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NO. 69406-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SUNNY GAUTAM and SUMAN GAUTAM,

Respondents,

vs.

DONALD HICKS, and JANE DOE HICKS, husband and wife and their marital
community,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT

Honorable James E. Rogers, Judge

BRIEF OF APPELLANTS

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I. NATURE OF CASE

This appeal stems from the trial court's award of attorney fees and expert witness fees pursuant to MAR 7.3. Defendant requested a trial de novo following the arbitrator's award. Plaintiff made an offer of compromise. Defendant did not accept the offer as written. A jury trial was held. The jury's damages award was less than the offer of compromise.

Nevertheless, the trial court awarded plaintiff MAR 7.3 fees and costs in direct contravention of RCW 7.06.050. The court erroneously concluded that defendant had not improved his position. The court also concluded that a plaintiff was entitled to certain attorney fees, costs, expert costs and a lodestar multiplier. There was no factual or legal basis for a lodestar multiplier. There was no legal basis for the court to award expert costs. The trial court's order and judgment are reversible error.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the judgment and awarding the plaintiff \$49,947.40 in attorney fees and costs when it concluded that defendant failed to improve his position at trial relative to the plaintiff's RCW 7.06.050 offer of judgment. (CP 149-153)

2. Alternatively, the trial court erred in granting in award of a lodestar multiplier of attorney fees where there was no evidence before the court which would require a lodestar multiplier. (CP 149-153)

3. The trial court erred in entering the judgment and granting plaintiff \$2200.00 in expert witness fees where such fees are not permitted under RCW 4.84.010 and plaintiff was not entitled to the fees or costs under MAR 7.3 and RCW 7.06.050 (CP 149-153)

III. ISSUES PRESENTED

1. Did the trial court committed reversible error in awarding plaintiff MAR 7.3 attorney fees and costs where defendant did, in fact, improve his position at trial relative to plaintiff's post arbitration RCW 7.06.050 offer of compromise? (Pertaining to Assignment of Error No. 1)

2. Did the trial court committed reversible error by awarding plaintiff a lodestar multiplier on his attorney fee request? (Pertaining to Assignment of Error No. 2)

3. Did the trial court committed reversible error by awarding expert witness expenses as costs where such expenses are not permitted under RCW 4.84.010? (Pertaining to Assignment of Error No. 3)

IV. STATEMENT OF THE CASE

Plaintiff Sunny Gautam and defendant Donald Hicks were involved in an automobile accident on August 25, 2010. (CP 1-4). Plaintiff sued

Hicks to recover for his injuries. Plaintiff's wife (Suman Gautam) also brought a claim for loss of consortium. (CP 1-4).

This matter was transferred to mandatory arbitration. On April 3, 2012 the arbitrator awarded \$31,136 to Sunny and Suman Gautam. The arbitrator also awarded \$852.90 as allowable costs. (CP 191). Hicks timely filed a request for trial de novo (CP 11-13).

Following the request for trial de novo, Plaintiff served an offer of compromise pursuant to RCW 7.06.050 in amount of \$32,000 for full and final settlement of all claims in the action. The Plaintiffs' offer was inclusive of costs and statutory attorney fees. The Plaintiffs' offer of compromise stated:

"YOU AND EACH OF YOU ARE HEREBY NOTIFIED that pursuant to RCW 7.06.050, plaintiff SUNNY GAUTAM and SUMAN GAUTAM hereby make an Offer of Compromise in the sum of Thirty Two Thousand Dollars (\$32,000.00) for full and final settlement of all claims in this action. This amount is inclusive of costs and statutory attorney fees. This Offer of Compromise shall remain open for ten calendar days from the date of service, at which time it shall expire without further notice."

CP (102-134) (CP 154-171)

Defendant did not accept the offer, and the matter proceeded to trial. The jury returned a verdict awarding damages to plaintiff Sunny

Gautam in the amount of \$30,000. The jury returned a defense verdict in the matter of Suman Gautam. (CP 14-15).

Following trial, plaintiff brought a motion for an award of fees and costs pursuant to MAR 7.3 and RCW 7.06.060. Plaintiff claimed that Hicks had failed to improve his position at the trial de novo. (CP 16-53). Plaintiff sought substantial attorney fees and costs and also sought expenses related to the testimony of his expert witness. Hicks opposed the motion, arguing as he does here, that he **did** improve his position relative to the offer of compromise. The trial court ruled that since plaintiff Sunny Gautam received a verdict in his favor in excess of the arbitration award, he was entitled to reasonable attorney fees and costs. (CP 149-153). As part of his order, Judge Rogers expressly lined out the language proposed by the plaintiff that the \$30,000 verdict exceeded plaintiff's offer of compromise. (CP 150). The court issued an order on August 27, 2012, granting Plaintiff's motion in part and awarding attorney fees and costs in the amount of \$49,947.40. (CP 149-153).

V. ARGUMENT

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn. 2d 1009 (1999). Similarly, a review of the

application of a statute is reviewed de novo. *Basin Paving Co. v. Contractors Bonding and Insurance Co.*, 123 Wn. App. 410, 414, 90 P.3d 109 (2004).

The trial court committed a legal error in its interpretation and application of RCW 7.06.050, MAR 7.3 and RCW 4.84.010. This court should reverse the award of attorney fees and costs under RCW 7.0 6.050 and remand with instructions to revise the judgment.

B. THE TRIAL COURT ERRED IN AWARDING FEES AND COSTS BECAUSE HICKS IMPROVED HIS POSITION AT THE TRIAL DE NOVO

1. The Party Who Does Not Accept an Offer of Compromise Only Pays Attorney Fees if He Fails to Improve His Position.

After mandatory arbitration, the party who requests a trial de novo must only pay the fees and costs of the opponent if he fails to improve his position at the trial de novo. MAR 7.3; RCW 7.06.050 (1)(b). MAR 7.3 provides in relevant part:

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on trial de novo.

Similarly, RCW 7.06.060 (1) provides:

The Superior Court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo.

Washington law also allows for the non-appealing party to make an offer of compromise to settle the case which, if rejected, changes the threshold for comparison after the trial de novo. RCW 7.06.050(1)(b) states:

In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, **for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award** for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

(Emphasis added)

When a party serves an offer of compromise, the compromise offer becomes the amount used to determine whether a party has improved his position on the trial de novo. Plaintiff's offer of compromise in the amount of \$32,000 "replace[d] the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo." RCW 7.06.050 (1) (b). In other words, to determine whether a party has improved his position at the trial de novo, the trial court must compare the amount of the compromise offer to the amount of the jury verdict. This was not done in the instant matter.

The plain meaning of RCW 7.06.050 is that the amount of the offer simply replaces the amount of the arbitrator's award. It is not required that

a plaintiff make an offer of compromise, however; if they do, this amount **replaces** the arbitration award for purposes of determining whether the appealing party has improved his position on the trial de novo.

Plaintiffs' counsel drafted the offer of compromise. The offer is unambiguous on its face. It clearly states that Plaintiffs "Sunny Gautam and Suman Gautam hereby make an offer of compromise in the sum of \$32,000 for full and final settlement of all claims in this action." (CP 102-134). The offer is not broken down into components by plaintiff. The offer does not reference the arbitration award. It simply says that Plaintiffs (Sunny & Suman Gautam) will accept \$32,000 for full and final settlement of all claims in this action. The jury awarded \$30,000 for all claims in this action (CP 14-15). Defendant improved his position.

**C. THE TRIAL COURTS ORDER CONFLICTS
WITH THE PLAIN MEANING OF RCW
7.06.050(1)(b)**

To award plaintiff attorney fees and costs under the facts of this case is inconsistent with the plain language of RCW 7.06.050. When interpreting statutes, courts should not rewrite explicit and unequivocal language. *In re Estate of Black*, 153 Wn.2d 152,162, 102 P.3d 796 (2004). Courts must assume that the Legislature meant exactly what it said and must apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, a statute should be construed to the

effect the legislative purpose and to avoid unlikely, strained, or absurd results. *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). A court should not construe a statute as the legislature could have but did not phrase it. See *Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999).

There is no ambiguity in RCW 7.06.050 and it should be applied as written. The statute is clear that the offer of compromise "shall replace the amount of the arbitrator's award" for determining whether a party improved his position and whether attorney fees are appropriate. The statute makes no provision for some of the offer replacing the arbitrator's award and for some unknown amount to be adjusted out. There is no mechanism to account for plaintiff's apparent attempt to include only the claim of one successful plaintiff and omit out the claims of the unsuccessful plaintiff. The offer of compromise was unambiguous. The figure of \$32,000 replaced the arbitration award as the threshold amount .A simple substitution of one number for another is all that is required to determine whether attorney fees and costs were to be assessed.

When a statute contains both the words "may" and "shall" it is presumed that the Legislature intended to distinguish between them, with "shall" being construed as mandatory and "may" as permissive. *Scannell*

V. City of Seattle, 97 Wn. 2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). RCW 7.06.050 contains both "may" and "shall".

RCW 7.06.050 (1)(a) states that the "non-appealing party **may** serve upon the appealing party a written offer of compromise." The plaintiff is not obligated to serve an offer of compromise. If the nonappealing party does not serve and offer, then the court looks to the arbitration award to determine if a defendant improved his position at the trial de novo for purposes of assessing fees pursuant to MAR 7.3. However, once a plaintiff serves an offer of compromise-that amount is what determines whether a defendant improved his position. To again look to the arbitration award completely emasculates the meaning of the statute and yields absurd results. What is the purpose behind RCW 7.06.050 if the trial court can ignore the offer of compromise and then look solely to the arbitrator's award to determine whether attorney fees should be assessed? Clearly, that is not what the Legislature intended.

Similarly, RCW 7.6.050 (1)(b)-stating that the amount of the offer "shall" replace the amount of the arbitrator's award- is construed as mandatory. The number from the offer becomes the arbitrator's award, and there is no room for further mathematics. The court is not to look at the arbitrator's award when determining whether attorney fees are required.

A basic tenet of statutory construction is that words should not be added or subtracted from the plain statutory language. *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn. 2d 894, 904, 949 P.2d 1291 (1997). The trial court's interpretation of the statute is inconsistent with the statutory language and rules of statutory interpretation. The statute should be applied as written. The compromise amount replaced the amount of the arbitration award. Thus, because the jury awarded both plaintiffs only \$30,000 at the trial de novo, Mr. Hicks improved his position.

Not only is this proper statutory interpretation, but it also provides the easiest rule for practitioners faced with offers of compromise. Regardless of any ambiguous or deceptive language a party uses to couch its offer of compromise in, only the stated dollar figure is important because that will become the new arbitrator's award. Litigants will know with certainty what figure serves as a threshold for attorney fees. This approach satisfies the rules of statutory interpretation, comports with common sense, and can be most consistently applied in the future.

D. DEFENDANT WOULD HAVE BEEN “WORSE OFF” HAVING ACCEPTED PLAINTIFF’S OFFER OF COMPROMISE THAN BY PROCEEDING TO THE TRIAL DE NOVO

Accepting plaintiff's offer of compromise would have ended the litigation for payment of \$32,000. An offer of compromise is, in essence, a settlement offer. If defendant Hicks would have accepted plaintiff's offer, he would have been “worse off” than he would have been in proceeding to trial.

Plaintiffs chose not to break down their offer by litigants. The lack of "segregation" is precisely the problem here. The offer clearly stated that both plaintiffs would accept the sum of \$32,000 for any and all claims that were pled in this lawsuit. When the offer of compromise replaced the arbitrator's award, defendant was left with a choice to accept the offer as written or, proceed to trial, in an attempt to better this amount. Plaintiffs' offer of compromise was an offer for a global settlement of the case, regardless of whether it was allocated to one of the plaintiffs or another. At the time the offer of compromise was made, it was impossible to determine how much of the \$32,000 offer was to be allocated to Sunny Gautam or how much was to be allocated to Suman Gautam. Consequently, it was impossible for defendant Hicks- at the time he was determining whether to accept the offer of compromise-to determine how much the jury verdict would have to be to beat the offer. The only thing that Hicks could know was that the plaintiffs were willing to accept \$32,000 to in the litigation.

If Mr. Hicks accepted the offer, the case would have ended. However, Mr. Hicks decided to proceed to trial and, in fact, he did better at trial. Mr. Hicks owes the plaintiff less by proceeding to trial than by accepting the offer of compromise.

**E. RECENT APPLICATION OF RCW 7.06.050
CONFIRMS THAT THE OFFER REPLACES THE
ARBITRATION AWARD**

This Court recently issued its published decision in the matter of *Greenwood v. Monnastes* 170 Wn. App. 242, 283 P.3d 603 (2012). One of the issues in dispute was whether attorney fees and costs pursuant to MAR 7.3 were warranted. *Greenwood* was a trial de novo from a mandatory arbitration. Following the award of the arbitrator, the plaintiff served an Offer of Compromise pursuant to RCW 7.060.050 which was not accepted and the case proceeded to trial.

While the issue in dispute was whether costs should be taken into consideration when determining whether a defendant improved his position at the trial de novo, when discussing whether attorney fees and costs should be assessed pursuant MAR 7.3, this Court stated:

“Here, Monnaste’s offer of compromise, which replaced the arbitrator’s award¹ was \$16,000. At the trial de novo, however, Monnastes obtained only \$15,661 in compensatory damages. Greenwood thus improved his position at trial and, under Tran,

¹ The Court cited to RCW 7.06.050(1)(b)

the trial court erred in concluding otherwise by adding costs...”

Greenwood v. Monnastes 170 Wn. App. 242, 245-246, 283 P.3d 603 (2012).

This Court also found:

“... The important consideration here is that "the amount of the offer of compromise shall replace the amount of the arbitrator's award" for the purpose of determining whether the appealing party improved his position. RCW 7.06.050(1)(b). As Monnastes concedes, the arbitrator's award did not include costs. To the extent Monnastes sought to replace this award of compensatory damages with an offer of compromise that included not only compensatory damages, but also costs, she should have so specified in the offer of compromise.”

Id. at 246.

“...To the extent a nonappealing party seeks to replace the arbitrator's award of compensatory damages with an offer of compromise that includes not only compensatory damages, but also costs, that party should so specify in the offer of compromise. Here, Monnastes did not do so, and therefore it was error for the court to consider costs when "comparing comparables" under Tran.”

Id. at 247.

There are two rules that come out of *Monnastes* that are applicable here. First, it is abundantly clear that the offer of compromise replaces the arbitrator's award for purposes of determining whether costs are to be awarded pursuant to MAR 7.3. Secondly, the plaintiff needs to be specific in their offer. In a multiparty case, if the plaintiff wishes to segregate out each claimant individually, he must do so. If not, the defendant can only agree to accept or reject the offer as written. In this case, the offer was for \$32,000 for all claims. The jury awarded \$30,000 for all claims. Defendant bettered his position.

The trial court erred in going back to the arbitrator's decision and trying to "interpret" the meaning behind plaintiff's offer.

In the court's findings of fact Judge Rogers specifically found that plaintiff "then made a timely offer of compromise pursuant to RCW 7.06.050 on May 10, 2012, offering to settle both plaintiffs' claims for \$32,000. Plaintiff did not differentiate between claims or make a request for costs."(CP 149-153).

Judge Rogers also found that the \$30,000 jury verdict exceeded the arbitration award but specifically delineated the proposed language "both" [the arbitration award] and "as well as plaintiff's offer of

compromise on” Sunny Gautam's claim.² In other words, Judge Rogers found that the jury verdict did not exceed the offer of compromise. Yet, despite this finding, the court awarded attorney fees pursuant to MAR 7.3-in direct contravention to RCW 7.06.050. (CP 149-153).

F. THE GOALS OF MANDATORY ARBITRATION ARE NOT FURTHERED IF THIS COURT WERE TO ADOPT THE REASONING OF THE TRIAL COURT.

The purpose of the mandatory arbitration system is to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn. 2d 804, 815, 947 P.2d 721 (1997)." A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals." *Wiley v. Rehak*, 143 Wn. 2d 339, 348, 20 P.3d 404 (2001). Justice Talmadge explained the purpose behind MAR 7.3 as follows:

[The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland 142 Wn. 2d 135, 159, 12 P.3d 119 (2000) (concurring opinion).

² Finding of fact number 3 states: “The \$30,000.00 verdict amount exceeded both the arbitration award as well as plaintiff's offer of compromise on Sunny Gautam's claim but was well below what had been awarded for Suman's claim”. The word “both” was stricken and the phrase “as well as plaintiff's offer of compromise on” was stricken by Judge Rogers in the proposed order. (CP 149-153).

These goals cannot be furthered if a party is allowed to alter-after the completion of trial-the numbers to be compared. The arbitrator's award, and any offer of compromise that it **replaces**, must be liquidated sums so that a defendant can make an informed decision "with frankness and prudence" about whether to pursue a trial de novo. To do so, a party requesting a trial de novo must know the dollar amount that he needs to beat in order to avoid paying attorney fees at the time he makes his decision. If the trial court's ruling is to be upheld, then an appealing party would not know what number he must better at the trial de novo. Does the appealing party have to do better than the amount awarded by the arbitrator? Or is it the offer of compromise? Judge Rogers decision acknowledges the existence of the offer of compromise, tacitly acknowledges the appealing party did better at trial than the offer of compromise, yet awards attorney fees and costs on the basis that one of the two plaintiffs did slightly better at the trial de novo than the arbitrator's award with regard to that claim.

**G. PLAINTIFF IS NOT ENTITLED TO A LODESTAR
MULTIPLIER**

It is Appellant's position that Plaintiff is not entitled to any attorney fees or costs pursuant to MAR 7.3 or RCW 7.06.060. Even if plaintiff were entitled to an additional award of attorney fees and costs, he would be entitled only to "costs and *reasonable* attorney fees." MAR 7.3 (emphasis added). There is no factual or legal basis for a lodestar multiplier in this case.

In general, Washington law on how to calculate attorney fee awards is well established. First, the court must calculate a lodestar fee, by determining the number of hours reasonably expended and multiplying that number by a reasonable hourly rate. *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Second, after the lodestar is calculated, the court may consider whether to adjust it upward or downward is "to reflect factors not considered up to this point." *Bowers*, 100 Wn. 2d at 598. However, the Washington Supreme Court has cautioned, "adjusting the lodestar amount upward or downward is appropriate in **rare instances**" *Henningsen v. WorldCom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000). There is a presumption that the lodestar amount represents a reasonable fee. *Xieng v. People's National Bank*, 63

Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993).

"The burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation." *Bowers*, 100 Wn.2d at 598 (quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980)). Thus, it was Plaintiff here who bore the burden of justifying any multiplier.

1. The Quality of Work Does Not Justify a Multiplier

No disrespect is meant to Mr. Banks. However, "The quality of the work supports an adjustment to the lodestar figure only when the representation is *unusually* good or bad considering the skill level normally expected of an attorney with the hourly rate used to compute the lodestar." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342, 54 P.3d 665 (2002) (emphasis added). Quality of work is "an *extremely limited* basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate." *Bowers*, 100 Wn.2d at 599 (emphasis added).

For example, in *Travis v. Washington Horse Breeders Association*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988), the trial court applied a 1.5 multiplier after finding that the quality of counsel's work was "of extremely high quality." The Washington Supreme Court ruled that the multiplier was not warranted because there was no finding that the quality

of work was "unusually good" or "exceptional" or words to that effect. *Id.* Accordingly, the quality of work is "an extremely limited basis for adjustment." *Bowers*, 100 Wn.2d at 599. There is no finding by the court that counsel's work was of extreme high quality or unusually good.

2. The Contingent Nature of the Claim Does Not Warrant a Multiplier

Plaintiffs had a contingent fee agreement with their attorneys. It appears the trial court awarded a Lodestar multiplier based solely on the "substantial risks" borne by plaintiff counsel in recovering no compensation or inadequate compensation to pay expenses and attorney fees. This was a rear end motor vehicle accident with liability having been determined prior to trial. There was very little risk that plaintiff would not be awarded something.

"The existence of a contingent fee agreement may be considered as one of several factors in making an award of attorney fees, **but it alone is not determinative.**" *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wash. App. 283, 294, 951 P.2d 798 (1998). The Washington State Court of Appeals has rejected the argument that a multiplier must be awarded whenever an attorney is on a contingent fee agreement. See *Faraj v. Chulisie*, 125 Wash. App. 536, 551, 105 P.3d 36 (2004). For example, to the extent the attorney's hourly rate takes into account the contingent nature of the

availability of fees, no further adjustment should be made. *Bowers*, 100 Wn. 2d at 599.

There is no evidence here that plaintiff's attorneys' hourly rate did not take into account the contingent nature of their fees. Plaintiffs' counsel admits that he works 100% on a contingency basis and therefore, it can be safely assumed that this is factored into the "hourly rate" as outlined in his fee agreement.

This is not a "high risk" contingency fee case. It was a rear end motor vehicle accident. The fact that there is a substantial risk of a low verdict is implied in any disputed case. There was nothing unusual in this garden-variety rear end motor vehicle accident soft tissue case that warrants the application of a lodestar multiplier.

It would not be out of line to state that almost every personal injury case is handled on a contingent fee basis. If the trial court's logic were to be followed, every time a contingent fee plaintiff was successful on a trial de novo, the plaintiff would automatically get a lodestar multiplier without the need of any analysis of the factors. This is clearly not the law in Washington.

Adjustments to lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." *Bowers*, 100 Wash. 2d at 598. "In considering the propriety of a

contingency adjustment, ... the trial court abuses its discretion when it takes the relevant factors into account." *Chuong Van Pham v Seattle City Light* 159 Wn. 2d 527, 543, 151 P.3d 976 (2007). While the court did not specifically make such a finding in its order, plaintiff counsel made several other arguments in support of his request for a lodestar adjustment. It is difficult to determine whether the trial court took into consideration respondent's argument concerning alleviating court congestion and punishing the defendant's insurer. To the extent that the court considered these arguments in the decision to award a lodestar multiplier, these considerations are improper.

Alleviating court congestion, while a worthy goal, is not a factor relevant to awarding a multiplier for attorney fees. Punishing defendants insurance Company is also not a relevant factor. Cf. *Ketchum v. Moses* 24 Cal.4th 1122, 1139, 17 P.3d 735 (2001) (lodestar adjustment should not be imposed to punish the losing party).

Simply put, there are no factors present in this case which would serve as a basis for the imposition of a lodestar multiplier.

H. PLAINTIFF IS NOT ENTITLED TO AN AWARD OF EXPERT COSTS

Pursuant to MAR 7.3 and RCW 7.06.060, the trial court may assess costs against a party who requests a trial de novo after arbitration

but does not improve his position. As Hicks demonstrated above, he improved his position at trial, so plaintiff was not entitled to any costs or attorney fees pursuant to MAR 7.3 or RCW 7.06.060.

Plaintiff's costs are limited to statutory costs. RCW 4.84.010.

Plaintiff is presumably the prevailing party for purposes of RCW 4.84.010 because he received a jury verdict awarding damages which was reduced to a judgment. However, the statutory costs allowed to a prevailing party under the statute did not include expert witness fees.

Costs have historically been very narrowly defined, and RCW 4.8 4.010, which statutorily defines costs, limits that recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses.

Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 743, 733 P.2d 208 (1987). Expert witness fees are not included as recoverable costs.

Plaintiff has requested an award of expert witness fees in the amount of \$2,200 pursuant to RCW 7.06.060. If these fees were awarded based on appellant not having improved his position pursuant to MAR 7.3 and RCW 7.0 6.050, they are improper because Defendant has bettered his position following the trial de novo and therefore, these expert fees cannot be awarded pursuant to this statute. If these fees were awarded based on plaintiff being the prevailing party pursuant to RCW 4.84.010, they were improper because such fees are not recoverable under the narrowly defined

and construed language of the statute. Either way, the trial court's decision to grant these expenses as costs was clear error.

VI. CONCLUSION

Pursuant to RCW 7.06.050 Plaintiffs' offer of compromise in the amount of \$32,000 **replaced** the amount of the arbitrator's award for purposes of awarding attorney fees and costs. The jury rendered a verdict in the amount of \$30,000.

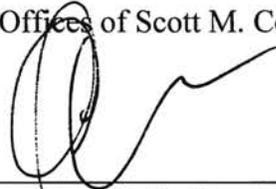
The trial court improperly considered the arbitration award in determining whether appellant improved his position at the trial de novo. This contradicted the plain language of RCW 7.06.050. The trial court should not have awarded attorney fees or costs to respondent pursuant to MAR 7.3. Further, the trial court granted plaintiff's expert witness fees despite the statute and case law which holds that such fees are not recoverable costs.

Plaintiff is not entitled to an award of attorney fees and costs, is not entitled to a lodestar multiplier or expert witness fees.

For these reasons, and in the interest of justice, appellant respectfully requests that this court reverse the trial court's judgment and remand for entry of judgment on the jury verdict.

DATED this 20th day of December, 2012.

Law Offices of Scott M. Collins, LLC

By: 

Scott M. Collins, WSBA #28541
Attorney for Appellants

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

SUNNY GAUTAM AND SUMAN GAUTAM,

Plaintiffs,

vs.

DONALD HICKS, and JANE DOE HICKS,
husband and wife and their marital community

Defendants.

No. 11-2-32453-2 SEA

**DECLARATION OF SERVICE BY
MESSENGER**

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of eighteen, competent to testify, not a party to this action, and am employed by the Law Offices of Scott M Collins, LLC.

On the dates set forth below, I delivered to ABC legal messenger services a copy of the **Appellate Brief**, together with a copy of this **Declaration of Service by Messenger**, with instructions to serve said documents on the following parties no later than 4:30 p.m. on December 28, 2012:

1 Mr. James E. Banks
2 Bishop Law Offices, P.S.
3 19743 First Avenue South
4 Normandy Park, WA 98148

5 Pursuant to RAP 5.4 (b), I also delivered to ABC legal messenger services the
6 original and one copy of the **Appellate Brief**, together with a copy of this **Declaration of**
7 **Service by Messenger**, with instructions to file said documents with the Washington state
8 Court of Appeals, Division I, 600 University St., Seattle, WA 98101, no later than five 4:30
9 p.m. on December 28, 2012.
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12 SIGNED at Seattle, Washington, this 28th day of December, 2012
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15 By: Heather A. Bolton
16 HEATHER BOLTON
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