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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

Court of Appeal Cause No. No. 34714-8-II

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

WACHOVIA SBA LENDING, INC., d/b/a WACHOVIA SMALL  
BUSINESS CAPITAL, a Washington corporation,

Plaintiff/Respondent

vs.

DEANNA D. KRAFT, individually,

Defendant/Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

**PETITION FOR REVIEW**

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**A. Identity of Petitioner.**

Deanna Kraft asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

**B. Court of Appeals Decision.**

Ms. Kraft requests review of the decision of the Court of Appeals filed May 30, 2007, that she was not a prevailing party entitled to fees and costs following Wachovia's voluntary dismissal, and its determination that she could not appeal the issue of whether dismissal should have been with prejudice (determined by a Court Commissioner on June 9, 2006; see also Footnote 4 to decision filed May 30, 2007).

A copy of the decisions are in the Appendix at pages A-1 through A-9 and B-1.

**C. Issues Presented for Review.**

1. Was it error to deny Deanna Kraft the opportunity to request an award of attorney fees and costs as the prevailing party following Wachovia's voluntary dismissal of all its claims against her on the morning of trial?

2. Was it error to deny Deanna Kraft's request that Wachovia's motion for dismissal be granted with prejudice when the statute of limitations had run on Wachovia's claims?

**D. Statement of the Case.**

In June of 1997, Deanna Kraft's husband at the time took out a Small Business Administration loan from The Money Store to purchase a home and veterinary business, which were located on the same premises. CP 4-5, 11, 30,

56. The home and business were located in North Carolina. CP 56. Ms. Kraft's husband, Randolph Kraft (hereinafter, "Dr. Kraft"), signed a Note in the amount of \$172,000 and a Deed of Trust that attached to the home. CP 30-41. Deanna Kraft did not sign the Note. CP 30-33, 56. She did sign a Personal Guaranty and the Deed of Trust (which attached to their home). CP 34-44; 56. Wachovia alleges it is the holder of the obligations signed by the Krafts to The Money Store. CP 5.

The Krafts were divorced in 1998. CP 59-64. Pursuant to the Kraft's Separation Agreement Dr. Kraft was made responsible for the obligations to The Money Store. *Id.* In 2003, Dr. Kraft filed for Chapter 7 bankruptcy protection. CP 5, 11. In approximately 2004, after getting relief from the bankruptcy stay, The Money Store's deed of trust was foreclosed in North Carolina. CP 5, 11, 25-29, 95. On September 19, 2005, Wachovia brought suit against Deanna Kraft alleging it is the holder of the The Money Store obligations, that a deficiency of almost \$80,000 remained after the foreclosure, and that Deanna Kraft is liable for the deficiency. CP 2-6. A trial on Wachovia's claims was set for March 20, 2006. CP 1.

In January of 2006, Wachovia filed a motion for summary judgment, which included a request that Ms. Kraft be held liable for Wachovia's attorney fees and costs pursuant to an attorney fee clause in the deed of trust and guaranty (which made Ms. Kraft responsible for obligations contained in the Note) signed by Ms. Kraft. CP 14-18. Wachovia's motion for summary judgment was denied on March 3, 2006. CP 104-107.

Seventeen days later, on the day set for trial, Wachovia presented to the court a motion for voluntary dismissal without prejudice and without an award of fees or costs pursuant to CR 41(a)(1)(B). CP 108-109; RP 4. Ms. Kraft opposed the dismissal being without prejudice and without an award of fees or costs because the statute of limitations had run on Wachovia's claim at that point. RP 6. At the hearing, the following discussions took place:

[MR. KIGER]: And then we're also asking that the Court just reserve jurisdiction to award attorneys' fees, with defendant as a prevailing party.

I attached a case, *Marassi v. Lau*, which basically says that when a plaintiff dismisses a case voluntarily, either with or without prejudice, the Court does retain jurisdiction to consider an award of fees. And if the Court would just reserve that issue, I can talk to my client about bringing a motion at a later time for that, as long as the Court reserves jurisdiction.

RP 6-7.

MR. KIGER: Could we reserve the issue of costs? The other case I submitted said that the defendant is automatically a prevailing party. We would have to brief the Court on the issue of whether -- you know, what types of fees and costs are awarded. But we just want to reserve that issue, your Honor.

I believe their proposed order says without fees or costs, and we just want to reserve that issue.

That's the *Marassi v. Lau* case.

RP 11.

THE COURT: Anything further, Mr. Kiger?

MR. KIGER: Just to reiterate we're not asking for a decision today; we're just asking that the issue be reserved.

THE COURT: The problem I have with reserving this is that it will be hanging out there. And it may hang out there for eternity if the parties do decide to settle and go away and never inform this Court of that issue.

I believe the civil rule does give the defendant the opportunity to ask for those fees if Wachovia files suit again, under the Civil Rule 41.

MR. KIGER: The rule only allows costs, it doesn't allow fees, is my reading of it.

For what it's worth, I can assure the Court that I will probably file a motion within the week if I could -- Ms. Kraft has other attorneys advise her, you know, a North Carolina attorney on this issue. And it may take a little while for me to get their cost bill. And we could certainly let the Court know too if for some reason Ms. Kraft decides not to file a motion.

MR. KLEINBERG: Your Honor, from what I recall too under CR 41 and the applicable case law, the Court does have the discretion as to whether or not it will reserve or even decide this issue. And again, I'd like to reiterate this is the first time plaintiff has filed suit and dismissed the case. It's not a case where we have had two or three filings here.

So we would ask that the Court deny the request here of defendant's counsel and allow each party to bear its own fees and costs, which seems appropriate. Frankly, in this case it's a matter of equity, especially given that the statute of limitations issue was raised today for the first time.

THE COURT: I am going to dismiss this case without prejudice and without costs.

RP 11-13. The order entered by the court denied an award of costs to either party.<sup>1</sup> CP 109, 112.

Ms. Kraft appealed the denial of her request for fees and costs as the prevailing party and the determination that dismissal should be without prejudice. CP 110-112. On appeal, Division II of the Court of Appeals held that because dismissal was without prejudice, she could not appeal that determination because it was not a final order. Appendix A-3, footnote 4; B-1. Further, the Court of Appeals held that Ms. Kraft was not entitled to fees because she was not a prevailing party as defined in RCW 4.84.330. Appendix A-4 to A-8.

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<sup>1</sup> Technically the written order only denies an award of costs, but the discussion between counsel and the Court at the hearing made it clear the Court was also denying Ms. Kraft's request to present a motion for attorney fees. RP 11-13.

**E. Argument Why Review Should be Accepted.**

Ms. Kraft's petition for review of the Court of Appeals decision filed May 30, 2007, should be granted because the decision may conflict with a decision of the Supreme Court, it does in fact conflict with several decisions of the Court of Appeals, and the decision involves an issue of substantial public interest that should be resolved by the Supreme Court. RAP 13.4(b) sets forth four considerations for whether a petition for review should be granted by the Supreme Court. The Supreme Court can accept review if one of these four considerations is present. RAP 13.4(b). These considerations include whether (1) the Court of Appeals decision conflicts with a Supreme Court decision, or (2) the Court of Appeals decision conflicts with another Court of Appeals decision, or (3) a significant question of law under the Washington or federal constitution is involved, or (4) the petition involves an issue of substantial public interest. RAP 13.4(b).

In its decision, the Court of Appeals observed that, "... the applicability of RCW 4.84.330 to a CR 41 dismissal without prejudice is a matter of first impression." Appendix A-5. But this issue has been decided by Division I of the Court of Appeals on multiple occasions, and has apparently been decided by this Court on at least one occasion. The decision of the Court of Appeals in the present case is contrary to each of those decisions. Consequently the first, second, and fourth considerations set forth in RAP 13.4(b) are all implicated and review should be granted.

**1. Conflict with Supreme Court Decision.**

Ms. Kraft briefed, and the Court of Appeals addressed, this Court's decision in *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 864, 975 P.2d 532 (1973). In that case, this Court upheld an award of fees following a non-suit stating:

6 J. Moore, Federal Practice 54.70(4) at 1306 (1966, Supp. 1967), states the rule to be that where there is a dismissal of an action, *even where such dismissal is voluntary and without prejudice*, the defendant is the prevailing party....

*Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d at 867. The Court of Appeals distinguished the *Anderson* case on the basis that this Court was applying the long arm statute, and it was not clear from the opinion in *Anderson* whether the dismissal was with or without prejudice. Appendix A-5, footnote 7. But this Court also previously held that it was an abuse of discretion to not impose an award of costs (including travel fees and lost wages) following a voluntary dismissal. *Guardianship of Freitas*, 58 Wn.2d 400, 363 P.2d 385, (1961).

In adopting the general rule in *Anderson* that a defendant is regarded as having prevailed when plaintiff takes a non-suit, this Court observed that, among other things, "... a defendant who ... has been put to expense in answering the complaint and preparing for trial should be reimbursed by the plaintiff if the court finds that the justice of the case requires it." *Anderson*, 81 Wn.2d at 868.

The Court of Appeals decision in the present case defeats the purposes and policies discussed by this Court in both *Anderson* and *Freitas*. Because the statute of limitations (which is one year both here in Washington and North Carolina) has now run on Wachovia's claims, the dismissal of Wachovia's case is

by default, a final determination of the case. N.C. Gen. Stat. § 1-54 (attached as Appendix C); RCW 61.24.100(4). Now Ms. Kraft will never have an opportunity to recover her fees incurred to this point. *See also, Hall v. Stolte*, 24 Wn.App. 423, 601 P.2d 967 (1979) (the cost award provision of CR 41(d) upon re-filing of the case does not provide for an award of attorney fees). The Court of Appeals decision denies Ms. Kraft the ability to recover her fees and costs in this matter to this point, which is contrary to the purpose of the rule as stated by this Court in *Anderson and Freitas*. Accordingly, the Supreme Court should accept review of this matter.

## **2. Conflict with Court of Appeals Decisions.**

In applying the decision and policies set forth by this Court in *Anderson*, Division I of the Court of Appeals has on at least four occasions applied RCW 4.84.330 to CR 41 dismissals granted without prejudice. *Hawk v. Branjes*, 97 Wn.App. 776, 986 P.2d 841 (1999); *Allahyari v. Carter Subaru*, 78 Wn.App. 518, 897 P.2d 413 (1995); *Marassi v. Lau*, 71 Wn.App. 912, 859 P.2d 605 (1993); *Walji v. Candyco, Inc.*, 57 Wn.App. 284, 787 P.2d 946 (1990). In the present case, after finding that the application of RCW 4.84.330 to CR 41 was a matter of first impression, the Court of Appeals went on to conclude that the definition of prevailing party contained in RCW 4.84.330 barred Ms. Kraft's request for fees and costs. That is because RCW 4.84.330 defines prevailing party as, "the party in whose favor a final judgment is rendered." RCW 4.84.330. The court went on to reason that because the case could be re-filed (despite the running of the statute of limitations) there had been no final judgment in the

present case. Appendix A-6. However, in each of the Division I cases cited above, this very analysis was argued, analyzed, and rejected.

In *Walji v. Candyco*, 57 Wn.App. 284 (1990), defendants sought fees under an attorney fee clause in a lease following a voluntary dismissal without prejudice. Plaintiffs argued the definition of prevailing party contained in RCW 4.84.330 should be employed to bar defendants' fee recovery. The plaintiff's argument in *Walji* is the same one that was adopted by the Court of Appeals in the present case. In rejecting this argument, the *Walji* court held:

No authority is cited, nor is any compelling legal reason urged, for adopting the statutory definition of "prevailing party" quoted above [from RCW 4.84.330] in interpreting the lease provision. At the time of a voluntary dismissal, the defendant has "prevailed" in the common sense meaning of the word. In interpreting the lease, the intentions of the parties are to be given effect. There is no reason to believe that the parties intended to incorporate this statutory definition, which is not even the usual legal definition.

...

Since the case may never be renewed, it is essential to apply the attorney fees provision of the lease at the time of dismissal to effectuate the intent of the parties.... This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.

The reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has "prevailed" as things stand at that point.

*Walji*, 57 Wn.App. at 288-289(emphasis added). As in *Walji*, Ms. Kraft is asking the court to apply the contractual attorney fee provision. The only reason RCW 4.84.330 is even implicated in the present case is because the contractual attorney fee provision is unilateral.

In *Marassi v. Lau*, 71 Wn.App 912 (1993), defendants sought attorney fees pursuant to an attorney fee provision in a purchase and sale agreement when plaintiffs voluntarily dismissed some claims without prejudice in connection with an amendment of their pleadings. As in the present case, the trial court in *Marassi* purportedly reserved the issue of fees for determination if the case were subsequently re-filed (apparently not recognizing the statute precludes that; see *Hall v. Stolte*, 24 Wn.App. 423, 601 P.2d 967 (1979)). *Marassi*, 71 Wn.App. at 919-910. Once again, the court stated, “In general, if a plaintiff voluntarily dismisses its entire action under CR 41, the defendant is considered to be the prevailing party for purposes of attorney fees under RCW 4.84.330.” *Marassi* 71 Wn.App. at 918 citing *Walji v. Candyco* and *Anderson v. Gold Seal Vineyards, Inc.* (emphasis added). The court also quoted *Walji* for the proposition that the reason a voluntary dismissal is not a final judgment is to permit plaintiffs to re-file their claim. *Id.* at 919. It is not for the purpose of precluding attorney fees to a defendant who has prevailed to that point. *Id.*

Attorney fee awards in the context of CR 41 and RCW 4.84.330 was again discussed in *Allahyari v. Carter Subaru*, 78 Wn.App. 518 (1995). In that case fees were denied under RCW 4.84.330 following a voluntary dismissal without prejudice. But the reason fees were denied under RCW 4.84.330 in *Allahyari* is because there was no underlying contract with an attorney fee clause in that case. The court did go on to find that defendant was the prevailing party in the case and awarded fees under RCW 4.84.250 (disputes of \$10,000 or less).

Finally, in *Hawk v. Branjes*, 97 Wn.App. 776 (1999), tenants were awarded fees under a lease agreement and RCW 4.84.330 following a voluntary dismissal by plaintiffs without prejudice. As in *Walji*, the *Hawk* court observed, “But at issue here is not the statutory definition of prevailing party, but rather the intent of the parties with regard to the attorneys’ fee provision in the lease agreement.” *Id.* at 779.

Because the Court of Appeals decision in the present case conflicts with the decisions in *Walji*, *Marassi*, *Carter Subaru*, and *Hawk*, the Supreme Court should accept review of this matter.

### **3. Issue of Substantial Public Interest.**

The effect of the Court of Appeals decision in the present case would be to deny a whole class of defendants the ability to recover attorney fees if plaintiffs take a voluntary non-suit without prejudice. That class of defendants is all defendants who are relying on a unilateral attorney fee provision in a contract. Such an outcome is particularly unjust because plaintiffs who have the benefit of a unilateral attorney fee provision are basically granted *carte blanche* to test their theories of the case. If they win, then they get attorney fees, if they lose (such as on summary judgment) they can voluntarily dismiss their case and avoid the same attorney fee provision that they would have benefited from. This is contrary to the purposes behind RCW 4.84.330, which is to ensure that unilateral attorney fee provisions are enforceable against both parties.

Under the particular facts of the present case this outcome is even more unjust because the statute of limitations has now run on Wachovia’s claims. N.C.

Gen. Stat. § 1-54 (Appendix C); RCW 61.24.100(4). By failing to address the issue of whether dismissal should have been with prejudice (based upon running of the statute of limitations) the Court of Appeals was able to reason that the order of dismissal was not a “final order” in the present case. For all practical purposes this is a fiction, and it provides unscrupulous plaintiffs with another tool to avoid liability for fees: voluntary dismissal without prejudice. In ruling against Ms. Kraft, even the Court of Appeals recognized this injustice. Appendix A-7 to A-8.

Further, the definition of “final judgment” adopted by the Court of Appeals in the present case has far reaching consequences for all defendants in litigation throughout Washington. Unless defendants assert a counterclaim or third party claim, it is generally accepted that most will prevail simply by having plaintiff’s claims dismissed. In *Anderson*, this court held, “[T]he legislature must naturally have had in mind that a defendant who ‘prevails’ is ordinarily one against whom no affirmative judgment is entered.” *Anderson*, 81 Wn.2d at 868. But the Court of Appeals definition of “prevailing party” in the present case could be interpreted as excluding defendants who prevail simply by avoiding having an affirmative judgment entered against them.

**F. Conclusion**

For the reasons stated above, not only should the Supreme Court accept review of the decision denying Ms. Kraft her fees and costs in this matter, it

should also accept review of the determination that dismissal should have been with prejudice given that the statutes of limitation have run.

RESPECTFULLY SUBMITTED this 27 day of June, 2007.

**BLADO KIGER, P.S.**

  
DOUGLAS N. KIGER, WSBA #26211  
Attorney for Appellant, Deanna Kraft

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 27<sup>th</sup> day of June, 2007, she placed with ABC Legal Messengers, Inc. an original and one copy of Petition for Review and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to the following party and its counsel of record:

RESPONDENT	ATTORNEY FOR RESPONDENT
Wachovia SBA Lending, Inc., d/b/a Wachovia Small Business Capital	Alexander S. Kleinberg EISENHOWER & CARLSON, PLLC 1200 Wells Fargo Plaza 1201 Pacific Avenue Tacoma, WA 98402

DATED this 27<sup>th</sup> day of June, 2007, at Tacoma, Washington.

**BLADO KIGER, P.S.**

  
Lisa Carr, Paralegal

# APPENDIX A

FILED  
COURT OF APPEALS  
DIVISION II

07 MAY 30 AM 8:36

STATE OF WASHINGTON

BY

DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

WACHOVIA SBA LENDING, d/b/a  
WACHOVIA SMALL BUSINESS CAPITAL,  
a Washington corporation,

Respondent,

v.

DEANNA D. KRAFT, individually,

Appellant.

No. 34714-8-II

PUBLISHED OPINION

HOUGHTON, C.J. — Deanna Kraft appeals the trial court's refusal to award her attorney fees under RCW 4.84.330 and costs under RCW 4.84.010, .060, and .080. We affirm.

**FACTS**

In June 1997, Kraft's husband (now her former husband) took out a Small Business Administration Loan (Loan) from Wachovia SBA Lending, Inc. d/b/a Wachovia Small Business Capital in order to purchase a home and an in-home veterinary business. Kraft's husband executed a Small Business Administration Promissory Note (Note), secured by a Deed of Trust on Kraft and her husband's North Carolina home. Kraft did not sign the Note. Kraft executed a Small Business Administration Guaranty (Guaranty) in connection with the Note. Wachovia claims to hold the Guaranty signed by Kraft and secured by the Deed of Trust on the North Carolina home.

By the terms of the Guaranty, the debtor agreed to pay all sums owed to the holder of an underlying Note, which Wachovia also claims to hold. The Note requires the debtor to pay “reasonable attorney’s fees and costs” incurred in satisfaction of the debt.<sup>1</sup> Clerk’s Papers (CP) at 32. The Note does not require the holder to pay the debtor’s attorney fees or costs. Thus, the Note and Guaranty, if enforceable, require Kraft to pay Wachovia’s attorney fees and costs but do not require Wachovia to pay Kraft’s attorney fees or costs.

Under the Deed of Trust, Wachovia foreclosed on Kraft’s former residence in North Carolina. Wachovia then sued Kraft on the Note and Guaranty in Pierce County Superior Court, seeking a deficiency balance of \$78,196.77.<sup>2</sup> Kraft answered that she was the guarantor, but she pleaded North Carolina law and, among others, the affirmative defense of choice of remedy.

Wachovia unsuccessfully moved for summary judgment. Over Kraft’s objection, Wachovia then sought leave to dismiss its complaint without prejudice, which the court granted. *See* CR 41(a)(1)(B), (a)(4). Kraft asked the trial court to reserve the issue of attorney fees and costs. The trial court apparently refused to reserve the issue of attorney fees because “it may

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<sup>1</sup> Specifically, the Note states, “The undersigned shall pay all expenses of any nature, whether incurred in or out of court . . . including but not limited to reasonable attorney’s fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the indebtedness.” Clerk’s Papers at 32.

<sup>2</sup> Wachovia also alleged unjust enrichment. But it does not explain how, if at all, that action bears on the present appeal. Accordingly, we do not consider it. *See* RAP 10.3(b); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

hang out there for eternity if the parties do decide to settle and go away and never inform this Court.”<sup>3</sup> Report of Proceedings at 12. The trial court declined to award attorney fees and costs to either party. Kraft appeals.<sup>4</sup>

#### ANALYSIS

Kraft relies on RCW 4.84.330<sup>5</sup> and argues the trial court erred in failing to reserve the attorney fees issue and allowing her to show her prevailing party attorney fees and costs. She urges de novo review.

Wachovia argues RCW 4.84.330 will not support an award of attorney fees because a voluntary dismissal without prejudice is not a “final judgment” within the statute’s meaning.

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<sup>3</sup> The parties dispute whether the trial court refused to reserve the issue or instead decided Kraft was not entitled to attorney fees. Our review of the record indicates the trial court did not rule on the award of attorney fees but rather refused Kraft’s motion to reserve the issue. Our understanding is bolstered by the fact that the motion before the trial court was for the reservation of the issue.

<sup>4</sup> Kraft appealed the order dismissing Wachovia’s suit without prejudice, a non-appealable order under RAP 2.2(a)(3). See *Am. States Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995); *Munden v. Hazelrigg*, 105 Wn.2d 39, 42-44, 711 P.2d 295 (1985). Our Commissioner properly allowed the appeal to proceed only to the extent Kraft claims attorney fees under RCW 4.84.330. See *Allahyari v. Carter Subaru*, 78 Wn. App. 518, 521 n.2, 897 P.2d 413 (1995).

<sup>5</sup> RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney’s fees in addition to costs and necessary disbursements.

Attorney’s fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney’s fees is void.

As used in this section “prevailing party” means the party in whose favor final judgment is rendered.

Resp't's Br. at 10-12. Wachovia asserts that where the plaintiff takes a voluntary dismissal without prejudice, we must review the denial of attorney fees for manifest abuse discretion. Thus, we first identify the appropriate standard of review.

The applicability of RCW 4.84.330 is a question of law. *Quality Food Ctrs. v. Mary Jewell T, L.L.C.*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006). We review questions of law de novo. *Mohr v. Grant*, 153 Wn.2d 812, 823, 108 P.3d 768 (2005).

Wachovia is correct that we review an award of attorney fees for abuse of discretion, that is, whether it was based on tenable grounds or reasons. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185 (2006). But where the meaning of an attorney fee statute is at issue, we review the decision to award or not award attorney fees de novo as a question of law.<sup>6</sup> *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 936-37, 147 P.3d 610 (2006) (attorney fees on change of venue under RCW 4.12.090).

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For RCW 4.84.330 to apply: (1) the action must be "on a contract or lease," (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a "prevailing party." RCW 4.84.330. The mere allegation of an enforceable contract containing a unilateral attorney fee provision satisfies the statute's first two requirements. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). Here, the parties agree the Note contains a unilateral attorney fee provision incorporated to the Guaranty. The narrow question

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<sup>6</sup> Moreover, where RCW 4.84.330 applies, awarding attorney fees is mandatory. *Singleton*, 108 Wn.2d at 729 ("[a]n interpretation allowing the trial court to deny recovery of reasonable attorney's fees at its discretion or whim would render the statute meaningless"); *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006).

remains whether the trial court's dismissal without prejudice is within RCW 4.84.330's "prevailing party" language.

Under RCW 4.84.330, the defendant generally prevails by successfully defending a contract action. *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999). The defendant also generally prevails where the plaintiff voluntarily dismisses its action under CR 41. *Anderson v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973)<sup>7</sup> (construing former RCW 4.28.185 (1959)); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 193, 69 P.3d 895 (2003) (construing RCW 4.84.185); *Marassi v. Lau*, 71 Wn. App. 912, 918-19, 859 P.2d 605 (1993) (construing RCW 4.84.330); *W. Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 295-96, 716 P.2d 959 (1986) (construing RCW 4.84.330). But the applicability of RCW 4.84.330 to a CR 41 dismissal without prejudice is a matter of first impression.

"The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." *In re Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). We must consider the statute as a whole and give all its language effect. *Seattle Popular Monorail Auth.*, 155 Wn.2d at 627. We review related statutes as a means of identifying legislative intent. *Seattle Popular Monorail Auth.*, 155 Wn.2d at 627. We resort to statutory construction only if the statute can reasonably be interpreted in more than one way.

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<sup>7</sup> More specifically, *Anderson* applied the long-arm statute, former RCW 4.28.185 (1959). 81 Wn.2d at 868. That statute then and now provides attorney fees for the out-of-state defendant who "prevails in the action," but it does not define "prevail." RCW 4.28.185(5). *Escude*, *Marassi*, and *Western Stud Welding* considered CR 41 dismissals *with* prejudice. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003); *Marassi v. Lau*, 71 Wn. App. 912, 914, 920, 859 P.2d 605 (1993); *W. Stud Welding, Inc. v. Omark Indus. Inc.*, 43 Wn. App. 293, 295, 716 P.2d 959 (1986). It is not clear whether the *Anderson* court considered a dismissal with or without prejudice. 81 Wn.2d at 864.

*Pub. Util. Dist. No. 2 v. N. Am. Foreign Trade Zone Indus., L.L.C.*, 159 Wn.2d 555, 566-67, 151 P.3d 176 (2007).

The statute defines “prevailing party” as “the party in whose favor final judgment is rendered.” RCW 4.84.330. The statute does not define “final judgment.” RCW 4.84.330. The term “final judgment” is facially unambiguous--it refers to any court order having preclusive effect. Thus, we refer to Webster’s Third New International Dictionary. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007) (where a statute is unambiguous, resorting to dictionary is appropriate). “Final,” in its legal sense, means

ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court’s finding but not precluding an appeal -- used of a court order, decision, judgment, decree, or sentence; compare INTERLOCUTORY : being a court finding that is conclusive as to jurisdiction and precluding the right to appeal to or continue the case in any other court upon the merits.

WEBSTER’S THIRD NEW INTERN’L DICTIONARY 851 (2002).

“Judgment,” in its legal sense, means “a formal decision or determination given in a cause by a court of law or other tribunal.” WEBSTER’S, *supra*, at 1223. Black’s Law Dictionary similarly defines “final judgment” as “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” BLACK’S LAW DICTIONARY 859 (8th ed. 2004).

As we have previously stated in the attorney fee context, “the effect of a voluntary dismissal ‘is to render the proceedings a nullity and leave the parties as if the action had never been brought.’” *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999) (quoting *Bonneville Assocs., Ltd. P’ship v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999)) (internal

quotation marks omitted). In *Beckman*, we held a condemnee to be the prevailing party under RCW 8.24.030 where the condemnor took a voluntary dismissal without prejudice. 96 Wn. App. at 358, 365-66. But we reasoned that the statute at issue did not predicate attorney fees on the entry of judgment. *Beckman*, 96 Wn. App. at 361-62. In contrast, the statute does precisely that --expressly requiring a "final judgment" before we may deem either party a "prevailing party."<sup>8</sup> A voluntary dismissal without prejudice is not a final judgment because it is not "a formal decision or determination" "leaving nothing further to be determined by the court." WEBSTER'S, *supra*, at 1223, 851; *accord State v. Taylor*, 150 Wn.2d 599, 607, 80 P.3d 605 (2003) (dismissal without prejudice is not "final"). Wachovia is free to file a new action against Kraft, leaving final judgment on their dispute for a future day.

We note the purpose behind RCW 4.84.330 is remedial--unilateral attorney fee provisions are to be applied bilaterally. *Quality Food Ctrs.*, 134 Wn. App. at 817. Kraft's

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<sup>8</sup> The legislature does not explain, nor can we divine, its intent and purpose in so limiting RCW 4.84.330. The only other statute that defines "prevailing party" in terms of "final judgment" is RCW 49.44.135. That statute, adopted eight years after RCW 4.84.330, allows attorney fees in actions alleging an employer's violation of RCW 49.44.120 (general prohibition on employers requiring that employees take lie detector tests). Under RCW 49.44.135(3), a court may, under RCW 4.84.185 (reasonable expenses for frivolous claims), "award any prevailing party against whom an action has been brought for a violation of RCW 49.44.120 reasonable expenses and attorneys' fees *upon final judgment* and written findings by the trial judge that the action was frivolous and advanced without reasonable cause." (Emphasis added.) But the same statute allows a court to award "reasonable attorneys' fees and costs to the prevailing employee or prospective employee" without any such limitation. RCW 49.44.135(2). The clear purpose of chapter 49.44 RCW is to protect employees and potential employees from unfair labor practices. It follows that employers should be required to meet a more restrictive standard for attorney fees. No similar policy rationale apparently underlies RCW 4.84.330. Indeed that statute, as written, permits a contract containing a unilateral attorney fee provision to be tested against summary judgment and later dismissed without the legislature's reciprocal purpose coming due. But "[t]he reason that an order of voluntary dismissal is not a final judgment is for the protection of plaintiffs by allowing the litigation to continue under certain circumstances. It is not for the purpose of precluding attorney fees to a defendant who has 'prevailed' as things stand at that point." *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 289, 787 P.2d 946 (1990).

argument is eminently compelling--that, given this purpose, a plaintiff should not be permitted to avoid attorney fee reciprocity after having tested his or her claim against summary judgment and causing the defendant to incur costs and attorney fees for naught. But given the definition of "final judgment," we cannot say that the legislature intended a suit dismissed without prejudice to yield a "prevailing party" under RCW 4.84.330.<sup>9</sup> Accordingly, under the plain language of the statute, Kraft's request for attorney fees is misplaced, and we must affirm, although on other grounds, the trial court's refusal to reserve the attorney fee issue.<sup>10</sup>

Kraft also argues the trial court erred in refusing to award her statutory costs, including the nominal attorney fees provided under RCW 4.84.010, .060, and .080. But the trial court correctly noted that CR 41(d) allows it to impose costs on further action by the plaintiff. The trial courts have discretion to award statutory costs after a plaintiff's voluntary dismissal. *Anderson*, 81 Wn.2d at 865. On this point, the trial court ruled on a tenable basis. Kraft does not show the trial court abused its discretion. Therefore, we affirm the trial court's denial of statutory costs and attorney fees.

#### ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal, relying on RAP 18.1. That rule authorizes the award of attorney fees on appeal where "applicable law grants to a party the right to recover reasonable attorney fees." RAP 18.1(a). Here, the applicable law is RCW 4.84.330, which under our holding does not permit either party to recover attorney fees where the plaintiff takes a

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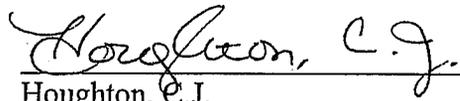
<sup>9</sup> We note that it is for the legislature to correct any injustice that its RCW 4.84.330 language may have inadvertently created.

<sup>10</sup> Whether Kraft can seek reimbursement for attorney fees if Wachovia refiles its action is not before us.

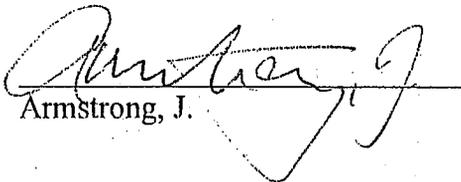
No. 34714-8-II

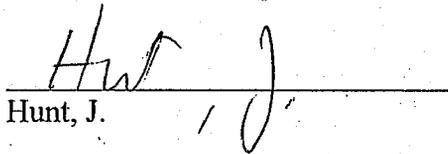
CR 41 dismissal without prejudice. Accordingly, neither party is awarded attorney fees on appeal.

We hold a CR 41 voluntary dismissal without prejudice is not a “final judgment” within the meaning of RCW 4.84.330’s “prevailing party” language and affirm the trial court.

  
\_\_\_\_\_  
Houghton, C.J.

We concur:

  
\_\_\_\_\_  
Armstrong, J.

  
\_\_\_\_\_  
Hunt, J.

# APPENDIX B



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

June 9, 2006

Alexander Sether Kleinberg  
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3408 S 23rd St  
Tacoma, WA 98405-1609

**CASE #: 34714-8-II**

**Wachovia SBA Lending, Inc., Respondent v. Deanna D. Kraft, Appellant**

Counsel:

The action indicated below was taken in the above-entitled case.

**A RULING SIGNED BY COMMISSIONER SCHMIDT:**

The clerk placed this matter on the motion calendar to dismiss. After considering the responses filed, the court determines that the order is appealable to the extent that it did not grant appellant's request for attorney fees. *Allahyari v. Carter Subaru*, 78 Wn.App. 518 (1995). The clerk is directed to issue an amended perfection schedule.

Very truly yours,

David C. Ponzoha  
Court Clerk

**RECEIVED**

JUN 12 2006

BLADO STRATTON & KIGER, P.S.  
ATTORNEYS

DELIVERED TO CLIENT

JUN 13 2006

# APPENDIX C

**1-54****Statutes and Session Law****Chapter 1. Civil Procedure.****Article 5. Limitations, Other than Real Property.****1-54 One year.****1-54. One year.**

Within one year an action or proceeding -

(1) Repealed by Session Laws 1975, c. 252, s. 5.

(2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3) For libel and slander.

(4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern.

(7) Repealed by Session Laws 1971, c. 939, s. 2.

(7a) For recovery of damages under Article 1A of Chapter 18B of the General Statutes.

(8) As provided in G.S. 105-377, to contest the validity of title to real property acquired in any tax foreclosure action or to reopen or set aside the judgment in any tax foreclosure action.

(9) As provided in Article 14 of Chapter 126 of the General Statutes, entitled "Protection for Reporting Improper Government Activities". (C.C.P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C.S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2; 1975, c. 252, s. 5; 1977, c. 886, s. 3; 1983, c. 435, s. 38; 1989, c. 236, s. 4; 2001-175, s. 1.)

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