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No. 68544-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JULIE BERRYMAN,

Respondent,

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE M. BARNETT

BRIEF OF RESPONDENT

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STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Farmers Insurance Company sought trial de novo of an arbitrator's award of $35,724 in favor of respondent Julie Berryman for personal injuries suffered in a rear-end car accident, and then rejected Berryman's $30,000 settlement offer. Two superior court judges exercised discretion to exclude Farmers' expert testimony about the forces involved in a rear-end car accident as speculative and lacking sufficient factual foundation. A superior court jury awarded Berryman $36,542, more than the arbitrator's award and more than Berryman's offer. The trial court awarded Berryman her lodestar attorney fees under MAR 7.3 and applied a multiplier, entering extensive findings that her attorneys were compelled to expend substantial time responding to Farmers' litigation tactics and faced a substantial risk of recovering nothing.

This court should reject Farmers' challenges to the trial court's discretionary decisions to exclude speculative evidence, to deny Farmers' motion for a new trial, and to award Berryman her attorney fees. It should affirm the judgment and award Berryman her fees on appeal.

II. RESTATEMENT OF ISSUES

1. Does a trial court abuse its discretion by excluding expert testimony regarding the force of a car accident that was based entirely on the lack of damage to a trailer hitch when the expert could not determine the maximum amount of force the trailer hitch could withstand?

2. Does a trial court abuse its discretion by denying a motion for a new trial that is premised on the trial court's exclusion of speculative testimony regarding the force of a car accident?

3. Does a trial court abuse its discretion in granting under MAR 7.3 and RCW 7.06.060 the attorney fees that plaintiff incurred in responding to the defendant's aggressive litigation strategy in seeking trial de novo of an arbitration award, when the defendant failed to improve its position and the award is supported by extensive findings that the fee is reasonable under the lodestar method?

4. Does a trial court abuse its discretion by granting a contingency enhancement to the attorney fees awarded under the lodestar method after finding the plaintiff's attorneys faced a substantial risk of receiving no compensation because of the

defendant's vigorous denial of all damages in unsuccessfully pursuing a trial de novo from an arbitration award?

III. RESTATEMENT OF FACTS

A. Respondent Julie Berryman Needed Substantial Chiropractic Treatment After Being Injured In A Rear-End Car Accident.

On February 24, 2007, a Dodge Caravan struck the rear of respondent Julie Berryman's Chevrolet Caprice as she pulled into her mother's driveway. (RP 380-81; CP 209) A Honda Accord had rear-ended the Dodge and pushed it into Berryman's Caprice. (CP 2, 209) That night Berryman felt significant pain in her neck and back, took painkillers, and iced her injury. (RP 382) Berryman's injury worsened over the next few days, causing pain when she walked. (RP 383-84)

Believing she had a whiplash injury from the accident, Berryman went to see a chiropractor, Dr. Saggau, two days after the accident. (RP 384-86) Because her pain and soreness did not resolve, Berryman saw Dr. Saggau for a little over a year. (RP 392) When Berryman's symptoms worsened in June 2008, she went to see another chiropractor, Dr. Chinn. (RP 239, 392, 399-401) At trial she complained of continuing pain for which she continues to receive treatment from Dr. Chinn's office. (RP 405-06)

B. Farmers Insurance, Berryman's Uninsured Motorist Insurance Carrier, Intervened In Berryman's Lawsuit To Assert The Defenses Of The Uninsured Drivers.

Berryman obtained counsel on a contingency basis and sued the other drivers involved in the accident, both of whom were uninsured. (CP 10, 666-69) Berryman's uninsured motorist carrier, respondent Farmers Insurance Company of Washington, intervened to assert the defenses of the other drivers. (CP 7-16) Berryman sought mandatory arbitration of her claim, agreeing to limit her damages to $50,000. (CP 17-21) The arbitrator awarded Berryman $35,724. (CP 679)

Farmers requested a trial de novo in the superior court, and the case was assigned to Superior Court Judge Cheryl Carey. (CP 27-29, 658) Berryman made a $30,000 offer of compromise under RCW 7.06.050 and MAR 7.3. (CP 624-25) Farmers did not respond to the offer. (CP 655)

C. Judge Carey Excluded One Of Farmers' Experts Because His Opinions Were "Unreliable And Based On Speculation."

In preparation for the trial de novo Farmers retained two expert witnesses, Dr. Thomas Renninger and Dr. Allan Tencer, to support its theory that Berryman suffered no damages as a result of the rear-end collision. (CP 442-43) Farmers retained Dr. Tencer to

opine about the force involved in the accident, and Dr. Renninger, a chiropractor, to examine Berryman regarding her injuries and their relationship to the accident. (CP 60-73, 207-12, 442-43)

Tencer explained in his report that because the car that rear-ended Berryman was no longer available for inspection, any determination of the force involved in the accident must be based solely on his visual inspection of Berryman's Caprice. (CP 209, 235) Tencer examined the trailer hitch attached to the rear of the Caprice, which showed no signs of damage. (CP 209) Tencer did not perform any tests on the trailer hitch or any similar trailer hitches and did not know who manufactured the trailer hitch on Berryman's car. (CP 223-25, 237) Nor did Tencer consult any studies regarding the strength of trailer hitches. (CP 225)

Tencer's initial calculation required assumptions about the weight and speed of the Dodge that struck Berryman's Caprice. (CP 209, 219) Tencer did not know the actual weight or speed of the car that struck Berryman. (CP 218-19, 226-27) Tencer acknowledged that his analysis included "a lot of assumptions about the Dodge." (CP 230) Tencer claimed that the force of the

accident could not have exceeded the forces experienced in normal day-to-day activities. (CP 208-10)

Tencer then performed a second calculation to confirm his assumptions about the Dodge. (CP 209, 219-20) Tencer stated that had the force been greater than his first calculation it would have exceeded the amount of force the trailer hitch was required to withstand under a Society of Automotive Engineers ("SAE") standard and that the hitch would have showed signs of damage. (CP 208-10, 221-23, 230) However, Tencer acknowledged that the SAE established a minimum standard, and not the maximum amount of force the trailer hitch could withstand. (CP 222-23) Tencer further acknowledged that he could not state "specifically" what the maximum strength was based on his visual inspection. (CP 236 ("Q: What's the maximum force that the trailer hitch could have withstood? A: I'm not sure I can tell you specifically. I can tell you that it looked to me like it just met the minimum standard, that's all")) Without the trailer hitch calculation, Tencer could not verify the accuracy of his assumptions about the weight and speed of the Dodge. (CP 209, 220, 227, 230)

Berryman moved to exclude Tencer's testimony because it was unreliable and based on speculation, based on information outside his area of expertise, and based on a novel method not generally accepted within the scientific community. (CP 177-93) Tencer then changed his deposition testimony that the SAE standard established the minimum amount of force the trailer hitch could withstand (CP 222-23), to state that the SAE standard established the maximum amount of force the hitch could withstand. (CP 261) Judge Carey granted the motion to exclude Tencer's testimony as "unreliable and based on speculation using methods and information that is outside his area of expertise and not generally accepted within the scientific community." (CP 283-84) Farmers filed a motion for reconsideration, which Judge Carey denied. (CP 406)

Farmers then filed an addendum to Dr. Renninger's original report, which had stated that there was no objective evidence that Berryman was injured in the car accident, and that based on "the minor nature of the accident" up to six weeks of treatment was reasonable care for "any possible injury associated with the accident." (CP 939-40) In his addendum, Renninger now stated

that based on Tencer's opinion, he believed "Berryman did not sustain any injury as a result of the accident." (CP 993)

Berryman moved to exclude Dr. Renninger's new opinion that Berryman suffered no injuries because it was disclosed after the discovery deadline and after Renninger's deposition, more than 45 days after Renninger's examination of Berryman, and less than 30 days before trial in violation of CR 35(b). (CP 909-19) Judge Carey denied the motion. (CP 110)

D. Judge Barnett Presided Over The Trial And Refused To Reconsider The Exclusion Of Tencer's Testimony.

The case was brokered for trial to Judge Suzanne Barnett ("the trial court"). (CP 658) On the first day of trial, the trial court granted Berryman's motions in limine to prohibit Dr. Renninger from expressing an opinion based on Tencer's report, to exclude any reference by lawyers or witnesses to the force involved in the accident, to bar any questioning regarding the damage to Berryman's vehicle, and to exclude photographs of the accident. (RP 8; CP 366-69, 374-80) The trial court denied Farmers' request to reconsider Judge Carey's ruling excluding Tencer's testimony. (RP 28)

At trial, Dr. Renninger testified that he did not consider Berryman's injury "significant" and that it was a "grade one" injury which may not have needed any treatment, but at most needed six weeks of treatment. (RP 451, 484-85, 491, 496-97, 505, 516-17) Renninger testified repeatedly that he did not believe that the accident caused Berryman any injury that lasted more than six weeks. (RP 452, 456, 458, 461, 471-72, 485, 519) Berryman's treating chiropractors, Dr. Saggau and Dr. Chinn, testified that the accident caused Berryman significant injury and that her subsequent treatment was reasonable and related to the accident. (*See, e.g.*, RP 270, 348, 356)

During trial, Farmers sought to question Berryman about the damage to her vehicle and asked the court to reconsider its order in limine restricting testimony about the damage to her vehicle. (RP 187-89) The trial court prohibited any questions about vehicle damage. (RP 191) In explaining her reasoning for refusing to reconsider her order in limine, the trial court stated "one cannot surmise anything about personal injury from the state of the vehicle." (RP 192)

In response to a question regarding the cause of Berryman's injury, Dr. Chinn stated that "the primary cause. . . seemed to be the high impact rear end accident that she had about a year earlier." (RP 261) Farmers' counsel did not object to this testimony. (RP 261) Farmers did not ask for a curative instruction, although Berryman's counsel suggested that the jury be instructed that "any mention about impact to vehicle should be disregarded by the jury." (RP 294) The trial court did not give a curative instruction. Farmers also did not object to Dr. Saggau's testimony that the accident involved "loud screeching brakes." (RP 346-47)

E. The Jury Awarded Berryman A Verdict Larger Than Both The Arbitration Award And Berryman's Offer Of Compromise. The Trial Court Granted Berryman Her Attorney Fees Under RCW 7.06.060 And MAR 7.3.

The jury found in Berryman's favor and awarded her $36,542 in damages. (CP 562) Because the jury verdict was greater than both the arbitrator's award and Berryman's pre-trial offer of compromise, the trial court awarded Berryman her attorney fees under RCW 7.06.060 and MAR 7.3. (CP 900-01)

In extensive findings of fact and conclusions of law, the trial court performed a lodestar analysis and found reasonable the hourly rates of Berryman's counsel ($300) and the 468.55 hours

they spent on the case. (FF 5-7, CP 902-06) The trial court considered the factors set forth in RPC 1.5(a). (FF 11, CP 904) The trial court multiplied the hours worked by counsel's hourly rate and awarded Berryman $140,565 for pre-verdict work and $11,950 for post-verdict work. (CL 2, 4, CP 905) The trial court applied a 2.0 lodestar multiplier to the pre-verdict fees based on the contingent nature of the case and the substantial risk of receiving no compensation borne by Berryman's counsel. (FF 12, CL 5, CP 905-06) The trial court entered a $307,685.14 amended judgment that included $301,267 in fees and costs. (CP 894-97)[1]

The trial court denied Farmers' motion for a new trial. (CP 796-807, 898-99) Farmers appealed.

[1] The judgment lists the verdict amount at $36,842 (CP 895), but the verdict was $36,542. (CP 562)

IV. ARGUMENT

A. Neither Judge Carey Nor The Trial Court Abused Her Discretion In Excluding Testimony About The Force Of The Accident.

An appellate court reviews a decision to exclude expert testimony for abuse of discretion. ***Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections***, 122 Wn. App. 227, 244, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005). This court may affirm Judge Carey's and the trial court's exclusion of Tencer's testimony and related evidence regarding the force of the accident on any basis supported by the record. ***Fulton v. State, Dept. of Soc. & Health Services***, __ Wn. App. __, ¶ 15, 279 P.3d 500 (2012). Judge Carey and the trial court's evidentiary rulings provide no basis for reversal (1) because Tencer's testimony was unreliable, speculative and outside his area of expertise, (2) because Farmers did not demonstrate that Tencer's methodology was generally accepted in the scientific community, and (3) because this evidence was cumulative of Dr. Renninger's testimony and thus the exclusion did not prejudice Farmers. This court need only conclude that one of these grounds was correct to affirm.

1. Judge Carey Properly Excluded Tencer's Testimony Under ER 702 And ER 703 Because It Lacked Sufficient Foundational Facts And Was Beyond Tencer's Expertise.

Farmers erroneously contends that Judge Barnett excluded Tencer's testimony based on her "firm belief" that the damage to Ms. Berryman's vehicle was not relevant to her injury. (App. Br. 15, 21, 27) But *Judge Carey* excluded Tencer's testimony. (CP 283-84) Judge Barnett declined to reverse that order on reconsideration (RP 28) – a decision that this court also reviews for abuse of discretion. ***Fishburn v. Pierce County Planning & Land Services Dept.***, 161 Wn. App. 452, 472, ¶ 42, 250 P.3d 146, *rev. denied,* 172 Wn.2d 1012 (2011). Judge Carey did not abuse her discretion by excluding Tencer's testimony and Judge Barnett did not abuse her discretion in refusing to reconsider that order.

Under ER 702, a trial court may admit expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." An expert's testimony "must stay within the area of his expertise." ***Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha***, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994). An expert may rely on inadmissible evidence only if it is "of a type reasonably relied upon by experts in the particular field

in forming opinions or inferences upon the subject." ER 703. "[W]hile ER 703 is intended to broaden the acceptable bases for expert opinion, there is no value in an opinion that is wholly lacking some factual basis" because an expert must have "sufficient foundational facts to support his opinion." ***Queen City Farms***, 126 Wn.2d at 102-04.

In ***Queen City Farms***, the expert testified about the practices of defendant's insurance "syndicates," one of which wrote the insurance policy at issue in the case. However, the expert was not a member of that syndicate and had never written an insurance policy regarding the risks at issue in the case. The Supreme Court reversed the trial court's decision to allow expert testimony because although the expert had knowledge of certain insurance practices, he "lacked the factual 'knowledge, skill, experience, training, or education' required by ER 702, in that he had no knowledge whatever of the underwriting practices of the syndicates which insured [plaintiff]." 126 Wn.2d at 104; *see also* ***Melville v. State***, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) ("The opinion of an expert must be based on facts. An opinion of an expert which is simply a

conclusion or is based on an assumption is not evidence which will take a case to the jury.") (quotation omitted).

Farmers bases its argument that the exclusion of Tencer's testimony was an abuse of discretion almost exclusively on Judge Barnett's statement regarding the relevance of the damage to Berryman's vehicle. (App. Br. 15 (quoting RP 192)) But *Judge Carey* excluded Tencer's testimony because it was "unreliable and based on speculation." (CP 283-84) Judge Barnett simply exercised her discretion to adhere to Judge Carey's decision, rather than to reconsider it. (RP 28) Farmers makes no mention of the standard for deciding a motion for reconsideration or why Judge Barnett abused her discretion in refusing to reconsider Judge Carey's decision. *See* ***Fishburn*** 161 Wn. App. at 472, ¶ 42 ("Motions for reconsideration are addressed to the sound discretion of the trial court"). Judge Barnett's "personal opinion" has no bearing on the issue of whether Judge Carey's decision to exclude Tencer was an abuse of discretion.

Regardless, neither Judge Carey nor Judge Barnett abused her discretion in determining that Tencer did not have the factual basis or expertise to testify about the force involved in *this* accident.

Tencer conceded he knew little about the vehicle that hit Berryman's car, including its weight or speed. (CP 218-19, 226-27, 230) Tencer based his opinion on his visual inspection of a trailer hitch and his assumptions about its strength, even though he did not test it or know who manufactured it. (CP 223-25, 237) Most importantly, Tencer admitted that the SAE standard upon which he based his testimony requires the hitch to withstand a *minimum* amount of force and has no bearing on the *maximum* amount of force the hitch could withstand. (CP 222-23) Indeed, Tencer conceded that he could not state "specifically" the maximum force that the trailer hitch could withstand. (CP 236) Without more, neither Judge Carey nor Judge Barnett abused her discretion in finding that Tencer lacked sufficient foundational facts to testify as an expert in *this* case. *See* ***Queen City Farms***, 126 Wn.2d at 104.

Likewise, although Tencer possesses expertise in low-impact collisions generally, Tencer has never tested trailer hitches nor consulted any studies regarding the strength of trailer hitches. (CP 223-25, 236) Tencer did not perform any experiments involving the cars in this accident. (CP 238-39) Tencer does not even know who manufactured the specific trailer hitch at issue in

this case. (CP 237) Neither Judge Carey nor Judge Barnett abused her discretion by concluding that Tencer was not qualified to testify in *this* case.

Farmers failed to preserve any objection to testimony from Berryman's experts about a "high impact" accident or "loud screeching brakes." (App. Br. at 28-29) Farmers did not object when these statements were made. (RP 261, 346-47) Farmers also failed to request a curative instruction after this testimony, even though Berryman's counsel suggested one. (RP 294) Farmers cannot complain about an error that it failed to give the trial court an opportunity to correct. ***Breimon v. General Motors Corp.***, 8 Wn. App. 747, 757, 509 P.2d 398 (1973) (admitting challenged testimony was not prejudicial error where party failed to timely object or request curative instruction it would have been entitled to); RAP 2.5(a). Likewise, Farmers waived any complaint regarding Berryman's rebuttal testimony because it did not object to this testimony on the grounds it now asserts on appeal. (App. Br. 29 citing RP 532-574)

Even had Farmers properly preserved this argument, it fails to demonstrate how the trial court abused its discretion in finding

that the testimony did not prejudice Farmers. "Trial courts have broad discretionary powers in conducting a trial and dealing with irregularities that arise." ***Kimball v. Otis Elevator Co.***, 89 Wn. App. 169, 178, 947 P.2d 1275 (1997). The trial court found that the passing statement about "high impact" was unnoticed by the majority of the jury. (RP 293) Berryman's counsel suggested a corrective instruction to cure any prejudice (RP 294), but Farmers apparently did not believe that the testimony was prejudicial enough to require an instruction.

Judge Carey did not abuse her discretion in excluding Tencer's testimony as speculative. The trial court did not abuse her discretion in refusing to reconsider this ruling.

2. Judge Carey Properly Excluded Tencer's Testimony Under *Frye* Because His Method Of Visually Inspecting A Trailer Hitch To Determine The Maximum Force It Can Withstand Is Novel And Not Generally Accepted Within The Scientific Community.

The trial court did not err in excluding Tencer's testimony under ***Frye v. United States***, 54 App.D.C. 46, 293 F. 1013 (App.

D.C. 1923).[2] Tencer based his testimony on a visual inspection of Berryman's car, without testing the trailer hitch and without determining who manufactured the trailer hitch at issue in this case. This methodology is novel and has not been generally accepted by the scientific community.

Washington courts apply the ***Frye*** standard when scientific evidence is challenged as novel. ***State v. Canaday***, 90 Wn.2d 808, 585 P.2d 1185 (1978) (adopting ***Frye*** test for determining admissibility of scientific evidence). The standard is whether "(1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results." ***State v. Sipin***, 130 Wn. App. 403, 414, ¶ 28, 123 P.3d 862 (2005). Appellate courts are not limited to the trial record when reviewing ***Frye*** determinations and may review "scientific

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[2] This court does not need to analyze Tencer's testimony under the standard for admission of expert testimony under ***Frye***, if it affirms the discretionary exclusion of Tencer's testimony as speculative and outside his area of expertise under ER 702 and 703.

literature as well as secondary legal authority before rendering a decision." 130 Wn. App. at 414, ¶ 27.

Visual inspection of vehicles "is not a generally accepted method in any relevant field of engineering or under the laws of physics." ***Clemente v. Blumenberg***, 183 Misc.2d 923, 705 N.Y.S.2d 792, 800 (1999) (excluding testimony of biomechanical engineer based on photographs of the vehicle); ***Whiting v. Coultrip***, 324 Ill. App.3d 161, 755 N.E.2d 494, 499 (2001) (excluding testimony of biomechanical engineer because "[t]here is no evidence in the record that use of photographs and repair estimates is a generally accepted method in the field of engineering for determining G-forces"); ***Tittsworth v. Robinson***, 252 Va. 151, 475 S.E.2d 261, 263 (Va. 1996) (rejecting biomechanical engineer's reliance solely on photographs to determine damage to

vehicles).[3] Judge Carey correctly held that Tencer's "visual inspection" methodology, which is not materially different from analyzing photographs, was not an accepted scientific method for determining the maximum force materials can withstand.

As the Supreme Court has acknowledged, ***Frye*** analysis is necessarily case-by-case, and even where a theory has been accepted in one case, it may be rejected in another distinct context. *See* ***State v. Riker***, 123 Wn.2d 351, 869 P.2d 43 (1994) (recognizing general acceptance of battered woman syndrome but rejecting its use in context other than that of a battering relationship). The fact that in another case an appellate court stated that Tencer's "work on low-speed collisions is generally accepted in the scientific community," therefore, does not establish that Tencer's testimony was proper in this case. (App. Br. 19, citing

[3] *See also* M. Robbins, *Lack of Relationship Between Vehicle Damage and Occupant Injury*, SAE Technical Paper 970494 (1997); Arthur Croft and Michael Freeman, *Correlating crash severity with injury risk, injury severity, and long-term symptoms in low velocity motor vehicle collisions*, 11 Medical Science Monitor 316, 320 (2005) ("the level of vehicle property damage appears to be an invalid construct for injury presence, severity, or duration"); CG Davis, *Rear-end impacts: vehicle and occupant response*, 21 Journal Manipulative Physiological Therapeutics 629 (1998); Arthur Croft, *Low Speed Rear Impact Collisions: In Search of an Injury Threshold*, 4 Journal of Musculoskeletal Pain 39 (1996).

Ma'ele v. Arrington, 111 Wn. App. 557, 563, 45 P.3d 557 (2002)) Tencer's testimony was rightly rejected here because Farmers failed to establish that Tencer's method of visual inspection can establish the strength of a trailer hitch, a different issue than that involved in ***Ma'ele***. Likewise, Farmers failed to establish that the SAE standard establishing the minimum strength required of a trailer hitch is sufficient to establish its maximum strength.

Farmers erroneously relies on the court's analysis of SAE standards in a case in which the plaintiff did "not contend that [the expert's] test fails to comply with this SAE standard." ***Moore v. Harley-Davidson Motor Co. Group, Inc.***, 158 Wn. App. 407, 423, ¶ 34, 241 P.3d 808 (2010) *rev. denied,* 171 Wn.2d 1009 (2011). (App. Br. 22-23) By contrast, here Berryman challenged Tencer's testimony precisely because it did not comply with the SAE standard and conflated the minimum and maximum forces that a trailer hitch could withstand. Thus, ***Moore*** is inapposite. This court should affirm the trial court's exclusion of Tencer's testimony under ***Frye***.

3. The Trial Court Properly Excluded Renninger's Testimony About The Force Of The Accident And Photographs Of The Accident.

Because the trial court correctly excluded Tencer's testimony, the trial court did not abuse its discretion by refusing to allow Farmers to introduce Tencer's conclusions through Dr. Renninger. Likewise, it did not abuse its discretion in excluding photographs of the accident.

The trial court's evidentiary decisions are reviewed for an abuse of discretion. ***Cole v. Harveyland, LLC***, 163 Wn. App. 199, 213, ¶ 33, 258 P.3d 70 (2011). The trial court did not abuse its discretion by prohibiting Dr. Renninger from testifying about Tencer's conclusions that had already been excluded. Judge Carey had already found that testimony speculative and unreliable. It did not become unspeculative and reliable simply because it was coming from Dr. Renninger rather than Tencer.

Likewise, the trial court did not abuse its discretion in excluding photographs of Berryman's car after the accident. "The admission or rejection of photographs lies in the sound discretion of the trial court." ***Toftoy v. Ocean Shores Properties, Inc.***, 71 Wn.2d 833, 836, 431 P.2d 212 (1967). The trial court was uniquely

positioned to decide whether the prejudicial impact of the photographs outweighed their probative value. The photographs supported the erroneous inference that severity of vehicle damage necessarily correlates to the severity of injury. *See, e.g.*, ***Whiting v. Coultrip***, 324 Ill. App. 3d 161, 755 N.E.2d 494, 499 (2001); M. Robbins, *Lack of Relationship Between Vehicle Damage and Occupant Injury*, SAE Technical Paper 970494 (1997). The trial court did not abuse its discretion by limiting Dr. Renninger's testimony or by excluding photographs of the accident.

4. Tencer's Testimony Would Have Been Cumulative Of Dr. Renninger's Testimony And Its Exclusion Did Not Prejudice Farmers.

"[E]videntiary error is grounds for reversal only if it results in prejudice." ***In re Detention of Mines***, 165 Wn. App. 112, 128, ¶ 31, 266 P.3d 242 (2011) (quotation omitted), *rev. denied*, 173 Wn.2d 1032 (2012). Neither Judge Carey's nor the trial court's evidentiary decisions prejudiced Farmers. Tencer's proposed testimony would have been cumulative of Renninger's testimony. This court should affirm because Farmers has not demonstrated prejudice.

"The exclusion of evidence which is cumulative or has speculative probative value is not reversible error." ***Havens v. C & D Plastics, Inc.***, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994). "The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted." 124 Wn.2d at 170. Washington courts have repeatedly found that the erroneous exclusion of evidence is harmless error where that evidence was cumulative of admitted evidence. ***Havens***, 124 Wn.2d at 170-71; ***Miller v. Arctic Alaska Fisheries Corp.***, 133 Wn.2d 250, 262, 944 P.2d 1005 (1997); ***Hendrickson v. King County***, 101 Wn. App. 258, 269, 2 P.3d 1006 (2000); *see generally* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277 (1996).

Here, Tencer's testimony would have been cumulative of Dr. Renninger's testimony. Tencer planned to testify that the force of the accident was not enough to cause Berryman's injury. (CP 208) But Renninger testified that there was no objective basis for Berryman's complaints of an injury related to the car accident and

that he did not believe her subjective complaints of pain. (RP 454, 457-58, 471-72, 476; *see also* App. Br. 26) He repeatedly testified that he did not think the accident caused Berryman a "significant injury," that she may have needed no treatment at all, and that her years of chiropractic treatment were unrelated to the accident. (RP 451-52, 456, 458, 461, 471-72, 484-85, 491, 496-97, 505, 516-17, 519; CP 498-99) Indeed, the trial court denied Berryman's motion that as a matter of law she was entitled to damages for six weeks of medical expenses because, as Farmers argued, there was evidence from which the jury could find that Berryman did not need any treatment after the accident. (RP 531) This testimony – all of which supported Farmers' argument that Berryman was not injured in the accident and did not need treatment – is cumulative of Tencer's testimony that Berryman was not injured in the accident.

5. The Trial Court Did Not Abuse Its Discretion By Denying Farmers A New Trial Because Exclusion Of Tencer's Testimony Was Proper.

Appellate courts review a trial court's decision to deny a new trial for abuse of discretion. ***A.C. ex rel. Cooper v. Bellingham Sch. Dist.***, 125 Wn. App. 511, 521, 105 P.3d 400 (2004). Farmers

moved for a new trial based entirely on the exclusion of Tencer's and Renninger's testimony regarding the force of the impact. An evidentiary decision that falls within the range of the trial court's broad discretion is not grounds for a new trial under CR 59. ***Toftoy v. Ocean Shores Properties, Inc.***, 71 Wn.2d 833, 836, 431 P.2d 212 (1967). Because the trial court correctly excluded Farmers' expert evidence as speculative, the trial court did not abuse its discretion in denying Farmers' motion for a new trial.

B. The Trial Court Properly Awarded Berryman Attorney Fees And Did Not Abuse Its Discretion In Setting The Amount Of Fees Or Applying A Contingency Multiplier.

The trial court correctly awarded Berryman her attorney fees under MAR 7.3 and RCW 7.06.060 because Farmers failed to improve its position at the trial de novo. (CP 902-06) This court reviews the trial court's attorney fee award for abuse of discretion. ***Chuong Van Pham v. City of Seattle, Seattle City Light***, 159 Wn.2d 527, 538, ¶ 16, 151 P.3d 976 (2007). The trial court did not abuse its discretion in its lodestar analysis by finding that the hours worked by Berryman's counsel were reasonable in light of Farmers' aggressive litigation tactics during the trial de novo. (FF 6, CP 904) Nor did the trial court abuse its discretion by applying a 2.0

multiplier where Berryman's attorneys' hourly rate of $300 failed to compensate them for the substantial risk of not receiving any compensation for their representation. (FF 7, 11, 12, CL 5, CP 904-06) This court should court should affirm the trial court's award of fees and its application of a multiplier.

MAR 7.3 is "a broad warning that one who asks for a trial de novo, and thereafter suffers a judgment for a greater amount than the arbitration award, will be liable for attorneys fees." ***Cormar, Ltd. v. Sauro***, 60 Wn. App. 622, 624, 806 P.2d 253 (1991) *rev. denied*, 117 Wn.2d 1004.[4] "The purpose of the attorney fee award under MAR 7.3 is to discourage meritless appeals of arbitration awards, to reduce delay in hearing civil cases, and to relieve court congestion." ***Yoon v. Keeling***, 91 Wn. App. 302, 305, 956 P.2d 1116 (1998); *see also* ***Fiore v. PPG Indus., Inc.***, __ Wn. App. __, ¶

[4] MAR 7.3 states, "The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo." RCW 7.06.060 states, "The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo." RCW 7.06.050 states, "In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo."

54, 279 P.3d 972 (2012) (Legislature intended to "discourag[e] appeals from arbitration decisions"). A party that appeals an arbitrator's award "place[s] a burden on the court system and cause[s] [the opposing party] to incur costs and attorney fees." ***Yoon***, 91 Wn. App. at 306. "The appellant can avoid the assessment of attorney fees by not bringing a meritless appeal." ***Christie-Lambert Van & Storage Co., Inc. v. McLeod***, 39 Wn. App. 298, 308, 693 P.2d 161 (1984). The term "position" in MAR 7.3 "was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a Superior Court judgment against them for more than the arbitrator awarded." ***Cormar, Ltd.***, 60 Wn. App. at 623.[5]

[5] Farmers states in passing that it improved its position at the trial de novo, citing its trial brief (App. Br. 31), but provides no argument to this court how Farmers improved its position when the jury awarded Berryman $6,542 more than her offer of comprise that Farmers rejected. (*Compare* CP 562 *with* CP 624-25) Washington appellate courts "do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b)." ***Diversified Wood Recycling, Inc. v. Johnson***, 161 Wn. App. 859, 890, ¶ 75, 251 P.3d 293 (2011), *rev. denied,* 172 Wn.2d 1025. Thus, Farmers has waived any argument regarding whether it improved its position at the trial de novo. ***In re Marriage of Fahey***, 164 Wn. App. 42, 59, ¶ 34, 262 P.3d 128 (2011) *review denied,* 173 Wn.2d 1019 (2012) ("We do not address arguments that are not supported by cited authorities.").

MAR 7.3 and RCW 7.06.060 mandated that the trial court award Berryman her fees after Farmers failed to improve its position after the trial de novo. The trial did not abuse its discretion in setting the amount of lodestar fees or in awarding a multiplier.

1. The Trial Court Did Not Abuse Its Discretion By Granting Berryman Her Lodestar Fees That Were Reasonably Incurred In Response To Farmers Aggressive Litigation Strategy.

The trial court did not abuse its discretion in calculating Berryman's lodestar fee or in finding reasonable the number of hours worked by her counsel. Berryman's counsel worked the hours and incurred the fees at issue here because Farmers pursued an aggressive litigation strategy, beginning with its decision to seek trial de novo, then refusing a $30,000 offer of compromise, continuing through contentious discovery, and culminating in its strategy to aggressively contest all of Berryman's damages. This court should defer to the trial court's findings based upon its firsthand experience in presiding over the case.

As its findings demonstrated, the trial court properly utilized the lodestar method which is "the preferred method for determining reasonable attorney fees" in Washington. ***Somsak v. Criton Technologies/Heath Tecna, Inc.***, 113 Wn. App. 84, 98, 52 P.3d

43 (2002), *modified sub nom.* 63 P.3d 800 (2003). The lodestar "is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit." 113 Wn. App. at 98. "[A]ttorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.,* senior partner, associate, etc.)." ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

"[I]t is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation." ***Chuong Van Pham v. City of Seattle, Seattle City Light***, 159 Wn.2d 527, 540, ¶ 20, 151 P.3d 976 (2007). "[T]he amount of the recovery, while a relevant consideration in determining the reasonableness of the fee award, is not a conclusive factor." ***Mahler v. Szucs***, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998); *see also* **Lay v. Hass**, 112 Wn. App. 818, 51 P.3d 130 (2002) (affirming fee award 31 times greater than recovery). Likewise, the amount of time spent by the opposing

party is not determinative of reasonableness. ***Hewitt v. Hewitt***, 78 Wn. App. 447, 457, 896 P.2d 1312 (1995). Under MAR 7.3, a trial court does not need to exclude time incurred on unsuccessful motions. ***Hough v. Stockbridge***, 152 Wn. App. 328, 349-50, ¶ 55, 216 P.3d 1077 (2009) ("Mr. Hough, moreover, does not provide any authority for his argument that he should not have to pay the Stockbridges' attorney fees that are related to motions on which he prevailed. The trial court's award was properly based on MAR 7.3."), *rev. denied*, 168 Wn.2d 1043 (2010).

The trial court properly applied the lodestar method in determining Berryman's fee award. (FF 5-13, CP 903-05) The trial court found that Berryman's counsel $300 hourly rate was reasonable based on their conduct throughout the trial and the declarations of other attorneys. (CP 652-777, 780-92, 888-93, 1004-13; FF 7, CP 904) The trial court found that the hours Berryman's counsel work on the case were reasonable based on contemporaneous records that explained who performed the work and what worked was performed. (FF 5-6, CP 903-4) Berryman's counsel was not required, as Farmers argues (App. Br. 38), to provide "minute detail" explaining the work performed. ***Bowers***,

100 Wn.2d at 597. The trial court also considered the factors set forth in RPC 1.5(a) when determining whether the fee was reasonable. (FF 11, CP 904)

The trial court did not abuse its discretion in finding that Berryman's counsels' $300 hourly rate was reasonable. (FF 7, CP 904) The trial court reviewed affidavits from attorneys establishing that $300 was a reasonable hourly rate for the work done by Berryman's counsel and was in fact less than the rate charged by other attorneys for similar work. (CP 782, 791, 1007, 1012; *see also* CP 654, 759-60) Indeed, Farmers did not present any evidence supporting its contention that $300 was an unreasonable rate.

Farmers' asks this court to substitute its discretion for that of the trial court by nitpicking the time worked by Berryman's attorneys. For instance, the trial court expressly found that the time spent preparing for Tencer's deposition was reasonable in light of the complicated and scientific nature of his testimony. (FF 6, CP 656, 904) Farmers also provides no support for its assertion that Berryman's counsel spent "97.4 hours for client and witness prep."

(App. Br. 37) Entries that contain client and witness preparation often contain other work. (*E.g.*, CP 700, 702-03, 880) For example, Berryman's counsel billed 3.2 hours on December 8, 2011, for "Email with opposing counsel and defense counsel re scheduling phone conference with court; Telephone conference with court re pretrial matters; Meeting with client and witness re preparation for trial testimony." (CP 703) The record also refutes Farmers' assumption that there was no time spent preparing Berryman's treating chiropractors for their testimony. (App. Br. 38; CP 703, 707) Further, the trial court extended the trial date several times necessitating further meetings with Berryman and witnesses to refresh previous preparation. (CP 658, 881) In contrast, Farmers had no "client" that it was required to meet with in order to prepare for trial.

Farmers fails to establish that any of Berryman's counsel engaged in "duplicative work [or] overstaffing." (App. Br. 31) Berryman's attorneys diligently allocated pre-trial work and examination of witnesses in order to avoid duplicative work. (*See, e.g.*, RP 238-320, 472-523; *see also* CP 656-59, 879) Farmers complains that both of Berryman's attorneys attended trial and

Tencer's deposition (App. Br. 36-37), but work is not "duplicative" simply because it is performed by more than one attorney. ***Fiore v. PPG Indus., Inc.***, __Wn. App. __, ¶ 45, 279 P.3d 972 (2012) ("Fiore does not demonstrate that 'duplicative effort' occurred because more than one attorney attended various court proceedings"). Indeed, based on their work at Tencer's deposition, Berryman's attorneys successfully excluded his testimony at trial. (CP 656-57, 879-80) Facing a defendant with Farmers' resources, it was more than reasonable for Berryman to use two attorneys at various times, particularly at Tencer's deposition because of the complex scientific testimony.

Farmers' critique of Berryman's counsel's hours is based on a series of unsupported assumptions that the trial court was free to reject. (*See, e.g.*, App. Br. 39 (assuming that discovery requests do not need to be re-drafted and criticizing 3.5 hours spent on "what appears to be a stock motion") In "annotating" Berryman's counsel's billing records, Farmers sought to substitute its own discretion for the trial court's. (CP 840-50) In its annotation, Farmers deletes numerous entries without explanation. (*E.g.*, CP 840) Farmers also reduces numerous entries based on its

conclusion that the time was "excessive." (*E.g.*, CP 842 (reducing 7.5 hours spent drafting motion to exclude Tencer to .5 hours)) The trial court, not Farmers, properly decided what time was reasonable.

Farmers' proportionality argument ignores the policies behind an award of fees in small cases under MAR 7.3. No authority requires the trial court to reduce a fee award under MAR 7.3 because it is greater than the jury verdict. *See* ***Mahler***, 135 Wn.2d at 433 ("We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.").[6] Likewise, the trial court was not required to deduct time for motions on which Farmers prevailed. ***Hough***, 152 Wn. App. at 349-50. The Legislature intended to encourage mandatory arbitration and not discourage the expeditious resolution of small

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[6] Washington courts have refused to reduce a large attorney fee award where the underlying judgment is small in civil rights litigation because otherwise it would be difficult for civil rights plaintiffs to obtain representation. ***Steele v. Lundgren***, 96 Wn. App. 773, 784, 982 P.2d 619 (1999) ("A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts.") (quoting ***City of Riverside v. Rivera***, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)), *rev. denied*, 139 Wn.2d 1026 (2000). Likewise, were fees in mandatory arbitration limited by a rule of proportionality, plaintiffs would have difficulty obtaining representation in a forum where damages are limited.

claims by imposing arbitrary rules limiting an award of attorney fees. The trial court did not abuse its discretion by awarding Berryman her full lodestar fee after she prevailed on her only claim.

Farmers' own briefing and aggressive litigation strategy is at odds with its assertion that this was a "simple, low-impact rear-end auto damages case." (App. Br. 31) Indeed, "common sense indicates that the amount of fees incurred is often directly related to how aggressively an opposing party litigates a case." ***Fiore***, __Wn. App. __, ¶ 46 n.17. Farmers devoted 17 pages in its brief to the "simple" issue of exclusion of Tencer's testimony and related evidence. (App. Br. 14-30) Indeed, Farmers' attempt to backdoor Tencer's testimony through Renninger caused a significant portion of the fees it now complains of. (CP 657) Berryman's attorneys were also forced to contest Farmers' requests for discovery of Berryman's irrelevant mental health records. (CP 656) Both parties filed numerous pre-trial motions. (CP 656-58) This case involved competing expert medical testimony regarding the severity of Berryman's injury, requiring Berryman's counsel to research and prepare cross-examination on chiropractic techniques and

diagnosis. (*E.g.*, RP 480-86) All of these factors complicated the nature of the case and the work required.

Farmers failed to heed MAR 7.3's "broad warning" that it would be liable for Berryman's fees if it did not improve its position at trial. ***Cormar***, 60 Wn. App. at 624. It cannot now complain about fees that it caused Berryman to incur by refusing Berryman's offer of compromise and requesting a trial de novo. This court should adhere to the policies underlying mandatory arbitration and reject Farmers' complaints of attorney fees it could have easily avoided. ***Yoon***, 91 Wn. App. at 305; ***McLeod***, 39 Wn. App. at 308.

2. The Trial Court Did Not Abuse Its Discretion In Granting Berryman A Multiplier Based On The Contingent Nature Of The Case And The Significant Risk Of No Compensation That Berryman's Counsel Faced.

Just as the trial court did not abuse its discretion in setting the amount of Berryman's fees under the lodestar method, it did not abuse its discretion in awarding a lodestar multiplier. Berryman's attorneys took a significant risk by agreeing to represent her on a contingent basis against a defendant with virtually unlimited resources. (FF 12, CL 5, CP 905-06; *see also* CP 654, 659-62) Because counsel's $300 hourly rate did not reflect the risk of non-

payment, the trial court did not abuse its discretion by compensating counsel for the contingency risk by applying a multiplier.

"After the lodestar has been calculated, the court may consider the necessity of adjusting it to reflect factors not considered up to this point." ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." 100 Wn.2d at 598. Courts award contingency multipliers to encourage representation of plaintiffs who cannot afford to pay on an hourly basis. 100 Wn.2d at 598 ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk."); *see also* ***Ethridge v. Hwang***, 105 Wn. App. 447, 462, 20 P.3d 958 (2001) ("[M]ultipliers are appropriate in contingent fee cases").

The trial court recognized the contingent nature of the case and the significant risk of receiving no compensation that Berryman's attorneys faced. (FF 12-13, CP 905) In contrast to the federal authority cited by Farmers, the Washington Supreme Court

has specifically authorized contingency multipliers where, as here, "the lodestar figure does not adequately account for the high risk nature of a case".[7] ***Chuong Van Pham v. City of Seattle, Seattle City Light***, 159 Wn.2d 527, 542, ¶ 23, 151 P.3d 976 (2007), refusing to follow ***City of Burlington v. Dague***, 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), which rejected contingency multipliers under the fee-shifting provisions of Solid Waste Disposal Act and Clean Water Act. (App. Br. 42-43)

Washington courts have affirmed contingency multipliers in similar circumstances. *See, e.g.*, ***Bowers***, 100 Wn.2d at 601; ***Somsak v. Criton Technologies/Heath Tecna, Inc.***, 113 Wn. App. 84, 99, 52 P.3d 43 (2002), *modified sub nom.* 63 P.3d 800 (2003); ***Carlson v. Lake Chelan Cmty. Hosp.***, 116 Wn. App. 718, 743, 75 P.3d 533 (2003) (affirming multiplier because "the case was contingent, Mr. Carlson proceeded at considerable risk, defense counsel granted no concessions, and there was no assurance of recovery"), *rev. granted*, 150 Wn.2d 1017. As the trial court found, without a multiplier it is unlikely that plaintiffs such as

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[7] In another case cited by Farmers, ***Sanders v. State***, 169 Wn.2d 827, 240 P.3d 120 (2010). (App. 43-44), the trial court denied a multiplier and the Supreme Court refused to substitute its discretion for that of the trial court. 169 Wn.2d at 869.

Berryman will find representation because their claims are challenging to prove and mandatory arbitration limits damages. (CP 659-62; CL 5, CP 906)

Because Washington encourages arbitration, courts have also affirmed multipliers after a trial de novo of an arbitration award. ***Ethridge***, 105 Wn. App. at 462. This court most recently recognized that fee awards following trial de novo must comport with the policies underlying MAR 7.3 in ***Fiore v. PPG Indus., Inc.***, __Wn. App. __, 279 P.3d 972 (2012), holding that the trial court's application of a contingent fee multiplier to the party appealing from an arbitrator's award inappropriately incentivized, rather than discouraged, the appeal and undermined the policy behind MAR 7.3. __ Wn. App. __, ¶ 55.[8] Here, by contrast, the trial court awarded a contingency enhancement to counsel for the party successfully *resisting* trial de novo and whose hourly rate, at $300,

[8] The ***Fiore*** court held that the attorney's hourly rate already accounted for the contingent nature of the representation, and that the case was not "high risk" because "both liability and damages were resolved in the plaintiff's favor on summary judgment." __ Wn. App. __, ¶ 53. In contrast, this case could not be resolved on summary judgment (CP 657) and Berryman's counsel faced significant evidentiary challenges in establishing her soft-tissue injury based largely on her subjective complaints. (CP 661, 760-61, 790)

was *lower* than other attorneys who handle similar contingent fee work. (CP 782, 791, 1007, 1012)

Nor is the amount of the multiplier an abuse of discretion. Other courts have found that a 2.0 multiplier is appropriate based on contingency. (*See* CP 663, 741, 752; *see also* ***Thornber v. City of Fort Walton Beach***, 622 So.2d 570, 571 (Fla. Dist. Ct. App. 1993). The trial court found that the multiplier was justified because, plaintiff's counsel takes a substantial risk by representing a plaintiff against a defendant with a reputation for vigorously contesting small claims such as Berryman's. (FF 12, CP 905; CP 660-61, 784-86, 1005-06) The trial court did not abuse its discretion.

C. Berryman Is Entitled To Her Attorney Fees On Appeal.

"A party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve her position." ***Arment v. Kmart Corp.***, 79 Wn. App. 694, 700, 902 P.2d 1254 (1995); *see also* ***Pudmaroff v. Allen***, 138 Wn.2d 55, 69, 977 P.2d 574 (1999). This court should award Berryman her fees incurred on appeal under MAR 7.3 and RAP 18.1(a).

V. CONCLUSION

The trial court did not abuse its discretion by excluding Tencer's unreliable and speculative testimony. Farmers' appeal from an arbitration award and rejection of Berryman's offer of compromise justified an award of lodestar fees to Berryman's counsel at trial. The trial court did not abuse its discretion in applying a contingency multiplier. This court should affirm the jury's verdict and the trial court's award of fees to Berryman, and grant Berryman her fees on appeal.

Dated this 1st day of August, 2012.

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