

NO. 36968-1-II

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

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CLARK COUNTY FIRE DISTRICT NO. 5, CITY OF VANCOUVER,  
COUNTY OF CLARK, and MARTY JAMES

Appellants,

v.

SUE COLLINS, HELEN HAYDEN,  
VALERIE LARWICK and KRISTY MASON,

Respondents and Cross-Appellants.

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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## I. INTRODUCTION

Sue Collins, Helen Hayden, Valerie Larwick, and Kristy Mason (“the employees”) suffered severe and pervasive sexual harassment while they worked at Clark County Fire District No. 5. (“the District”). After a lengthy trial the jury returned a verdict for the plaintiffs in excess of \$3 million. On appeal, the District does not assign error to a single jury instruction nor does it challenge any evidentiary ruling by the trial court. The District also does not challenge the jury’s decision with respect to Hayden or Mason. Thus, the District concedes that a well-instructed jury heard ample evidence of the harassment, and awarded appropriate damages to two of the four employees. The challenged awards are equally well-supported.

However, the trial court erred on a number of key post-trial matters that must be rectified in this cross-appeal. First, the trial court improperly granted remittitur regarding the award to one of the four plaintiffs, disregarding that fact that the award was supported by substantial evidence in the record. Second, the trial court abused its discretion in awarding attorney fees that not only failed to account for the contingent risk of the case, but did not even compensate the employees’ counsel at the rate he regularly charges his hourly clients, a reasonable hourly rate. Nothing in

the record nor in the trial court's analysis warranted the downward deviation.

## II. REPLY ON STATEMENT OF THE CASE

The District takes no exception to any statement of fact contained in the employees' statement of the case, except to say in its argument section that some of the facts are "irrelevant." Cross-response at 1. Therefore, the District concedes that the employees have stated all the facts accurately.

## III. SUMMARY OF ARGUMENT IN CROSS-REPLY

Upon *de novo* review of the trial record, ample evidence supported the carefully considered jury verdict in this case. Nothing about the amount awarded to Larwick should shock the conscience of the Court on these facts. The verdict is within the range of the evidence. The jury's core function of assessing damages has been properly exercised. This Court should reverse the trial court's remittitur and reinstate the jury's verdict.

The trial court abused its discretion in fashioning its attorney fee award. The employees' counsel's \$300 hourly rate was reasonable for an employment law attorney; the trial court did not apply the proper factors and deviated downward from that rate despite uncontroverted independent evidence that the rate was proper. The trial court also improperly

deducted hours that should have been included. Finally, the court erred in refusing to apply a contingent risk multiplier, despite the fact that the lodestar rate did not account for the normal hourly rate of an attorney providing similar services, let alone the contingent nature of success.

The employees are entitled to their reasonable attorney fees on appeal.

#### IV. ARGUMENT IN CROSS-REPLY

The employees have raised two issues on cross appeal. First, they have challenged as inappropriate remittitur of the jury's award to Larwick, because the award was not shocking to the conscience and was supported by substantial evidence in the record. Opening cross-appeal br. at 20-36, 49-69. Second, they have challenged the trial court's assessment of attorney fees as an abuse of discretion, because the trial court did not apply the proper factors before it, reduced the employees' counsel's hourly rate, and denied a multiplier. *Id.* at 38-44.

The District has responded that this Court should uphold the trial court's remittitur because the trial court's reasoning was correct. Cross-response at 2, 14. The District also suggested that some evidence in the record cuts against the jury's damage awards to Larwick, but concedes that harassment took place. *Id.* at 4-5. Finally, the District suggested that the employees' counsel's \$300 hourly rate was inappropriate based on

evidence of general and personal injury practice in Clark County. *Id.* at 28-9.

In this cross-reply, the employees maintain that the trial court's incorrect reasoning regarding remittitur should not sway this Court in its *de novo* review. Nothing about the award to Larwick should shock this Court's conscience, given the ample evidence of severe harassment in this case. The trial court's basis for reducing the employees' counsel's attorney fees was flawed, because the uncontroverted evidence demonstrated that \$300 was a reasonable rate for an employment law practitioner of similar experience. Also, denial of a multiplier was incorrect because the hourly rate did not account for contingent risk factors.

A. Standard of Review

The District makes no response regarding the standard of review. Again, because the damage award was remitted, this Court reviews the order *de novo*. RCW 4.76.030; *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005). This Court's inquiry is governed by the standard set forth in RCW 4.76.030 (full text in appendix at 1). The jury's verdict is presumed correct. *Ma v. Russell*, 71 Wn.2d 657, 430 P.2d 518 (1967). Remittitur is appropriate only if this Court believes the damages awarded were "so excessive...as unmistakably

to indicate that the amount of the verdict must have been the result of passion or prejudice.” RCW 4.76.030.

B. The Jury Properly Exercised Its Central Function of Determining Larwick’s Noneconomic Damages Based on Substantial Evidence

The right to a trial by jury is inviolate, including the right to have a jury decide the appropriate measure of damages. Wash. Const. Art. I § 21; *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976). Neither the trial court nor any appellate court should substitute its judgment for that of the jury as to the amount of damages. *Cowan v. Jensen*, 79 Wn.2d 844, 847, 490 P.2d 436 (1971). The jury’s damages assessment should be overturned only in the most extraordinary circumstances. *Hoglund v. Raymark Indus., Inc.*, 50 Wn. App. 360, 373, 749 P.2d 164 (1987), *review denied*, 110 Wn.2d 1008 (1988).

In addition to *Bunch*, which the employees have already addressed throughout their opening brief on cross-appeal, *Ma v. Russell* is highly analogous and controlling. In that case, four plaintiffs were injured in an automobile collision and sought damages. 71 Wn.2d at 659. Liability was admitted; the jury awarded damages to each plaintiff. *Id.* The defendant accepted three of the four awards as reasonable, but challenged the fourth – a \$49,500 award for noneconomic damages to a young woman scarred by the collision – as excessive. *Id.* The noneconomic damages were ten

times the \$5,000 the victim incurred in economic damages. *Id.* The defendant moved for remittitur, and the trial court granted it. The court reasoned that the young woman was overly sensitive about the scarring, and reduced the jury's award to \$30,000. *Id. at 660.*

The Supreme Court, reviewing the record *de novo*, concluded that the jury's original verdict was justified by the evidence. *Id. at 664.* Specifically, the court noted that pain and suffering are inherently difficult to measure, but that ultimately they are the province of a properly instructed jury. *Id. at 662-63.* The *Ma* court observed that the trial was properly conducted:

No improper evidence was admitted on which a jury might have acted, nor were improper instructions given which might have misled the jury, nor was there improper argument of counsel which might have been calculated to prejudice the jury, nor any misconduct of the jury on which prejudice could be presumed. If there was passion and prejudice, its source cannot be found in the record.

*Id. at 661.* Even if a trial was not conducted to perfection, the verdict will not be overturned merely because of some stray remark by counsel. *Bunch*, 155 Wn.2d at 183. Rather, "it must be of such manifest clarity as to make it unmistakable." *Id.*

The District ignores *Bunch*, *Ma*, and all other case law dealing with the issue of remittitur, and relies instead on *Hojem v. Kelly*, 93 Wn.2d 143, 605 P.2d 275 (1980). Cross-response at 2, 10 n.4. *Hojem* is

inapposite. In addition to its total lack of analysis on the remittitur issue, it bears no factual resemblance to this case. *Hojem* merely affirmed a judgment N.O.V. where the plaintiff argued that a horse stable was negligent for failing to warn her of the “danger of riderless horses.” 93 Wn.2d at 144. Our Supreme Court concluded that *Hojem* had presented no evidence on the standard of care, and the jury could only have based its verdict on speculation. *Id.* at 147.

The District also relies on *Campbell v. ITE Imperial Corp.*, 107 Wn.2d at 807, 733 P.2d 969 (1987). Cross-response at 2, 10 n.4. *Campbell*, like *Hojem*, is another judgment N.O.V. case evaluating whether a plaintiff proved negligent failure to warn claim. 107 Wn.2d at 808. It has no application here.

Here, as in *Ma* and *Bunch*, there is nothing so inflammatory in the trial court record to justify reduction of Larwick’s non-economic damages. Cross-response at 2-10. Instead, the District invites this Court to re-weigh properly admitted evidence that was presented to a properly instructed jury. *Id.* The District identifies “resentment against the District” as the source of the jury’s passion, but does not explain how this “resentment,” even if it existed, translates into prejudice of unmistakable manifest clarity. Cross-response at 2.

The District's reliance on two stray remarks in closing argument is also unavailing. The District notes that during closing employees' counsel stated: (1) that the Department would not be hurt or have to raise taxes as a result of the verdict, and (2) the verdict should be large enough to ensure that the violations would not be repeated. No contemporaneous objection to either statement was made by the District, and the District has waived any claim of error with respect to those arguments. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993). Also, Washington courts follow a stringent standard for determining whether misconduct of counsel justifies overturning a jury's verdict in a civil case:

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record.... The movant must ordinarily have properly objected to the misconduct at trial, ... and the misconduct must not have been cured by court instructions.

*Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000).<sup>1</sup>

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<sup>1</sup> Although *Alcoa* addresses the standard for granting a new trial, an issue which is not the subject of this cross-appeal, trial courts simultaneously evaluate whether misconduct warrants remittitur or a new trial. RCW 4.76.030. In either case, the trial court is deciding whether as a matter of law it should intercede in the central function of the jury. Thus, the standard misconduct of counsel should apply equally to a request for remittitur as to a request for a new trial.

Contrary to the District's claim, counsel's remark about "hurting the department" was not a reference, direct or indirect, to the topic of insurance, and the trial court so found. CP 888-89. To justify a reversal on appeal, any reference to insurance must be clearly and deliberately intended to advise the jury of the presence of insurance. *King v. Starr*, 43 Wn.2d 115, 118, 260 P.2d 351 (1953); *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 482, 135 P. 233 (1913). In some cases the insurance rule is not violated even when direct reference is made to insurance. *Heath v. Stephens*, 144 Wash. 440, 442, 258 P. 321 (1923) (voir dire about jurors' status as insurance company employees); *Child v. Hill*, 149 Wash. 468, 469, 271 P. 266 (1928) (same).

Regarding the "send a message" argument, there is no evidence that the statement prejudiced the jury, particularly because it was swiftly and properly cured. RP 4310. The trial court admonished counsel on the subject, it was not repeated, and the jury was properly instructed that arguments were not evidence. RP 4176.

The District's final plea, that "the testimony actually proves that a substantial amount of Larwick's physical and mental ailments were the result of her own personal problems," is equally unavailing. Cross-response at 10. Just as the trial judge in *Ma* improperly remitted based on his own perception of the plaintiff as oversensitive, such a re-weighing of

evidence was not a proper basis for the trial court to alter the jury's award here. *Ma* 71 Wn.2d at 661. Comparing the facts of *Bunch*, where a denial of remittitur was sustained (even under the narrow "abuse of discretion" standard of review) to this case, the trial court should not have disturbed the jury's verdict. Here, the record on Larwick's emotional distress was far more powerful and direct than the evidence adduced in *Bunch*.<sup>2</sup>

The District's attempt to minimize the record to justify remittitur is unpersuasive, and, at any rate, the damages issue was for the jury to decide. The District would have this Court reduce Larwick's noneconomic damages because James' behavior was no more than a "gruff, direct management style." Cross-response at 4. Similarly, the District asserts that Larwick felt only embarrassment, but did not display signs of emotional disarray. Cross-response at 5.<sup>3</sup> But the jury did not agree with the District's view of James' behavior, and this Court should not second guess the jury's decision, which was supported by substantial

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<sup>2</sup> In *Bunch*, the Court found that the plaintiff was disciplined for petty offenses that others committed with impunity, that he presently worked for significantly less pay with minimal benefits, and that he had to explain to his family why he was fired. 155 Wn.2d at 168-69. The Court found that, "all of these facts provide a basis for which the jury could infer emotional distress." *Id.* at 180.

<sup>3</sup> The District also improperly argues that this Court should ignore Larwick's trial testimony because it purportedly contradicted her deposition testimony. Cross-response at 5. Even if there were inconsistencies, those alleged inconsistencies only affect weight and credibility and are therefore within the exclusive province of the jury to address in making its decision. *Dupea v. City of Seattle*, 20 Wn. 2d 285, 290, 147 P.2d 272 (1944); *McUne v. Fuqua*, 45 Wash. 2d 650, 653, 277 P.2d 324 (1954).

evidence. *Ma*, 71 Wn.2d at 663. Larwick testified that “it was very stressful, emotionally draining, belittling. Difficult to put all those emotions into the words I want to tell you today.” RP 873. Larwick described how she talked to a friend, Aileen Bono, at the time about the “environment, how toxic I felt my environment was”. RP 984. Larwick testified that she had no idea that a job “could be so draining, so stressful, and cause so much anxiety in my life.” RP 988-89. Larwick described nights without sleep, nightmares and frequent headaches. RP 989. Larwick further testified that even though she thought “things couldn’t get worse, they did. Treatment became harsher, and it’s hard for me to relay to you the levels of harshness and the increasing hostility that I received from Marty, but it did increase.” RP 996.

In addition to Larwick’s testimony, the jury also heard the other three plaintiffs testify that Larwick was James’ primary target and subject of his worst abuse. RP 2466, 1243, 1730-32. Third-party witnesses testified to Larwick’s sense of helplessness and frustration in dealing with James and her emotional disintegration. RP 409-11, 457, 465, 496-97, 513, 528-29, 77-73, 814-15. Those witnesses also testified to Larwick’s devastation upon being terminated and complete withdrawal from life as she had known it. RP 655-56; 786, 832, 1142-43. Expert Dr. James Boehnlein testified that when he saw Larwick in 2007, she was still

experiencing nightmares involving James, that her sensitivity to the wind-up penis incident was higher than an ordinary person might experience because of the emotional and psychological connection to the sexual abuse of her daughter by her ex-husband. He concluded that James' "actions conveyed a sense of threat" by "playing on people's weaknesses." RP 2817-18. The jury heard ample, specific testimony about the devastation brought on by Larwick's experience at the District. RP 457, 513, 529, 655-56, 786, 832, 1142-43.

The District argues that the trial court had other "valid reasons" to remit Larwick's award, including the fact that she received the highest award even though James victimized other employees over longer periods of time. Cross-response at 14-16. Once again, the District's suggestion that this Court should approve the trial court's decision to set aside the jury's verdict is misplaced. The standard of review on this issue is *de novo*. The question is whether the jury was patently incorrect in awarding Larwick's damages, not whether the trial court was correct in remitting them. *Ma*, 71 Wn.2d at 430.

The District provides no legal support, because none exists, for the proposition that the amount of noneconomic damages must directly correlate to the length of time pain and suffering occurred. Cross-response at 14-16. In fact, the opposite is true: this Court has long held that pain

and suffering are not susceptible to precise measurement and cannot be fixed with mathematical certainty by the evidence. *Stevens v. Gordon*, 118 Wn. App. 43, 59, 74 P.3d 653 (2003); *Wagner v. Monteilh*, 43 Wn. App. 908, 912, 720 P.2d 847 (1986). Also, when reviewing a jury award for pain and suffering, Washington courts do not coldly compare the award at issue with other verdicts. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 268, 840 P.2d 860 (1992). Such a calculus ignores the realities of each individual's personal experience, and "is inimical to the foundation of particularized justice." *Id.* at 266.

The length of Larwick's harassment was only one factor for the jury to consider in evaluating her noneconomic damages. Based on substantial evidence, the jury concluded that James' harassment of Larwick was the most severe. CP 250. Larwick was clearly James' special target for daily abuse; she got the worst of it. RP 1243, 1728, 1730-31, 1733-34, 2465-66.

The District cannot, and does not, deny that harassment of the four employees occurred. Cross-response at 4-5. Having therefore proved that discrimination occurred, Larwick "is only required to offer proof of actual anguish or emotional distress in order to have those damages included in recoverable costs." *Bunch*, 155 Wn. 2d at 180. It is why "the distress

need not be severe.” *Id.* It is also why “noneconomic damages are especially are within a properly instructed jury’s discretion.” *Id.*

C. The Jury’s Award of Economic Damages to Larwick Is Also Supported by Substantial, Specific Evidence and Should Not Be Disturbed

The jury also awarded Larwick economic damages. CP 250. The District apparently concedes that the amount of economic damages the jury awarded Larwick was within the mathematical range of evidence presented at trial. Cross-response at 10-14. Larwick produced substantial evidence of her economic damages. Regarding past wage loss, specific numbers detailing Larwick’s lost wages until the date of trial went to the jury. Exh. 63.

Regarding future wage loss, Larwick provided substantial evidence to support her damages. Vocational expert Richard Ross analyzed Larwick’s skills and testified as to what income should properly be attributed to her. RP 2518-21. Ross made his evaluation based on two alternative analytical grounds. Ross’ first basis for his opinion was that Larwick was emotionally unable to return to work and, therefore, would have no income attributable to her. RP 2519. Ross’ second basis was that Larwick should have income attributed to her comparable to what her skill set would earn if she went out looking for a job, recognizing her emotional

inability to return to the paramedic field where she had worked. RP 2520-21.

Larwick's economic damages are also supported by testimony from economist Walter Lierman, Ph.D., who took back pay loss numbers as well as the income ranges established by Ross and generated two sets of calculations. Ex. 320, 321. Both of those calculations went to the jury without objection from the District. RP 2723. The jury believed Larwick's evidence. It is not the function of the trial court or this Court to second guess that decision. *Cowan*, 79 Wn.2d at 847.

In the face of this substantial evidence of economic damages and a jury verdict that is within the range of the evidence presented, the District simply argues that Larwick failed to sufficiently mitigate those damages by "voluntarily" withdrawing from the workforce. Cross-response at 12.

The burden of proving failure to mitigate here is on the District. *Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 301, 890 P.2d 480 (1995). Again, this Court must review the damages issue *de novo*, contrary to the District's assertion that an abuse of discretion standard applied. *Ma*, 71 Wn.2d at 430; cross-response at 14. The District's principal argument on the mitigation issue is that Larwick was capable of finding employment on the open market, and that her mental distress was irrelevant to the jury's assessment of economic damages. *Id.* at 13-14.

The District's assertion that mental distress is irrelevant to the jury's award of economic damages is incorrect. An employer cannot psychologically damage an employee, and then avoid economic damages by claiming that the employee's mental state is irrelevant to the employee's ability to find work. *Xieng v. Peoples Nat. Bank of Washington*, 63 Wn. App. 572, 583, 821 P.2d 520 (1991). See also RCW 49.60.040(25)(c)(ii) (2007) (defining "disability" in part as "Any mental, developmental, traumatic, or psychological disorder" and recognizing that it can impair employee's ability to perform a job).

In *Xieng*, an employee was repeatedly passed over for promotions based on his national origin. 63 Wn. App. at 577. As a result, he suffered from severe depression that manifested itself in psychological and physical symptoms, which interfered with his ability to work. *Id.* In addition to noneconomic damages for pain and suffering, the jury awarded Xieng back pay and five years of front pay under the Washington Law Against Discrimination, RCW 49.60 (WLAD), based on his psychiatric expert's testimony that it would take him five years to fully recover from the emotional toll. *Id.* at 583.

This Court upheld the jury's award of economic damages to Xieng, because the emotional distress interfered with his ability to work and caused him economic harm. *Id.* Explaining why Xieng's psychological

injury was relevant to his economic damages, the Court noted that under WLAD, front pay “is a type of actual damages awarded in...employment discrimination suits which compensates victims for the continuing *future* effects of discrimination.” *Id.* (emphasis in original).

A jury is given great latitude to decide whether a plaintiff’s mitigation actions were reasonable:

While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss.

*Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956), quoting *Charles T. McCormick Handbook on the Law of Damages* § 35, at 133 (1935). The District unsuccessfully argued to the jury that Larwick’s emotional distress should not have inhibited her ability to find reemployment. RP 4305. The jury rejected this argument and awarded Larwick economic damages, including front pay. CP 250.

Substantial evidence supports the jury’s verdict. Larwick presented sufficient evidence that the prolonged and severe discrimination she suffered adversely affected her ability to find employment, and the

jury was entitled to believe her. Larwick was devastated by James' actions; after the District destroyed her emotional well-being, Larwick retreated from her previous life and hid. RP 655-56, 737-38, 832, 1142-43, 1148-49. This severely impaired her ability to find work. RP 2521.

The jury's award of economic damages is either just under 100 percent of the secretarial wage-imputed damages set forth in Exhibit 321, or about 67.5 percent of the calculated economic damages based on the history of actual earnings that supported Exhibit 320. Either way, the jury's award of economic damages was within the range of admitted evidence and, therefore, within the jury's "constitutional role to determine questions of fact, and the amount of damages is a question of fact." *Bunch*, 155 Wn. 2d at 179. The verdict does not shock the conscience, is not clearly the result of passion or prejudice, and should be allowed to stand.

D. The Jury's Award of Economic Damages to Larwick Is Supported by Substantial, Specific Evidence and Should Not Be Disturbed

The trial court denied remittitur as to the jury's award of damages to Collins. CP 895. The District argues that the jury's award of economic damages to Collins should be reduced, for similar reasons to those advanced in opposition of Larwick's award. Cross-response at 16-21. Again, the District's opposition is almost completely factual in nature,

with very little legal authority presented. *Id.* The District does not deny that the jury based its decision on admissible evidence, it merely challenges the weight of that evidence, particularly with respect to Dr. Lierman's expert testimony. *Id.* at 19-21.

It is the jury's responsibility to resolve these factual disputes and inconsistencies, and this Court should not re-weigh the evidence presented at trial. *Cowan*, 79 Wn.2d at 847. The jury appropriately assesses damages, and its determination should be overturned only in the most extraordinary of circumstances. *Raymark Indus.*, 50 Wn. App. at 373.

E. The Trial Court Abused Its Discretion in Making Its Attorney Fee Award

The trial court in this case not only refused to apply a risk multiplier to the lodestar rate, but actually reduced the hourly rate of the employees' counsel for lodestar purposes from \$300 to \$280, despite *uncontroverted* evidence that the \$300 rate was reasonable for an employment lawyer of Mr. Boothe's background and skills. The District argues that the employees failed to meet their burden of proving that a \$300 rate was reasonable. Cross-response at 21-29. The District also argues that a multiplier was not justified because this was not a high risk case. Cross-response at 31. The District is wrong on both contentions.

1. Standard of Review

In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court abused its discretion here.

2. Counsel's \$300 Hourly Rate Was Reasonable for an Employment Lawyer in a Case of This Type

The trial court abused its discretion in setting the lodestar rate at \$280 instead of the employees' counsel's reasonable hourly rate of \$300, because the trial court's findings contain no tenable grounds for the reduction, and, in fact, all support the \$300 rate.

In determining a reasonable hourly rate, trial courts may follow the factors set forth in RPC 1.5. *Mahler v. Szucs* 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998). Those factors are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

*Id.*; RPC 1.5(a). The trial court must take an “active role” in the process.

*Id.*

The trial court did not expressly address the RPC 1.5(a) factors in its analysis. CP 888-99. Instead, the court recited its factual findings regarding attorney fees and then announced a rate of \$280. *Id.* at 897.

However, proper application of the trial court’s findings to the RPC 1.5(a) factors should have resulted in a lodestar rate equal to counsel’s reasonable hourly of \$300, not \$280. First, the trial court found that this case required over 2000 hours of commitment and that similar cases “are difficult to try and represent a substantial risk.” CP 896.

Second, the trial court rejected the notion that the rate should simply reflect rates in the Clark County locality, because “counsel in this highly specialized field often would be from Seattle or Portland where they’re with firms more highly specialized in this type of case and case management.” CP 897. Employment law is a narrow area requiring specialized skills. CP 764, 1047; *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7<sup>th</sup> Cir. 1082). The trial court also found that “A fee *in excess* of \$300 was suggested as common among practitioners dealing with this type of case.” *Id.* (emphasis added). Third, the amount in question here was large; as was the verdict. As the trial court succinctly stated, “The damage claims are high.” CP 889. Fourth, the trial court found that the employees’ counsel regularly billed at an hourly rate of \$300. CP 391. It was undisputed that he has hourly clients at that rate, and above; therefore the \$300 rate did not account for contingent risk. CP 1044. Fifth, it was also undisputed that his clients understood the nature of the fee agreement terms. CP 897.

Despite findings that supported the \$300 hourly rate, the trial court reduced the lodestar rate to \$280, stating as grounds only that “[\$280] appears to be within the range of reasonable fees.” CP 897. The trial court provided no tenable grounds for this reduction. The only possible justification for the reduction might be the District’s contention that \$250

was appropriate for Clark County. CP 666-716, 897. However, the trial court *expressly rejected* this argument. CP 897.

In support of the trial court's reduction of counsel's reasonable hourly rate, the District relies principally on *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P2d 193 (1983), and *Chrapliwy*, *supra*, a Seventh Circuit case. Neither of these cases upholds a trial court's decision to reduce counsel's reasonable hourly rate.

*Bowers* is inapposite to the issue of whether counsel's normal hourly rate was reasonable: in that case the opposing party conceded the issue. 100 Wn.2d at 594. Also, in *Bowers*, the Court approved without reduction varying hourly rates for lawyers with varying levels of experience. *Id.* at 597. *Bowers* dealt with the question of whether a 50 percent multiplier to account for contingent risk, and a 50% multiplier to reflect the quality of representation, were both appropriate. *Id.* Our Supreme Court concluded that a risk multiplier was appropriate, but not a quality multiplier. *Id.* at 601.

*Chrapliwy* actually supports the employees' argument against reducing the hourly rate solely to account for rates charged in the locality. In *Chrapliwy*, the Second Circuit overturned a district court's decision to lower the reasonable rates of out-of-town Title VII practitioners to reflect the local rates. 670 F.2d at 769. The Second Circuit pointed out that the

fee customarily charged in the locality is only one of a number of factors to be considered in determining a reasonable hourly rate, and that area of expertise and availability of other counsel rates practicing in the same field were relevant. *Id. Compare, West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008) (downward deviation for one appellate practitioner, but upward deviation for another, appropriate based on various factors).

The trial court abused its discretion by reducing the employees' counsel's reasonable hourly rate despite ample findings supporting that rate. The reasonable hourly rate of \$300 was presumed proper and should have been allowed based on application of the trial court's analysis to the factors set forth in RPC 1.5(a). *Bowers*, 100 Wn.2d at 597; *Mahler*, 135 Wn.2d at 433 n.20.

3. Deduction from the Lodestar Spent on Summary Judgment Was Improper

After the reasonable rate is determined, to calculate the lodestar, the trial court must also determine the reasonable number of hours spent. *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). For example, the court must discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time. *Pham*, 159 Wn.2d at 538.

The trial court abused its discretion in reducing the fees based on the successful motions to dismiss from the case the City of Vancouver as to the employees other than Collins and Clark County as to all four employees. CP 897. The City and County were legally intertwined with the Fire District.<sup>4</sup> Naming them was necessary to avoid an empty chair defense and an adverse *Tegman* situation.<sup>5</sup>

The City and County were joined in the action in good faith for procedural purposes, and their ultimate dismissal does not amount to an “unsuccessful claim.” It was necessary to achieve a good result for the employees. The employees should have been allowed attorney fees for

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<sup>4</sup> The District, the City of Vancouver, Clark County and other entities participated in an inter-local agreement that was not a model of clarity. CP 1076-1093; Exh. 185 at pgs. 3-6, 11. All four women were listed as City employees on the City’s website, in the City’s phone directories, and in City Fire Department rosters. CP 989, 999, 1004, 1007-1008, 1011. Hayden, Larwick, and Mason turned in their time records for payment to the County on County forms. CP 1004, 1008, 1011. Mason was interviewed for her job by the Clark County Public Works Director, and by City and District personnel. CP 990, 999, 1011. During her hiring interview, Mason was told that the City would pay one-half her salary. CP 990-92, 1004, 1011. Collins had been told the same in advance of the interview. CP 999. Mason was supervised by Collins, a City employee. CP 999. The County contributed a portion of an employee unit to the Fire District that funded Kristy Mason’s position. CP 990-91. County employees contended that they could control Mason’s time. CP 991-92, 1000, 1004, 1012. Even Jill Dinse, an attorney co-hired by the District, the City, and the County to investigate the County’s treatment of Mason, found that “County staff seems to believe that since the County pays for half of Mason’s salary, they should get half of Mason’s time.” Exh. 185 at pg.6. Mason’s file also yielded multiple Clark County records, including personnel action forms and time records. CP 991.

<sup>5</sup> The “empty chair defense” allows a jury to apportion fault to unnamed defendants against whom no judgment can be entered. In comparative fault settings, this could greatly reduce a plaintiff’s ability to be made whole. *See, Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 111-113, 75 P.3d 497 (2003). In *Tegman*, the Washington Supreme Court recognized that under the 1986 amendments to the Tort Reform Act, RCW 4.22.005 *et seq.*, joint and several liability became a highly complex proposition in cases where negligent and intentional acts intertwine.

defending the retention of the County and City in the case, even though they were ultimately unsuccessful in demonstrating the County's actual legal connection to the case.

4. A Contingent Risk Multiplier Was Warranted Here, Particularly Given the Trial Court's Reduction of the Employees' Counsel's Reasonable Hourly Rate

The trial court refused to grant a contingent risk multiplier, despite finding that "the plaintiff in bringing this type of case is generally facing a well-financed defendant and the cases are difficult to try and represent a substantial risk." CP 896. The District contends this was proper because the contingent risk was already accounted for in the lodestar fee, but neglects to identify how that is true. Cross-response at 32.

Washington law recognizes contingent risk multipliers. *Pham*, 159 Wn.2d at 541. Attorneys who take cases on contingency run a great risk that they may never be paid. *Id.* Multipliers compensate for that risk in order to encourage attorneys to accept cases in which their clients cannot afford to pay by the hour. *Id.* The WLAD places a premium on encouraging private enforcement, as discussed above, and the possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases. *Pham*, 159 Wn.2d at 542; RCW 49.60.020.

Application of a lodestar multiplier is within the discretion of the trial court. *Pham*, 159 Wn.2d at 542; *Bowers*, 100 Wn.2d at 598. If the

factors underlying a multiplier are already accounted for in the lodestar, then a multiplier is not justified. However, if the trial court takes improper factors into account, or does not accurately address the test for a multiplier, reversal is warranted. *Pham*, 159 Wn.2d at 543.

If an attorney charges contingent fee clients the same rate as that charged to clients paying by the hour, then that hourly rate by definition does not account for contingent risk. *See, Bowers*, 100 Wn.2d at 598 (if hourly rate underlying lodestar already accounts for contingent risk premium, no multiplier is needed). In that circumstance, particularly in a WLAD case, a multiplier is warranted. *Pham*, 159 Wn.2d at 542.

Here, the trial court fundamentally misapprehended the concept of compensating for contingent risk. The court was under the impression that the *lodestar process* inherently accounts for contingent risk:

If the jury verdict had been against the plaintiffs, clearly counsel would have little or no opportunity to be reimbursed by his clients and as such, because of this high contingency, a lodestar figure has been accepted as an appropriate way to insure that these parties will be appropriately represented by counsel and have the ability to bring their claim to an ultimate resolution before a jury.

CP 897.

The \$280 lodestar rate did not account for the risk involved, because the employees' counsel regularly charges a rate of \$300 or more.

CP 805. Not only did the lodestar fail to account for the contingent risk, it

was lower even than what counsel would have received from a client whose payment was guaranteed. *Id.*

The trial court concluded that this was a high risk case, yet reduced the employees' counsel's fees below the reasonable hourly rate *and* failed to apply a contingent risk multiplier. This was an abuse of discretion, and could discourage highly qualified attorneys from pursuing risky WLAD cases.

F. The Employees Are Entitled to Their Attorney Fees on Appeal

Under RAP 18.1 and RCW 49.60.030(2), the employees are entitled to reasonable attorney fees incurred on appeal. "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before...the Court of Appeals...the party must request fees as provided in this rule...." RAP 18.1.

RCW 49.60.030(2) provides that persons injured under WLAD are entitled to "reasonable attorney fees." This includes fees on appeal to discrimination victims, provided they are "substantially prevailing parties." *Martinez v. City of Tacoma*, 81 Wn. App. 228, 246, 914 P.2d 86 (1996). The employees are entitled to their reasonable attorney fees incurred in defending the District's appeal. *Id.* If they substantially prevail on their cross-appeal, they are entitled to those fees as well.

*Carlson v. Lake Chelan Community Hosp.*, 116 Wn. App. 718, 745, 75 P.3d 533 (2003).

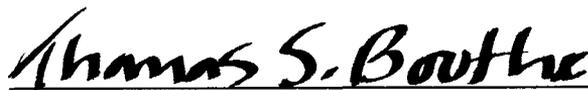
V. CONCLUSION

The District admits that a well-instructed, well-informed jury awarded damages to Larwick and Collins, and the record substantially supports the jury's considered verdict.

The trial court abused its discretion when it reduced employees' counsel's reasonable hourly rate and in refused to apply a contingent risk multiplier despite clear findings in support of both actions.

This Court should reinstate the jury's full verdict, vacate the trial court's attorney fee award, and remand the case to the trial court to enter a proper fee award. This Court should also award the employees their attorney fees on appeal.

Dated this 2<sup>nd</sup> day of March, 2009.



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# APPENDIX

### **RCW 4.76.030**

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

### CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing

### REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

on the following named person(s) on the date and time indicated

below by:

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery
- e-mail transmittal to

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