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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 361969-III

Douglas County Superior Court: 13-2-00489-2

JENNIFER TYLER, an individual;

Plaintiff-Appellant,

v.

CHELAN COUNTY, by and through its agency the CHELAN COUNTY
SHERIFF'S OFFICE, a Washington municipal corporation,

Defendant-Respondent.

**RESPONDENT/DEFENDANTS RESPONSE TO PLAINTIFF
OPENING BRIEF**

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I. RESTATEMENT OF THE ISSUES

1. Did the Trial Court abuse its discretion in awarding reasonable attorney fees and costs as a sanction pursuant to Rule 26(g)?
2. Did the Trial Court error when it denied Plaintiff's Motion for A Supplemental Award for Adverse Tax Consequences?
3. Did the Trial Court abuse its discretion when it denied Plaintiff's Motion for Post-Trial Attorney Fees and Costs?

II. STATEMENT OF THE CASE

Defendants submit the following Statement of the Case consistent with Rules of Appellate Procedure ("RAP") 10.3(a)(5) and (b) and limits its statement to "facts and procedure relevant to the issues presented for review." Tyler's "Substantive Facts" include to her testimony at trial not relevant to the issues raised (opening brief pages 2-5, 6-8). Respondent presented evidence and testimony at trial in defense to Tyler's claims. CCSO's Statement of the Case is in compliance with RAP 10.3. It does not set forth the testimony and evidence CCSO submitted at trial in response to Tyler's provided testimony and evidence set forth on the pages referenced above.

A. Summary of Facts for Issue No. 1—Did the Trial Court Abuse its Discretion in Awarding Reasonable Attorney Fees and Costs as a Sanction Pursuant to Rule 26(g)?

Respondent, Plaintiff Jennifer Tyler (hereinafter “Tyler”) properly filed a claim for damages on Chelan County on October 28, 2013. CP 169. That claim did not specifically note that she was requesting a document hold. CP 169. During the course of litigation, Tyler served no less than 44 interrogatories and 33 requests for production in five separate discovery requests. CP 161, 170. Tyler’s discovery requests included, but was not limited to the following: (1) Tyler’s personnel file; (2) Tyler’s supervisory and/or managerial files; and (3) correspondence regarding Tyler’s possible move to the night shift. CP 62-63, 100. Defendant Chelan County Sheriff’s Office (hereinafter “CCSO”) conducted initial and follow up searches for documents and produced 1,000 of documents in discovery to Tyler over the course of 36 months. CP 73, 91, 142, 161-163, 170-173, 195-202, 206-208, 217-218.

CCSO’s general personnel files contain institutional employment records: hiring documents, letters of conditional offers, signed codes of ethics, certificates of appointment, job status reclassification evaluations, as well as letters of recommendation or disciplinary letters. CP, 73-74, 161. CCSO produced these files for Tyler. CP, 160-161.

Second and apart from personnel files CCSO maintains so-called “drop files”, also referred to as supervisory files. CP 74-75, 161. Drop-files are not kept in a central location by the County and are fluid files, meaning documents are not permanently maintained . CP 74, 161. Instead, “[they are] a supervisory file that each supervisor [Sergeant or above] keeps for a limited amount of time that helps [the supervisor] prepare for annual evaluations.” CP 74, 161. CCSO informed Tyler of the temporary nature of the drop files in its initial response to interrogatories in March, 2015¹; “Any files separate from the personnel file and maintained by a supervisor are destroyed on an annual basis and only to be used for evaluation purposes.” CP 170.² She did not request that future supervisory

¹ Tyler’s request for documents was sent on November 17, 2014. CP 9

² After receiving Chelan County’s response, Plaintiff deposed the following witnesses: Brent Patterson, a deputy with the Chelan County Sheriff’s Office, on August 26, 2015; Aaron Seabright, a deputy with the Chelan County Sheriff’s Office, on August 26, 2015; Brian Burnett, Chelan County Sheriff, on August 27, 2015; Jan Brincat, the sheriff’s executive assistant, on November 16, 2015; Bruce Long, a sergeant with the Chelan County Sheriff’s Office, on November 16, 2015; Daniel McCue, a deputy with the Chelan County Sheriff’s Office, on November 16, 2015; Scott Moen, a deputy with the Chelan County Sheriff’s Office, on November 16, 2015; Douglas Shae, Chelan County prosecutor, on November 17, 2015; Andrew Zimmerman, a sergeant with the Chelan County Sheriff’s Office, on November 17, 2015; and Randy Lake, a corporal with the Chelan County Sheriff’s Office, on November 17, 2015;. CP 171. None of these notices of deposition were served with a subpoena for documents or records. CP 171.

files be maintained. CP 171. Nonetheless, On October 26, 2017, over two and one-half years later, Tyler filed a motion for sanctions. (see CP 8).

CCSO does not use a retention policy for the drop files because they are maintained only for evaluation purposes for that calendar year only. CP 75, 161. They are maintained for reference purposes pursuant to the Collective Bargaining Agreement. CP 161, 170-171. While personnel files would be available pursuant to a public records request, supervisory files (or drop files) would not be disclosable and would remain confidential to any non-party. CP 162. The purpose of the contents are for incorporation into future performance evaluations and are used for that purpose and the information is to be maintained only as long as necessary to complete personnel evaluations. CP 159, 161, 171. It is undisputed that subsequent to Tyler's return to work, Tyler received positive performance evaluations. CP 159, 182-193.

Ms. Brincat, the Chelan County Sheriff's Administrative Assistant, prepared the extensive documents produced by the County in this litigation. CP 73, 161. While Ms. Brincat, in the course of her work, receives all information which makes it into an employee's file, she does not receive or "have anything to do with" drop files. CP 74, 161. Ms. Brincat did send an email to all supervisors after receipt of the first set of discovery served on November 17, 2014 by Tyler requesting materials from the supervisors.

CP 9, 76, 172. Sergeant Bruce Long, during his deposition, testified that he had received Ms. Brincat's request. CP 162, 217-218. Sergeant Long personally searched the email archiver for all emails associated with "Jennifer" and provided those to Ms. Brincat. CP 218. CCSO also had its IT Department search for emails using certain search terms. CP 91-92.

After receiving a request from Plaintiff to supplement its discovery responses, CCSO conducted an additional search for documents in February, 2017. CP 11, 142, 162-163. CCSO's Counsel provided the emails that it located during this additional search to Tyler's Counsel via email. CP 163, 173. CCSO further provided supplemental responses to discovery on February 3, 2017, and November 9, 2017. CP 173, 195-202, 206-208. CCSO produced 1,000's of pages of documents in discovery to Tyler over the course of 36 months. CP 170. CCSO did not take the discovery process lightly. CP 173. The Sheriff's Office had not previously dealt with discovery requests such as these in breadth and scope. *Id.* Following these discovery requests the Sheriff's Office Administration requested recommendations from Counsel on how to better record its efforts taken in document production. *Id.*

Nonetheless, Tyler filed a Motion for Sanctions on (October 26, 2017) alleging the CCSO neglected its discovery obligations by failing to preserve, produce and/or conduct reasonable searches for requested

documents. CP 8-28. Tyler requested attorney fees and costs in connection with her Motion for Sanctions in the amount of \$20,182.20. CP 22, 26027, 231. On December 29, 2017, the Trial Court granted Tyler's Motion for Sanctions. CP 240-243. Its Order held that "...sanctions are appropriate." CP 242. The Order also noted that "the Court might believe that the number of hours is somewhat excessive and the hourly rate may well also be somewhat excessive..." CP 242. At Tyler's Request, the Trial Court delayed its decision on the amount of sanctions until after trial. CP 240-243.

Trial commenced on February 27, 2018. CP 1030. During trial, Tyler provided a series of exhibits A-L that were not produced in discovery. CP 707-748, 812. Defense Counsel received each exhibit the morning of, leaving Defense Counsel no time to even fully review, let alone prepare any witnesses or presentation regarding the exhibits. CP 814. The Trial Court admitted all of the exhibits. CP701. CCSO does not know where Tyler obtained these documents. CP 813. In fact, the first time Defense Counsel saw these exhibits was at trial. CP 812.

The case went to the jury on March 7, 2018. RP 1481, 1671. On June 14, 2018, the Trial Court issued its Order setting the amount of appropriate sanctions, after the final verdict and judgment was entered. CP 987-990. Plaintiff requested attorney fees and costs in connection with her

Motion for Sanctions for 47.8 hours of attorney time and \$531.10 in costs. CP 27, 231. The Trial Court's Order imposed sanctions against CCSO for reasonable attorney fees and costs incurred in connection with the discovery dispute. CP 990. The Trial Court held: "As the Court has already awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate." CP 990. The Trial Court held that the appropriate hourly rate was \$350. CP 987. The total amount of sanctions imposed against CCSO in connection with the discovery dispute amounted to \$17,261.10. CP 27, 231, 987-990.

All of the fees and costs awarded to Tyler were immediately disbursed pursuant to Tyler's Counsel's instructions on June 20, 2018. CP 1012, 1021-1022.

B. Summary of Facts for Issue No. 2-- Did the Trial Court error When it Denied Plaintiff's Motion for A Supplemental Award for Adverse Tax Consequences?

Tyler was terminated on November 10, 2010. CP 490. She grieved that termination and was represented by her union attorney, Mitchell A. Riese. CP 490, 511. CCSO was represented by attorney Stan Bastian. *Id.* In Tyler's Complaint, she alleged:

"The County illegally terminated Ms. Tyler's employment on November 1, 2010. Tyler challenged that termination under the applicable Collective Bargaining Agreement,

and prevailed in the Arbitration hearing regarding termination.” CP 5.

An arbitration hearing was held on November 15 and 16, 2012. *Id.* The Arbitrator’s Award stated, “The Grievant shall be reinstated, with pay and benefits retroactive to November 10, 2010, subject to the suspension and reprimand referred to in its FINDINGS, above.” CP 490. The Arbitrator’s Award further stated, “Jurisdiction of the Arbitrator is retained for a period of 90 days from the date of this Award to resolve any disputes pertaining to the remedy ordered.” CP 490.

Tyler did not object to the award, did not alert the arbitrator as to any issues with the award, she did not appeal the award or request any post-award relief. CP 490, 501-528. In fact, the actual amount of the back pay award received by Tyler in arbitration was negotiated by her union attorney, Mitchell A. Riese, and the County’s Attorney, Stan Bastian. CP, 490, 501-504. The final settlement of the amount of the award was approved by Tyler and her attorney, Mr. Riese. CP, 502-507.

Tyler subsequently filed the underlying lawsuit, which was tried on February 27 – March 7, 2018. CP, 490. During *motions in limine*, Tyler argued that she should be permitted to present evidence regarding allegations of incorrect back pay awarded in the arbitration. CP, 491, RP 59:17 to 61:6. CCSO argued that Tyler should have raised that through her

union at the time the Arbitration Award was entered and could not raise it at trial. RP 57, 61. The Trial Court held that Tyler was not permitted to argue to the jury that she was paid an incorrect amount of back pay. CP 255-256, 322; CP 490-491. This issue was also raised during at least one bench conference during the course of the trial and again denied by the Trial Court. CP 491. Tyler did not appeal the Trial Court's decision to exclude this evidence, nor did she raise the court's exclusion of this evidence in any issues asserted in her appeal. Appellant's Brief, p. 1.

During closing arguments, Tyler's Counsel argued to the jury, "That's why, on the first claim that we just talked about, there's no money damage. You can't give her financial damages because the arbitrator already did that for you." RP 1605:13-16. Following the presentation of evidence, the jury entered a verdict in favor of Tyler and awarded her \$6,500 in economic damages for childcare expenses associated with flying her mother-in-law out to watch her daughter. RP 495-496, 1674:7; CP 788. The amount of economic damages awarded by the jury in this matter (\$6,500) does not subject Tyler to any adverse tax consequences. CP, 791, 805-806. Tyler's expert agreed that there is no award for adverse tax consequences for the \$6,500 awarded in 2018. CP 985.

C. Summary of Facts for Issue No. 3-- Did the Trial Court abuse its Discretion When it Denied Plaintiff's Motion for Post-Trial Attorney Fees and Costs?

The verdict was entered on March 7, 2017. RP 1481, 1672-1673. Tyler filed a Motion for Attorney Fees and Costs on May 1, 2018. CP 1011. The Court entered its Order on Tyler's Motion for Attorney Fees and Costs on June 14, 2018. CP 987-990, 1011. As set forth in the June 14, 2018 Order, the court awarded Tyler attorney fees and costs in the amount of \$448,659.45. CP 987-990, 1031. These awarded attorney fees and costs were disbursed pursuant to Tyler's Counsel's instructions on June 20, 2018. CP 1011, 1017, 1021-1022.

On June 18, 2018 Tyler thereafter filed a second motion for attorney fees and costs entitled "Plaintiff's Motion for Award of Post-Trial Attorney Fees and Costs". CP 991 (emphasis added). Tyler requested an additional award of attorney fees for 91.9 hours of attorney time (78.8 for Ms. Messit and 13.1 for Mr. Kelly) for a total of an additional \$37,476.00. CP 994. In Tyler's second Motion for fees and costs the majority of the Attorneys time consists of entries dated prior to Tyler's filing its initial Motion for Attorney Fees and Costs on May 1, 2018³. CP 1017, 1006-

³ Tyler also requested additional attorney fees and costs for 3.1 hours of attorney time in drafting entry of judgment and the associated pleadings.

1007. The Court denied Tyler’s request for additional attorney fees, stating:

“The Court denies any further costs and fees for post-trial motions for a number of reasons, one of which is because of the blocked billing submitted by Plaintiff’s counsel, the Court was not able to determine how much time and effort was spent on motions concerning the arbitration, which were denied on several occasions, including the motion submitted post-trial. The Plaintiff lost all of those motions, no matter how many times they submitted them and, as such, should not receive attorney fees and costs for submitting motions for which they did not prevail.” CP 1032.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion in Awarding Reasonable Attorney Fees and Costs as a Sanction Pursuant to Rule 26(g)

The proper standard to apply in reviewing sanction decisions is the abuse of discretion standard. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 338–39, 858 P.2d 1054, 1075 (1993). The abuse of discretion standard recognizes that deference is owed to the judicial actor who is “ ‘better positioned than another to decide the

CP 1011, 1006-1007, 1017. However, this was not necessary as CCSO promptly paid the full verdict amount on May 11, 2018. CP 1017.

issue in question.’ ” *Id.* citing *Cooper v. Viking Ventures*, 53 Wash.App. 739, 742–43, 770 P.2d 659 (1989) (quoting Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

Tyler’s arguments are premised on the incorrect assertion that the Trial Court refused to impose sanctions against CCSO. Appellant’s Brief, p. 1, 22, 24, 27, The Trial Court entered an Order on December 29, 2017 stating that “sanctions are appropriate.” CP 242 (emphasis added). It went on to state that it “will conduct a hearing as suggested by the Plaintiff as to the nature and amount of the sanctions.” CP 242. Following the hearing, the Trial Court awarded attorney fees and costs, but did not impose any further sanction against CCSO. CP 990 (emphasis added). The total amount of the sanction imposed was \$17,261.10. CP 27, 231, 987, 990. Tyler simply ignores the fact that sanctions were awarded in the form of Attorney fees and costs (emphasis added). Because sanctions were imposed, Tyler’s argument fails on its face. Attorney fees are appropriate sanctions as a matter of law and Tyler provided no argument to the contrary. Tyler simply ignores the fact that sanctions were awarded in the form of attorney fees and costs. Nonetheless, CCSO address the issues raised by Tyler in further detail below.

1. Attorney Fees and Costs are Appropriate Sanctions Pursuant to Civil Rule 26(g)

Tyler's argument that the Trial Court refused to impose sanctions is not supported by the record. Contrary to Tyler's arguments, the Court in this matter imposed sanctions against CCSO. In the Court's December 29, 2017 Order finding discovery violations, it held:

...The Court believes that the Defendants are in violation of their discovery obligations and sanctions are appropriate. The Plaintiff has suggested that as opposed to the Court imposing sanctions based upon the briefing it has received that the Court hold that sanctions are appropriate and a hearing should be conducted to determine the size of monetary sanctions. The Plaintiff has already requested approximately \$15,000 in costs and fees in preparing the motion for sanctions. Although the Court might believe that the number of hours is somewhat excessive and the hourly rate may well be also somewhat excessive (the Court notes that the claim for damages requests \$300 per hour, although that was filed at the end of 2013), the Court believes that the Plaintiff should have an opportunity to justify its request. In addition, the court may impose monetary sanctions in an effort to prevent future violations. The Defendants should have an opportunity to present argument as to that issue. The Court will conduct a hearing as suggested by the Plaintiff as to the nature and amount of the sanctions. CP 240-243.

After receiving additional briefing from both parties following the trial in this matter, the Trial Court issued an Order regarding the amount of sanctions imposed. CP 702-703, 810-816, 987-990. The Order states, “As the Court has already awarded attorney fees, the Court does not feel any further sanctions are necessary or appropriate.” CP 990 (emphasis added). Tyler’s award of attorney fees included the time expended in connection with its motion for sanctions. CP 612-613, 987-990. In other words, Tyler’s motion for sanctions was included in the fee request following trial. The Trial Court ordered that award and did not exclude or subtract any time for the motion for sanctions. CP 612-613, 987-990.

Civil Rule 26(g) specifically provides that an appropriate sanction may include the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee. CR 26(g). The fact that the Order assessing the amount of sanctions in this matter was issued post-verdict does not negate the fact that the Court (1) imposed sanctions; and (2) imposed an appropriate sanction pursuant to Rule 26(g)—reasonable expenses incurred because of the violation, including a reasonable attorney fee. Recall also, it was Tyler who requested the Trial Court address sanctions at a later time.

The amount of the sanction imposed against CCSO was \$17,261.10 well within a reasonable sanction. CP 27, 231, 987, 990. *See Washington*

Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc., 168 Wash. App. 710, 716, 282 P.3d 1107 (2012) (court's award of \$8,624 in attorney fees and costs as sanction for improper rule 26(g) certification not an abuse of discretion); *Miller v. Badgley*, 51 Wash. App. 285, 303, 753 P.2d 530, 540 (1988) (The basic principle governing the choice of sanctions is that the least severe sanctions adequate to serve the purpose should be imposed. Resolution of these matters lies within the informed discretion of the trial court).

In *Fisons*, the Supreme Court of Washington recognized that the sanction rules are “ ‘designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to reduce the reluctance of courts to impose sanctions.’ “ 122 Wn.2d at 339 (internal quotation marks omitted) (quoting *Cooper v. Viking Ventures*, 53 Wn.App. 739, 742–43, 770 P.2d 659 (1989)). Many motions in court, even Motions to Compel, do not result in any award of Attorney fees and costs. Thus, a trial court that awards full fees and costs is clearly acknowledging a sanction. Attorney fees is often the requested sanction by the moving party. The Trial Court's award of attorney fees and costs in the amount of \$17,261.10 is not an abuse of discretion. Those awarded fees and costs were immediately disbursed pursuant to Tyler's Counsel's instruction on June 20, 2018. CP 1012, 1021-1022.

Tyler next argues that no sanction was imposed because Tyler requested post-verdict attorney fees pursuant to the WLAD. This argument mixes the issues. Nonetheless, it also ignores the plain language of Civil Rule 26(g) and would impose an absurd result, requiring trial court's to revisit pre-verdict sanction awards for all cases where a party is entitled to recover attorney fees post-verdict. It would also limit a court's wide discretion under Rule 26(g) in determining appropriate sanctions. The case law cited by Plaintiff does not support this result, nor does the plain language of Rule 26(g).

The rule in Washington with respect to attorney fees, that they may be awarded as part of the cost of litigation when authorized by contract, statute or a recognized ground in equity, was in existence prior to Rule 26(g) being added to the Civil Rules in 1985. *Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wash. 2d 806, 815, 638 P.2d 1220, 1225 (1982); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d at 340. Had the legislature intended for "additional sanctions" to be imposed in cases where an attorney fee award was in play (pursuant to contract, statute or equity), the legislature would have explicitly done so. *See In re Detention of Swanson*, 115 Wash.2d 21, 27, 804 P.2d 1 (1990) (had Legislature intended initial detention period to be measured in days rather than hours, it would have

said so); *State v. Thornbury*, 190 Wash. 549, 552–53, 69 P.2d 815, 816–17 (1937) (The Legislature is presumed to have passed the state liquor act with full knowledge of existing statutes. Had it intended to repeal such an important part [sic] of the criminal code as the Sabbath breaking law, it is reasonable to suppose that the Legislature's intention to do so would have been expressly stated and not left to inference and conjecture).

The Trial Court acted in accordance with the plain language of Rule 26(g) and within its discretion when it determined the appropriate amount of sanction to impose—attorney fees and costs.

2. The Trial Court Did not Apply an Erroneous Legal Standard

Tyler's argument that the court applied an erroneously legal standard again incorrectly presupposes that the Trial Court "refused to sanction CCSO and/or its attorneys for violating discovery obligations." Appellant's Brief, p. 27. As set forth supra, this is incorrect. The Trial Court imposed sanctions against CCSO. CP, 242, 990. It simply didn't award the "sanctions" Tyler wanted. Tyler's argument that "the Trial Court erred by personally 'vouching' for CCSO's attorney based on his experience with them 'in the past', which is improper and an erroneous basis upon which to refuse to impose sanctions" is moot and lacks merit as

the Trial Court did not refuse to impose sanctions. Appellant’s Brief, p. 28; CP 242, 990.

In determining what sanctions are appropriate, a trial court is given wide latitude. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d at 355–56. The *Fisons* Court set forth the factors a trial court should consider when determining the amount of a sanctions award. The *Fisons* Court held that how to sanction the person is left to the discretion of the trial judge, who is to consider the least severe sanction necessary to support the purpose of the sanction. *Fisons*, 122 Wash.2d at 355-356. The sanction must not be so minimal, however, that it undermines the purpose of discovery. *Id.* The sanction should insure that the wrongdoer does not profit from the wrong. *Id.* The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions. *Id.*

The Court in *Fisons* additionally warned against the risk that such motions for sanctions would deviate from the purpose of punishing, compensating, and educating, and would instead turn into a fee-generation device.

Furthermore, requests for sanctions should not turn into satellite litigation or become a “cottage industry” for lawyers. To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to

consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds.

Fisons Corp., 122 Wash. 2d at 356. CCSO recognized that it needed to improve its documenting and cataloging from this incident. This clearly fulfills the educational component *Fisons* noted was an important factor.

The Court of Appeals, Division 1, has specifically held that “the trial court may consider an attorney’s history of misconduct in determining appropriate sanction. *Marin v. King Cty.*, 194 Wash. App. 795, 807, 378 P.3d 203, 211 (2016). In *Washington Motorsports Ltd. P’ship v. Spokane Raceway Park, Inc.*, 168 Wash. App. 710, 716, 282 P.3d 1107 (2012), the attorney for Defendant challenged the imposition and amount of sanctions against him. Mr. Shulkin contended that the trial court did not follow the *Fisons* principles in setting the amount of the sanction. *Id.* at 716. The appellate court disagreed noting that the trial court specifically considered Mr. Shulkin’s actions in certifying the discovery responses, stating: “this was the second time Mr. Shulkin had certified the inadequate answers...” *Id.*

It is axiomatic that if the court can properly consider a counsel’s prior negative acts, then it can consider counsel’s ethical reputation to evaluate a sanctions award. In fact, one of the elements for a court to consider when determining the amount of sanctions to impose, as set out in

the *Fisons* matter, is “[t]he wrongdoer’s lack of intent to violate the rules...” *Fisons*, 122 Wash.2d at 355-356. Here, CCSO recognized its mistake and noted to the Trial Court the same. There was no evidence presented by Tyler that there was any intent by CCSO (or its Counsel) to withhold documents (emphasis added). Thousands of pages were provided. CP 170. The trial court did not abuse its discretion when evaluating counsel’s “lack of intent to violate the rules..” Rule 26 provides that a sanctions award may be imposed against the signing attorney, the party on whose behalf the response is made, or both. CR 26(g). When determining the amount of a sanctions award and against whom it should be imposed the law clearly establishes that evaluation of the purported wrongdoer’s intent (attorney, client or both) is appropriate. *Fisons*, 122 Wash.2d at 355-356. Based on the statutory language and case law, Tyler’s argument is without merit.

Tyler’s argument that the Trial Court failed to consider CCSO’s actions in ruling on the issue of sanctions is completely unsupported by the record. The Trial Court evaluated CCSO’s actions in relation to the discovery dispute. The Court’s Order imposing sanctions specifically states that the court reviewed (1) the memorandum of the Plaintiff; (2) declarations in support of the motion for sanctions; (3) Defendants’

response to Plaintiff's motion for sanctions; and (4) reply to Defendants' response to Plaintiff's motion for sanctions. CP 240.

In *Johnson v. Jones*, 91 Wash.App. 127, 136, the Court of Appeals, Division 1, specifically rejected a similar argument made by Tyler in this matter that the Trial Court did not consider facts in the record. In *Johnson v. Jones*, the court rejected "Jones' contention that the court did not consider special factors mitigating against his discovery errors. The court did consider these factors. In its order determining that sanctions were warranted, it listed the pleadings it reviewed. Those pleadings contained the same arguments that Jones now claims were not considered." Tyler's argument that the CCSO allegedly failed to conduct an adequate search for documents, destroyed documents, and willfully or recklessly testified that a requested document did not exist are all arguments set forth in the specific briefing reviewed by the Court. CP 8-22, 220-228. The Trial Court did consider the facts in the records as evidenced in its order identifying the briefing it reviewed. CP 240 (emphasis added).

Tyler's second argument that the Trial Court "placed an erroneous burden on Tyler when it suggested she needed to show the discovery abuses 'hurt her case' before sanctions are imposed" again lacks merit and is moot as the Trial Court did not refuse to impose sanctions against CCSO. CP 242, 990. (Supra)

This argument is also unsupported by the record. The Trial Court did not engage in any such analysis prior to determining whether sanctions were appropriate. CP 240-243. Instead, the Trial Court issued a ruling on December 29, 2017, wherein it held that “sanctions are appropriate.” CP 242. In the Trial Court’s December 29, 2017 Order, it specifically stated: “It is the Plaintiff’s right to discover any and all information possessed by the Defendant, whether it benefits or hurts the Plaintiff’s case.” The Trial Court did not require Tyler to show that any purported discovery abuse “hurt her case” prior to imposing sanctions.

At Tyler’s request, Court decided the amount of sanctions, at a subsequent hearing, which occurred after trial in June 2018.⁴ CP 220, 242, 990. The Court’s ruling on June 14th, 2018, dealt solely with the amount of an “appropriate sanction” pursuant to Rule 26(g).

Tyler’s citation to *Magana v. Hyundai Motor Am.*, 167 Wash. 2d 570, 220 P.3d 191 (2009) in support of her position that the Trial Court utilized an erroneous legal standard is misplaced. Appellant’s Brief, p. 29. *Magana* dealt with a Rule 37 violation. Tyler brought her motion for sanctions pursuant to Rule 26(g). CP 14. As set forth in *Fisons*, “[i]n determining whether an attorney has complied with the rule [Rule 26(g)],

⁴ Following trial, the jury awarded Tyler \$500,000 in non-economic damages and \$6,500 in economic damages. RP 1674.

the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request.” *Fisons*, 122 Wash.2d at 343 (emphasis added); *see also Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 689, 132 P.3d 115, 121 (2006) (Because the Mayers' sanctions motion was brought under CR 26(g), the *Burnet* test⁵, which is applicable to “ ‘the harsher remedies allowable under CR 37(b),’ ” should have no applicability.).

The Trial Court did not require Tyler to demonstrate that the discovery abuse “hurt her case” before sanctions were imposed, nor are the legal authorities discussing a Rule 37 violations applicable to Plaintiff’s request for sanctions pursuant to Rule 26(g).

⁵ The court in *Burnet* held the following: When the trial court “chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.

Mayer v. Sto Indus., Inc., 156 Wash. 2d 677, 687, 132 P.3d 115, 120 (2006) citing

Burnet v. Spokane Ambulance, 131 Wash. 2d 484, 494, 933 P.2d 1036, 1040 (1997), as amended on denial of reconsideration (June 5, 1997).

3. Tyler's Argument that the Trial Court Failed to Consider Facts in the Record is Not Supported by the Record

Tyler argues that given the facts and circumstances in the record, the Trial Court's decision is manifestly unreasonable for two reasons. First, she argues that the court's decision is "manifestly unreasonable in light of CCSO's admissions regarding its failure to conduct a reasonable search for documents..." Appellant's Brief, p. 30. This is the exact same argument Tyler's counsel set forth in its motion for sanctions. CP 8-23. The Trial Court specifically reviewed Tyler's motion and reply briefs in support of her motion for sanctions. CP 240. Tyler's argument that the Trial Court failed to consider any argument or facts submitted in her briefing fails. She simply didn't like the outcome. There is no evidence offered, indeed there is none even available, that the Trial Court didn't consider the Motions and supporting documentation. *See Johnson v. Jones*, 91 Wash.App. 127, 136 (the court rejected Jones' contention that the Trial Court did not consider facts on the records where the Trial Court listed the pleadings it reviewed, which contained the same arguments Jones contended on appeal were not considered).

In addition, CCSO's 30(b)(6), Ms. Brincat, never admitted to conducting an unreasonable search. CP 69-99. Ms. Brincat answered Tyler's counsel questions and outlined the steps she took in responding to

Tyler's discovery requests. CP 69-99. Whether an attorney or party has made a reasonable inquiry in compliance with the discovery certification requirements of CR 26(g) is judged by an objective standard. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d at 343. Ms. Brincat sent out an email to the supervisors asking for the documents specifically requested in discovery. CP 76. CCSO also utilized its IT Department to conduct searches for email utilizing certain search terms. CP 90-91. While CCSO's method of production was not perfect, there was no nefarious intent⁶, and the goal of its production and search for records was to produce the requested records. CP 162, 73, 83-85, 90-91.

Tyler's second argument that the Trial Court's decision is manifestly unreasonable is her assertion of the "vital role the destroyed and withheld documents played at trial." Appellant's Brief, p. 31. Tyler then goes on to discuss several documents that she provided at trial and that were not produced in discovery. CP 707-748, 812. Tyler states that she received these documents by a "Good Samaritan" she refused to identify by name or in response to a public records request she made. Appellant's Brief, p. 32-42. These were the same documents that CCSO had never

⁶ The wrongdoer's lack of intent to violate the rules is an appropriate factor to consider determining the amount of a sanctions award. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d at 355-356.

seen. CP 812. CCSO does not know where Tyler obtained these documents. CP 813. Defense Counsel received each exhibit the morning of, leaving Defense Counsel no time to even fully review, let alone prepare any witnesses or presentation regarding the exhibits. CP 814. The exhibits were all admitted. It was not a question of “ambush,” unless the ambush was laid by Tyler.

Yet out of these exhibits from the “Good Samaritan,” there was only one document discussed that was set forth in Tyler’s motion for sanctions filed on October 26, 2017. CP 238-239, 736-737. Contrary to Tyler’s assertions that this document was vital to her case, the Trial Court commented: “The Court has reviewed the written complaint of Sgt. Zimmerman, which was apparently given to the Plaintiff by an unnamed fellow employee/supervisor. Although this Court does not believe that the complaint necessarily supports [Tyler’s] position...It is not this Court’s opinion as to the relevancy, at this point...” CP 241-242.

Further, Tyler never filed a motion for sanctions with respect to these particular documents she claims were given to her by a “Good Samaritan” she refused to identify by name or in response to a public records request she made. Appellant’s Brief, p. 32-42. Her motion for sanction was filed well before she produced these documents at trial. Thus, any purported discovery violations related to these particular documents are

not properly before this Court. Arguments not raised in the trial court generally will not be considered on appeal. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 50 P.3d 256 (2002); *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993).

In addition, Tyler's argument that these were not considered by the Trial Court fails as it presided over the trial in this matter and Tyler identified and attached these exhibits to her Motion Requesting an Award on the Trial Court's Decision on Sanctions Entered 12/29/17. CP 704-748; *See Johnson v. Jones*, 91 Wash.App. 127, 136; *See also Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wash. App. 422, 431, 10 P.3d 417, 423 (2000) (In declining to impose sanctions, the trial court noted that any potential prejudice from the late discovery of the document, after Hill's perpetuation deposition, could be cured because Hill was available to testify at trial. We conclude the trial court did not err in finding that sanctions were not warranted.).

In addition, with respect to the deletion of temporary files, in her claim filed with the County prior to this litigation, Tyler did not specifically note that she was requesting a document hold. CP 169. It was explained in answers to the first set of discovery responses that the drop files were not maintained for over a year. It was not until over a year later a Motion was filed (*supra*). The Sheriff employees were not put on notice to keep the

files beyond the initial request. Again an issue which while unfortunate, was not fatal as evidenced by the result. In addition, Tyler's "good Samaritan" surely had his/her documents prior to the first day of trial, yet they were not provided. A "fair" sanction against CCSO could also be their admissibility.

In *Cook v. Tarbert Logging, Inc.*, 190 Wash.App. 448, 360 P.3d 855 (Div.3, 2015) the defense contended that the "black box" to a vehicle involved in an accident should have been preserved. The black box would show the speed of the plaintiffs' vehicle. The vehicle was instead "parted-out" and destroyed. The trial court found that spoliation of evidence had occurred. The court of appeals disagreed:

The culpable conduct relied on in seeking a sanction must be connected to the party against whom a sanction is sought. *Id.* at 606, 910 P.2d 522. In *Henderson*, the court applied the "connection" requirement as meaning that the act of destruction was by someone over whom the potentially sanctioned party had some control. And in *Henderson*, the court charged the plaintiff with his lawyer's knowledge that the defense had requested that evidence be preserved. *Id.* at 611, 910 P.2d 522.

In weighing the importance of the destroyed evidence, the fact that the culpable party itself investigated the evidence is relevant but not determinative. *See id.* at 607-09, 910 P.2d 522. Whether destruction of the evidence gave the culpable party an investigative advantage is a consideration; conversely, the fact that neither party presents the testimony of an expert who

examined the evidence before its destruction diminishes its importance. *Id.* at 607–08, 910 P.2d 522. In *Henderson*, in which a car involved in a one-car accident was destroyed, the “many photographs available to the experts” supported the court's decision that no sanction was appropriate. *Id.* at 609, 910 P.2d 522.

In considering culpability, courts examine whether the party acted in bad faith or with conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction. *Id.* “**Another important consideration is whether the actor violated a duty to preserve the evidence.**” *Id.* at 610, 910 P.2d 522. **In *Henderson*, the plaintiff's duty to preserve his car arose from an explicit request by the defendant to preserve it.** Even the violation of the duty to preserve was excused in *Henderson*, however, because the defendant had almost two years before the car was destroyed, which the court characterized as “ample opportunity” to examine it. *Id.* at 611, 910 P.2d 522. *Cook*, 190 Wash. App. at 462–63 (emphasis added).

Contrary to Tyler’s assertions, the Trial Court considered the facts and the records before it when (1) it ruled on Tyler’s motion for sanctions; and (2) determined an appropriate sanction to impose against CCSO.

B. The Trial Court Did Not Error When it Denied Plaintiff’s Motion for Supplemental Award for Adverse Tax Consequences

1. The Court of Appeals May Not Rule on Matters Not Properly Before this Court

The Trial Court properly precluded Tyler from presenting evidence to the jury that showed the back pay actually paid to Tyler by CCSO in 2013 did not make her whole. CP, 495-496. The jury awarded \$6,500 in economic damages. Had Tyler taken issue with the Court's ruling precluding the introduction of evidence, Tyler should have appealed the Court's ruling on that motion. Tyler did not. This issue is not properly before this Court. See *Currier v. Northland Servs., Inc.*, 182 Wash. App. 733, 741 fn. 5, 332 P.3d 1006 (2014) (An issue not briefed is deemed waived); *Bldg. Indus. Ass'n of Washington v. McCarthy*, 152 Wash. App. 720, 746 fn. 11, 218 P.3d 196 (2009) (Issues relying on incorporated trial court briefing are considered abandoned on appeal); *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011) (Additionally, a party "is deemed to have waived any issues that are not raised as assignments of error and argued by brief."); *Marin v. King Cty.*, 194 Wash. App. 795, 820, 378 P.3d 203, 217 (2016); *Rutter v. Rutter* (1962) 59 Wash.2d 781, 370 P.2d 862 (Supreme court will not consider appellant's contention where his argument is not supported by assignment of error.); *Boyle v. King County* (1955) 46 Wash.2d 428, 282 P.2d 261; *Hafer v. Marsh* (1943) 16 Wash.2d 175, 132 P.2d 1024; *Hollingbery v. Dunn* (1966) 68 Wash.2d 75, 411 P.2d 431; RAP

2.4. Tyler has not raised any assignment of error (or submitted legal authorities discussing the exclusion of evidence) with respect to the Trial Court's decision precluding evidence of damages following arbitration and thus, this issue is waived.

2. Any Award for Adverse Tax Consequences on the Issue of the Back Pay Awarded at Arbitration Five Years Prior to the Verdict in this Matter is Moot

Any award for adverse tax consequences relative to Tyler's back pay award in a separate proceeding occurring in 2013 (over five years ago) is moot. Tyler had several remedies available to her in 2013 after receiving the arbitrator's award, but she chose not to avail herself of any of them. It is undisputed that Tyler did not appeal any portion of the arbitration award. CP 790. Nor did Tyler challenge the award or request modification to include an award for adverse tax consequences pursuant to RCW 7.04A.240 (allowing a 90-day period for a party to move to modify or correct an award).

It cannot be disputed that Tyler at the time of trial was well past the 90-day deadline set forth in RCW 7.04A.240. Despite this fact, Tyler continues to attempt to circumvent the proper procedure set forth in the Uniform Arbitration Act to modify the award. Yet she offers no legal authorities that would allow this Court, or the Trial Court, to award tax consequences on a five year old decision from a prior proceeding, or that

would allow Tyler to completely circumvent the procedural requirements and timelines for objecting to an arbitrator's award or appealing the decision pursuant to the Uniform Arbitration Act and Washington's Rules of Appellate Procedure. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (declining to consider arguments unsupported by reference to the record or citation to authority).

Not only did Tyler fail to avail herself of any of the remedies available pursuant to her after the arbiter's decision in 2013, she agreed to and accepted the back pay calculation. CP, 490, 501-504 (emphasis added). While it is unclear whether Tyler ever requested any income tax compensation in 2013 due to the attorney-client privilege, the evidence clearly establishes that there were negotiations between Tyler's attorney and CCSO. *Id.* The emails between former Chelan County attorney, Stan Bastian, and Chelan County Deputy Sheriff's Association union attorney, Mitch Reise, evidence at least a portion of the negotiations regarding Tyler's back pay award following arbitration. *Id.* Ultimately, Mr. Riese notified Mr. Bastian on May 30, 2013, that Tyler had approved Chelan County's back pay calculation. *Id.*; See *Oregon Mut. Ins. Co. v. Barton*, 109 Wash.App. 405, 413-14, 36 P.3d 1065 (2001) (A strong presumption attaches to a settlement agreement that the parties have considered and

settled every existing difference.). Tyler's acceptance of the award renders any controversy regarding same moot.

In its order, the trial court correctly stated:

“..the request by the Plaintiff to award damages that were agreed to in arbitration is denied. It is pretty hard to deny that Plaintiff and her attorney settled that issue. See email from Mitchell Riese to Stan Bastian dated May 30, 2013, attached to the Declaration of Heather C. Yakely dated April 9, 2019.” CP558-559; CP, 502-507.

Tyler may not now (continue) to argue she was not properly compensated. Her acceptance of the amount of back pay she agreed to and accepted in 2013 is moot. *See Kenneth W. Brooks Trust v. Pac. Media LLC*, 111 Wash. App. 393, 399, 44 P.3d 938, 942 (2002) Pacific Media's prompt payment peremptorily satisfied any need for judgment and effectively brought the underlying controversy to a close. Given the facts, including binding arbitration, award, tender, and acceptance without apparent further dispute, the matter was for all intents and purposes effectively settled); *see also Oregon Mut. Ins. Co. v. Barton*, 109 Wash.App. at 413–14, (discussing accord and satisfaction).

In *Kenneth W. Brooks Trust v. Pac. Media LLC* the Plaintiff, Kenneth W. Brooks Trust, and the Defendant, Pac. Media LLC agreed to enter binding arbitration pursuant to a breach of lease complaint. *Kenneth*

W. Brooks Trust 111 Wash. App. at 395. The arbitrator made an award to the Plaintiff Kenneth W. Brooks Trust. *Id.* Plaintiff moved the superior court to confirm the award. *Id.* Defendant, Pacific Media, tendered and the trust accepted payment of the award in full before the confirmation hearing. *Id.* At the confirmation hearing, the trial court declined to enter the proposed confirmation order and instead, dismissed the complaint. *Id.* The Plaintiff appealed, arguing (1) an inadequate award, and (2) trial court error in dismissing its complaint without first confirming the award. The Court of Appeals, Division 3, held:

Because the arbitration award is not properly before us, and the Trust accepted tender of the award prior to the confirmation hearing, we decide in the interests of judicial economy and in furtherance of the principles underlying arbitration as a means of dispute resolution, that the trial court properly treated the matter as settled. Accordingly, we affirm.
Id.

Similarly in this matter, the tender and acceptance after negotiations between Tyler's counsel and CCSO's counsel, render any controversy raised by Tyler relative to the arbitrator's award in 2013 moot. The amount of economic damages in this matter amounted to \$6,500—an amount that does not subject Tyler to adverse tax consequences.

3. Plaintiff Suffered No Adverse Tax Consequences As a Result of the Jury's Award of Economic Damages in the Amount of \$6,500

Tyler suffered from no adverse tax consequences. Using Tyler's retained expert's figures for Tyler's income and calculations on the tax consequence of \$6,500 in economic damages yields a tax consequence of \$0.00. CP, 791,805-806. The Trial Court did not error in denying Tyler's motion for supplemental award of adverse tax consequences based upon the verdict of economic damages in the amount of \$6,500. (*infra*).

4. Plaintiff Waived Any Argument on Appeal With Respect to the Special Verdict Form

As previously noted, Tyler's award of back wages was finalized over five years ago. CP, 790. During closing arguments, Tyler's Counsel argued to the jury, "That's why, on the first claim that we just talked about, there's no money damage. You can't give her financial damages because the arbitrator already did that for you." RP 1605:13-16. In accord with Tyler's attorney's arguments to the jurors, the special verdict form did not provide for the jury to award damages for "back pay" in relation to damages Tyler had already been compensated for in relation to the arbitration over five years prior. CP 1673-1674. There is no evidence in the record before the Court that Tyler took issue or objected to the special verdict form. RP 1555. The record suggests that Tyler submitted the

special verdict form and CCSO was the only party that took exception to any portion of the special verdict form. RP 155; See *Sdorra v. Dickinson*, 80 Wash.App. 695, 702–03, 910 P.2d 1328 (1996) (because plaintiffs submitted the verdict form at issue, the plaintiffs invited the error and could not complain on a motion for new trial or on appeal that the verdict forms were inconsistent).

C. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff’s Second Motion for Attorney’s Fees

The reasonableness of an award of attorney's fees is reviewed under the abuse of discretion standard. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. *Berryman v. Melcalf* 177 Wn. App. 644, 656-7, 312 P.3d 745 (2013) (citing *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). The Trial Court must exercise its discretion in light of the particular circumstances of each case. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169,795 P.2d 1143(1990).

1. The Trial Court Created an Adequate Record

Tyler's argument that the Trial Court failed to create an adequate record is not supported by the record. On June 14, 2018, the Court entered its findings and conclusions related to Tyler's Motion for Attorney Fees and Costs filed on May 1, 2018. CP 987-990. Tyler did not challenge these findings as inadequate. The findings demonstrate that the Trial Court reviewed the billing entries submitted by Tyler in detail. CP 987-990. The Court awarded Tyler \$448,659.25 in attorney fees and costs. CP 988, 1030. Tyler then brought a second motion for attorney fees and costs, entitled "Plaintiff's Motion for Award of Post-Trial Attorney Fees and Costs". CP 991-995. In ruling on that Motion, the Court did not perform the redundant and unnecessary task of revisiting issues already decided in dealing with Tyler's initial motion for fees and costs, such as calculating the reasonable attorney fee. The Court did, however, issue additional findings setting forth the reasons for denial of Tyler's Motion for Award of Post-Trial Attorney Fees and Costs. CP 1032. It is evident from the record in reviewing the two Orders that the Court thoughtfully considered the facts before it and made appropriate reductions for time spent on unsuccessful claims and duplicated and wasted efforts. CP 987-990, 1032.

Tyler relies on *Mayer v. City of Seattle*, where the court made no findings regarding the items challenged (emphasis added). That is not the

case here. The Trial Court made specific findings, supported by the record, (infra), regarding its denial of Tyler's Motion for Award of Post-Trial Attorney Fees and Costs. CP 1032. Specifically, the Court took issue with Tyler's block billing, which failed to allow the Court to determine and exclude fees for wasted and duplicative efforts. CP 1032. Tyler was represented by two attorneys. Yet she cites to no legal authority that would require a court to undergo a redundant analysis, which it had already done (and which is not challenged) with respect to Tyler's Motion for Attorney Fees and supplemented with its Order issued on June 27, 2018 related to Tyler's second request for attorney fees and costs. Nor does judicial efficiency require such a result. The court adequately set forth the reasons for its denial of Tyler's motion and CCSO respectfully requests that this Court affirm the lower Court's order.

However, should the Court disagree with CCSO, the proper remedy is not for the Appellate Court to award the full amount of attorney fees Tyler had requested in her Motion for Award of Post-Trial Attorney Fees and Costs, but rather to remand to the Trial Court. *Mayer v. City of Seattle*, 102 Wash. App. 66, 79, 10 P.3d 408, 415 (2000); *Berryman v. Metcalf*, 177 Wash. App. 644, 312 P.3d 745 (2013) (Remand was required for the superior court to enter proper findings of fact and conclusions of law that explained the basis for attorney fees award, although the judge who entered

the inadequate findings was no longer serving on the superior court; remand on the existing record would preserve to the trial court its traditional role of resolving disputed facts and exercising suitable discretion.).

2. Plaintiff Failed to Meet Her Burden of Proving the Reasonableness of the Fee Request; The Amounts Were Properly Denied

The fee applicant has the burden of proving the reasonableness of the fee request and “must provide reasonable documentation of the work performed.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141,151, 859 P.2d 1210 (1993). The documentation must be as detailed as it would be if it were submitted to the requesting party's own client, and must clearly and convincingly demonstrate that the time and effort expended “was necessary to achieve the results obtained.” *Hensley v. Eckerhart*, 461 U.S. 424, 441, 103 S. Ct. 1933, 76 L. Ed. 2d 40, (1983) (Burger, concurring) (emphasis added).

In determining reasonable attorney fees, a court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time. *Bright v. Frank Russell Investments*, 191 Wash. App. 73, 361 P.3d 245 (2015); *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 599–600, 675 P.2d 193, 205 (1983). The Trial

Court was within its discretion in denying Tyler attorney fees for her repeated and unsuccessful motions, duplicated efforts, and unproductive time.

Tyler's Motion for Award of Post-Trial Attorney Fees and Costs (the second request for attorney fees) highlights Tyler's duplicity in her requests for fees that was a constant throughout the litigation. Although Tyler submitted her Motion for Attorney fees on May 1, 2018 (See CP 560-577), Tyler did not include attorney time for events up to that date. CP 601-616. Tyler's duplicity, as well as concerns over block billing, is also noted in the Court's Order on June 14, 2018 wherein the Court stated:

The Plaintiff has also asked for a supplemental award for adverse tax consequences and once again, for the fourth or fifth time, has requested some sort of compensation for the arbitration that occurred. The Court did not note in the billing provided by the Plaintiff, probably because of the blocked billing, how much was charged for requesting compensation *ad naseum* for litigation that has already occurred. The Court will not make any award for adverse tax consequences. CP 989.

Tyler's own submissions evidence that the Trial Court did not abuse its discretion when denying her Motion for Post-Verdict Attorney Fees. The basis for the Court's denial--block billing--is highlighted by Tyler's own submissions in support of its Motion for Post-Trial Attorney Fees and

Costs. Attorney Michael J. Kelly submitted a declaration attesting that he had “specifically removed all time spent on (a) Plaintiff’s Motion for Supplemental Awards, (b) Plaintiff’s Motion for Award of Tax Consequences, and (c) Request for Award on Sanctions. CP 1003. Mr. Kelly contends that he expended 13.6 hours reviewing and analyzing other motions prepared and submitted in the litigation.⁷ CP 1003. Tyler’s Motion for Post Verdict Attorney Fees specifically requests fees for Mr. Kelly’s 13.6 hours he contends he spent on these matter (and not the matters he claims to have excluded). CP 994. The 13.6 hours submitted in support of Tyler’s Motion for these additional fees contain the following:

5/31/2018: Communicate with Co-Counsel Annette Messitt re: our reply motions for tax consequences and sanctions. Receive drafts from Annette and review and revise. CP 1006.

6/04/2018: Make final edits to all reply briefs. File briefs and email to opposing counsel. CP 1006.

A review of the bills submitted by Tyler clearly shows that the block billed time does in fact include items Mr. Kelly stated he excluded. If Mr. Kelly is unable to successfully segregate his own time, Tyler cannot

⁷ These include Plaintiff’s Motion for Entry of Judgment, Defendant’s Motion for a New Trial, Plaintiff’s Motion to Continue Trial, including responses and replies thereto, and including revising/editing drafts completed and sent to me by Annette Messitt. CP 1003.

argue that the Trial Court abused its discretion in denying attorney fees for this very reason. While Ms. Messitt also attests to have removed several items from her entries (as did Mr. Kelly), it is unclear where and how they were removed and whether they were previously “lumped” into other tasks and block billed. CP 1003, 1006-1010. Illustrative examples of block billing submitted by Ms. Messitt were examined by the Trial Court when it reviewed and ruled on Tyler’s Motion for Attorney Fees and Costs filed on May 1, 2018. Two examples (although there are more set forth in the record at CP 601-616) are set forth below:

10/31/2016: Review Plaintiff’s discovery responses and email client for supplemental information if any; Review the email about backpay from 02-19-16 and prepare for production; Compare to docs produced by Defendant; Telephone conference with MK and OC regarding outstanding discovery; Review discovery responses and detail deficiencies; Draft email to OC and MK regarding the deficiencies; Gather documents and review and calculate approximate monetary damages incurred as a result of retaliation; create lists in preparation for mediation and/or trial. CP 606.

8/16/2016: Review to do list; Draft 4th ROGs and RFPs; Research in preparation for call with expert Redskin tomorrow; Email MK regarding to do list and send draft ROGS and RFPs 607.

These various items are all lumped into one time entry for a total of 4.7 hours and 1.7 hours, respectively. CP 606, 607. It is impossible to decipher how much time was spent on each task. The Court in *Berryman v. Metcalf* explained the issue with block billing:

The block billing entries tend to be obscure. For example, on November 3, 2011, Kang billed 11.7 hours for meeting with Berryman about trial preparation and also for drafting a reply brief in support of plaintiffs motions in limine. How many hours were devoted to meeting with Berryman, and how many to drafting a reply brief, is impossible to tell. *Berryman v. Metcalf*, 177 Wash. App. 644, 663–64, 312 P.3d 745, 756 (2013).

The same is true with respect to Ms. Messitt's billing entries—it would be impossible for her or the Trial Court to determine how much time was devoted to each entry in such block billed time. The burden of demonstrating that a fee is reasonable is on the fee applicant. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney. *Mayer v. City of Seattle*, 102 Wash. App. 66, 79, 10 P.3d 408, 415 (2000). Nor should courts simply accept unquestioningly fee affidavits from counsel. *Mahler v. Szucs*, 135 Wash. 2d 398, 435, 957 P.2d 632, 651, order corrected on denial of reconsideration, 966 P.2d 305

(Wash. 1998) implied overruling on other grounds recognized in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wash.2d 643, 659, 272 P.3d 802 (2012). The Trial Court followed established law when it independently evaluated Tyler’s billing entries, both in connection with Tyler’s initial motion for attorney fees and Tyler’s second motion for attorney fees.

Federal courts have viewed with great suspicions “block billed” time. “The term ‘block billing’ refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.” *Au v. Funding Grp., Inc.*, 933 F. Supp. 2d 1264, 1276 (D. Haw. 2013)(citing *Robinson v. City of Edmond*, 160 F.3d 1275, 1284 n. 9 (10th Cir.1998)). Block billing entries generally fail to specify a breakdown of how much time was spent on each task. *Id.* District courts have the authority to reduce hours that are billed in block format because such a billing style makes it difficult for courts to ascertain how much time counsel expended on specified tasks. *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir.2007); *See also id.* (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C.Cir.2004) (reducing requested hours because counsel’s practice of block billing “lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness”)); *Hensley*, 461 U.S. at 437 (holding that applicant should “maintain billing time records in a manner

that will enable a reviewing court to identify distinct claims”)). “[I]t is a challenge to determine the reasonableness of a time entry when it includes several tasks.” *Au v. Funding Grp., Inc.*, 933 F. Supp. 2d 1264, 1276-77 (D. Haw. 2013).

The Trial Court did not abuse its discretion when it denied Tyler’s motion because Tyler’s block billing made it impossible to tell how much time was devoted to wasted duplicated efforts. CP 1032.

IV. CONCLUSION

The Court should (1) affirm the Trial Court’s June 14, 2018 Decision on Sanctions; (2) affirm the Trial Court’s June 14, 2018 Order denying Plaintiff’s Motion for Supplemental Award for Adverse Tax Consequences; and (3) affirm the Trial Court’s June 27, 2018 order denying Plaintiff’s Motion for Award of Post-trial Fees and Costs and Entry of Supplemental Judgment; and (4) award sanctions in favor of CCSO and against Ms. Tyler’s counsel pursuant to RAP 18.9.

DATED this 18th day of March, 2019.

KUTAK ROCK, LLP

By: s/Heather C. Yakely
Heather C. Yakely, #28848
Attorney for Defendant

DECLARATION OF SERVICE:

On the 18th day of March, 2019, I caused the foregoing document described as Defendant's Response to Plaintiff's Opening Brief to be served via U.S. Mail at the addresses listed below on all interested parties to this action as follows: Notification of this filing will be also sent electronically by the Court's Electronic Filing System to all attorneys of record.

Michael J. Kelly
Gehrke, Baker, Doull, & Kelly
22030 7th Ave S, Suite 202
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s/Adrien M. Plummer

Adrien Plummer, Paralegal to
HEATHER C. YAKELY

KUTAK ROCK, LLP

March 18, 2019 - 2:26 PM

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