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No. 707477

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CAVALRY SPVI, LLC, Plaintiff, Respondent

v.

JAMES SWALWELL and DOE I, Defendant, Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON COUNTY OF KING

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**REPLY BRIEF OF APPELLANT**  
JAMES SWALWELL

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~~COURT OF APPEALS DIV I~~  
STATE OF WASHINGTON

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## **I. SUMMARY OF REPLY BY APPELLANT**

Almost the entirety of Respondent's Brief is made up of new issues and arguments/contentions that were not raised at the trial court and are now being presented for the first time on appeal. The ONLY issue at the trial court was the question of whether a voluntary dismissal precludes attorney fees under RCW 4.84.250 on the basis that there is no final judgment. That was the only argument raised by Respondent at the hearing (the holding of Wachovia v. Kraft) and that lack of a final judgment was the sole basis for the Trial Court's incorrect denial of the motion.

The issues raised by Respondent in their brief (total value of the case, CR 41(d), and RCW 4.84.330/terms of the contract in the underlying case) were never raised at the trial court hearing and are improperly being raised for the first time here. The remainder of Respondent's Brief contains mischaracterizations of the facts, of the law, and of the Trial Court's ruling in the matter. Each of the separate portions shall be addressed below.

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## II. ARGUMENT

### Issues and Contentions Not Raised by the Parties at the Trial Court May Not Be Considered For the First Time On Appeal

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). The rule does provide for some issues that can always be raised, such as jurisdiction or constitutional issues, but our case at hand does not involve any of those scenarios.

Case law from the Court has gone even further in addressing the question of new arguments. “Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment **may not be considered for the first time on appeal.**” Green v. Normandy Park, 137 Wn. App. 665, 687 (2007) emphasis added. The proper time and opportunity for Respondent to raise issues and defenses to the motion was in the Trial Court at the time of the motion.

The response to the Motion for Attorney Fees, submitted by Respondent, was rather short (less than 1 total page of argument), and raised one, and only one, defense to the claim for fees. (CP 47) The only issue/defense raised by Respondent was the claim that a voluntary dismissal under CR 41 precluded the award of attorney fees as there was

no prevailing party due to having no “final judgment.” The sole support for that claim was the argument that Wachovia v. Kraft overturned the ruling in Allahyari v. Carter Subaru.

Respondent did NOT raise any issue/defense in the Trial Court about the total value of the claim being over \$10,000, that CR 41(d) applied in any way, or any allegations connected with RCW 4.84.330 and the terms of the alleged contract between the parties. All of these arguments are being raised for the first time on appeal and are not proper. Accordingly, this Court should not consider the new arguments of Respondent. **The only issue at the Trial Court, and the only issue on appeal, is whether a “final judgment” is required to be the prevailing party under RCW 4.84.250 or whether a voluntary dismissal will suffice to meet the standard that “the Plaintiff recover nothing”.** (I.e. Whether Wachovia v. Kraft overturned the holding of the court in Allahyari v. Carter Subaru).

When the Respondent’s counsel failed to appear on time for the hearing on fees, Judge Hayden called counsel for Swalwell forward and indicated that he felt the motion had to be denied as a voluntary dismissal under CR 41 meant that there was no “final judgment” in the case and that meant there could not be a finding of a prevailing party. His reasoning was the same as the holding in Wachovia v. Kraft. As

Wachovia does not apply in our case, counsel for Swalwell asked him to place the matter on the record to specify his holding and to confirm that there were no other issues before the Trial Court and no other defenses being raised by Respondent. Judge Hayden then put us on the record and stated his position saying, “I’ve informed counsel for the defense that it’s this Court’s judgment that where you file a CR 41 motion for voluntary dismissal, that there is no prevailing party and that you’re not entitled attorney’s fees as the opposition party.” (Verbatim Transcript, 7/19/13, 3:9-14)

Counsel for Swalwell then spelled out each point of the requirements of a Motion for Fees under RCW 4.84.250 and Judge Hayden confirmed that all of the requirements were met, not objected to, and not an issue that was before the Trial Court. Counsel clarified that the only issue was about “final judgment” and prevailing party and Judge Hayden confirmed that fact stating, “That’s the only issue before this Court. Is it’s my view under CR 41, a voluntary dismissal that there are no attorney’s fees provisions that allow for attorney’s fees.” (Verbatim Transcript, 7/19/13, 5:13-16)

Any and all arguments raised by Respondent in their brief, other than the question of “final judgment” and Wachovia abrogating Allahyari, are new arguments, brought for the first time on appeal, and

were not raised, or an issue, before the Trial Court. This Court should not consider the new arguments presented by Respondent for that reason. For any arguments the Court does decide to consider, each is addressed as follows.

**Plaintiff's Claim in the Underlying Case Was NOT in Excess of \$10,000**

Respondent failed to raise any argument at the Trial Court to claim that the claim in the underlying case exceeded \$10,000. This was done because the Trial Court was exceedingly familiar with the case and would have seen through the attempt. Instead, Respondent has raised the issue for the first time on appeal, cherry picking a few documents from the record in an attempt to substantiate the allegation. Respondent's argument in their brief essentially boils down to, "We did our job so poorly, violated so many civil rules and case schedule deadlines, that as a result we should not be held accountable under RCW 4.84.250 because a lot of interest accrued on the case." A timeline of the progression of the case makes this abundantly clear.

(Appellant has filed a Supplemental Designation of Clerks Papers to supply this Court with the complete picture on this issue. As the documents have not yet been sent by the Trial Court Clerk, Appellant will try to give approximate designations of CP in citations.)

Respondent's original Complaint was served on Mr. Swalwell's son on April 11, 2010. The original Complaint sought damages of only \$9,747.89. (CP 78-79 approx) **Respondent did absolutely nothing to prosecute the case for the next 1 ½ years.** On October 31, 2011, Respondent issued an Amended Complaint adding interest that had accrued on the alleged balance during the time that the case sat inactive. Respondent has supplied this Court with the Amended Complaint but conveniently failed to provide the Court with a copy of the original Complaint requesting only the \$9,747.89.

In January of 2012, Respondent noted a Motion for Default asking for the \$9,747.89 principal. (CP 80-81 approx) This motion was stricken once it was pointed out to Respondent that they had not served Mr. Swalwell with the Amended Complaint.

Just a few weeks later, Respondent noted a Motion for Summary Judgment asking for the same principal of \$9,747.89. (CP 82-83 approx) This motion was also stricken when it was again pointed out to Respondent that they had not served Mr. Swalwell.

Respondent then did nothing on the case for approximately 5 months before again noting up the same Summary Judgment set for hearing in June of 2012, again asking for the same principal balance of

\$9,747.89. It was pointed out yet again that Respondent had still not served Mr. Swalwell and yet again the hearing was stricken.

Respondent finally served Mr. Swalwell with the Amended Complaint on June 19, 2012, approximately 2 years and 2 months after service of the original complaint.

After finally perfecting service, Respondent again noted up the same Summary Judgment asking for \$9,747.89 but failed to note it in compliance with CR 56. Respondent's motion was stricken and Swalwell requested attorney fees for the continued violations of the civil rules. In the Motion for Fees, Respondent was also notified of their failures to comply with the case schedule. Swalwell's Motion for Fees was deferred until the conclusion of the case. (CP 33)

After taking no action at all for another 2-3 months, Respondent finally noted their Motion for Summary Judgment in compliance with the Civil Rules, set for hearing on October 26, 2012. Respondent's motion was heard and denied by the Trial Court specifically because the Affidavit in Support of Judgment and its attached substantiation did not match the numbers requested by Respondent in their motion. (CP 84

appox) **That Affidavit, that had incorrect numbers and faulty proof, that was responsible for the denial of their Motion for Summary Judgment, is the same Affidavit that Respondent has now supplied to this Court and relies on as proof that their claim exceeds \$10,000.**

Upon denial of the Summary Judgment, Respondent again did nothing on the case for approximately 6 months. In April of 2013, the Trial Court sent out pre-trial notices and Respondent quickly noted motions to shorten time, change the named Plaintiff, and transfer the case to arbitration. Respondent included the Declaration of Jeffrey S. Mackie in support of the motion to transfer the case into arbitration. (CP 37-38) Mr. Mackie's Declaration stated, "the principal owing as of the date of this application is \$9,747.89, well within the jurisdiction of the arbitration limits." Respondent's motion to transfer the case into arbitration was denied by the Trial Court.

Appellant objected to the motions at the time and provided notice to Respondent of the intent to seek fees pursuant to RCW 4.84.250. (CP 35) This would have been the perfect time for Respondent to reply, object, or state in some way that the value of their case exceeded \$10,000, or state any argument that RCW 4.84.250 should not apply. However, they did not respond in any way.

Respondent then took a voluntary dismissal of the case on May 14, 2013....**1128 days (3 years and 1 month) after starting litigation** in the matter. Appellant brought the Motion for Attorney Fees that is the basis of this appeal shortly thereafter, asserting that the total value of the case was under \$10,000, citing to the Declaration of Jeffrey S. Mackie as well as the pleadings on file with the court. Provided with yet another opportunity to refute that assertion, Respondent failed to make any objection about the total value of the case in either their Response to the Motion or at the hearing itself. **Respondent never raised the issue at the Trial Court, and did not object in any way, to both the assertion that the case was under \$10,000 and the finding by the Trial Court that the case was under \$10,000.**

Respondent's claim, for the first time at the appeal, that the case is over \$10,000 is disingenuous at best. The alleged interest that Respondent claims has put the case over the \$10,000 mark is a direct result of Respondent's complete failure to prosecute their case. Multiple times during the 1128 days of litigation in this matter, Respondent went months or even years between taking any action. The original complaint was for \$9,747.89 only and after doing nothing for 1.5 years, Respondent amended it to add interest that they claim had accrued while they failed to do anything.

Respondent’s failure to litigate this case, comply with the civil rules, and comply with the case schedule, is something that should be punished, not rewarded. In Beckmann v. Spokane Transit, the case cited by Respondent, the Court specified the purpose of the statute, stating “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.*” 107 Wn.2d 785, 788 (1987) emphasis added. Although Beckmann dealt with a Plaintiff’s claim for fees, the intent of the statute holds true for Defendant’s fee claims as well. The clear intent of the statute is to **promote resolution** of smaller value cases. Respondent’s claim that they should not be liable under the statute because they **purposefully avoided resolution** and allowed interest to accrue is amazingly ironic.

The clear intent of RCW 4.84.250 is to dissuade the type of behavior that Respondent exhibited in this case. Accordingly, as with any attorney fee penalty provisions (CR 11, etc), the intent is for the statute to be broadly interpreted and applicable to the widest range of cases possible. To do any less takes the “teeth” out of the statute.

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Purposeful delay to increase interest charges is surely not something the legislature intended. The legislature, in enacting the statute, certainly did not intend for it to apply to cases under \$10,000 principal that are new...and cases of \$9,000 principal that are less than 1 year old...and cases of \$8,000 principal that are less than 25 months old, etc. To claim that RCW 4.84.250 does not apply on the basis that Respondent delayed the case so long that sufficient interest accrued, is ridiculous. Failure of Respondent to do their job as counsel should not somehow alleviate their liability under a statute specifically designed to dissuade that same behavior.

Respondent's original claim was for \$9,747.89, under the \$10,000 mark as required by RCW 4.84.250. Throughout the history of the case, even up to the last minute motion to transfer into arbitration, that same principal was requested and put forth by Respondent. Any alleged interest in addition to that principal is solely the result of Respondent's inaction in the case. Accordingly, given those facts and that this issue is being improperly raised for the first time on appeal, this Court should disregard any and all claims by Respondent that RCW 4.84.250 does not apply due to the total value of the case exceeding \$10,000.

**Awards of Fees Pursuant to RCW 4.84.250 are Not at the Judge's Discretion.**

Respondent indicates that awards of fees under RCW 4.84.250 are awarded at the Trial Court Judge's discretion. Respondent tries to tie awards under RCW 4.84.250 to the case law regarding the awards of statutory costs. Respondent, however, fails to acknowledge the wording of the statute itself. RCW 4.84.250 states, "there *shall* be taxed and allowed to the prevailing party..." emphasis added. The plain language of the statute does not provide the court with discretion in this matter. It is not that the Trial Court *may* award fees. The statute indicates that if the requirements of the statute are met, the Trial Court *shall* award fees. The only remaining question would be any arguments about the reasonableness of the fees being requested. However, in this case, Respondent failed to object or provide any argument that the fees requested were not reasonable or necessary. If this Court finds that the requirements of RCW 4.84.250 are met, it should reverse the Trial Court's denial and remand the matter for award of the requested fees in full.

**CR 41(d) Does NOT Apply in This Case and is NOT a Bar to**

**Awards of Attorney Fees Under Other Statutes**

CR 41(d) is yet another provision for potentially awarding attorney fees. It provides for the award of attorney fees in situations where a case is voluntarily dismissed and then re-filed again. Contrary to Respondent's assertions, CR 41(d) is **not** a bar to awarding attorney fees under other statutes. CR 41(d) does not contain any language that states that attorney fees can **only** be awarded under that specific rule or that if the facts do not meet the rule then fees **cannot** be awarded under other rules. If a party voluntarily dismisses and re-files a case, then they may have fees awarded against them under CR 41(d). Choosing not to re-file the case does not somehow prohibit awards of attorney fees under other statutes. Failing to re-file the case simply means that CR 41(d) is not available as an option for requesting attorney fees.

That is the factual situation in this case, just as it was the factual situation in Allahyari v. Carter Subaru. Respondent's brief discusses that the court in Allahyari did not address CR 41(d) and generally indicates/assumes that the appellate court in that case must have forgotten to address the rule or that it was not pointed out to the court. That argument is ridiculous and is a clear misstatement of the law. The Court in Allahyari did not address CR 41(d) because it did not apply, just

as the Trial Court in this matter did not address CR 41(d) as it does not apply. As neither case involved a re-filed complaint, CR 41(d) is irrelevant.

Respondent continues the process of “assuming” the mental state of judiciary when addressing the holding of the Trial Court. Respondent states that the Trial Court’s rationale indicates that he must have had CR 41(d) in mind based on the wording of one sentence cherry picked from the middle of the transcript. The Trial Court, however, did **not** mention CR 41(d) at any time and did **not** base the denial on that rule. In fact, the Trial Court specifically indicated that the one and only reason for the denial of the motion was the lack of a “final judgment” precluding the finding of a prevailing party (ie. The holding in Wachovia v. Kraft)

As CR 41(d) does not apply in the case at hand, does not bar the award of attorney fees under other statutes, and as the Trial Court’s denial was not based on the rule, this Court should disregard any arguments put forth by Respondent on the subject.

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**RCW 4.84.330 Also Does Not Apply In This Case and Does Not Bar**

**Awards of Attorney Fees Under Other Statutes**

Respondent argues that RCW 4.84.330 applies in this case on the basis that the alleged contract between the parties includes a unilateral fee provision. However, Appellant has never made any claim for fees under RCW 4.84.330, or the contract, and it is irrelevant to the case at hand (other than the fact that Wachovia dealt with RCW 4.84.330 and Respondent has erroneously claimed that the prevailing party standard in Wachovia applies in this case). RCW 4.84.330 does not bar awards of attorney fees under other statutes, just as CR 41(d) does not bar awards of fees by other means. Both methods are simply additional ways that attorney fees may be awarded in different factual situations and neither prohibits or precludes awards made pursuant to RCW 4.84.250.

As Appellant has never requested fees under RCW 4.84.330, the statute does not apply in this case and this Court should disregard any arguments to the contrary.

**Wachovia v. Kraft Did Not Overturn Allahyari v. Carter Subaru And**

**Allahyari is Still the Controlling Law in This Case**

Respondent's brief backs off of their earlier assertion that Wachovia v. Kraft abrogated Allahyari v. Carter Subaru and has chosen not to repeat the non-existent quote provided in the Response to the

Motion for Fees. Instead, Respondent now indicates that “the rationale employed by the court in Allahyari, was subsequently *discredited* by our Supreme Court in Wachovia SBA Lending, Inc. v. Kraft.” (Brief of Respondent, page 20, emphasis added). Respondent supports this allegation with the claim that “the court in Allahyari, *relied* on the decisions in Marassi v. Lau and Walji v. Candyco, Inc.” (emphasis added) Respondent’s assertion is simply incorrect. The Court in Allahyari discussed with approval the Marassi reasoning but distinguished Marassi from their case and did not rely on the holding in Marassi to reach their decision.

The Court in Wachovia v. Kraft abrogated Marassi v. Lau but did not question the ultimate holding of Allahyari v. Carter Subaru. Respondent contends otherwise based on a quote from Wachovia stating that Allahyari is “unpersuasive” to their case “because it repeats Marassi’s flawed reasoning.” Of course Allahyari is unpersuasive in Wachovia’s case...the first half of that same quote points out that Allahyari dealt with RCW 4.82.250 and not RCW 4.84.330. The statutes have different standards for defining a prevailing party and the question of prevailing party was the primary issue in both cases. The fact that Allahyari, a case dealing with a different statute and standard, was not persuasive to the Wachovia court does not somehow mean that the

holding of Allahyari was in any way discredited or abrogated by Wachovia. It simply means that they are two different cases about two different statutes and two different standards for prevailing party.

Just as Allahyari, and the standard for prevailing party under RCW 4.84.250, is not persuasive in a factual situation like Wachovia, Wachovia's holding, and the standard for a prevailing party under RCW 4.84.330, is not persuasive in the case at hand. The sole question before this Court, and the sole issue before the Trial Court, was the standard for "prevailing party" in RCW 4.84.250, not RCW 4.84.330. At the Respondent's urging, the Trial Court erroneously applied the standard from Wachovia (prevailing party requires "final judgment" under RCW 4.84.330) instead of applying the standard from Allahyari and RCW 4.84.250 and .270 (prevailing party requires "plaintiff recover nothing").

As Appellant has pointed out in the original Motion for Fees, the Reply to Plaintiff's Response, and Appellant's Brief, the standard for Defendant to be the prevailing party under RCW 4.84.250 is that "the Plaintiff recover nothing" as stated in RCW 4.84.270. That is the ONLY requirement for Defendant to be the prevailing party in claims made under RCW 4.84.250. Pursuant to Allahyari v. Carter Subaru, that standard is met when a Plaintiff takes a voluntary dismissal under CR 41.

As Allahyari was not abrogated by Wachovia v. Kraft and is still controlling law, the Trial Court's denial based on Wachovia's holding should be reversed. Respondent's continued arguments to the contrary are incorrect and unfounded.

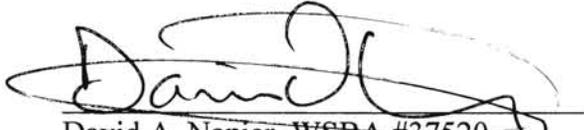
### **III. CONCLUSION**

The only issue at the Trial Court, and the only issue on appeal, is whether a "final judgment" is required to be the prevailing party under RCW 4.84.250 or whether a voluntary dismissal will suffice to meet the standard that "the Plaintiff recover nothing" as stated in RCW 4.84.270. (Ie. Whether Wachovia v. Kraft overturned the holding of the court in Allahyari v. Carter Subaru). Respondent's additional arguments, contained in their brief, were not raised at the Trial Court and are improperly raised for the first time on appeal. The total value of Respondent's case is below \$10,000 as any additional alleged amounts are solely due to their failure to prosecute their case and their failure to comply with the Civil Rules. CR 41(d) and RCW 4.84.330 do not apply in this case and are irrelevant. The issue of Defendant being the prevailing party under RCW 4.84.250 after a voluntary dismissal by Plaintiff has been answered by this Court previously in Allahyari v. Carter Subaru and that holding has not be overturned or abrogated.

Accordingly, Appellant requests that this Court overturn the Trial Court decision of July 19, 2013, apply the standard set forth in Allahyari v. Carter Subaru and RCW 4.84.270, and award Defendant the requested fees in full as well as fees for this appeal pursuant to RCW 4.84.290.

DATED this 23<sup>rd</sup> day of December, 2013.

**NAPIER & GEORGE, PS**



David A. Napier, WSBA #37520  
Attorney for Appellant James Swalwell

**CERTIFICATION OF SERVICE**

I certify that I hand delivered a copy of the foregoing Reply Brief to Bishop, White, Marshall & Weibel, PS, Attorney for Respondent, at 720 Olive Way, Suite 1201, Seattle, WA 98101, on December 23, 2013.

**NAPIER & GEORGE, PS**



David A. Napier, WSBA #37520  
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