in Cardiac's favor. Clerk's Papers ("CP") 319-24. That ruling made Cardiac the "prevailing party" for the first time in this litigation. Cardiac, having finally prevailed, is entitled to an award of all its reasonable attorney's fees, including those fees incurred during the earlier appeal where it successfully overturned the trial court's previous ruling in Emerick's favor and fees incurred opposing Emerick's subsequent petition to the Washington Supreme Court.

## **II. ASSIGNMENT OF ERROR**

The trial court erred after finding that Cardiac was the prevailing party under the parties' Shareholder Employment Agreement and finding that the fees incurred by Cardiac were reasonable, in denying that portion of Cardiac Study Center's motion for prevailing party attorneys' fees for work performed relating to its successful appeal.

## **III. STATEMENT OF THE CASE**

In September, 2009 Emerick brought suit against his former employer to invalidate a restrictive covenant in the Shareholder Employment Agreement Emerick executed when he became a principal of the business. CP 634-55. After Cardiac and Emerick filed motions for summary judgment, in March, 2010, Judge Fleming ruled in Emerick's favor. CP 1318-23. After granting Emerick's motion, Judge Fleming

found that Emerick was the prevailing party and was entitled to judgment against Cardiac for his reasonable attorneys' fees as provided under the Shareholder Employment Agreement. CP 1375-80.

Cardiac appealed Judge Fleming's decision. In an initially-unpublished opinion, the Court of Appeals reversed Judge Fleming's grant of summary judgment, vacated the award of prevailing party attorney's fees to Emerick, and remanded the case to the trial court for additional proceedings. CP 1381-91. The court also awarded Cardiac its "statutory attorney fees on appeal." CP 1391. Following a motion by Cardiac for clarification of the fee award, the court issued an Order Amending Opinion on July 10, 2012, stating that Cardiac was awarded its statutory attorney's fees but was denied fees under RAP 18.1. CP 1392-93.

On August 8, 2012, the Court of Appeals issued yet another order amending the opinion and granting Cardiac's and non-party UW Physicians motions to publish the opinion. CP 1394-95. The amendment to the court's unpublished opinion contained in this second order removed mention of RAP 18.1, and instead included only the court's original statement that Cardiac was awarded its statutory attorney's fees. CP 1395. The Court of Appeals filed its Mandate with the trial court on January 9, 2013 returning the case to the trial court for further proceedings. CP 1396-1425. (The court then filed an identical Mandate,

with the same date as the previously-filed Mandate, on January 22, 2013, which appears to have simply removed duplicate copies of attachments that were included in the first filing. CP 1426-42.)

Following remand, Cardiac moved the trial court for summary judgment on the enforceability of the Shareholder Employment Agreement. CP 1-33. The trial court granted Cardiac's motion and Cardiac then moved for an award of attorney's fees under Paragraph 13 of the Agreement.<sup>1</sup> CP 319-24; CP 326-334. Emerick opposed Cardiac's motion for an award of attorney's fees on several grounds, including the argument that Cardiac was not entitled to its prevailing party attorney's fees for work performed on appeal because the Court of Appeals had declined to award Cardiac its prevailing party fees on appeal and instead awarded only Cardiac's statutory attorney's fees. CP 470-71.

Emerick argued to the trial court that Cardiac was precluded from recovering its attorney's fees on appeal because the Court of Appeals had denied Cardiac's request and that denial had not been appealed. Emerick's counsel stated: "And the mandate says – this is a direct quote from the mandate – 'We deny Cardiac an award of attorney's fees under

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<sup>1</sup> The facts relevant to the Court's determination of the assignments of error alleged by Emerick in his appeal of the trial court's ruling on summary judgment, and on the remaining issues raised by Emerick on appeal, will be included in Cardiac's Brief of Respondent. In the interest of brevity, Cardiac includes only those facts relevant to determining Cardiac's cross-appeal in this brief.

RAP 18.1 because it did not devote a section of its opening brief to the request for fees.’ ... That’s done.” Verbatim Transcript of Proceedings, October 18, 2013 (“10/18/13 VTP”) at 11:9-13. That quote, however, was read from the Court of Appeal’s first order amending its decision, which was then replaced and superseded by the Court of Appeal’s second order amending and publishing its opinion. See CP 1392-93 (first Order); CP 1394-95 (second Order). The effect of the Court of Appeal’s second order amending and publishing its decision was to remove mention of RAP 18.1 and instead the opinion now simply states “We also award Cardiac its statutory attorney fees.” See CP 1395; and *Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. at 259. Based in part, on the misunderstanding caused by Emerick’s erroneous representation, the trial court concluded that the Court of Appeals had issued a binding decision regarding Cardiac’s appellate fees. The trial court then concluded that it lacked any discretion or authority to change that binding decision and award Cardiac its prevailing party attorney’s fees incurred on appeal.

Emerick identified over \$83,000 in fees that he contended were not recoverable by Cardiac due to the Court of Appeal’s prior ruling. CP 470-71; CP 483-597. This calculation included all work performed by Cardiac’s attorneys while the case was on appeal, including, for example, fees incurred in responding to Emerick’s motion for reconsideration of the



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Court of Appeals' decision, and those incurred opposing Emerick's petition for discretionary review to the Supreme Court. *See, e.g.*, CP 558-61; 568-71. This amount was far in excess of the fees Emerick contended had already been denied to Cardiac by the Court of Appeals.

In briefing and during oral argument before the trial court, Cardiac articulated the basis for an award of prevailing party attorney's fees under the parties' Agreement and RCW 4.84.330. CP 326-34; CP 602-12; 10/18/13 VTP. Specifically, Cardiac explained that while the parties' Agreement expressly provided for prevailing party attorney's fees incurred in "any suit or action against the other [party] for any type of relief, declaratory or otherwise, including any appeal thereof, arising out of this Agreement" (CP 327), prior to prevailing on summary judgment, Cardiac was not yet the "prevailing party" entitled to recover under this clause. CP 607-11; 10/18/13 VTP at 13:13-14:21. Having prevailed on summary judgment on September 11, 2013, Cardiac then became the prevailing party entitled to recover its reasonable attorney's fees in "any suit or action ... including any appeal thereof." CP 610-11.

After hearing argument from each of the parties, Judge Costello ruled that the attorney's fees incurred by Cardiac were reasonable, and that Cardiac was entitled to recover fees as the prevailing party under the parties' Agreement. 10/18/13 VTP at 19:8-12. Despite these conclusions,

however, Judge Costello denied Cardiac's request for any attorney's fees incurred on appeal. *Id.* at 18:14-15. Judge Costello entered the trial court's Findings of Fact and Conclusions of Law, noting the basis for denying fees was his conclusion that the "the Court finds that fees on the appeal were denied by the Court of Appeals and declines to award \$83,169.50 in fees incurred on the appeal an[d] \$1,368.87 in costs on appeal." CP 623. Cardiac timely filed its Notice of Cross Appeal on this issue. CP 694-709.<sup>2</sup>

#### IV. ARGUMENT

##### A. Standard of Review.

Review of the legal basis upon which a trial court relies to grant or deny a request for attorney's fees is a question of law that the Court of Appeals will review *de novo*. See *Gander v. Yeager*, 167 Wn. App. 638, 646-47, 282 P.3d 1100 (2012) (citing *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011); *Bank of New York v. Hooper*, 164 Wn. App. 295, 303, 263 P.3d 1263 (2011)). Once the legal determination has been made with regard to the basis for an award of fees, a trial court's determination of the reasonableness of the fees awarded (or denied) will be reviewed for an abuse of discretion. *Id.*

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<sup>2</sup> Cardiac included two rulings in its Notice of Cross Appeal; Cardiac now seeks review of only the first of those two rulings (*i.e.*, that "the trial court declined to award Cardiac Study Center its fees on appeal"). CP 694.

Here, the language of the parties' Agreement is mandatory: it states "the prevailing party shall have and recover against the other party ... such sum as the court may adjudge to be a reasonable attorney's fee." CP 654. The trial court found that Cardiac's attorney's fees were reasonable, but ultimately determined that Cardiac did not have a legal basis for recovering its prevailing party attorney's fees for appellate work based on the Court of Appeal's prior decisions. 10/18/13 VTP at 17:23-18:15. This ruling is precisely the type of legal ruling that this Court will review *de novo*. See *Gander v. Yeager*, 167 Wn. App. at 646-47. Moreover, even if this decision is reviewed for an abuse of discretion, a trial court abuses its discretion by applying the wrong legal standard or coming to a conclusion that is legally unsound. *E.g.*, *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

**B. The Trial Court Erred as a Matter of Law When It Denied Cardiac Its Attorney's Fees Incurred on Appeal.**

After the trial court determined that Cardiac was the prevailing party in this action, Emerick argued that Cardiac was not entitled to recover its prevailing party attorney's fees for work done on appeal because Cardiac had failed to request these fees in the course of its earlier appeal asking this Court to reverse the trial court's 2010 order granting

summary judgment in favor of Emerick and to vacate the award of prevailing party attorney's fees to Emerick. CP 470-71. Emerick also argued that the trial court lacked the authority to award prevailing party attorney's fees to Cardiac for work done on appeal because the Court of Appeals was the only court that could award these fees and it had elected only to award Cardiac its statutory (and not prevailing party) attorneys' fees. CP 470-71; 10/18/13 VTP at 11:9-13. This argument – and the decision the trial court reached based on this argument – were both legally flawed.

Washington case law supports an award of prevailing party attorney's fees under RAP 18.1 only where the party requesting those fees is the prevailing party in the underlying action and can demonstrate a basis for the recovery of fees for work performed during a successful appeal. *See, e.g., Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 670, 160 P.3d 39 (2007); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001) (noting that because no prevailing party attorneys' fees were available at trial, none were available under RAP 18.1).

In *Belfor* the party requesting an award of attorney's fees under RAP 18.1 had successfully resisted a petition for review of the trial court's order compelling arbitration under the parties' contract. *Belfor USA*

*Group, Inc. v. Thiel*, 160 Wn.2d 669. The court on appeal held that, despite the fact that Belfor prevailed in its request to compel arbitration under the contract, and again prevailed in resisting discretionary review of that decision, “Belfor has not yet prevailed in collecting under the contract.” *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d at 671. Because the parties’ contract provided only for prevailing party fees incurred in collecting under the contract, the court reversed the grant of fees to Belfor for the work done enforcing arbitration and resisting a petition for review. *Id.* at 671. The court instead found that Belfor could collect its fees if it prevailed in its collection efforts through arbitration, but that at the time of the appeal “Belfor is not yet a ‘prevailing party’ for purposes of the contract’s attorney fees provision” and therefore was not yet eligible to recover fees. *Id.*

Similarly, in *Satomi Owners Association*, the parties’ agreement stated that if either party instituted suit against the other concerning the agreement, the prevailing party was entitled to recover its fees and costs. After reversing the decision of the trial court and remanding the case for further proceedings, the Supreme Court determined that neither party was entitled to prevailing party fees on appeal because “[the court’s] decision is not determinative of the prevailing party with regard to the underlying

litigation.” *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d at 817. As a result, the court deferred the question of RAP 18.1 fees. *Id.* at 818.

In the present case, the Court of Appeals’ decision reversing summary judgment in Emerick’s favor had the effect of undoing Emerick’s status as the prevailing party, but neither the Court of Appeals nor the trial court had yet concluded that Cardiac should prevail on the merits. *See Emerick v. Cardiac Study Center, Inc.*, 170 Wn. App. at 695. Thus, like the situation presented in *Satomi*, there was not yet any “prevailing party” entitled to recover under the parties’ Shareholder Employment Agreement. Cardiac was therefore not yet entitled to an award of fees under RAP 18.1, the Shareholder Employment Agreement or RCW 4.84.330. However, after returning to the trial court and prevailing on summary judgment, Cardiac then became the prevailing party in this action and was for the first time entitled to recover its reasonable attorney’s fees as provided in the Shareholder Employment Agreement. These included fees incurred in “any suit or action for any type of relief ... including any appeal thereof, arising out of this Agreement.” CP at 21.

To avoid this result, Emerick argues that that Cardiac was required to make a premature request for prevailing party attorneys’ fees to the Court of Appeals under RAP 18.1 in its earlier appeal, and that Cardiac is

forever barred from recovering any fees that would have been included in that baseless request. This argument is illogical and not supported by legal authority. Cardiac was not yet the “prevailing party” in this action when it was last before the Court of Appeals, having returned to the trial court and obtained affirmative relief, Cardiac is now entitled to recover all reasonable attorneys’ fees under the Shareholder Employment Agreement, including the fees incurred by Cardiac for work done on appeal. The trial court erred as a matter of law when it determined that Cardiac had waived the right to that portion of its prevailing party attorney’s for work performed on appeal, and this decision should be reversed.

Even if this Court finds that Cardiac somehow waived its right to recover attorney’s fees as the now-prevailing party for work performed on appeal prior to Cardiac prevailing on the underlying action, this Court should determine that any such bar applies only to the fees Cardiac incurred but failed to request on appeal. Emerick argued that Cardiac incurred \$83,169.50 in appellate fees and another \$1,368.87 in appellate costs, recovery of which was denied by this Court. CP 470, 476. This calculation is flawed, as Cardiac incurred a substantial amount of these fees after this Court’s February 28, 2012, Opinion due to Emerick’s continued appellate wrangling, including Emerick’s unsuccessful motion

for reconsideration and unsuccessful petition for review to the Washington Supreme Court. *See, e.g.*, CP 560-71.

At a minimum the trial court erred in concluding that Cardiac was precluded from recovering any of its fees incurred on appeal, and this Court should reverse that decision and remand with instructions on which fees if any should be excluded from Cardiac's award of attorney's fees.

**C. Cardiac is Entitled to an Award of Prevailing Party Attorney's Fees on This Appeal.**

Pursuant to RAP 18.1, Cardiac requests an award of its attorney's fees incurred in this matter including the previous appeal as well as this appeal, which are available under the terms of the parties' Shareholder Employment Agreement (CP 654) and RCW 4.84.330. The trial court's decision should be affirmed for reasons set forth in Cardiac's Brief of Respondent, Cardiac is now clearly the prevailing party and the request for fees is timely.

**V. CONCLUSION**

For the reasons set forth above, Cardiac respectfully requests that this Court reverse the trial court's denial of Cardiac's motion for attorney's fees incurred on appeal and either enter an award of Cardiac's reasonable attorney's fees as demonstrated by the record, or remand this matter to the trial court for entry of an award of Cardiac's reasonable



attorney's fees. Cardiac also requests an award of its statutory attorney's fees and costs and its prevailing party attorney's fees from this Court pursuant to RAP 18.1.

Dated this 14<sup>th</sup> day of March, 2014.

Respectfully submitted,

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**DECLARATION OF SERVICE**

I declare that on this 14<sup>th</sup> day of March, 2014, I caused a true and correct copy of the BRIEF OF CROSS-APPELLANT to be delivered to the following individuals in the manner described below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Tacoma, Pierce County Washington.

  
Gina A. Mitchell

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