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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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NO. 63743-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PATRICK A. WILLIAMS and ANDREA HARRIS,
his wife, and ANDREA HARRIS as guardian for
ELENA-GENEVIEVE HARRIS, a minor child,
and JOSHUA HARRIS, a minor child,

Respondents/Cross-Appellants,

v.

FESSEHA K. TILAYE and JANE DOE TILAYE,
his wife and the marital community composed thereof,
and MAMUYE A. AYELEKA d.b.a.
ORANGE CAB 485 and JANE DOE AYELEKA,
his wife and the marital community composed thereof,

Appellants/Cross-Respondents.

BRIEF OF RESPONDENT AND CROSS-APPELLANT HARRIS

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A. INTRODUCTION

Andrea Harris (“Harris”) was injured when the car in which she was a passenger was side-swiped by a taxi cab driven by Fesseha Tilaye (“Tilaye”). Harris sued Tilaye, and the case went to mandatory arbitration. After the arbitrator found in Tilaye’s favor, Harris requested a trial de novo at the King County Superior Court. After a three-day bench trial, the court entered judgment in favor of Harris, and awarded her damages, statutory costs, and attorney fees. Although Harris’s attorney, Patrick Kang (“Kang”) had requested a multiplier on the attorney fee award to compensate for assuming the risk of prosecuting Harris’s case, the trial court did not award one.

Tilaye has now appealed. One aspect of his appeal – the court’s admission of testimony by Harris’s chiropractor regarding future damages – turns on the trial court’s discretion. The trial court acted well within its discretion in allowing the testimony. The remainder of his appeal largely concerns a procedural question regarding the timing of a settlement offer. His appeal is fatally undermined by his failure to address, or to bring to this Court’s attention, a controlling Washington Supreme Court case which was argued and briefed to the trial court below. Tilaye’s failure to address *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2004) makes that portion of his appeal essentially frivolous, as its holding

is directly contrary to the appellate decisions on which his argument relies.

For her part, Harris cross-appeals the trial court's decision not to award a multiplier. Her case was a risky one for any attorney to take on; she had great difficulty finding counsel willing to represent her as her comparatively small claim was for soft tissue injuries which are difficult to prove, and the arbitrator had already ruled against her by the time Kang agreed to represent her. The purpose of a fee multiplier is to allow plaintiffs to facilitate representation in certain cases by compensating attorneys for the increased risk of representing small contingency claims. The trial court here abused its discretion in not awarding a multiplier.

B. COUNTER STATEMENT OF THE ISSUES

Harris acknowledges Tilaye's assignments of error but believes the issues pertaining to them are better formulated as follows:

1. Where the initial arbitration was a nullity and the superior court trial was a trial de novo, was the trial court correct in its application of RCW 4.84.250 in awarding attorney fees?
2. Where defendant Ayeleka was dismissed at the outset of the trial, was the trial court correct in denying him an award of attorney fees?
3. Where there was no showing of willful, intentional, or tactical nondisclosure of the chiropractor's recommendation of future

treatment, did the trial court abuse its discretion in allowing the chiropractor - the only expert witness - to testify about Harris's future damages?

4. Did the trial court abuse its discretion in not reducing Harris's attorney fees where Harris's claims for fees were successful and were not duplicative?

C. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred in not awarding Harris a multiplier on her attorney fees.

D. ISSUE PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL

Did the trial court abuse its discretion in not awarding Harris an attorney fee multiplier where courts may award such a multiplier to compensate attorneys for taking risky cases on a contingency basis, where Harris had lost at arbitration, where her case was otherwise extremely risky for Kang to accept, and where the multiplier would represent the premium afforded Kang under Washington case law for taking on the risk of the case, furthering the purpose behind the multiplier?

E. COUNTER STATEMENT OF THE CASE

Very early on a dark and rainy Christmas morning in 2005, Andrea Harris was traveling to SeaTac Airport. RP 245, 247.¹ Her boyfriend at the time, Patrick Williams (“Williams”), was driving and Harris was in the seat behind him with her two children seated next to her. RP 241, 246. There was water in the roadway. CP 575. As the car travelled south on Interstate 5 in the far right lane, Harris saw an orange taxi cab pass very quickly by in the far left lane. RP 249. As it passed, the cab swayed to the left, seeming to hit the concrete divider. *Id.* The cab then swayed back and forth across several lanes and collided with William’s car. RP 249-50, 328-32. Harris, Williams, and Harris’s children were shaken inside the car. RP 251.

Williams pulled his car over to the side of the road and parked. RP 252, 332-33. Moments later, the cab also pulled over to the right shoulder ahead of William’s car. RP 252, 332-33. Williams immediately called for a state trooper. RP 253. He also tried to exchange insurance information with the cab driver, but the cab driver, who was yelling profanities, refused to provide him any. RP 255, 333.

The following day, Harris began experiencing muscle stiffness and pain, but thought it would go away if she iced, stretched, and took over-

¹ The cover pages on the reports of proceedings incorrectly show the date of the proceedings as May 2008. The court clerk’s minutes correctly show the date as 2009, as do the opening pages of the reports of proceedings. *See* RP 5, 118.

the-counter pain killers. RP 258, 266-68. Instead of going away, her pain and stiffness increased. RP 264-65. She found herself suffering from extreme pain in the neck, back, and sides; she could not turn her head to the side or look down to read, had burning pain in her shoulder, and tingling in her hands. RP 265. She could not lift groceries or her children. RP 265.

Friends recommended that Harris see a chiropractor, but she was dismayed to find that most of them required upfront payment, which she could not afford. RP 269. She was then referred to Dr. Marisa DeLisle (“Dr. DeLisle”) who agreed to treat her without requiring immediate payment. RP 270. Dr. DeLisle treated Harris three to four times a week over two standard rounds of treatment consisting of 36 visits each. RP 146-47. At the end of those two rounds of treatment, Harris had achieved an 80 percent change to the curve of her spine caused by the accident. RP 144, 147. Dr. DeLisle recommended additional treatment to help prevent long-term damage, re-injury, and pain. RP 155, 282. Unfortunately, at that point Dr. DeLisle told Harris she would need to pay for service at the time of treatment. RP 148. Harris could not afford to make payments, and decided to forgo any further treatment. RP 147-48, 155, 276, 282.

Although Dr. DeLisle’s treatment had helped relieve Harris’s symptoms, her condition gradually worsened and she never got back to the

physical condition she was in before the accident. RP 277-78. She was still having trouble turning her head and continued to have headaches and burning pain in her shoulders and back. RP 279-80.

Harris returned to Dr. DeLisle in February 2009, complaining of intermittent headaches, and tingling and numbness in her hands. RP 149, 152, 170-71, 315. Upon examining Harris, Dr. DeLisle determined that her third cervical vertebra was changing shape, most likely as a result of the trauma and abnormal stress caused by the car crash. RP 153. Dr. DeLisle believed a further course of treatment would be necessary to make sure Harris's soft tissue would function as best it could. RP 156. The further course of treatment would consist of three visits a week for six to eight weeks followed by twice a month visits for the remainder of the year. RP 156.

Williams and Harris filed a complaint for negligence against Tilaye, as the driver of the cab which had struck them on Christmas, and Mamuye Ayeleka, as the registered owner of the cab. CP 3-7. Williams and Harris were represented at the time by attorney Robert D. Kelley ("Kelley"). CP 28, 539.

The case was transferred to arbitration. CP 24-26. The arbitrator held in favor of Tilaye and Ayeleka, stating that he was unable to find proximate cause. CP 31-32. After the arbitration, Kelley told Harris he

was withdrawing from her case and declined to handle a de novo appeal because of the substantial legal and financial risks of going to trial. CP 44, 539-40. Harris herself requested a trial de novo pursuant to MAR 7.1. CP 33-34. After twenty or more attorneys declined to represent her, Harris was eventually able to convince Kang to take her case on a contingency basis. CP 476, 487-90, 540.

Kang filed an amended request for a trial de novo. CP 41-42. Prior to trial, Harris made an offer of settlement under RCW 4.84.250 in the amount of \$9,000.00. CP 493-94. Tilaye's insurer declined the settlement offer. CP 476.

Preliminarily, the trial court granted Harris's motion for partial summary judgment regarding the reasonableness and necessity of medical treatments arising from the accident. CP 254-56. That order made no determination as to whether a collision occurred, whether Tilaye was negligent, or as to causation. CP 255. The case then went to a bench trial on the remaining issues before the Honorable Cheryl Carey.

Ayeleka was dismissed at the outset of the trial. RP 74-76, 407-08. The claims of Harris's children were likewise dismissed by settlement on the first day of trial. CP 435-36; RP 77-80.

On the second day of trial, Dr. DeLisle testified regarding her recommendations for Harris's future treatment. RP 149, 155-59. Tilaye's

counsel objected. RP 149-50. While acknowledging that he had learned in Harris's trial brief that Dr. DeLisle would be testifying about future damages, he argued surprise. RP 149-50. The court permitted Dr. DeLisle to continue testifying, but returned to the issue of future damages later in the proceedings. RP 150-51, 483. After reviewing the attorneys' briefs and Harris's answers to interrogatories, the trial court found that the interrogatory answers indicated Harris's need for continuing treatment, that Dr. DeLisle was the only expert witness called, that Dr. DeLisle did state that Harris would need continuing treatment, and that Harris herself testified she needed continuing treatment. RP 492. The court found there was no surprise for Tilaye and no evidence of intentional concealment, and ruled that it would consider future damages should it find causation. RP 492-93.

The trial court found in favor of Harris and against Tilaye, awarding Harris \$20,512.00, statutory costs of \$1,372.68, and attorney fees of \$49,847.50 for a total judgment of \$71,732.18. CP 437-39, 800-02. Tilaye appealed, and Harris cross-appealed the trial court's decision not to award her requested multiplier on her attorney fees.

F. SUMMARY OF ARGUMENT IN RESPONSE

Tilaye argues that RCW 4.84.250 does not apply. His assertion is directly contrary to a Supreme Court decision briefed by both sides below

but not mentioned at all in his appellate brief. Harris made a timely offer of settlement prior to the trial de novo in the superior court as required by RCW 4.84.250. For the purposes of the trial de novo, the arbitration did not exist. No mention of arbitration, and no documents produced in connection with the arbitration could be introduced during the trial de novo. The only offer of settlement of legal consequence was the one made prior to the superior court proceeding. Thus, the trial court properly awarded attorney fees pursuant to RCW 4.84.250.

The trial court did not abuse its discretion in allowing Harris's chiropractor to testify about Harris's future damages. Tilaye was on notice that Harris had not fully recovered from the accident but chose not to depose the chiropractor despite being informed that the chiropractor would be testifying at trial. Tilaye had the opportunity to cross examine the chiropractor during the trial, thus curing any potential prejudice, and there was no evidence that Harris willfully withheld information about future damages.

Ayeleka was not a prevailing party and was thus not entitled to attorney fees.

Tilaye assigns error to a number of the court's findings of fact and conclusions of law, but fails to incorporate them into any legal argument or provide this court with citation to any authority. This Court will not

consider issues unsupported by argument or citation to authority and should decline to find error in any of the trial court's findings of fact and conclusions of law.

Harris was successful in pursuing her claims against Tilaye, and none of those claims involved duplicative effort. This court should not credit Tilaye's argument that Harris's attorney fees should be reduced to account for unsuccessful or duplicative claims.

G. ARGUMENT IN RESPONSE

(1) RCW 4.84.250 Applies to this Case

(a) Harris Made an Offer of Settlement Prior to Trial

This Court reviews the trial court's conclusions of law de novo. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002).

Tilaye argues that RCW 4.84.250 does not apply to this case.² His argument boils down to a legally erroneous assertion that Harris should be denied her attorney fees because she did not make an offer of settlement under RCW 4.84.250 prior to arbitration. Br. of Appellant at 22-26. For the purposes of determining attorney fees under RCW 4.84.250, offers of settlement shall be served at least ten days prior to trial. RCW 4.84.280. According to Tilaye, the arbitration was the original trial and the trial de

² RCW 4.84.250 allows a prevailing party to recover reasonable attorney fees where the plaintiff's initial claim for damages is for \$10,000 or less.

novo was an appeal. Br. of Appellant at 22-26. Tilaye argues that because Harris made her offer of settlement prior to the trial de novo and not before the arbitration, Harris is not entitled to her attorney fees under RCW 4.84.250.

Tilaye supports his argument by citing to several opinions from this Court which hold that a trial de novo after an arbitration is an appeal. *See, e.g., Singer v. Etherington*, 57 Wn. App. 542, 546, 789 P.2d 108 (1990); *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002). Brief at 25-26. He also cites *Hertz v. Riebe*, 86 Wn. App. 102, 107, 936 P.2d 24 (1997), a case in which the court denied attorney fees because no offer of settlement was made prior to a district court trial from which the parties appealed to the superior court. Br. of Appellant at 24.

Glaringly absent from Tilaye's brief is any mention of *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2004), in which our Supreme Court analyzed the nature of a trial de novo following mandatory arbitration.

There is no dispute that a trial de novo following an arbitration is an appeal. The *Mousse* court affirmed as much when it stated that the sole way to appeal from mandatory arbitration is the trial de novo. *Id.* at 529. But the Court then described what the term "trial de novo" means in the context of an appeal from mandatory arbitration, and the superior court's

role when conducting such a trial. Its analysis is crystal clear and unambiguous:

We believe the trial de novo process is exactly what the rule says it is: a trial that is conducted as if the parties had never proceeded to arbitration. The entire case begins anew. The arbitral proceeding becomes a nullity, and it is relevant solely for purposes of determining whether a party has failed to improve his or her position, in which case attorney fees are mandated....[A] court should not defer, consider, or analyze an arbitration award at all when conducting a trial de novo under chapter 7.06 RCW.

Id. at 528.

The Court used the word “nullity,” taking pains to sweep the mandatory arbitration and all its attendant briefs and pleadings off the table when it comes to the trial de novo before the superior court. Under *Malted Mousse*, it is as if the arbitration never occurred and the superior court approaches the case with fresh eyes, considering nothing which had occurred before. “A court conducting a trial de novo of a mandatory arbitration appeal should not consider the arbitration award *at all*. See MAR 7.2(b)(1).” *Malted Mousse*, 150 Wn.2d at 532 (emphasis in original). The trial de novo is “*conducted as though no arbitration proceeding had occurred.*” *Id.* at 528, quoting MAR 7.2(b)(1) (emphasis in original). No pleading, brief, statement (written or oral) during the trial de novo may refer to the arbitration proceeding. *Id.*

The *Malted Mousse* court fleshed out what was only implicit in prior appellate court decisions: while a trial de novo is technically an appeal after a mandatory arbitration, the usual appellate procedures do not apply and the trial is instead literally “new.” It is not a standard of review but a complete nullification of the prior proceeding.³ This holding addresses an implicit concern this Court appeared to show in *Thomas-Kerr* when it wrote, “To preserve the right to “appeal” an arbitrator’s decision, an aggrieved party must file its request within 20 days.” *Id.* at 558-59. The quotation marks around the word “appeal” seem to indicate the Court’s acknowledgment that while the superior court was the proper appellate forum following an arbitration, the trial de novo was an “appeal” in theory only, not in practice.⁴

³ In this respect, the *Malted Mousse* Court affirmed *In re Smith-Bartlett*, 95 Wn. App. 633, 976 P.2d 173 (1999). The *Smith-Bartlett* court held that in “the context of arbitration, “trial de novo” is not a review - de novo or otherwise - of the arbitration proceedings. The trial de novo must be conducted as though no arbitration proceedings had ever occurred. ...The arbitration proceedings are sealed. MAR 7.2(a). Absolutely no reference may be made to any aspect of the arbitration, even the fact that it existed, before, during or after the de novo trial. MAR 7.2(b)(1). The “trial” in the trial de novo after a failed arbitration refers specifically to the pre-existing cause of action on which the parties were entitled to a trial before the arbitration.” *Id.* at 641.

⁴ The necessity of the *Malted Mousse* court’s clarification of the law is underscored by its discussion in 1974 of the lack of uniform definitions of de novo review. “The phrase ‘hearing de novo’ does not have a settled meaning as to the nature of the evidence to be reviewed or received on appeal. In fact, the term ‘de novo’ occurs 67 times in 55 sections of the Revised Code of Washington with varied meanings, dependent upon the statutory source. For that reason, discussions of the term in numerous cases have been equally varied.” *Goodman v. Bethel School Dist. No. 403*, 84 Wn.2d 120, 126, 524 P.2d 918 (1974).

Based on our Supreme Court's explicit language in *Malted Mousse*, it cannot be said that the mandatory arbitration was the initial trial and that Harris is barred from seeking attorney fees because she did not make a settlement offer "prior to trial." Harris made her settlement offer under RCW 4.84.250 well before the superior court trial de novo. CP 493-94. Because she made a timely offer of settlement, Harris is entitled to her attorney fees under RCW 4.84.250. Where the mandatory arbitration became a "nullity" and no pleading, brief, statement (written or oral) during the trial de novo may refer to the arbitration proceeding, Tilaye cannot plausibly argue otherwise.

As noted above, Tilaye studiously ignores *Malted Mousse*. This is not because he is unaware of the case. The holding in *Malted Mousse* was briefed by both parties below. CP 784-85, 860-61. This Court may reasonably conclude Tilaye does not discuss *Malted Mousse* because doing so would be highly inconvenient to his argument. While a lawyer is not required to make a disinterested exposition of the law, he must recognize the existence of pertinent legal authorities. RPC 3.3, Comment 4. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. *Id.* RPC 3.3(a)(3) states that a lawyer shall not knowingly "[f]ail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer

to be directly adverse to the position of the client and not disclosed by opposing counsel.” See *American Manufacturers Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 702, 17 P.3d 1229, 1237 (2001).

The legal premises properly applicable to this case are to be found in *Malted Mousse*. The relief sought by the parties at the trial de novo is unrestricted by prior arbitration proceedings. *Id.* at 528. The fact that Harris did not make an offer of settlement prior to arbitration is of absolutely no consequence. The entire case began anew with the trial de novo. *Id.* at 528. Harris did make a timely offer prior to the trial de novo, and RCW 4.84.250 applies. *Malted Mousse* makes Tilaye’s policy arguments against applying RCW 4.84.250 irrelevant, and his appeal of this issue treads close to frivolousness.

(b) RCW 4.84.250 Controls Regardless of the Amount of Harris’s Recovery

Tilaye argues that RCW 4.84.250 does not apply to Harris’s claim because her special damages exceeded \$10,000. His argument is erroneous. Our Supreme Court has held that a plaintiff may recover in excess of the statutory maximum if the offers of settlement do not exceed the \$10,000 limit. *Beckman v. Spokane Transit Authority*, 107 Wn.2d 785, 791, 733 P.2d 960 (1987). Beckman was in an automobile accident with a Spokane municipal bus. *Id.* at 786. Beckman made a pretrial settlement

offer of \$3,000. *Id.* at 787. At trial, Beckman's attorney asked for damages of \$18,000, but the trial court awarded her only \$4,360. Spokane Transit argued that Beckman had waived her right to attorney fees under RCW 4.84.250 because of her attorney's request at trial for \$18,000 in damages, a figure well above the statutory maximum. *Id.* at 790. The court rejected that argument. The defendant could have required Beckman to present a dollar amount of damages sought well before trial, the court noted, and had it done so, RCW 4.84.250 would have applied. Spokane Transit had never requested a statement of general or special damages in accordance with RCW 4.28.360. *Id.* at 786-87. Furthermore, the purpose of RCW 4.84.250 is to prevent trials and encourage settlement. *Id.* at 791. Therefore, anything that occurs during trial has no effect on the applicability of this statute. *Id.* Had Beckman pleaded an award of the statutory maximum, the court held, she could have received a still larger award if the court believed she was entitled to it. *Id.*

Here, Tilaye never requested a statement of damages from Harris and never made such a request in his interrogatories. RCW 4.28.360 prevents a party in a personal injury action from claiming a dollar amount of damages in the complaint. *Beckman*, 107 Wn.2d at 789. Harris made no such claim in her complaint. CP 3-7. Harris made an offer of settlement under RCW 4.84.250 in the amount of \$9,000.00 – an amount

less than the statutory maximum. CP 493-94. The point is that Harris's offer was less than \$10,000. The statute applied even if the court subsequently awarded her a higher amount. Harris is the prevailing party and is entitled to her attorney fees.

(2) Defendant Ayeleka Is Not Entitled to Attorney Fees and Costs

Ayeleka, who was dismissed as a defendant on the first day of trial, requests an award of attorney fees.⁵ In support of his request, he cites to *Allahyari v. Carter Subaru*, 78 Wn. App. 518, 819 P.2d 413 (1995) for the proposition where the plaintiff voluntarily dismisses a defendant, the defendant is the prevailing party and entitled to attorney fees. Br. of Appellant at 32. But *Allahyari* was specifically abrogated by our Supreme Court in *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). Addressing the question of attorney fees, the Court discounted the *Allahyari* court's characterization of the general rule regarding voluntary dismissal. *Id.* at 488, 490-91. Noting that the statutory definition of "prevailing party" as one who obtains a favorable final judgment, the Court held that a "voluntary dismissal" is not a final judgment: no substantive issues are resolved and the dismissal leaves the

⁵ Notably, there is no mention of Ayeleka in the defendants' trial brief which only discusses Tilaye. CP 363-67.

parties as if the action had never been brought.⁶ *Id.* at 491-92. Even where the party initiating the suit voluntarily dismisses it, the court's holding will shield that party from paying the dismissed party's attorney fees. *Id.* at 492. Ayeleka was voluntarily dismissed as a defendant. RP 74-76, 407-08. Under *Wachovia*, he cannot claim attorney fees or costs under RCW 4.84.250.

(3) The Court Did Not Abuse Its Discretion in Allowing Dr. DeLisle to Testify about Future Damages

A court's decision regarding the exclusion of evidence as a discovery sanction is reviewed for abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A trial court has broad discretion in deciding whether and how to sanction a party for discovery violations. *Blair v. TA-Seattle East # 176*, 150 Wn. App. 904, 908-09, 210 P.3d 326 (2009). Absent a manifest abuse of this discretion, appellate courts will not overturn a trial court's decision regarding discovery sanctions. *Id.* An abuse of discretion occurs if the trial court decision is manifestly unreasonable or based on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Tilaye appeals the trial court's admission of Dr. DeLisle's testimony regarding Harris's future treatment. He argues that Harris's

⁶ The specific statute under Chapter 4.84 RCW at issue in *Wachovia* was RCW 4.84.330. Like RCW 4.84.250, RCW 4.84.330 awards attorney fees to the "prevailing party."

answers to interrogatories gave no indication of future damages, and that he was prejudiced by Dr. DeLisle's testimony at trial. Br. of Appellant at 14-16. He also attempts to improperly introduce testimony from the arbitration. *Id.* at 17. (No pleading, brief, or statement during the trial de novo may refer to the arbitration proceeding.) *Malted Mousse*, 150 Wn.2d at 532. The trial court issued no discovery order. There was therefore no willful violation of any discovery order. The trial court's decision to admit the doctor's testimony was well within its discretion.

The trial court found that Harris's interrogatory answers indicated her need for continuing treatment and that Dr. DeLisle was the only health care provider that was called, that Dr. DeLisle did state that Harris would need continuing treatment, and that Harris herself testified she needed continuing treatment. RP 492. The trial court found there was no surprise for Tilaye and no evidence of intentional concealment, and ruled that it would consider future damages should it find causation. RP 492-93. The record supports those findings.

Interrogatory No. 20 asked:

Did you seek treatment or receive services from any HEALTHCARE PROVIDER or any other person for your injuries after the INCIDENT? If so, for each, please state: the name and address of each; the reason you sought treatment or care; and describe the treatment provided, the diagnosis rendered, and any recommendation provided as to additional care. CP 769.

Harris answered by providing Dr. DeLisle's name and address and the name and address of her Licensed Massage Practitioner. CP 781. She then stated:

Treatment was sought because of pain in neck, back and muscles. The treatments included chiropractic adjustments and massage therapy. See medical records. There were about six months of treatments. At the end of the treatments, *the condition was improved, but not completely healed.* CP 781. Emphasis added.

Interrogatory No. 21 asked:

Are you claiming any physical, mental or emotional injuries, disability, or disfigurement due to the subject INCIDENT? If so, please:

- (a) Describe your understanding of each injury, disability or disfigurement, and for each, identify the area of your body affected;
- (b) State those from which you have recovered and the approximate date of your recovery: and
- (c) For all continuing complaints, state whether the complaint is subsiding, remaining the same or becoming worse; and state the frequency and duration of the complaint. CP 769-70

Harris answered by stating:

- (a) Neck, shoulder, muscle pain. Headaches.
- (b) The conditions improved very much, but *did not completely heal.*
- (c) The conditions are staying about the same. *They are apparent every day, but are worse on occasion.* Exercises help. CP 781. Emphasis added.

Interrogatory No. 24 asked:

Has any HEALTHCARE PROVIDER advised you that *you may require future care or additional treatment* for any injuries related to the INCIDENT? If so, for each injury state: the name of each such health care provider; the injury complained of; and the nature, duration, and estimated cost of future care or additional treatment. CP 770. Emphasis added.

Harris answered:

Dr. DeLisle recommended further treatments. CP 781.

In answer to Interrogatory No. 26, which inquired about future income loss, Harris stated, “When I drive, I get shoulder pain. If I sit for a long time, I have pain.” CP 771, 781. Finally, in answer to Interrogatory No. 36 requesting the identity of any experts expected to testify at trial,

Harris answered:

We expect to call as expert witnesses the health care providers previously identified, who would testify about the complaints, observations, diagnoses, and treatments related to the subject motor vehicle collision and the necessity of the treatments and the reasonableness of the charges therefore.

CP 775, 782.

Even a cursory reading of Harris’s interrogatory answers reveals that she was not completely healed, continued to experience pain and discomfort as a result of the accident, and was advised to continue treatment. “At the end of the treatments, the condition was improved, but not completely healed.” CP 781. “The conditions improved very much,

but did not completely heal...They are apparent every day, but are worse on occasion.” CP 781. “Dr. DeLisle recommended further treatments.” CP 781. Harris also answered that Dr. DeLisle would be testifying about her treatment.⁷ CP 782. Tilaye was on notice that Harris was continuing to suffer physically as a result of the accident and that Dr. DeLisle had recommended future treatment.

Harris had stopped seeing Dr. DeLisle only because she could not afford to continue doing so, even though Dr. DeLisle recommended further treatment. RP 156, 276, 282. When she continued to suffer from burning pain, stiffness, and headaches, she was finally compelled to return to Dr. DeLisle on February 24, 2009. RP 170-71, 280-82.

The first time Kang obtained information on possible future treatment was when he was discussing Dr. DeLisle’s trial testimony with her on April 27, 2009. CP 415. During that meeting, when Kang asked whether Dr. DeLisle had an opinion about future treatment Dr. DeLisle opined that she believed that Harris would need future care consistent with what she had told Harris back in May 2006. *Id.* When Kang inquired about the possible cost and duration of Harris’s future care, Dr. DeLisle indicated that she would need to re-examine her notes and let Kang know, which she did via email on April 29. *Id.*; CP 418.

⁷ *See also*, The Joint Confirmation Regarding Trial Readiness which stipulates that Kang would be calling Harris’s treating doctor to testify at trial. CP 279.

In the email of April 29, 2009 Dr. DeLisle informed Kang that, based on her most recent examination of Harris, she recommended further treatment and detailed the recommended length of treatment as well as its estimated cost. CP 418. That email was sent a mere five days before the first day of trial. CP 418; RP 5. A party is under a duty *seasonably* to supplement her response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. CR 26(e)(1) (emphasis added). Dr. DeLisle emailed Kang on Wednesday. CP 418. The trial commenced the following Monday. RP 5. Kang was under an obligation to “seasonably” supplement Harris’s response. It is not reasonable to argue that Kang failed to “seasonably” supplement his response by not filing an amended answer to an interrogatory over the weekend before trial.

Kang did, however, put Tilaye on notice on April 28 by stating in his trial brief that Harris would request future medical expenses of an unspecified amount, and that Dr. DeLisle would testify at trial regarding Harris’s future damages. CP 346. CR 26(e)(2)(B) requires that the circumstances indicate the failure to amend a response “is in substance a knowing concealment.” Given the extremely short time between Dr.

DeLisle's notice to Kang and the start of the trial, the trial court did not err in finding that there was no evidence of willful or intentional concealment. RP 492-93.⁸

A trial court may exclude evidence if the failure to disclose was a willful failure to comply with a court's discovery order. *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994), *review denied*, 126 Wn.2d 1015 (1995); *Lampard v. Roth*, 38 Wn. App. 198, 201-02, 684 P.2d 1353 (1984). Moreover, it is an abuse of discretion to exclude testimony absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A "willful" violation means a violation without a reasonable excuse. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984).

The general rule is that a trial judge should not exclude testimony absent a showing of intentional or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct. *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 181, 828 P.2d 610 (1992). Exclusion

⁸ Compare the four days between Dr. DeLisle's email to Kang and the four years the defendant sat on information requested in discovery discussed in this Court's recent opinion in *Amy v. Kmart of Washington, LLC*, Slip Opinion, Docket No. 62312-5. See also, *Magana v. Hyundai*, ____ P.3d ____ (2009) (evidence that could be analyzed by experts was lost because of the time -more than five years- that elapsed between when Hyundai should have disclosed the information and the time it was compelled to do so.)

of testimony is an extreme sanction. *In re Estate of Foster*, 55 Wn. App. 545, 548-49, 779 P.2d 272 (1989). The trial judge is necessarily accorded wide latitude in determining the appropriateness of sanctions for discovery abuse. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons*, 122 Wn.2d 299, 338-39, 96 P.3d 420 (2004). Tilaye himself acknowledges the trial court's considerable discretion. Br. of Appellant at 20.

In determining whether an attorney has complied with discovery rules, the trial 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. *Id.* at 343. Finally, when deciding on sanctions, the court may consider the other party's failure to mitigate. *Id.* at 355-56.

Tilaye chose not to mitigate any potential prejudice and chose not to depose Dr. DeLisle, despite the fact that Harris's answers to interrogatories identified Dr. DeLisle, plainly indicated that Harris was still in pain, and that Dr. DeLisle had recommended further treatment. Despite this notice, Tilaye failed to do anything about Dr. DeLisle's potential testimony. He did not depose the doctor, nor did he file a motion to compel. In *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Development*, 143 Wn. App. 345, 177 P.3d 755 (2008), the defendant did not move to require greater specificity to what it described

as evasive, misleading, and incomplete discovery responses by the plaintiff. *Id.* at 360. This Court held that the trial court did not abuse its discretion in not imposing sanctions where the defendant was put on notice of the plaintiff's claims in documents submitted during discovery which sufficiently described the nature of defect the plaintiff was suing over. *Id.* at 360-61. Tilaye failed to mitigate, and the trial court did not err in declining to exclude Dr. DeLisle's testimony.

Perhaps most importantly, Tilaye was not prejudiced. It is only where willful noncompliance substantially prejudices the opponent's ability to prepare for trial that the exclusion of evidence is within the trial court's discretion. *In re Estate of Foster*, 55 Wn. App. 545, 548-49, 779 P.2d 272 (1989). A trial court may properly decline to exclude testimony where any potential prejudice to the opposing party may be cured by cross examining the testifying witness during trial. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 431, 10 P.3d 417 (2000). This is exactly what occurred here. Dr. DeLisle testified about Harris's potential future treatment, and Tilaye was able to cross examine her at length. RP 159-173, 197-204. Tilaye had ample opportunity during Dr. DeLisle's time on the stand to flesh out her testimony in that regard, had he chosen to do so.

Considering all of the circumstances surrounding Dr. DeLisle's testimony, the lack of any willful failure to disclose, the importance to Harris of her testimony, and Tilaye's ability to formulate a response and cross examine Dr. DeLisle at trial, the trial court did not abuse its discretion in allowing testimony regarding future damages. *Fisons*, 122 Wn .2d at 355-56.

(4) The Trial Court Did Not Err in Entering Findings of Fact and Conclusions of Law

Tilaye assigns error to a number of the trial court's findings of fact and conclusions of law.⁹ Br. of Appellant at 33-42. Tilaye misapprehends the nature of an appeal, which is to address issues of legal error, not to rehash factual issues best left to the discretion of the trial court. *See Goodman v. Bethel School Dist. No. 403*, 84 Wn. 2d 120, 126, 524 P.2d 918, 922 (1974). Aside from being groundless, his objections are made without any legal argument or citation to authority, unmoored from any of the legal issues he appeals. Tilaye merely asserts that the trial court erred

⁹ Tilaye did not designate the notices of appeal or the findings of fact and conclusions of law regarding attorney fees to which he assigns error. Harris has designated those documents as supplemental clerk's papers. The findings and conclusions to which Tilaye assigns error are those relating to Harris's motion for attorney fees. Tilaye assigns error to findings of fact 1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 24, 26, 27, 31 and to conclusions of law 1, 9, 10, 11 and 12. At trial, he contested only findings of fact 8, 9, 10, 11, 12, 13, 27, 31 and conclusions of law 1, 2 and 9. CP 854. Ordinarily, Harris would cite to the clerk's papers, but must instead cite to the findings of fact and conclusions of law. A copy of the findings of fact regarding attorney fees is attached as **Appendix A** for the court's convenience.

in entering findings of fact and conclusions of law on the grounds that they contain hearsay and are not supported by substantial evidence. This Court will not consider an issue absent argument and citation to legal authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

Tilaye acknowledges that where the trial court has weighed the evidence, review is limited to ascertain whether the findings of fact are supported by substantial evidence and whether the findings support the conclusions of law and the judgment. Br. of Appellant at 33; *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). But beyond that acknowledgment, he fails to tie his assignments of error to any legal issue. Because Tilaye has not supported his assignments of error with legal argument or authority, Harris will not belabor each disputed finding of fact and conclusion of law. However, the evidence on which the findings and conclusions were based are readily found in the record. *See* CP 474-83 (Declaration of Patrick Kang); CP 539-41 (Declaration of Andrea Harris);

CP 440-44 (Declaration of Thomas Bierlein); CP 445-50 (Declaration of Scott Blair); CP 801.

Even overlooking the lack of argument and authority, Tilaye's assignments of error are without merit. The findings and conclusions are not based on hearsay, as Tilaye avers. The basic definition of hearsay is set forth in ER 801(c). It provides:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v. Williams, 79 Wn. App. 21, 25, 902 P.2d 1258 (1995).

None of the statements about which Tilaye complains were offered to prove the truth of the matter asserted. They were made in support of Harris's request for attorney fees, and did not bear on the legal issues at trial.

Tilaye's argument that the findings and conclusions improperly referred to settlement offers in violation of ER 408 is equally empty. Br. of Appellant at 37. ER 408 precludes offers of compromise if it is “to prove liability for or invalidity of the claim or its amount.” It does not require exclusion of such evidence when it is offered for another purpose. ER 408; *Hensrude v. Sloss*, 150 Wn. App. 853, 861, 209 P.3d 543 (2009). (Where the relative fault of multiple potentially liable parties is at issue,

settlement agreements between the claimant and a person liable are relevant for the purpose of offsetting the claimant's recovery against other persons.) Here, the evidence of settlement discussions was not to prove liability for or invalidity of the claim or its amount, but rather to substantiate the reasonableness of Harris's attorney fee request, which is permitted under ER 408.¹⁰

Harris concedes that finding of fact No. 31 misstates the name of Tilaye's insurance company whereas it correctly identified the company in other findings, *e.g.*, finding of fact 8. Br. of Appellant at 39.

Finally, contrary to Tilaye's assertion, Harris is entitled to statutory costs as awarded in findings of fact 18 and 24. RCW 4.84.250 states:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250 (emphasis added).

The phrase "Notwithstanding any other provisions of chapter 4.84 RCW" makes it clear that a prevailing party may recover statutory attorney fees as costs under RCW 4.84.010 and .080 in addition to

¹⁰ The settlement offer was not disclosed to the court until after judgment was entered against Tilaye. Finding of fact 9.

recovering reasonable attorney fees under RCW 4.84.250 as discussed above. This is further supported by the inclusion of RCW 12.20.060 within the statute. *See Matter of Estate of Mathwig*, 68 Wn. App. 472, 479, 843 P.2d 1112 (1993) (By including specific language relating to attorney fees, the Legislature intended that language to encompass actual attorney fees and provide statutory basis for award of attorney fees.).

Tilaye's objections to the findings of fact and conclusions of law are legally groundless. More to the point, he does not tie them to the legal issues he has presented to the court on appeal and fails to provide any legal argument or authority in discussing them as required by RAP 10.3(a)(4), (6). The Court should not consider his objections.

(5) Harris Made No Unsuccessful or Duplicative Claims and Her Attorney Fees Should Not Be Discounted

Tilaye argues that Harris's attorney fee award should be reduced to account for what he describes as unsuccessful and duplicative claims. Br. of Appellant at 42. Harris prevailed on her claim – that Tilaye's negligence was the proximate cause of her injuries. (FF 15). As discussed above, Ayeleka was dismissed as a defendant on the first day of trial. The claims of Harris's children were likewise dismissed via settlement on the first day of trial. There were no duplicative or unsuccessful claims. The sole issue was Tilaye's negligent driving which led to the accident. None

of the work done by Kang as set forth in the billing records was attributable to Ayeleka or the issue of vicarious liability. CP 526-34. All of the work done in this case was done to prove Tilaye's negligence. Similarly, Kang deducted time spent on Harris's children's claims. CP 481.

Where claims are so interrelated that no reasonable segregation of claims can be made, there need be no segregation of attorney fees. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 692-93, 132 P.3d 115 (2006); *Blair v. Wash. St. Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987) (Where plaintiffs had prevailed on many significant issues, and the evidence presented and attorney fees incurred for the successful and unsuccessful claims were inseparable, the trial court did not abuse its discretion in determining the plaintiffs were the prevailing parties and entitled to all fees awarded.). The work Kang performed in preparing this case for trial was so interrelated and intertwined amongst Tilaye, Ayeleka, Harris, and Harris's children that it is impossible to segregate them. This Court will overturn a trial court's award of attorney fees only for manifest abuse of discretion. *Public Utilities Dist. 1 of Grays Harbor County v. Crea*, 88 Wn. App. 390, 396, 945 P.2d 722 (1997). The trial court did not err in not reducing Harris's award to account for duplicative or unsuccessful claims.

H. SUMMARY OF ARGUMENT ON CROSS-APPEAL

Courts may apply a multiplier to a party's lodestar attorney fees to compensate the attorney for the risk in accepting a case with a small dollar value on a contingency basis, making it possible for clients with good claims to secure competent legal assistance. The purpose of the multiplier is to recompense the attorney who bears the risk that they will not be compensated at all for their time and effort if the case is not victorious.

Harris's case was highly risky. She had lost at arbitration, her claim was for a comparatively small amount, she suffered soft tissue damage which is difficult to prove at trial, and Kang agreed to accept her case only after Harris had been rebuffed by many other attorneys. Her case is precisely the sort a multiplier is designed to support. The trial court recognized the difficulties Harris faced and acknowledged that her case was undesirable. Yet ultimately the court did not award her a multiplier. In failing to award a multiplier to compensate Kang for the considerable risk he took on when he agreed to represent Harris, the court abused its discretion.

I. ARGUMENT ON CROSS-APPEAL

The trial court has broad discretion in fixing the amount of attorney fees to be awarded. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). This Court reviews the trial court's award of attorney fees for manifest abuse of

that discretion. *Public Utilities Dist. 1 of Grays Harbor County v. Crea*, 88 Wn. App. 390, 396, 945 P.2d 722 (1997).

Washington courts generally use the lodestar method to determine an attorney fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 433, 957 P.2d 632 (1998). To calculate the lodestar figure, the trial court multiplies the number of hours reasonably expended on the matter by a reasonable hourly rate. *Id.* at 434.

After the court calculates attorney fees under the lodestar method, the court may adjust the fee under two broad categories: the contingent nature of success, and the quality of the work performed. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). The party proposing a deviation from the underlying lodestar bears the burden of justifying that deviation. *Id.* It is this second step which is at issue in Harris's cross-appeal.

Upward adjustments for the contingency nature of the representation should be considered as attorneys who undertake cases on a contingency basis bear the risk that they will not be compensated at all for their time and effort if the case is not victorious. *Bowers*, 100 Wn.2d at 598-99. Due to the substantial risk of a zero return in the event of loss "lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." *Id.* at 598 (citing

Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable,"* 126 U. Pa. L. Rev. 281, 324-25 (1977)). The contingency adjustment is designed to compensate for the possibility that litigation may be unsuccessful and that no fee would be received. *Id.* at 598-99. A contingency risk multiplier is intended to make it possible for clients with good claims to secure competent legal assistance. *Id.* A court may award a multiplier where such a multiplier would further the purpose behind the multiplier itself. *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411-12, 759 P.2d 418 (1988).

When an attorney takes a case on a contingency basis, the attorney not only risks obtaining no compensation at all for their time, but also risks having to wait years before receiving any compensation for their time. Unless attorneys handling cases on a contingency basis receive a premium for taking those risks, people with legitimate claims will not be able to find representation. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 550, 151 P.3d 976 (2007) (fee enhancements are based on the notion that attorneys who take undesirable high-risk case on a contingent fee basis assume a substantial risk that a fee will never materialize). Marketplace experience indicates that lawyers generally will

not provide legal representation on a contingent basis unless they receive a premium for taking that risk. *Bowers*, 100 Wn.2d at 598.¹¹

Under *Bowers*, the trial court may consider the following in awarding a multiplier: (1) whether there is a fee agreement that assures the attorney of fees regardless of the outcome of the case; (2) whether the hourly rate underlying the lodestar fee comprehends an allowance for the contingent nature of the availability of fees; (3) the risk factor adjustment should only be applied to time where there was risk incurred, that meaning, the time before recovery was assured. *Id.* at 598-99. Harris has satisfied the *Bowers* factors. *Id.* at 598-99. There was no fee agreement assuring her attorney of his fees regardless of the outcome of the case. CP 487-91. The hourly fee Kang requested was actually below the reasonable hourly rates he charged for other, non-contingent work and did not allow for the contingent nature of the case. CP 462, 487-91. Finally, Harris sought a multiplier only on the time expended to secure judgment, and not

¹¹ There is ample case law in addition to *Bowers* to support a multiplier. In *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 617, 141 P.3d 652 (2006), the court upheld a multiplier of 1.5 noting that it would not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small. *Id.* In *Fisons*, the court awarded a multiplier of 1.5. *Fisons*, 122 Wn.2d at 335. The court in *Somsak v. Criton Technologies/Health Tecna*, 113 Wn. App. 84, 98-99, 52 P.3d 43 (2002), awarded a multiplier where there was a “significant risk of defeat” and the case was not desirable. Likewise, the court in *Durand v. HIMC Corp.*, 151 Wn. App. 818, 837, 214 P.3d 189 (2009) upheld a multiplier due to the “enormous amount of contingent risk” inherent in the litigation.

on any post judgment fees.¹² CP 467. A lodestar adjustment would represent the premium afforded under *Bowers* for taking on the risk of the case and would further the purpose behind the multiplier itself. *Id.* at 598; *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411-12, 759 P.2d 418 (1988).

Here, the court granted Harris attorney fees. CP 800-01. Harris requested a multiplier in her motion for award of attorney fees. CP 461. The trial court recognized the risks and costs involved in handling a minor impact soft tissue injury case where liability and damages were in dispute. (FF 5, 26). It recognized that Kang was requesting only \$275 an hour, rather than his ordinary hourly rate of \$300. (FF 21). The court specifically found that Harris's case was a difficult one where liability and damages were in dispute and the defendant prevailed in arbitration. (FF 22). It found that bringing soft tissue injury suits is risky where the defense claims no impact to the vehicle and/or no objective evidence of injury. (FF 26). It further found the case was undesirable as no other attorney Harris contacted wanted to represent her for the trial de novo. *Id.* It also found that many lawyers decline to accept such cases or to take the

¹² Harris did not request a multiplier for the quality of work performed because Kang's usual hourly fee adequately reflected his reputation and the quality of his work. CP 467. *Bowers*, 100 Wn.2d at 599 (an adjustment to the lodestar for the quality of work is extremely limited in application because in most cases the quality of work will be reflected in the hourly rate).

cases to trial. (FF 27). Despite these findings, the court did not award the multiplier. CP 800-01. In adjusting the lodestar to account for the risk factor, the trial court must assess the likelihood of success at the outset of the litigation. *Bowers*, 100 Wn.2d at 598. The trial court's findings of fact clearly showed the likelihood of success at the outset of Harris's litigation was not good. In not awarding Harris a multiplier, despite its findings about the precariousness of her suit, the trial court abused its discretion.

If ever a case called for a multiplier, it is this one. As the trial court found, Harris's case was extremely risky and her prospects of prevailing in the trial de novo were not propitious. Tilaye had prevailed at arbitration, and her first lawyer declined to represent her beyond the arbitration. Harris then contacted twenty or more attorneys who all declined to represent her before Kang finally agreed to take her case. She suffered soft tissue injuries which, as the court noted, are risky to litigate. Kang accepted her case on a contingency basis, with no guarantee of compensation or success, and requested compensation at a rate below his normal hourly rate. Harris made a formal settlement offer before trial which Tilaye rejected. Nothing about the case presented itself as desirable, winnable, or remunerative.

Harris supported her request for a multiplier with copies of judgments and findings of fact and conclusions of law from King County

Superior Court cases in which plaintiffs were awarded multipliers of 2.0 in soft tissue cases because of the undesirability of the cases, the fact that they were handled on a contingency basis, and the risk that no fee would be earned. CP 507-08, 518-20.

Harris also submitted declarations from seasoned plaintiff's attorneys attesting to the great risk involved in the present case and opining that a multiplier as high as 2.0 was warranted as reasonable compensation for accepting the risk of taking the case on in the first place. CP 440-44, 446-50. Taken together, the declarations make clear why a multiplier has become such an essential tool in the plaintiff's attorney's tool kit. As Thomas Bierlein stated in his declaration:

Most insurance carriers know that most claimants will simply fold and accept low offers rather than face a long and expensive battle. For those who choose to resist, a long drawn out battle is in order with no guarantee of success. This has become the norm in the insurance industry since the mid 90s...This is a classic "zero sum game" where insurance carriers will use scorched earth litigation tactics to defeat litigants unless the court awards a lodestar amount to discourage these practices that are so inimical to the judicial system.

CP 443.

In not awarding Harris a multiplier, the trial court exercised its discretion on untenable grounds or for untenable reasons, *considering the purposes of the trial court's discretion*. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

Harris's case is precisely the sort of low reward – high risk case the *Bowers* court had in mind when it described the purpose of the contingency fee adjustment to the lodestar. Where a plaintiff seeks to pursue a small claim against steep odds, the multiplier evens the playing field and allows attorneys to accept risky cases they would, by the simple imperative of business calculations, be otherwise unable to take.

Given the trial court's acknowledgement of the uncertainty and risk involved in pursuing Harris's comparatively small claim and the difficulty of bringing a soft tissue injury suit where the defense claimed no impact to the vehicle and/or no objective evidence of injury, the substantial risk of receiving no fees whatsoever, and the public policy expressed in *Bowers* of compensating counsel for accepting such risk, the Court abused its discretion in not awarding Harris a multiplier.

J. ATTORNEY FEES ON APPEAL

RCW 4.84.250 allows the prevailing party attorney fees. RCW 4.84.290 provides that the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250. In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the

appeal. *Id.* Pursuant to RCW 4.84.250 and RCW 4.84.290, Harris requests this Court award her attorney fees on appeal under RAP 18.1.

K. CONCLUSION

Under *Malted Mousse*, the trial court properly applied RCW 4.84.250 in awarding Harris attorney fees. Ayeleka was not a prevailing party, and under *Wachovia*, the trial court properly declined to award him attorney fees. The trial court properly exercised its discretion in allowing Dr. DeLisle to testify about Harris's future damages. Tilaye has made no legal argument and provided no legal authority in disputing the findings of fact and conclusion of law which are, in any event, supported by substantial evidence. Harris's claims were neither unsuccessful nor duplicative and need not be reduced on that basis. The Court should affirm the trial court except as to the award of multiplier. It should award Harris costs on appeal including reasonable attorney fees. The Court should hold that the trial court abused its discretion in not awarding Harris a multiplier on her attorney fees, and remand for award of a multiplier.

DATED this 7 day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Lohnes", written over a horizontal line.

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APPENDIX

MAILED

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MERRICK
HOFSTEDT
& LINDSEY

The Honorable Cheryl Carey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

PATRICK A. WILLIAMS et al.,

No. 07-2-14407-2KNT

Plaintiffs,

) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW REGARDING
) ANDREA HARRIS'S MOTION FOR
) ATTORNEY'S FEES AND COSTS

vs.

FESSEHA K. TILAYE et al.,

Defendants.

THIS MATTER having come before the Court on Plaintiff Andrea Harris's Motion for Award of Attorney's Fees and Costs and To Amend Judgment pursuant to RCW 4.84.010, .250, .260, and .280, the Declaration of Andrea Harris, the Declaration of Patrick J. Kang and Exhibits attached thereto, the Declaration of Scott Blair, and the Declaration of Thomas C. Bierlein, the Court having reviewed and considered the motion, Defendant's responsive pleadings, and Plaintiff's reply, now, therefore, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

COPY
ORIGINAL

1 1. This personal injury claim arose as a result of a car crash occurring on December
2 25, 2005. Defendant Tilaye lost control of his vehicle on Interstate 5 and collided into the Plaintiff
3 Harris's vehicle. Plaintiff Harris sustained neck and shoulder injuries as a result of the collision.

4 2. Prior to retaining her current attorney, Plaintiff Harris was represented by another
5 attorney who represented her at the mandatory arbitration. At the arbitration, the arbitrator found
6 in favor of Defendant Tilaye.

7 3. After the defense arbitration award, the attorney who represented Plaintiff Harris at
8 the arbitration declined to further represent Ms. Harris on the *de novo* appeal, ~~due to the great risk~~
9 ~~of not succeeding at trial and the additional out of pocket expense that would need to be incurred~~
10 ~~in this case.~~ He therefore withdrew.

11 4. Plaintiff Harris, therefore, began looking for an attorney to represent her on her *de*
12 *novo* appeal by contacting several personal injury attorneys and law firms in the phone book.
13 However, all of the attorneys Plaintiff Harris contacted declined to represent her, ~~due to the~~
14 ~~unlikely chance of success at the trial along with the high level of contingent risk that they would~~
15 ~~face. Plaintiff Harris was repeatedly told that her case was too risky and difficult due to the fact~~
16 ~~that liability was disputed by Defendant, and that the amount of time and expense that would be~~
17 ~~incurred to represent her through trial was just too great with the minimal chance of success,~~
18 ~~making the case not economically feasible from a business standpoint.~~

19 5. Plaintiff Harris contacted her current attorney, Patrick Kang, who reluctantly agreed
20 to represent her, even though he knew and understood the ~~high~~ risks and costs that would be
21 involved in handling a minor impact soft tissue injury case where liability and damages were in
22 dispute. Mr. Kang also understood that more likely than not, this case would have to be tried to
23 fully recover compensation for Ms. Harris' ~~due to the fact that Defendant prevailed at arbitration.~~

1
2 6. Most of Mr. Kang's cases have to do with employment litigation and civil rights
3 cases involving discrimination, non-payment of wages, and police misconduct, which involve
4 larger recovery of damages than Plaintiff Harris's case.

5 7. Because Plaintiff Harris did not have the financial means to retain her counsel on
6 an hourly basis, Plaintiff Harris and her counsel entered into a contingency fee agreement which
7 calculates the amount of attorney fees at 40% of all sums recovered. The expenses of litigation
8 after the *de novo* appeal were advanced by Plaintiff's counsel's law firm because Plaintiff Harris
9 could not afford to advance the costs herself.

10 8. On April 16, 2008, shortly after Attorney Kang appeared on the case, he spoke
11 with defense counsel, Philip Meade, regarding potential settlement of this case. Mr. Meade
12 advised that the defendant's insurance company, Acceptance Indemnity Insurance Co., was not
13 interested in making any type of settlement offer and that if Defendant prevailed at trial, the
14 insurance company would do everything it could to recover its attorney's fees from Ms. Harris.
15 He, therefore, recommended that it would be in Plaintiff Harris's best interest if she dropped the
16 *de novo* appeal.

17 9. On August 14, 2008, Plaintiff Harris made a formal Offer of Settlement under
18 RCW 4.84.250, .260 and .280 to fully settle the case for \$9,000. Defendant declined the offer of
19 settlement. As a result, Plaintiff Harris began preparing for trial. The Offer of Settlement was
20 not disclosed to the Court until after Judgment was entered against Defendant Tilaye.

21 10. In September 2008, Plaintiff Harris moved for partial summary judgment related
22 to the reasonableness and necessity of her medical expenses. Although Defendant opposed the
23 reasonableness and necessity of the medical expenses, Judge Kimberley Prochnau granted
Plaintiff Harris's motion.

1 11. Shortly thereafter, Defendant's insurance company offered to fully settle Plaintiff
2 Harris's case for \$6,000, which was less than Plaintiff Harris's medical expenses. Plaintiff
3 Harris rejected the offer due to the fact that the amount offered would not relieve her of her
4 financial obligations to her health care provider.

5 12. The trial date was scheduled for October 20, 2008. However, on October 9, 2008,
6 Judge Prochnau ordered the parties to attend mediation and continued the trial date to December
7 1, 2008. The parties attended mediation on December 1, 2008.

8 13. Defendant made the same \$6,000 offer at mediation that was previously offered.
9 Although the mediator recommended that Plaintiff Harris accept the settlement, she rejected the
10 offer because it would not relieve her of her financial obligations to her health care provider.

11 14. The trial date was again continued due to the late mediation date. Defendant
12 made no other settlement offer.

13 15. This matter was tried before this Court on May 4. After three days of trial, this
14 Court concluded that Defendant Tilaye was negligent and that his negligence was the proximate
15 cause of Plaintiff Harris's injuries and damages. This Court awarded Plaintiff Harris total award
16 of \$20,512.

17 16. The amount of the trial award was in excess of Plaintiff Harris's Offer of
18 Settlement of \$9,000.

19 17. Plaintiff Harris's counsel has submitted a declaration and detailed time records
20 showing the time and work he spent preparing this case for trial and actually trying it.
21 Additionally, he also included detailed time records for his paralegals on certain tasks, billed at
22 a lower rate of \$75 per hour. Plaintiff Harris's counsel put a total of 140.75 hours of time into
23 preparing for this case after the date of Plaintiff Harris's Offer of Settlement through the time
of the verdict, which excludes time he spent for matters other than prosecuting Plaintiff

1 Harris's claim. Plaintiff Harris's counsel's paralegal put a total of 5 hours of time into
2 preparing for this case after the Offer of Settlement.

3 18. Plaintiff Harris incurred \$1,372.68 in statutory costs which is recoverable under
4 RCW 4.84.010.

5 19. Plaintiff Harris's counsel spent an additional 24.85 hours of time for post-
6 verdict work, including preparing the Findings of Fact and Conclusions of Law regarding
7 liability and damages, the Entry of Judgment, the Motion for Attorneys Fees and Costs,
8 Declaration of Andrea Harris, Declaration of Patrick J. Kang and the exhibits thereto, and the
9 Declarations of Scott Blair and Thomas C. Bierlein in support thereof.

10 20. Additional time of 14.5 hours was also spent by Plaintiff Harris's counsel
11 after the filing of Plaintiff Harris's motion for attorney's fees, which included preparing this
12 Findings of Fact and Conclusions of Law, the Amended Judgment, and reviewing and
13 responding to Defendant's response to Plaintiff Harris's Motion for an Award of Attorney
14 Fees.

15 21. Although Plaintiff Harris's counsel's retainer agreement provides for an hourly
16 fee of \$300 for clients who wish to hire his firm on an hourly basis, Plaintiff Harris's counsel is
17 requesting \$275 per hour for his time and \$75 per hour for his paralegal's time.

18 22. This Court finds Plaintiff Harris's counsel's request for \$275 per hour for his
19 time and \$75 per hour for his paralegal's time to be reasonable based on the Declaration of
20 Thomas C. Bierlein as well as the level of skill required for this difficult case where liability
21 and damages were in dispute and the defendant prevailed at arbitration. Moreover, further
22 favoring the hourly rates were the size of the award received as well as the reputation of
23 Plaintiff's counsel, and the undesirability of this case as no other attorney Plaintiff Harris
contacted wanted to represent Plaintiff Harris for the trial *de novo*.

24 23. The Court further finds that 140.75 hours spent by Mr. Kang in preparing for and
trying this case following Plaintiff Harris's Offer of Settlement, as well as the 24.85 hours spent

1 for work post-verdict, including this motion, are reasonable and productive. The Court further
2 finds that the additional 14.5 hours spent after the filing of Plaintiff Harris's motion for
3 attorney's fees, preparing this Findings of Fact and Conclusions, the Amended Judgment, and
4 reviewing and responding to Defendant's response to Plaintiff Harris's Motion for an Award of
5 Attorney Fees, is also reasonable. Moreover, the 5 hours spent by Mr. Kang's paralegal spent
6 preparing for this trial is also reasonable and productive.

7 24. Plaintiff Harris has filed and served her cost bill, and said costs being claimed
8 pursuant to RCW 4.84.010 are \$1,372.68.

9 25. This court has considered the factors set forth in RPC 1.5(a) when determining a
10 reasonable attorney's fee, including (a) the time and effort required, (b) the terms of the fee
11 agreement and whether the fee is contingent, (c) whether the work will preclude acceptance of
12 other cases by the lawyer, (d) the fee customarily charged for similar work or similar cases, (e)
13 the results obtained, and (f) the lawyer's experience, reputation an ability.

14 26. This case involved a minor impact "soft tissue" injury. Plaintiff Harris's
15 counsel herein has presented evidence through his Declaration, as well as through the
16 Declarations of Scot Blair and Thomas Bierlein, two experienced plaintiff attorneys who have
17 practiced extensively in the area of plaintiff personal injury, and this court is aware from prior
18 cases over which it has presided, that soft tissue injury cases of lesser magnitude where the
19 defense claims no impact to the vehicle and/or no objective evidence of injury is present ~~are~~
20 ~~inherently~~ ^{can be} costly and ~~very~~ risky to litigate, ~~particularly when compared to the anticipated~~
21 ~~recovery in many such cases where the medical bills do not exceed \$5-10,000 such as this case.~~ ^{or}

22 27. The Court also finds that Defendant, through his auto insurance carrier and the
23 lawyer retained by it to defend their insured, often vigorously defend such cases, causing many
lawyers to decline accepting such cases or to decline to take these cases to trial.

1 3. The Lodestar amount for calculating Plaintiff Harris's reasonable attorney fees
2 for work done after the Offer of Settlement through verdict shall be set at 140.75 hours for
3 work done by Plaintiff's counsel and 5 hours for work done by his paralegal. These hours
4 worked shall be multiplied by Plaintiff counsel's reasonable hourly rate of \$275.00 and his
5 paralegal's hourly rate of \$75 for a lodestar amount of \$39,081.25.

6 4. The Lodestar amount for calculating Plaintiff Harris's reasonable attorney fees
7 for work done post-verdict, including preparing the Findings of Fact and Conclusions of Law
8 regarding liability and damages, the entry of Judgment, the Motion for Attorneys Fees and
9 Costs, Declaration of Andrea Harris, Declaration of Patrick J. Kang and the exhibits thereto,
10 and the Declarations of Scott Blair and Thomas C. Bierlein in support thereof, shall be set at
11 24.85 hours, which will be multiplied by Plaintiff Harris's hourly rate of \$275.00, for a lodestar
12 amount of \$6,833.75.

13 5. The Lodestar amount for calculating Plaintiff Harris's reasonable attorney fees
14 for the work done after the filing of Plaintiff Harris's motion for attorney's fees, which
15 included preparing this Findings of Fact and Conclusions, the Amended Judgment, and
16 reviewing and responding to Defendant's response to Plaintiff Harris's Motion for an Award of
17 Attorney Fees is set at 14.3 hours, which will be multiplied by Plaintiff Harris's hourly
18 rate of \$275.00, for a lodestar amount of \$ 3,932.5.

19 6. Plaintiff Harris's contingency fee agreement was reasonable and customary for
20 this type of case.

21 7. ~~An upward adjustment (contingency multiplier) to the Lodestar amount is
22 reasonable and appropriate in this case and should be adjusted upward by a multiple of 2.0 due
23 to the contingency nature of the case with substantial risks involved based on the fact that the
case was handled on a contingency basis by Plaintiff Harris's counsel. Plaintiff's counsel faced
substantial risk that no fee would have resulted if the Court ruled in Defendant's favor based on
the difficult and risky facts of this case as set forth above in the Findings of Fact. Moreover, an~~

1 ~~upward adjustment by a multiple of 2.0 is further appropriate because of the risk Plaintiff~~
2 ~~Harris's counsel took in advancing costs in excess of \$1,200 for the case, as well as having to~~
3 ~~wait in excess of a year to receive any type of compensation. Finally, the fact that Plaintiff~~
4 ~~Harris's counsel was prevented from working on other cases that involved potential larger~~
5 ~~recoveries also justifies an upward adjustment by a multiple of 2.0.~~ *abc*

6 8. ~~The Court reasonably concludes that the Lodestar amount shall be adjusted~~
7 ~~upwards by a multiplier of 2.0 based upon the Findings of Fact and Conclusions of Law stated~~
8 ~~above. As a result, the Lodestar amount set forth in paragraph 3 in the amount of \$39,081.25~~
9 ~~shall be adjusted upwards by a multiple of 2.0 for an adjusted Lodestar amount of \$78,162.50.~~

10 9. Plaintiff Harris shall also recover her statutory costs pursuant to RCW 4.84.010
11 in the amount of \$1,372.68.

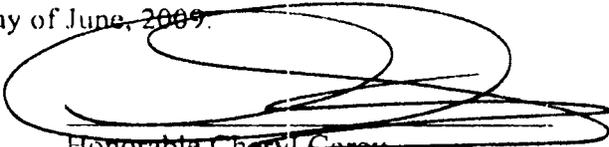
12 10. The total reasonable attorney's fees awarded to Plaintiff Harris shall be
13 \$ 49,847.5, which is the sum of ^{39,081.25} ~~\$78,162.50~~ (paragraph 8), \$6,833.75
14 (paragraph 4), and \$ 3,732.5 (paragraph 5).

15 11. An Amended Judgment against Defendant Tilaye shall be entered accordingly.

16 12. The entire judgment entered herein shall bear interest at the statutory rate set
17 forth in RCW 4.56.110.

18 12. \$ 71,732.18

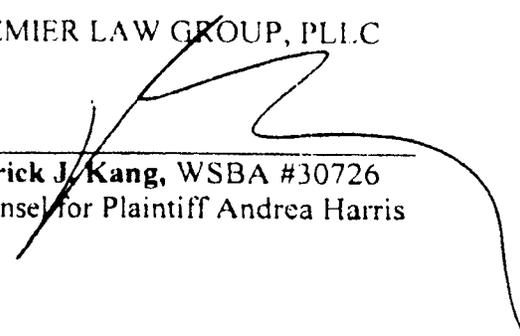
19 DONE IN OPEN COURT this 19 day of June, 2009.

20 
Honorable Cheryl Carey

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Presented by:

PREMIER LAW GROUP, PLLC


Patrick J. Kang, WSBA #30726
Counsel for Plaintiff Andrea Harris

DECLARATION OF SERVICE

On said day below I served by ABC Legal Messenger a true and accurate copy of: Brief of Respondent/Cross-Appellant in Court of Appeals Cause No. 63743-6-I to the following parties:

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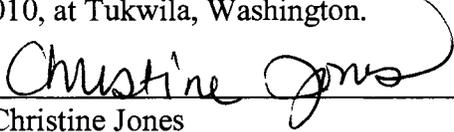
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 7, 2010, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick