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Case No. 69568-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

2013 JUL 31 AM 10:08
COURT REPORTERS UNIT
STATE OF WASHINGTON

AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,
a Washington limited liability company,
Plaintiff/Respondent,

v.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL MINT, L.L.C., a
Washington limited liability company,

Defendants/Appellants.

**SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS REGARDING
ATTORNEYS' FEES AND COSTS**

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TABLE OF CONTENTS

A. The trial court abused its discretion by accepting Auburn’s billing statements without question and failing to deduct for wasteful and duplicative work..... 1

B. The trial court abused its discretion by failing to segregate the time related to Auburn’s unsuccessful tenant improvement claim..... 4

C. Auburn’s attorneys spent unnecessary time on post-judgment matters, including the Fee Motion. 6

D. The trial court abused its discretion by awarding Auburn every penny of its claimed \$425,767.28 in costs..... 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>224 Westlake, LLC v. Engstrom Props., LLC</i> , 169 Wn. App. 700, 281 P.3d 693 (2012)	2, 5
<i>Absher Constr. Co. v. Kent Sch. Dist.</i> , 79 Wn. App. 841 (1995)	9
<i>Chuong Van Pham v. Seattle City Light</i> , 159 Wn.2d 527, 151 P.3d 976 (2007)	4
<i>Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship</i> , 158 Wn. App. 203, 242 P.3d 1 (2010)	2
<i>Deep Water Brewing, LLC v. Fairway Res. Ltd.</i> , 170 Wn. App. 1, 282, P.3d 146, 149 (2012)	1
<i>Estep v. Hamilton</i> , 148 Wn. App. 246, 201 P.3d 331 (2008).....	8, 9
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001)	6
<i>Fiore v. PPG Indus., Inc.</i> , 169 Wn. App. 325, 279 P.3d 972 (2012)	2, 5
<i>Kiewit-Grice v. State</i> , 77 Wn. App. 867, 895 P.2d 6 (1995).....	9
<i>Kreidler v. Pixler</i> , 2011 U.S. Dist. LEXIS 1373 (W.D. Wash. 2011)	9
<i>Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now</i> , 119 Wn. App. 665, 82 P.3d 1199(2004).....	6
<i>Louisiana-Pacific Corp. v. Asarco, Inc.</i> , 131 Wn.2d 587, 934 P.2d 685 (1997)	8
<i>Magana v. Hyundai Motor Am.</i> , 167 Wn.2d 570, 220 P.3d 191 (2009)	2, 3
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	1, 2, 3
<i>Manna Funding, LLC v. Kittitas County</i> , 173 Wn. App. 879, 295 P.3d 1197 (2013).....	6

<i>Mayer v. City of Seattle,</i> 102 Wn. App. 66, 10 P.3d 408 (2000)	3
<i>Mayer v. Sto Indus., Inc.,</i> 156 Wn.2d 677, 132 P.3d 115 (2006)	3
<i>Nordstrom, Inc. v. Tampourlos,</i> 107 Wn.2d 735, 733 P.2d 208 (1987)	3
<i>One 2008 Toyota Rav 4 Sports Util. Vehicle,</i> 2012 U.S. Dist. LEXIS 158417, 23-24 (C.D. Cal. 2012)	4
<i>Scott Fetzer Co. v. Weeks,</i> 122 Wn.2d 141, 859 P.2d 1210 (1993)	3
<i>Straitshot Communs. v. Telekenex, Inc.,</i> 2012 U.S. Dist. LEXIS 166305 (W.D. Wash. 2012)	5
<i>Taliesen Corp. v. Razore Land Co.,</i> 135 Wn. App. 106, 144 P.3d 1185 (2006)	1, 9
 <u>Statutes</u>	
RCW 4.84.010	8

Defendants/Appellants Ross Hansen and Northwest Territorial Mint, L.L.C. (collectively "NW Mint") submit this Supplemental Brief Regarding Attorneys' Fees and Costs. NW Mint contends the trial court abused its discretion by accepting Plaintiff/Respondent Auburn Valley Industrial Capital, L.L.C.'s ("Auburn's") billing statements without question, failing to deduct for wasteful and duplicative work and failing to properly adjust the fee award for unsuccessful claims when it awarded \$1,166,279.33 in attorneys' fees to Auburn. The trial court further abused its discretion by awarding every penny of Auburn's claimed \$425,767.28 in costs.

A. The trial court abused its discretion by accepting Auburn's billing statements without question and failing to deduct for wasteful and duplicative work.

The rule in Washington is that courts "must calculate an attorneys' fee award using the lodestar method of analysis."¹ The calculation is simple; the difficulty lies in determining what hours "were reasonable or essential to the successful outcome."²

¹ *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 170 Wn. App. 1, 282 P.3d 146, 149 (2012). An award of attorneys' fees under the Model Toxics Control Act ("MTCA") is not exempt from this requirement. See *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 143, 144 P.3d 1185 (2006).

² *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009) (citing *Mahler*, 135 Wn.2d at 435. See *Wyant v. Allstate Indem. Co.*, 2009 U.S. Dist. LEXIS 111663, 4-5 (W.D. Wash. 2009) ("The difficulty lies in determining what hours are reasonably nec-

Auburn had the burden of proving the reasonableness of its requested fees and costs.³ Meeting this burden required Auburn to exclude fees and costs related to wasteful or duplicative efforts and pertaining to unsuccessful theories or claims.⁴ However, Auburn claimed that not even a single minute of the almost 4,000 hours that twenty attorneys, three law clerks and four paralegals from five different law firms spent on the case was wasteful or duplicative.⁵

Courts are required to “take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.”⁶ Courts must independently decide what represents a reasonable amount of attorneys’ fees and cannot simply rely upon the billing records of counsel.⁷

essary to obtain success on those claims which provide for fee recovery.”) (citing *Mahler*, 135 Wn.2d at 434).

³ 224 *Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 741, 281 P.3d 693 (2012); *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 234, 242 P.3d 1 (2010).

⁴ 224 *Westlake*, 169 Wn. App. at 734-735; *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 351, 279 P.3d 972 (2012).

⁵ CP 2114.

⁶ *Mahler*, 135 Wn.2d at 434-435.

⁷ *Id.* (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); *Mayer v. City of Seattle*, 102 Wn. App. 66, 78-79, 10 P.3d 408 (2000). See *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (While the fee documentation provided by counsel “forms the starting point under the lodestar method, it is not dispositive on the issue of the reasonableness of the hours.”).

The trial court abused its discretion by failing to reduce Auburn's claimed fees to account for wasteful and duplicative efforts.⁸ To be recoverable, an attorney's services must be "reasonable or essential to the successful outcome."⁹ Yet, other than deducting for an excessive number of attorneys at trial, the court unquestioningly accepted Auburn's claim that every minute of time its attorneys spent on the case was reasonable and essential to the litigation's outcome. The following are examples of duplicative work for which the trial court allowed Auburn to recover its fees without deduction:

- **Excessive contacts between Auburn's counsel:** Auburn's attorneys spent more than 200 hours just talking with each other.¹⁰ "The sheer frequency of such communications, coupled with their vague descriptions in most cases, supports the inference that a substantial portion of these entries were excessive."¹¹ The trial court abused its discretion by awarding Auburn more than \$70,000.00 for communications between its lawyers.

⁸ An award of attorney fees is reviewed for abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009).

⁹ *Magana*, 167 Wn.2d at 593 (citing *Mahler*, 135 Wn.2d at 435).

¹⁰ CP 2358-2359. Auburn's fee statements showed more than 1,000 billing entries for communications between co-counsel. These entries included such things as "e-mail to co-counsel," "correspondence to and from co-counsel," "telephone conversation with co-counsel," "confer with co-counsel," "review e-mail from co-counsel," "review correspondence from co-counsel," "coordination with co-counsel" and "conference call with co-counsel." *Id.*

¹¹ *One 2008 Toyota Rav 4 Sports Util. Vehicle*, 2012 U.S. Dist. LEXIS 158417, 23-24 (C.D. Cal. 2012).

- **Duplication of effort in reviewing pleadings and documents:** Multiple attorneys reviewed (and billed Auburn for reviewing) every pleading filed in the litigation.¹² This was in addition to the time Auburn’s attorneys spent drafting or responding to the particular motion. The trial court abused its discretion by awarding Auburn more than \$63,000.00 for its attorneys’ “review” efforts.¹³
- **Duplication of effort in conducting depositions or attending hearings:** At least two partner-level attorneys attended depositions and hearings for Auburn. Only one of the attorneys actually represented Auburn in the deposition or proceeding. The trial court abused its discretion by awarding Auburn more than \$27,000.00 in fees for this duplicative effort.¹⁴

The trial court had a duty to discount the hours Auburn’s counsel “spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.”¹⁵ The trial court abused its discretion by accepting Auburn’s billing statements without question or deduction.

B. The trial court abused its discretion by failing to segregate the time related to Auburn’s unsuccessful tenant improvement claim.

In calculating its fee request, Auburn was required to exclude the fees and costs related to Auburn’s unsuccessful tenant improvement

¹² Collectively, Auburn’s counsel billed more than 180 hours just to “review” pleadings. CP 2359-2360.

¹³ *Id.*

¹⁴ CP 2362-2363; 3099-3104.

¹⁵ *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

claim.¹⁶ Not surprisingly, Auburn asserted that the tenant improvement removal claim was “inextricably intertwined” with its contamination claim and that it “spent virtually no time” on this claim “as a separate, discrete element of work.”¹⁷ Auburn offered “[i]n the interests of fairness” to “accept an adjustment of 100 hours to reflect the fact that it did not prevail on this claim.”¹⁸ The trial court accepted the 100 hour estimate proffered by Auburn without question or deduction.¹⁹

However, “plaintiffs’ counsel cannot simply assign an amount of time to a particular activity in the entry absent some contemporaneous record to support such allocation.”²⁰ “If attorney fees are recoverable for only some of a party’s claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.”²¹ Auburn “had the burden of segregating its lawyer’s

¹⁶ *224 Westlake*, 169 Wn. App. at 734-735; *Fiore*, 169 Wn. App. at 351.

¹⁷ CP 3533.

¹⁸ CP 2118; 2366.

¹⁹ CP 3589.

²⁰ *Straitshot Communs. v. Telekenex, Inc.*, 2012 U.S. Dist. LEXIS 166305 (W.D. Wash. 2012).

²¹ *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 901, 295 P.3d 1197 (2013) (quoting *Mayer*, 102 Wn. App. at 79-80).

time.”²²

A trial court is not required “to artificially segregate time . . . where the claims all relate to the same fact pattern, but allege different bases for recovery.”²³ However, the fact pattern for Auburn’s tenant improvement claim was completely separate from and unrelated to the fact pattern for its contamination claim. The trial court abused its discretion by unquestioningly accepting Auburn’s unsupported estimate of the time its attorneys spent on the unsuccessful tenant improvement claim.²⁴

C. Auburn’s attorneys spent unnecessary time on post-judgment matters, including the Fee Motion.

The trial ended in August 2012. Auburn claims that since the trial ended, its attorneys spent more than 400 hours and incurred almost \$143,000.00 in fees working on the case. Auburn’s attorneys spent more than 300 of these hours—for which they billed over \$107,000.00 in fees—drafting the application for fees and costs.²⁵ This represents approximately 10% of the legal fees Auburn incurred during the entire

²² *Id.* (citing *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004)).

²³ *Id.* (quoting *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001)).

²⁴ *Loeffelholz*, 119 Wn. App. at 692.

²⁵ CP 2367; 3539-3540; 3557.

three-year litigation.

The trial court held argument on Auburn's Fee Motion in May 2013. Shortly before the hearing, Auburn produced for the first time the billing statements for its attorneys for the months of December 2012 through April 2013. NW Mint filed a motion requesting the trial court to either strike Auburn's late-produced invoices or continue the fee hearing by an additional 20 days to give him a proper opportunity to review the invoices.²⁶ The trial court denied the motion.²⁷

The trial court awarded Auburn all of its claimed fees for the period between the end of trial and November 2012, plus an additional \$50,000.00 for its attorneys' fees during the period between December 2012 and May 2013. The trial court abused its discretion by accepting Auburn's billing statements without question or deduction and by refusing to give NW Mint the opportunity to challenge their reasonableness of Auburn's claimed fees.

D. The trial court abused its discretion by awarding Auburn every penny of its claimed \$425,767.28 in costs.

Auburn claimed it was entitled to recover all of its litigation expenses

²⁶ CP 3554-3558.

²⁷ CP 3581-3582.

pursuant to MTCA's "expanded cost recovery" standard. The trial court abused its discretion by awarding Auburn \$425,767.28—every penny of its claimed costs—without determining whether those costs were reasonable or necessary for the litigation.²⁸ The following are examples of the inappropriate costs the trial court allowed:

- **Deposition expenses:** The court awarded Auburn \$6,383.60 for deposition-related expenses.²⁹ A party is entitled to deposition costs if the depositions are taken and used for trial purposes.³⁰ Auburn did not publish any depositions at trial or otherwise have them admitted into evidence.
- **Daily transcription charges:** The trial court awarded Auburn \$21,388.00 for the cost of daily transcriptions at trial.³¹ These nearly real-time transcripts were extremely expensive, totally unnecessary and do not qualify as a reasonable litigation expense.
- **Travel costs for parties:** The trial court awarded Auburn more than \$23,700.00 in travel costs for Doreen Ray and Bradley Cohen, both of whom were Auburn's client representatives for purposes of the lawsuit.³² A party who is a witness is not entitled to travel

²⁸ The Washington Supreme Court determined in *Louisiana-Pacific Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997), that "remedial action costs" awarded under MTCA include reasonable attorneys' fees and expenses. The Court held that trial courts are "authorized to additionally award other reasonably necessary expenses of litigation based upon such equitable factors as the court determines are appropriate." *Id.*

²⁹ CP 1991-1992.

³⁰ RCW 4.84.010. See *Estep v. Hamilton*, 148 Wn. App. 246, 261, 201 P.3d 331 (2008) (error to allow costs for depositions that were not used at trial or for witnesses who did not testify).

³¹ CP 1991-1992.

³² *Id.*

costs.³³

- **Lay Witness Travel Costs:** The trial court allowed \$10,095.07 in “travel costs,” including \$5,710.00 as “time for testimony,” to three out-of-state lay witnesses. Witnesses are allowed mileage costs for in-state travel to attend court, but are not allowed mileage costs for out-of state travel.³⁴ A payment made to get a witness to testify at trial is not a reimbursable expense.
- **Support staff overtime:** The trial court allowed \$2,025.00 in overtime payments to the support staff of Auburn’s counsel.³⁵ “[C]lerical charges . . . [a]re not included in the definition of costs under a MTCA award . . .”³⁶
- **Computer management software:** *Asarco* provides for the recovery of “computerized legal research.”³⁷ However, the trial court allowed \$6,025.63 to reimburse Auburn’s counsel for the purchase of a software program for litigation management.³⁸
- **Copying charges:** The trial court awarded Auburn \$25,141.54 as

³³ *Estep*, 148 Wn. App. at 262 (“in general, a party who is also a witness is not entitled to mileage costs.”) (reversing award of airfare for parties as recoverable costs).

³⁴ *Kiewit-Grice v. State*, 77 Wn. App. 867, 875, 895 P.2d 6 (1995) (“it appears that the Supreme Court ... intended that there not be a mileage award until the witness crossed the state line.”).

³⁵ CP 2138-2140.

³⁶ *Taliesen*, 135 Wn. App. at 144-45 (quoting superior court finding that refused to award clerical charges, and affirming same). The trial court also abused its discretion by awarding Auburn \$28,538.00 as reimbursement for fees charged for clerical tasks such as making copies of documents, preparing notebooks, bates-stamping documents, indexing documents and renaming documents. *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 845-846 (1995). See *Kreidler v. Pixler*, 2011 U.S. Dist. LEXIS 1373 (W.D. Wash. 2011); (“Although fees for non-lawyers are compensable, the services performed by the non-lawyer must be legal, rather than clerical, in nature.”)

³⁷ 131 Wn.2d at 597.

³⁸ CP 1916-1922.

reimbursement for its attorneys' claimed copying charges.³⁹ This amount is excessive on its face.

- **Meal expenses during trial:** The trial court awarded Auburn \$1,507.46 in daily meals for no less than eight people during trial.⁴⁰ Meal expenses for attorneys and staff are not recoverable.

The trial court abused its discretion by allowing costs to Auburn that were not "reasonably necessary expenses of litigation."

CONCLUSION

The trial court abused its discretion by accepting Auburn's billing statements without question, failing to deduct for wasteful and duplicative work, failing to properly adjust the fee award for unsuccessful claims and allowing costs that were not "reasonably necessary expenses of litigation." NW Mint requests the Court to reverse the trial court's award and remand the matter back to the trial court for a proper determination of the allowable fees and costs.

³⁹ CP 1916-1922; 2138-2140.

⁴⁰ CP 2138-2140.

Respectfully submitted,



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