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No. 69046-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KAREN JOHNSON,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

APPELLANT'S REPLY BRIEF

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I. APPELLANT'S REPLY TO COUNTER STATEMENT OF THE CASE

A. Johnson's Supplemental Authorities and Mann's Supplemental Declaration of March 26, 2012.

At 11:17am on March 26, 2012, Appellant Karen Johnson ("Johnson") submitted a *Supplemental Declaration of Mann* and *Supplement Authorities* in support of her fee petition to the trial court. Later that same day at 3:52pm, Johnson received the trial court's letter via email wherein Judge Heller issued a list of conclusions pertaining to the petition. Johnson had not received any prior notice that the trial court would be issuing any decision or ruling on the matter on that day. The Court's letter was later filed with the King County Superior Court Clerk on March 28, 2012. The Respondent State of Washington ("DOT") did not raise any objection in the trial court proceedings to Johnson's filing of Ms. Mann's supplemental declaration and authorities. *See* Appendix A attached hereto.

B. Johnson's Motion for Reconsideration and Supplemental Declarations.

The DOT misstates the statement made by Johnson's counsel, Ms. Mann, regarding the fee petition submitted in the *Burklow* case on page 21 of its brief and in footnote 21. The import of Ms. Mann's statement was that the State paid the "fees on fees" and costs for the fee petition without

any argument that the CR 68 Offer barred recovery of fees for litigation of the fee petition, or that the State was not responsible for an award of fees incurred in regards to the fee petition itself. In other words, in *Burklow*, under identical language of a CR 68 Offer, the State never argued that fees and costs on a fee petition were the plaintiff's responsibility instead of the State's.

II. ARGUMENT

A. The Court May Consider Johnson's Additional Material on a Motion for Reconsideration.

At the time Johnson filed a Motion for Reconsideration, no judgment had been entered. Rather, the court issued a March 26, 2012 letter signed by Judge Heller, which listed a set of conclusions and requested that the parties "attempt to agree on stipulated Findings of Fact and Conclusions of Law." CP 1135-1136. The Court's letter assures that "[i]f outstanding issues remain, the Court will resolve them." CP 1136.

In a discrimination case decided under RCW 49.60, the Court of Appeals noted as follows:

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *Applied Indus. Materials Corp. v. Melton*, 74 Wash.App. 73, 77, 872 P.2d 87 (1994). Furthermore, **nothing in CR 59 prohibits the submission of new or additional materials on reconsideration.** *Sellsted*, 69 Wash.App. at 865 n. 19, 851 P.2d 716. **Motions**

for reconsideration and the taking of additional evidence, therefore, are within the discretion of the trial court. See *Trohimovich v. Department of Labor & Indus.*, 73 Wash.App. 314, 318, 869 P.2d 95 (1994) (trial court did not abuse discretion by failing to grant reconsideration motion); *Ghaffari v. Department of Licensing*, 62 Wash.App. 870, 816 P.2d 66 (1991) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court).

Chen v. State of Washington, 86 Wn. App. 183, 191-192, 937 P.2d 612, 617 (Div.2, 1997) (emphasis added).

Thus, it was within the trial court's discretion to consider on reconsideration the additional materials Johnson filed, but the Court unquestionably here should consider materials which were filed before entry of any findings, conclusions, or judgment.

B. Public Policy Demands that CR 68 Not Be Used to Coerce Relinquishment of Statutory Rights to Reasonable Attorney's Fees for Claims Made Pursuant to the WLAD.

The trial court allowed the State to use sharp practices not authorized by CR 68 to coerce relinquishment of Johnson's rights to reasonable time for orderly preparation of a fee petition and her rights to have a WLAD remedy of reasonable fees and costs necessary to litigation of a fee petition. Johnson's attorney fees, documented in detail and "in good faith," necessary to achieve a substantial judgment of \$350,000.00

(plus a fee shifting outcome) under RCW 49.60.030, were slashed by 41.8%,¹ and the costs were slashed by 81.5%.²

The purpose of CR 68 is to promote fair and early settlements and avoid lengthy litigation. *Wallace v. Kuehner*, 111 Wn. App. 809, 823, 46 P.3d 823 (Div. 2, 2002). The purpose is not to defeat fee shifting where litigation will continue. The DOT in this case did not make a CR 68 offer of a specific dollar amount for costs or fees, clearly anticipated a fee petition would ensue, and did not dispute Johnson's clearly stated characterization and written materials in her acceptance documentation that fees and costs on a fee petition would be recoverable. The DOT has engaged in exactly the kind of conduct that CR 68 was designed to deter. The DOT then litigated and opposed the very terms that it used to induce Johnson to settle. The DOT urges this Court to ignore the representations and negotiations that induced Johnson to accept the CR 68 offer and urges the Court to ignore clear public policies promulgated by CR 68 and WLAD, and to condone the DOT's deceptive and ambiguous tactics. If it did so, this Court would be turning CR 68 on its head and effectively

¹ Stipulated fees Johnson seeks, at Court awarded rates and multiplier, are \$205,276.50. CP 1468. Court awarded fees at the same rate and multiplier are \$119,448.20, representing 58% of the time expended. The trial court did not question counsel's "good faith" in documenting some items of reconstructed time during review of records for the fee petition. CP 1481.

² Stipulated costs Johnson seeks are \$65,127.98. CP 1468. Court awarded costs are \$12,034.38 (CP 1481) or 18.5% of the actual costs.

rewarding defendants who aggressively over-extended and misuse CR 68 to corner⁴ plaintiffs to accept an offer of judgment,⁵ only to surreptitiously extinguish their statutory right to reasonable attorney fees and to then drag out the litigation much further. CR 68's cost-shifting provision was designed to encourage parties to settle their claims on clear and final terms without extended litigation, but to allow the State's over-reaching and duplicitous use of the rule with one-sided procedures and "conditions" not provided for in the rule undermines WLAD plaintiffs' access to counsel and the judicial system and the statutory rights and remedies crucial to WLAD enforcement. The only way to prevent such abuse is for this Court to construe against the drafter or now hold unlawful CR 68 "offers" such as DOT's abnormal offer terms, that are contingent on unreasonable timeframes for preparation, service, or filing of fee documentation, and/or are ambiguous about or contingent on a plaintiff's agreement to conduct future litigation of remaining issues in the case under a waiver of "costs" and statutory attorneys' fees, including the fees which would necessarily

⁴ In this case the DOT made its CR 68 offer while at the same time moving to amend its answer (CP 325-343) to assert a questionable affirmative defense #16, claiming, "A third party, Dr. Timothy Reisenauer fell below the standard of care in treating Plaintiff for an anxiety disorder and caused some or all of Plaintiff's emotional damages." CP 343. This was a not so veiled threat to the psychologically vulnerable Plaintiff that defendants would also direct harm toward her treating psychologist if she did not settle.

⁵ Plaintiffs who receive CR 68 Offers of Judgment must decide to either settle for an amount that is likely much less than what they believe their case is worth versus taking their chances and continuing to advocate their cause but face the risk of paying mounting defense costs if they ultimately do not "prevail."

be incurred in enforcing the CR 68 offer. Any CR 68 offer in a WLAD case which intends to put the plaintiff to a choice of settling or going forward should clearly state the dollar amount of the full offer, including the dollar amount of "costs" offered (including reasonable attorney fees in WLAD litigation). Fee and cost shifting is a material remedy in WLAD cases and is essential to the public policy and remedial plan of the legislature.

If a CR 68 offer requires further litigation to determine the actual payment and final outcome of the case, then the purpose of CR 68 has not been achieved and a statutory remedy remains to be litigated and the Offer does not determine the matters yet to be litigated or "costs" as to those matters. Defendants should not be able to undermine the purpose of the anti-discrimination statutes, as here, by using CR 68 to deprive plaintiffs and their counsel of the ability fairly plead and prove their "reasonable attorney fees," by taking away their potential for recovering the high cost of expert testimony, attorney time, and potential appeals which are common in efforts to obtain a full and fair fee shifting remedy. It is not part of the purpose of CR 68 to reduce WLAD settlements or to cut effective rates of fee and cost recovery by requiring months or even years of uncompensated legal work and litigation costs and appeals after successful "CR 68 resolution" of WLAD damages.

Furthermore, federal law interpreting CR 68 is not controlling of this issue when it relates to claims made under the Washington Law Against Discrimination. *See Allison v. Housing Authority of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991) (because Title VII does not contain a provision that requires a liberal construction, we are not bound by federal law). While in the absence of state authority, Washington courts may look to federal interpretations of FRCP 68, WLAD provisions are “radically different” from federal civil rights law, particularly regarding remedies and available relief to a plaintiff. *Martini v. Boeing Co.*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999). In *Martini*, the Washington Supreme Court found the Title VII damages provision to be radically different from the WLAD damages provision. *Id.* As a result, the Court distinguished and declined to follow the Title VII cases. *Id.*, at 375. Adopting the federal interpretation of FRCP 68 for WLAD plaintiffs would impermissibly narrow the protective language and purposes of the WLAD, as well as be contrary to the liberal construction mandate of the act. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996); RCW 49.60.020 (nothing contained in the law shall “be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights”). The Court must use caution when considering any interpretation that would narrow the

coverage of WLAD. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992). To allow defendants to make offers of judgment that are contingent on a plaintiff's relinquishment of rights to yet to be determined remedies, including costs and attorney fees, would undercut what this state has identified as "a public policy of the highest priority." *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993); RCW 49.60.010; *see also, Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 114 Wn. App. 80, 98-99, 55 P.3d 1208 (Div. 1, 2002).

The State attempts to use only part of CR 68 as a sword. The State combined sharp practices, amending its Answer to claim a questionable affirmative defense that Johnson's treating psychologist's care was responsible for some or all of her claimed emotional damages, at the same time serving a CR 68 offer (CP 343) with manipulative language beyond the language or intent of CR 68 in a way that violates the fee shifting public policies applicable to and remedies under RCW 49.60.

The State neglected to make an offer of judgment under the section of CR 68 which would have allowed CR 68 resolution of the "further proceedings" after entry of the partial judgment:

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...When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CR 68.

The DOT did not use the CR 68 specified procedure that would have resolved the fees and costs “liability that remained to be determined” prior to the commencement of hearings on the fee petition to determine the amount or extent of that liability. CR 68 makes it clear that if, after judgment is entered, there are still issues being litigated to “determine the amount or extent of liability,” those remaining issues (attorney fees and costs in this case) would need to be the subject of a new offer of judgment “with costs then accrued.”

The DOT never made an offer of judgment as to the amount of attorney fees and costs of suit. That remained to be litigated after “judgment” and should have been the subject of another “offer of judgment” in order to finally resolve the litigation. The purpose of an offer of judgment is not to cut off fee shifting during ongoing litigation of “the extent of liability,” rather to finally determine the extent of liability.

The offer of judgment made by the DOT was not effective to determine the amount of the remedy of attorney fees and costs. It required further “settlement” of the fees and costs or litigation. It then should come within the second part of Civil Rule 68(b) “the amount or extent of the liability remains to be determined by further proceeding.” A further CR 68 offer can be made if the defendant wants final and preclusive effect as to fee shifting on that liability (the fees and costs in this case).

Given the clear and expressed public policies of both CR 68 and the WLAD, this Court should reverse the trial court’s decision to not award Johnson attorneys’ fees and costs necessary to litigate WLAD remedies of “reasonable attorney fees and costs.”

C. The Evidence Demonstrates No Meeting of the Minds on the DOT’S Alleged Terms, When Johnson Accepted the CR 68 Offer of Judgment.

General contract principles should be applied to CR 68 offers of judgment only where such principles neither conflict with the rule nor defeat its purpose. *Dussault v. Seattle Public Schools*, 69 Wn. App. 728, 733, 850 P.2d 581 (Div. 1, 1993). Courts must then construe any ambiguities in an offer of judgment against the drafter. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 580-81, 271 P.3d 899 (Div. 2, 2012). Most importantly, any waiver of statutory rights must be clear and unambiguous. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875

F.2d 695 (9th Cir. 1989); *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997).

To determine whether there was a meeting of the minds, courts may look to extrinsic evidence, including discussions during settlement negotiations. *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988).

The DOT contends there was a “meeting of the minds” with the “acceptance” of the Offer of Judgment and that Johnson simply agreed to waive all attorney fees for pursuing a Fee Petition if that was necessary, regardless of how much litigation or how many years of appeals, like this appeal, were required to recover a “reasonable attorney fee,” as provided by RCW 49.60.

That is a disingenuous argument for the DOT to make for many reasons, but two are necessary to explore on Reply:

1. The DOT represented to Johnson, after the “Offer of Judgment” was made, that it did not know whether Fees for a Fee Petition would be recoverable. CP 1368.
2. The DOT, in a continuation of its “sharp” dealings with Washington State citizen Karen Johnson, ignores the contemporaneous record of the parties’ agreement as contained in written entries in the time records document it required Johnson to provide as part of her acceptance of the Offer of Judgment.

- a. **October 17, 2011: MRM: “Time expended in seeking reasonable attorneys fees and costs from the Court if necessary. – Amount not Yet Known”**
- b. **October 17, 2011: MRM: “This listing is preliminary and subject to review and revision by counsel, correction of any errors and supplementation with any inadvertently unrecorded entries. This document is prematurely demanded by Defendant as a condition of settlement and will be supplemented with any time required for preparing and filing and pursuing a Petition for Fees and Costs.”**
- c. **October 17, 2011: MRM: “Plaintiff seeks a 1.5 Multiplier on the Fees incurred in this case based on Risk of Contingent Litigation and other factors recognized by Statute as well as outcome achieved. The amount is not yet known and will be determined by the amount of fees finally entered based on a “lodestar” by the Court or by stipulation in this case. Estimate of a 1.5 Multiplier.”**

CP 2007.

- d. **October 16, 2011: “Dr. Reisenauer fees for legal consultations – invoice not yet received. (Place Holder.01 entered)”**
- e. **October 17, 2011: “Other – such other costs and litigation related expenses as have not yet been billed in an amount not yet known and costs incurred in any fee petition required to obtain such fees and costs as set forth[herein]”**

CP 2009.

In fact, the same October 17, 2011 time and billing document which the DOT uses as a sword to limit Johnson’s fee claim contains clear entries provisional to her acceptance of the Offer, including fees related to

a fee petition if it became necessary, fees for “inadvertently omitted entries,” and for costs including Dr. Reisenauer’s “legal consultations” not yet in counsel’s billing system. Those constituted part of Johnson’s “acceptance.” Meanwhile, the DOT has never given notice that they considered this added language a counter-offer or not part of Johnson’s proper “acceptance.”

In negotiating about the Offer of Judgment, the parties discussed the prior *Burklow* CR 68 Offer. The fact that they discussed the hourly rate and multiplier but not the cut-off date language does not preclude this as evidence of the parties’ intent. It is clear that Ms. Mann used the course of dealing and terms of the *Burklow* offer during the negotiations and relied on it as evidence of recent past dealings with State’s Assistant Attorney General, including how to interpret the Offer of Judgment in this case and what her intent and expectations would be regarding same. This objective manifestation of Johnson’s intent in negotiating the Offer of Judgment contradicts the DOT’s claims regarding its ultimate interpretation, thus proving there was no meeting of the minds on the DOT’s alleged terms here. The DOT, prior to the acceptance, specifically disavowed the knowledge, interpretation, and intent it now claims was clear and mutual.

D. Administrative Appeal of Johnson’s “Disability Termination” Should not be Segregated as It Was “an Action” on Identical Claims as the Civil Suit, Was Necessary and Not Duplicative, Provided the Investigation, Legal Research, Preparation and Discovery Under CR 11 for Filing the Civil Suit, Could Have Resolved the Termination and Accommodation Issues in the Civil Suit, and Is Not Segregable.

1. When several claims involve common facts and related legal theories, an award of fees that does not segregate is proper.⁶

The claims here all involved the same core facts and involved related legal theories. The court should not have segregated or disallowed the time spent. *Francom v. Costco Wholesale Corp.*, 122 Wn.App. 1069 (2004).

2. The legal research, investigation, and deposition discovery in the administrative appeal of Johnson’s disability termination provided Johnson and Counsel the basis required under CR 11 for filing a successful civil suit as to the disability termination of Johnson by the State of Washington.

Such work prior to suit is compensable as part of reasonable attorney fees. *Dice v. City of Montesano*, 131 Wn.App. 675, 128 P.3d 125.

To properly prosecute a claim, Civil Rule 11 requires that an attorney adequately investigate the factual basis of all claims as well as the proper and applicable legal theories.^{E7N7} In preparing for litigation, an attorney

⁶ *Steele v. Lundgren*, 96 Wn.App. 773, 783, 982 P.2d 619 (1999), review denied, 139 Wn.2d 1026 (2000).

⁷FN7.Civil Rule 11(a) reads in pertinent part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in

necessarily engages in discussions with the client and potential witnesses, obtains and reviews pertinent files and other information related to the client's concerns and claims, and drafts documents to initiate and file the claim in court. Attorney fee requests routinely include time records showing how much time and what costs were incurred from the attorney's first contact with a litigant. Because our court rules require such pre-filing preparation, it is a necessary and legitimate part of a judicial proceeding and, therefore, attorney fees and costs incurred during this process should be considered **part of an "action"** under RCW 49.48.030. Thus, Dice is entitled to fees and costs he incurred for this preparation.

Id. at 692-93.

The DOT's plea to deprive Johnson of significant fees on the basis that the administrative appeal of her disability termination is "segregable" as not arising from the same core of facts, issues, and claims is peculiar, given that the DOT answered Johnson's civil suit with affirmative defenses: "2. The Plaintiff's employment was terminated for legitimate, non-discriminatory, and non-retaliatory reasons" (CP 36); and "15. The

fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

plaintiff's claims are barred by res judicata and/or collateral estoppel," (CP 37).

Collateral estoppel is an affirmative defense. The party asserting it has the burden of proof. ... Application of collateral estoppel is limited to situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and 'where the controlling facts and applicable legal rules remain unchanged.' Further, issue preclusion is only appropriate if the issue raised in the second case 'involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,' even if the facts and the issue are identical.

Lemond v. State, DOL, 143 Wn.App.797, 805, 180 P.3d 829 (2008), quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721(1974).

When the State Board of Personnel Appeals denied Johnson's appeal of the disability termination on "summary judgment," she filed a "tort claim" and challenged that decision as a denial of reasonable accommodation in this civil suit and Johnson was successful in obtaining the substantial Judgment in this case. The DOT's affirmative defenses of *res judicata* and collateral estoppel are an assertion requiring "identity" of parties and claims. The DOT asserted those same affirmative defenses in its Answer on August 10, 2010, contending that the parties and claims in the Administrative Appeal action were identical, and again in its Amended Answer signed October 5, 2011 (CP 342-343), 6 days prior to the DOT's

Offer of Judgment triggering Johnson's fee petition. The DOT's counsel certainly recognized that the depositions of administrators, though taken under the administrative caption, were witness investigation and discovery for the pending civil tort claims and defenses. The DOT should be estopped and not be heard NOW to argue the opposite to deprive Johnson of reasonable fees and costs.

3. Fees need not be incurred in the same action to be recoverable under remedial fee shifting statutes.

In *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 40, 42 P.3d 1265 (2002) (quotations omitted), the court defined "action" under American Jurisprudence as "a judicial proceeding in which one asserts a right or seeks redress for a wrong." *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 41–42 (quotations omitted). The court applied these definitions to RCW 49.48.030 and concluded that arbitration proceedings constituted "action" under the statute. *Id.* at 41. The administrative appeal of the disability termination is an "action" equivalent to a grievance arbitration proceeding in which Johnson sought discovery and a hearing to overturn unlawful discrimination in the form of her disability termination. In *Pham v. Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007), the Court found that the complexity of the proceedings below warranted deferring to the trial court's discretion as to fee reductions (state and federal proceedings, trials, appeals and remands). There are no such

reasons in Johnson's case. This case resulted in judgment where nearly all the discovery/investigation had been done by Johnson in the administrative appeal, Johnson brought a successful motion for a protective order under CR 35 and there was no motion for summary judgment, nor any trial, and no interlocutory appeals. The appellate Court has the same opportunity to evaluate the case as the trial judge on the records. Under remedial fee shifting statutes, fees can be incurred in more than one action and collected for both. It is not necessary that fees be incurred and recovered in the "same action." *Int'l Ass'n of Fire Fighters*, 146 Wn.2d 29, 42 P.3d 1265 (2002).

[T]he Hanson court made it clear that the nature of the proceeding did not affect the availability of attorney fees to an employee who is successful in recovering wages or salary owed. *Hanson [v. City of Tacoma]*, 105 Wash.2d [864]at 872, 719 P.2d 104 [1986]. Hanson's position is consistent with the liberal construction doctrine that RCW 49.48.030 is subject to. Reading Hanson as limiting the recovery of attorney fees to the same action in which "wages or salary owed" are awarded would also be inconsistent with awarding attorney fees on appeal pursuant to RCW 49.48.030. See *Hanson*, 105 Wash.2d at 873, 719 P.2d 104 (remanding case to trial court to determine reasonable attorney fees on appeal); *Kohn [v. Georgia-Pacific Corp.]*, 69 Wash.App. [709]at 727, 850 P.2d 517 [(1993)](holding that employee may receive attorney fees for successfully defending an award of wages or salary on appeal).

Id. at 43.

4. RCW 49.60.030 provision for recovery of reasonable attorney fees and costs is even broader than RCW 49.48.030.

2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

RCW 49.60.030.

The broad remedial provisions are further expanded by RCW 49.60.020: "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Reasonable fees are considered "costs" under RCW 49.60.030; so they should also be included in the concept of "expanded costs" necessary to achieve the purposes of the statute.

E. The Court Should Reverse the Trial Court's Outright Denial of All Fees Submitted via Reviewed and Corrected, or "Reconstructed" Records

First, the DOT misrepresents the holding as to attorney fees in *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012). The Supreme Court affirmed the trial court's reduction of requested attorney time as follows:

//
//

The trial court estimated that 90 percent of the attorneys' time was spent on issues related to maintenance and cure and accordingly, reduced total fees and costs by 10 percent. The court recognized that maintenance and cure issues were present from the beginning of the case and that 12 out of 14 witnesses testified about those issues. The court also acknowledged that this was the attorneys' first case involving punitive damages for maintenance and cure, suggesting that the issue required a significant amount of time.

Id. at 82.

Thus, the reduction in *Clausen* had nothing to do with the fact that the time submitted by Plaintiff's counsel was reconstructed time for which the Court did allow compensation. CP 1278-1292. Ms. Mann reviewed all recorded time and also reviewed the file and the billings to see if there were documents or events in the case file for which time was inadvertently not entered. When she located an event or document that showed time was spent but not recorded, she made a conservative assessment of the time that necessarily was spent on that item and recorded that time. Ms. Mann has personal knowledge and memory of the work done on this case and entered time only that she had personal knowledge of and for which there was a record in the file, letters, emails, pleadings, depositions, phone notes, and the like showing the work done. The entries are for minimal amounts of time. CP 1126.

F. The Court Should Reverse the Trial Court's Determination that a Treating Doctor's Legal Consultations Constitute "Treatment" of a Patient's Medical Condition

Dr. Reisenauer's costs incurred above and beyond treatment of Appellant's medical condition involved extensive review of medical charts, production of reports, and several hours of consultation with Appellant's counsel to develop and document her legal case. The Court should consider Dr. Reisenauer's time for comprehensive reports as costs allowed to a prevailing party under RCW 4.84.010(5).

The parties do not dispute that the costs claimed and at issue **do not** pertain to Dr. Reisenauer's treatment of Johnson's medical condition, such as psychological counseling or prescribing medication. Rather, the services Dr. Reisenauer provided are not, under any characterization, of the kind for which a health insurance company would provide coverage, nor for which a defendant would consider "medical damages."

Dr. Reisenauer was not retained as an expert as he continued to treat Ms. Johnson, but he spent an unusually large amount of time responding to issues that arose from 2008 – 2011 in documentation to the employer of Ms. Johnson's disability regarding the need for accommodations, the need for confidentiality of her records, and the need to protect her from her immediate supervisor. In order to address Ms. Johnson's employment status and legal issues, Dr. Reisenauer responsibly

reviewed many documents at several points in time, especially prior to deposition. Dr. Reisenauer was not “employed” by Mann & Kytly; but, like any treating doctor, and “more so” in this case, he knew the client was in litigation and kept extra levels of records of time spent meeting with counsel, documenting, talking with counsel, and reviewing records and literature and authority. Dr. Reisenauer’s billings for services related to the litigation are detailed at CP 1247-1251. The DOT implies that “the medical bills submitted to DOT covered all of the time [Dr. Reisenauer] billed on this case except for some administrative time that he did not bill. CP at 792-93; Respondent’s brief at 45. This is an inaccurate representation of the question posed to Dr. Reisenauer in his deposition and his response thereto:

Q. Okay. And have you -- other than these bills,
18 have you submitted **any bills to anyone else from your**
19 **treatment of Ms. Johnson?**

20 A. I may have billed Ms. Johnson for some
21 administrative work, but -- because I don't generally
22 include the administrative work on this, but I'd have to
23 actually I don't actually do my own billing. I have a
24 lady who does it, so I'd have to go look

Q. **Okay. All right. But would those bills then --**

Page24:

1 **for every session that you had with her, then you**
would have

2 **a corresponding bill?**

3 **Absolutely**

CP 792-793.

Clearly, the import of the question and Dr. Reisenauer's response were related to the billing for "treatment." Counsel for the DOT never inquired as to whether Dr. Reisenauer had bills for legal consultation or services other than treatment. Thus, Dr. Reisenauer's testimony was not false or misleading, as so stated by the DOT's brief at P. 46. Rather, the DOT never asked the question. Again, the sums sought as costs are not bills for medical treatment.

III. CONCLUSION

For the above reasons and those contained in her initial Brief, Appellant Karen Johnson respectfully requests that this Court award her: full fees and costs on her fee petition, the amount of Dr. Reisenauer's legal consultation bills, fees for reconstructed time, and attorney fees for non-segregable time. Johnson also seeks fees and costs on this appeal.

RESPECTFULLY SUBMITTED this 11TH day of FEBRUARY 2013.

MANN & KYTLE, PLLC

By: 

Mary Ruth Mann, WSBA 9343
James W. Kytle, WSBA 35048
Mark W. Rose, WSBA 41916
200 Second Ave. W
Seattle, WA 98119
(206)587-2700
(206)587-0262 Fax

Attorneys for Appellant

PROOF OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served via messenger on the following attorneys:

Tad Robinson O'Neill
Catherine Hendricks
Assistant Attorneys General
Office of the Attorney General
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED this 11TH day of FEBRUARY 2013 in SEATTLE,
WASHINGTON.

s/Danielle J. Rieger
DANIELLE RIEGER, Paralegal

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 11 PM 2:36

Karen Johnson v. State of Washington et al.
No. 69046-9

APPELLANT'S REPLY BRIEF

APPENDIX A

CONFIRMATION RECEIPT

Case Number: 10-2-24681-9 SEA
Case Title: JOHNSON VS WASHINGTON STATE OF TRANSPORTATION
Submitted By: Mary Ruth Mann
Bar Number: 9343
User ID: mannkyle
Submitted Date/Time: 3/26/2012 11:17:34 AM
Received Date/Time: 3/26/2012 11:17:34 AM
Total Cost: \$0.00

DOCUMENTS

Document Type: OTHER (DO NOT FILE UNSIGNED ORDERS) RE SUPPLEMENTAL
AUTHORITIES RE FEE PET

File Name: P's Supplemental Authorities in Support of Fee Petition.pdf

Attachment(s): P's Supplemental Authorities in Support of Fee Petition - Exhibits.pdf

Cost: \$0.00

Document Type: DECLARATION OF SUPPLEMENTAL DECLARATION OF MANN RE
IN SUPPORT OF FEE PETITION

File Name: P's Declaration of Mann re Fees & Costs - Supplemental.pdf

Attachment(s): P's Declaration of Mann re Fees & Costs - Supplemental - Exhibits.pdf

Cost: \$0.00

Printed On: 3/26/2012 11:17:39 AM

Danielle Rieger

From: Jackson, Teresa <Teresa.Jackson@kingcounty.gov>
Sent: Monday, March 26, 2012 3:52 PM
To: 'Amidon, Courtney (ATG)'
Cc: Mary Ruth Mann; Danielle Rieger
Subject: Karen Johnson v. Dept of Transportation; Cause No. 10-2-24681-9 SEA
Attachments: document2012-03-26-072636.pdf

Counsel,

Please see attached correspondence from the Court.

Thank you,

Teresa Jackson

Bailiff to Judge Bruce E. Heller

King County Superior Court

516 Third Avenue - Courtroom E-746

Seattle, Washington 98104

Telephone: 206-296-9085 | Fax: 206-296-0986

E-Mail: Teresa.Jackson@kingcounty.gov

**Superior Court of the State of Washington
for the County of King**

**Bruce E. Heller
Judge**

**King County Superior Court
516 Third Avenue
Seattle, Washington 98104**

March 26, 2012

Via Email

Mary Ruth Mann
200 Second Ave West
Seattle, WA 98119
Attorney for Plaintiff

Tad Robinson O'Neill
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
Attorney for Defendant

RE: Karen Johnson v. State of Washington; Cause No. 10-2-24681-9 SEA

Dear Counsel:

The Court concludes as follows with respect to plaintiff's fee and cost petition:

- (1) The reasonable hourly rate for Ms. Mann and Mr. Kytel is \$425.00; for Mr. Rose \$225; for their paralegal \$125.00;
- (2) Plaintiff is not entitled to fees for hours expended after October 5, 2011 pursuant to the terms of the offer of judgment. *Guerrero v. Cummings*, 70 F.3rd 1111, 1113 (9th Cir. 1995);
- (3) Plaintiff is only entitled fees based on hours that were contemporaneously billed. *Mahler v. Szucs*, 135 Wn.2d 398, 434 (1998).
- (4) Plaintiff is entitled to fees for all hours expended on this case through October 5, 2011, with the exception of time spent on her administrative challenge to her transfer to another state agency.
- (5) Plaintiff is entitled to a multiplier of 1.3.
- (6) Plaintiff is entitled to reimbursement for all costs, with the exception of Dr. Reisenauer's bills for work performed before June 17, 2011 as her treating physician. Dr. Reisenauer did not submit a cost bill that segregated the costs incurred as an expert witness rather than as a treating physician. His costs are therefore not recoverable.

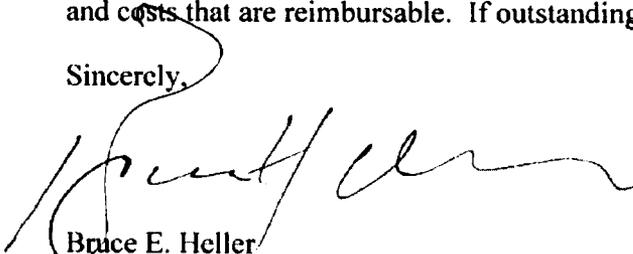
**Superior Court of the State of Washington
for the County of King**

**Bruce E. Heller
Judge**

**King County Superior Court
516 Third Avenue
Seattle, Washington 98104**

The Court requests that the parties attempt to agree on stipulated Findings of Fact and Conclusions of Law consistent with the above findings, including the number of attorney hours and costs that are reimbursable. If outstanding issues remain, the Court will resolve them.

Sincerely,



Bruce E. Heller
Judge

Original: Court File

Karen Johnson v. State of Washington et al.
No. 69046-9

APPELLANT'S REPLY BRIEF

APPENDIX B

		<u>Hrs/Rate</u>	<u>Amount</u>
10/13/2011	MRM Correspondence - draft and final letter re: Hammond Dep	0.17 450.00/hr	75.00
	MWR Work on Opposition to Def's Mtn to Amend complaint.	0.82 225.00/hr	183.44
10/16/2011	MRM Work on review and preparation of response to Offers; review and summarize billing and costs; review correspondence with with client	3.50 450.00/hr	1,575.00
	MWR Work on Opp to Def's Mtn to Amend	4.26 225.00/hr	958.69
	MWR Work on confer with client on settlement proposal;	0.50 175.00/hr	87.50
10/17/2011	MRM Time expended in seeking reasonable attorney fees and costs from the Court if necessary. - Amount Not Yet Known	0.02 450.00/hr	7.50
	MRM This filing is preliminary and subject to review and revision by counsel, correction of any errors and supplementation with any inadequately unrecorded entries. This document is prematurely demanded by Defendant as a condition of settlement and will be supplemented with any final figures to preparing and filing and pursuing a Petition for Fees and Costs	0.02 450.00/hr	7.50
	MWR Work on Opp to Def's Mtn to Amend	2.34 225.00/hr	526.56
	MRM Work on confer with client on settlement proposal; Offer of Judgment; review and final Response to Motion to Amend and Declaration ; email with OC re: terms	3.50 450.00/hr	1,575.00
	MRM Plaintiff seeks a 1.5 Multiplier on the Fees Incurred in this case based on Risk of Contingent Litigation and other factors recognized by Statute as well as outcome achieved. The amount is not yet known and will be determined by the amount of fees finally entered based on a "lodestar" by the Court or by stipulation in this case. Estimate of 1.5 Multiplier		65,000.00
	For professional services rendered	341.78	\$193,707.52
	Additional Charges :		
9/10/2008	FedEx		4.64
12/3/2008	Postage In House		0.42
1/15/2009	Postage In House		9.70

	<u>Amount</u>
6/13/2011 Court Reporter Fees for: deposition of Karen Johnson, Invoice #A9654	769.55
7/5/2011 ABC Legal Services - Invoice No. 20495032	26.25
7/7/2011 Dr. Reisenauer Consultation	700.00
8/16/2011 Laura Opson RN from Johnson funds	1,283.00
Verb8lm Reporting	974.00
8/31/2011 ABC Legal Messenger - Invoice No. 20514870	12.50
9/2/2011 ABC Legal Services - Invoice No. 7216416	73.76
9/6/2011 Chart Review by Goodwin of Reisenauer from Johnson funds	675.00
9/21/2011 ABC Legal Messenger - Invoice No. 20521811	17.50
9/30/2011 ABC Legal Messenger - Invoice No. 20524884	12.50
10/16/2011 Robert Moss Economist from Johnson funds	950.00
Expert Witness Robert Moss from Johnson funds	375.00
Dr. Reisenauer fees for legal consultations - Invoice not yet received (Place Holder .01 entered)	0.01
10/17/2011 Other - such other costs and litigation related expenses as have not yet been billed in an amount not yet known and costs incurred in any fee petition required to obtain such fees and costs as set forth herein	0.01
Total additional charges	\$12,706.97