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ARGUMENT

The plaintiffs' response and cross-appeal is emblematic of the same problems that plagued the proceedings during trial. While the plaintiffs complain that the Fire District has violated RAP 10.3(a)(5) with its so-called "misrepresentations of the record and insertion of argument," (Br. of Resp't at 4), the plaintiffs' counterstatement of the case is far from "[a] fair statement of the facts," either. *See* RAP 10.3(a)(5).

This appeal is solely about the jury's awards to Collins and Larwick. Yet a significant portion of the plaintiffs' counterstatement of the case can be relevant for no other purpose than to unfairly prejudice this court against the Fire District. A "fair statement of the facts," RAP 10.3(a)(5), would not have included reference to the staggering number of irrelevant facts.

Furthermore, the plaintiffs' brief is full of irregularities; it misconstrues the law; and it omits key facts. Just as the plaintiffs urged the jury and the trial court, the plaintiffs now urge this court to forsake all sensible thought and reach an opinion based on outrage, animosity, and spite. *See, e.g., Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975). But impassioned pleas, however persuasive, should not – and cannot – be a substitute for the law.

I. THE TRIAL COURT DID NOT ERR IN REMITTING LARWICK'S DAMAGES AWARD

Contrary to what the plaintiffs argue, (Br. of Resp't at 49-66), the trial court did not err in remitting Valerie Larwick's damages. When looking at the evidence supporting the jury's verdict, it is clear that the jury based its verdict on passion and prejudice. The evidence was not – and is not – of a character that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Hojem v. Kelly*, 93 Wn.2d 143, 145, 605 P.2d 275 (1980). In fact, the trial court stated as much when it noted, “Without question the jury was influenced by [the Fire District's] actions, feeling a resentment against the District for an action against an employee who, for the most part, had been one of the primary persons putting the program in place.” CP at 893. And it is axiomatic that a jury's verdict cannot be based on passion, prejudice, theory, and/or speculation. *See Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 817-18, 733 P.2d 969 (1987); *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976).

A. LARWICK'S NON-ECONOMIC DAMAGES WERE SUPPORTED BY PASSION, PREJUDICE, AND SPECULATION

In their brief, the plaintiffs claim that the jury's verdict regarding Larwick's non-economic damages “was satisfied by the testimony of the many witnesses to Larwick's devastation, James' devastating crudeness,

and the commissioners' complicity or cluelessness." (Br. of Resp't at 61-62). While accusing the Fire District of displaying "their blindness to the severity of what Larwick suffered through," (Br. of Resp't at 62), the plaintiffs conveniently omit that all damages awards, regardless of the number and breadth of witnesses, must be supported by competent evidence concerning the injury. *See 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*, 87 Wn.2d at 530. And the plaintiffs conveniently omit that, regardless of whether the conduct complained of is objectively abusive, the conduct complained of still must be subjectively perceived as abusive by the victim, i.e., Larwick. *See Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297, 57 P.3d 280 (2002) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)). Instead, for almost seven pages of their brief, the plaintiffs "mix and match" the testimony of witnesses, misrepresent the record, and omit significant facts.

To begin with, there is no evidence that Larwick knew that she was "James' special target." (Br. of Resp't at 50). Instead, the plaintiffs rely on Kristy Mason's testimony that she "was just so taken aback by these things that were said." (Br. of Resp't at 50); RP (May 17, 2007) at 2465-66. The plaintiffs claim that Sue Collins heard James say that "he was

going to get rid of [Larwick].” (Br. of Resp’t at 50); RP (May 17, 2007) at 2481. But this statement is actually attributable to Mason. RP (May 17, 2007) at 2481. And Helen Hayden’s testimony simply recounts her own understanding of the environment at the Training Center. RP (May 9, 2007) at 1243.

The plaintiffs readily admit that working at the Training Center was stressful and emotionally draining. RP (May 7, 2007) at 872. And much of Larwick’s testimony simply reflects that she – and others – had to endure Marty James’s uncontrollable temper, and random and unpredictable episodes of verbal abuse. For instance, the plaintiffs emphasize that James “would get in [Larwick’s] face and say, ‘You hate Sue Collins. Just face it, you hate her.’” (Br. of Resp’t at 52); RP (May 7, 2007) at 958. And the plaintiffs emphasize that James would yell and scream in Larwick’s face. (Br. of Resp’t at 52); RP (May 7, 2007) at 961. But a gruff, direct management style does not, in and of itself, rise to the level of sexual harassment. *See, e.g., Adams*, 114 Wn. App. at 297. Moreover, Larwick admitted that she often “butted heads” with both James and Collins. RP (May 7, 2007) at 961-62.

No one disputes that James said such comments as “she’s got a nice rack.” RP (May 7, 2007) at 963. No one disputes that James commonly asked, “Is it cold in here or are you happy to see me?” RP

(May 7, 2007) at 964-65. But in describing her reaction to these comments, Larwick simply noted, “It was really tacky, and I was embarrassed because of the forum.” RP (May 7, 2007) at 964. And she agreed with her own counsel that they were not funny. RP (May 7, 2007) at 964-65. Instead of taking “deep offense” to James’s comments and questioning, Larwick merely thought that it was “crude.” RP (May 7, 2007) at 965. Clearly, Larwick’s feelings of embarrassment and frustration over these comments and questioning cannot be signs of “emotional disarray.” (Br. of Resp’t at 50).

During direct examination, Larwick described the results of being referred to as a “stupid woman” and a “stupid bitch” by James as “a constant daily battery.” RP (May 7, 2007) at 973. And the plaintiffs emphasize that Larwick has had a “lingering reaction” to these comments. (Br. of Resp’t at 51); RP (May 7, 2007) at 973. Yet the plaintiffs fail to note that Larwick conceded that her in-court testimony regarding these statements contradicted her deposition testimony. 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.

In their brief, the plaintiffs paint a picture of sexual harassment that was so allegedly pervasive that they needed to arrange for a mediation session with a mental health counselor, Patricia Kellogg, in 2001. (Br. of Resp’t at 52). Yet during this mediation, Kellogg found that “[e]veryone is enthusiastically supportive of the main goal, which is the success of the center.” RP (May 4, 2007) at 610. Among other things, Kellogg found that “there are good people there, that they’re hard working; that there’s openness to improving the workplace, that it’s a small enough group to be able to foster some sense of community; that it’s a reasonably pleasant environment; that there’s reasonable compensation.” RP (May 4, 2007) at 611. And Kellogg recalled, “[T]hey said that there was a good front office area; that a lot of people had an awesome sense of humor and that it could be used as a stress reliever.” RP (May 4, 2007) at 611. Kellogg never mentioned anything about any complaints of sexual harassment. RP (May 4, 2007) at 606, 612.

Nevertheless, the plaintiffs try to “bootstrap” their argument by relying on statements that Larwick allegedly made to Kellogg in 2004, after Larwick had been terminated from the Training Center. (Br. of

Resp't at 52). But as the Fire District already noted in its brief, Larwick did not produce a single document from a doctor, therapist, or counselor, *until after meeting with her attorney*, in which she complained about any injuries as a result of James's conduct. In fact, 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. RP (May 4, 2007) at 588-89. And Larwick did not seek any further counseling until after more than 12 months had passed since her termination from the Training Center and only after Helen Hayden contacted her to join the current lawsuit. RP (May 8, 2007) at 1108-10.

Many of the comments that the plaintiffs rely on in their brief are simply irrelevant to Larwick's subjective perceptions of James's conduct.¹ (Br. of Resp't at 52, 53, 54, 55). For instance, Larwick did not hear James referring to her as "that fucking bitch running a business out of her kitchen." RP (May 14, 2007) at 1730. Instead, Collins testified that

¹ In fact, with no citation to the record, the plaintiffs boldly state, "Larwick's termination was intended by James to cause Larwick plain." (Br. of Resp't at 55). Much of the testimony that allegedly supports this statement is simply the speculation and opinion of Collins and Mason.

James would tell these things to her.² RP (May 14, 2007) at 1730. Mason, not Larwick, testified that James made comments to her about Larwick's white pants. RP (May 17, 2007) at 2466. Many of the statements were not Larwick's own observations, but the observations and perceptions of others, including Marc Muhr and Sheryl Anderson. RP (May 3, 2007) at 410-11, 413; RP (May 7, 2007) at 779. And the plaintiff's statement that "Larwick felt helpless" was actually Dr. James Boehnlein's observation – in preparation for this trial. RP (May 18, 2007) at 2819.

Finally, the plaintiffs rely significantly on Dr. Boehnlein's testimony to support Larwick's non-economic damages. (Br. of Resp't at 62-64). Yet, in their 70-page brief, the plaintiffs fail to mention that during the last year or so of her employment at the Training Center, Larwick 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.

² In addition, Collins, not Larwick, testified that James referred to Larwick with disparaging comments. RP (May 14, 2007) at 1730-31.

During this eventful year, Larwick noted, “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. And due in part to the divorce, Larwick lost a significant amount of weight and was “very depressed.” RP (May 8, 2007) at 1042, 1071-72.

Moreover, about 14 months before being terminated from the Training Center, Larwick had sought counseling from Kellogg on two separate occasions. RP (May 4, 2007) at 591-92. During these counseling sessions, did Larwick complain, in the words of Dr. Boehnlein, about “feeling trapped, of being closed in, of fear, of humiliation”? RP (May 18, 2007) at 2804. No. Did Larwick complain, in the words of Dr. Boehnlein, that “in order to be most valued in the family ... [she] had to excel or be successful?” RP (May 18, 2007) at 2812. No. Did Larwick complain about post-traumatic stress disorder? RP (May 18, 2007) at 2856. No.³

The notes from these counseling sessions – during the time that Larwick was employed at the Training Center – did not reflect any

³ In fact, Dr. Boehnlein admitted that he had not talked to any of the plaintiffs’ doctors or counselors. RP (May 18, 2007) at 2843.

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, and most telling, Larwick complained about “a crisis in her family” and “about what happened to her daughter.” RP (May 4, 2007) at 591.

Far from what the plaintiffs call a “mountain of evidence,” (Br. of Resp’t at 64), the testimony actually proves that a substantial amount of Larwick’s physical and mental ailments were the result of her own personal problems. The jury was misled by its resentment against the Training Center. And the trial court, concluding that the jury compensated Larwick in disregard of the law,⁴ correctly remitted Larwick’s non-economic damages.

B. LARWICK’S ECONOMIC DAMAGES WERE SUPPORTED BY THEORY AND SPECULATION

In their brief, the plaintiffs claim:

The situation at the Training Center is material to Larwick’s emotional condition and her ability to enter the marketplace. The Trial Court noted with regard to Collins that the situation at the training center contributed to her emotional disarray, which reduced her ability to obtain later employment. CP 890-91. The same would certainly be true for Larwick.

⁴ See *Campbell*, 107 Wn.2d at 817-18; *Hojem v. Kelly*, 93 Wn.2d 143, 145, 605 P.2d 275 (1980); *Sommer v. Dep’t of Social & Health Servs.*, 104 Wn. App. 160, 172, 15 P.3d 664, *review denied*, 144 Wn.2d 1007 (2001).

(Br. of Resp't at 50). But the trial court decided no such thing with regard to Collins. CP at 894-95.⁵ Nevertheless, for the next seven pages of their brief, the plaintiffs use their own and others' testimony regarding the environment at the Training Center to support the jury's verdict regarding Larwick's *economic* damages. (Br. of Resp't at 50-56).

But such evidence has nothing to do with *economic* damages such as lost wages, back pay, front pay, and pension loss.⁶ This evidence does not support the jury's verdict regarding Larwick's *economic* damages. (If anything, the testimony of these witnesses might go to *non-economic damages*, such as physical harm and emotional harm.)⁷ But most

⁵ In fact, the trial court noted, "However, it was clear from the testimony that the hostile environment did contribute to her emotional well-being in disarray as testimony of neutral parties clearly portrays a person subject to emotional issues brought on by the activities taking place at her place of employment." CP at 894-95.

⁶ The only testimony from these seven pages that could remotely support the jury's verdict regarding Larwick's *economic* damages is the testimony from Larwick's husband that she stopped selling her first aid books after she started working for him in his timber business. (Br. of Resp't at 56); RP (May 8, 2007) at 1149.

⁷ 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.

importantly, as the trial court noted, this evidence simply invites the jury to “[feel] a resentment against the District for an action against an employee who, for the most part, had been one of the primary persons putting the program in place.” CP at 893. Thus, it is easy to see that the plaintiffs asked the jury to forsake all sensible thought and reach an opinion, not based on relevant evidence regarding Larwick’s economic damages, but instead based on the passion and prejudice of “the situation at the training center.” (Br. of Resp’t at 50).

Moreover, relying on Richard Ross’s testimony, the plaintiffs tried to convince the jury – and are trying to convince this court – that Larwick had only two options for moving forward with her life: (1) remain out of the competitive labor market or (2) enter the competitive labor market as a secretary. RP (May 17, 2007) at 2519-20. But even Ross admitted, “Well, again, Ms. Larwick has decided to pursue a different course.” RP (May 17, 2007) at 2519. The plaintiffs do not want to admit that Larwick took the third option for moving forward with her life, by voluntarily changing careers and voluntarily removing herself from a labor market of comparable earnings.⁸

⁸ Even Hank Lageman, the Fire District’s vocational rehabilitation specialist, testified that Larwick was now “helping the family business and trying to do her artwork.” RP (May 24, 2007) at 3698. And this court should not give any credence to the plaintiffs’ attempt to discredit

After all, Larwick testified that she 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. 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.

And in making his calculations for future economic loss, Walter Lierman totally ignored these facts. Ex. 320; Ex. 321. 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.

The plaintiffs try to rationalize these inconsistencies, unsupported theories, and speculation by concluding, “[The jury’s] responsible approach to this was to issue its first jury request, for an electronic calculator.” (Br. of Resp’t at 61). But the plaintiffs do not, and cannot, explain how the jury’s request for a calculator somehow transforms the inconsistencies, unsupported theories, and speculation into “substantial

Lageman because he had not read Larwick's books. (Br. of Resp't at 59). Lageman testified that he had not read Larwick's *children's* books. RP (May 24, 2007) at 3715.

evidence,” which “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *See 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)).

Yet, based on the evidence, the trial court correctly recognized that Larwick had a “total change of career.” CP at 893. As the trial court correctly summarized, “[Larwick] began assisting in the tree farming operation of her new husband, and she had continued to do so prior to the jury’s determination of the ultimate award.” CP at 893. And as the trial court correctly noted, “The jury did not take into account her mitigation in removing herself from the labor market of comparable earnings.” CP at 893-94. Finally, as the trial court correctly concluded, the jury based its verdict regarding Larwick’s economic damages on “feeling a resentment against the District.” CP at 893. Thus, the trial court did not err in remitting Larwick’s economic damages award.

**C. TRIAL COURT HAD OTHER VALID REASONS
TO REMIT LARWICK’S AWARD**

With a shotgun approach, the plaintiffs claim that the trial court’s other reasons for remitting Larwick’s damages award were contrary to the evidence. (Br. of Resp’t at 64-68). But with regard to Larwick’s length of service with the Training Center, the plaintiffs presented no evidence that the sexual harassment climate began the very first day of Larwick’s

employment on June 12, 2000.⁹ (Br. of Resp't at 64). In fact, as recited by the plaintiffs in their brief, the first time that Larwick remembered complaining of her treatment at the Training Center was around the end of December 2000. (Br. of Resp't at 54). Given that Larwick was terminated from the Training Center in October 31, 2002, RP (May 8, 2007) at 1108, she was subjected to the sexual harassment climate for about 22 months – about two-thirds the time that Collins was subjected to the sexual harassment climate and about one-half the time that Hayden was subjected to the sexual harassment climate. (Br. of Resp't at 65). Thus, the trial court did not err and the plaintiffs cannot complain that they did not meet their burden of proof before the jury.

Finally, based on unknown and unsupported legal theories, the plaintiffs urge this court to come to the opinion that the trial court simply erred because the Fire District somehow “ratified the jury’s verdict.” (Br. of Resp't at 68). But this court should not address the plaintiffs’ argument, as it is unsupported by relevant authority or meaningful legal argument. *See Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989).

⁹ Similarly, the plaintiffs present no evidence that the sexual harassment climate began the very first day that Larwick volunteered with the Training Center. (Br. of Resp't at 64).

Nevertheless, this appeal is not – and was not – about the jury’s awards to either Hayden or Mason. This appeal is not – and was not – about whether Collins “got shafted by a jury.” (Br. of Resp’t at 68). And this appeal is not – and was not – about whether Collins was “wounded by the result.” (Br. of Resp’t at 68).

Simply put, this appeal is about whether the jury “[felt] a resentment against the District.” CP at 893. Here, Larwick’s non-economic damages were supported by passion, prejudice, and speculation. Larwick’s economic damages were supported by theory and speculation. And the trial court correctly remitted Larwick’s damages.

II. COLLINS’S ECONOMIC DAMAGES CANNOT BE FOUNDED ON MERE THEORY OR SPECULATION

For more than four pages of its brief, the plaintiffs rely on CR 50 and argue that the evidence was “overwhelming” to sustain the jury’s verdict regarding Collins’s economic damages.¹⁰ (Br. of Resp’t at 28-32). They note that more than 70 witnesses testified before the jury. (Br. of Resp’t at 30). And they note that the evidence “dwarf[s] the minimal burden necessary to let the jury decide the matter.” (Br. of Resp’t at 30).

¹⁰ Contrary to what the plaintiffs assume, (Br. of Resp’t at 29-30), the Fire District is not appealing a decision regarding a motion for judgment as a matter of law.

But the issue that the plaintiffs fail to address is that “a feeling of prejudice [had] been engendered or located in the minds of the jury as to prevent [the Fire District] from having a fair trial.” *See, e.g., Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quotations omitted). And as a result, the jury based its verdict regarding Collins’s economic damages, not on substantial evidence, but on theory, speculation, and an unrealistic and irrational appraisal of damages.

**A. DR. BOEHNLEIN’S AND DR. DODGE’S TESTIMONY
ARE IRRELEVANT IN ESTABLISHING
COLLINS’S ECONOMIC DAMAGES**

First, in support of Collins’s economic damages, the plaintiffs rely in part on the testimony of Dr. Boehnlein. (Br. of Resp’t at 27-28). According to them, Dr. Boehnlein testified about “the ongoing impact of what Collins had experienced at the Training Center.” (Br. of Resp’t at 27). Dr. Boehnlein testified, “And it was still very emotionally fresh to her.” RP (May 18, 2007) at 2794. And Dr. Boehnlein explained that Collins had experienced nightmares. RP (May 18, 2007) at 2804.

The plaintiffs also rely in part on the testimony of Dr. Cyril Dodge. (Br. of Resp’t at 10-11). In his videotaped testimony, Dr. Dodge testified that as early as October 31, 2003, he started Collins on medication and encouraged her not to return to work at the regional training center. Ex.

308 at 8. Dr. Dodge was concerned about her well-being returning to work. Ex. 308 at 8.

Yet, even with this “doctor’s note,” Collins did not notify the Training Center about Dr. Dodge’s recommendations. And she did not apply for time off under the Family and Medical Leave Act (FMLA). RP (May 15, 2007) at 2112-13. Instead, Collins unilaterally, and with no notice, decided to quit working at the Training Center in early November 2003. RP (May 15, 2007) at 1888-89. And during this time, Collins simply relied on her vacation and sick pay until it ran out in March 2004. RP (May 15, 2007) at 2055-56.

In February 2004, almost four months after Collins had quit working at the Training Center, she finally applied for time off under the FMLA. RP (May 15, 2007) at 2113. But in May 2004 when she was informed that her time off under the FMLA was expiring in a few days, Collins took no action to retain her employment at the Training Center. RP (May 15, 2007) at 2116-17. According to Collins, she simply “assumed [she] was still on medical leave.” RP (May 15, 2007) at 2118. Obviously, given that Collins had not communicated with her employer about her status as an employee, she was thereafter administratively terminated. RP (May 15, 2007) at 2118.

In their brief, the plaintiffs use Dr. Boehnlein's and Dr. Dodge's testimony to support the jury's verdict regarding Collins's *economic* damages. But as seen above, the testimony of these doctors has nothing to do with *economic* damages such as lost wages, back pay, front pay, and pension loss. Instead, the testimony of these doctors has everything to do with *non-economic damages*, such as physical harm and emotional harm.

But neither the Fire District nor the plaintiffs have appealed the jury's verdict regarding Collins's *non-economic* damages. (Br. of Appellant at 1-2; Br. of Resp't at 3). The plaintiffs are trying to obfuscate the evidence supporting economic damages and the evidence supporting non-economic damages. (Br. of Resp't at 10-12, 24-25). And whether the jury was presented with evidence sufficient to sustain its verdict regarding Collins's non-economic damages is simply irrelevant for this appeal.

B. LIERMAN'S TESTIMONY REGARDING COLLINS'S ECONOMIC DAMAGES IS SIMPLY SPECULATIVE

Second, the plaintiffs try to excuse Lierman's speculation in his economic analysis by blaming the Fire District, which, according to the plaintiffs, "provided the numbers that Lierman used." (Br. of Resp't at 26). It is one thing to provide "the numbers"; but it is quite another thing to apply "the numbers."

As argued, with little or no opposition by the plaintiffs, Lierman failed in his application of "the numbers." In making his calculations,

Lierman 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. 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. And Lierman would have learned that Collins abandoned these business plans because her attorney thought “it would be bad for her court case.” RP (May 15, 2007) at 2005. Finally, if Lierman had met with Collins, he would have learned that Collins earned approximately \$10,400, while working for only half of 2005. RP (May 17, 2007) at 2525-26.

Moreover, 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. Although Lierman was aware of this figure, he was not aware that Collins had received significant raises – and could continue to expect significant raises – in her current employment.

RP (May 17, 2007) at 2770-71. And Lierman discounted this figure in his calculations. Ex. 318. Most importantly, using the historical rates of raises in her current employment, Lierman was unaware that there would be no wage loss for Collins about 18 months into the future. RP (May 17, 2007) at 2771.

Far from justifying the jury's verdict regarding Collins's economic damages, this records shows that the jury simply based its verdict on the theory and speculation of these so-called "expert" witnesses.

III. IMPROPER COMMENTS DURING CLOSING ARGUMENT

A. DIRECT OR INDIRECT COMMENTS REGARDING THE PRESENCE OR ABSENCE OF INSURANCE ARE IMPROPER

The plaintiffs obfuscate the issue regarding their counsel's improper comments about the Fire District's insurance during closing argument by claiming "insurance was never raised, let alone the word having been spoken." (Br. of Resp't at 34). But as our Supreme Court has 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, 383, 38 P.2d 229 (1934) (emphasis added). And although the plaintiffs artfully try to justify Thomas Boothe's improper comments, (Br. of Resp't at 34), there still is no justification for Boothe's improper

comments that a jury's verdict of over \$4 million "will not in any way ... hurt the department ... raise taxes, [or] do any of the bogies that might be mentioned." RP (May 30, 2007) at 4246.

Such comments are improper because they 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).

Moreover, the plaintiffs' list of revenue and salary figures from the Fire District, (Br. of Resp't at 34), does little to excuse Boothe's improper comments.¹¹ Are the plaintiffs arguing that James can take "a pay cut" in order to satisfy a judgment against the Fire District? Are the plaintiffs arguing that the Fire District can "dip into" its revenue to satisfy a judgment against the Fire District? Of course not. And the plaintiffs have admitted as much already. CP at 330. Referring to his improper comments during closing argument, Boothe previously stated, "Nothing

¹¹ And whether James wears "a chief's badge," RP (May 3, 2007) at 290, is totally irrelevant for purposes of the plaintiffs' argument. (Br. of Resp't at 34).

... even suggests that there would be any adverse financial effect from a judgment against Marty James (or any other defendant).” CP at 330.

Thus, the only logical conclusion about Boothe’s comments is that they were an attempt to inject the matter of the Fire District’s liability insurance coverage into the trial. But 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.

**B. INTENTIONAL OR UNINTENTIONAL COMMENTS REGARDING
“SENDING A MESSAGE” ARE IMPROPER**

The plaintiffs try to excuse Boothe’s “send a message” argument by explaining that it was unintentional. (Br. of Resp’t at 36-37). They note that “[t]his wasn’t a planned, planted message.” (Br. of Resp’t at 37); RP (August 27, 2007) at 54. Nevertheless, Boothe admitted that “[he] said it” and that “it came out in the context of argument.” RP (August 27, 2007) at 54.

Whether Boothe’s comments were intentional or unintentional, it “encourage[d] 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)). It encouraged the jury “to send a message about some social issue that is larger than the case itself.” See BLACK’S LAW DICTIONARY 875 (8th ed. 2004). And it invited the jury to speculate and award what amounted to punitive damages.¹²

Clearly, Boothe’s “send a message” argument was improper. It appealed to the jury’s passion and prejudice. 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.

**IV. JURY’S VERDICT IS EXCESSIVE,
BASED ON THEORY AND SPECULATION,
AND TAINTED BY PASSION AND PREJUDICE**

As previously argued, 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

¹² 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).

1230 (1985). And the trial court should have found that the jury's verdict was 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 based on theory and speculation. *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, whether intentional or unintentional, during closing argument: (1) injected the issue of the Fire District's liability insurance coverage into the trial and (2) urged 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.

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 Manor*, 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). And this court should reverse and remand for a new trial.

V. ATTORNEY FEES

In their discussion about attorney fees, the plaintiffs fail to note one simple reality: "The burden of proving reasonableness of the fees requested is upon the fee applicant." *Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993) (citing *Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)). Here, the plaintiffs have consistently failed to meet their burden of proving the reasonableness of their attorney fees. If anything, the trial court abused its discretion in

awarding the plaintiffs more than \$750,000 in attorney fees under RCW 49.60.030(2).¹³

**A. THE PLAINTIFFS HAVE FAILED TO PROVE
THE REASONABLENESS OF THEIR ATTORNEY FEES**

To support their request for attorney fees, the plaintiffs simply note, “Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate.” (Br. of Resp’t at 40) (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). But the plaintiffs fail to heed the very next sentence in *Bowers*, wherein our Supreme Court cautioned, “The attorney’s usual fee is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment.” *Bowers*, 100 Wn.2d at 597 (citing *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983)).

In *Chrapliwy*, the Seventh Circuit Court of Appeals noted that “a judge is not required to accept an attorney’s valuation of his own time. A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates.” *Chrapliwy*, 670 F.2d at 767.

¹³ As previously discussed, this award was excessive for the following reasons: (1) an hourly rate of \$280 is not reasonable; (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. (Br. of Appellant at 33-41).

“For example, an attorney may be overqualified for particular services which could reasonably be performed by a less skilled or experienced attorney or by a lay person. In such a case, it may be unreasonable to value the attorney’s time at his regular billing rate.” *Chrapliwy*, 670 F.2d at 767.

And while the plaintiffs rely on declarations from so-called “employment specialists,” (Br. of Resp’t at 40-41), they fail to address Donald Grant’s declaration 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. And the plaintiffs fail to address the recent survey by Judge Roger A. Bennett, of the Clark County Superior Court, which 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 trial 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 plaintiffs failed to meet their burden of proving that an hourly rate of \$280 – or even \$300 – was reasonable. As such, in relying on

unsupported facts and/or applying the wrong legal standard in setting “the lodestar” at an hourly rate of \$280, the trial court abused its discretion.

Moreover, the plaintiffs claim that the trial court abused its discretion by striking an award for “litigation expenses.” (Br. of Resp’t at 42). While our Supreme Court has allowed for a “more liberal recovery of costs,” *Blair v. Washington State University*, 108 Wn.2d 558, 573-74, 740 P.2d 1379 (1987), the plaintiffs still had the burden of proving the reasonableness of the fees and costs requested. *Fetzer Co.* 122 Wn.2d at 149.

Yet here, the plaintiffs failed to meet their burden. With regard to the plaintiffs’ trial consultant, the trial court clearly stated, “No particular itemization of his billing was presented, and no claim of expertise other than being a person available to assist in voir dire was ever represented to the Court. *Since costs must be proven under the claim for reimbursement, there was a total failure.*” CP at 898 (emphasis added).¹⁴

The plaintiffs’ billing combined numerous tasks into a single time entry. CP at 729-30. This “block billing” disguised redundant, questionable, and otherwise unproductive time. CP at 725-30. The plaintiffs’ billing included inappropriate entries and inappropriate use of

¹⁴ And the fact that Boothe was “a lone counsel ... against a phalanx of defense attorneys” does not prove whether a trial consultant’s fees were reasonable. (Br. of Resp’t at 43-44).

attorney time. CP at 725-30. And much of the requested “litigation expenses,” (Br. of Resp’t at 42), were billed by Boothe’s legal assistants at an hourly rate of \$80. CP at 730-31. 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). In other words, the plaintiffs failed to show that its “litigation expenses,” (Br. of Resp’t at 42), were both “reasonable and necessary expenditures.” *See Blair*, 108 Wn.2d at 574.

B. THE PLAINTIFFS HAVE FAILED TO PROVE THAT A 1.5X MULTIPLIER SHOULD HAVE BEEN APPLIED

Finally, the plaintiffs claim that the trial court abused its discretion in not applying a 1.5x multiplier. (Br. of Resp’t at 44-48). And they argue that “[t]his case is the textbook illustration of the reason why multipliers are applied.” (Br. of Resp’t at 44). There is no question that the Washington courts can adjust the lodestar fee upward or downward. *See Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Bowers*, 100 Wn.2d at 598-600. “Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed.” *Bowers*, 100 Wn.2d at 598.

But there is a presumption that the lodestar fee represents a reasonable fee. *Xieng v. Peoples Nat’l Bank of Wash.*, 63 Wn. App 572,

587, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993). And once again, “[t]he burden of justifying any deviation from the ‘lodestar’ rests on the party proposing the deviation.” *Bowers*, 100 Wn.2d at 598 (quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980)).

First, to support its request for a 1.5x multiplier, the plaintiffs note that “[t]his was a difficult setting, and challenging to counsel to keep the co-plaintiffs together and cooperating.” (Br. of Resp’t at 44-45). “The risk of loss was real.” (Br. of Resp’t at 45). But the plaintiffs do not support this statement with any evidence.¹⁵ In fact, the plaintiffs never faced summary judgment on those claims at which they prevailed during trial. CP at 732. And the plaintiffs’ reference to the settlement negotiations before trial does not support the statement that “[t]he risk of loss was real.” (Br. of Resp’t at 45). Moreover, the plaintiffs have overlooked our Supreme Court’s directive that “[t]he trial court must assess the likelihood of success at *the outset of the litigation.*” *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007) (quoting *Bowers*, 100 Wn.2d at 598).

¹⁵ The only support for this statement is the following supposition: “It *appears* that [the Fire District] assessed the case the same way.” (Br. of Resp’t at 45) (emphasis added).

The typical risk of a defense verdict was no greater here than in any other matter. The risk should have been accounted for already in a reasonable lodestar fee. *See Bowers*, 100 Wn.2d at 599 (to the extent an hourly rate underlying the lodestar fee allows for the contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made). And the trial court did not abuse its discretion in denying a 1.5x multiplier based on the contingent nature of success.

Second, to support its request for a 1.5x multiplier, the plaintiffs rely on a self-serving declaration from a “Washington employment law expert,” (Br. of Resp’t at 46), that the quality of work performed by plaintiffs’ counsel was “excellent,” “a high level,” and “remarkable.” (Br. of Resp’t at 47-48). But adjusting the lodestar fee upward to reflect the quality of work performed is extremely limited. *Bowers*, 100 Wn.2d at 599. “[I]n virtually every case the quality of work will be reflected in the reasonable hourly rate.” *Bowers*, 100 Wn.2d at 599. “A quality adjustment is appropriate only when the representation is unusually good or bad, *taking into account the level of skill normally expected* of an attorney commanding the hourly rate used to compute the ‘lodestar.’” *Bowers*, 100 Wn.2d at 599 (quoting *Copeland*, 641 F.2d at 893).

But here, absent the conclusory and self-serving statements, there is no evidence that the representation of plaintiffs' counsel was "unusually good." And Boothe's decision to "[stand] as solo" against the defendants, (Br. of Resp't at 48), does not speak to the quality of his work, but how he conducted his work. Moreover, the quality of Boothe's work should have been accounted for already in a reasonable lodestar fee. Thus, the trial court did not abuse its discretion in denying a 1.5x multiplier based on the quality of work performed.

VI. CONCLUSION

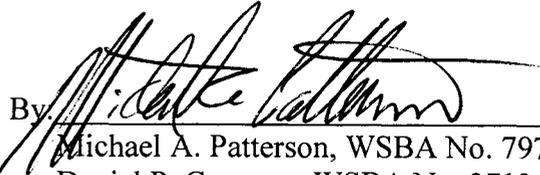
In its CR 59(a) motions for a new trial, the Fire District informed the trial court of: (1) the irregularities in the proceedings; (2) the misconduct of the prevailing party; (3) the excessive damages awards; and (4) the resulting prejudice and substantial injustice to the Fire District. CP at 276-309. There was no doubt that the jury was asked to forsake all sensible thought and reach its verdict out of outrage, animosity, and spite.

Nevertheless, the trial court failed to redress any of these causes materially affecting the substantial rights of the Fire District. The trial court erroneously denied the Fire District's motions and erroneously awarded the plaintiffs more than \$750,000 in attorney fees. Finally, because the trial court abused its discretion in denying the Fire District's

CR 59(a) motions, this court should reverse and remand for further proceedings.

RESPECTFULLY SUBMITTED this 21st day of January, 2009.

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., P.S.

By 

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Marty James

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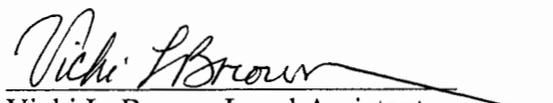
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated in Seattle, Washington, on this 21st day of January, 2009.


Vicki L. Brown, Legal Assistant

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