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NO. 68544-9 I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JULIE BERRYMAN,

Respondent

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant

**OPENING BRIEF OF APPELLANT
FARMERS INSURANCE COMPANY OF WASHINGTON**

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Issue One: The court erred in substituting her personal opinion in place of expert testimony that the force involved could not have caused plaintiff's injuries. The court further erred in excluding Dr. Tencer's expert testimony under *Frye* because his opinions were within his area of expertise, based on the facts of the case, and did not involve novel methodology, and because plaintiff did not offer controverting evidence,

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II. STATEMENT OF THE CASE

A. Background of the Case

This case arose from a low impact, three car collision. Plaintiff Julie Berryman was preparing to turn right into a driveway when the Chevrolet Caprice she was driving was bumped by a 1989 Dodge Caravan driven by uninsured driver Akeen Metcalf. RP 381. The Dodge was pushed into plaintiff's car by a Honda Accord driven by another uninsured driver, Jeffrey Walker. CP 2. The Dodge was not available for inspection, but the Chevy was extensively inspected and photographed. CP 209-210. The photographs show there was no damage to the hitch on the Chevy's bumper and very little—if any—other damage. CP 209, 252-257; 261. Plaintiff did not seek emergency attention after the accident. Her first post-accident "treatment" was a visit to her chiropractor two days later. RP 385.

Plaintiff sued the uninsured drivers, who did not appear in the action. Farmers, the underinsured motorist (UIM) insurer for the Chevy, intervened to assert the defenses that could have been asserted by the uninsured drivers. CP 9;14. Default orders were entered against the drivers and the case was transferred to mandatory arbitration. CP 17; 20.

After discovery, the case proceeded to arbitration where plaintiff was awarded $35,724 in damages. CP 679. Farmers filed a request for a trial de novo. CP 27-32. Plaintiff made an offer of settlement of $30,000

plus costs, which was not accepted. CP 624-625. Trial followed.

B. Defense Expert Dr. Allan Tencer

Defendant retained two experts to testify at trial, Dr. Allan Tencer and Dr. Thomas Renninger. Dr. Tencer's extensive qualifications as a biomechanical engineer were not challenged by plaintiff and have previously been recognized by the Court of Appeals. See, e.g., *Ma'ele v. Arrington*, 111 Wn. App. 537, 45 P.3d 557, 560 (2002). His qualifications are set out in detail in his declaration and resume. CP 326-327. In brief, Dr. Tencer has a doctorate in mechanical engineering. CP 329. He has been a professor in biomechanical engineering at the University of Washington (UW) School of Engineering for 23 years and also teaches in the medical school. CP 330. He has published extensive research relating to forces involved in low impact car accidents. CP 331. He has held federally funded grants for his research and has obtained a patent for auto designs. CP 331. His published work on rear-end accidents includes a biomechanical study of 432 accidents, a study of the seated position of 719 drivers, a study of the dynamics of vehicles in collisions and the forces generated, as well as many others. CP 331.

Dr. Tencer "completely inspected" the Chevy and determined there was no visible damage to the bumper, isolators, or trailer hitch. CP 209, 331. He also reviewed plaintiff's deposition and the police report and

obtained information about the weight of the vehicles involved. CP 330-332. Dr. Tencer then used standard engineering methodology to calculate the maximum speed change and acceleration of the Chevy and the resulting peak horizontal acceleration on plaintiff. CP 324. Based on this information he calculated the forces involved in the impact as having a "peak acceleration (or jolt) of about 3.1g or less", creating a "bending force during impact on Ms. Berryman's neck…in the range of 23 ft-lbs[.]" CP 208. Her lumbar "experienced about 1.6 g of horizontal acceleration from the seat back." *Id.* He concluded that the forces acting on Ms. Berryman's body in the accident were within the range of forces experienced in daily living. CP 208-10. Dr. Tencer did a second set of calculations to verify the accuracy of the assumptions used in calculating the forces in the impact. The second set of calculations confirmed the original findings. CP 324-325. Dr. Tencer emphasized that he used "standard engineering approaches," citing numerous supporting studies. CP 209.

Plaintiff moved to exclude Dr. Tencer's testimony, claiming it was speculative, outside his area of expertise, and based on "novel methodology." CP 177-193. Plaintiff did not offer any evidence that Dr. Tencer's methodology was novel. CP 177-193. She argued that he was not qualified to testify about the strength of the trailer hitch because he

had not done destructive testing on the hitch or designed trailer hitches himself. CP 189-190. She also argued that Dr. Tencer's opinions were speculative because "he did not have any information about the Dodge." CP 189. However, plaintiff offered nothing to rebut Dr. Tencer's testimony that relying on published standards and visual inspection are common engineering practice, or that he did not need information about the Dodge to determine the impact on the driver of the Chevy. CP 329. She similarly failed to offer any evidentiary support for her argument that Dr. Tencer was not qualified to testify about the maximum level of inward force of impact on trailer hitches. CP 190. As Dr. Tencer explained, he has over 20 years of engineering experience, has been involved in the fabrication of metal components, and is familiar with the forces metal components can handle and the meaning of standards such as the SAE (Society for Automotive Engineers) standard for hitches, which he used in his second set of calculations. CP 329. It was not necessary for him to personally test the hitch to perform his calculations. CP 328-9.

Despite the complete lack of support for plaintiff's motion to exclude Dr. Tencer, the motion was granted. A subsequent motion for reconsideration, further explaining that Dr. Tencer's work was based on accepted scientific methods, was not speculative, and was within his area of expertise as a biomechanical engineer, was denied. CP 310-33, 406.

The case was transferred to Judge Barnett for trial. She repeatedly refused to reconsider allowing Dr. Tencer to testify. See, e.g., RP 293, 427-8. Judge Barnett stated that she did not personally believe that the amount of force "had anything to do" with the level of injuries in an accident and added that "I am a firm believer—and always have been—that you cannot—one cannot surmise anything about personal injury from the state of the vehicle. You can total a vehicle and walk away from it or you can have a fender-bender and be injured." RP 191-192.

C. Defense Expert Dr. Thomas Renninger

Thomas Renninger, D.C., performed an independent medical examination of plaintiff. CP 939. He found there was no objective evidence that plaintiff was injured or needed treatment as a result of the accident. CP 939-940. He noted it was not a "significant accident." CP 939. Based solely on plaintiff's subjective complaints, Dr. Renninger stated that treatment for up to six weeks post-accident was the "upper limit of reasonable care." CP 940. He doubted that plaintiff was injured in the accident, and said he would reconsider his opinions if more information became available. CP 941.

Dr. Renninger was subsequently given Dr. Tencer's report and issued an addendum report on May 17, 2011. CP 991-994. The addendum states in part that "[a]fter reviewing the additional information

from Allan Tencer, PhD, in my opinion, Ms. Berryman did not sustain any injury as a result of the accident of February 24, 2007." CP 993. He noted that "ongoing complaints as of October 28, 2010 are not consistent with my understanding of the minor motor vehicle accident of February 24, 2007." CP 993. Dr. Renninger further stated that, on a more probable than not basis, plaintiff did not sustain any injury in the 2007 accident requiring treatment. CP 993.

Plaintiff moved to strike what she called Dr. Renninger's "new opinions," claiming that they were inadmissible because they were untimely. CP 909, 913. That motion was denied. CP 110. However, a subsequent motion in limine to exclude Dr. Renninger's "new opinions," made to a different judge, was granted[1]. CP 366; RP 8, 20. Dr. Renninger was thus forced to testify as to an opinion he no longer held—that up to six weeks of treatment was reasonable—and was not allowed to testify that he did not believe that plaintiff was injured in the accident. He was also prevented from explaining why he thought plaintiff's years of chiropractic treatment were unnecessary. Had he been allowed to do so, he would have testified that there was insufficient force involved in the

[1] The case was originally assigned to Judge Cheryl Carey who decided most of the pre-trial motions. It was transferred to Judge Suzanne Barnett for trial. Judge Barnett decided the motions in limine and was the judge for trial and post-trial proceedings.

accident to cause the type of long-term injury claimed by plaintiff. CP 993-994.

Defense counsel argued to the court that Dr. Renninger considered the lack of damage to plaintiff's car in reaching his conclusions in the initial report, and that precluding any mention of the amount of force in the accident prevented Dr. Renninger from explaining the full basis for his opinions. RP 427-8. The judge declined to change her ruling, but acknowledged at the end of trial that her rulings precluded Dr. Renninger from testifying fully, stating that "[b]ased on those rulings Dr. Renninger was prohibited from testifying fully as he might have regarding the reasons for his opinions." RP 531-32.

While the defense was prevented from presenting any evidence about the force involved in the accident, plaintiff's chiropractors were free to testify about the relationship between the purported severity of the accident and the duration of injuries, and about the mechanics of a rear-end accident and how it causes whiplash injuries. See, e.g., RP 532-574. The problem was exacerbated when, despite the Court's ruling on plaintiff's motion in limine, plaintiff's chiropractor, Perry Chinn, testified that "the primary cause" of plaintiff's injuries was "the high impact rear end accident..." RP 261. Defense counsel argued that Dr. Chinn's statement violated the motion in limine order, opening the door to

testimony about the amount of force actually involved in the impact. RP 290. The court rejected that argument and limited cross examination on the issue to what Dr. Chinn recalled plaintiff telling him about the accident. The Court did not offer a principled basis for her ruling, stating only that "maybe ten out of twelve jurors didn't hear [Dr. Chinn] say high impact..." RP 293. She added that she did not "want to go all over board, because then we have Dr. Ten[c]er back at issue. And, you know, I'm not bringing Dr. Ten[c]er in. We're not going into biomechanics, impact, force of impact, speed, vehicle damage." RP 293.

A second chiropractor called by plaintiff, Dr. Saggau, testified that it is important to know the mechanism of injury, and that she used the information about the accident from plaintiff in determining that plaintiff had a significant spinal injury. RP 346-347. She testified that plaintiff told her there were "loud screeching brakes, slam, and was hit..." RP 346-47. The misimpression of a significant impact was further enhanced by constant references to the low impact accident as a "car crash" by plaintiff and her counsel. (See, e.g. RP 381, 384-85, 387, 398-99, 401, 404). Despite plaintiff presenting this misleading testimony, defendant was still not allowed to present evidence that, contrary to plaintiff's claim, this was not a high impact accident, but instead involved no more force than encountered in "daily living." After hearing only plaintiff's

misleading version of the impact, the jury awarded $36,542 to plaintiff of which half was for "past medical expenses." CP 562.

D. Attorney Fee Award

Plaintiff filed a post-trial motion for attorney fees and costs pursuant to MAR 7.3 and RCW 7.06. CP 626. She claimed to have incurred $140,565 in attorney fees from the time the trial de novo was requested through the date of the verdict, and an additional $11,950 in post-verdict fees. CP 627. She asked for a multiplier of 1.5–2.0 times the base lodestar fee of $140,565 claiming this was a "high-risk, contingency fee" case. CP 627. The purported "high-risk" was that

> This was a minor impact soft tissue injury case with no visible car damage and over $18,000 in treatments mostly for chiropractic visits where Plaintiff's major complaint was subjective in nature. The very nature of the case further increases the risk of a successful outcome at trial.
>
> .....Further making the case risky was the fact that Plaintiff's prior history, including her prior accidents and injuries further created an uncertainty about the likelihood of success."

CP 646-647. In other words, this was a questionable case, of dubious value, which plaintiff never estimated as being worth over the $50,000 mandatory arbitration limit. One of plaintiff's attorneys acknowledged "the very real possibility" of a "defense verdict." CP 760. Nonetheless, plaintiff requested an attorney fee award of $293,080 plus costs.

Defendant opposed the excessive fee request, arguing that there was

no need to have two attorneys present at all proceedings in this simple rear-end trial de novo, that spending 468 hours to prepare and try a four-day damages case that had already been presented at arbitration was excessive, and that the fee request included time that was duplicative or spent on unsuccessful motions such as an ill-conceived effort to obtain Farmers' UIM claims file and to depose the UIM claims representative, even though this was not a bad faith case. CP 812-849. Defendant presented a detailed list of the duplicative time, including annotated copies of the time records pointing out duplicative, excessive, and unsuccessful time. CP 840-850. Defendant also argued that a multiplier was inappropriate because the case was not unusually difficult, controversial, or otherwise complex.

The fee request was more than eight times the amount of the verdict, and excessive on its face. Nonetheless, the court awarded the amount requested, including a 2.0 multiplier. CP 901, 906.

E. Motion for New Trial

Defendant filed a post-trial motion for a new trial under Civil Rule 59, arguing that excluding all evidence and testimony about the amount of force involved in the accident, even after plaintiff introduced false evidence of a "high impact" accident, was erroneous as a matter of law and prejudicial to the defense. CP 796. The motion also argued that it

was error to invoke the *Frye* test to exclude Dr. Tencer's testimony because his methodology was not novel and because there was no evidence contradicting Dr. Tencer's expert testimony that his methods were used and accepted in the relevant scientific community. CP 801. The trial court denied the motion for new trial without hearing or explanation, even though plaintiff had not opposed the motion. CP 898.

III. ARGUMENT

ISSUE ONE: The court erred in substituting her personal opinion in place of expert testimony that the force involved could not have caused plaintiff's injuries. The court further erred in excluding Dr. Tencer's testimony under *Frye* because his opinions were within his area of expertise, based on the facts of the case, and did not involve novel methodology, and because plaintiff did not offer controverting evidence, relying solely on the unsupported speculation of her counsel.

The Court's ruling excluding Dr. Tencer's testimony should be reversed, and the case remanded for retrial, because the court erred as a matter of law in excluding the testimony. The standard of review for a *Frye* ruling is de novo, with the trial court's ruling given no deference. *State v. Kunze*, 97 Wn. App. 832, 854, 988 P.2d 977 (1998); *State v. Gregory*, 158 Wn.2d 759, 830, 147 P.3d 1201, 1239 (2006). The standard of review for other evidentiary rulings is abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.*

A. The Trial Judge Improperly Relied on Her Personal Belief, Rather Than the Evidence, in Excluding All Evidence Relating to the Minimal Force Involved in the Accident

The trial judge based her decision to exclude defense evidence that the minimal force involved in the accident could not have caused plaintiff's alleged injuries on her personal opinion rather than on the evidence submitted in court. RP 192. Judge Barnett's personal opinion about "the state of the vehicle" is irrelevant. There is no indication in the record that the judge is qualified to testify on the relationship between the damage to the vehicle, the force involved in the accident, and plaintiff's injuries. Her role was to rule based on the evidence presented by the parties, not on her personal belief.

Defendant is not claiming judicial bias against the defense, but does contend that Judge Barnett's decision to exclude all evidence about damage to the vehicle and the forces involved in the accident because of her "firm" personal belief was an abuse of discretion: "discretion exercised on untenable grounds or for untenable reasons." To the extent her evidentiary rulings, discussed in the remainder of this brief, are reviewed for abuse of discretion, the rulings must be reversed because they were based on untenable grounds and untenable reasons.

B. The *Frye* Test Was Inapplicable Because Dr. Tencer's Testimony Was Not Novel and His Methods Are Generally Accepted in the Biomechanical Engineering Community

When a challenge to scientific evidence alleges that it is novel, Washington courts apply the *Frye* standard, asking whether "both the underlying scientific principle *and* the technique employing that principle find general acceptance in the scientific community." *City of Bellevue v. Lightfoot,* 75 Wn. App. 214, 222, 877 P.2d 247 (1994) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923)). However, when the evidence does not involve a novel scientific theory, a *Frye* hearing is not appropriate even if the opposing party attempts to raise a *Frye* challenge, as plaintiff did here. *State v. Hayden*, 90 Wn. App. 100, 104, 950 P.2d 1024 (1998); see also *State v. Vermillion*, 112 Wn. App. 844, 862–63, 51 P.3d 188 (2002.

The *Frye* test was inapplicable here because Dr. Tencer did not use novel methodology and his opinions are generally accepted in the engineering community. "Testimony which does not involve new methods of proof or new scientific principles from which conclusions are drawn need not be subjected to the *Frye* test." *State v. Young*, 62 Wn. App. 895, 906, 802 P.2d 829, 817 P.2d 412 (1991). An expert opinion regarding application of an accepted theory or methodology to a particular condition does not implicate *Frye*. *State v. Ortiz*, 119 Wn.2d 294, 311,

831 P.2d 1060 (1992). A necessary aspect of any successful *Frye* challenge is that there be "significant dispute between qualified experts as to the validity of scientific evidence". See *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). It was an error of law to exclude Dr. Tencer's testimony under *Frye* because his methods were not novel and the only admissible expert evidence was that his methods are accepted by the scientific community. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 611-612, 260 P.3d 857 (2011).

Visual inspection of a component to determine that it has not been damaged and relying on the laws of physics are not novel. Using published standards is an accepted approach to engineering problems according to Dr. Tencer, an acknowledged expert and the only expert providing testimony on this topic. Where, as here, the methodology used is not novel, the *Frye* test should not be applied. See *Anderson, supra.*

"The *Frye* standard recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, **the courts must turn to experts in the particular field to help them determine the admissibility of the proffered testimony**." *State v. Greene,* 139 Wn.2d 64, 70, 984 P.2d 1024, 1027 (1999) (emphasis added). The court's function is not to second-guess the scientific community. "Rather, the 'inquiry turns on the level of recognition accorded to the scientific

principle involved – we look for *general acceptance* in the appropriate scientific community.'" *Greene*, 139 Wn.2d at 70; see also, *State v. Phillips,* 123 Wn. App. 761, 766, 98 P.3d 838 (2004). Whether a method is generally accepted may be determined "from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts." *State v. Kunze*, 97 Wn. App. at 853 (footnotes omitted); *State v. Phillips, supra.* The only scientific evidence offered here was Dr. Tencer's testimony that his methods are generally used and accepted. He explained that the SAE standard describes the load capacities for a class 2 trailer hitch, which he described as a "very simple metal structure built to the standard" with no indications it had been reinforced. The SAE standard indicates "the maximum forward impact load that the trailer hitch can withstand before it becomes noticeably damaged." It was a simple matter of calculation to determine the peak force from this information. CP 329. It is unnecessary for an expert in this field to personally test every component of a vehicle "built to well established standards." CP 329. Dr. Tencer has substantial experience with automotive components and design. His training and experience qualifies him to testify, as he did, that it "is not speculative for an engineer to inspect a vehicle component and establish its load capacity based on a well-established standard." CP 329. Dr. Tencer stated that it is

"completely accepted that a component such as a trailer hitch, or any other part of the vehicle, has a standard defining its performance and that if the component is not damaged, it has not exceeded the standard. This is the very reason for having a standard in the first place." CP 329. Plaintiff presented no controverting expert testimony.

The Washington appellate courts have already recognized that Dr. Tencer is a qualified expert, that his work on low-speed accidents and injuries in such accidents is helpful to the trier of fact and within his area of expertise, and is admissible at trial. See, e.g., *Ma'ele v. Arrington*, 111 Wn. App. 537, 45 P.3d 557, 560 (2002). There is a substantial body of literature supporting Dr. Tencer's work, as cited in his bibliography and declaration. CP 211-212. Plaintiff offered no opposing literature, no opposing expert testimony, and no opposing case law. It was an error of law to apply the *Frye* test to exclude Dr. Tencer's testimony, and defendant was gravely prejudiced by this error. The decision should be reversed and the case remanded for a new trial.

C. Dr. Tencer's Testimony Was Not Speculative or Outside His Area of Expertise

Plaintiff also argued that Dr. Tencer's opinions were speculative because he did not inspect the Dodge, and outside his area of expertise because he never designed or tested a trailer hitch. These claims were not

based on or supported by expert testimony, but were merely argument by plaintiff's counsel. Such challenges are evaluated under ER 702. When the methodology is not novel, the testimony must meet only the "relaxed" standard of ER 703: the data must be "of a type reasonably relied upon by experts in the particular field...." *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 216, 890 P.2d 469, 477 (1995).

ER 703 is modeled after Federal Rule of Evidence (FRE) 703. Federal cases interpreting FRE 703 are therefore instructive in interpreting ER 703. See *Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988). The federal courts have held that "the trial court should defer to the expert's opinion of what data they find reasonably reliable" in analyzing evidence under FRE 703. See, e.g., *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1495 (5th Cir.1985); *Peteet v. Dow Chemical Co.,* 868 F.2d 1428, 1432 (5th Cir. 1989). The comments to ER 703 similarly indicate that the expert's opinion on the reliability of the data is a key factor to be considered in evaluating admissibility:

> The expert will ordinarily be in the best position to know what data can be reasonably relied upon, and the court will usually follow the expert's advice on the point. The court's decision will, to a large extent, be based on the degree of confidence it has in the professional caliber and ethics of the expert group involved.

Comments, ER 702 (quoted in *In re Welfare of Bennett*, 24 Wn. App. 398,

403, 600 P.2d 1308 (1979)). Dr. Tencer's professional qualifications are impeccable, as even plaintiff acknowledged. Judge Barnett, however, did not give any deference to his expertise, instead relying on her personal, "firm belief" that the condition of a car after an accident is irrelevant. This was an abuse of discretion.

When a vehicle is no longer available for inspection, the next best alternative is using reliable information about the vehicle. Dr. Tencer is well qualified to determine what constitutes reliable data and to perform calculations based on that data. It is not the role of the court to substitute its personal opinion or the speculations of plaintiff's counsel for uncontroverted expert testimony. Absent contrary authority or expert testimony, the trial court should have deferred to Dr. Tencer's opinion of what data he and others in his field find reasonably reliable.

Dr. Tencer explained that he did not need to see the *Dodge* to calculate the forces in the collision because he could calculate the forces based on his inspection of the *Chevy*. CP 329. There was no evidence from any source that Dr. Tencer was incorrect in stating that he did not need further information about the Dodge or the trailer hitch for his analysis.

Further, plaintiff was incorrect in claiming Dr. Tencer had 'no information' about the Dodge. He obtained the specifications for a 1989

Dodge Caravan from Expert AutoStats. CP 217. He added an additional 280 pounds for a driver and load. CP 218. While these weights are estimates, they are not speculative. As Dr. Tencer explained, in real world engineering problems "you are always dealing with unknowns." CP 219. It is necessary to use estimates to solve real-world problems. In order to check the accuracy of those estimates, Dr. Tencer used two methods of analysis which yielded consistent results, establishing the validity of the underlying assumptions. There could not have been significantly more weight in the Dodge than Dr. Tencer estimated because the two methods of calculations would then not have yielded similar results. CP 220. It was similarly within Dr. Tencer's purview to determine that the SAE standard for the trailer hitch was reliable, and that he could determine by visual inspection that the hitch was not reinforced beyond the standard or damaged in the collision.

In any event, any alleged deficiencies in Dr. Tencer's procedures go to the weight, not the admissibility, of his testimony. See *State v. Copeland*, 130 Wn.2d 244, 272, 922 P.2d 1304 (1996). In *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn. App. 407, 423-424, 241 P.3d 808 (2010), the court rejected a challenge to a temperature test which did not include vibration, where vibration would have been present in the circumstances involved in the case. The test at issue was designed in

accordance to an SAE vehicle standard. The court specifically held that "SAE protocol use demonstrates not just general acceptance but lack of novelty." *Id.* As a result, a *Frye* analysis was unnecessary, and any deficiency in the testing went to the weight, not the admissibility, of the evidence. *Id.*

There is no case law holding that expert opinion testimony is inadmissible simply because the expert uses estimates to fill in for unavailable data. To the contrary, the courts routinely admit expert opinion testimony based on estimates. See, *e.g., Knight v. Borgan*, 52 Wn.2d 219, 228, 324 P.2d 797 (1958)(expert's estimate of speed at time of collision should have been admitted); *Larsen v. Walton Plywood Co.,* 65 Wn.2d 1, 17, 390 P.2d 677 (1964); *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*, 71 Wn. App. 844, 849, 863 P.2d 79 (1993)(lost profits of new business may be based on expert estimates); *Jacob's Meadow Owners Ass'n v. Plateau*, 139 Wn. App. 743, 771, 162 P.3d 1153 (2007)(contractor's repair estimate admissible); *Martin v. Huston*, 11 Wn. App. 294, 300, 522 P.2d 192 (1974)(accident reconstructionist); *McBroom v. Orner*, 64 Wn.2d 887, 889, 395 P.2d 95 (1964)(mechanic testified about force based on inspection of cars); *State v. Tobin,*132 Wn. App. 161, 174-175, 130 P.3d 426 (2006)(forensic accountant's estimate of value of stolen geoducks). Plaintiff offered no support for her claim that Dr. Tencer's

reliance on published standards and visual inspection were improper. It was an abuse of discretion to exclude Dr. Tencer's testimony.

Plaintiff also argued that Dr. Tencer was not qualified to testify about trailer hitches because he had never tested or designed a trailer hitch. CP 269. However, as Dr. Tencer explained, it is not necessary for a biomechanical engineer to have personally tested a particular object to have expert knowledge about its physical properties. Dr. Tencer has extensive metal-working experience and understands the construction and basic strength of metals. CP 224. He has designed and fabricated many different types of metal apparatus, and knows the shear strength of bolts and other materials from using them frequently. CP 224. Dr. Tencer examined the trailer hitch which "was only a quarter inch bar." CP 223. Based on his experience with metals, "it was certainly on the minimum side of strength." CP 224. There was no need to perform physical testing: the manufacturer could not sell the hitch as a class 2 SAE hitch if it did not meet the minimum requirements, CP 223, and physical inspection established that the hitch was not reinforced or excessively strong. CP 224. The real issue was the bolt strength. CP 236. The bolts are what determine the shear force that the hitch can withstand. CP 226. Dr. Tencer could evaluate the strength of the hitch by examining the size of the bolts and the materials based on his extensive training and experience.

The minimum standard and knowledge of the materials is all that is required to evaluate the failure load of the hitch. CP 226; 233.

Dr. Tencer's evaluation of the hitch was just one part of a multi-step analysis of the force of the impact involved in this accident. As an engineer with years of experience in automotives, Dr. Tencer explained that he has substantial knowledge of and experience with metals and their properties. The hitch was significant only in that it has a well-established standard, CP 329, and could be used to verify the accuracy of the first set of calculations. The fact that both sets of calculations yielded similar results indicates that the underlying assumptions were correct.

An expert need not have personally designed and tested every part of every machine involved in a case in order to testify. Rather, the expert needs to have education or experience which qualifies him to testify about matters beyond the knowledge of the layperson. Dr. Tencer has the education and experience to testify about the biomechanics of accidents, including the forces involved in the accidents, and how those forces affect components of a vehicle, such as the bumper and the hitch. He has expertise in metals and their properties sufficient to allow him to testify about the physical properties of the hitch. Any perceived defects in the bases for his opinions go to the weight, not the admissibility, of his opinions and could have been explored on cross-examination. It was

reversible error to exclude his testimony. See *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 35, 991 P.2d 728, 732 (2000); *Moore v. Harley-Davidson Motor Co. Group, Inc.*, *supra.*

ISSUE TWO: Precluding Dr. Renninger's expert medical testimony that plaintiff was not injured in the accident was an abuse of discretion, as was excluding photographs of the car and all reference to the force of impact in the accident. Excluding the evidence prevented the defense from putting on its damages case and unduly favored the plaintiff.

Having successfully excluded Dr. Tencer's testimony, plaintiff followed up with a motion to exclude Dr. Renninger's opinion, based in part on Dr. Tencer's report, that plaintiff was not injured in the accident. Plaintiff argued that Dr. Renninger could not rely on Dr. Tencer's report because it had been excluded. Because Dr. Tencer's report was improperly excluded, it follows that Dr. Renninger was entitled to rely on the report, and it was error to exclude Dr. Renninger's testimony that plaintiff was not injured in the accident and did not require treatment. This opinion was consistent with Dr. Renninger's original opinion in which he noted only subjective complaints and stated several times that he doubted that plaintiff had been injured in what he understood to be a minor accident. Precluding Dr. Renninger from testifying to the opinions he formed after reviewing Dr. Tencer's report essentially forced him to testify to opinions he no longer believed—that up to 6 weeks of treatment

was appropriate—and prevented him from explaining his true opinion and the basis for it.

The Court excluded photographs of the car and trailer hitch involved in the accident, because "property damage is not at issue" and she "firmly believe[d]" that "one cannot surmise anything about personal injury from the state of the vehicle." CP 191-192. The court abused her discretion in excluding all evidence relating to the force involved in the incident based on her personal opinion, as discussed above. Further, photographs of the vehicles involved in an accident are generally admissible and were relevant here to rebut plaintiff's testimony about a "high impact" accident, "squealing brakes" and "car crash." See, *e.g., Murray v. Mossman*, 52 Wn.2d 885, 887-888, 329 P.2d 1089 (1958) (photographs of vehicle damage in personal injury actions are relevant and admissible to show the force of impact); see *also Washington v. City of Seattle,* 170 Wash. 371, 375, 16 P.2d 597, 599 (1932) (photos of accident scene admissible).

The evidence was necessary to allow Dr. Renninger to explain fully the basis for his opinion that plaintiff was not hurt. This was particularly important as plaintiff presented the testimony of three chiropractors about her allegedly "severe" injuries. They testified that the longer the injuries persist, the more severe the underlying accident. Given that plaintiff was continuing to complain about pain over three years after the accident, this

testimony could easily have misled the jury into believing that this was a major accident, rather than a bump so minor that it was equivalent to "the forces experienced in daily life" such as a sneeze.

Defense counsel pursued the issue with the Court, pointing out that Dr. Chinn asked about the impact on his intake form and plaintiff checked "moderate." RP 192-194. Counsel argued that the defense should be allowed to ask why Dr. Chinn sought that information and to explore the basis for Dr. Chinn's opinion that the purported injuries were caused by the accident. The Court still refused to allow the damage to the vehicle or force of impact to be raised. RP 194. The next day, Dr. Chinn testified that the primary cause of the plaintiff's injuries was "the high impact rear end accident." RP 261. He added that his findings were consistent with injuries from a rear-end collision. Defense counsel again raised the issue of admitting the photographs after Dr. Chinn's testimony, but the Court again refused to allow the defendant to raise the issue of force of impact, stating "I'm not bringing Dr. Tencer in. We're not going into biomechanics, impact, force of impact, speed, vehicle damage. But, well, you know, plaintiff can testify what she felt and heard in the car...." RP 293. With this ruling, the plaintiff and her witnesses were free to talk about the purported severity of her injuries, the "crash," the mechanics of a whiplash, and similar topics, while Farmers was precluded from pointing

out that the impact was so minor that there was essentially no damage to the Chevy, and was precluded from presenting the expert testimony that the forces involved were so minor they could not have caused injury.

The problem was exacerbated when plaintiff's second chiropractor witness testified that Ms. Berryman told him she "heard loud screeching brakes, slam, and was hit from another car..." RP 346. As the court had previously noted, this is exactly the type of testimony that could lead a juror to infer that the accident was high impact or more significant than it was. RP 192. The possibility of such a misinterpretation was compounded by plaintiff's constant references to the accident as a "car crash." Additionally, a third chiropractor testified on behalf of plaintiff about the mechanics of a rear-end accident injury—testimony the defense was precluded from putting on through its experts. See RP 532-574.

Cumulatively, the comments about "high impact," "loud screeching brakes," and "car crash," coupled with chiropractic testimony that serious accidents cause longer lasting injuries and about the forces involved in a rear-end accident, made the accident sound as if it involved significant force and speed, which could cause the kind of injuries plaintiff alleged. It was unfair and prejudicial to exclude the photographs and questioning about the impact and the testimony of Drs. Tencer and Renninger while allowing plaintiff to insinuate evidence about the force of the "crash,"

especially because the sole issue before the jury was damages. CP 808-810.

Plaintiff's chiropractor witnesses acknowledged they had no information about the accident other than what they were told by plaintiff. Dr. Chinn testified that plaintiff's injuries were consistent with a high impact accident. He may well have reached a different conclusion about whether plaintiff's injuries were caused by the accident, or whether plaintiff was injured at all, had the defense been allowed to cross-examine him about the amount of force involved in the accident, and to present the evidence of Drs. Tencer and Renninger. And the jury certainly could have accorded different weight to Dr. Chinn's testimony, even if he had not changed it in response to the testimony that Drs. Tencer and Renninger should have been allowed to offer, if defense counsel had been allowed to introduce evidence about the minimal force involved in the accident.

The trial judge herself recognized that her rulings prevented Dr. Renninger from explaining the basis for his testimony. RP 531-32. Nonetheless, the court refused to allow any evidence relating to the force involved in the accident. Her decisions were an abuse of discretion, again requiring that the verdict be reversed and the matter remanded for a new trial.

ISSUE THREE: The court erred in awarding $301,267 in attorney fees and costs in this simple rear-end damages trial de novo case, allowing fees for duplicative, unnecessary, and unsuccessful work, and using a 2.0 multiplier instead of reducing the lodestar amount. The award is excessive and violates RPC 1.5.

A. The Fee Award Is Punitive and Violates RPC 1.5

This case was a simple, low-impact rear-end auto damages case. There were no controversial or complicated issues, and the trial lasted only four days. The plaintiff never valued the case at over $50,000. The jury awarded $36,542, just slightly more than the $35,724 awarded by the arbitrator. In making an apples-to-apples comparison of plaintiff's Offer of Compromise, she did not improve her position at the trial de novo. CP 821-822; see also *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003). Despite this, the court awarded a total of $301,267 in attorney fees and expert witness costs, on top of the costs previously awarded. The court did not deduct any time for duplicative work, overstaffing, or unsuccessful work, and allowed an excessive hourly rate as well as a 2.0 "multiplier" requested by plaintiff. The end result was an excessive fee, violating RPC 1.5. It was a windfall to plaintiff's counsel and an impermissible award of punitive damages against defendant.

Plaintiff's counsel billed 468.55 hours (58.6 work-days at 8 hours per day) to prepare and try a case with a total of seven witnesses, lasting less than four days. This is excessive. To put it into perspective, assuming a

forty hour work week, plaintiff's counsel billed 8 ½ weeks of full-time work on this case. The requested fee of $300 per hour is unwarranted if counsel needed this much time to prepare a simple rear-end de novo damages case. Even an inexperienced attorney should not require over 8 weeks of full-time trial preparation for a short trial on damages from a minor rear-end accident. Plaintiff's counsel may have the right to choose to spend almost 500 hours preparing for a trial de novo, but the defendant should not have to pay the resulting unreasonable bill.

A trial court has broad discretion in determining a reasonable attorney fee; however, the determination of whether the fees are reasonable must be based on the specific circumstances of the case. *Singleton v. Frost*, 108 Wn.2d 723, 731, 742 P.2d 1224, 1228 (1987). That fee requests are too often seen as an occasion for excess was recognized in *Scott Fetzer Co. v. Weeks,* 122 Wn.2d 141, 149–50, 859 P.2d 1210 (1993):

> Over a decade ago, the United States Supreme Court exhorted attorneys to exercise "billing judgment" in fees requests so as to avoid a costly second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Unfortunately, this case demonstrates that the Court's words have not been uniformly heeded.... **[A] claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any, billing judgment.** Finally, both Texas and Washington have **ethical rules mandating that**

> **attorneys charge only a reasonable fee**.... We take this occasion to remind practitioners that **such considerations apply whether one's fee is being paid by a client or the opposing party.**

Weeks at 156 (emphasis added). The *Weeks* court reduced a $200,000 fee request to approximately $22,000, including appellate work. A similar reduction is necessary here if this Court does not believe a new trial is warranted.

RPC 1.5 provides that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee..." and lists a number of factors to consider in determining the reasonableness of a fee request, including the novelty and difficulty of the questions involved, the skill required, the amount involved and the results obtained. A lodestar fee, like all attorney fees, must comply with RPC 1.5. *Weeks*, *supra*. Considering the RPC factors applied to the facts of this case mandates the conclusion that the fee award here is unreasonable and excessive.

Like *Weeks*, which was a "simple commercial case" involving 120 vacuum cleaners, this case was a simple, small case with only 10 hours of testimony. There were no novel or difficult questions involved and no unusual or special skill was required. Even plaintiff evaluated the case at a low value, putting it into mandatory arbitration. The jury verdict was only $36,542. An award of $280,000 in fees to verdict is almost eight

time the value of the case. Adding post-trial fees and expert fees, brings the award to nearly ten times the value of the case. This is not reasonable under *Weeks* or RPC 1.5, both of which require consideration of the relationship between the size of the case and the award requested.

A fee agreement for $300,000 in fees for a mandatory arbitration level rear-end auto case would undoubtedly be voided and the attorney extorting such an agreement subjected to disciplinary proceedings under RPC 1.5. A fee agreement violating the RPCs is against public policy and unenforceable. *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 909, 988 P.2d 467 (1999). An award of fees by the court that would be unconscionable if contained in a fee agreement is improper.

In *Cotton v. Kronenberg*, 111 Wn. App. 258, 271, 44 P.3d 878, 885 (2002), the court found a fee of $42,000 as a nonrefundable retainer for taking a criminal matter through trial to be excessive. A $300,000 fee for a small civil rear-end auto trial is even more excessive, and violates RPC 1.5. What would be an unconscionable fee if charged to plaintiff Berryman is equally unconscionable when assessed against the defendant. Plaintiff's claimed attorneys' fees are eight times the verdict and 20 times what the contingent fee award based on the verdict would be. If the tables were turned and plaintiff had requested a trial de novo, there is no doubt the court would not award defendant over $300,000 in attorney fees and

costs. It is no more appropriate to make such an award against defendant, and the award clearly violates RPC 1.5's prohibition against collecting excessive fees.

B. Calculation of a Reasonable Attorney Fee: the Lodestar Method

Review of an attorney fee award is under the abuse of discretion standard. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). As the *Weeks* court explained, Washington courts utilize the lodestar method in calculating attorney fee awards. 122 Wn.2d at 149. "The starting point for the calculation of the lodestar is the number of hours reasonably expended in the litigation. In calculating this figure, the court **must discount any duplicated or wasted effort by the attorneys**." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 600, 675 P.2d 193 (1983) (emphasis added).

After determining the lodestar, the trial court may adjust the award up or down "to reflect factors not already taken into consideration." *Broyles v. Thurston County*, 147 Wn. App. 409, 452, 195 P.3d 985 (2008). "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." *Bowers* at 598. The trial court "should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Bowers* at 597. Because a lodestar fee is presumed

reasonable, it should be adjusted upwards only rarely. *Mahler v. Szucs,* 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998).

Under the lodestar method, the party seeking fees bears the burden of proving the reasonableness of a fee request. *Weeks* at 151. The lodestar method is merely a starting point. A fee calculated in this way may not necessarily be found to be a "reasonable" fee. *Weeks* at 151. Whether the fee requested is "reasonable" is an independent determination to be made by the Court. *Weeks* at 151; *Nordstrom, Inc. v. Tampourlos,* 107 Wn.2d 735, 744, 733 P.2d 208 (1987). "[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees." *Tampourlos* at 744.

There are additional issues relevant to what constitutes a "reasonable" amount of attorney fees. "The awarding court should consider the relationship between the amount in dispute and the fee requested." *Weeks* at 150. When the lodestar fee greatly exceeds the value of the case, it should be adjusted downward. *Bowers* at 597. Attorney fees are not penalties, but rather a cost of litigation. *Detonics "45" Assocs. v. Bank of Cal.,* 97 Wn.2d 351, 354, 644 P.2d 1170 (1982).

C. The Lodestar Method Applied to This Case

There was significant overstaffing and duplication of effort by

plaintiff's counsel in this case, but the court failed to deduct even a minute of the excessive and duplicative time. Even though this was a simple rear-ender damages case, plaintiff had two attorneys working up the case and attending trial. Both attorneys billed for trial and trial preparation. Similarly, both billed for the same pre-trial tasks. For example, both billed 4.5 hours to attend Dr. Tencer's deposition. Mr. Epstein billed an astounding 30 hours to prepare for the deposition, which was only four hours long.

The two attorneys billed a combined total of 97.4 hours for "client and witness prep" even though there were only 6 witnesses for plaintiff, and the deposition of one of those had already been perpetuated and time for that preparation billed separately. Additional "witness preparation time" is included in block billing with "attend trial." This is clearly excessive "witness prep" for less than 10 hours of trial testimony. Two of the witnesses, plaintiff's mother and boyfriend, testified very briefly and their testimony was limited to their observations of how the accident affected the plaintiff. RP 321-341. Plaintiff herself testified primarily about her injury and how it affected her, which should not have required ten hours of preparation, particularly as she had already testified at arbitration. RP 379-420.

97.4 hours for witness preparation is unreasonable, averaging out to

16.2 hours per witness, excluding the additional time spent on trial days. No competent attorney requires 16 hours to prepare a boyfriend to testify for 20 minutes about his girlfriend's injuries, or to prepare the testimony of treating chiropractors. Indeed, based on the evidence submitted on expert costs, CP 664, the chiropractors did not spend *any* time with the attorneys in preparation unless they did so gratis, an unlikely proposition.

Fees were also awarded for time spent on motions on which plaintiff did not—and should have known she would not—prevail, including 43.1 hours improperly attempting to obtain Farmers' UIM claims file and depose the claim representative. Attorneys claiming substantial expertise should have known that the insurer's claims file was not discoverable in a non-bad faith case where the UIM insurer is simply an intervenor.

Mr. Kang claimed an additional 33.50 hours to "prep for trial," separate from time billed for standard pre-trial work such as motions in limine. Mr. Epstein also billed 13.4 hours for otherwise undescribed "trial prep." There is a 4.8 hour ($1440) entry on 3/19/11 simply for "Review and analyze" with no indication of what was reviewed. There were also entries for 1.5 hours spent on a motion to continue the trial date to accommodate plaintiff counsel's schedule which should not be chargeable to the defense. The 18.5 hours billed for her unsuccessful partial summary judgment motion on damages should be disallowed as well.

Plaintiff claimed in her fee request that counsel "spent a significant amount of time researching the law...." CP 631. There were no unusual or difficult issues in this case that should have required "significant" research time, particularly as plaintiff's counsel purport to be extremely experienced. The research time should be reduced as should the time spent propounding discovery, since discovery requests in a rear-end auto case are standard and do not need to be re-drafted for each new case. CP 836, 973-979.

The amount of time billed for simple tasks was excessive. For example, Mr. Kang billed 3.5 hours for what appears to be a stock motion in limine to exclude testimony about a prior asymptomatic condition, and 10.7 hours for 5 1/2 pages of simple briefing, the bulk of which was block quotations from depositions, on a motion "re subsequent non-related ankle injury, police report and photographs." CP 357-65, 375-80. He billed 1.6 hours to "prepare pleadings re: order on joint trial readiness," which typically involves signing a statement of readiness. CP 844. It is not possible to tell exactly how much time was billed opposing the motion to exclude mention of Farmers, but it appears in entries on 11/1 and 11/2 bundled with other tasks, and billed at 9.6 and 6.8 hours. He billed again to "complete trial readiness doc" (among other things) on 12/7, this time at a more reasonable .4 hours. CP 845. Even though literally dozens of hours are billed for motions in limine, witness preparation, preparing ER 904, and similar trial

preparation, there are additional generic "preparation for trial" entries on 12/11, 12/12, and 12/13, totaling 16.7 hours. CP 845-46. Both attorneys billed time to prepare Dr. Bangerter for deposition (CP 843, 849). Time was billed to "research re: awarding deposition costs," something that should be known by experienced counsel, not chargeable to defendant. CP 847. The cost of preparing pleadings to correct mistakes in the original cost bill similarly should not be put on defendant's tab.

Annotated copies of the time records submitted by plaintiff in support of her fee request were provided to the trial court to illustrate the deductions that should have been made. CP 840-850. The trial court's failure to deduct even a minute of time from the duplicative, unnecessary and unproductive hours billed violated the rule set out in *Bowers* and was an abuse of discretion.

D. A 2.0 Multiplier to the Lodestar Fee Was an Abuse of Discretion

Applying a 2.0 multiplier to the lodestar fee was also an abuse of discretion. As noted above, upward adjustment of the lodestar figure should be done only in rare instances. "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." *Bowers* at 598. In adjusting the lodestar to account for the likelihood of success, "the court must assess the likelihood of success at the outset of the litigation." *Id.* It is expected that

the hourly rate in large part accounts for this element. *Bowers* at 541.

This case was a rear-end car accident. It is well known that the following driver is liable for damages caused by a rear-end accident, absent unusual circumstances not present here. See, e.g., *Ryan v. Westgard*, 12 Wn. App. 500, 505, 530 P.2d 687(1975). Thus, from the outset, plaintiff's counsel should have expected that they would receive some attorney fees. They argued below that the case was risky because plaintiff had no wage loss, prior injuries, and only chiropractic treatment. These are all factors that could limit the amount of damages recoverable, but not the fact that some damages would more probably than not be awarded. A contingency enhancement is not appropriate here because it was likely from the outset that plaintiff would recover and the hourly rate awarded is much higher than is typically charged for auto work and therefore already factors in that this was a contingent fee case.

Plaintiff argued that this was a "risky" case because there was a good chance of a defense verdict and the UIM insurer "vigorously defended," and asserted that this made a multiplier appropriate. She also argued that there should be a multiplier for contingent fee cases because there is a risk of not being paid in such cases. These arguments misapprehend the principle behind multipliers. There is no *per se* multiplier for contingent cases, nor are multipliers awarded because

plaintiff prevailed on a case with a low probability of success. A litigant's "risk" for the purposes of assessing a multiplier is not measured by the weakness of her case. This would provide a perverse incentive to take on meritless cases in the hope of receiving an attorney fee windfall. This is not the purpose of the multiplier in the rare instances a multiplier is deemed appropriate. See, e.g., *Bowers,* 100 Wn.2d at 598-99.

Counsel undoubtedly assumed some risk taking on this case given its facts and what counsel admits to have been a strong chance of a defense verdict (indicating a non-meritorious case), but that alone does not warrant a lodestar multiplier. This is particularly true where the risk assumed is already accounted for in the generous $300/hour rate the trial court used. This was a run-of-the-mill personal injury case with no complex or unusual issues. Further, courts have already rejected the bad incentives that would arise if there was a *per se* contingency fee multiplier, as plaintiff impliedly requests. The United States Supreme Court in *City of Burlington v. Dague,* 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), addressed a contingency multiplier in the context of a federal attorney fee statute. The *Dague* Court reasoned that the lodestar calculation is presumptively reasonable and that a contingency multiplier would "likely duplicate in substantial part factors already subsumed in the lodestar." 505 U.S. at 562. The Court explained that the

risk of loss in a particular case is the product of (1) the legal and factual merits of the claim and (2) the difficulty of establishing those merits. *Id.* The difficulty of establishing the merits of the case is already reflected in the lodestar amount because the more difficult a case is, the more hours an attorney will have to prepare and the more skilled an attorney will have to be to succeed. *Id.* A contingency enhancement would result in double payment. *Id.* at 563. With regard to the relative merits of the claim, the Court reasoned that this is a factor that always exists to some degree. *Id.* Applying contingency or risk multipliers results in a "social cost of indiscriminately encouraging nonmeritorious claims to be brought as well [as meritorious ones]." *Id.* The fact that plaintiff's injury claim could be perceived as lacking merit is not a basis for a multiplier.

Multipliers are generally reserved for statutory claims brought in furtherance of the public interest. See, e.g., *Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008) (addressing RCW 49.60.030(2)). The prospect of a multiplier encourages private enforcement of these statutes. *Martinez v. City of Tacoma,* 81 Wn. App. 228, 235, 914 P.2d 86 (1996). Outside this narrow context, multipliers are generally inappropriate. For example, when Justice Richard Sanders sued the State of Washington under the Public Records Act, he asked for a "multiplier of 1.5 because his attorneys worked on a contingency." *Sanders v. State*, 169

Wn.2d 827, 869, 240 P.3d 120 (2010). The trial court rejected Justice Sanders' effort to apply a multiplier for the benefit of his attorneys, and the Washington Supreme Court affirmed. The *Sanders* court reasoned:

> The uncertain nature of a contingency fee contract may merit multiplying the lodestar product by some amount. *E.g.*, *Broyles*, 147 Wn. App. at 452-53, 195 P.3d 985 (using a lodestar multiplier in a contingency fee case). But, *Mahler* suggests that adjustments of the lodestar product are discretionary and **rare**. It was not an abuse of discretion for the trial court to refuse to give Justice Sanders the benefit of the exception when the rate times hours product already greatly exceeded the contingency fee for the case.

Id. (emphasis added). The *Sanders* lawsuit was the result of years of diligent work by the attorneys on both sides, with Justice Sanders' attorneys taking a big risk that they would never see a dime for their work. It was a case of broad public import, dealing with matters of the separation of powers and government transparency. Yet Justice Sander's request for a multiplier was still denied. The present case is about a minor bump to the back of plaintiff's car as she turned into her driveway. If a multiplier was not justified in the *Sanders* case, it surely is not justified here.

E. In Fact, the Lodestar Should Be Adjusted Downward

Given that the lodestar award is supposed to reflect a reasonable number of hours multiplied by a reasonable hourly rate, the court should have applied a *downward* adjustment to the claimed fees, not a 2.0 multiplier. Applying a downward adjustment of a lodestar fee was addressed by the *Weeks* Court. In determining that the amount of

attorneys' fees awarded by the trial court in that case was excessive, the *Weeks* court held:

> What is particularly obvious in this case is **the gross disparity between the amount requested, and even the amount actually awarded by the trial court, when compared to the amount in controversy.... [A] lodestar figure which grossly exceeds the amount involved should suggest a downward adjustment**.... While the amount in dispute does not create an absolute limit on fees, **that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.**

122 Wn.2d at 150 (emphasis added). Calculating a 40% contingent fee on the jury verdict in plaintiff Berryman's favor gives a fee of $14,616.80 if one does not first deduct costs. The court's use of a 2.0 multiplier to award $291,950 in fees created an award 8 times the amount of the verdict and 20 times what plaintiff counsel's contingent fee would have been. This is exactly the kind of discrepancy between the lodestar award and the amount at issue that raised concern in *Weeks*. When the lodestar fee vastly exceeds the value of the case, the lodestar fee is unreasonable and should be adjusted downward.

As discussed above, the bills submitted by plaintiff's counsel with excessive and duplicative time deducted are located at CP 840-850. The total hours, after the deductions (which err on the side of generosity to plaintiff), was 137.9 hours, a substantial amount of time for a short trial de novo on damages in a minor rear-end collision case, and well over double

the 60 hours spent by the defense attorney. CP 853. At plaintiff's requested $300 per hour, the lodestar fee would be $41,370, which exceeds the verdict. This is three times the contingency fee amount on the verdict. At a more reasonable $200 per hour, the fee total would be $27,580, which is still double the contingency fee based on the verdict.

The lodestar figure should be even lower. A generous but more reasonable number of hours for preparation and trial would be 90 hours. This is still 30 hours, or 50%, more time than defense counsel spent on the same case. The trial court should have reduced to 90 the number of hours allowed, or at the very most, 137.9 hours. This is similar to what the *Weeks* court did in reducing a $200,000 fee request to roughly $22,000.

The hourly rate of $300 is higher than typical in King County for simple trial work, although, since most auto cases are done on a contingent fee basis, it is difficult to find practitioners actually charging an hourly rate for such work. While plaintiff's counsel here claim to charge $300 per hour, in reality most of their work is done on contingent fee. They do not identify or claim a long list of clients actually paying them that hourly rate. In other simple tort matters and arbitrations, $200 per hour is considered an excellent hourly rate. CP 869. At $200 per hour for 90 hours, plaintiff's fee award would be $18,000. This is a very generous award for a $36,000 case—50% of the total verdict. If the $300 figure is used as the hourly rate for 90 hours,

the award would be $27,000, which is 158% of the verdict after deducting costs. A contract for a 158% contingency fee would doubtless be considered unconscionable and would not be enforced by the Court. Of course, as discussed above, the lodestar award would be even more disproportionate if the higher 137.9 hour figure is used.

Plaintiff's counsel took on this case with the expectation of a fee substantially less than that if they prevailed at the arbitration: 40% of the $50,000 maximum they could have received at arbitration, after deducting costs, would have been $16,273.20. Plaintiff's counsel is not entitled to a windfall of 18 times that amount simply because defendant is paying the fee. In the interest of judicial economy, this Court should adjust the fee, if this Court does not order a new trial; remand on the attorney's fee issue only would result in some new trial judge having to learn the case given that Judge Barnett has now retired.

ISSUE FOUR: The trial court erred in denying the motion for new trial under Civil Rule 59(a)(1), (8), and (9) because excluding all evidence and testimony about the amount of force involved in the accident even after plaintiff introduced false evidence of a "high impact" accident was error as a matter of law and/or abuse of discretion and prejudicial to the defense.

Defendant moved for a new trial under CR 59, which provide that a motion for new trial may be granted for:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion,

by which such party was prevented from having a fair trial.

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done

See CP 796-807. The motion for new trial argued that excluding all evidence and testimony about the amount of force involved in the accident, even after plaintiff introduced false evidence of a "high impact accident" was error as a matter of law. Errors of law are the basis for a new trial when they are prejudicial to the rights of the objecting party. *State v. Higgins*, 75 Wn.2d 110, 449 P.2d 393 (1969). Improperly applying the *Frye* test to exclude Dr. Tencer's testimony was clearly prejudicial. Further, even a series of minor errors, each harmless by itself, justifies a new trial if the cumulative effect prejudices a party. *Jazbec v. Dobbs*, 55 Wn.2d 373, 375, 347 P.2d 1054 (1960).

There can be no doubt that it was severely prejudicial to the defense not to have the testimony of Dr. Tencer about the negligible impact involved in the accident and Dr. Renninger's testimony that plaintiff was not injured in the accident, particularly after Dr. Chinn testified that it was a high impact accident and Dr. Saggau testified that there were "loud screeching brakes, slam, and was hit..." RP 346-7. Dr. Saggau explained that it is important to know the mechanism of injury, and that she used the information about the accident from plaintiff in determining that she had a

significant spinal injury. RP 347-348. Defendant was precluded from cross-examining Dr. Saggau, and plaintiff's other chiropractors, about the minor force involved in the accident and, as argued above, Dr. Renninger was prevented from explaining that his opinion was based in part on the minor nature of the impact.

This prejudice was compounded by excluding pictures of the Chevy and preventing defense counsel from even questioning witnesses about the force of the impact. Excluding all relevant information about the impact left plaintiff free to exaggerate her injuries and prevented effective cross-examination based on the minimal force involved.

The standard of review on appeal for denial of a motion for new trial is "abuse of discretion." *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856, 869 (2000). However, the test for abuse of discretion is different when examining the denial of a motion for new trial. In this setting, "[t]he criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?'" *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quotation omitted). Denial of a motion for new trial is viewed "more critically" than grant of such a motion because "a new trial places the parties where they were before, while a decision denying a new trial concludes their rights." *State*

v. Taylor, 60 Wn.2d 32, 41–42, 371 P.2d 617 (1962); *Byerly v. Madsen*, 41 Wn. App. 495, 499, 704 P.2d 1236 (1985).

Defendant here was denied a fair trial because the trial court excluded all evidence of the negligible impact involved in the accident. The trial judge's rulings, based on her personal beliefs, prejudiced the defense. The verdict should be set aside and the case remanded for a new trial.

IV. CONCLUSION

The trial court erred as a matter of law in applying the *Frye* test to exclude Dr. Tencer's testimony. The court abused its discretion in excluding Dr. Tencer's testimony under ER 702 and in precluding Dr. Renninger's testimony based on Dr. Tencer's report. The court further abused its discretion in refusing to allow testimony on the minimal force involved in the accident after Dr. Chinn falsely testified that this was a "high impact…accident." The cumulative result of the errors was to deny defendant a fair trial. The court also erred in awarding an attorney fee which grossly exceeded the value of the case and included large amounts of wasteful and duplicative time. The case should be reversed and remanded for new trial. In the alternative, the fee award should be reduced to a reasonable fee and judgment entered accordingly.

DATED this 18th day of June, 2012.

SOHA & LANG, P.S.

By: _____

Nathaniel Smith, WSBA # 28302
Nancy K. McCoid, WSBA #13763
Attorneys for Appellant Farmers
Insurance Company of Washington

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On June 18, 2012, a true and correct copy of **OPENING BRIEF OF APPELLANT FARMERS INSURANCE COMPANY OF WASHINGTON (with attached Declaration of Service)** was served on the parties in this action as indicated:

Patrick J. Kang
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Attorneys for Plaintiff
Via Hand Delivery

Howard M. Goodfriend
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Attorneys for Plaintiff
Via Hand Delivery

Executed on this 18th day of June, 2012, at Seattle, Washington.

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

Helen M. Thomas
Legal Secretary to Nathaniel J.R. Smith

APPENDIX I

Honorable Suzanne Barnett

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

JULIE BERRYMAN, an individual

Plaintiff,

v.

AKEEM METCALF and JANE DOE METCALF, and the marital community comprised thereof, and RITA METCALF and JOHN DOE METCALF, and the marital community comprised thereof and JEFFREY WALKER and JANE DOE WALKER, and the marital community comprised thereof, and MICHAEL A. WARD and JANE DOE WARD, and the marital community comprised thereof; FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendants,

NO. 10-2-02865-0 KNT

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ATTORNEY'S FEES AND COSTS

THIS MATTER having come before the Court on Plaintiff's Motion for Award of Fees and Costs Pursuant to MAR 7.3 and RCW 7.06; the court having considered Plaintiff's motion with supporting declarations of Patrick J. Kang and exhibits attached thereto, Jason Epstein and exhibits attached thereto, Julie Berryman, Scott Blair, Thomas Bierlein, Brad Fulton, and Brad Moore; the Court having also reviewed Defendant's response, Plaintiff's reply, and the file and

ORIGINAL

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pleadings herein; now, therefore, the court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This personal injury case went through mandatory arbitration before attorney Leslie A. Wahlstrom, who entered an MAR award in the amount of $35,724.00 on December 16, 2010. Defendant then timely filed a Request for Trial De Novo and Jury Trial on December 29, 2010. Plaintiff then timely made an offer of compromise pursuant to RCW 7.06.050 on January 25, 2011, offering to settle the case for $30,000.00. Ten days passed and Defendant failed to accept the Offer of Compromise. As a result, the $30,000.00 therefore became the amount to determine if Defendant subsequently improved its position upon trial de novo.

2. On December 14, 2011, this matter was tried in King County Superior Court before the Hon. Suzanne Barnett. Around noon on December 20, 2011, the matter went to the jury. Two (2) hours later, the jury returned a verdict awarding Plaintiff $36,842.00.

3. On January 25, 2012, this Court entered judgment of the jury verdict in the amount of $36,842.00. The Court awarded costs pursuant to RCW 4.84.010 in the amount of $6,418.14, for a total judgment of $43,260.14.

4. The $36,842.00 verdict amount exceeded both the MAR award as well as Plaintiff's Offer of Compromise.

5. Plaintiff's counsel has filed declarations with supporting documentation and time sheets detailing the time and effort they put into this case. Patrick Kang expended 316.0 hours on this case at his rate of $300.00 per hour. Jason Epstein expended 152.55 hours on this case at his rate of $300.00 per hour. These hours do not include the times spent for work before the Request for Trial De Novo.

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6. This Court finds Patrick Kang's time expended for this case after the Request for Trial De Novo. Similarly, the Court also finds the time expended by Jason Epstein to be reasonable.

7. The Court further finds that $300.00 per hour for Patrick Kang's time and $300.00 per hour for Jason Epstein's time to be reasonable based on the declarations of Scott Blair, Thomas Bierlein, Brad Fulton, and Brad Moore, as well as the skill level and reputation of Plaintiff's counsel.

8. Plaintiff has incurred taxable costs pursuant to RCW 7.06.060 in the amount of $9,317.00 as related to all expert testimony after the Request for Trial De Novo was filed. The court finds reasonable that all expenses related to expert witness testimony were reasonably necessary.

9. Plaintiff's counsel spent an additional 42.5 hours of times for post-verdict work, including the Motion for Entry of Judgment, the Motion for Attorney's Fees and Costs, preparing the Findings of Fact and Conclusions of Law, the Declarations of Patrick Kang and Jason Epstein and the exhibits attached thereto, and the Declarations of Scott Blair, Thomas Bierlein, Brad Fulton, and Brad Moore.

10. This Court further finds that the hours expended by Patrick Kang and Jason Epstein for work post-verdict, including this Motion, are also reasonable.

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

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12. The Court also find that the Lodestar should be adjusted upwards to reflect the contingent nature of this case based on the substantial risks borne by Plaintiff's counsel in recovering no compensation or inadequate compensation to pay expenses and attorney's fees.

13. The Court therefore finds that a Lodestar multiplier of 2.0 is appropriate in this case. However, the multiplier shall only apply to fees incurred up to the time the jury verdict was entered.

14. Pursuant to RCW 7.06.060, Plaintiff may recover all expenses related to expert witness testimony. Plaintiff incurred The Court also finds that,

From the foregoing FINDINGS OF FACT, the court makes the following CONCLUSIONS OF LAW:

CONCLUSIONS OF LAW

1. By failing to return a jury verdict in its favor greater than Plaintiff's Offer of Compromise ($30,000.00) subsequent to the MAR award, Defendant Farmers failed to improve its position. Pursuant to MAR 7.3 and RCW 7.06.060, Plaintiff is therefore entitled to her reasonable attorney's fees and costs.

2. Having failed to improve its position from the Offer of Compromise, this Court concludes as a matter of law that Plaintiff is entitled to reasonable attorney's fees up to the time of judgment being entered in the amount of $140,565.00.

3. The Court further concludes as a matter of law that Plaintiff is also entitled to post-MAR costs in the amount of $9,317.00.

4. The Court further concludes as a matter of law that Plaintiff is also entitled to **$11,950.00** as reasonable attorney's fees for the post-judgment work, including motion for entry of judgment and the motion for attorney's fees and costs.

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5. The Court further concludes as a matter of law that under the factors enumerated in *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597-602 (1983), and all the factors provided by Plaintiff in her motion and the supporting declarations as well as considerations of resolving Court congestion, a Lodestar multiplier of 2.0 is appropriate here. As a result, the Lodestar amount set forth in paragraph 2 in the amount of $140,000 shall be adjusted upwards by a multiple of 2.0 for an adjusted Lodestar amount of $280,000.

6. The total reasonable attorney's fees awarded to Plaintiff shall be $280,000 + $11,950 (post-judgment) + $9,317 (costs) = $301,267.

11. An Order against Defendant Farmers shall be entered accordingly.

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

DONE ~~IN OPEN COURT~~ this 1 day of ~~February~~ March, 2012.

SUZANNE BARNETT

Presented by:

PREMIER LAW GROUP, PLLC

Theresa M Price, WSBA #44264 for
Patrick J. Kang, WSBA #30726
Counsel for Plaintiff

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