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No. 373851
District Court No. 17-1-01371-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff-Respondent,

vs.

THOMAS MADISON CAREY,

Defendant-Appellant.

On Appeal From the Court of Appeals of the State of
Washington, Division III

DEFENDANT-APPELLANT'S REPLY BRIEF

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A. RCW 9A.16.110 ALLOWS THE COURT TO DETERMINE THE REASONABLENESS OF THE AWARD FOR COSTS AND FEES, HOWEVER THE TRIAL COURT ERRED IN APPLYING *LODESTAR* TO DETERMINE THE REASONABLENESS OF MR. PARTOVI'S FEES AND COSTS.

The State is generally correct in their Response, stating that the Court is allowed to determine the amount of an award under RCW 9A.16.110. However, the State argues that the Court has more discretion in determining the amount of that award than the relevant case law and the statute indicates. Essentially, RCW 9A.16.110(2) provides that the Judge is to simply decide whether the amount of fees and costs requested were reasonably incurred in establishing the Defendant's claim of self-defense. To undersigned counsel's knowledge, there is no reported case in Washington where the major legal issue in contention under RCW 9A.16.110 is the "reasonableness" of the fee, rather, the main issue of contention in Washington case law is whether the State should be required to pay the fee at all.¹ The crux of the reasonableness question is whether the fee was "reasonably incurred" in establishing self-defense, not whether the fee is a reasonable rate. *Id.*

As noted in Mr. Carey's Opening Brief, undersigned counsel could not find a reported case in the Washington Court system where a Washington Court employs the *Lodestar* method in determining a reasonable reimbursement award under RCW 9A.16.110(2). Opening Brief at p. 3. Nor does the State's Response cite any case in where the *Lodestar* method would be the appropriate method to determine the amount of legal fees incurred.

¹ See generally *State v. Manuel*, 94 Wash.2d 695, 619 P.2d 997 (1980); see also *State v. Jones*, 92 Wn. App. 555, 561, 964 P.2d 398 (Div. 2, 1988)(the main contention in *Jones* surrounded whether the Defendant was entitled to recover for fees incurred for the first trial that ended in a hung jury, prior to the second trial where Defendant was acquitted due to a claim of self-defense); see also *State v. Joswick*, 71 Wn. App. 311, 858 P.2d 280 (Div. 2, 1993); see also *State v. Villanueva*, 177 Wn. App. 251, 311 P.3d 79 (Div. 3, 2013); see also *Rimson v. State*, 75 Wn. App. 289, 877 P.2d 697 (Div. 1, 1994).

The State presents an argument and interpretation of RCW 9A.16.110 and related case law to essentially allow the Trial Court to determine an arbitrary fee in circumstances where a Defendant is found not guilty of a violent crime by reason of self-defense. As laid out in Mr. Carey's Opening Brief, that is not the intent of the statute nor how the statute has been applied by Washington Courts.

The state misinterprets the 1995 change of the language in RCW 9A.16.110, as the prior version of the statute explicitly allowed for indemnification of attorney's fees and costs. The current version of the statute does not explicitly say "indemnify," however the statute reads that the State shall reimburse for "legal fees incurred." The State also cites to Legislative History of the statute, yet the State's Response itself admits that the Legislative History does not discuss the issue of removing the indemnify language. The Legislature did however add the term "fees incurred" to the statute during that same legislative session. *See* S.S.B. FINAL BILL REP. on S.S.B. 5278, 54th Leg. Reg. Sess. (1995).

Black's Legal Dictionary defines 'incurred' as "to bring upon yourself or to happen to yourself." With the 1995 addition of the term "fees incurred," common legal sense would lead the reasonable legal mind to believe that RCW 9A.16.110 still provides for indemnification of contractually obligated legal fees. Again, it is worth reiteration that the Legislature could have amended the statute to read "fees paid," or add some sort of limitation on indemnifying what is contractually owed to an attorney in a circumstance such as this. But our State Legislature did not do that and added the term "incurred" while removing the term "indemnify." *See* Laws of 1995, ch. 44 (S.S.B. 5278). An overall read shows the changes simply made RCW 9A.16.110 easier to read. The legislature could have but did not change the statute from requiring the longstanding indemnification provision.

This is supported by the limited case law available based upon circumstances such as this. The State is correct that “[n]othing in *Anderson* contradicts the plain language of the statute.” See State’s Response at p. 8.; see also *State v. Anderson*, 72 Wn. App. 253, 263, 863 P.2d 1370 (1993). Nor did the legislature substantively change the statute after *Anderson*.

Accepting the State’s narrow, self-interested reading of *Anderson* and of RCW 9A.16.110 would also directly contradict the purpose and intent behind the Washington Legislature’s enactment of the statute. In short, and as reflected by the Washington Supreme Court in *State v. Manuel*, the primary overarching purpose of RCW 9A.16.110 is to make the defendant financially whole again in the event said defendant is acquitted due to a finding of legally justified defense of self or others.

As we read the statute, it was the intent of the legislature that where it clearly appears that a person has used reasonable and necessary force to defend himself or others, he shall not be prosecuted. But where there is a substantial question as to whether his acts were justified, that is, where the question is in doubt and he is subjected to prosecution, he is entitled to recover his legal fees and expenses and time loss if and when it is subsequently determined that his actions were justified within the intent of that section.

State v. Manuel, 94 Wash.2d 695, 699, 619 P.2d 977 (1980)

In essence, the sole question before the Trial Court in this circumstance is whether the fees incurred by Mr. Carey in his defense requested for reimbursement were reasonably incurred to establish self-defense. Only after the Trial Court makes a finding that the fees (or portions thereof) were *not* reasonably incurred to establish self-defense might the *Lodestar* analysis come into play. To use a hypothetical situation as an illustration for this Court, *Lodestar* analysis might be appropriate to determine the amount of an award in the circumstance where the attorney is also retained on a matter completely separate and distinct from the hypothetical defendant’s self-defense claim. That was not the case here.

B. THE TRIAL COURT NEVER MADE A FINDING THAT THE AMOUNT OF FEES INCURRED BY MR. PARTOVI WAS UNREASONABLE

As noted in the Opening Brief, the Trial Court never found that Mr. Partovi's requested fees and costs of \$278,879.94 was unreasonable. In fact, the Trial Court directly praised Mr. Partovi's talent, preparation, and experience in his handling of Mr. Carey's case. *See* Order on Attorney's Fees (*CP 96 at p.3*). The Trial Court noted:

Mr. Partovi has been practicing law in the State of Washington for approximately 20 years, and has, in many instances obtained excellent results for his clients in a number of complex and high-profile criminal proceedings. In the matter before this Court, Mr. Partovi was thoroughly prepared and provided zealous representation [Mr. Partovi's] arguments before the Court were well reasoned and when necessary, properly briefed. The Court would also note that the State was well represented by Mr. Whaley who at all times zealously advocated on the State's behalf and presented what appeared to be a very strong case. It is not unreasonable to assume under these circumstances that defense counsel with less experience than Mr. Partovi, may very well have obtained an unfavorable verdict given the unique complexities of this case and a highly skilled [Mr. Whaley] representing the State.

CP 96 at p.3

Along with this high praise for Mr. Partovi's and Mr. Whaley's experience and talent, the Trial Court never made a finding that the amount of costs and fees incurred through Mr. Partovi's representation of Mr. Carey was not reasonable; the only factual findings were to the contrary. *See generally id.* The Court however did find that it would be reasonable to assume a lesser skilled attorney than Mr. Partovi may not have obtained a not-guilty verdict for Mr. Carey. *See id.* The State seems to make the assertion in their Response that the Judge made a finding that Mr. Partovi's requested fee was unreasonable – as already illustrated, this is patently false.

Despite this direct praise for Mr. Partovi's work, experience, and the outcome, the Trial Court reduced the award by more than 50 percent of what Mr. Carey is contractually obligated

to pay Mr. Partovi. *See CP 96 at p.8.* The Trial Court did not follow Mr. Partovi's proposed hourly rate in the Court's using the *Lodestar* method, nor did they take note of the over \$60,000 in hourly work that Mr. Partovi completed based upon the original \$10,000 retainer agreement between Mr. Partovi and Mr. Carey. *See generally id.* The Trial Court's award essentially states that the requested amount is reasonable for someone like Mr. Partovi, but then determines the award on its own volition. *See generally CP 96.*

C. \$278,879.84 IS A REASONABLE FEE and COST FOR AN ATTORNEY WITH MR. PARTOVI'S TALENT AND EXPERIENCE IN A CIRCUMSTANCE SUCH AS THIS

Given the totality of the circumstances surrounding Mr. Carey's acquittal for Aggravated Second Degree Assault (which was initially charged as a Second Degree Murder) and the high level and high volume of work performed by Mr. Partovi in helping Mr. Carey receive said acquittal, \$278,879.84 is a reasonable fee for Mr. Partovi's services. Not only is Mr. Carey still contractually obligated to pay Mr. Partovi that sum for these fees incurred, but the Trial Court itself indicated "the risk of a guilty verdict and the need for extraordinary preparation clearly outweighs the need to economize attorney's fees incurred." *See CP 96 at p.3.* Given his age, Mr. Carey was facing a potential life sentence and he paid Mr. Partovi what he agreed to be a reasonable amount for Mr. Partovi to be extraordinarily prepared and to save his life.

D. ALLOWING THE TRIAL COURT TO REDUCE THE CONTRACTUALLY AGREED AMOUNT FOR MR. PARTOVI'S SERVICES IS ANTITHETICAL TO BOTH MR. CAREY'S AND MR. PARTOVI'S CONSTITUTIONALLY RECOGNIZED FREEDOM TO CONTRACT.

The State's position and Trial Court's ruling in this matter is antithetical to Mr. Carey's and Mr. Partovi's constitutionally recognized freedom to engage in contracts. U.S. Const. Art. I, Sec. 10, cl. 1 (hereinafter "The Contract Clause") ("No State shall pass any Law impairing

the Obligation of Contracts.”); Wash Const. Art. I, Sec. 23 (“No . . . law impairing the obligations of contracts shall ever be passed.”)

United States Courts have interpreted The Contract Clause to protect the freedom of contract by “limiting the states’ power to modify or affect contracts already formed.” *McCarthy v. Mayo*, 827 F.2d 1310, 1316 (9th Cir. 1987) (citing *U.S. Trust Co. V. N.J.*, 431 U.S. 1, 97 S. Ct. 1505 (1977)); *see generally Morta v. Korea Ins. Corp.*, 840 F.2s 1452 (9th Cir. 1988). The Washington State Constitution equivalent of The Contract Clause is generally given the same effect in that it limits the power of the state to modify or affect contracts already formed. *See Wash. Const. Art I, Sec. 23; World Wide Video of Wash., Inc., v. City of Spokane*, 125 Wn. App 289, 309, 103 P.3d 1265 (Div. 3, 2005).

In short, not only is the State arguing to have this Court subvert the plain meaning of RCW 9A.16.110 and related Washington case-law, the State is also arguing to have this Court paternalistically decide that Mr. Partovi’s rate is too high and that Mr. Carey should have hired a cheaper lawyer. That paternalistic position is directly antithetical to the plain meaning of the statute, and when coupled with The Contract Clause and Article I, Section 23 of the Washington Constitution the position likely becomes unconstitutional.

As outlined in his declaration in support of the fee award, *CP 92*, Mr. Carey tells the Court that he did not want a cheaper lawyer to save his life. Instead, he hired the lawyer recommended to him by a family friend who had spent a lifetime reporting in the Federal Courts of Eastern Washington who told him he needed Mr. Partovi. The State should not be permitted to interject itself into the Constitutionally protected rights of Mr. Carey and Mr. Partovi to meet, confer and agree to a contract of mutual benefit. The State was always on notice and thus in control of the indemnification risk and knowingly took it.

CONCLUSION

Due to the Trial Court's erroneous application of the incorrect law in ruling on the total amount of Mr. Carey's award in the trial court's Order on Attorney's Fees, this Court should reverse and order the State to indemnify of Mr. Carey for the full amount of fees and costs of \$278,879.84. Any offset for payments previously made, because they are not before this Court, should be left the Legislature's subsequent vote on appropriations.

DATED: August 4, 2020

PARTOVI LAW

A handwritten signature in blue ink that reads "DAVID PARTOVI". The signature is stylized with a large, sweeping initial "D" and "P".

DAVID PARTOVI, WSBA 30611
Attorney for Appellant
THOMAS MADISON CAREY

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this 4th day of August, 2020, a true and correct copy of the foregoing was served via e-filing – Court of Appeals website and email to the following:

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