NO. 89678-0

SUPREME COURT
OF THE STATE OF WASHINGTON

JULIE BERRYMAN,

Petitioner

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent

RESPONDENT FARMERS INSURANCE COMPANY OF WASHINGTON'S OPPOSITION TO BERRYMAN'S PETITION FOR REVIEW

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I. Identity of Answering Party

Farmers Insurance Company of Washington (FICW), defendant in the trial court and appellant in the Court of Appeals, answers the Petition for Review filed by plaintiff Julie Berryman.

II. Issue Presented For Review

Berryman asserts that the Court of Appeals erred in reversing the trial court's award of attorneys' fees. The Court of Appeals found that the lodestar amount sought by Berryman's counsel and awarded by the trial court was manifestly unreasonable, and also found that the trial court erred in awarding a multiplier on the inflated and unreasonable base amount claimed by Berryman's counsel.

III. Statement of the Case

This case arose from a low impact, three-car collision – a basic, simple, rear-ender auto damages case. Plaintiff's allegation that FICW engaged in "scorched earth" tactics in defending this small case is simply false. Moreover, the Court of Appeals' affirmance of the jury verdict in her favor means that Berryman herself will certainly come out far ahead of where she would have financially if FICW had not sought trial de novo. A reasonable attorneys' fee award in the range of what her attorneys would have recovered under their contingent fee agreement serves the purposes of MAR 7.3 and RCW 7.06. The Court of Appeals disregarded

Berryman's rhetoric, and instead looked at the actual evidence – and then correctly applied the law to that evidence to reverse the inflated and punitive attorneys' fee award. This Court should decline review.

The incident occurred when Berryman was preparing to turn right into a driveway and the Chevrolet Caprice she was driving was bumped by a Dodge driven by an uninsured driver. RP 381. The Dodge was pushed into her car by a Honda driven by another uninsured driver. CP 2. There was very little – if any – damage to the Chevy. CP 209, 252-257, 261. Her first post-accident "treatment" was a visit to her chiropractor two days later. RP 385. Plaintiff sued the uninsured drivers, who did not appear in the action. FICW, the underinsured motorist (UIM) insurer for the Chevy, intervened to assert the defenses that could have been asserted by the uninsured drivers. CP 9;14. Default orders were entered against the drivers and the case was transferred to mandatory arbitration. CP 17; 20.

After discovery, the case proceeded to arbitration where Berryman was awarded $35,724 in damages. CP 679. FICW filed a request for a trial de novo. CP 27-32. Berryman made an offer of settlement of $30,000 plus costs, which was not accepted. CP 624-625. Trial followed.

FICW retained two experts to testify at trial, Dr. Allan Tencer, a biomechanical engineering expert, and Dr. Thomas Renninger, a chiropractor. The trial court refused to allow Dr. Tencer to testify. CP

310-33, 406. The trial court also refused to allow Dr. Renninger to rely on Dr. Tencer's conclusions. CP 366; RP 8, 20. As a result of the exclusion of this testimony, the jury heard only Berryman's misleading version of the impact, and consequently awarded her $36,542 – only $800 more than the arbitration award – of which half was for "past medical expenses." CP 208-210, 324-325, 562, 993.

Berryman filed a post-trial motion for attorneys' fees and costs pursuant to MAR 7.3 and RCW 7.06. CP 626. She claimed to have incurred $140,565 in attorney fees from the time the trial de novo was requested through the date of the verdict, and an additional $11,950 in post-verdict fees. CP 627. She asked for a multiplier of 1.5–2.0 times the base lodestar fee of $140,565 claiming this was a "high-risk, contingency fee" case. CP 627. The purported "high-risk" was that this was a questionable case, of dubious value, which Berryman never viewed as being worth over the $50,000 MAR limit. See CP 646-647.

FICW opposed the excessive fee request, arguing that there was no need to have two attorneys present at all proceedings in this simple trial de novo, that spending 468 hours to prepare and try a four-day damages case that had already been presented at arbitration was excessive, and that the fee request included time spent on unsuccessful efforts. CP 812-849. FICW presented a detailed list of the improper time, including annotated

copies of the time records pointing out the duplicative, excessive, and unsuccessful time, and also argued that a multiplier was inappropriate because the case was not unusually difficult or complex. CP 840-850.

The fee request was more than eight times the amount of the verdict, and excessive on its face. Nevertheless, the trial court awarded the amount requested, without deducting even a minute of time or addressing FICW's objections, and included a 2.0 multiplier. CP 901, 906. FICW appealed the exclusion of its evidence, the denial of its motion for a new trial, and the attorney's fee award. The Court of Appeals affirmed on the evidentiary issues and the denial of FICW's motion for new trial.[1] The Court of Appeals agreed with FICW on the attorneys' fee issue, finding that the trial court's attorneys' fee award was an abuse of discretion: "the award is excessive, rewards duplicative and unsuccessful work, and inappropriately applies a multiplier to a standard damages case." *Berryman v. Farmers*, 312 P.3d 745, 753 (2013). Accordingly, the Court of Appeals remanded for the trial court to do what it should have done in the first place, but failed to do: set a reasonable amount of attorneys' fees and costs that does not include any duplicative or unsuccessful time.

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[1] Although FICW respectfully disagrees with the Court of Appeals' conclusions which resulted in the denial of a new trial, FICW does not seek discretionary review of any aspect of the Court of Appeals' decision.

IV. Argument Why Review Should Be Denied

The Supreme Court will only accept a petition for review under four circumstances:

1) The decision of the Court of Appeals conflicts with a decision of the Supreme Court;
2) The decision of the Court of Appeals conflicts with another decision of the Court of Appeals;
3) The petition raises a significant question of constitutional law; or
4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Berryman seeks review under RAP 13.4(b)(1), (2), and (4). But, her petition does not meet the jurisdictional requirements noted above as the Court of Appeals applied well-established Washington law, and its decision does not conflict with any other appellate decision. Moreover, the Court of Appeals' correct decision regarding attorneys' fees implicates no substantial public interest. Berryman's petition should be denied.

A. Review Is Not Justified Under RAP 13.4(b)(1) or (2) – The Court of Appeals' Decision Does Not Conflict With any Other Appellate Decision

Because the Court of Appeals' decision is consistent with other Washington appellate cases, neither RAP 13.4(b)(1) nor (2) provides a basis for this Court to accept review. The Court of Appeals simply applied well-established Washington law to correct a grossly excessive attorneys' fee award that was clearly an abuse of discretion. Berryman failed to meet her burden of demonstrating that $291,950 was a reasonable

award of fees for obtaining a $36,542 verdict which was only $800 more than the arbitration award in her favor. No aspect of Washington law would support FICW owing nearly $300,000 in attorneys' fees for Berryman having improved her position by $800 at a trial de novo.

1. The Court of Appeals Correctly Determined that the Trial Court's Lodestar Calculation Was an Abuse of Discretion.

MAR 7.3 provides that the court may assess costs and reasonable attorney fees against a party "who appeals the [arbitration] award and fails to improve the party's position on the trial de novo." Washington courts use the lodestar method as a starting point in determining what the reasonable attorneys' fees award would be in a given case. *Berryman*, 312 P.3d at 755; *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210, 1215 (1993) (*Fetzer II*). Under the lodestar method, the party seeking fees bears the burden of proving the reasonableness of a fee request. 312 P.3d at 753 (citing *Fetzer II*, 122 Wn.2d at 151). The lodestar amount is determined by first multiplying "a **reasonable** hourly rate by the number of hours expended on the matter." *Fetzer II* at 149-150 (citations omitted)(emphasis by the court); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). An "attorney's hourly rate encompasses the attorney's efficiency, or 'ability to produce results in the minimum time.'" 312 P.3d at 757 (quoting *Bowers*, 100 Wn.2d at 600).

The lodestar method is only a starting point. 312 P.3d at 755. A fee calculated in this way may not necessarily be found to be a "reasonable" fee. See, e.g., *Fetzer II*, 122 Wn.2d at 151. Whether the fee requested is a "reasonable" fee is an independent determination to be made by the Court. *Fetzer II* at 151; *Nordstrom, Inc. v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987). "[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees." *Tampourlos* at 744. "Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." 312 P.3d at 753 (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998)). "In assessing the reasonableness of a fee request, a 'vital' consideration is 'the size of the amount in dispute in relation to the fees requested.'" 312 P.3d at 755 (quoting *Fetzer II*, 122 Wn.2d at 150). "In a mandatory arbitration case, where the sole objective of filing suit is to obtain compensatory damages for an individual plaintiff, the proportionality of the fee award to the amount at stake remains a vital consideration." 312 P.3d at 755.

A trial court has discretion in determining a reasonable attorney fee, but the determination of whether the fees are reasonable must be based on

the specific facts of the case. *Singleton v. Frost*, 108 Wn.2d 723, 731, 742 P.2d 1224, 1228 (1987); see also *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). "The total hours an attorney has recorded for work in a case is to be discounted for hours spent on 'unsuccessful claims, duplicated effort, or otherwise unproductive time.'" 312 P.3d at 755-756 (quoting *Bowers*, 100 Wn.2d at 597). "Duplicated efforts includes overstaffing." 312 P.3d at 756. That fee requests are too often seen as an occasion for excess was recognized by this Court in *Fetzer II*:

> **[A] claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any, billing judgment....** Washington ha[s] **ethical rules mandating that attorneys charge only a reasonable fee**.... We take this occasion to remind practitioners that **such considerations apply whether one's fee is being paid by a client or the opposing party.**

Fetzer II, 122 Wn.2d at 156 (emphasis added). The *Fetzer II* court reduced a $200,000 fee request to approximately $22,000, including appellate work. The Court of Appeals' decision here is consistent with *Fetzer II*. When the lodestar fee greatly exceeds the value of the case, the lodestar fee is unreasonable and should be adjusted downward. *Bowers*, 100 Wn.2d at 597. Any fee that would be unreasonable if paid by the actual client is not made reasonable simply because the other party ends up paying the fee. See 312 P.3d at 753.

RPC 1.5 provides that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee..." and lists a number of factors to consider in determining the reasonableness of a fee request, including the novelty and difficulty of the questions involved, the skill required, the amount involved and the results obtained. A lodestar fee, like all attorney fees, must comply with RPC 1.5. *Fetzer II, supra.* The RPC factors applied to the facts of this case mandated the Court of Appeals' conclusion that the trial court's fee award was unreasonable and excessive.

Like *Fetzer II*, which was a "simple commercial case" involving 120 vacuum cleaners, this case was a simple auto personal injury case with only 10 hours of testimony. There were no novel or difficult questions involved and no unusual or special skill was required. Even plaintiff evaluated the case at a low value, putting it into mandatory arbitration. An award of $280,000 in fees is almost eight times the verdict, and more than 15 times what the contingent fee award based on the verdict would have been. This was not reasonable under *Fetzer II* or RPC 1.5, both of which require consideration of the relationship between the size of the case and the award requested. The trial court's award to Berryman presented exactly the kind of discrepancy that *Fetzer II* held unacceptable.

A fee agreement for $300,000 in fees for an MAR level rear-end auto case would undoubtedly be voided under RPC 1.5 as against public

policy and unenforceable. See, e.g., *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 909, 988 P.2d 467 (1999). An award of fees by the court that would be unconscionable if contained in a fee agreement is improper. What would be an unconscionable fee if charged to Berryman is equally unconscionable when assessed against FICW.

Berryman's counsel were allowed to make the choice to double staff and overwork this case, but the Court of Appeals was correct in holding that FICW does not have to pay fees in conjunction with that overworking of the case. As the Court of Appeals noted, a defendant paying fees as a result of a trial de novo does not have to pay for a "Cadillac approach to a Chevrolet case." 312 P.3d at 756. If Berryman's counsel truly spent nearly 500 hours on the trial de novo in this simple, small case, that was clearly a decision to take a "Cadillac approach to a Chevrolet case." Berryman's counsel may choose to spend their time that way, but FICW does not have to pay the resulting unreasonable bill.

There was significant overstaffing and duplication of effort by Berryman's counsel in this case, but the trial court failed to deduct any of the excessive and duplicative time or even address FICW's detailed objections. Due to space limitations, FICW cannot go into detail regarding all the ways in which the attorneys' fee request was shockingly excessive, but in general terms, she had two attorneys working up the case

and attending trial. Both attorneys billed for trial and trial preparation, and the same pre-trial tasks. They billed for a number of unsuccessful tasks, such as 43.1 hours for improperly attempting to obtain FICW's UIM claims file and depose the claim representative even though FICW was simply an intervenor standing in the shoes of the uninsured drivers.

Her counsel billed 468.55 hours (58.6 work-days at 8 hours per day) to prepare and try a case with a total of seven witnesses, lasting less than four days.[2] This was excessive. To put it into perspective, assuming a 40-hour work week, her counsel billed 8 ½ weeks of full-time work on this case – even though "the case had previously been prepared for and taken through an arbitration, the fault of the uninsured drivers was conceded before trial, the witnesses gave ordinary testimony typical of such cases, and trial took three and a half days." 312 P.3d at 755. In violation of *Bowers*, the trial court did not deduct any time for the duplicative work, overstaffing, and unsuccessful work, and allowed an excessive hourly rate as well as a 2.0 "multiplier" requested by plaintiff. The end result was an excessive fee which violated RPC 1.5 – a windfall to Berryman's counsel

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[2] The brief trial continuance from November 2011 to December did not, as Berryman asserts, significantly increase the time needed for witness preparation. The vast majority of entries for witness preparation were in October and November, before the trial was continued to December. See CP 840-850. In addition, Berryman's assertion that an earlier five-month continuance was at FICW's request (Petition, p. 6) is wrong – that continuance was at Berryman's request, as was an earlier two-month continuance. See CP 136, 656, 700.

and an impermissible award of punitive damages against FICW. The Court of Appeals simply correctly applied prior precedent in reversing the trial court's clearly erroneous attorneys' fee award, correctly finding that it was a manifest abuse of discretion for the trial court to accept 468.55 hours as reasonable for this small case.

The Court of Appeals correctly found that, in a basic personal injury case like this, the expectations of the attorney under his contingent fee agreement are highly relevant. Here, Berryman's counsel put the case into MAR, demonstrating that they did not believe the value of her claims exceeded $50,000. Under the fee agreement, they were entitled to 40% of the award, after deducting costs, for trial, and 50% if appeal were necessary. CP 666. 40% of the $50,000 maximum Berryman could have received at arbitration, after deducting costs, would have been $16,273.20. Her counsel are not entitled to a windfall of 18 times that amount simply because FICW, rather than Berryman, is paying the fee.

Berryman asserts that the contingent fee agreement she signed cannot serve as a basis for reduction of the lodestar amount, but in support cites only distinguishable cases. *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987), *Fahn v. Cowlitz County*, 95 Wn.2d 679, 628, P.2d 813 (1981), *Martinez v. City of Tacoma,* 81 Wn. App. 228, 235, 914 P.2d 86 (1996), and *Pham* are all Washington Law Against Discrimination

cases, where, as discussed below, the injuries pursued are considered public injuries such that a fee award can potentially significantly exceed the amount recovered by the plaintiff. In stark contrast, Berryman's claim was a private claim for her own bodily injury. In such basic personal injury cases, no public policy concerns are implicated which would support a departure from RPC 1.5 and *Fetzer II*. It is absolutely fair and correct that, in determining attorneys' fees for such a private car accident injury, the courts look to the contingent fee agreement to see what amount the attorney expected to be compensated by his client when he took the case.

2. The Court of Appeals Correctly Determined that the Trial Court Must Make Findings of Fact Where a Party Against Which Fees Are to Be Awarded Makes Detailed Objections Regarding Specific Time Entries

The Court of Appeals also correctly required that the trial court, on remand, make substantive determinations regarding all of the detailed objections made by FICW. In arguing that this was improper, Berryman cites only two readily distinguishable cases: *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006) (party opposing fee request did not argue hourly rate excessive and trial court's order specified that fee award did not include any fees for the disputed tasks); and *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007) (no indication that party opposing

$26,301.91 fee and cost request had argued against inclusion of any specific tasks or that hourly rate was excessive).

This case is very different. Here, FICW objected to many specific tasks and time entries as to which hours were awarded, and the fee request exponentially exceeded the verdict, but the trial court failed to address any of FICW's detailed objections. Under these circumstances, a detailed trial court review was, and still is, necessary. See, e.g., *Mayer v. City of Seattle*, 102 Wn. App. 66, 82-83, 10 P.3d 408 (2000). A careful analysis and review of the challenged entries may be time consuming, but that is what is required in order to determine whether the time requested was reasonable and necessary. The trial court being directed to create a record sufficient for appellate review under the specific facts of this case provides no basis for this Court to accept review.

3. The Court of Appeals Correctly Determined that the Trial Court's 2.0 Multiplier to the Lodestar Fee Was an Abuse of Discretion

The Court of Appeals also correctly found that the trial court's use of a multiplier was an abuse of discretion, thoroughly examining all reported multiplier decisions to date and noting that all multiplier cases relied upon by Berryman are materially different – as are the additional cases she now cites in incorrectly asserting that the Court of Appeals' decision here conflicts with other Washington appellate decisions. No

Washington case law would support the use of a multiplier in a small, simple, run-of-the-mill auto accident injury case like this one.

After determining the lodestar, the trial court may adjust the award up or down "to reflect factors not already taken into consideration." *Broyles v. Thurston County*, 147 Wn. App. 409, 452, 195 P.3d 985 (2008). Because a lodestar fee is presumed reasonable, it should be adjusted upwards only rarely. *Mahler,* 135 Wn.2d at 434. Multipliers are generally reserved for statutory claims brought in furtherance of the public interest. See, e.g., *Broyles*, 147 Wn. App. 409, (addressing WLAD). The prospect of a multiplier encourages private enforcement of these statutes. *Martinez.* Outside this narrow context of public injuries such as discrimination and civil rights, multipliers are generally inappropriate. For example, when Justice Sanders sued the State of Washington under the Public Records Act, he asked for a "multiplier of 1.5 because his attorneys worked on a contingency." *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010). The trial court rejected his effort to apply a multiplier for the benefit of his attorneys, and this Court affirmed. The *Sanders* lawsuit was the result of years of diligent work by Justice Sanders' attorneys, with them taking a big risk that they would never see a dime for their work. It was a case of broad public import, dealing with matters of the separation of powers and government transparency. Yet Justice Sander's request for

a multiplier was still denied.

A contingency enhancement was also not appropriate here because it was likely from the outset that plaintiff would recover, and, as the Court of Appeals recognized, the $300 hourly rate awarded by the trial court is much higher than is typically charged for auto work and such a rate would therefore already factor in that this was a contingent fee case.[3] This case arose from a rear-end car accident where plaintiff's counsel should always have expected they would receive some attorney fees as Berryman's car was bumped by a following driver. See, e.g., *Ryan v. Westgard*, 12 Wn. App. 500, 505, 530 P.2d 687(1975). They argued below that the case was risky because plaintiff had prior injuries, only chiropractic treatment, and no wage loss. But, although these factors could limit the amount of damages recoverable, they would not likely result in a defense verdict.

Berryman asserted below that a multiplier was appropriate because this was a "risky" case with a good chance of a defense verdict and the UIM insurer "vigorously defended." She also argued that there should be a multiplier for contingent fee cases because there is a risk of not being paid in such cases. But, as the Court of Appeals correctly recognized,

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[3] In addition, the requested rate of $300 per hour (a rate Berryman's counsel were unable to demonstrate any client has actually paid them) was unwarranted if counsel needed more than eight weeks of full-time work to prepare a simple rear-end de novo damages case. Even an inexperienced attorney should not require that much trial preparation in this type of case.

these arguments misapprehend the principle behind multipliers. There is no *per se* multiplier for contingent cases, nor are multipliers awarded because plaintiff prevailed on a case with a low probability of success. Otherwise, there would be a perverse incentive to take on meritless cases in the hope of receiving an attorney fee windfall. This is not the purpose of the multiplier in the rare instances one is deemed appropriate. See, e.g., *Bowers,* 100 Wn.2d at 598-99.

The argument that Berryman's counsel are entitled to the bonus of a multiplier because they risked getting nothing by bringing a weak case is contrary to common sense and public policy and was correctly rejected. By plaintiff's logic, a multiplier would be appropriate, or even required, in absolutely every case where a defendant seeks trial de novo and does not improve its position. But, as the Court of Appeals noted, "[w]hen the granting of a multiplier becomes routine, it undermines our Supreme Court's repeated statement that adjustments to the lodestar should be rare." 312 P.3d at 760. The Court of Appeals was also correct that if it affirmed a multiplier in this case, multipliers will likely become routine in trial de novo cases. See *Id.*

Further, courts have already rejected the bad incentives that would arise if there was a *per se* contingency fee multiplier, as plaintiff impliedly requests. The United States Supreme Court in *City of Burlington v.*

Dague, 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), in the context of a federal attorney fee statute, reasoned that the lodestar calculation is presumptively reasonable and that a contingency multiplier would "likely duplicate in substantial part factors already subsumed in the lodestar." 505 U.S. at 562-563. Applying contingency or risk multipliers results in a "social cost of indiscriminately encouraging nonmeritorious claims to be brought as well." *Id.* The fact that Berryman's injury claim could be perceived as lacking merit is not a basis for a multiplier.[4] The Court of Appeals correctly applied prior precedent to find that a multiplier is inappropriate in the trial de novo personal injury setting.

In arguing for a multiplier, Berryman has consistently relied on cases discussing statutes such as the Washington Law Against Discrimination, the Consumer Protection Act, the Minimum Wage Act, and the Industrial Insurance Act – but cases such as *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 739, 281 P.3d 693 (2012), remind that multipliers in cases brought under such public interest statutes are treated differently for public policy reasons. As the Court of Appeals noted here, Berryman seeks personal compensation for a private injury.

[4] As the Court of Appeals noted, although this Court declined in *Pham* to adopt *Dague*'s bright line rule that a multiplier is never appropriate where there is a contingent fee agreement, the *Pham* Court agreed with *Dague*'s explanation of why there is a presumption that the lodestar represents a reasonable fee such that a multiplier should rarely be granted. The *Pham* Court simply held that an injury to the public such as discrimination could potentially warrant a multiplier.

Accordingly, the purpose of the MAR fee-shifting provision is fundamentally different than the purpose of fee-shifting provisions in remedial statutes – which are that successful discrimination and CPA claimants are deemed to have benefitted society as a whole, rather than solely benefitting themselves as Berryman did here. 312 P.3d at 762.

None of the cases cited by Berryman is inconsistent with the Court of Appeals' decision here. All such cases are simply distinguishable because of the personal and private nature of her claims, the MAR attorneys' fee statute does not implicate any strong public interest, and the MAR statute does not mandate a liberal construction. In the MAR setting, a large fee award far in excess of the amount the attorney could have received from his own client is necessarily punitive when awarded against the defendant. FICW having to pay a reasonable attorneys fee here already allows Berryman to come out much better financially than she would have if FICW had accepted her offer of compromise.

B. Review Is Not Justified Under RAP 13.4(b)(4)– The Court of Appeals' Correct Application of Washington Law Does Not Implicate a Substantial Public Interest

For the reasons discussed above, the Court of Appeals' decision on the attorneys' fee issue was correct both legally and factually. In addition, the holding will also apply, as RCW 7.06 and MAR 7.3 anticipate, when a defendant is seeking attorneys' fees from a plaintiff who has failed to

improve her position after seeking a trial de novo, because the MAR statute does not treat defendants and plaintiffs differently. For $300,000 to be a reasonable attorney fee award here, a court would necessarily have to find that an award of the same amount against an individual plaintiff who failed to improve her position at trial de novo would be appropriate. The fee-shifting aspect of an unsuccessful trial de novo case does not implicate any substantial public interest, and RAP 13.4(b)(4) does not provide a basis for this Court to accept review. There is no substantial public interest in personal injury attorneys obtaining much larger fees from an opponent than could ever be obtained from the attorneys' own client, or than they agreed to take from that client when they accepted representation.

V. CONCLUSION

This Court should decline review because the Court of Appeals correctly applied Washington law in all respects.

DATED this 10th day of January, 2013.

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DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On January 10, 2014, I served a true and correct copy of **Respondent Farmers Insurance Company of Washington's Opposition to Berryman's Petition for Review (with attached Declaration of Service)** on parties in this action as indicated:

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Executed on this 10th day of January, 2014, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Helen M. Thomas
Legal Secretary to Nathaniel J.R. Smith