NO. 96446-7

SUPREME COURT
OF THE STATE OF WASHINGTON

NO: 76218-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RONALD A. BAKER AND JOYCE BAKER,

Appellants,

vs.

FIREMAN'S FUND INSURANCE COMPANY and
AMERICAN INSURANCE COMPANY

Respondents/Cross Appellants.

BAKERS' PETITION FOR REVIEW

Brent W. Beecher, WSBA #31095
HACKETT, BEECHER & HART
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
Telephone: 206 624 2200
Attorneys for Petitioner

Table of Contents

Table of Authorities

Cases

Statutes

Rules

I. Identity of Petitioner and Court of Appeals Decision

The Petitioners are Ronald and Joyce Baker and the law firm of Hackett Beecher & Hart. The Bakers were the plaintiffs at the trial court, and appellants at the Court of Appeals. They petition this Court to review the published case of *Baker v. Fireman's Fund Ins. Co.*, __Wn. App. __, __ P.3d__, No. 76218-4-I, 2018 Wash. App. LEXIS 2322, at *1 (Ct. App. Oct. 15, 2018). (Appendix A). It was filed on October 15, 2018. No Motion for Reconsideration was filed.

II. Issues Presented for Review.

1. Is an insured entitled to be "made whole" by an award of fees under *Olympic Steamship*?

2. Did the Court of Appeals err in affirming an *Olympic Steamship* fee award representing only a fraction of the insured's reasonable attorney fees?

3. Should this Court accept review under RAP 13.4(b)(1) because the Opinion of the Court of Appeals is in direct conflict with Opinion of this Court, and RAP 13.4(b)(4) because the issue is of substantial public interest? In so doing, should this Court create a single standard of "reasonableness" of fees that prevents insureds from having to pay their coverage attorneys by dipping into the compensatory award against their insurers?

III. Statement of the Case

1. Overview of the posture of the case.

Ron and Joyce Baker, the insureds in this case, contend that the Court of Appeals erroneously affirmed the trial court's award of *Olympic Steamship* fees in an amount that is a fraction of their actual fee agreement with their attorneys. The underlying insurance coverage dispute itself ended with settlement, reserving only the issue of the fee award for resolution by the court.

The insurance saga forming the basis of this case began in 1984 with a denial of insurance coverage for the Bakers' liability for environmental damage at their woodwaste landfill. CP 959. Through the Bakers' persistent legal action, it ended in 2016 with their insurers, Fireman's Fund and American Insurance Company (collectively "FFIC") reversing course on the denial, paying the Bakers the amounts identified at CP 1775 for the Bakers environmental liabilities, and as compensation for the Bakers personal damages.[1] The settlement in this case was an unequivocal win for the Bakers and for the cleanup of a toxic waste site in Snohomish County.

[1] The amount of the insurance settlements in this case are confidential per the agreements. In order to maintain that confidentiality, the trial court sealed the versions of the declarations and pleadings containing the amounts. Rather than request this Court to seal this Petition, the Bakers direct the Court's attention to the sealed Clerk's Papers containing these amounts. The Petitioners recognize this makes review more cumbersome, and apologize for the inconvenience.

The Bakers' attorneys in this case, Hackett Beecher & Hart ("HBH"), were engaged to represent them on a contingent fee basis in 2007. CP 62. Years later, during the course of settlement negotiations in 2015, it became apparent that the value of the attorney fee claim could become an impediment. In order to prevent this issue from derailing settlement, the parties agreed to settle all claims except for attorney fees, and to present that issue separately to the Court for resolution.[2]

2. History of the claims in this litigation

After Ron Baker was discharged from the Army in 1965, he and his wife Joyce had saved enough money to purchase logging equipment and to buy some properties for logging and resale. CP 634. The largest property was about 114 acres. *Id.* Logging of this property was mostly complete by 1976 when Snohomish County officials approached Mr. Baker about establishing a woodwaste landfill, claiming it was desperately needed to accommodate expanding industrial development. *Id.* The County agreed to provide the Bakers with assistance in the operation of the landfill. *Id.*

The Sisco site opened in 1978. Starting that year, and for several years thereafter, the Bakers purchased general liability insurance policies from FFIC, specifically to insure the landfill. *Id.*

[2] CP 1823, CP 209.

The Sisco site received waste from a number of parties, including Brunswick, Snohomish County, Rubatino and Boeing. *Id.* Although the Bakers did not know it, waste from each of these entities later turned out to contain some hazardous materials *Id.* From 1977 up to 1983, the Health District only occasionally made requests for minor improvements in the Bakers' operation. *Id.* However, in the latter part of 1983, the Health Department began to insist on major changes in handling leachate at the site. The Bakers made strong efforts to comply, but by the spring of 1984, it was apparent that the County wanted Sisco to be closed. *Id.* In April 1984, the Bakers' permit was suspended and the landfill was closed. *Id.*

Over the next several years, following the 1984 closure, the Bakers were forced to sell their homes, equipment and all their real estate (except the Sisco site that had a negative value because of the environmental concerns) in order to deal with the landfill problems. *Id.* They spent hundreds of thousands of dollars on attorney fees alone. *Id.* In 1990, they found two attorneys who agreed to sue Boeing over its ash deliveries for a contingent fee. *Id.* In mediation, Boeing agreed to pay $335,000. *Id.* The Bakers did not want to accept that amount, but the attorneys threatened to withdraw if the Bakers refused. *Id.* After fees, expenses and direct payment by the lawyers on some obligations that had to be paid, the Bakers netted about $17,000. *Id.* Because they no longer

owned a home, they used that money to wall off a small portion of an old barn on one of their son's property, where they have lived ever since. *Id.*

For decades, they had been without resources that could make a dent in their liability under the Model Toxins Control Act. Nearly all their income consisted of $1,500 per month from social security. *Id.* In 2000, one of the Bakers relatives sent a letter to FFIC inquiring about the insurance requirements for landfills. *Id.* FFIC responded by sending the Bakers a letter "reserving its rights" in which FFIC threatened to sue them for a declaration of no coverage, and to force them to reimburse any money FFIC had spent if the Court actually found no coverage. CP 65-68. Aside from threats and listing a litany of exclusions, FFIC offered the Bakers *no* policy benefits. *Id.*

This was the extent of FFIC's investigation until 2005, when Fireman's Fund suddenly "came alive" and hired the Marten Law firm to investigate and defend. CP 636. FFIC wrote the Bakers a new letter "reserving its rights," again threatening them with litigation. CP 70. The plan that FFIC then recommended to the Bakers was that they pay for the cleanup *themselves*, by selling the entire "140-acre site" and using *the Bakers'* equity to offset the purchaser's liability associated with the environmental contamination. CP 96-97. That is to say, FFIC was proposing that if the 140-acre site were valued at $3 million (in a clean

condition) and the cleanup of the 15-acre landfill cost $3 million, the Bakers could give away their valuable, uncontaminated land to pay the purchaser's cost of cleaning it up. FFIC made it clear that the *maximum* amount it would pay – coverage for actually *doing* cleanup work – would be $100,000, but reserved its rights not to pay that. CP 65.

The Bakers were uncomfortable, not least because that same insurance company making these recommendations was threatening to sue them and was demanding repayment of all the money it spent – pushing upward through $280,000 at that time. CP 96. The Bakers sought attorneys willing to take their case on a contingency, to advocate for *their* position, even if opposed to the best interests of the insurance company. CP 636. Of the lawyers the Bakers approached, only HBH was willing to work for a contingent fee. CP 637. The Bakers would not have been able to pursue this case otherwise. CP 637. The risks associated with a contingent fee were daunting and constantly threatened the Bakers' recovery over the next eight years of litigation. There were serious issues of statutes of limitation and laches related to claims that matured in the 1980's. The Bakers' settlement and release of Boeing as a Potentially Liable Party under the Model Toxins Control Act[3] was potentially sufficiently prejudicial to the insurers so as to jeopardize coverage. If the insurers

[3] RCW 70.105D

could characterize the site cleanup as the normal business expense of closing the landfill rather than remediating an accidental release, coverage could vanish. Over the course of the next nine years, HBH carefully developed and bolstered the Bakers' legal and factual case against FFIC.

The Marten Law Group and PES Environmental (an environmental engineering firm) conducted an investigation of the contamination, and coordinated with the Department of Ecology through the Voluntary Cleanup Program. CP 1142. This allowed the Bakers to work toward a DOE approved "No Further Action" letter. Throughout, it was clear that FFIC's asserted policy limits of $100,000 would not be enough to remediate. FFIC maintained that there was no coverage for the Marten Law Group defense, nor any cost of remediation. CP 116-119.

There were three mediations of this case. The first was on January 7, 2015, and resulted in an "in principle" framework for resolution amongst the PLPs. FFIC suggested it would be willing to commit a certain amount for the Bakers' environmental liabilities.[4] A few days later, FFIC and OneBeacon filed *seven* motions for summary judgment on discrete coverage issues, seeking rulings from the Court that they owed the Bakers *nothing* under their policies – no defense, and no indemnity. CP 1125, 1140, 1150, 1170, 1186, 1956, 1991. These seven motions cut

[4] Exhibit B – McDougal Declaration (filed under seal), p. 5.

to the core of the weaknesses in the Bakers' case, and instantiated the risk that had been apparent to HBH from the inception of the representation.

The Bakers and FFIC mediated again on February 24, reaching no agreement (Ex. B, McDougal Dec. p. 5), and finally again on March 10. *Id.* At the final mediation, the Bakers and FFIC signed a CR 2A agreement which conditionally settled the insurance claims but reserved the issue of the Bakers attorney fees for later determination by the court. *Id.* In order to prevent the fee issue from derailing settlement, HBH had agreed with the Bakers that it would look solely to the Bakers' rights against FFIC to satisfy their attorney fee obligation[5].

In the CR 2A agreement, FFIC and the Bakers specifically agreed, among other things, that the Bakers preserved all bases for their fee award, including *Olympic Steamship,* and the Consumer Protection Act. The fee motion contemplated by the FFIC settlement, which is the subject of this Petition, was filed in June 2016. CP 892.

The trial court applied a lodestar analysis, which cut, at FFIC's urging, over $200,000 from the base lodestar amount. The final fee award was *substantially* less than the one-third of the gross amount recovered that the Bakers owed under their contingency fee agreement. CP 62.

The Bakers timely appealed, arguing *inter alia* that the award

[5] Sealed Ex. B, Decl. of J. McDougall, at 157-159, Ex. Q – CR2A Mem. of Settlement

violated the "make whole" mandate of *Olympic Steamship.* The Court of Appeals affirmed, and the Bakers now petition this Court for review.

IV. Argument

1. Olympic Steamship fees are awarded to allow the insured to "recoup" its attorney fees from the insurer that refused policy benefits short of litigation.

One well recognized equitable ground for fee shifting is known by the name of the case that introduced it: *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). In *Olympic Steamship*, this Court ruled that where an insured is compelled to litigate with its insurer to obtain policy benefits, the insured is equitably entitled to "recoup attorney fees that it incurred" from the insurer. *Id.* As this Court put it:

> When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer. . . [T]he conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured. Further, allowing an award of attorney fees will encourage the prompt payment of claims.
>
> *Id.* at 52-53 (citations omitted).

The policy explanation of *Olympic Steamship* fee shifting has been expanded and reinforced over the years. For example, *McRory v. N. Ins. Co. of N.Y.*, 138 Wn.2d 550, 560, 980 P.2d 736, 741 (1999) held:

> More than just money is at stake in a coverage case. . .In the context of controversies involving insurance coverage, the enhanced fiduciary obligation springing from an insurer-insured relationship requires that "an insurance company must refrain from

> engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Thus, when an insurer unsuccessfully engages an insured in litigation to deny coverage, it can be said that the insurer not only delays the benefit of the bargain of the insurance contract to the insured, but also that the insurer acts in contravention to its enhanced fiduciary obligations. Providing a remedy for this inequitable situation is at the bottom of the rule announced in *Olympic Steamship.*
>
> *Id.* (citations omitted)

Thus the remedy is focused on undoing the financial harm caused to the insured by the litigation itself.

2. The purpose of an Olympic Steamship award of attorney fees is to make the insured whole. This Court has refused to tolerate requiring the insured to shoulder the burden of any reasonable litigation expenses.

The Court of Appeals' Opinion is in direct conflict with this Court's holdings in at least *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37*, McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731, 738 (1995)*, Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012)*,* and *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.,* 144 Wn.2d 130, 26 P.3d 910 (2001). Review is warranted under RAP 13.4(b)(1). This Court has strongly expressed the policy grounds on which an award of *Olympic Steamship* fees is based and has been emphatic about the measure of the remedy: the insured ***must*** be made whole. "Our decision in *Olympic Steamship . . . require[s]* that the insured be made whole." *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d at 39-

40, (emphasis added). As reiterated in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643 at 661, "In the absence of *Olympic Steamship* fees, Weismann would not be made whole because the coverage she is entitled to would be diminished by the attorney fees she incurred to obtain it."

This Court has had one opportunity to examine an actual *Olympic Steamship* fee award and measure it against the "make whole" directive, although the opinion was focused exclusively on costs rather than fees. That case is *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d at 133. There, the insured was forced to litigate to obtain the benefit of its policy, and the trial court awarded *Olympic Steamship* fees. As part of its fee request, the insured submitted for reimbursement substantial invoices for expert witnesses. The Supreme Court held these expenses must be paid by the insurer, reversing the Court of Appeals, and relying on the policy of *Olympic Steamship* fees.

> It is the purpose of the *Olympic Steamship* exception to make an insured whole when he is forced to bring a lawsuit to obtain the benefit of his bargain with an insurer. To make such plaintiffs whole, "reasonable attorney fees" must, by necessity, contemplate expenses other than merely the hours billed by an attorney. The insured must therefore be compensated for **all** of the expenses necessary to establish coverage as part of those attorney fees which are reasonable. Failure to reimburse expenses would often eat up whatever benefits the litigation might produce . . . *Id.* at 143-44 (citations omitted, emphasis in original).

This Court has never addressed the issue of how to compute the

value of *Olympic Steamship* fees where an insured is represented pursuant to a contingent fee agreement. However, the only time it has spoken to the scope of fees awardable under *Olympic Steamship*, the Supreme Court reversed appellate opinions which required the insured to bear a portion of its own litigation expenses, thus failing to make the insured whole with regard to the coverage litigation. In doing so, the Court spoke to future disputes about the scope of an *Olympic Steamship* award, emphasizing the point with a rare use of boldface: "The insured must therefore be compensated for **all** of the expenses necessary to establish coverage as part of those attorney fees which are reasonable." *Id.*

In the case at bar, the Court of Appeals created an unsustainable legal vortex in contravention of Washington jurisprudence; it recognized this Court's "make whole" imperative while simultaneously affirming an *Olympic Steamship* award leaving hundreds of thousands of dollars in unpaid fees. Any logic which supports a conclusion that an insured has been "made whole" by an award leaving large sums of attorney fees unpaid is not only unsound, but in *direct violation* of this Court's explicit injunction that the insured "must therefore be compensated for **all** of the expenses necessary to establish coverage. . ."

Courts have come to radically disparate conclusions about the meaning of this Court's "make whole" mandate, and this case offers the

opportunity for resolution. For example, in *Sec. Ins. Co. v. Sea N Air Travel*, No. C05-1062RSL, 2006 U.S. Dist. LEXIS 26805, at *1-8 (W.D. Wash. Apr. 20, 2006), Judge Lasnik held:

> Bearing in mind the equitable nature of an award of attorney's fees in this context (*McGreevy*, 128 Wn.2d at 35) and Washington's public policy in favor of compelling insurers to honor their commitments and make prompt payment of claims (*McRory v. Northern Ins. Co. of N.Y.*, 138 Wn.2d 550, 560, 980 P.2d 736 (1999)), the Court finds that defendant is entitled to recover all fees and costs incurred in defending this coverage suit. The Court will not reduce the fee award by those amounts associated with unsuccessful claims and/or vague descriptions. ***To hold otherwise would leave the insured in a worse position than if the insurer had promptly acknowledged its coverage obligations, thereby defeating the Supreme Court's clear intent to make the insured whole***. *McGreevy*, 128 Wn.2d at 40.
>
> *Id. (emphasis added).*

To the opposite effect, Judge Robart flatly rejected the insured's argument that an *Olympic Steamship* award should cover its contingent fee ("a new and unprecedented approach for fee calculation in insurance coverage disputes"), and used the lodestar like a knife to reduce the fee award dramatically below the contingency the insured had actually paid its lawyers. *MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp. 3d 1078, 1085 (W.D. Wash. 2015). The fact that Judge Robart took this approach in 2015 is strong evidence that trial courts believe an *Olympic Steamship* award that fails to fully compensate the insured for the reasonable fee it agreed to pay its attorneys is consonant with this Court's "make whole"

rule. It is not. Now is the time to bring this misperception to an end.

3. When an insured hires an attorney on a contingent fee, the value of the contingent fee defines the insured's expenses to establish coverage.

Where an insurer wrongly denies a covered claim and forces its insured to litigate, it is commonplace that the insured has no option other than contingent fee representation. Indeed, *it is often true, as is the case here, that the insurer's wrongful denial that has left them in that position.* The Opinion of the Court of Appeals allows the insurer to parlay the financial damage it has already inflicted upon its insured to *the insurer's advantage* by forcing the insured to shoulder an often-significant portion of the contingent fee to establish coverage. In *Panorama Village*, the justification for forcing the insurer to pay **all** expenses related to establishing coverage was that "failure to reimburse those expenses would often eat up whatever benefits the litigation might produce." *Id. at 144.* This case presents precisely the same concern. The entire point of *Olympic Steamship* and its progeny is that the compensatory award should not be the piggy bank the insured must use to pay its coverage attorneys.

4. The lodestar should be used as a guardrail for reasonableness in Olympic Steamship cases, not an independent mechanism to generate a fee lower than the reasonable fee the insured is contractually obligated to pay.

An insurer should not be forced to pay an unreasonable fee under

Olympic Steamship, nor should an insured be forced to pay an unreasonable fee under a contingent fee agreement. Where the insured and attorney agree on a fee that is expected to be transferred to the insurer, there exists a potential for collusion. They could agree to astronomical rates or an unreasonable contingency. An insured who does not expect to pay the fee will have little concern over that fee's reasonableness. A black-letter rule that an *Olympic Steamship* award must always match the insured's fee agreement could contain the seeds of abuse. However, the Bakers have never advocated the adoption of such an absolute rule.

There is a pre-existing legal framework to be used in evaluating the reasonableness of the insured's attorney fee, which can eliminate this concern: RPC 1.5(a), as quantified by the lodestar. RPC 1.5(a) enumerates factors to be considered in assessing reasonableness of *any* attorney fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the

> client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent; and
>
> (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.
>
> RPC 1.5(a)

Washington courts have recognized that RPC 1.5(a) is an appropriate framework for analyzing attorney fees where the reasonableness of those fees is an issue in litigation. *Allard v. First Interstate Bank, N.A.,* 112 Wn.2d 145, 150, 768 P.2d 998, 1000 (1989). However, RPC 1.5(a) is purely qualitative. In order to apply it to any particular fee dispute, real numbers must be put into its categories. The "time and labor required (1)" is the "number of hours reasonably actually spent." The "fees customarily charged for similar services in the locality (1)," combined with the "requisite skill (1). . . experience, reputation and ability (7)" of the lawyer is the "reasonable hourly rate." To evaluate RPC 1.5(a)-reasonableness, the quantitative expression thus starts with "the number of hours reasonably spent" times the "reasonable hourly rate." RPC 1.5(a) then suggests consideration of whether the fee was "fixed or contingent (8)," permitting a reasonable fee in excess of that base

calculation where *the attorney* took the risk that no amount (and thus no fee) would be recovered. The act of quantifying – putting real numbers into the RPC 1.5(a) reasonableness analysis – is thus exactly the same thing as using the "lodestar" method.[6]

The application of the lodestar to contingent fee agreements under *Olympic Steamship* is not difficult. The trial court should take the reasonable number hours spent to establish coverage, multiply it by a reasonable hourly rate, and then compare that amount to the actual value of the contingent fee. The ratio of the first to the second is the multiplier[7]. If that multiplier results in an unreasonable fee under RPC 1.5(a), then the fee should be adjusted – for *both* the insured *and* the insurer; neither the insurer nor the insured should ever be required to pay an unreasonable fee. Conversely, the insurer should not be entitled to evade payment of a fee that is reasonable vis-à-vis the insured, which is exactly what happened in the case at bar. This use of the lodestar represents a shift only in

[6] In the "lodestar method," the trial court examines the attorneys' billing records, and determines the reasonable number of hours that were expended on the litigation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). Next, the court multiplies those hours by a reasonable hourly rate to determine the "base" lodestar amount. *Id.* Finally, the trial court has discretion to adjust the award based on the contingent nature of the fee agreement. *Id.*

[7] The Court should note that if hours have been deducted for unproductive work, or work unrelated to coverage, then it will be that smaller base of hours that should be used to determine what multiplier is required to get to the equivalent of the contingency fee. For example, if a contingent fee were $10,000, and the attorney billed 100 hours at $100/hour, a court might find that 80 of them were necessary for success. A multiplier of 1.25 would be necessary to synthesize the $10,000 contingent fee: probably reasonable. Conversely, if the court found only 10 of the hours were necessary for success, a multiplier of 10 would be required to get to $10,000: quite possibly unreasonable.

perspective: the question traditionally answered by the lodestar has been "what award would represent a reasonable fee?" In the *Olympic Steamship* context, the question answered by the lodestar should be "is the *fee the insured agreed to pay* a reasonable fee?"

This approach to the lodestar is required by *Panorama Village* because the insured is bound by its fee agreement (so long as it is reasonable), and allowing the insurer to pay less than that will fail to make the insured whole, impermissibly "eating up the benefits" of the litigation. *Id.* The Opinion of the Court of Appeals sanctions the trial court's use of the lodestar in a vacuum, without reference to the insured's actual fee agreement, and holds by judicial fiat that whatever the result of that analysis may be, the award makes the insured "whole," by definition. This Court should accept review and terminate this unjustified legal fiction that an insured is made whole by payment of a fee that is a fraction of the reasonable 1/3 contingency it actually agreed to pay its attorneys.

The Court of Appeals held that the Bakers waived their right to be made whole by proposing that the trial court find the actual fee reasonable under the lodestar methodology, suggesting they instead should have relied on a "percent recovery" theory under *Allard v. First Interstate Bank,*

N.A., 112 Wn.2d 145, 768 P.2d 998 (1989)[8]. But the Bakers have been consistent that their contingent fee was reasonable *under the lodestar*, which is nothing more than a quantification of the same RPC 1.5(a) factors used in *Allard*. And the Bakers *did* urge the trial court to award them their contingency under *Allard*. CP 1946, RP 97-98. There is no magic in the word "lodestar" that waives the right to a fully restorative award of attorney fees; the question is whether the multiplier necessary to synthesize the contingent fee is RPC 1.5(a)-reasonable. This approach is not exotic. The use of the lodestar to measure the reasonableness of a percent recovery was exactly what the court did in *In re Settlement/Guardianship of A.G.M.*, 154 Wn. App. 58, 223 P.3d 1276 (2010). There, the court found a contingent fee *unreasonable* under the lodestar because the required multiplier would have been 3.5, and other RPC 1.5(a) factors strongly militated a reduction. This is exactly what using the lodestar as a "guardrail" looks like. Importantly, neither the trial court nor the Court of Appeals have even hinted that the Bakers' actual fee agreement was *unreasonable* under *any* test.

5. The Bakers have <u>not</u> been made whole

FFIC has consistently argued that the Bakers were made whole because HBH agreed to look to their insurance asset for satisfaction of

[8] *Opinion* at footnote 5.

their attorney fee, rather than sequester the funds that FFIC paid them as compensatory damages. The fact that HBH agreed to continue financing the Bakers' attorney fees even after the Bakers received those compensatory damages changes nothing, and is no concern of FFIC. It reflects only the reality that the Bakers *should not have to* pay attorney fees out of their compensatory damages under *Panorama Village*. The Court of Appeals did not address FFIC's argument on this issue, and it is thus not relevant to the precedential value of the published Opinion undermining this Court's "make whole" holdings. However, in the event that FFIC raises the issue in its Answer to this Petition, the Court should be aware that HBH agreed that the Bakers would go to the front of the line and receive their compensatory damages prior to the funding of their attorney fee obligation. FFIC's attempt to characterize HBH's willingness to put the Bakers' financial interests in front of its own (by continuing to finance the Bakers' legal fees) as a waiver of the Bakers' right to full reimbursement is distasteful, and unjustified. This Court should reject such an argument.

V. Conclusion

The Court of Appeals Opinion is contrary to the law established by this Court, and runs afoul of the public interest. The Petitioners respectfully request that this Court accept review and reverse.

Respectfully submitted this 17th day of October 2018.

HACKETT, BEECHER & HART

Brent W. Beecher, WSBA #31095
Attorneys for Petitioners

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RONALD A. BAKER AND JOYCE BAKER Appellant / Cross-Respondent, v. FIREMAN'S FUND INSURANCE COMPANY and AMERICAN INSURANCE COMPANY Respondent / Cross-Appellant.	NO. 76218-4-I DECLARATION OF SERVICE

Brent Beecher declares under penalty of perjury, that on the date noted below he caused a copy of the Petition for Review to be delivered to the Court and parties listed below, via the Court's JIS e-filing portal:

Jodi McDougal
Molly Eckman
Cozen O'Connor
999 3rd Avenue, Suite 1900
Seattle, WA 98104-4028

Signed in Seattle, WA this 17th day of October 2018.

Brent Beecher

APPENDIX A

Court of Appeals Opinion - *Baker v. Fireman's Fund Ins. Co.*, __Wn. App. __, __ P.3d__, No. 76218-4-I, 2018 Wash. App. LEXIS 2322, at *1 (Ct. App. Oct. 15, 2018)

Baker v. Fireman's Fund Ins. Co.

Court of Appeals of Washington, Division One

May 31, 2018, Oral Argument; October 15, 2018, Filed

No. 76218-4-I

Reporter
2018 Wash. App. LEXIS 2322 *

RONALD A. BAKER ET AL., *Appellants*, v. FIREMAN'S FUND INSURANCE COMPANY ET AL., *Respondents*.

Prior History: **[*1]** Appeal from Snohomish Superior Court. Docket No: 07-2-04798-9. Judge signing: Honorable Linda C Krese. Judgment or order under review. Date filed: 12/12/2016.

Baker v. Fireman's Fund Ins. Co., 2018 Wash. App. LEXIS 2116 (Wash. Ct. App., Sept. 17, 2018)

Core Terms

trial court, attorney's fees, multiplier, landfill, lodestar, settlement, insured, parties, coverage, reasonable attorney's fees, lodestar method, attorneys, excluding, time spent, abused, issues, costs, hourly rate, contingent, hours spent, foreclosure, billed, contingency fee agreement, award of attorney's fees, reasonable hourly rate, insurance company, prevailing party, fee award, duplicative, recovered

Case Summary

Overview
HOLDINGS: [1]-The trial court did not abuse its discretion in awarding attorney fees to the insureds following the mediated settlement of their action against their insurers because the court's failure to award fees at a level commensurate with the contingent fee they agreed to pay their attorneys did not fail to make them whole; [2]-The trial court did not abuse its discretion by accepting the insureds' argument that the lodestar method was proper for determining a reasonable award of attorney fees; [3]-The trial court did not abuse its discretion by excluding or reducing hours billed for work that was unnecessary to the claims made against the insurers or that was duplicative; [4]-The trial court's determination of reasonable hourly rates was supported by substantial evidence and was not an abuse of discretion.

Outcome
The trial court's award of attorney fees was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

HN1[] **Standards of Review, Abuse of Discretion**

There are two relevant inquires in determining an award of attorney fees: first, whether the prevailing party is entitled to legal fees, and second, whether the award of attorney fees is reasonable. Whether a party is legally entitled to recover attorney fees is a question of law that an appellate court reviews de novo. Whether the amount of fees awarded is reasonable is reviewed for an abuse of discretion. In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

HN2[] Basis of Recovery, American Rule

In general, Washington follows the American rule in awarding attorney fees. Under the American rule, a court may award attorney fees only if the award is authorized by contract, statute, or a recognized ground in equity.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

Insurance Law > Remedies > Costs & Attorney Fees

Civil Procedure > Preliminary Considerations > Equity > Relief

HN3[] Attorney Fees & Expenses, Basis of Recovery

One recognized equitable ground for awarding attorney fees is the rule announced by the Washington Supreme Court in Olympic Steamship Co. v. Centennial Ins. Co. Under Olympic Steamship, an insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to be awarded attorney fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

Insurance Law > Remedies > Costs & Attorney Fees

Civil Procedure > Preliminary Considerations > Equity > Relief

HN4[] Attorney Fees & Expenses, Basis of Recovery

The equitable purpose supporting an award of attorney fees under the rule announced by the Washington Supreme Court in Olympic Steamship Co. v. Centennial Ins. Co. requires that the insured be made whole. When an insurer unsuccessfully contests coverage, it has placed its interests above the insured. The decision in Olympic Steamship remedies this inequity by requiring that the insured be made whole.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5[] Attorney Fees & Expenses, Reasonable Fees

The starting point, and indeed, the primary consideration in determining an appropriate award of attorney fees is reasonableness.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Insurance Law > Remedies > Costs & Attorney Fees > Computation

HN6[] Attorney Fees & Expenses, Reasonable Fees

In order to assure that an insured is made whole under the rule announced by the Washington Supreme Court in Olympic Steamship Co. v. Centennial Ins. Co., an attorney fee award must include all reasonable attorney fees, including all expenses necessary to establish coverage.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7[] Attorney Fees & Expenses, Reasonable Fees

One established method for determining a reasonable attorney fee award is the lodestar method. Under this method, a trial court first examines the attorneys' billing records and determines the number of hours that were reasonably expended in pursuing the litigation. The total number of hours reasonably expended is then multiplied by the reasonable hourly rate of compensation resulting in the lodestar fee. After the lodestar fee has been calculated, the court may then consider the necessity of adjusting the rate after considering factors not already taken into consideration, including the contingent nature of the work.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN8[] Attorney Fees & Expenses, Reasonable Fees

No Washington court has held the lodestar method is the exclusive method to determine reasonable attorney fees. By the same token, no Washington court has held that a trial court abuses its discretion by using the lodestar method in order to determine reasonable attorney fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney

Fees & Expenses > Reasonable Fees

Evidence > Burdens of Proof > Allocation

HN9[] **Attorney Fees & Expenses, Reasonable Fees**

Under the lodestar method, the party seeking fees bears the burden of proving the reasonableness of the fees.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN10[] **Attorney Fees & Expenses, Reasonable Fees**

In determining a base lodestar attorney fee, a trial court must limit the lodestar to hours reasonably expended and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. The hours reasonably expended must be spent on claims having a common core of facts and related legal theories. Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. The trial court is required to enter findings of fact and conclusions of law.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

Insurance Law > Remedies > Costs & Attorney Fees

Civil Procedure > Preliminary Considerations > Equity > Relief

Insurance Law > Claim, Contract & Practice Issues > Unjust Enrichment Doctrine

HN11[] **Attorney Fees & Expenses, Basis of Recovery**

The common-fund doctrine applies does not apply unless a common fund is created by a recovery from an at-fault party.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

Insurance Law > Remedies > Costs & Attorney Fees

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN12[] **Attorney Fees & Expenses, Basis of Recovery**

Under the continuous-trigger doctrine, when an insured sustains continuous damages, all insurers providing coverage for any portion of the total time period of the continuing damage are jointly and severally liable for the entire amount of damage.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN13[] **Attorney Fees & Expenses, Reasonable Fees**

After a court has calculated a lodestar attorney fee, it may adjust the fee by applying a multiplier. A lodestar fee may, in rare instances, be adjusted upward or downward in a trial court's discretion. Adjustments to the lodestar product are reserved for rare occasions. The lodestar is presumed to adequately compensate an attorney.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN14[] **Attorney Fees & Expenses, Reasonable Fees**

A court can adjust a lodestar attorney fee based on factors not already taken into consideration, including the benefit to the client and the contingency or uncertainty in collecting the fee.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees

Legal Ethics > Client Relations > Billing & Collection

HN15[] **Attorney Fees & Expenses, Reasonable Fees**

When attorneys have an established rate for billing clients, that rate is likely a reasonable rate. The usual rate is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment. A court may also consider the level of skill, time limits imposed by the litigation, the attorney's reputation, and the undesirability of the case, and on local rates charged by attorneys with similar skills and experience.

Counsel: For Appellant: James Morton Beecher, Law Offices of Hackett, Beecher, & Hart, Seattle, WA; Brent William Beecher, Hackett Beecher & Hart, Seattle, WA; Jeff B. Kray,

Marten Law PLLC, Seattle, WA.

For Respondent: Jodi Ann Mcdougall, Molly Siebert Eckman, Cozen O'Connor, Seattle, WA; Mark Mclean Myers, Attorney at Law, Seattle, WA; Michael Alan Nesteroff, John Sterling DevlinIII, Lane Powell PC, Seattle, WA; Michael Charles Held, Civil Div Snohomish County Prosecutor's, Everett, WA.

Judges: Authored by David Mann. Concurring: Stephen Dwyer, J. Leach.

Opinion by: David Mann

Opinion

¶1 MANN, A.C.J. — Ronald and Joyce Baker filed suit against their insurance companies, Fireman's Fund Insurance Company and American Insurance Company (collectively Fireman's Fund), for breaching their duty to defend. The litigation ended in a settlement preserving the Bakers' claim for attorney fees for resolution by the trial court. Using the lodestar method, and a 1.3 multiplier, the trial court awarded the Bakers $1,209,757.25 for attorney fees and costs. The Bakers appeal and argue that **[*2]** the trial court erred in (1) failing to make them whole under *Olympic Steamship Co., v. Centennial Ins. Co.,117 Wn.2d 37, 811 P.2d 673 (1991)*, (2) excluding some of their claimed fees, and (3) applying only a 1.3 multiplier to the lodestar. Fireman's Fund cross appeals.[1] Because the trial court acted well within its discretion, we affirm.

I

¶2 The Bakers owned and operated the Sisco Woodwaste Landfill (landfill) in Snohomish County. The Bakers opened the landfill in 1978 and operated it for six years until 1984. The Bakers purchased insurance policies for the landfill from Fireman's Fund covering the years between 1978 and 1986. The Bakers also purchased a three year policy from North Pacific Insurance Company, the predecessor to OneBeacon Insurance Company, in January 1986. OneBeacon cancelled this policy after only a year.

¶3 The landfill received waste from a number of generators, including Snohomish County and incinerator ash from a Boeing waste-to-energy facility. After the ash was found to contain hazardous materials, the ash deliveries were stopped. In 1983, the Washington Department of Ecology (Ecology) found that leachate had escaped from the landfill. A year later, in 1984, the Snohomish Health District (SHD) suspended the Bakers' operating permit and ordered **[*3]** the Bakers to stop operating the landfill.

¶4 The landfill continued to be problematic after its closure. In August 2000, the SHD directed the Bakers to respond to the leachate problem and obtain a permit to perform closure activities in accordance with the SHD sanitary code.

¶5 In October 2000, the Bakers contacted Fireman's Fund about insurance coverage. Fireman's Fund responded and informed the Bakers that it had concluded that some or all of the claims alleged may not be covered and "specifically reserve[d] the right to assert any and all defenses to coverage." The letter informed the Bakers that Fireman's Fund reserved the right to file a declaratory judgment action to determine coverage and that it would seek reimbursement for all monies paid toward the defense or representation if it was determined there was no coverage.

¶6 In May 2001, the SHD sued the Bakers alleging permit violations, violations of a SHD order, and nuisance. The Bakers appeared pro se and did not retain counsel. A default judgment was ultimately issued against the Bakers. The landfill was subsequently identified on Ecology's hazardous sites list and ranked a "2" out of a scale of 1 to 5 with 1 representing the highest **[*4]** level of concern.

¶7 In November 2005, Fireman's Fund changed its coverage determination and agreed to participate in the "defense of claims asserted against [the Bakers] by the SHD and DOE that the Landfill and adjacent property and/or associated groundwater are contaminated." It agreed to provide this defense subject to a full reservation of its rights. It also appointed Marten Law Group (Marten Law) to represent the Bakers.

¶8 In October 2006, Marten Law identified 12 waste generators and transporters who, by disposing potentially hazardous waste at the landfill, may have been potentially liable parties (PLPs). Marten Law identified several options for dealing with cleanup liability at the landfill including seeking contribution from the PLPs and settlement with the Ecology and Snohomish County.

¶9 In May 2007, the Bakers retained Hackett Beecher & Hart (HBH) on a contingency fee agreement. The contingency agreement required the Bakers to pay HBH one-third of the "gross amount recovered." With HBH as their attorney, the Bakers then filed suit against Fireman's Fund and one of the PLP's identified by Marten Law. The Bakers alleged that Fireman's Fund (1) breached its contractual duties to

[1] Respondent/Cross-Appellants Fireman's Fund filed a motion to Strike Appellant/Cross-Respondent's Reply Brief. The motion is denied.

investigate, **[*5]** defend, and indemnify them for costs incurred under the Model Toxic Control Act (MTCA)[2], (2) acted negligently and in bad faith, and (3) engaged in unfair claims settlement practices in violation of the Consumer Protection Act (CPA).[3] In May 2008, Fireman's Fund agreed to the Bakers' request to fund legal action against the PLPs using Marten Law.

¶10 In April 2009, after Fireman's Fund unsuccessfully moved to sever the Bakers' insurance-related claims from claims against PLPs, the parties stipulated, at the trial court's direction, that "actions or positions taken by [Fireman's Fund] in [its] own defense as parties to this suit … shall not be used or referred to in any way in connection with any of the causes of action [the Bakers] have asserted or will assert against [Fireman's Fund]."

¶11 In December 2009, in an effort to avoid foreclosure, the Bakers asked Fireman's Fund if it would pay the Bakers' outstanding property tax bill of $70,286.14. Fireman's Fund agreed and promptly paid the bill.

¶12 From August 2010 until the summer of 2013, the Bakers' case against Fireman's Fund was pending but inactive. This was because of the lengthy time periods necessary to gather environmental data, present **[*6]** findings to Ecology, await the Ecology's opinion, and then gather more data.

¶13 In July 2014, the court continued trial to March 2015 and ordered the parties to mediate within 30 days of receiving Ecology's opinion on environmental remediation. The parties received Ecology's opinion letter in December 2014, and began mediation in January 2015.

¶14 Over the course of three mediation sessions, the parties resolved their disputes. The first settlement agreement resolved the disputes over the landfill remediation between the Bakers, Snohomish County, and two PLPs. Under this settlement, Snohomish County agreed to take ownership and full responsibility for remediating the landfill and closing it in return for payments on behalf of the Bakers and the two PLPs.

¶15 The Bakers and Fireman's Fund then resolved their dispute by entering a settlement agreement, buy back of insurance policies, and release of all claims. In exchange for monetary payments, the Bakers agreed to release all claims against

¶16 Fireman's Fund. The settlement, however, left open the Bakers' ability to separately pursue attorney fees through the trial court:

> Nothing in this Agreement shall foreclose the Bakers' ability to pursue attorney **[*7]** fees from Fireman's Fund based on *Olympic Steamship*, alleged Consumer Protection Act (CPA) violations, and/or bad faith, which attorney fee claim will be resolved on motion practice in the Lawsuit. The Bakers will file their motion for their claim for fees within 10 days of this fully executed Agreement, or as soon as practicable thereafter given the court's and the parties' availability for hearing the motion. The parties agree to abide by the briefing schedule set forth in *CR 56(c)*, i.e., the Bakers' motion shall be filed not later than 28 calendar days before the hearing, any opposition shall be filed not later than 11 calendar days before the hearing, and any rebuttal shall be filed not later than five (5) calendar days before the hearing. For purposes of the Bakers' motion for attorney fees, CPA violations need not be proven, although Fireman's Fund makes no concessions that a specific fee entry relates to the CPA claim.

¶17 Consistent with the settlement, on June 10, 2016, the Bakers petitioned the trial court for an award of their attorney fees and costs. The petitions sought fees pursuant to either *Olympic Steamship*, the CPA, or under equity due to bad faith. The Bakers asked the court **[*8]** to apply the lodestar method as the proper measurement of reasonable attorney fees. In support, the Bakers offered declarations from several local attorneys in support of a reasonable hourly rate, along with time records to support the number of hours billed. Under the lodestar method, the Bakers sought $1,147,435 in attorney fees. The Bakers asked the trial court to apply a "liberal multiplier" of 2.5 times the base amount in recognition of the unusual, difficult and risky nature of the litigation. The Bakers requested a total of $2,875,177 in attorney fees and costs. The trial court entered findings and conclusions concurring that the Baker's requested hourly rates were reasonable but reducing some of the hours billed for matters it deemed either unnecessary or inappropriate. The court determined that the proper lodestar amount was $930,582.50. The court then used a 1.3 times multiplier concluding that "it is appropriate to take into account the exceptionally long pendency of this case during which time HBH received no payment of fees or reimbursement for costs, the exceptionally favorable result which they obtained on behalf of their clients, and the risk (albeit not large) that **[*9]** no recovery might be obtained." The court awarded the Bakers' $1,209,757.25 for reasonable attorney fees and $26,634.06 in reasonable costs.

¶18 After the trial court denied the Bakers' motion for reconsideration, the Bakers appealed. Fireman's Fund cross

---

[2] *Chapter 70.105D RCW.*

[3] Chapter 19.86 RCW.

appealed.

II

¶19 HN1[↑] There are two relevant inquires in determining an award of attorney fees: first, whether the prevailing party is entitled to legal fees, and second, whether the award of attorney fees is reasonable. Public Util. Dist. 1 v. International Ins. Co., 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). Whether a party is legally entitled to recover attorney fees is a question of law that we review de novo. King County v. Vinci Constr. Grands Proiets/Parsons RCI/Frontier-Kemper JV, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion. "In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion." Pham v. Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). "That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons." Pham, 159 Wn.2d at 538.

¶20 We first examine whether the Bakers were legally entitled to recover attorney fees. HN2[↑] In general, "Washington follows the American rule in awarding attorney fees." Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Under the American rule, a court may award attorney fees only if that award is authorized by contract, statute, or a recognized ground in equity. **[*10]** Vinci Constr., 188 Wn.2d at 625. HN3[↑] One such recognized equitable ground is the rule announced in *Olympic Steamship*, Under *Olympic Steamship*, "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." 117 Wn.2d at 54.

¶21 The parties do not dispute that the Bakers were the prevailing party and thus entitled to reasonable attorney fees under Olympic Steamship.[4] Consequently, our analysis focuses on whether the trial court abused its discretion in determining the Bakers' reasonable attorney fees.

III

¶22 The Bakers argue first that the trial court abused its discretion in failing to consider the "make whole" purpose of an award of attorney fees under *Olympic Steamship*. In essence, the Bakers assert that because the fee agreement with their attorneys would have obligated them to pay HBH one-third of the gross recovery from Fireman's Fund, any award of fees less than that amount does not make them whole. We disagree.

¶23 At the outset, we agree with the Bakers that HN4[↑] the equitable purpose supporting an award of attorney fees under *Olympic Steamship* requires that the insured be made whole. As our Supreme Court has explained: "when an insurer unsuccessfully contests **[*11]** coverage, it has placed its interests above the insured. Our decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole." McGreevy v. Oregon Mutual Ins. Co., 128 Wn.2d 26, 39-40, 904 P.2d 731 (1995); Panorama Village Condominium Owners Ass'n v. Allstate Ins. Co., 144 Wn.2d 130, 144, 26 P.3d 910 (2001). We disagree, however, with the Bakers' assertion that because the trial court failed to award attorney fees at a level commiserate with the contingency fee agreement between the Bakers and HBH, it failed to make them whole and therefore abused its discretion.

¶24 HN5[↑] The starting point, and indeed, the "primary consideration," in determining an appropriate award of attorney fees is reasonableness. Allard v. First Interstate Bank of Washington. N.A., 112 Wn.2d 145, 153, 768 P.2d 998 (1989). Thus, HN6[↑] in order to assure that an insured is made whole under *Olympic Steamship*, the attorney fee award must include all reasonable attorney fees, including all expenses necessary to establish coverage. Panorama Village, 144 Wn.2d at 144.

¶25 HN7[↑] One established method of determining a reasonable attorney fee award is the lodestar method. Mahler v. Szucs, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). Under this method, the trial court first examines the attorneys' billing records and determines the number of hours that were reasonably expended in pursuing the litigation. Mahler, 135 Wn.2d at 433-34. The total number of hours reasonably expended is then multiplied by the reasonable hourly rate of compensation resulting in the lodestar fee. Mahler, 135 Wn.2d at 434. After the lodestar has **[*12]** been calculated, the court may then consider the necessity of adjusting the rate after considering factors not already taken into consideration including the contingent nature of the work. Mahler, 135 Wn.2d at 434: Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 150, 859 P.2d 1210(1993).

¶26 HN8[↑] No Washington court has held the lodestar method is the exclusive method to determine reasonable attorney fees.[5] By the same token, no Washington court has

[4] While Fireman's Fund argues in its briefing before this court that the Bakers were not the prevailing party under the settlement, during oral argument counsel conceded that the Bakers were the prevailing party.

[5] For example, the Bakers' could have presented the trial court with their underlying contingency fee agreement and asked the court to determine if the agreement was reasonable under RPC 1.5(a) (the RPA governing reasonableness of attorney fees), and if so, award the

held that a trial court abuses its discretion by using the lodestar method in order to determine reasonable attorney fees. In this case, the Bakers agreed that the lodestar method was appropriate:

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

The trial court did not abuse its discretion by accepting the Bakers' argument that the lodestar method was proper for determining the Bakers' reasonable attorney fee award under *Olympic Steamship*.

IV

¶27 The Bakers **[*13]** next claim that the trial court abused its discretion by excluding fees for work that were not necessary to pursue the claims against Fireman's Fund. We disagree.

¶28 ***HN9***[↑] Under the lodestar method, "the party seeking fees bears the burden of proving the reasonableness of the fees." *Mahler, 135 Wn.2d at 433-34*. ***HN10***[↑] In determining the base lodestar, the trial court "'must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.'" *Scott Fetzer, 122 Wn.2d at 151* (quoting *Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)*). "The hours reasonably expended must be spent on claims having a 'common core of facts and related legal theories.'" *Pham, 159 Wn.2d at 538* (quoting *Martinez v. City of Tacoma, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996)*). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Mahler, 135 Wn.2d at 434*. The trial court is required to enter findings of fact and conclusions of law. *Mahler, 135 Wn.2d at 435*.

¶29 The Bakers claim that the trial court abused its discretion in excluding or reducing hours billed for four different matters. We address each in turn.

Bakers the agreed one-third of the gross amount recovered from Fireman's Fund for fees. *See Allard, 112 Wn.2d at 152-154* (approving using contingency fee agreement to determine reasonable fees). But this is not what the Bakers did. The Bakers elected to follow the lodestar method.

Fees Related to Tax Foreclosure

¶30 The Bakers' attorney time records show that they spent over 226 hours assessing the Bakers' outstanding tax bill and possible foreclosure on their property **[*14]** over the course of approximately 18 months. When the Bakers notified Fireman's Fund of the tax issue in December 2009, Fireman's Fund agreed to pay the long overdue bill within a week. The trial court excluded 211.7 hours spent on the Bakers' outstanding property tax bill and related foreclosure:

> Claims related to the property tax foreclosure proceedings against the landfill property, for 211.7 hours, totaling $61,280.00. While HBH obtained a favorable result for [the Bakers] by getting Fireman's Fund to pay the outstanding tax bill, this was not an item covered by the applicable insurance policies and should not be included in fees awarded against Fireman's Fund. Arguably it does not fall within the contingent fee agreement HBH had with the Bakers at all.

¶31 The Bakers failed to carry their burden to demonstrate these fees were appropriate. Because Fireman's Fund promptly paid the tax bill after being notified, and the property tax bill was at best tangential to the Bakers' claims against Fireman's Fund, the trial court did not abuse its discretion in denying the 211.7 hours spent on the foreclosure issue.

Fees Related to PRP Claims

¶32 In May 2008, at the Bakers' request, Fireman's Fund agreed **[*15]** to pay Marten Law to prosecute claims against the PRPs. There is no dispute that Fireman's Fund paid Marten Law in full. The Bakers sought recovery for additional attorney fees by HBH for litigation against the PRPs. Fireman's Fund did not oppose some of the claimed fees including time spent attending depositions of witnesses related to the PRP claims, time spent reviewing discovery, or time spent for updates from Marten Law. Fireman's fund did, however, object to time spent by HBH for preparing for depositions, strategy and assessment of claims, hours spent reviewing documents that consultants prepared for Marten Law, and other duplicative tasks. The trial court agreed with Fireman's Fund that some of these hours should be excluded:

> Fees related to [PLPs] which were pursued by [MLG] on behalf of [the Bakers], for 139.4 hours, in the amount of $58,292.50. [The Bakers] have not established that it was necessary to prevail on their insurance claims to incur these attorney hours when [MLG] had been retained by Fireman's Fund to represent them with regard to issues related to the landfill clean-up, including seeking

contribution by third parties.

¶33 The Bakers argue that this time should have **[*16]** been included because the work related to the Bakers' insurance claims against Fireman's Fund. They point to specific entries where the trial court excluded time that was spent on issues relevant to both sets of claims, the Bakers' insurance claims and the PLP litigation led by MLG. The Bakers failed to carry their burden to demonstrate these fees were non-duplicative or necessary for the Bakers' claims against Fireman's Fund.

¶34 The trial court did not abuse its discretion in excluding 139.4 hours for duplicative work related to the PRP claims.

Fees incurred litigating against OneBeacon

¶35 The trial court excluded time spent litigating claims against OneBeacon, another insurer that had issued a policy to the Bakers from 1986 to 1987:

> Fees related to claims against One Beacon, for 142.6 hours, totaling $65,540.00. Plaintiffs have not established that it was necessary for them to pursue these claims when the contribution claims were being handled by [MLG] on behalf of [the Bakers].

¶36 The Bakers argue that excluding time litigating with OneBeacon was error because of the common-fund doctrine: Fireman's Fund is required to pay for the Bakers' fees incurred recovering a contribution from OneBeacon **[*17]** because that contribution ultimately lowered the amount that Fireman's Fund had to pay to Snohomish County. (OneBeacon contributed $300,000 to the County.) The Bakers claim that the trial court's factual mistake about OneBeacon's status—it was an insurer, but the court appeared to treat OneBeacon as if it were a PLP—compounded the court's error.

¶37 Here, excluding time billed on OneBeacon-related work was reasonable. First, ***HN11***[↑] the common-fund doctrine does not apply because in order to create the common fund, the insured must recover from the "at-fault party" and OneBeacon is not the at-fault party. *Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 650, 272 P.3d 802 (2012)*; *see Mahler, 125 Wn.2d at 428* (discussing doctrine in context of insured recovering from tortfeasors, not another insurer).

¶38 Second, Fireman's Fund likely secured its right to contribution from OneBeacon at the time the Bakers tendered their claim to OneBeacon. This right was created by ***HN12***[↑] the continuous-trigger doctrine: when an insured sustains continuous damages all insurers providing coverage for any portion of the total time period of the continuing damage are jointly and severally liable for the entire amount of damage. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Const. Co., Inc., 134 Wn.2d 413, 424, 951 P.2d 250 (1998)*. Here, since the landfill's environmental damage continued over time, under the continuous-trigger **[*18]** doctrine both insurers would have been jointly and severally liable for the entire amount of the damage at the time the Bakers tendered a claim to them.

¶39 Finally, the Bakers' argument that the trial court's factual mistake as to OneBeacon's identity somehow led to it misapplying the common-fund doctrine is unpersuasive. OneBeacon's identity is irrelevant to Fireman's Fund's liability under insurance policies.

¶40 The trial court did not abuse its discretion in excluding 142.6 hours for litigating claims against OneBeacon.

Fees for acting as the Bakers' personal counsel

¶41 The trial court excluded time that HBH spent as the Bakers' personal counsel:

> Fees related to acting as personal counsel for [the Bakers] with regard to tax consequences of the settlement to them and other issues, for 46.7 hours, totaling $21,000.00. These issues were undoubtedly of importance to [the Bakers] but were not necessary to establishing Fireman's Fund[']s obligations under the insurance contracts, and appear to have been incurred after settlement was reached in March 2015.

¶42 The Bakers argue that the lodestar should include time their counsel advised them on the settlement's tax effects for two reasons. First, *Olympic* **[*19]** *Steamship* and the CPA allow a prevailing party to recover all of its fees, not just fees related to liability issues. Second, the *CR 2A* Agreement did not settle the case because payment from Fireman's Fund was contingent on the rest of the parties settling with the Bakers.

¶43 The trial court recognized that the issues regarding the tax consequences of the settlement were important to the Bakers but irrelevant to establishing Fireman's Fund's liability to the Bakers. Further, whether the Bakers would have reneged on the *CR 2A* Agreement had HBH not advised them is irrelevant: the record shows that they settled their claims against Fireman's Fund and that the parties in fact agreed to a settlement in principle.

¶44 The trial court did not abuse its discretion in excluding 46.7 hours for personal counsel.

V

¶45 The Bakers finally claim that the trial court abused its discretion by applying a 1.3 multiplier instead of their

requested 2.5 multiplier. Again, we disagree.

¶46 HN13[] After the court has calculated the lodestar, it may adjust it by applying a multiplier: "the lodestar fee … may, in rare instances, be adjusted upward or downward in the trial court's discretion." *Mahler, 135 Wn.2d at 434*. "Adjustments to the lodestar product are reserved **[*20]** for 'rare' occasions." *Miller v. Kenny, 180 Wn. App. 772, 825, 325 P.3d 278 (2014)*. The lodestar is "presumed to adequately compensate an attorney." *Miller, 180 Wn. App. at 825*.

¶47 HN14[] Courts can adjust the lodestar based on factors not already taken into consideration including, the benefit to the client and the contingency or uncertainty in collecting the fee. *Scott Fetzer, 122 Wn.2d at 150*.

¶48 The trial court agreed with the Bakers that the reasonable hourly rate did not reflect the quality of the work performed. The court disagreed, however, that the Baker's requested 2.5 times multiplier was appropriate and instead applied a 1.3 multiplier. The court explained:

> while this case was complicated by long delays in part due to waiting on decisions from the Washington State Department of Ecology, the number of parties, and the combination of claims, it did not present complex or novel issue with regard to the insurance coverage issues. Furthermore, the probability of ultimately prevailing on the coverage issues was high because of Fireman's Fund's lack of responsiveness to Plaintiffs' inquiries from 2001 to 2005 and early assertions that there was no coverage under the policies. There is no evidence that HBH was required to turn down other profitable work because of this case.
>
> After considering the entire record, **[*21]** the court is not persuaded that Plaintiffs have established that a 2.5 multiplier is appropriate. However, the court concludes that it is appropriate to take into account the exceptionally long pendency of this case during which time HBH received no payment of fees or reimbursement for costs, the exceptionally favorable result which they obtained on behalf of their clients, and the risk (albeit not large) that no recovery might be obtained. For these reasons, the court concludes a multiplier of 1.3 is supported by the record. This results in an attorney fee award of $1,209,757.25.

¶49 The court awarded a multiplier because of "the risk (albeit not large) that no recovery might be obtained," the length of time it took to resolve, and that HBH recovered no fees or costs for up to nine years. This are proper reasons supporting a multiplier. *Scott Fetzer, 122 Wn.2d at 150*. The court's decision also took into account the contingent nature of the Bakers' fee agreement. The court's decision is supported by its finding and substantial evidence. The trial court did not abuse its discretion in awarding a 1.3 times multiplier to the lodestar fee.

VI

¶50 Fireman's Fund cross appeals and challenges (1) the trial court's failure to deduct **[*22]** hours for additional unsuccessful, duplicated, and unproductive work, and (2) the hourly rates approved for the Bakers' attorneys. We address each in turn.

Additional Exclusions

¶51 Fireman's Fund claims first that the trial court erred in approving the following additional fees claimed by the Bakers: (1) 43 hours spent on a motion for summary judgment that was never filed; (2) time spent consulting with the Bakers regarding settlements that had already been agreed to; (3) time spent submitting claims for other defense expenses after the parties had settled; and (4) communications and meetings with the assessor's office and environmental consultants. We disagree.

¶52 The trial court rejected Fireman's Fund's argument that this work should be excluded:

> Fireman's Fund has asserted that other fees should also be deducted. These include fees they designate as administrative, correcting discovery responses, duplicative/excess time, unnecessary/unsuccessful, vague[,] and not apparently related to the claims against Fireman's Fund. The court does not agree. For example, counsel is required to correct and supplement discovery responses. The charge for this is minimal, and the need is not out of line with **[*23]** what occurs in many cases. The time spent on researching a motion for summary judgment is not unreasonable and cannot be said to be unnecessary. The benefits of such research would still be applicable for trial and mediation of claims.

¶53 The record before us demonstrates that the court considered the entire record and found that this work by the Bakers' attorneys was reasonable and necessary. While Fireman's Fund disagrees with the court's decision, it fails to show that the court's decision was manifestly unreasonable. The trial court did not abuse its discretion in excluding hours from the lodestar.

Hourly Rates

¶54 Fireman's Fund claims that it was error to calculate the

lodestar without evidence of HBH's actual hourly rates. We disagree.

¶55 HN15[] When attorneys have an established rate for billing clients, that rate is likely a reasonable rate. *McGreevy, 90 Wn. App. at 283* (citing *Bowers, 100 Wn.2d at 597*). The usual rate is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment. The court may also consider the level of skill, time limits imposed by the litigation, the attorney's reputation, and the undesirability of the case, and on local rates charged by attorneys with similar skills and experience. *McGreevy, 90 Wn. App. at 293*; *Miller, 180 Wn. App. at 820-21*.

¶56 Here, **[*24]** the Bakers did not offer evidence of actual hourly rates charged by HBH. As the trial court explained, the fee agreement between the Bakers and HBH was contingent and consequently, HBH was not charging an hourly rate for its work for the Bakers. Instead, the trial court based its determination of relevant rates on declarations from several local attorneys that do similar work in the relevant legal community. The trial court concluded: "Based on the evidence presented, the hourly rates set forth above are reasonable for the type of legal work performed in this case in the Puget Sound legal community for attorneys and paralegals of similar skill, experience, and reputation." The trial court's determination of reasonable hourly rates was supported by substantial evidence and was not an abuse of discretion.

¶57 We affirm the trial court's fee award.[6]

LEACH and DWYER, JJ., concur.

End of Document

[6] The Bakers request attorney fees on appeal "pursuant to *Olympic Steamship* and the [CPA] and *RAP 18.1*." We decline to award the Bakers fees because they do not prevail.

HACKETT BEECHER & HART

October 17, 2018 - 2:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76218-4
Appellate Court Case Title:	Ronald A. Baker and Joyce Baker, Apps. v. Fireman's Fund Ins. Co., et al., Res.
Superior Court Case Number:	07-2-04798-9

The following documents have been uploaded:

- 762184_Petition_for_Review_20181017135833D1095141_1686.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dbowzer@cozen.com
- devlinj@lanepowell.com
- jbeecher@hackettbeecher.com
- jkray@martenlaw.com
- jmcdougall@cozen.com
- kevinsmith@cozen.com
- meckman@cozen.com
- mheld@co.snohomish.wa.us
- mmyers@williamskastner.com
- mmyers@wkg.com
- nesteroffm@lanepowell.com

Comments:

Sender Name: Brent Beecher - Email: bbeecher@hackettbeecher.com
Address:
601 UNION ST STE 2600
SEATTLE, WA, 98101-2302
Phone: 206-624-2200

Note: The Filing Id is 20181017135833D1095141