No. 96446-7

SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD A. BAKER and JOYCE BAKER

Petitioners,

v.

FIREMAN'S FUND INSURANCE COMPANY and
AMERICAN INSURANCE COMPANY,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This matter involves the determination of a reasonable attorney fee award. The trial court properly followed the well-established lodestar method to determine the hours related to the insurance claims, multiplied that by the claimed rates, and applied a generous 1.3 multiplier. The Court of Appeals properly found there was no abuse of discretion, and affirmed the trial court on all issues.

The Petitioners, Ronald and Joyce Baker (the "Bakers"), asked the trial court to follow the lodestar method. Not once have the Bakers argued the fee award they received was unreasonable for the work performed. They nevertheless now ask this Court to require their insurers, Fireman's Fund Insurance Company and The American Insurance Company (collectively "Fireman's Fund"), to assume the Bakers' liability under the Bakers' fee agreement with their counsel, and pay an attorney fee equal to one-third of (1) the amount Fireman's Fund paid to settle the Bakers' landfill liability, (2) the amount Fireman's Fund paid to settle the Bakers' insurance claims against Fireman's Fund, (3) the amount Fireman's Fund paid to defend the Bakers against their potential landfill liability,[1] (4) the amount Fireman's Fund paid in good faith to extinguish the Bakers' tax

[1] As discussed herein, Fireman's Fund had been defending the Bakers for 18 months before the Bakers filed suit. Fireman's Fund never denied coverage.

liability, ***and*** (5) the amount a co-insurer paid to settle the Bakers' claims. Notably, after Fireman's Fund pointed out the inequity that would result with such application of the fee agreement, the Bakers' counsel assured the trial court that counsel had excused the Bakers from performing their obligations under the agreement. CP 171-72.

On both the facts and the law, the Bakers have failed to demonstrate that any factor warranting review by this Court has been met. Respondents thus respectfully request that this Court deny review.

II. IDENTITY OF RESPONDENT

The Respondents are Fireman's Fund Insurance Company and The American Insurance Company (collectively "Fireman's Fund"). Fireman's Fund was the Respondent in the Court of Appeals and the Defendant in the Snohomish County Superior Court proceeding.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW

Where the standard of review on an attorney fee award is abuse of discretion, and where the trial court issued a thorough, well-reasoned opinion that determined the recoverable lodestar amount and applied a 1.3 multiplier, have the Bakers failed to demonstrate any basis under RAP 13.4(b) for acceptance of review?

IV. RESPONSE TO STATEMENT OF THE CASE

A. Relevant Background

This matter arises out of the Bakers' former ownership and operation of a landfill, and their potential liability for remediation of contamination stemming therefrom. The Bakers' liability insurer, Fireman's Fund, was already defending the Bakers in full against any such landfill liability when the Bakers filed suit against Fireman's Fund for bad faith. *See, e.g.*, CP 70-80 (November 2005 letter agreeing to defend under a reservation of rights); CP 1762-771 (complaint filed May 2007).

Due to a roughly four-year gap in Fireman's Fund's communications with the Bakers prior to the time Fireman's Fund agreed to defend them, the Bakers enjoyed substantial leverage in the case. Fireman's Fund made repeated settlement overtures, and ultimately settled all of the Bakers' coverage and bad faith claims without the Bakers having to take a single deposition or litigate any coverage issues to conclusion. *See, e.g.*, CP 207, ¶11 and CP 307; CP 208-09, ¶¶18-28; CP 2534-46.

The insurance litigation was dormant for long periods of time while the Bakers' defense attorneys and environmental consultants (both fully funded by Fireman's Fund) worked to investigate the landfill and reach an agreement with the Department of Ecology and other involved parties regarding the necessary remediation of the same. Notably, twice

the Snohomish County court clerk ordered the Bakers to show cause as to why the matter should not be dismissed. CP 2781 (Aug. 2011), 2770 (Sept. 2012). Each time, the Bakers advised that they were working with Ecology to investigate the landfill and determine the appropriate remedial action. CP 2775-76, CP 2743-45. In sum, the delays were not due to Fireman's Fund.

Fireman's Fund ultimately paid substantial sums to settle the Bakers' underlying liability for the landfill, as well as the Bakers' bad faith claims against Fireman's Fund. CP 1775 (Conf. Settlement Agmt.).

The sole issue that was not settled was the scope of the Bakers' entitlement to attorney fees. On briefing before the trial court, the Bakers asked the court to apply the lodestar method, and acknowledged it is the appropriate method to determine a fee award:

> Under any of the fee-shifting rules described above, the proper measurement of a reasonable attorney fee is the same: the Court determines a base award by using the lodestar calculation: the reasonable number of hours spent representing the plaintiff is multiplied by a reasonably [sic] hourly rate. . . . The Court then determines whether that base award should be subject to a multiplier, primarily on the basis of the contingent nature of the fee and the risk of no recovery at the inception of the case.

CP 910 (Bakers' Trial Court Pet. at 19).

The Bakers' own fee expert likewise followed the lodestar method and identified deductions to the hours incurred by the Bakers attorneys,

and suggested that the Court "strongly consider a multiplier." CP 915 (Trial Court Pet. at 24); CP 643-47 (Dennis Smith Dec.).

The Bakers cited their contingent fee agreement as one of the factors warranting a multiplier:

> In sum, the total recovered is thus $[ ] and their fee commitment is accordingly $[ ]. This is the minimum amount that would be required to make the Bakers whole, and is a proper consideration for the Court in selecting a multiplier along the appropriate spectrum.

CP 1947 (Trial Court Pet. at 36).[2] In reaching the dollar figure for the amount allegedly owed under the fee agreement, the Bakers included the following categories in the amount "recovered":

- The amount Fireman's Fund paid in settlement to clean up the landfill;
- The amount Fireman's Fund paid in settlement to the Bakers for their loss of enjoyment of life claims;
- The amount paid by Fireman's Fund to defend the Bakers, even though Fireman's Fund was providing a full defense for well over a year before the Bakers filed suit;
- The amount paid by a co-insurer (not Fireman's Fund) to clean up the landfill;
- The amount paid by Fireman's Fund to avoid the Bakers' tax lien foreclosure, even though the Bakers acknowledged this payment was not owed under the policy and even though Fireman's Fund paid it voluntarily within seven days of being asked to do so. CP 206-07, ¶ 9.

CP 1946-47 (Trial Court Pet. at 35-36).

Fireman's Fund's response brief pointed out that, as the Bakers

[2] The settlement amount is confidential. Fireman's Fund respectfully refers the Court to the sealed briefing for the amounts referenced.

sought to apply it, their contingent fee agreement would leave counsel with a recovery almost three times the amount of their clients' recovery. CP 606 (Trial Court Resp. at 38). On reply, the Bakers acknowledged that such an outcome would be "nightmarish" but advised Fireman's Fund and the trial court that they could "rest assured" that the Bakers' attorneys would look to the trial court's fee award "as its sole and only source of compensation." CP 172 (Trial Court Reply at 2). They nevertheless continued to argue that Fireman's Fund was responsible for the very amount that the Bakers were excused from paying. *See, e.g., id.* (arguing that the "attorney fees that [the Bakers] agreed to pay at the outset" should be paid by Fireman's Fund).

The trial court issued a thorough and lengthy opinion that identified the reasonable hours expended by the Bakers in their pursuit of claims against Fireman's Fund, multiplied those hours by the claimed rates, and awarded the Bakers a 1.3 multiplier. There was nothing unique or controversial about the trial court's opinion. Indeed the trial court followed the methodology the Bakers asked it to follow, even if the Bakers did not agree with the final figure. As the Bakers themselves stated: "The Bakers recognize that a three-times multiplier represents that high end of the appropriate range, and that the choice of multiplier is highly discretionary with the Court." CP 926 (Trial Court Pet. at 35).

The Court of Appeals correctly affirmed the trial court, finding no abuse of discretion.

B. Unsupported Factual Assertions in the Bakers' Petition

At the trial court, the Court of Appeals, and again in petitioning this Court for review, the Bakers repeat a series of statements that Fireman's Fund strongly disputes. *See* Pet. for Review at 5-7. Because they relied on these statements to frame their arguments to the trial court, a close examination of them was necessary. *See* CP 578-584. In sum:

Fireman's Fund did not "threaten" or "promise" to sue the Bakers to recover defense fees and costs. *See* CP 579-581.

Fireman's Fund consistently took the position that at least $600,000 in policy limits were available, not $100,000. *See* CP 581-582.

There is no evidence of impropriety in Fireman's Fund's pre-suit defense of the Bakers, nor evidence that the Bakers were not satisfied with the defense Fireman's Fund provided. *See* CP 582-583.

The Bakers' suggestion that they contacted multiple other attorneys to pursue Fireman's Fund prior to retaining their current counsel is false. *See* CP 583-584.

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Bakers Cannot Establish That Any One of the Criteria for Accepting Review is Met

Under RAP 13.4(b), a petition for review will be accepted by this Court only if one or more of the following considerations is present:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As set forth in greater detail below, the Court of Appeals decision at issue here is in line with well-established law governing attorney fee awards in insurance cases; it does not conflict with any decision of this Court nor any other decision of the Court of Appeals, nor does the case present any question of law under the Washington State Constitution or any issue of substantial public interest. For these reasons, the Bakers' Petition for Review should be denied.

B. The Court of Appeals Correctly Found the Trial Court Did Not Abuse Its Discretion

Trial courts are awarded deference on fee awards. In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).[3] A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Cook*, 180 Wn. App. at 375 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

There can be no serious claim that the trial court abused its discretion here. The trial court followed binding and well-established law regarding calculation of an attorney fee award. *See, e.g.*, *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998) *overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012). The trial court's hourly deductions and application of a multiplier reflect the court's years of knowledge regarding the factual and procedural background of the case; the trial court was in the best position to determine a reasonable fee award. Moreover, the trial court

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[3] *De novo* review applies only to the trial court's initial determination of the legal basis for an award of attorney fees. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014). "[W]e review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." *Id.*

followed the exact methodology that the Bakers and their own expert asked the court to follow—the court just declined to apply the three-times multiplier the Bakers requested.

On appeal, the Bakers changed their position to advocate for a standard that would effectively disregard the well-established lodestar methodology, and instead focus disproportionately on the fee agreement between the insured and its attorneys. The Court of Appeals' rejection of this request was not an error of law, and does not warrant review.

C. The Court of Appeals Opinion Is Consistent with Prior Opinions from this Court: The Bakers Were Made Whole By a Reasonable Fee Award

Contrary to the Bakers' assertion, and without conceding that the cases even apply here, where Fireman's Fund was defending the Bakers prior to being sued, never denied coverage, and settled all claims before any substantive issues were decided, the fee award affirmed by the Court of Appeals is in line with this Court's precedent under *Olympic Steamship*, *McGreevy*, *Matsyuk*, and *Panorama Village*.

In *Olympic Steamship*, this Court held, "An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). *Olympic Steamship* applies to cases where the insurer either refuses to defend or

refuses to pay a justified claim.

Assuming, for the sake of argument, that *Olympic Steamship* applies in a case such as this—where the insurer had been defending the insured for 18 months before the insured sued it, and where the insurer settled all underlying claims against the insured without the insured having to litigate a single coverage issue to conclusion[4]—*Olympic Steamship* stands for the proposition that an insured is entitled to a reasonable fee award. Even under *Olympic Steamship*, the award is not unlimited: the insured's right to "recoup" attorney fees is for fees "that [the insured] incurred," and that are reasonably related to obtaining coverage. *See Olympic S.S. Co.*, 117 Wn.2d at 52 ("We also extend the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured."); *see also Leingang v. Pierce Cty. Medical Bureau, Inc.*, 131 Wn.2d 133, 158, 930 P.2d 288 (1997) ("we order an award of reasonable attorney fees for the part of the action in this court which concerned the award of attorney fees under *Olympic Steamship*").

[4] Fireman's Fund never conceded that the Bakers were compelled to bring the coverage lawsuit. *See* Sealed Ex. C, Dec. of M. Eckman in Opp'n to Plaintiffs' Pet. for Award of Fees and Costs, Ex. D – Final Executed Settlement Agmt. ¶16. The Bakers did not prevail on any dispositive motions or at trial. The Bakers never established they were entitled to coverage under the policy, nor did they establish that Fireman's Fund violated the Consumer Protection Act.

The Bakers cannot dispute that the trial court awarded them a reasonable fee for the work performed. Indeed, due to the trial court's application of the multiplier, the final amount awarded well exceeded the amount incurred (using the total hours claimed times the claimed rates)—despite the deductions taken.[5]

In *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995), the trial court had declined to award ***any*** attorney fees to the insured. The narrow issue before this Court was whether it should overrule *Olympic Steamship*. This Court declined to do so, and its statement that *Olympic Steamship* requires that the insured be made whole was made in that context. *See id.* at 39-40. Notably, this Court did ***not*** address the ***calculation*** of the attorney fee award in any fashion.

The same is true of *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012). This Court's statement about making the insured whole was made in the context of confirming that the insured was entitled to recover attorney fees; this Court said nothing about the calculation of such fees. *Id.* at 661.

Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins.

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[5] The total award was **$1,299,541.31**, for all fees and costs, including on the supplemental petition. CP 2051 (Dec. 12, 2016 Am. Judgment). The Bakers claimed $1,165,237.50 in fees (CP 491) and $39,215.78 in costs (CP 498) on the initial petition, plus $63,150.00 on the supplemental petition (CP 2110). The total amount incurred was thus **$1,267,603.28**.

Co., 144 Wn.2d 130, 26 P.3d 910 (2001) contains some discussion of the calculation of an attorney fee award, but still does not support the Bakers' argument. Specifically, this Court confirmed that, in addition to reasonable fees, an insurer must also pay "expenses ***necessary to establish coverage*** as part of those attorney fees ***which are reasonable***." *Id.* at 144 (emphasis added). Again, this Court still limited the recovery to expenses "necessary to establish coverage" and emphasized that the award must be reasonable, placing an inherent limit on the insured's recovery.

Even under the standard the Bakers now advocate, there was no abuse of discretion. It was the Bakers' burden to show their fee agreement was reasonable.[6] As noted above, the Bakers' counsel agreed that, had they sought to apply their fee agreement against the Bakers in the same manner as they did against Fireman's Fund, it would be "offensive" and "scandalous." CP 171. Counsel thus agreed to look only to the fee awarded by the trial court. CP 172. This was an implicit admission that the fee agreement, as counsel seek to apply it, was unreasonable. The trial court was well within its discretion to reject counsel's application of the fee agreement as to Fireman's Fund under these facts.

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[6] *See, e.g.*, *Mahler*, 135 Wn.2d at 433-34.

D. Non-Binding Federal Court Opinions Reflect the Fact-Specific Inquiry Necessary to Determine a Reasonable Fee Award

The federal district court opinions cited by the Bakers have no bearing on the trial court's award or the Court of Appeals opinion in this case. The Bakers did not cite either case to the trial court. Moreover, any variances in how the federal district judges calculated the awards in those cases do not reflect some widespread confusion among the courts; they simply reflect the highly fact-specific nature of a fee award.

For example, in *MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp. 3d 1078 (W.D. Wash. 2015), the district court emphasized that "the party seeking attorney's fees 'bears the burden of proving the reasonableness of the fees.'" *Id.* at 1085-86 (quoting *Mahler*, 957 P.2d at 651). The court found that the insured's counsel's block billing entries made it "impossible for the court to calculate how much attorney time was actually spent on any given task," and reduced the lodestar accordingly. *Id.* at 1087-88. The court declined to make an upwards adjustment to the lodestar figure because the insured waited until its reply to ask for a multiplier, and relied solely on the fact of its contingent fee agreement; the insured did not cite the quality of its representation or any other factors warranting upwards adjustment. *Id.* at 1086. The court also noted that the insured switched from paying its counsel's fees on an hourly basis to a

continent fee arrangement partway through the litigation. *Id.* at 1084.

Sec. Ins. Co. v. Sean N Air Travel, 2006 U.S. Dist. LEXIS 26805 (W.D. Wash. Apr. 20, 2006) involved a request for $54,604.82 in attorney fees "incurred in [the insured's] successful effort to obtain coverage under an insurance policy issued by plaintiff." *Id.* at *1. The fee award was made under *Olympic Steamship* because the insured was required to litigate to obtain coverage. There is no indication that there was a contingency fee at issue. Furthermore, *Sec. Ins. Co.* is a non-binding, unpublished decision in which the court placed absolutely no limits on the insured's fee recovery, in apparent disregard of the well-established rule that "above all else, the fee award must be reasonable." *See, e.g.*, *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989); *see also* RPC 1.5(a). Again, the Bakers did not cite *Sec. Ins. Co.* to the trial court, and the Bakers' own fee expert acknowledged that there are limits on what an insured may recover. CP 644-645. *Sec. Ins. Co.* is in no way binding on this Court. It is also inconsistent with what the Bakers argued below, and the Bakers are therefore prohibited from relying upon it. *See, e.g.*, *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958, 962 (2011) (holding that appellant waived arguments supporting its preferred method of calculating termination fee under the parties' contract).

E. The Bakers' Change in Position Would Discourage Settlements

Changing the long-established rule for determining attorney fee awards, and then applying the rule to a case like this where the insurer was already providing a defense prior to being sued, never denied coverage, and settled all substantive issues, would discourage insurers from settling claims, to the detriment of both injured third-parties and the insured. Specifically, if an insurer knows it will have to pay an attorney fee award equal to one-third of the amount it pays to ***settle*** both the underlying claims made against the insured and the insured's claims against the insurer,[7] insurers will be incentivized to pay as little as possible, to keep the attorney fee award low. This is contrary to the strong public policy favoring settlement of disputed claims. *See, e.g.*, *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007).

Furthermore, if the insured's attorney's contingent fee has to be factored into the settlement value and/or if the insurer knows it will be held liable for that fee even though it settles, it will impede settlement negotiations and effectively creates a conflict of interest between the insured and the insured's attorney. Indeed, that is essentially what happened in this case. Although Fireman's Fund is unaware if the Bakers'

[7] Here, the Bakers have also included the amount Fireman's Fund paid to defend them and the amount another insurer paid to settle their claims.

counsel conceded they had a conflict of interest, as the Bakers themselves state in seeking review from this Court: "HBH . . . agreed with the Bakers that it would look solely to the Bakers' rights against FFIC to satisfy their attorney fee obligation" "***[i]n order to prevent the fee issue from derailing settlement.***" Pet. for Review at 8 (emphasis added).

Finally, as the Bakers themselves acknowledge on page 15 of their Petition for Review, there is the potential for collusion, as attorneys and insureds could enter into any agreement to inflate their fee claim, then have a side agreement in place confirming the insured would never actually be responsible for paying the fee.

VI. CONCLUSION

Review should be denied because not one of the grounds set forth in RAP 13.4 for acceptance of a Petition for Review is met.

RESPECTFULLY SUBMITTED this 30th day of November, 2018.

COZEN O'CONNOR

/s/ Molly Eckman

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DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 30th day of November, 2018, I caused to be filed the foregoing Respondents' Answer to Petition for Review. I also served a copy of said document on the following parties as indicated below:

James M. Beecher Brent Beecher Hackett, Beecher & Hart 1601 Fifth Avenue, Suite 2200 Seattle, WA 98101-1651 jbeecher@hackettbeecher.com bbeecher@hackettbeecher.com lvoss@hackettbeecher.com *Attorneys for the Bakers / Petitioners*	☐ U.S. Mail ☒ Email ☐ Legal Messenger

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

Executed at Seattle, Washington, this 30th day of November, 2018.

/s/ Dava Bowzer
Dava Bowzer, Legal Assistant

COZEN O'CONNOR

November 30, 2018 - 2:58 PM

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