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SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK A. WILLIAMS and ANDREA HARRIS, his wife, and
ANDREA HARRIS as guardian for ELENA-GENEVIEVE HARRIS,
a minor child, and JOSHUA HARRIS, a minor child,

Petitioners,

v.

FESSEHA K. TILAYE and JANE DOE TILAYE, his wife, and the
marital community composed thereof, and MAMUYE A. AYELEKA
d.b.a ORANGE CAB 485 and JANE DOE AYELEKA, his wife, and
the marital community composed thereof,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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& LINDSEY, P.S.

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ORIGINAL

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I. INTRODUCTION

RCW 4.84.250 provides for the recovery of attorney fees where the amount of damages pleaded does not exceed \$10,000. A plaintiff who does not limit her claim to \$10,000 and asks for more than the statutory limit is not entitled to an award of attorney fees. In a case subject to mandatory arbitration under ch. 7.06 RCW, the arbitration is the "trial" and the trial de novo in the superior court is the "appeal" under RCW 4.84.280 and .290. The Court of Appeals properly held that when a case is subject to mandatory arbitration, a party must invoke the statutory scheme by making an offer to settle for less than \$10,000 before the mandatory arbitration hearing.

II. SUPPLEMENTAL STATEMENT OF ISSUES

1. In a case subject to mandatory arbitration, must a plaintiff seeking an award of attorney fees under RCW 4.84.250 place the defendant on notice that plaintiff's claim is limited to \$10,000 by making an offer to settle for less than that amount under RCW 4.84.260 and .280 prior to the arbitration hearing?

2. When attorney fees are awarded by the superior court using the lodestar method, does the superior court have discretion to deny a multiplier?

III. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners Patrick Williams ("Williams") and Andrea Harris ("Harris") filed this action claiming personal injuries and alleging that a taxicab driven by respondent Fessaha Tilaye ("Tilaye") and owned by Mamuye Ayeleka ("Ayeleka") struck the Williams vehicle on December 25, 2005. (CP 1-7) The case was transferred to mandatory arbitration pursuant to the parties' stipulation. (CP 24-26)

Prior to filing suit, Harris and Williams each offered to settle their claims for more than \$20,000. The settlement offers were not accepted. Neither Williams nor Harris made any subsequent settlement offers prior to the mandatory arbitration hearing. Neither Williams nor Harris notified Ayeleka or Tilaye that their claims would be limited to \$10,000 per plaintiff before the mandatory arbitration hearing. (CP 739, 749)

The arbitrator ruled in favor of Tilaye and Ayeleka following a March 28, 2008 mandatory arbitration hearing. The arbitrator held that plaintiffs failed to establish that the alleged accident was the proximate cause of their claimed injuries. (CP 32) Williams and Harris appealed by filing timely requests for trial de novo. (CP 33-34, 41-42, 46-49)

On May 20, 2008, Williams sent an offer of settlement for \$3,900 that expired on June 3, 2008. On August 14, 2008, Harris made an offer of settlement for \$9,000. Each offer referenced RCW 4.84.280. Tilaye

and Ayekele did not accept either offer. (CP 476, 493-94, 554, 564-65, 828)

Harris' and Williams' appeal of the mandatory arbitration award was tried without a jury to King County Superior Judge Cheryl Carey ("the superior court") on May 4, 2009. Plaintiffs voluntarily dismissed their claims against Ayeleka on the first day of trial. (CP 407-08) After a four-day trial, the superior court awarded \$20,512 to Harris and \$7,482 to Williams. (CP 437-39, 542-43)

Harris and Williams sought fees under RCW 4.84.250, which allows for an award of attorney fees where "the amount pleaded by the prevailing party" is \$10,000 or less. The superior court awarded Harris fees of \$49,847.50 and Williams fees of \$25,722 under the lodestar method, reasoning that they recovered more than they offered in settlement after the mandatory arbitration hearing but prior to the trial de novo. (CP 800-12, 950-59)

The Court of Appeals reversed the superior court's award of attorney fees to Harris and Williams. Because plaintiffs' offers, made after the mandatory arbitration hearing and after filing for trial de novo, "were not made before 'trial,' they did not secure the statutory right to attorney fees" under RCW 4.84.280. (Opinion at 1, 5)

IV. SUPPLEMENTAL ARGUMENT

A. Plaintiffs Must Give Notice Of Their Intent To Seek Attorney Fees Under RCW 4.84.250 By Making An Offer Of Settlement Prior To The Mandatory Arbitration Hearing.

Petitioners were not entitled to fees under RCW 4.84.250 because they did not limit their claims to \$10,000 and did not make an offer of settlement under RCW 4.84.280 before the case first came to "trial" before an arbitrator under the Rules of Mandatory Arbitration. Allowing a plaintiff to recover fees under RCW 4.84.250-.280 where, as here, plaintiff awaits the outcome of arbitration, and first puts defendant on notice of intent to seek fees under the statute after appealing the arbitration award, would only encourage dissatisfied litigants to appeal the arbitrator's decision and undermine the legislature's intent to facilitate prompt settlement and reduce court congestion.

1. The Statutory Language Reflects The Legislature's Intent To Authorize An Award Of Fees Where The Plaintiff Invokes RCW 4.84.250 By Making An Offer Of Less Than \$10,000 Before Trial, Regardless Whether The Trial Is Conducted In Mandatory Arbitration Or Superior Court.

A plaintiff must put a defendant on notice of plaintiff's intent to seek fees by making an offer of settlement "at least ten days prior to trial." RCW 4.84.280. Harris contends that the plain meaning of the word "trial" in RCW 4.84.280 refers to "trial de novo" in superior court, and therefore

allows an award of fees to a plaintiff who has failed to make an offer or otherwise invoke the statute prior to arbitration so long as the plaintiff recovers more than an offer of settlement that is first served more than ten days prior to the trial de novo. Harris' argument improperly reads the word "trial" in isolation and without considering the rest of the statutory scheme.

While this Court looks first to "the words used in the statute" by the Legislature, *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 171 Wn.2d 54, 60, ¶ 10, 248 P.3d 83 (2011), it does so by examining the "entire statute in which the provision is found and . . . related statutes." *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C.*, 168 Wn.2d 421, 433, ¶ 13, 228 P.3d 1260 (2010). The relevant statutes here are RCW 4.84.250 through .290 and the Mandatory Arbitration Act, ch. 7.06 RCW.

The fee shifting regimen at issue here authorizes the recovery of attorney fees "in any action for damages where the amount pleaded by the prevailing party" is less than \$10,000. RCW 4.84.250. *See Reynolds v. Hicks*, 134 Wn.2d 491, 502, 951 P.2d 761 (1998) ("Attorney fees under RCW 4.84.250 are to be awarded to the prevailing party if the pleading party sought damages, exclusive of costs, of \$10,000 or less."); *Industrial Coatings Co. v. Fidelity and Deposit Co. of Maryland*, 117 Wn.2d 511,

519, 817 P.2d 393 (1991) (party may not obtain an award of fees under RCW 4.84.250 where the claim “prevailed on below exceeded the statutory maximum of \$10,000.”). The next section of the statute defines the plaintiff as “the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, as set forth in RCW 4.84.280.” RCW 4.84.260.

RCW 4.84.280 requires that an “offer of settlement” must be served “at least ten days prior to trial”:

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. . . .

RCW 4.84.280. Finally, RCW 4.84.290 provides that “[i]f the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250.”

The Court of Appeals correctly held that for purposes of RCW 4.84.280, “trial” is the arbitration hearing, and that the trial de novo is the “appeal” under RCW 4.84.290. It followed Division One’s decision in *Singer v. Etherington*, 57 Wn. App. 542, 546, 789 P.2d 108, 802 P.2d 133 (1990), holding that “[a] trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable.”

Harris' argument that the Legislature distinguished between mandatory arbitration hearings, trials, and appeals in ch. 4.84 RCW reads these statutes in isolation and fails to give effect to the entire statutory scheme and purpose. "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, ¶ 12, 173 P.3d 228 (2007). See *G-P Gypsum Corp. v. State, Dept. of Revenue*, 169 Wn.2d 304, 309, ¶ 10, 237 P.3d 256, 259 (2010) ("We have previously criticized such a crabbed notion of statutory interpretation, holding instead that a statute's plain meaning should be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.")

The statutes that mandate arbitration of claims that do not exceed \$50,000 reflect the Legislature's intent that the "trial" in RCW 4.84.280 encompasses the determination of the merits of plaintiff's claim in mandatory arbitration, and make clear that the "appeal" from a mandatory arbitration award is resolved procedurally by trial de novo. RCW 7.06.050(1) provides that following arbitration an "aggrieved party may file with the clerk a written notice of *appeal* and request for a trial de novo in the superior court. . . ." (emphasis added). RCW 7.06.060 directs the

superior court to “assess costs and reasonable attorneys’ fees against a party *who appeals* the award and fails to improve his or her position on the trial de novo.”) (emphasis added). Under RCW 7.06.080, these provisions “apply to all requests for a trial de novo filed pursuant to and *in appeal* of an arbitrator’s decision.”) (emphasis added). *See also* MAR 7.1(a) (“any aggrieved party *not having waived the right to appeal* may serve and file with the clerk a written request for a trial de novo in the superior court . . .”) (emphasis added); MAR 7.3 (“The court shall assess costs and reasonable attorney fees against a party who *appeals* the award and fails to improve the party’s position on the trial de novo. . . .”) (emphasis added).

In 2002, the Legislature amended the mandatory arbitration statute to provide additional incentive to encourage settlement and reduce litigation by authorizing attorney fees only to the “*nonappealing party*” whose offer is made more than 30 days prior to a trial de novo:

(a) Up to thirty days prior to the actual date of a trial de novo, a *nonappealing party* may serve upon the *appealing party* a written offer of compromise.

(b) In any case in which an offer of compromise is not accepted by the *appealing party* within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator’s award for determining whether the party *appealing* the arbitrator’s award failed to improve that party’s position on the trial de novo. . . .

RCW 7.06.050(1). *See* Laws 2002, ch. 339, § 1 (emphasis added).

The Legislature therefore has addressed when a party may recover attorney fees by filing an “offer to compromise” before trial de novo. By allowing only a “nonappealing party” to recover fees by making an offer of compromise, the Legislature has indicated its intent that a plaintiff appealing a mandatory arbitration award by filing for trial de novo may not for the first time put the defendant on notice that it is seeking fees under RCW 4.84.250 on the eve of resolution of the “appeal.” As the non-appealing parties from the arbitrator’s award, Tilaye and Ayeleka were the only parties authorized to make an offer of compromise that would trigger the right to an award of attorney’s fees in an appeal of an arbitrator’s award by trial de novo.

Harris cites *dicta* from this Court’s decision in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), to argue that RCW 4.84.250 *et seq.* may be invoked for the first time on appeal from the arbitrator’s ruling because “the entire case” – not just the adjudicative proceeding – “begins anew” and, therefore, “must be conducted as though no arbitration had occurred.” 150 Wn.2d at 528. However, the *Malted Mousse* Court specifically held that “the sole way to *appeal* an erroneous ruling from mandatory arbitration is the trial de novo,” 150 Wn.2d at 529 (emphasis added). The language that Harris relies on comes from the section of the decision entitled “*Appealing* an adverse decision under

mandatory arbitration.” 150 Wn.2d at 527 (emphasis added). The Court of Appeals correctly observed that *Malted Mousse* addressed only the scope of a trial de novo (in particular, whether a party could appeal only an attorney fee award), (Opinion at 4-5), and provides no support for Harris’ contention that a mandatory arbitration hearing is not the original “trial” for purposes of RCW 4.84.280.

Instead of addressing the Legislature’s use of the term “trial de novo” rather than “trial” to refer to the “appeal” from a mandatory arbitration award in ch. 7.06 RCW, Harris cites a 1984 amendment to RCW 4.84.010 that authorized the recovery of certain expenses as “costs allowed to the prevailing party” in arbitration to argue that the Legislature intended to distinguish the term “mandatory arbitration” from “trial” in RCW 4.84.280. *See* RCW 4.84.010(5); (7). If the term “trial” in RCW 4.84.280 referred to the trial de novo, “offers of settlement” could *only* be used to authorize the recovery of attorney fees on appeal from a mandatory arbitration award, and not at the arbitration hearing itself. There is no indication that the Legislature intended this bizarre result under a statutory scheme designed to expedite the resolution of small claims. *See Pudmaroff v. Allen*, 138 Wn.2d 55, 65, 977 P.2d 574 (1999)

“we do not give a hypertechnical reading of a statute so as to yield an absurd result.”¹

Harris also argues that a trial de novo cannot be considered the “appeal” under RCW 4.84.290, because the statute provides that “if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any. . . .” The fact that the superior court does not on appeal remand a case to mandatory arbitration is not germane to the issue whether the trial de novo in the superior court is the appeal for purposes of RCW 4.84.250 *et seq.* The language of RCW 4.84.290 regarding a potential retrial after a remand from an appellate court is conditional, indicating that it applies only to the specific situation of a remand from a court of review, either the superior court under the RALJ or the appellate

¹ The King County Arbitration Department, which is responsible for administering the mandatory arbitration program in Washington’s most populous county, interprets the statutory scheme as authorizing an award of fees by the arbitrator to a plaintiff whose recovery at “trial” exceeds the amount offered in settlement under RCW 4.84.280. Its form outlines how to invoke the right to an award of attorney fees from the arbitrator pursuant to RCW 4.84.280 at the conclusion of the mandatory arbitration:

8. **ATTORNEY FEES:** ...If you intend to rely on RCW 4.84.280, offers of settlement in determining attorney fees, the deadlines and procedures outlined in LMAR 6.2(b) will still apply. Please inform me by the end of the arbitration hearing of the possibility of seeking fees pursuant to this statute, . . .

(App. A) The decision of the entity responsible for administering the Mandatory Arbitration Act should be afforded deference by this Court. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004). *See also* MAR 8.2 (authorizing local rules).

court under the RAP. *See* RCW 4.84.300 (fee shifting provisions of RCW 4.84.250 *et seq.* apply uniformly in all cases, whether they are “commenced in district court or superior court.”) RCW 4.84.280 thus applies to cases that have been commenced in superior court and referred to arbitration for “trial”, and RCW 4.84.290 applies to arbitration awards that are “appealed” to superior court.

2. Petitioners’ Interpretation of the Term “Trial” Defeats The Statutory Purpose Of Encouraging The Expeditious Resolution Of Small Claims And Elimination Of Court Congestion.

Petitioners’ interpretation also undermines the statutory purposes of both the fee shifting provisions of RCW 4.84.250 *et seq.* and the Mandatory Arbitration Act, ch. 7.06 RCW. Allowing a party to seek attorney fees under RCW 4.84.250 for the first time after that party files for trial de novo would only encourage parties to file for trial de novo, and increase rather than reduce court congestion.

“The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims.” *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 788, 733 P.2d 960 (1987). The Mandatory Arbitration Act, ch. 7.06 RCW, has a similar salutary purpose – “to reduce congestion in the courts and delays in hearing civil cases.” *Malted Mousse*, 150 Wn.2d at 526; *Nevers v.*

Fireside, Inc., 133 Wn.2d 804, 815, 947 P.2d 721 (1997). RCW 4.84.280 encourages defendants to promptly settle claims that are under \$10,000, before the fees incurred in trying the case overwhelm the amount at issue.

“[T]he overriding purpose of allowing plaintiffs to pursue and settle small claims requires that the defendant be put on notice” of the plaintiff’s intent to limit his or her claim to under \$10,000. *Beckmann*, 107 Wn.2d at 790. Authorizing a plaintiff to recover fees without invoking RCW 4.84.250 until after the conclusion of a mandatory arbitration proceeding and before trial de novo provides no incentive to settle before the parties have already invested substantial attorney fees and financially strapped counties have already paid arbitrators appointed under RCW 7.06.040 to conduct hearings.

Authorizing an award of fees to the party appealing an arbitrator’s ruling and invoking RCW 4.84.280 for the first time on the eve of a trial de novo also defeats the legislative intent behind the 2002 amendments to RCW 7.06.050. The Legislature imposed upon an appealing party the risk of paying the nonappealing party’s fees in order to discourage appeals of arbitration awards. Senate Bill Report, SB 5373, 57th Leg., 2002 Reg. Sess. It did not adopt a proposed amendment to SB 5373 that would have authorized a fee award “in any case in which an offer of compromise or a counter offer of compromise is not accepted by the appealing party or the

nonappealing party respectively” prior to trial de novo. SB 5373, H. AMD 0405 (withdrawn March 7, 2002).

In the instant case, the arbitrator entered a defense award on claims that were not limited to \$10,000, and therefore were not subject to RCW 4.84.250 or .280. Plaintiffs appealed the mandatory arbitration decision by filing for trial de novo. Under MAR 7.3 and RCW 7.06.060(1), plaintiffs were responsible for defendants’ fees if they failed to improve their position at the trial de novo. Having failed to limit their claims to \$10,000 before all parties incurred substantial litigation expenses and attorney fees, plaintiffs were not entitled to first invoke RCW 4.84.280 after appealing by filing for trial de novo. Harris’ interpretation is not only unsupported by the statutory language, but plainly defeats the legislature’s intent to encourage settlement and reduce court congestion.

3. Allowing Plaintiffs To Selectively Seek Their Attorney Fees In Either The Mandatory Arbitration Or The Trial De Novo Would Dramatically Alter The Risks And Benefits Of The Arbitration Scheme.

Only plaintiffs can invoke the attorney-fee scheme, by limiting their damages to \$10,000 or less. See *Reynolds*, 134 Wn.2d. at 502; *Sherman v. Kissinger*, 146 Wn. App. 855, 876, ¶ 44, 195 P.3d 539 (2008). They do so, however, at the risk of paying the defendant’s fees if they

recover nothing or do not achieve a result better than what the defendant offers in settlement under RCW 4.84.270. *See Public Utilities Dist. 1 of Grays Harbor County v. Crea*, 88 Wn. App. 390, 945 P.2d 722 (1997), *rev. denied*, 134 Wn.2d 1021 (1998). Allowing plaintiffs to invoke RCW 4.84.250 *et seq.* for the first time after requesting a trial de novo following a mandatory arbitration award would “artificially alter[] the balance of power between the parties.” *Hudson v. Hapner*, 170 Wn.2d 22, 31, ¶ 26, 239 P.3d 579 (2010).²

Allowing plaintiffs to invoke the fee shifting mechanism of RCW 4.84.250 *et seq.* for the first time after appealing an arbitration award by filing for trial de novo would give plaintiffs two chances to obtain a substantial award against defendants, with little or no corresponding risk. A plaintiff could seek up to \$50,000 in a mandatory arbitration, without offering to settle for \$10,000 or less prior to the arbitration hearing. Dissatisfied with the arbitrator’s award, plaintiff could then appeal, invoke RCW 4.84.280 on the eve of trial de novo, and thereby shift to defendants the substantial attorney fees that have accrued in both proceedings.

² This Court in *Hudson* refused to allow a party the unlimited right to file, and then unilaterally withdraw, a request for trial de novo. The *Hudson* Court expressed reluctance to interpret the mandatory arbitration rules in a manner that “only encourages a party who is unsuccessful in arbitration to seek a trial de novo.” 170 Wn.2d at 32.

By contrast, defendants would be unable to promptly dispose of a case for \$10,000 or less before incurring the expense of the mandatory arbitration hearing. Plaintiffs would have two chances to litigate a claim, and could selectively seek all their attorney fees without being subjected to any additional risk, while a non-appealing defendant who was deprived of the opportunity to settle the case before arbitration could face the possibility of paying the appealing party's attorney fees. Moreover, this interpretation of RCW 4.84.280 would authorize an award of attorney fees to a plaintiff who seeks trial de novo and did not improve her position in the trial de novo, contrary to RCW 7.06.050 and .060.

No decision allows a party to recover attorney fees under RCW 4.84.250 and .280 when, as here, the plaintiff does not timely plead that the claim for damages is under the statutory limit, or otherwise inform the defendant that plaintiff's claim is less than \$10,000. *See e.g., Reynolds*, 134 Wn.2d at 502; *Pierson v. Hernandez*, 149 Wn. App. 297, 202 P.3d 1014 (2009); *Schmerer v. Darcy*, 80 Wn. App. 499, 910 P.2d 498 (1996). In *Pierson*, the Court of Appeals held that the plaintiff could not invoke RCW 4.84.250 after claiming damages in excess of \$10,000 in interrogatory answers, even though she subsequently sent an offer of settlement for \$8,000 pursuant to RCW 4.84.280 prior to the mandatory arbitration hearing. 149 Wn. App. at 306, ¶ 27. Similarly, in *Schmerer*,

there was no right to attorney fees when the plaintiff "sent notice before trial to Ms. Schmerer's attorney telling him that the claim was in excess of \$10,000." 80 Wn. App. at 510.

Before they filed their complaint, Harris and Williams offered to settle their claims for over \$20,000 each. After filing their lawsuits, neither plaintiff invoked RCW 4.84.250. Instead they each claimed damages in excess of \$10,000, and declined to limit their damages in their interrogatory answers.³ Petitioners did not give the defendants an opportunity to settle the case for \$10,000 or less and were therefore at no risk of having to pay attorney fees for the arbitration hearing.

Petitioners did not limit their claims to \$10,000 after invoking RCW 4.84.280 before the trial de novo in superior court. Harris claimed that her special damages alone exceeded \$10,000, even though she failed to disclose until the trial de novo was underway that her chiropractor had revised her opinion about the need for additional treatment based on a new examination conducted after the discovery cutoff. (CP 272, 405-06, 412-23, 614, 622; RP 483-93)⁴ Had Harris complied with CR 26(e), she would have been disqualified from seeking fees under RCW 4.84.250 by

³ Harris claimed special damages of \$6,032 in interrogatory answers, but also claimed unspecified "past or future non-economic damages." (CP 615, 622)

⁴ The Court of Appeals held that Harris' failure to supplement her interrogatory answers violated CR 26(e), but affirmed the trial court's denial of sanctions, concluding that Tilaye could not show prejudice. (Opinion at 8-10)

pleading an amount in excess of \$10,000. *See Pierson* 149 Wn. App. at 304, ¶ 21 (plaintiff may not claim attorney fees where she “pleaded a statement of damages greater than \$10,000 in her response to the interrogatory.”) Thus, Harris’ belated reliance on RCW 4.84.250 penalizes the defendants who prevailed at the arbitration hearing and doubly rewards Harris, not just for her appeal of the arbitrator’s award, but also for her refusal to supplement discovery.

Adopting the rule advanced by petitioners would allow plaintiffs to treat the mandatory arbitration hearing as nothing more than a “dry run,” at which they could test the strength of their evidence and theories before a neutral decision-maker.⁵ If, as here, that plaintiff is dissatisfied with the result at arbitration, plaintiff may appeal, require defendants to incur their own substantial attorney fees and costs, and then assert a right to attorney fees that the Mandatory Arbitration Act grants only to the nonappealing party. This Court should not grant plaintiffs the unilateral right to a “do over” at which they could shift attorney fees to defendants under a statutory scheme designed to expeditiously resolve small claims.

⁵ The petitioners’ fee shifting rule could be invoked by economically powerful litigants in collection actions and commercial cases, as well as by individual plaintiffs in auto accident cases, such as here.

B. If This Court Holds That RCW 4.84.250 Applies To This Case, Plaintiffs Are Not Entitled To A Multiplier Of Their Lodestar Award of Attorneys' Fees.

The Court of Appeals did not address Harris' challenge to the denial of a multiplier, because it held that Harris was not entitled to attorneys' fees under RCW 4.84.250 and 4.84.280. If this Court reverses, it should hold that the superior court properly exercised its discretion to deny a multiplier under the lodestar method, or remand to the Court of Appeals to decide this issue. RAP 13.7(b)⁶

A trial court making an award under the lodestar method has substantial discretion to award or to deny a multiplier. *See Boeing Co. v. Heidy*, 147 Wn.2d 78, 90-91, 51 P.3d 793 (2002) (refusal to grant multiplier affirmed); *Broyles v. Thurston County*, 147 Wn. App. 409, 452-53, 195 P.3d 985 (2008) (decision to grant multiplier affirmed). Where the hourly rate underlying the lodestar fee takes into account the contingent nature of the representation, "no further adjustment duplicating that allowance should be made." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983).

⁶ Because it held that RCW 4.84.250 does not apply, the Court of Appeals also did not address Tilaye's and Ayeleka's specific challenges to the trial court's fee award, including the denial of fees to Ayeleka, the unsubstantiated findings of fact, and the refusal to segregate fees for unsuccessful or duplicative claims. (App. Br. at 31-42) If it holds that RCW 4.84.250 applies, this Court should either consider these issues or remand to the Court of Appeals. RAP 13.7(b).

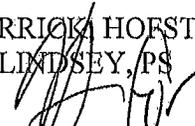
These principles apply in appeals of mandatory arbitrations awards. See *Faraj v. Chulisie*, 125 Wn. App. 536, 551, 105 P.3d 36 (2004) (affirming denial of multiplier on trial de novo because “a contingency calculation is wholly within the trial court’s discretion.”) Here, the superior court granted Harris and Williams attorney fees at hourly rates of \$275 and \$260, respectively, for a case involving an allegedly minor collision and claims of relatively minor injuries. The superior court used the “lodestar” method and awarded Harris attorney fees of \$49,847.50 and awarded Williams attorney fees of \$25,722 after considering the factors of RPC 1.5(b), including “whether the fee is contingent.” (CP 808, 990) It did not abuse its discretion by declining to award a multiplier.

V. CONCLUSION

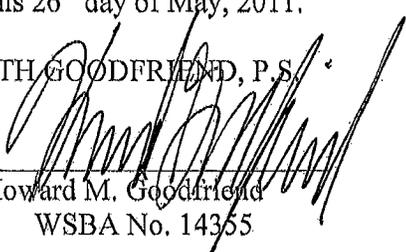
Petitioners were not entitled to attorney fees pursuant to RCW 4.84.250 and 4.84.280. This Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 26th day of May, 2011.

MERRICK HOFSTEDT
& LINDSEY, PS

By: 
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Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 26, 2011, I arranged for service of the foregoing Supplemental Brief of Respondents, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Jason E. Anderson Law Offices of Jason E. Anderson 8015 15th Ave. NW, Suite 5 Seattle, WA 98117	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Patrick Kang Premier Law Group 3380 - 146th Place SE, Suite 430 Bellevue WA 98007	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Phillp R. Meade Merrick, Hofstedt & Lindsey, PS 3101 Western Ave Ste 200 Seattle WA 98121-1024	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 26th day of May, 2011.



Carrie L. Steen

MANDATORY ARBITRATION HEARING NOTICE

COPIES OF THIS NOTICE MUST BE SENT TO PARTIES AND TO ARBITRATION DEPARTMENT, 516 THIRD AVE E-219, KING COUNTY COURTHOUSE, SEATTLE, WA 98104.

DO NOT FILE WITH CLERK

REGARDING ARBITRATION _____ VS _____

FROM: ARBITRATOR _____

TO: ATTORNEYS FOR LITIGANTS King County No: _____

SCHEDULE

(a) Date and time of hearing _____

(b) Place of hearing _____

(c) Estimated length of hearing _____ hours

(d) Deadline for filing the prehearing statement under MAR 5.2 with the arbitrator _____

(e) Person to call: _____ Phone: _____

(f) A party who fails to participate, without good cause, waives the right to a trial de novo (MAR 5.4). Terms may also be imposed under LMAR 3.2(b).

SUGGESTIONS, REQUESTS AND DIRECTIONS TO COUNSEL IN ARBITRATION

1. **USE OF THIS MEMO:** This memo may help you prepare for this hearing.

2. **MOTIONS AND OTHER CONTACTS WITH ARBITRATOR:** Prehearing motions should be directed to the arbitrator with the exception of MOTIONS REGARDING ARBITRABILITY (MAR 2.1, 2.2); SUMMARY JUDGMENT OR INVOLUNTARY DISMISSAL; TO CHANGE OR ADD A PARTY (MAR 3.2); OR TO DISQUALIFY AN ARBITRATOR (MAR 3.2(1)) which shall be decided by the assigned judge. Any motion or other pretrial discussion shall be arranged through _____ of my office. All contacts of any kind with me, including motions, may be done by conference call. Our preference is to conduct such a call at _____ a.m. if possible.

3. **PREHEARING STATEMENT, FILINGS, EVIDENCE:** I would urge you to take advantage of MAR 5.3 (d), which presumes certain documents admissible if served upon all parties at least 14 days prior to the hearing along with your prehearing statement. (See MAR 5.3 (d) for the exact steps necessary to comply.) All documents served in compliance with this rule will be accepted by me as your exhibits with no need to supply original or special marking. They will come into evidence as a packet at the commencement of the hearing, and I will not return them after the hearing unless specifically requested to do so.

4. **BRIEFING:** Briefs together with highlighted copies of cited authorities should be provided to me no later than one (1) working day prior to the hearing.

5. **LENGTH OF HEARING:** Unless informed otherwise, I anticipate approximately four (4) hours as the maximum time necessary for the hearing on this matter. Any help counsel can provide in preparing and presenting evidence by stipulation will aid in saving hearing time, attorney's fees and reducing the time required for decision.

6. **TECHNOLOGY:** Please make arrangements in advance for monitors etc.

7. **SETTLEMENT:** Please advise my office **and** the Arbitration department if a settlement is reached prior to the scheduled hearing date, and confirm that settlement in accordance with LMAR 4.4.

8. **ATTORNEY FEES:** The arbitrator has the power to award attorney fees by contract or by law, (LMAR 3.2.). If the facts of your case provide the right to an award of attorney fees, please bring documentary support, including your affidavit and time records, to the hearing and present it with your final argument. The attorney fee award will be made as part of the arbitrator's decision.

You may also request that the arbitrator delay filing an award so as to allow consideration of a subsequent motion for attorney fees and inclusion of any award of fees in the final arbitration award. The arbitrator must request an extension from the Arbitration Department for filing the award if the award will be filed after the 14-day deadline.

If you intend to rely on RCW 4.84.280, offers of settlement in determining attorney fees, the deadlines and procedures outlined in LMAR 6.2(d) will still apply. Please inform me by the end of the arbitration hearing of the possibility of seeking fees under this statute, and:

- 1) I will announce, but not file, my award in a letter to counsel within 3 days of the arbitration hearing.
- 2) You should then announce promptly to me that you are seeking attorney fees pursuant to 4.84.280.
- 3) I will then schedule a hearing by conference call for the 4.84.280 argument.
- 4) You must deliver all written and documentary support of your right to an award of fees to my office before 5 p.m. on the day before the 4.84.280 hearing.
- 5) I will include in the arbitration award any award of attorney fees pursuant to 4.84.280 and file the award within 14 days of the arbitration hearing.

9. **POST-TRIAL MOTIONS:** The arbitrator is restricted under MAR 6.2 to issues related to attorney fees and correction of obvious errors. The Arbitrator has no power to reconsider the award.

Arbitrator

Date