

NO. 43639-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

2012 OCT -5 PM 1:05
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

JOSEPH M. LOWE,

Appellant,

v.

PCL CONSTRUCTION SERVICES, INC. and WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

**JOINT BRIEF OF RESPONDENTS PCL CONSTRUCTION
SERVICES AND DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, the Industrial Insurance Act. Joseph Lowe was injured while working for PCL Construction Services, Inc.

Lowe appealed a decision of the Board of Industrial Insurance Appeals (Board) to the Pierce County Superior Court. The trial court affirmed the Board and awarded PCL costs as a prevailing party, including, in particular, the cost of transcribing depositions that PCL took while the case was pending at the Board, and that were part of the record used by the trial court to decide the case. Lowe does not dispute the merits of the superior court's decision, and challenges only the trial court's decision to award PCL the cost of transcribing its depositions. Lowe also argues that he is entitled to reasonable attorneys fees under RCW 51.52.130 in the event that this Court agrees that the trial court should not have awarded PCL those costs.

Neither of Lowe's arguments have merit. RCW 4.84.010 and RCW 4.84.030 plainly support the trial court's decision to award PCL the cost of the transcription of its perpetuation depositions, as PCL is a prevailing party as defined by RCW 4.84.030 and the cost of transcribing those depositions is a cost it is entitled to receive under RCW 4.84.010(7).

Furthermore, even in the event that this Court decides that PCL should not have been awarded those costs, Lowe would not be entitled to attorney's fees under RCW 51.52.130, as that statute does not authorize the payment of fees when a worker was denied benefits by the Board and the worker fails to overturn the Board's decision on appeal.

II. COUNTER STATEMENT OF THE ISSUES

1. Under RCW 4.84.010, did the trial court err when it awarded PCL its deposition transcription costs when that statute makes such costs awardable as to those portions of a deposition which are "used" at time of trial, when all of the depositions that PCL took were considered as evidence by the trial court, and when all of the evidence that PCL relied on at the trial was contained in those perpetuation depositions?

2. Assuming arguendo that this Court concludes that the trial court erred when it awarded PCL the costs of its perpetuation depositions, would Lowe be entitled to receive an award of reasonable attorney's fees under RCW 51.52.130, when the plain language of RCW 51.52.130 shows that a worker who does not prevail at the Board is only entitled to such an award if the decision of the Board is reversed and the worker receives additional medical treatment or disability benefits as a result, and when Lowe does not seek a reversal of the Board's decision through his current appeal?

III. STATEMENT OF THE CASE

Lowe was injured while working for PCL. CABR 31.¹ His claim was allowed, and benefits were paid. CABR 31.

The Department issued an order that accepted responsibility for a left hip condition, finding that that condition was proximately caused by his industrial injury. CABR 31, 34. PCL appealed the Department's decision to the Board. CABR 36.

PCL presented several witnesses in support of its appeal, and it presented the testimony of each of its witnesses through perpetuation depositions. *See* CABR 22, 23. The witnesses it deposed were Dr. David Millett, Dr. Marvin Brooke, Dominique Martin-Mitchell, and Kim Bisson. CABR 22, 23.

A proposed decision and order was issued that reversed the Department order because the preponderance of the evidence showed that Lowe's hip condition was not proximately caused by his industrial injury. CABR 22-33. Lowe filed a petition for review. CABR 10-17. The Board denied review and adopted the proposed decision as its own. CABR 2.

¹ The certified appeal board record (CABR) contains numerous documents that are consecutively numbered with a machine-stamped number, as well as the transcripts of hearings and depositions that do not have such numbers. Citations to the documents containing machine-stamped numbers will be listed with CABR followed by the appropriate page number.

Lowe appealed to the Pierce County Superior Court. The trial court considered the certified appeal board record—which included all of the perpetuation depositions that had been taken in the course of the Board appeal—and it affirmed the Board’s decision. CP 11-13; CP 16-19.

Judgment was entered on April 27, 2012. CP 16-19. The judgment awarded PCL costs that included \$200 in statutory attorney’s fees and \$1,161.65 in deposition transcription costs, for a total of \$1,361.65. CP 16-19.

Lowe moved for reconsideration of the judgment with regard to the costs that were awarded to PCL. CP 5-7, 21-27. The trial court denied his motion. CP 46-47.

Lowe then appealed to this Court. CP 48-49. He assigned error to the trial court’s decision to award PCL \$1,161.65 in costs associated with the transcription of the perpetuation depositions it took. App. Br at 1.² Lowe did not assign error to the trial court’s affirmation of the Board’s order, nor did he assign error to the trial court’s decision to award PCL \$200 in statutory attorney’s fees. *See* App. Br. at 1.

IV. STANDARD OF REVIEW

In a worker’s compensation matter involving an appeal from a trial court’s decision to this Court, the ordinary civil standard of review

²“App. Br.” refers to the brief of appellant.

applies. *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This means, among other things, that this Court conducts a de novo review of questions of law raised by an appeal. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997).

Where a party challenges, on appeal, the trial court's statutory authority to award attorney's fees or costs, an appellate court conducts a de novo review of that issue, as it is a pure question of law. *Tradewell v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).³

Here, Lowe argues only that it was improper under RCW 4.84.010 and RCW 4.84.030 for the trial court to award PCL the cost of transcribing its perpetuation deposition when it prevailed in his appeal from the Board's decision. App. Br. at 1. Lowe has not raised any issue with regard to the amount of that (or any other) cost award. See App. Br. at 1. Therefore, the issues raised by this appeal are subject to de novo review. *Mavis*, 71 Wn. App. at 126-27.

³ Where a party challenges the *amount* of a cost or fee award, the award is reviewed for abuse of discretion. *Mavis*, 71 Wn. App. at 126-27.

V. ARGUMENT

A. The Trial Court Appropriately Awarded PCL Its Costs As A Prevailing Party Under RCW 4.84.010 And RCW 4.84.030

1. RCW 4.84.010's cost provisions, including deposition transcription costs, apply when the Department or an employer is a prevailing party in a superior court matter stemming from an industrial insurance appeal

The trial court appropriately awarded PCL its deposition transcription costs under RCW 4.84.010 and RCW 4.84.030 because, as the Supreme Court has recognized, the cost-provisions contained in those statutes apply to superior court proceedings involving appeals from decisions of the Board. *See Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997); *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729-30, 175 P.3d 1109 (2008); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992).

RCW 4.84.030 allows a party who prevails in any superior court action to claim, and receive, certain litigation expenses. It states, in pertinent part:

In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements

RCW 4.84.030 (emphasis added).

RCW 4.84.010 specifies the types of costs that a prevailing party may recover, and subsection (7) of that statute allows a party to claim as a cost the expenses incurred in transcribing a deposition.

As noted above, RCW 4.84.030 states that it applies to “any action in the superior court.” As *Black*, *Ferencak*, and *Allan* each recognized, RCW 51.52.140 provides that the rules of civil practice generally apply in industrial insurance appeals. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

RCW 51.52.140 reads, in part:

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases

RCW 51.52.140.

Black, *Ferenak*, and *Allan* each concluded that RCW 51.52.140’s incorporation of the “practice in civil cases” to industrial insurance cases includes the provisions governing costs that are set forth in RCW 4.84.010 and RCW 4.84.030. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23. Since the Department was the prevailing party in each of those cases, each case held that the Department was entitled to its statutory attorney’s fees. *Black*, 131 Wn.2d

at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Here, it cannot be reasonably disputed, and Lowe does not dispute, that PCL was a “prevailing party” as defined by RCW 4.84.030. *See* App. Br. at 1. Nor does Lowe challenge the superior court’s decision to award PCL statutory attorney’s fees under RCW 4.84.010(6). *Id.* Rather, Lowe argues only that the trial court erred when it awarded PCL its deposition transcription costs under RCW 4.84.010(7). *Id.*

While *Black*, *Ferencak*, and *Allan* did not address the precise question of whether an employer who is a prevailing party (under RCW 4.84.030) in a superior court matter stemming from an industrial insurance case is entitled to an award of its deposition transcriptions under RCW 4.84.010(7), those cases did hold that the cost provisions contained in RCW 4.84.010 and RCW 4.84.030 apply to superior court matters that stem from industrial insurance appeals. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23. Thus, in the absence of a compelling reason to distinguish the costs identified in RCW 4.84.010(6) from the costs identified in RCW 4.84.010(7), *Black*, *Ferencak* and *Allan* all support the conclusion that a prevailing party is entitled to its deposition transcription costs under the circumstances

present in this case. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Under the plain language of RCW 4.84.010(7), PCL was properly awarded its deposition transcription costs. RCW 4.84.010(7) provides:

(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 evidence or used for purposes of impeachment

Here, the depositions were “necessary” for PCL “to achieve the successful result,” as the depositions were the only evidence offered by PCL in support of its position. RCW 4.84.010(7). PCL’s “expense” associated with taking them is recoverable, because the depositions were “used at trial.” RCW 4.84.010. Furthermore, there is no reason to make a pro rata apportionment of the deposition transcription costs, because all of the perpetuation depositions that PCL took were “introduced into evidence” in their entirety. RCW 4.84.010(7).

2. A deposition that was used at time of trial need not have been originally taken for “trial purposes” for it to be compensable under RCW 4.84.010(7)

Lowe’s arguments as to why PCL was not entitled to an award of those costs do not have merit. Lowe argues that a court may only award a party deposition transcription costs if the deposition expense was incurred

“in the action,” which, he contends, obligates the party seeking those costs to affirmatively establish that the deposition “was both taken and used for trial purposes.” App. Br. at 5. Lowe cites *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6 (1995), *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. 145, 150, 574 P.2d 401 (1978), and *Most Worshipful Price Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wn.2d 28, 43, 381 P.2d 130 (1963), for this conclusion. App. Br. at 5-6.

Lowe’s argument fails. Under the plain language of RCW 4.84.010(7) it is not necessary that a party show that a deposition was originally taken for trial purposes: the key is whether it was introduced into evidence or used for impeachment purposes at the trial. Furthermore, while the case law cited by Lowe (App. Br. at 5-6) shows that a deposition transcription cost *is* compensable if the deposition was both taken and used for trial purposes, none of those cases held that a deposition cost is not recoverable unless both of those things are true. *See Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150. Further, to the extent the case law could be construed as suggesting that such a requirement exists, such a suggestion would be contrary to the plain language of RCW 4.84.010(7).

It must be noted that prior to the enactment of RCW 4.84.010(7),⁴ a party's right to recover costs associated with the transcription of depositions was governed only by RCW 4.84.090. RCW 4.84.090 provided (and currently provides) that a prevailing party may recover "the necessary expenses of taking depositions, by commission or otherwise. . . ." Unlike RCW 4.84.010(7), RCW 4.84.090 does not mention the use of depositions "for impeachment purposes," nor does it direct a court to apportion the cost of depositions on a pro rata basis based on the portions of the depositions that were either introduced into evidence or used for impeachment purposes.

The idea that a deposition is compensable if it was taken and used for trial purposes appears to stem from a Supreme Court decision, *Platts v. Arney*, 46 Wn.2d 122, 128-129, 278 P.2d 657 (1955), which was issued prior to the enactment of RCW 4.84.010(7) and at a time when the only statute which related to a prevailing party's ability to recover costs for transcribing a deposition was RCW 4.84.090.⁵ Although *Platts* did not actually state that a deposition cost is not recoverable unless the deposition

⁴ Subsection (7) was added to RCW 4.84.010 in 1983. Prior to 1983, RCW 4.84.010 did not contain any references to deposition transcription fees, nor did it identify any other specific costs that could be awarded to a prevailing party in a superior court action. A copy of the Westlaw entry for RCW 4.84.010, which includes a summary of the history of the statute, is attached as Appendix One for the Court's convenience.

⁵ Lowe does not cite to *Platts*, but does cite to *Most Worshipful Price Hall*, a case which, itself, cited *Platts*. App. Br. at 5-6. See *Most Worshipful Price Hall*, 62 Wn.2d at 43 (citing *Platts*, 46 Wn.2d 122).

was taken and used for trial purposes, *Platts* did state that RCW 4.84.090 does not allow a prevailing party to recover the cost of a pretrial discovery deposition of either an adverse party or an adverse witness if the deposition was taken either “for the purpose of preparing for trial” or for “ascertaining his rights for his own benefit.” *See id.* at 129. The *Platts* Court, thus, ruled that a prevailing party was not entitled to the costs associated with the transcription of the two, pre-trial, discovery depositions that were taken in that case, one of which was not used at trial, and the other of which was used for impeachment purposes. *See id.* at 128-29.

The *Platts* Court noted that, at the time RCW 4.84.090 was enacted, the civil rules did not allow a party to take a discovery deposition of an adverse party, nor did they allow a party to take a discovery deposition of an adverse party’s witness. *Platts*, 46 Wn.2d at 129. Subsequent to the enactment of RCW 4.84.090, but prior to the issuance of the *Platts* opinion, the rules were amended to allow for such discovery depositions to take place. *See id.* While the *Platts* opinion does not expressly state this, it appears that the Court reasoned that the legislature could not have intended for RCW 4.84.090 to allow a party to recover costs associated with a discovery deposition of an adverse party or

witnesses, since the rules did not allow such depositions to be undertaken at the time that that statute was passed. *See id.*

Notably, RCW 4.84.010(7), which was enacted after the *Platts* decision was issued, expressly authorizes a party to recover those portions of a deposition that were used for impeachment purposes. *Compare* RCW 4.84.010(7) *with Platts*, 46 Wn.2d at 128-29. Furthermore, at the time that RCW 4.84.010(7) was enacted, the civil rules did authorize parties to take discovery depositions of adverse parties and witnesses. Thus, the *Platts* decision has been at least partially abrogated by statute, as it would be untenable to claim that a party may not recover any costs associated with depositions that were used at time of trial for impeachment purposes under the existing law given that RCW 4.84.010(7) expressly authorizes a prevailing party to be awarded such costs under such circumstances. *Compare* RCW 4.84.010(7) *with Platts*, 46 Wn.2d at 128-29.

In any event, the depositions that PCL took in this case were not discovery depositions that were taken merely to help PCL “prepare” for the case or to “ascertain” its rights. Rather, the depositions were originally taken as perpetuation depositions and were necessarily intended to be offered and used as substantive evidence during both the Board appeal and any subsequent court appeal. Thus, even assuming that *Platts*’s ruling that

pre-trial discovery depositions taken to prepare for a case or to ascertain a party's rights are not compensable is somehow binding in this case—notwithstanding the subsequent enactment of RCW 4.84.010(7)—PCL would still be entitled to recover the cost of transcribing its discovery depositions. *See Platts*, 46 Wn.2d at 128-29.

Lowe cites to *Most Worshipful Price Hall* in support of his claim that PCL should not have received its deposition transcription costs (App. Br. at 5), but a close reading of that case shows that it supports the Department and PCL, not Lowe. *Most Worshipful Price Hall*, 62 Wn.2d at 42-43. In that case, a prevailing party was awarded the cost of a deposition of a defendant who died prior to the trial because the deposition was introduced as evidence at the trial. *Id.* at 42-43. Lowe claims that “the mere use of a deposition at trial is insufficient to award costs, unless the deposition was taken for the purpose of that trial.” App. Br. at 6. *Most Worshipful Price Hall* did not hold that a party must establish that a deposition was both originally taken and actually used for trial purposes in order for the cost of transcribing that deposition to be recoverable. *Most Worshipful Price Hall*, 62 Wn.2d at 43. Rather, the *Most Worshipful Price Hall* Court noted that the appellants argued (relying on *Platts*) that a party's ability to be awarded those costs should depend “on the purpose for which it was taken and not the eventual use of it made at trial.” *Id.*

(citing *Platts*, 46 Wn.2d 122). The Court then observed that “[a]ssuming *this is true*, it does not help appellants.” (Emphasis added). *Id.* The Court then stated that, “Since the deposition was, in fact, introduced into evidence, we shall not presume that it was not taken for that purpose. Therefore, there was no error in taxing this item.” *Id.*

Thus, the Court did not hold that a deposition must have been originally taken with the intention of it being introduced into evidence at trial. *Id.* Rather, it said that, even assuming that the issue was whether a deposition was taken for trial purposes, a court should not presume that a deposition was not taken for trial purposes when it was, in fact, offered and used in its entirety at trial. *Id.* Thus, far from establishing that a party must demonstrate that a deposition was both originally taken and actually used for trial purposes, *Most Worshipful Price Hall* strongly suggests that the fact that a deposition was actually used at trial is dispositive as to whether the deposition was taken for that purpose. *Most Worshipful Price Hall*, 62 Wn.2d at 43. *See id.* Here, just as in *Most Worshipful Price Hall*, there is no reason for this Court to presume that PCL did not take its depositions for trial purposes when they were, in fact, used at the trial. *Id.*

Furthermore, it must be noted that *Most Worshipful Price Hall*, like *Platts*, was decided under RCW 4.84.090 rather than RCW 4.84.010(7). *Most Worshipful Price Hall*, 62 Wn.2d at 42-43;

Platts, 46 Wn.2d 128-29. To the extent that *Most Worshipful Price Hall* can be read as implying that a party must show that a deposition was originally taken for trial purposes in order for it to be recoverable (*Most Worshipful Price Hall*, 62 Wn.2d at 42-43), that aspect of the opinion has been abrogated by the enactment of RCW 4.84.010(7), since, under RCW 4.84.010(7), a party may recover costs for depositions that were actually used at time of trial either for impeachment purposes or as substantive evidence.

Tombari, another case cited by Lowe (App. Br. at 5), similarly fails to support his arguments. *Tombari*, 19 Wn. App. at 150. In *Tombari*, the prevailing party in a superior court action assigned error to the trial court's refusal to grant it costs including its deposition transcription expenses. *Id.* In that case, no witnesses testified at trial. *See id.* Rather, the superior court made a decision based on facts contained in a pre-trial order, a set of published depositions, and a set of exhibits. *Tombari*, 19 Wn. App. at 150.

The *Tombari* Court concluded that the depositions were taken and used for trial purposes and that the superior court erred when it denied the prevailing party its claimed expenses, citing *Most Worshipful Price Hall* in support of its conclusion. *Id.* (citing *Most Worshipful Price Hall*, 62 Wn.2d 28). The *Tombari* Court did not actually hold that a party is *not*

entitled to its deposition costs unless the depositions were both taken and used for trial purposes; rather, it stated that the depositions in that case were both taken and used for trial purposes and that it was error for the trial court to refuse to award such expenses to the prevailing party. *Id.*

Furthermore, to the extent that *Tombari* can be interpreted as implying that a party *does* have to show that a deposition was both taken and used for trial purposes, that aspect of the opinion is based on its interpretation of *Most Worshipful Price Hall*, a case that, as noted, did not hold that a deposition must be both taken and used for trial purposes for such costs to be recoverable. *Tombari*, 19 Wn. App. at 150 (citing *Most Worshipful Price Hall*, 62 Wn.2d 28). And *Tombari*, like *Most Worshipful Price Hall* and *Platts*, was decided under RCW 4.84.090, not RCW 4.84.010(7). *Most Worshipful Price Hall*, 62 Wn.2d at 42-43; *Platts*, 46 Wn.2d at 128-29; *Tombari*, 19 Wn. App. at 150.

As noted, RCW 4.84.010(7) plainly states that a party may recover transcription costs for portions of the depositions introduced into evidence or used for purposes of impeachment. Thus, to the extent that *Tombari* can be interpreted as implying that a party must independently establish that a deposition was taken for trial purposes rather than general discovery purposes, and that it is not sufficient for a party to show that a deposition was actually used for impeachment purposes or as substantive evidence,

its implication as to that issue has been superseded by that statute. *Compare* RCW 4.84.010(7) *with Tombari*, 19 Wn. App. at 150.

The *Kiewit-Grice* case cited by Lowe (App. Br. at 5), similarly, does not support him. *Kiewit-Grice*, 77 Wn. App. at 874. In *Kiewit-Grice* the prevailing party took several depositions but only used some of them at the trial. *Id.* The trial court awarded the prevailing party the cost of all of the transcripts that were generated, including the transcripts of depositions that were not used at trial. *Id.* The *Kiewit-Grice* Court noted that RCW 4.84.010(7) expressly states that “the expense of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment,” and it concluded that, under the plain language of that statute, it was error for a trial court to award costs associated with the transcription of depositions that were not used at trial. *Kiewit-Grice*, 77 Wn. App. at 874.

Here, all the depositions taken by PCL were “introduced into evidence” in their entirety at the trial, and the trial court considered all of them when it rendered its decision in the case. Just as the plain language of RCW 4.84.010(7) forbids a court from awarding a party costs based on transcripts or portions of transcripts that were not used at time of trial, the statute also plainly directs a court to award a party the costs associated with the portions of the deposition that were used at time of trial. Since,

here, all of the deposition transcripts were considered and used by the trial court when it decided the case, PCL was entitled to an award of all of the transcription costs associated with the taking of its depositions. RCW 4.84.010(7).

The *Kiewit-Grice* opinion does reference *Tombari* and its statement that a party is entitled to recovery of deposition costs if the deposition was “taken and used for trial purposes.” *Kiewit-Grice*, 77 Wn. App. at 874 (citing *Tombari*, 19 Wn. App. at 150). However, *Kiewit-Grice* did not actually state that a deposition cost is not recoverable unless it is shown that it was both taken and used for trial purposes. *Id.*

Moreover, the *Kiewit-Grice* Court did not resolve the issue of whether the prevailing party was entitled to its deposition transcription costs by determining whether any of the various depositions were originally taken for trial purposes. *Kiewit-Grice*, 77 Wn. App. at 874. Rather, the Court ruled that, under the plain language of RCW 4.84.010(7), a party is not entitled to recovery of depositions that were not used at time of trial, while it is entitled to recovery of the depositions that were so used. *Kiewit-Grice*, 77 Wn. App. at 874. As *Kiewit-Grice* did not purport to base its decision on any finding regarding whether the depositions were originally taken for trial purposes, the case cannot be reasonably construed as holding that deposition costs are not

recoverable unless the record shows that the depositions were originally taken for those purposes. *See id.*

It should also be noted that in *Gorman v. City of Woodinville*, 160 Wn. App. 759, 765, 249 P.3d 1040 (2011), the Court entered a footnote which explained, albeit in dicta, that “deposition costs are awardable only insofar as the depositions were used at trial.” Notably, *Gorman* describes *Kiewit-Grice’s* holding as “fees for deposition transcripts not used at trial not awardable under RCW 4.84.010” and it summarizes *Platts’s* holding as “fees for depositions taken in discovery but not used at trial not awardable under RCW 4.84.090.” *Gorman*, 160 Wn. App. at 765 (citing *Platts*, 46 Wn.2d 128-29, and *Kiewit-Grice*, 77 Wn. App. at 874). Thus, *Gorman* suggests that the key issue when determining whether the cost of transcribing a deposition is recoverable is whether the deposition was actually used at a trial, not whether it was originally taken for trial purposes. *Gorman*, 160 Wn. App. at 765.

Finally, even assuming for the sake of argument that Lowe is correct that a deposition must have been originally taken and actually used for trial purposes in order for it to be compensable, Lowe’s assertion that PCL was not entitled to recovery of its deposition transcription costs would still fail. Depositions can be, and often are, both taken and used for a variety of reasons. In the context of a worker’s compensation appeal, a

perpetuation deposition becomes part of the record that will be used by any trier of fact who is charged with deciding the case, including industrial appeals judges, the full Board, and superior court judges. *See* RCW 51.52.115 (providing that a superior court conducts a de novo review of a worker's compensation case, but does so based on the record generated at the Board); WAC 263-12-117 (providing that perpetuation deposition transcripts filed with Board become part of the Board's record). A party who takes a perpetuation deposition in a Board appeal necessarily takes it with the understanding that it will be used by the trial court if the Board's decision is appealed. Thus, laying the groundwork for a subsequent superior court appeal is, necessarily, *one* of the purposes for which a perpetuation deposition is taken, and such depositions are, therefore, "taken and used" for trial purposes.

3. Lowe fails to support his claim that the "purpose" of RCW 4.84 was to distinguish between cases in which a trial court hears an appeal from an administrative decision and cases in which the trial court hears a case as a court of original jurisdiction

Next, in an argument that appears to be related to his argument that depositions must be "taken and used" for trial purposes, Lowe argues that the "purpose of RCW 4.84" is "to shift only those costs actually incurred in presenting one's case to the superior court in its capacity as a trial court

of original jurisdiction.” App. Br. at 6. However, Lowe fails to support his claim that this is the “purpose” of RCW 4.84.

First, Lowe’s sweeping assertion that RCW 4.84’s “purpose” is for it to apply only to cases where a court acts in its capacity as a court of original jurisdiction is contrary to *Black*, *Ferencak*, and *Allan*, all of which held that RCW 4.84 applies, at least as a general matter, to superior court matters involving appeals from decisions of the Board in which the Department is a prevailing party. *Black*, 131 Wn.2d at 557-58; *Ferencak*, 142 Wn. App. at 729-30; *Allan*, 66 Wn. App. at 422-23.

Second, RCW 4.84.010 does not contain any language which distinguishes, even implicitly, between the costs that are available to a prevailing party when the trial court acted in an appellate capacity in a review from an administrative decision and the costs that are available to a prevailing party when a trial court acted pursuant to its original jurisdiction. Legislative intent is implemented by giving effect to the plain meaning of the language of a statute. *E.g.*, *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). As RCW 4.84.010 does not contain any language suggesting that the legislature intended to distinguish between the costs that are awardable when a superior court acts in an appellate capacity rather than pursuant to

its original jurisdiction, there is no basis to ascribe such an intention to the legislature.

Third, none of the cases cited by Lowe (App. Br. at 5-6) support the conclusion that the costs identified in RCW 4.84.010 (including deposition transcription costs) are only available when a court hears a matter in its capacity as a court of original jurisdiction. *See Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150. As explained above, none of the cases discussing depositions that were “taken and used for trial purposes” actually held that the cost of taking a deposition is not compensable unless it was originally taken with the intention of it being offered at trial. *See Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150. Furthermore, to the extent that those cases can be read as implying that such an intention is a necessary precondition for a deposition transcription cost to be recoverable, those opinions are contrary to the plain of language of RCW 4.84.010(7), which only requires that a deposition actually be used at time of trial. *Compare RCW 4.84.010(7) with Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150.

And, in any event, none of the cases cited by Lowe suggest that there is a distinction between matters in which a court acts in an appellate capacity and cases where it acts pursuant to its original jurisdiction. *See Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150. Rather, *at most*, those cases suggest that a distinction may be made between depositions that were taken and used purely for discovery-related purposes and depositions that were taken and used for trial-related purposes. *See Most Worshipful Price Hall*, 62 Wn.2d at 43; *Kiewit-Grice v. State*, 77 Wn. App. at 874; *Tombari v. Blankeship-Dixon Co.*, 19 Wn. App. at 150. *See also Platts*, 46 Wn.2d at 128-29. Even assuming that that distinction continues to be a valid one after the adoption of RCW 4.84.010(7)—and it is not—that distinction is inapplicable here, as the depositions at issue in this case were not taken and used for discovery-related purposes. Rather, they were taken with the intention that they be used as substantive evidence, and they were considered and relied upon as such by both the Board and the trial court.

4. The fact that PCL took depositions while the case was before the Board does not make the cost of transcribing them non-recoverable, since the deposition was used as evidence at the trial

Lowé notes that depositions that are taken in an industrial insurance matter are transmitted to a superior court when a superior court appeal is filed, and that the party who took the deposition does not incur an additional expense when those transcripts are transmitted to the superior court. App. Br. at 7-9. Lowé argues that when the Board incorporated PCL's depositions into its administrative record, this altered "the essential nature of the depositions" in a way that somehow precludes the cost of transcribing them from being awardable. *See* App. Br. at 8.

While Lowé is correct that perpetuation depositions become part of the Board's record and that they are transmitted to a superior court when such an appeal is filed, it does not follow that PCL's deposition transcription costs are not recoverable under RCW 4.84.010(7) when an employer prevails in a case involving a superior court appeal from a Board decision. The depositions that were taken by PCL did not cease to be depositions simply because the Board incorporated them into its administrative record. Rather, they became depositions that were part of the Board's record. They are, in this sense, no different from depositions that are taken while a matter is pending before a superior court and that are

subsequently introduced into evidence at a trial: depositions that are introduced into evidence at a trial and that become part of the superior court's record are, nonetheless, depositions, and so, too, are depositions that become part of the Board's administrative record.

Furthermore, RCW 4.84.010(7) requires that a party's deposition transcription costs be "necessary to achieve a successful result" and it provides that the costs of the depositions "shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence." The statute does not mandate that the deposition cost be incurred at some time after a superior court appeal was filed. Rather, it requires that the deposition be "necessary" to the result that was achieved and that it be "introduced into evidence" (or used for impeachment purposes) at the trial. Here, the depositions were necessary to PCL securing a successful result, as they were the sole evidence it relied on in this case, and the depositions were "introduced into evidence" during the trial. The statute requires nothing more, and, therefore, the costs were properly awarded to PCL. RCW 4.84.010(7).

Lowe also argues that neither WAC 263-12-117(2) nor any other regulation adopted by the Board authorizes a prevailing party to be awarded its deposition transcription costs in a Board appeal. App. Br. at 9. He appears to suggest that since WAC 263-12-117(2) does not

provide for such an award when a party prevails before the Board, a superior court may not make such a cost award when the Department or an employer prevails at superior court. *See* App. Br. at 9.

However, WAC 263-12-117(2) is a regulation that was adopted by the Board pursuant to the limited authority granted to it by the Industrial Insurance Act. WAC 263-12-117(2) does not purport to apply to superior court proceedings, nor would the Board have the authority, under the Act, to adopt a regulation which limits a superior court's ability to make cost awards under RCW 4.84.010. Thus, while WAC 263-12-117(2) provides that the Board will not award a party its deposition transcription costs to a party that prevails in a Board appeal, this in no way precludes a superior court from awarding a party its deposition transcription costs when that party prevails in a superior court appeal from a Board decision.

5. It is not contrary to the purpose of the Industrial Insurance Act to allow an employer who is a prevailing party to receive the costs specified under RCW 4.84.010

Finally, Lowe argues that it would be contrary to the Industrial Insurance Act to allow an employer who prevails at superior court to receive its deposition transcription costs, since RCW 51.52.130 only provides for attorney's fees and litigation expenses to *workers* who prevail in such appeal. App. Br. at 9-13. However, a virtually identical argument was made, and rejected, in *Ferencak*. *Ferencak*, 142 Wn. App. at 729-30.

The worker in the *Ferencak* case argued that since RCW 51.52.130 governs cost and fee awards in court appeals involving industrial insurance matters, and since that statute allows for costs and fees to be awarded to workers but does not provide for such awards to the Department or employers, it would be contrary to that statute to allow the Department to recover any of its costs, including statutory attorney's fees. *Ferencak*, 142 Wn. App. at 729-30.

The *Ferencak* Court rejected that argument, concluding that there is no conflict between RCW 51.52.130 and RCW 4.84.010 that would warrant denying the Department a cost award under RCW 4.84.010 simply because RCW 51.52.130 did not provide for one. *Id.* The Court noted that the two statutes govern completely different *types* of cost and fee awards, and that as RCW 51.52.140 provides that the rules of civil procedure apply to worker's compensation matters, the Department remains entitled to a statutory attorney fee award under RCW 4.84.010 even though RCW 51.52.130 does not expressly authorize any sort of cost or fee award being made to it. *Id.*

While Lowe, here, does not challenge PCL's right to an award of its statutory attorney's fees (App. Br. at 1), he challenges its award of its deposition transcription costs under a rationale similar to the one relied on by the worker in *Ferencak*: namely, that RCW 51.52.130 somehow

precludes the Department or an employer from receiving any award of litigation costs, including the awards that a prevailing party is entitled to under RCW 4.84.010. *See Ferencak*, 142 Wn. App. at 729-30. His argument fails for the same reason that the worker's argument in that case failed: there is no conflict between RCW 51.52.130 and RCW 4.84.010. While PCL cannot claim reasonable attorney's fees or litigation expenses under RCW 51.52.130 when they prevail in worker's compensation matters, it is, nonetheless, entitled to the costs that are allowed to a prevailing party under RCW 4.84.010. *See Ferencak*, 142 Wn. App. at 729-30.

Lowe cites to *Seattle School District No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 363-64, 804 P.2d 621 (1991), in support of this contention (App. Br. at 10), but his reliance on that case is misplaced, as it is readily distinguishable. In that case, an employer who prevailed in a superior court action sought an award of reasonable attorney's fees under RCW 51.52.130, not simply an award of its costs under RCW 4.84.010. *Id.* Moreover, the employer argued that RCW 51.52.130 was unconstitutional to the extent that it precluded it from receiving its reasonable attorney's fees when it prevailed. *Id.* The Court rejected the employer's argument, concluding that an employer and a worker are not similarly situated, and, therefore, it is constitutional for the legislature to

make workers eligible for awards of their reasonable attorney's fees when they prevail on appeal, while not making employers eligible for such awards when they prevail in a similar appeal. *Seattle School District No. 1*, 116 Wn.2d at 363-64.

Here, neither the Department nor PCL contend that PCL is entitled to an award of its reasonable attorney's fees and litigation expenses under RCW 51.52.130, nor do they contend that RCW 51.52.130 is unconstitutional. Rather, the Department and PCL contend that PCL may receive costs under RCW 4.84.010 like any other prevailing party in a superior court case, a conclusion that the Washington Supreme Court has endorsed, at least as a general matter, in *Black*. See *Black*, 131 Wn.2d at 557-58 (concluding that the Department is entitled to an award of statutory attorney's fees under RCW 4.84.010 when it prevails in a superior court matter).

Lowe also argues that RCW 4.84.010(7) should be liberally construed in the manner most beneficial to injured workers to the extent that this Court sees any ambiguity in its language. App. Br. at 12-13. However, while it is true that the Industrial Insurance Act is subject to liberal construction, the central issue in this case turns on the proper construction of RCW 4.84.010(7), which is not part of the Industrial

Insurance Act and which is not, therefore, subject to that rule of construction.

Furthermore, RCW 4.84.010(7) is not ambiguous, as it plainly supports the award of deposition transcription costs to PCL. Liberal construction does not authorize courts to either ignore the plain language of a statute or interpret it in an unrealistic or unreasonable manner. *Senate Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Here, there is no ambiguity between RCW 4.84.030's provision that all prevailing parties are entitled to an award of costs (including deposition transcription costs under RCW 4.84.010(7)) and RCW 51.52.130's silence as to whether an employer is entitled to its costs (including deposition transcription costs) when it prevails. Lowe's attempt to read language into RCW 51.52.130 that is not present in that statute cannot be supported by the principle of "liberal construction."

B. Lowe Would Not Be Entitled To An Award Of His Reasonable Attorneys' Fees Under RCW 51.52.130 Even If This Court Concludes That The Trial Court Erred When It Awarded PCL Its Deposition Costs

Lowe argues that he is entitled to an award of his reasonable attorneys' fees under RCW 51.52.130 if this Court reverses the trial court's award of deposition transcription fees to PCL. App. Br. at 13. As

the Department explained above, the trial court did not err when it awarded PCL its deposition transcription costs. However, even assuming that this Court concludes that the trial court erred when it awarded PCL those costs, Lowe would still not be entitled to an award of reasonable attorneys fees under the plain language of RCW 51.52.130.

RCW 51.52.130 provides, in pertinent part, as follows:

If in a worker or beneficiary appeal the decision of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained...the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the Department.

Under the plain language of the statute, a worker only receives an award of attorney's fees and litigation expenses in two circumstances: first, the worker is entitled to such an award if the worker appeals a decision of the Board to the courts and, as a result of the appeal, the Board's decision is reversed and the accident fund or medical aid fund is affected. RCW 51.52.130; *see also Hi-Way Fuel Co. v. Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). Second, the worker is entitled to such an award if the Department or an employer appeals a decision of the Board to the courts and the worker's right to relief is sustained on appeal. RCW 51.52.130; *Allyn*, 128 Wn. App. at 363-64.

Here, it was Lowe who appealed the Board's decision to superior court, and it is Lowe who appealed the superior court's decision to this Court. Thus, under the plain language of RCW 51.52.130, Lowe would only be entitled to an award of reasonable attorney's fees and costs if he secured, on appeal, a reversal of the Board's decision (and the Board's decision was reversed in a way that results in an impact on the medical aid fund or the accident fund). RCW 51.52.130.

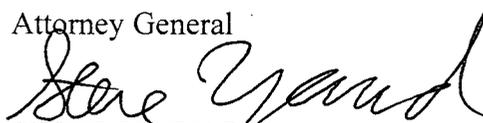
Even if this Court reverses the superior court's grant to PCL of its deposition transcription costs, the Board's decision, itself, would remain affirmed. Lowe did not assign error to the superior court's affirmation of the Board's order, and he did not ask this Court to reverse the trial court's affirmation of the Board's decision. Since a claimant who appealed a decision of the Board to the courts is not eligible for an award of costs and fees under RCW 51.52.130 unless the appeal results in a reversal of the Board's decision, and since Lowe does not seek such a reversal, he would not be entitled to reasonable attorney's fees under the plain language of that statute even if this Court concludes that the deposition transcription costs should not have been awarded to PCL. Therefore, this Court should deny Lowe's request for reasonable attorney's fees and costs under RCW 51.52.130 even if it agrees with Lowe with regard to whether PCL was properly awarded its deposition transcription costs.

VI. CONCLUSION

For the reasons discussed above, PCL and the Department ask that this Court affirm the decision of the superior court, and that, specifically, it uphold the superior court's grant to PCL of its deposition transcription costs.

RESPECTFULLY SUBMITTED this 5 day of October, 2012.

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C

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.84. Costs (Refs & Annos)

→ → 4.84.010. Costs allowed to prevailing party--Defined--Compensation of attorneys

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
 - (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
 - (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (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 evidence or used for purposes of impeachment.

Westlaw Delivery Summary Report for VINYARD,STEVE

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CREDIT(S)

[2009 c 240 § 1, eff. July 26, 2009; 2007 c 121 § 1, eff. July 22, 2007; 1993 c 48 § 1; 1984 c 258 § 92; 1983 1st ex.s. c 45 § 7; Code 1881 § 505; 1877 p 108 § 509; 1869 p 123 § 459; 1854 p 201 § 367; RRS § 474.]

HISTORICAL AND STATUTORY NOTES

Court Improvement Act of 1984--Effective dates--Severability--Short title--1984 c 258: See notes following RCW 3.30.010.

Laws 1983, 1st Ex.Sess., ch. 45, § 7, rewrote this section, which formerly read:

“The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.”

Laws 1984, ch. 258, § 92, added the qualifying phrase to subsec. (4), relating to notary fees; and included costs incurred in mandatory arbitration in the definition of costs.

Laws 1993, ch. 48, § 1, in subsec. (2), in the introductory paragraph, added “by a public officer, registered process server, or other means, as follows:” and added subsds. (a) and (b).

2007 Legislation

Laws 2007, ch. 121, § 1 rewrote subsec. (2)(b), which formerly read:

“(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount reasonably incurred in effecting service;”

2009 Legislation

Laws 2009, ch. 240, § 1, in the introductory paragraph, following “sums” deleted “by way of indemnity”.

Source:

Laws 1854, p. 201, § 367.

Laws 1869, p. 123, § 459.

Laws 1877, p. 108, § 509.

RRS § 474.

CROSS REFERENCES

- Appeals from board of industrial insurance appeal, attorneys' fees, see §§ 51.52.130, 51.52.132.
- Attorneys' fee provisions,
 - Abandonment of cemetery lots, see § 68.36.050.
 - Assignment for benefit of creditors, see § 7.08.010.
 - Attachment bond, action on, see § 6.25.100.
 - Bond validity proceedings, see § 7.25.020.
 - Disclaimer and deposit in court in actions to determine conflicting claims to property, see § 4.08.170.
 - Employee's lien enforcement (employer default in employee benefit payments), see § 60.76.040.
 - Enforcement of lien, see § 60.40.010 et seq.
 - Garnishment proceedings, see §§ 6.26.030, 6.27.230.
 - Industrial insurance, actions at law for injury or death against third persons, see § 51.24.030 et seq.
 - Interstate compact on juveniles, see § 13.24.050.
 - Partition proceedings, see § 7.52.480.
 - Waste by guardian or tenant, see § 64.12.020.
 - Will contests, see § 11.24.050.
- Cost provisions in civil actions,
 - Adverse claim to property levied on, see § 6.19.060.
 - Agreed cases, see § 4.52.020.
 - Bonds or security required determined by court, see § 4.44.470.
 - County liability for, see § 36.01.060.
 - Crop liens, see § 60.11.010 et seq.
 - Executions, see § 6.17.060.
 - Executions against homesteads, see § 6.13.200.
 - Garnishment, see § 6.27.010 et seq.
 - Industrial insurance cases, see § 51.52.120 et seq.
 - Jury trial, see § 4.44.110.
 - Labor lien on orchards and lands, see § 60.16.030.
 - Partition, see § 7.52.010 et seq.
 - Quo warranto, see § 7.56.010 et seq.
 - Suit to establish lost or uncertain boundary, see § 58.04.020.
 - Supplemental proceedings, see §§ 6.32.160, 6.32.170.
- Judgment for costs, attorney's fee, see § 12.20.060.
- Probate proceedings,
 - Generally, see § 11.48.210.
 - Accountings, compelling or contesting, see § 11.76.070.
 - Claims against estate, see §§ 11.40.010, 11.40.020 et seq.
 - Personal representative, wrongdoing, discovery proceedings, see § 11.48.070.
 - Salaried attorney or bank or trust company, see § 11.36.010.

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Award of attorney fees in civil litigation. Philip A. Talmage, 16 Gonz.L.Rev. 57, 185 (1980).

Survey of Washington law: allowance of attorneys' fees under common fund doctrine to parties challenging disbursements of public funds under unconstitutional legislation. 10 Gonz.L.Rev. 236 (1974).

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C.J.S. Costs §§ 6, 10 to 14, 94 to 97, 99 to 101, 105 to 130, 132.

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34 ALR 6th 431, Recoverable Costs Under State Offer of Judgment Rule.

87 ALR 3rd 429, Insured's Right to Recover Attorneys' Fees Incurred in Declaratory Judgment Action to Determine Existence of Coverage Under Liability Policy.

106 ALR 928, Costs or Reimbursement for Expenses Incident to Election Contest or Recount.

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84 Am. Jur. Trials 367, Using Taxation of Costs to Collect Some Litigation Expenses and Maximize Client Recovery.

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4 Wash. Prac. Series CR 54, Judgments and Costs.

9 Wash. Prac. Series § 8.21, Complaint--General Form.

10 Wash. Prac. Series § 41.72, Declaration in Support of Motion for Payment of Costs and Stay of Proceedings.

10 Wash. Prac. Series § 53.1.62, Declaration in Support of Motion to Affirm Referee's Report and for Judgment.

16 Wash. Prac. Series § 7.10, The Consumer Protection Act--Remedies.

20 Wash. Prac. Series § 40.2, Basis for Award--Need, Ability, and Related Factors.

27 Wash. Prac. Series § 1.49, Private CAA Actions Under the Consumer Protection Act (CPA).

27 Wash. Prac. Series § 5.131, Costs and Attorney Fees.

29 Wash. Prac. Series § 5:7, Remedies--Costs.

14A Wash. Prac. Series § 36:1, Costs Generally--Terminology, Pleading, Bond or Other Security.

14A Wash. Prac. Series § 37:7, Basis for Award--Insurance Contracts--Olympic Steamship.

14A Wash. Prac. Series § 36:14, Cost Bill--Generally.

14A Wash. Prac. Series § 36:17, Allowable Costs--Generally.

15A Wash. Prac. Series § 71.1, Introduction and Overview.

15A Wash. Prac. Series § 71.7, Expenses Recoverable--Traditional Costs.

15A Wash. Prac. Series § 79.2, Attorney Fees and Costs.

15A Wash. Prac. Series § 79.19, Costs and Attorney Fees--Costs, Attorney Fees, and Sanctions.

UNITED STATES SUPREME COURT

Indigents costs, Connecticut statute, which provided that in paternity actions cost of blood grouping tests is to be borne by party requesting them, denied due process when applied to deny such tests to indigent defendant, in view of unique quality of blood grouping tests as source of exculpatory evidence, state of Connecticut's prominent role in litigation, and character of paternity suits under Connecticut law, see *Little v. Streater*, U.S.Conn.1981, 101 S.Ct. 2202, 452 U.S. 1, 68 L.Ed.2d 627.

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1. In general

Right to costs is generally statutory; however, this is true only in absence of agreement concerning costs

between parties. *Ernst Home Center, Inc. v. Sato* (1996) 80 Wash.App. 473, 910 P.2d 486. Costs ☞ 4; Costs ☞ 10

Under American rule, fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote* (1996) 128 Wash.2d 408, 908 P.2d 884. Costs ☞ 2; Costs ☞ 194.16

Right to costs is substantive right, purely a matter of statutory regulation. *Gerken v. Mutual of Enumclaw Ins. Co.* (1994) 74 Wash.App. 220, 872 P.2d 1108, review denied 125 Wash.2d 1005, 886 P.2d 1134. Costs ☞ 3

Items allowable as costs include filing fees, costs of service of process, notary fees, costs of reports and records as evidence, statutory attorney and witness fees, costs of transcription of depositions used at trial or arbitration and costs otherwise authorized by law. *Gerken v. Mutual of Enumclaw Ins. Co.* (1994) 74 Wash.App. 220, 872 P.2d 1108, review denied 125 Wash.2d 1005, 886 P.2d 1134. Costs ☞ 146

“Costs” which may be awarded in declaratory judgment proceedings do not include attorneys' fees other than statutory fees. *Rocky Mountain Fire & Cas. Co. v. Rose* (1963) 62 Wash.2d 896, 385 P.2d 45. Costs ☞ 194.40

Right to costs is purely statutory. *State ex rel. Lemon v. Coffin* (1958) 52 Wash.2d 894, 327 P.2d 741, opinion clarified 52 Wash.2d 894, 332 P.2d 1096. Costs ☞ 3

Costs, which are taxed by clerk, are not part of judgment at time it is rendered. *Hatzenbuhler v. Harrison* (1957) 49 Wash.2d 691, 306 P.2d 745. Judgment ☞ 224

Right to costs is not matter of procedure but is substantive right, and it is purely matter of statutory regulation. *Platts v. Arney* (1955) 46 Wash.2d 122, 278 P.2d 657. Costs ☞ 2

Costs are allowances to party for expense incurred in prosecuting or defending suit, and in absence of statute or agreement costs do not include counsel fees. *Fiorito v. Goerig* (1947) 27 Wash.2d 615, 179 P.2d 316.

Term “costs” is broad comprehensive term, which includes filing fees. *State ex rel. Hamilton v. Ayer* (1938) 194 Wash. 165, 77 P.2d 610.

2. Construction and application

Award to ship owner of costs it incurred in defending initial Jones Act action brought against it by seaman, which seaman had voluntarily dismissed without prejudice, was governed by rule addressing costs of previously dismissed action, rather than more limited, general statute governing costs allowed to prevailing party, and, thus, ship owner was properly awarded costs it incurred in defending first action, after seaman filed second, identical

action against owner; rule did not reference statute, which evidenced legislature's intent not to limit cost recovery authorized by the rule to costs authorized by the statute, and rule conferred discretion on trial court to award costs without limiting them to those authorized by the statute. *Johnson v. Horizon Fisheries, LLC* (2009) 148 Wash.App. 628, 201 P.3d 346. Seamen ↪ 29(5)

In awarding relief to homeowners for siding manufacturer's violations of Consumer Protection Act (CPA), trial court was required to limit award of costs as enumerated in statute providing for award of costs to prevailing party. *Mayer v. Sto Industries, Inc.* (2004) 123 Wash.App. 443, 98 P.3d 116, review granted 155 Wash.2d 1008, 122 P.3d 912, affirmed in part, reversed in part 156 Wash.2d 677, 132 P.3d 115. Antitrust And Trade Regulation ↪ 396

Provision in public records act requiring that any person who prevails in action against an agency be awarded "all costs" provides for a more liberal recovery of costs than does statute that governs recovery of costs generally; public records act provision permits prevailing party to recover all reasonable costs incurred in litigating dispute. *American Civil Liberties Union of Washington v. Blaine School Dist. No. 503* (1999) 95 Wash.App. 106, 975 P.2d 536. Records ↪ 68

Postage and photocopying costs were not authorized in dissolution action under statute governing costs allowed to prevailing party. *Matter of Marriage of Van Camp* (1996) 82 Wash.App. 339, 918 P.2d 509, review denied 130 Wash.2d 1019, 928 P.2d 416. Divorce ↪ 1156

In employment discrimination action under law against discrimination, trial court improperly limited award of costs to successful plaintiff to those costs allowed by general costs statute. *Martinez v. City of Tacoma* (1996) 81 Wash.App. 228, 914 P.2d 86, review denied 130 Wash.2d 1010, 928 P.2d 415. Civil Rights ↪ 1773

When parties have entered into agreement regarding costs, costs are "otherwise authorized by law" within meaning of statute determining costs. *Ernst Home Center, Inc. v. Sato* (1996) 80 Wash.App. 473, 910 P.2d 486. Costs ↪ 10

Absent statute that expressly allows expanded cost recovery, plaintiffs are not entitled to recover costs beyond narrow range of statutorily defined expenses such as filing fees, witness fees, and services of process expenses. *Hume v. American Disposal Co.* (1994) 124 Wash.2d 656, 880 P.2d 988, reconsideration denied, certiorari denied 115 S.Ct. 905, 513 U.S. 1112, 130 L.Ed.2d 788. Costs ↪ 146

Statutorily defined costs include specific fees prevailing party has incurred; cost bills should not be inflated to recover additional fees. *Gerken v. Mutual of Enumclaw Ins. Co.* (1994) 74 Wash.App. 220, 872 P.2d 1108, review denied 125 Wash.2d 1005, 886 P.2d 1134. Costs ↪ 146

Successful Consumer Protection Act plaintiff was not entitled to award of cost items not recoverable as statutory costs. *Evergreen Intern. Inc. v. American Cas. Co. of Reading, Pa.* (1988) 52 Wash.App. 548, 761 P.2d 964. Antitrust And Trade Regulation ↪ 396

Term "taxable costs" as used in CR 41(d) providing that if a plaintiff dismisses an action and commences another action based on or including the same claim against the same defendant the court may make such order for payment of taxable costs of the action previously dismissed as it deems proper does not include award of attorney fees. *Hall v. Stolte* (1979) 24 Wash.App. 423, 601 P.2d 967. Pretrial Procedure ⚡ 516

Expenditures by plaintiff in lien foreclosure action for title search are not recoverable as costs in such action, since costs, absent contractual provision, is matter governed by statute, and neither lien statute (§ 60.04.130) nor this section authorize reimbursement of moneys expended on title report. *Washington Asphalt Co. v. Boyd* (1964) 63 Wash.2d 690, 388 P.2d 965.

Allowance of costs is governed by statute, and prayer for them in complaint is unnecessary to warrant their inclusion in judgment for plaintiffs. *Lujan v. Santoya* (1952) 41 Wash.2d 499, 250 P.2d 543. Costs ⚡ 3; Judgment ⚡ 253(2)

"Costs" are allowances to party for expense incurred in prosecuting or defending suit; and in absence of statute or agreement, term does not include counsel fees. *State ex rel. Macri v. City of Bremerton* (1941) 8 Wash.2d 93, 111 P.2d 612. Costs ⚡ 2; Costs ⚡ 194.16

Term "costs," as used in this statute only applies to costs fixed by statute, and not to compensation of attorneys as agreed on. *Commercial State Bank v. Curtis* (1941) 7 Wash.2d 296, 109 P.2d 558.

While terms "costs" and "fees" are not synonyms, they are often used interchangeably as having same application. *State ex rel. Hamilton v. Ayer* (1938) 194 Wash. 165, 77 P.2d 610. Costs ⚡ 146

3. Attorney fees--In general

Attorney fees awarded to homeowners association in settlement of construction defect case against insured condominium builder were not "costs taxed against the insured" and, therefore, were not "supplementary payments" payable by liability insurer above policy limits, even though insured included a claim in its original suit against insurer for the "litigation costs" portion of the settlement; "costs taxed" was intended to have legal meaning which excluded reasonable attorney fees. *Polygon Northwest Co. v. American Nat. Fire Ins. Co.* (2008) 143 Wash.App. 753, 189 P.3d 777, review denied 164 Wash.2d 1033, 197 P.3d 1184. Insurance ⚡ 2270(1)

The right to reasonable attorney fees is not limited by the statute entitling the prevailing party to costs; the phrase "reasonable attorney fees" in and of itself supports an award not limited by "costs" to which a prevailing party is statutorily entitled. *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.* (2001) 144 Wash.2d 130, 26 P.3d 910. Costs ⚡ 194.22

Trial court did not abuse its discretion in denying attorney fees to prevailing party in unlawful detainer proceeding as trial court was entitled to conclude that moorage owner acted neither oppressively or with bad faith. *Lee v. Sauvage* (1984) 38 Wash.App. 699, 689 P.2d 404. Forcible Entry And Detainer ⚡ 47

Purchaser of office building property was not entitled to attorney fees from vendor in action for breach of covenant of warranty and peaceful possession, where vendor had not been notified of purchaser's settlement of adjoining landowner's encroachment claim, nor given opportunity to defend against such claim, and there was no private agreement, statute, or basis in equity for such award. *Mellor v. Chamberlin* (1983) 100 Wash.2d 643, 673 P.2d 610. Costs ⤵ 194.36; Covenants ⤵ 132(2)

Attorney fees may be recovered only when authorized by private agreement of parties, statute, or recognized ground of equity. *Pennsylvania Life Ins. Co. v. Employment Sec. Dept.* (1982) 97 Wash.2d 412, 645 P.2d 693. Costs ⤵ 194.16

Attorney fees are considered costs of litigation. *Detonics .45 Associates v. Bank of California* (1982) 97 Wash.2d 351, 644 P.2d 1170. Costs ⤵ 194.10

Lessee of restaurant premises which prevailed in suit for specific performance of its option right to a new five-year lease term was not entitled to recover actual costs and attorney fees. *Wharf Restaurant, Inc. v. Port of Seattle* (1979) 24 Wash.App. 601, 605 P.2d 334. Specific Performance ⤵ 134

In absence of contract, statute, or recognized ground of equity, court has no power to award attorneys' fees as part of costs of litigation to any of parties to transaction from which cause of action arose. *Armstrong Const. Co. v. Thomson* (1964) 64 Wash.2d 191, 390 P.2d 976. Costs ⤵ 194.16

Successful litigant in ordinary civil action may recover only such attorney fees as statute or agreement of party provides shall be taxed as costs in action. *State ex rel. Macri v. City of Bremerton* (1941) 8 Wash.2d 93, 111 P.2d 612. Mandamus ⤵ 1; Mandamus ⤵ 190

In action for accounting between parties to joint venture, court has no power to assess attorneys' fees or charges of accountants in absence of any statute providing therefor. *Schoenwald v. Diamond K. Packing Co.* (1937) 192 Wash. 409, 73 P.2d 748.

If doctrine of champerty ever obtained foothold in this state, it was repealed by this statute, insofar as such doctrine related to contracts between attorneys and clients. *Weed v. Foster* (1910) 58 Wash. 675, 109 P. 123.

In action for partition of real estate, attorneys' fees outside statutory fee could not be allowed or taxed as part of costs or disbursements provided for by Bal.Code (1897) § 5604 (now § 7.52.480) especially in view of the statute leaving attorneys' fees to agreement of parties. *Legg v. Legg* (1904) 34 Wash. 132, 75 P. 130.

In action at law, court can impose no cost by way of attorney's fee excepting such as are expressly provided by statute. *Larson v. Winder* (1896) 14 Wash. 647, 45 P. 315. Costs ⤵ 194.16

4. ---- Agreement of the parties, attorney fees

Federal courts are required to apply state law in diversity actions with regard to the allowance or disallowance of attorney fees; under the law of Washington, where there is no specific statutory authorization for recovery of attorney fees, the measure and mode of attorney's compensation is to be decided by the agreement of the parties. *Michael-Regan Co., Inc. v. Lindell*, C.A.9 (Cal.)1975, 527 F.2d 653.

Borrower's request that lender seeking to enforce usurious law not recover attorney fees or costs stripped lender of contractual right to award of costs and it was required to bear its own costs and attorney fees and, in addition, to pay the amounts due the borrower for penalties, costs, and attorney fees. *Aetna Finance Co. v. Darwin* (1984) 38 Wash.App. 921, 691 P.2d 581, review denied. Usury ⤴ 125

Shareholders and trustees of assets of utility company were not entitled to attorney fees on appeal, based on sale and arbitration agreement, where agreement spoke of action to specifically compel commissioners to increase water rates to cover payments to shareholders and trustees, while instant action was originally to show cause why district should not be required to pay shareholders and trustees the initial \$30,000 down payment, not to compel commissioners to make possible payments to shareholders and trustees. *Liberty Lake Sewer Dist. No. 1 v. Liberty Lake Utilities Co., Inc.* (1984) 37 Wash.App. 809, 683 P.2d 1117, review denied. Costs ⤴ 252

Where equipment lease agreement provided for payment of attorney fees, trial court did not abuse its discretion in awarding such fees. *Northwest Acceptance Corp. v. Hesco Const., Inc.* (1980) 26 Wash.App. 823, 614 P.2d 1302. Costs ⤴ 194.34

Mortgagee of interest of contract vendee of real property, as opposed to assignee or grantee of such interest, is not bound by provisions in contract providing for reasonable attorneys' fees in event of litigation to terminate the contract. *Kendrick v. Davis* (1969) 75 Wash.2d 456, 452 P.2d 222.

It was intent of parties to four promissory notes that attorney's fees be allowed in event suit for action was instituted on any of notes, where on two of notes makers had inserted word "we" in blank preceding printed promise to pay such fees, and in other two notes nothing had been inserted in blank preceding promise, but neither had printed clause been deleted. *Peoples Nat. Bank of Wash. v. National Bank of Commerce of Seattle* (1966) 69 Wash.2d 682, 420 P.2d 208.

When lawyers are employed by express contract, they are entitled to compensation for services rendered to their clients; in absence of express agreement as to amount of compensation which they are to receive, they are entitled to reasonable compensation for services rendered. *Purvis v. Public Utility Dist. No. 1 of Kitsap County* (1957) 50 Wash.2d 204, 310 P.2d 233.

As general rule, allowances of attorneys' fees and other expenses in preparing for trial, such as accountants' fees, will be allowed only in case of agreement between parties or by virtue of specific authority. *Fiorito v. Goerig* (1947) 27 Wash.2d 615, 179 P.2d 316. Costs ⤴ 194.16

In action based in part on promissory note providing for reasonable attorney's fee, fee is properly allowed as

against property on which lien was claimed. *Hawley v. Priest Rapids Ice & Cold Storage Co.* (1933) 172 Wash. 71, 19 P.2d 400.

On foreclosure of mortgage securing payment of principal sum and interest according to terms and conditions of two promissory notes which provided for reasonable attorneys' fees, superior court is authorized to fix reasonable sum for attorneys' fees to be included in judgment and made lien on mortgaged property, in view of provisions of this and succeeding section. *Matson v. Frank* (1915) 86 Wash. 669, 151 P. 89.

Where space left in printed form for note for inserting amount of attorney's fee was left blank by drawing pen across blank, note clearly indicates that no attorney's fee is to be allowed. *Scandinavian-American Bank v. Long* (1913) 75 Wash. 270, 134 P. 913. Bills And Notes ↪ 534

5. ---- Statutory attorney and witness fees

In view of fact that claims under federal securities law, state securities law, and other state laws overlapped to the extent that claims on which plaintiff did not prevail were insignificant, it was appropriate for trial court to award attorney fees for all time reasonably spent in litigating the matter. *Burgess v. Premier Corp., C.A.9* (Wash.)1984, 727 F.2d 826. Securities Regulation ↪ 157.1; Securities Regulation ↪ 309

Award of costs to employees who prevailed in establishing violations of Minimum Wage Act by employer was governed by Minimum Wage Act provision which authorized expanded costs "as may be allowed by the court," rather than more limited, general statute, and thus employees were properly awarded costs for expert witnesses, depositions and transcripts not used at trial, travel expenses, mediation fees, ordinary office expenses, and parking. *McConnell v. Mothers Work, Inc.* (2006) 131 Wash.App. 525, 128 P.3d 128. Labor And Employment ↪ 2402

State could recover attorney fees as prevailing party in action under Uniform Reciprocal Enforcement of Support Act (URESA), even though state made no formal request in its complaint or other pleadings. *State ex rel. A.N.C. v. Grenley* (1998) 91 Wash.App. 919, 959 P.2d 1130, review denied 136 Wash.2d 1031, 972 P.2d 467. Child Support ↪ 509(1)

Because the allowance of costs, including attorney fees, is governed by statute, it is not necessary that the plaintiff include a request for fees in the complaint. *State ex rel. A.N.C. v. Grenley* (1998) 91 Wash.App. 919, 959 P.2d 1130, review denied 136 Wash.2d 1031, 972 P.2d 467. Costs ↪ 199

Statute providing that superior court may order costs, including attorney fees, to be paid by any party or out of assets of estate as justice may require did not authorize only statutory attorney fees. *Matter of Estate of Mathwig* (1993) 68 Wash.App. 472, 843 P.2d 1112, review denied 121 Wash.2d 1030, 856 P.2d 382. Executors And Administrators ↪ 257

There is no constitutional right to attorney fees, and any award of fees must be based on a statute. *City of Ever-*

ett v. Weborg (1984) 39 Wash.App. 10, 691 P.2d 242. Costs ⚡ 194.16

Where city was liable to landowners under 42 U.S.C.A. § 1983 for violating their civil rights in providing inadequate notice of foreclosure proceedings on irrigation assessment liens against their properties, landowners were entitled to reasonable attorney fees, and good faith on part of city was not special circumstance justifying denial of attorney fees. Brower v. Wells (1984) 103 Wash.2d 96, 690 P.2d 1144, reconsideration denied. Civil Rights ⚡ 1482

Prevailing plaintiff in action under 42 U.S.C.A. § 1983 should recover attorney fees unless special circumstances render such an award unjust. Brower v. Wells (1984) 103 Wash.2d 96, 690 P.2d 1144, reconsideration denied. Civil Rights ⚡ 1482

Where factors, considered individually, did not constitute special circumstances warranting denial of attorney fees to prevailing plaintiff in civil rights action, such factors, when considered together, could not rise to the level of special circumstance warranting such a denial. Duranceau v. City of Tacoma (1984) 37 Wash.App. 846, 684 P.2d 1311. Civil Rights ⚡ 1482

Special assistant attorney general had sufficient statutory authority to be an appropriate alternate means of representation of consumers in electric rate proceedings and was empowered to provide the kind of representation which is necessary to meet the requirements of the federal Public Utility Regulatory Policies Act (16 U.S.C.A. § 2632), such that intervening consumers were not entitled to be compensated by electric utility involved for reasonable attorney fees, expert witness fees and other reasonable costs, if they were given adequate representation in the instant case. Power v. Washington Water Power Co. (1983) 99 Wash.2d 289, 662 P.2d 374, on reconsideration 102 Wash.2d 260, 684 P.2d 716. Electricity ⚡ 11.3(6)

Under Public Employment Relations Act, § 41.56.010 et seq., novelty or debatability of party's legal defense to unfair labor practice should not shield charged party from imposition of obligation to pay charging party's attorney fees when it is clear that history of underlying conduct evidenced patent disregard for statutory mandate to engage in good-faith negotiations. Lewis County v. Public Employment Relations Commission (1982) 31 Wash.App. 853, 644 P.2d 1231, review denied. Labor And Employment ⚡ 1810

In light of finding that administrators of group medical insurance policy governed by Employee Retirement Income Security Act [29 U.S.C.A. § 1132(g)] breached their fiduciary duties to plaintiff, award of attorney fees would be confirmed. Patnode v. Edward N. Getoor & Associates, Inc. (1980) 26 Wash.App. 463, 613 P.2d 804, review denied. Insurance ⚡ 3585

Trial court did not err in awarding attorney's fees under deceptive trade practices statute, § 19.86.020, where record indicated that plaintiff suffered injuries for purposes of statute in that he was inconvenienced and deprived of use and enjoyment of his property when he purchased an automobile from defendant other than which had been advertised. Tallmadge v. Aurora Chrysler Plymouth, Inc. (1979) 25 Wash.App. 90, 605 P.2d 1275. Anti-trust And Trade Regulation ⚡ 397

Section 41.56.160, which provides that higher education personnel board is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders, is broad enough to permit a remedial order containing award of litigation expenses when that is necessary to make order effective, but such allowance is not automatic, and such awards should not be permitted routinely, simply because charging party prevails, but, rather, should be reserved for cases in which a defense to unfair labor practice charge can be characterized as frivolous or meritless, which means groundless or without foundation. *State ex rel. Washington Federation of State Emp., AFL-CIO v. Board of Trustees of Central Washington University* (1980) 93 Wash.2d 60, 605 P.2d 1252. Labor And Employment ↪ 1810

In action by landowners alleging that inclusion of their property in inventory of natural areas violated federal Civil Rights Act [42 U.S.C.A. §§ 1983, 1985, 1986, 1988], award of attorney fees was proper, notwithstanding dispute by landowners as to proper itemization; further, award of fees was appropriate on appeal by landowners from summary judgments against them. *Lange v. Nature Conservancy, Inc.* (1979) 24 Wash.App. 416, 601 P.2d 963, review denied, certiorari denied 101 S.Ct. 99, 449 U.S. 831, 66 L.Ed.2d 36. Civil Rights ↪ 1492

On final settlement of guardian's contest of account, court cannot allow attorney's fees to ward beyond statutory costs allowed in adversary proceeding. *In re Williamson* (1913) 75 Wash. 353, 134 P. 1066.

6. ---- Divorce proceedings, attorney fees

This statute is applicable where legal services are to be rendered in connection with action for divorce; and where attorney and his client involved in such suit enter into lawful agreement as to fees, it is binding on parties and may not be modified in divorce action. *In re Smith* (1953) 42 Wash.2d 188, 254 P.2d 464. Attorney And Client ↪ 131; Attorney And Client ↪ 143

This statute authorizes lawful fee contracts in divorce actions. *In re Smith* (1953) 42 Wash.2d 188, 254 P.2d 464 .

In an action for divorce, court is without jurisdiction to settle controversy between party and her attorney by summary judgment and lien in favor of attorney against his client, that being matter for contractual obligation. *Hutson v. Hutson* (1937) 192 Wash. 36, 72 P.2d 293.

Contract to employ attorney was void as against public policy and sound morals, where attorney was to secure evidence to coerce from husband largest possible share of his separate property for benefit of wife, and if necessary to begin action for divorce for that purpose, when in fact wife had no grounds for divorce; and invalidity of contract is not affected by provisions of this statute which leaves compensation of attorneys to agreement of parties, or by fact that parties to divorce suit may agree on division of their property. *Delbridge v. Beach* (1912) 66 Wash. 416, 119 P. 856.

This statute applies to actions for divorce; hence, in fixing attorney's fee in divorce, court considers circumstances and conditions of defendant, irrespective of wife's agreement with her counsel. *State v. Superior Court of King County* (1910) 58 Wash. 97, 107 P. 876.

When parties to divorce action have ample means to employ their own counsel, or when they are furnished with ample means by decree of court, compensation to be made to their attorneys should be left to private contract of parties, and court should not assume to make contracts for them. *Sullivan v. Sullivan* (1909) 52 Wash. 160, 100 P. 321.

Where wife settles with her husband for action for divorce, her attorneys cannot intervene in suit and obtain judgment for their fees and costs advanced. *Hillman v. Hillman* (1906) 42 Wash. 595, 85 P. 61, 114 Am.St.Rep. 135.

In absence of provision in divorce decree for attorneys' fees, plaintiff is entitled to only statutory fee authorized by this statute as costs to prevailing party. *Trumble v. Trumble* (1901) 26 Wash. 133, 66 P. 124.

7. ---- Election contests, attorney fees

Candidate who was elected to office of port district commissioner, and who was permitted to intervene in action challenging validity of election, in which election was upheld, was only entitled under statute to recover costs, and could not recover attorney fees. *Dumas v. Gagner* (1999) 137 Wash.2d 268, 971 P.2d 17, reconsideration denied. Elections ↪ 307

8. ---- Insurance suits, attorney fees

"Costs taxed against the insured" within the meaning of supplementary payments provision of liability policy are taxable costs as that term is commonly used in legal parlance and, therefore, exclude attorney fees. *Polygon Northwest Co. v. American Nat. Fire Ins. Co.* (2008) 143 Wash.App. 753, 189 P.3d 777, review denied 164 Wash.2d 1033, 197 P.3d 1184. Insurance ↪ 2270(1)

Insured who prevailed action to recover underinsured motorist (UIM) benefits was not entitled to award of costs of investigation, photographs and expert witness fees in amount of \$1,298.34 absent statutory basis for award of those costs. *Gerken v. Mutual of Enumclaw Ins. Co.* (1994) 74 Wash.App. 220, 872 P.2d 1108, review denied 125 Wash.2d 1005, 886 P.2d 1134. Insurance ↪ 3374

Insured has the right to recoup attorney fees which it incurs because insurer refuses to defend or pay justified action or claim of the insured, regardless of whether lawsuit is filed against the insured; overruling *Farmers Ins. Co. v. Rees*, 96 Wash. 679, 638 P.2d 580. *Olympic S.S. Co., Inc. v. Centennial Ins. Co.* (1991) 117 Wash.2d 37, 811 P.2d 673, reconsideration denied. Insurance ↪ 3585

Insured could recover attorney fees incurred because of insurer's continuing breach of its duty to defend, even though insured brought action rather than wait for insurer to commence declaratory judgment action. *Smith v. Ohio Cas. Ins. Co.* (1984) 37 Wash.App. 71, 678 P.2d 829. Insurance ↪ 2934(2)

Where insurer did defend insureds in liability action and did not violate its contractual duty, and where only is-

sue adjudicated in declaratory judgment action was insurer's liability under home-owner policy, insureds could not recover attorney fees under policy, which provided that insurer would pay reasonable expenses incurred by insureds at insurer's request, for defending declaratory judgment action brought by insurer to determine extent of its coverage after it completed defense of liability action under reservation of right. *Farmers Ins. Co. of Washington v. Rees* (1982) 96 Wash.2d 679, 638 P.2d 580, reconsideration dismissed 676 P.2d 963. Insurance ☞ 3585

Under homeowner policy provision which requires insurer to pay, in addition to applicable limit of liability, reasonable expenses incurred by insured at insurer's request, reasonable expenses must be supplemental to insured's contractual right to be defended by insurer, and thus attorney fees incurred by insured in defending declaratory judgment action brought by insurer to determine contractual duty to defend are "reasonable expenses" supplemental to insurer's contractual duty to defend that may be recovered. *Farmers Ins. Co. of Washington v. Rees* (1982) 96 Wash.2d 679, 638 P.2d 580, reconsideration dismissed 676 P.2d 963. Insurance ☞ 2270(1); Insurance ☞ 3585

Insureds, who prevailed in declaratory judgment action brought by their insurer, were not entitled to recover attorney fees under section of policy providing that company would pay reasonable expenses incurred by insured at insurer's request. *Farmers Ins. Co. of Washington v. Rees* (1980) 27 Wash.App. 369, 617 P.2d 747, review granted, affirmed 96 Wash.2d 679, 638 P.2d 580, reconsideration dismissed 676 P.2d 963. Insurance ☞ 3585

In action wherein insurance broker sought damages from former insured, trial court's conclusion that broker's expenses incurred as a result of former insured's failure to timely pay promissory note by which former insured had financed premium for insurance which he subsequently cancelled resulted from a course of conduct which was largely of broker's own choosing supported court's failure to award attorney fees to broker as allowed by terms of the note. *Persing, Dyckman & Toynbee, Inc. v. George Scofield Co., Inc.* (1980) 25 Wash.App. 580, 612 P.2d 2, review denied. Bills And Notes ☞ 534

Insurer is liable to insured for expenses and reasonable attorney's fees incurred by insured, where policy contains provision that insured will defend any suit within provisions of policy which is brought against insured, and insurer fails to defend such action. *Lawrence v. Northwest Cas. Co.* (1957) 50 Wash.2d 282, 311 P.2d 670.

9. ---- Environmental litigation, attorney fees

Private action section of Model Toxics Control Act (MTCA) does not limit the prevailing party's award of attorney fees and costs to actual attorney fees and statutory costs, and court is authorized to additionally award other reasonably necessary expenses of litigation based on such equitable factors as the court determines are appropriate. *Louisiana-Pacific Corp. v. Asarco Inc.* (1997) 131 Wash.2d 587, 934 P.2d 685. Costs ☞ 146; Costs ☞ 194.25

10. ---- Injunction, attorney fees

Attorney fees which a defendant incurs in dissolving a wrongfully issued preliminary injunction or restraining

order are recoverable as damages; point at which wrongfully issued court order is dissolved is point at which attorney fees cease to be recoverable, whether court order be preliminary injunction dissolved by trial on the merits, restraining order dissolved by defendant's motion and hearing, or temporary restraining order dissolved by stipulation of the parties. *Ritchie v. Markley* (1979) 23 Wash.App. 569, 597 P.2d 449. Injunction ↪ 188

If injunctive relief is sole purpose of suit, and temporary injunction has issued on notice and hearing pending trial on merits, counsel's fees are recoverable as damages resulting from temporary injunction if injunction be dissolved at trial; but, where injunctive relief is not sole purpose of suit and only incidental or ancillary thereto, counsel fees as damages are recoverable only for services reasonably performed in attempting to quash temporary injunction and not for professional services rendered in trial on merits. *Cecil v. Dominy* (1966) 69 Wash.2d 289, 418 P.2d 233.

Reasonable attorney's fees incurred in procuring dissolution of temporary injunction were recoverable as damages suffered from injunction, where sole issue in trial wherein attorney's fees were incurred was whether temporary injunction should be made permanent or dissolved and, since temporary injunction had been issued on notice to show cause and in contested hearings, there was no other procedure available to relitigate and quash temporary injunction prior to trial wherein fees were incurred. *Cecil v. Dominy* (1966) 69 Wash.2d 289, 418 P.2d 233.

Attorney fees are not recoverable in action on injunction bond, where no motion for dissolution of injunction is made, and it is allowed to stand until defeated by trial on merits. *Donahue v. Johnson* (1894) 9 Wash. 187, 37 P. 322.

11. ---- Contingency arrangement, attorney fees

Contract for compensation of attorney entered into after confidential relationship of attorney and client has been established, as differentiated from situation where agreement is negotiated before actual employment has taken place, is considered void, or voidable until it is shown by attorney that contract was fair and reasonable, free from undue influence, and made after fair and full disclosure of facts on which it is predicated. *Kennedy v. Clausing* (1968) 74 Wash.2d 483, 445 P.2d 637.

Contract between attorney and his client in which attorney's fee is contingent on amount of money received by client in divorce action, is void as against public policy. *In re Smith* (1953) 42 Wash.2d 188, 254 P.2d 464.

Agreement made contingent on collection of debt, accompanied by assignment of share of debt, does not give attorney power coupled with interest in debt so that as assignee he may sue to recover his assigned portion. *Hamlin v. Case & Case* (1936) 188 Wash. 150, 61 P.2d 1287.

Agreement for contingent attorneys' fees, which was solicited contrary to ethics, entered into without fraud or misrepresentations, is not thereby void as against public policy, in view of this statute leaving measure or amount of attorneys' fees to agreement of parties. *Beck v. Boucher* (1921) 114 Wash. 574, 195 P. 996.

Party plaintiff may settle his cause action without consent of his attorney notwithstanding agreement that attorney was to be compensated by receiving one-half of amount of judgment received, where no collusion or fraud against attorney is practiced and attorney has not taken steps provided by statute for asserting lien on subject-matter of action. *McRea v. Warehime* (1908) 49 Wash. 194, 94 P. 924.

Under this statute agreement whereby attorney agrees to pay costs and to prosecute case for a percentage of recovery is legal. *Smits v. Hogan* (1904) 35 Wash. 290, 77 P. 390, 1 Am. Ann. Cas. 297.

12. ---- Amount of fee, attorney fees

Necessary expenses such as expert witness fees cannot be excluded from an award of reasonable attorney fees; disapproving *McGreevy v. Or. Mut. Ins. Co.*, 128 Wash.2d 26, 904 P.2d 731. *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.* (2001) 144 Wash.2d 130, 26 P.3d 910. Costs ↪ 187; Costs ↪ 194.18

Although tenant involved in landlord-tenant dispute misjudged amount of time required for trial, which caused some delay leading to higher fees, trial court properly awarded tenant attorney fees based on number of hours needed for preparation and presentation of case at trial, since landlord and court congestion were also responsible for some delays. *Ernst Home Center, Inc. v. Sato* (1996) 80 Wash.App. 473, 910 P.2d 486. Costs ↪ 194.34

Award of attorney fees should be based on more than just estimation or conjecture. *Austin v. U.S. Bank of Washington* (1994) 73 Wash.App. 293, 869 P.2d 404, review denied 124 Wash.2d 1015, 880 P.2d 1005. Costs ↪ 207

Trial court should not have awarded \$6,000 in attorney fees to remainder beneficiaries, for successfully litigating their claims against trustee for wrongful disbursement of funds, based solely upon trial court's estimation of what was a reasonable attorney's fee, with no affidavits or time sheets from beneficiaries' counsel to support its determination. *Austin v. U.S. Bank of Washington* (1994) 73 Wash.App. 293, 869 P.2d 404, review denied 124 Wash.2d 1015, 880 P.2d 1005. Trusts ↪ 377

Where a trial judge allows no more than a basic hourly rate for time reasonably spent by attorneys, there is no abuse of discretion. *Safeco Ins. Co. of America v. JMG Restaurants, Inc.* (1984) 37 Wash.App. 1, 680 P.2d 409. Costs ↪ 194.18

Appellate court has inherent jurisdiction to fix attorneys' fees for services on appeal when allowable by contract or statute; however the court may remand case to superior court for fixing of fee where circumstances require taking of evidence as to fees' reasonableness. *Brandt v. Impero* (1969) 1 Wash.App. 678, 463 P.2d 197. Costs ↪ 55; Costs ↪ 223

Failure to detail legal services does not preclude recovery of attorneys' fees when provision is made for them in

promissory note collection action, though failure to detail them can result in more modest fee than if they are stated. *Ranta v. German* (1969) 1 Wash.App. 104, 459 P.2d 961, review denied.

Matter of reasonableness or fairness of attorney's fee is problem for civil courts and cannot be basis for disciplinary proceeding. *In re Greer* (1963) 61 Wash.2d 741, 380 P.2d 482.

13. ---- Multiparty cases, attorney fees

Attorney fees and costs in multiparty cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result. *Christie-Lambert Van & Storage Co., Inc. v. McLeod* (1984) 39 Wash.App. 298, 693 P.2d 161. Costs ☞ 208

13.5. ---- Frivolous complaints, attorney fees

Defendant's affirmative defense that plaintiff's complaint was frivolous provided independent basis for trial court to award attorney fees to defendant beyond the \$200 statutory fee, which supported order that required \$125,000 bond as security for costs and fees of plaintiff foreign corporation. *White Coral Corp. v. Geysler Giant Clam Farms, LLC* (2008) 145 Wash.App. 862, 189 P.3d 205, review denied 165 Wash.2d 1018, 199 P.3d 411. Costs ☞ 105; Costs ☞ 118

14. ---- Vacation of judgment for want of prosecution, attorney fees

On vacation of judgment entered for want of prosecution, it is discretionary for trial court to make same conditional on payment of attorney's fee in excess of statutory fee for trial of cause without jury. *Redding v. Puget Sound Iron & Steel Works* (1906) 44 Wash. 200, 87 P. 119.

15. ---- Appeal, attorney fees

Plaintiff was not entitled to attorney fees on appeal under the parties' admission agreement, although his Consumer Protection Act (CPA) claim was reinstated, as his breach of contract claim was properly dismissed. *Sorrel v. Eagle Healthcare, Inc.* (2002) 110 Wash.App. 290, 38 P.3d 1024, reconsideration denied, review denied 147 Wash.2d 1016, 56 P.3d 992. Costs ☞ 252

Insured, whose claims against renter's insurer for breach of contract and bad faith were precluded by his fraud, was not entitled to award of attorney fees on appeal. *Tornetta v. Allstate Ins. Co.* (1999) 94 Wash.App. 803, 973 P.2d 8, review denied 138 Wash.2d 1012, 989 P.2d 1143. Insurance ☞ 3586

Reimbursement provision of liability policy was directed at expenses incurred as result of insurer's agreement to defend insured, and where insured did not receive judgment entitling it to entirely free defense by liability insurer but insured did incur attorney fees in defense of law suit in which insurer engaged in extensive investigation of facts of wrongful death complaints in attempt to avoid duty to defend, insured having complied with rule was entitled to reasonable attorney's fees on appeal pursuant to expenses reimbursement provision in policy.

Travelers Ins. Companies v. North Seattle Christian and Missionary Alliance (1982) 32 Wash.App. 836, 650 P.2d 250. Insurance ⚡ 2270(1)

A provision in a contract which provides for attorney's fees incurred in an action to collect on the contract includes fees necessary for both trial and appeal. Granite Equipment Leasing Corp. v. Hutton (1974) 84 Wash.2d 320, 525 P.2d 223. Costs ⚡ 194.32; Costs ⚡ 252

Authorization in contract for allowance of attorneys' fees in litigation thereon includes attorneys' fees on appeal. F.S. Jones Const. Co. v. Duncan Crane & Rigging, Inc. (1970) 2 Wash.App. 509, 468 P.2d 699, review denied. Costs ⚡ 252

Provision in promissory note allowing recovery of reasonable attorney's fee in case of suit thereon encompasses fees on appeal as well as at trial. Ranta v. German (1969) 1 Wash.App. 104, 459 P.2d 961, review denied.

16. Equitable award--In general

Elements necessary to create equitable right to recover attorney's fees as part of consequential damages are: a wrongful act or omission by A towards B; such act or omission exposes or involves B in litigation with C; and C was not connected with original wrongful act or omission of A towards B. Aldrich & Hedman, Inc. v. Blakely (1982) 31 Wash.App. 16, 639 P.2d 235, review denied. Damages ⚡ 73

In proceeding in which trial court's order vacating pollution control hearings board's decision vacating air pollution control agency's resolution granting variance was reversed, appellants would not be awarded attorney fees under supreme court's alleged equitable and supervisory powers where court was not informed as to why or under what applicable facts it should exercise such alleged powers. ASARCO Inc. v. Air Quality Coalition (1979) 92 Wash.2d 685, 601 P.2d 501. Environmental Law ⚡ 717

In proceeding in which trial court's order vacating pollution control hearings board's decision vacating air pollution control agency's resolution granting a variance was reversed, appellants would not be awarded attorney fees under theory that prevailing party would be entitled to fees if conduct of losing party constituted had faith for wantonness; mere fact that case had been hard fought with considerable legal infighting and delay by corporation did not establish wantonness and bad faith on its part. ASARCO Inc. v. Air Quality Coalition (1979) 92 Wash.2d 685, 601 P.2d 501. Environmental Law ⚡ 717

In proceeding in which trial court's order vacating pollution control hearings board's decision vacating air pollution control agency's resolution granting variance was reversed, appellants would not be granted attorney fees on basis of contention that a prevailing party could be awarded attorney fees if the action had conferred a substantial benefit on an ascertainable plan where record failed to disclose membership of the asserted class, what benefit it derived or the extent thereof and supreme court was not shown to have any identifiable "estate" or "fund" under its control on which attorney fees could be imposed. ASARCO Inc. v. Air Quality Coalition (1979) 92 Wash.2d 685, 601 P.2d 501. Environmental Law ⚡ 717

The power of the court to fix and award attorneys' fees to a prevailing party under special, limited circumstances is founded in its equity powers and is subject to only those limits the court may impose. *Weiss v. Bruno* (1974) 83 Wash.2d 911, 523 P.2d 915.

17. ---- Common fund, equitable award

In proceeding in which trial court's order vacating pollution control hearings board's decision vacating air pollution control agency's resolution granting variance was reversed, appellants were not entitled to award of attorney fees on basis of contention that a prevailing party could recover attorney fees under common fund theory where no identifiable "common fund" was preserved by the litigation. *ASARCO Inc. v. Air Quality Coalition* (1979) 92 Wash.2d 685, 601 P.2d 501. Attorney And Client ☞ 155; Environmental Law ☞ 717

While attorneys' fees are generally not recoverable by a prevailing party in the absence of statutory or contractual grounds, equitable considerations may permit the recovery of such fees when a private party, initiating the action after the refusal of appropriate officials to do so, has successfully prevented the unlawful or unconstitutional expenditure of public funds. Preservation of public funds to the benefit of the citizenry permits the court to require reasonable attorneys' fees to be provided from the funds so preserved. *Weiss v. Bruno* (1974) 83 Wash.2d 911, 523 P.2d 915.

Common funds from which the court may direct the disbursement of attorneys' fees to a party preserving such funds need only be the subject of the litigation, they need not be funds paid into the registry of the court. *Weiss v. Bruno* (1974) 83 Wash.2d 911, 523 P.2d 915.

If fact of litigation has brought benefit to common fund, party participating therein is entitled to reasonable attorney's fees regardless of his success in litigation. *Grein v. Cavano* (1963) 61 Wash.2d 498, 379 P.2d 209. Attorney And Client ☞ 155

In judgment awarding counsel fees and costs for litigation involving common fund, it was not error to reserve to prevailing parties right to claim additional fees and costs in event judgment was appealed to Supreme Court. *Grein v. Cavano* (1963) 61 Wash.2d 498, 379 P.2d 209.

Equitable principle that court may, in its discretion, allow counsel's fees to complainant who has maintained successful suit for preservation, protection, or increase of common fund, is applicable to funds of labor unions. *Grein v. Cavano* (1963) 61 Wash.2d 498, 379 P.2d 209. Attorney And Client ☞ 155

18. ---- Indemnity, equitable award

While attorney fees will not be awarded as a part of the costs of litigation unless there is a contract, statute, or recognized ground of equity, if the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons, that is, to a suit by persons not connected with the initial transaction or event, the allowance of attorney fees under the rule in *Armstrong Constr. Co. v. Thomson* (1964) 64 Wash.2d 191, 390 P.2d 976, may be a proper element of consequential damages. *Haner v. Quincy Farm Chemicals, Inc.* (1982) 97

Wash.2d 753, 649 P.2d 828. Damages ☞ 73

Attorney fees could not be awarded to wheat seed manufacturer, a nonnegligent third-party defendant, as consequential damage against wheat seed supplier, a negligent third-party plaintiff, where the action was not brought against the third-party defendant, but was brought by the purchaser of defective seed against the third-party plaintiff. *Haner v. Quincy Farm Chemicals, Inc.* (1982) 97 Wash.2d 753, 649 P.2d 828. Damages ☞ 73

Insurance adjuster was properly held liable for attorney's fees to insured and fire insurer in action brought by contractor against insured, former contractor, insurance adjuster and fire insurer for completion of repairs to insured's fire damaged premises where adjuster wrongfully omitted to investigate former contractor's credentials before recommending him for repair job, such omissions involved both insured and fire insurer in litigation with contractor hired to complete job when former contractor was "red tagged" by building inspector, and contractor was not connected with adjuster's failure to investigate former contractor's credentials. *Aldrich & Hedman, Inc. v. Blakely* (1982) 31 Wash.App. 16, 639 P.2d 235, review denied. Damages ☞ 73

Assignee of road construction contract was entitled to attorney fees against assignor in its indemnity action against assignor after owner sued assignor and assignee for breach of contract, despite the fact that owner was privy to the assignment contract, where wrongful act which gave rise to litigation was not the assignment contract but fraud committed by assignor in inducing assignee to accept assignment before owner even became involved in the transaction. *North Pac. Plywood, Inc. v. Access Road Builders, Inc.* (1981) 29 Wash.App. 228, 628 P.2d 482, review denied. Damages ☞ 73

Where natural and proximate consequences of a wrongful act by one person involve another in litigation with third persons, wronged party may recover reasonable expenses for the litigation, including attorney fees only so long as third person who institutes the action was not connected with the original transaction. *North Pac. Plywood, Inc. v. Access Road Builders, Inc.* (1981) 29 Wash.App. 228, 628 P.2d 482, review denied. Damages ☞ 73

Purchaser of defective motor home was entitled to recover attorney fees in his successful suit against retailer, builder of home on chassis and manufacturer of the chassis, and retailer was entitled to recover its attorney fees from builder and manufacturer, but since builder and manufacturer were joint tort-feasors, builder was not entitled to allowance of attorney fees from manufacturer. *Massingale v. Northwest Cortez, Inc.* (1980) 27 Wash.App. 749, 620 P.2d 1009, review denied. Costs ☞ 194.36

Where claimants who sought attorney's fees in interpleader action initiated by city to determine rightful owner of certain funds found in auctioned safe did not demonstrate a wrongful act or omission by other claimants to funds which exposed them to litigation with city, they would not be entitled to attorney's fees pursuant to common-law theory of indemnity. *City of Everett v. Sumstad's Estate* (1980) 26 Wash.App. 742, 614 P.2d 1294, review granted, affirmed in part, reversed in part 95 Wash.2d 853, 631 P.2d 366. Indemnity ☞ 64

While attorneys' fees are not generally recoverable absent some contractual, statutory, or recognized equitable

grounds, a party may recover the expenses of litigation, including attorneys' fees, when he is involved in litigation as the natural and proximate consequence of a wrongful act by a defendant, so long as the original suit generating the expenses was brought by a third party not connected with the original wrongful act. *Koch v. City of Seattle* (1973) 9 Wash.App. 580, 513 P.2d 573, review denied.

19. Private attorney general doctrine

Private Attorney General doctrine, intended to encourage private individuals to pursue legal remedies which will benefit public, is not applicable in Washington to enable a prevailing party to obtain an award of attorney fees; rejecting *Miotke v. Spokane*, 101 Wash.2d 307, 678 P.2d 803; *Serrano v. Priest*, 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303; *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524. *Blue Sky Advocates v. State* (1986) 107 Wash.2d 112, 727 P.2d 644. Costs ⚡ 194.42

Private Attorney General doctrine did not apply in Washington to allow citizens' group to recover attorney fees in action against Attorney General arising from his appointment of counsel for environment in proceedings before Energy Facility Site Evaluation Council on application of electric utility for certification of coal-fired electrical generating facility. *Blue Sky Advocates v. State* (1986) 107 Wash.2d 112, 727 P.2d 644. Costs ⚡ 194.42

An award of \$88,500 in attorney fees for the injunctive phase of the litigation was warranted under the "private attorney general" theory in nuisance action brought by the owners of waterfront property against the city and the department of ecology for discharging raw sewage into a river in violation of a waste disposal permit. (Per Pearson, J., with two Judges concurring and two Judges concurring in result). *Miotke v. City of Spokane* (1984) 101 Wash.2d 307, 678 P.2d 803. Nuisance ⚡ 88

20. Discretion of court

It is the function of the trial judge to exercise discretion and set award of reasonable attorney fees in a jury case; local rule providing that evidence regarding attorney fees is to be presented following determination by court that party applying is entitled to award is a proper procedure for exercising that discretion. *Safeco Ins. Co. of America v. JMG Restaurants, Inc.* (1984) 37 Wash.App. 1, 680 P.2d 409. Costs ⚡ 207

Trial court exercises its discretion to award attorney's fees to party as much by denying those fees as by allowing them, and its decision will not be disturbed on appeal absent manifest abuse of that discretion. *Lande v. South Kitsap School Dist. No. 402* (1970) 2 Wash.App. 468, 469 P.2d 982.

21. Prevailing party

Borrowers, who prevailed on appeal in their action against trustee of deed of trust and others to set aside nonjudicial foreclosure sale, were entitled to prevailing party attorney fees. *Albice v. Premier Mortg. Services of Washington, Inc.* (2010) 157 Wash.App. 912, 239 P.3d 1148, review granted 170 Wash.2d 1029; 249 P.3d 623. Mortgages ⚡ 581(1)

Fellow dominant tenement owner who prevailed on appeal of superior court judgment reversing award of attorney fees and costs, was entitled attorney fees, and costs for appeal as prevailing party under statutes that allowed attorneys' fees and costs to the prevailing party. *Kalich v. Clark* (2009) 152 Wash.App. 544, 215 P.3d 1049. Costs ↪ 252

Statute setting forth costs allowed to prevailing party does not apply where a specific rule or statute expressly authorizes expands cost recovery. *Johnson v. Horizon Fisheries, LLC* (2009) 148 Wash.App. 628, 201 P.3d 346. Costs ↪ 146

Trial court could decline to award costs to employees who prevailed in action for wrongful discharge in violation of public policy; claimed costs were equivalent to only three percent of total award of \$4,802,600, and employees provided no evidence of misconduct by employer that contributed to excessive costs. *Brundridge v. Fluor Federal Services, Inc.* (2008) 164 Wash.2d 432, 191 P.3d 879. Labor and Employment ↪ 879

Prevailing plaintiffs in wrongful discharge cases may not recover costs beyond those costs defined in statute relating to cost awards to prevailing plaintiffs in civil actions generally. *Brundridge v. Fluor Federal Services, Inc.* (2008) 164 Wash.2d 432, 191 P.3d 879. Labor and Employment ↪ 879

Real estate contract which provided "the prevailing party is entitled to reasonable attorney's fees and expenses" allowed purchasers, as the prevailing party, to recover expenses which exceeded those listed by statute. *Bloor v. Fritz* (2008) 143 Wash.App. 718, 180 P.3d 805. Costs ↪ 194.36

Damages recovered by employees who prevailed in action against employer for violations of Minimum Wage Act were liquidated, and thus award of prejudgment interest was proper, although jury had to evaluate disputed evidence as to number of unpaid hours worked, as necessary data to make factual determination was set out in the evidence. *McConnell v. Mothers Work, Inc.* (2006) 131 Wash.App. 525, 128 P.3d 128. Interest ↪ 39(2.40)

Insurer was not entitled to statutory award of fees and costs following declaratory judgment in its favor stating that insureds made material misrepresentations during investigation of fire in their home, and thus that ensuing claim was subject to material misrepresentation exclusion in fire insurance policy, where jury also found that there was no arson by insureds, which was insurer's primary allegation in complaint, and that insurer was not entitled to damages award in amount it had paid out on claim to insureds prior to trial, so that it was arguable that insurer had not prevailed. *Allstate Ins. Co. v. Huston* (2004) 123 Wash.App. 530, 94 P.3d 358, review denied 153 Wash.2d 1021, 108 P.3d 1228. Insurance ↪ 3585

Despite having prevailed on two out of the three issues it appealed to Superior Court, employer did not prevail on the central issue, namely whether it could use a median-based allocation method to reduce workers' compensation claimant's hearing loss permanent partial disability (PPD) award to compensate for age-related hearing loss (ARHL), and as such, employer was not a "prevailing party" within the meaning of statute allowing attorney fees to prevailing party. *Boeing Co. v. Heidy* (2002) 147 Wash.2d 78, 51 P.3d 793. Workers' Compensation

☞ 1980.17

Although attorney, who was defendant in private defamation action, was not entitled to award of actual attorney fees, he was entitled to recover his costs and statutory attorney fees as a prevailing party as result of trial court's dismissal of him from suit. *Moe v. Wise* (1999) 97 Wash.App. 950, 989 P.2d 1148, review denied 140 Wash.2d 1025, 10 P.3d 406. Libel And Slander ☞ 129

Trial court properly awarded prevailing party in landlord-tenant dispute costs beyond mere statutory costs, where parties had bargained for provision in commercial lease stating that prevailing party to any litigation shall receive all costs associated with litigation. *Ernst Home Center, Inc. v. Sato* (1996) 80 Wash.App. 473, 910 P.2d 486. Costs ☞ 194.34

Parents who brought claims for themselves and for their children against, inter alia, state for damages allegedly caused by sexual abuse of their children resulting from state's tortious conduct in licensing, operating and monitoring day-care center, did not "prevail" against state, for purpose of taxing costs against state, even though damage verdicts were returned in favor of some but not all plaintiffs; no damage verdict exceeded what had been received in settlement from other defendants. *Stout v. State* (1991) 60 Wash.App. 527, 803 P.2d 1352, review denied 116 Wash.2d 1029, 813 P.2d 582. States ☞ 215

Where victorious plaintiffs in negligence action obtained judgment that was less than settlement offer made by defendants, plaintiffs were not "prevailing parties" for purposes of this section awarding attorney fees, but rather defendants were entitled to recover costs and attorney fees pursuant to CR 68 providing for such fees when rejected settlement offer exceeds judgment awarded. *Tippie v. Delisle* (1989) 55 Wash.App. 417, 777 P.2d 1080, review denied 114 Wash.2d 1003, 788 P.2d 1078. Costs ☞ 42(4); Costs ☞ 194.50

22. Expert witness fees

Where an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party as a part of the costs of action. *Estep v. Hamilton* (2008) 148 Wash.App. 246, 201 P.3d 331, reconsideration denied, review denied 166 Wash.2d 1027, 217 P.3d 336. Costs ☞ 187

Insured who prevailed action to recover underinsured motorist (UIM) benefits was not entitled to award of costs of investigation, photographs and expert witness fees in amount of \$1,298.34 absent statutory basis for award of those costs. *Gerken v. Mutual of Enumclaw Ins. Co.* (1994) 74 Wash.App. 220, 872 P.2d 1108, review denied 125 Wash.2d 1005, 886 P.2d 1134. Insurance ☞ 3374

"Costs" as used in mandatory arbitration rule that governs assessment of attorney fees and costs against party who did not improve his or her position in trial de novo does not include expert witness fees; rather, "costs" are limited to those items listed in statute setting forth allowable costs. *Colarusso v. Petersen* (1991) 61 Wash.App. 767, 812 P.2d 862, review denied 117 Wash.2d 1024, 820 P.2d 510. Alternative Dispute Resolution ☞ 377

22.5. Mileage

In general, a party who is also a witness is not entitled to mileage costs under statutes authorizing the prevailing party to recover witness mileage costs. *Estep v. Hamilton* (2008) 148 Wash.App. 246, 201 P.3d 331, reconsideration denied, review denied 166 Wash.2d 1027, 217 P.3d 336. Costs  185

After prevailing on a summary judgment motion in client's legal malpractice action, attorney was not entitled to award of costs for his airfare under statutes authorizing the prevailing party to recover witness mileage costs; there was no indication in the record that the attorney appeared in court in connection with the taxed airfare, or reported to the court clerk, as required by statute, and as a party to the action, the attorney was not entitled to mileage costs. *Estep v. Hamilton* (2008) 148 Wash.App. 246, 201 P.3d 331, reconsideration denied, review denied 166 Wash.2d 1027, 217 P.3d 336. Costs  185; Costs  193

23. Reports and records

Photocopying expenses were properly awarded to trust beneficiaries as cost, in litigation against trustee for wrongfully disbursing trust funds, where compilations of photocopies were admitted in evidence at trial. *Austin v. U.S. Bank of Washington* (1994) 73 Wash.App. 293, 869 P.2d 404, review denied 124 Wash.2d 1015, 880 P.2d 1005. Trusts  377

24. Civil rights actions

Plaintiffs who prevail under tort of discharge in retaliation for asserting wage claims are limited to recovering narrow statutory costs, rather than expanded costs available under civil rights statutes. *Hume v. American Disposal Co.* (1994) 124 Wash.2d 656, 880 P.2d 988, reconsideration denied, certiorari denied 115 S.Ct. 905, 513 U.S. 1112, 130 L.Ed.2d 788. Labor And Employment  879

25. Depositions

Party is entitled to costs of taking depositions if depositions were taken and used for trial purposes. *Kiewit-Grice v. State* (1995) 77 Wash.App. 867, 895 P.2d 6, review denied 127 Wash.2d 1018, 904 P.2d 299. Costs  193

Costs awarded to assisted living facility owner for depositions after dismissal of residents' suit alleging abuse were allowable, even though no trial testimony was taken in the case, given that depositions were used in their entirety in summary judgment motions and pretrial motions in limine and all depositions related to incompetence and unreliability of one plaintiff's statements due to dementia, final evidentiary order excluded the testimony of that particular plaintiff, and owner obtained dismissals of many of plaintiff's claims on summary judgment. *Warner v. Regent Assisted Living* (2006) 132 Wash.App. 1008, 2006 WL 689162, Unreported. Costs  154

25.5. Photocopies

Photocopying costs are not awardable costs under the statute governing costs allowed to prevailing party, and

there are no recognized grounds in equity supporting an award of photocopying costs. *Estep v. Hamilton* (2008) 148 Wash.App. 246, 201 P.3d 331, reconsideration denied, review denied 166 Wash.2d 1027, 217 P.3d 336. Costs ↪ 190

26. Arbitration

Costs could be awarded against insured who lost trial de novo that she demanded after arbitration of her underinsured motorist (UIM) claim, notwithstanding *Kenworthy* rule prohibiting making insureds pay costs of arbitrating UIM claims. *Kohfeld v. United Pacific Ins. Co.* (1997) 85 Wash.App. 34, 931 P.2d 911. Insurance ↪ 3331(4)

Statute authorizing awards of certain costs upon granting of order confirming arbitration award precludes award of costs in such situation under more general statute setting forth costs to be awarded in civil actions. *Anderson v. Farmers Ins. Co. of Washington* (1996) 83 Wash.App. 725, 923 P.2d 713, amended on denial of reconsideration, review denied 132 Wash.2d 1006, 940 P.2d 656. Alternative Dispute Resolution ↪ 359; Alternative Dispute Resolution ↪ 405

Insurer timely submitted for consideration by trial court supplemental legal memorandum arguing that insured was not entitled to costs under arbitration statute, though it did not cite that statute in initial brief and supplemental brief was submitted after trial court had orally argued on motion for reconsideration of order confirming arbitration award on underinsured motorist (UIM) claim, where insurer had argued in initial brief that insured was not entitled to costs under more general statute and supplemental brief was submitted before written order was entered. *Anderson v. Farmers Ins. Co. of Washington* (1996) 83 Wash.App. 725, 923 P.2d 713, amended on denial of reconsideration, review denied 132 Wash.2d 1006, 940 P.2d 656. Insurance ↪ 3317

27. Review

Upon reversal of summary judgment in favor of lenders on subcontractor's motion to remove its improvement from ice arena, in lenders' foreclosure proceedings against subcontractor and others, the Court of Appeals would reverse trial court's award of attorney fees to lenders and would decline to award lenders fees on appeal, given that lenders were not prevailing party. *Haselwood v. Bremerton Ice Arena, Inc.* (2007) 137 Wash.App. 872, 155 P.3d 952, review granted 163 Wash.2d 1017, 180 P.3d 1291, affirmed 166 Wash.2d 489, 210 P.3d 308. Mortgages ↪ 579; Mortgages ↪ 581(1)

Court of Appeals reviews award of attorney fees and costs for abuse of discretion. *Ernst Home Center, Inc. v. Sato* (1996) 80 Wash.App. 473, 910 P.2d 486. Appeal And Error ↪ 984(5)

Appellate courts review trial court's award of attorney fees for abuse of discretion. *Austin v. U.S. Bank of Washington* (1994) 73 Wash.App. 293, 869 P.2d 404, review denied 124 Wash.2d 1015, 880 P.2d 1005. Appeal And Error ↪ 984(5)

Appellate review of the reasonableness of an attorney fee awarded pursuant to statutory authorization requires

that a record be made in the trial court of the evidence considered by the court in determining the amount of the award for the fee. *Hos Bros. Bulldozing, Inc. v. Hugh S. Ferguson Co.* (1973) 8 Wash.App. 769, 508 P.2d 1377.

Court's order fixing attorney's fees for services rendered in relation to trust and charging such fees against trust income as operating expense is appealable order; and where such order is not appealed from within time provided by law, it cannot be collaterally attacked in subsequent proceeding. *In re Preston's Estate* (1961) 59 Wash.2d 11, 365 P.2d 595.

West's RCWA 4.84.010, WA ST 4.84.010

Current with all Legislation from the 2011 2nd Special Session and all 2012 Legislation

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NO. 43639-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOSEPH LOWE,
Appellant,
v.
PCL CONSTRUCTION SERVICES,
INC.; and WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondents.

**DECLARATION OF
SERVICE**

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DIVISION II
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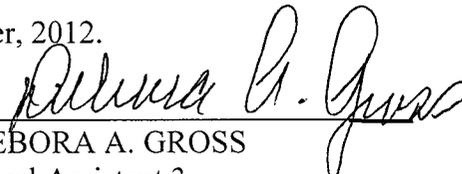
DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Joint Brief of Respondents PCL Construction Services and Department of Labor and Industries (with Appendix) and this Declaration of Service to all parties on record by depositing postage prepaid envelopes in the U.S. mail addressed as follows:

Stanley Rumbaugh
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DATED this 5 day of October, 2012.


DEBORA A. GROSS
Legal Assistant 3