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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

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STATE OF WASHINGTON
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JUDITH A. LONNQUIST and LAW OFFICES OF JUDITH A.
LONNQUIST, P.S.

Appellants,

v.

REBA WEISS

Appellee.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

After repeating many of her assertions of fact from previous briefings unrelated to the attorney's fees issue here in an apparent effort to divert this Court's attention from the clear errors committed by the court below, Ms. Weiss claims that the trial court did determine a lodestar, had a legal basis for its finding of joint and several liability and was correct in entering a pre-dated judgment. As we show, none of those claims has merit.

ARGUMENT

I. The Trial Court's Failure To Determine the Lodestar is An Abuse of Discretion.

For at least the past twenty years, Washington courts have applied the "lodestar method" for determining fee awards. See: *Scott Fetzer v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990). In subsequent review of the case after remand, the *Fetzer* Court explained:

The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made. Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees.

122 Wn.2d 141, 151 (1993); accord: *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, (1998). The *Fetzer* Court continued:

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any ... hours pertaining to unsuccessful theories or claims.

122 Wn.2d at 151; *see also: Bowers v. Transamerica*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). In addition, in determining the lodestar, the court must separate time spent on fee-shifting claims from time spent on claims for which no statutory award of fees is provided. *Travis v. Washington Horse Breeders*, 111 Wn.2d 396, 410, 759 P.2d 418 (1988).

Here, in accordance with the foregoing cases, and as shown in Appellants' Opening Brief on Attorney's Fees at pp. 8-9, as the party seeking to recover an attorney-fee award in a fee-shifting case, Weiss was required to segregate fees attributable to the fee-shifting claim from those attributable to non-fee-shifting claims. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), and its progeny. That party must also segregate fees attributable to successful claims from those spent on non-successful claims. *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (Div. I, 1999) and its progeny.¹

¹ *See also: Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26 (1993), in which the Court also required segregation of attorney's fees "between successful and unsuccessful claims that allow for the award of fees. [citing cases]. If the claims are unrelated, the court should award only the fees reasonably attributable to the recovery. *Blair*, at 572. In *Blair*, the trial court found that the evidence presented and the attorney's fees incurred for the plaintiffs' successful and unsuccessful claims were

Weiss complied with neither of the foregoing segregation of time requirements. One need only review the “148 pages of declarations and supporting documentation” touted by Weiss (Response at p. 6) to determine that there was no segregation whatsoever. This glaring error, which made it impossible to determine the gross amount of compensable fees and any deductions thereto resulting in determination of the lodestar, was pointed out to the trial court, but inexplicably disregarded by it.

Here, even if the trial court had been able to determine the gross number of hours in total expended by Weiss’s attorneys on the litigation (unsegregated by claim), such determination was not the “lodestar.” To reach the lodestar, as shown above, the court had to deduct from amount of gross fees, the time spent on the emotional distress infliction claims, the defamation claim, and the wrongful withholding of wages claim for which an offer of judgment had been made and rejected. Given the failure of Weiss’s attorney to segregate his fees, there was simply no way possible for the trial court to calculate the net lodestar. And as shown in Appellants’ Opening Brief of Fees, at p. 7, the trial court made no such

inseparable. This court agreed and upheld the trial court’s decision that the plaintiffs were entitled to all fees awarded. *Blair*, at 572. [As is true in the Weiss case, the trial court in *Kastanis*] ...made no express finding that plaintiff’s successful and unsuccessful claims were inseparable. Plaintiff prevailed only on one claim out of four. It does not appear that her successful and unsuccessful claims were inseparable, or that it would have been unnecessarily complex for her to have segregated her requests for attorney’s fees among her four claims.” The same rationale applies here. The trial court’s condonation of the failure of Weiss’s attorney to segregate his fees and resulting award of fees was reversible error.

determination. Under such circumstances, the trial court’s method of calculating the fee award here, as described in *Rice v. Janovich*, 109 Wn.2d 48, 67, 742 P.2d 1230 (1987), constitutes “an abuse of discretion and is in error.” The same conclusion is warranted here.

The other fatal flaw in Weiss’s claim that the trial court did calculate the lodestar (Response, p. 8), is the fact that her submissions provided the trial court with no way to determine the hourly rate to use, given the variable rates of the attorneys for both the type of work performed and the timing of the work performed.² The *Bowers* Court expressly mandated that “[t]he reasonable hourly rate should be computed for each attorney and each attorney’s hourly rate may well vary with each type of work involved in the litigation.” 100 Wn.2d at 597. Lest there be confusion, the *Bowers* Court even provided a “simple table illustrating the calculation of the lodestar.” *Id.*:

Attorney & Type of Work	Hours	Rate	Total
Senior Partner: court appearances			
Senior Partner: Review of pleadings			
Junior Associate: Research & drafting			
Junior Associate: Depositions			

In his declaration to the trial court, Weiss’s attorney states that his hourly rates “at the time of retention” were \$400 for “work outside of

² Weiss’s claim that the trial court determined a lodestar of \$171,182 (Response, p. 5) ignores the fact that such figure was reached only by a subsequent mathematical computation and only with the *ex post facto* assistance of counsel (Opening Brief on Fees, p. 7 and Exhibit B appended thereto).

court,” \$425 for depositions, and \$450 per hour for “trials, hearings, motions, arbitrations, and mediation.” (CP 1975). He further asserts that his rates have risen “since that time” by \$25/hour in each of the three categories, but does not state when such increases took effect. *Id.* His co-counsel Brian Waid states that his rates range from \$300 to \$350 “depending on the nature of the case, the amount involved, and the complexity of the work required.” (CP 2106). But Weiss’s attorneys failed to submit their fees in accordance with the “simple table” from *Bowers*. Their billings do not even contain any hourly rates attributed to the particular work described. (CP 1983-2095). It is thus impossible to determine what hours to multiply by what hourly rate at what point in time in order to calculate the lodestar (“the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Bowers*, 100 Wn.2d at 581).

Accordingly, in its initial determination of fees, the trial court made no determination of the total number of hours it found were reasonably expended on the sole remaining compensable claim of wrongful discharge and the applicable hourly rate used. In other words, the trial judge did not determine the lodestar, Weiss’s protestations

notwithstanding.³ By ignoring the lodestar methodology and condoning the failure of Weiss's attorneys to segregate their time as required by Washington law, the court below committed reversible error.⁴

II. The Fee Agreement Should Have Been Produced.

Nothing in Weiss's Response derogates from the conclusion that the trial court erred in failing to order Weiss to respond to the timely discovery requesting itemization and production of her contingent fee agreement. Weiss miscites *Martinez v. City of Tacoma*, 81 Wn. App. 228, 241, (1996) (Response, p. 10). The *Martinez* court did not hold that the contingent fee agreement was irrelevant, as asserted by Weiss, it simply held that the trial court had placed "undue emphasis" on it when "determining a reasonable attorney fee for this case." As shown in RPC 1.5(a), the contingent fee agreement is one of the factors to be considered in determining the reasonableness of the fee.

³ The Court's finding, cited by Weiss in her Response at p. 7, that "the amount of time devoted to the engagement by the Law Office of Robert B. Gould in total are [sic] reasonable," is not a finding of the lodestar, for reasons cited above.

⁴ Weiss argues for liberal approach to attorney's fees based on principles that apply to civil rights laws (Response, p. 11), but provides no legal authority for contention that wrongful discharge implicates a "civil rights" issue. In reality, whereas civil rights laws such as the Washington Law Against Discrimination are to be construed "liberally"(RCW 49.60.020), the reverse is true with respect to wrongful discharge claims. *Cudney v. AlSCO*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011) (and cases cited therein). Neither the courts nor the legislature have sought to incentivize litigants to bring wrongful discharge claims by mandating liberal construction.

III. Weiss Ignores the Very Statute Under Which She Sought Fee Recovery.

As discussed in Appellants' Opening Brief on Fees, at pp. 16-17, the only statute on which Weiss would be entitled to fee recovery here is RCW 49.48.030 which limits liability for fees to employers, not individuals.⁵ Nonetheless, Weiss accuses Lonquist of ignoring the fact that she is the owner of the firm and is not shielded from tort liability. But Appellant Lonquist is not claiming that she may not be held individually liable for tort damages, simply that there is no statutory basis for imposing individual liability for attorney's fees.

As to attorney's fees, Washington courts follow the "American rule" which holds that each party in a civil action will pay its own attorney fees and costs. *See: In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002); *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). Statutes in derogation of the common law must be construed narrowly. *See, e.g., Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) ("a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it"); *see also: Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wn.

⁵ RCW 49.48.030 provides, in pertinent part: "In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against **said employer or former employer...**" (emphasis added).

App. 283, 286, 949 P.2d 382 (1997). Had the legislature intended to replace the American rule so broadly as to impose individual liability for attorney fees pursuant to RCW 49.48.030, it would have done so more explicitly. See: *Cosmopolitan Engineering Group v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). Instead, the Legislature imposed such liability only upon the employer. By interpreting RCW 49.48.030 to impose liability more broadly, the trial court violated the American rule and the rules of statutory construction, and committed clear error.

IV. Weiss Has Not Refuted The Clear Error of the Date of Entry of the Judgment On Fees and the Rate of Interest.

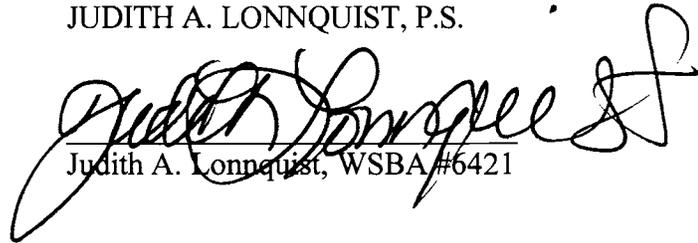
Weiss cites no legal authority to counter Appellants' arguments that the retroactive judgment date and rate of interest are reversible error. Further, Weiss's vague contention that the order was "equitable" (Response at p. 11) lacks factual as well as legal support, as it was wholly inequitable to charge Appellants interest for a period when the court had not yet identified an amount of payment due. Because Respondent has not provided a factual or legal response, Appellants stand on the argument set forth in their Opening Brief on Fees at pp. 17 – 19.

CONCLUSION

For the foregoing reasons, Appellants request that the trial court's Findings of Fact, Conclusions of Law be reversed and the Judgment Awarding Fees vacated.

Dated this 24th day of January, 2012.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.



Judith A. Lonquist, WSBA #6421

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LAW OFFICES OF JUDITH A.
LONNQUIST, P.S. and JUDITH
A. LONNQUIST,

Appellants,

v.

REBA WEISS,

Respondent.

NO. 66626-6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of January, 2012, I caused to be delivered a true and correct copy of the APPELLANTS' REPLY BRIEF and this document by method indicated below and addressed to the following:

Robert B. Gould
2110 North Pacific Street
Suite 100
Seattle, WA 98103-9181

- VIA REGULAR MAIL
 VIA CERTIFIED MAIL
 VIA LEGAL MESSENGER
 VIA FAX
 VIA HAND DELIVERY

DATED this 23rd day of January, 2012.


Ann Holiday