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No. 63743-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION I
CLERK OF COURT

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.

REPLY BRIEF OF 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. Harris requested a multiplier of her attorney fees as compensation for the considerable risk entailed in taking her case against Tilaye to trial. The court denied Harris’s motion.

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, thus 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 of not being compensated at all for his or her time and effort if the case is not successful.

Harris’s claim was highly risky. She had lost at arbitration, her claim was for a comparatively small amount, she suffered soft tissue injury - a type of injury which is difficult to prove at trial, and her attorney, Patrick Kang (“Kang”) agreed to accept her case only after Harris had been rebuffed by many other attorneys. Hers is precisely the

sort of case a multiplier is designed to support. The trial court recognized the difficulties Harris faced and acknowledged that her case was undesirable. Nevertheless, the court did not award her a multiplier. Harris satisfied the factors laid out in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598-99, 675 P.2d 193 (1983), factors which the court should analyze in determining whether to award a multiplier. Where Harris met the *Bowers* factors, and the purpose of a multiplier is to compensate attorneys for accepting high risk cases like Harris's, the court abused its discretion in not awarding a multiplier.

B. ARGUMENT IN REPLY

(1) The Trial Court Abused Its Discretion When It Declined To Award Harris a Multiplier

Tilaye characterizes Harris's argument on cross-appeal as obligating a court to award a multiplier for attorney fees. Br. of Resp't at 26. That is not Harris's position at all. Harris recognizes that the trial court has broad discretion in fixing the amount of attorney fees to be awarded. *Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335, 858 P.2d 1054 (1993). Harris argues, rather, that the trial court abused its discretion where Harris satisfied the *Bowers* factors, and the court made numerous findings of fact regarding the difficulty and undesirability of Harris's case yet nevertheless declined to award her a

multiplier. Tilaye contents himself with pointing out that the award of a multiplier is discretionary, while ignoring the significant policy considerations supporting the award of multipliers.

The contingency adjustment of an attorney fee is designed to compensate for the possibility that litigation may be unsuccessful and that no fee would be received. *Bowers* at 598-99. Lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk. *Id.*, 100 Wn.2d at 598. Consequently, a court should consider an upward multiplier where attorneys represent clients on a contingent basis and bear the risk that they will not be compensated at all for their time and effort if the case is not successful. *Id.* Those with legitimate, but risky, claims may not be able to find representation at all if attorneys handling contingent fee cases are not able to receive a premium for taking their cases. *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 cases on a contingent fee basis assume a substantial risk that a fee will never materialize). To the extent an attorney's hourly fees do not take into account the contingent nature of cases, contingency can support a multiplier. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 98, 52 P.3d 43 (2002).

Under *Bowers*, the contingency adjustment is designed solely to compensate for the possibility that the litigation would be unsuccessful and that no fee would be obtained. *Bowers*, 100 Wash.2d at 598-99. The risk factor should apply where: (1) there is no fee agreement that assures the attorney of fees regardless of the outcome of the case; (2) the hourly rate underlying the lodestar fee does not comprehend an allowance for the contingent nature of the availability of fees; and (3) the risk factor is applied only to time expended before recovery is assured; for example, time expended in obtaining the fees themselves should not be adjusted. *Id.*

Numerous courts have applied the *Bowers* factors to determine whether the trial court properly exercised its discretion in determining whether or not to award a multiplier.

For example, in *Somsak*, this Court upheld the award of a multiplier where there was significant risk of defeat and the attorneys would not be paid for their services, the amount of possible recovery was insignificant, the attorneys' hourly rate did not take the risk into account, and the case was undesirable. *Id.* at 98-99. In short, the plaintiff satisfied the *Bowers* factors and the trial court properly exercised its discretion in awarding a multiplier.

Similarly, the Court in *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 617, 141 P.3d 652 (2006), applied the *Bowers* factors and

upheld a multiplier based, *inter alia*, on the contingent nature of the success and the small amount at stake. *Id.*, 134 Wn. App. at 617. The Court held that a multiplier is appropriate to compensate attorneys for the risk the litigation would be unsuccessful and that no fee would be obtained, and 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.* at 616-17.

In *Carlson v. Lake Chelan Community Hospital*, 116 Wn. App. 718, 75 P.3d 533, *review granted*, 150 Wn.2d 1017 (2003), the Court upheld a multiplier where the case was contingent, the plaintiff proceeded at considerable risk, defense counsel granted no concessions, there was no assurance of recovery, and the plaintiff's attorney fee was one of the higher hourly fees charged in the community. *Id.* at 742-43.

This Court has upheld the denial of a multiplier where the usual risk factors of a contingent fee were absent. *Morgan v. Kingen*, 141 Wn. App. 143, 166, 169 P.3d 487 (2007). In that case, the plaintiff sought a fee multiplier based on the contingent nature of success and the quality of work performed. *Id.* This Court upheld the trial court's discretion in declining to award a multiplier because the case did *not* involve the usual risk of contingent fee cases. *Id.* The basic facts and amount at issue were clear, the defendants being pursued for the statutory remedy were easily

determined and well able to pay the judgment, and the potential statutory liability of the defendants was not a highly risky contingent claim. *Id.*

This Court also found a trial court abused its discretion where the trial court concluded that the plaintiff had satisfied the necessary factors for a multiplier, but declined to award one based solely on considerations of the proportionality of the fee to the damage award. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 809, 98 P.3d 1264 (2004). In essence, where the trial court found that the case was contingent and the fee did not account for the contingent risk, this Court held it to be abuse of discretion to deny a multiplier on factors not enumerated in *Bowers*.

Most recently, the court in *Collins v. Clark County Fire Dist. No. 5*, 2010 WL 820039, held that a contingent multiplier was not warranted when the hourly-rate underlying the lodestar fee “already comprehends an allowance for the contingent nature” of the fees. *Id.* (citing *Pham*, 159 Wn.2d at 542.) Because the trial court specifically noted that its lodestar rate already comprehended the “high contingency” of the case, the Court held that the trial court did not abuse its discretion in failing to apply an additional multiplier for the same risk of contingency. That was the opposite of the situation here, where Kang’s fee did not comprehend the contingency of the case, but was actually *lower* than his normal rate.

Harris satisfied the *Bowers* factors. *Id.* at 598-99. Kang represented Harris on a contingent basis, and his fee agreement did not assure him payment regardless of the outcome of the case. The hourly rate he requested was lower than his regular rate, making no allowance for the contingent nature of the case.¹ Harris sought a multiplier only on the time expended to secure judgment, and not on any postjudgment fees.

The trial court made specific findings of the difficulties Harris faced in bringing her claim to trial. It found that Tilaye had prevailed at the arbitration. CP 951; FF 2. It found that all the attorneys she contacted prior to Kang declined to represent her. *Id.*; FF 4. Because those other attorneys declined to represent her, the court found that Harris's case was undesirable. CP 954; FF 22. The court found that Kang agreed to represent Harris despite the risks involved in handling minor impact soft tissue cases where liability and damages are in dispute. CP 951; FF 5. Kang took Harris's case on a contingent basis, and advanced costs because Harris was unable to advance costs herself. CP 952; FF 7. Soft tissue cases, the court found, can be costly and risky to litigate. CP 955; FF 26. Many lawyers decline to accept such cases because they are often

¹ The phrase "contingent nature of success," is broad enough to allow the trial court, in its discretion, to consider the degree to which the prevailing party risked receiving either no recovery at all or a monetary judgment insufficient to adequately compensate its counsel for all work performed. *Tribble v. Allstate Property & Cas. Ins. Co.*, 134 Wn. App. 163, 172, 139 P.3d 373 (2006).

vigorously defended. *Id.*; FF 27. The court found that most of Kang's cases involve larger recovery of damages than were available in Harris's case. CP 952; FF 6. The court found that Kang sought only \$275 an hour compensation instead of his usual hourly rate of \$300. CP 954; FF 21. It also found that Kang's rate was reasonable for pursuing "this difficult case," and given the size of the award received, his reputation, and "the undesirability of this case" as no other attorney Harris contacted wanted to represent her. *Id.*; FF 22.

In adjusting an attorney fee 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. Here, the trial court's findings of fact clearly showed the likelihood of success at the outset of Harris's litigation was poor, and her position precarious. A multiplier 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. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411-12, 759 P.2d 418 (1988). Nevertheless, despite these findings of how undesirable and risky Harris's case was for Kang to accept, the trial court did not award a multiplier. CP 800-01.

The court made findings of fact concerning all the elements supporting a multiplier, but then neglected the purpose and policy behind

the multiplier. By making those findings regarding the difficulty of Harris's case, but then declining to award a multiplier, the trial court abused its discretion.

While a court may exercise its discretion, discretion does not imply arbitrary action. *In re Adoption of Reinius*, 55 Wash.2d 117, 129-30, 346 P.2d 672 (1959). Some apparent reason must be present for the action of the court to constitute a proper exercise of discretion in this type of case. *Id.* A trial court abuses its discretion when it decides a case by whim or caprice. *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 698, 705, 270 P.2d 464 (1954).

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). A trial court exercises its discretion in awarding multipliers by applying the *Bowers* factors. This allows the Court to ensure that plaintiffs with risky and undesirable cases are able to secure competent representation by ensuring that their attorneys receive a premium for accepting those risky cases while still ensuring that cases that do not meet the *Bowers* standards are not awarded a multiplier. Harris has met the *Bowers* factors. The court detailed all the reasons Harris's case was risky for Kang to pursue, but gave no indication why it was declining

to award a multiplier. To make those findings, and then decline to award a multiplier is to retreat from *Bowers* and the purpose and principles underlying the award of multipliers.

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. Where a plaintiff like Harris 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. If plaintiffs' attorneys believe that they may be arbitrarily denied a multiplier even where the *Bowers* factors are satisfied, they may choose not to accept risky cases at all, and the public purpose of the multiplier will be undermined.

Given the trial court's acknowledgement of the uncertainty and risk involved in pursuing Harris's comparatively small claim, 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.

(2) Harris Is Entitled to Attorney Fees On Appeal

As argued in her opening brief, RCW 4.84.250, which allows the prevailing party attorney fees, applies here. 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. 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.

C. CONCLUSION

The trial court abused its discretion in not awarding Harris a multiplier on her attorney fees. The Court should reverse the trial court's fee award and remand for award of a multiplier. Costs on appeal, including reasonable attorney fees, should be awarded to Harris.

DATED this 15 day of March, 2010.

Respectfully submitted,



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