

No. 50297-6-II

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COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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BRITT EASTERLY,

Appellant,

and

ELZY EDWARDS and CLIFFORD EVELYN,

Plaintiffs,

v.

CLARK COUNTY,

Respondent.

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REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Clark County (“County”) is incautious in its responsive brief with regard to the facts and law attendant upon the trial court’s attorney fee decision as to Britt Easterly.<sup>1</sup> A jury found the County guilty of racial discrimination against Easterly. This is no simple matter that should be overlooked. The County hopes to transform the reality of a hard-fought case involving an 8-day racial discrimination trial against Easterly into a simple matter for which Easterly’s counsel should not be appropriately compensated. The County asserts that the hourly rate awarded Easterly’s counsel was highest rate he was ever awarded, counsel’s hours were “vastly exaggerated,” and Easterly was not entitled to a multiplier on the lodestar fee calculated by the trial court. Each assertion is belied by the record here and Washington law on fees in actions arising under Washington’s Law Against Discrimination, RCW 49.60 (“WLAD”).

B. STATEMENT OF THE CASE<sup>2</sup>

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<sup>1</sup> The County loosely asserts that Easterly’s counsel, Thomas Boothe, moved for an award of fees in the trial court. Resp’t br. at 1. Easterly, not Boothe, sought a fee award. CP 214.

<sup>2</sup> The County complains in its brief at 1 n.1 about Easterly’s reference to *Easterly v. Clark County*, 194 Wn. App. 1029, 2016 WL 3351562, *review denied*, 187 Wn.2d 1020 (2017). Br. of Appellant at 1. As noted, this Court’s opinion set out the background facts in the case.

The County's statement of the case, resp't br. at 2-4, is nothing but an argumentative description of the facts and should be disregarded as such by this Court. RAP 10.3(a)(5) (a statement of the case should be a fair statement of the facts and procedure relevant to the issues on review "without argument").<sup>3</sup> Of particular note are the County's attempt to distinguish the extensive testimony in support of Boothe's requested hourly rate and the false assertion that the hours requested by Easterly's counsel were "vastly exaggerated."

Easterly has not assigned error to the trial court's treatment of the hours spent by his counsel on the case, br. of appellant at 1-2, but Easterly believes that it is important to note that the County's assertion that his counsel's hours were "vastly exaggerated," resp't br. at 2, is simply false. The trial court made reductions in the requested time, but awarded a total of 1,100 hours of counsel time and 1,320 hours of paralegal time. CP 501. As for the latter, the reduction is largely explained by the exclusion of Kesten Media time. *Nowhere* did the trial court find that the hours sought by Easterly's counsel were "vastly exaggerated." There is little question that

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<sup>3</sup> The County contends that Easterly presented only one claim to the jury and notes that Easterly was not awarded backpay, implying that the case was unsuccessful for Easterly. Resp't br. at 1. Easterly focused his WLAD case on the one claim from the outset, abandoning any non-WLAD claims. No discovery occurred on them. Easterly did seek back pay. The jury awarded him \$500,000 in damages, CP 43, far more than the County's \$40,001 offer of judgment. CP 42.

Boothe and his staff performed *extensive* work in Easterly's case, work that Greg Price, the former president of the Clark County bar, testified was reasonable and necessary for Easterly's successful outcome, CP 11-12, as did employment lawyer Mary Ruth Mann. CP 241-45.

With regard to the evidence on the hourly rate of Easterly's counsel, the County attempts in its brief at 2-3 to distinguish the many declarations offered below by Easterly that support Boothe's requested hourly rate of \$475 per hour and to lionize the view of its expert, David Burkett. As noted in Easterly's opening brief at 3, those attorneys supported two key propositions advanced here by Easterly: (1) *Employment law is a specialized subset of litigation practice*, as evidenced by the declaration of Mary Ruth Mann, herself a well-respected practitioner in this specialized field. CP 235-51. Attorney Peter Fels noted that Boothe focuses even more precisely in the representation of government employees in that specialized area. CP 440-41. (2) *A rate of \$475 for Boothe's time was reasonable*, as, among others, the former president of the Clark County bar association, Greg Price, testified. CP 12. Fels specifically noted in his declaration that other employment law attorneys employ rates as high as \$500 per hour. CP

440, as did Mann. CP 245 (Boothe would qualify for senior partner rates in employment cases which were between \$475 and \$700 per hour in Seattle).<sup>4</sup>

By contrast, the County's expert has no actual experience in employment law litigation, CP 444-46, despite his claim to have "practiced employment law." CP 267. Burkett did not provide the trial court the name of a single case in employment law that he actually litigated, *id.*, nor does his name appear on any appellate case involving employment law as counsel of record. CP 445, 475-76. The trial court should have been suspicious, in particular, of Burkett's testimony regarding Boothe's hourly rate, based on an alleged "informal" survey of employment law attorneys, CP 273-74, when he did not fully reveal his actual contacts with such counsel, CP 439-42, and he failed to contact actual employment attorneys in Clark County who testified below that Boothe's former hourly rate of \$475 was reasonable. CP 437, 492. Fels testified that Burkett misrepresented their actual conversation. CP 440.

### C. ARGUMENT

#### (1) The Trial Court Erred in Calculating the Lodestar Fee to Which Easterly Was Entitled

The County ignored the overarching policy reasons set forth in Easterly's opening brief at 8 that encourage liberal fee awards in the

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<sup>4</sup> Boothe raised his hourly rate on January 1, 2017 to \$500 per hour.

employment law context. The United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) noted that prevailing parties in civil rights litigation must be awarded fees unless special circumstances render such an award unjust. Justice Brennan amplified on this rule in his concurrence:

In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned.

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court. Senate Report 2; see House Report 1-3, U.S. Code Cong. & Admin. News 1976, p. 5910.

*Id.* at 444-45. For this reason, counsel in civil right litigation, as here, must be compensated on a basis akin to attorneys in the private market:

At a number of points, the legislative history of § 1988 reveals Congress's basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in civil rights cases (and hence the funds out of which their clients would pay legal fees) would seldom be equivalent to

recoveries in most private-law litigation. Thus, the Senate Report specifies that fee awards under § 1988 should be equivalent to fees “in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature.” Senate Report 6, U.S. Code Cong. & Admin. News 1976, p. 5913. Furthermore, “counsel for prevailing parties should be paid, as is traditional with attorneys compensated by fee-paying clients, for all time reasonably expended on a matter.” *Id.*

As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market in non-civil-rights cases, see generally *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 400-410, 641 F.2d 880, 890-900 (1980) (en banc), both by awarding them market-rate-fees, *id.*, at 899, and by awarding fees only for time *reasonably* expended, *id.*, at 881. If attorneys representing civil rights plaintiffs do not expect to receive full compensation for their efforts when they are successful, or if they feel they can “lard” winning cases with additional work solely to augment their fees, the balance struck by § 1877 goes awry.

*Id.* at 447 (Brennan, J. concurring) (emphasis original).

This public policy is also reflected in Washington law. The legislative goal in enacting the fee shifting provision in the WLAD was to enable vigorous enforcement and to make it financially feasible for individuals to litigate civil rights violations. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112 (1995). An attorney who takes such a case on a contingent basis assumes a substantial risk that she/he will never earn a fee. “The experience of the

marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983) (quoting Samuel Berger, *Court Awarded Attorneys’ Fees: What is “Reasonable”?*, 126 U. Pa. L. Rev. 281, 324-25 (1977)).

- (a) The Trial Court Erred in Setting the Hourly Rates for Easterly’s Counsel in Calculating the Lodestar by Failing in Particular to Recognize that Employment Litigation Is a Specialized Statewide Subset of Litigation Practice<sup>5</sup>

With regard to Easterly’s contention that the trial court erred in setting the hourly rate for his counsel, Tom Boothe, br. of appellant at 9-11, the County ignores the law on calculation of the lodestar as to hourly rates, insisting employment practice is not a specialized field of litigation practice and repeating persistently that \$400 per hour was the highest rate ever awarded Boothe by a court. Resp’t br. at 6-14. In doing so, the County misrepresents Easterly’s argument and the record.<sup>6</sup>

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<sup>5</sup> The County asserts that Easterly did not preserve the argument that employment law is a specialized area of practice for appellate review. Resp’t br. a 10. That is false. Easterly specifically raised this issue below in the Boothe declaration on reply. CP 446. It is noteworthy that the trial judge in *Collins*, the case frequently referenced in its brief by the County as approving a \$280 hourly rate for Boothe in 2007 (not 2010 as the County contends), resp’t br. at 7-8, stated that Clark County standards should not apply to “counsel in this highly specialized field,” *i.e.* employment law. CP 446.

<sup>6</sup> Recognizing just how skinny the trial court’s actual finding on the hourly rates of counsel actually was, CP 500 (“A reasonable hourly rate for attorney time in this matter

First, the starting point to this analysis is the rate actually charged by counsel to clients. *Bowers*, 100 Wn.2d at 597. Contrary to the County's contention in its brief at 11-14, Boothe charged clients more than \$400 per hour at the times in question in this case. CP 40-41. Until January 1, 2017, he charged actual clients the \$475 hourly rate in his region-wide practice. CP 18, 43. In making this award, the trial court should have employed current, not historical, hourly rates. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375-77, 798 P.2d 799 (1990).<sup>7</sup> Thus, the court should have determined Boothe's hourly rate on February 10, 2017, and applied to all hours spent on Easterly's case.

Second, the County argues that a single court's 2007 fee ruling, a ruling made more than 7 years ago, supports its position. Resp't br. at 7-8. The judge in that case expressed his position that he had never awarded an hourly rate of more than \$300 and had done so only once in a land use case. CP 446. The County only addresses an Oregon case in which Boothe was awarded \$400 as an hourly rate in 2010 in a brief footnote. Resp't br. at 1 n.2.

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is \$400 per hour.”), the County leaves that finding to the very end of its argument on the hourly rates. Resp't br. at 14. It is clear, however, that the trial court did not explain its precise reason for lowering Boothe's rate to \$400 per hour. Nor did the trial court address the specialized state-wide nature of employment practice, the rates Boothe charged, or the experts supporting his position.

<sup>7</sup> The County agrees. Resp't br. at 29.

Third, perhaps the most problematic feature of the trial court's decision is its steadfast insistence that only "legal work of a similar character in this area," *i.e.* Clark County, was relevant to its analysis of the appropriate hourly rate. The County doubles down on this point by denigrating the argument that employment litigation is not a specialized subset of litigation practice and contending that "practical questions" foreclose consideration of an attorney's membership in state-wide professional organizations. Resp't br. at 9-12. The County distorts Easterly's argument and misses its point.

The trial court here committed legal error in setting the hourly rate of Easterly's counsel because it refused to even consider the notion that employment litigation is a *state-wide* area of practice with specialized practitioners charging a higher hourly rate than litigators doing other commercial or personal injury litigation in Clark County.<sup>8</sup> This Court has held to be reversible error for a trial court to limit rates to those charged in a particular county without considering, on the record, a statewide standard

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<sup>8</sup> As this Court well knows, certain areas of practice are state-wide in nature and attorneys performing such work command higher hourly rates. For example, bankruptcy and intellectual property counsel, among others, often command higher rates. *See, e.g., In re Thomas*, 2009 WL 7751299 (9th Cir. Bankr. 2009) at \*12 n.5 (Pappas, J. dissenting) ("Obviously, some bankruptcy attorneys command higher rates for their services; the media has reported rates for bankruptcy lawyers appearing in chapter 11 mega-cases in some courts of \$1,000 per hour or more."). As the Fifth Circuit cogently observed in *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974): "It is open knowledge that various types of legal work command differing scales of compensation."

for fees. *Crest v. Costco Wholesale Corp.*, 128 Wn. App. 760, 774, 115 P.3d 349 (2005). This Court has also expressly approved of higher hourly rates than those charged by counsel in a particular county where insurance bad faith litigation was “not so geographically limited but instead requires a much broader degree of talent and specialization.” *Miller v. Kenny*, 180 Wn. App. 772, 821, 325 P.3d 278 (2014) (approving lead counsel’s rate of \$450 per hour). *See also, Broyles v. Thurston County*, 147 Wn. App. 409, 446-49, 195 P.3d 985 (2008) (in WLAD case of discrimination against female deputy prosecutors, this Court upheld fee award for plaintiffs’ employment counsel based on rates charged in Puget Sound region rather than Thurston/Mason County).

The existence of a specialized practice association, the Washington Employment Lawyers Association, is not conclusive of this point that a specialized area of practice exists, but it is solid evidence that this is true. This Court should disregard the County’s largely frivolous argument in its brief at 10-12 that the existence of an organization of attorneys interested in similar issues, *i.e.*, Washington Lawyers for Sustainability or Washington Lawyers for the Arts, equates to a specialized area of practice. That was never Easterly’s argument. Rather, the existence of an organization like WELA, whose members are involved in an active, specialized area of practice is evidence that such a specialized area exists and should be

considered by a trial court in assessing “market rates in the relevant legal community” in calculating the lodestar fee.

The County even misrepresents the decision in *West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008), *review denied*, 165 Wn.2d 1050 (2009) to make its point. Resp’t br. at 12. The County claims that the case stands for the proposition that a trial court’s restriction on fees must be confined to a local area. In fact, the trial court there held that the fees for trial court work in a PRA case by an appellate practitioner could be limited to fees charged for litigation in the Olympia area rather than the attorney’s higher appellate hourly rate because no appellate issues were involved. *Id.* at 123. Implicit in the trial court’s decision was the belief that hourly rates for appellate practice, a state-wide specialized practice area, could be charged for such state-wide work.

Indeed, cases arising under RPC 1.5(a)(3), or similar rules around the nation, contemplate the broader conception of “locality” than that employed here by the trial court. The United States Supreme Court in *Blum v. Stenson* 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984), made clear that the reasonable hourly rate of counsel lodestar calculation for civil rights cases to be evaluated in light of comparable market rates in the relevant legal *community*. *Id.* at 896 n.11. Although it did not specifically define “community,” other courts have treated that community as

something more than mere geography. As pointedly noted by the Eighth Circuit in *Casey v. City of Cabool, Missouri*, 12 F.3d 799, 805 (8th Cir. 1993), *cert. denied*, 513 U.S. 932 (1994):

The relevant market for attorneys in a matter such as this may extend beyond the local geographic community. “A national market or a market for a particular legal specialization may provide the appropriate market.” *Hendrickson v. Branstad*, 740 F.Supp. 636, 642 (N.D.Iowa 1990) (reversed in part on grounds not relevant here, *Hendrickson v. Branstad*, 934 F.2d 158 (8<sup>th</sup> Cir. 1991)). To limit rates to those prevailing in a local community might have the effect of limiting civil rights enforcement to those communities where the rates are sufficient to attract experienced counsel. Civil rights would be more meaningful, then, in those communities (large cities) where experienced attorneys can command their customary fees. The result would be in direct contravention to the purposes of diffuse enforcement through the “private attorneys general” concept.

*See also, Gilster v. Primebank*, 884 F. Supp. 2d 811, 871 (N.D. Iowa 2012), *rev’d on other grounds*, 747 F.3d 1007 (8th Cir. 2014) (relevant market in specialized areas of practice may extend beyond local geographic community).

Finally, the County’s repeated irrelevant assertion that \$400 per hour is the highest rate awarded Boothe by a court is simply wrong. Resp’t br. at 2, 3, 26. As previously noted, an Oregon court awarded him \$400 per hour in 2010. CP 43. Recently, in *Burley v. Clackamas County*, (Case No. CV 14110305), an Oregon trial court made an attorney fee award in a

discrimination case based on Boothe's \$475 hourly rate.

The trial court here erred in refusing to treat the relevant legal market for Boothe's rate as the entire state, or at least the rates applicable for the specialized area of employment litigation practice.

(b) The Trial Court Erred in Failing to Recognize the Work of Kesten Media as that of a Legal Assistant

The County contends in its brief at 14-22 that the trial court properly denied Easterly compensation for the hourly rates of Kesten Media personnel as part of the lodestar fee because those personnel allegedly did not perform the services of legal assistants, even though the trial court authorized an award of costs as to their services. The County is wrong.

The County does not dispute that the applicable standard for determining if time spent by Kesten Media staff in this case is recoverable as part of the lodestar fee is set forth in *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995). Resp't br. at 15-16. However, the trial court *nowhere* applied the *Absher* standard in its finding and simply made a *categorical* determination that "technical support and courtroom assistance," as it characterized Kesten's services, could *never* be recoverable as part of the lodestar calculation. CP 501. That was error. That error is not overcome by the County's notion that the trial court's observation of events is important, resp't br. at 15, or by its after-the-fact

characterization of the work of Michael Kesten and Emily Smith Harrington. Resp't br. at 16-20.<sup>9</sup>

As noted in Easterly's opening brief, trial consultant and other courtroom services are recognized as work to which the lodestar analysis applies. Br. of Appellant at 15-16.<sup>10</sup> Moreover, *Absher* has been applied to a broad array of services in Washington. *Id.* at 13. As noted in Easterly's opening brief at 13-14, Kesten and Harrington met the *Absher* test.

The trial court simply erred in announcing a categorical rule that failed to faithfully apply the *Absher* test that this Court adopted in *Trainer v. Kitsap Cty.*, 107 Wn. App. 1035, 2001 WL 873826 (2001), *review denied*, 147 Wn.2d 1005 (2002). Reversal is required.<sup>11</sup>

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<sup>9</sup> Michael Kesten's declaration provides his educational and work background as well as a complete description of his services for Easterly. CP 33-35.

<sup>10</sup> The County's assertion that *Bender v. County of Los Angeles*, 217 Cal. App. 4th 968, 159 Cal. Rptr. 3d 204 (Cal. App. 2013) does not support Easterly's argument is baseless. The point of *Bender* is that trial technology is an essential, "commonplace" aspect of trial practice. Moreover, in that case, part of the awarded "costs" included the time for "a trial technician for nine days of trial." *Id.* at 990. In *BD v. DeBuono*, 177 F. Supp. 2d 201, 204 (S.D.N.Y. 2001), the time for litigation support specialists just like Kesten who provided "technological assistance" was recoverable as a part of the lodestar as "the equivalent of additional attorneys or legal para-professionals."

<sup>11</sup> As is typical of the County's argument here, it spends considerable time in its brief at 20-22 only to reaffirm that the trial court properly addressed Kesten's services as recoverable costs. The County's obvious objective in this discussion is to raise the totally irrelevant red herring of a Kesten "success bonus," something that is utterly irrelevant to the argument raised by Easterly on appeal. The Court should disregard it.

Similarly, the County resurfaces the irrelevant point that Boothe did not appear at the cost hearing below. Resp't br. at 15 n.10. Easterly explained the reason in his brief at 6 n.3. The trial court found Boothe's miscues to be inadvertent. The County had no legitimate reason to mention that issue in its brief.

(c) The Trial Court Erred in Addressing Easterly's Entitlement to a Multiplier

The County asserts that a multiplier was inappropriate here because Easterly's case was "the epitome of a garden-variety employment case," resp't br. at 23, thereby not meriting a quality of work multiplier. Moreover, the County seems to argue that this case was not "risky," resp't br. at 28-32, even though Easterly's counsel has not been paid for services rendered in the case for 8 years – Easterly's notice of claim to the County was filed on September 28, 2009. CP 43.<sup>12</sup>

With regard to contingent risk, the *Hensley* court reminded us that but for attorneys like Tom Boothe taking cases like Britt Easterly's, a vital public policy of enforcing civil rights laws like the WLAD that prevent the cancer of racial discrimination in our society would not be enforced and that contingent risk must be recognized:

...[o]n many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference,

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<sup>12</sup> By contrast, of course, the County's outside counsel has been paid regularly upon invoicing the County at his hourly rate of \$375 per hour. CP 272.

however, reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.

Therefore, district courts should not end their fee inquiries when they have multiplied a customary rate times the reasonable number of hours expended, and then checked the product against the results obtained. They should also consider both delays in payment and the pre-litigation likelihood that the claims which did in fact prevail would prevail. *Copeland v. Marshall*, 205 U.S.App., at 402-403, 641 F.2d, at 892-893; *Northcross v. Board of Education*, 611 F.2d 624, 638 (CA6 1979); *Lindy Bros. Builders v. American Radiator & Standard Sanitation Corp.*, 540 F.2d 102, 177 (CA3 1976). These factors are potentially relevant in every case. Even if the results obtained do not justify awarding fees for all the hours spent on a particular case, no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

461 U.S. at 459 (Brennan, J concurring).<sup>13</sup>

Here, the trial court did not document its reasoning as to why neither a quality of work nor a contingent risk multiplier was improper. CP 501-02. Instead, it merely relied on its perception that it had already awarded “high end” hourly rates in calculating the multiplier. CP 501.

Contrary to the County’s argument that this was a “garden variety”

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<sup>13</sup> The events of Charlottesville, Virginia that are contemporaneous with the preparation of this reply brief fully reinforce the need for continued vigilance and aggressive enforcement of our laws against racial discrimination.

case of racial discrimination against Easterly by its employees, Easterly offered *detailed* evidence of the massive amount of work performed by Boothe over 7 years of litigation to obtain a successful result for Easterly. *E.g.*, CP 41-42. In particular, the declaration of Mary Ruth Mann on the conduct of the litigation necessitated by the County's actions in this case is telling. CP 241-46. As Mann stated, Boothe obtained an outstanding result for Easterly in a particularly difficult case.

12. The Judgment for Mr. Easterly of \$500,000. Is a substantial WLAD judgment in the state of Washington. It vindicates the purpose of the statute and supports the level of fees sought by Mr. Boothe and the effort of his firm in achieving that outcome. Fees incurred to vindicate RCW 49.60 rights often exceed the amount recovered by verdict or settlement.

....

17. This case is among the highest risk cases employment lawyers face. Public Jurisdictions have unlimited resources to fight these cases and law enforcement organizations typically aggressively oppose any discrimination case whether because of inherent biases or temperament or policy decisions. The Defense evaluation of this case confirms that it was a high risk case. Their Offer of Judgment, bet on this as not more than a "\$40,000" case (which would also be referred to as "defense costs" or "nuisance value" in litigation) and from my observation they never raised their Offer of Judgment from that level. The Court's rulings also show this was a high risk case with difficult factual and proof issues.

CP 244, 245. Contrary to the County's assertion in its brief at 23, this was not a "garden variety" case described by Division I in *Fiore v. PPG Indus.*,

*Inc.*, 169 Wn. App. 325, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012). That case was not a civil rights case involving race discrimination,<sup>14</sup> and involved a routine wages and hours claim. Attorney Mann testified:

20. This case deals with one of the most important social issues that threatens to divide this Country today, and that is racial discrimination in law enforcement. It is tragic that Mr. Easterly had to leave local law enforcement because of racial discrimination, in order to find a brilliant career with the Secret Service. This case truly speaks to the purpose of the WLAD exemplifying that “discrimination threatens the foundation of a free and democratic state.”

21. The claimed hourly rate alone will not meet the statutory purposes or case law standards for awards of reasonable attorney fees and would not tempt any attorney to take on this daunting case against a law enforcement agency in the future.

CP 246. As in *Miller*, Boothe achieved an outstanding result for Easterly and a multiplier was merited.

As for contingent risk, the County misrepresents the law. Resp’t br. at 27-28. The federal authority on which it relies was *rejected* by our Supreme Court in *Pham v. City of Seattle*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007) (declining to follow United States Supreme Court’s disapproval of multipliers in its *Degue* decision cited by the County in its brief at 28 n.14). Contingent risk multipliers are recoverable under Washington law.

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<sup>14</sup> This Court should reject the County’s undocumented claim that race discrimination cases like Easterly’s “fill court dockets across the state and country.” Resp’t br. at 23.

*Id.* at 541. In cases where the attorney's compensation is contingent on success, the court may consider the necessity of adjusting the lodestar figure to account for the risk factor. *Bowers*, 100 Wn.2d at 598-99. This calls for an assessment of what the likelihood of success was at the outset of litigation. *Id.* at 598-99. The contingent adjustment is designed solely to compensate for the possibility that the litigation would be unsuccessful and that no fee would be obtained. There is no doubt that Boothe's representation of Easterly was contingent on a successful result, CP 43, 253-54, and that he has not been paid for *seven years*, unlike the County's counsel.<sup>15</sup> The County has *no answer* to WLAD cases mandating awards of multipliers like *Tupas v. Dep't of Ecology*, 191 Wn. App. 1036, 2015 WL 8160678 (2016) at \*8 (reversing trial court failure to award multiplier) or *Wash. State Commc'ns Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293 P.3d 413, *review denied*, 178 Wn.2d 1010 (2013) (affirming multiplier in WLAD case)<sup>16</sup> cited in Easterly's opening brief.

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<sup>15</sup> The County's argument that the contingent fee agreement between Boothe and Easterly has not been disclosed, resp't br. at 30-31, is yet another red herring. The terms of such an agreement are irrelevant to the undisputed point that the representation was contingent. Indeed, Boothe even fronted all litigation expenses for Easterly. The County's counsel has not revealed his fee agreement with the County or the hours he spent in the case.

<sup>16</sup> *See also, Demetrio v. Sakuma Bros. Farms, Inc.*, 2016 WL 9227161 (W.D. Wash. 2016) (awarding contingent risk/quality of work multiplier). *See also, Broyles, supra* at 452-53 (this Court upholds contingent risk multiplier in WLAD case brought by female deputy prosecutors).

Further, the County's additional argument that Boothe should have unethically abandoned his client by accepting the County's lowball offer of judgment,<sup>17</sup> thereby elevating his personal interest in being paid over Easterly's interests is truly offensive. Resp't br. at 30.

Simply put, the lodestar, even with the application of current rates (albeit at the lower rate prescribed by the trial court), resp't br. at 28-29, does not compensate Easterly's counsel for the thousands of hours of time and advanced expenses for which he has not been paid for 7 years. Indeed, in this respect, this case mirrors *Miller* where a contingent risk multiplier was awarded. Easterly's counsel should have been fully compensated by a contingent risk adjustment to his market rate to reflect the County's 7-year non-payment period.<sup>18</sup>

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<sup>17</sup> The County never varied from the \$40,000 offer; Easterly obtained a verdict of \$500,000, more than 12 times the County's best offer. CP 42.

<sup>18</sup> This view is supported by Mann's expert opinion:

1. The facts of this case relate to events from 2004-2009 and the complaint was filed in 2009 – 7 years ago. This is the textbook case that must be taken to achieve the purposes of the WLAD, but which is also the reason most civil attorneys will not take WLAD cases on a contingency.

2. It is not feasible to do hundreds of thousands of dollars of legal work and wait 5-10 or more years to be paid. Typical fee awards do not come close to compensating for this risk and delay. This is the "risk" inherent in WLAD cases and in aggressively contested discovery, summary judgments, frequent appeals and trials and retrials.

22. In my opinion that a substantial multiplier of over "2 times" the hourly fees would be necessary to make this an economically reasonable

The trial court abused its discretion in making its decision on the multiplier here.

(2) Easterly Is Entitled to Fees on Appeal

As noted in his opening brief at 23 because Easterly recovered his attorney fees below, he is entitled to recover his fees on appeal. RAP 18.1(a).

D. CONCLUSION

Nothing in the County's brief should dissuade this Court from concluding that the trial court failed to properly apply the lodestar analysis for Easterly's counsel's services in this WLAD action.

This Court should reverse the trial court's fee award and remand the case to the trial court for entry of a fee award that encompasses the appropriate hourly rate for Easterly's counsel and proper compensation for the services of Kesten Media, and awards a multiplier of the lodestar. Costs

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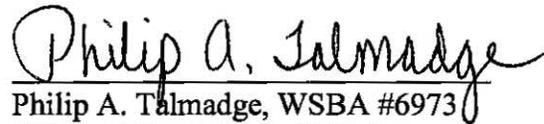
risk, to convince other attorneys to undertake the risk of this case and cases like it on a contingency. Contingency representation is disappearing for employees facing discrimination because of unpleasant and expensive and time consuming and endless litigation to prevail in such cases, as well as social biases that make the cases extremely risky. Attorneys are progressively having to ask for up front partial fees and for cost deposits, diminishing access to justice and defeating the statutory scheme for "private attorneys general" to take cases for employees without resources due to discrimination.

CP 241, 246-47.

on appeal, including reasonable attorney fees, should be awarded to Easterly.

DATED this 22d day of August, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the following document: *Reply Brief of Appellant* in Court of Appeals, Division II Cause No. 50297-6-II to the following parties:

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

DATED: August 22, 2017 at Seattle, Washington.



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Tammy Sendelback, Legal Assistant  
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**TALMADGE FITZPATRICK TRIBE**

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50297-6  
**Appellate Court Case Title:** Britt Easterly, Appellant v Clark County, Respondent  
**Superior Court Case Number:** 09-2-05520-7

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