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STATE OF WASHINGTON
BY
DEPUTY

No. 42417-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG and JOHN DOE HOFFENBURG,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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ISSUES OF LAW

Whether the Trial Court, pursuant to CR 54(e), abused its discretion when it entered judgment on the jury's verdict more than 15 days after the jury rendered a verdict in favor of Defendant?

Whether the Trial Court, pursuant to RCW 4.84.250, properly awarded costs and reasonable attorney's fees to Defendant as the prevailing party where Plaintiff pleaded the case less than $10,000?

STATEMENT OF THE CASE

This lawsuit arises out of a two vehicle accident that occurred on February 21, 2008, in Mason County, Washington. CP 46-48. While driving a vehicle, Defendant struck Plaintiff's lawfully parked and unoccupied 2003 Chevrolet Suburban, causing property damage to Plaintiff's vehicle. CP 46-48. Following the accident, Plaintiff's vehicle was fully repaired at the expense of Defendant's insurance carrier. CP 14. Following the repair of the vehicle, Plaintiff filed suit against Defendant seeking recovery for the diminished value of the repaired vehicle. CP 46-48.

The parties began the discovery process, and Plaintiff returned Defendant's Request for Statement of Damages, listing her damages as totaling $6,353.00, thereby pleading the case less than $10,000 and

implicating RCW 4.84.250. CP 14 & CP 5-7. The case proceeded to a mandatory arbitration, and an award was made in favor of Plaintiff for $5,044.00. CP 41-42. Defendant filed a request for a trial de novo and a demand for a jury trial, paying the respective filing fees for each. CP 39. Defendant then provided Plaintiff with an Offer of Judgment for $1,000.00, pursuant to CR 68 and RCW 4.84.250 through 4.84.300, which was not accepted by Plaintiff. CP 15. On April 28, 2011, following a three day trial, the jury rendered a zero dollar verdict in favor of the Defendant. CP 37.

On May 26, 2011, Defendant filed a Motion Seeking Costs and Reasonable attorney's fees, which was then held on June 6, 2011. CP 29-36 & RP 1-13. At that motion hearing, rather than awarding costs and reasonable attorney's fees, and upon Defendant's further motion, the Court entered judgment upon the jury's verdict in favor of Defendant. RP 11-12. Costs and reasonable attorney's fees were not awarded on June 6, 2011, and the matter was set over for further detail to be provided regarding the amount of Defendant's attorney's fees. RP 12.

On June 15, 2011, nine days after the judgment was entered, Defendant filed a Note for Motion and filed her Second Motion Seeking Costs and Reasonable Attorney's Fees. CP 13-20. At the second motion hearing, which was held on June 24, 2011, the Court granted Defendant's

motion and entered an Order Awarding Costs and Reasonable Attorney's Fees in the amount of $11,490. CP 5-7 & RP 14-20. This amount included $500.00 in costs, which represented the jury fee and the de novo fee, and $10,990 in reasonable attorney's fees, which represented Defendant's counsel's hours spent on the case, 68.2, multiplied by a rate of $175.00 per hour. CP 5-7 & RP 14-20.

Plaintiff then filed the Notice of Appeal and is the Appellant herein. Defendant, who was the prevailing party at the Trial Court, is the Respondent herein.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The applicable standard of review is concisely put in *North Coast Electric Co. v. Selig*, 136 Wn.App.636, 642-643, 151 P.3d 211 (2007), where the Division I stated the following:

> "When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable." Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion. A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion. (citing *Ethridge v. Hwang*, 105 Wn.App. 447, 459-460, 20 P.3d 958 (2001)).

II. DEFENDANT'S MOTION FOR COSTS AND REASONABLE ATTORNEY'S FEES WAS TIMELY MADE WITHIN 10 DAYS OF ENTRY OF JUDGMENT UPON THE JURY'S VERDICT.

The Trial Court did not abuse its discretion when it entered judgment on June 6, 2011, 39 days after the jury's defense verdict. CP 5-7. Since the jury's verdict was for Defendant in the amount of zero dollars, there was, in fact, no amount for which to enter a judgment absent a motion for costs and reasonable attorney's fees. CP 37. It was within the Trial Court's discretion to enter judgment at the June 6, 2011, hearing since CR 54(e) unambiguously allows the trial court to direct the entry of judgment. CR 54(e) states the following:

> "[t]he attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, *or at any other time as the court may direct*." (emphasis added)

Based upon this rule, the Trial Court directed entry of judgment at the June 6, 2011, motion hearing for costs and reasonable attorney's fees. CP 5-7. Consistent with CR 54(f)(2)(C), presentation of the judgment was made while opposing counsel was present and in open court. Thus, while it is true that judgment was entered more than 15 days after the jury's verdict for Defendant, it was, nevertheless, proper and within the Court's discretion to do.

Plaintiff argues that the judgment was not entered within 15 days of the jury's verdict while simultaneously arguing that the award for costs and fees was not timely made within 10 days of the *jury's verdict.* Plaintiff's argument confuses the requirement of CR 54(d)(2), which states that an award of costs and reasonable attorneys fees be made within 10 days of *entry of judgment*, with a *perceived* requirement that an award of costs and reasonable attorney's fees be made within 10 days of the *jury's verdict.* Yet, a jury's verdict is separate and distinctly different from a judgment upon a verdict. The civil rules make this difference clear where they specifically enumerate a procedure for entering a judgment after a jury's verdict in CR 54(e) and (f).

Moreover, even in the case cited by Plaintiff as authoritative, *Corey v. Pierce County*, 154 Wn.App. 752, 774, 225 P.3d 367 (2010), the Court stated "[w]e do not believe the mandate of liberal construction of the statutory attorney fees claim precludes the application of a temporal limitation, such as that in CR 54(d). *The timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court."* (emphasis added) Indeed, CR 54(d) only provides a timeline for a motion for costs and reasonable attorney's fees relative to entry of judgment, not relative to a jury's verdict. So long as a judgment upon a verdict is entered at such "time as the court may direct," a motion for costs

and reasonable attorneys fees need only be made within 10 days. CR 54(e).

In this case there was no need to enter judgment upon the jury's verdict but for the fact that Defendant subsequently sought to recover her costs and reasonable attorney's fees after the defense verdict. Since entering judgment on the jury's verdict is a procedural prerequisite to recovering costs and reasonable attorney's fees, the judgment was properly entered at the first motion hearing on June 6, 2011. CP 5-7. Contrary to Plaintiff's contention, the Trial Court had discretion to direct entry of judgment at the first motion hearing under CR 54(e). Nine days later, on June 15, 2011, Defendant noted the second motion for costs and reasonable attorney's fees, which then took place on June 27, 2011. CP 13-20. It is undisputed that once the judgment was entered, the motion for costs and reasonable attorney's fees was noted within 10 days, as required by CR 54(d)(1).

Since the Trial Court was within its discretion to enter judgment more than 15 days after the jury's verdict, and since the motion for costs and reasonable attorney's was noted within 10 days of entry of judgment, the Trial court properly awarded Defendant her costs and reasonable attorney's fees associated with being the prevailing party at trial.

III. DEFENDANT, AS THE PREVAILING PARTY AT TRIAL, HAS STANDING TO SEEK COSTS AND REASONABLE ATTORNEY'S FEES.

The issue of Defendant's standing to recover her costs and reasonable attorney's fees because she is indemnified by an insurance company was not briefed or argued to the Trial Court, and it is not properly before this Court on appeal. Although Plaintiff pointed out that Defendant was indemnified throughout the litigation, the parties did not argue about Defendant's standing, or claimed lack thereof, to recover costs and reasonable attorney's fees. RP 6-7. Thus, this Court should not consider this particular issue on appeal. Nevertheless, if this Court considers this particular argument on its merits, there is little merit to consider.

Plaintiff argues that Defendant lacked standing to move for costs and reasonable attorney's fees merely because Plaintiff was indemnified by an insurance company throughout the course of litigation. Plaintiff concedes that there is no precedent for this assertion, which is simply because it is a nonsensical argument. There is no statute, civil rule or case law which suggests that where a party is indemnified by an insurance company that the indemnified party then forfeits their right to recover their defense costs under Washington law. Plaintiff attempts comparison with *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 116

(1986), however, as the name of the case implies, an insurance company was, in fact, a party to that suit. It is simply inapplicable to the facts here. Here, Defendant, Heather Hoffenberg, as the named party in the underlying lawsuit, irrespective of her insurance status, has legal standing to recover her costs and reasonable attorney's fees.

In bolstering this argument, Plaintiff attempts to misdirect this Court with regard to who the Defendant, in fact, is. Plaintiff, in her briefing, deceptively refers to Defendant's insurer, GEICO, rather than referring to Defendant, Heather Hoffenberg, as the party to the lawsuit. Plaintiff, having filed and served the underlying lawsuit, ought to know that GEICO has never been a party to the lawsuit, and GEICO is not a party to this appeal. GEICO is merely the insurance company indemnifying Defendant in the lawsuit and the present appeal. Thus, Plaintiff is correct when she argues that GEICO was not an aggrieved party - GEICO is not party at all. That Plaintiff was indemnified by an insurance company was wholly immaterial to the case at trial, was wholly immaterial to the Trial Court's issuance of costs and attorneys fees, and it is wholly immaterial to this appeal.

IV. THE TRIAL COURT PROPERLY COMPUTED AND AWARDED COSTS AND REASONABLE ATTORNEY'S FEES FROM THE ONSET OF THE LITIGATION.

Defendant was properly awarded her costs and reasonable attorney's fees associated with defending this lawsuit because the case was "pleaded" as valued less than $10,000 in Plaintiff's response for Request for Statement of Damages. Defendant was the prevailing party when she obtained a defense verdict at trial, thereby improving her position upon the mandatory arbitration award and her $1,000 offer to settlement, which was made pursuant to CR 68 and RCW 4.84.250 et. seq.

Plaintiff argues that costs and reasonable attorneys fees should not have been awarded if they were incurred before the mandatory arbitration because MAR 7.3 only allows for costs and reasonable attorney's fees incurred after the de novo. Plaintiff correctly states the rule. However, this argument ignores that costs and reasonable attorneys fees were not awarded under MAR 7.3, but rather were awarded under RCW 4.84.250, et. seq. Since Plaintiff pleaded the case less than $10,000, Defendant is entitled to costs and reasonable attorney's fees from the filing of the lawsuit and not simply following the mandatory arbitration.

RCW 4.84.250 is titled "Attorneys' fees as costs in damages actions of ten thousand dollars or less – Allowed to prevailing party." RCW 4.84.250 states the following:

> Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred 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. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

While RCW 4.84.250 assumes the prevailing party is the plaintiff, RCW 4.84.270 is titled "Attorneys' fees as costs in damage actions of ten thousand dollars or less – When defendant deemed prevailing party." RCW 4.84.270 reads as follows:

> The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages were the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, *recovered nothing*, or if the recovery, exclusive of costs, is the same or *less than the amount offered in settlement by the defendant*, or the party resisting relief as set forth in RCW 4.84.280. (emphasis added)

In this case, Plaintiff "pleaded" her damages to be less than $10,000 when she responded to the Request for Statement of Damages by writing "$6,053.00 Diminished value; $300.00 Diminished Value Report." CP 3-5. While RCW 4.28.360 does not allow a plaintiff to plead a specific amount in their Complaint, it does allow for a defendant to send a Request for Statement of Damages. The Request for Statement of

Damages has been unequivocally held to be a "pleading" within the meaning of RCW 4.84.250. *Pierson v. Hernandez*, 149 Wn.App. 297, 202 P.3d 1014 (2009). "The Washington Supreme Court has ruled that a request for damages pursuant to RCW 4.28.360 triggers the 'pleading' of damages applicable to RCW 4.84.250." *Pierson* 149 Wn.App. at 3*03* (citing *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 789-790, 733 P.2d 960 (1987)). Since, in this case, the amount pleaded by Plaintiff response to the Statement of Damages was less than $10,000, the reasonable attorney's fees provisions of RCW 4.84.250 and 4.84.270 are implicated.

Defendant was the prevailing party as the jury rendered a verdict for Defendant. CP 3-7. Thus, under the plain language of RCW 4.84.250 and 4.84.270, Defendant is entitled to reasonable attorney's fees. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (citing *State v. J.M.*, 144 Wn.2d, 472, 480, 28 P.3d 720 (2001). Here, the statute is plain on its face, and Defendant was properly allowed awarded her reasonable attorney's fees and not simply $200.00 in statutory attorney's fees contemplated by 4.84.080.

RCWs 4.84.250 and 4.84.270 explicitly allow for reasonable attorneys fees in cases such as this where the amount plead is less than $10,000. Defendant is entitled to and deserves reasonable attorney's fees since Defendant filed a request for a trial de novo and faced a substantial financial risk in doing so. Indeed, had Plaintiff improved her position over the arbitration award, pursuant to MAR 7.3, she would have been able to recover her "reasonable attorney fees." Despite the large financial risk of proceeding to trial on a trial de novo, Defendant proceeded to trial and prevailed with a defense verdict. Had the Plaintiff received a jury award for even one dollar over mandatory arbitration award, Defendant would have had to pay "reasonable attorney fees" to Plaintiff, which, surely, would have been many times greater than the $10,990 awarded to Defendant.

In addition to the reasonable attorney's fees, the Trial Court correctly awarded Defendant her statutory costs. CP 3-7. RCW 4.84.030 states "[i]n any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements;..." Additionally, RCW 4.84.060 states that "[i]n all cases where costs and disbursements are not allowed to the plaintiff, the defendant *shall* be entitled to have judgment in his favor for the same." (emphasis added) In this case, costs and disbursements were not allowed to Plaintiff, so under

the unambiguous language of the law, Defendant was entitled to an award in her favor "for the same."

The specific recoverable costs are contained within RCW 4.84.010, which states "there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action..." The statute then goes on to enumerate which costs are recoverable, which, relevant herein, are as follows:

> (1) Filing fees; . . .
> (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, , which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
> (6) Statutory attorney and witness fees; and
> (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing; PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into the evidence or used for purposes of impeachment. (emphasis in original)

Defendant calculated her recoverable costs under RCW 4.84.010 as only being $500.00 for the filing of the trial de novo, $250.00, and the jury demand fee, $250.00. While Defendant did incur substantial fees in obtaining expert reports and records, Defendant conceded that none of these documents were specifically admitted at trial, making them not

recoverable. Moreover, witnesses' statutory witness fees were paid by the Court, and Plaintiff's deposition testimony was not introduced into evidence at trial, thus making those costs not recoverable by Defendant. Accordingly, Defendant's recoverable costs are merely $500.00 for the filing fees incurred by Defendant.

CONCLUSIONS

The decisions of the Trial Court should be affirmed by this Court. It was within the Trial Court's discretion to enter judgment more than 15 days after the jury's verdict. CR 54(e) specifically grants the Trial Court discretion to direct entry of judgment, and the facts under which it was done in this case do not constitute an abuse of that discretion. Defendant, as the prevailing party at trial, had standing to recover her costs and reasonable attorney's fees, regardless of whether she was indemnified by an insurance company – this fact is simply immaterial to this Court's analysis. Finally, the Trial Court did not abuse its discretion when it entered an order awarding Defendant her costs and reasonable attorney's fees. RCW 4.84.250 et. seq., allows for Defendant to recover her costs and reasonable attorney's fees as the prevailing party. The computation of time spent on the case and the hourly rate were very modest, and the costs were nominal as well. Thus, the Trial Court's order awarding Defendant

$11,490, should be affirmed. Costs and reasonable attorney's fees associated with this appeal should also be awarded.

DATED this 29th day of February, 2012.

MARY E. OWEN & ASSOCIATES

By: _____
Morgan J. Wais, WSBA #36603
Attorney for Respondent, Hoffenberg

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CERTIFICATE OF SERVICE

I, Angelina de Caracena, am an employee of Mary E. Owen and Associates, and hereby certify that on March 1, 2012, I caused a true and correct copy of the Respondent's Response Brief to be served via Seattle Legal Couriers on the following address:

Alana Bullis
Alana Bullis, PS
1911 Nelson Street
DuPont, WA 98327-7743

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

DATED this **1st** day of March, 2012.

A de Caracena

Angelina de Caracena, Paralegal to Morgan Wais