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No.: 71536-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
LEID

ALLSTATE PROPERTY AND CASUALTY INSURANCE
COMPANY,

Appellant,

vs.

NICHOLAS AND ANGELA XAVIER, husband and wife, and
the marital community thereof,

Respondents.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. ARGUMENT AND AUTHORITY

A. A CR 68 Offer Is Not An Agreement To Pay Unreasonable Fees

The Xaviers argue that the parties resolved this matter and there is a resulting settlement agreement. The Xaviers accepted a CR 68 agreement. CR 68 agreements are *not* settlement agreements, but are unique and separate from other standard agreements. The Sixth Circuit in *Mallory v. Eyrich*, 922 F.3d 1273 (6th Cir. 1991), aptly explained that "Rule 68 has several unique features that distinguish it from other means of compromise and settlement in civil litigation." *Id.* at 1277.

The Xaviers' characterization of the CR 68 agreement as a "settlement agreement" is not correct, and ignores the case law which specifically applies to CR 68 agreements as separate and different from other settlement agreements. See *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991); *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir. 1988); *Johnson v. University College of the Univ. of Alabama*, 706 F.2d 1205, 1209 (11th Cir. 1983).

Allstate included language in its CR 68 offer as a means of clarifying that the Plaintiffs' could make a claim for their allowable litigation expenses separately. That is precisely what the offer of judgment states. CP 2471-2473. The Offer does not indicate that all fees, regardless of the reasonableness will be payable, only that the Plaintiffs may assert their claim separately from the Offer. Further, it does not indicate that this claim may include any conceivable fee or cost incurred, or that the existing rule of law would not apply to their claim for fees.

Contract analysis requires that the contract be interpreted as a whole. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Had the Plaintiffs not accepted the offer of judgment, and had recovered less than the Offer at trial, Allstate would be bound to recovery of those costs incurred and recoverable pursuant to the pertinent statutes subject to the cost shifting provision of CR 68. The Xaviers strained reading of the CR 68 agreement is diametrically opposed to how the rules regarding a CR 68 offer would have been applied to Allstate under the law. Further, the Xaviers' reading does not conform to contract analysis provisions, by failing to take the agreement as a whole and adding meaning to the clause allowing the Xaviers to make a fee claim without any basis for such a reading.

The record is clear that, at the time the CR 68 offer was made, the Xaviers' claim for breach of contract had already been dismissed. *See* CP 2471-2473; *see* CP 287. There is no basis under CR 68 or Washington law for the proposition the CR 68 award allows the Xaviers' to claim fees for a claim that was no longer in existence at the time the offer was made.

Additionally, the Xaviers assert that they are entitled to fee recovery for requesting their fees based not on any existing law, but based on the CR 68 agreement. There is no language whatsoever indicating that the Xaviers may make continual fee claims for post-litigation motion practice. The offer specifically states "The Plaintiffs shall be entitled to make a claim for reasonable attorney fees and expenses incurred after the

filing of the lawsuit, which would be in addition to the \$60,000.00 as set forth herein.” CP 2471.

To the extent that the Xaviers’ believe that the clause included in the Appellant’s offer of judgment was to encompass any and all fees imaginable, Allstate asserts that there was no meeting of the minds and cannot be the basis for an award of fees beyond those allowable by law.

B. Separation of Fees is the Burden of the Party Seeking Fees

As an alternative, the Xaviers argue that they are entitled to fees for all of their claims, regardless of whether they are recoverable under the law, because the Trial Court found it “impossible” to separate fees related to the various claims. CP 2458. The burden to provide a billing record for the Court that can be used to award fees under the law is on the party seeking the fees, as is the burden to show that they are reasonable and appropriate. *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991); *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999) (Citing *Hensley v. Eckert*, 461 U.S. 424, 434 (1983)); *West Virginia University Hospital, Inc. v. Casey*, 898 F.2d 357 (3rd Cir. 1990); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993); *Berryman v. Metcalf*, 177 Wn. App. 644, 656-657, 312 P.3d 745 (2013).

The Xaviers’ argument that they should be awarded the fees they have requested, regardless of whether they are recoverable under the law, BECAUSE they have failed to provide the Court with an adequate billing record that follows the guidelines of *Berryman v. Metcalf*, 177 Wn. App.

644, 656-657, 312 P.3d 745 (2013), is in direct opposition to Washington law.

C. Only Reasonable Fees May Be Awarded

Plaintiff does not refute that, where fees are recoverable, only reasonable attorney fees are recoverable under the law. It is well settled that attorneys' fees must be fair and reasonable. *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 520 (1st Cir. 1991). Attorneys must use what the U.S. Supreme Court terms good "billing judgment." *ACLU v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (Citing *Hensley v. Eckert*, 461 U.S. 424, 434 (1983)). It is unreasonable to bill a client for hours that are "excessive, redundant, or otherwise unnecessary." *Id.* A lawyer must exercise care, judgment and ethical responsibility in the delicate task of billing time and exclude hours that are unnecessary. *West Virginia University Hospital, Inc. v. Casey*, 898 F.2d 357, 365 (3rd Cir. 1990). Please see also CP 2237-2299 at 2246-2247. It is the burden of the party seeking fees to show that the fees requested are fair, reasonable, and use good billing judgment. See *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991); *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999) (Citing *Hensley v. Eckert*, 461 U.S. 424, 434 (1983)); *West Virginia University Hospital, Inc. v. Casey*, 898 F.2d 357 (3rd Cir. 1990); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993); *Berryman v. Metcalf*, 177 Wn. App. 644, 656-657, 312 P.3d 745 (2013).

D. The Trial Court Did Not Follow *Julie Berryman v. Metcalf and Johnson v. State of Washington, Department of Transportation*

1. The Order is Not Sufficient under *Berryman*

The *Berryman* Court held that all arguments against the asserted reasonableness of fees must be addressed in the Court's findings, and the Court must place the burden of proof on the party requesting fees. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-657, 312 P.3d 745 (2013).

“Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.” *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998).

Id.

The Xaviers assert without basis that the Court's Order in this matter is not inadequate under *Berryman*, but is more like the order described by the Court in *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 603 (2006). *Banuelos*, a significantly earlier opinion, provides only minimal description of the Court's order, but also included a detailed letter opinion describing the Court's reasoning for its decision for the fees allowed and disallowed. The Xaviers' assertion that the Order in question here is sufficiently detailed is simply incorrect.

The Order in question is before the Court {CP cite}. The Order awards fees for the following billing practices, which were specifically disallowed as a matter of law by the Court in *Berryman*:

- Block billing;
- Billing entries with minimal detail;
- A request to increase the fee award due to insurance company tactics;

- Billing for duplicated effort;
- Billing for the presence of multiple attorneys for preparing and attending depositions, reviewing the same documents, and engaging in the same pre-trial preparation.

CP 2478-2483.

The Xaviers' attorney fee records are replete with examples of these disallowed activities, as briefed in Brief of Appellant §§ III.F-L. As is briefed in detail in Allstate's opening Brief, the Trial Court makes reductions to the Xaviers' billing for some of these categories. However, in each case the Court only reduces a portion of the impermissible billing, without explanation regarding why. Brief of Appellant §§ III.F-L. For example, counsel identified 229 instances of block billing which contains disputed work combined with billable work items under a single time entry. CP 2035-2140.

The trial court reduced Plaintiffs' fee request by \$1,500 for block billing. However, defendant identified 181.9 block billed attorney hours for which \$61,985 in fees were claimed, and 75.7 block billed paralegal hours for which \$7,570 in fees were claimed.¹ CP 2035-2140. The trial court did not explain 1) why it chose the amount of \$1,500, approximately 2% of the \$69,555 of block billed entries claimed by the Xaviers, 2) which entries it disallowed and which it allowed, or 3) the basis behind allowing some block billing. CP 2478-2483.

¹ 16.8 hours for attorney Hanson at \$250 per hour; 92.7 hours for attorney McLean at \$250 per hour, and 72.4 hours for attorney Watkins at \$350 per hour. CP 2035-2140.

The Trial Court's Order does NOT meet the standard of *Berryman*, as is shown by the Order itself. Not only does it allow many of the billing practices the *Berryman* Court found were per se unreasonable, the Order does not provide an explanation regarding why the per se unreasonable practices were allowed or why small percentages were reduced. Brief of Appellant §§ III.F-L. Plaintiff's assertion that any amount of reduction amounts to an "acceptance" of Allstate's criticism of the submitted billing and can, therefore, not be questioned is wholly without basis. Plaintiffs cite no law in this regard, and this is not the holding of *Julie Berryman v. Metcalf and Johnson v. State of Washington, Department of Transportation*. In fact, the Trial Court specifically allowed practices such as block billing and multiple attorney billing that are barred by *Berryman* and *Johnson*.

E. The Trial Court Improperly Shifted the Burden to Allstate

It is the burden of the party seeking fees to show that the fees requested are fair, reasonable, and use good billing judgment. See *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991); *ACLU v. Barnes*, 168 F.3d 423 (11th Cir. 1999) (Citing *Hensley v. Eckert*, 461 U.S. 424, 434 (1983)); *West Virginia University Hospital, Inc. v. Casey*, 898 F.2d 357 (3rd Cir. 1990); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993); *Berryman v. Metcalf*, 177 Wn. App. 644, 656-657, 312 P.3d 745 (2013). The Trial Court did not require the Xaviers to meet this burden.

This is shown most clearly in the way the Court failed to require the Xaviers to show that the amount of work asserted was fair, reasonable, and a use of good billing judgment. Although the Trial Court specifically found that “the litigation in this case was standard fare”, the Trial Court did not address overbilling by the Xavier’s counsel.

The Xaviers’ counsel assert that they drafted “454 separate pleadings or drafts of pleadings” for a case where the ENTIRE docket, including all documents filed by all parties and all filings by the court, includes only minimal entries. CP 2029-2033. In fact, Plaintiff only filed 18 documents with the court throughout the entire matter, inclusive of the Summons and Complaint, an Amended Summons, a Notice of Appearance, responses to motions by RestorX², and the Motion to Remand and Reply in support of same filed in the US District Court. *Id.* For Plaintiff’s counsel to have drafted “454 separate pleadings or drafts of pleadings”, they would have had to re-drafted each of these documents, actually submitted including notices of appearance, **more than 25 times each.** *Id.* and CP 3219 at ¶ 38. This is per se unreasonable. CP 1997-2004 at ¶ 18.C.

The billing entries were also replete with instances of multiple persons reviewing the same document or correspondence. CP 2237-2299 at CP 2251-2252.

Plaintiffs’ submission to the trial Court provided no explanation for why 804.8 hours, or 33.6 days of non-stop time, should be billed on a

² Any fees or expenses related to RestorX are not reasonable because Plaintiffs settled with RestorX.

file where discovery was minimal, Plaintiffs filed few briefs, and the facts were well established prior to the start of litigation because the entire claim had been paid prior to suit. As noted by the Court in *Ursic v. Bethlehem Mines*, “Our cases supply no authorities for rewarding non-stop meter running in law offices. A Michelangelo should not charge Sistine Chapel rates for painting a farmer’s barn.” *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983) (holding that highly skilled attorneys who charge premium rates due to their expertise in an area of law should neither be running up long hours for researching law nor performing routine tasks.).

The Xaviers have never provided an explanation for this, or other inappropriate billing behavior. For example, Mr. Watkins bills twice for reading the same document, with slightly different descriptions.

Reviewed Allstate’s Initial Disclosures; analyzed same.	7/26/12	0.50
Reviewed Allstate’s ECF Initial Disclosure filing.	7/26/12	0.30

CP 2075. No explanation for duplicative billing such as this have been provided by the Xaviers or their counsel.

The Xaviers’ counsel charged premium rates of \$350/hour for attorneys Watkins and McLean, who performed the vast majority of the attorney work on the case, \$250/hour for attorney Hanson, and \$100/per hour for each of their paralegals. CP 2479. The case law is clear that attorneys who charge premium rates should not be presenting bills for large amounts of time spent on routine tasks. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983). This litigation was determined to be

“standard fare”, by the Trial Court, yet the Xaviers’ counsel has asserted that they prepared so many drafts that each filing required 25 separate drafts, down to the simplest pleading. This is not the conduct of experienced attorneys in standard litigation. Xaviers’ counsel claim to be experienced in insurance litigation, yet they provide no explanation regarding why they required far more time and generated significantly more drafts than would be expected for standard insurance litigation. The Trial Court did not address the extreme amount of time claims by the Xaviers’ counsel in this case, did not require the Xaviers to meet their burden of proof, and did not meet the standard required under *Berryman*.

F. The Court Should Have Supplemented the Record Pursuant to RAP 7.2(e) and CR 60(a)

The Xaviers argue that the Court should not have granted Allstate’s motion under CR 60 because the error in this case was not “clerical” in nature. However, CR 60(a) permits the trial court to correct “ errors therein arising from oversight or omission.” *See* CR 60(a). CR 60(a) further states that after appellate review is accepted, motions pursuant to said rule may be made pursuant to RAP 7.2(e). RAP 7.2(e) states in relevant part:

(e) Post judgment Motions and Actions to Modify Decision. The trial court has authority to hear and determine (1) post judgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The post judgment motion or action shall first be heard

by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision....

RAP 7.2(e) is not limited to clerical mistakes.

Because the trial Court inappropriately shifted the burden of proof on fees from Plaintiffs', who were requesting fees, to Allstate, Allstate is now put in the position of arguing the unreasonableness of requested fees on appeal, where Plaintiff has not been required to make a showing of the reasonableness of billing and requested fees. *See Weinberger v. Great Northern Nekoosa Corp., supra; ACLU v. Barnes, supra; Hensley v. Eckert, supra; West Virginia University Hospital, Inc. v. Casey, supra.*

However, the Court in this matter denied Defendant's Motion to supplement, including defendant's request to take judicial notice of the federal court record, despite the fact that Plaintiffs did not object to or present arguments against the request for judicial notice. CP 3054-3061; CP 3073-3074. Supplementary materials showed non-pleading documents that Plaintiffs' counsel requested fees for reading. CP 2551-2794.

The Superior Court should have required the Plaintiffs' to prove the reasonableness of their billing, as required by Washington law. Having failed to do so, the Superior Court should have granted Defendant's Motion to Supplement the record to present examples of those documents not already contained in the Docket for which Plaintiffs' counsel asserted attorney fees for reviewing.

G. Allstate has Made No Misrepresentations

Plaintiffs assert that Allstate has made three misrepresentations to this Court. This is wholly incorrect. Each asserted misrepresentation will be addressed separately below.

1. Slow Pay/No Pay

The Xaviers assert that Allstate made a misrepresentation to the Appellate Court by asserting that the Trial Court took the Xaviers' argument that fee awards are necessary to deter slow pay/no pay behavior on the part of insurance companies. The Xaviers assert that the Court was critical of this argument.

Allstate has presented this Court with the Order by the Trial Court. CP 2478-2483. That Order lists arguments considered by the Court, including the Xaviers' slow pay/no pay argument, despite extensive briefing showing that all insurance claims made by the Xaviers were paid prior to the initiation of suit and the Trial Court's earlier decision affirming the same. That Order does not state that this argument by the Xaviers is in direct opposition to Washington law. That Order does not state that the Court rejected the argument. The inclusion of this argument without refutation in the Order clearly indicates that the Court considered this argument as a part of its decision. Allstate has made no misrepresentation to this Court.

To the extent that the Order could be read as the Xaviers assert, then this is further evidence that the Order produced by the Trial Court did not sufficiently lay out the reasons for its determination of the fee award.

2. Plaintiff's Fee Entries to the Federal Court

The Xaviers assert that the difference in their fee requests is simply due to the fact that their fee request at the federal level only included entries for a remand motion. The Xaviers assert that Allstate knows this and is making a deliberate misrepresentation to the Court. This is absolutely not the case, and is a gross misrepresentation by the Xaviers. The billing documents themselves show that the Xaviers' representation is not correct. A comparison of the two billing documents shows not that they were made contemporaneously and entries that did not have to do with a remand motion were redacted, but that they are different documents. This suggests the billing statements have been altered after the fact.

From the June 28, 2012, billing submission by Plaintiffs (CP 2670):

Reviewed Notice of Removal and Complaint; researched, revised and supplemented Motion to Remand (4x); emailed same to Mr. Hanson for his review.	6/20/12	4.50
Reviewed emails and Mr. Hanson's edits to Motion to Remand / analyzed same; conferred with assistant re: drafting supporting Declaration.	6/21/12	0.50
Revised and supplemented Motion to Remand / emailed assistants re: editing same.	6/23/12	1.30
Revised and supplemented Declaration in Support of Motion for Remand; emailed assistants re: modifications.	6/23/12	1.00
Revised and supplemented Declaration in Support of Motion for Remand; conferred with Mr. Cunningham re: same.	6/25/12	0.70
Finalized Motion for Remand and Declaration in Support thereof; emailed assistant re: collecting Exhibits for Declaration.	6/27/12	1.30

9.30

From the September 27, 2013, billing submissions by Plaintiffs (see CP 2072):

Reviewed Notice of Removal and Complaint; researched, revised and supplemented Motion to Remand (4x); emailed same to Mr. Hanson for his review.	6/20/12	4.50
Reviewed emails and Mr. Hanson's version 6 of Motion to Remand / analyzed same; conferred with assistant re: drafting supporting Declaration.	6/21/12	0.50
Revised my Declaration for Motion to Remand.	6/21/12	0.50
Revised Plaintiffs' Motion for Remand.	6/23/12	1.00
Supplemented Watkins' Declaration / Motion for Remand.	6/23/12	0.50
Conferred with Mr. Howson re: status of case.	6/23/12	0.20
Revised and supplemented Motion to Remand / emailed assistants re: editing same.	6/23/12	1.30
Revised and supplemented Declaration in Support of Motion for Remand; emailed assistants re: modifications.	6/23/12	1.00
Attended Case Assignment Meeting.	6/25/12	0.20
Revised and supplemented Declaration in Support of Motion for Remand; conferred with Mr. Cunningham re: same.	6/25/12	0.70
Finalized Motion for Remand and Declaration in Support thereof; emailed assistant re: collecting Exhibits for Declaration.	6/27/12	1.30

In fact, both examples of billing contain ONLY entries related to the motion for remand, except for one entry for a conference with Roger Howson contained in the September 27, 2013, billing submission. The September 27, 2013, billing submission contains additional entries for the motion to remand not submitted at the time the motion for remand was filed. Allstate has made no misrepresentation to this Court, and the Xaviers' accusation of the same is in itself a gross misrepresentation.

3. Items Considered by the Trial Court

The Xaviers assert that Allstate has misrepresented to the Appellate Court what documents the Trial Court did and did not consider. This statement is beyond frivolous. Allstate specifically appealed the Trial Court's Order denying its motion to supplement. Allstate has made clear that the Trial Court did not consider the Federal Court pleadings or the additional examples of work product and communications which Allstate requested it consider. To assert that Allstate has somehow hidden the fact that the Trial Court did not consider these items when Allstate is specifically asserting to this Court that the Trial Court's failure to consider them is an error to be addressed is ludicrous.

H. *Olympic Steamship* is Not Applicable

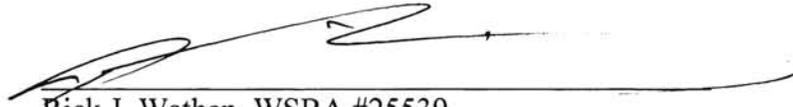
The Plaintiffs assert that it is not consequential that they represented to the Trial Court that they were Plaintiffs' represented to the Trial Court that they were entitled attorneys' fees in part pursuant to *Olympic Steamship Company v. Centennial Insurance Company*, 117 Wn.2d. 37, 811 P.2d. 673 (1991), because they assert that the Trial Court did not make its decision on those grounds. It is the position of Allstate that it is unclear whether *Olympic Steamship* was one of the bases for the Court's fee award. To the extent that the Trial Court found that the Xaviers are entitled to an award of fees based on *Olympic Steamship*, the award should be vacated.

II. CONCLUSION

The Appellant respectfully requests that the Superior Court's award of attorney fees to Plaintiffs for work on the litigation be vacated and reduced to no more than \$45,906.87, and that costs be reduced to \$10,504.20, to correct the errors briefed above, or, that the Superior Court's award of attorney fees to Plaintiffs for work on the litigation be vacated and remanded for a new hearing. The Appellant further requests the Superior Court's supplemental award of attorney fees to Plaintiffs for fees sought in requesting fees be vacated. The Appellant further requests that this Court find that the Superior Court erred in denying Appellant's Motion to Supplement the Record.

Dated this 18th day of August, 2014, at Seattle, Washington.

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ORIGINAL

CERTIFICATE OF SERVICE

I, Rose Behbahani, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

I certify that on August 18, 2014, I had one original and one copy of the **Reply Brief of Appellant** delivered to the Court of Appeals Division One *via legal messenger*; and a copy of the same was served as indicated on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18 day of August, 2014, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Rose Behbahani". The signature is written in a cursive style with a large initial "R" and "B".

Rose Behbahani, Legal Assistant