

No. 74407-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant

v.

ARIKA PRINCE,

Respondent

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APPELLANT BRIEF

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2016 FEB 18 AM 11:13  
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COURT OF APPEALS

**ORIGINAL**

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This matter comes before Division I of the Washington Court of Appeals pursuant to RAP 2.2.

### **I. ASSIGNMENTS OF ERROR**

No. 1: Trial court's failure to hold reasonableness hearing on fees and costs associated with motion for offsets

No. 2: Trial court's order denying motion for offsets

No. 3: Trial court's order granting attorney fees and costs

No. 4: Trial court's failure to reduce attorney fees and costs

### **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

No. 1: Did the trial court abuse its discretion in failing to hold a reasonableness hearing on fees and costs associated with motion for offsets?

No. 2: Did the trial court abuse its discretion by denying motion for offsets?

No. 3: Did the trial court abuse its discretion in granting attorney fees and costs?

No. 4: Did the trial court abuse its discretion in failing to reduce attorney fees and costs?

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

#### **A. Undisputed Background of Claim**

This matter arises from a motor vehicle accident that occurred on September 11, 2011 in Snohomish County, Washington that was caused by an uninsured motorist.<sup>1</sup> Respondent was insured by Appellant at the

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<sup>1</sup> Clerk's Papers (CP) at 1-4.

time of the subject accident and had uninsured motorist coverage (UM) and personal injury protection (PIP).<sup>2</sup> Appellant paid \$10,000 of Respondent's subsequent medical treatment under the PIP policy.<sup>3</sup> The parties could not agree on the amount of compensatory damages owed to Respondent under the UM coverage.<sup>4</sup> Pursuant to the terms of the insurance contract, Respondent filed suit to determine the amount of her damages.<sup>5</sup>

The relevant portions of the policy for the issues brought in this matter include the following provisions:

### **Limits**

1. The Underinsured Motor Vehicle Bodily Injury Coverage Limits are shown on the Declarations Page under "Underinsured Motor Vehicle Bodily Injury Coverage – Limits – Each Person, Each Accident".
  - a. The most **we** will pay for all damages resulting from **bodily injury** to any one insured injured in any one accident, including all damages sustained by other **insureds** as a result of that **bodily injury** is the lesser of:

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<sup>2</sup> CP 1-4

<sup>3</sup> CP 302-410

<sup>4</sup> CP 1-4

<sup>5</sup> CP 1-4

(1) the **insured's** compensatory damages resulting from

**bodily injury** reduced by:

(a) the sum of all payments for damages resulting from

that **bodily injury** made by or on behalf of any

**person** or organization who is or may be held

legally liable for that bodily injury; or

(b) the sum of all limits of all bodily injury liability

bonds and insurance policies that apply to the

insured's bodily injury; or

(2) the limits of this coverage.

- b. The limit showed under "Each Accident" is the most we will pay, subject to the limit for "Each Person", for all compensatory damages resulting from **bodily injury** to two or more **insureds** injured in the same accident.

### **Nonduplication**

**We** will not pay under Underinsured Motor Vehicle Bodily Injury

Coverage any damages:

1. that have already been paid to or for the **insured**:
  - a. by or on behalf of any **person** or organization who is or may be held legally liable for the **bodily injury** to the **insured**; or

b. for **bodily injury** under Liability Coverage of any policy issued by the **State Farm Companies** to **you** or any **resident relative**; or

2. that have already been paid as:

a. benefits under Personal Injury Protection Coverage of this Policy; or expenses under Medical Payments Coverage of this Policy.<sup>6</sup>

On December 31, 2013, Respondent filed her lawsuit.<sup>7</sup> On December 9, 2014, Appellant stipulated to transfer this matter to Mandatory Arbitration despite the deadline having passed for Respondent to file a statement of arbitrability.<sup>8</sup> Jennifer James, MD performed a CR 35 Examination on Respondent that formed the basis of Appellant admitting to the reasonableness, necessity, and relatedness of \$8,947.04 of the \$13,447.07 in medical special damages awarded at trial.<sup>9</sup>

On April 24, 2015, the parties proceeded to Mandatory Arbitration, and Appellant admitted to the reasonableness, necessity, and relatedness of \$8,947.04 in medical special damages.<sup>10</sup> The arbitrator returned an

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<sup>6</sup> CP 302-410

<sup>7</sup> CP 1-4

<sup>8</sup> CP 701-38

<sup>9</sup> CP 302-410

<sup>10</sup> CP 701-38

award of \$70,480.07 that was reduced to the statutory maximum of \$50,000.00.<sup>11</sup> Respondent sought trial de novo.<sup>12</sup>

On May 22, 2015, Respondent served an Offer of Compromise in the amount of \$17,499.00.<sup>13</sup> Respondent's Offer of Compromise stated that "Plaintiff hereby offers to settle this proceeding upon defendant's **payment to her** in the amount of \$17,499."<sup>14</sup> Appellant did not accept the offer.

On June 15, 2015 Appellant sent Respondent, via her attorney, a check in the amount of \$4,000.00 as an advance payment of her general damages ('undisputed amount').<sup>15</sup> The letter specifically stated: "The remaining coverage available will be reduced by the amount of this payment and this amount will also be credited against any final determination of damages."<sup>16</sup> On or about June 23, 2015, Respondent cashed the \$4,000 said check.<sup>17</sup>

On September 21, 2015, trial commenced, and on September 23, 2015, the trial court ordered that the issue of offsets/credits would be addressed after the jury's verdict and prior to entry of judgment.<sup>18</sup> On

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<sup>11</sup> CP 701-38

<sup>12</sup> CP 613-34

<sup>13</sup> CP 296-97

<sup>14</sup> CP 296-97

<sup>15</sup> CP 153-215

<sup>16</sup> CP 153-215

<sup>17</sup> CP 153-215

<sup>18</sup> CP 13-37, 127-29

September 30, 2015, the jury returned its verdict sheet with the following award:

- |   |                          |
|---|--------------------------|
| (1) For undisputed past economic damages: | \$8,947.07               |
| (2) For further past economic damages:    | \$4,500.00               |
| (3) For past non-economic damages:        | \$4,500.00 <sup>19</sup> |

**B. Respondent's Presentation of Judgment**

On October 1, 2015, Respondent moved for entry of judgment on the verdict.<sup>20</sup> Appellant filed an opposition to Respondent's motion for entry of judgment on the basis that the issue of offsets/credits had not yet been addressed.<sup>21</sup> On October 7, 2015, Respondent filed her reply.<sup>22</sup> In this reply, contrary to RCW 7.06.050(1)(c), Respondent disclosed and communicated to the trial court Respondent's post-arbitration Offer of Compromise.<sup>23</sup> Respondent contended that she had improved her position and was thus entitled to attorney fees and costs.<sup>24</sup>

On October 9, 2015, the trial court ordered that Respondent's motion for entry of judgment was denied, Appellant would be entitled to

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<sup>19</sup> CP 156, 613-34

<sup>20</sup> CP 149-52

<sup>21</sup> CP 153-215

<sup>22</sup> CP 803-14 (anticipated pagination after First Supplemental Designation of Clerk's Papers)

<sup>23</sup> CP 803-14

<sup>24</sup> CP 803-14

determine offsets prior to entry of judgment, and that Respondent had improved her position post-arbitration and was entitled to fees and costs.<sup>25</sup>

1. Appellant's Motion for Reconsideration

On October 14, 2015, Appellant moved for reconsideration of the trial court's October 9, 2015 order regarding its determination that Respondent had improved her position post-arbitration and that Respondent improperly disclosed and communicated her post-arbitration Offer of Compromise to the trial court.<sup>26</sup> Appellant's motion also addressed the issue that Respondent's Offer of Compromise could not have contemplated payment for the \$10,000 in PIP benefits already rendered because of the obvious statutory language and therefore contemplated a 17,499.00 payment and a waiver of PIP reimbursement.<sup>27</sup>

Respondent opposed the motion for reconsideration, but the trial court granted Appellant's motion as follows: the trial court struck the portion of the October 9, 2015 order determining that Respondent had improved her post-arbitration position; the trial court held that Respondent violated RCW 7.06.050(1)(c) when the post-arbitration Offer of Compromise was disclosed and communicated to the court prior to entry of judgment; and the trial court held that a determination of Appellant's

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<sup>25</sup> CP 222-23

<sup>26</sup> CP 224-301

<sup>27</sup> CP 224-301

offsets was necessary and should occur prior to any determination whether Respondent improved her position post-arbitration.<sup>28</sup>

C. Appellant's Motion for Offset

Appellant filed its motion for offsets regarding the \$10,000 paid in PIP benefits and \$4,000 in undisputed damages paid from the UM policy.<sup>29</sup> At the time of filing, Respondents had not provided any indication of their alleged costs in bringing the UM action that would have allowed Appellant to determine the offset.<sup>30</sup> On November 2, 2015, Respondent filed her response and alleged \$15,967.85 in legal expenses.<sup>31</sup> Respondent's alleged legal expenses for copying, faxing, and transferring documents to Dropbox, an online storage service; parking charges; travel fees; and messenger services.<sup>32</sup> Respondent also claimed \$3,973.00 in expert fees for an undisclosed expert<sup>33</sup> that is separate and apart from the \$6,748.00 in expert fees for the two providers that testified at trial.<sup>34</sup> Respondent also included costs for obtaining medical records when none were submitted via ER 904 by Respondent.<sup>35</sup>

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<sup>28</sup> CP 535-37

<sup>29</sup> CP 302-410

<sup>30</sup> CP 302-410

<sup>31</sup> CP 538-45

<sup>32</sup> CP 538-45, 546-90

<sup>33</sup> CP 571, 573-74

<sup>34</sup> CP 583-84

<sup>35</sup> CP 546-90

Appellant filed its reply and objected to Respondent's costs as unreasonable.<sup>36</sup> Appellant argued that Respondent's costs were artificially inflated in order to wipe out Appellant's offset.<sup>37</sup> Appellant directed the trial court's attention to the sums of money allegedly charged as outlined above.<sup>38</sup> Appellant reminded the trial court that only reasonable costs should be considered and that courts should take an active role in assessing cost decisions.<sup>39</sup> However, the trial court declined to address Respondent's alleged costs, made no findings of fact or conclusions of law regarding the alleged costs, performed no evaluation of the reasonableness of the alleged costs, and no reasonableness hearing was conducted.<sup>40</sup> The trial court determined that there were no offsets available by assumedly awarding all of Respondent's costs, that the \$4,000 prepayment was a credit, that judgment should be entered in the amount of \$17,947.07, and that Respondent was free to move to amend the judgment for post-arbitration attorney fees and costs.<sup>41</sup>

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<sup>36</sup> CP 591-99

<sup>37</sup> CP 591-99

<sup>38</sup> CP 591-99

<sup>39</sup> CP 591-99

<sup>40</sup> CP 600-01

<sup>41</sup> CP 600-01

D. Respondent's Motion for Attorney Fees and Costs

On November 30, 2015, Respondent filed her motion for attorney fees and costs following entry of judgment.<sup>42</sup> Respondent claimed 283.8 hours of attorney time charged at \$350 per hour for primary counsel and \$450 for associated counsel and 24.55 hours of paralegal time were expended in the nearly six months between the de novo appeal and filing of the motion for costs.<sup>43</sup> Respondent requested a total of \$103,979.75 in attorney fees.<sup>44</sup> Respondent also requested \$10,623.20 in costs.

Appellant filed its response to Respondent's request for fees and costs and specifically objected to any award of fees and costs due to Respondent's intentional disclosure and communication of the post-arbitration Offer of Compromise contrary to statute and case law.<sup>45</sup> Appellant also objected to the amount of attorney fees in relation to the relatively modest damage award in an admitted liability action where the majority of damages were stipulated prior to trial.<sup>46</sup> Further, Appellant objected to numerous billing entries provided in support of Respondent's motion for fees and costs:

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<sup>42</sup> CP 613-34

<sup>43</sup> CP 613-34

<sup>44</sup> CP 613-34

<sup>45</sup> CP 701-38

<sup>46</sup> CP 701-38

- 12 hour trial days (6 a.m. to 9 p.m.) on 3 trial days, 13 hours spent on day 4 of trial, 10.5 hours for day 5 and 2 hours to attend a jury question and the verdict<sup>47</sup>;
- Numerous hours bills on work with a '**medical consultant**' who is never named and it is unknown what actual work was done to 'benefit' plaintiff's case;
- 6/29/15–1 hour to review defendant's witness lists, 2 of which were disclosed **before** the case was transferred to MAR and were nearly identical to the one served following the de novo, which Mr. Malek **already reviewed** on 6/9/15 for .2
- 7/29/15 – 3.50 hours (9:30 to 1pm) to attend the deposition of Dr. James.
- Work on a Joint Statement of Evidence is a **clerical** function;
- Extensive hours working on motions in limine, which were **uncomplicated**;
- Extensive hours working on jury instructions in a simple tort matter;
- Letters, calls and contact with **Dr. Zhu**, whose office advised defendant's attorney he was in China and 'unavailable' for trial testimony
- Hours of trial preparation regarding addiction, which was a **failed** strategy
- Time spent with Dr. Momeyer and Ms. Pruitt when the defense **admitted** plaintiff was injured, their treatment costs were reasonable and where the majority of the awarded medical expenses were admitted<sup>48</sup>

Appellant noted that these were but a few of Respondent's inflated billing entries.<sup>49</sup> Finally, Appellant objected to the inclusion of non-attorney fees for paralegal work that did not qualify as legal in nature.<sup>50</sup>

Respondent filed her reply and argued that she should not forfeit her attorney fees and costs because of her disclosure and communication

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<sup>47</sup> The majority of the time spent in court was done so waiting for plaintiff to drive to Court from Kent.

<sup>48</sup> CP 701-38

<sup>49</sup> CP 701-38

<sup>50</sup> CP 701-38

of the post-arbitration Offer of Compromise to the trial court because the trial court had no discretion in determining if Appellant was entitled to a PIP offset.<sup>51</sup> Respondent also requested that all the proffered fees and costs should be awarded despite Appellant's objection.<sup>52</sup>

The trial court ordered that \$88,804.75 in attorney fees were reasonable and awarded all costs of \$10,623.20.<sup>53</sup> The trial court determined that forfeiture of all attorney fees and costs was not the appropriate remedy for improperly disclosing and communicating the post-arbitration Offer of Compromise to the trial court and instead determined that forfeiture of fees associated with Respondent's reply, in which she disclosed the Offer of Compromise, was the appropriate sanction.<sup>54</sup>

#### IV. ARGUMENT

A. **The Trial Court Abused Its Discretion in Failing to Provide Evaluation of Fees and Costs Sufficient for Review Regarding Motion for Offsets and in Failing to Allow Offset**

The standard of review for determination of costs involves a two-step process, under which the reviewing court first considers whether a statute, contract, or equitable theory authorizes the cost, which is a matter of law subject to de novo review. Second, if such authority exists, the

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<sup>51</sup> CP 739-65

<sup>52</sup> CP 739-65

<sup>53</sup> CP 782-86

<sup>54</sup> CP 782-86

amount of the cost is subject to the abuse of discretion standard. *Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331 (2008), *review denied*, 166 Wn.2d 1027, 217 P.3d 336 (2009). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990).

“The trial court is vested with wide discretion to disallow costs where it appears that they are exorbitant or unnecessarily incurred.” *Kraft v. Spencer Tucker Sales*, 39 Wn.2d 943, 953, 239 P.2d 563 (1952). All parties owe a duty to avoid needless costs in litigation. *Id.* A trial court abuses its discretion by failing to articulate on the record appropriate findings of fact and law for its discretionary decision in determining reasonable costs and fees. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 534-35, 128 P.3d 128 (2006). The court must make a record of this process, sufficient for review. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998).

In order for an insurer to claim an offset of payment of PIP benefits against its UM obligations to its insured, it must pay a pro rata share of the insured’s legal fees and costs. *Hamm v. State Farm Mut. Auto. Ins.*, 151 Wn.2d 303, 88 P.3d 395 (2004). An insurer is only responsible for a pro rata share of the fees and costs reasonably expended

to obtain the liability proceeds. *Winters v. State Farm Mut. Auto. Ins. Co.*, 99 Wn. App. 602, 610, 994 P.2d 881 (2000).

Courts must take an active role in assessing the reasonableness of fees and costs, rather than treating cost decisions as a litigation afterthought. *Mahler*, 135 Wn.2d at 434–35. Courts should not simply accept unquestioningly cost and fee affidavits from counsel. *Id.*

As a general rule, a party is entitled to recover only those costs allowed by statute or court rule, and it is reversible error for the court to award additional costs. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994); thus, for example, fees charged by experts, investigators, consultants, photographers, and the like are not recoverable. *Wagner v. Foote*, 128 Wn.2d 408, 908 P.2d 884 (1996); *Nelson v. Industrial Ins. Dept.*, 104 Wn. 204, 176 P. 15 (1918); *Estep*, 148 Wn. App. 246; *Gerken v. Mutual of Enumclaw Ins. Co.*, 74 Wn. App. 220, 872 P.2d 1108 (1994).<sup>55</sup> Incidental costs such as messenger services, faxing, scanning and photocopying are not recoverable. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 917 P.2d 1086 (1995).<sup>56</sup> There are no “recognized grounds in equity” supporting an award of

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<sup>55</sup> Courts have made exception to this rule in discrimination, other civil rights cases, and suits necessary to establish coverage. *See, e.g. Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 844 P.2d 389 (1993).

<sup>56</sup> Again, however, successful plaintiffs in discrimination cases have occasionally recovered such costs. *See, e.g., Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86 (1996); *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987).

photocopying costs and to award such costs is error. *Estep*, 148 Wn. App. at 263, *citing Wagner*, 128 Wn.2d at 416.

1. *The Trial Court Abused Its Discretion in Failing to Provide Evaluation of the Respondent's Fees and Costs Sufficient for Review Regarding Appellant's Motion for Offsets*

Here, the trial court did not perform nor did it provide any evaluation or review of Respondent's alleged costs and fees used in order to determine if an offset was available. Instead, the trial court simply noted that there was no offset available.<sup>57</sup> The trial court provided no indication that it even looked at the costs put forth, let alone used a critical eye as it was mandated to do. Appellant raised objection to Respondent's cost bill and stated that even a cursory inspection of the alleged costs revealed that much of the \$15,967.85 should be excluded. Respondent's alleged costs for copying, faxing, and transferring documents to Dropbox, an online storage service; parking charges; travel fees; and messenger services are not supportable or awardable. Respondent's claimed \$3,973.00 for an undisclosed expert's consulting fees is not supportable or awardable. Respondent also included costs for obtaining medical records when none were submitted by her in her ER 904 and barely any records were admitted via her experts who brought their records to trial.

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<sup>57</sup> CP 600-01

Beyond the fact that most of Respondent's alleged costs were inappropriate, many were unreasonable in nature. Copying charges of \$.20 a page and \$.40 a page for faxes far and away exceeds the cost for reasonable copies in an office setting. Additionally, \$600 per hour for a treating chiropractor in Kent, WA rivals the rates of medical doctors. Moreover, why four hours of preparation time is required in a case where most of the medical damages were admitted and fixed remains a mystery.

Respondent's motivation in proffering the inflated costs is blatantly clear: The Offer of Compromise was a mere few hundred dollars over the jury's verdict, and in order to keep the offer above the verdict, Respondent had to eliminate the offset. In what scenario would it be reasonable to expend X+5 just to recover X? Respondent was aware of the value of her case in filing the offer at \$17,499, yet Respondent spent nearly \$16,000 to bring the action. How is that reasonable? Frankly put, it is not.

The trial court apparently accepted Respondent's representations of costs carte blanche as there is no evidence in the record to indicate any of the requisite scrutiny was made to the egregious expenditures. The trial court abused its discretion when it failed to scrutinize, eliminate or even provide an evaluation of these costs sufficient for review. Remand with

instructions to only allow reasonable and appropriate costs is therefore appropriate.

2. *The Trial Court Abused Its Discretion in Failing Allow Offsets*

Here, the trial court abused its discretion by awarding fees not supported by statute of court rule. As stated above, the trial court failed to provide any evaluation or review of Respondent's costs sufficient for review and appears to have merely "rubberstamped" the proffered costs. In so doing, it required Appellant to be responsible for a pro rata share of costs that are not awardable. Appellant, in order to claim its offset, would have been forced to pay thousands of dollars in copying, faxing, and scanning fees; alleged consulting witness fees; expert fees; parking charges; travel fees; messenger services; and costs for records that were not used at trial.

Neither respondent nor the trial court provided any authority for the allowance of these costs, and, as cited above, these costs are not allowed outside a limited number of exceptions not present here. Appellant was entitled to an offset after the payment of its pro rata share of reasonable attorney fees and costs. Under any of the following calculations, Appellant was entitled to an offset:

$$(\text{PIP Payment/Verdict}) \quad \times \quad (\text{Fees} + \text{Costs}) = \quad \text{Pro Rata Share}$$

- Attorney fees provided in Respondent's Response to Motion for Offsets<sup>58</sup> and costs provided in Respondent's Motion for fees and costs:

$$\begin{aligned}
 (\$10,000 / \$17,947.07) & \quad \times \quad (\$3,178.83 + \$1,657.30) \\
 55.72\% & \quad \times \quad \$4,989.71 \quad = \quad \mathbf{\$2,694.69}
 \end{aligned}$$

Accordingly, Appellant would be entitled to a \$7,305.31 offset against PIP payments, reducing the verdict to \$10,641.76 for entry of judgment. This calculation does not account for the \$4,000 payment for undisputed damages that should also be reduced prior to judgment.

- Attorney fees at 40% of the verdict and costs provided in Respondent's Motion for fees and costs:

$$\begin{aligned}
 (\$10,000 / \$17,947.07) & \quad \times \quad (\$7,178.83 + \$1,657.30) \\
 55.72\% & \quad \times \quad \$8,836.13 \quad = \quad \mathbf{\$4,923.49}
 \end{aligned}$$

Accordingly, Appellant would be entitled to a \$5,076.51 offset against PIP payments, reducing the verdict to \$12,870.56 for entry of judgment. This calculation does not account for the \$4,000 payment for undisputed damages that should also be reduced prior to judgment.

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<sup>58</sup> CP 528, line 18.

- Attorney fees at 40% of the verdict and costs provided in Respondent’s Motion for fees and costs with the addition of testifying expert costs for trial<sup>59</sup>:

$$\begin{array}{rclcl}
 (\$10,000 / \$17,947.07) & & \times & & (\$7,178.83 + \$1,657.30 + \$6,748.00) \\
 & & & & \\
 55.72\% & & \times & & \$15,584.13 & = & \mathbf{\$8,683.48}
 \end{array}$$

Accordingly, Appellant would be entitled to a \$1,316.52 offset against PIP payments, reducing the verdict to \$16,630.55 for entry of judgment. This calculation does not account for the \$4,000 payment for undisputed damages that should also be reduced prior to judgment.

The trial court, in denying Appellant’s offset, abused its discretion by allowing unsupported costs and requiring Appellant to bear responsibility therefor. After remand and instruction as to the costs that should be considered, the trial court should revisit its determination as to who is the prevailing party.

**B. The Trial Court Abused Its Discretion in Granting Attorney Fees and Costs**

With respect to offers of compromise, RCW 7.06.050(1)(c) states, in relevant part: “A postarbitration offer of compromise shall not be filed

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<sup>59</sup> Appellant does not concede it is responsible for a pro rata share of testifying expert costs, but for argument’s sake, this calculation is provided.

or communicated to the court or the trier of fact until after judgment on the trial de novo.”

As a matter of statutory interpretation, “[t]he word ‘shall’ in a statute...imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513, 518, P.2d 288 (1993)). Tegland’s Handbook on Civil Procedure cautions, “Communication of the offer of settlement to the trier of fact prior to judgment violates the statute and will result in loss of a prevailing party’s right to an attorney fee award.” Tegland and Ende, 15A Wash. Prac., Handbook on Civil Procedure § 81.6 (2013-2014 ed.) (citing *Hanson v. Estell*, 100 Wn. App. 281, 997 P.2d 426 (2000)); *Hernandez v. Stender*, 182 Wn. App. 52, 358 P.3d 1169 (2014).

In *Hernandez*, the plaintiff disclosed a post-arbitration Offer of Compromise to the trial court in response to the defendant’s motion for remittitur, and Division I of the Washington Court of Appeals held that an award of costs and fees after the disclosure of an Offer of Compromise prior to entry of judgment was an abuse of discretion. *Id.* at 58. There, Hernandez filed a post-arbitration Offer of Compromise of \$9,500 and received a jury award of \$11,703. *Id.* at 55-56. Defendant filed a post-verdict motion for remittitur seeking to lower the jury award, and

Hernandez filed a response that argued that defendant was only seeking to lower the award so that it did not exceed the Offer of Compromise of \$9,500. *Id.* at 56. The trial court entered judgment on the verdict and awarded attorney fees and costs to Hernandez. *Id.*

Defendant appealed the award of attorney fees arguing that disclosure of the Offer precludes the award of fees; to which, Hernandez argued that fee forfeiture is not mandatory and that no sanction is warranted as the trial court entered judgment that mirrored the verdict. *Id.* Hernandez further argued that fee awards are a matter of trial court discretion and that a grant of fees in this situation was not an abuse of discretion. *Id.* at 57.

Division I, relying primarily on *Hanson v. Estell*<sup>60</sup> and *Do v. Farmer*<sup>61</sup>, held: “The clear policy of RCW 7.06.050 is to prevent a trial court from considering an offer of compromise in its entry of judgment. Our case law indicates the importance of complying with the statute. And, it demonstrates that fee forfeiture is an appropriate remedy where a violation frustrates the statute’s purpose.” *Hernandez*, 182 Wn. App. at 57. Division I further stated that Hernandez intentionally violated the clear language of RCW 7.06.050 with the purpose of affecting the trial court’s decision to reduce the verdict prior to judgment. *Id.* at 57-58.

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<sup>60</sup> 100 Wn. App. 281, 997 P.2d 426 (2000).

<sup>61</sup> 127 Wn. App. 180, 110 P.3d 840 (2005)

In *Hanson*, the Court of Appeals reversed an attorney fee award under RCW 4.84.280, which shares similar language with RCW 7.06.050, stating that “[o]ffers of settlement shall not be filed or communicated to the trier of ... fact until after judgment.” 100 Wn. App at 291. There, the plaintiffs filed a copy of their offer of settlement prior to the entry of judgment. *Id.* at 290. The trial court acknowledged disclosure of the offer but nonetheless awarded fees. *Id.* The Court of Appeals found that the clear language of RCW 4.84.280 prohibits the trial court from learning of settlement offers until after the judgment is signed; thus, the plaintiffs' violation of the statute precluded the recovery of attorney fees. *Id.* at 290-291.

In *Do*, Division I addressed the relationship between the *Hanson* decision and RCW 7.06.050. *Do*, 127 Wn. App. at 188. There, the appellant argued that the respondent waived her right to attorney fees, because she did not request them until after the judgment was filed. *Id.* at 187. Division I discussed *Hanson* and acknowledged prior enforcement of statutes with similar provisions. *Id.* at 188. Division I further noted that RCW 7.06.050 requires parties to wait until after the judgment to communicate an offer of compromise. *Id.*

Here, Respondent intentionally violated the clear language of RCW 7.06.050 when she voluntarily disclosed and communicated the

post-arbitration Offer of Compromise to the trial court prior to entry of judgment. Respondent made her intentional disclosure in her response to Appellant's objection to entry of judgment prior to the determination of offsets. Respondent's reply expressly acknowledges that Appellant was actively attempting to reduce the jury's verdict prior to entry of judgment.<sup>62</sup> Respondent also acknowledged that attorney fees and costs were at stake depending on how the trial court ruled on the matter of offsets.<sup>63</sup> Respondent intentionally violated RCW 7.06.050 with the purpose of affecting the trial court's decision to reduce the verdict prior to judgment. Respondent could not have made her intention any more clear.

Respondent later argued in her reply to her motion for attorney fees and costs that this situation is different than that in *Hernandez* (motion for remittitur). In so doing, Respondent made her ultimate belief known: she believes that the trial court had no discretion in determining what fees and costs were reasonable in determining the offset. Respondent made it known that she believes that when she places a cost figure in front of the trial court that the court must accept it as the gospel. Respondent made it known that she believes she is freely able to abuse the PIP offset calculation without being questioned by the trial court.

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<sup>62</sup> CP 803-14 (anticipated pagination after First Supplemental Designation of Clerk's Papers)

<sup>63</sup> CP 803-14

As stated above, the trial court made no finding of fact or law that demonstrated it even reviewed yet alone critiqued Respondent's cost bill to determine if a PIP offset was available. Quite clearly, there is discretion on the part of the trial court in determining if an offset is present because an insurer is only responsible for a pro rata share of **reasonable fees and costs**.

Respondent will likely argue that it was associated counsel that made the disclosure, so it should not be primary counsel that suffers fee forfeiture. This argument should carry no weight. Respondent was free to associate with whomever she selected. In fact, Respondent voluntarily chose to associate with an attorney who represents himself as a very experienced trial attorney with 40 years of experience, a member of the Gerry Spence Trial Lawyers College, whose "reasonable" hourly rate is \$450 per hour, and whose declaration in support of his request for fees goes to great length to demonstrate his expertise with post-arbitration trial de novo.<sup>64</sup> Respondent associated with counsel who knew full well what he was doing in this matter. Moreover, association with other counsel was only necessary due to Respondent rushing to have judgment entered prior to the determination of offset, which was contrary to what Respondent was mandated to do when the trial court granted Appellant's pre-trial motion in

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<sup>64</sup> CP 684-700

limine ordering the determination of the offset issues post-verdict and prior to entry of judgment.

Respondent, with clear intent, disclosed and communicated her post-arbitration Offer of Compromise to the trial court for the purpose of affecting the trial court's decision to reduce the verdict prior to judgment. The trial court correctly determined that (1) Respondent violated RCW 7.06.050(1)(c) when the post-arbitration Offer of Compromise was disclosed and communicated to the court prior to entry of judgment; and (2) held that a determination of Appellant's offsets was necessary and should occur prior to any determination whether Respondent improved her position post-arbitration.<sup>65</sup> Respondent could not have made her intention any more clear. An award of fees here is not warranted and fee forfeiture is the appropriate remedy as this Court has already made abundantly clear. As such, the trial court abused its discretion in awarding fees to Respondent.

**C. The Trial Court Abused Its Discretion in Failing to Reduce Attorney Fees and Costs**<sup>66</sup>

MAR 7.3 states, in pertinent part:

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<sup>65</sup> CP 535-37

<sup>66</sup> Appellant does not believe Respondent was the prevailing party at trial. Appellant believes that Respondent is not entitled to fees for that reason and, alternatively, for the intentional disclosure and communication of the post-arbitration Offer of Compromise in violation of RCW 7.06.050. However, Appellant puts forth this argument in the alternative to prior arguments.

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. . . . "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

RCW 7.06.050 allows for the non-appealing party to serve a written offer of compromise that if not accepted will replace the arbitrator's award for determining whether the appealing party has failed to improve their position after the trial de novo.

On appeal, a court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Cogle*, 56 Wn. App. 499. The burden of demonstrating that a fee is reasonable is upon the fee applicant. *Berryman*, 177 Wn. App. at 657.

Courts must take an active role in assessing the reasonableness of fees and costs, rather than treating cost decisions as a litigation afterthought. *Mahler*, 135 Wn.2d at 434-35. Courts should not simply accept unquestioningly cost and fee affidavits from counsel. *Id.* "Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney." *Mayer v. City of Seattle*, 102 Wn. App. 66,

79, 10 P.3d 408 (2000) (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). The court must make a record of this process, sufficient for review. *Mahler*, 135 Wn.2d at 435. Failure to address specific objections to an attorney fee request does not allow for proper review of these issues. *Berryman*, 177 Wn. App. at 658-59.

In the absence of a specialized statute, Washington follows the *Lodestar* method of calculating fees, with the *Lodestar* amount determined by multiplying a reasonable number of hours times a reasonable hourly rate. *Mahler*, 135 Wn.2d at 433-34. A *lodestar* fee must comply with the ethical rules for attorneys, including the general rule that a lawyer shall not charge an unreasonable fee. *Berryman*, 177 Wn. App. at 660 (citing RPC 1.5; *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993)). The *lodestar* is only the starting point of calculating the appropriate attorney fee, and the fee thus calculated is not necessarily a reasonable fee. *Berryman*, 177 Wn. App. at 660 (citing *Fetzer*, 122 Wn.2d at 151). The total hours an attorney has recorded for work in a case is to be discounted for hours spent on “unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The court should keep in mind that the attorney's reasonable hourly rate encompasses the attorney's efficiency, or “ability to produce results in the minimum time.” *Id.* at 600.

In assessing the reasonableness of a fee request, a “vital” consideration is “the size of the amount in dispute in relation to the fees requested.” *Berryman*, 177 Wn. App. at 660 (citing *Fetzer*, 122 Wn.2d at 150). Specifically, the *Berryman* Court noted,

It is true that the court “will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Mahler*, 135 Wn.2d at 433. This cautionary observation should not, however, become a talisman for justifying an otherwise excessive award. *In a mandatory arbitration case, where the sole objective of filing suit is to obtain compensatory damages for an individual plaintiff, the proportionality of the fee award to the amount at stake remains a vital consideration.*

177 Wn. App. at 660 (emphasis added). “A lodestar figure that ‘grossly exceeds’ the amount in controversy ‘should suggest a downward adjustment’” of an attorney fees award. *Id.* at 661 (citing *Fetzer*, 122 Wn.2d at 156 (noting a lack of billing judgment which raised suspicion of unreasonableness when the attorney claimed over \$200,000 in attorney fees for a “run-of-the-mill” commercial dispute over 120 vacuum cleaners worth less than \$20,000)).

In *Berryman*, a plaintiff was injured by two uninsured motorists and brought a UM claim with her insurer, which did not contest liability for the underlying three-car accident and only contested plaintiff’s alleged damages. *Id.* at 650-51. At trial, the jury awarded \$36,542, which exceeded the \$30,000 post-arbitration Offer of Compromise and entitled

plaintiff to attorney fees and costs under MAR 7.3. *Id.* at 653-54. Plaintiff's counsel applied for and was granted a *lodestar* amount of \$140,000 in attorney fees and \$9,317 in costs. *Id.* at 654. The trial court accepted all of plaintiff's alleged fees and costs without making any alterations based upon the objections of defendant. *Id.* at 658.

Division I determined that the trial court abused its discretion when it failed to conduct any meaningful review to the concerns raised by defendants. *Id.* at 664-65. Specifically, Division I noted that the trial court did not make any changes to the proposed findings of fact and conclusions of law proposed by plaintiff other than adding a multiplier, *Id.* at 657; the trial court did not making any findings or conclusions on the specific objections raised by defendant, *Id.* at 658; and plaintiff's counsel lacked billing judgment demonstrated by their request for exorbitant fees for a case they knew to be worth \$30,000 to \$40,000, *Id.* at 661. Division I determined the trial court had abused its discretion and remanded to the for an attorney fee determination consistent with Division I's opinion.

Here, Respondent claimed 283.8 hours of attorney time, charged at \$350 per hour for primary counsel and \$450 for associated counsel, and 24.55 hours of paralegal time were expended in the nearly six months between the de novo appeal and filing of the motion for costs. Respondent requested a total of \$103,979.75 in attorney fees and \$10,623.20 in costs.

Appellant filed its response and objected to Respondent's request for fees and costs, noting that like in *Berryman*, the number of hours spent on a relatively simple admitted liability and partially admitted damages case was excessive.

Like in *Berryman*, Respondent requested attorney fees that were grossly disproportionate to the value of the case. Respondent requested attorney fees of more than six times the amount of the jury's valuation. This fact alone, like in *Berryman*, demonstrates a lack of billing judgment that should necessitate remand as an abuse of discretion.

While Appellant did not object to the proposed hourly rates figures below, the objection to the hours spent incorporates an element of the hourly rate. As the *Bowers* court noted, the hourly rate encompasses the attorney's efficiency, or "ability to produce results in the minimum time;" therefore, by its nature, a hourly rate of \$350 and \$450 should reflect a level of efficiency and expertise that should not require 283.8 hours of work post arbitration in an admitted liability and partially admitted damages case.

Additionally, like in *Berryman*, Appellant raised a number of specific objections to Respondent's billing entries:

- 12 hour trial days (6 a.m. to 9 p.m.) on 3 trial days, 13 hours spent on day 4 of trial, 10.5 hours for day 5 and 2 hours to attend a jury question and the verdict<sup>67</sup>;
- Numerous hours bills on work with a **'medical consultant'** who is never named and it is unknown what actual work was done to 'benefit' plaintiff's case;
- 6/29/15–1 hour to review defendant's witness lists, 2 of which were disclosed **before** the case was transferred to MAR and were nearly identical to the one served following the de novo, which Mr. Malek **already reviewed** on 6/9/15 for .2
- 7/29/15 – 3.50 hours (9:30 to 1pm) to attend the deposition of Dr. James.
- Work on a Joint Statement of Evidence is a **clerical** function;
- Extensive hours working on motions in limine, which were **uncomplicated**;
- Extensive hours working on jury instructions in a simple tort matter;
- Letters, calls and contact with **Dr. Zhu**, whose office advised defendant's attorney he was in China and 'unavailable' for trial testimony
- Hours of trial preparation regarding addiction, which was a **failed** strategy
- Time spent with Dr. Momeyer and Ms. Pruitt when the defense **admitted** plaintiff was injured, their treatment costs were reasonable and where the majority of the awarded medical expenses were admitted

Here, as in *Berryman*, the trial court did not make any findings of fact or law in relation to any of the specific objections. While the trial court reduced Respondent's primary counsel's hours by 28.9 hours, it made no indication where it was making reductions that would allow for sufficient review. The reduction of hours still resulted in an award of \$88,804.75 in fees, but Appellant cannot properly address the trial court's

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<sup>67</sup> The majority of the time spent in court was done so waiting for plaintiff to drive to Court from Kent.

reduction without remand and specific findings other than noting, again, that this figure is nearly five times the jury's verdict.

The trial court's lack of addressing the specific objections and identifying where reductions in time occur does not create a record sufficient for review and is thus an abuse of discretion.

1. *The Request for Non-Attorney Fees is Not Supported by the Record*

In addition to a request for attorney fees, Respondent submitted a request for non-attorney fees for work done by two paralegals. The review of these billing indicates that most, if not all, of the work does not qualify for an attorney's fee award. In *Absher*, the Court of Appeals recognized that the time of non-lawyer personnel may be included in an attorney fee award and specified the criteria in determining whether such services should be compensated:

(1) the services performed by the non-lawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical.

79 Wn. App. at 845. “[C]ompensation for preparing pleadings for duplication, preparing and delivering copies, requesting copies, and obtaining and delivering a docket sheet” is not within the realm of “reasonable attorney fees.” *Id.* Additionally, contacting the court, preparing basic legal documents, and preparing basic correspondence has been excluded as clerical in nature. *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 151 P.3d 211 (2007).

Here, the billing records of the two paralegals show no sufficient indication to establish that “the services performed were legal rather than clerical.” By contrast, the records show multiple and routine billings for clerical tasks. Furthermore, more than 10 hours was spent by one paralegal attending trial – along with primary counsel. Even if that can be considered legal rather than clerical, the duplication factor alone would warrant no award for the time she spent at trial.

The billing entries are nearly all document processing and duplicative efforts with counsel of record. Again, while the trial court reduced the requested hours, it is unclear where those reductions occurred sufficient for review. Here, any award of non-attorney billable time is unwarranted as the hours spent were clerical in nature or duplicative of other efforts; therefore, any award is an abuse of discretion.

## V. CONCLUSION

For the reasons stated above, Appellant requests that this Court find that the trial court abused its discretion by (1) failing to review Respondent's fees and costs sufficient for review regarding Appellant's motion for offsets, and in turn, denying Appellant's motion for offsets; (2) awarding attorney fees after Respondent intentionally violated RCW 7.06.050 by disclosing and communicating her post-arbitration Offer of Compromise to the trial court prior to entry of judgment; and (3) failing to reduce its award for attorney fees and costs.

DATED: February 17, 2016.

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