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NO. 68544-9 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JULIE BERRYMAN,

Respondent

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant

REPLY BRIEF OF APPELLANT FARMERS INSURANCE COMPANY OF WASHINGTON

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Defendant/Appellant Farmers Insurance Company of Washington respectfully reiterates its request that the Court order a new trial because of the trial court's numerous prejudicial errors. If this Court declines to order a new trial, the Court should reverse the trial court's grossly excessive and duplicative attorney's fees award.

A. The Trial Court Abused Its Discretion in Excluding Dr. Tencer's Testimony

In seeking to exclude Dr. Tencer's testimony, plaintiff asserted only that: (1) Dr. Tencer's calculations and opinion are unreliable and based on speculation; (2) Dr. Tencer's opinions are based on information outside his area of expertise for which he lacks foundation; and (3) Dr. Tencer's opinions are based on a novel method that is not generally accepted within the scientific community. CP 177-178. None of these arguments withstands scrutiny.

Plaintiff's first and second arguments are closely related. Both fail because plaintiff had no expert testimony supporting her position.[1] Dr. Tencer explained why his review of the trailer hitch was sufficient, in

[1] In reponse to Farmers' argument that Judge Barnett improperly excluded Dr. Tencer's testimony based on her personal opinion without any supporting expert testimony, plaintiff makes much of the fact that Judge Carey initially granted the motion to exclude Dr. Tencer. A ruling on a motion in limine can be changed at any time during trial and the standard of review is the same for Judge Carey's original decision and Judge Barnett's continued exclusion of the testimony even after plaintiff opened the door: abuse of discretion. See, e.g., *State v. White*, 43 Wn. App. 580, 584, 718 P.2d 841 (1986).

conjunction with his familiarity with SAE standards for trailer hitches and years of engineering experience and his experience with fabricating metal components, to determine the force involved in this minor accident. In opposition, plaintiff provided nothing but the argument of her counsel, leaving Dr. Tencer's testimony unrebutted.

Plaintiff complains that Dr. Tencer did not perform destructive testing on the trailer hitch and did not "consult any studies regarding the strength of trailer hitches." Brief, p. 5. However, Dr. Tencer testified that an expert biomechanical engineer does not need to perform destructive testing, and that the trailer hitch at issue here was in conformance with the known industry standard. Plaintiff also complains that Dr. Tencer did not know the manufacturer of the trailer hitch, but Dr. Tencer explained why the existence of the SAE standard made the manufacturer's identity irrelevant. Moreover, the law is clear that an expert need not have personal experience in the design or manufacture of a particular product in order to be qualified to testify about its properties. See, e.g., *Mannino v. International Manuf. Co.*, 650 F.2d 846, 850-851 (6th Cir. 1981). "[D]oubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Miles v. General Motors Corp.*, 262 F.3d 720,724 (8th Cir. 2001); see also *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1352 n. 5 (9th Cir. 1987).

Plaintiff provided no expert testimony that destructive testing was necessary in order for a biomechanical engineer to determine the force involved in this accident, or that Dr. Tencer's calculation of the force involved was inaccurate. Plaintiff counsel's stated personal belief as to what information Dr. Tencer should have gathered before giving his opinions is irrelevant, is clearly not evidence upon which the trial court could justifiably rely, and as a result cannot provide a basis for this Court to affirm excluding Dr. Tencer's testimony. Only another expert engineer could even potentially be in a position to attack Dr. Tencer's calculations. Certainly, plaintiff's failure to obtain any such expert testimony supports Dr. Tencer's testimony that his assumptions and estimates are the type that are routinely employed by scientists in his area of expertise.[2]

Similarly, Plaintiff complains that Dr. Tencer made "assumptions," but provided no expert testimony contradicting Dr. Tencer's testimony that this very type of scientific assumption is routinely made in calculating forces in the field of biomechanical engineering. See *Canron v. Federal Ins. Co.*, 82 Wn. App. 480, 495, 918 P.2d 937 (1996). Plaintiff relies on *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102-104,

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[2] Plaintiff asserts that visual inspection of the actual auto is "not materially different from analyzing photographs" for purposes of scientific analysis. Brief, p. 21. Not surprisingly, plaintiff provides no support for this highly counterintuitive assertion – and the only evidence in the record is to the contrary.

882 P.2d 703, 891 P.2d 718 (1994), for the proposition that an expert should not be allowed to speculate, but *Queen City Farms* has no application here. *Queen City Farms* involved a non-scientific expert who admitted he was not familiar with the relevant universe of non-scientific facts behind his opinions; in contrast, Dr. Tencer is a scientific expert, who testified that the assumptions and estimates he used are those typically used by scientific experts in his field looking at the force involved in an auto accident. Plaintiff did not address the many illustrative cases Farmers noted which have held that an expert is allowed to rely on estimates if it is typical for an expert in his field to do so.

At the trial court, and on appeal, plaintiff cited to a number of distinguishable cases from other jurisdictions, but these foreign cases likewise do not support excluding Dr. Tencer's testimony.[3] She incorrectly asserts that the trial court opinion in *Clemente v. Blumenberg*, 705 N.Y.S.2d 792 (1999), stands for the proposition that "[v]isual inspection of vehicles is not a generally accepted method in any relevant

[3] Farmers is obviously aware of this Court's recent *Stedman* decision, __ Wn. App. __, 282 P.3d 1168 (2012), and is aware that the Court cited to some of these same cases in *Stedman*. Even assuming these cases had some relevance under the facts of *Stedman*, they do not have any relevance here. *Stedman* is inapplicable here because, in *Stedman,* this Court affirmed excluding Dr. Tencer's testimony on relevance grounds. In contrast, relevance was *not* one of the bases the trial court cited here in excluding the evidence. See 282 P.3d at 1172. Moreover, Dr. Tencer's testimony is clearly relevant given plaintiff's burden to prove causation between the accident and her claimed injuries. See, e.g., *Gestson v. Scott*, 116 Wn. App 616, 620-625, 67 P.3d 469 (2003).

field of engineering or under the laws of physics." Brief, p. 20. In reality, *Clemente* is easily distinguishable and stands for a much narrower proposition – that a court does not abuse its discretion in excluding some of the testimony of an engineer who admits that his methodology has not been "scientifically tested," and admits that no literature supports his methodology. 705 N.Y.S.2d at 800; see also *Smith v. Jacobs Engineering Group*, 2008 WL 4216277, **2-3 (N.D. Fla. 2008) (distinguishing *Clemente*). Other material distinctions include that the expert at issue in *Clemente* never examined the plaintiff's vehicle, and instead relied only on photographs, a repair estimate, and a chart of average repair costs for 5 mile per hour collisions. In contrast, Dr. Tencer thoroughly examined plaintiff's vehicle and testified that his methodology and sources of information were in conformance with the standards of his scientific specialty. Plaintiff provided no scientific evidence to the contrary. Moreover, the expert in *Clemente* was allowed to testify regarding the force involved in the accident, despite the shortcomings in his methodology; he was not allowed to testify that the plaintiff was not injured in the accident. 705 N.Y.S.2d at 800. More recently, a New York appellate court held that it was reversible error for a trial court to exclude biomechanical testimony in the auto accident setting. *Valentine v. Grossman*, 724 N.Y.S.2d 504 (2001).

Whiting v. Coultrip, 755 N.E.2d 494 (Ill. App. 2001), and *Tittsworth v. Robinson*, 475 S.E.2d 261 (Va. 1996), are likewise easily distinguishable for similar reasons – that Dr. Tencer, among other things, examined plaintiff's vehicle, incorporated the well-established SAE standard into his calculations, relied upon the typical sources of information for a scientist in his field, and relied upon numerous specific peer-reviewed scientific articles.

Whiting involved a biomechanical expert who had looked only at photographs, repair estimates, and the parties' depositions. Citing *Clemente*, the *Whiting* court held that the use of repair estimates and photographs alone was not a generally accepted means for determining the change in velocity of two vehicles upon impact. 755 N.E.2d at 499-500. Accordingly, the *Whiting* Court held that the biomechanical engineer could not testify regarding the maximum possible speed change and level of acceleration of plaintiff's vehicle at the time of impact. The Court also prevented the defendant's biomedical engineer from testifying that plaintiff's alleged long-term injuries were not consistent with the forces she experienced in the accident, because his testimony was based in part on the stricken biomechanical testimony, and the defendant had not presented evidence that his methodology had been "empirically tested and subject to peer review." 755 N.E.2d at 500. The Court specifically held

that admission of this type of testimony by engineers may well be appropriate in other cases where the party seeking the admission of such testimony has laid a better foundation for it. 755 N.E.2d at 500.

Tittsworth involved an expert who did not examine the plaintiff's vehicle, and instead determined the force involved in the accident by looking at photographs and assuming half an inch of crush damage over the width of the involved portion of each vehicle. He planned to testify, based on his calculation of force, that the accident could not have caused the specific injury plaintiff alleged. Moreover, the expert conceded that there were no studies involving the type of injury alleged by the plaintiff.[4]

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[4] Although plaintiff has not cited to *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000), the *Stedman* decision signals that this Court is likely to consider *Schultz* as it determines whether the trial court here erred in excluding Dr. Tencer's testimony. In *Schultz*, the biomechanical engineer was allowed to testify about the maximum amount of force that would have been experienced by the plaintiff in the accident, and that testing on primates had demonstrated that the force threshold for the type of injury the plaintiff complained of required much greater force than that she experienced in the accident. The engineer was not allowed to testify about the threshold speed/force injury results of rear-end collision testing conducted with volunteers. *Schultz* is inapposite because here Dr. Tencer was not going to offer testimony that the minimal force involved in this accident could not have injured plaintiff. The plaintiff in *Schultz* must also have presented expert scientific testimony, because there would have been no other way for the trial court there to conclude that "there is no agreement, far from it, in the engineering field or in the automobile industry concerning whether there is such a threshold [of injury]." 18 P.3d at 852. In addition, volunteer collision testing results are but a small part of the many bases for Dr. Tencer's conclusions. In fact, there is nothing in Dr. Tencer's specific opinions comparing the forces experienced in an impact to those observed during human volunteer testing and such testing does not form a necessary basis for his testimony. Rather, as explained in his report and declaration, there are myriad data regarding forces upon a human body from which Dr. Tencer can evaluate the forces involved in a given accident. Moreover, the *Schultz* court agreed that the results of human volunteer collision experiments

See also *Balderas v. Starks*, 138 P.3d 75, 83 n. 11 (Utah App. 2006) (distinguishing *Tittsworth*).

For the first time on appeal, plaintiff cites to a few articles. Pl. Brief, p. 21. These are problematic and inapposite for a number of reasons. The role of biomechanics in the establishment of human injury force thresholds and probabilities is well established and, in fact, forms the basis for crash testing performed on all passenger automobiles before they are allowed for sale in the U.S. This methodology is codified in our standards for auto safety. See, e.g., 49 CFR §571.208. The methodology of this standard is based on extensive research that has been developed over nearly 60 years of biomechanics research, much of it summarized in *Development of Improved Injury Criteria for the Assessment of Advanced Automotive Restraint Systems – II*, November 1999 (from the National Highway Traffic Safety Administration).

The authors of the articles cited by plaintiff appear simply to disregard the extensive work that has been performed, and the level of

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are not "novel" and do not implicate *Frye*. 13 P.3d at 850; see also *Baerwald v. Flores*, 930 P.2d 816, 821 (N.M. App. 1997).

Frye emphasizes that science evolves. See *State v. Copeland*,130 Wn.2d 244, 256, 922 P.2d 1304 (1996). Reliance on *Schultz* to keep Dr. Tencer's opinions out would ignore this principle. What one trial judge in Colorado concluded in the late 1990s, based on the specific record in that one case, should not be used to forever keep out the testimony of all biomechanical experts who – in contrast to the particular expert in *Schultz* – have an adequate foundation for their opinions. Moreover, as noted above, most of what Dr. Tencer was prepared to say here would have been admitted under *Schultz*'s analysis.

acceptance of neck injury forces and threshold criteria that have been established as a result of these investigations. As noted above, these criteria are now a matter of federal law. Plaintiff's analysis also has other shortcomings. The 1996 article by Croft is 15 years out of date. The 2005 article by Croft and Freeman is based on patient self-reports, not objective scientific criteria. The article by Robbins, although it proposes that there is no correlation between crash damage and occupant injury, did not develop data documenting severity of a series of crashes and the resulting injuries to occupants. In fact, no occupants were studied, and no injuries reported, in the article. The articles cited by plaintiff ignore the scientific consensus which Dr. Tencer's opinions incorporate.

In this particular case, the damage to the van that struck the Berryman vehicle was unknown. However, Dr. Tencer was able to inspect the Berryman vehicle, which had a class 2 trailer hitch attached which showed no damage. Because the maximum force that the trailer hitch can support in various directions is known by the SAE standard, the maximum force and peak acceleration acting on the vehicle could be easily determined as set out in Dr. Tencer's report, and allowed the forces acting on plaintiff's neck to be calculated as described in Dr. Tencer's report.

The force at which the human neck sustains injury is well established and forms the basis for automotive safety testing. Crash

severity is clearly generally related to the extent of injury. For example, airbags are set to inflate at a specific "g force," based on the establishment of a specific value as a threshold above which injury is predicted and below which injury is unlikely.

Dr. Tencer's testimony was not speculative. To the contrary, it was reliable, it was based on information within his area of expertise, and he had an adequate foundation for it. Given the complete absence of any contrary expert testimony, the trial court's finding that Dr. Tencer's opinions were "unreliable and based on speculation using methods and information that is outside his area of expertise" was clearly erroneous.

As to plaintiff's third argument, as discussed in Farmers' opening brief, *Frye* has no application unless there is competing scientific evidence on a particular scientific issue. *Frye* never came into play here because plaintiff presented no scientific evidence to counter Dr. Tencer's testimony. Moreover, this Court's recent decision in *Stedman* confirmed *Ma'ele*'s holding that Dr. Tencer's testimony meets the *Frye* standard in any event. See 282 P.3d at 1170-71 (reflecting no issues with Dr. Tencer's qualifications or methodology). This is consistent with Washington's longstanding view that "[u]nder Frye, a court is to determine if the evidence in question has a valid, scientific basis. Because judges do not have the expertise required to decide whether a challenged

scientific theory is correct, we defer this judgment to scientists." *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). As the *Cauthron* Court cautioned, "[d]ecisions from other jurisdictions may be examined as well, but the relevant inquiry is the general acceptance by scientists, not by the courts." 120 Wn.2d at 888.

Because Dr. Tencer is clearly qualified to testify regarding biomechanical engineering topics such as the force involved in a given accident, and it is undisputed that his methodology is generally accepted in the biomechanical engineering community, his testimony clearly satisfied the *Frye* test. As a result, the trial court's finding that Dr. Tencer's opinions were based on "methods and information...not generally accepted within the scientific community" was simply wrong. *Frye* should never have been invoked, but even if *Frye* were to be applied Dr. Tencer's testimony clearly meets the *Frye* standard.[5]

Dr. Tencer's testimony was improperly excluded, and Farmers was gravely prejudiced by this error. Moreover, because the trial court clearly erred in excluded Dr. Tencer's testimony, the trial court necessarily also

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[5] On appeal, plaintiff also asserts a fourth basis for the exclusion of Dr. Tencer's testimony, that Dr. Tencer's testimony was cumulative of Dr. Renninger's testimony. This argument fails under *Stedman*. See 282 P.3d at 1172. Contrary to plaintiff's assertion, Dr. Tencer's excluded testimony was not cumulative of Dr. Renninger's testimony. Dr. Tencer was prepared to testify as to the forces involved in the collision, and explicitly was not going to testify on any medical link between the force and Ms. Berryman's lack of injuries. Only Dr. Renninger was going to give the necessary linking medical testimony.

erred in preventing Dr. Renninger from relying on Dr. Tencer's testimony. These erroneous evidentiary rulings prevented Farmers from putting on its defense to plaintiff's claims, and the prejudice from these errors requires reversal for a new trial.

B. The Trial Court Abused Its Discretion in Excluding Photographs and Questioning About Lack of Damage to Car

Plaintiff asserts that the trial court's exclusion of the photographs should be affirmed, because the lack of damage to plaintiff's vehicle would allegedly give rise to an "erroneous inference" that plaintiff was not injured in the accident. Pl. Brief, p. 24. As explained above, such an inference is not erroneous. Moreover, courts generally admit such photos precisely because there is a general correlation between absence of damage and absence of significant injury. See, e.g., *Kadmiri v. Claasen*, 103 Wn. App. 146, 147, 10 P.3d 1076 (2000), and *Murray v. Mossman*, 52 Wn.2d 885, 887, 329 P.2d 1089 (1958); see also *Mason v. Lynch*, 822 A.2d 1281 (Md. App. 2003), and *Allstate Ins. Co. v. Kidwell*, 746 So.2d 1129 (Fla. App. 1999). Plaintiff's reliance on *Toftoy* is misplaced, given that *Toftoy* does not involve photos of a vehicle to show lack of damage. *Mossman*, which held that photographs of vehicle damage are relevant and admissible to show the force of impact, controls under the facts of this case. The trial court's exclusion of the photographs of plaintiff's vehicle

was clearly an abuse of discretion, based only on the judge's personal view of the matter – a view which was contrary to the scientific evidence.

For the same reason, the trial court erred in refusing to allow Farmers' counsel to ask questions about, or point out, the absence of any visible damage to the vehicle plaintiff was driving at the time of the accident. This was particularly egregious in light of plaintiff having opened the door by her chiropractor having falsely stated that this was a "high impact" accident, and plaintiff and her counsel's misleading statements regarding "squealing brakes" and a "car crash" when this accident actually involved little more than a bump. Individually and cumulatively, these errors prevented a fair trial and require reversal. This error was preserved by Farmers' counsel at trial, as explained in Farmers' opening brief.

C. Plaintiff Was Not Entitled to Attorney Fees Because She Did Not Improve Her Position At the Trial De Novo

MAR 7.3 provides that the court may assess costs and reasonable attorney fees against a party "who appeals the [arbitration]award and fails to improve the party's position on the trial de novo." For purposes of MAR 7.3, if the appealing party fails to accept a timely offer of compromise, "the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party

appealing the arbitrator's award has failed to improve that party's position on the trial de novo." RCW 7.06.050(1)(b).

The amount of the final judgment entered in favor of the party seeking attorney fees is not necessarily controlling. Rather, the trial court should "compare comparables" when determining whether a party improved its position. *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003). In *Tran*, this Court held that the trial court properly subtracted statutory costs and CR 37 sanctions before applying MAR 7.3 because these amounts were not part of the arbitrator's award and were therefore not "comparable" to the jury's award of compensatory damages. *Tran*, 118 Wn. App. at 616. The *Tran* analysis was applied to offers of compromise in *Niccum v. Enquist*, with the Court again concluding that it is necessary to "compare comparables" when determining whether a party improved its position. 152 Wn. App. 496, 501, 215 P.3d 987 (2009) (reversed on other grounds September 20, 2012).

Whether a party has improved its position, as the term is used in RCW 7.06.060(1) and MAR 7.3, is not intended to be a complicated question. It "was meant to be understood by ordinary people" who would not think they had improved their position if they ended up having to pay more as a result of a trial de novo. *Cf. Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253 (1991). In *Cormar*, the verdict against one

of the defendants was $20,000 less after a trial de novo. The Court commented that the defendant "would certainly answer 'yes' if asked whether it improved its position following the trial de novo, as it is now liable for $20,000 less in damages." *Id.* That defendant did not have to pay attorney fees because it had improved its position.

Similarly, Farmers would "certainly answer yes" if asked whether it improved its position following the trial de novo. "Comparing comparables" here requires comparing the total amount of the compromise offer ($36,418.14) to the jury verdict minus the PIP offset. The compromise offer was expressed as $30,000 plus costs incurred, but those numbers have to be added together to get the amount of the compromise offer. It is that number which must be compared to the jury verdict in order to "compare comparables." If Farmers had accepted the offer of compromise, it would have paid $36,418.14: $30,000 plus taxable costs incurred at arbitration. Following the jury verdict, Farmers is liable for $36,842 minus the PIP offset of $4,393.47, meaning Farmers must pay $32,448.53, less than the offer of compromise. Farmers has to pay less money as a result of the trial de novo and therefore has bettered its position. Berryman therefore is not entitled to any attorney fees.[6]

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[6] Contrary to plaintiff's assertion, this issue was clearly raised in Farmers' opening brief. See Opening Brief, p. 31. As a result, neither *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011), nor *In re*

D. The Grossly Excessive Attorney's Fee Award Cannot Stand Even If This Court Believes a New Trial Is Unwarranted and Believes that Plaintiff Improved Her Position at Trial De Novo

The trial court signed plaintiff's proposed findings and conclusions without any changes. However, this does not help plaintiff, as it merely underscores that the trial court abdicated her responsibility to exercise her discretion in determining a reasonable fee award. In addition to the multiplier, which was unjustified and should not have been awarded, the Court did not even bother to deduct the time which was clearly duplicative, unnecessary, and devoted to unsuccessful efforts on plaintiff's part as is clearly required by controlling Supreme Court precedent.

Respondent complains that Farmers is "nitpicking" the time worked by Berryman's attorneys. Pl. Brief, p. 33. However, analyzing the reasonableness of the hours billed by Berryman's counsel is not "nitpicking," it is exactly what the trial court should have done, but failed to do. Farmers is not asking, as Berryman contends, that this Court substitute Farmers' opinion for that of the trial court. Rather, Farmers is asking that some discretion be exercised in the fee award for the first time, as the trial court clearly did not do any analysis of the hours allegedly

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Marriage of Fahey, 164 Wn. App. 42, 59, 262 P.3d 128 (2011), has any application. The issue has now been discussed in both of Farmers' briefs. Plaintiff used only 43 pages in the brief she submitted to the Court, meaning she had plenty of space to address Farmers' argument, but chose not to do so. She should not be heard to complain now about her own decision.

billed on this small trial de novo before signing the proposed order drafted by Berryman's counsel.

Plaintiff's claim that there is no support for Farmers' analysis of hours billed on the claim is simply incorrect. The record includes the time records submitted by her counsel in support of their fee application, which were analyzed in detail in the opposition to the attorney fee request below, and in Farmers' opening brief on appeal. The 97.4 hours for "client and witness prep" is simply based on adding up the time entries denominated as "client and witness prep." Unfortunately, plaintiff's counsel utilized block billing, making it impossible to determine with 100% accuracy how much of a block entry was devoted to witness preparation versus other matters billed in the same line entry. However, in tallying the time spent on "client and witness prep," Farmers erred on the side of generosity toward plaintiff, deducting estimated time for entries such as "send email" from the total billed on the block entry to derive an estimated time for "witness prep." CP 836. Further, there was additional "witness prep" time billed on trial days which was not included in the 97.4 hours, meaning the actual time spent "preparing witnesses" was even higher. Having elected to utilize block billing, plaintiff's counsel cannot now be heard to complain that only estimates are available to determine the reasonableness of their bills; they could have provided more detailed

information in rebuttal on the motion below, but elected not to do so. It is too late now to complain that the record which they created is insufficient to determine the reasonableness of their bills, unless they wish to concede that they failed to meet their burden of establishing the basis for the award.

Plaintiff cites *Fiore v. PPG Indus., Inc.*, __ Wn. App. __, 279 P.3d 972 (2012), an employment law wage and hours case not involving mandatory arbitration, for the proposition that multiple attorneys attending depositions and trial is not "duplicative." Interestingly, the *Fiore* court held, contrary to plaintiff's position elsewhere in her opposition, that the trial court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time. *Fiore*, 279 P.3d at 987. The *Fiore* court did not hold that staffing a case with multiple attorneys attending the same deposition or trial is never duplicative, rather, it held simply that the defendant "[did] not demonstrate" that the work was duplicative in that case.

Unlike *Fiore*, which involved complex wage and hours claims, this trial was a simple rear-end auto case. Berryman's attorneys claimed a high level of expertise, justifying a high $300 hourly rate. They cannot simultaneously claim that such a simple case required two "highly experienced" attorneys at Dr. Tencer's deposition or at trial. This was not a complex documents case, there were not numerous witnesses or issues,

and there was simply no need for two attorneys at trial. See CP 853; 869. While Berryman's counsel were entitled to decide to have two attorneys at deposition and trial, that is not a cost that should be passed on to Farmers.

As the *Fiore* court noted, the amount of fees charged by the attorney for the party opposing the fee request "is probative of the reasonableness of a request for attorney fees by prevailing counsel." *Fiore*, 279 P.3d at 988. The *Fiore* Court added:

> Where a defendant, challenging a plaintiff's attorney fee petition contends that the request includes unnecessary or excessive charges, the amount of time expended by defense counsel in performing the same task "may well be the best measure of what amount of time is reasonable for this task."

Fiore, 279 P.3d at 988. Comparing the time spent by defense counsel with the time spent by Berryman's counsel for the same discovery and trial aptly illustrates the excessive number of hours billed by Berryman's counsel. Mr. Feldmann, counsel for Farmers through trial, spent a total of 60 hours (CP 853) compared to 468.55 claimed by Berryman's counsel. In other words, Berryman's counsel billed almost 8 times as many hours as Farmers' counsel spent, a clearly excessive number of hours for a short trial de novo in a rear-ender auto case.

Plaintiff further complains that Farmers substituted its judgment for that of the trial court in annotating the billing records. The annotated

records were submitted to illustrate the type of deductions that should have been made by the court. Entries were not "deleted without explanation" as claimed by plaintiff. Pl. Brief, p. 35. The suggested deductions were either explained on the entries themselves or in the brief. For example, plaintiff cites CP 840 as an example of a deduction "without explanation." The relevant entry on CP 840 relates to time billed for the motion to continue the trial date. As explained in the brief opposing the requested attorney fees:

> Time spent on matters on which plaintiff was unsuccessful, and time spent on the motion for continuance which was for plaintiff counsel's personal convenience, is also deducted. Mr. Epstein's time is deducted with the exception of time spent deposing Dr. Tencer and reasonable preparation time for that deposition. Mr. Kang's time at Dr. Tencer's deposition was deducted as there was no need to have two attorneys at the deposition. Time spent on inter-office conferences was deducted as it would have been unnecessary had this case been staffed appropriately with one attorney.

CP 836. The basis for each suggested deduction was clearly spelled out in the brief or on the bills themselves.

Plaintiff is similarly incorrect in claiming that the time spent drafting the motion to exclude Dr. Tencer was reduced from 7.5 to .5 hours. The actual total billed for the motion to exclude Dr. Tencer was over 40 hours.[7] The time on one entry for 7.5 hours was reduced to .5

[7] Again, it is difficult to determine the precise number of hours due to plaintiff counsel's use of block billing. However, the entries included with the hours

hours to allow time for the entries for trial preparation and client meeting. An additional 7 hours for "continuing" to work on the Tencer brief was excessive given the substantial number of hours billed prior to that entry.

Plaintiff apparently misunderstood the significance of Farmers' argument relating to the time spent preparing the chiropractors to testify. Farmers did not claim that her counsel failed to bill for this time; rather, Farmers noted that there is nothing in the record indicating the chiropractors billed her for any time spent preparing for their depositions, as would be the normal practice for expert witnesses, particularly chiropractors. As noted in Farmers' opposition to the attorney fee motion:

> ... based on Mr. Kang's listing of expert costs in his declaration (at p. 13, I. 7-17) the chiropractors did not spend any significant time with the attorneys in witness preparation. He lists "$125 consult fee to testify re Saggau at Lake Meridian Chiro" which could be time spent in witness preparation. However, there are no other fees identified for time spent meeting with the attorneys for preparation, only the sum charged for trial testimony and deposition. And, even if the chiropractors did spend 16 hours with counsel free of charge-something highly unlikely-that would be an unreasonable use of resources, and not one which defendant should have to reimburse.

CP 828. Counsel's claims of spending time preparing the chiropractors to testify was not supported by their cost bill, even after the omission was

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spent on the Tencer motion are generally for tasks that would not require significant time, such as sending email. Further, the 41.7 hours does not include the substantial amount of time billed reviewing Dr. Tencer's report and preparing for and attending his deposition.

pointed out below. It is reasonable to infer that counsel did *not* spend time with the chiropractors preparing them to testify for deposition or trial. The time entries on CP 703 and 707 for meeting with Dr. Chinn and "treating healthcare provided" should therefore be excluded from the total awarded.

Further, the absence of support for time spent in witness preparation with the health care providers was initially raised to establish that the estimate of 16.2 hours of preparation per witness was conservative: if no time was spent with the chiropractors, the "witness preparation time" per witness would been over 32 hours per witness for the boyfriend, plaintiff, and plaintiff's mother. This would be an absolutely staggering amount of time to spend preparing the mother and boyfriend to testify about their observations of how the accident affected plaintiff, and a grossly excessive amount of time to spend preparing plaintiff to testify about her injuries. Even if that amount of time was actually spent on witness preparation, it was excessive and unnecessary and should have been reduced to a reasonable number. Even two hours each for the boyfriend and mother would have been generous. Thirty-two hours is simply wrong.

The brief continuance from November to December did not, as plaintiff now argues, significantly increase the time needed for witness preparation. The vast majority of entries for witness preparation are in October and November, before the trial was continued to December. The

only exceptions are time billed as "preparation for Bangerter" and an additional 7.5 hours billed as "preparation for witness—plaintiff."[8] The remaining witness preparation time was all billed before the first trial date. Further, the duplication in the trial preparation is clearly reflected in the billing records. As an example, both attorneys billed 5.1 on 10/31/2011 for witness preparation, presumably for "preparing" the same unidentified witness. CP 776, 844. Both billed time on 11/2/11 for "preparing" Dr. Chinn to testify, and time was also billed on 10/27/2011 for "meeting with Dr. Chinn." *Id.* None of the time purportedly spent with Dr. Chinn is reflected in a bill from Dr. Chinn for his time, and this amount of time to prepare a chiropractor to testify for an hour or two would be excessive in any case.

A careful analysis and review of the bills, line by line, is undoubtedly time consuming, but it is what is required in order to determine whether the time spent was reasonable and necessary. The trial court here clearly failed to review the bills in detail, failing to strike even a minute of time billed even when the time was duplicative or spent on unsuccessful motions. If no new trial is ordered, this Court should reduce the bills or remand to the trial court with instructions to do so.

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[8] The entry includes "t/c/ with court." Due to block billing it is not possible to determine precisely how much of the 3.5 hours billed on that date was witness preparation vs. the call with the court, but such calls typically are not long.

Fiore also makes clear that multipliers are used very rarely, only in the very unusual instance that the lodestar hourly amount does not adequately reimburse the attorney for the risk involved in taking the specific case. 279 P.3d at 988-989. Other recent cases have also emphasized the longstanding principle that multipliers are very rarely appropriate. See *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, __ Wn. App. ___, 282 P.3d 146, 151-152 (2012); see also *224 Westlake, LLC v. Engstrom Properties, LLC*, __ Wn. App. ___, 281 P.3d 693, 713-714 (2012). In arguing for a multiplier, plaintiff relies upon cases discussing civil rights statutes such as the Washington Law Against Discrimination, but *224 Westlake* reminds that Civil Rights and CPA cases are treated differently for public policy reasons. 281 P.3d at 714. *Stedman* also provides an example of a more reasonable (although still large) award of attorney's fees and costs in a trial de novo arising from a minor auto accident, $58,546.88. 282 P.3d at 1170. *Niccum* illustrates a more typical attorney fee award in this setting, $15,640. 152 Wn. App. at 499 (reversed on other grounds September 20, 2012).

By plaintiff's logic, a multiplier is appropriate in absolutely every case where a party seeks trial de novo and does not improve its position. In other words, plaintiff advocates that a multiplier is the rule, not the exception – but the above-cited cases make clear that a multiplier is not

only the exception, it is a very rare exception. For the Court to approve a $300,000 attorney fee award here for a short rear-ender trial de novo, the Court would necessarily have to find that an award of the same amount against an individual plaintiff would be appropriate and fair. Farmers cannot imagine this Court would ever approve of a $300,000 attorney's fee award against Berryman, underscoring that this grossly inflated attorney's fee award in her favor cannot stand.

This Court should disregard the unsupported complaints that Farmers dared to "defend aggressively" against what plaintiff's counsel themselves have characterized as an extremely weak claim. The record shows that Farmers did only necessary discovery in defending this suit. The aggression, if any, was by plaintiff who attempted (unsuccessfully) to obtain Farmers' claims file and made an unsuccessful motion for summary judgment on liability. Counsel's position that they are entitled to the bonus of a multiplier because they risked getting nothing by bringing a weak case is contrary to common sense and public policy and should be rejected.[9]

[9] Whether the Court reverses for a new trial, or simply reverses the attorney's fee award, plaintiff should not be awarded fees or costs on appeal.

DATED this 20th day of September, 2012.

SOHA & LANG, P.S.

By: _____

Nathaniel Smith, WSBA # 28302
Nancy K. McCoid, WSBA #13763
Attorneys for Appellant Farmers
Insurance Company of Washington

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

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

On September 21, 2012, a true and correct copy of **REPLY BRIEF OF APPELLANT FARMERS INSURANCE COMPANY OF WASHINGTON (with attached Declaration of Service)** was served on the parties in this action as indicated:

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Executed on this 21st day of September, 2012, at Seattle, Washington.

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

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