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No. 69046-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KAREN JOHNSON,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case arises under the Washington Law Against Discrimination. CP 1-24. Appellant Karen Johnson ("Johnson") received an *Offer of Judgment* from the Respondent State of Washington; Department of Transportation ("DOT") in the amount of $350,000.00, which was accepted and has been paid. The *Offer of Judgment* also provided that the DOT would pay Johnson's "awardable costs and reasonable attorney's fees accrued in this lawsuit up to the date/time of this Offer, which sum shall be determined by the King County Superior Court in the event that counsel for the parties cannot agree within 10 days of [Johnson's] timely acceptance. [Johnson's] claimed costs and fees shall be substantiated by billing records attached to [Johnson's] acceptance of this Offer detailing the nature and date of the work performed and hours accrued." CP 532-534.

The parties could not "settle" the amount of "awardable costs and reasonable attorney fees" within the 10 day period. Thus the case continued in months of litigation, followed by this appeal. Johnson prepared and filed a fee petition supported by expert testimony, to recover Johnson's additional statutory remedies in Washington Law Against Discrimination cases of "reasonable attorney fees and costs" awardable to the "injured" party under RCW 49.60.030. The State contested the fee

petition with its own multiple experts and other challenges. The trial court awarded certain fees and costs, but denied a significant proportion of the fees and costs sought. CP 1475-1482. The State has paid to Plaintiff the $350,000 and the fees and costs awarded below.

This appeal involves the following issues as to the judgment for fees and costs:

1. Johnson sought fees and costs incurred in the post-Offer of Judgment continued litigation of the RCW 49.60.030 remedy which provides "costs" and "reasonable attorney fee" to an "injured" party. Johnson through presenting evidence, briefing, expert testimony and oral argument litigated her fee petition to the trial court. The trial court denied all such fees and costs related to the Petition, finding that the *Offer of Judgment* did not include "post-acceptance" fees and costs. CP 1478-1479.
2. The trial court denied all costs for Johnson's treating counselor incurred over a 3 year period prior to the Offer of Judgment, for "non-therapeutic" work related to the disability discrimination and retaliation legal issues, in conferring with counsel, maintaining extra documentation, preparing for deposition, reviewing documents, preparing claim and litigation related documents, reports and materials and preparing declaration testimony related

to CR 35 examination requests and in response to CR 35 examination.

3. The trial court denied pre-Offer of Judgment attorney fees on "non-segregable" time for overlapping research, discovery and briefing incurred after Johnson's tort claim was filed, during Johnson's "disability termination" by DOT.
4. The trial court denied attorney fees refusing to compensate 100% of the portion of the attorney hours which had not been "contemporaneously entered" but which had been documented and supported by detailed entries made during review and correction of time and billing records for Johnson's fee petition. CP 1481, 1478-1479.

The parties below stipulated to the amount attributable to each disputed category of fees and costs. CP 1464-1470. The trial court's fee and cost judgment below is not disputed by the State, and has been paid.

Johnson asks this Court to award a supplemental judgment for the additional attorney fees and costs for litigating Johnson's Petition for "reasonable attorney fees and costs," for non-segregable time in the State disability termination appeal procedures, for attorney time documented and detailed during review and correction of time and billing records, and the costs for law-related, non-treatment time for Johnson's treating

counselor, Dr. Reisenauer. Counsel asks that fees awarded on appeal carry the same multiplier asked for in the trial court and supported by expert testimony, a 1.5 multiplier. This is higher than the multiplier awarded in the trial court, a 1.3 multiplier, but justified by the risks of taking on such cases, as borne out by the risk of having to litigate for the attorney fees with no assurance of compensation for the protracted litigation required to recover fees, under the "scheme" advanced in this case by the State.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in denying Johnson "reasonable attorney fees and costs" incurred in litigating her Petition for Attorney Fees and Costs under RCW 49.60.030.

2. The trial court erred in denying Johnson fees on issues and time which are non-segregable as between the civil case and the State's "disability termination" appeal process, which were contemporaneous and involved overlapping issues, discovery and depositions, research, briefing, and attempted mediation processes.

3. The trial court erred in denying all fees for attorney time entries which were documented in detailed "non contemporaneous" time and billing entries, and which were supported with attorney testimony as representing conservative time entries for case work and documents inadvertently missing from the "contemporaneous" time and billing records.

4. The trial court erred in denying Johnson costs for her treating counselor Dr. Reisenauer's non-therapeutic time related to legal matters.

III. STATEMENT OF THE CASE

Karen Johnson was a Human Resource Professional in the Washington State Department of Transportation ("DOT") who was rendered ill and disabled by discriminatory and retaliatory conduct directed at her and others, including retaliation for her opposition to unlawful conduct of a new probationary HR Manager who supervised her.[1] Johnson sought extensive electronic and documentary discovery to explain the "back story" – that is, who made the decisions and why Johnson was the one fired, rather than the perpetrator of the discrimination and retaliation. Discovery and investigation showed that DOT HR Director Kermit Wooden and Assistant Secretary of Administration Bill Ford were recent respondents/defendants in litigation of charges of harassment and discrimination against females. Mann Declaration Exh 11; CP 382-449, 672-679.

Johnson was diagnosed with high blood pressure, PTSD, and Anxiety Disorder so severe that she was restricted from returning to work, initially in her workplace, and eventually, after participation of Headquarters in her demise, in the DOT as a whole. DOT made no offers of settlement in over 3 years of administrative complaints and civil litigation, though they twice caused excess time and expense by agreeing

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[1] CP 1-24

to and scheduling, but then cancelling two professional mediations: the first was scheduled while she was still able and working and the second was after she had been rendered disabled and had a pending tort claim. Mann Decl.; CP 471-472.

The CR 68 *Offer of Judgment* was made only after extensive discovery requests and after no less than 3 involved Regional and Headquarters HR and EEO officials in DOT left the agency.[2] The DOT's offer came shortly after the trial court denied the DOT's Motion to Quash the deposition of Secretary Hammond and just before the "Due Date" for massive disclosure of Email discovery from headquarters managers. CP 348-349. DOT's primary defense in the civil case was the same issue as their basis for "disability separation" of Johnson from employment, that the State has no duty to assist disabled employees in finding disability accommodation by transfer between agencies. Johnson was "disability separated" by the State without any effort to assist her in the accommodations her treating professional recommended: first that she be transferred out of the office where she was supervised by the harasser, and then after DOT Headquarters cancelled a mediation and the investigation of her complaint, accommodation by transfer to comparable Human Resource Manager duties in another State agency. CP 7, ¶¶2.24-2.29; CP

[2] Kermit Wooden, Margarita Mendoza de Sugiyama, Corey Moriyama

12 ¶¶2.36-2.40; CP 14 ¶2.44; CP 17 ¶2.50; CP 18 ¶¶2.52-2.56; CP 19 ¶¶260-2.63. The issues were identical. The "disability separation" was alleged to violate RCW 49.60 as she was being terminated without making reasonable accommodation. CP 20 ¶¶3.4-3.5

The DOT obtained a continuance to produce the e-discovery, and then moved to amend their answer with defensive allegations that Johnson's injuries were somehow caused by her treating counselor. CP 325-329, 343. Those allegations were a clear psychological and legal threat to begin an attack on Johnson's treating PTSD professional if she did not accept the *Offer of Judgment* within the 10 day window. Johnson's counsel sought expert ethics counsel for advice on that tactic from the firm of Talmadge and Fitzpatrick.

Johnson's expert economist prepared a report and an updated report as the medical situation changed in which her damages had a range topping over $900,000. Mann Decl. Exh. 6; CP 600-611. The amount of the *Offer of Judgment* Johnson decided to take does not reflect the potential value of her case at trial, but rather could be seen to reflect her inability to withstand further stress and conflict because of her disability and the intensity of the DOT's tactics. The litigation was time intensive for the treating counselor. Mann Decl.; CP 1213-1216. Johnson also had a

Vocational Counselor, expert, who prepared two reports. Only the treating counselor's case related fees were refused by the Court.

Johnson's counsel presented a fee petition seeking fees of $205,276.50 and costs of $65,127.98 (re-computed using the trial court's rates and 1.3 multiplier).[3] The trial court set the reasonable hourly rates as $425 per hour for partner time; $225 per hour for associate time; and $125 per hour for paralegal time. The Court reduced the rate for firm partners from their $450 hourly rate to $425 per hour. CP 1477.

The trial court found a 1.3 multiplier on the attorney fees was appropriate finding, "This case presented high risks and difficulties related to Plaintiff's post-traumatic stress and anxiety as well as the resources available to a large public agency to defend the action." *Citing Pham v. City of Seattle* 159 Wn.2d 527,541 (2007). CP 1480.

However, the trial court with the other hand severely reduced the attorney hours to be recovered from 327.94 partner hours documented in detail and requested[4] to 189.99 awarded; associate hours from 67.93 to 41.27; and paralegal hours from 25.97 to 15.06. CP 1481.

The trial court erroneously found that the hours spent by Johnson's counsel "in the unsuccessful administrative claim and on depositions

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[3] CP 1464-1470 initial table.
[4] CP 485-515

limited to the administrative claim are not recoverable." *Pham v. City of Seattle*, 159 Wn.2d 527,538,151 P.3d 976 (2007); CP 1478.[5] This cut 27.4 partner hours and 25.18 associate hours from the fee petition total. CP 1478. The time largely represents depositions taken by Plaintiff during while the tort claim and administrative appeal of termination were both pending, all were related to the civil case and did not have to be retaken the as the facts and issues were indistinguishable.

> ... Plaintiff efficiently coordinated discovery for both the Administrative appeal of her "Disability Termination" and the civil case while the tort claim was pending, mediation being discussed. She sought "reasonable accommodation" and mediation to overturn her termination administratively while the OEO investigation and tort claim were being addressed and "rejected" by DOT's Assistant Attorneys General. Her recovery of $350,000 plus fees and costs is all a remedy for the lost wages of being terminated as well as the emotional distress and disability caused by the violations of RCW 40.60.

CP 476.

The trial court found that any hours expended by Johnson's counsel litigating fees and costs after the acceptance of the *Offer of Judgment* were not recoverable, citing the terms of the offer of judgment and the case of *Guerrero v. Cummings*, 70 F.3d 1111,1113 (9th Cir. 1995). CP 1478. Time and costs disallowed on this basis totaled 59.76 partner

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[5] The parties entered into a stipulation as to the number of hours at issue in this appeal. See CP 1464-1470.

hours, 5.85 Associate hours, 4.08 Paralegal Hours, and $7,438.91 in costs, prior to appeal.

Though the trial court did not question counsels' good faith as to "non-contemporaneous time records," but found that the reconstructed time was "unreliable" and denied 100% of those entries. CP 1479-1480. The trial court on that basis cut 58.54 partner hours and .15 paralegal hours on that basis for documented work. CP 1480.

Finally, the trial court denied Johnson any recovery for costs attributable to litigation-related time of Dr. Reisenauer because he was a treating medical provider and not retained as an expert. This cut $42,968.56 from Johnson's cost petition. CP 1481.

IV. ARGUMENT

A. FEES INCURRED IN PREPARING FEE PETITION

1. Public Policy

Attorney fees and costs incurred on a fee petition are recognized as recoverable in fee shifting cases. *Fisher v. Arden Mayfair* 115 Wn.2d 364,378, 798 P.2d 799 (1990); *Steele v. Lundgren*, 96 Wn.App.773, 781, 982 P.2d 619 (1999). Johnson is unaware of any appellate decision under RCW 49.60.030 and CR 68 that would deny such fees for litigation of a fee petition where the offer does not determine the amount of "costs of suit, including reasonable attorney fees" recoverable under both the offer and the

statute. The policy behind the anti-discrimination fee shifting statutes under Washington law demand a liberal construction. RCW 49.60.020.

> "The statute mandates that it be construed liberally for the accomplishment of its declared purposes. RCW 49.60.020. The statute embodies a public policy of "the highest priority." *Allison v. Housing Auth.*, 118 Wash.2d 79, 821 P.2d 34 (1991)

Xieng v. Peoples Nat'l Bank, 120 Wash.2d 512, 521, 844 P.2d 389 (1993).

RCW 49.60.030 (2) provides:

> Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, **together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter...**[emphasis added]

2. <u>Adverse Effect of Ruling</u>

An award of fees for litigating the Petition to recover awardable fees is necessary to put the parties on the same footing. In the absence of such a rule, a defendant opposing a fee petition can defeat the value of its "offer of judgment." In this case, the DOT retained an expert witness, and contested a majority of Johnson's fee petition. Suppose the DOT also sought to take depositions regarding the fees, and did discovery of vendors' costs and the like. Would Johnson's counsel be required to bear and respond to endless further proceedings without the "fee shifting" protection of RCW 49.60.030?

Would Johnson's counsel or Johnson be expected to bear the time and cost? Would it go so far as to include appeals of the fee petition and would Johnsons counsel's fees be diluted by having to donate years of trial court and appellate advocacy and possible remand for further proceedings just to collect "pretrial-offer of judgment" RCW 49.60.030 attorney fees and costs.

The ruling in this case undermines RCW 49.60.030 and the language of CR 68, to defeat the "public policy of the highest order" in the Washington Law Against Discrimination.

3. Course of Conduct

The DOT has engaged in sharp practices in this case. Johnson's counsel resolved the cited *Burklow v. State of Washington* case with the state under an **identically worded** Offer of Judgment not six months before Johnson's Offer, and the State of Washington **did not contest** the fees for litigation of the fee petition, and paid fees for litigating the fee petition. Kytle Dec. Exh 7, 8; CP 1155-1160. When the State enters into an agreement with one of its citizens, it has a duty to act fairly. The following quote from the Washington Supreme Court is appropriate for consideration:

> We reiterate with approval language from *State v. Horr,* 165 Minn. 1, 7, 205 N.W. 444 (1925):
>
> The state is formed for the purpose of securing for its citizens impartial justice, and it must not be heard to repudiate its solemn agreement, relied on by another to his detriment, nor to perpetrate upon its citizens wrongs which

> it would promptly condemn if practiced by one of them upon another.
>
> quoted in *Strand v. State,* 16 Wash.2d at 118–19, 132 P.2d 1011; *see also* Comment, *Estoppel and Government,* 14 Gonz.L.Rev. 597, 621 (1979) (appropriate to apply estoppel against government to insure fairness in government's relationship with its citizens).

Bd. Of Regents of Univ. Wash. v. City of Seattle, 108 Wash.2d 545,551-552, 741 P.2d 11(1987).

Extrinsic evidence is essential to analyzing the state's conduct at issue. *Berg v. Hudesman,* 115 Wash.2d 657, 667, 801 P.2d 222 (1990) holds that.

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context.... Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties provides an analytical framework for considering a course of dealing of the intent of the parties. *Id.* at 658 quoting the Restatement (Second) of Contracts §§ 212, 214(c) (1981) comment b.

Immediately prior to service of the *Offer of Judgment* on Johnson in this case, the course of dealing was that post-offer fees and costs for a litigated fee petition, were recoverable from the State **under the exact language** of this Offer of Judgment to Johnson. Kytle Dec. Exh 7, 8. CP 975, 1155-1160. The State in *Burklow* **did not** assert that the language of

the Offer of Judgment precluded an award of fees or costs for preparing and filing a fee petition. Further, the Offer of Judgment states the purpose is to "eliminate the added costs of further trial preparation," not costs of a fee petition. Kytle Dec. Exh 7, 8; CP 1155-1160.

The "course of dealing" regarding Johnson's *Offer of Judgment* includes pre-acceptance discussion between counsel about whether to enter into a "settlement" rather than the "Offer of Judgment," which would have allowed structuring of a settlement for Johnson to make it more desirable for her to settle. In email, the "settlement" was compared to the time limited "offer of judgment," Johnson's counsel wrote to DOT's counsel:

> NO. The rule is that fees and costs incurred in seeking "reasonable attorney fees and costs" under RCW 49.60 are recoverable. Your [settlement] offer does not settle what reasonable attorney fees and costs will be and RCW 49.60 provides that fees necessary to obtain reasonable fees and costs are recoverable. We cannot resolve this if you can put us to endless litigation on the fees and costs. Such fees would be recoverable under the "Offer of Judgment" so why not the [settlement] Offer?

Kytle Dec. Exh 10; CP 1194-1196.

Johnson's counsel had specifically discussed with DOT's counsel, the "*Burklow* formula." DOT's counsel responded to Johnson's email very differently than the post-acceptance pleadings. DOT's counsel wrote:

> **I don't know whether such fees are recoverable under the Offer of Judgment or not. I have not done research on the issue and don't know what position my client will ultimately take. If, as you claim, the rule is that fees incurred in such disputes are recoverable, then the (sic) presumably the rule will control** without any input from me. I am not willing to agree on behalf of my client to a "rule" in this settlement offer, or in the offer of judgment, at this time. There are simply too many variables. Having not seen any accounting or documentation or amount, I can't tell whether my client will ask me to dispute the fees or not or whether there will be any litigation. ... thus I put it as a term in the offer of judgment and in the settlement offer that the parties may refer it to the court if they cannot agree between counsel. The best that I can do at this time is rest on the plain language of the settlement offer and of the offer of judgment.[emphasis added]

Kytle Dec. Exh. 10; CP 1194-1196.

The DOT cannot contend on this contemporaneous record that, as the "maker of the Offer of Judgment," it intended to cut off the fee petition hours rather than defer to case law on recoverability under RCW 49.60.030. It cannot claim that acceptance after that email in any way was acceptance of a limitation of fees for the fee petition hours, in the event the fees and costs could not be resolved during the period allowed for settling the fee issue. Either the DOT intended its Offer to be identical to the *Burklow* Offer (as appears on its face) with recoverable fees on the petition, or the DOT mislead Johnson as to the intended terms of its *Offer of Judgment.* Any intent by the DOT to cut off RCW 49.60.030 fees on the Petition, if such intent existed pre-acceptance, was affirmatively

hidden from Johnson until after her acceptance. In the face of Johnson's clear assertion that those fees were recoverable, her the State imposed time limited choice with significant legal consequences, the State's affirmative denial of contrary intent, and the contemporaneous course of dealing where they were sought and paid without objection, the State must be estopped to oppose the recovery of fees on the Petition or argue a different intent and meaning "post-acceptance."

Instead of following the mutual course of dealing regarding this identically worded offer of judgment, the DOT cited to a Federal case, *Guerrero v. Cummings,* 70 F.3d 1111 (9th Cir. 1995) for the proposition that no post-offer fees incurred for a fee petition should be awarded. *Guerrero* is not controlling authority. Other federal case law reaches a different conclusion regarding a Rule 68 offer. In *Lasswell v. City of Johnston City*, 436 F.Supp.2d 974, 980-982 (S.D. Ill. 2006) (Kytle Dec. Exh 9; CP 1168-1182), the Court awarded fees incurred up to the time of acceptance of the offer, and fees incurred in preparation of a fee request, where the offer was as follows: "...on all the plaintiff's state and federal claims for the sum of $1000 **plus costs accrued to date, to be determined by the court.**" (emphasis added) Kytle Dec. Exh 9; CP 1177,1182. In so ruling, the Court stated:

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> Defendants contend that "costs then accrued" refers to the date of offer, not the date of acceptance or judgment. Defendants point out that at least one other district court has held that a plaintiff cannot recover attorney's fees for time spent after the Rule 68 offer was made. *Said v. Va. Commw. Univ./Med. Coll. of Va.*, 130 F.R.D. 60, 64 (E.D.Va.1990). In addition, defendants point out that the Ninth Circuit Court of Appeals has held that the terms of a Rule 68 offer, not the language of Rule 68 itself, control the cutoff of attorney's fees and costs. *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir.1995). However, in *Guerrero,* the offer provided for "costs incurred by this plaintiff *prior to the date of this offer." Id.* (Emphasis added). Here the offer includes "costs accrued to date." (Doc. 30 Ex. A 2). *Id.* at 981.

Lasswell v. City of Johnston City, 436 F.Supp.2d 974, 980-982 (S.D. Ill. 2006).

> The Offer in this case (Johnson) states (similar to *Lasswell)*:
>
> ....awardable costs and reasonable attorney's fees **accrued in this lawsuit up to the date/time of this Offer,** which sum shall be determined by the King County Superior Court in the event that counsel for the parties cannot agree within 10 days of Plaintiff's timely acceptance.

Kytle Dec. Exh. 8; CP 1158.

The *Lasswell* court, in authorizing the fees incurred in preparing the petition for fees emphasized the public policy considerations and noted that:

> Attorneys will be less likely to take civil rights cases if they know that the time spent establishing and litigating their fees will be uncompensated. *Bagby,* 606 F.2d at 416. In effect, civil rights attorneys' hourly rates will be decreased, because a portion of the hours they expend on a case will be uncompensated. *Id.* Such a result would undercut Congress' purpose in passing § 1988, that is, to make civil

> rights cases more attractive to attorneys. *Rivera,* 477 U.S. at 578, 106 S.Ct. 2686. Therefore, the Court will allow plaintiffs to recover attorneys fees for time reasonably expended establishing a right to attorneys fees. Id. at 982.

Lasswell at 980-982.

As cited above, the Washington Law Against Discrimination is to be construed liberally and is of the highest priority. *Supra Xieng at* 521 and RCW 49.60.030(2). To deny fees and costs incurred on the fee petition on these facts would not further the purposes of this statute, but rather undermine it. Further, Washington recognizes that contracts that would undermine strong public policies will not be enforced. *See, eg., McKee v. AT&T,* 164 Wash. 2d. 372, 398-399 (2008) (confidentiality provision violates strong public policy against secrecy).

B. ATTORNEY FEES FOR NON-SEGREGABLE CLAIMS

Johnson's fees should not have been reduced for work done necessary to obtaining a final determination by the State as to whether a remedy and/or disability accommodation could be obtained through internal avenues, including internal discovery, briefing, appeal, and opposition to Johnson's "disability separation."

> The Supreme Court held that where a plaintiff brought "distinctly different claims for relief that are based on different facts and legal theories," counsel's work on unsuccessful claims cannot be deemed to have been expended on successful claims. But where the plaintiff's claims involve a common core of facts and related legal

> theories, "a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." ..."All of Steele's claims involved a common core of facts and related legal theories. Steele won substantial relief. The trial court recognized that Steele's claims were overlapping and that, despite the elimination of some of the claims on summary judgment, the core of her claims went to the jury."

Steele v. Lundgren, 96 Wash. App. 773, 783 (1999) quoting *Martinez v. City of Tacoma,* 81 Wash. App.228, 242-43 (Div. II 1996) (citations omitted).

The issues raised in the discovery, briefing and appeal of Johnson's disability termination were based on common facts and legal issues with her "standard tort claims," and the work was overlapping and contemporaneous. See Chronological Table and documents. Mann Dec. Exh. 3; CP 1227-1228. Johnson conducted legal research, discovery, and briefing which overlapped completely with the issues of the required "standard tort claims," preparation for pre-filing mediation [cancelled by DOT], civil suit, as well as the internal discrimination complaint and investigations, and mediation efforts. Id. Depositions of key discriminating officials and witnesses for the civil case were scheduled to be taken "post tort claim," "pre-suit" to facilitate a mediation, and Johnson's written and documentary discovery were carried out under the administrative caption at the "standard tort claim" stage of the civil case. Id. The work was efficient and those depositions did not have to

be retaken in the civil case. Johnson attempted twice during the internal complaint/appeal/tort claim phase to mediate all claims with the State. Id. Discrimination cases often have a variety of claims and avenues for redress of the same facts and claims for which fees are allowed if they are related to the discrimination claims on which the Plaintiff ultimately achieved substantial relief. *Steel v. Lundgren, supra.*

Counsel for the DOT in the 2008-2009 time frame similarly charged fees of the internal appeal and related issues as "ADA Litigation" and did not segregate his work on the appeal. Mann Dec. Exh 2; CP 1210-1213, 1221-1225. Fees for attorney time during Johnson's administrative appeal are "non-segregable" as the issues and claims were simultaneous and nearly identical to those in the tort claims and the lawsuit. Discovery obtained in the appeal was successful and substantial as early and efficient discovery of the civil case. Id.

C. CASE LAW REGARDING CONTEMPORANEOUS TIME RECORDS

The trial court cited the case of *Mahler* v. *Szucs,* 135 Wn.2d 398, 434, 957 P.2d 632 (1998) for the proposition that Johnson must provide contemporaneous time records. This was incorrect. In *Mahler,* the Court's focus was not on whether billing entries were "contemporaneous."

Mahler cites *Bowers v. Transamerica Title Ins. Co.*, saying that documentation of fees:

> need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (Ie, senior partner, associate, etc.)

Mahler at 434 citing *Bowers*, *supra*.

The *Mahler* Court was simply reciting the standard for application of the lodestar multiplier, which includes the word "contemporaneous." Nothing in the *Mahler* case or in any appellate case in the State of Washington holds that an attorney has not properly earned fees because some portion of the attorney time was not recorded immediately following the instant the work was performed. To the contrary, in *Bowers* v. *Transamerica Title Ins. Co.,* 100 Wn.2d 581, 675 P.2d 193 (1983), our Supreme Court recognized that all of an attorneys' time might not be documented "contemporaneously." *Bowers,* 100 Wn.2d at 597. "The attorney requesting attorney fees must provide only 'reasonable documentation of the work performed' and the 'documentation need not be exhaustive or in minute detail.'" Id. Likewise, in *Clausen v. Icicle Seafoods, Inc.,* 174 Wash. 2d. 70, 75, 81-82 (2012), our Supreme Court affirmed the trial courts award of attorney fees that were based on declarations by attorneys of the work performed based on reconstructed

time records. Kytle Dec. Exh 1-2; CP 1278-1292. The trial court declarations of James Beard and James Jacobsen, Plaintiff's counsel in *Clausen,* presented time "based on my review of the file" and that counsel "based my estimate of time upon my experience keeping track of time in the past." Findings of fact make clear that the trial court awarded fees based on the reconstructed time. Kytle Dec. Exh 3; CP 1280, 1288, 1305.

An example from another jurisdiction is *Miles-Hickman v. David Powers Homes, Inc.,* 2009 WL 995632 (S.D.Tex. 2009): the court, in response to a fee petition based on after the fact attorney time estimates, stated the following:

> In this case, Hickman seeks to recover fees paid to her two attorneys, Steven Petrou, Esq. and Stanley Santire, Esq. Hickman has submitted an after-the-fact billing summary prepared by Petrou months or years after the work was performed. Petrou reports that he spent 516.35 hours on this case and seeks compensation at an hourly rate of $250.....
>
> First and most significantly, Petrou testified his time entries were after-the-fact estimates based on his review of his files in preparation for his attorneys' fee request. As he explained at the fee hearing, he attempted to reconstruct the amount of time he spent on many hundreds of tasks involved in this suit. Despite Petrou's obvious 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. Having reviewed carefully Petrou's summary of work

> performed, **the Court finds that he has not demonstrated that his estimates are sufficiently reliable and the time requested was all necessary. His time clearly was not adequately documented in such a way to warrant compensation every hour sought. The Court therefore adjusts downward by 10% the total time reported in Petrou's summary.** (emphasis added)

Id. at *4.

Here, the large majority of counsel's hourly time was in detailed contemporaneous billing records, and the additional time entries were based on review of documents and correspondence during review of records for the fee petition, and were entered by the attorney who performed the work, based on review of the work actually performed which had been missed in the contemporaneous billing entries. CP 1213. With sworn testimony and detailed documentation, the Court still disallowed 100% of all such non-contemporaneous entries, rather than applying a reasoned analysis or adjustment to the time.

D. DR. REISENAUER'S BILLS

Under CR 26(b)(7) and RCW 49.60.030, time of medical providers spent responding to legal matters is an expense to be compensated. The trial court was apparently under the impression that the bills submitted by counsel for billings of Dr. Reisenauer included time spent in treating Johnson, as well as time spent in performing matters related to her claims. **This is incorrect**. Johnson's counsel submitted only the segregated

statement for legal related time Dr. Reisenauer related to Ms. Johnson's legal matters. *See* Mann Dec. ¶ 4, Exh 4; CP 1213-1216, 1246-1251. The billing for Dr. Reisenauer's therapeutic sessions with Ms. Johnson was not part of the fee petition submitted to the Court, but were in segregated invoice records. On reconsideration, the segregated billing documents were provided to the trial Court so the Court could see that the fee petition seeks only the non-treatment, litigation related, fees for Dr. Reisenauer. Mann Dec. Exh 5; CP 1099-1102. Dr. Reisenauer, as a treating professional, is properly compensated for records review, preparation of documentation and reports, declarations, deposition preparation, meetings with counsel, and the like.

The trial court went further, however, to find that because Dr. Reisenauer was not an expert witness, his costs associated with the above should not be compensated. There is no reasonable basis for this holding. If a party's medical provider is asked to spend time, review or make records, review or prepare documents, review or give depositions, etc. related to the litigation and not part of the actual treatment of the party, then this cost to be reimbursed.

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V. CONCLUSION

Johnson respectfully requests that this Court find that attorney fees for preparing a fee petition should have been awarded, that the reconstructed time was sufficiently documented to be awarded, fees should have been awarded for non-segregable time, and that Dr. Reisenauer's bill should have been awarded and paid as a costs for legal matters.

Fees and Costs on Appeal

Johnson also seeks fees and costs on appeal under RAP18.1 and RCW 49.60.030.

RESPECTFULLY SUBMITTED this 31 day of OCTOBER, 2012.

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PROOF OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via messenger on the following attorneys:

Kathryn Marie Battuello
John R. Morrone
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DATED this 31 day of OCTOBER 2012 in SEATTLE, WASHINGTON.

s/Danielle J. Rieger
DANIELLE RIEGER, Paralegal