

NO. 69406-5-I

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

SUNNY GAUTAM and SUMAN GAUTAM,

Respondents,

vs.

**DONALD HICKS, and JANE DOE HICKS, husband and wife and their marital
community,**

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT

Honorable James E. Rogers, Judge

APPELLANT'S REPLY BRIEF

**Address:
7016 35th Ave NE
Seattle, WA 98115
(206) 729-0547**

**LAW OFFICES OF SCOTT M. COLLINS
By: Scott M. Collins
Attorney for Appellant**

**FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 25 AM 10:10**

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
A. THE STANDARD OF REVIEW IS DE NOVO.....	1
B. THE PLAN LANGUAGE OF RCW 7.06.050 MANDATES REVERSAL.....	2
C. THE TRIAL COURT’S ORDER CONFLICTS WITH THE PLAIN MEANING OF RCW 7.06.050 (1)(b).....	3
D. HICKS WOULD HAVE BEEN “WORSE OFF” HAVING ACCEPTED PLAINTIFF’S OFFER OF COMPROMISE THAN BY PROCEEDING TO THE TRIAL DE NOVO.....	6
E. THE GOALS OF MANDATORY ARBITRATION ARE NOT FURTHERED IF THIS COURT WERE TO ADOPT THE REASONING OF THE TRIAL COURT.....	7
F. APPELLANT IMPROVED HIS POSITION.....	9
G. PLAINTIFF IS NOT ENTITLED TO A LODESTAR MULTIPLIER.....	9
1. The Quality of Work Does Not Justify a Multiplier.....	10
2. The Contingent Nature of the Claim Does Not Warrant a Multiplier.....	11
3. Gautam’s Arguments Do Not Require Adjustment.....	12
H. RESPONDENT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.....	13
III. CONCLUSION.....	13

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Basin Paving Co. v. Contractors Bonding and Insurance Co.</i> , 123 Wn. App. 410, 414, 90 P.3d 109 (2004).....	2
<i>Bowers v. Transamerica Title Insurance Co.</i> , 100 Wn.2d 581, 597, 675 P.2d 193 (1983).....	10
<i>Faraj v. Chulisie</i> , 125 Wash. App. 536, 551, 105 P.3d 36 (2004).....	11
<i>Gray v. Pierce County Housing Authority</i> , 123 Wash. App. 744, 760, 97 P.3d 26 (2004).....	2
<i>Henningsen v. WorldCom, Inc.</i> , 102 Wn. App. 828, 847, 9 P.3d 948 (2000).....	10
<i>Ketchum v. Moses</i> 24 Cal.4 th 1122, 1139, 17 P.3d 735 (2001).....	12
<i>Kim v. Pham</i> , 95 Wn. App. 439, 441, 975 P.2d 544, <i>rev. denied</i> , 139 Wn. 2d 1009 (1999).....	2
<i>Orshan v. Macchiarola</i> , 629 F. Supp. 1014, 1024 (E.D.N.Y. 1986).....	12
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 342, 54 P.3d 665 (2002).....	10
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 625, 106 P.3d 196 (2005).....	3
<i>Xieng v. People's National Bank</i> , 63 Wn. App. 572, 587, 821 P.2d 520 (1991), <i>aff'd</i> , 120 Wn.2d 512, 844 P.2d 389 (1993).....	10

Statutes

RCW 4.84.010.....	2
RCW 7.06.050.....	1, 2, 3, 4, 5, 13
RCW 7.06.050 (1) (a).....	5

RCW 7.06.050 (1) (b).....3
RCW 7.06.060.....9
RCW 7.06.060 (1).....5

Rules and Regulations

MAR 7.3.....2, 5, 9, 10, 13

I. INTRODUCTION

Respondent (hereinafter referred to as “Gautam”) fails to address the key issue raised in this appeal, namely that the trial court failed to properly apply RCW 7.06.050. Furthermore, the Gautams base their argument concerning the offer of compromise on what they hoped the offer was to convey – not what it specifically said. Gautam misapplies the policies underpinning mandatory arbitration and fails to address how the offer of compromise replaces the arbitration award for purposes of awarding attorney fees and costs following a trial de novo.

An appropriate review of the applicable law and facts reveals that the Appellant (hereinafter referred to as “Hicks”) improved his position at trial, and attorney fees were improperly granted by the trial court. Hicks asked this court to reverse the judgment and award of attorney fees.

II. ARGUMENT

A. THE STANDARD OF REVIEW IS DE NOVO

Gautam sets forth the standard of review in this case as an abuse of discretion. Respondent Brief p. 4. This is a fundamental misunderstanding of the issues involved in this appeal. This appeal centers on the trial court's failure to properly apply a statute. The issue on appeal is not whether the trial court erroneously applied facts in determining an attorney fee award.

The issue is whether the trial court properly awarded attorney fees pursuant to MAR 7.3 and RCW 7.06.050. This Court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn. 2d 1009 (1999). Similarly, a review of the application of a statute is reviewed de novo. *Basin Paving Co. v. Contractors Bonding and Insurance Co.*, 123 Wn. App. 410, 414, 90 P.3d 109 (2004). The Court of Appeals will review de novo a trial court's determination as to whether a particular statutory or contractual provision authorizes an award of attorney fees. *Gray v. Pierce County Housing Authority*, 123 Wash. App. 744, 760, 97 P.3d 26 (2004).

Hicks contends the trial court committed legal error in its interpretation and application of RCW 7.06.050, MAR 7.3 and RCW 4.84.010 and therefore is subject to a de novo review. Abuse of discretion is not the proper standard.

**B. THE PLAIN LANGUAGE OF RCW 7.06.050
MANDATES REVERSAL**

Gautam does not dispute the proposition that a trial court must interpret the legislature's intent behind rules and statutes as expressed in the plain language. See *State v. Roggenkamp*, 153 Wash. 2d 614, 625, 106 P.3d 196 (2005). Further, Gautam does not contest that the plain language of

RCW 7.06.050. In fact, Gautam altogether ignores the application of this statute and the trial court's failure to follow the plain meaning of the statute.

RCW 7.06.050 unequivocally states that "the amount of the offer of compromise shall replace the amount of the arbitrator's award" for determining whether a party improved his position and whether attorney fees are appropriate. RCW 7.06.050(1)(b) (emphasis added). There is no ambiguity about this language, and it should be applied as written. See *Roggenkamp*, 153 Wash. 2d at 625. Thus, the amount of Gautam's offer of compromise (\$32,000.00) replaced the amount of the arbitrator's award for purposes of awarding attorney fees and costs. Therefore, when an offer of compromise is made, there is no reason for the trial court to go back to the arbitration award to determine whether a party bettered his position on a trial de novo. To go back, once again, and look at the arbitration award in this situation renders RCW 7.06.050 meaningless.

C. THE TRIAL COURT'S ORDER CONFLICTS WITH THE PLAIN MEANING OF RCW 7.06.050(1)(b)

There is no ambiguity in RCW 7.06.050 and it should be applied as written. The statute is clear: that the offer of compromise "shall replace the amount of the arbitrator's award" for determining whether a party improved his position and whether attorney fees are appropriate. The statute makes no provision to account for Gautam's apparent attempt to

include only the claim of one successful plaintiff and omit the claims of the unsuccessful plaintiff. The offer of compromise – drafted by Gautam – was unambiguous. The figure of \$32,000 replaced the arbitration award as the threshold amount. A simple substitution of one number for another is all that is required to determine whether attorney fees and costs were to be assessed.

The Gautams' attempt at a "Monday morning quarterback" review of their offer of compromise should not be persuasive. Gautam states "plaintiff attempted to reduce the arbitration award to an offer of compromise to provide defendant with another opportunity to resolve this matter without trial" Respondent Brief page 2-4. Gautam then attempts to give this court a "break down" of what the offer **meant** to convey. The unfortunate part of this analysis is that it is not what the offer **unequivocally** stated. The offer of compromise stated:

“YOU AND EACH OF YOU ARE HEREBY NOTIFIED that pursuant to RCW 7.06.050, plaintiff SUNNY GAUTAM and SUMAN GAUTAM hereby make an Offer of Compromise in the sum of Thirty Two Thousand Dollars (\$32,000.00) for full and final settlement of all claims in this action. This amount is inclusive of costs and statutory attorney fees. This Offer of Compromise shall remain open for ten calendar days from the date of service, at which time it shall expire without further notice.”

CP (102-134) (CP 154-171) (Emphasis Added)

There is no language in the offer which references the arbitration award. There is no language in the offer as to how it is to be "broken down". The offer merely states that pursuant to RCW 7.06.050 Sunny and Suman Gautam will compromise their claim for \$32,000.

Judge Rogers found "Plaintiff then made a timely offer of compromise pursuant to RCW 7.06.050 on May 10, 2012, offering the {sic} settle **both plaintiffs'** claims for \$32,000..." "**Plaintiff did not delineate between claims** or make a request for costs." Finding of Fact and Conclusion of Law No. 1. CP149-153. (Emphasis added).

RCW 7.06.050 (1)(a) states that the "non-appealing party **may** serve upon the appealing party a written offer of compromise." The plaintiff is not obligated to serve an offer of compromise. If the non-appealing party does not serve and offer – **then** the court looks to the arbitration award to determine if a defendant improved his position at the trial de novo for purposes of assessing fees pursuant to MAR 7.3. However, once a plaintiff serves an offer of compromise, that amount is what determines whether a defendant improved his position. To again look to the arbitration award completely emasculates the meaning of the statute and yields absurd results. What is the purpose behind RCW 7.06.050 if the trial court can ignore the offer of compromise and then look solely to the

arbitrator's award to determine whether attorney fees should be assessed? Clearly, that is not what the Legislature intended.

Not only is this proper statutory interpretation, but it also provides the easiest rule for practitioners faced with offers of compromise. Regardless of any ambiguous or deceptive language a party uses to couch its offer of compromise in, only the stated dollar figure is important because that will become the new arbitrator's award. Litigants will know with certainty what figure serves as a threshold for attorney fees. This approach satisfies the rules of statutory interpretation, comports with common sense, and can be most consistently applied in the future.

**D. HICKS WOULD HAVE BEEN “WORSE OFF”
HAVING ACCEPTED PLAINTIFF’S OFFER OF
COMPROMISE THAN BY PROCEEDING TO THE
TRIAL DE NOVO**

Accepting Gautam's offer of compromise would have ended the litigation for payment of \$32,000. An offer of compromise is, in essence, a settlement offer. If defendant Hicks would have accepted the offer, he would have been “worse off” than he would have been in proceeding to trial.

When the offer of compromise replaced the arbitrator's award, Hicks was left with a choice to accept the offer as written or proceed to trial in an attempt to better this amount. The Gautam’s offer was for a global settlement of the case, regardless of whether it was allocated to one of the plaintiffs or another. At the time the offer of compromise was made,

it was impossible to determine how much of the \$32,000 offer was to be allocated to Sunny Gautam or how much was to be allocated to Suman Gautam. Consequently, it was impossible for defendant Hicks – at the time he was determining whether to accept the offer of compromise – to determine how much the jury verdict would have to be to beat the offer. The only thing that Hicks could know was that the plaintiffs were willing to accept \$32,000 to in the litigation.

E. THE GOALS OF MANDATORY ARBITRATION ARE NOT FURTHERED IF THIS COURT WERE TO ADOPT THE REASONING OF THE TRIAL COURT.

Respondent argues the trial court ruling furthers the goals of the mandatory arbitration system of reducing congestion and delays in the courts and discouraging meritless appeals. (Respondent's Brief 13). The truth of the matter is that the trial court's ruling interferes with these goals.

There is no way to meet the objectives of the mandatory arbitration process if the parties do not know the amount that will later be compared to the jury verdict. When the offer of compromise is made, it must be a liquidated sum so that a party contemplating a trial de novo is able to assess the merits of the trial "with frankness and prudence."

Paradoxically, though Gautam made an offer of compromise which clearly and unequivocally stated that Sunny and Suman Gautam would accept \$32,000, on appeal he argues the amount of the arbitration award

for Sunny Gautam should be the determining number, completely ignoring the fact that an offer of compromise was made. Again, if the offer of compromise is meaningless and the trial court can go back to the arbitration award – without reference to the offer – then it is impossible for a party contemplating a request for trial de novo to evaluate "with frankness and prudence" what dollar figure they must be to avoid attorney fees.

It is instructive to compare the assessment made in a case with an offer of compromise to one with no such offer. If no offer of compromise is made, there is no "guesswork" about the threshold amount. The arbitrator's award is a fixed amount, and a party analyzes his future chances based on that knowledge.

However, in this case, there was an offer of compromise. The unambiguous language, which was drafted by counsel for Gautam, clearly states that both claims can be resolved for \$32,000. That is the threshold number Hicks was facing. A party considering whether to continue pursuing a trial de novo after an offer of compromise should not have to engage in additional guesswork to try to figure out which is the number to beat – the arbitrator's award, or the offer of compromise amount?

There is no indication that the Legislature intended that an offer of compromise should result in a more difficult and uncertain analysis given

the clear and unequivocal language. Yet the trial court's ruling results in precisely this untenable situation.

F. APPELLANT IMPROVED HIS POSITION

Gautam's offer of compromise did not contain any segregated amounts. It did not contain any reference to what the "intent" of the offer was. There was no offer based on each distinct claim. There was only a global offer to compromise. Pursuant to the offer of compromise, the Gautams would agree to resolve their claims for \$32,000. The jury awarded \$30,000 for both claims. Appellant improved his position.

In fact, Judge Rogers' Finding of Fact No. 3 specifically states: "the \$30,000 verdict amount exceeded ~~both~~ the arbitration award ~~as well as plaintiff's offer of compromise~~ on Sunny's claim but was below what had been awarded for Suman's claim." CP 149-153. The trial court tacitly acknowledged that the jury verdict **did not exceed** Gautam's offer of compromise. Notwithstanding this finding, the trial court awarded attorney fees nonetheless.

G. PLAINTIFF IS NOT ENTITLED TO A LODESTAR MULTIPLIER

Gautam is not entitled to any attorney fees or costs pursuant to MAR 7.3 or RCW 7.06.060. Even if he is entitled to attorney fees and costs, he would be entitled only to "costs and *reasonable* attorney fees."

MAR 7.3 (emphasis added). There is no factual or legal basis for a lodestar multiplier in this case.

The Washington Supreme Court has cautioned, "adjusting the lodestar amount upward or downward is appropriate **in rare instances**" *Henningsen v. WorldCom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000). There is a presumption that the lodestar amount represents a reasonable fee. *Xieng v. People's National Bank*, 63 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993).

1. **The Quality of Work Does Not Justify a Multiplier**

"The quality of the work supports an adjustment to the lodestar figure only when the representation is **unusually** good or bad considering the skill level normally expected of an attorney with the hourly rate used to compute the lodestar." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342, 54 P.3d 665 (2002) (emphasis added). Quality of work is "an **extremely limited** basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate." *Bowers*, 100 Wn.2d at 599 (emphasis added).

There is no finding of fact made by the trial court which would warrant the imposition of a lodestar multiplier. The only finding of fact made by Judge Rogers on this issue states that the 1.5 multiplier that was awarded is "based upon the contingent fee agreement and the difficult

facts in this case, including the fact that plaintiff's job aggravated the injury." CP 149-153. Trial court's Findings of Fact and Conclusions of Law p. 3 of 5. An additional hand written Finding states that "the court sustained in whole or in part all defense objections to Mr. Banks' time, based upon defendant's opposition on pages 9 through 12. In addition, Mr. Banks billed excessively on 7/30-7/31/12 for trial preparation and this was reduced. **This case was not complex and already had been arbitrated...**" CP 149-153 trial court's Findings of fact and Conclusions of Law p. 5.

Here, there is no finding that the quality of work was "unusually good or exceptional" or any words to that effect.

2. The Contingent Nature of the Claim Does Not Warrant a Multiplier

Plaintiffs had a contingent fee agreement with their attorneys. It appears the trial court awarded a Lodestar multiplier based solely on the "substantial risks" borne by plaintiff counsel in recovering no compensation or inadequate compensation to pay expenses and attorney fees. The Washington State Court of Appeals has rejected the argument that a multiplier must be awarded whenever an attorney is on a contingent fee agreement. See *Faraj v. Chulisie*, 125 Wash. App. 536, 551, 105 P.3d 36 (2004).

It would not be out of line to state that almost every personal injury case is handled on a contingent fee basis. If the trial court's logic were to be followed, every time a contingent fee plaintiff was successful on a trial de novo, the plaintiff would automatically get a lodestar multiplier without the need of any analysis of the factors. This is clearly not the law in Washington.

3. Gautam's Arguments Do Not Require Adjustment

Gautam makes additional arguments, not based on the record, about the perceived difficulties of the case. Substantial argument is made concerning Hicks' insurer's pre-litigation settlement position and defense strategies. Notwithstanding the inadmissible nature of these assertions, these are not relevant factors to be considered – and were not considered by the trial court – in determining whether a multiplier should be awarded. Punishing appellant's insurance company is not a relevant factor. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1139, 17 P.3d 735, 104 Cal. Rptr. 2d 377, 392 (2001) (lodestar adjustment should not be imposed to punish the losing party). If, as plaintiff claims, the defense took positions at increasing the time plaintiffs' counsel had spent on the case, that time was reflected in the lodestar amount. See, *Orshan v. Macchiarola*, 629 F. Supp. 1014, 1024 (E.D.N.Y. 1986).

H. RESPONDENT IS NOT ENTITLED TO ATTORNEY FEES ON APPROVAL

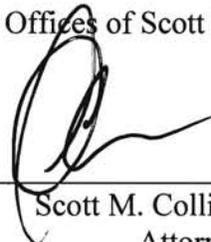
Respondent seeks attorney fees on this appeal under MAR 7.3. (Respondent's Brief p.22). If this court determines that the trial court erred in granting attorney fees below, then Respondent is not entitled to fees on this appeal. Accordingly, the court should deny the fee request.

III. CONCLUSION

Pursuant to RCW 7.06.050 Respondents' offer of compromise in the amount of \$32,000 **replaced** the amount of the arbitrator's award for purposes of awarding attorney fees and costs. The jury rendered a verdict in the amount of \$30,000. Appellant improved his position at the trial de novo. The trial court erred in awarding MAR 7.3 fees and costs. This court should reverse the judgment and demand for entry of judgment without attorney fees.

DATED this 22 day of February, 2013.

Law Offices of Scott M. Collins, LLC

By: 

Scott M. Collins, WSBA #28541
Attorney for Appellants

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 25 AM 10:12

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

SUNNY GAUTAM AND SUMAN GAUTAM,

Plaintiffs,

vs.

DONALD HICKS, and JANE DOE HICKS,
husband and wife and their marital community

Defendants.

No. 11-2-32453-2 SEA

**DECLARATION OF SERVICE BY
MESSENGER**

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of eighteen, competent to testify, not a party to this action, and am employed by the Law Offices of Scott M Collins, LLC.

On the dates set forth below, I delivered to ABC legal messenger services a copy of the **Appellant's Reply Brief**, together with a copy of this **Declaration of Service by Messenger**, with instructions to serve said documents on the following parties:

1 Mr. James E. Banks
2 Bishop Law Offices, P.S.
3 19743 First Avenue South
4 Normandy Park, WA 98148

5 Pursuant to RAP 5.4 (b), I also delivered to ABC legal messenger services the
6 original and one copy of the **Appellate Brief**, together with a copy of this **Declaration of**
7 **Service by Messenger**, with instructions to file said documents with the Washington state
8 Court of Appeals, Division I, 600 University St., Seattle, WA 98101.

9
10
11 SIGNED at Seattle, Washington, this 22nd day of February, 2013

12
13
14 By: Heather A. Bolton
15 Heather Bolton