

COA No. 74407-1-I  
King Co. Superior Court Cause No. 13-2-42897-1 KNT

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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ARIKA PRINCE,  
*Plaintiff-Respondent,*

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,  
*Defendant-Appellant.*

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RESPONDENT'S BRIEF

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George Ahrend, WSBA #25160  
AHREND LAW FIRM PLLC  
100 E. Broadway Ave.  
Moses Lake, WA 98837  
(509) 764-9000

Steven M. Malek, WSBA #28942  
CLAUSEN LAW FIRM PLLC  
701 5<sup>th</sup> Ave., Ste. 4400  
Seattle, WA 98104  
(206) 264-0960

Co-Attorneys for Respondent

FILED  
Apr 27, 2016  
Court of Appeals  
Division I  
State of Washington

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## **I. INTRODUCTION**

This appeal arises from a trial de novo requested by Defendant/Appellant State Farm Mutual Automobile Insurance Company (State Farm) after its insured, Plaintiff/Respondent Arika Prince (Prince), received an award of damages in mandatory arbitration for uninsured motorist (UIM) benefits due under a policy issued to her parents. Following arbitration, Prince offered to compromise pursuant to RCW 7.06.050 in the amount of \$17,499. At trial, the jury rendered a verdict in her favor in the amount of \$17,947.07. Because State Farm did not improve its position on trial de novo, the superior court awarded attorney fees and costs to Prince pursuant to RCW 7.06.060 and MAR 7.3.

State Farm appeals the superior court's order denying a post-trial offset for personal injury protection (PIP) benefits paid for certain medical expenses, as well as Prince's entitlement to MAR fees and costs and the amount of such fees and costs.

## **II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

State Farm contends the superior court should have reduced the jury verdict for UIM benefits by applying an offset for personal injury protection PIP benefits. *See* App. Br., at 1 (assignments of

error #1-2 & issues #1-2). This contention raises the following issues:

1. In calculating proportional attorney fees and costs for the purpose of determining whether an insurer is entitled to a PIP offset, does the insurer have standing to object to the costs incurred by its insured to obtain a UIM award?
2. Assuming the insurer has standing to challenge costs, the Court must also address:
  - a. What costs are included—statutory costs recoverable under RCW 4.84.010, or all costs actually incurred by the insured?
  - b. Does the insurer have the burden of proving which costs are unreasonable or unnecessary, in keeping with its burden to prove that its insured has been fully compensated and/or the overall burden of proof on its affirmative defense of offset?
  - c. Did State Farm satisfy its burden in this case by making a blanket objection to certain categories of costs that are not recoverable under RCW 4.84.010, without identifying particular cost items that it contends were unreasonable or unnecessary to obtain the UIM recovery?

State Farm also contends that the superior court should not have awarded MAR fees and costs to Prince. *See App. Br.*, at 1 (assignments of error #3-4 and issues #3-4). This includes challenges to Prince's entitlement to MAR fees and costs as well as

the amount of such fees and costs, and raises the following additional issues:

3. Should Prince's entitlement to MAR fees and costs be forfeited because associated counsel prematurely disclosed her offer of compromise?
4. Is the superior court's award of MAR fees and costs excessive?

### **III. RESTATEMENT OF THE CASE**

#### **A. Prince filed suit to recover UIM benefits due.**

Prince was injured in a motor vehicle collision caused by an uninsured motorist. She initially submitted a claim to State Farm for UIM benefits due under a policy issued by the company to her parents. Ultimately, however, she had to file suit to recover the benefits due. CP 1-4 (Amended Complaint). In her complaint, Prince alleged that she was insured under the UIM policy, as follows:

2.1 State Farm issued automobile insurance policy No. 006 2165-E14-47J ("the policy") to Tom and Karlese Prince. The policy was in full force and effect on September 11, 2011.

2.2 Tom and Karlese Prince are Plaintiff's parents and Plaintiff is a resident relative and an insured within the meaning of the policy.

CP 2. Prince further alleged that, on September 11, 2011, an uninsured motorist caused her to suffer injury and damage, and

that the uninsured motorist was 100% at fault. CP 2-4 (¶¶ 2.5-2.7, 3.2-3.6 & 4.1).

**B. State Farm answered by denying coverage, causation and damages.**

In answer to Prince's complaint State Farm denied that Prince suffered damage and that the uninsured motorist was at fault, ostensibly on grounds of lack of sufficient knowledge or information. CP 479-80 (Answer, ¶¶ 2.5-2.7, 3.3-3.6 & 4.1). While admitting that it had issued a UIM policy to her parents, State Farm also denied that Prince was covered as an insured under the policy, again on grounds of lack of sufficient knowledge or information. CP 479 (¶¶ 2.1-2.2). State Farm's answer was never amended following discovery, nor was it superseded by any pretrial order removing the issues denied by State Farm from controversy. CP 9-12.

**C. State Farm raised an affirmative defense of offset.**

In its answer to Prince's complaint, State Farm also alleged the following affirmative defense:

7. Plaintiff may have been paid for part or all of her claimed injuries and damages and is not entitled to a double recovery. To the extent said damages have already been paid by defendant (i.e., PIP payments, advance payments pursuant to UIM, etc. ...), or any other agent/representative, this answering defendant

is entitled to a credit and/or offset. Any judgment should be reduced accordingly.

CP 481. When it alleged this affirmative defense, State Farm had paid the \$10,000 limits available to Prince for medical bills under the Personal Injury Protection (PIP) portion of the policy issued to her parents. CP 33, 198.

**D. State Farm responded Prince's discovery requests.**

In the course of discovery, Prince submitted requests for admission to State Farm. CP 501-10. On February 27, 2015, State Farm responded the requests. CP 511-19. In its responses, State Farm admitted that Prince was an insured under her parents' policy. CP 502 & 511 (request #1). The company admitted that the uninsured motorist was 100% at fault in the motor vehicle collision with Prince, although it objected to these requests as involving ultimate issues to be decided by the trier of fact. CP 502-04 & 511-13 (requests #2-9). It also admitted certain medical bills incurred by Prince, subject to multiple objections. CP 504-06 & 514-17 (requests #10-18 & 20). However, State Farm denied that Prince's chiropractor bills were reasonable or causally related to the collision, even those paid by State Farm under the PIP coverage. CP 507-08 & 517-19 (requests #19 & 21-22).

**E. In mandatory arbitration, the arbitrator awarded \$50,000 in damages to Prince, and State Farm requested trial de novo.**

On April 24, 2015, the parties participated in mandatory arbitration. CP 486. After hearing the evidence, the arbitrator awarded \$50,000 in damages to Prince plus costs. CP 486. On May 5, 2015, State Farm requested trial de novo of the arbitrator's award. CP 494-95.

**F. After mandatory arbitration, Prince offered to compromise for \$17,499.**

On May 22, 2015, Prince served an offer of compromise on State Farm, stating:

Pursuant to RCW 7.06.050, Plaintiff hereby offers to settle this proceeding upon Defendant's payment to her in the amount of \$17,499.

CP 498. State Farm did not accept the offer of compromise, and, by statute, the offer lapsed 10 days after service. *See* RCW 7.06.050(1)(b). Also by statute, the amount of Prince's offer replaced the arbitrator's award for purposes of determining whether State Farm improved its position on trial de novo. *See id.*

**G. After the offer of compromise lapsed, State Farm amended its discovery responses to admit \$8,947.07 in medical bills.**

On June 8, 2015, State Farm amended its prior responses to Prince's requests for admission. CP 521-24. The company withdrew

its objections to certain medical bills incurred by Prince, and continued to deny that certain chiropractor bills were reasonable or causally related to the collision. CP 522-23 (requests #19 & 21). In sum, State Farm admitted medical bills in the amount of \$8,947.07. CP 144.<sup>1</sup>

**H. Also after the offer of compromise lapsed, State Farm made a \$4,000 advance payment of UIM benefits, while expressly reserving all defenses.**

On June 15, 2015, State Farm tendered an advance payment of UIM benefits to Prince in the amount of \$4,000. CP 205. The cover letter that accompanied the payment stated:

This payment is made in advance without prejudicing the right to receive a higher amount in the future through continuing negotiations or alternative means of resolution.

Enclosed is our payment for \$4000, which represents the amount of our initial offer. The remaining coverage available will be reduced by the amount of this payment and this amount will also be credited against any final determination of damages. This offer or your acceptance does not waive any defenses, we may have now or in the future, under the policy.

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<sup>1</sup> In its opening brief, State Farm wrongly suggests that it admitted these medical bills *before or during* mandatory arbitration rather than afterward. *See* App. Br., at 4 (stating “[o]n April 24, 2015, the parties proceeded to Mandatory Arbitration, and Appellant admitted to the reasonableness, necessity, and relatedness of \$8,947.04 in medical special damages”). State Farm cites CP 701-38 to support this proposition, which consists of its response to Prince’s motion for MAR fees and costs. *See* CP 701-38. The cited pages do not contain the proposition for which State Farm cites them. Instead, the record reflects that State Farm did not admit the medical bills until it amended its answers to discovery requests *after* mandatory arbitration.

CP 205. The letter did not purport to reduce the amount of Prince's unaccepted offer of compromise for purposes of determining whether State Farm improved its position on trial de novo. CP 205. Prince accepted the advance payment. CP 208.

**I. The superior court granted State Farm's motion in limine to have its offset, if any, determined after trial.**

On September 14, 2015, State Farm filed pretrial motions in limine. CP 13-21. They included the following motion regarding State Farm's affirmative defense:

3. Offsets/Credits to State Farm. Pursuant to the terms of the State Farm underinsured motorist policy defendant is entitled to offsets for payments plaintiff has received for medical expenses, other related collateral sources, and the PIP payment made by State Farm. State Farm paid \$10,000.00 in medical benefits on behalf of plaintiff through her PIP coverage. These payments and defendant's entitlement to offsetting the amounts are not issues to be determined by the jury as set forth in the contract; therefore, these issues should not be submitted as evidence to the jury and should be addressed by the Court following the verdict and before entry of judgment.

CP 16. The superior court granted the motion. CP 128.

**J. At trial, the jury returned a verdict of \$17,947.07 in favor of Prince.**

The case was tried to a jury between September 22 and 30, 2015. At the conclusion of trial, the jury returned a verdict for Prince in the amount of \$17,947.07. CP 148. The verdict included the undisputed medical bills in the amount of \$8,947.07, plus \$4,500 in disputed medical bills and an additional \$4,500 for noneconomic damages. CP 148.

**K. The superior court declined to enter judgment pending a determination of State Farm's offset, if any.**

On October 1, 2015, Prince noted for presentment a proposed judgment in the amount of the jury's verdict. CP 149-50. State Farm objected to the presentment on grounds that it was premature to enter judgment before the court determined whether it was entitled to any offset, and the amount of such offset. CP 153-59. On October 9, 2015, the superior court sustained State Farm's objection and denied Prince's motion for entry of judgment pending a determination of State Farm's offset, if any. CP 222-23.

**L. The offer of compromise was prematurely disclosed by associated counsel.**

In its order denying entry of judgment, the superior court also ruled that Prince was entitled to costs "[b]ecause the jury

verdict improved the Plaintiff's position from her offer of compromise[.]” CP 222. State Farm moved for reconsideration of this portion of the order because associated counsel had improperly disclosed the offer of compromise in reply to the company's objection to entry of judgment. CP 227-34. The superior concluded that the offer was disclosed prematurely in violation of the MAR statute and granted reconsideration. CP 535-37. The court struck the award of costs from its prior order and reserved the issue until after resolving the issue of State Farm's offset. CP 535-37.<sup>2</sup>

**M. The superior court determined that State Farm is not entitled to any offset for PIP benefits under the formula approved by the Washington Supreme Court.**

In accordance with its motion in limine, State Farm sought to resolve issues of its entitlement to offset, and the amount of any such offset, by post-trial motion. CP 302-09. While it acknowledged the obligation to pay proportional attorney fees and costs from any

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<sup>2</sup> Associated counsel explained the filing as follows: “I am at once embarrassed and chagrined about my premature disclosure of the Offer of Compromise in this case. I was unaware of the cases now cited by both sides re disclosure of such before entry of Judgment. Not distinguishing between entry of the verdict (which I have always used as the comparison to determine whether the defense bettered its position) and the judgment, I simply assumed that once the verdict was entered, the case was at issue for comparison purposes. Had State Farm moved for a remittitur rather than an offset, I'm sure that the prejudice of disclosing the Offer of Compromise would have been clear to me and I would have refrained from doing so. At this point all I can say is that I'm sorry and certainly regret my mistake, especially if it ends up prejudicing the Plaintiff and my colleague who called on me for help in his absence.” CP 771-72.

reimbursement of PIP benefits, State Farm nonetheless sought an offset for the full \$10,000 of PIP benefits paid, without any reduction for fees and costs. CP 308 & n.12; CP 591.<sup>3</sup> The company also sought credit for the \$4,000 advance payment of UIM benefits, yielding a net proposed judgment in the amount of \$3,947.07. CP 308 & 409-10.

In response to State Farm's offset motion, Prince pointed out that proportional fees and costs exceeded the amount of PIP benefits paid under the formula approved by the Washington Supreme Court. CP 540-42. "The formula for calculating a PIP carrier's pro rata share of the insured's legal expenses is 'legal expenses multiplied by the ratio obtained by dividing the PIP reimbursement by total damages.'" *Hamm*, 151 Wn.2d at 314 (quoting *Safeco Ins. Co. v. Woodley*, 150 Wash.2d 765, 772-73, 82 P.3d 660 (2004)).<sup>4</sup>

Trial counsel represented Prince under an agreement providing for a 40% contingency fee on "all sums recovered" plus reimbursement of costs. CP 540 & 559-60. Limiting trial counsel's contingency fee to the amount by which the jury verdict exceeded

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<sup>3</sup> The insurer's obligation to pay proportional fees and costs under these circumstances is established by *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn. 2d 303, 88 P.3d 395 (2004).

<sup>4</sup> The formula is correctly summarized in State Farm's brief as:  $(\text{PIP Payment} / \text{Verdict}) \times (\text{Fees} + \text{Costs}) = \text{Pro Rata Share}$ . See App. Br., at 18.

the PIP benefits, yields a fee of \$3,178.83. CP 541. Prince also incurred costs in the amount of \$15,967.05 to take the case to trial, substantiated by a detailed itemization and supporting invoices. CP 540 & 560-86. Under the applicable formula, proportional fees and costs exceed PIP benefits, and, on this basis, Prince contended that State Farm is not entitled to an offset for PIP benefits. CP 542.<sup>5</sup> However, Prince acknowledged that State Farm was entitled to a credit, as distinguished from an offset, for the post-mandatory arbitration (and post-offer of compromise) payment of UIM benefits in the amount of \$4,000.<sup>6</sup>

In reply, State Farm agreed that Prince had used the correct formula, that she had properly calculated attorney fees, and that she had properly calculated the ratio of PIP benefits to total damages. CP 593. The only disagreement was regarding the amount of costs incurred to take the case to trial. CP 592-93. State Farm did not dispute that the costs were actually incurred. Instead, the company raised a blanket objection to all costs for obtaining

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<sup>5</sup> Attorney fees in the amount of \$3,178.83 plus costs in the amount of \$15,967.05 yields total legal expenses of \$19,146.68. The ratio of PIP benefits in the amount of \$10,000 to total damages in the amount of \$17,947.07 is 55.7194%. When total legal expenses are multiplied by this ratio, the result is \$10,668.42. CP 542.

<sup>6</sup> An “offset” refers to a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy, i.e., an offset of PIP benefits against UIM benefits. *See Hamm*, 151 Wn. 2d at 308 n.2. This brief uses “credit” to refer to the advance payment of UIM benefits.

records that were not introduced into evidence, scanning, copying and faxing documents, parking and other travel expenses, and messenger service, without identifying any particular cost items that should not count toward its proportional share. CP 592. State Farm argued that Prince should be limited to statutory costs of \$1,810.88 under RCW 4.84.010. CP 592-93.

In ruling on the motion, the superior court determined that State Farm was not entitled to an offset for PIP benefits under the applicable formula, and that judgment should be entered in the amount of the jury's verdict, with credit for State Farm's advance payment. CP 600-01. Judgment was subsequently entered in accordance with this order. CP 611-12.

**N. The superior court determined that State Farm did not improve its position on trial de novo and awarded attorney fees and costs to Prince, although it reduced the award for premature disclosure of the offer of compromise.**

In its order denying State Farm's motion for offset, the superior Court also ordered:

that Plaintiff may move to amend the Judgment for allowable fees and costs pursuant to RCW 7.06.060 and MAR 7.3, if any, following order upon her motion to determine whether Defendant failed to improve its position on the trial de novo[.]

CP 601. Prince duly moved the court for an award of fees and costs. CP 613-24. In support of the motion, she submitted declarations from her primary trial counsel, Steven M. Malek, as well as associated counsel, Karl Malling. CP 635-700 & 766-771. The declarations attested to Mr. Malek's normal hourly rates of \$350-400, his paralegal's normal hourly rate of \$125, and Mr. Malling's normal hourly rate of \$450, and his paralegal's normal hourly rate of \$145. CP 635-36 & 685. These hourly rates are consistent with the reasonable rates charged by other lawyers and paralegals in the Seattle area, and Mr. Malling has previously received a court-approved fee award at his rate in a similar case. CP 635-36, 685-86 & 694-97.

The declarations submitted by Prince in support of her motion also included: a summary of Mr. Malek's and Mr. Malling's qualifications, CP 635-36 & 684-86; her written contingency fee agreement, CP 647-48; detailed itemizations of time spent and costs incurred to take Prince's UIM claim to trial, CP 649-664 & 698-700; and supporting documentation for the significant costs, CP 665-83.

In response to Prince's motion for fees and costs, State Farm argued that the premature disclosure of the offer of compromise should result in a forfeiture of all fees and costs, CP 703-05; that Prince is not the prevailing party in light of State Farm's claimed PIP offset and advance of UIM benefits, CP 706-07; and that fees and costs requested by Prince are excessive, CP 707-12.

The superior court determined that Prince was entitled to fees and costs pursuant to MAR 7.3 and RCW 7.06.060(2) because State Farm did not improve its position on trial de novo. CP 782. The court performed an independent review of billing statements and cost invoices submitted by Prince, and entered detailed findings and conclusions. CP 782-86. The court found that the hourly rates charged by Mr. Malek and Mr. Malling and their paralegals are reasonable, and multiplied those rates by the number of hours reasonably expended by each of them. The court reduced the number of hours for both lawyers and their paralegals, including a reduction intended as a sanction for the premature filing of the offer of compromise. CP 783-84. In total, the court awarded \$88,804.75 in fees and \$10,623.20 in costs. CP 784-85.

An amended judgment was entered to reflect the fee and cost award. CP 779-80. From this judgment, State Farm appeals. CP 774-78 & 787-802.

#### IV. ARGUMENT

**A. State Farm has not satisfied its burden to prove any entitlement to a PIP offset against Prince's UIM award.**

State Farm assigns error to what it describes as the superior court's "failure to provide evaluation of fees and costs sufficient for review regarding [its] motion for offsets" and denial of its motion for offsets. App. Br., at 1 (assignments of error #1-2). In its supporting argument, State Farm equates the determination of offset with a post-litigation award of attorney fees and costs to a prevailing party. *See* App. Br., at 12-19. In making this argument, State Farm misapprehends the nature of an offset for PIP benefits paid in the context of a UIM claim, and the insurer's obligation to pay proportional fees and costs incurred by its insured. Because its right to offset, if any, is subject to the requirement of full compensation to its insured, State Farm does not have standing to challenge fees and costs paid by Prince. Even if it could challenge fees and costs—and there is no challenge to fees here—State Farm's objections to costs incurred by Prince are without merit. The

superior court order denying a State Farm's requested offset should be affirmed.

**1. State Farm does not have standing to challenge costs paid by Prince to obtain the UIM recovery against which it seeks a PIP offset.**

Standing is a threshold issue that the Court reviews de novo. *See Estate of Becker*, 177 Wn. 2d 242, 246, 298 P.3d 720 (2013). In this case, given the nature of an insurer's obligation to pay proportional fees and costs incurred by its insured when taking a PIP offset from a UIM award, an insurer in the position of State Farm lacks standing to object to the fees and costs incurred by its insured. As a result, the Court should not entertain State Farm's objection to costs incurred by Prince to obtain her UIM award.

Before an insurer may obtain an offset for PIP benefits, the insured must have been fully compensated for her damages. *See Mahler v. Szucs*, 135 Wn.2d 398, 421 & n.11, 417-18, 957 P.2d 632, 966 P.2d 305 (1998) (noting public policy requiring full compensation to insured before insurer is entitled to reimbursement for a loss in the PIP context, citing and discussing *Thiringer v. American Motors Ins. Co.*, 91 Wn. 2d 215, 588 P.2d 191 (1978)). The insurer has the burden of proof on the issue of full compensation. *See British Columbia Ministry of Health v.*

*Homewood*, 93 Wn. App. 702, 713-14, 970 P.2d 381 (1999) (citing *Elovich v. Nationwide Ins. Co.*, 104 Wn. 2d 543, 555-56, 707 P.2d 1319 (1985)), *rev. denied*, 140 Wn. 2d 1015 (2000). This is in keeping with the placement of the burden of proof for offset as an affirmative defense. *See Puget Sound Energy, Inc. v. Alba General Ins. Co.*, 149 Wn. 2d 135, 140-42, 68 P.3d 1061 (2003).

If the insurer satisfies its burden of proof, then it must pay a proportional share of attorney fees and costs incurred by the insured to obtain a recovery. *See Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn. 2d 303, 312-18, 88 P.3d 395 (2004) (applying *Mahler* rule to offset of PIP benefits from UIM award). Because the focus is on full compensation to the insured, the insurer may not limit its obligation to pay proportional fees and costs to those it deems necessary or beneficial. *See Mahler*, 135 Wn. 2d at 422 (agreeing with statement that “[t]here is no additional requirement that the efforts of the insured’s attorney be necessary to State Farm’s recovery, or that they benefit State Farm” under contractual reimbursement provision).<sup>7</sup>

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<sup>7</sup> While the basis for sharing of fees and costs in *Mahler* appeared to be largely contractual, the Court also referenced the equitable common fund doctrine. *See* 135 Wn. 2d at 426-27 (stating “[t]his equitable sharing rule is based on the common fund doctrine”). In cases following *Mahler*, the Supreme Court clarified that the underlying basis for sharing fees and costs is the common fund doctrine as modified by the requirement of full compensation for the insured. *See Winters*,

There is no attorney-client relationship between the insurer and the insured's lawyer, and the insurer does not have standing to object to the attorney fees and costs incurred by its insured. As explained in the seminal *Mahler* case, in answer to a similar type of objection raised by State Farm (i.e., that payment of proportional fees and costs would result in "a second, unmerited attorney fee" for the insured's lawyer):

It is of no concern to State Farm whether any fee agreement between Mahler and her attorney provides for additional attorney fees. *State Farm has no standing to complain about fee agreements it is not a party to. This is as it should be.* The effort to secure a personal injury recovery, which involves both the insurer's PIP payments and the insured's other damages, must inure to the benefit of the insured, not the insured's lawyers.

135 Wn. 2d at 422-29 (emphasis added). Professional obligations running from the lawyer to the insured, *see* RPC 1.5, statutory protections for the insured, *see* RCW 4.24.005, and the insured's own self-interest in minimizing fees and costs adequately protects

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144 Wn. 2d at 879 (explaining *Mahler* "held that each party benefitted from a common fund generated by the plaintiff, so each should pay a pro rata share of the expenses necessary to generate that fund"); *Hamm*, 151 Wn. 2d at 320 (stating "[a]s *Winters* clarifies, the rule requiring a pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy language").

the insurer from allegedly excessive fees and costs under the circumstances.<sup>8</sup>

State Farm’s position—that it should have the ability to interject itself into the relationship between the insured and the insured’s lawyer by scrutinizing fees and costs and objecting to those it deems unnecessary or unreasonable—is unsupported by authority. State Farm cites *Mahler*, 135 Wn. 2d at 434-35, out of context for the proposition that courts must review attorney fees and costs incurred by an insured for reasonableness before requiring an insurer to pay its proportionate share from any offset.<sup>9</sup> In context, the pages of *Mahler* cited by State Farm deal with post-litigation awards of attorney fees and costs under MAR 7.3 and *Olympic S.S. v. Centennial Ins. Co.*, 117 Wn. 2d 37, 54, 811 P.2d 673 (1991). *See Mahler*, 135 Wn. 2d at 430-35. This discussion contrasts with the Court’s discussion of reducing the insurer’s offset for

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<sup>8</sup> Of course, an insured may not “knowingly prejudice the right of the insurer to be reimbursed.” *Mahler*, 135 Wn. 2d at 418. However, there is no suggestion here that Prince entered the fee agreement with her lawyer for the sake of prejudicing State Farm’s interests.

<sup>9</sup> *See App. Br.*, at 13 (citing *Mahler*, at 435, for the proposition that “[t]he court must make a record of this process,” i.e., “articulating on the record appropriate findings of fact and law for its discretionary decision in determining reasonable costs and fees”); *id.* at 14 (citing *Mahler*, at 434-35, for the proposition that “[c]ourts must take an active role in assessing the reasonableness of fees and costs” and “not simply accept unquestioningly cost and fee affidavits from counsel”).

proportional fees and costs, which an insurer does *not* have standing to challenge. *See id.* at 428-29.

State Farm also seems to cite the Court of Appeals decision in *Winters v. State Farm Mut. Auto. Ins. Co.*, 99 Wn. App. 602, 610, 994 P.2d 881 (2000), *aff'd*, 144 Wn. 2d 869, 31 P.3d 1164 (2001), for a similar proposition, that “[a]n insurer is only responsible for a pro rata share of the fees and costs reasonably expended to obtain the liability insurance proceeds.” App. Br., at 13-14. However, nothing in the Court of Appeals or Supreme Court decisions in *Winters* varies the rule of *Mahler* or suggests that an insurer has standing to contest the reasonableness of attorney fees incurred by its insured to obtain a recovery against which it seeks to take an offset.<sup>10</sup>

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<sup>10</sup> The remaining cases cited by State Farm involve post-litigation awards of attorney fees and costs under various statutes, and have no bearing on the reduction of a PIP offset for proportional fees and costs. *See* App. Br., at 13-15 (citing *Estep v. Hamilton*, 148 Wn. App. 246, 259-63, 201 P.3d 331 (2008) (involving various costs under CR 68 and RCW 4.84.010), *rev. denied*, 166 Wn. 2d 1027 (2009); *Kraft v. Spencer Tucker Sales*, 39 Wn. 2d 943, 952-53, 239 P.2d 563 (1952) (involving premium on attachment bond under former Rem. Supp. 1943 § 7247); *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 534-35, 128 P.3d 128 (2006) (involving attorney fees and costs under Minimum Wage Act, RCW 49.46.090); *Hume v. American Disposal Co.*, 124 Wn. 2d 656, 672-75, 880 P.2d 988 (1994) (involving attorney fees under wage claim statute, RCW 49.48.030; and costs under RCW 4.84.010); *Wagner v. Foote*, 128 Wn. 2d 408, 416-17, 908 P.2d 884 (1996) (involving costs under Ch. 4.84 RCW); *Nelson v. Industrial Ins. Dep’t*, 104 Wash. 204, 176 P. 15 (1918) (involving costs under former Workmen’s Compensation Act, Laws of 1911, p. 345), *overruled by Ellis v. Dep’t of Labor & Indus.*, 88 Wn. 2d 844, 848-49, 567 P.2d 224 (1977); *Gerken v. Mutual of Enumclaw Ins. Co.*, 74 Wn. App. 220, 231, 872 P.2d 1108 (1994) (involving costs under RCW 4.84.010), *rev. denied*, 125 Wn. 2d 1005 (1994)).

If State Farm's attempt to second guess attorney fees and costs incurred by its insured were approved by the Court, there would be a number of undesirable side effects. *First*, State Farm's position would undermine the public policy in favor of full compensation for insureds to the extent it relieves the insurer of its obligation to pay a proportionate share of fees and costs. *Second*, it has the potential to embroil trial courts in difficult issues of attorney-client privilege and work product, since the insurer often takes an adversarial position against its insured. *Third*, it would create an additional area of dispute, hindering the parties' ability to settle claims and undermining the policy in favor of settlements, especially in the insurance context.<sup>11</sup>

The Court should follow *Mahler*, and confirm that an insurer does not have standing to contest proportional attorney fees and costs paid by its insured to obtain a recovery from which the insurer takes a PIP offset. Applying *Mahler* to the facts of this case, no offset is available and the superior court order denying the offset requested by State Farm should be affirmed.

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<sup>11</sup> See, e.g., *American Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn. 2d 762, 772, 174 P.3d 54 (2007) (stating "Washington law strongly favors the public policy of settlement over litigation"); RCW 48.01.030 (regarding duty of good faith); RCW 48.30.010-.015 (regarding unfair insurance practices); WAC 284-30-330 & -390 (regarding unfair settlement practices).

**2. Even if it did have standing, State Farm has not met its burden to prove the costs incurred by Prince are unreasonable.**

If the Court were to determine that State Farm has standing to object to costs incurred by Prince, then it would also have to determine what costs are recoverable in the context of a PIP offset, and who has the burden of proof regarding such costs, before it could determine whether the costs were properly awarded by the superior court below. These issues are not addressed in State Farm's opening brief, and there appears to be no precedent governing these issues. The lack of precedent implicitly seems to confirm the lack of standing to challenge costs in the context of a PIP offset. In any event, all costs actually incurred by Prince should be taken into account when determining a PIP offset, by analogy to costs available in insurance coverage disputes under *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn. 2d 37, 52-53, 811 P.2d 673 (1991). The burden of proving that costs incurred by the insured are unnecessary or unreasonable should be placed on State Farm, consistent with placement of the burden of proof on the issue of full compensation as well as placement of the burden of proof on an affirmative defense of offset. Viewing the facts within the proper framework, State Farm failed to satisfy its burden of proof.

**a. All costs actually incurred by Prince should be taken into account when determining a PIP offset.**

What costs are recoverable in a given context presents a question of law that is subject to de novo review. *See Panorama Village Condo. Owners Ass'n Bd. Of Directors v. Allstate Ins. Co.*, 144 Wn. 2d 130, 134, 141-44, 26 P.3d 910 (2001). In the circumstances present here, all costs actually incurred by Prince should be taken into account when determining the amount of State Farm's PIP offset.

In the proceedings below, State Farm urged the superior court to award only those costs recoverable under RCW 4.84.010, and made a blanket objection to certain types of costs, i.e., for obtaining records that were not introduced into evidence, scanning, copying and faxing documents, parking and other travel expenses, and messenger service. State Farm makes the same objection on appeal, citing cases that involve costs recoverable under Ch. 4.84 RCW as well as other cost statutes. *See App. Br.*, at 13-15.

The reasoning underlying State Farm's objection seems to be that, because such costs are not recoverable under Ch. 4.84 RCW or similar statutes, they are not properly considered in determining its proportionate share of fees and costs before taking an offset.

However, Prince does not seek fees under Ch. 4.84 RCW or any of the other statutes involved in the cases cited by State Farm. Prince seeks fees under the equitable fee-sharing rule grounded in the common fund doctrine, as recognized in *Mahler* and its progeny. None of the statutory limitations on recoverable costs have been read into this equitable fee-sharing rule.

The closest analogy to fees and costs recoverable under *Mahler* is found in *Olympic S.S.*, 117 Wn. 2d at 52-53, which recognized “the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured,” i.e., when the insurer wrongly denies coverage. Like *Mahler*, *Olympic S.S.* represents an equitable exception to the general American Rule disallowing recovery of fees and costs. See *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn. 2d 26, 37, 904 P.2d 731 (1995).

Both *Mahler* and *Olympic S.S.* can be traced to the unique relationship between insurer and insured. An insurer has a quasi-fiduciary relationship with its insured that requires it to give equal consideration to the insured’s interests. See *Tank v. State Farm Fire & Cas. Co.*, 105 Wn. 2d 381, 385-86, 715 P.2d 1133 (1986). *Olympic S.S.* exemplifies the equal consideration rule because

“when an insurer unsuccessfully contests coverage, it has placed its interests above the insured.” *McGreevy*, 128 Wn. 2d at 39-40. *Mahler* similarly exemplifies the equal consideration rule because the insurer cannot place its interest in being reimbursed for PIP benefits over its insured’s interest in being fully compensated for his or her injuries. In this way, *Olympic S.S.* and *Mahler* both reflect concerns and policies unique to the insurance context.

Costs recoverable under *Olympic S.S.* are not limited to those recoverable under Ch. 4.84 RCW or statute. *See Panorama*, 144 Wn. 2d at 134 (holding an award of expenses incurred to establish coverage under an insurance policy “is not limited to those expenses enumerated as recoverable statutory costs in RCW 4.84.010”). “The insured must therefore be compensated for **all** of the expenses necessary to establish coverage[.]” *Id.* at 144 (bold in original). Such recovery is necessary to make the insured whole, remedy the violation of the equal consideration rule, and fulfill the purpose of an award under *Olympic S.S.* *See id.*

The same expansive approach to cost recovery should be applied under *Mahler* as under *Olympic S.S.* (assuming, again, that State Farm has standing to challenge costs). Such an approach is necessary to fulfill *Mahler*’s purpose of ensuring that the insured

receives full compensation. Under this approach, there is no reason why certain types of costs, ipso facto, should be disallowed. State Farm's blanket objection to certain costs, and its attempt to limit Prince to costs available under RCW 4.84.010, should be rejected.

**b. The burden of proving that costs incurred by Prince are unnecessary or unreasonable should be placed on State Farm.**

Placement of the burden of proof presents a question of law that is reviewed de novo. *See Kofmehl v. Baseline Lake, LLC*, 177 Wn. 2d 584, 596-97, 305 P.3d 230 (2013). In this case, State Farm does not explicitly address placement of the burden of proof, but seems to assume that the burden is on Prince when it equates the determination of proportional fees and costs for purposes of determining whether an insurer is entitled to a PIP offset with a post-litigation award of attorney fees and costs to a prevailing party. *See App. Br.*, at 12-19. This placement of the burden is incorrect, and State Farm should have the burden to prove which costs incurred by Prince were unreasonable in order to reduce its proportionate share of attorney fees and costs. As noted above, placing the burden of proof on State Farm follows from the its burden, as Prince's insurer, to show that she has been fully compensated before taking an offset, *see Homewood*, 93 Wn. App.

at 713-14, and is consistent with the ordinary placement of the burden of proof on an affirmative defense of offset, *see Puget Sound Energy*, 149 Wn. 2d at 140-42.

**c. State Farm cannot satisfy its burden of proof, and the superior court did not abuse its discretion in taking all costs incurred by Prince into account.**

An award of costs is reviewed for abuse of discretion. *See Panorama*, 144 Wn. 2d at 141. In this case, the superior court did not abuse its discretion in taking costs incurred by Prince into account in determining whether State Farm was entitled to a PIP offset because State Farm failed to satisfy its burden of proof. Prince submitted a detailed itemization of costs incurred along with supporting documentation. While State Farm characterizes the costs as “inflated,” it does not dispute that they were actually incurred by Prince in the prosecution of her UIM claim. *See App. Br.*, at 16. In the superior court, State Farm made blanket objections to certain categories of costs, and did not identify a single cost item that it contends was unreasonable or unnecessary to obtain the UIM recovery. CP 592-93. Instead, it calculated its PIP offset by limiting costs to those recoverable under RCW 4.84.010. CP 593.

On appeal, State Farm makes the same type of blanket objections to certain categories of costs, and also, for the first time, objects to the *amount* of costs for copies, faxes, and expert witnesses. *See* App. Br., at 15-16. Costs recoverable under *Olympic S.S.* do not limit costs for copies, faxes and experts to a particular amount. *See Panorama*, 144 Wn. 2d at 144 (specifically authorizing recovery of expert costs under *Olympic S.S.*). Because objections to the amount of these costs were not raised in the superior court, Prince did not have an opportunity to justify the amounts on the record. *See* CP 591-93. Accordingly, objections to the amount have not been preserved and should be disregarded. *See* RAP 2.5(a).

Moreover, State Farm's objection to the amount of certain costs, as distinguished from the types of cost incurred, is not based on the record, but rather on the argument of counsel. *See id.* State Farm does not acknowledge whether any amount for these costs is reasonable, and it is not clear whether it has unilaterally reduced these costs by an unspecified amount or simply excluded them in performing its alternate calculations of recoverable costs. *See id.* at 17-19. In any event, none of the three alternate calculations of costs contained in State Farm's opening brief matches its calculation in the superior court. *Compare id. with* CP 593. Whatever number is

used, State Farm still fails to satisfy its burden to prove that particular cost items were unreasonable or unnecessary for Prince to obtain her UIM recovery.

**B. The superior court properly awarded MAR fees to Prince.**

State Farm assigns error to the superior court's order awarding MAR fees to Prince, contesting both her entitlement to fees and costs and the amount of fees and costs awarded. *See App. Br.*, at 1 (assignments of error #3-4). State Farm argues that premature disclosure of the offer of compromise by associated counsel should result in forfeiture of Prince's right to recover fees and costs, *see App. Br.*, at 19-25, and that the amount of fees and costs awarded by the superior court is excessive, *see id.* at 25-33.<sup>12</sup> These arguments should be rejected, and the superior court's award of fees and costs should be affirmed.

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<sup>12</sup> Presumably, Prince's entitlement to attorney fees and costs may hinge in part on the issue of whether State Farm is entitled to a PIP offset, but State Farm does not separately argue the point. It merely requests "remand and instruction as to the costs that should be considered" in connection with the PIP offset, along with a request that "the trial court should revisit its determination as to who is the prevailing party." *App. Br.*, at 19. Absent an offset for PIP benefits paid, State Farm does not appear to dispute that the judgment obtained by Prince exceeds her offer of compromise, justifying an award of attorney fees and costs under RCW 7.06.060 and MAR 7.3.

- 1. Premature disclosure of the offer of compromise by associated counsel should not result in forfeiture of Prince's right to recover fees and costs because the determination of whether State Farm was entitled to a PIP offset does not involve the exercise of discretion.**

State Farm relies on *Hernandez v. Stender*, 182 Wn. App. 52, 358 P.3d 1169 (2014), to support its argument that Prince's right to recover fees and costs has been forfeited. *See* App. Br., at 19-25. In *Hernandez*, the jury awarded damages to the plaintiff in excess of an offer of compromise. *See Hernandez*, 182 Wn. App. at 55-56. Before entry of judgment the defendant filed a motion for remittitur. *See id.* at 56. In response to the motion, the plaintiff prematurely disclosed the amount of the offer of compromise in violation of RCW 7.06.050(1)(c). *See id.* The superior court denied the motion for remittitur and subsequently awarded attorney fees and costs to the plaintiff under RCW 7.06.060 and MAR 7.3. *See id.*

On appeal, this Court held that disclosure of the offer of compromise in response to a motion for remittitur resulted in forfeiture of the right to recover fees and costs, explaining:

The clear policy of RCW 7.06.050 is to prevent a trial court from considering an offer of compromise in its entry of judgment. Our case law indicates the importance of complying with the statute. And, it demonstrates that fee forfeiture is an appropriate remedy where a violation frustrates the statute's

purpose. Here, Hernandez intentionally violated the plain terms of the statute with the purpose of affecting the trial court's decision on Stender's motion for remittitur. RCW 7.06.050 is designed to prohibit this behavior. It is equally clear that the record does not establish that the premature communication of the offer of compromise could not have affected the decision of the trial court. Forfeiture of fees is warranted.

*Hernandez*, 182 Wn. App. at 57-58 (citations omitted).

*Hernandez* is distinguishable from this case and should not result in a forfeiture here because remittitur is a matter of discretion, whereas determination of a PIP offset is not. The standard for remittitur is whether the jury's award is outside the range of substantial evidence in the record, shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice. *See Bunch v. King County*, 155 Wn. 2d 165, 175, 116 P.3d 381 (2005). Orders denying remittitur "are committed to the trial court's discretion" and "not only is this matter within the trial judge's discretion, but the judge must, under our state constitution, give great deference to the jury's finding of fact, including the determination of damages." *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 667, 771 P.2d 711 (1989); *see also Bunch*, 155 Wn. 2d at 176 (noting de novo standard of review for orders granting remittitur). The effect of denying remittitur is to strengthen the verdict,

resulting in narrow and restrained appellate review. *See Washington St. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 330, 858 P.2d 1054 (1993).

Unlike remittitur, a determination of whether a PIP offset can be taken against a UIM award is a matter of arithmetic, applying the formula adopted by the Washington Supreme Court. *See Hamm*, 151 Wn.2d at 314. As a result, “the premature communication of the offer of compromise could not have affected the decision of the trial court,” *Hernandez*, 182 Wn. 2d at 58, nor could it frustrate the purpose of the rule governing the disclosure of such offers, RCW 7.06.050(1)(c). Recognizing the distinction between this case and *Hernandez*, the superior court below properly declined to order that Prince forfeited her right to recover fees and costs, although it reduced the recoverable fees as a sanction for the premature filing. *See CP 784*.

**2. The MAR fees and costs awarded by the superior court are not excessive, and are supported by adequate findings.**

While the burden to demonstrate that attorney fees and costs are reasonable initially falls upon the party seeking to recover such fees and costs in the superior court, on appeal the party seeking to overturn an award of fees and costs has the burden to establish that

the superior court abused its discretion. *See Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013), *rev. denied*, 179 Wn. 2d 1026 (2014). The parties do not disagree regarding the abuse of discretion standard of review, the lodestar methodology for determining reasonable fees, or the fact that the court will not overturn a relatively large fee award merely because the amount at stake in the case is small. *See App. Br.*, at 25-33. State Farm does not dispute that the superior court below applied the lodestar methodology and prepared its own findings of fact and conclusions of law supporting the fee and cost award. CP 782-85. State Farm does not assign error to any of the findings of fact contained in the award. State Farm acknowledges that the superior court reduced the number of hours requested as a result of its independent review. *See App. Br.*, at 31.

State Farm's complaint appears to be that the superior court did not enter a separate, specific finding in response to each of its objections, or otherwise link the reductions in hours to the objections. *See App. Br.*, at 31 (stating "the trial court did not make any findings of fact or law in relation to any of the specific objections" and "[w]hile the trial court reduced Respondent's primary counsel's hours by 28.9 hours, it made no indication where

it was making the reductions”); *id.* at 33 (stating “while the trial court reduced the requested hours, it is unclear where those reductions occurred”).

The specificity sought by State Farm should not be required. “Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought[,]” and “should not simply accept unquestioningly fee affidavits from counsel.” *Mahler*, 135 Wn. 2d at 434-35 (italics in original); *Berryman*, 177 Wn. App. at 657 (quoting *Mahler*). To provide an adequate record for review, courts should enter findings of fact and conclusions of law. *See Mahler*, at 435.

In this case, State Farm does not dispute that the superior court below “conducted an independent review of detailed billings statements and cost invoices submitted” by Prince to prepare its findings and conclusions. CP 782. The superior court did not uncritically accept the billings and statements submitted by Prince, and there is a sufficient record for review. State Farm should be obligated to assign error to specific findings of the superior court and argue that they are unsupported by substantial evidence. *See* RAP 10.3(g). It should not be permitted to simply re-argue its

objections to the fees and costs sought by Prince under the guise of insufficient findings.<sup>13</sup>

**C. As an alternate basis to affirm the superior court’s award of attorney fees and costs, Prince is entitled to fees and costs under *Olympic S.S.* because State Farm denied coverage in its answer and reserved all rights when it tendered the advance payment of UIM benefits.**

Under RAP 2.5(a), “[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” In this case, the Court can affirm the superior court’s award of fees and costs to Prince on alternate grounds because State Farm denied coverage in its answer to her complaint. The denial of coverage was initially based on a lack of information, but State Farm had a duty to investigate coverage beforehand.<sup>14</sup> State

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<sup>13</sup> Prince acknowledges language in *Berryman*, 177 Wn. App. at 659, quoting *Mayer v. City of Seattle*, 102 Wn. App. 66, 82-83, 10 P.3d 408 (2000), *rev. denied*, 142 Wn. 2d 1029 (2001), seeming to require findings regarding specific challenges to time entries. To the extent the Court determines the superior court’s findings were not sufficiently specific, the remedy is to remand for such findings. *See Berryman*, at 659-60. The scope of the remand, if required, should be limited to the specific and relatively minor objections raised in the superior court and identified in State Farm’s opening brief. *See App. Br.*, at 31. The response to the objections is in the record at CP 766-70.

<sup>14</sup> *See, e.g.*, WAC 284-30-330(3)-(4) (providing that “[r]efusing to pay claims without conducting a reasonable investigation” and [f]ailing to adopt and implement reasonable standards for the prompt investigation of claims” are “unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance”); WAC 284-30-370 (requiring “[e]very insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time”).

Farm never sought to remove the issue from controversy by amending its answer after completing discovery, and the answer was never superseded by a pretrial order narrowing the issues.

Although State Farm eventually admitted the existence of coverage in response to Prince's discovery requests, it retained the right to amend those responses (as it did with other responses). Even after the admission of coverage in discovery, State Farm tendered the advance payment of UIM benefits with an express reservation of all defenses. The reservation of defenses did not exclude coverage defenses. This action was therefore necessary to obtain coverage, and Prince is entitled to recover fees and costs under *Olympic S.S., supra*.

**D. Prince is entitled to attorney fees and costs incurred on appeal.**

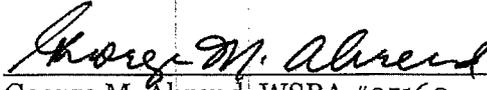
Under RAP 18.1(a), “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule.” Prince requests that the Court award attorney fees and costs incurred on appeal on the same basis as the superior court, i.e., because State Farm has not improved its position on trial de novo. *See* RCW 7.06.060; MAR 7.3. Such fees and costs are available on

they have been forfeited in the trial court. *See Hernandez*, 182 Wn. App. at 62.

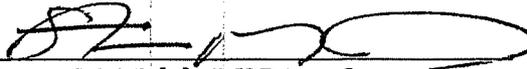
## VI. CONCLUSION

Based on the foregoing, Prince respectfully asks this Court to affirm the decision of the superior court and to award attorney fees and costs incurred on appeal pursuant to RAP 18.1, RCW 7.06.060, and MAR 7.3.

Respectfully submitted this 27th day of April, 2016.



George M. Ahrend, WSBA #25160  
AHREND LAW FIRM PLLC  
100 E. Broadway Ave.  
Moses Lake, WA 98837  
(509) 764-9000



Steven M. Malek, WSBA #28942  
CLAUSEN LAW FIRM PLLC  
701 5<sup>th</sup> Ave., Ste. 4400  
Seattle, WA 98104  
(206) 264-0960

Co-Attorneys for Respondent

## CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

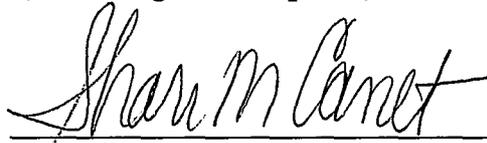
On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

James N. Mendel  
Bendele & Mendel PLLC  
200 W. Mercer St., Ste. 411  
Seattle, WA 98119-3958  
Email: [james@benmenlaw.com](mailto:james@benmenlaw.com)

and upon Respondent's co-counsel, via email pursuant to prior agreement for electronic service, as follows:

Steven M. Malek at [smalek@clausenlawfirm.com](mailto:smalek@clausenlawfirm.com)  
Karl E. Malling at [karl@mallinglaw.com](mailto:karl@mallinglaw.com)

Signed at Moses Lake, Washington on April 27, 2016.



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Shari M. Canet, Paralegal