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NO. 66569-3-I

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

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BIRHANE JENBERE, an individual,  
  
Respondent,

vs.

CHRISTINA LASSEK and "JOHN DOE" LASSEK, wife and husband, both  
individual and on behalf of their marital community composed thereof,  
  
Appellants.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Joan E. DuBuque, Judge

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BRIEF OF APPELLANTS

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## I. NATURE OF THE CASE

This case presents the question of whether a \$5,500 offer of judgment that expressly said it was “inclusive of any and all attorney fees and costs” really is inclusive of any and all attorney fees and costs. The trial court did not think so and awarded plaintiff \$74,965 in attorney fees and costs.

## II. ASSIGNMENTS OF ERROR<sup>1</sup>

The trial court erred in—

A. Entering the Judgment of MAR Attorneys Fees Against Defendant Lassek (CP 74-75);

B. Ordering that “Defendant pay Plaintiff’s MAR 7.13 [*sic*] and RCW 7.06.060 attorney fees in the amount of \$31,255, with a Lodestar multiplier of 2.0 resulting in an additional \$31,225 in attorney’s fees, for a total attorneys fee award of \$62,510” (CP 65);

C. Ordering that “Defendant pay Plaintiff’s MAR 7.13 [*sic*] and RCW 7.06.060 post judgment attorney fees in the amount of \$10,930” (CP 65);

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<sup>1</sup> A copy of the trial court’s Findings of Fact, Conclusions of law, Order for Fees and Judgment is included in the Appendix hereto.

D. Ordering that “Defendant pay Plaintiff’s MAR 7.13 [*sic*] and RCW 7.06.060 post arbitration costs in the amount of \$1,525” (CP 66);

E. Ordering that “Plaintiff shall have judgment entered against defendant in the total amount of **\$74,965.00**” (CP 66);

F. Entering Finding of Fact 4 (CP 63);

G. Entering Finding of Fact 5 (CP 63);

H. Entering Finding of Fact 6 (CP 64);

I. Entering Finding of Fact 7 (CP 64);

J. Entering Finding of Fact 8 (CP 64);

K. Entering Conclusion of Law 1 (CP 64);

L. Entering Conclusion of Law 2 (CP 64);

M. Entering Conclusion of Law 3 (CP 64-65);

N. Entering Conclusion of Law 4 (CP 65);

O. Entering Conclusion of Law 5 (CP 65);

P. Entering Conclusion of Law 6 (CP 65);

Q. Entering Conclusion of Law 7 (CP 65).

### **III. ISSUES PRESENTED**

A. Is an offer of judgment that expressly states that it is “inclusive of any and all attorney fees and costs” really inclusive of any and all attorney fees and costs, particularly, where the offering party

clarifies in writing to the accepting party that the offer “is all inclusive and not just limited to the cited rcw [sic] attorney fees provisions”?

B. If not, was the \$74,965 attorney fees award reasonable?

#### IV. STATEMENT OF THE CASE

Plaintiff/respondent Birhane Jenbere sued defendant/appellant Christina Lassek for damages arising out of an automobile accident. (CP 3-7) The case was submitted to mandatory arbitration. (CP 13, 62) The arbitrator awarded plaintiff \$9,242.22. (CP 15, 62)

Defendant Lassek timely filed a request for trial de novo. (CP 18, 62) In September 2010 plaintiff made an offer of compromise for \$4,999. (CP 37, 62, 110) The offer was not accepted. (CP 37, 62-63, 110)

Trial was scheduled for November 15, 2010. (CP 37) On or about November 3, 2010, defendant Lassek made an offer of compromise, which provided in pertinent part as follows:

COMES NOW Defendant Lassek by and through her attorneys of record, and pursuant to Rule 68 of the Civil Rules for Superior Court in the State of Washington, and pertinent statute, including but not limited to Chapters 4.84.250 through RCW 4.84.300 of the Revised Code of Washington, if applicable, and hereby offers to allow judgment to be taken in the above matter in the amount of **Five Thousand Five Hundred Dollars and 00 cents (5,500.00) inclusive of any and all attorney fees and costs, any and all special damages, any and all general damages, and any and all property damages.**

(CP 51) (boldface plain type in original; boldface italics added).

On November 9, 2010, plaintiff's counsel asked defense counsel whether the "any and all attorney fees" referred to in the offer meant "specifically . . . any and all fees available under 4.84.250-300". (CP 53) Defense counsel replied, "That offer is all inclusive and not just limited to the cited rcw [*sic*] attorney fees provisions." (CP 53) Thereafter, plaintiff accepted the offer without any conditions or amendments. (CP 31, 111)

On November 10, 2010, defendant Lassek's insurance company issued a check for the agreed \$5,500. (CP 50, 54) Judgment for \$5,500 was entered. (CP 34-35) Satisfaction of judgment was filed. (CP 36)

Despite the fact that the offer of judgment had expressly been "inclusive of any and all attorney fees and costs", plaintiff then moved for attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. (CP 88-99) The law firm representing plaintiff had used two attorneys with hourly rates of \$350 and \$175. The attorneys claimed that they had spent 142.8 hours on the case, from the trial de novo notice through judgment, resulting in a lodestar fee amount of \$31,255. (CP 98) They requested a multiplier of 2 based on the quality of work and the contingent nature of success. (CP 98-99) They also said they had spent 42.5 hours on the attorney fees issue, and asked for an additional \$10,270 therefor. (CP 99)

Because the offer of judgment had been "inclusive of any and all attorney fees and costs," defendant Lassek objected to any additional

award of attorney fees. (CP 37-54) In addition, she argued that the fee request was not reasonable. (CP 38)

The trial court awarded all fees requested by the plaintiff, increased by the 2.0 multiplier suggested by his attorneys. Also awarded were \$10,930 in fees for litigating the attorney fee issue, and \$1,525 in costs. (CP 65-66) Judgment for the total of fees and costs, \$74,965, was entered. (CP 74-75)

## V. ARGUMENT

### A. PLAINTIFF WAS NOT ENTITLED TO AN ADDITIONAL AWARD OF ATTORNEY FEES AND COSTS.

The issue in this case is whether plaintiff is entitled to additional attorney fees and costs or whether, by accepting the CR 68 offer of judgment that was ““inclusive of any and all attorney fees and costs”, plaintiff is precluded from recovering any additional fees and costs. Whether a party is entitled to an award of attorney fees and costs is a question of law subject to *de novo* review. *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 643, 151 P.3d 211 (2007). Further, the construction of a CR 68 offer is also reviewed *de novo*. *Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 266, 131 P.3d 910 (2006), *rev. denied*, 158 Wn.2d 1027 (2007).

A leading treatise on Washington civil procedure explains what happens vis-à-vis attorney fees when, as here, a plaintiff accepts a defendant's offer of judgment that expressly includes attorney fees:

[I]f attorney fees are authorized by applicable law (or by a contract between the parties, or by equitable principles), the next question is whether the amount offered by D included attorney fees. If the amount included attorney fees, P receives whatever was offered by D ***and no additional amount for attorney fees***. However, if D's offer was silent on whether it included attorney fees, and P clearly and unequivocally accepted D's offer, then P is entitled to the amount offered *plus an additional amount* to cover the attorney fees to which P is entitled under applicable law (or contract, or equitable principles).

4 K. Tegland, WASHINGTON PRACTICE *Rules Practice* 75-76 (2010 pocket part) (boldfaced italics added; italics in original).

In this case, attorney fees were authorized by applicable law, namely, RCW 7.06.060 and MAR 7.3. Under the statute and the rule, costs and reasonable attorney fees are chargeable against a party who appeals a mandatory arbitration award, but fails to improve her position on the trial de novo. Where, as here, the plaintiff made an offer of judgment that was not accepted prior to accepting the defense's offer of judgment, RCW 7.06.050(1)(b) provides:

In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party

appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

Accordingly, because the offer of judgment that plaintiff accepted—\$5,500—was more than plaintiff's earlier \$4,900 offer of judgment to defendant Lassek, which was not accepted, plaintiff would have been entitled to attorney fees and costs under RCW 7.06.060 and MAR 7.3, *if the accepted offer of judgment did not preclude his recovering any such additional fees and costs*. See *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005) (attorney fees under MAR 7.3 awardable even if no trial de novo occurs). As will be discussed, by accepting the offer of judgment that specified it was “inclusive of any and all attorney fees and costs”, plaintiff could not recover any additional attorney fees and costs thereafter.

**1. The CR 68 Offer of Judgment Was “Inclusive of Any and All Attorney Fees and Costs.”**

CR 68 provides in pertinent part as follows:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. . . . The fact that an offer is made but not accepted does not preclude a subsequent offer. . . .

Here, there is no dispute that more than 10 days before trial, defendant Lassek made an offer of judgment for \$5,500 “inclusive of any and all attorney fees and costs.” (CP 32-33, 37) There is also no dispute that within 10 days after the service of the offer, plaintiff served a written notice that the offer was accepted. (CP 31) Judgment for \$5,500 was thereafter entered. (CP 34-35)

The issue here is whether the offer of judgment was “inclusive of any and all attorney fees and costs”, or whether plaintiff was entitled to recover additional attorney fees and costs, over and above whatever was included in the \$5,500 offer of judgment despite it being “inclusive of any and all attorney fees and costs.”

*Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006), *rev. denied*, 158 Wn.2d 1027 (2007), provides a helpful comparison. In that case, the plaintiff contractor sued the defendant property owner for \$1,824.48 owed for contracting work. The property owner counterclaimed for breach of contract and various torts.

Two weeks before trial, the plaintiff contractor made a \$4,500 offer of judgment. A few days later, the plaintiff contractor sent a letter stating it would also dismiss its collection claim if the property owner accepted the offer of judgment in writing.

The property owner accepted the offer. The plaintiff contractor accordingly dismissed its complaint and the property owner moved for entry of judgment for \$4,500. It also moved for an award of \$68,000 in attorney fees, based on attorney fee provisions in the parties' contract. The trial court awarded the property owner \$38,000 in attorney fees.

The issue, as here, was whether the offer of judgment included attorney fees. ***Unlike here, the offer did not mention attorney fees.***

Thus, the court explained:

If a CR 68 offer of judgment is silent on the issue of attorney fees, then the court must look to the underlying statute or contract provision. If the statute or contract defines attorney fees as part of costs, then the offer of judgment is inclusive of attorney fees even though they are not mentioned. If the attorney fees are defined as separate from costs under the statute or contract, then the court must award those fees in addition to the amount of the offer.

132 Wn. App. at 267 (footnote omitted). Because the applicable attorney fee provision in the parties' contract treated attorney fees as separate from costs, the court ruled that the offer of judgment did not include fees, so that the property owner could recover attorney fees. *See also Hodge v. Development Services of America*, 65 Wn. App. 576, 828 P.2d 1175 (1992).

*McGuire v. Bates*, 169 Wn.2d 185, 234 P.3d 205 (2010), is also illustrative. In that case, while mandatory arbitration was pending, the

plaintiff accepted a \$2,180 offer of settlement for “all claims.” Thereafter, the plaintiff asked the arbitrator to award attorney fees pursuant to a statute. The arbitrator denied the request on the ground that the settlement had included plaintiff’s request for fees. The plaintiff then requested a trial de novo. The trial court awarded her fees.

The Washington Supreme Court reversed. Noting that “[t]he settlement offer . . . was not silent regarding attorney fees,” the court ruled that “the settlement offer that was accepted . . . settled ‘all claims’ and one of the claims was for attorney fees.” 169 Wn.2d at 198.

In the preceding cases, the offers of judgment did not expressly mention the phrase “attorney fees.” Because of the confusion surrounding whether a CR 68 offer of judgment includes attorney fees, this court has declared:

Accordingly, it would be prudent practice and we strongly recommend that where a defendant intends that his offer shall include any attorneys’ fees provided for in the underlying statute he expressly so state. His offer should say, “costs including attorneys’ fees” or words to that affect [*sic*].

*Hodge*, 65 Wn. App. at 584.

That is exactly what defendant Lassek here did. Her offer of judgment expressly stated that it was “*inclusive of any and all attorney fees and costs*” (emphasis added).

“All” means all. The dictionary defines “all” to mean “: the whole amount, quantity, or extent of”. <http://www.merriam-webster.com/dictionary/all>. Indeed, as discussed *supra*, the Washington Supreme Court has held that “all claims” “encompasses all claims” including claims for attorney fees. *McGuire*, 169 Wn.2d at 190-91. *See also S.S. Mullen, Inc. v. Marshland Flood Control District*, 67 Wn.2d 461, 464, 407 P.2d 990 (1965) (“all applicable . . . taxes’ encompass[es] every conceivable tax . . .”) (emphasis omitted); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997) (“plain and ordinary meaning of [“all”] is ‘[b]eing or representing the entire or total number, amount, or quantity’), *rev. denied*, 132 Wn.2d 1013 (1997). Since the offer of judgment in *McGuire* for “all claims” was deemed to include attorney fees, surely the offer of judgment here, which said it was “inclusive of any and all attorney fees and costs”, must as well.

Even if “inclusive of any and all attorney fees and costs” were ambiguous, which it is not, any ambiguity was cleared up by the exchange between the parties’ counsel. Before accepting the offer, plaintiff’s counsel asked defense counsel whether the “any and all attorney fees” used in the offer referred “specifically to any and all fees available under 4.84.250-300”. (CP 53) Defense counsel replied, “That offer is *all*

*inclusive* and *not just limited* to the cited rcw [sic] attorney fees provisions.” (CP 53) (emphasis added).

If plaintiff wanted to preserve his right to seek additional fees, he could have made a counteroffer that expressly reserved that right. *See, e.g., Dussault v. Seattle Public Schools*, 69 Wn. App. 728, 850 P.2d 581 (1993), *rev. denied*, 123 Wn.2d 1004 (1994); *Hodge v. Development Services of America*, 65 Wn. App. 576, 581-82, 828 P.2d 1175 (1992). He did not. Instead, he accepted the offer unconditionally. (CP 31, 111)

Any offer to settle for a sum certain “inclusive of any and all attorney fees and costs” means that the offer includes “any and all attorney fees and costs.” The trial court erred in awarding plaintiff additional attorney fees and costs beyond the judgment for \$5,500.

## **2. Conclusions of Law 1- 3 Are Erroneous.**

In Conclusion of Law 1, the trial court held that plaintiff was entitled to additional attorney fees and costs. (CP 64) It reached this conclusion by ruling in conclusions of law 2 and 3 that *McGuire* does not apply, but *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005), does. (CP 64-65) The trial court was wrong.

The trial court stated that *McGuire* did not apply because (1) attorney fees are not included within the definition of costs under MAR 7.3 and RCW 7.06.060, (2) *McGuire* involved a settlement agreement

rather than a CR 68 offer of judgment, and (3) the judgment for the agreed \$5,500 included only \$200 statutory attorney fees. None of these grounds supports the trial court's conclusion that plaintiff was entitled to additional attorney fees and costs.

First, while it is true that MAR 7.3 and RCW 7.06.060 treat attorney fees as separate from costs, that fact is irrelevant in this case. It is irrelevant because the CR 68 offer of judgment expressly stated that the offer was for \$5,500 "inclusive of any and all attorney fees and costs." Whether MAR 7.3 and RCW 7.06.060 treat attorney fees separately from costs is material only when an offer of judgment or settlement offer does not expressly include attorney fees and costs. "*When an offer of judgment pursuant to CR 68 is silent on attorney fees* and the contract or statute underlying the offer defines attorney fees as costs, the offer is construed to include attorney fees." *McGuire*, 169 Wn.2d at 189 (footnote omitted; emphasis added); *Seaborn*, 132 Wn. App. at 267.

Second, although *McGuire* did involve a settlement offer rather than a CR 68 offer of judgment, that is a distinction without a difference where, as here, the issue is whether, by its terms, defendant Lassek's \$5,500 offer included attorney fees and costs. "Settlements are a form of contract and proceedings under CR 68 are essentially contractual in

nature.” *Hodge v. Development Services of America*, 65 Wn. App. 576, 581-82, 828 P.2d 1175 (1992).

Finally, the \$5,500 judgment does not mention attorney fees, one way or the other. Only the judgment summary, mandated by RCW 4.64.030, breaks down the \$5,500 into a \$5,300 principal amount and \$200 statutory attorney fees. (CP 34-35)

The judgment summary is irrelevant, because the offer itself specifically said that it was “inclusive of any and all attorney fees and costs”, defense counsel expressly advised plaintiff’s counsel that that meant the offer was “all inclusive and not just limited to the cited rcw [*sic*] attorney fees provisions”, and the plaintiff thereafter accepted the offer unconditionally. (CP 53)

The trial court erred in holding that *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005), is controlling. The principal issue in *Do* was whether a CR 68 offer of judgment made after a trial de novo request following mandatory arbitration “is sufficiently like a voluntary withdrawal to qualify for discretionary attorney fees instead of mandatory ones.” *Id.* at 186.

Furthermore, unlike the offer of judgment here, the offer of judgment in *Do* did not specifically mention attorney fees. There was no argument that the offer impliedly included attorney fees. Thus, whether

the CR 68 offer of judgment in *Do* was inclusive of “any and all” attorney fees, as is the offer of judgment in the instant case, was not at issue.

**B. EVEN IF PLAINTIFF WERE ENTITLED TO AN ADDITIONAL AWARD OF ATTORNEY FEES AND COSTS, THE AWARD WOULD BE UNREASONABLE.**

Even if plaintiff were entitled to an additional award of attorney fees and costs, he would be entitled only to “costs and *reasonable* attorney fees.” MAR 7.3 (emphasis added). While the size of recovery is not dispositive as to the amount of reasonable attorney fees awarded, it is a “vital consideration” when determining their reasonableness. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993); see *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 666, 989 P.2d 1111 (1999). As will be discussed, the fee and cost amount awarded here—\$74,965—for a claim that settled for \$5,500, was unreasonable.

Significantly, the Washington Supreme Court has declared:

Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.

*Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998) (emphasis in original). Thus, whether a fee is reasonable is “an independent determination to be made by the awarding court.” *McGreevy v. Oregon Mutual Insurance Co.*, 90 Wn. App. 283, 291, 951 P.2d 798 (1998).

In general, Washington law on how to calculate attorney fee awards is well-established. First, the court must calculate a lodestar fee, by determining the number of hours *reasonably* expended and multiplying that number by a reasonable hourly rate. *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

Second, after the lodestar is calculated, the court may consider whether to adjust it upwards or downwards “to reflect factors not considered up to this point.” *Bowers*, 100 Wn.2d at 598. However, Indeed, the Washington Supreme Court has cautioned, “Adjusting the lodestar amount upward or downward is appropriate ‘in rare instances.’” *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000) (quoting *Mahler*, 135 Wn.2d at 434).

**1. The 2.0 Multiplier Was Unwarranted.**

As will be discussed *infra*, the lodestar fee calculated by the trial court was not reasonable. But even if it were, the trial court erred in applying a 2.0 multiplier.

Once a lodestar is calculated, the court may adjust it upward or downward, based on the contingent nature of success and the quality of the work performed. *Bowers*, 100 Wn.2d at 598. There is, however, a presumption that the lodestar amount represents a reasonable fee. *Xieng v.*

*People's National Bank*, 63 Wn. App. 572, 587, 821 P.2d 520 (1991),  
*aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993).

“The burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation.” *Bowers*, 100 Wn.2d at 598 (quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980)). Thus, it was plaintiff here who bore the burden of justifying any multiplier.

“Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed.” *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007) (quoting *Bowers*, 100 Wn.2d at 598)). Here, Findings of Fact 6 and 7 and Conclusion of Law 7 provide (CP 64, 65):

6. The Court finds that the Lodestar should be adjusted upwards to reflect the contingent nature of this case and the various difficulties Plaintiff faced in the course of prosecuting this case. The Court further finds that the quality of work performed on this case by Plaintiff's counsel, based upon the record before the Court, to be of high quality. The Court further finds that the stated legislative intent behind MAR 7.13 [*sic*] is to reduce court congestion. While the Defendant did make an Offer of Judgment and a trial was avoided, it nevertheless waited until the last day to serve the Offer of Judgment, adding to the court congestion problem and increasing the costs and fees of Plaintiff unnecessarily, particularly when it could have accepted a less expensive Offer of Compromise of \$4,999 much earlier and avoided further judicial proceedings.

7. The Court therefore finds that a Lodestar multiplier of 2.0 is appropriate in this case. However, the multiplier

shall only apply to the fees incurred up to the acceptance of the Offer of Judgment.

....

7. The Court further finds as a matter of law that under the factors enumerated in *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597-602 (1983), and all the factors provided by Plaintiff in his Motion and supporting Declarations, as well as considerations of resolving Court congestion, a Lodestar multiplier of 2.0 is appropriate here.

The trial court abused its discretion in applying the multiplier.

**a. The Quality of Work Did Not Justify a Multiplier.**

“The quality of the work supports an adjustment to the lodestar figure only when the representation is *unusually* good or bad considering the skill level normally expected of an attorney with the hourly rate used to compute the lodestar.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342, 54 P.3d 665 (2002) (emphasis added). Quality of work is “an *extremely limited* basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate.” *Bowers*, 100 Wn.2d at 599 (emphasis added).

For example, in *Travis v. Washington Horse Breeders Association*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988), the trial court applied a 1.5 multiplier after finding that the quality of counsel’s work was “of extremely high quality.” The Washington Supreme Court ruled that the multiplier was not warranted because there was no finding that the quality

of work was “unusually good” or “exceptional” or words to that effect. *Id.* Accordingly, the quality of work is “an extremely limited basis for adjustment.” *Bowers*, 100 Wn.2d at 599.

Here, Finding of Fact 6 found merely that the quality of work performed by plaintiff’s counsel was “of high quality.” (CP 64) There was no finding that it was unusually good or exceptional or any words to that effect.<sup>2</sup> Because *Travis* held that a 1.5 multiplier was not warranted when the quality of work was “of extremely high quality”, the 2.0 multiplier here cannot be warranted by the trial court’s finding that the quality of work was “of high quality”.

**b. The Contingent Nature of Success Did Not Warrant the Multiplier.**

Plaintiff had a contingent fee agreement with his attorneys. ““The existence of a contingent fee agreement may be considered as one of several factors in making an award of attorneys’ fees, but it alone is not determinative.”” *McGreevy v. Oregon Mutual Insurance Co.*, 90 Wn. App. 283, 294, 951 P.2d 798 (1998). Thus, this court has rejected the argument that a multiplier must be awarded whenever an attorney is on a contingent fee agreement. *See Faraj v. Chulisie*, 125 Wn. App. 536, 551, 105 P.3d

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<sup>2</sup> This is not surprising given that the plaintiff ended up with roughly \$3,750 less than what the arbitrator had awarded. (CP 15, 31)

36 (2004). For example, to the extent the attorney's hourly rate takes into account the contingent nature of the availability of fees, no further adjustment should be made. *Bowers*, 100 Wn.2d at 599.

There was no evidence here that plaintiff's attorneys' hourly rates did not take into account the contingent nature of their fees. Indeed, plaintiff's attorney testified that he worked "100% of the time on a contingency basis" and that his \$350 hourly rate and the \$175 hourly rate for his associate was warranted in part because of "what are reasonable hourly rates for experienced trial lawyers with similar personal injury experience." (CP 114, 116)

**c. The Trial Court's Other Factors Did Not Warrant the Multiplier.**

In addition to the quality of work and contingent nature of success factors, the trial court appeared to award the 2.0 multiplier based on other considerations. For example, Finding of Fact 6, finding that a multiplier was warranted, also stated that the purpose of MAR 7.3 was to reduce court congestion and that, by making the offer of judgment on "the last day", the defense added to court congestion and unnecessarily increased plaintiff's fees and costs. (CP 64) Conclusion of Law 7 also mentioned "resolving Court congestion" as a factor in awarding the 2.0 multiplier. (CP 65)

This was hardly surprising since plaintiff's counsel, in his declaration supporting the attorney fee request, testified:

A Lodestar multiplier of 2.0 *would serve as a deterrent* to Geico to keep appealing cases such as this, or attempting to manipulate the CR 68 Offer of Judgment rule to try and insulate itself from payment of MAR fees. More importantly, it *would send a clear message to Geico* that the judicial system simply cannot tolerate any further abuses given the dire financial situation the courts find themselves in. . . . .

(CP 116) (emphasis added). Indeed, a substantial part of counsel's declaration consisted of a diatribe against insurance companies including but not limited to Allstate, which has nothing to do with this case. (CP 103-05, 107)

"Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." *Bowers*, 100 Wn.2d at 598. "In considering the propriety of a contingency adjustment, . . . the trial court abuses its discretion when it takes irrelevant factors into account." *Chuong Vam Pham v. Seattle City Light*, 159 Wn.2d 527, 543, 151 P.3d 976 (2007).

Alleviating court congestion, while a worthy goal, is not a factor relevant to awarding a multiplier for attorney fees. Punishing defendant Lassek's insurance company is also not a relevant factor. *Cf. Ketchum v. Moses*, 24 Cal. 4<sup>th</sup> 1122, 1139, 17 P.3d 735, 104 Cal. Rptr. 2d 377, 392

(2001) (lodestar adjustment should not be imposed to punish the losing party). If, as plaintiff claims, the defense took positions that increased the time plaintiff's counsel had to spend on the case, that time was reflected in the lodestar amount. *See Orshan v. Macchiarola*, 629 F. Supp. 1014, 1024 (E.D. N.Y. 1986).

**2. The Number of Hours Was Excessive.**

In any event, the lodestar fee calculated by the trial court was unreasonable because the number of hours was excessive.

To calculate the lodestar fee, the court must determine the number of hours *reasonably* expended and multiply that number by a reasonable hourly rate. *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Unsuccessful claims, duplicated effort, or otherwise unproductive time must be eliminated. *Bowers*, 100 Wn.2d at 597.

The number of hours a law firm can bill is not determinative. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Rather, attorneys must "exercise 'billing judgment' in fees requests so as to avoid a costly second major litigation." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993).

In this appeal, defendant Lassek does not dispute the reasonableness of the hourly rates claimed: (a) \$350 for Mr. Blair, the

principal of plaintiff's law firm who, at the time, had been in practice for 27 years, 21 of which focused on personal injury and insurance bad faith work, and (b) \$175 for Mr. Nauheim, Mr. Blair's associate, who at the time was, in his own words, "a new attorney with one year of experience." (CP 98, 101, 174) Contrary to Finding of Fact 4 and 8, however, the total number of hours spent was unreasonable.

This was a relatively small personal injury case arising out of a motor vehicle collision. The arbitrator had awarded \$9,242.22. After the trial de novo was filed, plaintiff was willing to take \$4,999 and ultimately settled for \$5,500.

Yet between the time the request for trial de novo was filed and judgment was entered, plaintiff's two attorneys spent 142.8 hours. (CP 98) They incurred an additional 42.5 hours on their attorney fees motion. (CP 99)

Because Mr. Blair decided to allow his first-year associate to handle the case, significant time was spent on overseeing the associate's work. Thus, the two attorneys spent a total of 10.1 hours in conference with each other:

8/4/2010	Nauh & Blair conf re: whether to hire an expert to counter Tencer	0.2	\$105.00
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8/6/2010	Nauh & Blair conf re: how to comply w/ADR mediation requirements	0.2	\$105.00
8/16/2010	Conf w/Blair re: dep and litigation/discovery strategy	0.2	\$105.00
8/23/2010	Conf w/Blair re: Def's RFAs: CR 35 exam	0.2	\$105.00
9/3/2010	N/B conf re: offer of compromise	0.1	\$52.50
9/9/2010	N/B conf re: possible SJM, Mot to strike tencer	0.2	\$105.00
9/15/2010	N/B conf re: Jenbere	0.6	\$315.00
9/16/2010	Conf N/B re: Dr. Jackson report et al	0.1	\$52.50
9/23/2010	Conf w/Blair re: litigation strategy regarding Dr. Jackson's report	0.1	\$17.50
9/23/2010	N/B conf re: litigation strategy, MIL's, witness examination ideas	0.8	\$420.00
10/4/2010	N/B conf re.: Def's ER 904s	0.1	\$52.50
10/12/2010	N/B conf re Tencer motion strategy	0.2	\$105.00
10/14/2010	N/B conf re: voir dire; judicial settlement conf	0.4	\$210.00
10/14/2010	N/B conf re: ER904s and objection	0.3	\$157.50
10/18/2010	N/B conf re: Trial strategy	0.5	\$262.50

10/19/2010	N/B conf re: Velasco perp de [sic]	0.1	\$52.50
10/20/2010	N/B conf: re litigation strategy	0.9	\$472.50
10/20/2010	N/B conf w/scott re: def counsel's 10/20 letter	0.1	\$52.50
10/20/2010	N/B conf re: Velasco dep	0.4	\$210.00
10/21/2010	N/B discuss litigation strategy, voir dire, examination of wits etc.	0.4	\$210.00
10/22/2010	N/B conf on Mengistu[] examination	0.2	\$105.00
10/22/2010	Conf re: Mengistu dep; Velasco dep	0.5	\$262.50
10/25/2010	N/B conf: re Mengistu dep	0.3	\$157.50
10/26/2010	N/B conf re: litigation strategy - theme	0.3	\$157.50
10/27/2010	N/B discuss litigation strategy	0.3	\$157.50
11/3/2010	Conf on Offer of Judgment, MIL etc.	0.5	\$262.50
11/3/2919	Conf re: litigation strategy	0.5	\$262.50
11/8/2010	N/B conf re: joint statement of evidence	0.1	\$52.50

11/8/2010	N/B conf re: dealing with objections in perpetuation dep – notice of intent to offer deps	0.2	\$105.00
11/8/2010	N/B conf re: Offer of Judgment	0.4	\$210.00
11/9/2010	N/B conf on OoJ vs. continuance	0.2	\$105.00
11/10/2010	B/B <sup>3</sup> conf re: motion for entry judgment	0.3	\$157.50
11/16/2010	N/B conf on attorney fees motion	0.2	\$105.00
TOTAL		10.1	\$5,267.50

(CP 132-39)

While a first-year associate, confronted with the possibility of his first jury trial, no doubt needs training and supervision from a more experienced attorney, the question here is who should pay for it. Many courts have ruled that in-house conferences, particularly between a senior attorney and an inexperienced associate, are not properly recoverable. *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 514 (D. Md. 2005); *Heavener v. Meyers*, 158 F. Supp. 2d 1278, 1282-83 (E.D. Okla. 2001); *In re Maruko, Inc.*, 160 B.R. 633, 641 (S.D. Cal. 1993); *O’Rear v.*

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<sup>3</sup> The “B/B” appears to be a typographical error and should have read “N/B”.

*American Family Life Assurance Co.*, 144 F.R.D. 410, 415 (M.D. Fla. 1992). As one court has explained:

While training and reviewing the work of associates . . . are necessary functions, the costs associated therewith are expenses to the firm. They should not be born by its clients. Clients expect and are entitled to a certain level of expertise. It is up to the professional firm to train and oversee its staff in order to provide that level of service.

*In re Big Rivers Electric Corp.*, 233 B.R. 768, 780 (W.D. Ky. 1999), *rev'd on other grounds*, 252 B.R. 393 (W.D. Ky. 2000); *accord In re New Boston Coke Corp.*, 299 B.R. 432, 445 (E.D. Mich. 2003).

In addition, plaintiff's attorneys sought *attorney* fees for "travel to Mary Owen to serve acceptance of OoJ" and "[t]ravel to court house to file mot to shorten time—then to Mary Owen to serve order."<sup>4</sup> (CP 138-39) In other words, plaintiff's lawyers used *a lawyer* to deliver their acceptance of the defense's offer of judgment (OoJ), and to file and serve their motion to shorten time, at a cost of \$122.50 and \$175, respectively. (CP 138-39)

Moreover, plaintiffs' attorneys sought payment for 45.2 hours—more than a week—on the attorney fees issue. (CP 99) The Washington Supreme Court has cautioned that an attorney fees dispute should not turn

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<sup>4</sup> Mary Owen is one of the trial attorneys for defendant Lassek.

into “a costly second major litigation.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993).

*Steele v. Lundgren*, 96 Wn. App. 773, 982 P.2d 619 (1999), *rev. denied*, 139 Wn.2d 1026 (2000), presents a helpful comparison. That case was a hostile work environment case that went to a jury trial. The prevailing employee sought attorney fees. The attorney fee petition was more than 20 pages long and was supported by *six years* of billing records, as well as declarations from the employee’s attorneys and from two other employment law experts. The employee’s attorney spent 18.5 hours on the fee petition. *Id.* at 782.

In contrast, this case never went to trial and, insofar as the attorney fee petition is concerned, lasted only six months. Yet counsel spent more than double the time on the attorney fees issue than did the attorney in *Steele*.

## VI. CONCLUSION

An offer of judgment that says it is “inclusive of any and all attorney fees and costs” is really inclusive of any and all attorney fees and costs. This is particularly so when the offering party advises the accepting party, prior to acceptance, that the “offer is all inclusive and not just limited to the cited rew [*sic*]attorney fees provisions.” The judgment for

attorney fees and costs should be reversed. At the very least, the multiplier should be eliminated or reduced and the lodestar should be cut.

DATED this 24<sup>th</sup> day of March, 2011.

**REED McCLURE**

By *Pamela A. Okano*  
**Pamela A. Okano**      **WSBA #7718**  
**Attorneys for Appellants**

063060.000005/292951

**FILED**  
KING COUNTY, WASHINGTON

DEC 08 2010

**SUPERIOR COURT CLERK  
THERESA GRAHAM  
DEPUTY**

THE HONORABLE JOAN E. DUBUQUE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1	2	3	4	5	6	7	8	9	10	11	12	13
							BIRHANE JENBERE, an individual,	)				
								)				
							Plaintiff,	)				
							vs.	)				
							CHRISTINA LASSEK and JOHN DOE	)				
							LASSEK, wife and husband, both individual	)				
							and on behalf of their marital community	)				
							composed thereof,	)				
							Defendants.	)				

No. 10-2-07052-4 SEA

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, ORDER  
FOR FEES AND JUDGMENT

(CLERK'S ACTION REQUIRED)

THIS MATTER having come on for hearing upon Plaintiff's Motion for award of attorney's fees pursuant to MAR 7.3 and RCW 7.60.060, the Court having considered Plaintiff's Motion, with supporting Affidavits and exhibits thereto of Scott Blair, David Nauheim, Michael Caryl, Christopher Davis, and Karl Malling, Defendant's response and supporting documents, and Plaintiff's Reply to Defendant's response, and the files and pleadings herein, now, therefore, the court hereby makes the following findings of fact:

*the court adopts the analysis in Plaintiff's briefing and*

**FINDINGS OF FACT**

1. This matter went through MAR arbitration on July 14, 2010, where the arbitrator entered a MAR verdict in the amount of \$9,200 on July 15, 2010. Defendant then timely filed a request for Trial De Novo and Jury Trial on July 27, 2010. Plaintiff then timely filed an Offer of Compromise pursuant to RCW 7.06.050 on September 23, 2010, offering to settle his claim for \$4,999 in compensatory damages. Ten days passed and Defendant failed to

ORDER FOR FEES - 1

**ORIGINAL**  
**APPENDIX A**

THE BLAIR FIRM, INC., P.S.  
ATTORNEYS AT LAW  
THE BLAIR BUILDING  
4711 AURORA AVENUE NORTH  
SEATTLE, WASHINGTON 98103-6515  
(206) 527-2000 FAX (206) 548-8104

1 accept the Offer of Compromise. The \$4,999 amount therefore became the amount to  
2 determine if Defendant subsequently improved her position on appeal.

3 2. On November 3, 2010, Defendant served a CR 68 Offer of Judgment on  
4 Plaintiff, offering to enter judgment against Defendant in the amount of \$5,500. The Plaintiff  
5 timely accepted Defendant's CR 68 Offer of Judgment on November 9, 2010. Judgment was  
6 then entered on November 12, 2010 on motion of Plaintiff. The parties jointly signed off on  
7 the judgment form and no objection to the form of the judgment was made either in writing or  
8 orally at oral argument on the motion to enter judgment. The judgment amount only included  
9 \$200 in statutory attorney's fees and \$5,300 in "principle judgment amount". The Defendant  
10 then requested that a satisfaction of judgment be entered as Defendant had already tendered a  
11 check to Plaintiff counsel that was in payment of "bodily injury".

12 3. After "comparing comparables", his Court finds that even after deducting  
13 payment of statutory attorney's fees, Defendant has failed to improve her position on appeal  
14 since the Judgment reflects payment of \$5,300 in compensatory damages, which is clearly in  
15 excess of the \$4,999 compensatory damages Offer of Compromise filed by Plaintiff.

16 4. Plaintiff counsel has filed a declaration with supporting documentation and  
17 time sheets reflecting the time and effort put into this case. This Court finds the hours  
18 expended by Plaintiff's counsel to be reasonable in light of the type of case, the skill level of  
19 Plaintiff's counsel, the denial of liability and causation defenses asserted by Defendant and the  
20 effects of this denial on the time expended by Plaintiff in prosecuting this case, the size of the  
21 possible recovery in this case, the undesirability of the case and likely difficulties Plaintiff  
22 would face in meeting his burden of proof, the lack of financial appeal this case might have to  
23 most attorneys, the reputation of Plaintiff's counsel, and the risk of a possible poor outcome  
24 for Plaintiff and Plaintiff's counsel if he did not exceed his Offer of Compromise.

25 5. The Court finds that the taxable costs in the amount of \$1,525 requested by  
26 Plaintiff counsel under RCW 7.06.060 are reasonable and customary for this type of case.



1 7.13 and RCW 7.06.060, and because *McGuire* involved a settlement agreement rather than  
2 a CR 68 offer. The Court also finds that the Judgment entered in this case, agreed to in open  
3 Court by Defendant, only included statutory attorneys fees of \$200 under RCW 4.84.080  
4 and the parties are bound by the final language of the judgment on the issue of what  
5 attorneys fees were included in the Offer of Judgment.

6 4. Having failed to improve her position, the Court finds, based upon the  
7 findings of fact above, that pursuant to MAR 7.13 and RCW 7.06.060, as a matter of law  
8 Plaintiff is entitled to his post MAR arbitration reasonable attorney's fees up to the time of  
9 judgment being entered in the amount of \$31,255.

10 5. The Court further finds as a matter of law that the Plaintiff is entitled to his  
11 post MAR arbitration costs in the amount of \$1,525.

12 6. The Court further finds pursuant to MAR 7.13 and RCW 7.06.060 as a  
13 matter of law that Plaintiff's attorneys fees for his post judgment Motion for Attorney's  
14 Fees and Costs should be awarded in the amount of \$10,930.

15 7. The Court further finds as a matter of law that under the factors enumerated  
16 in *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597-602 (1983), and all the factors  
17 provided by Plaintiff in his Motion and supporting Declarations, as well as considerations  
18 of resolving Court congestion, a Lodestar multiplier of 2.0 is appropriate here.

19 **In light of the foregoing Findings of Fact and Conclusions of Law, it is hereby**  
20 **ORDERED, ADJUDGED and DECREED** that Defendant pay Plaintiff's MAR 7.13  
21 and RCW 7.06.060 attorneys fees in the amount of \$31,255, with a Lodestar multiplier of 2.0  
22 resulting in an additional \$31,225 in attorney's fees, for a total attorneys fee award of \$62,510;

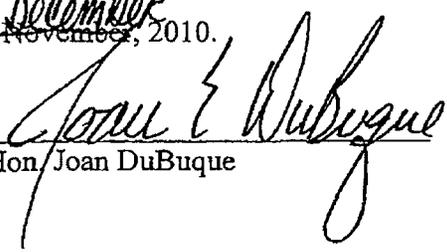
23 **ORDERED, ADJUDGED and DECREED** that Defendant pay Plaintiff's MAR 7.13  
24 and RCW 7.06.060 post judgment attorney fees in the amount of \$10,930;  
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It is further ORDERED, ADJUDGED and DECREED that Defendant pay Plaintiff's  
MAR 7.13 and RCW 7.06.060 post arbitration costs in the amount of \$1,525;

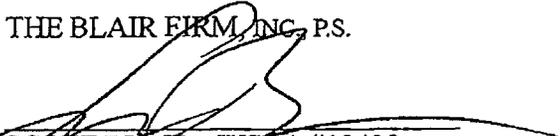
It is further ORDERED, ADJUDGED and DECREED that Plaintiff shall have  
judgment entered against defendant in the total amount of \$74,965.00.

DONE IN OPEN COURT this 8<sup>th</sup> day of December, 2010.

  
Hon/Joan DuBuque

Presented by:

THE BLAIR FIRM, INC., P.S.

  
SCOTT BLAIR - WSBA #13428  
Attorneys for Plaintiff