NO. 89661-5

SUPREME COURT OF THE STATE OF WASHINGTON

KAREN JOHNSON,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONDENT'S BRIEF
PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION

Petitioner Karen Johnson accepted a settlement offer with clear and unambiguous language limiting her recovery to reasonable attorney fees and costs accrued as of the date of offer. The trial court applied well-settled legal principles to this specific case to determine the amount of fees. The Court of Appeals found no abuse of discretion, and its decision is not in conflict with any other attorney fee cases, nor does it implicate any issue of substantial public interest. Although Ms. Johnson attempts to cast the issues raised in this appeal as being of public import or first impression, there is a well-developed body of attorney fee case law. Here, the Petitioner benefited from an early substantial settlement and her attorney was fully compensated by the award of all reasonable attorney fees independently determined by the trial court. Additional review is not warranted under any of the factors in RAP 13.4(b).

II. COUNTERSTATEMENT OF THE ISSUES

Review is not warranted under RAP 13.4(b). But if review were accepted, the issues would be:

A. **Following well-established precedent, did the trial court abuse its discretion in excluding time spent on a segregable, unsuccessful claim from its lodestar calculation of attorney fees?**

B. **Did the trial court err or court of appeals err in applying a clear and unambiguous contractual term in a CR 68 offer of**

judgment where its application is consistent with both state and federal case law?

C. **Following well-established precedent, did the trial court abuse its discretion in excluding time it determined was wholly unreliable from its lodestar calculation?**

D. **Where a Plaintiff does not retain a witness as an expert, and the witness testifies he is a not an expert, did the trial court or court of appeals err in denying recovery of her fees under a fee-shifting statute that allows recovery of expert witness fees?**

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement of Facts

1. Two Distinct Underlying Claims

The trial court determined that in this case, Petitioner Karen Johnson raised two separate and distinct claims arising out of her employment with the Department of Transportation (DOT). CP at 1478. First, in 2008, Ms. Johnson alleged discrimination, retaliation and negligence related to her treatment by her supervisor, Corey Moriyama, from June 2007 to August 2008. CP at 1478. Second, Ms. Johnson alleged a failure to accommodate a disability. This second claim arose in July 2009, nine months after Ms. Johnson last interacted with Mr. Moriyama, when her treating psychologist, Dr. Timothy Reisenauer, determined that she could not return to work at DOT and that the only possible accommodation was a transfer to another state agency. CP at 17, 33, 715-16. DOT disability separated her because her treating

psychologist said she was not capable of returning to work. CP at 31, 34; 714-20; WAC 357-46-160, -165.

Ms. Johnson's accommodation claim related to the July 2009 decision was unsuccessful both in an administrative challenge to the Personnel Resources Board (Board) and at the trial court level. Ms. Johnson conducted several discovery depositions in the administrative challenge, each strictly limited in scope to DOT's alleged duty to transfer her to a different agency. CP at 1328-29, citing CP at 1376-1425 *passim*. In awarding summary judgment to DOT, the Board found that: "Under *Havalina* [sic] [*v. Washington State Department of Transportation*, 142 Wn. App. 510, 178 P.3d 354 (2007)], DOT had no duty to search for vacant positions in other agencies to accommodate [Ms. Johnson]." CP at 720. When Ms. Johnson attempted to renew her accommodation claim in her subsequent civil suit, the trial court agreed with the Board. CP at 720.

2. Dr. Reisenauer's Treatment and Consultation

After Ms. Johnson filed the civil complaint alleging discrimination, the parties litigated several motions, the most significant of which involved DOT's request for an independent medical examination. In support of that motion, Dr. Reisenauer filed a declaration identifying himself as Ms. Johnson's "treating psychologist". CP at 59. In the declaration, Dr. Reisenauer indicated that an independent medical

examination would be dangerous[1] to her health, and asked that he and her medical doctor be given the opportunity to review and respond as to any psychological testing. CP at 60, 61, 62-63.

Dr. Reisenauer denied being retained as a litigation expert by Ms. Johnson's counsel. CP at 790-91. Ms. Johnson's counsel concurred, admitting that he was never retained or identified as an expert witness by Ms. Johnson or counsel. CP at 1214-15. Dr. Reisenauer described having had "snippets" of conversations with Ms. Johnson's counsel. CP at 791. Ms. Johnson's counsel described his input as providing documentation in support of disability accommodation claims, protecting the confidentiality of Ms. Johnson's records, and protecting Ms. Johnson. CP at 1214. According to Ms. Johnson's counsel, he was acting, "like any treating doctor". CP at 1214.

In his deposition, Dr. Reisenauer stated that his extant billing for therapy sessions constituted "a hundred percent of his treatment" and that those bills included all of his bills except for "some administrative work". CP at 792-3. Nevertheless, sometime after his deposition, Dr. Reisenauer

[1] Dr. Reisenauer's declaration inaccurately describes the medical danger as being that of stroke from high blood pressure. CP at 60. Contrary to his declaration, Ms. Johnson's treating physician testified that she was never in any danger, and that it would have been healthier to have been accurately informed of her risks. CP at 763-65. Dr. Reisenauer neglected to consult with her treating physician. CP at 758.

created a separate and new "non-clinical" billing[2] for Ms. Johnson. CP at 525.

3. Ms. Johnson Agrees to Settlement

While discovery was ongoing, DOT tendered a CR 68 offer of judgment, stating in relevant part, that DOT would pay, as part of the settlement Ms. Johnson's "awardable costs and reasonable attorney's fees accrued in this lawsuit *up to the date/time of this offer*". CP at 533 (emphasis added). The offer also required Ms. Johnson to provide all billing records with the acceptance. CP at 533-34. When Ms. Johnson's counsel inquired about whether the offer included recovery for time spent litigating the amount of reasonable fees, DOT's counsel replied that the "American rule would apply and the parties would bear their own costs." CP at 1368. Ms. Johnson's counsel responded by insisting that there was a rule for fees on fees, and DOT's counsel replied again, "I am not willing to agree on behalf of my client to a 'rule' in this settlement offer, or in the offer of judgment . . . the best I can do at this time is rely on the plain language of the settlement offer and of the offer of judgment."

[2] Actually, the largest section of non-clinical billing, approximately 96 entries, consisted of extra time during clinical sessions. CP at 522. The largest amount, $11,166.26, was directed at preparing his declaration and reviewing the psychological testing from the independent medical examination described by Dr. Reisenauer as being necessary to his medical treatment of Ms. Johnson. CP at 521.

CP at 1368. After this exchange, Ms. Johnson unconditionally accepted the offer of judgment. CP at 528.

4. Ms. Johnson Files an Expanded Fee Petition

Per the terms of the offer of judgment, Ms. Johnson attached contemporaneously generated billing records documenting 341.78 hours of partner, associate, and paralegal time. CP at 551. Four months later, in February 2012, Ms. Johnson's counsel filed a fee petition documenting an additional 101.48 hours. CP at 513-15. The additional hours consisted of time that Ms. Johnson's counsel "reconstructed" in addition to her contemporaneous billing, and time spent preparing the fee petition after the October 5, 2011 offer. CP at 1479-80.

B. The Trial Court's Decision on Fees and the Court of Appeals' Affirmance

The trial court applied the "lodestar" method of determining reasonable attorney fees, determining the reasonable hourly rate for Ms. Johnson's counsel and then determining the number of hours reasonably expended. CP at 1477-78. The trial court also determined that a 1.3 multiplier was appropriate. CP at 1480-81. The trial court supported its determination by detailed factual findings. CP at 1475-82. DOT

timely paid both the substantive judgment and the undisputed portion of the attorney fees.[3]

The trial court excluded four categories of time and costs from its calculations. First, the trial court determined that the time spent litigating the unsuccessful, reasonable accommodation claim was segregable because it involved a different legal theory, occurred during an entirely different time period, and did not involve a common core of facts.[4] CP at 1478. Second, the trial court determined that the term in the offer of judgment was clear and unambiguous and operated to cut off recovery for hours accrued after October 5, 2011. CP at 1478-79. To the extent extrinsic evidence was relevant, the trial court determined that correspondence preceding acceptance of the offer of judgment established that Plaintiff's counsel was not misled about the clear language and intent of the offer. CP at 1479. Third, the trial court determined that the "reconstructed" time was wholly unreliable, noting that Plaintiff's counsel did not keep any informal records, and had no explanation for why her contemporaneous records failed to include the reconstructed time. CP at 1480. Fourth, because Dr. Reisenauer was neither retained nor disclosed

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[3] *Johnson v. State*, ___Wn. App. ____, 313 P.3d 1197, 1201, fn.2 (2013).

[4] The only time excluded for the accommodation claim was work on administrative pleadings, correspondence specifically related to the administrative appeal, and time spent on the limited administrative depositions. CP at 702, 722-73 (identifying the contested administrative time). The parties entered a stipulation that these were the hours at issue. CP at 1464-67.

as an expert witness, the court determined his fees were not a litigation expense. CP at 1481.

The Court of Appeals affirmed the trial court's decision, holding that the trial court operated within its discretion in excluding hours for an unsuccessful claim and for wholly unreliable time.[5] *Johnson v. State*, ___ Wn. App. ___, 313 P.3d 1197, 1202, 1206 (2013). The Court of Appeals also held that the language in the Offer of Judgment was clear and unambiguous and rejected both Ms. Johnson's appeal to policy and "course of dealing" theory.[6] Last, the Court of Appeals agreed that bills from a non-retained treating psychologist were not a litigation expense subject to cost shifting.[7]

IV. ARGUMENT

Further review of this case is unwarranted. Ms. Johnson fails to articulate how this decision is in conflict with any Washington case law or how the interpretation of this case-specific contract constitutes a matter of substantial public concern. In fact, the Court of Appeals applied well-settled law to the facts of this case, determining that the trial court acted within its discretion. The Court of Appeals' reasoning is consistent with Washington and federal law and, because it is an interpretation of a

[5] *Johnson*, 313 P.3d at 1202, 1206.
[6] *Johnson*, 313 P.3d at 1204-05.
[7] *Johnson*, 313 P.3d at 1207-1208.

specific contract, does not present an issue of substantial public interest. Similarly, the Court of Appeals' holding regarding a treating psychologist not retained as an expert is limited in scope to the unusual facts of this case and review is not warranted

A. Standard of Review

Discretionary review in this case is governed by RAP 13.4(b), and is appropriate "only" if it meets one of four enumerated criteria. Ms. Johnson's petition fails to explicitly identify the alleged basis for review, but appears to argue review is appropriate under RAP 13.4(b)(1), conflict with Supreme Court precedent, citing to this court's decision in *Blair v. Washington State Univ.*,[8] or RAP 13.4(b)(4), an issue of substantial public interest.

Initially, the appellate standard of review explains why Supreme Court review is unnecessary. Appellate courts review fee decisions for manifest abuse of discretion.[9] The manifest abuse of discretion standard applies to all attorney fee awards, including those interpreting the award of reasonable attorneys' fees under RCW 49.60.030(2) (WLAD).[10] The trial court here fully complied with this court's admonition from *Mahler v. Szucs* to "take an *active* role in assessing the reasonableness of fee awards,

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[8] 108 Wn.2d 558, 573, 740 P.2d 1379 (1987). Petr's Br. at 1.

[9] *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987).

[10] *See e.g., Pham*, 159 Wn.2d at 538-41.

rather than treating costs decisions as a litigation afterthought."[11] Here, where the trial court exercised its discretion and awarded all reasonable attorney fees, its decision is not in conflict with *Blair's* stated goal of fully compensating attorneys who take WLAD claims.

B. The Court of Appeals Decision Is Entirely Consistent With Case Law Providing For Segregation of Unsuccessful Claims

Under the lodestar method, the trial court should discount hours spent on unsuccessful claims, including time on ancillary or parallel litigation.[12] Holding these rules apply in discrimination cases, the *Pham* Court upheld the trial court's reduction of time related to an unsuccessful injunctive claim, stating "that is why the law requires us to defer to the trial court's judgment on these issues."[13] One commentator described the rule in this way: "*Pham* represents a significant statement by the Supreme Court that trial courts must be very aggressive about excluding attorney time spent on unsuccessful portions of an overall successful litigation effort."[14]

Far from conflicting with Washington case law, the trial court's decision in this case represents a straightforward application of it. The trial court appropriately focused on whether the unsuccessful

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[11] *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998) (emphasis in the original).

[12] *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn App. 841, 847, 917 P.2d 1086 (1995).

[13] *Pham v. Seattle*, 159 Wn.2d at 538, 539-540.

[14] Talmadge, Philip and Mark Jordan, *Attorney Fees in Washington*, at 146 (Lodestar Publishing 2007).

accommodation claim shared a common core of facts and legal theories with the successful age and gender discrimination claims, concluding it did not. CP at 1478. With this factual determination, exclusion of time spent on Ms. Johnson's unsuccessful accommodation claim is both consistent with and required by *Pham*. Further appellate review on these facts will not clarify the law on segregation of unsuccessful claims.

Nonetheless, Ms. Johnson contends the trial court erred because the discovery time spent on the administrative claim overlapped with the civil suit.[15] For this proposition, Ms. Johnson cites, without analysis, *Steele v. Lundgren.*[16] *Steele,* however, is unavailing for two reasons. First, the *Steele* court provided no analysis of how to determine if claims are overlapping; it merely confirmed that the trial court has the discretion to make that determination.[17] And in fact, *Steele* did not involve separate accommodation and discrimination claims as in this case.[18] Here, the trial court was well within its discretion in deciding that Ms. Johnson's accommodation claim was separate from her discrimination claims. Second, the trial court limited its exclusion in this case and only excluded time spent on administrative pleadings, administrative correspondence,

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[15] Petr.'s Br. at 16.

[16] 96 Wn. App. 773, 783, 982 P.3d 619 (1999).

[17] *Steele*, 96 Wn. App. at 783 ("The trial court did not abuse its discretion).

[18] *Steele*, 96 Wn. App. at 775 (Steele brought retaliation, discrimination, sexual harassment, a hostile work environment claims, and only the hostile work environment claims survived).

and the limited administrative depositions. CP at 702, 722-23, 1464-67. The trial court thus allowed recovery for time not exclusively directed at the unsuccessful claim. Because the trial court was in the best position to make this determination, further appellate review is unnecessary and unwarranted.[19]

C. Enforcing Clear and Unambiguous Contract Language is Consistent with Case Law and Does Not Involve an Issue of Substantial Public Interest

Under both Washington and federal law, CR 68 offers are contractual in nature and allow an offer to limit recovery "to the effect specified in [its] offer." The purpose of CR 68 is to encourage settlement by promoting certainty and eliminating unintended results.[20] As both state and federal courts have noted, a defendant is the master of what is offered.[21] Waiver of attorney fee recovery in a CR 68 offer, however, must be clear and unambiguous.[22]

The Court of Appeals' opinion in this case concurs with existing federal and state precedent holding that the terms in a CR 68 offer are enforceable as written.[23] Further, the decision is favorable to civil rights

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[19] *Pham*, 159 Wn.2d at 540.

[20] *Wallace v. Kuehner*, 111 Wn. App. 809, 822, 49 P.3d 823 (2002).

[21] *Nusom v.Comh Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997); *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wn. App 261, 272, 131 P.3d 910 (2006); *Hodge v. Dev. Servs. of America*, 65 Wn. App. 576, 584, 828 P.2d 1175 (1992).

[22] *Nusom*, 122 F.3d at 833.

[23] *Johnson*, 313 P.3d at 1203 ("the terms of the offer control to the extent to which attorney fees and costs may be awarded."); *Hodge*, 65 Wn. App. at 584.

plaintiffs, expressly endorsing a rule that requires any waiver of attorney fees in WLAD cases be clear and unambiguous.[24] This holding is consistent with Washington case law from the last 20 years as well as with federal precedent.[25] In *Guerrero v. Cummings*, for example, the Ninth Circuit addressed a CR 68 offer virtually identical to the offer in this case and found it to be a clear and unambiguous waiver of fees after the date of the offer.[26]

Ms. Johnson has produced no contrary case authority to contradict this well established approach to CR 68. She cites *Lasswell v. City of Johnston City,* a federal district court case from Illinois.[27] *Lasswell*, however, expressly endorses the *Guerrero's* analysis and holds that the language in *Lasswell* was ambiguous.[28] Ms. Johnson's citation, for the first time, to *Erdman v. Cochise County et. al.*[29] does not reveal any contradictory authority; the *Erdman* court repeats the rule that waiver of fees must be clear, and concludes that in that case, because "the terms of the accepted

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[24] *Johnson*, 313 P.3d at 1203 ("A waiver of attorney fees and costs must be unambiguous in order to be binding.").

[25] *Hodge*, 65 Wn. App. at 584, ("Accordingly, it would be prudent practice and we strongly recommend that where a defendant intends that this offer shall include any attorneys' fees provided for in the underlying statute he expressly so state."); *Seaborn*, 132 Wn. App. at 272 ("[A] wise offeror will expressly state that the offer includes attorney fees...Seaborn as the maker of the offer, should have availed itself of the chance to contravene the CR 68 default rule."); *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir. 1995).

[26] *Guerrero*, 70 F.3d at 1112-13 (9th Cir. 1995) (noting that language "up to the date of this offer" was clear and unambiguous).

[27] Petr.'s Br. at 14-15 citing, *Lasswell v. City of Johnston City*, 436 F.Supp.2d 974 (S.D. Ill. 2006).

[28] *Lasswell*, 436 F.Supp.2d at 981 (reasoning that "costs then accrued" is ambiguous as to whether that was the date of the offer or the date of the judgment.).

[29] 926 F.2d 877 (9th Cir. 1991).

offer did not clearly exclude an additional attorney fee award as required [by our case law], the City is bound to the letter of its agreement."[30] Here, the Court of Appeals opinion concluding that the clear terms of the CR 68 offer bind both DOT and Ms. Johnson is consistent with both state and federal law. Thus, there is little or no precedential value to further appellate review.

Ms. Johnson also fails to elucidate how this issue is of substantial public concern. As the *Hodge* court explained in analyzing a discrimination claim; "The purpose of CR 68 is to promote fair settlements. This is best accomplished by eliminating uncertainty and any possible unintended consequences for either party in connection with the making, accepting, or rejecting of CR 68 offers."[31] That public policy is furthered by the holding in this case. In following the analysis of *Guerrero*, the Court of Appeals correctly reasoned that allowing defendants to make CR 68 offers that limit the amount of attorney fees may force plaintiffs to make a difficult choice, but it does not deny them access to the courts or significantly deter suit.[32] In the end, the Plaintiff may always reject the settlement offer, and that voluntary decision is easier to make when clearly articulated settlement terms are upheld.

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[30] *Erdman*, 926 F.2d 877, 881.
[31] *Hodge*, 65 Wn. App. at 584 (1992).
[32] *Johnson*, 313 P.3d at 1204.

Nor does Ms. Johnson's claim that she was misled justify additional appellate review. The trial court found, as a factual matter, that DOT's representations were consistent with the plain language of the CR 68 offer.[33] The trial court did not abuse its discretion where DOT's communication explicitly rejected Ms. Johnson's assertion of a rule.[34]

D. Exclusion of Unreliable Time is Consistent With Washington Case Law

The Court of Appeals unremarkably held that the trial court did not abuse its discretion in excluding unreliable time: "The trial court did not abuse its discretion by excluding from its calculation of the lodestar amount hours that were not proved to its satisfaction to have been worked."[35] Because this decision is directly in line with this Court's precedent that requires trial courts to determine, independently, what hours were reasonably spent, further review is unwarranted.

This Court has explained that in making fee determinations, the law requires deference to the trial court's judgment and that the issue on review is not whether the appellate court would have awarded a different

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[33] CP at 1479.

[34] Moreover, Ms. Johnson's position on appeal carries with it a substantial procedural problem. As the Court of Appeals noted, assuming Ms. Johnson was correct that there was no meeting of the minds over whether fees on fees were recoverable, the appropriate remedy is rescission, not a unilateral modification of the contract in her own favor. *Johnson*, 313 P.3d at 1205, fn. 11.

[35] *Johnson*, 313 P.3d at 1206.

amount, but whether the trial court abused its discretion.[36] The party seeking an award for attorney fees bears the burden of proving that such fees are reasonable, and the trial court must independently determine that amount.[37] The trial court may not simply rely upon the billing records of the attorney seeking fees.[38]

Although Ms. Johnson attempts to recast the trial court's decision as being purely about whether her counsel's fees were contemporaneous,[39] that is a mischaracterization. Plaintiff's counsel here is claiming that her contemporaneous records were inaccurate and that she should be allowed to adjust them upward to account for her own inaccuracy. The trial court's concern was with the unreliability of her counsel's *method* for adding time to her contemporaneously kept billing records.[40] "An attorney must keep specific, contemporaneous time records of fees incurred . . . Courts are justifiably skeptical about fee declaration creating time after the fact."[41] The trial court's concern with reliable records is in line with established precedent and its decision to be skeptical on these facts is not an abuse of discretion.

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[36] *Pham*, 159 Wn.2d at 540.

[37] *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 151, 859 P.2d 1210 (1993); *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[38] *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

[39] Petr.'s Br. 17-18

[40] CP at 1480 (noting the court's skepticism with counsel's methodology noting that Plaintiff's counsel failed to explain how her contemporaneous documentation did not capture the added time).

[41] Talmadge, *Attorney Fees in Washington*, p. 132.

And contrary to Ms. Johnson's arguments, the trial court's decision here is also consistent with *Bowers v. Transamerica Title Ins. Co.*[42] and *Clausen v. Icicle Seafoods, Inc.*[43] The *Bowers* court expressly stated that a fee award must be supported by "reasonable documentation".[44] Here the trial court's determination that the additional time was not reasonably documented is consistent with *Bowers.* The *Clausen* court addressed only whether a trial court may apply a percentage reduction, holding that it may do so.[45] Tellingly, the *Clausen* court cited, with approval, reasoning from a federal district court case in which a trial court reduced the final recovery to 44% of fees for hours that "were duplicative or inadequately documented."[46] Here, where the trial court determined that a 14% reduction in fees was warranted for inadequate documentation, the decision is entirely within the trial court's discretion and consistent with *Clausen.* It is also consistent with the federal approach.[47]

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[42] 100 Wn.2d 581, 675 P.2d (1983).

[43] 174 Wn.2d 70, 272 P.3d 827 (2012).

[44] *Bowers*, 100 Wn.2d at 597.

[45] *Clausen*, 174 Wn.2d at 82-83 (Identifying the appellate issue as, "*Icicle* contends it was improper for the trial court to segregate hours based on a generalized percentage reduction rather than on actual hourly records. . . *Icicle* makes no claim that the hours themselves were invalid.").

[46] *Clausen*, 174 Wn.2d at 82 citing *Peake v. Chevron Shipping Co.*, No C00-4228 MHP, 2004 WL 1781008, 2004 A.M.C. 2778, 2791 (N.D. Aug. 10, 2004).

[47] *Hensley v. Eckerhart*, 461 U.S. 424, 428-29, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (upholding a district court decision reducing an award by a third in part for failure to keep contemporaneous records.); *Frank Music Corp. v. Metro-Goldwyn Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) ("The lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or

Additionally, as the Court of Appeals noted in its decision, the lack of reasonable documentation is not the only basis for denying Ms. Johnson's late-created fees. The Court of Appeals concluded that as a matter of contract law, the offer of judgment required billing records to be attached to the acceptance.[48] Because Ms. Johnson's counsel did not attach the "reconstructed time" until four months later, she did not comply with the contract provision and that is a "sufficient alternative basis to affirm the trial court's ruling" excluding those hours.[49] Ms. Johnson's identified issue is, therefore, not appropriate for review because it would not change the outcome here.

E. The Court of Appeals Decision Regarding Expert Fees From a Provider Not Retained as an Expert Does Not Raise an Issue of Substantial Public Interest

This case presents a unique situation in which a litigant and her counsel did not retain Dr. Reisenauer as an expert witness and failed to

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secondary documentation."). The failure to keep contemporaneous records justifies discounting fees. The *Frank Music* court, in remanding the case, noted, "Plaintiff's counsel's inadequate showing has invited substantial discounting of his fee." *Id* at 1557. *See also Miles-Hickman v. David Powers Homes, Inc.*, 2009 WL 9995632 at *4 (S.D. Texas 2009)[47] ("Despite [plaintiff's counsel's] good faith, the court is unpersuaded and will not condone his practice of writing time entries long after the events reported. Counsel who plan to seek attorneys' fee awards in litigation must keep some type of reliable records, which generally requires that the records be made contemporaneously with - or at least close in time - to when the work is performed."). The *Miles-Hickman* court used the lack of contemporaneous records as a basis to reduce the entire award by 10 percent even where plaintiff's attorney attempted to underestimate hours spent. *Id.*

[48] *Johnson*, 313 P.3d at 1206 n.12.

[49] *Id.*

disclose him as one.[50] The Court of Appeals' holding that Dr. Reisenauer's bills did not constitute a "litigation cost" under Washington case law allowing for recovery of "expert witness fees" is hardly a novel application of the law to this unique set of facts.[51] And it is easily avoidable; a litigant must disclose when they enter into an employment relationship with a witness, particularly one in which the witness bills over $40,000 in expenses after denying in a deposition that he had other bills. CP at 792-3; CP 525.

Denial of costs for Dr. Reisenauer is also consistent with Washington case law. In King County, litigants are required, by court rule, to disclose expert witnesses and the failure to do so results in their exclusion.[52] Washington courts also distinguish between retained experts and witnesses who happen to have expertise as a professional.[53] Here, Ms. Johnson chose to use Dr. Reisenauer as a fact witness rather than an expert. CP at 1214. Holding her to that choice is equitable and appropriate.

The Court of Appeals' holding is limited in scope and therefore does not raise an issue of substantial public concern. It will only be repeated in the unusual circumstance when counsel fails to properly identify an expert

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[50] *Johnson*, 313 P.3d at 1200 ("However, Dr. Reisenauer was neither retained nor listed as an expert witness.").

[51] *Xiang v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 528, 844 P.2d 389 (1993) (". . . an award of expert witness fees is clearly authorized by RCW 49.60.030(2)").

[52] *Jones v. City of Seattle*, ___ Wn.2d ____, 314 P.3d 380, 389-90 (2013); KCLR 26(K)(3).

[53] *Paiya v. Durham Construction Co.*, 69 Wn. App. 578, 580, 849 P.2d 660 (1993).

witness. The ordinary involvement of treating medical professionals in litigation—time spent responding to discovery and/or depositions—is already compensated, as it was in this case.[54] The Court of Appeals' ruling affects only the narrow circumstance where a litigant chooses not to retain and disclose an expert, but uses someone as an expert nonetheless. The Court of Appeals' holding is focused on the facts of this case and does not raise an issue of substantial public concern.

V. CONCLUSION

For all the foregoing reasons, DOT respectfully requests that this court deny the petition for review as Ms. Johnson has failed to establish any of the criteria in RAP 13.4(c).

RESPECTFULLY SUBMITTED this 13th day of January, 2014.

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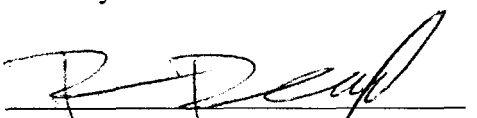
Attorney General



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[54] CR 26(b)(7); *Johnson*, 313 P.3d at 1206 fn. 14.

DECLARATION OF SERVICE

I certify that I caused to be served a copy of Respondent's Brief to the Petition for Review on all parties or their counsel of record on the date below, via ABC Legal Services, as follows:

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

Dated this 13th day of January, 2014, at Seattle, Washington

Valerie Tucker
VALERIE TUCKER
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Subject: Johnson v. WSDOT - No. 89661-5 Answer to Petition for Review

Please find attached Defendant's Answer to Plaintiff's Petition for Review.
Case Name: Karen Johnson v. Washington State Department of Transportation
Case No. 89661-5
Filed by:

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Sincerely,

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