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**FILED**  
JAN 29 2008

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

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COA No. 60463-5-1

**IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON**

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JAN 14 AM 10:40

ROBERT BATES; B&H CONSTRUCTION SERVICES INC.,  
a Washington corporation,

Petitioners

v.

JULIANNE MCGUIRE,

Respondent

And

BANNER BANK (Bellingham), Bond Acct. #3540233253

Defendant

**PETITION FOR REVIEW**

Philip Buri, WSBA #17637  
Buri Funston Mumford, PLLC  
1601 F. Street  
Bellingham, WA 98225  
(360) 752-1500  
Attorney for Petitioners

**ORIGINAL**

**TABLE OF CONTENTS**

**INTRODUCTION** ..... 1

**I. IDENTITY OF PETITIONERS** ..... 2

**II. COURT OF APPEALS DECISION.** ..... 2

**III. ISSUES PRESENTED FOR REVIEW.**..... 2

**IV. STATEMENT OF FACTS.**..... 4

**ARGUMENT** ..... 8

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.** ..... 8

**A. The Term “All Claims” Should Include Claims  
        For Attorneys’ Fees** ..... 9

**B. CR 68 Provides The Correct Rule For Fees  
        Under Title 4** ..... 13

**C. The Court of Appeal’s Prevailing Party  
        Analysis Has Far-Reaching And Unpredictable  
        Consequences** ..... 15

**CONCLUSION** ..... 18

## TABLE OF AUTHORITIES

### Washington Supreme Court

<u>Beckmann v. Spokane Transit Authority</u> , 107 Wn.2d 785, 733 P.2d 960 (1987).....	8, 14
<u>LRS Electric Controls, Inc. v. Hamre Const., Inc.</u> , 153 Wn.2d 731, 107 P.3d 721, 722 (2005).....	14
<u>Schmidt v. Cornerstone Invs. Inc.</u> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	15
<u>Reynolds v. Hicks</u> , 134 Wn.2d 491, 951 P.2d 761 (1998).....	14

### Washington State Court of Appeals

<u>Allahyari v. Carter Subaru</u> , 78 Wn. App. 518, 897 P.2d 413 (1995).....	4, 15, 16, 17
<u>Eagle Point Condominium Owners Ass'n v. Coy</u> , 102 Wn. App. 697, 9 P.3d 898 (2000).....	12
<u>Seaborn Pile Driving Co., Inc. v. Glew</u> , 132 Wn. App. 261, 131 P.3d 910 (2006).....	3, 13, 14
<u>Stephens v. Gillispie</u> , 126 Wn. App. 375, 108 P.3d 1230 (2005).....	3
<u>Stottlemire v. Reed</u> , 35 Wn. App. 169, 665 P.2d 1383 (1983).....	10

### Other Authorities

10A Breskin, Washington Practice: Civil Procedure Forms § 68.28 (3d Ed.).....	9
<u>Marek v. Chesny</u> , 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (U.S.Ill.,1985).....	13

## Codes and Regulations

CR 68 .....	3, 12, 13, 14, 18
RAP 13.4.....	2
RCW 18.27.040.....	2, 5, 7, 9, 10, 14, 15
RCW 19.86.090.....	15
RCW 4.28.185.....	15
RCW 4.84.250.....	3, 8, 12, 13, 18
RCW 4.84.250-.280.....	1, 2, 3, 10, 13, 14, 18
RCW 4.84.260.....	14
RCW 4.84.260-.270.....	11
RCW 4.84.270.....	3, 7, 9, 11, 12, 15, 16

## INTRODUCTION

This case presents two questions of first impression for the Supreme Court. First, what must a settlement offer say under RCW 4.84.250-.280 to resolve all claims in a lawsuit, including those for attorneys' fees? This is an issue practitioners face daily: how to settle a lawsuit under \$10,000 and avoid paying the other sides' attorneys' fees. Here, defendants Robert Bates and B&H Construction Services offered Plaintiff Julianne McGuire \$2,180 to settle all claims in her lawsuit. The Court of Appeals, in a published opinion, ruled that the phrase "all claims" does not include attorneys' fees, and affirmed Ms. McGuire's fee award of \$6,269.40.

Second, does a plaintiff become a "prevailing party", entitled to an award of attorneys' fees, solely by accepting a settlement offer? The Court of Appeals ruled Ms. McGuire was the prevailing party, even though Mr. Bates never had a trial on the merits and disputed her claims. "We agree with the trial court that McGuire became a prevailing party when she accepted Bates' offer to settle." McGuire v. Bates, slip op. at 5-6 (Appendix A).

Because these two questions have significant consequences for settlement of any case with a fee provision, Mr. Bates now

petitions this Court to accept review under RAP 13.4(b)(4). The Court of Appeals' decision raises issues of substantial public interest that deserve Supreme Court scrutiny.

**I. IDENTITY OF PETITIONERS**

Robert Bates and B&H Construction Services, Inc., (Bates) ask this Court to accept review of the published Court of Appeals decision terminating review designated in Part II of this petition

**II. COURT OF APPEALS DECISION**

Mr. Bates seeks review of the decision of the Court of Appeals Division I, filed December 15, 2008. A copy of the decision is in Appendix A at pages A-1 through A-6.

**III. ISSUES PRESENTED FOR REVIEW**

Mr. Bates' petition presents four issues for review:

A. Mr. Bates gave respondent Julianne McGuire "pursuant to RCW 4.84.250-.280 [an] offer to pay Plaintiff the sum of \$2,180.00, in settlement of all claims against the Defendants." (Settlement Offer; CP 65-66) (Appendix B). Ms. McGuire accepted the offer without modification. (Acceptance; CP 67) (Appendix C). Did Ms. McGuire's acceptance of the settlement resolve all claims she alleged in her complaint, including one for attorneys' fees under RCW 18.27.040?

B. Washington courts interpret and enforce settlement agreements as they would any contract – by the terms of the agreement and the parties’ intent. Stephens v. Gillispie, 126 Wn. App. 375, 380, 108 P.3d 1230 (2005). The Court of Appeals concluded that an offer to settle all claims under RCW 4.84.250-.280 did not include attorneys’ fees because “an offer made pursuant to this statute is necessarily defined by the language contained in the statute.” McGuire, slip op. at 3. Does the language of the statute trump contrary evidence of the parties’ intent?

C. Under CR 68, “if the statute or contract defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned.” Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App. 261, 267, 131 P.3d 910 (2006). As the Court of Appeals recognized in this case, RCW 4.84.250 counts attorneys’ fees as part of the costs of an action. McGuire, slip op. at 3. Does caselaw interpreting offers of judgment under CR 68 apply to settlement offers under RCW 4.84.250-.280?

D. Under RCW 4.84.270, a defendant is the prevailing party if the plaintiff voluntarily dismisses the lawsuit without

prejudice. Allahyari v. Carter Subaru, 78 Wn. App. 518, 522, 897 P.2d 413 (1995). The Court of Appeals ruled the converse was also true, concluding the plaintiff, "Ms. McGuire, became a prevailing party when she accepted Bates' offer to settle." McGuire, slip op. at 5-6. Do plaintiffs who accept settlement offers from defendants before trial now become prevailing parties under statutes granting attorneys' fees?

#### **IV. STATEMENT OF FACTS**

In May 2005, Ms. McGuire hired Mr. Bates to remodel her kitchen. (Proposal; CP 86). The work called for Bates to install cabinets of Western Maple. (CP 86). As the proposal stated,

This is real wood and will vary in color and texture.  
Finish will be water resistant lacquer (satin finish).

(CP 86). A few months after installation, Ms. McGuire noticed water stains and damage to the backsplash and drip edge and contacted Mr. Bates. He inspected the wood and concluded the damage was not from faulty installation. (CP 80). Ms. McGuire hired another contractor who repaired the backsplash and drip edge for \$2,166.00. (CP 84, 87).

On March 14, 2006, Ms. McGuire sued Bates pro se. McGuire, slip op. at 2. Mr. Bates appeared through counsel on April 3, 2006. (CP 27). Three months later, Ms. McGuire, now represented by an attorney, filed a second amended complaint. (Complaint; CP 83) (Appendix D) She claimed \$2,166 for the costs of repair. (CP 83-84). She also made a claim for pre-judgment interest of 12% "from payment until the entry of judgment herein" on the \$2,166 and "\$750 in accrued attorneys' fees for bringing this action and more if contested further by Defendants." (CP 84).

Finally, she made a separate claim for attorneys' fees in paragraph 13 of her complaint. "Plaintiff is entitled to attorneys' fees and costs pursuant to RCW 18.27.040(6)." (Complaint ¶ 13; CP 84). In her request for relief, Ms. McGuire repeated her claim "for attorneys' fees and costs of suit." (CP 85).

A few months after receiving the second amended complaint, Mr. Bates began settlement discussions. The Court of Appeals' decision omits the offers and counteroffers that preceded the final agreement. On October 3, 2006, Bates' attorney made the following offer:

I have been authorized by my client Robert Bates to make a pre-trial offer of the sum of fifteen hundred and fifty dollars (\$1550.00) to settle all claims against him pursuant to cause no. 06-2-00535-6. This offer is made pursuant to RCW 4.48.250-.280 and RCW 18.27.040.

(10/3/06 Offer; CP 34).

On December 8, 2006, counsel for Ms. McGuire counter offered, asking for fees.

Ms. McGuire is willing to accept \$1550 for the damage, but Mr. Bates would also have to pay my attorneys' fees and costs on this case, pursuant to RCW 18.27.040(6). It's worth noting that my client's actual damages are \$2,166, which she has already paid. At this time, my fees are \$1,975 and my costs are small at \$20. To sum it up, my client will settle her case for \$3,545.

(12/8/06 Counteroffer; CP 35).

On December 15, 2006, Mr. Bates rejected Ms. McGuire's request for attorneys' fees and provided this counteroffer:

Your offer to settle your \$2166 claim for \$3,545 is rejected. My client has authorized me to amend his previous offer of settlement of all claims against him to \$1700. This offer is made pursuant to RCW 4.48.250-.280 and RCW 18.27.040.

(12/15/06 Counteroffer; CP 36). Negotiations ended here. The parties agreed to submit the case to mandatory arbitration. (CP 81-82).

On February 22, 2007, counsel for Mr. Bates made the final settlement offer under RCW 4.84.270.

Pursuant to RCW 4.84.250-.280, we offer to pay Plaintiff the sum of \$2,180.00 in settlement of all claims against the Defendants. Said offer is open to acceptance for ten (10) days from the date hereof; if not accepted it shall be withdrawn.

(2/22/07 Offer; CP 46-47) (Appendix B). Five days later, Ms. McGuire accepted the offer.

Plaintiff Julianne McGuire by and through her attorney Joseph T. Pemberton of Pemberton & Hoogestraat, P.S., hereby accepts Defendants' Settlement Offer dated February 22, 2007.

(2/27/07 Acceptance; CP 49) (Appendix C). Mr. Bates thought the lawsuit was settled.

At the March 6, 2007 arbitration hearing, counsel for Ms. McGuire made a motion for attorneys' fees under RCW 18.27.040. The arbitrator denied the motion.

The Plaintiff's Motion for an Award of Attorney's Fees must be denied. All claims were settled by Offer and Acceptance prior to the hearing.

(CP 78). Ms. McGuire requested a trial de novo, and on July 20, 2007, Whatcom County Superior Court Judge Steven Mura vacated the arbitrator's decision. (Findings of Fact and Conclusions of Law; CP 9-12) (Appendix E). The Court awarded Ms. McGuire the

settlement amount, \$2166.00; prejudgment interest, \$368.11; costs, \$470.00; and attorneys' fees, \$6,269.40.

Mr. Bates appealed to Division I of the Court of Appeals. On December 15, 2008, the court affirmed the trial court. McGuire, slip op. at 6. Mr. Bates now timely petitions this Court for review.

## ARGUMENT

### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The attorneys' fee provision in RCW 4.84.250 exists to promote settlement or judicial resolution of small claims.

The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. Valley v. Hand, 38 Wn. App. 170, 684 P.2d 1341, review denied, 103 Wn.2d 1006 (1984); Harold Meyer Drug v. Hurd, 23 Wn. App. 683, 598 P.2d 404 (1979). Another appellate court referred to the statute's purpose as: "[t]he obvious legislative intent is to enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by legal fees." Northside Auto Serv., Inc. v. Consumers United Ins. Co., 25 Wn. App. 486, 492, 607 P.2d 890 (1980).

Beckmann v. Spokane Transit Authority, 107 Wn.2d 785, 788-789, 733 P.2d 960 (1987). If the Court of Appeals' published decision stands, practitioners will have no guidance on how to draft settlement letters without unintentionally exposing their clients to a

fee award. This promotes neither settlement nor resolution of these cases.

A. The Term "All Claims" Should Include Claims For Attorneys' Fees

Mr. Bates tried his best to settle this lawsuit without attorneys' fees. Washington Practice gives the following form for a settlement offer under RCW 4.84.270:

*[Court Caption]*  
*[Parties]*

No.  
DEFENDANT  
*[Name]'s* OFFER  
OF SETTLEMENT

Defendant *[name]* offers to settle the plaintiff's claim against him for *[specify]*. This offer is subject to the provisions of RCW 4.84.250 to 4.84.280.  
Dated: *[month, day, year]*.

10A Breskin, Washington Practice: Civil Procedure Forms § 68.28 (3d Ed.). Here, counsel for Mr. Bates reinforced the language by stating the offer applied to "all claims". (CP 65).

Ms. McGuire made a claim for attorneys' fees under RCW 18.27.040(6) in paragraph 13 of her complaint. In his rejection of her counteroffer, Mr. Bates made clear he refused to pay her attorneys' fees in addition to damages. This is significant evidence of the parties' intent and should have settled her claim for fees under RCW 18.27.040(6).

Since releases and compromise and settlement agreements are considered to be contracts, their construction is governed by the legal principles applicable to contracts and they are subject to judicial interpretation in light of the language used and the circumstances surrounding their making.

Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983).

“All claims” in the settlement agreement included Ms. McGuire’s claim for fees under RCW 18.27.040.

Both the trial court and Court of Appeals took pains to interpret the settlement offer without determining the parties’ intent. The trial court stated Ms. McGuire did not have a “claim” for attorneys’ fees until she became the prevailing party.

Prior to Plaintiff accepting Defendants’ offer of settlement, Plaintiff was not a prevailing party under 18.27.030 and had no claim for attorneys’ fees or costs, which existed at the time Defendants made their offer of settlement pursuant to RCW 4.84.250-.280.

(Conclusion of Law ¶ 1; CP 11).

The Court of Appeals concluded that an offer to settle all claims under RCW 4.84.250-.280 did not include attorneys’ fees, because the statute defines fees as costs rather than a claim.

An offer made pursuant to this statute is necessarily defined by the language contained in the statute. Since attorneys fees are defined as costs, the use of the term “claim” refers only to McGuire’s claim for damages.

McGuire, slip op. at 3. Neither accounts for the parties' negotiating history or that Ms. McGuire claimed attorneys' fees under Title 18 in her complaint.

Under the Court of Appeals' decision, counsel for defendants face a dilemma crafting settlement offers for small claims. If they do not expressly state that an offer includes attorneys' fees, plaintiffs can accept the offer and then request fees, substantially increasing their recovery. The parties' negotiations do not matter; the only criterion is whether the offer specifies fees in addition to claims.

On the other hand, if defense counsel states the offer includes attorneys' fees, identifying the prevailing party under RCW 4.84.260-.270 becomes intractable. For example, under RCW 4.84.270,

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

RCW 4.84.270. The problem is that attorneys' fees are a cost under this statute. When a defendant offers a lump sum that includes attorneys' fees, how much are damages and how much are fees?

Furthermore, if defendant includes fees in the offer, does the court add plaintiff's fee award to the recovery to decide whether plaintiff beat defendant's offer? For example, under the Condominium Act, attorneys' fees count against a CR 68 offer.

Coy is mistaken in his contention that the Association failed to improve upon the rejected offer of \$40,000. Coy contends the relevant figure for comparison is the Association's net damage award of \$22,441. But the court entered judgment in favor of the Association for \$47,617. That judgment included the award of \$25,000 in attorney fees. To exclude the attorney fees from the calculation would be inconsistent with the Supreme Court's determination of the prevailing party on similar facts in Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 795 P.2d 1143 (1990).

Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn. App. 697, 709, 9 P.3d 898 (2000). By requiring counsel to include fees in offers under RCW 4.84.250, the Court unnecessarily complicates determining who the prevailing party is. The better rule is to assume an offer to settle all claims is just that – all claims plaintiff has. If plaintiff accepts the offer, that is the total recovery.

B. CR 68 Provides The Correct Rule For Fees Under Title 4

An earlier decision from the Court of Appeals under CR 68 gives the correct rule for Mr. Bates' offer. Since fees under RCW 4.84.250 are considered costs, a settlement offer under that statute includes fees automatically.

If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying statute or contract provision. If the statute or contract defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned. If attorney fees are defined as separate from costs under the statute or contract, then the court must award those fees in addition to the amount of the offer.

Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App. 261, 267, 131 P.3d 910 (2006); Marek v. Chesny, 473 U.S. 1, 9, 105 S.Ct. 3012, 3016, 87 L.Ed.2d 1 (U.S.Ill.,1985) ("where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68"). By adopting this rule, the Court would eliminate the dilemma created by the Court of Appeals. A plaintiff is the prevailing party under RCW Ch. 4.84 only if he or she recovers in damages more than defendants' offer.

The Court of Appeals quoted Seaborn to justify allowing Ms. McGuire to recover fees under RCW 18.27.040, because they are separate from costs. McGuire, slip op. at 4. But this was possible only after assuming the term “all claims” did not cover a claim for attorneys’ fees under that statute. The converse is correct. The settlement agreement resolved “all claims” under RCW 18.27.040, and Ms. McGuire under Seaborn could not recover fees under RCW 4.84.260.

The interplay of RCW Ch. 4.84, RCW 18.27.040, and CR 68 makes this case far more complicated than it seems at first glance. This Court has written only a few paragraphs on the settlement procedures under RCW Ch. 4.84 and none on the intersection of that statute and CR 68. LRS Electric Controls, Inc. v. Hamre Const., Inc., 153 Wn.2d 731, 107 P.3d 721, 722 (2005); Reynolds v. Hicks, 134 Wn.2d 491, 951 P.2d 761 (1998); Beckmann v. Spokane Transit Authority, 107 Wn.2d 785, 733 P.2d 960 (1987). Mr. Bates’ petition for review provides the Court an opportunity to clarify this confusing area of law.

C. The Court of Appeal's Prevailing Party Analysis Has Far-Reaching And Unpredictable Consequences

The Court of Appeals' decision raised a second issue that merits Supreme Court review. Simply by accepting Mr. Bates' settlement offer, Ms. McGuire became the prevailing party to recover attorneys' fees under RCW 18.27.040. She did not prevail on the merits of her claim and Mr. Bates never conceded liability. This ruling would have substantial, unintended effects on all attorneys' fee statutes.

The Court of Appeals based its decision on two grounds: (1) RCW 18.27.040 requires plaintiff to prevail in an action, not a judgment; and (2) under Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), a plaintiff may prevail under RCW 4.84.270 without a judgment. McGuire, slip op. at 6. Both reasons justify Supreme Court review.

First, many fee-shifting statutes require plaintiff to prevail in an action. See, e.g., RCW 4.28.185(5) (long arm jurisdiction) ("defendant...prevails in the action"); RCW 19.86.090 (Consumer Protection Act). Established caselaw defines a prevailing party as "one who receives a judgment in its favor." Schmidt v. Cornerstone Invs. Inc., 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). The Court

of Appeals decision casts this caselaw in doubt, allowing plaintiffs to claim they are a prevailing party when they settle for a payment from defendants.

The Court of Appeals rejected the need for a judgment, ruling,

the language of this statutory provision [RCW 18.27.040] refers only to an action and not to a judgment. We will not impose a more restrictive term than the statute contains. We agree with the trial court that McGuire became a prevailing party when she accepted Bates' offer to settle.

McGuire, slip op. at 5-6. The implications from this decision are boundless. Unless a fee-shifting statute clearly requires entry of a judgment, parties will face a second round of litigation to decide whether a settlement included attorneys' fees.

Second, the Court of Appeals' decision in Allahyari does not apply to the converse situation. In Allahyari, the court awarded attorneys' fees to defendant under RCW 4.84.270 when plaintiff voluntarily dismissed his suit.

Under RCW 4.84.270, a defendant's status as a prevailing party is determined by examining what, if anything, the plaintiff recovered. Where the plaintiff recovers nothing, the defendant is the prevailing party. When a plaintiff voluntarily dismisses its entire action, as here, the plaintiff recovers nothing. Therefore, for purposes of a fee award under RCW

4.84.250, the defendant under such circumstances is the prevailing party.

Allahyari, 78 Wn. App. at 523. The Court of Appeals ruled that the reciprocal statement is true – if plaintiff recovers anything in a settlement, he or she prevailed.

We believe a similar approach should apply. Moreover, such an approach will both promote settlement and discourage shoddy work by contractors, both clear legislative mandates.

McGuire, slip op. at 6.

But a positive settlement for a plaintiff does not necessarily mean that a plaintiff prevailed. Defendants often settle for the nuisance value of the lawsuit, far below plaintiff's damage claim. Furthermore, as here, defendants settle without admitting liability to resolve a dispute rather than spending more in attorneys' fees to fight them. To then say that the plaintiff prevailed makes settlement an illusion. Without a trial on the merits, the Court of Appeals judged Mr. Bates liable and Ms. McGuire the victor. This will not promote settlement, but rather make it more unlikely – defendants will avoid conceding liability and paying attorneys' fees to plaintiffs.

The Court of Appeals' decision on the prevailing party raises an issue of substantial public importance. Civil settlements are essential to a functioning judiciary. By casting existing caselaw in

doubt, the Court of Appeals' decision has far-reaching and unpredictable consequences for civil litigation. The case merits Supreme Court review.

### CONCLUSION

The Legislature adopted RCW 4.84.250-.280 to resolve disputes, not further complicate them. By concluding that a settlement offer under RCW 4.84.250 does not include attorneys' fees, the Court of Appeals adopted a rule contrary to that under CR 68. Then, by concluding plaintiff was the prevailing party for accepting a settlement, the Court of Appeals raised the specter of attorneys' fees in any settlement with a claim for fees. Petitioner Robert Bates and B&H Construction respectfully request this Court to accept review of his case, and reverse the decision of the Court of Appeals.

DATED this 13<sup>th</sup> day of January, 2009.

BURI FUNSTON MUMFORD, PLLC

By 

Philip J. Buri, WSBA #17637  
1601 F. Street  
Bellingham, WA 98225  
360/752-1500

**DECLARATION OF SERVICE**

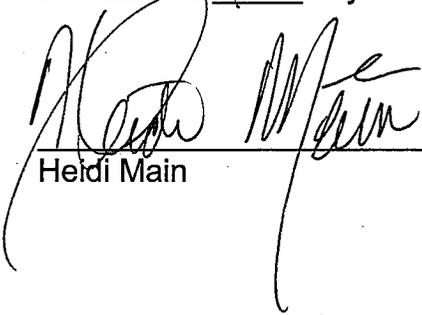
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Petition for Review to:

Joseph T. Pemberton  
Attorney at Law  
120 Prospect Street, Ste. 1  
Bellingham, WA 98225

Rolf Beckhusen  
2014 Iron Street  
Bellingham, WA 98225

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JAN 14 AM 10:40

DATED this 13<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
Heidi Main

# APPENDIX A

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

JULIANNE MCGUIRE,	)	
	)	No. 60463-5-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	PUBLISHED OPINION
ROBERT BATES; B&H	)	
CONSTRUCTION SERVICES INC.,	)	
a Washington corporation,	)	
	)	
Appellants,	)	
	)	
and	)	
	)	
BANNER BANK (Bellingham), Bond	)	
Acct. #3540233253,	)	
	)	FILED: December 15, 2008
Defendant.	)	

Grosse, J. — Attorney fees are not included in an offer to settle all claims made under a statutory scheme that defines those attorney fees as costs. Thus, the plaintiff's acceptance of such an offer does not preclude her from recovering attorney fees pursuant to another statute. The trial court is affirmed.

**FACTS**

In May 2005, Julianne McGuire hired Robert Bates, B&H Construction Services, Inc. to remodel her kitchen. Bates completed the work in September 2005. A few months thereafter, McGuire noticed water stains and other problems resulting from the remodel. McGuire reported the defects to Bates who denied any responsibility after inspecting the property. McGuire hired another contractor who repaired the defects for \$2,166.00.

McGuire first tried to proceed pro se to recover the cost of repair, filing a complaint on March 14, 2006. McGuire subsequently hired an attorney who filed an amended complaint in June 2006. After McGuire filed for entry of a default judgment, Bates finally filed an answer in which he denied all allegations. Discovery ensued.

On January 5, 2007, the matter was transferred to mandatory arbitration by stipulation. On February 22, thirteen days before the scheduled arbitration, Bates offered in writing to settle "all claims" for \$2,180.00 pursuant to RCW 4.84.250-.280. McGuire accepted. McGuire then moved for attorney fees, claiming she was entitled to such an award as the prevailing party under RCW 18.27.040. The arbitrator denied the motion, ruling that the parties' agreement to settle "all claims" necessarily included attorney fees.

McGuire sought a trial de novo in superior court on the arbitrator's denial of attorney fees. The trial court ruled in favor of McGuire, ordering entry of a judgment in the amount of \$2,180.00, prejudgment interest of \$348.17, costs of suit of \$470.00, and attorney fees totaling \$6,269.40. Bates appeals.

#### ANALYSIS

Bates made an offer to settle the case and McGuire accepted. The offer stated:

COMES NOW the Defendants Robert Bates and B&H Construction Services, Inc. and makes the following offer in settlement of all claims between the parties:

Pursuant to RCW 4.84.250-.280, we offer to pay Plaintiff the sum of \$2,180.00, in settlement of all claims against the Defendants. Said offer is open to acceptance for ten (10) days from the date hereof; if not accepted it shall be withdrawn.

The question before us is whether or not Bates' offer to settle "all claims" "[p]ursuant to RCW 4.84.250-.280" included attorney fees. We hold that it does not.

RCW 4.84.250 provides for an award of attorney fees to a prevailing party in matters where the amount in controversy is less than \$10,000:

[I]n any action for damages where the amount pleaded by the prevailing party . . . exclusive of costs, is [ten thousand] dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.<sup>[1]</sup>

Clearly the language shows that the legislature intended attorney fees be recovered as costs rather than as damages. The reference to the amount pleaded in RCW 4.84.250 includes only a plaintiff's basic claim for damages.<sup>2</sup> An offer made pursuant to this statute is necessarily defined by the language contained in the statute. Since attorney fees are defined as costs, the use of the term "claim" refers only to McGuire's claim for damages.

Settlement offers made pursuant to chapter 4.84 RCW are analogous to CR 68 offers of judgment.<sup>3</sup> CR 68 permits a defendant to extend one or more

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<sup>1</sup> RCW 4.84.250. "Attorneys' fees as costs in damage actions of ten thousand dollars or less — Allowed to prevailing party" (emphasis omitted).

<sup>2</sup> Mackey v. Am. Fashion Inst. Corp., 60 Wn. App. 426, 431-32, 804 P.2d 642 (1991).

<sup>3</sup> CR 68 provides the following:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof

offers of a judgment to the plaintiff. Similar to chapter 4.84 RCW, the rule is designed to encourage early settlements and avoid protracted litigation by penalizing a plaintiff who rejects a reasonable offer. Under CR 68, an offer of judgment that does not specify whether attorney fees are included does not necessarily preclude a plaintiff from subsequently requesting judgment for both the offer and attorney fees.

In Seaborn Pile Driving Co. v. Glew, this court held that where a CR 68 offer of judgment was silent regarding attorney fees and the underlying statute or contract did not define attorney fees as part of the costs, the plaintiff was not barred from seeking an award of attorney fees in addition to the amount of the offer.<sup>4</sup>

And further, as noted by the Ninth Circuit in Nusom v. Comh Woodburn, Inc., “a waiver or limitation on attorney fees must be clear and unambiguous.”<sup>5</sup> In Nusom, the Ninth Circuit held that an offeree may seek attorney fees by

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of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

<sup>4</sup> 132 Wn. App. 261, 272, 131 P.3d 910 (2006).

<sup>5</sup> 122 F.3d 830, 832 (9th Cir. 1997).

separate motion where the underlying statute does not define attorney fees as part of costs and the offer fails to specify that attorney fees are included. Thus, under both federal and state case law, an offer which does not specifically set forth inclusion of costs or attorney fees is subject to those additional fees where, as here, the applicable statute so provides.

Prevailing Party

Bates next argues that even if the settlement offer did not bar McGuire's later claim for attorney fees, costs and interest, McGuire is estopped from seeking attorney fees because she is not the prevailing party because there was no judgment entered.

The purpose of an award of damages under RCW 18.27.040(6) is to protect the public from "unreliable, fraudulent, financially irresponsible, or incompetent contractors."<sup>6</sup> Here, McGuire requested fees under RCW 18.27.040(6), which provides:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.<sup>7</sup>

The language of this statutory provision refers only to an action and not to a judgment. We will not impose a more restrictive term than the statute contains. We agree with the trial court that McGuire became a prevailing party

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<sup>6</sup> RCW 18.27.140.

<sup>7</sup> Emphasis added.

when she accepted Bates' offer to settle. As this court held in Allahyari v. Carter Subaru, a defendant is a prevailing party under RCW 4.84.270 "regardless of whether [a] voluntary dismissal constitutes a final judgment."<sup>8</sup>

"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."<sup>9</sup>

We believe a similar approach should apply. Moreover, such an approach will both promote settlement and discourage shoddy work by contractors, both clear legislative mandates.

Because the statute awards attorney fees and McGuire is the prevailing party on appeal, she is entitled to attorney fees here.<sup>10</sup>

The trial court is affirmed.

Grosse, J

WE CONCUR:

Dwyer, A.C.J.

Schneider, C.J.

<sup>8</sup> 78 Wn. App. 518, 524, 897 P.2d 413 (1995).

<sup>9</sup> Allahyari, 85 Wn. App. at 522-23 (quoting Walji v. Candyco, Inc., 57 Wn. App. 284, 289, 787 P.2d 946 (1990)).

<sup>10</sup> RAP 18.1.

# APPENDIX B

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FEB 22 2007

PEMBERTON & HOOGESTRAAT, PS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHATCOM

JULIANNE MCGUIRE,

Plaintiff,

v.

ROBERT BATES; B&H CONSTRUCTION)  
SERVICES, INC., AND BANNER BANK )  
(Bellingham), BOND ACCT. #3540233253, )

Defendants.

NO. 06-2-00535-6

SETTLEMENT OFFER BY  
DEFENDANTS ROBERT BATES  
AND B&H CONSTRUCTION  
SERVICES, INC.

TO: JULIANNE MCGUIRE

AND TO: JOSEPH PEMBERTON, her attorney

COMES NOW the Defendants Robert Bates and B & H Construction Services,  
Inc. and makes the following offer in settlement of all claims between the parties:

Pursuant to RCW 4.84.250-280, we offer to pay Plaintiff the sum of \$2180.00, in  
settlement of all claims against the Defendants. Said offer is open to acceptance for ten  
(10) days from the date hereof; if not accepted it shall be deemed withdrawn.

ROLF BECKHUSEN  
ATTORNEY AT LAW  
2014 Iron Street  
Bellingham, WA 98225  
(360) 671-6900

1.  
2. DATED THIS 22<sup>nd</sup> DAY OF FEBRUARY, 2007.  
3.

4. 

5. Rolf Beckhusen (5037)  
6. Attorney for Defendants Bates and B&H  
7.  
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ROLF BECKHUSEN  
ATTORNEY AT LAW  
2014 Iron Street  
Bellingham, WA 98225  
(360) 671-6900

# APPENDIX C

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The Honorable Charles Snyder

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR WHATCOM COUNTY

JULIANNE MCGUIRE, )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
ROBERT BATES; B&H CONSTRUCTION )  
SERVICES INC, a Washington Corporation; )  
and BANNER BANK (Bellingham), Bond )  
Acct. #3540233253, )  
)  
Defendants. )

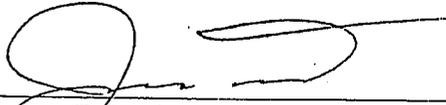
NO. 06-2-00535-6

ACCEPTANCE OF  
SETTLEMENT OFFER

PLAINTIFF JULIANNE MCGUIRE by and through her attorney Joseph T. Pemberton  
of PEMBERTON & HOOGESTRAAT, P.S. hereby accepts Defendants' Settlement Offer  
dated February 22, 2007.

DATED: February 27, 2007

PEMBERTON & HOOGESTRAAT, P.S.

  
\_\_\_\_\_  
Joseph T. Pemberton, WSBA #12467  
Attorney for Plaintiff.

ACCEPTANCE OF SETTLEMENT OFFER  
Page 1

PEMBERTON & HOOGESTRAAT, P.S.  
ATTORNEYS AT LAW  
120 Prospect Street, Suite 1  
Bellingham, WA 98225  
(360) 671-1551  
FAX: (360) 671-8799

# APPENDIX D

ORIGINAL

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WHATCOM COUNTY  
WASHINGTON

BY: [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR WHATCOM COUNTY

JULIANNE MCGUIRE,

Plaintiff,

vs.

ROBERT BATES; B&H CONSTRUCTION  
SERVICES INC, a Washington Corporation; and  
BANNER BANK (Bellingham), Bond Acct.  
#3540233253,

Defendants.

NO. 06-2-00535-6

SECOND AMENDED  
COMPLAINT

PLAINTIFF, for her claim, states:

1. Plaintiff Julianne McGuire at all times material herein and at the present time is a resident of Whatcom County, Washington.

2. Defendant B & H Construction Services, Inc. (hereinafter "B&H") is a corporation organized and existing under the laws of the State of Washington with its primary place of business located in Bellingham, Washington.

3. Defendant Banner Bank is the holder of B&H's savings bond account #3540233253.

5

1           4.     B&H contracted with Plaintiff to remodel Plaintiff 's kitchen, a copy of said  
2 contract is attached as Exhibit 1 hereto.

3           5.     B&H completed said remodel and was paid by Plaintiff according to said  
4 contract.

5           6.     Shortly thereafter, Plaintiff's new cabinets and backsplash began to crack,  
6 split, and lost their finish.

7           7.     B&H denied responsibility and declined to make the necessary repairs.

8           8.     Plaintiff hired Grain and Shine Woodworking (hereinafter "Grain") to make  
9 the necessary repairs. Attached as Exhibit 2, is a copy of Grain's estimate.

10          9.     Plaintiff paid Grain the following amounts:

11                     \$1,000 on March 14, 2006

12                     \$ 500 on March 21, 2006

                      \$ 666 on March 22, 2006

13          10.    B&H is indebted to Plaintiff in the amount of \$2,166.00 for repairs made.

14          11.    Defendant has failed to pay the above-stated sum owed to Plaintiff, despite  
15 repeated requests by Plaintiff.

16          12.    Plaintiff has incurred attorneys' fees and costs for having to bring this action.

17          13.    Plaintiff is entitled to attorneys' fees and costs pursuant to RCW 18.27.040(6).

18  
19          WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

20           A. For \$2,166.00 for the costs of repair;

21           B. For \$750.00 in accrued attorneys fees for bringing this action and more if  
22 contested further by Defendants;

23  
**2ND AMENDED COMPLAINT**

**Page 2**

**PEMBERTON & HOOGESTRAAT, P.S.**

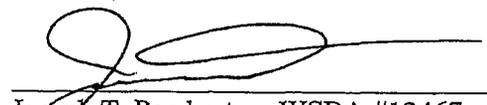
ATTORNEYS AT LAW  
120 Prospect Street, Suite 1  
Bellingham, WA 98225  
(360) 671-1551  
FAX: (360) 671-8799

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- C. For pre-judgment interest of 12% from payment until the entry of the judgment herein, on the payments made and set forth in paragraph 9, above;
- D. For attorneys fees and costs of suit; and
- E. For such other and further relief as the Court deems just and equitable.

DATED: 6/30/06

PEMBERTON & HOOGESTRAAT, P.S.

  
\_\_\_\_\_  
Joseph T. Pemberton, WSBA #12467  
Attorney for Plaintiff.

# B & H Construction Services, Inc.

2614 Iron Street • Bellingham, Washington 98225 • (360) 671-5097 \*

Cont. I.D. No. BHCONSI053M8



PROPOSAL SUBMITTED TO <i>Julianne McGuire</i>	PHONE <i>757-9927</i>	DATE <i>May 26, 05</i>
STREET <i>#105 Shoreview Condo Station</i>	JOB NAME <i>Interior Kitchen remodel</i>	
CITY, STATE AND ZIP CODE <i>Bellingham, Wa 98225</i>	JOB LOCATION <i>same</i>	
ARCHITECT	DATE OF PLANS	JOB PHONE

We hereby submit specifications and estimates for:

*pull + install pantry and cabinets, reframe 2 pitch walls reframe entry and entry closet. Reframe vanity wall in guest bath and install one row of glass block by ceiling. Install kitchen and reframe areas as needed. Other work by others*

Notice to owner:

*Contract, under Washington state law has the right to lien your property whether take legal action for non-payment*

*details: Western Maple (solid) some very small 1/2" x 1/2" allowed. Just is real wood and will wear in color and texture. Finish will be water resistant lacquer (satin finish)*

All overdue accounts bear interest at 1.5% monthly plus bookkeeping charge.

We propose hereby to furnish material and labor to complete in accordance with above specifications for the sum of

*one thousand seven hundred twenty two dollars (\$1,722.00) for*

Payment to be made as follows:

*\$2500 down, draws every two weeks based on work performed and materials provided.*

All materials guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized Signature: *Robert J. Stiles (P)*

Note: This proposal may be withdrawn by us if not accepted within *one (1)* days.

**Acceptance of Proposal** — The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance: *5-26-05*

Signature: *X Julianne McGuire*

Signature: **EXHIBIT 1**



# APPENDIX E

ORIGINAL

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WHATCOM COUNTY CLERK

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By [Signature] Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR WHATCOM COUNTY

JULIANNE MCGUIRE,	)	
	)	
	)	
Plaintiff,	)	NO. 06-2-00535-6
	)	
vs.	)	
	)	
ROBERT BATES; B&H CONSTRUCTION	)	FINDINGS OF FACT &
SERVICES INC, a Washington Corporation;	)	CONCLUSIONS OF LAW
and BANNER BANK (Bellingham), Bond	)	
Acct. #3540233253,	)	
	)	
Defendants.	)	(Honorable Steven J. Mura)

THIS MATTER having come before the Court upon the motion of the Plaintiff and the Plaintiff appearing by and through her attorney Joseph T. Pemberton of PEMBERTON & HOOGESTRAAT, P.S., and the Defendants appearing by and through their attorney Rolf Beckhusen, and the Court hearing argument from counsel, and having reviewed the files and records herein, does therefore enter the following:

I. FINDINGS OF FACT.

1. On March 14, 2006, Plaintiff filed suit against Defendants and their contractors bond for breach of contract to obtain reimbursement of payment to a third party for work needed to repair her kitchen cabinets and backsplash. The contract between the parties contained no attorney's fees provision.

*FINDINGS OF FACT & CONCLUSIONS OF LAW*  
Page 1

PEMBERTON & HOOGESTRAAT, P.S.  
ATTORNEYS AT LAW  
120 Prospect Street, Suite 1  
Bellingham, WA 98225  
(360) 671-1551  
FAX: (360) 671-8799

45



1 II. CONCLUSIONS OF LAW.

2 1. Prior to Plaintiff accepting Defendants' offer of settlement, Plaintiff was not a  
3 prevailing party under 18.27.030 and had no claim for attorney's fees or costs, which existed  
4 at the time Defendants' made their offer of settlement pursuant to RCW 4.84.250-.280.

5 2. After acceptance of Defendants' offer of settlement, Plaintiff became the  
6 prevailing party under RCW 18.27.030.

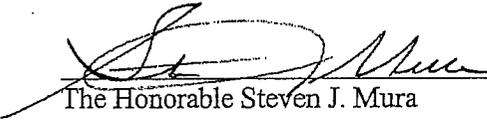
7 3. When the settlement became binding, which it did upon communication of the  
8 acceptance of the offer to the Defendant, then Plaintiff was at that instant a prevailing party  
9 under RCW 18.27.030 and from that moment forward had a right to make a claim for her  
10 attorney's fees, costs of suit, and prejudgment interest, pursuant to RCW 18.27.030.

11 4. The Public policy underlying RCW 18.27.030 is that a party who prosecutes  
12 their case to conclusion, either by settlement or judgment, should not have to bear the costs  
13 of litigation.

14 5. Plaintiff, being the prevailing party, is entitled to her attorney's fees, costs,  
15 and prejudgment interest, as set forth in RCW 18.27.030.

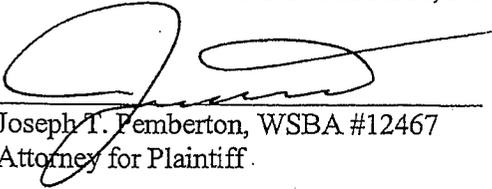
16 6. Judgment should be entered for the Plaintiff in the amount of \$2,180, plus  
17 attorney's fees of \$6,269.40, together with costs of \$470.00 and prejudgment interest of  
18 \$368.11.

19  
20 DONE IN OPEN COURT this 17th day of August 2007.

21  
22   
23 The Honorable Steven J. Mura

24 Presented by:

25 PEMBERTON & HOOGESTRAAT, P.S.

26   
27 Joseph T. Pemberton, WSBA #12467  
28 Attorney for Plaintiff.

**FINDINGS OF FACT & CONCLUSIONS OF LAW**  
Page 3

PEMBERTON & HOOGESTRAAT, P.S.  
ATTORNEYS AT LAW  
120 Prospect Street, Suite 1  
Bellingham, WA 98225  
(360) 671-1551  
FAX: (360) 671-8799

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Copy Received:



Rolf Beckhusen, WSBA #5037  
Attorney for Defendants