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No. ~~41765-1-II~~

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

SUNNY GAUTAM and SUMAN GAUTAM,

Respondents,

v.

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

Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is a multi-party case involving multiple claims. Plaintiff Sunny Gautam and Plaintiff Suman Gautam are two different plaintiffs with two separate causes of action against Defendant Donald Hicks.

The case proceeded to mandatory arbitration, and separate arbitration awards were made for each Plaintiff. The arbitrator awarded Sunny Gautam \$28,136.00 for general and special damages; and the arbitrator awarded Suman Gautam \$3,000.00 for loss of consortium. Defendant Donald Hicks requested a trial de novo of all claims. The Gautams each made an Offer of Compromise to attempt to resolve their claims. Defendant countered with Offers of Judgment to each Plaintiff, which both rejected. Their cases proceeded to trial, and the jury returned a verdict in favor of Sunny Gautam for \$30,000.00; and a defense verdict on Suman Gautam's claims. Judge Jim Rogers allowed attorney fees only on Sunny Gautam's claim. Defendant appealed.

II. COUNTERSTATEMENT OF THE ISSUES

The relevant issues on appeal are whether the trial court properly used its discretion by awarding attorney fees and costs in this matter, whether the fees and costs were reasonable, and whether awards of attorney fees serves the goal of discouraging meritless appeals, alleviating court congestion and reducing delay in hearing civil cases.

III. COUNTERSTATEMENT OF THE CASE

Sunny Gautam's and Suman Gautam's mandatory arbitration awards were separate. The arbitration awards were \$28,136.00 for Sunny Gautam; and \$3,000 for Suman Gautam. The arbitration awards were not a lump sum. Rather, there was one award for Sunny Gautam, and there was one award for Suman Gautam.

Defendant requested a trial de novo of all claims. CP 11-13. By appealing both awards, the Defendant accepted the risk that it would be assessed costs and reasonable attorney's fees under MAR 7.3 if he did not improve his position as to those awards in the trial de novo. Further, by appealing both awards, Defendant placed a burden on the court system and caused both Plaintiffs to incur costs and attorney fees.

On May 10, 2012, Plaintiff attempted to reduce the Arbitration Award to an Offer of Compromise to provide Defendant with another opportunity to resolve this matter without a trial, though there was a difference of \$11.10 between the two. The Offer of Compromise breakdown is:

- \$28,147.10 for Sunny Gautam's claim (\$11.10 increase from Arb. Award);
- \$3,000 for Suman Gautam's loss of consortium claim; and
- \$852.90 for statutory fees and costs;

➤ For a total of \$32,000.00.

See CP 16-53.

On July 10, 2012, Defendant served two separate Offers of Judgment: One for Sunny Gautam's claim and one for Suman Gautam's loss of consortium claim. CP 16-53. Defendant offered \$12,001.00 for Sunny Gautam's claim, and he offered \$751.00 for Suman Gautam's loss of consortium claim. Defendant offered two separate amounts for the two separate claims because the parties have always treated the claims separately. Sunny Gautam chose not to accept Defendant's Offer of Judgment. And Suman Gautam chose not to accept Defendant's Offer of Judgment. However, either Plaintiff could have accepted his or her respective offer of judgment, while the other proceeded to trial.

Sunny Gautam and Suman Gautam tried their cases before a King County Superior Court jury August 1 - 2, 2012, presided over by Judge Jim Rogers. After a two-day trial, the jury returned a verdict in favor of the Plaintiff Sunny Gautam for \$30,000.00. CP 14-15. The jury returned a defense verdict on Suman Gautam's loss of consortium claim. CP 14-15.

The Defendant failed to improve his position on the trial de novo regarding Sunny Gautam's claim because the jury returned a verdict of \$30,000.00 in favor of Mr. Gautam, beating Mr. Gautam's Arbitration Award of \$28,136.00. Judge Jim Rogers granted, in part, Plaintiff Sunny

Gautam's Motion for Fees and Costs. Plaintiff did not request any fees or costs related to Suman Gautam's loss of consortium claim. Judge Rogers also allowed a multiplier on Plaintiff Sunny Gautam's fee request due to the high risk, contingency fee nature of this case.

IV. ARGUMENT

A. Standard of Review: Abuse of Discretion.

The standard of review of an award of attorney fees is abuse of discretion. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 524, 280 P.3d 1133 (2012); *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 335, 858 P.2d 1054 (1993). The central idea of a trial judge's discretion is *choice*: the trial judge has discretion in the sense that there are no "officially wrong" answers to the questions posed. Abuse of discretion means the decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 774-75, 287 P.3d 551 (2012). In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Whether attorney's fees are reasonable is a factual inquiry depending on the circumstances of a given case. The trial court is accorded broad discretion in allowing attorney's fees. *Id.* In the present

case, Judge Rogers' ruling regarding attorney's fees was a factual determination supported by the record, and he acted within his discretion.

Further, by providing for the award of attorney fees, MAR 7.3 serves the goal of discouraging meritless appeals, thereby alleviating court congestion and reducing delay in hearing civil cases. *Sultani v. Leuthy*, 86 Wash.App. 753, 757, 943 P.2d 1122 (1997). It is with these purposes in mind that each of Defendant's arguments should be considered.

B. Judge Rogers' Ruling Allowing Reasonable Attorney's Fees On Sunny Gautam's Claim Was Correct.

Judge Rogers acted within his discretion to allow attorney's fees on Sunny Gautam's claim and his decision should be upheld. Attorney fees and costs in multi-party cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result. *Sultani v. Leuthy*, 86 Wn. App. 753, 758, 943 P.2d 1122 (1997); citing *Christie-Lambert Van & Storage Co., Inc., v. McLeod*, 39 Wn. App. 298, 693 P.2d 161 (1984). Defendant's position with respect to Sunny Gautam's claim did not improve at the trial de novo. Simply stated, the jury awarded Sunny Gautam more money than the arbitrator did. Sunny Gautam's arbitration award is \$28,136.00. Sunny Gautam's jury verdict is \$30,000.00. The Defendant did not improve his position with respect to Sunny Gautam's claim.

When assessing attorney fees in a multiparty case, the court normally looks to the outcome as to each party, rather than the outcome in the case as a whole. *Sultani*, 86 Wash.App. at 755–56. *Sultani* involved arbitration with four defendants, a trial de novo resulted in an increase in the total amount of damages awarded to the plaintiff. *Id.* As a result of a reallocation of fault, however, two of the defendants actually owed less as a result of the trial de novo. *Id.* The court held that the two defendants who owed less were not required to pay attorney fees to the plaintiff. The court reasoned that it is inherently unfair to deny an attorney fee award to a party that has borne the costs of mandatory arbitration and a trial de novo without a change in results. *Id.* Similarly, in this case, it would be inherently unfair to deny an attorney fee award to Sunny Gautam when he has borne the costs of mandatory arbitration and a trial de novo, and he **improved** his position at trial. The jury awarded him more money than the arbitrator did. Judge Rogers acted within his discretion and followed the general rule that in multi-party cases, attorney’s fees are awarded on the basis of separate judgments obtained, not the overall trial result. *Id.* at 758.

Determining whether or not a party requesting a trial de novo has failed to improve that party’s position is not always a simple task. *Niccum v. Enquist*, 175 Wn.2d 441, 453, 286 P.3d 966 (2012) (Chambers, J. dissenting). There may be multiple parties and multiple claims,

counterclaims, and cross claims. *Id.* at 454. It is possible that after arbitration some parties or some claims will settle while others will not. *Id.* The court must consider all factors in determining whether a party has achieved a better result at the trial de novo. *Id.*

In some circumstances, the court may require the payment of attorney fees under MAR 7.3 even where the appealing party improved its overall position. *Christie-Lambert*, 39 Wash.App. at 305, 693 P.2d 161. For example, the appealing defendant in *Christie-Lambert* prevailed on a cross-claim that he raised for the first time at the trial de novo, and thereby improved his overall position. *Id.* Nonetheless, because he failed to improve his position relative to the plaintiff, the court required him to pay the plaintiff's attorney fees. *Id.* at 304-05. In the present case, the Defendant Donald Hicks failed to improve his position relative to Sunny Gautam's claim, similar to the Defendant in *Christie –Lambert*, and Judge Rogers acted within his discretion to allow attorney's fees on the claim. *See Id.*

The Defendant asks the court to apply an absurd application of the rule that the offer of compromise shall replace the arbitration award to determine whether a party improved its position. The Defendant's reasoning **encourages** defendants to appeal all claims from an arbitration, hoping to improve on at least one claim, then argue that it bettered its

position and is not liable for attorney's fees. Here, there were multiple parties with multiple claims, and Judge Rogers was within his discretion to consider the arbitration award to determine that the Defendant failed to improve his position on Sunny Gautam's claim at the trial de novo.

Further, suppose Suman Gautam had accepted the Defendant's Offer of Judgment. Suman Gautam's claim would not have been a part of the trial de novo. Would the court still only be required to refer to an offer of compromise? No. The court would look to the arbitration award. Determining whether or not a party requesting a trial de novo has failed to improve that party's position is not always a simple task. The court should consider all factors in determining whether a party has achieved a better result at the trial de novo. *Niccum v. Enquist*, 175 Wn.2d at 454. To serve MAR 7.3's purpose of discouraging meritless appeals and reducing delay and court congestion, Defendant must be responsible for Sunny Gautam's attorney fees. *Yoon v. Keeling*, 91 Wn. App. 302, 306, 956 P.2d 1116 (1998).

Further, the term "position" used in RCW 7.06.060(1) and MAR 7.3 "was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a superior court judgment against them for more than the arbitrator awarded." *Cormar, Ltd. v. Sauro*, 60

Wash.App. 622, 623, 806 P.2d 253 (1991) (footnote omitted). Here, the Defendant would certainly answer “no” if asked whether it improved its position on Sunny Gautam’s claim following the trial de novo, as it is now liable for \$30,000.00 in damages. The mandatory arbitration award was \$28,136.00. Defendant would have been better off not appealing Sunny Gautam’s arbitration award. Allowing attorney’s fees on Sunny Gautam’s claim furthers the purpose of mandatory arbitration, which is to keep disputes out of the courts. *Hudson v. Hapner*, 170 Wn.2d 22, 30, 239 P.3d 579 (2010).

This simple fact remains: Sunny Gautam received a higher damage award at trial than he did at arbitration. The purpose of MAR 7.3 serves the goal of discouraging meritless appeals, thereby alleviating court congestion and reducing delay in hearing civil cases. *Id.* Judge Rogers acted within his discretion to allow attorney’s fees on Sunny Gautam’s claim. *See Bird v. Best Plumbing Group, LLC*, 175 Wn.2d at 774-75.

C. There are two separate claims for the purpose of determining the prevailing party; loss of consortium claims are distinct from those of the injured Plaintiff.

Judge Rogers was within his discretion by treating Sunny Gautam’s claim separate from Suman Gautam’s claim to determine that Defendant failed to improve his position at the trial de novo on Sunny

Gautam's claim. Plaintiff Sunny Gautam and Plaintiff Suman Gautam are two different plaintiffs with two separate claims. Each plaintiff had a separate cause of action that could have been tried separately.

A loss of consortium claim is distinct from the claim of the person whose injury is the reason for the loss of consortium. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987). Washington law treats a loss of consortium as a separate, not derivative, claim. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008), cert. dismissed, 2008 WL 2434106 (U.S. 2008); *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998). At trial, Sunny Gautam and Suman Gautam were two separate plaintiffs with two distinct claims. Sunny Gautam brought a claim for non-economic damages. Suman Gautam brought a claim for loss of consortium. Further, under Washington's community property laws, the portion of a personal injury award that compensates one spouse for pain and suffering is the separate property of the injured spouse. *In Re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.d 735 (1995).

Defendant requested a trial de novo of all claims. CP 11-13. By appealing both awards, the Defendant accepted the risk that it would be assessed costs and reasonable attorney's fees under MAR 7.3 if it did not improve its position as to those awards in the trial de novo.

On July 10, 2012, Defendant served two separate Offers of Judgment: One for Sunny Gautam's claim and another for Suman Gautam's loss of consortium claim. Defendant offered \$12,001.00 for Sunny Gautam's claim, and it offered \$751.00 for Suman Gautam's loss of consortium claim. CP 16-53. Defendant's Offers of Judgment were served months after Plaintiff's offer of compromise. Defendant offered two separate amounts for the two separate claims because the parties have always treated the claims separately.

In his post-trial motion, Defendant requested the trial court to award him \$200 in statutory attorney fees for improving his position on Suman Gautam's claim pursuant to CR 68. CP 102-134. Defendant acknowledges that the claims are separate. CP 102-134. Defendant requested the Court to treat the claims as separate to determine that he improved his position on Suman Gautam's loss of consortium claim. CP 102-134.

Judge Rogers' ruling did not allow attorney fees related to the work done on Suman Gautam's loss of consortium claim. CP 149-153. Plaintiff's Motion for Award of Fees and Costs related only to the work Plaintiff's counsel performed on Sunny Gautam's claim. Plaintiff concedes that Defendant improved his position at the trial de novo on Suman Gautam's loss of consortium claim, and that he is entitled to

\$200.00 in statutory attorney fees. And Defendant doesn't deny that he failed to improve his position on Sunny Gautam's claim.

In *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 815 P.2d 293 the Court of Appeals held that the court must "compare comparables" in determining whether a party's position has improved. In that case, an arbitrator awarded the plaintiff approximately \$11,000 in compensatory damages and another \$10,000 in attorney fees under the CPA. *Id.* The defendant requested a trial de novo, and the trial court dismissed the CPA claim. *Id.* A jury then returned a verdict for \$16,000 in compensatory damages, but the trial court refused to award the defendant its attorney fees and costs under MAR 7.3. *Id.* The appellate court affirmed, concluding that it would be inequitable to compare the jury verdict for compensatory damages with an arbitrator's combined award of compensatory damages and attorney fees. *Id.* The court held that because the jury's compensatory damage award exceeded the arbitrator's compensatory damage award, the defendant had not improved its position.

Here, the jury's compensatory damage award for Sunny Gautam of \$30,000.00 exceeded the arbitrator's compensatory damage award for Sunny Gautam of \$28,136.00. It would be inequitable to compare Sunny Gautam's jury verdict with the overall arbitration and offer of compromise result that included costs and Suman Gautam's loss of consortium claim.

Judge Rogers was within his discretion when he allowed attorney's fees on Sunny Gautam's claim. Abuse of judicial discretion is not shown unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable. *See Bird v. Best Plumbing Group, LLC*, 175 Wn.2d at 774-75.

D. Upholding Judge Rogers' Ruling Will Further the Purposes of Mandatory Arbitration.

The mandatory arbitration rules, like any other court rules, are to be interpreted as though they were drafted by the Legislature and are construed consistent with their purpose. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). The purpose of MAR 7.3 specifically is to discourage meritless appeals, thereby alleviating court congestion and reducing delays in hearing civil cases. *Sultani v. Leuthy*, 86 Wn. App. 753, 757, 943 P.2d 1122 (1997).

It is these principles and goals – to allow efficient and effective resolution of smaller dollar value claims, to reduce court congestion, to reduce delay and actual trial time, to increase the access to justice for all and to deter meritless appeals such as this one – that should guide this Court upholding Judge Rogers' ruling. *See Sultani*, 86 Wn. App. at 757.

Here, Sunny Gautam was awarded \$28,136.00 at arbitration, and he was awarded \$30,000.00 at trial. It is a simple fact that Sunny Gautam

emerged from Superior Court with a judgment for more money than the arbitrator awarded. The Defendant was worse off appealing Sunny Gautam's arbitration award. By appealing the award, Defendant placed a burden on the court system and caused Plaintiff to incur costs and attorney fees, yet Defendant did not improve his position on this claim. This scenario is precisely why MAR 7.3 provides for the award of attorney fees.

The Defendant's approach is not consonant with the purpose of arbitration, which is to keep disputes out of court. "That purpose is best served by reading MAR 7.3 as a broad warning that one who asks for a trial de novo, and thereafter suffers a judgment for a greater amount than the arbitration award, will be liable for reasonable attorney's fees." *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 624, 806 P.2d 253 (1991).

E. Washington Follows the "Lodestar" Method in Making Fee Awards, and "Multipliers" of the Lodestar are Authorized in Contingency Fee Cases.

Judge Rogers was within his discretion to allow a 1.5 times multiplier of the lodestar amount. Washington courts apply the lodestar method to calculate reasonable attorney fees. *See e.g., Brand v. Dept. of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999); *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998); *Scott Fetzer*

Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983). Under the "lodestar" method, the party seeking fees bears the burden of proving the reasonableness of the fees requested. *Fetzer*, 122 Wn. 2d at 151.

The formula for determining reasonable attorney fees is discussed in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-602, 675 P.2d 193 (1983), in which attorney fees were awarded under the Consumer Protection Act. The first step is to calculate a "lodestar" figure based on the number of hours reasonably expended in the litigation, multiplied by the reasonable hourly rate of compensation. In determining the reasonableness of the attorney's hourly rate, trial courts may consider the skill level the litigation requires, the time limitations the litigation imposes, the size of the potential recovery, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wn.2d at 597. The second step is to consider whether the lodestar should be adjusted to reflect the contingent nature of the recovery and the quality of work performed.

"[T]he attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work." *Id.* Where an attorney has a usual rate for billing

clients, that rate will likely be a reasonable rate. *Id.* In addition to the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of potential recovery, the attorney's reputation, and the undesirability of the case." *Id.* "The court is not required to artificially segregate time in a case ... where the claims all relate to the same fact pattern, but allege different bases for recovery." *Ethridge v. Hwang*, 105 Wn. App. 447, 461 (2001) (citing *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572 (1987)).

In this case, Judge Jim Rogers was within his discretion when he weighed the relevant factors and made a factual determination to allow a multiplier. The multiplier was reasonable based on the level of skill required by the litigation, the attorney's reputation, and the undesirability of the case. Workmen's Insurance vigorously defended Sunny Gautam's damages because it believed that Mr. Gautam could not have been seriously injured where there was no visible damage to his vehicle and Mr. Gautam waited 36 days to obtain chiropractic medical treatment. Workmen's Insurance's nuisance value pre-litigation offer of \$2,000.00 and defense counsel's closing argument request of \$5,000.00 speaks volumes as to the skill level needed to obtain the result reached.

This was a high risk case. The car collision was a minor impact case with no visible damage to Sunny Gautam's vehicle and he suffered

soft-tissue injuries with almost exclusively chiropractic treatments after a 36 day delay. Sunny Gautam is an immigrant from India and he speaks with an accent, making it difficult at times for him to articulate to a jury how his injuries impact his life. Mr. Gautam never missed time from work and continues working full time as a taxi driver, a job that aggravated his injuries. There was nothing desirable about this case.

F. Multipliers Should Be Considered in High-Risk Contingency Fee Cases.

The purpose of the contingency adjustment to the lodestar is to compensate for the risk taken by Plaintiff's counsel that there would be no attorney fee recovered. *Bowers*, 100 Wn.2d at 598. When an attorney takes a case on a contingency basis, the attorney (1) risks no recovery at all – or a nominal recovery -- for their time (and the time of their staff); (2) risks having to wait a year or more before receiving any compensation for their time; and (3) risks losing money advanced by the attorney to pay costs if the case is unsuccessful and the client is unable to pay the costs. Unless attorneys handling cases on a contingency basis receive a premium for taking those risks, people with legitimate claims will be unable to find representation. No reasonable attorney can afford to give away their time and advance thousands of dollars in costs unless there is a premium for assuming those risks when a case is successful.

In determining what an appropriate multiplier is, the Court should consider the contingent nature of success as of the outset of the litigation, and no adjustment should be applied to work done after the verdict, because recovery is assured at that time. *Bowers*, 100 Wn.2d at 598-599. As discussed below, if the verdict in this case had been in the amount requested by defense counsel, Plaintiff's counsel would have received nothing for their time and effort expended in prosecuting this case.

Bishop Law Offices, P.S., has been working on Sunny Gautam's case for approximately 26 months without any compensation for their time. Plaintiff's counsel knew going into this case that the Defendant was insured by Workmen's Insurance and that there was a good chance that the case would go to trial because of auto insurance companies' reputations for not making reasonable settlement offers. Workmen's Insurance pre-lawsuit offer for Sunny Gautam's claim was \$2,000.00. *See* CP 16-53. This case was, in fact, vigorously challenged by the defense, which hired two experienced medical experts, Dr. Renninger and Dr. Bays, to challenge the causation of Mr. Gautam's injuries and medical treatment.

This case presented a substantial risk of a low verdict, particularly with current juror attitudes about tort reform, low property damage, chiropractic health care, and "pain and suffering" damages. It is necessary to earn a substantial hourly rate on successful contingency fee cases in

order to make up for losses and for the time value of money related to the delayed compensation. Mr. Gautam is an immigrant from India. He never missed time from work and continues driving a taxi full time. Mr. Gautam is also the sole provider for his family, and he would not have been able to hire an attorney to represent him on an hourly basis. If Plaintiff's counsel had been unwilling to undertake his representation for uncertain and delayed compensation, Mr. Gautam likely would have been forced to accept Workmen's Insurance only settlement offer of \$2,000, which was 15 times less than what the jury awarded. *Id.*

The attorney and staff time spent in depositions, scheduling and meeting with witnesses, writing briefs, and otherwise preparing this case for trial. Time spent on this case meant time was not available for other cases being handled by Plaintiff's counsel. Plaintiff requested that a multiplier be applied to the lodestar to reflect the contingent nature of Plaintiff's counsel's work and the risks inherent in trying a soft-tissue personal injury case such as this.

G. The Court should fully compensate Plaintiff for the attorney fees and costs required to obtain the verdict in this case.

As discussed above, this case presented a number of challenges. In the current climate of jury pools that have been poisoned by tort reform propaganda, "soft tissue" injury cases often result in low verdicts. Many

examples could be given of cases in which juries have awarded little or no non-economic damages. These cases are aggressively defended by insurance companies, which hire physicians with significant experience testifying in court to attack plaintiffs' claims, such as the testifying defense medical expert in this case, Dr. Bays, Orthopedic Surgeon.

There was substantial amount of risk taking this case on, having to spend thousands of dollars in advanced costs and hundreds of hours in attorney time to obtain a successful outcome for Plaintiff Sunny Gautam.

Among the challenges with Mr. Gautam's case was that Mr. Gautam's vehicle showed very little damage. *See* CP 16-53. In trial, the Defense argued repeatedly that this was a low-impact collision, that Plaintiff drove his vehicle from the scene, and that Plaintiff continued driving the vehicle because no repairs were needed due to the low impact nature of the collision. The Defense desperately tried to get the jury to infer that Plaintiff could not have been seriously injured in such a low impact collision.

Further, Mr. Gautam had an initial 36 day gap in treatment from the day after the collision on August 26, 2010, until he sought treatment with Dr. Jex on October 1, 2010. In fact, the initial gap in treatment was Workmen's Insurance's own doing. Workmen's Insurance promised to assist Mr. Gautam in obtaining health care. *See* CP 16-53. Workmen's

Insurance broke its promise by never returning Mr. Gautam's phone calls. Then it used Mr. Gautam's reliance on its promise against him by arguing that the gap in treatment proved that he was not injured in the collision. *See* CP 16-53.

Workmen's Insurance obviously believed that the Plaintiff faced significant problems in this case, as evidenced by Workmen's Insurance maximum pre-suit settlement offer of \$2,000 which was over \$4,000 less than Plaintiff's medical expenses. *See* CP 16-53. On August 5, 2011, the Workmen's Insurance adjuster stated: "At this time, I am staying firm on my offer of \$2,000.00. This is a soft tissue injury case that does not warrant settlement in the amount demanded. I will consider the emergency room treatment rendered by your client. However, the gap in treatment of 5 weeks shows that your client was not injured and thus all chiropractic treatment will not be considered as result of this loss." *See* CP 16-53.

Cases of this nature are extremely risky to take to trial due to the costs of litigation and amount of attorney time involved, compared to the likely amount of the verdict. It cannot be overstated that there would have been serious ramifications for Plaintiff's counsel's small, five-person firm had this case been lost as Plaintiff's counsel would have received no fee and would have lost over \$3,000 in advanced costs. These costs exceeded Workmen's Insurance's paltry pre-litigation offer of \$2,000. Similarly,

had the jury agreed with Workmen's evaluation of this claim - \$5,000 (closing argument) to \$12,001 (highest pre-trial offer) – Plaintiff's counsel may well have received no fee whatsoever, despite putting in hundreds of hours of time into this case both leading up to the Arbitration and after Workmen's Insurance's decision to push this matter to a jury trial. Plus, Plaintiff's counsel most likely would not have recouped the advanced costs. To make things worse, such a verdict would have resulted in Sunny Gautam having received nothing and still owing his treating providers thousands of dollars, even though he was the innocent victim of the defendant's negligent driving. This reality should not be lost on the court.

H. Plaintiff Is Entitled To An Award Of Expert Expenses.

Judge Rogers' acted within his discretion to allow Plaintiff's expert expenses. Pursuant to RCW 7.06.060(2), Plaintiff was awarded the following expenses required to present expert witness testimony at trial:

Dr. Kevin Jex, D.C., \$2,200.00.

See CP 149-153.

Dr. Jex usual and customary hourly rate for legal preparation and testimony is \$750.00. Dr. Jex spent 0.5 hours preparing for trial testimony and 2.5 hours giving trial testimony. This expense for Dr. Jex's expert

witness testimony was necessary to prove the extent of Mr. Gautam's spinal injury and the causal relationship of his symptoms to the August 25, 2010, motor vehicle collision. Plaintiff could not have achieved a successful result without this expert witness because causation was vigorously contested by the Defendant, who presented the live testimony of defense medical expert Dr. Patrick Bays, Orthopedic Surgeon.

I. Plaintiff Requests Attorney's Fees On This Appeal.

A party that is 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 its position. *Arment v. Kmart Corp.*, 79 Wash.App. 694, 700, 902 P.2d 1254 (1995) (citing *Wilkerson*, 62 Wash.App. at 717, 815 P.2d 293). Plaintiff is entitled to attorney fees on appeal in compliance with RAP 18.1.

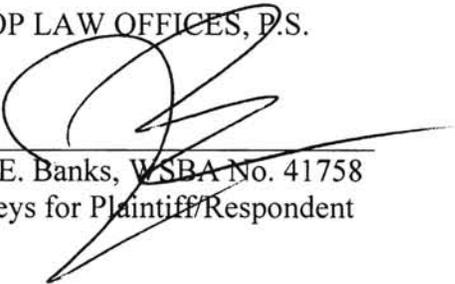
J. Conclusion

The trial court in this matter properly awarded attorney's fees and costs on Sunny Gautam's claim and within its discretion. This decision followed both an extremely reasonable award for plaintiffs in mandatory arbitration, and a jury award for Sunny Gautam and against Suman Gautam. Mr. Gautam was repeatedly forced by the Defendant Donald Hicks to litigate the matter in forum after forum. In each, the Defendant

failed to improve his position as to Sunny Gautam. Plaintiff did not request fees for Suman Gautam. The fees and costs awarded to Sunny Gautam were reasonable and should stand. Further, attorney's fees and costs should be awarded to the Sunny Gautam for the necessity of once again defending Plaintiff's claims in this forum.

Respectfully submitted this 28th day of January, 2013.

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