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ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Clark County Fire District No. 5's motions for a new trial. CP at 888-96.

2. The trial court abused its discretion when it denied Clark County Fire District No. 5's motion to remit Sue Collins's damages award. CP at 888-94.

3. The trial court abused its discretion when it granted the plaintiffs' petition for attorney fees. CP at 896-99.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CR 59(a), did the trial court abuse its discretion in denying the Fire District's motions for a new trial when the Fire District presented evidence that: (1) the damages awards were not substantially supported and were not reasonably within the range of the evidence of damages; (2) the plaintiffs' attorney had committed misconduct during closing argument; (3) the damages awards must have been the result of passion or prejudice; and (4) substantial justice had not been done? (Assignments of Error 1).

2. Under RCW 4.76.030, did the trial court abuse its discretion in denying the Fire District's motion to remit Sue Collins's damages award when the Fire District presented evidence that: (1) her damages award was

not substantially supported and were not reasonably within the range of the evidence of damages; (2) the plaintiffs' attorney had committed misconduct during closing argument; (3) her damages award must have been the result of passion or prejudice; and (4) substantial justice had not been done? (Assignments of Error 2).

3. Under RCW 49.60.030(2), did the trial court abuse its discretion in granting the plaintiffs' petition for attorney fees when the Fire District presented evidence that the plaintiffs were seeking an attorney fees award: (1) based on an unreasonable hourly rate; (2) for non-compensable time; (3) for time attributable to legal assistants; and (4) for redundant or unproductive billing, inappropriate entries, or inappropriate use of time? (Assignments of Error 3).

STATEMENT OF THE CASE

In 1999, Valerie Larwick and Roxy Barnes, along with a few others, developed the idea for a regional training center that would offer various first aid classes, paramedic training classes, and other emergency healthcare training. RP (May 7, 2007) at 882-83, 884-85. Marty James, who had retired from the Vancouver Fire Department, began serving as the administrator of the regional training center in 2000. CP at 99; RP (May 3, 2007) at 340, 344-45.

After forming the regional training center,¹ Larwick and James put together “the team” of employees. RP (May 7, 2007) at 892-93. They first hired Helen Hayden and some temporary employees to help with “the mountains and mountains” of work. RP (May 7, 2007) at 893-96. Then they hired Sue Collins.² RP (May 7, 2007) at 898-900. Eventually, they hired Kristy Mason. RP (May 17, 2007) at 2455-57.

Within a short amount of time, Larwick began having problems with both James and Collins. RP (May 7, 2007) at 958-59. As Larwick explained, “I felt like we’re in this, in this chaotic world of a person who is having a difficult time managing two females in the workplace ... He always told one of us one thing and one of us another thing.” RP (May 7, 2007) at 953-54, 962. And, during this time, Larwick recalled being subjected to several incidents of sexual harassment by James.³ RP (May 7, 2007) at 963-65, 971, 972. Being unable to cope with James’s behavior, Larwick sought advice from Don Bivins, the Chief of the Vancouver Fire Department, in late 2000. RP (May 8, 2007) at 990-92.

¹ The regional training center was created as a central training facility for various city and county agencies, with its operations based at Clark County Fire District No. 5. CP at 99.

² But at all times, Collins was a City of Vancouver employee. CP at 100.

³ But, interestingly, Collins regularly instigated much of the inappropriate behavior in the workplace. RP (May 15, 2007) at 1914, 1923, 1943-44, 1945, 1946.

But after talking with Bivins, Larwick felt that James's "[t]reatment became harsher." RP (May 8, 2007) at 996. Eventually, in early 2001, Larwick contacted Commissioner Bob Torrens about her concerns.⁴ RP (May 8, 2007) at 997-99. But the sexual harassment continued.⁵ RP (May 8, 2007) at 1021.

In the fall of 2002, the Fire District terminated Larwick. RP (May 8, 2007) at 1053-54. Although Larwick claimed that her termination was in retaliation for her actions, the Fire District finally had decided to hire a full-time program director. RP (May 8, 2007) at 1049-51, 1055. And the Training Center's budget did not allow for Larwick's position. RP (May 2, 2007) at 226.

After being terminated, Larwick initially looked for other similar positions. RP (May 8, 2007) at 1056-58. But then she went on a skiing

⁴ A few weeks later, in response to Larwick's concerns about the personnel issues at the Training Center, Patricia Kellogg, in her capacity as a consultant, conducted an in-service training about workplace conflict resolution. RP (May 3, 2007) at 474-75, 477-78; RP (May 8, 2007) at 1001-02.

⁵ In the fall of 2001, Larwick also learned that her then-current husband had been sexually molesting her daughter. RP (May 8, 2007) at 1025. Larwick learned that her son had been protecting her daughter. RP (May 8, 2007) at 1025. And, as a result of her then-current husband's actions, Larwick immediately sought a divorce. RP (May 8, 2007) at 1027.

trip, damaged her knee, and required surgery. RP (May 8, 2007) at 1057.

And she “started drawing on unemployment.” RP (May 8, 2007) at 1057.

Larwick was unemployed for just several months before her then-boyfriend suggested that she stop looking for a new job. RP (May 8, 2007) at 1104. On his advice in the spring of 2003, she started working for him in his timber business, being paid based on the profits of the timber business. RP (May 8, 2007) at 1061, 1105.

Meanwhile, Collins had remained at the Training Center.⁶ But by late 2003, she and Mason now realized that “[they] were being played against each other” by James. RP (May 14, 2008) at 1848. And Collins was worried about James’s behavior toward her. RP (May 15, 2007) at 1870-71.

Then, one day in late 2003, Collins’s husband picked her up from work and, unbeknownst to her, took her to a doctor’s appointment. RP (May 15, 2007) at 1880-81. Collins’s doctor suggested that she “get away for a couple days, just relax.” RP (May 14, 2007) at 1882.

But, after leaving the next day on a business trip, Collins never returned to the Training Center. RP (May 15, 2007) at 1887. Instead

⁶ In her testimony, she recalled many of James’s inappropriate comments and actions directed toward her and the other women. RP (May 14, 2007) at 1731, 1732, 1733, 1735.

Collins relied on her vacation and sick pay until it ran out in March 2004. RP (May 15, 2007) at 2055-56. In February 2004, Collins and her husband went on a cruise to New Orleans, Louisiana. RP (May 15, 2007) at 2056. And then in late spring of 2004, Collins and her husband took a motorcycle trip to the California redwoods. RP (May 15, 2007) at 2056. Ultimately, the City of Vancouver terminated her position. RP (May 15, 2007) at 2118.

Collins intended to start-up her own “safety and compliance type business” in early 2004. RP (May 15, 2007) at 1893-94. But Thomas Boothe, her attorney, put “the kibosh” on her start-up plans because “it would be bad for her court case.” RP (May 15, 2007) at 2005. Collins did not work again until 2005. RP (May 17, 2007) at 2525-26.

In 2005, Collins, Hayden, Larwick, and Mason filed a complaint against the City of Vancouver, Clark County, and Clark County Fire District No. 5. CP at 1-6. The plaintiffs alleged claims of: (1) outrage; (2) negligent supervision; (3) negligent retention; and (4) negligent infliction of emotional distress. CP at 4-6. And they alleged violations of the Washington Law Against Discrimination (WLAD). CP at 4.

Among other things, to support their claims of economic damages, the plaintiffs relied on the testimony of Richard Ross, a vocational evaluator and consultant, and Walter Lierman, a forensic economist. RP

(May 17, 2007) at 2512-33; RP (May 18, 2007) at 2725-78. Lierman estimated Collins's total economic damages varying between \$519,954 and \$683,365. Ex. 318. And Lierman estimated Larwick's total economic damages varying anywhere between \$521,338 and \$929,771. Ex. 320; Ex. 321.

After a lengthy trial, Boothe ended his closing argument with a series of improper comments, which: (1) deliberately injected the matter of defendants' insurance before the jury and (2) invited the jury to "send a message" to the Fire District and the other governmental agencies. RP (May 30, 2007) at 4246-47. Then he asked the jury to award each of the plaintiffs \$1,000,000 in non-economic damages. RP (May 30, 2007) at 4247. At the time, neither defense counsel nor the trial court could have anticipated the effectiveness of Boothe's comments.

After its deliberations, the jury returned a verdict in favor of the plaintiffs. CP at 248-52. The jury awarded Collins \$540,000 in economic damages and \$75,000 in non-economic damages.⁷ CP at 248-49. And the jury awarded Larwick \$626,000 in economic damages and \$875,000 in

⁷ These figures are before any apportionment or reduction for contributory fault. Based on 75% fault, a total of \$461,250 was apportioned to the Fire District and James. CP at 249, 279.

non-economic damages.⁸ CP at 250. It quickly became clear that the jury's verdict was contrary to the evidence and based on passion and prejudice.

In response, the Fire District filed: (1) a motion for a judgment as a matter of law under CR 50(b); (2) a motion for remittitur; and (3) several motions for a new trial under CR 59(a). CP at 276-309. With the exception of remitting Larwick's economic and non-economic damages award, the trial court denied the Fire District's motions. CP at 888-99.

Finally, under RCW 49.60.030(2), the plaintiffs petitioned the trial court for an award of reasonable attorney fees. CP at 390-93. The Fire District opposed this motion, arguing, among other things, that: (1) the hourly rate was excessive; (2) some of the fees were non-compensable; and (3) the plaintiffs failed to meet their burden of proving the reasonableness of the fees. CP at 717-35. But, with the exception of a small deduction, the trial court awarded the plaintiffs more than \$750,000 in attorney fees. CP at 896-99.

Based on the trial court's denial of a fair trial, the Fire District now appeals. CP at 904.

⁸ The jury awarded Hayden \$350,000 in economic damages and \$600,000 in non-economic damages. CP at 252. The jury awarded Mason \$215,000 in economic damages and \$250,000 in non-economic damages. CP at 251. Their verdicts and awards are not at issue in this appeal.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE FIRE DISTRICT'S MOTIONS UNDER CR 59(a) AND RCW 4.76.030

In its CR 59(a) motions for a new trial, the Fire District informed the trial court of: (1) the irregularities in the proceedings; (2) the misconduct of the prevailing party; (3) the excessive damages awards; and (4) the resulting prejudice and substantial injustice to the Fire District. CP at 276-309. Nevertheless, the trial court erroneously denied the Fire District's motions. Because the trial court abused its discretion in denying the Fire District's CR 59(a) motions, this court should reverse and remand for a new trial.

A. STANDARD OF REVIEW

This court reviews a trial court's order denying CR 59(a) motions for a new trial for an abuse of discretion. *Sommer v. Dep't of Social & Health Servs.*, 104 Wn. App. 160, 170, 15 P.3d 664, *review denied*, 144 Wn.2d 1007 (2001). Under such a standard of review, this court normally would consider whether the trial court's decision was manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Sommer*, 104 Wn. App. at 170. But the criterion for testing the trial court's abuse of discretion in denying a motion for a new trial is: "[H]as such a feeling of prejudice been engendered or located in the

minds of the jury as to prevent a litigant from having a fair trial?” *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quoting *Slattery v. City of Seattle*, 169 Wn.2d 144, 148, 13 P.2d 464 (1932)). Finally, because the denial of a new trial concludes the parties’ rights, a lesser showing is needed to set aside an order denying a new trial than one granting a new trial. See *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

B. JURY’S VERDICT CONTRARY TO THE EVIDENCE

To begin with, the jury’s verdicts for Larwick and Collins were *not* substantially supported by and were *not* reasonably within the range of the evidence of damages. See, e.g., CR 59(a)(7). In justifying a jury’s verdict, there must be “substantial evidence,” as distinguished from a “mere scintilla” of evidence, to support the verdict. *Sommer v. Dep’t of Social & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001) (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 605 P.2d 275 (1980)). And the evidence must be of a character that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Hojem*, 93 Wn.2d at 145. Finally, a verdict cannot be founded on mere theory or speculation. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987); *Hojem*, 93 Wn.2d at 145; *Sommer*, 104 Wn. App. at 172. Yet here, that is exactly what the jury did – base its verdicts on mere theory and speculation, instead of substantial evidence.

1. COLLINS'S ECONOMIC DAMAGES LARGELY UNSUPPORTED

Here, Collins's economic damages were largely unsupported. Walter Lierman, the plaintiffs' forensic economist, testified that Collins's past wage loss was more than \$127,000 and that Collins's past pension loss was more than \$6,000. RP (May 18, 2007) at 2731, 2735. But, in making his calculations, Lierman noted that he did not have any "W-2 information" available for Collins during 2005. Ex. 318. And, even more inexcusable, Lierman admitted that he had not met with the plaintiffs to obtain or discuss any personal information about their situation. RP (May 18, 2007) at 2748.

If Lierman had met with Collins, he would have learned that Collins abandoned her job in early November 2003. RP (May 15, 2007) at 1879-81, 1888. She made the decision not to return to the Training Center. RP (May 15, 2007) at 1888-89. And instead of mitigating her damages, as required by law, Collins simply relied on her vacation and sick pay until it ran out in March 2004. RP (May 15, 2007) at 2055-56. In fact, in February 2004, Collins and her husband went on a cruise to New Orleans, Louisiana. RP (May 15, 2007) at 2056. And then in late spring of 2004, Collins and her husband took a motorcycle trip to the California redwoods. RP (May 15, 2007) at 2056.

If Lierman had met with Collins, he would have learned that Collins intended to start-up her own “safety and compliance type business” in early 2004. RP (May 15, 2007) at 1893-94. Collins even went so far as to obtain a license for the business. RP (May 15, 2007) at 1894. Unfortunately, Collins “closed it up” and “never [did] anything with it.” RP (May 15, 2007) at 1894. But this business did not fail because of the economy or Collins’s psychological well-being. It failed because Collins’s attorney put “the kibosh” on it. RP (May 15, 2007) at 2005-08.

During one of the sessions with Laura Caldwell, a psychotherapist, Collins indicated that her attorney had put “the kibosh” on her start-up plans because “it would be bad for her court case.” RP (May 15, 2007) at 2005. Collins shared that she was “depressed” as a result of her attorney’s advice. RP (May 15, 2007) at 2006. And even Caldwell cautioned Collins that “what might be good for her court case wasn’t necessarily good for her psychologically.” RP (May 15, 2007) at 2007.

Furthermore, if Lierman had met with Collins, he would have been able to obtain her “W-2 information” for 2005. In fact, as the jury later learned, Collins earned approximately \$10,400, while working for only half of 2005. RP (May 17, 2007) at 2525-26. Yet Lierman noted that Collins’s “post-termination earnings” for 2005 were \$0. Ex. 318. And

Richard Ross, the plaintiffs' vocational evaluator and consultant, testified that Collins's current earnings – "\$54,000 annually, plus some benefits" – "fairly represent[ed] her residual earning capacity that is certainly commensurate with her skills, aptitudes, and abilities." RP (May 17, 2007) at 2525-26. But yet again, Lierman discounted this figure in his calculations. Ex. 318.

Finally, in coming to his opinion of economic damages in this case, Lierman simply guessed on the time frames of future wage loss and future pension loss for the plaintiffs. Depending on the time frames proposed by Lierman, Collins's total economic damages varied anywhere from \$519,954 to \$683,365. Ex. 318. But these time frames – three to 10 years into the future – were not particularized to each plaintiff's situation. In fact, as Lierman admitted, "It was determined by – after discussion with counsel that that would be an appropriate scenario – those would be appropriate scenarios to show." RP (May 18, 2007) at 2759. And most importantly, Lierman agreed with opposing counsel that "it would *not* have taken these plaintiffs three years or five years or ten years to get reemployed at levels comparable to what they were making at the training center." RP (May 18, 2007) at 2758 (emphasis added). In other words, quoting Lierman himself, "Those were choices that were ... arbitrarily chosen." RP (May 18, 2007) at 2759.

Far from justifying the jury's verdict, this record shows that the jury simply based its verdict on the theory and speculation of an expert and the arbitrary choice of plaintiffs' counsel.

2. LARWICK'S NON-ECONOMIC DAMAGES LARGELY UNSUPPORTED

While there is little doubt that James sexually harassed Larwick, she failed to present substantial evidence of any non-economic damages⁹ that were proximately caused by his behavior. Yet it is axiomatic that "all awards must be supported by competent evidence concerning *the injury*." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L. Ed. 2d 789 (1974) (emphasis added); *see also Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976). Given that the jury did not have this evidence before it, there can be no doubt that Larwick's non-economic damages were largely unsupported and not reasonably within the range of evidence.

For instance, in describing her reactions to James's public comments about women having "nice legs" or "a nice rack," Larwick

⁹ As defined by RCW 4.56.250(1)(b), non-economic damages means:

[S]ubjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

noted, “It was really tacky, and I was embarrassed because of the forum.” RP (May 7, 2007) at 963-64. In regard to these kinds of comments at the training center, Larwick simply noted, “It was frustrating.” RP (May 7, 2007) at 964. And in regard to James’s common question – “Is it cold in here or are you happy to see me?” – Larwick agreed with her own counsel that it was not funny. RP (May 7, 2007) at 964-65. But instead of taking “deep offense” to James’s questioning, Larwick merely thought it was “crude.” RP (May 7, 2007) at 965. Clearly, Larwick’s feelings of embarrassment and frustration over James’s comments cannot be substantial evidence of any injury, i.e., pain, suffering, mental anguish, or emotional distress.

During direct examination, Larwick described the results of constantly being referred to as a “stupid woman” and a “stupid bitch” by James. RP (May 7, 2007) at 973. She testified, “It’s a constant daily battery. It’s like every day hitting you with – somebody hitting you with your fi[ist].” RP (May 7, 2007) at 973. Then Larwick testified that she has had nightmares as a “lingering reaction” to these comments. RP (May 7, 2007) at 974.

But, during cross-examination, Larwick conceded that her deposition testimony contradicted her in-court testimony regarding these statements. RP (May 8, 2007) at 1106-07. In her deposition, Larwick

previously testified that on *one occasion* James had called her a “stupid bitch.” RP (May 8, 2007) at 1107. “We were – on the occasion that I remember, we were talking and I just remember him coming back at me saying, ‘stupid, stupid.’” RP (May 8, 2007) at 1107.

It is one thing for Larwick to claim a “lingering reaction” from multiple incidents of sexually inappropriate comments. But it is quite another thing for Larwick to claim a “lingering reaction” from an isolated incident of a sexually inappropriate comment. Given these contradictions, Larwick’s testimony about her alleged nightmares cannot be substantial evidence of her injuries.

Moreover, much of Larwick’s testimony in support of her sexual harassment claim had nothing to do with her injuries. For instance, Larwick recalled that James referred to a city councilwoman as “being a bird face and having a big nose.” RP (May 7, 2007) at 968-69. Larwick noted that often James would strike her proposed solution to a problem, saying that she was “stupid” and that it was “none of [her] business.” RP (May 8, 2007) at 987-88. Many of Larwick’s complaints about James and the training center focused on “the lack of communication; the lack of teamwork; the lack of support for [their] programs; and [her] workload – [her] workload – and the fact that [she] was asking, requesting daily for help at [her] level of education, an EMS or higher, because [she] needed

that help.” RP (May 8, 2007) at 995. And even Larwick realized that many of her complaints about James and the training center were a result, not of sexual harassment, but of James’s anger. RP (May 7, 2007) at 958-59; RP (May 8, 2007) at 1020. In fact, Larwick admitted that she often “buted heads” with both James and Collins. RP (May 7, 2007) at 961-62. Far from substantial evidence of her injuries from James’s sexual harassment, Larwick’s testimony merely proved her displeasure with James’s management style, manner, and attitude.

In addition, Larwick claimed that James’s behavior was “draining, so stressful, and cause[d] so much anxiety in [her] life.” RP (May 8, 2007) at 988-89. Larwick continued, “So I would go for nights without sleep; I had nightmares; I had headaches frequently; I had severe neck pain the last year while I was at the training center, to the point where – I’d never had a massage in my life until this point.” RP (May 8, 2007) at 989.

But during this time at the training center, Larwick also learned that her then-current husband had been sexually molesting her daughter. RP (May 8, 2007) at 1025. Larwick learned that her son had been protecting her daughter. RP (May 8, 2007) at 1025. And, as a result of her then-current husband’s actions, Larwick immediately sought a divorce. RP (May 8, 2007) at 1027. Due in part to this divorce, Larwick lost a

significant amount of weight and was “very depressed.” RP (May 8, 2007) at 1042, 1071-72. Again, far from substantial evidence of her injuries from James’s sexual harassment, Larwick’s testimony actually proves that a substantial amount of her physical and mental ailments were the result of her own personal problems, not any problems at the Training Center.

Finally, and most importantly, Larwick did not produce a single document from a doctor, therapist, or counselor, *before meeting with her attorney*, in which she complained about any injuries as a result of James’s conduct. Even though Larwick sought counseling from Kellogg the day after being terminated from the training center, the notes from this counseling session did not reflect any complaints by Larwick regarding: (1) sexual harassment at work; (2) unfair or discriminatory treatment at work; or (3) any other problems at work.¹⁰ RP (May 4, 2007) at 588-89. And Larwick did not seek any counseling from any individual until after more than 12 months had passed since her termination from the Training

¹⁰ About 14 months before being terminated, Larwick had sought counseling from Kellogg on two separate occasions. RP (May 4, 2007) at 591-92. But even the notes from these counseling sessions did not reflect any complaints by Larwick regarding: (1) sexual harassment at work; (2) unfair or discriminatory treatment at work; or (3) any other problems at work. RP (May 4, 2007) at 592. Instead, Larwick complained about “a crisis in her family” and “about what had happened to her daughter.” RP (May 4, 2007) at 591.

Center and only after Helen Hayden contacted her to join the current lawsuit.¹¹ RP (May 8, 2007) at 1108-10.

In summary, the purpose of non-economic damages is to compensate the plaintiff for her injuries. *See, e.g.*, 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL § 30.01.01 (5th ed. 2005). But here, Larwick failed to present substantial evidence of any injuries that were proximately caused by James's behavior. Instead, Larwick simply produced the following evidence: (1) that she had feelings of embarrassment and frustration over James's comments; (2) that she had a "lingering reaction" from an isolated incident of a sexually inappropriate comment; (3) that she was displeased with James's management style, manner, and attitude; (4) that she was suffering from problems as a result of her then-current husband's molestation of her daughter; (5) that she was suffering from problems as a result of her divorce; and (6) that she sought counseling only after she met with the other plaintiffs and attorney in the current lawsuit.

In other words, the jury had little or no evidence on which to base its non-economic award for Larwick. And, in disregard of the law,¹² the jury compensated Larwick for unsupported damages.

¹¹ Since Larwick decided to join the current lawsuit, she now has regularly attended counseling sessions. RP (May 8, 2007) at 1110.

3. LARWICK'S ECONOMIC DAMAGES LARGELY UNSUPPORTED

Here, Larwick's economic damages also were largely unsupported and based on speculation. Lierman, the plaintiffs' forensic economist, testified that Larwick's past wage loss was more than \$206,000 and that Larwick's past pension loss was more than \$5,000. RP (May 18, 2007) at 2741-42. But, in making his calculations, Lierman noted that between 2002 and 2007 Larwick was "self-employed as an artist." Ex. 320. He then noted that for the purpose of his calculations, he "[did] not include any income for this occupation, since the business is in the developmental stage." Ex. 320. And, as previously discussed, Lierman admitted that he had not met with the plaintiffs to obtain or discuss any personal information about their situation. RP (May 18, 2007) at 2748.

If Lierman had met with Larwick, he would have learned that his calculations of past economic loss were incorrect. For instance, after Larwick's termination, she "waited about a month" and then "started drawing on unemployment." RP (May 8, 2007) at 1057. But Larwick was unemployed for just several months before her then-boyfriend suggested that she stop looking for a new job. RP (May 8, 2007) at 1104. On his advice in the spring of 2003, she started working for him in his timber

¹² See *Campbell*, 107 Wn.2d at 817-18; *Hojem*, 93 Wn.2d at 145; *Sommer*, 104 Wn. App. at 172.

business. RP (May 8, 2007) at 1061, 1105. And Larwick agreed with opposing counsel that from that time forward she was being paid based on the profits of the timber business. RP (May 8, 2007) at 1105.

Furthermore, if Lierman had met with Larwick, he would have learned that she had stabilized her life, changed careers, and removed herself from a labor market of comparable earnings. In fact, Ross, the plaintiffs' vocational evaluator and consultant, who actually met with Larwick, testified, "She has withdrawn from the competitive labor force, lives up in the mountains, and is attempting to assist her husband in his enterprise." RP (May 17, 2008) at 2518.

Yet, in making his calculations for future economic loss, Lierman totally ignored these facts. Ex. 320; Ex. 321. Instead, Lierman made two sets of calculations: one set assuming that Larwick did not enter the competitive labor market and one set assuming that Larwick entered the competitive labor market as a secretary. RP (May 18, 2007) at 2741-44. Assuming she did not enter the competitive labor market, Lierman estimated that Larwick's total economic damages would be between \$628,676 and \$929,771. Ex. 320. Assuming that Larwick entered the competitive labor market as a secretary, Lierman estimated that her total economic damages would be between \$521,338 and \$626,377. Ex. 321. But most egregiously, Lierman never calculated Larwick's future

economic loss based on the undisputed facts of her own testimony – that she voluntarily withdrew from the competitive labor market.¹³

Thus, based on Lierman’s misguided theory and speculation, the jury came to a verdict that was so manifestly inconsistent and irreconcilable with the evidence as to deprive the Fire District of a fair trial.

C. IRREGULARITY AND MISCONDUCT

Here, Boothe’s improper comments during closing argument constituted both an irregularity and misconduct that materially affected the substantial rights of the Fire District. *See* CR 59(a)(1) and CR 59(a)(2).

In concluding the plaintiffs’ closing argument, Boothe stated:

But I’ll leave you with the request that we are gonna [sic] make for an award of \$1,000,000 in non-economic damages for each of the four plaintiffs.

The amount that’s being sought will not in any way reduce fire services, hurt the Department, it’s not going to do anything that will hurt services in any way or raise taxes, do any of the bogies that might be mentioned, it will not happen. We know that.

What you need to do, please, is put a value on their suffering that other departments will look up and say, “We can’t do that.” Put a value on what they have experienced and compensate them to a level that says, “If you do this, serious consequences flow, and we compensate people as they are injured.” And in so doing, help let the commissioners know the answer to the question they felt

¹³ As previously discussed, Lierman also guessed on the time frames of future wage loss and future pension loss for the plaintiffs. RP (May 18, 2007) at 2758-59.

had to go to you all to be decided. *And in so doing, also let HR departments know that there's a better structure, there's a better way to do this.*

HR departments don't exist for protection of the city. HR departments don't exist for protection of the company. *Let them know that they have to be up there with a viable means for somebody who's experiencing harassment to step forward and bring it forth in a safe way.* And an award of \$1,000,000, compensation of \$1,000,000 to Valerie Larwick, to Kristy Mason, to Sue Collins and to Helen Hayden is the best way you can do that. That, and their economic damages. Thank you.

RP (May 30, 2007) at 4246-47. (emphasis added).

1. NO OBJECTION REQUIRED FOR IMPROPER COMMENTS

At the time, defense counsel did not object to Boothe's comments.

RP (May 30, 2007) at 4246-47. Generally, absent an objection, a party cannot raise the issue of misconduct for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction would have cured the prejudicial effect. *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967); *Sommer*, 104 Wn. App. at 171.

But in *Riley v. Department of Labor & Industries*, 51 Wn.2d 438, 443, 319 P.2d 549 (1957), our Supreme Court found that a party's failure to object to misconduct during closing argument did not waive its right to contend that the alleged misconduct of counsel constituted prejudicial error requiring a new trial. In that case, the employer committed misconduct during its closing argument and rebuttal argument. *Riley*, 51

Wn.2d at 441-43. The employee did not object. *Riley*, 51 Wn.2d at 443. Nevertheless, in response to her motion for a new trial, the trial court granted her motion. *Riley*, 51 Wn.2d at 440. In responding to the employer's appeal, the employee explained her reasons for failing to object before moving for a new trial as follows: "To have made an objection or requested an instruction would have only called the attention all the more to appellant's argument under the circumstances that existed at the time of this particular trial." *Riley*, 51 Wn.2d at 443.

Our Supreme Court concluded that "the insidious effect" of the employer's misconduct was not so readily apparent at the time of its argument. *Riley*, 51 Wn.2d at 443. Moreover, and most importantly, "[n]either the trial court nor either counsel anticipated the effectiveness of those remarks at the time they were being made." *Riley*, 51 Wn.2d at 444. Only *after* the trial court heard the employee's presentation made in support of her motion was it then in a position to appraise the effectiveness of the argument and to understand the impact of the employer's misconduct on the jury's deliberations. *Riley*, 51 Wn.2d at 444.¹⁴

¹⁴ Our Supreme Court ultimately concluded, "Under the unusual circumstances existing in this case, we are unable to say that the trial court abused its discretion in ordering a new trial." *Riley*, 51 Wn.2d at 444.

Here, as our Supreme Court did in *Riley*, this court should conclude that defense counsel's failure to object to Boothe's misconduct during closing argument did not waive the Fire District's right to contend that the misconduct prejudiced its right to a fair trial. To begin with, Boothe's comments about the Fire District's liability insurance coverage and his urging of the jury to "send a message" were misconduct. *See Riley*, 51 Wn.2d at 441-43. Nevertheless, "the insidious effect" of his comments was not so readily apparent at the time of his argument.¹⁵ *See Riley*, 51 Wn.2d at 443. Moreover, and most importantly, neither the trial court nor defense counsel anticipated the effectiveness of Boothe's remarks at the time they were being made. *See Riley*, 51 Wn.2d at 444. Finally, only *after* the trial court heard the Fire District's presentation made in support of its motions for a new trial was it then in a position to appraise the effectiveness of the argument and to understand the impact of Boothe's misconduct on the jury's deliberations. *See Riley*, 51 Wn.2d at 444.

¹⁵ Defense counsel did not call attention to these comments until after the Fire District's closing argument and after the trial court cautioned Boothe in preparation for his rebuttal argument. RP (May 30, 2007) at 4310. The trial court warned Boothe, "Be careful on the sending a message language." RP (May 30, 2007) at 4310. Defense counsel then thanked the trial court, saying, "I appreciate that, Your Honor. I wanted to stand up, but for obvious reasons I didn't." RP (May 30, 2007) at 4310.

Unfortunately, while the trial court in *Riley* properly exercised its discretion, the trial court here abused its discretion under the unusual circumstances existing in this case. Thus, having been denied a fair trial, this court should reverse and remand for a new trial.

2. IMPROPER COMMENTS DURING CLOSING ARGUMENT

First, whether the Fire District is insured against liability is irrelevant to any of the issues in this case. *Todd v. Harr, Inc.*, 69 Wn.2d 166, 417 P.2d 945 (1966); *see* ER 411. Comments about insurance urge jurors to bring in verdicts against defendants on insufficient evidence and, most importantly, urge jurors to bring in verdicts for more than they would if they believed that the defendants themselves would be required to pay them. *See, e.g.*, J.B. Glen, Annotation, *Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance*, 4 A.L.R. 2d 761 (1949).

This rule is not new to Washington. As early as 1934, our Supreme Court stated, “The consensus of our decisions is that, if it is apparent that counsel deliberately sets about, *although in an indirect way*, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial.” *Gaskill v. Amadon*, 179 Wn. 375, 382, 38 P.2d 229 (1934) (emphasis added); *see*

also King v. Starr, 43 Wn.2d 115, 118, 260 P.2d 351 (1953). In 1966, our Supreme Court again reiterated, “[T]he fact that a personal injury defendant carries liability insurance is entirely immaterial, *and the deliberate or wanton injection of this matter into the case by plaintiff is ground for reversal.*” *Todd*, 69 Wn.2d at 168 (emphasis added). And as recently as 2007, Division Three of the Court of Appeals stated, “[T]he willful, deliberate, or collusive interjection of such evidence at trial is grounds for a new trial.” *Kappelman v. Lutz*, 141 Wn. App. 580, 170 P.3d 1189 (2007).

Here, based on the post-trial motions, there can be no doubt that Boothe’s comments during closing argument were a deliberate attempt on his part to inject the matter of the Fire District’s liability insurance coverage into the trial. Unlike either a witness’s inadvertent mention of insurance or a witness’s unresponsive answer to a question, *see, e.g., Lyster v. Metzger*, 68 Wn.2d 216, 223-24, 412 P.2d 340 (1966); *Williams v. Hofer*, 30 Wn.2d 253, 264, 191 P.2d 306 (1948), Boothe willfully and deliberately interjected evidence of the Fire District’s insurance before the jury. RP (May 30, 2007) at 4246-47.

During closing argument, it may not have been readily apparent to either the trial court or defense counsel that Boothe was commenting about the Fire District’s liability insurance coverage. But in the plaintiffs’

memorandum opposing the Fire District's post-trial motions, Boothe admitted as much. CP at 329-30. Referring to his comments during closing argument about the Fire District's insurance, Boothe stated, "Nothing ... even suggests that there would be any adverse financial effect from a judgment against Marty James (or any other defendant). In fact, the quoted passage made very clear that there would not." CP at 330.

But Boothe's statement fails to recognize the effect of his argument on the minds of the jury. ER 411 and Washington case law prohibit statements about *either* the presence or absence of liability insurance coverage because of the prejudicial effect it has on a jury's verdict. *See Gaskill*, 179 Wn. at 382. Quite simply, Boothe's comments that the loss would not fall on the Fire District urged the jurors: (1) to disregard the evidence before them and (2) to bring in a verdict for more than they would if they believed that the Fire District alone would be required to pay it. And while plaintiffs may dispute the nature of the disclosure, our Supreme Court nevertheless stated: "The gravamen of the offense is *not in the disclosure of a collateral fact, but in the manner of its disclosure*; that is, the misconduct of counsel." *Gaskill*, 179 Wn. at 382 (emphasis added). Here, there is no doubt that Boothe committed misconduct.

Second, urging the jury to “send a message” to the Fire District and other government agencies is improper. *See Joyce v. State Dep’t of Corrections*, 155 Wn.2d 306, 326, 119 P.3d 825 (2005); *see also State v. Powell*, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (“the prosecutor in effect told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed”), *review denied*, 118 Wn.2d 1013 (1992). Such arguments, including “golden rule” arguments, are “improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *See Adkins v. ALCOA*, 110 Wn.2d 128, 138-41, 750 P.2d 1257, 756 P.2d 142 (1998) (quoting *Rojas v. Richardson*, 703 F.2d 186, 191 (5th Cir. 1983)).

In civil cases, “golden rule” arguments and “send a message” arguments are tantamount to arguments for jury nullification of the applicable law. *See Lioce v. Cohen*, 174 P.3d 970, 982-84. Jury nullification has been defined as:

[a] jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either *because the jury wants to send a message about some social issue that is larger than the case itself* or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.

BLACK’S LAW DICTIONARY 875 (8th ed. 2004) (emphasis added). The particular problem with such arguments is that they invite the jury to

speculate and award what amounts to punitive damages. Yet, absent statutory authority, punitive damages are not allowed in Washington. *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 635 P.2d 441(1981), *amended by* 649 P.2d 827 (1982).

Furthermore, our Supreme Court has disapproved of such arguments. *See Adkins*, 110 Wn.2d at 140. Our Supreme Court warned:

Where an argument is designed to affect the outcome of the case, either upon the question of liability or damages, a plaintiff's potential recovery or a defendant's potential success in defending is involved. Whether a plaintiff recovers at all, and the amount of a plaintiff's recovery, if any, or whether a defendant prevails, are questions the jury must resolve solely on the evidence and the law, *and not on the basis of appeals to sympathy, passion or prejudice.*

Adkins, 110 Wn.2d at 140 (emphasis added).

Here, again based on the post-trial motions, there is no question that Boothe's argument was designed to affect the outcome of the case. While it may not have been readily apparent that Boothe was appealing to the jury's sympathy, passion, and prejudice during closing argument, in the plaintiffs' memorandum opposing the Fire District's post-trial motions, Boothe specifically admitted to urging the jury to "send a message." CP at 330-31. Boothe stated, "[P]laintiffs *urged the jury to send a message.* Their argument asked the jury to respect the harm incurred by plaintiffs, because to do otherwise would embolden other

employers and supervisors, to act without regard to consequence.” CP at 330 (emphasis added).

Taken together, this evidence shows that Boothe’s closing argument was improper. Boothe appealed to the jury’s passion and prejudice. Despite knowing the impropriety of such argument, Boothe gave it to the jury anyway. And Boothe made these comments at the very end of his closing argument, just before a recess, thus taking advantage of the “last heard longest remembered” principle. *See Adkins*, 110 Wn.2d at 141.

D. JURY’S VERDICT IS EXCESSIVE, TAINTED BY PASSION AND PREJUDICE

Based on the above record, there is no doubt that the jury was asked to forsake all sensible thought and reach its verdict out of outrage, animosity, and spite. *See, e.g., Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975); *see also Bingaman v. Grays Harbor Cmty. Hosp.*, 37 Wn. App. 825, 685 P.2d 1090 (1984), *rev’d in part*, 103 Wn.2d 831, 699 P.2d 1230 (1985). And the trial court should have found that the jury’s verdict was not supported by substantial evidence, but instead based on passion and prejudice. *See Rasor*, 87 Wn.2d at 531. In failing to do so, and in failing to grant the Fire District’s motions for a new trial, the trial court abused its discretion.

Based on the Fire District's post-trial motions, the trial court knew that there was an irregularity in the proceedings and that the jury's verdict was not supported by substantial evidence. *See* CR 59(a)(1), CR 59(a)(7). The trial court knew that Boothe's comments during closing argument were improper and implored the jury to ignore its duty under the jury instructions. *See* CR 59(a)(2). And the trial court knew that Boothe's improper comments during closing argument were a deliberate attempt on his part: (1) to inject the issue of the Fire District's liability insurance coverage into the trial and (2) to urge the jury to improperly "send a message" to the Fire District and other government agencies. *See* CR 59(a)(2), CR 59(a)(5).

Moreover, the conclusion is inescapable that the combined effect of these indiscretions and misconduct aroused the passion and prejudice of the jury. *See* CR 59(a)(5). Instead of basing its award on the evidence presented, the jury based its award on an unrealistic and irrational appraisal of damages. *See Bingaman*, 37 Wn. App. at 832. In fact, the jury awarded Larwick the highest award of economic damages – \$626,000 – even though she voluntarily removed herself from the competitive labor market. CP at 250. This award alone was \$86,000 more than what the jury awarded to Collins. CP at 248-49. And the jury also awarded Larwick the highest award of non-economic damages – \$875,000 – even though she

suffered for the least amount of time while at the Training Center and failed to produce substantial evidence of her injuries. CP at 250.

The trial court should have recognized, based on the above record, that substantial justice had not been done. *See* CR 59(a)(9). Clearly, the jury was taking out its wrath on the Fire District, in violation of Washington's firmly established policy against punitive damages. *See, e.g., Conrad ex rel. Conrad v. Alderwood Manner*, 119 Wn. App. 275, 294, 78 P.3d 177 (2003).

Yet, by failing to redress any of these causes materially affecting the substantial rights of the Fire District, the trial court abused its discretion in denying the Fire District's motions for a new trial under CR 59(a).¹⁶ And this court should reverse and remand for a new trial.

II. ATTORNEY FEES

In response to the plaintiffs' petition for an award of "reasonable attorney fees" under RCW 49.60.030(2), the trial court awarded the plaintiffs more than \$750,000. CP at 896-99. But this award was

¹⁶ Alternatively, for similar reasons under RCW 4.76.030, the trial court abused its discretion when it denied the Fire District's motion to remit Collins's damages award. "Trial court orders denying a remittitur are reviewed for an abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent." *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 174-78, 116 P.3d 381 (2005).

excessive for the following reasons: (1) \$280/hour is not a reasonable hourly rate; (2) the trial court awarded attorney fees for non-compensable time; (3) the trial court did not reduce the award for time attributable to legal assistants; and (4) the trial court did not reduce the award for redundant or unproductive billing, inappropriate entries, or inappropriate use of time. Seeing that the trial court abused its discretion, this court should reverse the trial court's award and remand for further proceedings.¹⁷

A. STANDARD OF REVIEW

This court reviews a trial court's attorney fee award for an abuse of discretion. *Pham v. City of Seattle*, 159 Wn.2d 527, 539, 151 P.3d 976 (2007). That is, this court considers whether the trial court's decision to award attorney fees was manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Pham*, 159 Wn.2d at 539.

B. REASONABLE HOURLY RATE

In their petition for an award of attorney fees, the plaintiffs argued that an hourly rate of \$300 was reasonable. CP at 391. But the Fire District clearly showed that such an hourly rate was unreasonable. CP at CP at 721-23. In fact, the Fire District showed that a reasonable hourly

¹⁷ Assuming that this court concludes that the trial court abused its discretion when it denied the Fire District's motions for a new trial under CR 59(a), this court should reverse the trial court's award in its entirety.

rate should not exceed \$225. CP at 723. Nevertheless, the trial court disagreed, setting the hourly rate at \$280. CP at 896-99. In explaining its decision, the trial court stated, “To argue that Clark County standards would set the fees is not persuasive as counsel in this highly specialized field often would be from Seattle or Portland where they’re with firms more highly specialized in this type of case and case management.” CP at 897. But the trial court abused its discretion.

It is well-established in Washington law that a reasonable hourly rate is grounded in the market value of the attorney’s services. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993); *Steele v. Ludgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 237, 914 P.2d 86 (1996). And it is also well-established that the party seeking attorney fees bears the burden of proving the reasonableness of the attorney fees. *Scott Fetzer Co.*, 122 Wn.2d at 151; *Faraj v. Chulisie*, 125 Wn. App. 536, 549, 105 P.3d 36 (2004).

Here, the plaintiffs asserted that an hourly rate of \$300 was reasonable in the context of the greater Pacific Northwest. CP at 391. But the plaintiffs cited no authority to support their proposition that the trial

court should somehow re-define what constitutes a prevailing market.¹⁸ Instead, the plaintiffs relied on self-serving declarations from attorneys familiar with the metropolitan markets in Portland, Oregon, and Seattle, Washington.¹⁹ CP at 769-70.

In contrast, the Fire District presented the following evidence that a reasonable hourly rate of an attorney of Boothe's experience and skill in the area of employment litigation should not exceed \$225. First, defense counsel Richard Matson, an attorney of similar experience and skill in the area of employment litigation, noted that he charges an hourly rate of \$210 for his services in Clark County. CP at 722-23. Second, Donald Grant, an attorney whose practice has emphasized employment litigation for the past 20 years, stated that he charges an hourly rate of \$215 for his services in Clark County. CP at 668. Grant also pointed out that an hourly fee of \$300, even in a highly specialized field, would price an attorney out of the Clark County market of an attorney's services. CP at 668-84. Third, a recent survey by Judge Roger A. Bennett, of the Clark County Superior

¹⁸ It is conceivable that one could inflate the market value of an attorney's services simply by re-defining what constitutes a prevailing market. But such an interpretation would lead to absurd results, where the market value of a Clark County attorney could be grounded in the market value of a New York or Los Angeles attorney.

¹⁹ If anything, the declaration of David Markowitz suggests that the market value of an attorney's services in Clark County is *not* \$300 per hour. CP at 769, 815-23.

Court, demonstrated that the mean hourly rate for a personal injury attorney of more than 10 years' experience was \$225. CP at 681-84.

Given that the plaintiffs provided the court with conclusory and generalized declarations, failed to address the evidence presented by the Fire District, and under Washington law failed to prove the reasonableness of any hourly rate exceeding \$225, there is no question that the trial court relied on unsupported facts and/or applied the wrong legal standard in deciding that an hourly rate of \$300 was reasonable.

C. NON-COMPENSABLE TIME

Washington courts have called for a liberal construction of the attorney fees entitlement under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. *Martinez*, 81 Wn. App. at 235. Nevertheless, Washington courts have limited attorney fees awards to hours reasonably expended. *Scott Fetzer Co.*, 122 Wn.2d at 151. In fact, our Supreme Court has stated:

The trial court must determine the number of hours reasonably expended in the litigation. To this end, the attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended, *and should therefore discount hours spent on*

unsuccessful claims, duplicated effort, or otherwise unproductive time.

Bowers v. Transamerica Title Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (emphasis added); *see also Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501, 859 P.2d 26 (1993) (“This court has held that a plaintiff can be required to segregate its attorney’s fees between successful and unsuccessful claims that allow for the award of fees.”).

Relying on *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987), the plaintiffs argued that “the fees for work on successful claims [were] not segregable from the work on unsuccessful parallel and overlapping claims.” CP at 770-72. Thus, the plaintiffs argued that they were entitled to properly recover “the entirety of the legal time involved with their claims.” CP at 770.

The trial court did not entirely agree with the plaintiffs. CP at 896-99. Instead, the trial court reduced the plaintiffs’ attorney fees award by \$21,000, the amount that the plaintiffs incurred for actions related to Clark County and the City of Vancouver, other co-defendants. CP at 898. But while the trial court properly discounted the award for these fees, the trial

court nonetheless failed to discount the award for other fees incurred for unsuccessful claims.²⁰ CP at 896-99.

In opposing the plaintiffs' petition for attorney fees, the Fire District noted that the plaintiffs were not entitled to fees incurred for the following dismissed claims: (1) plaintiffs' outrage claim; (2) plaintiffs' negligence claims; (3) Collins's constructive discharge claim; and (4) Collins's retaliation claim. CP at 724-25. Although these claims may have been based on a number of facts essential to the overall lawsuit, the law pertaining to the dismissed claims differed from the law pertaining to the WLAD claims. *See, e.g., Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344, 54 P.3d 665 (2002). Thus, the legal theories attaching to these facts differed. *See, e.g., Smith*, 113 Wn. App. at 344.

And while the plaintiffs may argue that all their claims involved a common core of facts and related legal theories, *Steele v. Lundgren*, 96 Wn. App. 773, 783, 982 P.2d 619 (1999), or that the attorney fees incurred for the successful and unsuccessful claims are inseparable, *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987), the plaintiffs have yet to meet their burden of proving the reasonableness

²⁰ In addition, the trial court failed to discount the award for fees incurred in unsuccessful motions. CP at 723-24, 896-99.

of the attorney fees. *Scott Fetzer Co.*, 122 Wn.2d at 151; *Faraj*, 125 Wn. App. at 549.

In fact, the plaintiffs' billing combined numerous tasks into a single time entry. CP at 729-30. This "block billing" effectively prevented an effective segregation of the attorney fees between successful and unsuccessful claims. CP at 729. It disguised redundant, questionable, and otherwise unproductive time. CP at 725-30. And the plaintiffs' billing did not enable the trial court to identify and segregate distinct claims. *Contra Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ("The applicant should exercise 'billing judgment' with respect to hours worked ... and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.").

Absent the plaintiffs proving the reasonableness of the attorney fees incurred for the dismissed claims, the trial court should have further discounted the plaintiffs' attorney fees award. *See Bowers*, 100 Wn.2d at 597 (the trial court should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time). And, given the plaintiffs' poor "billing judgment,"²¹ the trial court should have made a

²¹ As the Fire District noted, plaintiffs' billing included: (1) redundant and/or unproductive billing; (2) inappropriate entries; (3) and inappropriate use of attorney time. CP at 725-30. If nothing else, based solely on the cumulative inadequacies of plaintiff's billing, the trial court should have made a pro rata reduction. CP at 726.

pro rata reduction . See *Harper v. City of Chicago Heights*, 223 F.3d 593, 605 (7th Cir. 2000) (“[W]hen a fee petition is vague or inadequately documented, a [trial] court may either strike the problematic entries or (in recognition of the impracticalities of requiring courts to do an item-by-item account) reduce the proposed fee by a reasonable percentage.”). Doing nothing, as the trial court did when faced with a similar scenario, was an abuse of its discretion.

D. REDUCTIONS FOR TIME ATTRIBUTABLE TO LEGAL ASSISTANTS

Relying on declarations from two of Boothe’s legal assistants, the plaintiffs argued that legal assistants’ time should be included in the attorney fees award. CP at 878. And the trial court agreed. CP at 898-99.

But the plaintiffs did not show how the services of *these* legal assistants were the services of “*qualified* legal assistants,” as explained in *North Coast Electric Company v. Selig*, 136 Wn. App. 636, 644-45, 151 P.3d 211 (2007) (emphasis added). And the plaintiffs’ own billing, with nothing more, suggests that much of these legal assistants’ services were for secretarial work, not substantive legal work. CP at 730-31.

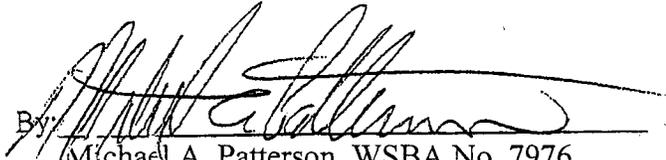
Nevertheless, the trial court relied on the plaintiffs’ inadequacies to “authorize[]” an attorney fee award that included legal assistants’ time. CP at 898-99. Giving such an award, for secretarial work, was an abuse of discretion.

III. CONCLUSION

For the reasons set out above, it is clear that the trial court abused its discretion when it: (1) denied the Fire District's motions for a new trial; (2) denied the Fire District's motions to remit Collins's damages; and (3) granted the plaintiffs' petition for attorney fees. Thus, the Fire District respectfully requests that this court reverse and remand for further proceedings.

RESPECTFULLY SUBMITTED this 29th day of September 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I caused the original and one copy of the foregoing to be filed with the clerk of the court via Legal Messenger and a true and correct copy to be served upon counsel as listed below:

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DEPUTY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington, this 29th day of September, 2008.

Vicki L Brown

Vicki L. Brown, Legal Assistant