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CASE NO. 707477

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**Court of Appeals  
of the State of Washington  
Division I**

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JAMES SWALWELL  
Appellant/Defendant,

v.

CAVALRY SPVI, LLC,  
Respondent/Plaintiff.

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**Brief of Respondent  
CAVALRY SPVI, LLC**

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Wendy L. Saunders, WSBA #39982  
Bishop White Marshall & Weibel  
Attorneys for Respondent

Bishop White Marshall & Weibel  
720 Olive Way Suite 1201  
Seattle, WA 98101  
Telephone: (206) 622-5306

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## **I. ASSIGNMENTS OF ERROR**

Respondent Cavalry does not assign any error to the decision of the trial court.

## **II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the requirements for applicability of RCW 4.84.250 are satisfied.
2. Assuming the applicability of RCW 4.84.250, whether abuse of discretion is the appropriate standard of review.
3. Assuming the applicability of RCW 4.84.250, whether the court below abused its discretion in denying Mr. Swalwell's motion for attorney's fees.

## **III. COUNTER-STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT**

Respondent Cavalry SPVI, LLC ("Cavalry"), the plaintiff in the court below, filed its amended complaint in which it pled a claim for damages totaling \$11,089.65 for breach of contract. Respondent's

Supplemental Clerk's Papers ("SCP") 1 - 2. The damages pled by Cavalry have not been amended.

Cavalry subsequently filed a motion for voluntary dismissal without prejudice pursuant to CR 41, which was granted. Thereafter, Appellant James Swalwell, the defendant in the court below, filed a motion for an award of attorney's fees pursuant to RCW 4.84.250, which provides in relevant part:

“. . . where the amount pleaded is \$10,000 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.

Mr. Swalwell's motion was denied, and Mr. Swalwell appeals to this Court from that denial. Both in the court below and on this appeal, RCW 4.84.250 is the only authority upon which Mr. Swalwell relies for an attorney's fee award.

Notwithstanding the fact that Cavalry pled damages in its amended complaint totaling \$11,089.65, Mr. Swalwell contends on page one of his brief that:

. . . both parties *agree* that, RCW 4.84.250 applies in this case; the *total value* of the case was under \$10,000 as required by the statute . . .

(Emphasis added.)

Nowhere in his brief does Mr. Swalwell mention that the amount *actually pleaded* by Cavalry exceeds \$10,000, and therefore exceeds the maximum amount of damages pled to which RCW 4.84.250 can apply. Rather, Mr. Swalwell maintains that the parties ‘agree’ or ‘stipulate’ that the ‘total value’ of the case ‘was under \$10,000.’ Mr. Swalwell cites in his brief two sources in the record in support of this alleged ‘agreement’ or ‘stipulation’ as to the ‘total value’ of the case.

First, Mr. Swalwell cites to portions of the transcript of the hearing on his motion for attorney’s fees, primarily the following excerpt wherein *his attorney states, prior to the arrival of Cavalry’s former counsel* who admittedly arrived late for the hearing, that:

Your Honor, the only things that I want to confirm is *it appears* that both of the parties through the plaintiff’s response to this motion, agree that RCW 4.84.250 is the applicable statute in this matter, *they agree that the total value of the case is under ten thousand*, they even *stipulate* that the, *or state* the defendant is deemed the prevailing party where plaintiff recovers nothing.

SCP – 20, Verbatim Transcript 7/19/13, p. 3, ln. 18 – 25. (Emphasis added.)<sup>1</sup>

Of course, the above excerpt is merely the statement of Mr. Swalwell’s own attorney, made out of the presence of Cavalry’s counsel

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<sup>1</sup> Mr. Swalwell cites to this transcript but did not include it among the Clerk’s Papers. Cavalry therefore includes it in its Supplemental Clerk Papers, at SCP 20.

and without his assent. This statement by Mr. Swalwell's attorney does not establish any kind of binding agreement, stipulation or joint statement of the parties. Indeed, it has no evidentiary value at all, and it does not satisfy the requirements of CR 2A, which governs such agreements and stipulations.

The other portion of the record upon which Mr. Swalwell relies in support of his claim of some agreement or stipulation between the parties regarding the applicability of RCW4.84.250 is Cavalry's response to his motion for attorney's fees. CP 46 – 50. Even though Cavalry filed a response *in opposition* to Mr. Swalwell's motion, and even though that response contains no references to any agreement, stipulation or waiver regarding the applicability of RCW4.84.250, Mr. Swalwell nonetheless maintains that Cavalry's response constitutes a stipulation of its applicability. It is noteworthy that Mr. Swalwell cites no authority, not even CR 2A which governs such agreements and stipulations, and offers no analysis to support such a conclusion.

It is also noteworthy that Mr. Swalwell cites no actual, admissible evidence of record to support the conclusion that the parties stipulated to the applicability of RCW4.84.250.

Furthermore, although the statute upon which Mr. Swalwell exclusively relies, RCW4.84.250, requires for its operation that the damages pled total \$10,000 or less, Mr. Swalwell can point to no pleading in which Calvary pled damages of \$10,000 or less. To the contrary, Cavalry pled damages in excess of \$11,000, SCP 1 - 2, and that figure has never been amended.

Simply stated, the damages pled in the amended complaint exceed \$11,000 and nothing short of an amendment can change the amount of damages pled. RCW 4.84.250 therefore has no application to this case, and the court below properly denied Mr. Swalwell's motion that was based solely on RCW 4.84.250.

The substantive arguments in Mr. Swalwell's brief are all premised on the assertion that RCW 4.84.250 is applicable, not because the damages pled exceed \$10,000 as that statute requires, but rather because of an alleged 'agreement or stipulation' that the 'total value' of the case is less than \$10,000.

Even assuming that Mr. Swalwell can somehow convince this Court that the record supports his claim of an actual agreement or stipulation that the 'total value' of the case is less than \$10,000, the relevant inquiry for purposes of determining whether RCW 4.84.250

applies is not the 'total value' of the case, but rather the amount of damages pled.

In summary, RCW 4.84.250 is not applicable because its requirement that the damages pled not exceed \$10,000 is not satisfied. Indeed, that requirement is refuted by the record, specifically by Cavalry's amended complaint. SCP 1 - 2.

This conclusion is dispositive of all issues raised by Mr. Swalwell on this appeal. The substantive arguments of Mr. Swalwell are thereby rendered moot, but are addressed below for the sake of completeness. They may be briefly summarized as follows.

Even if this Court were to conclude that RCW 4.84.250 is applicable, attorney's fees may not be awarded following a voluntary dismissal without prejudice pursuant to CR 41 unless and until the plaintiff refiles its action against the same defendant based on the same claims. CR 41(d). Such a refiling has not occurred, and the lower court therefore correctly applied CR 41.

The appellate authority upon which Mr. Swalwell primarily relies, Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), is distinguishable because unlike the present case, the damages pled in that case were less than \$10,000. Furthermore, although the court in Allahyari

held that attorney's fees may be awarded to a defendant after the plaintiff voluntarily dismisses its action pursuant to CR 41, it did not address CR 41(d), which authorizes such awards only after a voluntary dismissal *and* a refiling of the case by the plaintiff. Allahyari therefore provides no authority regarding the limitations imposed by CR 41(d) that govern the lower court's decision, and which the court below correctly applied.

Finally, Allahyari has been subsequently discredited by our Supreme Court in Wachovia SBA Lending v. Kraft, 65 Wn.2d 481, 200 P.3d 683 (2009), and is no longer authoritative.

#### **IV. ARGUMENT**

##### **A. RCW 4.84.250 IS INAPPLICABLE BECAUSE THE DAMAGES PLED EXCEED \$10,000.**

Mr. Swalwell's contention that he is entitled to an award of attorney's fees is based solely upon RCW 4.84.250, and not on any other statute, rule or other authority. The court below ruled that where the plaintiff voluntarily dismisses his claims without prejudice pursuant to CR 41, "... there are no attorney's fee provisions that allow for attorney's fees." SCP 21, p.4 ln. 21 – p.5 ln. 2. The lower court therefore rejected Mr. Swalwell's contention that RCW 4.84.250 authorizes an award of fees in the context of a voluntary dismissal governed by CR 41, and denied Mr. Swalwell's motion.

The issue on appeal is whether the lower court erred in ruling RCW 4.84.250 inapplicable. Applicability of a statute is a question of law that is reviewed de novo on appeal. Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 858, 158 P.3d 1271, (2007).

RCW 4.84.250 states in relevant part:

. . . in any action for damages where *the amount pleaded* by the prevailing party. . . is [ten thousand] 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.

Emphasis added.

Although Mr. Swalwell relies exclusively on a statute whose applicability is based on the 'amount of damages pleaded,' nowhere in his brief does he mention the fact that the amount of damages pleaded by Cavalry exceeds \$10,000. Nor did Mr. Swalwell include the amended complaint among the Clerk's Papers.

Instead, Mr. Swalwell seeks to circumvent the essential requirement of the statute, presumably because of his inability to satisfy it, by claiming the parties 'agree' or 'stipulate' that the 'total value' of the case is less than \$10,000, and for that reason, he argues, RCW 4.84.250 is applicable. This contention lacks merit for a variety of reasons.

First, Mr. Swalwell failed to establish that any such binding agreement or stipulation between the parties ever existed. Furthermore, he offers no legal authority or analysis to support his contention that a binding agreement or stipulation was reached.

Agreements or stipulations are governed by CR 2A, which Mr. Swalwell neither analyzes nor mentions. It states:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been *made and assented to* in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

Emphasis added.

Because such agreements or stipulations must be made or assented to *by the party to be charged* in open court or in writing, the statements made in court *by Mr. Swalwell's own attorney*, made outside the presence of Cavalry's attorney and without his assent, do not establish an agreement or stipulation in accordance with CR 2A.

The writing Mr. Swalwell relies upon to satisfy the requirement of a signed writing by the party to be bound to a purported agreement is Cavalry's response to his motion for attorney's fees. CP 46 - 50. It should first be noted that Cavalry's response clearly *opposes* Mr.

Swalwell's motion. Nowhere in its response does Cavalry make reference to any binding agreement or stipulation, or to any waiver of rights by Cavalry. Cavalry's response in opposition to Mr. Swalwell's motion for attorney's fees cannot reasonably be read to constitute a binding agreement that, contrary to the record, the damages pled were less than \$10,000.

The fact remains that Cavalry pled damages exceeding \$10,000, and nothing short of filing a second amended complaint pleading a lower damages claim can change that.

Moreover, CR 15 requires leave of court to file an amended pleading in the circumstances presented here, and such leave was neither obtained nor sought.

In short, the parties did not in fact agree that the value of the case was under \$10,000.

Second, even if the parties had agreed that the 'total value' of the case was less than \$10,000, the applicability of RCW 4.84.250 would not be affected by such an agreement unless it also culminated in an amendment of the damages claim pled by Cavalry. The applicability of RCW 4.84.250 is clearly dependent on the amount of damages pled, not on the 'total value' of the case or any other such measure. See generally,

Beckmann v. Spokane Transit Auth., 107 Wn.2d 785, 733 P.2d 960

(1987), in which the Court held that where the plaintiff pled damages *less* than \$10,000 which thereby rendered RCW 4.84.250 applicable, but then requested *more* than \$10,000 in his closing argument, that request made by counsel outside of the pleadings for more than \$10,000 did not constitute a waiver of the plaintiff's claim for attorney's fees under RCW 4.84.250.

Simply stated, the amount of damages pled determines whether RCW 4.84.250 is applicable. In order to change its applicability, one must necessarily change the factor upon which that applicability is based, the amount of damages pled.

In summary, RCW 4.84.250 applies only where damages of \$10,000 or less are pled. The damages pled in Cavalry's amended complaint exceed \$10,000, Supplemental SCP 1 - 2, and the amount of damages pled has not been subsequently amended.

Mr. Swalwell failed to establish the alleged agreement or stipulation by which he sought to circumvent the requirement of RCW 4.84.250 that the damages pled not exceed \$10,000. Even if Mr. Swalwell had established an agreement that the case value was less than \$10,000, it would not change the fact that the damages pled exceed \$10,000.

Accordingly, the statute upon which Mr. Swalwell relies does not apply to the facts of record, and the court below did not err in denying Mr. Swalwell's motion based solely on this inapplicable statute.

A determination by this Court that RCW 4.84.250 is inapplicable to this case will be dispositive of Mr. Swalwell's appeal overall because he relies exclusively on that statute. The other issues raised by Mr. Swalwell therefore need not be reached by this Court, but in an abundance of caution are discussed below.

B. EVEN IF RCW 4.84.250 IS DEEMED APPLICABLE, THE LOWER COURT'S DENIAL OF DEFENDANT'S MOTION FOR ATTORNEY'S FEES WAS PROPER.

It is demonstrated above that the damages pled by Cavalry in its amended complaint exceed \$10,000, and that the parties entered into no agreement or stipulation that resulted in any amendment of the damages pled to a lower level within the coverage of RCW 4.84.250. Accordingly, RCW 4.84.250, the only authority on which Mr. Swalwell relies, has no applicability.

However, even if RCW 4.84.250 was somehow deemed applicable notwithstanding that the damages pled are in excess of \$10,000, the lower court's ruling should still be affirmed for the following reasons.

1. If RCW 4.84.250 was Deemed Applicable, the Appropriate

Standard of Review would be Whether the Lower Court Abused its Discretion in Declining to Award Fees Pursuant to it.

As noted above, determinations regarding the applicability of a statute are reviewed de novo as a matter of law. Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 858, 158 P.3d 1271, (2007). The court below properly denied Mr. Swalwell's motion for a fee award under RCW 4.84.250 because the damages pled exceeded the maximum allowable under that statute, \$10,000, so that Mr. Swalwell was not entitled to an award under the plain terms of that statute as a matter of law.

Mr. Swalwell does not address the standard of review that would apply if, as he argues, RCW 4.84.250 was deemed to be applicable notwithstanding that the damages pled exceed \$10,000.

Based on the issues raised in this appeal, if RCW 4.84.250 was somehow deemed applicable, this Court's standard of review would be whether the lower court abused its discretion in denying Mr. Swalwell's motion for an award of attorney's fees.

RCW 4.84.250 states that any attorney's fees awarded pursuant to its authority ". . . shall be taxed . . . *as a part of the costs.*" Because any fees awarded pursuant to RCW 4.84.250 are specifically taxed as a part of the costs, such fee awards are necessarily subject to the rules governing

costs. Otherwise, the language, ‘as a part of the costs,’ would have no effect and would be mere surplusage. The rules of statutory construction require a court, whenever possible, to “give effect to every word, clause and sentence of a statute.” Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Thus, this statute does not make a fee award unconditionally mandatory, but rather makes it part of the costs, which as demonstrated below are discretionary.

Although the *general* rule is that statutory ‘costs’ ordinarily do not include attorney’s fees, RCW 4.84.250 specifically makes any fee award pursuant to that statute part of the costs. In Hall v. Stolte, 24 Wn. App. 423, 601 P.2d 967 (1979), a case that also involved costs where there had been a voluntary dismissal, the court stated:

The word "costs" *in the absence of statute* or agreement does not include counsel fees; in other words, the general rule is that counsel fees are not costs either in suits in equity or actions at law.

*Id.* at 425 – 426. (Emphasis added.)

In the present case, there is ‘no absence of statute.’ To the contrary, the statute upon which Mr. Swalwell relies specifically states

that attorney fees awarded under that statute shall be taxed as ‘a part of the costs.’

Washington law is clear that statutory cost awards following a voluntary dismissal are discretionary. “The trial courts have discretion to award statutory costs after a plaintiff’s voluntary dismissal.” Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 863, 158 P.3d 1271 (2007), (Aff’d. 65 Wn.2d 481, 200 P.3d 683), citing Anderson v. Gold Seal, 81 Wn. 2d 863, 505 P.2d 790 (1973). Mr. Swalwell cites Anderson, Id. as authoritative on page 6 of his brief.

Thus, even if RCW 4.84.250 was deemed applicable, the court below would have the discretion whether to award statutory costs, and attorney’s fee awards pursuant to RCW 4.84.250 are taxed as a part of the costs. Assuming the applicability of RCW 4.84.250, the lower court’s decision to deny Mr. Swalwell’s motion for attorney’s fees would necessarily be subject to the abuse of discretion standard of review. See generally Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 178 P.3d 981 (2008), discretionary rulings are reviewed on appeal for abuse of discretion.

Thus, assuming (but not conceding) that RCW 4.84.250 is deemed applicable, the appropriate standard for reviewing the denial of a fee

request under RCW 4.84.250 would be whether the court below abused its discretion.

2. The Lower Court did not Abuse its Discretion in Denying Defendant's Motion for Attorney's Fees.

The general rule in Washington is well settled; attorney's fees shall not be awarded unless pursuant to statutory authority or agreement of the parties. Leingang v. Pierce County Medical Bureau, 131 Wn. 2d 133, 930 P.2d 288 (1997). The specific (and only) authority upon which Mr. Swalwell relies is RCW 4.84.250 which, when applicable, authorizes the award of attorney's fees to be taxed *as a part of the costs*.

Voluntary dismissals are governed by CR 41. CR 41(d) establishes a very specific procedural point when such discretionary costs (and therefore fees) may be awarded. It states:

*If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.*

(Emphasis added.)

Thus, CR 41 provides authority to award costs, and therefore attorney's fees, only where an action has been voluntarily dismissed *and*

the plaintiff commences a new action against the same defendant based on the same claim. In that situation, the court presiding over the new action may award the costs incurred in the previously dismissed action. The award of statutory costs following a voluntary dismissal is discretionary. Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 863, 158 P.3d 1271 (2007).

The trial court's stated rationale for denying Mr. Swalwell's motion for attorney's fees is consistent with CR 41, which the court directly addressed. The court stated:

. . . I'm inclined to deny the motion based on the fact that my view is, under CR 41, there are no attorney's fees that are passed *once a CR 41 motion is granted*.

SCP 21, Verbatim Transcript, p.4 ln. 21 – p. 5 ln. 2. (Emphasis added.)

This reflects a correct reading of CR 41, which does not in fact provide authority to award costs, and thus attorney's fees, *once a CR 41 motion is granted*. Rather, CR 41(d) specifically authorizes a discretionary award of costs (and therefore fees under RCW 4.84.250) only after an action has been voluntarily dismissed *and* a new action against the same defendant based on the same claims is commenced.

Clearly, the court below did not abuse the discretion accorded it by CR 41(d), because the procedural point when the exercise of such discretion is authorized had not yet arrived. The trial court recognized that it did not have the authority or discretion to award fees at that point. It correctly noted that CR 41 did not authorize an award of fees based on the grant of a request for voluntary dismissal in the matter then before it.

3. Appellant's Position is Not Supported by Controlling Case Law.

Mr. Swalwall relies primarily on Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995) and the appellate decisions upon which it was based, which as demonstrated below have all subsequently been discredited by our Supreme Court in Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009).

As the appellate court in Allahyari recognized, it was addressing an issue of first impression under Washington law, specifically whether fees may be awarded under RCW 4.84.250 after a plaintiff voluntarily dismisses his action in its entirety. *Id.* at 522. That court therefore looked to RCW 4.84.330, which requires bilateral treatment to unilateral fee provisions in contracts, for guidance in analyzing RCW 4.84.250. *Id.* at 522.

The court in Allahyari held that in an action where damages totaling less than \$10,000 was pled, and the plaintiff voluntarily dismisses his claims, the defendant is the prevailing party and entitled to a fee award pursuant to RCW 4.84.250. *Id.* at 524.

It should first be noted that Allahyari, is distinguishable from the present case because the damages pled in that case did not exceed \$10,000, while the damages pled by Cavalry in the present case do in fact exceed \$10,000. Allahyari, is therefore not controlling.

Furthermore, although the court in Allahyari held that the defendant is the prevailing party and may be entitled to attorney's fees pursuant to RCW 4.84.250 after the plaintiff's voluntary dismissal under CR 41, it did not address the timing limitation imposed on such awards by CR 41(d). The court simply concluded that because the plaintiff who voluntarily dismisses his action recovers nothing, his opponent should be considered the prevailing party and entitled to a fee award.

The court in Allahyari did not address the fact that the authority to award fees (taxed as a part of the costs) provided by CR 41(d) may be exercised only after the action is voluntarily dismissed *and* a new action is commenced against the same defendant with the same claims.

The appellate court in Allahyari did not address this facet of CR 41(d), presumably because the parties did not raise it. As our appellate courts have frequently remarked, “Because we are not in the business of inventing unbriefed arguments for parties sua sponte, there certainly was no significance in our not doing so . . .” State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Because the Allahyari court did not address this time limitation imposed by CR 41(d), its decision is not controlling with respect to the limitation CR 41(d), which the court below correctly applied. As our Supreme Court noted, appellate court rulings should not be treated as dispositive where they do not answer the question presented in the case at bar. See State v. Frost, 160 Wn.2d 765, 775, 161 P.3d 361 (2007).

Furthermore, the rationale employed by the court in Allahyari, was subsequently discredited by our Supreme Court in Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009), which involved the applicability of RCW 4.84.330. The court in Allahyari, relied on decisions in Marassi v. Lau, 71 Wn. App. 912, 918-19, 859 P.2d 605 (1993) and Walji v. Candyco, Inc., 57 Wn. App. 284, 288, 787 P.2d 946 (1990). The Supreme Court in Wachovia stated:

[A]lthough Allahyari ultimately concluded that RCW 4.84.330 did not apply to the facts there, it

reiterated Marassi's mischaracterization of the general rule regarding RCW 4.84.330 and voluntary dismissal. (Citations omitted.) Not only does Allahyari lack facts that encompass RCW 4.84.330, *it is also unpersuasive because it repeats Marassi's flawed reasoning.*

*Id.* at 491, Emphasis added.

The Supreme Court in Wachovia also discussed the effect of a voluntary dismissal under CR 41. It stated:

A voluntary dismissal leaves the parties as if the action had never been brought. [Citations omitted.] No substantive issues are resolved, and the plaintiff may refile the suit.

*Id.* at 492.

This conclusion is in accord with the limited authority provided by CR 41(d) to award fees following a voluntary dismissal, but only after the suit has then been refiled and there is an opportunity to resolve substantive issues. Logic also supports this conclusion. If, contrary to CR 41(d), attorney's fees could be awarded as soon as a voluntary dismissal without prejudice is granted, and the plaintiff later refiles and ultimately prevails, the attorney's fee award would then have to be reversed. This would result in an additional, unnecessary layer of litigation which the proper application of CR 41(d) eliminates.

It is true that the specific statute at issue in Wachovia, Id. was RCW 4.84.330 rather than RCW 4.84.250. As noted above, however, because the application of RCW 4.84.250 in the context of a voluntary dismissal was an issue of first impression for the court in Allahyari, Id., that court specifically looked to RCW 4.84.330 for guidance in analyzing RCW 4.84.250.

Furthermore, Mr. Swalwell asserts (erroneously) on page 3 of his brief that the lower court improperly applied RCW 4.84.330 rather than 4.84.250 to his motion for attorney's fees. RCW 4.84.330 operates to render a unilateral attorney's fee provision in a contract applicable to both parties. It requires by its terms a final judgment before attorney's fees may be awarded.

Mr. Swalwell does not point to anything in the record to support his contention that the court below applied RCW 4.84.330 rather than RCW 4.84.250 in denying his motion. Indeed, the lower court concluded that *no* provisions authorized an attorney's fee award based on Mr. Swalwell's motion, which was filed after a voluntary dismissal but before any refiling of the action as required by CR 41(d).

There is a certain irony inherent in Mr. Swalwell's position regarding these statutes that is worth noting. First, he argues that RCW

4.84.250 applies to this case, even though the factor that renders that statute applicable, damages pled of \$10,000 or less, is plainly absent. Second, he argues that RCW 4.84.330, which provides that unilateral fee award provisions in contracts are deemed bilateral, does not apply. However, the contract in question does in fact contain a unilateral attorney's fee provision SCR 10, so that RCW 4.84.330 actually does apply based on the facts of record, and by its terms requires a final judgment before attorney's fees may be awarded pursuant to that statute.

Although RCW 4.84.330 is clearly applicable under the facts of this case, Mr. Swalwell did not rely on it, presumably because it would preclude a fee award since it first requires a final judgment. Its application would yield the same result dictated by CR 41(d), that fees may be awarded following a voluntary dismissal only after the same claim has been refiled parties have had the opportunity to test the merits of their respective positions.

In summary, the statute upon which Mr. Swalwell relies, RCW 4.84.250, does not apply because its requirement that the damages pled total \$10,000 or less has not been satisfied. Mr. Swalwell's attempt to circumvent that requirement and his inability to satisfy it, by alleging an agreement or stipulation between the parties of the 'total value' of the case

must fail because no such agreement was proven. Furthermore, even if such an agreement as to the 'total value' of the case had been established, the requirements of RCW 4.84.250 would still not be satisfied because the damages Cavalry pled in fact exceed \$10,000.

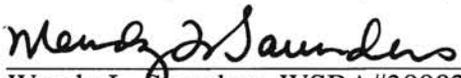
Furthermore, even if this Court were to conclude that RCW 4.84.250 is applicable, attorney's fees may not be awarded following a voluntary dismissal without prejudice pursuant to CR 41 unless and until the plaintiff refiles its action against the same defendant based on the same claims. Such a refiling has not occurred.

The appellate authority upon which Mr. Swalwell primarily relies, Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), is distinguishable because unlike the present case, it involved a damages claim under \$10,000. Furthermore, although the court in Allahyari, held that attorney's fees may be awarded to a defendant after the plaintiff voluntarily dismisses its action pursuant to CR 41, it did not address CR 41(d), which authorizes such awards only after a voluntary dismissal and a refiling of the case by the plaintiff. It therefore provides no guidance regarding the limitations imposed by CR 41(d). Finally, Allahyari, has been subsequently discredited by the Supreme Court in Wachovia, and is no longer authoritative.

## V. CONCLUSION

For all of the above reasons, the court below did not err in denying Mr. Swalwell's motion for attorney's fees pursuant to RCW 4.84.250, and this Court should therefore affirm the decision of the court below.

Respectfully submitted this 19<sup>th</sup> day of November, 2013,

  
Wendy L. Saunders, WSBA#39982  
Bishop White Marshall & Weibel, P.S.  
Attorneys for Respondent Cavalry

**CERTIFICATE OF SERVICE**

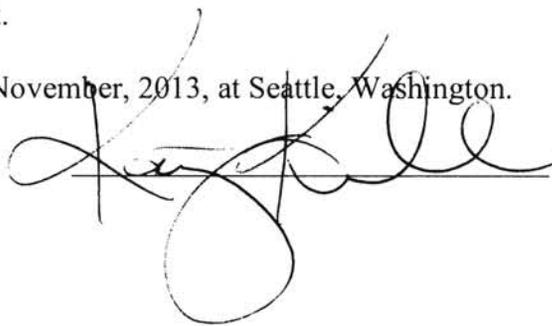
I, Kathy Krill, certify that on the 22 day of November, 2013, I caused the foregoing documents, Respondent's Brief to be delivered to the following parties in the manner indicated below:

David A. Napier, WSBA#37520  
3500 188<sup>th</sup> Street SW, Suite 430  
Lynnwood, WA 98037

By First Class Mail  
 By FedEx Overnight  
 By Email  
 By Facsimile

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 22 day of November, 2013, at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Kathy Krill', written over a horizontal line.