

No. 66956-7-I

Cause No. 09-2-46813-3 SEA

COURT OF APPEALS, OF THE STATE OF WASHINGTON

DIVISION I

PPG INDUSTRIES, INC., a Pennsylvania Corporation,

Appellant,

vs.

ANDREW FIORE,

Respondent.

REPLY BRIEF OF APPELLANT

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 COURT OF APPEALS
 STATE OF WASHINGTON
 DIVISION I
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I. REPLY ARGUMENT

A. PPG Properly Classified Fiore as Exempt.

Because the Trial Court did not provide any explanation for its summary judgment ruling that Fiore was not exempt from the overtime provisions of the WMWA (CP 1737-39), Fiore is left to speculate about the reason for the decision. Fiore presents three possible justifications: (1) Fiore claims that he was a “blue collar” manual laborer; (2) Fiore argues that he engaged in non-exempt “retail sales” work instead of exempt “promoting sales” activity; and (3) Fiore denies that his job required the exercise of discretion and judgment. (Brief of Respondent (“BR”) 11-29.) Fiore’s arguments are not sufficient to overcome the fact that his own admissions (coupled with the other undisputed facts presented to the Trial Court) establish that he “plainly and unmistakably” satisfied the requirements of the administrative exemption. (CP 2333-39.)

1. Fiore’s primary duty was nonmanual work.

The evidence presented to the Trial Court established without contradiction that Fiore’s *primary duty* (i.e., his most important duty) consisted of the performance of nonmanual work – pursuing strategies designed to promote the sale of Olympic paint and stain products by Lowe’s to its customers. (Brief of Appellant (“BA”) 7-25, describing strategies such as training, securing promotional placements and building

relationships.) Not surprisingly, in his appellate brief, *Fiore does not dispute that his primary (most important) duty was nonmanual work.*¹

While it is now undisputed that Fiore's *primary* duty was the performance of nonmanual work, Fiore claims that he spent so much of his time performing manual housekeeping tasks that he actually was a "blue collar" worker who cannot be exempt as a matter of law. (BR 11-18.) Fiore's contention rests upon a flawed analysis of the law and an unsupported factual assertion about how he spent his time.

a. Time Fiore spent performing secondary manual tasks is not material.

Fiore's first error is to assume that the amount of time he spent performing manual housekeeping tasks is a relevant consideration when determining his exempt status. The Washington Administrative Code (WAC) provides that the administrative exemption applies to employees whose "primary duty" consists of the performance of nonmanual work. WAC 296-128-520(b). The WAC specifically limits the "manual / nonmanual" assessment to the employee's "primary duty" – *not* to the cumulative total of all of the employee's duties. Fiore's contention that he

¹ Fiore even acknowledged that the "aim" and "whole focus of his job" was to improve the sale of Olympic products by Lowe's to its customers, and that he accomplished this by talking about paint constantly, having one on one time with Lowe's associates so that they would be better educated about the products, negotiating with Lowe's for additional promotional space, educating consumers and building relationships. (BA 8-15.)

spent so much time performing manual tasks that he was a “blue collar” worker (BR 11-13) is immaterial. So long as Fiore’s *primary* duty was nonmanual work, the WAC does not recognize a “blue collar” exception.

Unable to locate a “blue collar” exception in the WAC itself, Fiore relies instead upon an administrative policy statement from the Washington State Department of Labor & Industries (“L&I”). (BR 12, *citing* ES.A.9.4.) By its own terms, however, that informal policy statement does not have the force of law and cannot modify the WAC. ES.A.9.4 at 1.² In any event, even L&I agrees in its policy statement that employees who spend more than 50% of their time on manual tasks can qualify for the administrative exemption so long as their “primary duty” is exempt. *Id.* at 3 ¶ 5 (determining employee’s “primary duty” requires assessment of “relative importance” and not relative time).

Because it is undisputed that Fiore’s primary duty consisted of the performance of nonmanual work, he qualified for the exemption – *even if* he spent more than 50% of his time performing secondary manual tasks. Fiore’s attempt to distinguish the cases cited by PPG with respect to the determination of primary duty misses the point. (*See* BA 23-25; BR 16-18.) Those cases (several of which specifically addressed the

² RCW 34.05.230(1) (policy statements are advisory only and do not have force of law); RCW 49.34.010(15)-(16) (contrasting policy statements from rules); RCW 49.46.010(5)(c) (administrative exemption defined by rules, not policy statements).

administrative exemption) merely stand for the unremarkable proposition that the “primary duty” analysis is a qualitative (not quantitative) analysis, and that an employee’s primary duty may be nonmanual and exempt, even if his secondary manual duties occupy most of his time.

Fiore’s reliance on *Tanner v. Emma Bixby Medical Center* (BR 13) does not rescue his WMWA claim. *Tanner* arose exclusively under the FLSA and does not address the existence of a “blue collar” exception under the WMWA. Case No. 98-72261, 1998 U.S. Dist. LEXIS 21127, at *1-5 (E.D. Mich. Dec. 21, 1998). Also, the plaintiff in that case was a maintenance supervisor tasked with routine maintenance duties, and the employer did not establish his administrative duties. *Id.* at *2, 15 (employee shoveled sidewalks, painted, cleaned floors, performed repairs, responded to work orders, mowed grass, and moved furniture). The case is inapposite. Here, it is undisputed that Fiore’s primary duty was nonmanual work, and the record is replete with examples of him performing nonmanual tasks in fulfilling his primary duty of promoting sales. Because there is no “blue collar” exception under the WAC, Fiore’s first attempt to defeat the exemption fails as a matter of law.

b. Fiore did not spend 90-95% of his time performing manual tasks.

As PPG acknowledged in its opening brief, Fiore performed some

collateral housekeeping tasks while he was in the Lowe's stores. (BA 17-25.) Not even Fiore contends that those tasks comprised his primary duty. Fiore's only argument is that those tasks comprised a majority of his time. (BR 11-15.) For the reasons set forth above, whether Fiore spent most of his time performing housekeeping tasks is not material. To the extent that such an inquiry is deemed relevant, however, Fiore failed to show that he spent 90-95% of his time performing manual tasks.

Fiore first attempts to establish that he spent a majority of his time performing manual labor by referring to various documents relating to physical tasks. (BR 12-13.) For example, he directs the Court's attention to a document describing a medical restriction in which the employee (not Fiore) could only stand 10% of the work day. (BR 12, citing CP 447.) PPG's observation that such an employee could not do his job was not evidence of a manual labor job; it simply reflected that Territory Managers stand when they are at Lowe's. (CP 447.) Fiore identifies other documents describing PPG's commitment to a safe working environment. (BR 3, 12, citing CP 469-72.) Taken together, these documents merely confirm what has never been disputed – that the Territory Manager position does involve some physical tasks. They do not, however, support Fiore's claim that his job was 90-95% manual labor.

The centerpiece of Fiore's argument that the Territory Manager

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position was 90-95% manual labor is an alleged admission by Sherry Calhoun. (BR 14-15.) Ms. Calhoun made no such admission:

Q. And as Mr. Fiore, he says that he spent at least 90 or 95 percent of his time, actually, performing manual labor in the stores. You don't dispute that, correct?

A. No.

(CP 633.) Ms. Calhoun's "admission" is clearly limited to her not disputing that "Mr. Fiore ... says" that he spent 90-95% of his time performing manual labor. Fiore's suggestion that Ms. Calhoun was actually admitting that Fiore *did in fact* spend 90-95% of his time performing manual labor cannot withstand a literal reading of the question. As Ms. Calhoun explained:

During my deposition, I was asked: "And as Mr. Fiore, he says that he spent at least 90 or 95 percent of his time, actually, performing manual labor in the stores. You don't dispute that, correct?"

In response to that question, I answered "No."

In answering "No" to that question, I was only answering the question I was asked, and I do not dispute that Mr. Fiore says that he spent 90 or 95 percent of his time performing manual labor.

In answering "No" to that question, I was not agreeing or admitting that Mr. Fiore actually spent 90 to 95 percent of his time in the Lowe's stores performing manual labor. I certainly was not conceding that PPG expected Mr. Fiore to spend 90 to 95 percent of his time performing manual labor.

To the contrary, if Mr. Fiore (or any Territory Manager) was spending 90 to 95 percent of his time performing manual labor, he would not be meeting the expectations of PPG in the performance of his job duties as a Territory Manager. During my deposition, I testified at length about PPG's expectations for the position of Territory Manager.

(CP 1735 at ¶ 2-6.) Ms. Calhoun's testimony was unequivocal that PPG expected Territory Managers to spend their time promoting the sale of Olympic products through the strategies described in PPG's opening brief, not performing manual housekeeping tasks. (CP 1098-1109, 1113-1118.)³

In a final effort to establish that he spent 90-95% of his work time performing manual tasks, Fiore points to his own self-serving declaration. (BR 12, citing CP 318.) Fiore's declaration is insufficient to prove that there is no genuine dispute of fact on this issue. In fact, the evidence presented by PPG (including Fiore's own deposition testimony) confirms the extent to which Fiore spent his time performing nonmanual tasks. (*See* BA 7-25, citing evidence that Fiore spent his time training Lowe's associates, meeting with Lowe's contractor employees, negotiating for promotional space, educating Lowe's customers, building relationships, and "talking about paint constantly"; BR 15, declaration that contradicts previous deposition cannot establish a fact for summary judgment.)

³ At most, the testimony was ambiguous due to the phrasing of counsel's question, making any reliance on *Ramos* (BR 15) misplaced. It would be unjust to grant Fiore summary judgment based upon his strained reading of this one exchange.

During his employment, Fiore wrote, in his own words in his monthly reports to PPG management, “what [he] thought the company wanted [him] to be doing.” (CP 999-1000). He reported (truthfully) that he spent his time building relationships, gaining Olympic promotional space and exposure, and training Lowe’s associates. (BA 20, citing CP 789-801.) Notably absent from Fiore’s reports are any mention of manual work. (*Id.*) Because Fiore failed to establish that he spent 90-95% of his time performing manual labor, PPG would be entitled to summary judgment even if there was a “blue collar” exception in the WAC.⁴

2. Fiore’s primary duty was “promoting sales” (exempt), not “retail sales” (non-exempt).

Fiore’s second argument is that he was engaged in “retail sales” as opposed to “promoting sales.” (BR 10-11 & 19-21, citing *Cooper Electric, Reiseck, and Turcotte.*) Fiore’s argument, and his reliance on these cases, is misplaced. The plaintiffs in those cases were all focused on ***discrete, particularized sales transactions*** between their employers and

⁴ As Fiore noted, PPG previously agreed that this case was amenable to summary disposition. (BR 6-7, 10.) PPG did so because any disputes relating to the amount of time Fiore spent performing manual tasks were not material (since there is no “blue collar” exception). If it is determined that the amount of time Fiore spent on manual tasks *is* a material question, then the record does not support Fiore’s claim that he had a “blue collar” job, and PPG is still entitled to summary judgment. In the alternative, if the Court concludes that material issues of fact exist regarding how Fiore spent his time, the parties should at least be permitted to present their evidence on this issue to a jury.

their employers' customers. Fiore was not focused on individual consumer sales transactions, but rather on strategies designed to provide "the gift that keeps on giving" – promoting a *general improvement* in the sale of Olympic products by Lowe's to its customers during the many hours when Fiore was not even present in the store. (BA 8-15.)

Cases like *Cooper Electric*, *Reiseck*, and *Turcotte* recognize a critical legal distinction between employees whose primary duty is focused on the non-administrative task of "producing" specific, individual sales of products on behalf of a company that is in the business of selling those products (*e.g.*, the work performed by Lowe's non-exempt retail sales associates), and employees whose primary duty is focused on the exempt administrative task of promoting sales *generally* (*e.g.*, the work performed by Fiore). The undisputed evidence in the record demonstrates that Fiore falls on the "exempt" side of this analysis because his primary duty was to promote the increased sale of Olympic products by Lowe's in a general sense, not to focus on individual sales transactions that Lowe's consummates with its retail customers. (*See* BA 15-17, noting that marketing representatives, field representatives and promotion men qualify for the administrative exemption because "representing the company" and "promoting sales" are exempt administrative tasks.)

3. Fiore's primary duty included work requiring the exercise of discretion and judgment.

In its opening brief, PPG established that Fiore's primary duty included work requiring the exercise of discretion and independent judgment. (BA 25-31.) Fiore's final attempt to defeat the administrative exemption is to point to activities in which he alleges that he did not exercise discretion. (BR 24-29.) As Fiore has acknowledged, however, the exercise of discretion need only be "occasional" in order to satisfy this requirement. (*Id.* at 23-24.) Fiore's contention that he did not exercise discretion with respect to some aspects of his job does not negate that many of his primary work activities *did* include the exercise of discretion and independent judgment. The two concepts are not mutually exclusive.

Fiore's argument is also defective because it requires the Court to accept the false proposition that his job was comparable to the pharmaceutical sales representatives ("PSRs") in the case of *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2nd Cir. 2010). (BR 24-26.) *Novartis* does not help Fiore. In determining that PSRs lacked the discretion needed to qualify for the administrative exemption, the court found that PSRs were not permitted to deviate from a script due to strict FDA requirements, and that they were expected to be "robotic" in the delivery of that message. *Novartis*, 611 F.3d at 145, 157.

The limitations described in *Novartis* did not apply to Fiore's job as a Territory Manager. Fiore was not scripted or "robotic" in his promotional efforts, nor was he constrained by FDA regulations from discussing the technical attributes of Olympic products. In fact, PPG sent Fiore to technical training in Louisville, and kept him apprised of technical developments via *The Torch*, so that he could utilize that information as he saw fit to promote the products. (BA 19-20, 25-28.)

As described at length in PPG's opening brief, Fiore enjoyed wide discretion to run his territory, to analyze his business, and to develop his own strategies to promote the sale of Olympic products. (BA 9-12, 25-28.) Fiore's conclusory arguments to the contrary miss the point. The fact that PPG expected Fiore to devote time to each of the Lowe's stores in his territory (BR 25) is a matter of common sense, and does not mean that Fiore lacked discretion. The fact that Fiore needed to obtain approval from Lowe's for his promotion displays (*id.*) does not diminish the fact of Fiore's discretion; rather, it reflects the importance of a Territory Manager being able to analyze sales and markets, develop creative displays based on that analysis, and build relationships with Lowe's managers that will help facilitate approval for the proposed displays. (BA 11-12, 26-31.) The fact that Fiore had reporting accountabilities (BR 25-27) does not mean that he lacked authority to develop his own goals and strategies

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based on his own assessment of his territory. (BA 20-22). The fact that Fiore did not negotiate contracts (BR 28) does not mean that he did not exercise discretion with respect to how to best promote sales. Finally, the fact that Fiore was not an insurance agent (BR 28) does not mean that he cannot be properly analogized to the marketing representatives in *John Alden* whose work was “critically important” because “the success of the company in [the representative’s region] depends in large part on the success of the marketing representatives who promote sales of [the company’s] products.” *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 11 (1st Cir. 1997); *see also* BA 15-17 & 30. Fiore was exempt.

B. Calculating the Value of Fiore’s Overtime Claim.

1. The “half-time” method applies.

In its opening brief, PPG explained that the proper measure of damages in a misclassification case is determined using the “half-time” method, which is the method approved by the U.S. Supreme Court, five Circuit Courts of Appeals, and the U.S. Department of Labor. (BA 31-34, citing authorities.)⁵ Quite simply, because PPG already paid Fiore his full salary for all hours worked each week, the proper measure of his overtime claim is limited to an additional “half time” premium. Fiore’s attempt to

⁵ Fiore’s attempt to diminish the persuasive value of these so-called “foreign” authorities (BR 35-38) cannot withstand a careful reading. In each instance, the court (and the Department of Labor) applied the common-sense reasoning advanced by PPG here.

obtain a windfall recovery of “time and a half” – *on top of* the salary that he already received for his time worked – makes no sense. In essence, Fiore claims that he is entitled to “double time and a half” (his regular rate which was already paid, plus another 1.5 times his regular rate). Washington law does not support such an absurd result.

Fiore’s primary argument in support of this theory is that PPG cannot take advantage of 29 C.F.R. § 778.114 because it did not make contemporaneous overtime payments to Fiore. (BR 34-35.) Fiore’s argument is nothing but an “attack on a straw man” – PPG does not (and never did) rely on Section 778.114, so Fiore’s argument that the regulation does not apply signifies nothing in this case. Section 778.114 describes a method of computing overtime for salaried non-exempt employees, not a method of computing damages in a misclassification case. It has no bearing on this case. (BA 34.)

Fiore’s reliance on *Monahan* and *Innis* (BR 34-38) fails for the same reason. Those cases involved the application of Section 778.114 to *non-exempt* employees. *Innis v. Tandy Corp.*, 141 Wn.2d 517, 528-31, 7 P.3d 807 (2000) (approving employer’s practice of calculating employee’s regular rate by dividing salary by total hours worked); *Monahan v. Emerald Perf. Materials, LLC*, 705 F. Supp. 2d 1206, 1214-18 (W.D. Wash. 2010) (applying § 778.114 to non-exempt employees in context of

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evaluating a collective bargaining agreement). Simply put, these cases do not address the question before this Court.

Fiore's citation to a Northern District of California case rejecting application of Section 778.114 is equally unhelpful. (BR 37-38, citing *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008 (N.D. Cal. 2009).) For reasons unknown, the employer in *Russell* asked the district court to apply Section 778.114 in a misclassification case, leading the court to find that the regulation did not apply in the absence of a contemporaneous overtime payment. 672 F. Supp. 2d at 1013-16. While this distinction seems to have eluded Fiore, unlike the employer in *Russell*, PPG repeats that it does not seek to apply Section 778.114, but only to apply the common-sense conclusion, endorsed by numerous courts and the Department of Labor, that when an employee (classified as exempt) is already paid a salary for all hours worked, the employee (if found to be non-exempt) is only entitled to the half-time premium. (BA 31-34; *see also* WAC 296-128-550.) Fiore's repeated attempts to obfuscate this issue by referencing an inapplicable federal regulation should be rejected.⁶

⁶ Fiore's "back up" argument that the parties did not have a clear mutual understanding that his salary paid him for all hours worked (BR 35) merits little attention. This assertion was not even included in Fiore's motion for summary judgment, and it cannot withstand the evidence (and Fiore's concession) that he satisfied the "salary basis" element of the administrative exemption because he was paid a fixed salary for all hours worked. (BA 6-7 & 33; BR 9 & n.3.) Fiore's claim that his "hiring form" states that his salary was for a 40-hour week (BR 35) is a *post hoc* rationalization that was not presented

2. Fiore is not entitled to double damages.

When assessing Fiore's claim for double damages, the parties agree that PPG's state of mind is a relevant consideration. The parties disagree, however, on the critical questions of *why* PPG's state of mind is relevant, and *who* has the burden of proof on the issue. PPG contends that its state of mind is relevant on the threshold question (willfulness), and that Fiore bears the burden of proving that PPG acted in bad faith in order to establish willfulness. (BA 34-37.) In contrast, Fiore contends that PPG's state of mind is relevant to the secondary question of whether a *bona fide* dispute existed, and that PPG bears the burden of proving its good faith in order to show such a *bona fide* dispute. (BR 29-33.) Only PPG's position is supported by well-established precedent.

Fiore contends that a violation of the WMWA is "willful" if it is merely intentional – *i.e.*, that PPG intended not to pay Fiore overtime. (BR 29-30.) But it is not enough for Fiore to merely establish that PPG knew that it classified Fiore as exempt (of course it knew this). Fiore must also prove that PPG acted "with intent to deprive" him of wages to which he was legally entitled. RCW 49.52.050(2). In other words, in order to meet his burden, Fiore had to prove that PPG did not have a genuine belief

to the Trial Court. In fact, the reference in that form to 40 hours merely reflects that Fiore was full time, not that his salary was compensation for a 40-hour workweek.

that it properly classified Fiore as exempt. (BA 34-35, citing *McAnulty*, *Chelan* and *Champagne*.) In each of the cases cited by PPG, double damages were rejected because the plaintiff could not make the threshold showing that the employer acted in bad faith. Tellingly, Fiore’s brief makes no mention of these cases. They are determinative here.⁷

Double damages are also inappropriate because a *bona fide* dispute exists as to Fiore’s entitlement to overtime. A *bona fide* dispute is simply a “fairly debatable” dispute. PPG’s state of mind (*i.e.*, its good faith) is not relevant to the question of whether the dispute is fairly debatable. (BA 36, citing authority.)⁸ Fiore’s rhetoric notwithstanding, it cannot be seriously disputed that the record reflects a “fairly debatable” dispute regarding whether Fiore was properly classified under the WMWA. Indeed, the Arbitrator concluded that PPG’s position was more than “debatable” – he concluded that PPG was on the right side of the debate.

⁷ This allocation of the burden on intent is entirely consistent with the statute. Liability for double damages under RCW 49.52.070 depends on a showing that the employer violated RCW 49.52.050(1) or (2), which is part of a *criminal* statute. It follows that the *plaintiff* must prove *mens rea* as a predicate to establishing an employer’s liability.

⁸ Fiore argues that under the FLSA, PPG would have the burden to prove that it acted in good faith in order to avoid paying double damages. (BR 31; *see* 29 U.S.C. § 260.) But Fiore did not pursue a claim under the FLSA, so this is not relevant. The FLSA’s treatment of “willfulness” is instructive, however, but for reasons not contemplated by Fiore. The FLSA extends the statute of limitations to three years for “willful” violations (29 U.S.C. § 255), and on that question, the *employee* has the burden to prove that the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by statute.” *Fowler v. Incor*, 279 Fed. Appx. 590, 600 (10th Cir. 2008). By analogy, this supports PPG’s position that on questions of willfulness, the employee bears the burden of proving that the employer acted in bad faith.

(CP 2335-39; *see Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986) (affirming denial of double damages where there had been *bona fide* dispute prior to court's ruling on summary judgment).)⁹

The cases cited by Fiore do not rescue his claim for double damages. (BR 30.) In those cases, the employer's violation was found to be willful *and* there was no showing of a *bona fide* dispute. *Schilling v. Radio Holdings, Co.*, 136 Wn.2d 152, 162-66, 961 P.2d 371 (1998) (employer admitted it was aware of duty to pay, but did not pay due to financial hardship); *Ebling v. Gove's Cove, Inc.* 34 Wn. App. 495, 502, 663 P.2d 132 (1983) (rationale was arbitrary and unreasonable); *Flower v. T.R.A. Indus., Inc.*, 137 Wn. App. 13, 37, 111 P.3d 1192 (2005) (explanation was implausible). In this case, PPG paid Fiore his full salary in accordance with their agreement, there is no evidence that PPG believed that its classification of Fiore as exempt was made in bad faith, and there is clearly a fairly debatable argument that Fiore was properly classified.¹⁰

⁹ Further support that the exemption issue in this case is "fairly debatable" is provided by the decision in another case challenging the exempt status of a Territory Manager, in which the U.S. District Court recognized that the plaintiff's exempt status implicated "significant and numerous factual issues, and is inappropriate for the summary judgment stage." *Stage v. PPG Indus., Inc.*, 1:10-cv-5, 2011 U.S. Dist. LEXIS 68316, at *29-31 & n.16 (E.D. Tenn. June 24, 2011) (adding that the Trial Court's decision in *Fiore* need not be followed because it "sets forth no reasoning").

¹⁰ Fiore complains about PPG's assertion of the attorney-client privilege with respect to an exemption assessment of the Territory Manager position that was conducted in 2004. (BR 31.) Contrary to Fiore's assertion, PPG never claimed that "underlying facts" relating to the exemption assessment were privileged, and in fact PPG provided extensive

C. Calculating Fiore's Award of Attorney Fees and Costs.

1. Fees should be subject to judicial estoppel.

In response to PPG's argument that the Trial Court erred by failing to cap Fiore's fees and costs pursuant to principles of judicial estoppel (BA 37-40), Fiore asks this Court to review the Trial Court's judicial estoppel ruling for "abuse of discretion." (BR 41.) Unfortunately, the Trial Court did not even acknowledge or address PPG's judicial estoppel argument, which itself is an abuse of discretion justifying reversal. (CP 2507-12.) Again, Fiore attempts to "fill in the blanks" on one of the Trial Court's orders, offering his own speculation as to why judicial estoppel should not apply. (BR 41-43.)

First, Fiore argues that he did not assert inconsistent positions. (BR 42.) Fiore's argument cannot undo the fact that in his successful attempt to persuade the District Court to remand the case, Fiore promised that "[t]his is a typical wage claim case and it falls within the class of cases Fiore's counsel usually litigates in 100 hours or less," that "[t]he maximum amount of attorneys' fees would [be] around \$30,000," and that the amount in controversy, "including future attorneys' fees," would be "significantly below" \$75,000. (CP 2246, 2251, 2254-57.) In an attempt

testimony about the assessment. (See CP 1159, describing assessment and citing Balest Depo. at CP 1231-46.) In any event, Fiore never moved to compel further information about the assessment, so his untimely complaint about this matter has been waived.

to justify a fee award in excess of \$500,000, however, Fiore now claims that this case was exceptionally “complex” and implicated “difficult and uncertain questions of state and federal law” (except that he did not assert any federal law claims). (CP 2072, 2077-90.) In his attempt to bolster his outrageous fee demand, Fiore is now taking positions which are directly contrary to his representations and assurances to the District Court.

Second, Fiore contends that his prior inconsistent statements should be overlooked because PPG turned this into a “test case” with “national implications.” (BR 39-40, 42.) Yet for all of Fiore’s rhetoric, he cannot explain what made this case particularly complex. There were only eight depositions, limited discovery disputes (which PPG won), a two-day arbitration (which PPG won), cross-motions for summary judgment, cross-motions *in limine*, and no trial. The fact is that Fiore’s assurances to the District Court about his low fees were disingenuous. This became clear immediately after Fiore secured remand based on those assurances, when he demanded nearly \$20,000 in fees just on the remand motion alone, an amount that was two-thirds of the total amount of fees he promised would be incurred *throughout the entire case*. (BA 39.)

Third, Fiore contends that the District Court did not rely on his representations about the amount of his fees when remanding the case. (BR 42-43.) Fiore’s speculation aside, it was Fiore who secured remand

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by assuring the District Court that the amount in controversy, “including future attorneys’ fees,” would be “significantly below” \$75,000. (CP 2246, 2254-57.) It is entirely appropriate to apply judicial estoppel to bar recovery of fees beyond a party’s representations in a remand motion. (BA 40, citing *Adoff*.) Fiore’s outrageous contention that the District Court should not have believed the promises he made to that Court (BR at 42) provides additional evidence of his bad faith manipulation on this issue and further justifies the application of judicial estoppel.

**2. The Trial Court failed to properly evaluate
Fiore’s fee petition.**

As PPG explained in its opening brief, the Trial Court failed to make a record of its evaluation of Fiore’s fee petition sufficient to allow review by the Court of Appeals. (BA 40-41, citing *McConnell*.) In response, Fiore contends that the Trial Court was not required to “explicitly rule on every argument.” (BR 43, citing *Matheson*.) While that may be true when a party fails to make any argument (as was the case in *Matheson*), PPG presented a detailed explanation of the elements of Fiore’s fee petition that required scrutiny, yet the Trial Court simply ignored PPG’s arguments. (*Compare* CP 2507-12 *with* CP 2225-37.) Once again, the Court of Appeals is left to guess why the Trial Court rejected PPG’s position. This, alone, is reason to reverse the Trial Court.

Disproportionate Fee Award. While the amount in dispute is a “vital consideration” when assessing the reasonableness of a fee petition (BA 41, citing *Scott Fetzer Co.*), the Trial Court refused to even consider this issue, rejecting outright the legitimacy of any concern regarding the disproportionate fee award. (CP 2512.) While Fiore makes a number of arguments against proportionality (BR 43-44), in accordance with *Scott Fetzer*, the Trial Court should at least be required to explain why it concluded that a ratio of more than 24:1 was reasonable in this case.

Motion to Remand. The District Court denied Fiore’s motion for attorney fees relating to his remand motion. (BA 41-42.) Fiore claims that he should be entitled to a “second bite at the apple” with respect to those fees (BR 44), refusing to acknowledge that the District Court fully and finally adjudicated Fiore’s request. The Trial Court should have reduced Fiore’s proposed lodestar amount by \$17,710. Fiore’s reliance on the statutory “prevailing party” provisions (BR 44) does not support his second request for fees incurred during the time period when this matter was pending in federal court, where that court already rejected his request.

Unsuccessful Work. PPG requested that the Trial Court reduce Fiore’s lodestar amount by \$71,566 to account for his unsuccessful motion to compel and opposition to PPG’s motion for protective order, and the arbitration. (BA 42, citing *Pham v. Seattle City Light.*) In response, Fiore

mischaracterizes the holding in *Pham* and contends that fees incurred in connection with unsuccessful components of a case are recoverable as long as those components are related to the claim on which the plaintiff is successful. (BR 45.) Fiore is mistaken. Fees relating to unsuccessful and unproductive components of the litigation may be stricken from a fee award. *Pham*, 159 Wn.2d 527, 538-40, 151 P.3d 976 (2007). PPG should not have to pay Fiore's attorney for the time he spent pursuing an unsuccessful motion to compel, opposing PPG's successful motion for protective order, and losing the arbitration.

Duplicative Effort. PPG requested that the Trial Court reduce Fiore's lodestar amount by \$9,675 to account for duplicative work. (BA at 42-43.) Fiore claims that there was no evidence of duplicative work. (BR 45.) To the contrary, the billing entries cited in PPG's submission to the Trial Court establish attendance by multiple attorneys at proceedings at which only one attorney participated. (BA 43-45; CP 2292-93.) Again, the Trial Court did not consider PPG's evidence or evaluate this issue.

Excessive Fees for Document Review, Legal Research, and Summary Judgment. In its opening brief, PPG explained that the Trial Court should have reduced the lodestar amount to account for excessive fees attributed to document review (\$23,182.50), legal research (\$5,790), and the summary judgment proceedings (\$128,653.80). (BA 43-45.) In

his response brief, Fiore *does not express any disagreement* with PPG’s arguments on these reductions, implicitly conceding the point.

Impermissible Factors. The Trial Court’s failure to properly evaluate numerous elements of Fiore’s excessive fee petition was especially egregious in light of its decision to consider *sua sponte* two impermissible factors in its attempt to justify Fiore’s excessive fees.

First, the Trial Court accused PPG of engaging in “aggressive litigation tactics” – but the only such “tactic” identified by the Trial Court was that PPG used attorneys from three states. (BA 45.) Fiore responds weakly, claiming only that PPG did not cite any authority that this was an impermissible consideration. (BR 46.) Quite simply, it is self-evident that a litigant’s choice of counsel is not itself an “aggressive” tactic that warrants imposition of an excessive fee, and it is no surprise that Fiore does not cite any authority to the contrary. If the Trial Court is going to accuse a litigant of engaging in “aggressive” litigation tactics, then the Trial Court should at least identify those alleged tactics so that this Court has an adequate record upon which to evaluate the Trial Court’s position.

Second, the Trial Court *sua sponte* and impermissibly took an adverse inference against PPG because it did not submit a record of its fees expended in this case in connection with its opposition to Fiore’s fee petition. (BA 46, citing cases concluding that an opponent’s fees are not a

reliable comparator.) In response, Fiore argues that in some cases, courts have considered the opponent's fees in assessing the reasonableness of the requested fee. (BR 46-48.) But here, Fiore never requested that PPG produce a record of its fees or argued to the Trial Court that PPG's fees should be considered when deciding whether his fees were reasonable. The Trial Court should not have *sua sponte* injected speculation about PPG's fees into its order. (BA at 46, citing cases.)¹¹

3. The multiplier was not warranted.

Recognizing that upward adjustments to the lodestar should occur only in "rare" instances, PPG demonstrated that a fee multiplier was not justified in this case. (BA 47-49.) Fiore responds that he took a risk by proceeding with the litigation and that this was a "test case." (BR 48-49, citing *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977).) Fiore's arguments fail to distinguish this case from the many others in which a multiplier is not awarded. Fiore previously claimed that this was a "typical" case, and any contingency risk was mitigated by the high hourly rates he used to calculate the lodestar. (BA 48.) Further, in

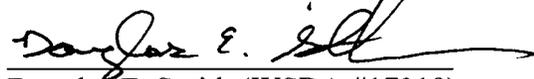
¹¹ *Lynott v. Nat'l Union Fire Ins. Co.* (cited at BR 47) does not justify the invocation of an adverse inference. *Lynott* involved documents that were relevant to the merits of the claim, not (as here) as a potential comparison. 123 Wn.2d 678, 688-89, 871 P.2d 146 (1994). Also, *Lynott* recognized that a satisfactory explanation for non-production would negate any adverse inference. (BR 47.) Here, Fiore never requested that PPG produce its confidential records or suggested to the Trial Court that such records might be relevant.

Beeson, there was less than a 4:1 ratio of fees to damages (\$3,600 / \$1,000), the amounts were low, and the case did not even involve a multiplier. 88 Wn.2d at 511. Fiore's "test case" rhetoric does not include any showing that the other PPG cases impacted the management of this action, increased his risk or justified a multiplier. The lodestar was already disproportionate to the damages, and no multiplier was warranted.

II. CONCLUSION

PPG requests that this Court reverse the judgment of the Trial Court on the merits of Fiore's misclassification claim, on the calculation of Fiore's alleged damages and on the award of attorney fees and costs.

Respectfully submitted this 21st day of October 2011,



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CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On October 21, 2011, I served a copy of the foregoing document:

- by facsimile transmission to the person(s) and facsimile number(s) set forth below.
- by placing a true copy of the documents(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.

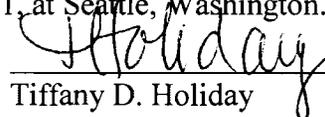
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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed on October 21, 2011, at Seattle, Washington.



Tiffany D. Holiday

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