

No. 82659-5

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

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

Petitioners

v.

JULIANNE MCGUIRE,

Respondent

And

BANNER BANK (Bellingham), Bond Acct. #3540233253

Defendant

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SUPREME COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF PETITIONERS

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ORIGINAL

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INTRODUCTION

This case concerns settling lawsuits worth less than \$10,000. Under RCW 4.84.250,

...in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, 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.

RCW 4.84.250. Plaintiff Julianne McGuire sued defendant Robert Bates and B&H Construction Services, Inc., (Bates) for \$2,166 plus interest, costs and reasonable attorneys' fees. McGuire accused Bates of faulty construction in a kitchen remodel.

On February 22, 2007, Bates offered this settlement to McGuire:

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 Said offer is open to acceptance for ten (10) days from the date hereof; if not accepted it shall be deemed withdrawn.

(Settlement Offer; CP 65-66) (Attached as Appendix B) (Emphasis added). Five days later, McGuire accepted the offer without modification. (Acceptance; CP 67) (Attached as Appendix C).

Despite the term “all claims” in the settlement, the trial court and Court of Appeals did not consider this a settlement of all claims. Both awarded McGuire reasonable attorneys’ fees in addition to the agreed amount. Bates now asks this Court to vacate the fee award for three reasons: (1) the parties agreed to resolve all claims, including those for attorneys’ fees; (2) the Court of Appeals’ decision reversed the proper order of addressing the fee claims; and (3) accepting a settlement does not make McGuire a prevailing party.

I. THE PARTIES’ INTENT GOVERNS

Settlement agreements are contracts, and Washington courts interpret them under common law rules.

A compromise or settlement agreement is a contract, and its construction is governed by the legal principles applicable to contracts. It is subject to judicial interpretation in the light of the language used and the circumstances surrounding its making.

Riley Pleas, Inc. v. State, 88 Wn.2d 933, 938, 568 P.2d 780 (1977).

Where the facts are not in dispute, this Court reviews the meaning of the contract *de novo*.

The meaning of contract provisions is a mixed question of law and fact because we ascertain the intent of the contracting parties “ ‘by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the

making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.' " Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting Stender v. Twin City Foods, Inc., 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). Where the facts are undisputed, such as where the parties agree that the contract language controls and there is no extrinsic evidence to be presented, courts may decide the issue as a matter of law.

Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 425, 191 P.3d 866 (2008).

The parties do not dispute they had a settlement or what it says. They dispute a legal issue: whether the term "all claims" in their settlement agreement includes claims for reasonable attorneys' fees.

As detailed in Bates' petition for review, both the parties' negotiations and the separate claim for attorneys' fees in McGuire's complaint confirm that all claims includes attorneys' fees. (Petition for Review at 4-7). First, the parties' earlier offers specifically included attorneys' fees. On December 8, 2006 for example, counsel for McGuire made this offer, 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, Bates rejected McGuire's total settlement figure and made 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).

The final offer for \$2180, which McGuire accepted, twice stated that it would settle all claims. "Defendants... make the following offer in settlement of all claims between the parties" and "[p]ursuant to RCW 4.84.250-.280, we offer to pay Plaintiff the sum of \$2180.00, in settlement of all claims against the Defendants." (Settlement Offer; CP 65-66) (Appendix B). The term "all claims" means what it says – Bates offered a settlement to resolve the entire dispute, including the claim for attorneys' fees under RCW 18.27.040.

Second, McGuire 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). The only reasonable meaning of “all claims” is that it encompassed every claim alleged in her complaint. This included her claim for reasonable attorneys’ fees in paragraph 13.

Two cases with similar facts – one from Wyoming and one from Colorado – confirm that the phrase “all claims” includes a claim for attorneys’ fees pled in the complaint. In The Real Estate Pros v. Byers, 90 P.3d 110 (Wyo. 2004) (Attached as Appendix D), the defendant made an offer of judgment under Rule 68 “in full and final satisfaction of all claims of Plaintiffs against Defendant herein.” The Real Estate Pros, 90 P.3d at 112. The plaintiff accepted the offer and then requested fees under a separate statute. The Wyoming Supreme Court concluded the settlement unambiguously included claims for attorneys’ fees.

We...find nothing ambiguous about an offer that refers to “all claims” of the plaintiff against the defendant. Dr. Byars' offer “in full and final satisfaction of all claims of Plaintiffs against Defendant” can only mean one amount for settlement of all claims made by the plaintiff, including the claim for attorneys' fees. The lack of the exact words “attorneys' fees” in Dr. Byars' offer does not render it ambiguous when it is considered in its entirety.

The Real Estate Pros, 90 P.3d at 115.

Next, in Bumbal v. Smith, 165 P.3d 844 (Colo. App. 2007) (Attached as Appendix E), the Colorado Court of Appeals held that a Rule 68 “offer to settle all claims with plaintiff Cindy Bumbal for \$495,000.00” included a separate claim for attorneys’ fees. Bumbal, 165 P.3d at 845.

Lake Loveland made an offer of settlement as to “all claims.” All is an unambiguous term and means the whole of, the whole number or sum of, or every member or individual component of, and is synonymous with ‘every’ and ‘each.’ A claim is defined in relevant part as “[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; cause of action.” *Black’s Law Dictionary* 264 (8th ed.2004).

Here, Bumbal presented each of her claims for relief in the original complaint, including the claim of consumer fraud pursuant to the CCPA. Therefore, “all claims” in the offer of settlement encompassed all relief sought on the basis of a claim in the original complaint.

Bumbal, 165 P.3d at 845-846.

The trial court and the Court of Appeals rejected this definition of all claims for unpersuasive reasons. The trial court ruled as a matter of law 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

18.27.040 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 flaw in this ruling is that a "claim" exists when a party seeks relief, not when a party actually gets that relief. For example, under CR 8, the civil rules define a claim for relief as

(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.

(CR 8(a)). This is exactly what McGuire provided in paragraph 13 of her complaint. It was a legally sufficient claim for attorneys' fees.

If the trial court's reasoning was correct, parties would not have claims for attorneys' fees (or presumably the right to allege them) until they prevailed in a lawsuit. This is incorrect. Parties have a claim when they have a good faith argument for fees. They recover on the claim when they become the prevailing party.

The Court of Appeals took a different tack. It 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 v. Bates, 147 Wn. App. 751, 198 P.3d 1038 (2008)

(Attached as Appendix A).

The key word is “necessarily”. The court presumes that the statute’s default rule trumps the parties’ intent. The opposite is correct. As noted above, the parties’ intent and the words they use drive the meaning of a contract. “The purpose of contract interpretation is to determine the intent of the parties.” Navlet v. Port of Seattle, 164 Wn.2d 818, 842, 194 P.3d 221 (2008). The parties’ intent determines the meaning of all claims.

On the other hand, the default rule of the statute – that attorneys’ fees are defined as costs – applies when the parties’ settlement agreement is silent on fees. See, e.g., Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App. 261, 267, 131 P.3d 910 (2006) (“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”). The statute does not dictate the meaning of “all claims” contrary to the parties’ negotiations.

When he offered to settle all claims for \$2180, Bates meant it. All claims included McGuire's claim for attorneys' fees under RCW 18.27.040(6). Both the trial court and Court of Appeals erred by ruling contrary to the plain meaning and intent of the parties' agreement.

II. THE COURT OF APPEALS REVERSED THE ORDER OF ADDRESSING THE FEE CLAIMS

McGuire sought fees under two statutes, RCW 18.27.040(6) and RCW 4.84.250. The first statute grants fees to the prevailing party in a contract dispute over residential construction.

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.

RCW 18.27.040(6) (contractor fee claim). The second statute awards fees to the prevailing party in any civil lawsuit under \$10,000. RCW 4.84.250.

The Court of Appeals erred by addressing McGuire's contractor fee claim through the prism of RCW 4.84.250 first, rather than through the contract language. This allowed the court to conclude that the Bates' settlement offer did not apply to the contractor fee claim. McGuire, 147 Wn. App. at 755 ("since

attorney fees are defined as costs [under RCW 4.84.250], the use of the term 'claim' refers only to McGuire's claim for damages"). Because the court looked at RCW 4.84.250 first, it could exclude McGuire's claim for fees under RCW 18.27.040 from the definition of all claims.

The court then looked at the contractor fee statute for its definition of prevailing party. The court concluded,

the language of this statutory provision [RCW 18.27.040(6)] refers only to an action and not to a judgment. We will not impose a more restrictive term than the statute contains.

McGuire, 147 Wn. App. at 757. The court exempted McGuire's contractor fee claim from settlement and then used it to declare her the prevailing party for accepting the settlement.

This Court should review the claims in reverse order. Because the parties' intent determines the scope of the settlement agreement, the first question is whether the contractor fee claim in paragraph 13 falls within the definition of all claims. It does for the reasons detailed in the previous section. Once the contractor fee claim is resolved, the next question is whether the settlement agreement resolves her RCW 4.84.250 claim. It does for three reasons.

First, the parties' agreement resolved all claims in the complaint, which includes the RCW 4.84.250 claim. Second, if the agreement is somehow ambiguous on fees under RCW 4.84.250, the default rule should be the same as that under CR 68. Attorneys' fees are costs under RCW 4.84.250 and therefore included in an offer to settle. The Court of Appeals in Seaborn stated the default rule for 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. 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).

The Seaborn court relied on the United States Supreme Court's decision in Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). In that opinion, the Supreme Court underscored treating offers of judgment as all-inclusive.

If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorneys' fees in whatever

amount the court might fix on motion of the plaintiff.”
720 F.2d, at 477.

Marek, 473 U.S. at 6-7. This presumption promotes settlements,
the underlying goal of Rule 68.

The Supreme Court concluded that an offer of judgment
includes attorneys’ fees awarded as costs.

All costs properly awardable in an action are to be
considered within the scope of Rule 68 “costs.” Thus,
absent congressional expressions to the contrary,
where the underlying statute defines “costs” to include
attorneys’ fees, we are satisfied such fees are to be
included as costs for purposes of Rule 68.

Marek, 473 U.S. at 9. The same rationale applies here.

Like CR 68, the purpose of RCW 4.84.250 is to promote
settlement without favoring plaintiffs or defendants. “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.”
Beckmann v. Spokane Transit Authority, 107 Wn.2d 785, 788, 733
P.2d 960 (1987). Under RCW 4.84.250, attorneys’ fees are a cost,
and an offer under the statute should automatically include
attorneys’ fees.

Harmonizing RCW 4.84.250 with CR 68 would eliminate a
potential trap for the unwary. Both provide procedures for shifting
attorneys’ fees when one party makes a settlement offer. Tegland,

14A Washington Practice § 37.9 (“CR 68 becomes far more significant, and is used far more often, in cases in which attorney fees are available as an element of costs”). If a CR 68 offer included attorneys’ fees as costs, but RCW 4.84.250 did not, practitioners would err if they used their offer of judgment forms on a case worth less than \$10,000. Furthermore, Washington courts would have to sort out which rule governs when both CR 68 and RCW 4.84.250 apply to a case.

Harmonizing the two would also not complicate determining the prevailing party under RCW 4.84.260 and .270. To obtain fees under RCW 4.84.250, a plaintiff must recover damages, exclusive of costs, greater than defendant’s offer or equal to or greater than plaintiff’s offer.

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 (emphasis added).

The italicized phrase “exclusive of costs” plays an important role in the calculation. Plaintiff’s damages, without attorneys’ fees under RCW 4.84.250, must be greater than defendant’s offer that implicitly includes fees under the statute. Neither RCW 4.84.260 or .270 qualifies “the amount offered in settlement” with “exclusive of costs.” The settlement as a whole is the benchmark.

This may seem lopsided, but plaintiffs benefit from the provision when calculating whether the statute applies. The statute excludes plaintiff’s request for fees under RCW 4.84.250 from the amount pleaded. For example, if McGuire recovered \$7200 in attorneys’ fees rather \$6200, her total recovery would exceed \$10,000. But because the statute excludes costs from the amount pleaded, her case would still qualify because the amount pleaded, *exclusive of costs*, was under \$10,000. The symmetry exists in how the statute calculates plaintiff’s request for damages and recovery of damages.

The default rule under RCW 4.84.250 should be the same as CR 68: an offer of settlement implicitly includes attorneys’ fees awarded as costs. Anytime a party makes an offer of settlement under RCW 4.84.250, it should automatically include fees under that statute. A party makes a settlement offer to end the case with

one lump sum, not to settle for damages with a second round of litigation over attorneys' fees.

The third reason Bates' offer resolved any fee claim under RCW 4.84.250 is that by accepting the settlement, McGuire ended the case. She did not become the prevailing party. The next section explains why.

III. ACCEPTING A SETTLEMENT DOES NOT CREATE A PREVAILING PARTY

The Court of Appeals considered McGuire a prevailing party for two reasons. First, the court ruled under RCW 18.27.040 that McGuire prevailed in an action by accepting the settlement. McGuire, 147 Wn. App. at 757 (“the language of this statutory provision refers only to an action and not to a judgment”). Second, the court ruled that under RCW 4.84.250 and Allahyari v. Carter Subaru, 78 Wn. App. 518, 897 P.2d 413 (1995), “McGuire became a prevailing party when she accepted Bates' offer to settle” McGuire, 147 Wn. App. at 757.

Both of these grounds rest on a faulty premise: McGuire won the lawsuit because she obtained a settlement. Parties settle cases for a number of reasons, and it is both unfair and

inappropriate to declare McGuire a prevailing party simply for compromising her claim.

To consider the terms of that settlement in this action would be improper and unjustified. It is well-established that statements made for purposes of settlement negotiations are inadmissible, and Rule 408 of the Federal Rules of Evidence extends the exclusion to completed compromises when offered against the compromiser. See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence, P 408(04) (1978).

...A host of factors may affect a litigant's decision to settle.

Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 486 F.Supp. 414, 423 n.10 (D.C.N.Y., 1980). Under ER 408, evidence of settlement is inadmissible to prove liability. It should be the same for proving that a party prevailed.

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 Bates liable and 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.

Accepting the settlement does not make McGuire the prevailing party any more than Bates. It is a compromise, by definition a neutral action that does not declare a winner or loser. The Court of Appeals erred by considering McGuire the prevailing party solely because she agreed to a settlement.

Next, the Court of Appeals erred by applying Allahyari v. Carter Subaru to this case. This Court recently overruled Allahyari, concluding that absent a final judgment, there is no prevailing party under RCW 4.84.330.

A voluntary dismissal leaves the parties as if the action had never been brought. No substantive issues are resolved, and the plaintiff may refile the suit. Because a voluntary dismissal is not a final judgment rendered in favor of the defendant, the Court of Appeals correctly concluded that Kraft cannot be considered a prevailing party under RCW 4.84.330.

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). The Court of Appeals' ruling is no longer based on valid precedent.

Furthermore, the Court of Appeal's ruling does not make sense. Under RCW 4.84.270, McGuire's recovery, *exclusive of costs*, must be greater than Bates' settlement amount. Yet

McGuire's recovery equaled the settlement amount. Everything else awarded by the trial court – fees, interest, and litigation costs -- are excluded from the recovery. If anyone has a claim for fees under RCW 4.84.250, it is Bates. He does not claim them, because as detailed above, the parties settled all claims to this lawsuit.

The Court of Appeals in a few sentences established a new, broad and controversial legal ruling. No longer will parties need to obtain a judgment to qualify for statutory attorneys' fees. If the parties settle, plaintiffs become prevailing parties by virtue of receiving money from defendants. This is not the law nor should it be.

CONCLUSION

This appeal asks whether the term "all claims" in a settlement agreement includes the claim for attorneys' fees in Julianne McGuire's complaint. It does. When the parties agreed to settle all claims in this lawsuit, they ended the case. Both the trial court and Court of Appeals erred by ruling that McGuire's claim for attorneys' fees survived the settlement agreement.

Petitioner Robert Bates respectfully requests this Court to reverse the Court of Appeals and vacate the trial court's judgment. This matter was, and should be, settled.

DATED this 3rd day of August, 2009.

BURI FUNSTON MUMFORD, PLLC

By 

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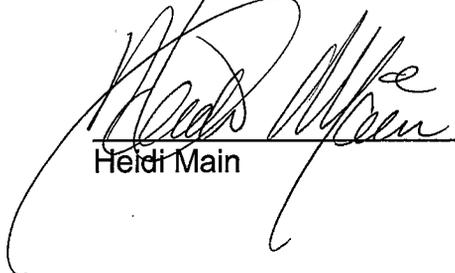
DECLARATION OF SERVICE

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
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120 Prospect Street, Ste. 1
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Rolf Beckhusen
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Bellingham, WA 98225

DATED this 3rd day of August, 2009.



Heidi Main

APPENDIX A

Westlaw.

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Court of Appeals of Washington,
 Division 1.
 Julianne **McGUIRE**, Respondent,
 v.
 Robert **BATES**; B & H Construction Services Inc.,
 a Washington corporation, Appellants,
 and
 Banner Bank (Bellingham), Bond Acct. #
 3540233253, Defendant.
No. 60463-5-I.

Dec. 15, 2008.

Background: Homeowner who settled claims arising from contractor's allegedly defective remodeling work sought a trial de novo after arbitrator denied her claim for attorney fees. The Whatcom County Superior Court, Steven J. Mura, J., entered judgment, including attorney fees, in favor of homeowner, and contractor appealed.

Holdings: The Court of Appeals, Grosse, J., held that:

- (1) contractor's offer to settle did not include attorney fees, and
- (2) homeowner was a prevailing party.

Affirmed.

West Headnotes

[1] Costs 102 ↪ 194.48

102 Costs
 102VIII Attorney Fees
 102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases
 Contractor's offer to settle, pursuant to statute that defined attorney fees as costs, "all claims" of homeowner in dispute over allegedly defective work, did not include attorney fees, and thus

homeowner who accepted the offer was not precluded from subsequently claiming attorney fees as a prevailing party pursuant to statute governing actions against contractors and contractor's bonds; use of the term "claims" referred only to homeowner's claim for damages, not costs. West's RCWA 4.84.250, 18.27.040(6).

[2] Costs 102 ↪ 71

102 Costs
 102I Nature, Grounds, and Extent of Right in General
 102k71 k. Waiver or Loss of Right. Most Cited Cases

Costs 102 ↪ 194.10

102 Costs
 102VIII Attorney Fees
 102k194.10 k. In General. Most Cited Cases
 A waiver or limitation on attorney fees must be clear and unambiguous.

[3] Costs 102 ↪ 194.48

102 Costs
 102VIII Attorney Fees
 102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases
 A settlement offer which does not specifically set forth inclusion of costs or attorney fees is subject to those additional fees where the applicable statute so provides.

[4] Costs 102 ↪ 194.48

102 Costs
 102VIII Attorney Fees
 102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases
 Homeowner who accepted contractor's settlement offer, in dispute over allegedly defective remodel-

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 147 Wash.App. 751, 198 P.3d 1038
 (Cite as: 147 Wash.App. 751, 198 P.3d 1038)

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ing work, was a prevailing party entitled to recover attorney fees under statute governing actions against contractors and contractor's bonds, even though no judgment was entered in homeowner's favor; statute referred only to an action and not to a judgment, and allowing attorney fees in a case that was settled but no judgment entered promoted settlement and discouraged shoddy work by contractors. West's RCWA 18.27.040(6).

****1039** Rolf G. Beckhusen Jr., Attorney at Law, Bellingham, WA, for Appellants and Defendant.

Joseph Thomas Pemberton Jr., Pemberton & Hoogstraat PS, Bellingham, WA, for Respondent.

GROSSE, J.

***753** ¶ 1 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

¶ 2 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.

¶ 3 McGuire first tried to proceed pro se to recover the cost of repair, filing a complaint on March 14, 2006. ***754** 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.

¶ 4 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 ****1040** "all claims" necessarily included attorney fees.

¶ 5 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

[1] ¶ 6 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.

¶ 7 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.

¶ 8 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:

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*755 [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.^[FN1]

FN1. RCW 4.84.250. "Attorneys' fees as costs in damage actions of ten thousand dollars or less—Allowed to prevailing party" (emphasis omitted).

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.^{FN2} 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.

FN2. *Mackey v. Am. Fashion Inst. Corp.*, 60 Wash.App. 426, 431-32, 804 P.2d 642 (1991).

¶ 9 Settlement offers made pursuant to chapter 4.84 RCW are analogous to CR 68 offers of judgment.^{FN3} CR 68 permits a defendant to extend one or more 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 *756 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.

FN3. 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 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.

¶ 10 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, **1041 the plaintiff was not barred from seeking an award of attorney fees in addition to the amount of the offer.^{FN4}

FN4. 132 Wash.App. 261, 272, 131 P.3d 910 (2006).

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[2][3] ¶ 11 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.”^{FN5} In *Nusom*, the Ninth Circuit held that an offeree may seek attorney fees by 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.

FN5. 122 F.3d 830, 832 (9th Cir.1997).

Prevailing Party

[4] ¶ 12 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.

¶ 13 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.”^{FN6} Here, McGuire requested fees under RCW 18.27.040(6), which provides:

FN6. RCW 18.27.140.

The *prevailing party in an action* filed under this section against the contractor and contractor's bond or deposit, for *757 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.^[FN7]

FN7. Emphasis added.

¶ 14 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 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.”^{FN8}

FN8. 78 Wash.App. 518, 524, 897 P.2d 413 (1995).

“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.”^[FN9]

FN9. *Allahyari*, 78 Wash.App. at 522-23, 897 P.2d 413 (quoting *Walji v. Candyco, Inc.*, 57 Wash.App. 284, 289, 787 P.2d 946 (1990)).

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.

¶ 15 Because the statute awards attorney fees and McGuire is the prevailing party on appeal, she is entitled to attorney fees here.^{FN10}

FN10. RAP 18.1.

¶ 16 The trial court is affirmed.

WE CONCUR: DWYER, A.C.J., and SCHINDLER, C.J.
 Wash.App. Div. 1,2008.

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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 22nd DAY OF FEBRUARY, 2007.
3.

4. 

5. Rolf Beckhusen (5037)
6. Attorney for Defendants Bates and B&H
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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.

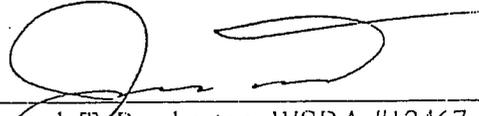
NO. 06-2-00535-6

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.

APPENDIX D

Westlaw

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C

Supreme Court of Wyoming.

THE REAL ESTATE PROS, P.C., a Wyoming corporation; and Debera S. Gibbs, d/b/a Real Estate Pros, Appellants (Plaintiffs),

v.

Dr. James R. BYARS, Jr., Appellee (Defendant).

No. 03-86.

May 19, 2004.

Background: Real estate agent and real estate vendor entered into exclusive right to sell listing contract. After real estate agent brought action against vendor for breach of listing contract, parties entered into settlement and judgment was entered against vendor. Real estate agent subsequently filed motion for attorneys' fees. The District Court, Sweetwater County, Nena James, J., denied the motion and real estate agent appealed.

Holding: The Supreme Court, Kite, J., held that vendor's offer of judgment was not ambiguous and included attorneys' fees, even though attorneys' fees were not expressly mentioned in offer of judgment.

Affirmed.

West Headnotes

[1] Costs 102  **42(2)**

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Offer of judgment under civil procedure rule is generally treated as offer to make contract. Rules Civ.Proc., Rule 68.

[2] Contracts 95  **176(2)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(2) k. Ambiguity in General.

Most Cited Cases

In contract litigation, when terms of agreement are unambiguous, interpretation is question of law.

[3] Contracts 95  **176(2)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(2) k. Ambiguity in General.

Most Cited Cases

Whether contract is ambiguous is question of law for reviewing court.

[4] Contracts 95  **152**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k152 k. In General. Most Cited Cases

Words used in contract are afforded plain meaning that reasonable person would give to them.

[5] Costs 102  **194.50**

102 Costs

102VIII Attorney Fees

102k194.50 k. Effect of Offer of Judgment or Pretrial Deposit or Tender. Most Cited Cases

Real estate vendor's offer of judgment, made under civil procedure rule on offers of settlement, to real estate agent in agent's action for breach of exclusive right to sell listing contract, was not ambiguous

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and included attorneys' fees, even though attorneys' fees were not expressly mentioned in offer of judgment; offer that referred to "all claims" and was "in full and final satisfaction of all claims" could only mean one amount for settlement of all claims made, including claim for attorneys' fees. Rules Civ.Proc., Rule 68.

[6] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Purpose of civil procedure rule on offer of settlement that acts as offer of judgment is to encourage settlement, and rule accomplishes this objective by providing expeditious process that forces parties to weigh costs and benefits of further litigation. Rules Civ.Proc., Rule 68.

[7] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Any party can make firm, non-negotiable offer of judgment under civil procedure rule on offers of settlement. Rules Civ.Proc., Rule 68.

[8] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in Gener-

al. Most Cited Cases

Unlike traditional settlement negotiations in which plaintiff may seek clarification, or make counteroffer, plaintiff faced with offer of settlement that acts as offer of judgment under civil procedure rule may only accept or reject offer. Rules Civ.Proc., Rule 68.

[9] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Offer of settlement that acts as offer of judgment under civil procedure rule must be for definite or ascertainable amount, and later proof cannot cure any defect in offer because party to whom offer was made must base its decision to accept or reject solely on what is contained within that offer. Rules Civ.Proc., Rule 68.

[10] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Offer of settlement under civil procedure rule is not simply offer of settlement, but offer that judgment can be entered on specified terms; if offer is accepted, court automatically enters judgment in favor of offeree, but, if offer is refused, case proceeds. Rules Civ.Proc., Rule 68.

[11] Costs 102 ↪42(4)

102 Costs

102I Nature, Grounds, and Extent of Right in

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General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(4) k. Recovery Less Favorable Than Tender or Offer. Most Cited Cases

Civil procedure rule on offer of settlement that acts as offer of judgment encourages plaintiffs to accept reasonable offers through what is referred to as "cost-shifting"; rule requires party who refuses offer, and then ultimately recovers less than offer amount, to pay costs incurred by offeror from time offer was made. Rules Civ.Proc., Rule 68.

[12] Costs 102 ↪42(4)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(4) k. Recovery Less Favorable Than Tender or Offer. Most Cited Cases

Civil procedure rule on offer of settlement that acts as offer of judgment, and that involves "cost-shifting" by requiring party who refuses offer, and then ultimately recovers less than offer amount, to pay costs incurred by offeror from time offer was made, prompts both parties to suit to evaluate risks and costs of litigation, and to balance them against likelihood of success on trial on merits. Rules Civ.Proc., Rule 68.

[13] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Offers of settlement, that act as offer of judgment under civil procedure rule, are interpreted according to contract law principles. Rules Civ.Proc.,

Rule 68.

[14] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Ambiguities in offer of settlement, that acts as offer of judgment under civil procedure rule, must be resolved against defendant, not only because defendant drafted offer, but also because plaintiff is being asked to give up right to trial. Rules Civ.Proc., Rule 68.

[15] Costs 102 ↪42(4)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(4) k. Recovery Less Favorable Than Tender or Offer. Most Cited Cases

Dynamics of customary contract negotiation are altered by operation of civil procedure rule on offer of settlement that acts as offer of judgment, and its cost shifting features that require party who refuses offer, and then ultimately recovers less than offer amount, to pay costs incurred by offeror from time offer was made. Rules Civ.Proc., Rule 68.

[16] Costs 102 ↪42(2)

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k42 Admissions, Offer of Judgment, Tender, or Payment Into Court

102k42(2) k. Offer of Judgment in General. Most Cited Cases

Even if offer of settlement that acts as offer of

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judgment under civil procedure rule is silent as to whether it includes attorneys' fees, other circumstances in case may make it clear that offer does include attorneys' fees. Rules Civ.Proc., Rule 68.

*111 Representing Appellant: Andrea L. Richard and John A. Coppede of Rothgerber Johnson & Lyons LLP, Cheyenne, Wyoming.

Representing Appellee: Richard Mathey, Green River, Wyoming.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

KITE, Justice.

[¶ 1] Real Estate Pros, P.C. (Real Estate Pros) a real estate agency, sued Dr. James R. Byars, Jr. (Dr. Byars) for breach of an exclusive listing contract. After accepting an offer of settlement from Dr. Byars pursuant to Rule 68 of the Wyoming Rules of Civil Procedure, Real Estate Pros filed a motion for attorneys' fees, which were provided for in the contract. The district court denied the motion, finding the offer, which stated it was "in full and final satisfaction of all claims of Plaintiffs against Defendant," included Real Estate Pros' claim for attorneys' fees. We affirm.

ISSUE

[¶ 2] The parties agree the issue presented is as follows:

Whether the district court erred in denying appellants' Motion for Attorneys' Fees?

FACTS

[¶ 3] On April 21, 1997, Real Estate Pros entered into an "Exclusive Right to Sell Listing Contract" ("listing contract") with Dr. Byars to sell five lots

that he owned. The contract between the parties provided the breaching or defaulting party would pay all reasonable attorneys' fees incurred by the nonbreaching party in enforcing the contract.

*112 [¶ 4] Nearly two years after listing the property, Frank Pirtz expressed interest in two of Dr. Byars' lots. Dr. Byars entered into a contract with Mr. Pirtz, under which Mr. Pirtz agreed to perform work on all five lots in exchange for the two lots. In September 2000, Dr. Byars executed a deed transferring the two lots to Mr. Pirtz. Dr. Byars did not pay a commission to Real Estate Pros as a result of the transaction. Consequently, Real Estate Pros filed suit to enforce the listing contract.

[¶ 5] The amended complaint asserted four claims: (1) breach of exclusive right to sell listing contract, (2) breach of oral contract, (3) breach of implied contract, and (4) promissory estoppel. Following discovery, both parties filed motions for summary judgment. On September 23, 2002, Dr. Byars made a Rule 68 offer to Real Estate Pros, which stated as follows:

COMES NOW, James R. Byars, Jr., Defendant herein, and pursuant to Rule 68, W.R.C.P, hereby offers the following in full and final satisfaction of all claims of Plaintiffs against Defendant herein:

- a. Judgment against Defendant in the amount of \$9,720.00, plus costs accrued to date.
- b. Dismissal with prejudice of all counterclaims presently pending herein against Plaintiffs.

[¶ 6] On September 27, 2002, Real Estate Pros accepted the offer. In accordance with Rule 68, the district court entered judgment against Dr. Byars and for Real Estate Pros in the amount of \$9,720.00, plus costs. On October 15, 2002, Real Estate Pros filed a motion for attorneys' fees, pursuant to the terms of the listing contract, seeking over \$44,000. After a hearing, the district court denied

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the motion finding Real Estate Pros had agreed to settlement of all of its claims, including its claim for attorneys' fees. This appeal followed.

STANDARD OF REVIEW

[1][2][3][4] [¶ 7] Although this case is an appeal from a motion denying attorneys' fees, we are not deciding whether or not the district court abused its discretion in determining an award of attorneys' fees. Rather, we must consider whether or not the district court properly interpreted the Rule 68 offer as including the claim for attorneys' fees. An offer of judgment is generally treated as an offer to make a contract. *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553 (8th Cir.2001). See also *Johnson v. Johnson*, 310 S.C. 44, 425 S.E.2d 46 (Ct.App.1992). In contract litigation, when the terms of the agreement are unambiguous, the interpretation is a question of law. *Double Eagle Petroleum & Mining Corp. v. Questar Exploration & Production Co.*, 2003 WY 139, ¶ 7, 78 P.3d 679, ¶ 7 (Wyo.2003). Whether a contract is ambiguous is a question of law for the reviewing court. *Boley v. Greenough*, 2001 WY 47, ¶ 10, 22 P.3d 854, ¶ 10 (Wyo.2001). We review questions of law *de novo* without affording deference to the decision of the district court. *Id.* According to our established standards for interpretation of contracts, the words used in the contract are afforded the plain meaning that a reasonable person would give to them. *Id.*

DISCUSSION

[5] [¶ 8] Given the fact that Dr. Byars' Rule 68 offer did not mention attorneys' fees, Real Estate Pros claims the district court erred in concluding the claim for attorneys' fees was included in the offer. Dr. Byars responds that because his offer was made "in full and final satisfaction of all claims," and Real Estate Pros' complaint included a specific claim for attorneys' fees, that claim was included in the offer. Real Estate Pros' second amended com-

plaint stated in pertinent part:

¶ 28: The contract provides "In the event that any party shall become in default or breach of any of the terms of this Contract, such defaulting or breaching party shall pay reasonable attorney's fees and other expenses which non-breaching or non-defaulting party may incur in enforcing this Contract...."

¶ 29: The Plaintiffs have incurred and will continue to incur attorney's fees in connection with their attempt to enforce the contract. The Plaintiffs are therefore entitled to recover their attorney's fees incurred in *113 connection with their efforts to recover the commission due and owing from the Defendant as a result of the exchange of Lots 4 and 5 of the property at issue.

[6] [¶ 9] The purpose of Rule 68 is to encourage settlement. *Duffy v. Brown*, 708 P.2d 433, 440 (Wyo.1985); see also *Marek v. Chesny*, 473 U.S. 1, 5, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). The rule provides:

At any time more than 60 days after service of the complaint and more than 30 days before the trial begins, any party may serve upon the adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in the 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 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. As used herein, "costs" does not include attorney's fees.

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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 settlement under this rule, 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.

[7][8][9][10][11][12] [¶ 10] Rule 68 accomplishes its objective of encouraging settlement by providing an expeditious process that forces the parties to weigh the costs and benefits of further litigation. *Utility Automation 2000, Inc. v. Choctawhatchee Electric Coop., Inc.*, 298 F.3d 1238, 1240 (11th Cir.2002). Any party can make a firm, non-negotiable offer of judgment. *Id.* Unlike traditional settlement negotiations in which a plaintiff may seek clarification or make a counteroffer, a plaintiff faced with a Rule 68 offer may only accept or reject the offer. *Id.* An offer under Rule 68 must be for a definite or ascertainable amount and later proof cannot cure any defect in the offer since the party to whom the offer was made must base its decision to accept or reject solely on what is contained within that offer. *Snodgrass v. Rissler & McMurry Co.*, 903 P.2d 1015, 1018 (Wyo.1995). A Rule 68 offer is not simply an offer of settlement, but an offer that judgment can be entered on specified terms. If the offer is accepted, the court automatically enters judgment in favor of the offeree; if the offer is refused, the case proceeds. The rule encourages plaintiffs to accept reasonable offers through what is referred to as "cost-shifting." It requires a party who refuses an offer, and then ultimately recovers less than the offer amount, to pay the costs incurred by the offeror from the time the offer was made. The rule specifies that those "costs" do not include attorneys' fees. Through this cost shifting, "the Rule

prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." *Utility Automation*, 298 F.3d at 1240 (citation omitted).

[13][14] [¶ 11] As a general matter, Rule 68 offers are interpreted according to contract law principles. Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* Civil 2d § 3002 at 95 (2001 Supp.) For example, courts have consistently held an ambiguous Rule 68 offer of judgment should be construed against the offeror. *First Financial Insurance Co. v. Hammons*, 58 Fed. Appx. 31, 34, 2003 WL 264700 (4th Cir.2003). See *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 391 (7th Cir.1999) (holding that "any ambiguities in a Rule 68 offer must be resolved against the [offeror]"); *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir.1997) (concluding that "the 'usual rules of contract construction' apply to a Rule 68 offer of judgment" and "therefore, ambiguities are *114 construed against the offeror") (citations omitted). Ambiguities in a Rule 68 offer "must be resolved against the defendant ..., not only because the defendant drafted the offer but also because the plaintiff is being asked to give up his right to a trial." *First Financial Insurance Co.* 58 Fed. Appx. at 34 (quoting *Nordby*, 199 F.3d at 391-92).

[15] [¶ 12] However, the dynamics of customary contract negotiation are altered by the operation of the rule and its cost shifting features. Wright, Miller & Marcus, *supra* at 94. The contract law analogy is just that, an analogy-the consequences of rejecting a Rule 68 offer are more serious than those of rejecting an ordinary contract offer. *Nordby*, 199 F.3d at 392. As a result, courts have considered interpretation of Rule 68 offers somewhat differently than contracts generally.

Were the agreement between the parties a simple contract, we might be inclined to consider the

history of the negotiations. Ambiguous contract terms compel a court to look to extrinsic evidence, and it *might* fairly be said that the terms of [defendant's] offer create an ambiguity as to [plaintiff's] attorneys' fees.

But the arrangement here is not a simple contract; it involves an accepted offer of judgment, and there is a difference. Courts should be much more reluctant to conclude that an offer of judgment is ambiguous. If a common, garden-variety offer to contract is unclear, the offeree is free to reject the offer or attempt to clarify it. An offeree who accepts an ambiguous offer is in no position to complain if a court called upon to interpret the contract turns to extrinsic evidence. By contrast, a plaintiff who receives a Rule 68 offer is in a difficult position, because "a Rule 68 offer has a binding effect when refused as well as when accepted." Unless the defendant allows the plaintiff to resolve or eliminate ambiguities, the plaintiff will be forced to guess whether and how the court would interpret the extrinsic evidence. Adherence to the language of the offer whenever possible alleviates this unfairness to the plaintiff.

Shorter v. Valley Bank & Trust Co., 678 F.Supp. 714, 719-720 (D.C.Ill.1988) (citations omitted).

[¶ 13] With regard to whether Rule 68 offers that are silent on the issue of attorneys' fees are ambiguous, courts have taken two different approaches. Some courts require specific mention of attorneys' fees in the offer before acceptance of the offer would bar those claims. See *Webb v. James*, 147 F.3d 617 (7th Cir.1998); *Nusom*, 122 F.3d 830; *Chambers v. Manning*, 169 F.R.D. 5 (D.Conn.1996). In *Webb*, an offer "of judgment in the above-captioned matter in the amount of Fifty Thousand Dollars (\$50,000)" made no mention of attorneys' fees. *Webb*, 147 F.3d at 619. The court found the offer ambiguous because attorneys' fees are often sought as an add-on to the judgment and construed it against the drafter so that the offer did

not bar a later claim for attorneys' fees.

[¶ 14] In *Nusom*, the Ninth Circuit Court of Appeals found that "a Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorney fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorney fees a part of the costs." *Nusom*, 122 F.3d at 835. Likewise, in *Chambers v. Manning*, 169 F.R.D. 5 (D.Conn.1996), the court stated, "if Defendant had intended for his offer to include fees, he could have said so explicitly. His failure to do so will be construed against him." *Chambers*, 169 F.R.D. at 8. Like *Webb* and *Chambers*, the *Nusom* court examined the specific language in the offer of judgment, and reached a similar conclusion: that the offer's silence regarding attorneys' fees created ambiguity with respect to whether the \$15,000 sum included attorneys' fees. The court concluded such ambiguity must be resolved against the drafter, and therefore the accepting party was not barred from seeking attorneys' fees *Nusom*, 122 F.3d at 835.

[16] [¶ 15] However, even if an offer is silent as to whether it includes attorneys' fees, other circumstances in the case may make it clear that the offer does include attorneys' fees. Moore's Federal Practice, Civil § 68.02, n. 17.3 (2004 Supp. LEXIS). *115 For example, *Nordby*, 199 F.3d at 391-93, involved a complaint in which one count claimed damages under a state law providing for an award of reasonable attorneys' fees. The court held that the plaintiff's acceptance of a Rule 68 offer of "\$56,003.00 plus \$1,000 in costs as one total sum as to all counts of the ... complaint" barred the plaintiff from later seeking an award of attorneys' fees. While the judge affirmed the above-stated notion that "ambiguities in Rule 68 offers are to be resolved against the offerors," and even encouraged defendants to include the words "attorneys' fees" in their Rule 68 offers, he rejected the "magic words approach ... in favor of an approach ... that gives effect to an unambiguous offer even if it does not

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mention attorneys fees explicitly.” The court found that this offer unambiguously encompassed the claims made in all the counts, including the count that requested fees.

[¶ 16] The offer in *Nordby* was similar to the offer in the present case. We agree with the holding in *Nordby* and find nothing ambiguous about an offer that refers to “all claims” of the plaintiff against the defendant. Dr. Byars' offer “in full and final satisfaction of all claims of Plaintiffs against Defendant” can only mean one amount for settlement of all claims made by the plaintiff, including the claim for attorneys' fees. The lack of the exact words “attorneys' fees” in Dr. Byars' offer does not render it ambiguous when it is considered in its entirety.

CONCLUSION

[¶ 17] Having concluded that attorneys' fees were included in Dr. Byars' Rule 68 offer, we need not address the issue of whether the district court erred in applying a prevailing party standard. We affirm the district court's denial of Real Estate Pros' motion for attorneys' fees.

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APPENDIX E

Westlaw

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H

Colorado Court of Appeals,
 Div. III.

Cindy BUMBAL, Plaintiff-Appellant and Cross-Appellee,

v.

Christopher M. SMITH, M.D., and Patrick J. Lillis, M.D., P.C., d/b/a Lake Loveland Dermatology, Defendants-Appellees and Cross-Appellants.

No. 05CA0893.

Feb. 8, 2007.

As Modified on Denial of Rehearing April 19, 2007.
 Certiorari Denied Aug. 27, 2007.

Background: Patient sued dermatologists asserting negligence and deceptive trade practices in violation of Colorado Consumer Protection Act (CCPA), and included demand for attorney fees. Patient accepted defendants' offer of settlement. The District Court, Larimer County, James H. Hiatt, J., denied patient's request for attorney fees and costs pursuant to CCPA on grounds they were included in settlement amount. Patient appealed.

Holdings: On denial of rehearing, the Court of Appeals, Taubman, J., held that:

(1) offer of settlement of "all claims" included statutory attorney fees sought in the complaint, and
 (2) patient waived right to seek costs under the CCPA in addition to the amount of the settlement.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪893(1)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most

Cited Cases

Compromise and Settlement 89 ↪24

89 Compromise and Settlement

89I In General

89k24 k. Questions for Jury. Most Cited Cases
 The interpretation of a settlement agreement, like any contract, is a question of law subject to de novo review.

[2] Contracts 95 ↪147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract.

Most Cited Cases

Written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language.

[3] Compromise and Settlement 89 ↪12

89 Compromise and Settlement

89I In General

89k10 Construction of Agreement

89k12 k. Matters Included. Most Cited

Cases

Dermatologists' offer of settlement of "all claims" in patient's action alleging negligence and consumer fraud under the Colorado Consumer Protection Act (CCPA) included settlement of attorney fees authorized under the CCPA. West's C.R.S.A. § 6-1-113(2)(b).

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[4] Compromise and Settlement 89 ↪12

89 Compromise and Settlement
 89I In General
 89k10 Construction of Agreement
 89k12 k. Matters Included. Most Cited Cases

Patient who sued dermatologists for alleged deceptive trade practices in violation of the Colorado Consumer Protection Act (CCPA) waived right to seek costs under the CCPA in addition to the amount of her settlement with dermatologists, where patient had accepted dermatologists' offer to settle "all claims." West's C.R.S.A. § 6-1-113(2)(b).

[5] Appeal and Error 30 ↪761

30 Appeal and Error
 30XII Briefs
 30k761 k. Points and Arguments. Most Cited Cases

Appeal and Error 30 ↪762

30 Appeal and Error
 30XII Briefs
 30k762 k. Reply Briefs. Most Cited Cases
 Patient who sued dermatologists for negligence and alleged deceptive trade practices in violation of the Colorado Consumer Protection Act (CCPA) failed to preserve for appellate review her claim at oral argument that she was entitled to recover costs under rule and statute providing costs to prevailing party, where patient did not assert these bases to recover costs in either her opening or reply briefs on appeal. West's C.R.S.A. §§ 6-1-101 et seq., 13-16-104; Rules Civ.Proc., Rule 54(d).
 *844 Leventhal, Brown & Puga, P.C., Benjamin Sachs, Timms R. Fowler, Lorraine E. Parker, Denver, Colorado, for Plaintiff-Appellant and Cross-Appellee.

Kennedy Childs & Fogg, P.C., John R. Mann, Julie E. Haines, Denver, Colorado, for Defendants-Appellees and Cross-Appellants.

Opinion by Judge TAUBMAN.

Plaintiff, Cindy Bumbal, appeals the order denying her request for attorney fees and costs against defendants, Christopher M. Smith, M.D., and Patrick J. Lillis, M.D., P.C., d/b/a Lake Loveland Dermatology (collectively Lake Loveland), after she accepted the defendants' offer of settlement. We affirm.

*845 Lake Loveland cross-appealed, but we later granted the defendants' motion to its their cross-appeal.

In 2002, Bumbal filed suit against Lake Loveland asserting negligence and deceptive trade practices pursuant to the Colorado Consumer Protection Act (CCPA), § 6-1-101, et seq., C.R.S.2006. She also included a demand for attorney fees pursuant to the CCPA.

In 2004, Lake Loveland made an offer of settlement that stated, "Pursuant to C.R.S. § 13-17-202 et sec. [sic], the defendants Christopher M. Smith, M.D., and Patrick J. Lillis, M.D., P.C. d/b/a Lake Loveland Dermatology offer to settle all claims with plaintiff Cindy Bumbal for \$495,000.00."

The version of § 13-17-202 then in effect stated: "If an offer of settlement is accepted within ten days after service of the offer, either party may file the offer, written notice of acceptance, and proof of service with the court, and the clerk shall enter judgment upon the accepted offer of settlement." Colo. Sess. Laws 1995, ch. 232, § 13-17-202(1)(a)(IV) at 1194.

Bumbal timely accepted the offer and filed the offer, the written notice of acceptance, and proof of service with the court. The court then entered judgment in favor of Bumbal on all claims, including the CCPA claim, as required by the former § 13-17-202(1)(a)(IV).

Bumbal sought a determination of law that she was entitled to recover attorney fees and costs pursuant

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to the CCPA in addition to the settlement amount. The trial court ruled that the offer of settlement, by its plain language, included attorney fees and costs and, therefore, Bumbal could not recover an additional amount. Bumbal then filed a motion for attorney fees pursuant to the CCPA and costs pursuant to the CCPA, C.R.C.P. 54(d), § 13-16-104, C.R.S.2006, and several other statutes. The trial court denied the motion, and this appeal followed.

Although the parties' briefs focus on whether Bumbal is entitled to attorney fees and costs under the then applicable language of § 13-17-202, they also address whether the language of the offer of settlement permits an additional award of attorney fees and costs. We conclude that this dispute can be resolved by considering the latter issue.

I. Standard of Review

[1] The interpretation of a settlement agreement, like any contract, is a question of law that we review de novo. *Humphrey v. O'Connor*, 940 P.2d 1015 (Colo.App.1996).

We review the construction of a statute de novo. *Estate of Wiltfong*, 148 P.3d 465 (Colo.App.2006). When construing a statute, we give the statute its plain and ordinary meaning whenever possible. *Crowe v. Tull*, 126 P.3d 196 (Colo.2006). Our goal is to give effect to the legislative intent. *Crowe v. Tull*, *supra*.

II. Offer of Settlement

Bumbal contends the trial court erred in denying her request for attorney fees and costs because Lake Loveland did not mention attorney fees and costs in its offer of settlement, and, therefore, they were not included within the settlement agreement. We disagree.

[2] Written contracts that are complete and free

from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language. *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373 (Colo.2000).

Lake Loveland made an offer of settlement as to "all claims." "[A]ll" is an unambiguous term and means the whole of, the whole number or sum of, or every member or individual component of, and is synonymous with 'every' and 'each.' " *Colo. Dep't of Revenue v. Woodmen of World*, 919 P.2d 806, 814 (Colo.1996) (quoting *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21, 23 (Colo.App.1990)). A claim is defined in relevant part as "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; cause of action." *Black's Law Dictionary* 264 (8th ed.2004).

Here, Bumbal presented each of her claims for relief in the original complaint, including the claim of consumer fraud pursuant to the *846 CCPA. Therefore, "all claims" in the offer of settlement encompassed all relief sought on the basis of a claim in the original complaint.

A. Attorney Fees

Any person found liable under the CCPA is liable for damages plus, "[i]n the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court." Section 6-1-113(2)(b), C.R.S.2006.

[3] The only basis upon which Bumbal sought attorney fees was pursuant to the CCPA. Therefore, Lake Loveland's offer to settle "all claims" included the CCPA claim and attorney fees pursuant to the CCPA. By accepting Lake Loveland's offer as to "all claims," Bumbal waived any further right to seek attorney fees pursuant to the CCPA. See *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir.1999). Bumbal does not claim

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any other basis for an award of attorney fees. Therefore, she is not entitled to attorney fees in addition to the settlement amount.

Our conclusion is supported by decisions of other courts that have interpreted similar offers of settlement. See *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238 (11th Cir.2002); *Nordby v. Anchor Hocking Packaging Co.*, *supra*; *Real Estate Pros, P.C. v. Byars*, 90 P.3d 110 (Wyo.2004).

The Seventh Circuit held that an offer to settle "all claims" unambiguously included a claim for attorney fees even though attorney fees were not mentioned in the offer. *Nordby v. Anchor Hocking Packaging Co.*, *supra*. In *Nordby*, the plaintiff included a demand for attorney fees in its complaint, and the defendant offered to settle for "[o]ne total sum as to all counts of the amended complaint." *Nordby v. Anchor Hocking Packaging Co.*, *supra*, 199 F.3d at 392. The Seventh Circuit held there was no ambiguity in the offer and "there is no doubt that by accepting the defendant's offer the plaintiff in our case abandoned any right to seek attorneys' fees for which he had asked in any of the counts of his complaint." *Nordby v. Anchor Hocking Packaging Co.*, *supra*, 199 F.3d at 392.

A prior Seventh Circuit decision held that a plaintiff may recover attorney fees in addition to the amount in an offer of settlement if provided by statute. *Webb v. James*, 147 F.3d 617 (7th Cir.1998). However, *Nordby* distinguished *Webb* because the offer of settlement there was for "judgment in the above captioned matter," and therefore, was ambiguous as to whether it included attorney fees. *Nordby v. Anchor Hocking Packaging Co.*, *supra*, 199 F.3d at 392.

The Wyoming Supreme Court also concluded that an offer of settlement as to all claims included a claim for attorney fees in the complaint. *Real Estate Pros, P.C. v. Byars*, *supra*. In *Real Estate Pros*,

the plaintiff accepted the defendant doctor's offer of settlement as to "all claims," and the plaintiff sought to recover attorney fees in addition to the settlement amount. The court held:

We agree with the holding in *Nordby* and find nothing ambiguous about an offer that refers to "all claims" of the plaintiff against the defendant. Dr. Byars' offer "in full and final satisfaction of all claims of Plaintiffs against Defendant" can only mean one amount for settlement of all claims made by the plaintiff, including the claim for attorneys' fees. The lack of the exact words "attorneys' fees" in Dr. Byars' offer does not render it ambiguous when it is considered in its entirety.

Real Estate Pros, P.C. v. Byars, *supra*, 90 P.3d at 115.

Furthermore, the Eleventh Circuit has held that an offer to settle "all claims" includes attorney fees. See *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, *supra*, 298 F.3d at 1243 (citing *Nordby* for the proposition that "[a]n offer that does unambiguously include attorneys' fees, on the other hand, will bar the plaintiff who accepts it from seeking additional attorneys' fees under the relevant statute").

We agree with the Seventh and Eleventh Circuits and the Wyoming Supreme Court that an offer of settlement as to "all claims" unambiguously includes attorney fees where the only claim for attorney fees appears in the complaint.

*847 *Bumbal*, nonetheless, relies on *Marek v. Chesny*, 473 U.S. 1, 9, 105 S.Ct. 3012, 3016, 87 L.Ed.2d 1 (1985), and other state cases adopting *Marek* to support her argument that an offer of settlement does not include attorney fees in certain situations.

However, the basis for the *Marek* decision was specific language in Fed.R.Civ.P. 68 that was not

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present in the 1995 version of § 13-17-202. Fed.R.Civ.P. 68 states:

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 the defending party for the money or property or to the effect specified in the offer, *with costs then accrued*.

(Emphasis added.)

The *Marek* Court held that where the underlying statute on which the claim for costs is based does not define attorney fees as “costs,” the plaintiff may recover attorney fees in addition to the settlement amount accepted in an offer of settlement. *Marek v. Chesny, supra*.

However, the holding in *Marek* is based upon the “costs then accrued” language in Fed.R.Civ.P. 68. Because the 1995 version of § 13-17-202 did not include the “costs then accrued” language, *Marek* is distinguishable. See *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., supra* (holding *Marek* was not dispositive where attorney fees were provided by statute or contract but the offer was silent or ambiguous as to whether the fees were included in the offer).

A line of Colorado cases interpreted an earlier version of § 13-17-202, Colo. Sess. Laws 1990, ch. 100 at 852, and its predecessor C.R.C.P. 68 (repealed July 12, 1990), which, like Fed.R.Civ.P. 68, included “costs then accrued.” See *Aberle v. Clark*, 916 P.2d 564 (Colo.App.1995); *Carpentier v. Berg*, 829 P.2d 507 (Colo.App.1992); *Heid v. Destefano*, 41 Colo.App. 436, 586 P.2d 246 (1978). Those cases held that an offer pursuant to the 1990 version of § 13-17-202 implicitly included attorney fees.

However, those cases are distinguishable because the 1995 amendments to § 13-17-202 removed the “costs then accrued” language. Although the divi-

sion in *Chartier v. Weinland Homes, Inc.*, 25 P.3d 1279 (Colo.App.2001), interpreted the 1995 version of § 13-17-202 to determine whether a plaintiff must pay attorney fees where he rejects an offer, it did not decide whether an accepted offer of settlement includes attorney fees. Therefore, *Chartier* is distinguishable.

We therefore conclude as a matter of law that when an offer of settlement encompasses “all claims,” the offer of settlement includes statutory attorney fees sought in the complaint. Thus, we further conclude that Lake Loveland's offer of settlement here encompassed Bumbal's claim for attorney fees under the CCPA.

B. Costs

Bumbal argues she is entitled to costs (1) because she was a prevailing party on the CCPA claim and (2) pursuant to C.R.C.P. 54(d) and § 13-16-104. We conclude she waived the right to seek costs pursuant to the CCPA and she did not preserve the second asserted bases for recovery.

[4] A party held liable under the CCPA must pay “the costs of the action together with reasonable attorney fees as determined by the court.” Section 6-1-113(2)(b), C.R.S. 2006. In the previous section, we concluded that the offer of settlement as to “all claims” encompassed every claim within the complaint, including the CCPA claim, which was the sole basis for attorney fees. Likewise, we conclude Bumbal cannot recover costs pursuant to the CCPA because she waived the right to seek costs under the CCPA in addition to the settlement amount by accepting Lake Loveland's offer to settle “all claims.” Because of this resolution, we need not determine whether Bumbal was in fact a prevailing party on the CCPA claim.

[5] Bumbal, nonetheless, contended at oral argument that she was entitled to costs pursuant to C.R.C.P. 54(d) and § 13-16-104. However, she did

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not assert these bases to recover costs in either her opening or reply briefs on appeal. Therefore, we do not consider that argument here. *See Bd. of County Comm'rs v. City of Greenwood Village*, 30 P.3d 846, 849 (Colo.App. 2001) (court will not *848 consider arguments raised for the first time in a reply brief or during oral argument).

We conclude the trial court properly declined to award Bumbal's costs in addition to the settlement amount.

III. Conclusion

Lake Loveland's offer of settlement did not state explicitly whether it included attorney fees or costs. The record reflects that neither party sought to clarify the question. The settlement agreement here thus failed in its apparent purpose of forestalling further litigation.

In this regard, we agree with Judge Posner's admonition in *Nordby* that "[t]he prudent defendant ...will mention [attorney fees] explicitly, in order to head off the type of appeal that we have been wrestling with here." *Nordby, supra*, 199 F.3d at 393. Indeed, Judge Posner's admonition should similarly extend to the prudent plaintiff to ascertain whether an offer of settlement includes attorney fees and costs.

We also note that the General Assembly attempted to clarify the procedure for offers of settlement when it amended § 13-17-202 by eliminating the phrase "with costs then accrued." However, our review of the legislative history indicates that the General Assembly did not consider whether the elimination of that phrase meant that future offers of settlement would or would not include costs and attorney fees. *See* Hearings on S.B. 95-21 before the Senate Judiciary Committee, 60th General Assembly, 1st Session (Apr. 12, 1995); Hearings on S.B. 95-21 before the House Judiciary Committee, 60th General Assembly, 1st Session (May 2, 1995). Accordingly, continued litigation in this area may

warrant the General Assembly's reviewing the statute once more. *See* C.A.R. 35(f) (publication appropriate when opinion directs attention to inadequacies in statutes).

The order is affirmed.

Judge WEBB and Judge ROMÁN concur.
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