

06569-3

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NO. 66569-3-I

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

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.

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

REPLY BRIEF OF APPELLANTS

FILED
2011 JUN 25 11:11 AM
KING COUNTY SUPERIOR COURT

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The critical issue in this appeal is whether defendant's offer of judgment, which expressly said it was "*inclusive of any and all attorney fees and costs*", was inclusive of any and all attorney fees and costs. If it was, plaintiff's attorney fee award must be reversed because by accepting the offer, plaintiff settled claims for "any and all attorney fees and costs."

"[I]nclusive of any and all attorney fees and costs" could not be clearer. Thus, plaintiff largely ignores it, instead raising irrelevant arguments about such things as court congestion and allegedly egregious conduct by insurance companies, including one that has nothing to do with this case.¹

I. ARGUMENT

Plaintiff's principal argument is that because attorney fees are "mandatory" under RCW 7.06.060, parties can never settle an attorney fees claim under that statute via a CR 68 offer of judgment. Indeed, he declares that "this Court should hold as a matter of law a CR 68 pleading may not include MAR 7.3 attorney fees." (Plaintiff's Response Brief 13)

Defendant Lassek has no quarrel that attorney fees under RCW 7.06.060 and the first sentence of MAR 7.3 are "mandatory." Indeed,

¹ Plaintiff's statement of the case is rife with argument, and it and the brief's argument in several instances lack references to the record, all in violation of RAP 10.3(a)(5)-(6), (b).

defendant/appellant Lassek's opening brief states:

[P]laintiff 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.***

(Brief of Appellants 7) (emphasis in original). In other words, plaintiff would have been entitled to so-called mandatory attorney fees and costs under RCW 7.06.060 and MAR 7.3 had he not agreed to compromise his attorney fees claim by accepting defendant Lassek's offer of judgment.

The dispute is what "mandatory" means. Defendant Lassek disagrees that it somehow means an RCW 7.06.060/MAR 7.3 attorney fees claim can never be compromised through a CR 68 offer of judgment.

Indeed, the law favors settlements. *Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978). Accordingly, "[t]he express public policy of the state is to encourage settlement." *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000), *rev. denied*, 143 Wn.2d 1014 (2001). The purpose of a CR 68 offer of judgment is to provide an incentive for parties to settle. *Magnussen v. Tawney*, 109 Wn. App. 272, 277, 34 P.3d 899 (2001).

Yet plaintiff—trumpeting the mantra of reducing court congestion—contends a RCW 7.06.060/MAR 7.3 attorney fees claim can never be settled through a CR 68 offer of judgment. Far from reducing court congestion, plaintiff's plan will create it. His position is meritless.

A. NEITHER RCW CH. 7.06/MAR 7.3 PRECLUDES COMPROMISING AN RCW 7.06.060 ATTORNEY FEE CLAIM IN A CR 68 OFFER.

Washington law is clear—an attorney fees claim can be compromised in a CR 68 offer of judgment.² *See, e.g., Seaborn Pile Driving Co. v. Glew*, 132 Wn. App. 261, 131 P.3d 910 (2006) (CR 68 offer can include attorney fees), *rev. denied*, 158 Wn.2d 1027 (2007). In fact, plaintiff fails to cite any case restricting the claims that can be settled under CR 68. Citing *Do v Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005), however, plaintiff claims RCW 7.06.060/MAR 7.3 attorney fees are somehow entitled to a special exemption from CR 68.

It is true RCW 7.06.060 and MAR 7.3 provide that costs and reasonable attorney fees “shall” be assessed against a party whose appeal of an MAR award fails to improve her position. But “shall” does not mean an attorney fee claim can never be compromised.

McGuire v. Bates, 169 Wn.2d 185, 234 P.3d 205 (2010), is illustrative. There an offer was made to settle “all claims” “[p]ursuant to RCW 4.84.250-[]280.” RCW 4.84.250 provides that where the amount pleaded by the prevailing party is \$10,000 or less, “there *shall* be taxed

² Plaintiff complains the defense “*is unable to cite a single MAR case that supports her position.*” (Plaintiff’s Response Brief 21-22) (emphasis in original). But to justify his attorney fee award, he says “the attorney fees motion involved a matter of first impression . . .” (*Id.* at 31) Plaintiff cannot have it both ways.

and allowed to the prevailing party” reasonable attorney fees (emphasis added). Plaintiff accepted the offer and then requested attorney fees.

Like attorney fees under MAR 7.3/7.06.060, attorney fees under RCW 4.84.250 are mandatory. *Absher Construction Co. v. Kent School District No. 415*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995); *see Klebs v. Yim*, 54 Wn. App. 41, 48-49, 772 P.2d 523 (1989); *Kingston Lumber Supply Co. v. High Tech Dev. Co.*, 52 Wn. App. 864, 867-68, 765 P.2d 27 (1988), 112 Wn.2d 1010 (1989). Nevertheless, the Washington Supreme Court ruled that because “all claims” included attorney fees claims, plaintiff was not entitled to additional attorney fees.

Thus, even though RCW 4.84.250—by using the word “shall”—mandates attorney fees, parties may compromise an attorney fee claim thereunder. Plaintiff’s argument that “as a matter of law a CR 68 pleading may not include MAR 7.3 attorney fees” is meritless.

Do v. Farmer, 127 Wn. App. 180, 110 P.3d 840 (2005), does not compel a different result. There the party who had filed a trial de novo request made a CR 68 offer of judgment that was accepted before trial de novo. The party requesting trial de novo did not improve his position.

Unlike here, no one claimed the *Do* offer of judgment included

attorney fees or costs.³ Unlike here, the issue in *Do* was not whether the terms of an offer of judgment included compromise of an attorney fees claim. Rather, the issue was whether an attorney fee award was (1) mandatory under MAR 7.3's first sentence because the party seeking trial de novo had failed to improve his position or (2) discretionary under MAR 7.3's second sentence because the offer of judgment was analogous to voluntary withdrawal of the trial de novo request.⁴

Indeed, *Do* described the issue as “whether Getty’s CR 68 offer of judgment is sufficiently like a voluntary withdrawal to qualify for discretionary attorney fees instead of mandatory ones.” 127 Wn. App. at 186. In other words, *Do* did not involve the issue here—whether the offer of judgment **by its terms** included a compromise of an attorney fee claim.

Do did said, “Allowing a party who requests a trial de novo to escape mandatory attorney fees **merely** by making an offer of judgment

³ While the *Do* opinion does not quote the offer, it apparently was for \$17,004 inclusive of all special damages. 127 Wn. App. at 184.

⁴ MAR 7.3 provides in pertinent part as follows:

The court **shall** assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party’s position on the trial de novo. The court **may** assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. . . . Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

(Emphasis added.)

would not be consistent with the purpose of MAR 7.3.” 127 Wn. App. at 187 (emphasis added). But this does not mean a MAR 7.3 attorney fees can never be compromised. Instead, it was explaining that a CR 68 offer of judgment is not analogous to a voluntary withdrawal of a trial de novo request within the meaning of MAR 7.3’s second sentence. In any event, defendant’s offer here was not “merely” an offer of judgment because unlike the *Do* offer, the offer here expressly included attorney fees.

Plaintiff’s other cited cases do not support his claim that attorney fees under MAR 7.3 can never be subject to a CR 68 offer of judgment. Either these cases⁵ did not involve a CR 68 offer of judgment or if they did, they did not involve RCW 7.06.060/MAR 7.3 attorney fees⁶.

⁵ See *Wiley v. Rehak*, 143 Wn. 2d 339, 20 P.3d 404 (2001) (MAR 7.3 fees available even though no trial de novo occurred because of procedural errors); *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987) (MAR 7.3 fees available even though no trial de novo occurred because of procedural errors); *Brandenberg v. Cloutier*, 103 Wn. App. 482, 12 P.3d 664 (2000) (whether party who had successfully obtained dismissal of untimely trial de novo request had waived right to attorney fees by waiting 17 months to file motion to dismiss), *rev. denied*, 143 Wn.2d 1012 (2001); *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544 (1999) (attorney fees under MAR 7.3 were mandatory), *rev. denied*, 139 Wn.2d 1009 (1999); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990) (discretionary attorney fees award under MAR 7.3’s second sentence); *Puget Sound Bank v. Richardson*, 54 Wn. App. 295, 773 P.2d 429 (1989) (MAR 7.3 fees available where trial de novo was resolved by summary judgment).

⁶ *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642 (1978) (defendant that made offer of judgment to settle defamation claim not entitled to attorney fees or expenses under CR 68 where there was no basis for awarding attorney fees and expenses), *rev. denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979).

Plaintiff erroneously claims that “Defendant would violate the strictures of RCW 7.06.050(1)(c) and MAR 7.1(b) if . . . her CR 68 offer referenced MAR 7.3 attorney fees.” (Plaintiff’s Response Brief 13) But MAR 7.1(b) simply provides:

When a trial de novo is requested as provided in section (a), the case shall be transferred from the arbitration calendar in accordance with rule 8.2 in a manner established by local rule.

MAR 7.1(b), by its terms, has nothing to do with the issues in this case.

If plaintiff intended to refer to MAR 7.2(b) instead, that rule does not apply either. MAR 7.2(b) provides:

(1) The trial de novo shall be conducted as though no arbitration proceeding had occurred. No reference shall be made to the arbitration award, in any pleading, brief, or other written or oral statement to the trial court or jury either before or during the trial, nor, in a jury trial, shall the jury be informed that there has been an arbitration proceeding.

(2) Testimony given during the arbitration proceeding is admissible in subsequent proceedings to the extent allowed by the Rules of Evidence, except that the testimony shall not be identified as having been given in an arbitration proceeding.

MAR 7.2(b) focuses only on arbitration and the arbitration award and says nothing about a CR 68 offer of judgment or even an RCW 7.06.050(1)(c) offer of compromise. Moreover, because plaintiff here made an offer of compromise (CP 37, 62, 110), RCW 7.06.050(1)(b) made the arbitration

and arbitration award irrelevant as to whether he could recover attorney fees.

RCW 7.06.050(1)(c)⁷ does preclude filing or communicating a “postarbitration offer of compromise” to the court or trier of fact before judgment on the trial de novo. But this is immaterial because an RCW 7.06.050 offer of compromise is not a CR 68 offer of judgment.

First, an RCW 7.06.050 offer of compromise can be made only by the party who did *not* file the trial de novo request—here, plaintiff. RCW 7.06.050(1)(a). A CR 68 offer of judgment, by the terms of that rule, can be made only by “a party defending against a claim”—here, defendant Lassek.

Second, an RCW 7.06.050 offer of compromise must be made, if at all, “[u]p to thirty days prior to the actual date of a trial de novo.” RCW 7.06.050(1)(a). A CR 68 offer of judgment can be made “[a]t any time more than 10 days before the trial begins.”

Third, if an RCW 7.06.050 offer of compromise is not accepted within ten days, its amount replaces the arbitration award to determine whether the party seeking trial de novo fails to improve her position. RCW 7.06.050(1)(b). Consequently, the offer of compromise cannot be filed or

⁷ A copy of RCW 7.06.050(1) is in the Appendix hereto.

communicated to the court or trier of fact until after judgment to avoid notifying the court or trier of fact of the damages amount that must be awarded for attorney fees to become available.

RCW 7.06.050 says *nothing* about a CR 68 offer of judgment made by the party who filed the trial de novo request.

Do is, again, inapposite. In *Do* the party who did not file the trial de novo request made an RCW 7.06.050(1)(c) offer of *compromise*. The party seeking the trial de novo then made a CR 68 offer of *judgment*, which was accepted. The party who made the offer of *compromise* then sought attorney fees under MAR 7.3 and RCW 7.06.060. To prove the right to attorney fees, that party had to present evidence of not only the *judgment*, but also of the offer of *compromise*, to show the judgment was for more than the offer of *compromise*. RCW 7.06.050(1)(b).

The opposing party claimed attorney fees had been waived because the judgment summary showed zero for fees. This court disagreed, explaining the party seeking attorney fees was “required by RCW 7.06.050(1)(c) to wait until after the judgment to communicate her *offer of compromise* to the court.” 127 Wn. App. at 187-88 (emphasis added).

Under *Do*, plaintiff here would have been precluded from disclosing his *offer of compromise* to the trial court before judgment. But

nothing in *Do* precluded defendant Lassek from including RCW 7.06.060 attorney fees in her CR 68 *offer of judgment*.

At page 6 of his brief, plaintiff claims his attorneys interpreted the CR 68 offer of judgment as “covering all *statutory* fees, i.e., RCW 4.84.010 & RCW 4.84.250-300”. (Emphasis in original.) Plaintiff further claims that even after defense counsel advised the offer was “all inclusive and not just limited to the cited rcw [sic] attorney fees provision”, his counsel still believed the offer included only “statutory attorney fees.” (Plaintiff’s Response Brief 6-7) Plaintiff’s counsel’s claimed understanding of the offer is unreasonable.

The offer of judgment was clear by its terms:

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 32) (boldface plain in original; boldface italics added). The parties agree that RCW 4.84.250-.300 are inapplicable, which the offer—by the phrase “if applicable”—expressly recognized as possible. (Plaintiff’s Response Brief 6 n.2) However, the offer said nothing about being limited

to statutory attorney fees, *i.e.*, the \$200 attorney fees provided pursuant to RCW 4.84.080. Indeed, by including the phrases “including but not limited to” and “inclusive of any and all attorney fees and costs”, the offer was not restricted to attorney fees under RCW 4.84.080.

Moreover, plaintiff’s counsel e-mailed defense counsel (CP 53):

The client is considering whether to accept your Offer of Judgment. We need to know, when you say “any and all attorney fees” are you referring specifically to any and all fees available under 4.84.250-300, that you reference in your Offer of Judgment?

Defense counsel’s response was in the negative and said:

That offer is ***all inclusive and not just limited to the cited rcw attorney fees provisions.***

(Emphasis added.) Plaintiff does not dispute that “all” means all. *McGuire*, 169 Wn.2d at 190-91; *see Certain Underwriters v. Travelers Property Casualty Co.*, 2011 WL 1678466, at *9 (Wash. App. Mar. 14, 2011). Neither the offer of judgment nor defense counsel’s response to plaintiff’s counsel limited the offer of judgment to statutory attorney fees or fees under RCW 4.84.250-.300. Plaintiff’s claim that the offer of judgment was limited to such attorney fees violates every rule of contract construction.

Plaintiff argues attorney fees under RCW 7.06.060 were not available at the time and thus could not have been included in the offer of judgment. (Plaintiff’s Response Brief 7) Even if RCW 7.06.060 fees were

not “available at the time” (which is not true), plaintiff cites no authority why a potential future claim cannot be compromised through CR 68. Indeed, settlements frequently include potential future claims. *See, e.g., Stottlemyre v. Reed*, 35 Wn. App. 169, 665 P.2d 1383, *rev. denied*, 100 Wn.2d 1015 (1983).

In any event, plaintiff’s claim that RCW 7.06.060 fees were not “available” at the time is frivolous. Plaintiff’s counsel has testified that when they decided to accept the offer of judgment, “I knew then . . . that accepting the Offer of Judgment should result in the award of MAR attorney’s fees” (CP 111)

If, as plaintiff claims, a CR 68 offer of judgment can never compromise an RCW 7.06.060 attorney fee claim, the result will be fewer settlements and more court congestion. What defendant would bother to make a CR 68 offer of judgment after requesting a trial de novo if she knew acceptance would not end the litigation because she would still be liable for a significant attorney fees? There would be *more* cases actually going through a trial de novo, not fewer. Plaintiff’s claim that removing the threat of mandatory attorney fees would deprive parties opposing a trial de novo of a “stick” to force earlier settlements misses the mark.

For example, here the case settled for \$5,500, but the \$74,965 attorney fee award is more than thirteen times greater. (CP 66) Had

defendant known her \$5,500 offer of judgment “inclusive of any and all attorney fees and costs” would not completely resolve the parties’ dispute and that she would still be liable for nearly \$75,000 *more*, she very well could have foregone making the CR 68 offer and chosen to go to trial to see if she could beat plaintiff’s earlier offer of compromise.

B. THE JUDGMENT SUMMARY IS NOT CONCLUSIVE.

The judgment against defendant Lassek provides:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that **judgment** shall be and hereby is rendered in favor of Plaintiff Birhane Jenbere and against Defendant Christina Lassek in the total amount of:

\$ 5,500.00

Judgment interest at the applicable statutory rate shall accrue on said amount from the date of this Judgment until paid in full.

(CP 35) (emphasis in original). The judgment does not break out the attorney fees included in the \$5,500.00 judgment. Thus, plaintiff’s argument that the judgment is “controlling” as to attorney fees is baseless.

What plaintiff is relying upon is the judgment *summary* required by RCW 4.64.030. (CP 34) This summary “is required . . . for the assistance of the county clerk’s record keeping responsibilities . . .” 10A D. Breskin, *WASHINGTON PRACTICE Civil Procedure Forms & Commentary* § 54.1, at 48 (2000); *see also id.* § 54.25, at 55. Where, as here, the judgment itself fails to allocate the amount attributable to

attorney fees or identify the basis for those fees, the judgment summary is irrelevant.

The *Do* court may have relied on the judgment summary in that case. But there the issue was not how much of the judgment was attributable to RCW 4.84.010 statutory attorney fees versus how much was attributable to attorney fees under some other statute. Rather the issue in *Do* was whether the judgment not including attorney fees waived them.

Indeed, if anything, *Do* supports defendant Lassek's position, not plaintiff's. *Do* held that the fact that the judgment summary provided for \$0 in attorney fees was not conclusive on the attorney fees issue.

Here, that the judgment summary shows \$200 in statutory attorney fees is not conclusive either. Thus, the judgment is, as the parties agreed, "*inclusive of any and all attorney fees and costs.*" (CP 32) (emphasis added).

Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 131 P.3d 910 (2006), *rev. denied*, 158 Wn.2d 1027 (2007), supports Lassek's position, not plaintiff's. There, the issue was whether a plaintiff could recover fees under a contractual attorney fees provision after accepting a CR 68 offer of judgment that was completely silent on attorney fees. The court observed, "[A] wise offeror will expressly state that the offer

includes attorney fees.” 132 Wn. App. at 272. That is exactly what defendant Lassek did here.

Plaintiff’s attempt to distinguish *Seaborn* and *Hodge v. Development Services of America*, 65 Wn. App. 576, 828 P.2d 1175 (1992), by claiming “MAR 7.3 was *not* a statute underlying Plaintiff’s claim” is difficult to understand. (Plaintiff’s Response Brief 22, 24) (emphasis in original). MAR 7.3 has its underpinning in RCW 7.06.060. Whether the basis for an attorney fees claim is a statute or a court rule and whether the lawsuit arises out of the statute or rule permitting attorney fees as opposed to common law is immaterial.

Citing *Dussault v. Seattle Public Schools*, 69 Wn. App. 728, 850 P.2d 581 (1993), *rev. denied*, 123 Wn.2d 1004 (1994), plaintiff claims, “This Court has said that when interpreting the MAR’s, contract law principles are *not* applied where such principles ‘conflict with the rule [or] defeat its purpose.’” (Plaintiff’s Response Brief 15-16) (emphasis in original). That is not what *Dussault* said. *Dussault*, which involved a child severely injured when she was hit by a bus, did not even discuss the Mandatory Arbitration Rules.

Moreover, *Dussault* explains why plaintiff’s argument that he could not make a counteroffer reserving the right to seek attorney fees because it would have nullified defendant’s CR 68 offer is erroneous.

Dussault held that a counteroffer made before the ten days provided in CR 68 would not nullify the CR 68 offer. 69 Wn. App. at 734.

C. THE ATTORNEY FEES AWARD WAS UNREASONABLE.

Even if plaintiff were entitled to RCW 7.06.060 fees, the trial court abused its discretion in granting an excessive lodestar and 2.0 multiplier.

Preliminarily, plaintiff claims, “Defendant essentially asks this Court to give her *de novo* review [of] a discretionary ruling of the trial court.” (Plaintiff’s Response Brief 2) Defendant Lassek *never* claimed the amount of attorney fees was subject to *de novo* review. What is subject to *de novo* review is plaintiff’s *entitlement* to any attorney fees at all—*i.e.*, the issue discussed in the previous section. *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007). Defendant Lassek agrees the *amount* of attorney fees is reviewable only for an abuse of discretion. The trial court abused its discretion here.

Citing RAP 2.5(a) and *State v. McFarland*, 127 Wn.2d 332, 899 P.2d 1251 (1995), plaintiff also claims this court “should refuse to consider argument and authority that was not raised below.” (Plaintiff’s Response Brief 28) But RAP 2.5(a) says an “appellate court may refuse to review any claim of error” for the first time on appeal. This means an appellate court “will not consider *issues* raised for the first time on appeal.” *McFarland*, 127 Wn.2d at 333 (emphasis added).

Defendant Lassek is not raising a new “claim of error” or “issue” for the first time on appeal. Below she challenged both the reasonableness of the lodestar and the 2.0 multiplier, claiming “[p]laintiff’s claim for attorney fees is excessive”, counsel’s hourly rates “already account[] for the contingent nature of the availability of fees”, and “[t]he court should also not apply any lodestar multiplier in this case because of the quality of work performed.” (CP 44-48) Although on appeal defendant may cite legal authority not cited below or set forth her argument with more precision, that does not mean appellate review cannot occur. As the Washington Supreme Court has said,

[Appellants] may have framed their argument more clearly

at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court.

Bennett v. Hardy, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990). Further, appellate review is possible even if there was a “lack of citation to the crucial case law and treatises” below. *State Farm Mutual Automobile Insurance Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329, *rev. denied*, 111 Wn.2d 1013 (1988).

1. The 2.0 Multiplier Is Unjustified.

Applying a multiplier to the lodestar fee is appropriate only for two reasons: quality of the work and contingent nature of success. *Chuong Van*

Pham v. Seattle City Light, 159 Wn.2d 527, 541, 151 P.3d 976 (2007). The trial court here applied a 2.0 multiplier for both reasons *plus* other factors. None of the trial court's bases for the multiplier is sustainable.

a. The Multiplier Was Not Justified for Reasons Besides Work Quality or Contingent Success.

As discussed at pages 20-22 of appellants' opening brief, the trial court awarded the 2.0 multiplier based on considerations beside the quality of work and the contingent nature of success. For example, court congestion and preventing delay appeared to be factors. But "the trial court abuses its discretion when it takes irrelevant factors into account" in awarding a multiplier. *Chuong Van Pham*, 159 Wn.2d at 543.

Plaintiff cites *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 693 P.2d 161 (1984), and *Davy v. Moss*, 19 Wn. App. 32, 573 P.2d 826, *rev. denied*, 90 Wn.2d 1021 (1978), as requiring the trial court to consider the goals of alleviating court congestion and reducing delay. But in both cases, the trial court had declined to award any attorney fees at all. The issue was thus entitlement to fees, not whether a multiplier was justified.

Moreover, a multiplier cannot be used to reward plaintiff for the time his attorneys were required to spend, since that is already reflected in

the lodestar. See *Orshan v. Macchiarola*, 629 F. Supp. 1014, 1024 (E.D.N.Y. 1986). Plaintiff has cited no authority to the contrary.

b. The Multiplier Was Not Justified by the Quality of Work.

First, the trial court awarded a multiplier because, as finding of fact 6 says, “the quality of work performed on this case by Plaintiff’s counsel . . . [was] of high quality.” (CP 64) But an upward multiplier for quality of work is allowable “only when the representation is *unusually* good.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342, 54 P.3d 665 (2002) (emphasis added). “High quality” is not the same as “unusually good.”

Travis v. Washington Horse Breeders Association, 111 Wn.2d 396, 759 P.2d 418 (1988), is illustrative. The trial court there granted a 1.5 multiplier based on quality of the work and the contingent nature of success. The Court of Appeals and the Washington Supreme Court both agreed the multiplier was not warranted under either criterion. As to the quality of the work, the high court explained:

[W]e affirm the view of the Court of Appeals that the granting of the 1.5 multiplier to the attorney fees was inappropriate. . . .

As to the quality of the work performed, although the trial court found the work done by "both plaintiff's counsel was of extremely high quality", there was no finding the representation was "unusually good" or exceptional. Thus, the Court of Appeals was correct in denying a multiplier for quality.

Id. at 411 (emphasis added) (citation omitted). Since the finding of “extremely high quality” in *Travis* was insufficient, finding of fact 6 here that counsel’s work was of “high quality” must be insufficient. To the extent the multiplier was based on the quality of work, it cannot stand.

Plaintiff argues that *Travis* was decided on the basis of the contingent nature of success. While that factor was pertinent to the decision that the entire multiplier was unwarranted, the fact remains that the *Travis* court expressly found no basis for a multiplier for quality.

c. The Multiplier Was Not Justified under the Contingency Factor.

Finding of Fact 6 said the multiplier was justifiable because of the contingent nature of this case. (CP 64) But that counsel had a contingent fee agreement is not alone enough to warrant awarding attorney fees in excess of the lodestar. *See Faraj v. Chulisie*, 125 Wn. App. 536, 551, 105 P.3d 36 (2004); *McGreevy v. Oregon Mutual Insurance Co.*, 90 Wn. App. 283, 294, 951 P.2d 798 (1998).

Accordingly, to the extent counsel’s hourly rate takes into account the contingent nature of the availability of fees, a contingency multiplier is not appropriate. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983). That is the case here. Plaintiff’s attorney testified his entire practice was on a contingency basis and that his \$350

hourly rate and the \$175 hourly rate for his associate were reasonable hourly rates for experienced trial lawyers with similar personal injury experience. (CP 114, 116) The only logical conclusion is that the hourly rates take into consideration the contingent nature of counsel's practice.

Plaintiff argues that Mr. Caryl testified the \$350 and \$175 hourly rates did not account for the contingent nature of the work. That is not what Mr. Caryl said. He said he personally would have to average more than his hourly rate to make contingent work worthwhile and that the hourly rates of plaintiff's counsel here were available to clients not on contingent fee. (CP 210, 213) He never said that plaintiff's counsel's hourly rates did not account for the contingent nature of their work.

Even if a contingency multiplier were proper, the 2.0 multiplier here must still be excessive because of the erroneous findings that the multiplier was also warranted by the quality of work and the goals of reducing court congestion and delay. Reversal is required.

2. The Lodestar Amount Is Unreasonable.

In any event, the lodestar amount is unreasonable. First, the trial court awarded \$74,965 in fees and costs for a claim that settled for \$5,500. While fees and costs awardable are not limited by the size of recovery, the latter remains a "vital consideration" in whether a fee award is reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993).

Second, as explained in defendant Lassek’s opening brief, counsel must exercise “billing judgment” in fee requests. (Brief of Appellants 22, citing *Scott Fetzer Co.*, 122 Wn.2d at 156.) Thus, contrary to plaintiff’s claim, “what a *client* can be billed” does have a bearing on what fees can be imposed upon an MAR appellant. (Plaintiff’s Response Brief 30) (emphasis in original).

Exercising billing judgment means, among other things, that in-house conferences between a senior attorney and an inexperienced associate are often 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 (Bankr. S.D. Cal. 1993); *O’Rear v. American Family Life Assurance Co.*, 144 F.R.D. 410, 415 (M.D. Fla. 1992).

Here, Mr. Blair’s declaration explained his work with his inexperienced associate (CP 112):

To help the court understand why two attorneys worked on this case, I offer the following: This case was Mr. Nauheim’s first jury trial, and it was necessary that I assist and accompany him to many of the pre-trial activities such as perpetuation depositions. I also had to discuss many aspects of trial preparation with him, as he had not prepared all of the pre-trial documents mandated by King County local rules before. Several things he did on his own without my assistance, but many of the items on our respective time sheets involved a joint effort since this was his first trial. . . .

The claim there is no evidence that Mr. Blair was overseeing the associate's work is meritless. (Plaintiff's Response Brief 29).

“Billing judgment” also means the time charged for having *an attorney* file and serve papers should not be assessed against defendant Lassek. Even if only an attorney was available to perform these functions, such functions are generally performed by a messenger and should not be charged to a client (or, therefore, defendant Lassek) *at an attorney's rate*.

“The burden of proving the reasonableness of the fees requested is upon the fee applicant.” *Scott Fetzer*, 122 Wn.2d at 151. It should have been obvious that billing time for filing and serving papers at an attorney rate was improper. Plaintiff could not show it was reasonable and even if he could, the burden was on him to do so. He failed to carry that burden.

The 42.5 hours—more than a full work week—expended on the attorney fees motion was also excessive. Mr. Blair's declaration, without supporting documents, was 19 pages long. (CP 101-19) A significant part was devoted to excoriating the insurance industry, especially Allstate Insurance Company, which is not even a party to the litigation or an insurer of either party. (*E.g.*, CP 102-07) The declaration also discussed court congestion in the past ten years and attached a 2004 judicial funding task force report and a 2009 report entitled “Analysis of Cowlitz County Superior Court.” (*E.g.*, CP 106, 121-22, 124-30) All this was unnecessary.

Further, plaintiff obtained declarations from not one, not two, but *three* other attorneys, to support the fee request. (CP 203-24, 226-29, 231-35) This was overkill.

Under these circumstances, the trial court abused its discretion in awarding more than a whole week's worth of fees for preparation of the attorney fees motion. This court should reverse.

D. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL UNLESS HE WAS ENTITLED TO ATTORNEY FEES BELOW.

Plaintiff requests attorney fees on appeal. He will be entitled to such fees only if this court rules he was entitled to them below because (1) defendant Lassek did not improve her position, as required by the first sentence of MAR 7.3, and (2) this court believes the accepted offer of judgment did not compromise any and all attorney fees.

Plaintiff also seeks attorney fees on appeal based on MAR 7.3's last sentence, which provides, "Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule." Plaintiff's assumption that this provides an independent basis for a fee award on appeal is erroneous. The sentence simply limits the fees recoverable under the first and second sentences of MAR 7.3. *See Hough v. Stockbridge*, 152 Wn. App. 328, 349-50, 216 P.3d 1077 (2009), *rev. denied*, 168 Wn.2d 1043 (2010).

Finally, plaintiff asks for remand to determine attorney fees and expenses on appeal. While RAP 18.1(i) permits this court to require the trial court to determine fees and expenses on appeal, ordinarily the appellate court commissioner or clerk does so pursuant to RAP 18.1(f). Plaintiff has failed to show any reason why remand is necessary.

II. CONCLUSION

By filing a trial de novo request, defendant Lassek reduced her exposure from \$9,242 to \$5,500. Her \$5,500 offer of judgment expressly said it was “inclusive of any and all attorney fees and costs”. The offer of judgment meant what it said. For plaintiff to now claim her counsel believed otherwise, particularly after defense counsel told them the offer was “all inclusive and not just limited to the cited rcw [sic] attorney fees provisions”, is disingenuous and self-serving. (CP 53)

The trial court erred in granting plaintiff any attorney fees. At the very least, the fee award was unreasonable. This court should reverse.

DATED this 3rd day of June, 2011.

REED McCLURE

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063060.000005/299064

RCW 7.06.050(1)

(1) Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. . . .

(a) Up to thirty days prior to the actual date of a trial de novo, a nonappealing party may serve upon the appealing party *a written offer of compromise*.

(b) 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.

(c) A postarbitration *offer of compromise* shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo, at which time a copy of the *offer of compromise* shall be filed for purposes of determining whether the party who appealed the arbitrator's award has failed to improve that party's position on the trial de novo, pursuant to MAR 7.3.

(Emphasis added.)