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No. 71536-4-I

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

NICHOLAS AND ANGELA XAVIER, husband and wife, and the marital
community thereof,

Respondents,

vs.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,
an insurance company, et al.,

Appellant.

BRIEF OF RESPONDENTS NICHOLAS AND ANGELA XAVIER

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A. INTRODUCTION

This Court's important role in the process of evaluating attorney fee awards is to ensure that the trial court thoroughly scrutinizes fee requests, makes appropriate deductions based upon the law and the evidence, and documents its process with detailed findings and conclusions that this Court may review. When a trial court carefully reviews, considers, and rules upon a request for attorney fees with detailed findings of fact and conclusions of law, and there is no abuse of that court's discretion, this Court should uphold the fee judgment.

It is not this Court's role to supplant the trial court's fact-finding function and re-weigh the facts and evidence. This is not merely a question of procedural propriety, but of constitutional constraint.

Allstate Property and Casualty Insurance Company ("Allstate") asks this Court to vacate a carefully considered and thoroughly documented attorney fee award in favor of the highly reduced award that Allstate prefers. Allstate can point to no substantive error of law or fact, nor any abuse of discretion but simply lodges general complaints about the trial court's reasoning.

When a trial court so thoroughly conforms to Washington courts' exacting standards for evaluating attorney fee requests, this Court should uphold the fee award.

B. ASSIGNMENTS OF ERROR

The Xaviers acknowledge Allstate's assignments of error, br. of appellant at 1, but believe that the issues pertaining to them are more accurately formulated as follows:

1. Does a trial court properly exercise its discretion by precisely adhering to the procedure for making attorney fee awards, and by entering specific, thorough findings of fact and conclusions of law in support of the award?
2. Should a fee award be upheld when it is based upon specific findings of fact and conclusions of law supported by substantial evidence, particularly when the trial court explained why it did not agree to every deduction requested by the opposing party?
3. Is it this Court's role to re-weigh the evidence and make findings of fact that differ from the trial court's findings, and to further reduce a fee award on appeal based upon those findings?
4. Does a trial court abuse its discretion when, after a fee judgment is entered, it declines to supplement the record on the motion with documents that were easily and publicly available to the parties at all times?
5. When a party must defend a fee award, should this Court award that party its fees on appeal?

C. STATEMENT OF THE CASE

- (1) Background of Underlying Case Giving Rise to Attorney Fee Award to the Xaviers¹

¹ The facts in this section are taken from the Xaviers' complaint. CP 1-8. Because Allstate and the Xaviers settled the underlying matter, and the only issue on appeal is the amount of attorney fees awarded to the Xaviers pursuant to that settlement contract, the facts of the underlying case are provided only for context.

Allstate issued a homeowner's policy of insurance to the Xaviers that was in force and effect on June 28, 2011. CP 2. The policy included Property Coverage that provided, *inter alia*, insurance coverage for damage to the Xaviers' residence caused by water. *Id.*

On June 28, 2011 a septic tank discharge filled the Xaviers' house with septic waste and caused property damage to their residence. *Id.* The Xaviers properly submitted a claim to their insurer, Allstate. CP 3.

Allstate failed to perform its obligation to investigate the loss and determine the appropriate remedies for the damage to the house and the health risks to the Xaviers. *Id.* Rather than send a representative to evaluate the damage and health risks associated with the loss, Allstate attempted to resolve the matter over the telephone. *Id.*

Allstate also failed to promptly disclose to the Xaviers that their policy provided coverage for them to stay in a rental house or other accommodation while awaiting the cleaning, sterilization, and repair of their home. *Id.* Instead, the Xaviers continued to live in the house with the septic waste. *Id.*

The Xaviers hired Restorx to remediate their home.² *Id.* Restorx failed to properly remediate the home, thereby exposing the Xavier family (who continued to be under the misimpression they could not afford to

² RestorX is not a party to this appeal.

leave) to harmful contaminants and pathogens contained in the septic waste. *Id.*

During the adjustment of the Xaviers' insurance claim, Allstate failed, to timely make sufficient payments to the plaintiffs to properly clean and/or replace their damaged contents, remediate, repair, and/or rebuild the Xaviers' residence to its pre-loss condition with like, kind, and quality materials and professional workmanship, and pay their additional living expenses. *Id.* As a consequence, the Xaviers were compelled to initiate appraisal, hire attorneys and hire a public adjuster to recover all amounts owed under their policy. *Id.* Allstate also violated the Washington Administrative Code ("WAC") claims handling regulations. CP 4.

(2) The Bad Faith, Consumer Protection Act, and Breach of Contract Litigation

The Xaviers filed their complaint in King County Superior Court for bad faith, Consumer Protection Act (RCW 19.86, hereinafter "CPA") violations, and breach of contract on May 1, 2012. CP 1. The case was assigned to the Honorable Michael Hayden. From May 2012 to September 2013, litigation ensued over the Xaviers' claims. Allstate in its statement of the case relies on the motions filed in the superior court to suggest that this litigation was "minimal." Br. of Appellant at 11.

However, Allstate ignores that litigation is about more than simply the number of motions filed, as the trial court docket reveals. Appendix A. Allstate also ignores that trial litigation involves more than just filing motions, including the discovery process, review of the documents produced, correspondence, legal research,³ analyzing documents, drafting declarations, and in this case, the process of negotiating a settlement agreement. *Id.*; *see, e.g.*, CP 1932-36 (listing numerous settlement-related documents).

Allstate also omits the fact that it sought to remove the case to federal district court, resulting in needless federal litigation until the case was remanded. CP 61-64; Appendix B. Allstate accused the Xaviers of “fraudulent joinder” of RestorX, a claim that the Xaviers had to overcome to obtain remand. CP 46.

(3) Allstate’s Offer of Judgment and the Attorney Fee Provision

On September 13, 2013,⁴ Allstate made an offer of judgment to the Xaviers for \$60,000. CP 1940. The \$60,000 figure included all attorney

³ Despite the fact that it is always the plaintiffs’ burden to adduce facts sufficient to prove their claims, Allstate focuses on its own “minimal” discovery efforts to downplay the intensity of the litigation. Br. of Appellant at 11-12.

⁴ The original trial date was set for September 30, 2013, just two weeks after Allstate made its offer. CP 14. Allstate’s offer was not made early in the litigation process, but rather after both parties had filed numerous summary judgment motions. Appendix A.

fees the Xaviers incurred in connection to their pre-litigation dealings with Allstate's claims handling team, but did not include attorney fees incurred in connection with the bad faith, CPA, and breach of contract litigation. CP 1940. The settlement contract Allstate drafted allowed the Xaviers to recover their attorney fees incurred after the filing of their complaint:

The Plaintiffs shall be entitled to make a claim for reasonable attorney fees and expenses *incurred after the filing of the lawsuit*, which would be in addition to the \$60,000.00 as set forth herein.

Id. The Xaviers accepted Allstate's offer of judgment, and then began the process of requesting their attorney fees incurred after May 1, 2012 as allowed by the settlement contract. CP 1937-38.

(4) Procedural History on the Xaviers' Attorney Fee Request

The Xaviers' counsel filed a detailed and extensively documented attorney fee request with the trial court. CP 3075-3374. They included contemporaneous time billings and declarations regarding the request that would allow the trial court to determine its reasonableness.⁵ The Xaviers did not request any fees incurred before May 1, 2012. CP 2456. The total hours expended in the fee request were 784.9. The total dollar amount in fees requested was \$220,655.00.

⁵ Allstate incorrectly accuses the Xaviers' trial counsel of altering billing records after the fact. Br. of Appellant at 12-13. In so doing, Allstate relies on documents that were not before the trial court. *See infra* Section E(7). Also, Allstate's attack is easily disproven by viewing the records at issue. *Id.*

Allstate hired an expert to review the fee request. *Id.* That expert concluded in a declaration that the Xaviers should only receive \$83,499.38. CP 2004. The same expert later filed a 12-page report that increased her opinion of the total fees recoverable to \$91,813.75. CP 2253. The expert also concluded that the Xaviers were entitled to recover \$21,008.41 in costs. *Id.*

Allstate initially filed a 23-page opposition to the Xaviers' fee request. CP 1973-95. The court rules allowed for only a 12-page document, but Allstate did not request to file an overlength document. KCLR 7(b)(5)(vi). Allstate submitted detailed annotated copies of the Xaviers' billing statements, marking every entry that Allstate believed was problematic. CP 2035-2140.

The Xaviers replied to Allstate's fee request, but also moved to strike it as overlength. CP 2164, 2182, 2191. Allstate responded by noting the extensive documentation the Xaviers submitted, and complained that given the level of detail, it would impossible to respond in only 12 pages. CP 2197.

Simultaneously, Allstate filed an "amended" opposition to the Xaviers' fee request that was even longer than the first one, 26 pages. CP 2200-25. The Xaviers again objected to this untimely additional briefing. CP 2305. Allstate then filed a "surreply" to the fee motion, which again

was not permitted by the court rules. CP 2321; KCLR 7. The Xaviers again were forced to respond Allstate's improper filing. CP 2393, 2412. In December 2013, Judge Hayden recused himself from the proceedings⁶ and the matter was reassigned to the Honorable Roger Rogoff. CP 2411.

The Xaviers requested a hearing on the attorney fee issue, and the matter was heard on January 22, 2014. CP 2314. The trial court drafted and entered detailed findings of fact and conclusions of law, examining the fee request and associated documentation, Allstate's opposition and annotated billings, and Allstate's expert's opinion. CP 2455-60; Appendix C. The trial court accepted most of Allstate's objections to the amount of the fee award, and substantially discounted the Xaviers' original fee and cost requests. *Id.* The court awarded the Xaviers \$184,360 in fees and \$12,500.00 in costs. CP 2460.

Having expended over \$20,000 in fees just to establish their right to fees and costs, the Xaviers requested a supplemental fee award for the time spent. CP 2465. Allstate objected, arguing that the Xaviers were not entitled to those fees under the American Rule, and arguing that the fees were excessive. CP 2500.

Of the more than \$24,000 in fees and costs the Xaviers expended

⁶ Judge Hayden recused himself because of a recent negative personal experience with Allstate's claims handling practices.

in the contentious litigation over the reasonable amount of fees, the trial court awarded a supplemental fee amount of \$4,375.00. CP 2431. The trial court's rationale for the 75% reduction in fees was that Allstate was largely successful in procuring deductions from the original fee request: "Defendant only 'lost' the [original fee] motion arguments by approximately 25%." CP 2537.

(5) Post-Judgment Trial Court Proceedings

On February 12, Allstate filed a notice of appeal from the trial court's fee award and judgment. CP 2524-26.

On March 7, a month after the judgment was entered and three weeks after it filed its notice of appeal, Allstate filed in the trial court what it called a "motion to supplement the record." CP 2545. Allstate argued that under CR 60(a) and RAP 7.2(e), the trial court should add to the record documents it did not consider in connection with the fee motion. *Id.* at 2547. Allstate cited as a rationale for its request to supplement the fact that it had filed a notice of appeal. *Id.* at 2546.

The Xaviers opposed Allstate's "motion to supplement the record," and the trial court denied it. CP 3061, 3073. Allstate then appealed from the order denying the motion, and designated as part of the record on appeal all of the briefing and evidence filed in connection with the

motion.⁷

D. SUMMARY OF ARGUMENT

Allstate asks this Court to enter new findings of fact and conclusions of law find that the reasonable attorney fee in this case is \$45,906.87, and that awardable costs are \$10,504.20. Br. of Appellant at 48. Allstate's brief raises no serious challenge to the trial court's exercise of discretion in adjudicating the Xaviers' fee award. The trial court carefully reviewed hundreds of pages of detailed billings, declarations, including an expert declaration secured by Allstate, and extensive briefing and argument. After holding a hearing on the matter, the trial court entered detailed findings of fact and conclusions of law. The trial court followed to the letter this Court's rule for the procedure governing fee requests, and in fact agreed with Allstate regarding most of its challenges.

The trial court's fee order complies with the law governing attorney fee awards based on settlement contracts. The contract Allstate drafted and signed allows the Xaviers to recover all of their fees incurred after the date they filed their complaint. It does not require the trial court to segregate fees for unsuccessful claims, or for claims that do not have a

⁷ Allstate cites to these documents in its statement of the case, without mentioning that they were not considered by the trial court and are only part of the record on appeal because Allstate is challenging the trial court's refusal to admit the documents below. Br. of Appellant at 12-13. This conduct should be sanctioned, as explained *infra* Section E(7).

statutory fee basis for recovery. Even if the law did require that the trial court attempt to segregate such fees, the trial court specifically found that doing so would be impossible.

The deductions that the trial court did make were supported by substantial evidence, and Allstate does not try to argue that they are not. Instead, Allstate claims that the trial court was obligated to deduct the full amount for each category of fees Allstate challenged. However, the trial court entered specific findings supporting the amount of deductions it did make, and explained why not all of Allstate's requested deductions were proper. The record supports the trial court's order.

The Xaviers were entitled to the modest \$4,375.00 supplemental fee award for the time expended litigating their fee request. There is no carve-out to statutory or contractual attorney fee awards that reinstates the American Rule *only* for the process of litigating attorney fee requests. Allstate's settlement contract, the common law, and the record all support that supplemental award.

The trial court did not abuse its discretion in denying Allstate's postjudgment CR 60(a) motion to "supplement the record" with documents that Allstate could have produced in connection with the motion. CR 60(a) governs motions to correct clerical errors in the record. Allstate claims that the documents should be admitted because the trial

court did not require the Xaviers to submit sufficient documentary evidence to support their fee request. Allstate thus asserts legal error, not clerical error, and its CR 60(a) motion was improper.

The Xaviers are entitled to an award of attorney fees on appeal based on the settlement contract and RAP 18.1.

Finally, Allstate has violated the RAPs and the RPCs in its brief. It has made material misrepresentations to this Court, wrongfully accused the Xaviers and their trial counsel of improper conduct, and relied upon documents that were not before the trial court without pointing out that fact to this Court. Allstate should be sanctioned for its conduct.

E. ARGUMENT

(1) Standard of Review and Applicable Law on the Procedure Governing a Trial Court's Consideration of Attorney Fee Awards

Appellate courts will uphold attorney fee awards unless the trial court *manifestly* abused its discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Id.* The trial court's determination regarding the reasonableness of a particular fee award will be upheld if it is based upon substantial evidence. *Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 615, 141 P.3d 652 (2006).

The starting point for calculating a reasonable fee is the lodestar method. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933 (1983); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). In essence, under that method, a court must multiply a reasonable number of hours by a reasonable hourly rate. The request must be based on contemporaneous billings of counsel. *Mahler*, 135 Wn.2d at 434.

As the trial court acknowledged in its order here, reviewing an attorney fee request should not be a rubber stamp process. *Id.*; CP 2456. Instead, the trial court must “take an active role in assessing the reasonableness of fee awards” rather than “simply accept[ing] unquestionably fee affidavits from counsel.” *Id.*

This Court’s most recent reaffirmation of the procedure a trial court must follow when awarding attorney fees is described in *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). This Court in *Berryman* acknowledged the continued vitality of our Supreme Court’s *Mahler* rule that attorney fee requests should be carefully scrutinized. *Berryman*, 177 Wn. App. at 657.

- (2) The Trial Court Precisely Followed This Court’s Instructions in *Berryman* to Scrutinize Attorney Fee Requests, Deduct Fees Where Appropriate, and Entered Specific Findings and Conclusions Explaining Its Process and Decision

Allstate's first argument on appeal is that the trial court failed to follow *Berryman*, and thus *Mahler*. Br. of Appellant at 2, 27-29. Allstate claims that the trial court (1) shifted the burden of showing reasonableness to Allstate, (2) failed to segregate fees for unsuccessful claims or claims for which there was no statutory fee basis, (3) awarded fees for duplicated effort, and (4) awarded fees based on insufficiently specific billing records. *Id.* Allstate admits that the Xaviers had a legal right to an attorney fee award, but disputes the amount the trial court awarded. *Id.*

(a) The Trial Court Here Followed This Court's Instructions in *Berryman* Precisely

Because Washington courts must carefully scrutinize fee requests, this Court in *Berryman* was understandably frustrated by a trial court's truncated treatment of the issue. *Berryman*, 177 Wn. App. at 658. In that case, the trial court just accepted at face value the plaintiff's fee request, doubled it with a 2.0 multiplier, and signed the plaintiff's proposed findings and conclusions without any explanation of the two parties' positions, or any analysis of why it was finding the fees reasonable:

The trial court signed *Berryman*'s proposed findings of fact and conclusions of law *without making any changes except to fill in the blank for the multiplier of 2.0*. The findings related to the calculation of the lodestar amount did not address Farmers' detailed arguments for reducing the hours billed to account for duplication of effort and time spent

unproductively. The court simply found that the hourly rate and hours billed were reasonable....

While the trial court did enter findings and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of Farmers' objections to the hourly rate, the number of hours billed, or the multiplier. The court simply accepted, unquestioningly, the fee affidavits from counsel.

Berryman, 177 Wn. App. at 657-58.

The proper method for trial court consideration of an attorney fee award was demonstrated in *Banuelos, supra*. In that case, the dispute was over a car dealer's failure to return timely a buyer's down payment check and trade-in vehicle. *Banuelos*, 134 Wn. App. at 608. After the trial court ruled in favor of the buyers on summary judgment, it entered a total damage award of \$19,040. *Id.* The buyer's counsel then submitted detailed billing records and requested fees for 448.67 hours of billed time. *Id.* at 657-58. The trial court reviewed the detailed billing records submitted by the buyer's counsel, and reduced the amount based on detailed reasoning stated in a letter opinion, and awarded \$90,125 in attorney fees, which included a 1.5 multiplier. *Id.*

On appeal in *Banuelos*, Division Three of this Court rejected the dealer's request for an additional reduction in the buyer's fee award. Although the dealer claimed that the fee award was excessive, and that the

trial court miscalculated the hours reasonably spent on the matter, this Court said that the trial court had responsibly undertaken its duty to consider the billing records, and that its decision was based upon substantial evidence and supported by proper findings. *Id.*

Allstate's argument that the trial court here acted like the trial court in *Berryman* is not well taken. The trial court's order here is nothing like the order in *Berryman*, and is exactly like the order in *Banuelos*. The trial court engaged in a highly interactive and scrupulous process wherein it examined all of the evidence and arguments presented by both parties, and entered well-reasoned findings and conclusions in support of its decision. CP 2455-60.

Here, the trial court first laid out the case background, citing the facts and procedure that led to the attorney fee proceedings. CP 2455-56. Then, the trial court recited in detail the parties' respective positions on the attorney fee issue. CP 2456-57. The Court then went through each of Allstate's challenges to the claimed attorney fees, and made deductions where the trial court thought appropriate. CP 2457-60. For each item addressed, the trial court laid out the rationale for why or why not a deduction should be made, and the amount of the deduction. *Id.*

Allstate's claims that the trial court acted improperly are based mostly on misreadings or misrepresentations of the findings and

conclusions. For example, Allstate claims that the trial court presumed that the Xaviers' claimed fees were reasonable, and placed the burden on Allstate to disprove that reasonableness. Br. of Appellant at 28. In fact the opposite is true. The trial court stated its belief that the Xaviers had "stretched the bounds of reasonableness" with its request, and accepted many of Allstate's arguments as to why those fees would not be awarded. CP 2458.

Allstate also misleadingly claims that the trial court improperly "referenced a need to 'deter slow-pay or no-pay behavior' by insurance companies." Br. of Appellant at 29-30.⁸ In fact, the trial court's use of this phrase was in *describing the Xaviers' position*, it is in no way a finding or conclusion of the court. CP 2457. The phrase appears under a heading entitled "The Parties' Positions With Respect to Attorney Fees/Costs." CP 2456. The full sentence, not quoted in Allstate's brief, is: "*Plaintiff went to great lengths to impress upon the Court the importance of fully allocating attorney fees in an effort to deter slow-pay and no-pay behavior on the party of insurance companies.*" CP 2457 (emphasis added).

⁸ Allstate claims that the "deterrence" language is improper because awarding fees on this basis is "expressly rejected by Washington law." Br. of Appellant at 30. Allstate's blatant attempt to mislead this Court regarding the trial court's findings is also the subject of the Xaviers' sanctions motion. *See infra* Section E(7).

Allstate repeatedly and incorrectly claims that, in *granting* Allstate's requests for deductions in certain categories, the trial court did not properly explain why those deductions did not match the *full* amounts Allstate was requesting. Br. of Appellant at 35, 36, 38. This allegation is without basis. The trial court entered specific findings and conclusions regarding each item of objection Allstate raised, and reduced the fee award accordingly. The fact that Allstate is not satisfied with the trial court's reasoning is not a basis for reversal when the reasoning is supported by substantial evidence.

The trial court followed this Court's instructions in *Berryman*, and the Supreme Court's instructions in *Mahler*, to the letter. The Xaviers' fee request – far from being rubber-stamped – was scrutinized, examined, and reduced substantially based on Allstate's objections. The trial court's thought process in reviewing the fee request is thoroughly documented in its findings and conclusions. Those findings and conclusions should be affirmed.

(b) The Trial Court's Findings and Conclusions on Claim Segregation Are a Correct Application of the Contract Allstate Authored and Signed, and of the Law

The trial court generally accepted Allstate's arguments regarding fee deductions and made substantial deductions in its order. CP 2457-60.

As described infra Section D(2)(c), the trial court entered findings and conclusions supporting a \$36,295 deduction from the Xaviers' fee request. CP 2456, 2460.

The trial court only rejected one of Allstate's arguments in support of a fee deduction. Br. of Appellant at 30-31. Allstate argued below, and argues now on appeal, that 50% must be deducted from the total fee award, because (1) only fees related to the Xaviers' Consumer Protection Act claim – and not fees related to their common law bad faith claim – were available and (2) fees should have been segregated for the time spent on the Xaviers' unsuccessful claims. Br. of Appellant at 30-32.

Allstate's arguments are not well taken. First, the fee award was based on a settlement contract, not the statutory or common law. Second, the trial court found, based upon substantial evidence, that fees could not reasonably be segregated for unsuccessful theories.

- (i) The Xaviers' Attorney Fee Award Is Based on a Contract that Allstate Authored Allowing the Xaviers to Seek Fees "Incurred After the Filing of the Lawsuit"

Allstate claims that trial court could only award the Xaviers' fees for work related to their CPA claim, because the common law does not provide for an award of fees to the prevailing party in an insurance bad faith claim. Br. of Appellant at 30.

The trial court's order and judgment were premised on the parties' settlement agreement, not upon statutory or common law. CP 1937, 2457. A settlement agreement is a contract. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006); *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146, 173 P.3d 977 (2007).

Settlement agreements are governed by general principles of contract law. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983); *Lavigne v. Green*, 106 Wn. App. 12, 20, 23 P.3d 515, 520 (2001). "It is well settled that parties may incorporate into a contract any provision that is not illegal or against public policy." *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 543, 874 P.2d 868 (1994); *Coast Sash & Door Co. v. Strom Constr. Co.*, 65 Wn.2d 279, 281, 396 P.2d 803 (1964).

In interpreting contracts, courts will give effect to their plain language, and will not rewrite unambiguous contracts based upon the unexpressed, ex post facto claims of one of the parties. *See, e.g., Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Courts are not at liberty to rewrite contracts under the guise of "interpretation." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (2007).

Once parties have agreed to settle a tort claim, the foundation for the resulting judgment is their written contract, not the underlying

allegations of tortious conduct. *Fenix Underground*, 142 Wn. App. at 146. Unless that settlement contract specifically provides otherwise, or a statute prohibits it, the terms of the contract supplant any statutory provisions. *Id.* In *Fenix Underground*, parties who settled their tort claim agreed to a covenant judgment that provided interest would accrue at a rate of 12%. Subsequently, the defendant's insurer sought relief from the judgment, arguing that the interest rate should be set at the statutory rate for a "judgment founded upon tortious conduct" rather than the rate in the contract. This Court upheld the contractual interest rate, holding that the interest rate statute allowed parties the freedom to specify a different interest rate by contract, and that the contract's stated term applied. *Id.* at 146-47.

Here, Allstate drafted and presented an offer of judgment, which the Xaviers accepted. That contract provided the Xaviers with the right to seek their reasonable attorney fees "incurred after the filing of the lawsuit:"

The Plaintiffs shall be entitled to make a claim for reasonable attorney fees and expenses *incurred after the filing of the lawsuit*, which would be in addition to the \$60,000.00 as set forth herein.

CP 1940 (emphasis added). Neither this provision nor any other provision of Allstate's contract makes reference to segregation of fees for

unsuccessful claims, or to exclusion fees for which there is not statutory basis for recovery. *Id.*

The plain language of Allstate's contract allows the Xaviers to seek the fees they incurred after the filing of the lawsuit. The fact that some of those fees might not otherwise have been recoverable had the Xaviers sought them under statutory or common law principles is irrelevant, because the contract does not exclude them. The trial court correctly refused to rewrite Allstate's contract.

(ii) Even Assuming *Arguendo* the Contract Term Does Not Control Here, the Trial Court Found that the Time Spent on Non-CPA Claims Could Not Be Segregated

In addition to arguing for a reduction in fees for the successful bad faith claim, Allstate also argues that under *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 583, 675 P.2d 193 (1983), the trial court should have segregated fees for unsuccessful claims "such as the breach of contract claim." Br. of Appellant at 31.⁹ As explained above, Allstate ignores the language of its own settlement contract with the Xaviers,

⁹ Allstate does not indicate which other claims should have been subject to segregation. The Xavier only brought three claims against Allstate: bad faith, CPA violations, and CP 4-6. The claim for violations of the Washington Administrative Code 284-30-300 ("WAC"), CP 5, is really a subclaim of the CPA and bad faith claims. WAC 284-30-300 codifies the specific *per se* unfair or deceptive acts by insurers that give rise to a CPA claim, as well as a bad faith claim. *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 615, 105 P.3d 1012 (2005); *James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App. 12, 20, 74 P.3d 648 (2003), *review denied*, 151 Wn.2d 1010, 89 P.3d 712 (2004).

claiming that the trial court was obligated to reduce the Xaviers' fee award to account for time spent on "unsuccessful claims." *Id.*

Bowers involved statutory fee shifting under RCW 19.86.090. *Bowers*, 100 Wn.2d at 595. The *Bowers* court did not interpret a contract, thus that opinion is irrelevant to this Court's analysis. *Id.* Even assuming *arguendo* that the trial court was legally obligated to segregate fees for the unsuccessful breach of contract claim and the successful bad faith claim, such failure to segregate is not an abuse of discretion if the trial court "finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 693, 132 P.3d 115 (2006), quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994).

In *Mayer*, the plaintiffs made claims under the CPA and the Washington Products Liability Act ("WPLA") for damages to their home from shoddy construction with a defective product. *Mayer*, 156 Wn.2d at 681. After the plaintiffs prevailed, the trial court awarded them reasonable fees. *Id.* at 682. When the defendants objected that the trial court must segregate the fees attributable to the WPLA claim, the trial court found that the two claims were so related that segregation would not be realistic. *Id.* at 692. The defendant appealed, arguing that the trial court should

have segregated fees incurred in bringing the WPLA claim from the fees incurred for bringing the CPA claim. *Id.* at 683.

Our Supreme Court in *Mayer* found no basis for disturbing the trial court's specific finding that the time related to the various claims could not reasonably be segregated. *Id.* at 693. The Court noted the overlapping elements of fact and law that were required to prove each claim, and held: “[G]iven the trial court’s clear explanation that the CPA work could not be segregated from the WPLA work, the trial court’s award of attorney fees under the CPA was not an abuse of discretion.” *Id.*

This Court has recently spoken on the subject of fee segregation for unsuccessful claims, and reaffirmed the considerable discretion afforded to trial courts on this issue: “The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion.” *Miller v. Kenny*, 325 P.3d 278, 304 (Wash. Court of Appeals Div. I, April 28, 2014).¹⁰ This Court went on to explain that a trial court’s obligation is to be mindful of its legal obligations in reviewing a fee request, and to undertake that responsibility thoughtfully:

The trial judge is in the best position to determine the proper lodestar amount. The trial judge in this case was mindful of his duty under *Bowers* and *Mahler* to consider the fee request thoughtfully, and he was well versed in the

¹⁰ Due to the recency of publication, the Washington Reporter citation for this case was not available at the time of filing of this brief.

legal standards applicable to fee requests. We find no abuse of discretion in the calculation of the lodestar amount.

Id. (citations omitted).

Here, the trial court specifically found that “separating the claims and the work done on each claim would be an impossibility.” CP 2458. Indeed, the record supports the trial courts analysis that the Xaviers’ breach of contract claim, CPA claim, and bad faith claim, were interrelated. CP 4-6. In fact, they all arose out of precisely the same conduct, and contained many of the same elements of proof. The breach of contract claim alleged that Allstate failed to meet its obligations under its insurance contract by failing to timely pay for the damage to their home. CP 4. The CPA and bad faith claims alleged that Allstate’s dilatory and untimely conduct constituted unfair, deceptive, and bad faith insurance practices under the laws of Washington. CP 5-6. Allstate’s contractual obligation was to timely, reasonably and fully respond to the Xaviers’ insurance claim. Allstate’s contractual, statutory, and common law obligations were based on all of the same conduct.

The record here contains substantial evidence that the claims at issue were interrelated. The trial court’s finding that they could not be segregated for the purposes of an attorney fee award was not an abuse of discretion.

(c) The Remaining Arguments Allstate Makes on Appeal for Additional Fee Deductions Were Addressed – and Accepted – By the Trial Court, and This Court Cannot Substitute Its Own Findings for the Trial Court’s Findings

Despite the trial court’s carefully crafted, specific, and well-reasoned order, Allstate seeks from this Court additional itemized deductions from the Xaviers’ fee award. Br. of Appellant at 29. Allstate claims that many of these additional deductions are required by Washington law, and that the trial court “ignored” the law in its fee order. *Id.*

Most of Allstate’s arguments on appeal for additional deductions from the fee award are complaints that the trial court was not sufficiently specific in its findings. *Id.* at 29-41. The below chart will assist this Court in determining whether the findings are sufficient. It explains each of Allstate’s claims for additional deductions from this Court, along with the trial court’s specific finding on the subject:

<u>Allstate’s Arguments for Additional Deductions on Appeal</u>	<u>Trial Court’s Corresponding Deductions Below</u>
Fees should be deducted because the Xavier’s counsel used a “team approach,” and included time for interoffice communications and providing instructions. Br. of Respondent at 33-34.	“Defendant asks for a reduction in the lodestar amount by \$19,290.00 for these interoffice meetings and correspondence. Based on the Court’s review, it is difficult to make a definitive reduction – some of this time is properly billed, while some is vague and unclear. Thus,

	the Court will reduce Plaintiff's lodestar amount by \$11,115.00 for work that falls within the "interoffice meeting and providing instruction category." CP 2459.
Fees should be deducted because the Xaviers' counsel used block billing. Br. of Appellant at 34-35.	"The Court has reviewed each of the claimed "block-billing" entries, and has determined that a reduction in the lodestar by an additional \$1,500 is appropriate." CP 2459.
Fees should be deducted because some of the billing entries are insufficiently detailed. Br. of Appellant at 35-36.	"In reviewing these entries and noting those that appear unclear or over-billed, the Court will reduce the lodestar by another \$18,500." CP 2460.
Fees should be deducted because the trial court did not sufficiently explain its reasoning for deducting only part of the entries related to the dismissed co-defendant RestorX. Br. of Appellant at 37.	"Defendant claims that Plaintiff has requested fees for billing related to co-defendant RestorX. The Court agrees that such billing should not be included. However, some of the entries noted by the Defendant include work on both RestorX and Allstate matters. Thus the Court has modified Defendant's request in the lodestar reduction, subtracting \$1,200.00 instead of the requested \$1,960.00." CP 2459.
Fees should be deducted because the trial court did not sufficiently explain its reasoning for deducting only part of the entries Allstate claimed were "unrelated to this litigation." Br. of Appellant at 38.	"The Court's review reveals that some of the work Plaintiff's lawyers did in this category did relate to the litigation, but much of it was not at all related to the current litigation. Based on a specific review of the items within the billing records, the Court will reduce plaintiff's attorney fee award for billing entries in this category

by \$2,145.00.” CP 2458.

Allstate asks this Court to substitute its own factual findings for those of the trial court and issue a new, lower fee award. Br. of Appellant at 48. Specifically, Allstate asks this Court to find that the appropriate attorney fee in this case is “no more than \$45,906.87.” *Id.* Allstate does not seek remand for entry of new findings of fact and conclusions of law by the trial court. *Id.*

This Court cannot substitute its findings for those of the trial court where those findings are supported by substantial evidence. *Parsons Travel, Inc. v. Hoag*, 18 Wn. App. 588, 594, 570 P.2d 445 (1977). “This is not only a matter of judicial policy, but is also a constitutional mandate.” *Id.*

Allstate fails to explain how the trial court’s deductions – as opposed to the deductions Allstate would have preferred – constitute an abuse of discretion. Br. of Appellant at 32-38; *cf.* CP 2458-60. The trial court’s findings here are supported by substantial evidence – the billing records of the Xaviers’ counsel. For example, Allstate’s claim that the trial court was obligated to deduct “All block billed entries” is insupportable. Br. of Appellant at 35. One such entry Allstate identifies attributes .7 hours dedicated to research, reviewing a document, and emailing co-counsel. CP 2037. Another entry attributes .2 hours for a

conference between an attorneys and a paralegal regarding the status of depositions. CP 2039. Allstate offers no cogent argument as to why it is an abuse of discretion for the trial court to refuse to allow these fees, or similar fees.

Allstate's notion that the *Berryman* decision categorically forbids *any* recovery for *any* fees included in a block-billed timesheet entry is nonsense. Nowhere does *Berryman* contain such a holding. That case simply states that a trial court must exercise discretion in awarding fees based upon such time entries. *Berryman*, 177 Wn. App. at 664. Nor does that case categorically forbid recovery of fees for members of a legal team meeting with or otherwise communicating with each other. It states that a trial court abuses its discretion by not addressing such a concern in a fee order. *Id.* at 663.

In fact, this Court has recently affirmed that in certain cases, *reconstructed* billing records (that is, non-contemporaneous summaries of time spent) are acceptable evidence, provided the trial court examines them and explains why they are reasonable. *Miller*, 325 P.3d at 303. If reconstructed time is acceptable as long as the trial court makes the necessary findings, then surely contemporaneous block billed entries can be considered reasonable.

The trial court carefully considered all of the billing records, made appropriate and substantial deductions, and explained its reasoning in a detailed, specific, and well-supported order. Allstate's objections are not well taken. The trial court's order should be affirmed.

(3) Allstate's *Olympic Steamship* Argument Is a Red Herring, the Trial Court's Fee Award Was Not Based on *Olympic Steamship*

Allstate next argues that *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) is not a proper basis for the fee award in this case. Br. of Appellant at 41-42. Allstate claims that the Xaviers' trial counsel "misrepresented" the holding of *Olympic Steamship* to the trial court. *Id.* However, Allstate cannot cite to any part of the order at issue where the trial court indicates that it relied on *Olympic Steamship* as the basis for fees. *Id.*

Allstate's *Olympic Steamship* argument appears to be an attempt to impugn the Xaviers' trial counsel, rather than a genuine argument for reversal. As evidenced by Allstate's own argument, the Xaviers' counsel did *not* misrepresent the holding of *Olympic Steamship*. Allstate claims in its brief that *Olympic Steamship* applies in cases where insureds are forced to file a lawsuit to obtain coverage under an insurance policy. Br. of Appellant at 39. Allstate then quotes the Xaviers' counsel, who states that *Olympic Steamship* provides for an award of attorney fees in cases where

the “insurance company claims that you have no coverage.” *Id.* This is a correct representation of the holding of that case, even within Allstate’s own framing of the issue.

More importantly for this Court’s purposes, the trial court *did not rely* on *Olympic Steamship* as the basis for fees. The trial court explicitly and exclusively relied on the settlement contract Allstate drafted as the basis for its fee award: “The Offer of Judgment included a specific provision allowing Plaintiff to seek reasonable attorney fees and expenses incurred after the filing of the Complaint on May 1, 2012.” CP 2456. That finding is the sole stated basis for the attorney fee award. *Id.*, CP 2457.

This Court should not be misled by Allstate’s attempt to impugn the Xaviers and their counsel. Trial counsel did not misrepresent the holding of *Olympic Steamship*, and the trial court did not award fees on that basis.

(4) Reasonable Fees for Time Spent Making the Fee Request to the Trial Court Are Recoverable

Allstate next argues that the trial court should not have awarded the Xaviers reasonable fees incurred in connection with litigating the fee award. Br. of Appellant at 41-46. Allstate claims that Washington law does not allow for a fee award for the time spent establishing the amount

of the recoverable fees. *Id.* at 41. It also argues that the \$4,375.00 award is excessive. *Id.* at 42-46.

(a) Fees for Establishing the Fee Award Are Recoverable Here Because Allstate's Settlement Contract Controls, Not the American Rule on Fees

Allstate argues that the American Rule on attorney fees prohibits the Xaviers from recovering fees incurred in litigating their fee request (“supplemental fees”). Br. of Appellant at 41. Allstate also claims that the \$4,375 supplemental fee award was unreasonable.

First, as Allstate acknowledges, the American Rule only applies when there is no basis in law, contract, or equity for the prevailing party to recover fees. Br. of Appellant at 41, citing *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731, 735 (1995). Here, there is a contractual basis for fees: the settlement contract. CP 1937. As explained *supra* Section D(3)(b)(i), that contract allows the Xaviers to recover attorney fees incurred after May 1, 2012. The fees incurred in litigating their fee request fall within the ambit of that contract. They are thus recoverable.

Second, when the American Rule does not apply because a statute provides for prevailing party attorney fees, time spent proving fees is also recoverable. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990); *Clark v. City of Los Angeles*, 803 F.2d 987, 992

(9th Cir. 1986); *Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir. 1986). The logic of this principle extends beyond the realm of statutory fee-shifting cases. There is no justification for carving out from a contractual attorney fee award the time spent proving the amount of fees. Such an exception would merely encourage losing litigants to pile on frivolous objections and endless pleadings in the hope of dealing a final blow to opponents.

Third, the modest award of \$4,375 was reasonable given Allstate's extensive litigation on the issue. Allstate has repeatedly reminded this Court that the Xaviers bore a heavy burden in specifically, thoroughly, and meticulously documenting the basis for their fee request. Br. of Appellant at 27, 36, 41. After meeting this challenge, the Xaviers were forced to defend an onslaught of objections from Allstate, including responding to multiple briefs Allstate filed in violation of the court rules. CP 2399, 2404, 2426. Without permission, Allstate filed an overlength objection to the Xavier's fee request that was twice the length permitted by the court rules. CP 1973-95. Again without permission, Allstate filed an "amended" response in opposition to the request that was even *longer*. CP 2200-25.

The Xaviers' counsel spent more than 36.3 hours of attorney time and 24.3 hours of paralegal time preparing and defending their request against an onslaught of opposition by Allstate. Applying the reasonable

hourly rates of \$350 and \$100 the trial court approved, the total request for supplemental fees was over \$15,000. The trial court’s modest award of \$4,375.00 was reasonable.

(b) Allstate’s Alternative Argument that the “Excessive” Fee Request Should Be “Cut” to Zero Is Nonsensical

Despite the fact that Allstate prevailed on most of its arguments below regarding supplemental fees, CP 2523, Allstate argues that this Court should second-guess the trial court’s discretionary decision and reduce the supplemental fee award again. Br. of Appellant at 42-46. Allstate spends several pages of its brief describing what it calls “duplicative” and “unrelated” work. *Id.*

However, some simple math reveals that Allstate is asking this Court to “cut” the reasonable fee to *zero*. The trial court awarded the Xaviers \$4,375.00 in supplemental fees. CP 2523. Allstate argues this Court should reduce the award more, but not by a particular dollar amount. Instead, Allstate argues that the award should be reduced by a 38.9 *hours*:

These defects in billing and billing of inappropriate activities should be cut from Plaintiffs’ billing. Time should be cut in the following amounts:

Attorney/Employee	Amount to Cut
Mike Watkins	6.4 hours
George McLean	5.5 hours
Randolph Gordan	7.5 hours
Kevin Myhre	19.5 hours

Br. of Appellant at 46.

Applying the reasonable hourly rates of these professionals, Allstate's request translates to an additional reduction in the Xaviers' supplemental fee of \$9,865.00.¹¹ Because the trial court only awarded \$4,375.00 total for the supplemental fee, Allstate is asking this Court to "cut" the supplemental fee to zero.

Allstate's argument is nonsensical and bizarre. Allstate asks this Court to reduce what it calls an "excessive" fee to *no* fee. Allstate's calculations are impossible to reconcile, waste this Court's time, and should be rejected.

(5) The Trial Court Did Not Abuse Its Discretion in Denying Allstate's Belated Motion to Supplement the Record

Allstate argues that the trial court abused its discretion in denying Allstate's post-judgment motion to supplement the record with additional evidence in response to the Xaviers' fee motion. Br. of Appellant at 46-47. Allstate *concedes* the evidence it sought to admit was not newly discovered, and that it could have been produced in connection with Allstate's original objection. CP 2557. Nonetheless, Allstate argues that the trial court forced Allstate to seek supplementation by failing to require

¹¹ Watkins: \$350/hr x 6.4 = \$2,240; McLean: \$350/hr x 5.5 = \$1,925; Gordan: \$500/hr x 7.5 = \$3,750; Myhre: \$100/hr x 19.5 = \$1,950.

the Xaviers to produce it in connection with their fee request. CP 2547, Br. of Appellant at 47.

Allstate's motion to supplement is not well-taken. Allstate claims that the documents should have been admitted under CR 60(a) and RAP 7.2(e). Neither of these rules permits Allstate to belatedly admit documents that it simply neglected to include in its original multiple fee motion filings.

(a) Allstate's Motion to Supplement the Record Was Not Proper Under CR 60(a), Because Allstate Complained of Judicial Error, Not Clerical Error

Post judgment, Allstate sought to "supplement the record" with new evidence that was not before the trial court in connection with the fee motion. Br. of Appellant at 47. Yet Allstate brought the motion under CR 60(a), which only allows for the record to be corrected due to "clerical mistakes" arising from "oversight or omission."

Allstate did not allege that the new evidence it sought to admit was reviewed by the trial court and simply omitted from the court file. Instead, Allstate claims that this is evidence that the trial court *should have compelled the Xaviers to produce* before making its reasonableness determination:

It is the burden of the party seeking fees to show that the fees requested are fair, reasonable, and use good billing judgment. Defendant is now put in the

position of arguing the reasonableness of the requested fees on appeal, *where Plaintiff has not been required to make a showing* of the reasonableness of billing and requested fees. Accordingly, Defendant must now supplement the record with materials that Plaintiffs' counsel should have been prompted to present to show the reasonableness of their billing.

CP 2465 (citations omitted). In other words, Allstate argued that the trial court committed legal error by basing its fee request on insufficient evidence. *Id.*

CR 60(a) provides that “[c]lerical mistakes in judgments ... *and errors therein arising from oversight or omission* may be corrected by the court at any time of its own initiative or on the motion of any party”. (Emphasis added.) A court cannot use CR 60(a) to correct judicial error, *i.e.*, error that involves an intentional act of the court. *E.g., In re Kramer’s Estate*, 49 Wn.2d 829, 830, 307 P.2d 274 (1957); *Wilson v. Henkle*, 45 Wn. App. 162, 167, 724 P.2d 1069 (1986). Thus, “[t]he test for distinguishing between ‘judicial’ and ‘clerical’ error is whether, based on the record, the judgment embodies the trial court’s intention.” *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.2d 406, *review denied*, 85 Wn.2d 1012 (1975).

The action of which Allstate complained in its CR 60(a) motion is a classic example of claimed judicial error that can only be corrected on

appeal. Allstate argued below, and argues again in its appeal, that the trial court's ruling was based on insufficient evidence. It is not the proper subject of a CR 60(a) motion. Because Allstate argues that as a matter of law, the trial court should have insisted that the Xaviers produce this evidence, its argument falls squarely into the realm of claimed "judicial error." It is not clerical error and cannot be subject of a motion under CR 60(a).

(b) Allstate's Citation to RAP 7.2(e) Is Unavailing Because Its CR 60(a) Motion Is Improper

Allstate also cited RAP 7.2(e) in its motion to supplement, and again to this Court. CP 2546, Br. of Appellant at 46-47. That appellate rule on its face applies to *orders*, not evidentiary decisions. RAP 7.2(e). It becomes relevant *only* if the trial court intends to enter an order on a postjudgment motion that affects the appeal, or intends to directly modify the order on review. *Id.* The rule states that the trial court must first seek permission from the Court of Appeals to directly modify the decision on review, or to enter a separate postjudgment order that will change the decision on review. *Id.* The rule does not state any basis for admitting new evidence to be used on appeal. *Id.*

Trial judges have authority to "settle the record," both inherently and under RAP 7.2(c). *State v. Arnold*, 81 Wn. App. 379, 384, 914 P.2d

762 (1996). However, settlement of the record refers only to the situation where “questions arise as to what was in the record before them at the time of a hearing.” *Id.*

Allstate was not seeking to “settle the record,” that is, asking the trial court to affirm the evidence that was actually before it at the hearing. Allstate was seeking to introduce new evidence into the record on appeal that the trial court did not consider. CP 2546.¹² RAP 7.2(c) therefore did not apply to Allstate’s request.

(c) Allstate Misstates the Burden Imposed Upon Parties and Trial Courts in Connection with Fee Motions; Allstate’s Proposed Procedure Is Absurd

Finally, Allstate’s rationale for claiming the trial court abused its discretion is flawed. Allstate argues that, in order for the trial court to set a reasonable fee, the trial court was required to (1) force the Xaviers to produce each individual document that their counsel drafted or reviewed during the litigation, (2) examine the length and complexity of each document, (3) compare that document with the amount of time counsel

¹² If Allstate wanted this Court to consider its new evidence on appeal, the proper method was to seek their admission under RAP 9.11. It has not done so. Allstate’s argument that the trial court should have taken “judicial notice” of the records contained in the docket of the United States District Court is also unavailing. Br. of Appellant at 47. Judicial notice may be taken of court documents, but RAP 9.11 severely restricts its use when the facts are not properly in the trial court record. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117, 1122 (2005); 5 *Karl Tegland*, Washington Practice: Evidence sec. 201.17 at 150–51 (4th ed. 1999). RAP 9.11 applies even if the documents sought to be “noticed” on appeal are from a proceeding that is connected to the proceeding at bar. *Spokane Research*, 155 Wn.2d at 98.

billed in connection with the document, and (4) make an independent determination as to whether the court thinks the amount of time spent in connection with the document was reasonable. Br. of Appellant at 47.

Allstate cites absolutely no authority – nor does any exist – that puts such a massive burden on parties and trial courts in connection with fee requests. It is difficult to imagine what such a fee motion and hearing would look like if Allstate’s standard were the law on fee requests in Washington. The notion that a trial court is required by law to engage in the exercise proposed by Allstate is frivolous.

Allstate offers no cogent explanation or argument for why this new evidence should have been admitted, nor any excuse for why it did not seek to introduce this evidence before the hearing. The trial court did not abuse its discretion in refusing to admit the evidence.

(6) The Xaviers Are Entitled to Attorney Fees On Appeal Under RAP 18.1 and the Settlement Contract

Contractual authority as a basis for an award of attorney fees at trial also supports such an award on appeal. RAP 18.1; *Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988); *West Coast Stationary Eng’rs Welfare Fund v. Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985).

The trial court awarded the Xaviers attorney fees based upon the settlement contract. CP 2456. Thus, the Xaviers request an award of reasonable attorney fees on appeal.

(7) This Court Should Sanction Allstate for Violating the Court Rules and the Rules of Professional Conduct, and Order Allstate to Pay the Sanction to the Court or to a Court-Related Fund

This Court has inherent authority to sanction counsel when appellate briefing violates one or more RAP. *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992). In *Hurlbert*, this Court sanctioned appellate counsel for incomplete, inaccurate, “laissez-faire” briefing that made it difficult for the Court and the opposing party to evaluate the merits of the factual and legal claims on appeal. *Id.*

The purposes of sanctions orders are to deter, punish, compensate, and educate. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993). Where compensation to litigants is appropriate, then sanctions should include a compensation award. *Id.* However, to avoid requests for sanctions turning into a “cottage industry” for lawyers, monetary sanctions awards can be paid to a particular court fund or to court-related funds. *Id.* Sanctions need to be severe enough to deter the attorneys involved, and others, from participating in similar conduct in the future. *Id.*

Allstate has violated court rules and ethical rules in its briefing on appeal. First, Allstate has violated its ethical obligation of candor toward this tribunal. RPC 3.3(a). Allstate misrepresented the record below by stating that the trial court relied upon “a need to deter slow-pay or no-pay behavior” and used the fee award to punish Allstate in violation of Washington law. Br. of Appellant at 1, 29-30. Allstate takes the “slow-pay or no-pay” language *completely* out of context. CP 2457. The trial court’s order clearly states that the “slow-pay or no-pay” justification was part of the Xaviers’ argument, and was not a basis for the fee award. *Id.* In fact, the trial court’s language in describing the Xaviers’ as going “to great lengths to impress upon the court” the need for a robust fee award expresses skepticism, not approval. *Id.*

Allstate dishonestly – and also in violation of its duty of candor – accuses the Xaviers’ counsel of altering billing records by adding entries after the fact. Br. of Appellant at 12-13. Allstate claims that a comparison of a fee request submitted in federal court with the fee request at issue here reveals a number of new entries “added to the September 27, 2013 submission, long after the fact.” *Id.*

Allstate knows perfectly well why the federal court fee request differs from the state court request: in federal court, the Xaviers *were requesting an award of fees only in connection with their motion for*

remand after Allstate improperly removed the case to federal court. CP 2653. Indeed, by law the only fees that were recoverable in the Xaviers' federal court fee request were those "incurred as a result of the removal." 28 U.S.C. § 1447(c). Thus, as explained in the Xaviers' federal fee motion declaration, the submitted time entries *only* included those hours related to work on the remand motion. CP 2666-67.¹³

In their state court, in where their fee request was based on Allstate's contract, the Xaviers were not limited to only seeking fees incurred in connection with their remand motion. Thus, they included in their request the entries related to the remand motion (which were listed in the federal court fee request) *and* other entries such as "Conferred with Mr. Howson re: status of case" and "Attended case assignment meeting." CP 2072. Unlike in the federal motion, these fees are recoverable as fees incurred "after May 1, 2012."

Allstate has, in a brief to this Court, dishonestly accused the Xaviers' counsel of falsifying records. This behavior should not be tolerated: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." *Fisons*, 122 Wn.2d at 355.

¹³ Had the Xaviers attempted to recover fees unconnected to the remand motion, Allstate would surely have protested.

Allstate also has violated RAP 10.3(a)(5), which requires a statement of the case to include a “fair statement of the facts and procedure relevant to the issues presented for review....” In its statement of the case, Allstate relies on documents that the trial court did not consider, documents that Allstate unsuccessfully sought to admit in its “motion to supplement the record.” *See, e.g.*, Br. of Appellant at 12-13. When quoting these documents in its statement of the case, Allstate does not mention that these documents were not relied upon by the trial court, and have not been the subject of a RAP 9.11 motion so that this Court may consider them on appeal. *Nowhere* in its argument section does Allstate explain how the contents of these documents are relevant to the issues on appeal. If the contents of the documents are not relevant to Allstate’s argument on appeal, then they should not have been included in the statement of the case, particularly when the trial court did not admit or rely on them.¹⁴

Allstate should not be allowed to violate its ethical obligation of candor toward this tribunal or the court rules. The Xaviers respectfully request that this Court sanction Allstate to clarify the public record and to

¹⁴ The Xaviers concede that Allstate could refer to the contents of the documents in connection with argument to this Court why the trial court should have granted its CR 60(a) motion to supplement the record. RAP 10.3(a)(5)-(6). However, such argument is notably absent; Allstate simply makes general assertions that the documents should have been added to the record post-judgment because the trial court “improperly shifted the burden of proof on fees...to Allstate.” Br. of Appellant at 47.

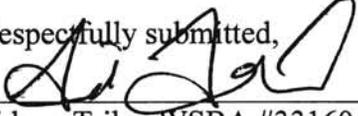
reinforce this important ethical rule, and order the sanction to be paid to an appropriate court-related fund.

F. CONCLUSION

The trial court did its duty under *Berryman* and awarded reasonable attorney fees to the Xaviers as required by Allstate's settlement contract. Allstate has not demonstrated any substantive violation of the trial court's considerable discretion in this matter. Allstate's request to have this Court find facts that differ from the trial court's facts is unavailing and should be rejected.

This Court should uphold the judgment in its entirety, award reasonable fees and costs on appeal to the Xaviers, and sanction Allstate for its inappropriate conduct.

DATED this 17th day of July, 2014.

Respectfully submitted,


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APPENDIX

A


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Superior Court Case Summary

Court: King Co Superior Ct
Case Number: 12-2-15758-8

Sub	Docket Date	Docket Code	Docket Description	Misc Info
1	05-01-2012	SUMMONS & COMPLAINT	Summons & Complaint	
2	05-01-2012	SET CASE SCHEDULE	Set Case Schedule	09-30-2013ST
3	05-01-2012	CASE INFORMATION COVER SHEET LOCS	Case Information Cover Sheet Original Location - Seattle	
4	05-01-2012	AMENDED SUMMONS	Amended Summons	
5	05-01-2012	SUMMONS	Summons	
6	05-09-2012	NOTICE OF APPEARANCE	Notice Of Appearance /allstate	
7	05-15-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
8	05-17-2012	NOTICE OF APPEARANCE	Notice Of Appearance /pla	
9	05-17-2012	OBJECTION / OPPOSITION	Objection To Plnts 1st Request Fr Admission/def Restorx's	
10	05-29-2012	NOTIC FILING PET REMOVE TO US DISTR	Notic Filing Pet Remove To Us Distr	
11	06-04-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
12	09-04-2012	NOTICE	Notice Of Remand From Us Dist Court	
13	09-05-2012	CORRESPONDENCE	Correspondence Re Reinstate Case	
14	09-24-2012	NOTICE	Notice Of Remand From Us Dist Court	
15	09-24-2012	TRANSCRIPT	Transcript Of Remand From Dist Crt Converted To File Exhibit	
16	10-02-2012	NOTICE	Notice Convert File Ex /sub 15	
17	10-09-2012	NOTICE WITHDRAW & SUBSTITUT COUNSEL	Notice Withdraw & Substitut Counsel	
18	10-10-2012	ANSWER & AFFIRMATIVE DEFENSE	Answer & Affirmative Def /speidel	
19	10-15-2012	CONFIRM. JOIN.: NO STATUS CONFER.	Confirm. Join.: No Status Confer.	

About Dockets

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

King Co Superior Ct
 516 3rd Ave, Rm C-203
 Seattle, WA 98104-2361

Map & Directions
 206-296-9100[Phone]
 206-296-0986[Fax]
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Disclaimer

What is this website? It is a search engine of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. The search results can point you to the official or complete court record.

How can I obtain the complete court record?
 You can contact the court in which the case was filed to

20	11-28-2012	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability		view the court record or to order copies of court records.
21	01-17-2013	NOTICE OF HEARING	Notice Of Hearing /revise Case Schd	01-28-2013	
22	01-17-2013	MOTION	Motion /allstate		How can I contact the court?
23	04-29-2013	WITNESS LIST	Witness List /allstate		Click here for a court directory with information on how to contact every court in the state.
24	05-10-2013	JOINDER	Joinder /restorx		
25	05-10-2013	DECLARATION	Declaration Of Thomas Nedderman		
25A	05-10-2013	NOTICE OF HEARING	Notice Of Hearing /partial Summ Jdg	06-07-2013	
25B	05-10-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	06-07-2013	Can I find the outcome of a case on this website? No. You must consult the local or appeals court record.
25C	05-10-2013	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment/def		
26	05-13-2013	DECLARATION	Declaration Of Jennifer P. Dinning		How do I verify the information contained in the search results? You must consult the court record to verify all information.
27	05-28-2013	RESPONSE	Response /allstate		
28	05-28-2013	DECLARATION	Declaration Of Jennifer P. Dinning		
29	05-28-2013	RESPONSE	Response /pla		
30	05-29-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgmt	06-21-2013	
31	05-29-2013	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment /def		Can I use the search results to find out someone's criminal record? No. The Washington State Patrol (WSP) maintains state criminal history record information. Click here to order criminal history information.
32	05-29-2013	DECLARATION	Declaration Of Thomas B. Nedderman		
33	06-03-2013	REPLY	Reply /pla		
34	06-03-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	06-21-2013	
35	06-03-2013	NOTICE OF HEARING	Notice Of Hearing /partial Smjg	06-21-2013	
36	06-03-2013	REPLY	Reply /allstate		Where does the information come from? Clerks at the municipal, district, superior, and appellate courts across the state enter information on the cases filed in their courts. The search engine will update approximately twenty-four hours from the time the clerks enter the information. This website is maintained by the Administrative Office of the Court for the State of Washington.
37	06-03-2013	RESPONSE	Response /allstate		
38	06-03-2013	DECLARATION	Declaration Of Jennifer P Dinning		
39	06-04-2013	NOTICE OF HEARING	Notice Of Hearing /protective Order	06-12-2013	
40	06-04-2013	MOTION	Motion /def		
41	06-04-2013	DECLARATION	Declaration Of Jennifer Dinning/3rd		
42	06-05-2013	RESPONSE	Response /allstate		
43	06-06-2013	NOTICE OF HEARING	Notice Of Hearing /protective Order	06-14-2013	
44	06-06-2013	DECLARATION	Declaration Of Jennifer Dinning		Do the government agencies that provide the information for this site and maintain this site:
45	06-06-2013	MOTION	Motion /allstate		
46	06-10-2013	RESPONSE	Response /pltfs		
47	06-10-2013	RESPONSE	Response /allstate Property		<ul style="list-style-type: none"> ▶ Guarantee that the information is accurate or complete? NO ▶ Guarantee that the information is in its most current form? NO
47A	06-10-2013	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment/def		
48	06-11-2013	REPLY	Reply/defs		

49	06-12-2013	RESPONSE	Response /pla		<p>▶ Guarantee the identity of any person whose name appears on these pages? NO</p> <p>▶ Assume any liability resulting from the release or use of the information? NO</p>
50	06-12-2013	NOTICE OF HEARING	Notice Of Hearing /strike	06-20-2013	
51	06-12-2013	JURY DEMAND RECEIVED - TWELVE	Jury Demand Received - Twelve	250.00	
51A	06-12-2013	REPLY	Reply /def Allstate		
52	06-13-2013	RESPONSE	Response /allstate		
53	06-13-2013	DECLARATION	Declaration/jennifer P Dinning		
54	06-14-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	07-12-2013	
54A	06-14-2013	ORDER DENYING MOTION/PETITION	Order Denying Motion For Prot Ord		
54B	06-17-2013	ORDER DENYING MOTION/PETITION	Order Denying Motion For Prot Ord		
55	06-19-2013	REPLY	Reply /pla		
56	06-28-2013	SUMMARY JUDGMENT HEARING JDG0016	Summary Judgment Hearing Judge Michael Hayden, Dept 16		
-	06-28-2013	AUDIO LOG	Audio Log Dr E863		
57	07-01-2013	RESPONSE	Response /pltfs		
58	07-24-2013	ORDER DISMISSING LITIGANT EXP0007	Order Dismiss Speidel Int'l Dba Ex-parte, Dept. Seattle - Clerk		
59	08-05-2013	ORD REQUIRING JOINT PRETRIAL REPORT	Ord Requiring Joint Pretrial Report		
60	08-06-2013	NOTICE OF HEARING	Notice Of Hearing /protective Order	08-16-2013	
61	08-06-2013	MOTION	Motion /def		
62	08-06-2013	DECLARATION	Declaration Of Rick Wathen		
63	08-06-2013	DECLARATION	Declaration Of Jennifer Dinning		
64	08-07-2013	ORDER GRANT PARTIAL SUMMARY JDG	Ord Grant Prtl Summ Jdg Fr Pltf Re Wac 284-30-330-2 & 284-30-360(3)		
65	08-09-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	09-06-2013	
66	08-09-2013	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment		
67	08-09-2013	DECLARATION	Declaration /paul M Nickels		
68	08-09-2013	DECLARATION	Declaration /jennifer P Dinning		
69	08-09-2013	DECLARATION	Declaration /rick J Wathen		
70	08-14-2013	RESPONSE	Response /pltfs		
71	08-15-2013	REPLY	Reply /def		
72	08-19-2013	NOTICE OF HEARING	Notice Of Hearing /continue Trial	08-27-2013	
73	08-19-2013	MOTION TO CHANGE TRIAL DATE	Motion To Change Trial Date /deft		

74	08-19-2013	DECLARATION	Declaration Of Jennifer Dinning	
75	08-19-2013	DECLARATION	Declaration Of Jennifer Dinning	
76	08-19-2013	DECLARATION	Declaration Of Rick Wathen	
76A	08-21-2013	ORDER GRANTING MOTION/PETITION	Order Granting Mtn For Prot Ord	
77	08-23-2013	RESPONSE	Response /pla	
78	08-23-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	09-05-2013
79	08-26-2013	REPLY	Reply /def	
80	08-26-2013	DECLARATION	Declaration Of Rick Wathen	
81	08-26-2013	DECLARATION	Declaration Of Jennifer Dinning	
82	08-26-2013	RESPONSE	Response /pla	
83	08-28-2013	ORDER DENYING MOTION/PETITION	Ord Deny Mt To Continue Trial	
84	09-03-2013	RESPONSE	Response /def	
85	09-03-2013	REPLY	Reply /allstate	
86	09-03-2013	DECLARATION	Declaration /jennifer Dinning	
87	09-03-2013	NOTICE RE: EVIDENTIARY RULE	Notice Re: Evidentiary Rule /pltfs	
88	09-03-2013	ATTACHMENT	Attachment/errata	
89	09-04-2013	REPLY	Reply /pltfs	
90	09-06-2013	SUMMARY JUDGMENT HEARING JDG0016	Summary Judgment Hearing Judge Michael Hayden, Dept 16	
-	09-06-2013	AUDIO LOG	Audio Log Dr E 863	
91	09-06-2013	ORDER DENYING MOTION/PETITION	Order Denying Motion For Summ Jdgt	
92	09-09-2013	WITNESS LIST	Witness List & Exhibit List /defs	
93	09-09-2013	PRE-TRIAL REPORT	Pre-trial Report/joint Confirmation	
94	09-12-2013	OBJECTION / OPPOSITION	Objection / Opposition /defs	
95	09-12-2013	NOTICE RE: EVIDENTIARY RULE	Notice Re: Evidentiary Rule	
96	09-12-2013	NOTICE	Notice Of Objections /pla	
97	09-19-2013	NOTICE	Notice Acceptance Of Offer Judgment	
98	09-20-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
99	09-27-2013	NOTICE OF HEARING	Notice Of Hearing /attorney Fees	10-09-2013
100	10-02-2013	NOTICE OF HEARING	Notice Of Hearing /shorten Time	10-04-2013
101	10-02-2013	MOTION	Motion /def	
102	10-02-2013	DECLARATION	Declaration Of Jennifer Dinning	

103	10-02-2013	NOTICE OF HEARING	Notice Of Hearing /cont Hrg	10-08-2013
104	10-02-2013	MOTION TO CONTINUE	Motion To Continue / Def	
105	10-02-2013	DECLARATION	Declaration Of Jennifer Dinning	
106	10-04-2013	RESPONSE	Response /pla	
107	10-07-2013	OBJECTION / OPPOSITION	Objection / Opposition /pla	
108	10-07-2013	RESPONSE	Response /def	
109	10-07-2013	DECLARATION	Declaration Of Jacqueline Vinaccia	
110	10-07-2013	DECLARATION	Declaration Of Jennifer Dinning	
111	10-07-2013	MEMORANDUM	Memorandum	
112	10-07-2013	MEMORANDUM	Memorandum	
113	10-07-2013	REPLY	Reply /def	
114	10-07-2013	DECLARATION	Declaration Of Jacqueline Vinaccia	
115	10-07-2013	ORDER SHORTENING TIME	Order Shortening Time	
116	10-08-2013	REPLY	Reply /pla	
117	10-08-2013	NOTE FOR MOTION DOCKET	Note For Motion Docket	10-09-2013
118	10-08-2013	NOTE FOR MOTION DOCKET	Note For Motion Docket	10-09-2013
119	10-09-2013	MOTION	Motion /allstate	
120	10-11-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
121	10-29-2013	RESPONSE	Response Amended /def	
122	10-29-2013	DECLARATION	Declaration Of Jennifer Dinning	
123	10-29-2013	DECLARATION	Declaration Of Jacqueline Vinaccia	
124	10-29-2013	NOTICE OF HEARING	Notice Of Hearing /ol Brief	11-06-2013
125	10-29-2013	MOTION	Motion /def	
126	10-30-2013	REPLY	Reply /pla	
127	11-21-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
128	11-25-2013	NOTICE OF HEARING	Notice Of Hearing /request Hearing	12-05-2013
129	12-03-2013	REPLY	Reply /def	
130	12-04-2013	REPLY	Reply /pla	
131	12-05-2013	NOTICE OF ASSOCIATION OF COUNSEL	Notice Of Association Of Counsel	
132	12-09-2013	REPLY	Reply /def Surreply	
133	12-10-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
134	12-10-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
135	12-20-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	

136	12-20-2013	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
137	12-20-2013	RECUSAL OF JUDGE JDG0016	Recusal Of Judge Judge Michael Hayden, Dept 16	
138	01-21-2014	REPLY	Reply /pla	
139	01-22-2014	MOTION HEARING JDG0047	Motion Hearing Judge Roger S. Rogoff, Dept 47	
-	01-22-2014	AUDIO LOG	Audio Log Dr W719	
140	01-23-2014	ORDER	Order Awarding Atty Fees & Costs	
141	01-30-2014	NOTICE OF HEARING	Notice Of Hearing /entry Jdgt	02-07-2014
142	02-05-2014	RESPONSE	Response /def	
143	02-05-2014	DECLARATION	Declaration J Dinning	
144	02-06-2014	REPLY	Reply In Supp Of Mt/ Plt	
145	02-07-2014	JUDGMENT	Judgment	
146	02-12-2014	NOTICE OF APPEAL TO COURT OF APPEAL	Notice Of Appeal To Court Of Appeal	
-	02-12-2014	APPELLATE FILING FEE	Appellate Filing Fee	
147	02-20-2014	NOTICE OF ASSOCIATION OF COUNSEL	Notice Of Association Of Counsel	
148	03-04-2014	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
149	03-07-2014	NOTICE OF HEARING	Notice Of Hearing /suppl Record	03-17-2014
150	03-07-2014	MOTION	Motion /def	
151	03-07-2014	DECLARATION	Declaration Of Jennifer Dinning	
152	03-10-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Pgs 1-2797 & File Exh Notified 3-25-14 Trans Coa 3-25-14/ Exh Room 71536-4 / Wathen	
152A	03-11-2014	INDEX	Index Clks Pprs Pgs 1-2797	
-	03-11-2014	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received 100107cp / Wathen Pd 3-24-14	1398.50
153	03-12-2014	OBJECTION / OPPOSITION	Objection / Opposition /plas	
154	03-12-2014	MOTION	Motion /pltfs	
155	03-13-2014	RESPONSE	Response /def	
156	03-13-2014	REPLY	Reply/def	
157	03-14-2014	REPLY	Reply /plas	
157A	03-24-2014	ORDER DENYING MOTION/PETITION	Order Denying Mtn To Suppl Record	
158	03-25-2014	COMMENT ENTRY	Clks Pprs Pgs 1-2797	

159	03-25-2014	LTR OF TRNSMTTAL/XHIBTS TO APP CRT	Ltr Of Trnsmttal/xhibts To App Crt	
160	03-28-2014	NOTICE OF HEARING	Notice Of Hearing /suppl Proc	04-15-2014
-	03-28-2014	FILING FEE RECEIVED	Filing Fee Received	20.00
161	03-28-2014	NOTICE OF HEARING ACTION	Notice Of Hearing Suppl Proc	04-11-2014SP
162	03-31-2014	NOTICE OF APPEAL TO COURT OF APPEAL	Notice Of Appeal To Court Of Appeal /amended	
-	03-31-2014	APPELLATE FILING FEE	Appellate Filing Fee	290.00
162A	03-31-2014	LETTER	Letter	
163	04-02-2014	AFFIDAVIT FOR GARNISHMENT	Affidavit For Garnishment	
164	04-08-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
165	04-09-2014	NOTICE	Notice Of Bond/def	
166	04-16-2014	ANSWER TO WRIT OF GARNISHMENT	Answer To Writ Of Garnishment	
167	04-29-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 71536-4 / Wathen Pgs 2798-3074 Trans Coa 5-12-14	
-	04-30-2014	COMMENT ENTRY	Disposed Per Sub 145/case Audit	
168	04-30-2014	INDEX	Index Clks Pprs Pgs 2798-3074	
-	04-30-2014	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received 100233 Cp/ Wathen Pd 5-9-14	138.50
-	05-06-2014	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 5-14-14 Hrg Of 9-6-13	
-	05-06-2014	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 5-14-14 Hrg Of 1-22-14	
169	05-12-2014	COMMENT ENTRY	Clks Pprs Pgs 2798-3074	
170	05-29-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 71536-4 / Wathen Pgs 3075-3374 Trans Coa 6/19/14	
171	06-02-2014	INDEX	Index Clks Pprs Pgs 3075-3374	
-	06-02-2014	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received 100322 Cp/ Wathen/pd 6/13-14	150.00
172	06-19-2014	COMMENT ENTRY	Clks Pprs Pgs 3075-3374	

B

CLOSED,JURYDEMAND,REMAND

**U.S. District Court
United States District Court for the Western District of Washington (Seattle)
CIVIL DOCKET FOR CASE #: 2:12-cv-00920-RAJ**

Xavier, et al v. Allstate Property and Casualty Insurance
Company et al
Assigned to: Judge Richard A Jones
Case in other court: .King County Superior Court, 12-00002-
15758-8 SEA
Cause: 28:1330 Breach of Contract

Date Filed: 05/29/2012
Date Terminated: 08/29/2012
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Federal Question

Plaintiff

Nicholas Xavier

represented by **George W. McLean , Jr**
LAW OFFICES OF GEORGE W.
MCLEAN JR.
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ATTORNEY TO BE NOTICED

Plaintiff

Angela Xavier
*husband and wife, and the marital
community thereof*

represented by **George W. McLean , Jr**
(See above for address)
ATTORNEY TO BE NOTICED

Joel B. Hanson

(See above for address)
ATTORNEY TO BE NOTICED

Michael Thomas Watkins
 (See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

**Allstate Property and Casualty
 Insurance Company**
an insurance company

represented by **Rick J Wathen**
 COLE | WATHEN | LEID | HALL,
 P.C.
 303 BATTERY STREET
 SEATTLE, WA 98121
 206-622-0494
 Fax: 206-587-2476
 Email: rwathen@cwllhlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer P Dinning
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ATTORNEY TO BE NOTICED

Defendant

Speidel International Inc
*a Washington corporation
 doing business as*
 Restorx of Washington

represented by **Thomas B Nedderman**
 FLOYD PFLUEGER & RINGER PS
 200 WEST THOMAS STREET
 SUITE 500
 SEATTLE, WA 98119-4296
 206-441-4455
 Fax: 206-441-4455
 Email: tnedderman@floyd-ringer.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/29/2012	<u>1</u>	NOTICE OF REMOVAL from King County Superior Court, case number 12-2-15758-8; (Receipt # 0981-2828829), filed by Allstate Property and Casualty Insurance Company.(Wathen, Rick) (Entered: 05/29/2012)
05/30/2012	<u>2</u>	DEMAND for JURY TRIAL by Plaintiff Nicholas Xavier. (Watkins, Michael)

		(Entered: 05/30/2012)
05/30/2012		NOTICE TO FILER: NO CIVIL COVER SHEET: Please post the Civil Cover Sheet using the event Civil Cover Sheet found in Other Documents and relate back to the Complaint.(RE) (Entered: 05/30/2012)
05/30/2012		NOTICE TO FILER: PARTIES MISSING ON DOCKET: In the future please enter ALL parties on the docket as they are listed on the Complaint, including party text. The missing parties have now been entered on the docket. Thank you.(RE) (Entered: 05/30/2012)
05/30/2012	<u>3</u>	CIVIL COVER SHEET re <u>1</u> Notice of Removal ; filed by Defendant Allstate Property and Casualty Insurance Company.. (Wathen, Rick) (Entered: 05/30/2012)
05/30/2012	<u>4</u>	NOTICE REGARDING LACK OF PROPER SIGNATURE. The <u>1</u> Notice of Removal filed on 5/29/2012 was improperly signed by Rick J. Wathen. Pursuant to FRCP Rule 11 and Local General Rule 2(h), signatures must comply with Section III(L) of the Electronic Filing Procedures, which states, "An electronically filed pleading or other document which requires an attorney's signature must have the signors' names printed or typed on the line and under all signature lines." Do not re-file this document; please be sure all future documents are properly signed. Thank you. (RE) (Entered: 05/30/2012)
05/30/2012		NOTICE Pursuant to Fed.R.Civ.P 7.1 Defendant(s)Allstate Property and Casualty Insurance Company and Speidel International Inc must file a Corporate Disclosure Statement by 6/6/2012. (RE) (Entered: 05/30/2012)
05/30/2012		Judge Richard A Jones added. (RE) (Entered: 05/30/2012)
05/30/2012	<u>5</u>	LETTER from Clerk to counsel re receipt of case from King County Superior Court and advising of WAWD case number and judge assignment. (RE) (Entered: 05/30/2012)
06/06/2012	<u>6</u>	CORPORATE DISCLOSURE STATEMENT identifying Corporate Parent Allstate Insurance Company, Corporate Parent Allstate Insurance Holdings, LLC, Corporate Parent Allstate Corporation for Allstate Property and Casualty Insurance Company. Filed pursuant to Fed.R.Civ.P 7.1.. (Wathen, Rick) (Entered: 06/06/2012)
06/13/2012	<u>7</u>	NOTICE of Appearance by attorney Thomas B Nedderman on behalf of Defendant Speidel International Inc. (Nedderman, Thomas) (Entered: 06/13/2012)
06/14/2012	<u>8</u>	NOTICE REGARDING LACK OF PROPER SIGNATURE. The <u>7</u> Notice of Appearance filed on 6/13/2012 was improperly signed by Francis S. Floyd. As such, one or more attorneys were not added to the case and will not receive future notices until corrected. Pursuant to FRCP Rule 11 and Local General Rule 2(h), signatures must comply with Section III(L) of the Electronic Filing Procedures, which states, "An electronically filed pleading or other document which requires an attorney's signature must have the signors' names printed or typed on the line and under all signature lines." (HBR) (Entered: 06/14/2012)
06/19/2012	<u>9</u>	ORDER REGARDING INITIAL DISCLOSURES, JOINT STATUS REPORT

		AND EARLY SETTLEMENT. FRCP 26f Conference Deadline is 7/19/2012, Initial Disclosure Deadline is 7/26/2012, Joint Status Report due by 8/2/2012, by Judge Richard A. Jones. (VE) (Entered: 06/19/2012)
06/28/2012	<u>10</u>	MOTION AND PROPOSED ORDER to Remand by Plaintiffs Angela Xavier, Nicholas Xavier. Noting Date 7/13/2012, (Watkins, Michael) Modified text on 6/29/2012 (CL). (Entered: 06/28/2012)
07/09/2012	<u>11</u>	RESPONSE, by Defendant Allstate Property and Casualty Insurance Company, to <u>10</u> MOTION to Remand. (Wathen, Rick) (Entered: 07/09/2012)
07/09/2012	<u>12</u>	Supplemental DECLARATION of Restorx re Consent filed by Defendant Allstate Property and Casualty Insurance Company re <u>10</u> MOTION to Remand (Wathen, Rick) (Entered: 07/09/2012)
07/13/2012	<u>13</u>	REPLY, filed by Plaintiffs Angela Xavier, Nicholas Xavier, TO RESPONSE to <u>10</u> MOTION to Remand (Watkins, Michael) (Entered: 07/13/2012)
07/24/2012	<u>14</u>	JOINT STATUS REPORT signed by all parties estimated Trial Days: 5. Filed by Plaintiffs Angela Xavier, Nicholas Xavier.(Watkins, Michael) (Entered: 07/24/2012)
07/26/2012	<u>15</u>	INITIAL DISCLOSURES Filed by Defendant Allstate Property and Casualty Insurance Company.(Wathen, Rick) (Entered: 07/26/2012)
07/26/2012	<u>16</u>	MINUTE ORDER SETTING TRIAL DATE AND RELATED DATES. Length of Trial: 5 days. <i>JURY TRIAL</i> is set for 6/24/2013 at 9:00 AM in Courtroom 13106 before Judge Richard A. Jones. Joinder of Parties due by 8/10/2012, Amended Pleadings due by 12/26/2012, Expert Witness Disclosure/Reports under FRCP 26(a)(2) due by 12/26/2012, Discovery completed by 2/25/2013, Dispositive motions due by 3/26/2013, Settlement conference to be held by 4/25/2013, 39.1 mediation to be completed by 5/28/2013, Motions in Limine due by 5/28/2013, Pretrial Order due by 6/10/2013, Trial briefs, proposed jury instructions, proposed voir dire, agreed neutral statement of the case, deposition designations, and trial exhibits to be submitted by 6/17/2013, by Judge Richard A. Jones. (VE) (Entered: 07/26/2012)
07/26/2012	<u>17</u>	INITIAL DISCLOSURES Filed by Plaintiffs Angela Xavier, Nicholas Xavier. (Watkins, Michael) (Entered: 07/26/2012)
07/27/2012	<u>18</u>	CORPORATE DISCLOSURE STATEMENT Filed pursuant to Fed.R.Civ.P 7.1.. (Nedderman, Thomas) (Entered: 07/27/2012)
07/27/2012	<u>19</u>	INITIAL DISCLOSURES Filed by Defendant Speidel International Inc. (Nedderman, Thomas) (Entered: 07/27/2012)
08/20/2012	<u>20</u>	ANSWER to Complaint by Allstate Property and Casualty Insurance Company. (Wathen, Rick) (Entered: 08/20/2012)
08/29/2012	<u>21</u>	ORDER by Judge Richard A Jones. The court GRANTS Plaintiffs' <u>10</u> Motion to Remand. The Clerk of Court is directed to REMAND this case to the Superior Court for the State of Washington, for King County. (CL) (Entered: 08/29/2012)

08/29/2012	<u>22</u>	Letter to Superior Court for the State of Washington, for King County re <u>21</u> Order to Remand Case. (CL) (Entered: 08/29/2012)
09/13/2012	<u>23</u>	Letter from USDC/Seattle to King County Superior Court, WA re <u>21</u> Order to Remand Case. (Case file mailed) (CL) (Entered: 09/13/2012)
09/26/2012	<u>24</u>	RECEIPT from King County Superior Court re <u>23</u> Letter re: Remand (MD) (Entered: 09/27/2012)

PACER Service Center			
Transaction Receipt			
03/07/2014 09:00:55			
PACER Login:	cb1551	Client Code:	11284
Description:	Docket Report	Search Criteria:	2:12-cv-00920-RAJ
Billable Pages:	4	Cost:	0.40

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FILED
KING COUNTY, WASHINGTON

JAN 23 2014

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

NICHOLAS AND ANGELA XAVIER)

Plaintiff,)

vs.)

ALLSTATE INSURANCE COMPANY)

Defendant.)

NO. 12-2-15758-8 SEA

ORDER ON CIVIL MOTION

The above entitled court having heard a motion for Reasonable Attorney Fees and Costs, makes the following findings, conclusions and orders:

BACKGROUND:

On June 28, 2011, the toilet and septic tank in the Xavier's home backed up and overflowed. It caused significant physical damage to their home. They made a claim pursuant to a homeowner's insurance contract with their insurer, Allstate. Private negotiations over the amount of coverage due to the Xaviers ensued. Significant legal work on the claim occurred prior to the filing of a Complaint.

On May 1, 2012, the Xaviers sued their insurance company, Allstate, for Breach of Contract, Violation of the Washington Administrative Code, Bad Faith, and Violations of the Consumer Protection Act (CPA). Dkt. #1 (Complaint). Typical, forceful litigation by both sides ensued. Defendants deposed three witnesses, and the Plaintiff deposed witnesses as well. The case was removed to federal court and then remanded back to state court. The parties filed and argued summary judgment motions, and then proceeded toward trial. While one can describe the course of the litigation as hard-nosed and tough, nothing about it stands out as particularly aggressive or over-the-top.

ORIGINAL

1 Approximately three weeks prior to trial, on September 13, 2013, Defendant offered a
2 resolution pursuant to a CR 68(a) Offer of Judgment. Plaintiff accepted the offer and the
3 substantive portion of the lawsuit ended.

4 The Offer of Judgment included a specific provision allowing Plaintiff to seek
5 reasonable attorney fees and expenses incurred after the filing of the Complaint on May 1,
6 2012.

7 **THE PARTIES' POSITIONS WITH RESPECT TO ATTORNEY FEES/COSTS:**

8 On September 27, 2013, Plaintiff made a Motion for Attorney Fees, in which they
9 claimed more than 780 hours of post-Complaint work on this litigation. Plaintiff has not
10 requested attorney fees for any work that occurred prior to the May 1, 2012 filing of the
11 lawsuit. Defendant's expert witness regarding the reasonableness of fees, Ms. Vinaccia,
12 reviewed the same records and found that Plaintiff had claimed the below-listed hours of
13 work on the case. Given that Plaintiff has not quarreled with Ms. Vinaccia's counting and
14 math, I will use the following numbers:

- 15 1. Attorney Michael Watkins spent 311.1 hours on the case at \$350/hr;
- 16 2. Attorney George McLean spent 240.1 hours on the case at \$350/hr;
- 17 3. Attorney Joel Hanson spent 29.1 hours on the case at \$250/hr;
- 18 4. Paralegal William Cunningham spent 89 hours on the case at \$100/hr;
- 19 5. Paralegal Sonia Chakalo spent 34.8 hours on the case at \$100/hr;
- 20 6. Paralegal Kevin Myhre spent 80.8 hours on the case at \$100/hr;

21 This represents a total of 784.9 hours of work totaling \$220,655.00 in fees. Trial courts may
22 award attorney fees when authorized "by contract, statute, or a recognized ground in equity."
23 Berryman v. Metcalf, 312 P.3d 745, 753 (2013), *citing* Cosmopolitan Eng'g Grp., Inc. v.
24 Ondeo Degremont, Inc., 159 Wash.2d 292, 296, 149 P.3d 666 (2006). An order of attorney
25 fees is within the sound discretion of the trial court, and discretion is only abused when the
26 trial court exercises it on untenable grounds or for untenable reasons. See Chuong Van
Pham v. City of Seattle, 159 Wash.2d 527, 151 P.3d 976 (2007). The burden of
demonstrating that a fee is reasonable is upon the fee applicant. Berryman, *infra* at 753,
citing Scott Fetzer Co. v. Weeks, 122 Wash.2d 141, 151, 859 P.2d 1210 (1993).

In making a determination of reasonable attorney fees, the Court must "take an active
role in assessing the reasonableness of fee awards, rather than treating cost decisions as a
litigation afterthought, and courts should not simply accept unquestioningly fee affidavits from
counsel." Mahler v. Szucs, 135 Wash.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998).

1 In this particular case, the undersigned has reviewed carefully the billing records from
2 all six of those who performed legal work on the above-entitled case for the Plaintiff.
3 According to Plaintiff's pleadings, all of the work performed by these individuals was
4 reasonable and necessary to the prosecution of the lawsuit. This amount would total
5 approximately \$220,655 in fees. Plaintiffs then indicate that this "lodestar" amount, Bowers
6 v. Transamerica Title Insurance Co., 100 Wn.2d 581, 597, 675 P.2d 193, 203 (1983), should
7 be multiplied by 1.25 to arrive at a reasonable fee for the work performed on the case -
8 \$280,000 or so. The Court can use a "lodestar multiplier" in situations where the attorney's
9 fee structure allows for the risk that the attorney will not get paid if they do not prevail. The
10 Court can also use the multiplier in situations where the representation has been unusually
11 good. Id. Plaintiff went to great lengths to impress upon the Court the importance of fully
12 allocating attorney fees in an effort to deter slow-pay and no-pay behavior on the part of
13 insurance companies.

14 The undersigned has also reviewed annotated copies of the same Plaintiff billing
15 records, prepared by Defendant, which purport to show a multitude of instances of double-
16 billing, indecipherable block billing, reference to billing for work unrelated to the current
17 litigation, and billing that simply does not make sense. Moreover, Defendant urges the Court
18 not to use a "lodestar multiplier" because the hourly rate of the attorneys already takes into
19 account the possibility of a bad outcome. Defendant also argues that, because Plaintiffs
20 failed to segregate their attorney fee requests between the CPA claim (for which reasonable
21 attorney fees are available), and common law bad faith (for which no attorney fees are
22 available), that whatever fee amount the Court calculates should be reduced by half.

23 THE COURT'S ANALYSIS OF THE ATTORNEY FEES AND COSTS:

24 DEFENDANT'S REQUEST FOR A 50% REDUCTION

25 Trial courts may award attorney fees when authorized by contract, statute or a
26 recognized ground in equity. Berryman, *infra*. Here, Defendant asks the Court to reduce any
award of attorney fees by 50% because fees are only statutorily authorized for the CPA
claim, and not the bad faith claim. However, a settlement agreement is a contract. Hisle v.
Todd Pacific Shipyards Corp., 113 Wash.App. 401, 415, 54 P.3d 687 (Div. 1, 2002),
referencing Riley Pleas, Inc. v. State, 88 Wash.2d 933, 938, 568 P.2d 780 (1977). Thus,
Defendant entered into a contract with Plaintiff to resolve this litigation. That contract
included a provision that allowed Plaintiff to seek reasonable attorney fees. The settlement

1 did not in any way limit those attorney fees to the CPA claim. The plain reading of the
2 agreement allows Plaintiff to seek all reasonable fees. Moreover, separating the claims and
3 the work done on each claim would be an impossibility. Given the clear language of the
4 settlement agreement, the Court will not segregate time spent on each specific claim within
the Complaint, and will not reduce the lodestar number, as calculated below, by 50%.

5 LODESTAR CALCULATION

6 Both the settlement agreement and the law allow for recovery of only fair and
7 reasonable attorney fees. It is unreasonable to bill for excessive, redundant or unnecessary
8 hours. ACLU v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999). In this case, Plaintiff has
9 stretched the bounds of reasonableness in its fee request. The Court will address each of
10 Defendant's concerns with Plaintiff's fee requests, and indicate by how much the fee lodestar
should be reduced, if at all, based on these concerns.

11 FEES FOR WORK NOT INCLUDED IN THE LITIGATION

12 Defendant claims that Plaintiff included attorney fees in its calculation for work Plaintiff
13 did in managing repair work in the Xavier home. Defendant claims that this work did not
14 relate to the litigation, but was separate work designed to save money for the Xaviers.
15 Plaintiff claims that this work in managing the construction and repairs constitutes their
16 assistance in helping the Xaviers to mitigate the damages caused by the water, and thus was
directly related to the current litigation.

17 Defendant's expert identified 10 hours and \$3,280,000 billed for this category of work.
18 The Court's review reveals that some of the work Plaintiff's lawyers did in this category did
19 relate to the litigation, but much of it was not at all related to the current litigation. Based on
20 a specific review of the items within the billing records, the Court will reduce Plaintiff's
attorney fee award for billing entries in this category by \$2,145.00.

21 ATTORNEY AND PARALEGAL BILLING FOR CLERICAL WORK

22 Clerical work should not be included in an award of attorney fees. North Coast
23 Electric Company v. Selig, 136 Wn.App. 636 (2007). Defendant claims that a portion of the
24 work performed and billed at paralegal billing rates (\$100/hour) in this case actually
25 constituted clerical work, and should not have been billed at this specialized rate.
26 Defendant's expert, Ms. Vinaccia identified 7.5 hours of billed paralegal time that falls into
this category, totaling \$1,075.00 in fees. The Court agrees that the vast majority of the
entries identified by Ms. Vinaccia do appear to relate to purely clerical work. Thus, the Court
will further reduce the lodestar amount by \$1,075.00.

1 INTEROFFICE MEETINGS AND PROVIDING INSTRUCTION

2 Defendant claims that a number of billing entries relate to "attorneys providing
3 instruction or assignments to paralegals," and for, "paralegals conferring with one another."
4 See Defendant's Amended Response, at 19-20. Defendant further claims that these
5 meetings did not result in any, "actual work." Plaintiff indicates that, in conducting its work
6 with a "team approach," these coordinative meetings are necessary to further the litigation.
7 No binding authority in the state of Washington addresses the question of "excessive
8 interoffice communication." Other jurisdictions have found, "a standard pattern of excessive
9 communication ... " inappropriate. See Vinaccia Report at 7-8.

10 The Court agrees that a "team approach" to litigation preparation necessarily
11 requires lawyers and paralegals to review internal documents, emails, and other material
12 relevant to the litigation. The Court has reviewed each of the entries annotated by Defendant
13 as inappropriate interoffice meeting and instruction. In reviewing these entries, many of the
14 six-minute entries for reading emails or reviewing documents almost certainly took much less
15 time than noted. Moreover, there are a number of unnecessary entries that fall within this
16 category.

17 Defendant asks for a reduction in the lodestar amount by \$19,290.00 for these
18 interoffice meetings and correspondence. Based on the Court's review, it is difficult to make
19 a definitive reduction – some of this time is properly billed, while some is vague and unclear.
20 Thus, the Court will reduce Plaintiff's lodestar amount by \$11,115.00 for work that falls within
21 the "interoffice meeting and providing instruction" category.

22 RESTORX BILLING

23 Defendant claims that Plaintiff has requested attorney fees for billing related to co-
24 defendant RestorX. The Court agrees that such billing should not be included. However,
25 some of the entries noted by Defendant include work on both RestorX and Allstate matters.
26 Thus, the Court has modified Defendant's request in the lodestar reduction, subtracting
\$1,200.00 instead of the requested \$1,960.

BLOCK BILLING

 Defendant points to 229 instances of block-billing – situations where the description of
the work performed includes several different actions. The Court has reviewed each of the
claimed "block-billing" entries, and has determined that a reduction in the lodestar by an
additional \$1,500.00 is appropriate.

EXCESSIVE BILLING

1 Finally, Defendant argues that some of the billing entries are simply unnecessary
2 padding of Plaintiff's lawyers' work. Defendant gives, as an example, situations where a
3 lawyer bills .1 hour (six minutes) to read an email, and then another .1 hour (six minutes) to
4 respond to it. The Court understands that .1 hour is the standard minimum block of time
5 available to bill clients. However, Defendant's argument is well-taken, in that many of the
6 billing entries by Plaintiffs appear to be aggressive. In reviewing these entries and noting
7 those that appear unclear or over-billed, the Court will reduce the lodestar by another
8 \$18,500.00.

8 FINAL CALCULATION OF LODESTAR

9 After subtracting these various unclear or overbilled portions of Plaintiff's fees, the
10 Court is left with a lodestar of \$184,360 in attorney fees.

11 MULTIPLIER:

12 Plaintiff seeks a multiplier of 1.25, arguing that the risk inherent in the contingent
13 nature of the fee structure requires compensation in the form of a multiplier. The Court finds
14 that a multiplier is unnecessary in this case. The Court finds that counsel's hourly fee
15 already takes into account the risk that they will not be compensated at all. Moreover, the
16 litigation in this case was standard fare, and does not require unnecessary additions to
17 attorney fees.

18 COSTS

19 Plaintiff seeks costs in the amount of \$25,074.93. Defendant rightfully questions the
20 \$150/hour spent on clerical work, but Defendant's assessment of the value of that work
21 contains no citation or support. Thus, the Court will reduce the cost award from \$25,074.93
22 to \$12,500.00.

23 IT IS HEREBY ORDERED that Defendant Allstate shall pay **\$184,360** in attorney fees
24 and **\$12,500** in litigation costs.

25 DATED: January 22, 2014

26 

ROGER S. ROGOFF, JUDGE

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Respondent in Court of Appeals, Cause No. 71536-4 to the following:

Rick J. Wathen
Jennifer P. Dinning
Cole | Wathen | Leid | Hall P.C.
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Michael T. Watkins
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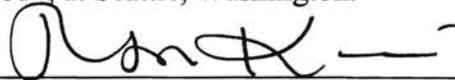
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Original and a copy delivered by ABC messenger:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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

DATED: July 19th, 2014, at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

COURT OF APPEALS
STATE OF WASHINGTON
2014 JUL 18 PM 3:09