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NO. 65498-5-I

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

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COURT OF APPEALS
STATE OF WASHINGTON

46

CARGOLUX AIRLINES INTERNATIONAL, S.A., a Luxembourg
corporation,

Respondent/Cross-Appellant,

vs.

SEA-TAC AIR CARGO L.P., a Washington limited partnership, acting
by and through its general partner TRANSIPLEX (SEATTLE), INC., a
Washington corporation,

Appellant.

CROSS-APPELLANT REPLY BRIEF (Replacement)

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ORIGINAL

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STATUTES

RCW 4.84.330	2, 4, 6, 7
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FACTS

The parties' dispute involved claims arising out of a commercial lease at Seatac Airport. Transiplex claimed that Cargolux was liable for \$999,473. Cargolux denied liability and sought \$287,176 in reimbursement for overpayments to Transiplex.¹ The parties' lease provided an award of attorneys' fee to the prevailing party: "In the event that suit is brought, attorney's fees and costs are to be awarded to the prevailing party."²

Since both sides were seeking an affirmative judgment against the other the total amount in controversy exclusive of attorney's fees came to \$1,286,649. However, because each side was also exposed to an attorneys' fee award in the event of loss, the total exposure must be increased by the amount of attorneys' fee exposure. In retrospect, we know that both parties requested \$550,000 or more in attorneys' fees. Accordingly, this amount must be added in, bringing the total amount in controversy to \$1,836,649.

At the conclusion of trial, Cargolux obtained a judgment as Judgment Creditor in the amount of \$40,479.27 against Transiplex who took nothing.³ Cargolux requested an attorneys' fee and cost award totaling \$644,655.22.⁴ (Transiplex's own fee request totaled \$558,956.40).⁵

¹ CP 3168-70

² CP 28, 237, 259.

³ CP 3164-66.

⁴ CP 3176.

⁵ CP 4364

Cargolux's fee request reflected a 12% reduction from the total fees it incurred. In support of its application for fees, Cargolux submitted copies of its legal billings, which included detailed identification of all fees incurred, the billers involved, and the services performed.⁶

Following briefing and argument on the attorneys' fee issue, the trial court issued a 38-page memorandum order identifying Cargolux as the prevailing party⁷:

The court concludes, under the circumstances presented in this case, that Cargolux is the prevailing party within the meaning of the parties' lease and the applicable case law, and therefore Transiplex is not entitled to recover any attorney fees.⁸

The Order also acknowledged the presence of the contract fee provision and the requirement that RCW 4.84.330 requires an attorneys' fee award when provided for by contract. However, the trial court declined to award any fees to Cargolux. The trial court explained that, under its understanding of the law, Cargolux had not met its burden of proving the "reasonableness" of the amount of its fee request.⁹

The court is mindful that all counsel concerned in this case put in long hours and performed at a high level in an effort to serve their clients. The court has devoted a significant amount of time in resolving the

⁶ CP 3231-414

⁷ The trial court also ruled that there was only one prevailing party for the purposes of the "proportionality rule" (*Marassi v. Lau*, 71 Wn. App. 912, 917(1993)): "Here, because both sides contend the respective attorney fee requests are not segregable, it appears to the court that the claims as to which Transiplex prevailed, are not "distinct and severable" within the meaning of *Marassi*, 71 Wn. App. at 917." *Id.* at 19. CP 4378.

⁸ Memorandum and Order Denying Attorney Fees Motions, p. 1 CP 4377-78.

⁹ CP 438.

issues before court in an effort to consider fully the viability of differing outcomes. But for the reasons discussed herein, the court has determined that Cargolux has failed to carry the necessary burden of proof.¹⁰

The court concludes that Cargolux has failed to carry its burden of proof to demonstrate the reasonableness of the \$627,884.40 award of fees requested. "Whether or not a fee is reasonable is an independent determination to be made by the awarding court. The burden of demonstrating that a fee is reasonable always remains on the fee applicant." *Absher*, 79 Wn. App. at 847.¹¹

In footnote 29 of the memorandum order, the court stated expressly that it was requiring more detailed factual support for the attorneys' fee award than the Court of Appeals identified as the minimum required in *Absher Constr. Co. v. Kent Sch. Dist. No. 115*, 79 Wn. App. 841, 848 (1995):

In the court's experience, the often quoted statement in *Absher*, 79 Wn. App at 848, that the "determination of the fee award should not become an unduly burdensome proceeding for the court or the parties," sometimes appears to be one that is overly optimistic. Where voluminous fee entries are involved, something approaching an "explicit hour-by-hour analysis of each lawyer's timesheets" inevitably must be undertaken by counsel (and likely the court as well) to convince the court that the fee award requested is reasonable. Only then will the court be able, without being arbitrary or basing its decision on speculation, to make an award within the proper exercise of its discretion "with a consideration of the relevant factors" and with "reasons sufficient for review ... given for the amount awarded."¹²

Cargolux moved for reconsideration in response to the fee award denial. Its motion for reconsideration included supplemental declarations of

¹⁰ CP 4401.

¹¹ CP 4390-91.

¹² CP 4394.

counsel and a chart graphically illustrating the fees incurred.¹³ The motion directly responded to the trial court's criticism of the supporting detail provided by itemizing, categorizing and segregating the types of work and associated hours performed by each of Cargolux's attorneys. Cargolux included a line-by-line analysis of each of its billings deducting entries that were duplicative or expenditures on unsuccessful theories, resulting in a further reduction in the amount of its fee request to \$622,540.65.¹⁴ The trial court again denied Cargolux any award of fees, stating that Cargolux had not satisfactorily addressed the deficiencies previously described.¹⁵ Notwithstanding its continuing denial of any fee award, the trial court did state that – if it were instructed by the Court of Appeals to make a fee award – it would likely award Cargolux 50% of the fees it had requested.¹⁶

ISSUES

I. The Trial Court Erred When It Refused To Award *Any* Attorneys' Fees To Cargolux Because Of Uncertainty Over How Much Of Its Fee Request Was Reasonable *Despite* (1) RCW 4.84.330's Mandate Of A Fee Award When Provided For By Contract, (2) The Presence Of A Contract Term Providing For A Fee Award, (3) The Trial Court's Declaration Of Cargolux As The Prevailing Party, And (4) Cargolux's Declarations Documenting Fees And Costs Totaling \$627,884.40.

II. The Trial Court Erred When it Dismissed the Breach of Duty of Good Faith and Fair Dealing.

¹³ CP 4426-32 for chart and 4418-32.

¹⁴ \$616,708 in fees and \$5,833 in costs.

¹⁵ CP 4457.

¹⁶ CP 4466-67.

ARGUMENT

A. CARGOLUX AS THE PREVAILING PARTY WAS ENTITLED TO AN AWARD OF ITS REASONABLE ATTORNEYS' FEES.

The comments of the trial court denying Cargolux *any* award of attorneys' fees reflect a misunderstanding of the fundamental distinction between proof of liability (or *entitlement* to damages) for breach of contract and proof of *the amount* of damages due. The error requires reversal.

1. Attorneys' Fee Awards Are Similar to Contract Damages Calculations Generally In That The Burden of Proving The Amount of An Award Is Significantly More Lenient Than The Burden of Proof Required to Establish Entitlement to The Award.

Under Washington law, parties asserting entitlement to damages for breach of contract must prove four elements of a *prima facie* case consisting of duty, breach, causation and existence of substantial damages.

A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.¹⁷

These elements must be proven by a preponderance¹⁸ of the evidence. Once liability (entitlement) is proven by preponderance, the proof required to establish the amount of damages due (quantum¹⁹) is substantially

¹⁷ *Northwest Indep. Forest Mfrs. v. Dept. of Labor and Indus.*, 78 Wn.App. 707, 899 P.2d 6 (1995) (citing *Larson v. Union Investment & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932); *Alpine Industries, Inc. v. Gohl*, 30 Wn.App. 750, 637 P.2d 998 (1981), review denied, 97 Wn.2d 1013 (1982)).

¹⁸ *Seattle Western Indus's, Inc. v. David A. Mowat Co.* 110 Wn.2d 1, 6, 750 P.2d 245 (1988).

¹⁹ *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 99-100, 330 P.2d 1068 (1958)(using the term "quantum" to distinguish amount of damages from liability

relaxed. The claimant is only required to provide a reasonable basis to estimate the amount of damages using the “best evidence available.” There is no requirement for mathematical certainty as to the amount. *Id.*

This distinction between the burdens of proof applicable to a contract claimant’s “entitlement” and “quantum” cases is equally applicable to contract damages in the form of attorneys’ fees. Washington law provides that a party claiming entitlement to an award of attorneys’ fees under a contract bears the burden of proof on both entitlement and quantum: “The burden of proving the reasonableness of the fees requested is upon the fee applicant.”²⁰ The trial court was under the impression that fulfilling the minimum requirements of this burden required Cargolux to provide far more detailed information than is actually required. By imposing such obligations, the court erroneously denied Cargolux the attorneys’ fee award to which it was entitled under the terms of its contract and by law.

2. An Award of Reasonable Attorneys’ Fees to the Prevailing Party Is Mandatory Under RCW 4.84.330.

The parties’ contract included an attorneys’ fee clause.²¹ Contractual attorneys’ fee clauses are enforceable under Washington law.²² When a

for damages.) The terms “entitlement” and “quantum” are commonly used in federal contracting law to maintain this distinction.

²⁰ *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) (citing *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548).

²¹ CP 28, 237, 259.

contract provides an award of attorneys' fees to the prevailing party, RCW 4.84.330 mandates that an award be made to whichever party prevails: "While the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in requiring an award of fees."²³

The first task of the trial court is to identify the "prevailing party."²⁴ As a general rule, the prevailing party is the one who receives an affirmative judgment in its favor.²⁵ When the alleged contract breaches consist of several distinct and severable claims there may be different prevailing parties for each claim, with the fee awards offset against each other.²⁶

3. Quantifying A Reasonable Attorney's Fees Award Is A Two-Step Process.

After identifying the prevailing party, the trial court itself decides the amount of the fee award to be made. "Whether or not a fee is reasonable is an independent determination to be made by the awarding court."²⁷ The trial court's decision is to be based on supporting (and opposing) affidavits

²² *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn.App. 814, 817, 142 P.3d 206 (2006).

²³ *Id.*

²⁴ *Public Util. Dist. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994);

²⁵ *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *Deep Water Brewing v. Fairway Resources Ltd.*, 152 Wn.App. 229, 215 P.3d 990 (Div. 3, 2009); see also, *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn.App. 814, 817, 142 P.3d 206 (Div. 1, 2006)(as used in RCW 4.84.330, prevailing party means the party in whose favor final judgment is rendered).

²⁶ *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993), overruled on other grounds, *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

²⁷ *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn.App. 283, 291, 951 P.2d 798 (Div. 3, 1998) (citing *Absher*, 79 Wash.App. at 847, 917 P.2d 1086).

submitted by counsel. *Id.* In making the attorneys' fee award, the trial court must support its decision with findings of fact and conclusions of law.

A fee award is reviewable on an abuse of discretion standard.²⁸ "A trial court abuses its discretion in awarding attorney fees if the award is manifestly unreasonable or is based upon untenable grounds."²⁹

Attorneys' fee awards are similar to contract damages calculations generally in that the burden of proving the amount of an award is significantly more lenient than the burden of proof required to establish entitlement to the award. Washington courts carefully distinguish between the very different burdens of proof applicable to liability issues and quantification of damages (quantum) issues.³⁰ Like the court reversed by

²⁸ *Id.*

²⁹ *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 159, 147 P.3d 1305 (2006)(errors of law constitute an abuse of discretion) (citing *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772, 115 P.3d 349 (2005).

³⁰ Such is a summary of the circumstances respecting both items. The fact of damage was established beyond cavil, but the dollar amount thereof was not proved with mathematical precision. Therefore, the trial court decided the respondent should be immunized from all liability.

Uncertainty as to the fact of damage is ground for denying liability, but the fact of damage being removed from the field of controversy by uncontradicted proof, immunization of the party responsible does not result from uncertainty as to the dollar amount of the damage. The controlling rule of law was summarized by the United States Supreme Court in the following passage from its opinion *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 580, 90 L.Ed. 652, a private triple-damage action under the antitrust laws:

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

the *Wenzler* holding, the trial court below “manifestly erred” by denying any recovery of attorney fees to Cargolux.³¹

Our cases are in accord. In one of them, *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wash.2d 386, 261 P.2d 692, a wrongful death action, the court quoted with approval from *Bigelow v. RKO Radio Pictures, Inc.*, *supra*. Other cases are collected in the margin. *Sund v. Keating*, 43 Wash.2d 36, 259 P.2d 1113, 1118, the court reviewed the situation in these words:

As to appellants' claim that damages here are speculative and conjectural, it seems sufficient to cite our recent decisions *Gaasland Company v. Hyak Lumber & Millwork*, 42 Wn.2d 705, 257 P.2d 784; *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P.2d 408, wherein we pointed out that while uncertainty as to the fact of damage is fatal; nevertheless, uncertainty as to the amount or quantum of damages is not to be regarded similarly, as fatal to a litigant's right to recover damages. * * *

There was substantial evidence of the amount of appellants' damage, and the court manifestly erred in denying appellants any recovery for the two items. *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 99-100, 330 P.2d 1068 (1958); cited with app'l *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 498 P.2d 870, 80 Wn.2d 784 (1972).

³¹ [T]he doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage.

Since the basic function of the rule of certainty is to assure that one will not recover where it is highly doubtful that he has been damaged in the first instance (as where he claims loss of profits in a business which is not shown to have any established record of earnings), the jury does not commit forbidden speculation when, once the fact of damage is established, it is permitted to make reasonable inferences based upon reasonably convincing evidence indicating the amount of damage. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712, 713, 257 P.2d 784 (1953). ...

... However, this court has stated that, where the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages. [Citations omitted.] In the case of *Larsen v. Walton Plywood Co., Inc.*, 65 Wn.2d 1, at 16, 390 P.2d 677, at 687 (1964), the court stated:

A measuring stick, whereby damages may be assessed within the demarcation of reasonable certainty, is sometimes difficult to find. Plaintiff must produce the best evidence available and ... if it is sufficient to afford a reasonable basis for estimating his loss, he is not to be denied a substantial recovery because the amount of the damage is incapable of exact ascertainment. *Reefer Queen Co. v. Marine Const. & Design Co.*, 73 Wn.2d 774, 440 P.2d 448, 1969 A.M.C. 677 (1968). ...

Where the court is convinced substantial damages have been incurred, even though the exact amount in dollars is incapable of proof, the injured party will not be denied a remedy in damages because of lack of certainty. [Citations omitted.] ... [Citations omitted.] ... The trier of fact must exercise a large measure of responsible and informed discretion where the fact of damages is proven. *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 83 Wn.2d 7, 15, 514 P.2d 1381 (1973). ... “The difficulty of calculating damages should not be confused with proof of damages as a necessary element of the

Confusion sometimes arises (perhaps due to the similarity between the language describing the fourth element of the *prima facie* case for breach of contract liability—the existence of *substantial damages*—and the language pertaining to *quantification of damages*). As these authorities demonstrate, there is a profound difference between the “preponderance of the evidence” burden of proof applicable to entitlement issues and the more lenient burdens applicable to quantification, or quantum, issues that arise once entitlement is proven. Once liability for a breach of contract is proven (which includes proof of the existence of substantial damages), the claimant need only provide the trier of fact with evidence sufficient to provide a reasonable basis for estimating the amount of damages due using the “best available evidence” under the circumstances.³² An inability to

plaintiff's case. Once the fact of damage has been established by a preponderance, the plaintiff is obligated to produce only the best evidence available which will afford the jury a reasonable basis for estimating the dollar amount of his loss. So long as the jury is not left to speculate or conjecture [as to the existence of damages, see *V.C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 83 Wn.2d 7, 15, 514 P.2d 1381 (1973).], it has wide latitude in calculating damages.” *Seattle Western Indus., Inc. v. David A. Mowat Co.* 110 Wn.2d 1, 6, 750 P.2d 245 (1988).

³² In light of this determination, the record before us contains sufficient evidence, of the best form available under the circumstances, to afford a reasonable basis for estimating the loss. [Citation omitted.] At the very least, this evidence would support a judgment in the lowest amount computable from the evidence. Plaintiff is not to be denied a substantial recovery merely because the precise amount of damage is incapable of exact ascertainment. [Citation omitted.] A more stringent requirement would be contrary to the basic principle which is operative in these cases, as quoted in *Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wash.2d 96, 99, 330 P.2d 1068 (1958):

‘The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . .

“The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused

prove the amount of damages with certainty is no bar to recovery, once the existence of substantial damages has been proven within the claimant's entitlement case. Although any reasonable basis for estimating the loss will suffice, the evidence generally must be the "best available" under the circumstances.³³ But this rule, requiring the best evidence available, pertains to the substance of the evidence, not its source.³⁴

with right of recovery' for a proven invasion of the plaintiff's rights. . . .' *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 789-90, 498 P.2d 870 (1972). *** A measuring stick, whereby damages may be assessed within the demarcation of reasonable certainty, is sometimes difficult to find. Plaintiff must produce the best evidence available and . . . if it is sufficient to afford a reasonable basis for estimating his loss, he is not to be denied a substantial recovery because the amount of the damage is incapable of exact ascertainment.' *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15-16, 390 P.2d 677 (1964), cited with app'l in *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (1980).

³³ *Lundgren*, 94 Wn.2d at 98, 614 P.2d 1272.

³⁴ "The Washington Supreme Court adopted the rule in *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 390 P.2d 677 (1964). . . . The Supreme Court departed from this traditional approach in *Larsen*, holding that a plaintiff should have the opportunity to present the best evidence available to show its lost profits, namely, the evidence that proves the plaintiff's damages with the greatest certainty. [Citation omitted.] The reliability of such evidence is for the trier of fact to determine. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 418-19, 58 P.3d 292 (2002).*** Under these circumstances, the Barnards are not to be denied recovery because the amount of damage is not susceptible to exact ascertainment or apportionment between Compugraphic's fault and other factors which may have contributed to the loss. [Citations omitted]. Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss. [Citation omitted]. Where damages cannot be ascertained with precision, the trial court must exercise its sound discretion. [Citation omitted]. The amount of the award will, therefore, not be overturned absent a showing of abuse."

Barnard v. Compugraphic Corp., 35 Wn.App. 414, 417-18, 667 P.2d 117, 37 UCC Rep.Serv. 141 (1983). *** Expert testimony as to the amount of lost profits is admissible and may be sufficient to support a jury verdict. [Citation omitted.]

(W)here the amount of damage is not susceptible of exact apportionment between the defendant's fault and other factors contributing to the loss, absolute certainty is not required. The trier of fact must exercise a large measure of responsible and informed discretion where the fact of damage is proved.

(a) Step I of Proving Reasonableness Required Submission to The Trial Court of Information Supporting A Lodestar Calculation, The Basis For The Trial Court to Make An Estimate of Reasonable Attorneys' Fees.

Thus far the discussion has addressed burdens of proof in breach of contract cases without focusing on the issue of attorneys' fees, specifically. The following demonstrates that attorneys' fees as a specific form of damages for breach of contract follows the same distinction between burdens applicable to entitlement and burdens applicable to quantum.

“Under this [lodestar] methodology, the party seeking fees bears the burden of proving the reasonableness of the fees.”³⁵ The burdens of proof applicable to contractual attorneys' fee awards parallel the burdens applicable to damages for breach of contract generally. As is the case with burdens for quantification of damages for breach of contract, the claimant seeking an attorneys' fee award must provide the court with a *reasonable basis* for estimating the reasonable amount of attorneys' fees due.

In addition to establishing entitlement to attorney fees, the party requesting them must also establish [the amount is] reasonable.³⁶

As this court stated in *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (Div. 1, 2005):

Long v. T-H Trucking Co., 4 Wn.App. 922, 927, 486 P.2d 300 (1971). [Citation omitted.] That no evidence sustained the exact amount awarded by the jury is immaterial. *Alpine Industries, Inc. v. Gohl*, 30 Wn.App. 750, 754-55, 637 P.2d 998 (1981).

³⁵ *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998) citing (*Fetzer*, 122 Wn.2d at 151, 859 P.2d 1210).

³⁶ *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 291, 951 P.2d 798 (Div. 3, 1998).

In the absence of a predetermined method set forth in the contract itself, the proper method for the calculation of a reasonable fee award is the lodestar method.³⁷

The lodestar method is the accepted means of establishing a reasonable basis for estimating the reasonable damages that are due:

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

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client.

Counsel must provide contemporaneous records documenting the hours worked. ... such 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.).

The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services.³⁸

In *McGreevy, supra*, the court of appeals indicated that this requirement would likely be satisfied by the supply of evidence that the rate charged was the attorney's customary billing rate for his clients.

When attorneys have an established rate for billing clients, that rate will likely be a reasonable rate. *Bowers*, 100 Wash.2d at 597, 675 P.2d 193. "The reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation."³⁹

³⁷ *Id.*

³⁸ *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

³⁹ *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 292, 951 P.2d 798 (1998).

(b) Step II of Proving Reasonableness Required The Trial Court to Review The Fees Determined Under The Lodestar Calculation and to Exercise Its Judgment Regarding Whether, And By How Much, to Make Any Subjective Adjustments to The Lodestar Amount.

After establishing the lodestar value, the trial court must then “make an independent decision as to what represents a reasonable amount for attorney fees.”⁴⁰ This “independent decision” requirement obligates the court to review the work performed and the amount requested, after establishing the lodestar, to verify that in the court’s judgment they appear reasonable.⁴¹ “Adjusting the lodestar amount⁴² is within the trial court’s

⁴⁰ Dwight’s attorneys have provided extensive documentation of their efforts in this case. While this documentation forms the starting point under the lodestar method, it is not dispositive on the issue of the reasonableness of the [859 P.2d 1217] hours. *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.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

⁴¹ “Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel,” *Mahler*, 135 Wn.2d at 434 (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)).

⁴² Examples of types of factors to consider in making adjustments include the following:

- the amount of the recovery - *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).
- the amount of the claims upon which the party prevailed - *Kastanis v. Educ. Employees Credit Union*, 122 Wash.2d 483, 501-02, 859 P.2d 26, 865 P.2d 507 (1993).
- a lodestar figure grossly exceeding amount involved - *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).
- time spent on unsuccessful claims - *Condominium Owners Ass’n v. Coy*, 102 Wn. App. 697, 714, 9 P.3d 898 (Div. 1, 2000).
- level of skill required - *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 293, 951 P.2d 798 (1998).
- time limits imposed - *Id.*
- amount of the potential recovery - *Id.*
- attorney’s reputation - *Id.*

discretion.”⁴³ However, it does not require meticulous independent review by the court.

"An explicit hour-by-hour analysis of each lawyer's time sheets is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount of the awarded."⁴⁴

The court held that the lease issue constituted two-thirds of the consolidated action and awarded IRI two-thirds of its attorney fees.

* * * *

However, the trial court did segregate the award. While the bases for its segregation did not involve a detailed analysis of each individual fee charge, such detail is not required.⁴⁵

A party opposing an attorneys' fee award has right and the responsibility to submit legal and factual challenges to the claimant's fee request. In the absence of such opposition, the trial court may exercise its discretion based on the judge's personal knowledge of the case and the strengths or weaknesses of the claimant's supporting affidavits.

4. The Trial Court Erred When It Declined to Award Attorneys Fee In the Absence of Detailed Information That Was Neither Required As A Matter of Law Nor Under the Factual Circumstances of This Case.

The trial court in this case erred when it improperly concluded that it was not permitted to use its informed discretion to judge the reasonable amount of attorneys' fees to award based on its knowledge of the case and

• undesirability of the case - *Id.*

⁴³ *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 294, 951 P.2d 798 (1998) (citing *Burnside v. Simpson Paper Co.*, 66 Wash.App. 510, 532, 832 P.2d 537 (1992))

⁴⁴ *McGreevy* at 292.

⁴⁵ *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (Div. 1, 1999).

the information provided by Cargolux in its lodestar calculation. The trial court referred to this as “speculating.” Instead of evaluating the information provided and any criticism offered by Transiplex to draw its own conclusion regarding what was reasonable, it fell back on an improper belief that Cargolux was entitled to nothing in the absence of detailed, item-by-item justification for the fees that it incurred. Such an obligation is inconsistent with the law of this state regarding the quantification of fee awards specifically and contract damages in general.

In *State v. Amunsis*,⁴⁶ a condemnation case, the state supreme court addressed a similar issue pertaining to burdens of proof to establish the reasonable value of condemned property where entitlement to an award was established. The court in an effectively⁴⁷ unanimous opinion ruled that the burden of proof in a situation where the issue was not which of two proffered valuations was correct, but rather what value generally was reasonable, it was improper to deny damages altogether based on burdens of proof when the existence of substantial damages was beyond dispute.

In order to raise such form of technical issue, to which rules arising out of burden of proof would apply, it would be necessary for the one party to determine upon a definite, particular proposal as to value, which definite proposal would be affirmed by one party and denied by the other. Such an unusual proposal would doubtless furnish the necessary technical issue to which the technical rules applicable to burden of proof would apply; but such would be most unusual in a

⁴⁶ *State v. Amunsis*, 61 Wn.2d 160, 163-64, 377 P.2d 462 (*en banc*, 1963).

⁴⁷ The lone dissent was based on an unrelated issue.

condemnation case, where the witnesses for the condemnor, as well as for the property owner, will vary thousands of dollars as to what the fair market value of the property is at the time of the inquiry, so that the jury would have before it no definite issue to which it could logically and reasonably apply the doctrine known as 'burden of proof.'

... *You might as well undertake to fit a hat to a headless man* as to fit the doctrine of burden of proof to a proceeding of this character, which is absolutely wanting an issue to which such doctrine can be applied.

For the reasons indicated, there should hereafter be no suggestion that either the property owner or the condemnor, in such a case, has to prove the fair market value at the time of trial of the property being condemned. After the condemnor has met the burden of going forward with the evidence as to value, it is a question for the jury on the probative effect of all the evidence regardless of who offered it, and the jury should be so instructed.⁴⁸

B. THIS COURT SHOULD REINSTATE CARGOLUX'S CLAIM FOR BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING AND REMAND FOR TRIAL

Transiplex claims that "Cargolux [sic] did not preserve this argument" on a theory that it waived the issue because it did not raise it on summary judgment motions on separate and distinct claims.⁴⁹ The trial court dismissed the claim because it "seems like there's already been a legal ruling...It's over."⁵⁰ As Cargolux showed in its initial briefing, there was no ruling on the issue, and the dismissal of the claim was improper.⁵¹

⁴⁸ *State v. Amunsis*, 61 Wn.2d 160, 163-64, 377 P.2d 462 (*En Banc*, 1963)(emphasis added).

⁴⁹ See Transiplex Response at 20-23.

⁵⁰ RP 89-90; CP 2368-69.

⁵¹ See Cargolux BR at 44-46.

• November 6, 2009: Transiplex moves for summary judgment on Cargolux's breach of the duty of good faith and fair dealing claims. CP 1584-97.

1. Cargolux Did Not Waive Its Claim.

For there to be a waiver, a party must voluntarily relinquish a known right.⁵² Cargolux's claim survived a motion for summary judgment.⁵³ Cargolux prepared to pursue this claim at trial and prepared jury instructions.⁵⁴ This claim was necessary in case the court determined that some of the Port Litigation expenses were chargeable as BOCs. TransiPLEX willfully ignores that the key legal question is the legal definition of "terminal," a contractually defined term.⁵⁵ While Cargolux disagrees with that any Port Litigation expenses are includable under the Lease, once the

• December 11, 2009: Court denies TransiPLEX's motion with respect to the duty of good faith and fair dealing claim. CP 3759-60.

⁵² *Public Utility Dist. No. 1 of Lewis Cty. v. Washington Public Power Supply System*, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985).

⁵³ CP 3759-60.

⁵⁴ CP 2094, 2102-03.

⁵⁵ September 3, 2008: TransiPLEX moves for summary judgment on arguing that legal fees and expenses were proper BOCs under the broad scope of Article 3.2 of the lease even though not specifically enumerated.

• October 17, 2008: Cargolux filed cross-motion for summary judgment arguing that Port litigation expenses could not be included BOCs because they were not incurred in operation of the Terminal as that word was defined within the lease. CP 533-44.

• December 10, 2008: the Court grants in part Cargolux's summary judgment motion that legal fees from the Port litigation were not incurred in the operation of the Terminal and denies in full TransiPLEX's motion. The Court states BOC charges under Article 3.2 must be incurred in operation of the Terminal as that term was defined in the lease, that the hardstand was not part of the Terminal pursuant to that definition, and that hardstand related Port litigation fees were, therefore, not chargeable as BOCs. CP 935-44.

• August 21, 2009: TransiPLEX moves for summary judgment arguing that all Port litigation expenses were incurred in operation of the Terminal, despite the earlier ruling that the hardstand-related fees were not. CP 3641-51

• October 9, 2009: the Court rules that certain Port litigation expenses were incurred in operation of the Terminal, *e.g.*, tortious interference and trespass. CP 3774.

court determined that some were then Cargolux had a right to challenge whether such charges were incurred in bad faith and thus not chargeable.

2. Cargolux Stated a Valid Claim.

Eliminating that implied duty is contrary to black letter Washington law. The Washington Supreme Court has held that: “There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of performance.”⁵⁶ Cargolux is entitled to the “full benefit” of Transiplex’s performance of its contractual requirements, which Transiplex breaches in several ways.⁵⁷

Transiplex admits the duty of good faith requires “that the parties perform in good faith the obligations imposed by their agreement.”⁵⁸ Transiplex had the duty to deliver statements setting forth Cargolux’s pro rata share of Additional Expenses. But Transiplex glosses over the requirement that it had the duty to perform this, and every, contractual requirement in good faith, which would include not hiding substantial charges to which it knew Cargolux would object by using misleading

⁵⁶ *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 510 P.2d 33 (1966) (emphasis added).

⁵⁷ Annual BOC reconciliation statements, Letter of intent to declare a Default; and Letter declaring that Transiplex had provided proper notice of termination prior to December 1, 2007.

⁵⁸ See Transiplex Response at 23.

categorizations. It is for the finder of fact to determine whether the statements reflected good or bad faith.

Transiplex is wrong to argue its “only duty” under the contract was to deliver statements to Cargolux.⁵⁹ It completely ignores its duty to administer and operate the terminal in good faith. Cargolux was required by the lease to pay as Additional Expenses “all . . . operating and administrative expenses of every kind and nature incurred by the Landlord in operation of Terminal. . . .”⁶⁰ The parties intended that Transiplex would administer and operate the Terminal.⁶¹ Cargolux is entitled to present its case regarding the bad faith of Transiplex in administering and operating the terminal in a manner designed to maximize Transiplex’s long-term benefit (being able to charge higher rents to its tenants) at Cargolux’s expense. Because the court improperly dismissed the claim based on a faulty determination that the court had seemingly already disposed of the claim, this court should reverse and remand for further proceedings.

C. TRANSIPLEX IMPROPERLY RAISES A NEW AND FALSE ARGUMENT IN RESPONSIVE BRIEFING.

This case was not tried as a case about whether one-year notice was given. Transiplex steals that argument into the appellate briefing after abandoning that contention and trying the case on a different, contradictory

⁵⁹ Transiplex Response at 23.

⁶⁰ CP at 3659-60.

⁶¹ *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 426-27, 922 P.2d 115 (1996).

theory. In fact, Transiplex originally claimed that one-year notice had been provided but abandoned that position to avoid a summary judgment. CP 98-100, 109-10, 360-63, 2032.⁶²

⁶² The following timeline procedural history documents Transiplex's previous attempt to assert that its communications to Cargolux were notices to terminate under the provisions of the lease and its abandonment of that argument:

- April 15, 2008: Transiplex finally reveals for the first time it had initiated a lawsuit in 2005 against the Port of Seattle over issues concerning the hardstand, that the amount of the legal expenses associated with the lawsuit against the Port were \$162,898 in 2005, \$168,591 in 2006 and \$560,001 in 2007, and also that Transiplex had included all said expenses in the operating costs ("BOCs") for the leased premises. CP 60-62.
- May 29, 2008: Transiplex sends Notice of Intent to Declare a Default based on BOCs that were unauthorized under the lease agreement. CP 64.
- May 30, 2008: Transiplex sends a separate letter telling Cargolux that "Cargolux's lease with Transiplex and [its] rights to occupy the Premises will expire on November 30, 2008,"—a date six months hence in contrary to the required 1-year notice termination provision in the lease. CP 87-88.
- June 5, 2008: Cargolux initiates a lawsuit to avoid the threatened forcible eviction in the Notice of Intent to Declare Default. The complaint contained a claim based upon breach of the duty of good faith and fair dealing. CP 2217-2225.
- June 5, 2008: Cargolux approaches the court *ex parte* to hear its Motion for Temporary Restraining Order concerning the threatened eviction in the Notice of Intent to Declare Default. Transiplex succeeds in continuing the hearing until June 9, 2008 by presenting a different copy of the lease and claiming Cargolux was presenting the wrong lease. Transiplex later retracts that lease when Cargolux presses for it to be produced and explains that it accidentally brought the lease of a different tenant to the hearing.
- June 9, 2008: the Court denied the Motion for Temporary Restraining Order. Cargolux, that same day, pays the disputed outstanding BOC charges to Transiplex in full under protest. CP 66-67.
- June 11th, 2008: Mr. Joseph Joyce responds (by the deadline) to Transiplex's May 30, 2008 letter, stating that Cargolux would not renew the Lease and would indeed vacate the premises by November 30, 2008. CP 69.
- June 12, 2008: Transiplex notifies Cargolux that unless it accepts the higher proposed rents, the lease terminates November 30, 2008, claiming that proper notice to terminate under the 2000 Amendment was sent prior to December 1, 2007. Transiplex also states that if Cargolux feels the termination notice was inadequate, then Cargolux should seek a legal determination as to whether it is entitled to remain a tenant. CP 92-93
- June 20, 2008: Cargolux serves its First Amended Complaint upon Transiplex, the first complaint served upon Transiplex in this matter. This complaint also contained claims for breach of the duty of good faith and fair dealing.
- August 5, 2008: Cargolux moves for summary judgment seeking a declaration that the lease terminates as of November 30, 2008 based upon Transiplex's assertions in its Answer to the First Amended Complaint and in its May-June letters to Cargolux that it

After abandoning the 1-year notice argument to avoid a summary judgment, Transiplex instead claimed at trial that November 30, 2008 was a “typo” that should have been November 30, 2009.⁶³ The jury studied the credibility of the witness and rejected that testimony. Now attempting to transform the entire argument and present new issues, Transiplex claims to have given immediate and repeated notice several times after that its offer to terminate on November 30, 2008 had been withdrawn, “[Transiplex] withdrew the repudiation almost immediately and several times subsequently.”⁶⁴ That is uncited and entirely false. Mr. Wilson’s own testimony confirms that Transiplex is neither telling the truth nor adhering to the record on appeal:

Q. ... I’m asking you if at any point in time you sent a letter to Cargolux saying, “When I said 2008, I’m sorry, it was a typo. I really meant 2009.” That letter doesn’t exist, does it?

had given proper notice of termination through its communications to Cargolux, thereby terminating the lease as of November 30, 2008. CP 70-78

- August 22, 2008: Transiplex opposes Cargolux’s motion arguing that it was premature because the Court had not yet been asked to decide the issue with respect to the termination provisions in the 2000 Amendment. Simultaneously, Transiplex moves to amend its Answer because “[h]aving reconsidered the underlying evidence, Transiplex believes the notices it sent Cargolux were appropriate notices of a rent increase only, rather than notice of termination.” Transiplex Mtn. for Leave to Amend Answer dated August 21, 2008 at 4 (emphasis added). CP 107-117. There is no provision in the Lease for a rent increase during the lease term. CP 938, RP 765.

- September 2, 2008: the Court denies Cargolux’s motion because Transiplex changed its position with regard to the notices it sent before December 2007. CP 303-04

- November 30, 2008: Cargolux vacates the Terminal as agreed per its June 11, 2008 letter. RP 870-71.

⁶³ RP 828, 865, 873-74, 876.

⁶⁴ Transiplex Response p.5.

A. There's no letter. It's just court documents.

Q. There's no letter? There's no phone call? You never called them and said, "Hey, that was a typo. It says 2008, but I really meant 2009?"

A. No. They didn't call me, and I didn't call them.⁶⁵

Q. ... Did you, Mr. Scott Wilson—when you found out that Cargolux was moving out, did you, Mr. Scott Wilson, tell Cargolux that, "Hey, when I said 2008, I really meant 2009?"

A. No, I did not speak directly to them.⁶⁶

Transplex conveniently omits that it previously presented and then abandoned the now resurrected-in-final-briefing-on-appeal argument that communications to Cargolux were notices of termination under the lease. Transplex presents that argument hoping to trump the jury's determination that the parties intended to modify their lease. In the face of these attempts to obtain a factual "do-over" pertinent to modification, termination or repudiation, there is extensive legal authority deferring to jury verdicts and findings—here the jury entered a verdict that, yes, the parties in fact intended a modification of their lease to terminate November 30, 2008:⁶⁷

⁶⁵ RP 871, *see also* RP 828.

⁶⁶ RP 881-82.

⁶⁷ This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. *Burnside*, 123 Wn.2d at 108, 864 P.2d 937 (citations omitted) (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)).

The witness for Transiplex, Mr. Scott Wilson, did not tell the truth on the witness stand at trial and, now, Transiplex attempts to change its story on appeal. "Juries decide credibility, not appellate courts."⁶⁸

Transiplex's arguments regarding repudiation are equally defective and misleading. Transiplex first suggests that Cargolux failed to respond to this argument.⁶⁹ However, Cargolux provided 2 pages of briefing on the subject.⁷⁰ As briefed, Transiplex has no right to appeal the denial of a motion for summary judgment on repudiation and if summary judgment is appropriate for either party then on the undisputed letters it must be in favor of Cargolux, not Transiplex. There is nothing improper or unusual about the trial court having presented the modification question to the jury first because the law is well established that parties may abandon, release and modify contract obligations by their conduct.⁷¹

The court will overturn a jury's verdict only rarely and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict.

The credibility of witnesses and the weight to be given the evidence are matters which rest within the province of the jury; and, even if the court were convinced that a wrong verdict had been rendered, it should not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered. *Burke v. Pepsi Bottling Co.*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964).

⁶⁸ *Morse v. Antonellis*, 149 Wn.2d 572, 575, 70 P.3d 125 (2003).

⁶⁹ Transiplex Response p.4-5.

⁷⁰ Respondent Cross-Appellant Brief p. 35-37.

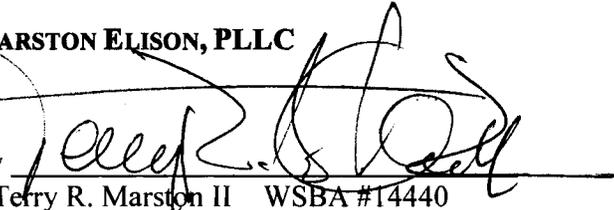
⁷¹ *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn.App. 86, 615 P.2d 1332 (1980).

CONCLUSION

Cargolux prevailed at trial and remains entitled to additional remedies. The trial court erred by failing to issue an attorney fee award and by dismissing the claim for breach of the duty of good faith and fair dealing. None of the appeals from Transiplex have merit. The jury verdict finding regarding modification may not be disturbed, and, except for the attorney fee and breach of duty of good faith and fair dealing claims identified above, which should be reversed and remanded, the trial court judgment and jury verdict should be affirmed.

DATED this 17th day of June 2011.

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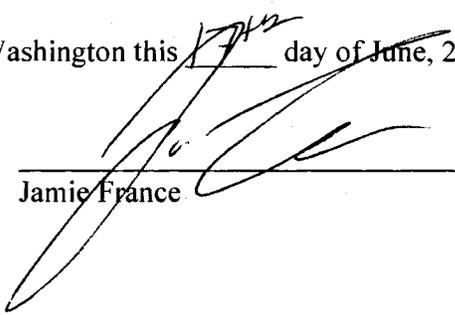
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