

No. 73134-3-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUL -7 PM 4:38

CHRISTA MCKILLOP, an individual,
Respondent/Cross-Appellant,

v.

PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E.
CARPINE, a deceased individual,
Appellant/Cross-Respondent.

REPLY BRIEF OF CROSS-APPELLANT

Eileen I. McKillop, WSBA 21602
Attorneys for Respondent/Cross-Appellant

LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4200
SEATTLE, WA 98111-9402
PHONE: (206) 223-7000
FAX: (206) 2232-7107

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ARGUMENT	2
A. CARPINE’S RESPONSE DID NOT ADDRESS ANY ISSUES RAISED IN MCKILLOP’S CROSS- APPEAL	2
B. CARPINE’S CR 68 OFFER CANNOT BE COMPARED WITH A VERDICT, EXCLUSIVE OF ATTORNEY FEES AND COSTS	2
C. CARPINE HAS WAIVED HIS ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL.....	6
III. CONCLUSION	8

TABLE OF AUTHORITIES

	Page(s)
WASHINGTON CASES	
<i>Concerned Coupeville Citizens. V. Town of Coupeville</i> , 62 Wn.App. 408, 814 P.2d 243 (1991).....	6
<i>Magnussen v. Tawney</i> , 109 Wn.App. 272, 34 P.3d 899 (2001).....	3, 8
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	7
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	6
<i>Wilkerson v. United Inv., Inc.</i> , 62 Wn.App. 712, 815 P.2d 293(1991).....	3
<i>Williams v. Tilaye</i> , 174 Wn.2d 57, 272 P.3d 235 (2012).....	5
WASHINGTON COURT RULES	
CR 68	1, 2, 3, 6
MAR 7.3	3
RAP 2.2(a)(1).....	6, 8
RAP 2.5(a)	1, 6, 7
RAP 2.5(a)(3).....	2, 7
RAP 5.2.....	6
WASHINGTON STATUTES	
RCW 4.84.250	passim
RCW 4.84.260	6

RCW 4.84.2703, 4, 5, 6
RCW 4.84.2901, 2, 6
RCW 4.84.3002, 3

I. SUMMARY OF ARGUMENT

The arguments advanced by Appellant/Cross Respondent Personal Representative of the Estate of Robert Carpine (“Carpine”) in its response do not address the issues raised by Respondent/Cross-Appellant Christa McKillop’s (“McKillop”) on her cross-appeal. Young did not raise any arguments to dispute that if McKillop is the prevailing party pursuant to RCW 4.84.290, she is entitled to an additional award of her attorneys’ fees and costs leading up to and including the arbitration in the amount of \$35,297.93. Thus, if the Court agrees that McKillop is the prevailing party, then McKillop is entitled to an additional attorney fee award in the amount of \$35,297.93, plus her attorney’s fees and costs incurred on this appeal.

Young’s argument that she can raise new legal issues and arguments for the first time on appeal is contrary to RAP 2.5(a). Young did not raise any argument in the trial court that CR 68 supersedes RCW 4.84.250, or that McKillop’s settlement offer is not a settlement offer under RCW 4.84.250. Moreover, Carpine never filed an opposition to McKillop’s motion for attorney’s fees and costs, and never challenged the reasonableness of McKillop’s attorney’s fees and costs. Carpine has not shown that his new arguments raise a manifest error affecting a

constitutional right entitling him to raise these issues for the first time on appeal. RAP 2.5(a)(3).

II. ARGUMENT

A. **CARPINE'S RESPONSE DID NOT ADDRESS ANY ISSUES RAISED IN MCKILLOP'S CROSS-APPEAL**

McKillop cross-appealed the trial court's entry of Judgment awarding her only \$65,000 in attorney's fees and costs, and denying her an additional award of \$35,297.93 in attorneys' fees and costs leading up to and including the arbitration. It appears from Carpine's Reply Brief that he did not address the issues raised in McKillop's cross-appeal. Carpine simply argued that the trial court erred in determining Plaintiff is the prevailing party under RCW 4.84.290, which is an issue raised in his appeal. McKillop is the prevailing party under RCW 4.84.290 and is entitled to an award of all of her attorneys' fees and costs incurred in the arbitration, trial de novo, and on this appeal.

B. **CARPINE'S CR 68 OFFER CANNOT BE COMPARED WITH A VERDICT, EXCLUSIVE OF ATTORNEY FEES AND COSTS**

Carpine ignores the plain wording of RCW 4.84.250 and argues that a trial court should compare a verdict, which is exclusive of attorney's fees and costs, with a CR 68 offer which is inclusive of attorney's fees and costs in determining whether a party is a prevailing party under RCW 4.84.250-.300. Even in the context of CR 68, a court cannot compare a

verdict for compensatory damages, exclusive of attorney fees and costs, with a CR 68 offer that is inclusive of attorney fees and costs. In other words, even a CR 68 offer that includes attorney fees has to be compared with a verdict that also includes attorney fees if the prevailing party is entitled to attorney fees. *Magnussen v. Tawney*, 109 Wn.App. 272, 34 P.3d 899 (2001). A trial court comparing a verdict to a CR 68 offer should “compare comparables.” *See Wilkerson v. United Inv., Inc.*, 62 Wn.App. 712, 717, 815 P.2d 293(1991) (court should compare the verdict for compensatory damages with an arbitrator’s award of compensatory damages, exclusive of attorney fees and costs, in determining whether a party was able to improve his position for purposes of MAR 7.3).

Even if we were only dealing with CR 68, a court would have to determine McKillop’s reasonable pre-offer attorney fees and costs, which were \$10,392.00 as of April 14, 2014, and add that figure to the \$8,500.00 verdict on her underlying claim, clearly exceed Carpine’s \$10,000 CR 68 offer. Even under CR 68, McKillop would be the prevailing party.

However, we are dealing with RCW 4.84.250-.300 and not CR 68. Under RCW 4.84.270, a defendant is the prevailing party if the plaintiff recovers nothing, or if the recovery, exclusive of costs, ***is the same or*** less than the amount offered in settlement by the defendant. Carpine attempted to thwart the statute by making a lump sum settlement offer for \$10,000,

inclusive of attorneys' fees and costs, thinking he could limit his total liability exposure to \$10,000 by cutting off McKillop's ability to recover any attorneys' fees and costs because the maximum she could ever recover on her underlying claim is the statutory limit of \$10,000.00. If the Court were to accept Carpine's argument, a defendant could unjustifiably resist a small claim (particularly in a clear liability case such as this case), force the Plaintiff to incur thousands of dollar in attorney's fees and costs litigating the claim, and then wait until 10 days before trial to make a settlement offer for \$10,000, inclusive of attorney's fees and costs, and prevent a Plaintiff from recovering any attorney's fees and costs because a Plaintiff can never recover more than the statutory limit of \$10,000 on her underlying claim. Moreover, the defendant would *always* be deemed the prevailing party under RCW 4.84.270 and entitled to an award of attorneys' fees and costs against the Plaintiff because Plaintiff's recovery could never be more than the \$10,000 maximum allowed under RCW 4.84.250. Even if the Plaintiff recovers the maximum amount of \$10,000 under RCW 4.84.250, the recovery "*is the same* or less than the amount offered in settlement by the defendant" thereby making the Defendant a prevailing party within the meaning of RCW 4.84.250 and entitled to an award of attorney's fees and costs. Carpine's proposed interpretation would actually reward Defendants who resist meritorious claims and

encourage Defendants to make lump sum settlement offers of \$10,000, inclusive of attorneys' fees and costs, in order to obtain prevailing party status under RCW 4.84.270, and obtain an award of attorneys' fees and costs against the Plaintiff which would diminish any \$10,000 settlement offer.

This is exactly what Carpine attempted to do in this case. It is inherently unfair to deny an attorney fee award to a party that has borne the cost of mandatory arbitration and a trial de novo and has improved her overall position in the trial de novo, and recovers more than the amount she offered in settlement on the underlying claim. Carpine's interpretation of the statute would be counter to the statutory purpose of penalizing parties who unjustifiably resist small claims, and enabling a party to pursue a meritorious small claim without seeing the award diminished by legal fees. *Williams v. Tilaye*, 174 Wn.2d 57, 62, 272 P.3d 235 (2012). Construed in this manner, it would penalize a Plaintiff for even bringing a small claim under RCW 4.84.250, regardless of whether the claim is meritorious, because the Plaintiff could never be deemed a prevailing party, and would always be held liable for defendant's attorney's fees and costs even if she recovers the full \$10,000 threshold in damages on his underlying claim. Plaintiffs would be put in the impossible position of not being able to avail themselves of RCW 4.84.250. The Court should reject

Carpine's interpretation of the statute, and affirm the trial court's ruling that McKillop is the prevailing party and entitled to an award of fees and costs under RCW 4.84.290.

C. CARPINE HAS WAIVED HIS ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL

Carpine argues that an appeal from a final judgment allows him to raise new legal issues and arguments that were never raised to the trial court. Although RAP 2.2(a)(1) and RAP 5.2 allow an appeal of right from a final judgment, the rule cannot be used to raise new legal issues and arguments that were never raised in the trial court. Contrary to Carpine's contention, the term "claim of error" under RAP 2.5(a) includes issues and legal theories. *See, e.g., Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992). In some cases, the courts have characterized the rule as barring consideration of contentions not made in the trial court. *See, e.g., Concerned Coupeville Citizens. V. Town of Coupeville*, 62 Wn.App. 408, 814 P.2d 243 (1991) (contentions not made to trial court in its consideration of summary judgment motion need not be considered on appeal).

Carpine does not dispute that he never argued to the trial court that CR 68 supersedes RCW 4.84.250, or that RCW 4.84.260 and RCW 4.84.270 are conflicting and that RCW 4.84.270 is controlling, or that the

attorney fee award of \$65,000 is unreasonable in light of McKillop's settlement offer on her underlying claim. RAP 2.5(a) codifies the nearly universal rule that an appellate court will ordinarily refuse to review issues that were not raised at the trial court level. The rule is based upon the belief that the trial court should be given the opportunity to correct an error, in order to avoid the time and expense of an unnecessary appeal if possible. *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). An even more important factor is the consideration that the opposing party should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories at the trial level, rather than facing newly asserted errors or new theories and issues for the first time on appeal.

Carpine does not show that his new legal arguments fall within RAP 2.5(a)(3) exceptions which affect a matter of fundamental justice, strong public policy or public interest, or the right to a fair trial. Moreover, none of the legal issues and arguments raised by Carpine for the first time on appeal were raised by McKillop in the trial court. RAP 2.5(a). Moreover, Carpine never raised any of these legal issues in his own motion for attorneys' fees and costs. A Court of Appeal does not address for the first time on appeal the issue of whether any attorney fees awarded to the plaintiff should be in proportion to the claims on which

they succeeded, where trial court did not address this issue. RAP 2.2(a)(1); *Magnussen v. Tawney*, 109 Wn.App. 272, 278, 34 P.3d 899 (2001). This Court should not review any of the issues raised by Carpine for the first time on appeal.

III. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision ruling that McKillops is the prevailing party, and reverse the trial court's decision and judgment denying McKillop an additional \$35,297.93 in attorneys' fees and cost for work leading up to and including the arbitration. The court should remand this matter to the trial court to enter a Judgment in favor of McKillop for a total award of attorneys' fees and costs of \$103,602.30, plus prejudgment interest on the unpaid portion of the Judgment award of \$65,000 at a rate of 5.25% from February 2, 2015, plus her attorney's fees and costs on this appeal.

DATED this 7th day of July, 2015.

LANE POWELL PC

By: 

Eileen I. McKillop, WSBA 21602
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I, Denise A. Campbell, hereby certify under the penalty of perjury of the laws of the State of Washington that on July 7, 2015, I caused to be served a copy of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** to the following counsel of record in the manner indicated below at the following address:

Robert A. Richard
Eric L. Lewis
Law Office of Robert A. Richards, PS
11625 Rainier Avenue S., Suite 102
Seattle, WA 98178
Email:
rarichards@seattlerichardslaw.com
elewis@seattlerichardslaw.com

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 JUL -7 PM 1:38

/s/Denise A. Campbell
Denise A. Campbell, Legal Assistant