

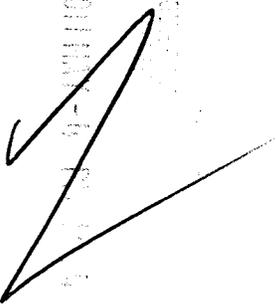
Case No: 66569-3-I

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

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COURT OF APPEALS  
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BIRHANE JENBERE, an individual,

*Respondent,*

v.

CHRISTINA LASSKE AND "JOHN DOE" LASSEK, wife and husband,  
both individual and on behalf of their marital community composed  
thereof,

*Appellants.*

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Joan E. DuBuque, Judge

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PLAINTIFF'S RESPONSE BRIEF

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## I. INTRODUCTION

“The man who first puts his cause before the judge seems to be in the right; but then his neighbor comes and puts his cause in its true light.” *Proverbs* 18:17.

In order to discourage frivolous appeals, promote early settlement, and reduce court congestion, our legislature built into the Mandatory Arbitration Rules (MAR’s) a carefully crafted “carrot and stick” scheme. At the heart of this scheme lies a “sword of Damocles,” which hangs over the head of every party that appeals an arbitration (hereinafter “MAR appellant”). The longer an MAR appellant continues the litigation, the greater the deterrent—an ever increasing award of *mandatory* attorney fees.

The Appellant in this case (hereinafter “Defendant”) engaged in exactly the kind of conduct that the legislature sought to deter. And now that the sword has fallen, Defendant seeks to avoid the consequences. Defendant, citing inapplicable case law, urges this Court to do something that every court of our state has thus far refused to do—create an exception to the MAR 7.3 mandatory attorney fees rule. Defendant asks this Court to hold that “mandatory” does not mean “mandatory”; to ignore the plain language of the statute and the MAR’s, to ignore the legislative policy, Defendant’s own abuse of the system, and this Court’s own holding in *Do v. Farmer*. Defendant asks the Court to gut the “carrot and stick” scheme by removing the sword, leaving a system turned on its head; one that rewards appellants

for dragging out litigation, rather than punishing them. Defendant asks this Court to take away virtually the *only* weapon the courts have to deter abuse of the MAR system—the mandatory award of attorney fees. This Court has refused to do so in the past and should refuse to do so now.

In the alternative, Defendant asks this Court to find that the trial court somehow abused its discretion with its award of attorney fees, by failing to consider argument and authority that were *not* raised below by Defendant. Defendant essentially asks this Court to give her de novo review a discretionary ruling of the trial court; to take the place of the trial judge and re-exam the evidence so that Defendant can “re-litigate” the attorney fees issue.

This would make a mockery of the abuse of discretion standard. The Plaintiff offered the trial judge ample evidence and authority to support the court’s award of attorney fees, including declarations of three well respected attorneys. Defendant, in contrast, did not offer *any* rebuttal evidence whatsoever. Now Defendant asks the court to find that the trial court abused its discretion, based on argument and authority that Defendant did not raise below. It would make no sense to reverse a trial judge on an abuse of discretion standard under these circumstances. Given that the trial court had ample evidence and authority for its ruling, this Court should hold that the trial court did not abuse its discretion and affirm the award of attorney fees.

This Court should also rule that Plaintiff is entitled to an award of reasonable attorney fees and expenses incurred on appeal under RAP 18.1 as well costs pursuant to RAP 14.1.

## **II. ISSUES PRESENTED**

- A.** *Do v. Farmer*, MAR 7.3, and RCW 7.06.060, hold that an award of attorney fees is mandatory when an appellant fails to improve its position on the trial de novo following an offer of judgment. This rule is an essential part of the legislative scheme designed to deter frivolous litigation and reduce court congestion. Should an exception be made that would allow an appellant to avoid mandatory attorney fees via a CR 68 offer made on the eve of trial? **[NO]**
- B.** A trial court has broad discretion in fixing the amount of attorney fees. The trial court had substantial evidence to support its award of attorney fees and no contradictory evidence was offered. Defendant now raises argument and authority that was not raised below and asks this Court to reverse the trial court. Should this court refuse to do a de novo review and hold the trial court did not abuse its discretion? **[YES]**
- C.** Whether Plaintiff is entitled to an additional award of attorney fees and expenses pursuant to RAP 18.1 as well as costs pursuant to RAP 14.2. **[YES]**

## **III. STATEMENT OF THE CASE**

This appeal arises from a motor vehicle accident that occurred on October 24, 2009, in the Capital Hill neighborhood of Seattle. Defendant, failing to yield right of way, pulled out the parking lot of the AM/PM in Capital Hill, striking Plaintiff (the favored driver) on the wheel and bumper. Plaintiff was diagnosed by Dr. Roberto Velasco, MD with cervical sprain,

lumbar sprain, chest pain, and headache. (CP 88.) Between his medical treatment, wage loss, and rental car expenses, he had economic damages in the amount of \$4,242.22. (*Id.*)

Quite simply, this was a small case that should have settled early. There was no serious question of liability. There was no serious question regarding injuries—if the forces in the collision were enough to bend the control arm on Plaintiff’s car, surely they could have caused the strain/sprains that were diagnosed and treated by Dr. Velasco, MD. Furthermore, Defendant’s own medical expert agreed that the injuries and 2.5 months of treatment were reasonable, necessary, and related to the accident. (CP 109-110.) There was no claim for future economic or noneconomic damages.

In the face of this simple case, Defendant made it her Waterloo. Defendant denied every element of Plaintiff’s claim including liability, causation, and the reasonableness and necessity of the medical treatment. Defendant named *four* experts—a biomechanic, a medical expert, and two property damage adjusters. Defendant requested a CR 35 exam. Between the experts and attorney fees, Defendant likely spent far more defending the case than the lowest of Plaintiff’s settlement offers.

In contrast, Plaintiff made extensive efforts to resolve the case, including *six* Offers of Compromise.<sup>1</sup> (CP 72.) Plaintiff made three Offers of Compromise even *before* the arbitration, including an offer for \$6084, dated July, 2, 2010. (*Id.*) Defendant counter offered the first two offers at \$500 and mockingly increased the third offer to \$501. (*Id.*)

Arbitration was held on July 14, 2010, and an award of \$9,242.22 was made (exclusive of fees and costs). (CP 172.) Despite the reasonableness of the award (barely more than two times the economic damages), Defendant appealed, requesting a trial de novo. Plaintiff continued his efforts to settle the case, making three more Offers of Compromise, including an offer on September 3, 2010, in the amount \$4999 (barely more than the economic damages). (*Id.*) Defendant again counter offered at \$501. (*Id.*) Plaintiff concluded that settlement negotiations were futile and began preparations for a trial.

Given that every element of his claim was contested, and the fact that Defendant named four experts, Plaintiff was forced to put considerable time into preparing for trial. Even so, Plaintiff made efforts to economize. For example, he did not take the deposition of any of the experts, nor did he hire responsive experts. Much of the trial preparation was done by an

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<sup>1</sup> All of Plaintiff's Offer's of Compromise were answered with a counteroffer of \$500. In mediation Defendant offered \$2000 and then walked out before Plaintiff made a final offer. (CP 173.) For a full history of negotiations, see Declaration of Nauheim, CP 72.

associate, at a much lower billing rate. Nonetheless, Plaintiff spent 142.8 hours preparing the case for trial for a total of \$31,255 (an amount that three well respected trial attorneys testified was reasonable). (CP 203-232.)

On November 3, 2010, just 12 days prior to trial (which is almost the latest date permitted by CR 68), Defendant made a CR 68 Offer of Judgment for \$5500.00. The offer stated that it was:

pursuant to Rule 68 of the civil rules for the Superior Court in the State of Washington, and pertinent statute, including but not limited to Chapters 4.84.250 through RCW 4.84.300 of the Revised Code of Washington, if applicable, and hereby offers to allow judgment to be taken in the above matter in the amount of Five Thousand Five Hundred Dollars and 00 cents (5,500.00) inclusive of any and all attorney fees and costs, any and all special damages, any and all general damages, and any and all property damage” citing RCW 4.84.250-300 including.

(CP 42.)

Plaintiff interpreted this offer as covering all *statutory* fees, i.e., RCW 4.84.010 & RCW 4.84.250-300, which were the only fees available at that stage of the litigation.<sup>2</sup> Nevertheless, in good faith, Plaintiff attempted to clarify the issue by email with defense counsel inquiring whether “any and all attorney fees” was limited to those fees available under the statutes cited in the CR 68 offer. (CP 53.) Defense counsel responded ambiguously only that the offer was “all inclusive and not just limited to the cited rcw [sic]

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<sup>2</sup> It should be noted that RCW 4.84.250-300 is inapplicable. Those statutes concern attorney fees in cases with amounts in controversy under \$10,000. Here, Plaintiff plead

attorney fees provision.” (CP 53.) Satisfied that the offer only concerned statutory attorney fees, Plaintiff accepted the offer and moved for entry of judgment.

A hearing was held on entry of judgment<sup>3</sup> and judgment was entered in the amount of \$5,500, which included \$200 in RCW 4.84.080 attorneys fees (the only fees which were available at the time) and \$5,300 in principle. (CP 34-35.) The entry of judgment did *not* recite that it was inclusive of “any and all attorney fees” or that it precluded an award of MAR 7.3 fees. (*Id.*) Defendant signed off on the Judgment in open court before the trial judge without objection. Defendant tendered a draft in payment of the judgment, which stated for “bodily injury.” (CP 142.)

Following entry of judgment, since Defendant failed to improve her position from Plaintiff’s \$4,999 Offer of Compromise, Plaintiff moved for a mandatory award of reasonable attorney fees under *Do v. Farmer*. Defendant objected, asserting for the first time that her *intent* was that the CR 68 offer precluded an award of MAR 7.3 attorney fees. She did not explain why she never mentioned in her clarification email that she intended the CR 68 offer

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an amount great than \$10,000 in his Response to Request for Statement of Damages. (CP 186.)

<sup>3</sup> After Plaintiff informed Defendant the he was going to accept the CR 68 offer and move for entry of judgment, Defendant moved preemptively for protection against entry of judgment. Plaintiff then accepted the CR 68 offer and moved for entry of judgment. The trial court denied Defendant’s motion and entered judgment pursuant to the CR 68 offer.

to include MAR 7.3 attorney fees. Nor did she explain why she knowingly signed off on the entry of judgment, which did not say anything about precluding MAR 7.3 fees, without objection. Instead she asserts that this Court should rely on her unexpressed intent, rather than the final judgment itself.

Both parties had the opportunity to bring evidence and argument before the trial court regarding whether attorney fees should be awarded and if so, how much. Plaintiff offered extensive evidence regarding Defendant's conduct in this action, as well as evidence that GEICO (defense counsel's employer) widely employs the same "scorched earth" tactics in other cases, contributing to the current crisis of congestion in the courts. Plaintiff also offered declarations of three well respected attorneys in support of the reasonableness of Plaintiff's attorney fees. The trial court found that attorney fees were mandatory under *Do v. Farmer*, that a lodestar double was appropriate, and awarded \$74,965.00 in reasonable attorney fees. Defendant appealed, assigning error to the trial court's award of attorney fees and the amount thereof.

#### IV. ARGUMENT

**A. An award of reasonable attorney fees is mandatory when an appellant fails to improve its position on the trial de novo.**

1. *RCW 7.006.060 and MAR 7.3 are unambiguous: attorney fees are mandatory when an MAR appellant fails to improve his position.*

“The court *shall* assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party’s position at the trial de novo.” MAR 7.3; RCW 7.06.060 (emphasis added) (hereinafter “MAR 7.3”). MAR 7.3 is unambiguous. *Haley v. Highland*, 12 P.3d 119, 134, 12 P. 3d 119 (2000) (Sanders, J. dissenting). A statute that is clear on its face is not subject to judicial interpretation. *In re Marriage Kovacs*, 121 Wash. 2d 795, 804, 854 P.2d 629 (Wash. 1993).<sup>4</sup> Our Supreme Court has said that “the word ‘shall’ in the MARs makes the stated requirement mandatory.” *Wiley v. Rehak*, 143 Wash. 2d 339, 20 P. 3d 404 (2001). “No exceptions are made. There is no appropriate language suggesting the right to the fee is in the court’s discretion.” *See Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987). Elsewhere in MAR 7.3, with regard to a de novo that is withdrawn voluntarily, the legislature provided that attorney fees “may” be assessed. This shows that the legislature use of the word “shall”

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<sup>4</sup> The MAR’s “are interpreted as though they were drafted by the Legislature and are construed consistent with their purpose.” *Wiley v. Rehak*, 143 Wash. 2d 339, 20 P. 3d 404 (2001)

versus “may” in MAR 7.3 was purposeful—heightening the need to respect the plain statutory language.

A statute “ ‘must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’ ” *State v. J.P.*, 149 Wash.2d 444, 449, 69 P. 3d 318 (Wash. 2003). A court may not “add words or clauses” or “delete language.” *Id.* In short, a court may not ignore the word “shall,” or read an exception into a statute.

Thus, when MAR 7.3 is read according to the rules of statutory interpretation, it is clear that when an appellant fails to improve its position, a court has no discretion—attorney fees are mandatory.<sup>5</sup> The unambiguous language of the statute leaves no room for judicially created “exceptions,” although many MAR appellants have tried. See string cite on page 18-19, *infra*. MAR 7.3 fees can no more be waived by a party than the requirement of subject matter jurisdiction. *Brandenberg v. Cloutier*, 103 Wn. App. 482, 485 12 P.3d 664 (Wa. Ct. App. Div. II 2000) (holding that the doctrine of waiver does not defeat an award of mandatory attorney fees).

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<sup>5</sup> For a Supreme Court attorney fees case that opines at great length regarding how the word “shall” is to be interpreted, see *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987).

2. *Controlling case law holds that attorney fees are mandatory when an MAR appellant fails to improve his position on the trial de novo (or CR 68 offer of judgment).*

The controlling case law is equally unambiguous: when an MAR appellant fails to improve his position on the trial de novo, an award of MAR 7.3 attorney fees is mandatory. *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (Wa. Ct. App. Div. I 2005). *Do* is a case that is virtually “on all fours” with the present case. In *Do*, like here, the appellant requested a trial de novo and then later made a CR 68 offer, which was accepted and did not improve his position. On appeal, the appellant argued that attorney fees were *not* mandatory because “parties must actually go through a trial de novo to qualify for a mandatory award of attorney fees.” *Id.* at 842. Appellant also reasoned that the CR 68 offer should be treated like a “voluntary” withdrawal of a request for trial de novo, which would trigger discretionary attorney fees, rather than mandatory. *Id.* This Court disagreed, citing *Kim v. Pham*, and *Brandenberg v. Cloutier* (both discussed in the string cite below). This Court reasoned that it was not a voluntary withdrawal because “a party making a CR 68 offer of judgment does not end the court case and thus, the expenditure of court resources.” *Id.* at 843. This Court further reasoned as follows:

The decisions in *Kim* and *Richardson* are most easily understood when considered within the context of the purpose of MAR 7.3 — “to discourage meritless appeals and to thereby reduce

court congestion.” MAR 7.3 uses both a stick and a carrot to accomplish its goal. First, the rule threatens mandatory attorney fees for any party who requests a trial de novo but does not improve its position. Next, it offers the party an incentive to withdraw its request, with the possibility of avoiding attorney fees at the discretion of the court. Both the stick and the carrot are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion. Looking at the facts of *Kim* and *Richardson*, we see that the party that requested the trial de novo was not responsible for ending the proceeding. Fees were thus mandatory, not discretionary.

Similarly, by making a CR 68 offer of judgment, Getty did not qualify for discretionary, rather than mandatory, fees. Unlike a party that voluntarily withdraws, a party making a CR 68 offer of judgment does not end the court case and thus, the expenditure of court resources. Instead, the offer of judgment places the responsibility on the party that did *not* request the trial de novo to end the controversy by accepting the offer. *Allowing a party who requests a trial de novo to escape mandatory attorney fees merely by making an offer of judgment would not be consistent with the purpose of MAR 7.3.*

*Id.* at 842-43 (internal citations omitted) (emphasis added in last sentence).

Similarly here, “the party that requested the trial de novo was not responsible for ending the proceedings,” rather it was the Plaintiff who ended the proceeding by accepting the CR 68 offer. Thus here, as in *Do*, fees are mandatory. Clearly, the trial court did not err by finding that *Do* was controlling.

Defendant asserts that her CR 68 offer referred to MAR 7.3 attorney fees. However, this Court’s holding in *Do* also makes clear that a CR 68 offer *cannot* reference MAR 7.3 attorney fees. In *Do* the MAR appellant argued that the appellee had waived her right to request attorney fees by not

addressing the issue in the entry of judgment. This Court held that no waiver occurred because the appellee in fact was *required* by RCW 7.06.050(1)(c) to *not* mention her offer of compromise to the trial court until after entry of judgment. *Id.* at 843 (citing RCW 7.06.050(1)(c) (“A postarbitration offer of compromise shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo at which time a copy of the offer of compromise shall be filed for purposes of determining whether the party who appealed the arbitrator’s award has failed to improve that party’s position on the trial de novo, pursuant to MAR 7.3”). This Court went on to note that it denied a party attorney fees for violating this rule and communicating an offer of compromise to the court too early. *Id.*; *cf Hanson v. Estell*, 100 Wash. App. 281, 997 P. 2d 426 (Wa. Ct. App. Div. III 2000) (“the clear language of RCW 4.84.280 prohibits the trial court from learning of any settlement offers until after the judgment has been signed”).

Similarly here, Defendant would violate the strictures of RCW 7.06.050(1)(c) and MAR 7.1(b) if, as she asserts, her CR 68 offer referenced MAR 7.3 attorney fees. For these reasons, this Court should hold as a matter of law a CR 68 pleading may not include MAR 7.3 attorney fees.

3. *The Judgment entered by the trial court is controlling; the subjective intent of the parties is irrelevant.*

This Court should look to the final judgment entered by the trial court to determine whether it precluded an award of MAR 7.3 attorney fees, not the unexpressed subjective intent of the parties. “A judgment *is the final determination of the rights of the parties* in the action and includes any decree and order from which an appeal lies.” CR 54(a)(1) (emphasis added).

Defendant asserts that the entry of judgment is “irrelevant.” *Br. App.* at 14. Defendant urges this Court instead to look to the subjective intent of the Defendant that the CR 68 offer would preclude MAR 7.3 attorney fees. However entry of judgment is not “irrelevant”—it is controlling. It is the “the final determination of the rights of the parties in the action . . . .” CR 54(a)(1). Moreover, the judgment is precisely where the Court should look to determine whether MAR 7.3 attorney fees were precluded. *Do*, 127 Wn. App. at 188.

In *Do* this Court reached its conclusion, that MAR 7.3 attorney fees were not precluded, in part based on the fact that “the court did not state that the judgment was inclusive of all attorney fees.” *Id.* Similarly here, the judgment did not state that it was inclusive of attorney fees. (CP 62-65.) Defendant, having signed off on the judgment and failing to object, now

asks this Court to look to her “unexpressed subjective intent,” rather than the judgment itself.

This Court rejected a similar argument in *Seaborn v. Glew* and it should do the same here. 132 Wn. App. 261, 267, 269 131 P. 3d 910 (Wash. Ct. App. Div. I 2006), *rev. denied*, 158 Wn. 2d 1027 (2007). In that case, Seaborn urged this Court to consider the unexpressed “subjective intent” he had when he made the CR 68 offer. This Court held “Seaborn’s argument that its unexpressed intent to include attorney fees makes them unavailable to the Glews also ignores *Do v. Farmer*, where we held that a separate attorney fee award was available to the CR 68 offeree, even when the judgment itself listed attorney fees as “\$0.”<sup>6</sup> *Id.* This Court should find that by not objecting at the time of entry of judgment, Defendant’s objection has been waived. It should not step into the quagmire of trying to divine the parties “subjective intent.” The Court should recognize this argument for what it is—a thinly veiled attempt to get the Court to clean defense counsel’s sloppy lawyering.

Further, this Court need not consider Defendant’s arguments regarding the significance of offer and acceptance, because they are rooted in contract law principles. This Court has said that when interpreting the

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<sup>6</sup> Additionally it should be noted that here the entry of judgment *did* list \$200 in statutory attorney fees per RCW 4.84.080. As this Court noted in *Do*, there is “no authority that

MAR's, contract law principles are *not* applied where such principles “conflict with the rule [or] defeat its purpose.” *Dussault v. Seattle Public Sch. 's*, 69 Wn. App. 728, 733 (Wa. Ct. App. Div. I 1993). Here, the interpretation of MAR 7.3 urged by Defendant (that an exception should be made to “mandatory” attorney fees would conflict with the purpose of the rule because it would encourage court congestion and delays in civil litigation. Thus, the Court should not consider Defendant's arguments, which are based on contract law principles.<sup>7</sup>

4. *The exception to MAR 7.3 urged by Defendant would undermine the legislative intent behind the MAR's.*

The MAR's must be construed in a manner that best effectuates the legislative intent, which includes discouraging meritless appeals, reducing court congestion, reducing delays in civil litigation, and punishing parties that unjustifiably resist small but meritorious claims. *E.g. Lambert v. McLeod*, 39 Wn. App. 298, 302, 693 P. 2d 161 (Wa. Ct. App. Div. I 1984).

Defendant asks this Court rule to create an exception to MAR 7.3— an “escape hatch,” which would allow an MAR appellant to engage in

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prohibits from awarding reasonable attorney fees in addition to statutory attorney fees awarded as a part of costs.” 127 Wn. App. at 188.

<sup>7</sup> Even if this Court did engage in contract law analysis, that analysis would not favor the Defendant. The judgment is unambiguous. Thus the parol evidence rule would prevent the Court from enquiring into the subjective intent of the parties. In the event that the Court found that the CR 68 offer was ambiguous, this Court should construe the ambiguity against the drafter. *Seaborn v. Glew*, 132 Wn. App. 261, 269 131 P. 3d 910 (Wash. Ct. App. Div I 2006), *rev. denied*, 158 Wn. 2d 1027 (2007).

exactly the conduct that the legislature sought to deter, and then avoid the “stick” that the legislature provided. Such an exception would undermine the legislative intent of the statute. For that very reason, this Court has already refused to do so in *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (Wa. Ct. App. Div. I 1990).

In *Walji*, an MAR appellant, at the conclusion of its opening case, moved for and was granted a voluntarily nonsuit without prejudice under CR 41(a)(2). *Id.* at 286. The trial court awarded discretionary MAR 7.3 attorney fees to the appellee. This Court affirmed the trial court under the following reasoning:

Accepting [the MAR appellants] argument would undercut the policy of mandatory arbitration by creating an *escape hatch* for [appellants] who, after having lost at arbitration and requesting a trial de novo, could avoid attorney fees by taking a voluntary nonsuit before resting. The policy of MAR 7.3 is to foster acceptance of the arbitrator’s award and penalize unsuccessful appeals therefrom. An appeal resulting in a dismissal, even a voluntary one, is unsuccessful. Taking a de novo appeal to trial involves substantial delay and expense to the prevailing party at arbitration. The court should have the discretion to *penalize* a dismissing party under these circumstances.

*Id.* at 290 (emphasis added). Similarly here, accepting Defendant’s argument would undercut the policy of MAR by creating an “escape hatch” that would allow the party engaging in the conduct that the legislature sought to deter, and then avoid the penalty by making a CR 68 offer that was “inclusive of any and all attorney fees.” Creating such an escape hatch

would undermine the legislative purpose behind the MAR's by removing the "stick" from the "carrot and stick" scheme. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525-26, 79 P. 3d 1154 (Wash. 2003) (holding that the MAR's must be interpreted consistent with their purpose: "the 'primary goal of the statutes providing for mandatory arbitration (RCW 7.06) and the MANDATORY ARBITRATION RULES that are designed to implement that chapter is to 'reduce congestion in the courts and *delays in hearing civil cases.*' " (emphasis in original).

The exception urged by Defendant would also turn a CR 68 offer on its head. The policy of the MAR's is to encourage *early* settlement in order to reduce court congestion. If the threat of mandatory attorney fees is removed,—what is the incentive to make a CR 68 offer *early* (as opposed to waiting until the last minute, as the Defendant did here)? Defendant's approach would convert a CR 68 offer from an olive branch into a sword.<sup>8</sup>

Moreover, this Court should tread lightly when considering an exception to the mandatory fees in MAR 7.3. The "stick" is a critical

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<sup>8</sup> In fact, Defendant views CR 68 as a sword. Defendant's CR 68 offer contained the following statement in all caps: "PURSUANT TO **CR 68**, IF THE JUDGMENT FINALLY OBTAINED BY YOU IS NOT MORE FAVORABLE THAN THIS OFFER, YOU MUST PAY THE COSTS INCURRED BY THE DEFENDANT AFTER THE MAKING OF THIS OFFER." (CP 51.) This was the only portion in all-caps. Clearly the CR 68 offer was intended by Defendant, not to promote settlement as intended by the legislature, but rather to *intimidate* the Plaintiff into (incorrectly) thinking that he may have to pay *all* of Defendant's trial costs—another scorched earth litigation tactic. *Sims v. Kiro, Inc.*, 20 Wash. App. 229, 238, 580 P.2d 642 (Wa. Ct. App. Div. I 1978) ("The term "costs" has been interpreted as not including attorney's fees and expert witness fees.")

element of the “carrot and stick” scheme, which was carefully crafted by the legislature using incentives and deterrents. Removing the “stick” will throw the whole system out of balance. If an exception is to be created, as this Court has observed, it should be made by the legislature. *See Sims v. Kiro, Inc.*, 20 Wash. App. 229, 238, 580 P.2d 642 (Wa. Ct. App. Div. I 1978) (“In the event that [CR 68] is to be expanded to include attorney’s fees and expert witness fees as “costs,” it should be expanded by statute or by amendment. We decline to assume to ourselves the prerogative to do so.”).

While many unsuccessful MAR appellants have urged the courts of our state to create exceptions to MAR 7.3, hoping to avoid an award of mandatory attorney fees, *our courts have uniformly refused to create a single exception. E.g., Wiley v. Rehak*, 143 Wash. 2d 339, 20 P. 3d 404 (Wash. 2001) (no exception for MAR appellant who’s de novo was stricken because it was not made by the aggrieved party pursuant to MAR 7.1); *Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (Wa. Ct. App. Div. I 2005) (no exception for MAR appellant when, like here, his CR 68 offer was accepted); *Kim v. Pham*, 95 Wash. App. 439, 441, 975 P.2d 544 (Wa. Ct. App. Div. I 1999) (no exception for MAR appellants who’s de novo was stricken because it did not comply with timing and filing requirements of MAR 7.1—even though he waited until two weeks before trial to strike the de novo); *Puget Sound Bank v. Richardson*, 54 Wn. App. 295, 773 P. 2d

429 (Wa. Ct. App. Div. I) (no exception for MAR appellant who's case was resolved on summary judgment rather than trial de novo); *Brandenberg v. Cloutier*, 103 Wn. App. 482, 12 P.3d 664 (Wa. Ct. App. Div. II 2000) (no exception under the doctrines of estoppel, laches, and waiver where an appellee waited 17 months to strike an invalid de novo). There is no principled reason why an exception should be made in this case, when our courts have refused to make an exception *in all prior cases*.

Additionally, the exception urged by Defendant would wreak havoc in the attorney-client relationship. It would pit the attorney's interest against the client in low value cases. For example, here the client and attorney would have happily settled the case early on for \$5500. However, after repeatedly being offered only \$501 in settlement negotiations—*less than one-tenth* of the last minute CR 68 offer—the attorney was left with no option but to prepare for trial. Once the attorney has prepared for trial, it is no longer economically feasible for him to accept a CR 68 offer of \$5500 if it contains a poison pill precluding MAR 7.3 attorney fees. The client, however, is immune to the poison pill. He is in essentially the same position had the CR 68 offer been made early or late. He has not expended any resources—he is still willing to take the \$5,500. And of course, the decision of whether to accept an offer belongs to the client. RPC 1.2. Thus, the exception urged by Defendant would pit client against attorney, making low

value MAR cases economically unfeasible for Plaintiff's counsel, closing the court house doors to many plaintiffs. *Eagle Point Condominiums*, 9 P. 3d 898, 906 (Wa. Ct. App. Div. I 2000) ("The attorney fees incurred in litigating small but meritorious consumer claims often exceed the value of the claim itself. It would be a substantial disincentive to making such claims if the defendant could disable the plaintiff from recovering attorney fees simply by waiting until the eve of trial to offer what the claim is worth.")

Finally, Defendant's position (that a CR 68 offer can include MAR 7.3 attorney fees) conflicts with MAR 7.1(b) and RCW 7.06.050(1)(c), both of which, as discussed above, prevent a party from mentioning MAR 7.3 to the court or in a pleading. The Court should not read MAR 7.3 in a manner that conflicts with other statutes and court rules. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992) (statutes should not be interpreted in such a way as to render any portion meaningless, superfluous, or questionable), *cert. denied*, 113 S. Ct. 1044 (1993). For all of these reasons, this Court should reject the exception to MAR 7.3 urged by the Defendant.

5. *Defendant's cases are inapplicable and factually distinguishable.*

Defendant cites several cases that it asserts as contrary authority. Tellingly, *Defendant is unable to cite a single MAR case that supports her*

*position.* Defendant cites cases concerning different statutes, which do not contain the MAR statutory language. Thus, Defendant's cases do not implicate the policy concerns behind the MAR's. The reasoning in Defendant's cases is not affected by the special rules of interpretation discussed above that apply to the MAR's. The reasoning in Defendant's cases did not consider the universe of MAR case law. Moreover, they are important factual distinctions between Defendant's cases and the case at bar. Thus, not only are these cases inapplicable, they are not even helpful to determining the issues before this Court.

Defendant cites Defendant *Seaborn v. Glew* for the proposition that a CR 68 offer can include attorney fees. However, the actual holding of *Seaborn* is that a CR 68 that only includes costs, will *only* be deemed to include attorney fees if the underlying statute defines fees as part of costs. *Seaborn v. Glew*, 132 Wn. App. 261, 267, 269 131 P. 3d 910 (2006), *rev. denied*, 158 Wn. 2d 1027 (2007). This has nothing to do with the issue in this case. Here, MAR 7.3 was *not* a statute underlying Plaintiff's claim (this was a negligence case). And regardless, MAR 7.3 *does* distinguish costs from fees and thus *Seaborn* is unhelpful to the Defendant's position. Moreover *Seaborn* is *not* an MAR case—it is a breach of contract/Consumer Protection Act case. Its reasoning is inapplicable

because it relies on principles of contract law, which as discussed above, do not apply here.

Defendant also cites *McGuire v. Bates*, 169 Wn. 2d 185 (Wash. 2010) for the proposition that when a plaintiff prior to arbitration accepted a settlement offer to settle “all claims,” that the plaintiff’s claim for attorney fees was thereby included. That case is distinguishable and inapplicable for several reasons. First, it is inapplicable because it is not an MAR case; rather, it concerns attorney fees under RCW 4.84.250.

Secondly, the issue in *McGuire* was whether “all claims” included a claim for attorney fees, which, unlike here, actually was before the court from the inception of the litigation. Unlike here, the attorney fees claim arose from the underlying statute, was plead in the complaint, and was one of the claims being negotiated. Thus, the phrase “all claims” obviously included the attorney fees claim. In contrast here, there was *no* claim for attorney fees at the time the CR 68 offer was made, an attorney fees claim was not plead in the complaint, was not negotiated between the parties, and did not even arise until *after* entry of judgment.

Third, *McGuire* is distinguishable because it concerned a settlement offer, not a CR 68 offer. This is not “a distinction without a difference,” as Defendant asserts. *Br. App.* at 13. Settlement offers are interpreted under principles of contracts whereas under MAR 7.3, as discussed above, contract

law principles apply only “where such principles neither conflict with the rule nor defeat its purpose.” *Dussault v. Seattle Public Sch. 's.*, 69 Wn. App. 728, 850 P.2d 581 (1993). *McGuire* is also inapplicable because, not being an MAR case, the court is required to interpret that attorney fees statute consistent with the legislative policy behind the MAR’s. For all of these reasons, the Court’s reasoning in *McGuire* has no application here.

Defendant also cites *Hodge v. Dev. Serv. 's of Am.*, 65 Wn. App. 576, 828 P.2d 1175 (Wa. Ct. App. Div. I 1992). *Hodge* is inapplicable because it is an employment discrimination case that relied on contract law principles, not an MAR case. Moreover, this Court’s admonition in *Hodge*, that an appellant would be wise to state that its offer includes “any attorney’ fees *provided for in the underlying statute*”—reinforces Plaintiff’s position, since it makes clear that fees under CR 68 are limited to those provided for in the underlying statute. As discussed above, MAR 7.3 was not an “underlying statute,” since it is not the statute from which a lawsuit arises. *Id.* at 584. Thus, *Hodges* reasoning in that regard is inapplicable.

Finally, Defendant argues that “if plaintiff wanted to preserve his right to seek additional fees, he should have made a counteroffer that expressly reserved that right.” (*Br. App.* at 12.) This is incorrect. If the Plaintiff had responded with less than an unequivocally acceptance, it would have operated as a rejection, nullifying the CR 68 offer. *Seaborn v. Glew*,

132 Wn. App. 261, 131 P. 3d 910 (2006) (“An offer of judgment under this line of cases may be nullified if there was a rejection and counteroffer by the offeree, but it is valid if the offer is unequivocally accepted.”). Thus, this was *not* an option for the Plaintiff, as Defendant asserts.

In sum, the Defendant has not offered the Court any explanation why, after she knowingly signed off on the judgment served on her well before entry of judgment; it should stoop to clean up her mess. Nor has the Defendant offered the Court any authority that supports her position—that after engaging in exactly the conduct that the legislature sought to deter, the Court should not create an “escape hatch” in MAR 7.3 so that she does not have to suffer the consequences. However, MAR 7.3 and the case law is clear, this Court must refuse to do so.

**B. The trial court’s award of reasonable attorney fees was based on ample evidence and authority and was not an abuse of discretion**

“A trial court’s fee award will not be overturned absent an abuse of discretion. Whether attorneys’ fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys’ fees.” *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 858 P. 2d 1054 (Wash. 1993). “An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.” *State v.*

*Castellanos*, 132 Wn.2d 94, 97, 935 P. 2d 1353 (Wash. 1997). Even if the appellate court disagrees with the trial court’s method of calculating the fees, this is not enough to warrant reversal unless it was an abuse of discretion. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 603, 675 P. 2d 193 (Wash. 1983).

Defendant does *not* contend that the trial court abused its discretion. Thus, she fails to meet her burden on appeal. Instead, she asks this Court to give her a de facto de novo review of a discretionary ruling by the court and find for her. Defendant cites argument and authority that was not raised below. Defendant treats this appeal like an opportunity to re-litigate the attorney fees issue, raising argument and authority that could have been raised below, but was not.

However, abuse of discretion review is not a second bite of the apple. To prevail, the Defendant must show that the trial court abused its discretion; that it took a position “that no reasonable person would take.” Even if, for the sake of argument, Defendant can persuade this Court that her position is more reasonable—that is *irrelevant*: the question before this Court is whether the trial court abused its discretion, *not* whether the appellate court agrees or disagrees with the discretionary rulings of the trial court. Defendant is not entitled to ask this Court to act as trial judge and give her a de novo review of the evidence or to consider argument that

was not raised below. Thus, Defendant has not even made a prima facie showing that would entitle her to the relief requested.

Moreover, Defendants conduct is a textbook example of *why* discretionary trial court decisions are reviewed for abuse of discretion, i.e., to discourage the waste of judicial resources. Defendant could have settled this small but meritorious claim early on for \$4999. Instead, she wasted judicial resources by taking the case through arbitration, mediation, a request for trial de novo, and now, seeks to re-litigate the case *again* on appeal.<sup>9</sup>

Defendant already had an opportunity to litigate the attorney fees issues before the trial court on the motion for entry of fees. Surprisingly, she did not bother to offer *any* evidence below and very little in the way of argument and authority. Perhaps defense counsel was gambling that she could always clean things up in the court of appeals in the event that the trial court ruled against her; a tactic that preserves the resources of her employer (GEICO) at the expense of judicial resources.

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<sup>9</sup> Plaintiff has referred to this conduct as “scorched earth litigation.” It is driven by the corporate strategy of GEICO, defense counsel’s employer. The purpose of this policy is to intimate plaintiff’s attorneys and their clients from brining small claims, even when they are meritorious. The purpose is also to delay payment so that the insurer can hold onto its reserves as long as possible and profit from the investment income. While this practice may be profitable for GEICO, it is unfair to tax payers and the judicial system, who must shoulder the expense of prosecuting the unnecessary litigation. Plaintiff offered considerable evidence below regarding GEICO’s scorched earth litigation tactics. (CP 101-19; CP 214-16; CP 224; CP 231-32.)

This Court should not reinforce this conduct by considering this new argument and authority, particularly at a time when judicial resources are precious. In the interest of judicial economy alone, this Court should refuse to consider argument and authority that was not raised below. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P. 2d 1251 (“As a general rule, appellate courts will not consider issues raised for the first time on appeal.”) The Court should confine itself to determining whether the trial court abused its discretion when it considered the evidence and authority offer below, which Defendant does not even contend. In an abundance of caution, however, Plaintiff will address the new argument authority raised by the Defendant, in the event that Court does consider it.

1. *The trial court did not abuse its discretion when it found that the hours expended by plaintiff's counsel were reasonable.*

The trial court’s finding on the reasonableness of the hours expended by plaintiff’s counsel was based on the evidence and not an abuse of discretion. “An ‘explicit hour-by-hour analysis of each lawyer’s time sheets’ is unnecessary as long as the award is made with a consideration of the relevant factors and reasons sufficient for review are given for the amount awarded.” *Absher Const. Co. v. Kent Sch. Dist.*, 79 Wash.App. 841, 848, 905 P. 2d 1229 (Wa. Ct. App. Div. I 1995). The trial court considered relevant factors, under *Bowers*. (CP 64-65.) The court

also considered the billing records of the plaintiff's counsel as well as the declaration of three well respected trial attorneys and found the billing to be reasonable. (CP 63.) Defendant does not explain why the finding was an abuse of discretion. Instead Defendant asks this Court for a de novo review of the billing records, *literally pasting three pages of billing records into her brief* and raising argument not raised below. For the reasons stated above, this Court should not do a de novo review of the billing records. However, even if the Court does, it will find Defendant's arguments meritless.

**a. In house conferences between Nauheim and Blair**

Defendant argues for the first time on appeal that in house conferences between a senior attorney and a less experienced associate are not recoverable. However, Defendant does not cite any authority supporting this proposition. On the contrary, having an associate do the bulk of the work and occasionally consulting with a partner is a time honored method of *reducing* total legal fees. Moreover, there is no evidence that these conferences consisted of, as Defendant asserts, "overseeing the associate's work." *Br. App.* at 23. There are many valid reasons for conferencing, such as brainstorming, scheduling, coordinating, discussing strategy, et cetera. Three other well respected trial attorneys, one of whom regularly serves as an expert in attorney fee matters, all felt

this activity to be reasonable. (CP 203-232.) It was certainly within the discretion of the trial judge to find this billing reasonable.

Moreover, Defendant does not cite a single case from the courts of this state that would prevent such billing from being recoverable. The Kentucky case quoted by Defendant concerns what a *client* can be billed in that state; it has no bearing on what an MAR appellant can be billed under MAR 7.3. Further, this argument should not be considered because it was not raised below.

**b. Associate personally serving papers on defense counsel**

Defendant also contends for the first time on appeal that the Plaintiff should not have sent an associate attorney to file papers at the court house and serve them on Defendant. This argument, which was not raised below, is meritless and also highlights why the trial court, who has the ability to admit evidence, is the finder of fact, not the appellate court. Had this issue been raised below, Plaintiff would have pointed out *why* an attorney was forced to do what would normally be done by messenger or paralegal. This was necessary because Defendant improperly (without notice to the Plaintiff) obtained an ex parte order shortening time on her motion for protection from entry of judgment. This left Plaintiff (without warning) in a time crunch, leaving only an attorney available at the last minute to respond. It was certainly within the discretion of the trial judge

to find this billing reasonable. The trivialness of this dispute over *one hour* of billing highlights the importance of why this Court should limit its review to abuse of discretion, and not be tempted to don the shoes of the trial judge, wade into the muck, and re-examine the evidence. As an apt equitable maxim observes: “Equity does not stoop to pick up pins.” Neither should this court.

**c. 42.5 hours expended in drafting Plaintiff’s Motion for Fees**

Additionally, the trial court’s finding that 42.5 hours on the attorney fees motion was not an abuse of discretion. Defendant for the first time on appeal cites *Steele v. Lundgren*, a large case in which fewer hours were expended on the attorney fees motion. The issue in that case was a simple one regarding the timeliness of the attorney fees motion. *Steele v. Lundgren* 96 Wash. App. 773, 982 P. 2d 619 (Wa. Ct. App. Div. I 1999). Here, in contrast, the attorney fees motion involved a matter of first impression in a complex area of law. This necessitated extensive research and writing. Thus, the number of hours expended by counsel in *Steele* is irrelevant. The only thing that is relevant is the number of hours that were reasonable on *this* motion.

The trial court found that “hours spent by Plaintiff’s counsel in bring this post judgment motion to be reasonable in light of the issues presented to the Court . . . .” Defendant did not offer any rebuttal

evidence; she only offered the conclusory assertion that “[c]learly [the number of hours expended] exceeds what any finder of fact could find to be hours reasonably expended . . . .” (CP 45.) Given the evidence before the court, Defendant has not shown that “no reasonable person” would adopt this position. The trial court did not abuse its discretion.

2. *The Trial court did not abuse its discretion by considering the legislative intent behind MAR 7.3.*

Defendant’s argument, that the trial court should not have considered the deterrent effect the award of attorney fees would have on the Defendant, is also meritless and was not raised below. On the contrary, the trial court is *required* under this Court’s holding in *McLeod* to interpret MAR 7.3 in a manner that effectuates the legislative intent, to—“alleviate the court congestion and reduce the delay in hearing civil cases.” *Christie-Lambert v. McLeod*, 39 Wn. App. 298, 302-4, 693 P. 2d 161 (Wa. Ct. App. Div. I 1984). Furthermore, this Court has explicitly said that the *purpose* of the attorney fees award is to “deter meritless appeals and to favor arbitration.” *Id.* at 305. Additionally, this Court has observed that limiting the attorney fees award to the successful appellee, not the successful appellant “reflects a policy decision favoring arbitration in certain cases in order for mandatory arbitration effectively to relieve court congestion.” As this Court said in *McLeod*, this provision was:

obviously designed to serve as a brake or *deterrent* on the taking of frivolous and wholly unjustified appeals; if there were not such a provision the defeated party would be likely to appeal in nearly all instances and the arbitration proceedings would tend to become a mere nullity and waste of time.

*Id.* (emphasis added) (quoting *Application of Smith*, 381 Pa. 223, 112 A.2d 625, 629 (PA. 1955); *cf Davy v. Moss, Davy v. Moss*, 19 Wn. App. 32, 34, 573 P.2d 826 (Wa. Ct. App. Div. I 1978) (RCW 4.84's settlement scheme is designed to promote nonjudicial determination of court actions and discourage resistance to small just claims for damages).

Thus, the trial court did not abuse its discretion when, in addition to considering the other lodestar factors, it considered the legislative intent of MAR 7.3, "considerations of resolving court congestion." (CP 65.) "[T]he stated legislative intent behind [MAR 7.3] is to reduce court congestion. . . . [Defendant] waited until the last day to serve the Offer of Judgment, adding to the court congestion problem and increasing the costs and fees of Plaintiff unnecessarily, particularly when it could have accepted a less expensive Offer of Compromise of \$4999 much earlier and avoid judicial proceeding." (CP 64.)

Respondent provided the trial court with compelling evidence that appellant's carrier Geico is institutionally abusing the judicial system by ignoring the MAR system and insisting that every case be appealed and tried to a jury. (CP 101-19; CP 214-16; CP 224; CP 231-32.) This critical

and damaging evidence was left entirely un rebutted by appellant, which is tantamount to an admission. The trial court was correct in finding appellant and GEICO's conduct contrary to the clear intent of conserving judicial resources under the MAR system.

Given that the trial court is required to consider legislative policy, these findings were an abuse of discretion. Certainly, the Defendant would prefer that the Court put blinders on and not consider that current crisis of congestion in the courts, and extent to which Defendant and her insurance carrier's conduct aggravates this critical public issue. However, this Court is not required to put blinders on. In fact, this Court is required to do the opposite—it *must* consider the legislative intent of MAR 7.3 and the evidence provided to it in the motion. Thus, the trial court did not abuse its discretion.

3. *The trial court's application of lodestar multiplier was not an abuse of discretion.*

The trial court's application of a 2.0 multiplier was based on evidence and authority and not an abuse of discretion. The formula for calculating an award of reasonable attorney fees is discussed by our Supreme Court in *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597-602 (1983), in which attorney fees were awarded under the Consumer Protection Act.

[T]here are two principal steps to computing an award of fees. First, a “lodestar” fee is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. Second, the “lodestar” is adjusted up or down to reflect factors, such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not *already* been taken into account in computing the “lodestar” and which are shown to warrant the adjustment by the party proposing it.

*Id.* 593-94. The burden of proving a deviation from the lodestar rests on the party requesting the deviation. *Id.* at 598.

Here, Plaintiff, pursuant to his burden, presented evidence via sworn declaration of three well respected attorneys regarding why the contingent nature of the case and the quality of the work justified a 2.0 lodestar multiplier.<sup>10</sup> The court, relying on Plaintiff’s evidence, found “that the Lodestar should be adjuster upwards to reflect the contingent nature of the case and the various difficulties.” (CP 64.) “The trial court further found that “the quality of work performed on this case by Plaintiff’s counsel, based upon the record before the Court, to be of high quality.” (*Id.*) The Defendant did not provide *any* rebuttal evidence. Given that the Plaintiff met his burden of proof, that the trial court had ample authority and evidence for its finding, and the complete lack of contradictory evidence, Plaintiff is at a loss to understand how this finding

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<sup>10</sup> One of these attorneys is widely regarded as the pre-eminent expert in the Puget Sound area on attorney fee disputes and issues over the reasonableness of fees (CP 209-10, *Dec. of Michael Caryl*).

was an abuse of discretion. Regardless, Plaintiff will address Defendant's specific contentions.

**a. Plaintiff's counsel's work was of high quality**

Defendant, relying on *Travis v. Washington Horse Breeders Assoc.*, 111 Wn. 2d 396, 411, 759 P.2d 418 (Wash. 1988), argues for the first time on appeal that court erred because it "merely" found that the work was "high quality," versus "unusually good or exceptional." *Br. App.* at 19. However, Defendant fails to mention that in *Travis*, the court found that there was "an apparent incongruity" in the evidence offered in support of the Lodestar multiplier. *Travis*, 111 Wn. 2d 411-12. Whereas one witness claimed that counsel "took an enormous risk in going contingent," the record showed that counsel had in fact been paid an hourly rate for his trial work. On this evidence, the court held that a lodestar multiplier was inappropriate. *Id.* at 412. Here, there was no such contradictory evidence; the trial court's findings were supported by evidence and authority. Thus, there was no abuse of discretion.

**b. The contingent nature of success justified a lodestar multiplier**

The trial court did not abuse its discretion when it found that a lodestar multiplier of 2.0 was appropriate. The purpose of the contingency fee adjustment to the lodestar is to compensate for the risk taken by

plaintiff's counsel that there would be no, or only a small attorney fee recovered. *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597-602 (Wash. 1983).

Defendant contends that "there was no evidence that plaintiff's attorneys' hourly rates did not take into account the contingent nature of their fees." *Br. App.* at 20. This is incorrect. On the contrary, Plaintiff offered the declaration of Michael R. Caryl (an expert on attorney fees), who testified that plaintiff's counsel's hourly rates did *not* account for the contingent nature of the work. He testified that the hourly fees (before the lodestar multiplier) were in line with those that are "available to clients who bear the risk of loss in a case and who promptly pay their fees and costs. (CP 210.) Mr. Caryl testified, however, that the "taking into account the risk and the time value of money, I would have to charge substantially greater than my hourly rate charged to clients on contingent fees in order to justify continuing to do it. With the advancing of costs, the risk of poor or no recovery and having to wait to get paid for two to four years, I would hope to recover twice my hourly rate in a contingency fee case." (CP 213-14.) Mr. Caryl cited several other reasons justifying a lodestar multiplier. (CP 214-17.)

In addition, Plaintiff offered the declaration of Karl Malling and Christopher Davis, who like Mr. Blair, are both experienced plaintiff's

attorneys. They also testified that the contingent nature of the case warranted a lodestar multiplier. Plaintiff counsel Blair also filed a declaration describing in detail why a multiplier was appropriate in this case. Thus, Defendant is incorrect—the trial court had *ample* evidence that the attorneys’ hourly rates *did* take into account the contingent nature of their fees, and Defendant did not offer any rebuttal evidence. Thus, the trial court did not abuse its discretion and Defendant’s contention, not only is untrue, but lacks merit.

In sum, Defendant has failed to show how any of the trial court’s findings regarding attorney fees were an abuse of discretion. The trial court’s findings were reasonable; they were based on ample evidence and authority, and no rebuttal evidence and precious little contrary authority was offered. This Court should therefore affirm the trial court and not reward Defendant’s abuse of the judicial system by conducting a *de novo* review of the evidence.

**C. Plaintiff is entitled to an award of reasonable attorney fees and expenses, as well as costs on appeal**

Under RAP 18.1 a party may be entitled to an award of reasonable attorney fees and if they are available under the applicable law and the party requests them. RAP 18.1(a). “[A] party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on

appeal if the appealing party again fails to improve [his] position.” *Do v. Farmer*, 127 Wn. App. 180, 190, 110 P.3d 840 (Wa. Ct. App. Div. I 2005). The appellate court determines costs “after the filing of the decision terminating review.” RAP 14.1.

Plaintiff has complied with RAP 18.1 by requesting fees in his response brief on appeal. If this Court affirms the trial court, it should also find that Plaintiff is entitled to fees on appeal because he was entitled to MAR 7.3 at the trial court level and because the appellant will have failed to improve her position.

Plaintiff is also entitled to a mandatory award of reasonable attorney fees and costs incurred on appeal under MAR 7.3, which states, “Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under the rule.” Thus, Plaintiff is entitled to all reasonable attorney fees and costs incurred *after* the request for trial de novo, including his fees and costs incurred in the appeal.

This Court should find that the Plaintiff is entitled to an award of reasonable attorney fees and expenses and remand this matter to the trial court for a determination of the award. Plaintiff will submit a costs bill to this Court after its decision is filed, pursuant to RAP 14.1.

## V. CONCLUSION

The legislature created the mandatory award of MAR 7.3 attorney fees in order to discourage frivolous appeals, promote early settlement, reduce court congestion, and reduce delays in civil litigation. The Defendant in this case engaged in exactly the conduct that the legislature sought to deter, and now asks this Court to create an exception so that she can avoid accountability. Creating an exception to MAR 7.3 would be contrary to the unambiguous statutory language, all of the case law, and would undermine the legislative intent of the MAR 7.3. This Court must therefore refuse to do so. Additionally, this Court should affirm the trial court's award of reasonable attorney fees and lodestar multiplier, because the trial court decision was reasonable, based on ample evidence and authority, and no rebuttal evidence was offered; Defendant is not entitled to abuse the system by re-litigating what it failed to litigate below. Finally, this Court should hold that the Plaintiff is entitled to an award of reasonable attorney fees and expenses, as well as costs incurred on appeal,

and remand this matter to the trial court for a determination of costs, and reasonable attorney fees and expenses incurred on appeal.

RESPECTFULLY SUBMITTED this 3 day of May, 2011.

THE BLAIR FIRM, INC., P.S.

*David Nauheim* WSBA 41880  
for: Scott Blair, WSBA 13428

*David Nauheim*  
David Nauheim, WSBA 41880  
Attorneys for the Appellant

CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury of the laws of the State of Washington that I mailed, or caused to be mailed, a copy of the foregoing PLAINTIFF'S RESPONSE BRIEF postage prepaid, via U.S. mail on the \_\_\_\_\_3\_\_\_\_\_ day of May 2011, to the following counsel of record at the following addresses:

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\_\_\_\_\_  
David Nauheim, WSBA 41880  
Dated: April 25, 2011 at Seattle.