THE HONORABLE MICHAEL J. FOX
HEARING DATE: January 23, 2009 @ 10:15 A.M.
WITH ORAL ARGUMENT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARK DeCOURSEY, et ux., et al.,

Plaintiffs,

v.

PAUL STICKNEY, PAUL H. STICKNEY REAL ESTATE SERVICES, INC., and WINDERMERE REAL ESTATE / SCA, INC.

Defendants.

NO. 06-2-24906-2 SEA

PLAINTIFF'S MOTION IN SUPPORT OF AN AWARD OF ATTORNEYS' FEES AND COSTS

I. INTRODUCTION AND RELIEF REQUESTED

Windermere gambled and lost, and the DeCourseys, as persons of limited means, should not be forced to bear the burden of Windermere's wager.

On October 30, 2008, the jury rendered a verdict in favor of the DeCourseys' claims against Paul H. Stickney, Paul H. Stickney Real Estate Services, Inc., and Windermere Real Estate/SCA, Inc. ("Windermere defendants") for breaches of their fiduciary duty and violation of the Washington Consumer Protection Act ("CPA"). During the trial, the DeCourseys presented evidence through live testimony of lay and expert witnesses, and also through admitted documentary evidence. Windermere offered nothing but argument. This conduct at

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trial was consistent with Windermere's actions before trial. Windermere and Stickney forced the DeCourseys to proceed all the way through trial where the only evidence established their liability.

Windermere's litigation practice was emboldened, however, by an unfortunate ruling by Judge Erlick while the DeCourseys were representing themselves *pro se*. Under normal circumstances, RCW 19.86.090 entitles a prevailing private plaintiff under the CPA to an award of "costs of the suit including reasonable attorney fees." On August 23, 2007, the Honorable John Erlick heard motions from various parties regarding alleged discovery violations. At the time of the hearing, the DeCourseys represented themselves *pro se*. The hearing is described in detail in the Declaration of Mark DeCoursey filed with this motion.

Judge Erlick signed an Order that day. In the handwritten Order, Judge Erlick interceded his own hand-written note, stating that the DeCourseys had waived their right to attorney fees. The Court did not hear any testimony or conduct any fact finding as to the elements of waiver. Nor did the Court request any briefing on whether attorneys' fees under the RCW 19.86.090 are waivable.

The DeCourseys seek redress from this Order. Among other things, the Order emboldened Windermere and Stickney force the DeCourseys to trial. Indeed, the day after mediation in August 2008, Stickney's attorney, Michelle McNeill, stated to the DeCourseys' attorney, Brent Nourse, that the DeCourseys should accept half their damages in settlement because "everyone knows [the DeCourseys] are out of money and can't afford to go to trial."

Stickney and Windermere filed numerous motions for summary judgment, sought amendment to orders denying their summary judgments, failed to cooperate in discovery, and continuously threatened to pursue discovery and admit evidence regarding the DeCourseys' political and religious views. Before trial, Windermere argued that (1) it was a third party beneficiary of the Purchase and Sales Agreement; (2) that Stickney was not a Windermere

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agent; and (3) that Windermere was not vicariously liable for Stickney. All of these issues required the DeCourseys to expend time and money filing responsive briefing.

Notwithstanding Windermere's pre-trial motions and discovery practice, Windermere ultimately conceded many issues at trial and admitted no affirmative evidence or testimony at all. Windermere failed to answer DeCourseys' Second Set of Interrogatories and Requests for Production that were propounded specifically to ascertain the factual bases for Windermere's allegations described above, and refused to identify and provide any speaking agents to the DeCourseys' properly noted CR 30(b)(6) deposition. Nonetheless, the DeCourseys were forced to answer each motion Windermere submitted despite Windermere's apparent lack of factual support.

Windermere's failure to support its arguments with evidence is consistent with its failure to provide any affirmative evidence during the trial. Windermere forced a trial in this matter even though it had not secured any expert opinions, it did not submit any live affirmative testimony, and did not submit any admissible documentary evidence for the jury to consider. Windermere exacerbated the DeCourseys' trial preparation costs, however, when it listed experts and witnesses on its pre-trial witness lists, causing the DeCourseys' attorneys to prepare for expert and lay cross examinations. The details of Windermere's actions are included in the Declaration of Brent L. Nourse in support of DeCouseys' Motion for Attorneys' Fees and Costs.

The DeCourseys were served with this suit on April 1, 2006. As adduced at trial, the DeCourseys attempted to settle matters with Windermere before asserting third-party claims against Windermere and Stickney. On April 4, 2006, the DeCourseys sent a letter to affected parties requesting negotiation rather than litigation. On May 18, 2006, the DeCourseys met with representatives of Windermere, again seeking resolution outside of litigation, but Windermere insisted that the DeCourseys would not recover anything outside of a lawsuit.

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See April 4, 2006 letter and DeCoursey Declaration, Exhibit A.. The DeCourseys' claims against Windermere in suit were only pursued after their earlier efforts failed.

Should the costs of the suit and reasonable attorney fees under CPA not be awarded to DeCourseys, much of the jury award for $522,200 damages will be consumed by the costs of the suit, and the DeCourseys will be returned to the state they were in before the suit – their home and much of their retirement funds ruined. *See* Exhibit E concerning the total costs of this suit. The August 23, 2007 Order ensured that the DeCourseys would not be made whole even before the triers of fact heard the case. If the Order is not revised, DeCourseys will be deprived of essential rights afforded CPA plaintiffs by the Washington Legislature. Judge Erlick's Order is subject to revision under CR 54(b), and equity requires that this Court amend the Order to allow the DeCourseys' their rights under RCW 19.86.090 as well as the Purchase and Sales Agreement (a contractual basis for attorneys' fees).

Windermere's conduct before trial exemplifies the policy reasons behind the Legislature's decision to provide for mandatory recovery of attorneys' fees and costs in consumer actions under the CPA. Much, if not most, of Windermere's clientele are individual homeowners without the economic capacity to finance a professional misconduct litigation. Windermere, however, which advertises itself as the largest real estate company in the Pacific Northwest, can rely upon its insurance. Thus, Windermere has the capacity to financially outlast most complaints brought by its wronged clients.

Here, Windermere chose to force the DeCourseys to present their entire case to a jury – this is true even though Windermere had no evidence or expert opinions tending to disprove either the substance or quantum of the DeCourseys' claims. Not only were the DeCourseys forced to present all their evidence, including experts, DeCourseys were also forced to prepare for the witnesses and experts and documents Windermere identified in its Witness and Exhibits List and Joint Statement of Evidence that were never presented. In the end, Windermere was content to watch the DeCourseys present a case-in-chief all the while not

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preparing or presenting a case of its own. Windermere should not be allowed to force the DeCourseys to shoulder the entire burden of Windermere's gamble.

II. COSTS AND ATTORNEY'S FEES INCURRED

The costs of the suit, including reasonable attorneys' fees incurred by the DeCourseys in prosecuting its CPA claim against the Windermere defendants, is attached as Exhibit A to the Declaration of Brent L. Nourse (Lane Powell costs), and Exhibit A to the Declaration of Mark & Carol DeCoursey (*pro se* costs, Exhibit E).

III. EVIDENCE RELIED UPON

The DeCourseys rely upon the Declarations of Richard Edwards, Brent L. Nourse, Geoff Bridgman and Mark DeCoursey together with the exhibits attached therewith. DeCourseys also rely upon the papers and pleadings on file in this matter.

IV. DISCUSSION

A. The DeCourseys did not waive their right to recover the costs of the suit under CPA.

It is well established that a waiver of a right requires that the person making such waiver have the actual intent to do so. Mike M. Johnson Inc. v. County of Spokane, 150 Wn.2d 375, 391, 78 P.3d 161 (2003); TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 165 P.3d 1271, (2007) ("Intent will not be inferred from doubtful or ambiguous facts").

Here, the supposed waiver occurred at the end of a hearing on a motion for a protective order filed by the DeCourseys. After Judge Erlick had ruled on the motion, he asked the DeCourseys if they were seeking attorney fees in the case, without pointing out to the DeCourseys and their opponents that, under CPA, DeCourseys had a right to recover the costs of the suit and reasonable attorney fees. At this point in the litigation, the DeCourseys

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Counsel for the City of Redmond was drafting the order and discussing the contents of the order with Judge Erlick when Mark DeCoursey stated they had not made a claim for attorney's fees, believing they, as pro se litigants, had consulted lawyers, not attorneys. Judge Erlick then added to the order that the DeCourseys waived any claim for attorney's fees except for statutory attorney's fees. But the plain English interpretation of what the DeCourseys said indicates they did not, and would not, waive their right to costs of the suit and attorney fees. See DeCoursey Declaration at Exhibit D which includes a transcript of relevant parts of the hearing. Counsel for the City of Redmond asked Judge Erlick whether that included CPA attorney's fees and Judge Erlick reiterated that the DeCourseys waive any and all attorney's fees. See DeCoursey Declaration at Exhibit D.

Moreover, the issue of waiving attorney's fees had not come before the court until essentially after the hearing ended. There was no briefing or oral argument regarding the waiver of costs of the suit and attorney's fees. See DeCoursey Declaration at Exhibit D.

It is extremely unlikely that the DeCourseys' statements and conduct at the August 23, 2007 hearing satisfy the requirement for waiver articulated in Mike M. Johnson and TMT. The facts suggest that, as of the time of the hearing, the Court did not know whether DeCourseys were aware of their statutory right to costs of suit and attorney fees under the CPA. Lacking such knowledge, it is difficult to see how Court could determine the DeCourseys intended to waive their right. Here, the meaning of Mark DeCoursey's statement relating to attorney fees is at least ambiguous. It is apparent from the transcript that Judge Erlick misunderstood the distinction between "lawyer" and "attorney" Mark was making, and failed to point out that, for the purposes of the matter being discussed, the distinction was not relevant. In light of this plausible interpretation, TMT's caution against inferring intent requires that the finding of the alleged waiver was improper. This is particularly true where, as here, the court did not conduct any factual hearings to determine whether the DeCourseys knew that had such rights and had actual intent to waive their rights.

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Additionally, it does not make any sense that the DeCourseys would intentionally waive their right to recover the costs of suit including attorney fees under the CPA. A suspect in a criminal case might waive his Miranda rights because he believes he can adequately explain his innocence. A litigant in a civil case may waive his right to a jury trial because he believes that a judge can more ably understand the issues. A defendant may waive his right to a speedy trial because he needs more time to develop his case. It defies understanding, however, why a plaintiff in the DeCourseys' position would waive their CPA right to costs of suit and attorney fees. Although this nonsensicality is not dispositive, it seriously calls into question whether or not the DeCourseys actually intended to waive their right to fees. The court docket shows that on discovery of the Court's error, DeCourseys immediately filed for reconsideration to restore their CPA rights.

As will be argued below, the CPA provides for mandatory costs of the suit including attorney fees for prevailing private plaintiffs. Although trial courts have some discretion in determining the amount of the attorney fees, they do not have the discretion not to award them at all. In light of the CPA's overwhelming presumption in favor of attorney fees for plaintiffs such as the DeCourseys, Judge Erlick's ruling should be revised (under CR 54(b)) and the DeCourseys should be awarded the costs of the suit, including attorney fees, given that they prevailed on the merits of their CPA claim.

B. Washington Courts have noted that a prevailing private plaintiff in a CPA claim is necessarily entitled to costs of suit including reasonable attorney fees.

No Washington Court has yet had the opportunity to rule directly on the issue of whether or not costs of suit including attorney fees are mandatory for a prevailing plaintiff under the CPA. Where the issue has been discussed in dicta, however, the conclusion has been that such costs and fees are indeed mandatory.

In State v. Black, the Attorney General brought CPA claims against real estate brokers under theories of antitrust and unfair competition. State v. Black, 100 Wn.2d 793, 676 P.2d

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963 (1984). In Black, the Supreme Court had occasion to discuss the factors to be considered when evaluating the trial court's discretion to award attorney fees to the state in a CPA claim. The court remarked that, "[i]t is clear that in making the award of attorney's fees discretionary in Attorney General suits while *mandatory for prevailing plaintiffs in private actions*, RCW 19.86.090, the Legislature intended that the courts develop standards to guide the exercise of their discretion." Id., 100 Wn.2d at 805 (*italics ours*). Although the reference to private actions is dicta, there is no reason to dismiss the conclusion of the Supreme Court as anything but the highest form of persuasive authority.

C. Secondary sources agree that costs of suit including attorney fees for prevailing private plaintiffs are mandatory in CPA suits.

The editors of Washington Practice are of the opinion that a prevailing private plaintiff in a CPA claim is necessarily entitled to attorney fees. In its section on private CPA suits the treatise informs, "[r]easonable attorney's fees and costs are mandatory for prevailing plaintiffs." Betsy Hollingsworth and Tina Kondo, Washington Practice Series (Thomson Reuters / West 2008) at 1A WAPRAC § 46.25.

ARL 4th is in agreement with Washington Practice regarding the mandatory nature of such fees. 35 ALR 4th at § 3. In § 3, the ALR notes that "[i]n the following cases... the courts held or recognized that an award of attorney's fees to a prevailing plaintiff is mandatory, upon establishment of the requisite showing set forth in the statute." Id. Among the cases cited are a large number of cases from Washington. Id. As in Black, none of these cases directly address the issue of whether the trial court has discretion to declare that the plaintiff has his right to fees. Like Black, however, the language of the cases appears to rest upon the assumption that such fees are indeed mandatory. In the following section, the ALR cites cases where the award of fees has been held to be within the discretion of the trial court. Id. at § 4. The single Washington case cited was one where the CPA plaintiff was the state. Id. Thus, the ALR reaffirms the view set forth in Black: the trial court has discretion to award

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attorney fees where the state is the plaintiff; such fees are mandatory where the prevailing plaintiff is a private party.

D. The principles of statutory interpretation indicate that costs of suit including attorney fees for prevailing private plaintiffs are mandatory under the CPA.

Causes of action under RCW 19.86, *et seq.* are established in two separate subsections. RCW 19.86.80 sets out a cause of action for the state:

> The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; *and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.*

RCW 19.86.80 (*italics ours*). In subsection 90, a cause of action is provided for private plaintiffs:

> Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, *may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee*, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained...

RCW 19.86.90 (*italics ours*).

A plain reading of subsection 90, taken on its own, does not introduce a discretionary element into the plaintiff's ability to recover attorney fees. Discretion is mentioned, for the first time in the subsection, in regard to the award of treble damages. Thus, it appears that "discretion" modifies only the award of damages, not the ability to obtain costs of suit including attorney fees.

One might argue that in this subsection the meaning of the word "recover" is ambiguous. It may not be clear whether the plaintiff is necessarily entitled to recover the things mentioned or whether the court has discretion to limit what he may recover. The principle *noscitur a sociis* (meaning is derived from company) instructs that where a statute is

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ambiguous, meaning may be determined by reference to the rest of the statute. The fact that the legislature explicitly mentioned that the award of damages was discretionary while not using such language in reference to the attorney fees suggests that the attorney fees are not discretionary but instead mandatory.

Even assuming that RCW 19.86.90 is ambiguous, principles of statutory interpretation also require the same conclusion. Where a statute is ambiguous, the principle of interpretation *in pari materia* (on the same subject) instructs that meaning may be derived from other statutes on the same subject. The principle of *in pari materia* directs one to RCW 19.86.80. In that statute, the legislature explicitly conditions an award of attorney fees upon the discretion of the trial court. Thus, if the legislature meant to subject the attorney fees for private causes of action in RCW 19.86.90 to such discretion, they surely would have worded that statute in a way similar to RCW 19.86.80. The legislature's failure to so word the statute indicates that they did not intend the attorney fees available under subsection 90 to be subject to the trial court's discretion; the legislature intended such fees to be mandatory.

E. The public policy behind RCW 19.86.90 suggests that costs of suit including attorney fees should be mandatory for prevailing private plaintiffs.

In Sign-O-Lite, the Court of Appeals ruled on whether CPA attorney fees were available on appeal. Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 825 P.2d 714 (1992). Allowing the plaintiff to collect some fees on appeal, the court noted that the policy behind the award of attorney fees is "aimed at helping the victim file the suit and ultimately serves to protect the public from further violations." Id., 64 Wn.App at 568.

The public policy driving the availability of costs of suit including attorney fees supports the idea that the award of such fees is outside the discretion of the trial court. Many CPA claims present a situation where a plaintiff's attorney will face much more work in litigating a claim than could ever be properly compensated for by a contingent award. Additionally, the plaintiff is often times not in a position to pay the attorney a competitive

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hourly rate. Thus, in the interest of public policy, the attorney is incentivized to take on solid claims, irrespective of value, because of the statutory promise of costs of suit including attorney fees. Were such fees discretionary, plaintiffs' attorneys would be less eager to take on such cases and small value claims would go unlitigated to the detriment of the potential plaintiff and the consuming public. Attorney fees are discretionary where the plaintiff is the state because, unlike the private plaintiff, the state is assured of the resources to properly litigate its claim. Accordingly, the award of attorney fees in the public context is reserved for special instances.

It cannot reasonably be disputed that state actions require less financial incentive for proper litigation than do private actions. If it is the policy of the state to incentivize the proper litigation of claims, it only makes sense for private claims to be supported by stronger incentives than state claims. If state claims are incentivized by the potential for a discretionary attorney fee, it makes good sense that private claims would be more strongly incentivized by the mandatory award of costs or the suit, including attorney fees.

F. No appellate court has ever upheld a trial court ruling that a private CPA plaintiff has waived costs of suit including attorney fees.

For the purposes of this motion, counsel for the DeCourseys have thoroughly surveyed Washington case law as it pertains to the award of attorney fees under the CPA. The DeCourseys' counsel have been unable to find a single instance of any appellate court in Washington upholding a trial court ruling that a private CPA plaintiff has waived his right to attorney fees. The existence of cases such as Black and the writings of the secondary source authors make clear that this is not a novel issue in Washington. The inference to be drawn from the dearth of cases upholding a ruling of waiver is this: courts have so overwhelming recognized the mandatory nature of CPA fees that the issue has not come up on appeal. This Court should continue this line of reasoning by awarding the DeCourseys costs of suit including attorney fees, given that they prevailed on the merits of their CPA claim.

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Calculation of attorney fees under the CPA is within the discretion of the trial court. The method for calculating fees is the lodestar method: a reasonable hourly rate is determined and this rate is then multiplied by the number of hours worked. A fee award may be upwardly modified based on the riskiness of the representation or the quality of the work.

G. DeCourseys Are Entitled to Receive $356,142.45 Under RCW 19.86.090.

RCW 19.86.090 provides that a prevailing private plaintiff may recover a reasonable attorney fee in suit under the Consumer Protection Act ("CPA"). Attorney fees are calculated using the lodestar method: "multiplying a reasonable hourly rate by the number of hours reasonably expended on theories necessary to establish the elements of a Consumer Protection Act cause of action." *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334 858 P.2d 1054 (1993). The trial court has broad discretion in fixing an attorney fee award. *Id.*

As more fully explained in the Declaration of [redacted] L. [redacted] DeCourseys were forced to resist numerous motions from Windermere and Stickney, forced to fight for discovery that Windermere never provided, and ultimately forced to proceed to trial despite Windermere and Stickney's inability to present any affirmative evidence contradicting the DeCourseys' claims.

At the same time, the costs and efforts expended by DeCourseys cannot be apportioned between the various claims asserted against Windermere and Stickney. In order to prove that Stickney committed an unfair and deceptive act, DeCourseys were required to prove that Stickney had an undisclosed conflict of interest. The claims were intertwined such that segregation of fees for one as against another cannot be reasonably made and are impracticable. The Court of Appeals explained segregation of fees between claims as follows:

> Under the CPA, if attorney fees are only reasonable for certain claims, the court must segregate the time spent on other theories and claims on the

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> record, even if the other theories and claims are interrelated or overlap, unless the trial court finds that "no reasonable segregation of successful and unsuccessful claims can be made." *Hume v. Am. Disposal Co.,* 124 Wash.2d 656, 673, 880 P.2d 988 (1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 905, 130 L.Ed.2d 788 (1995). "The burden of segregating, like the burden of showing reasonableness overall, rests on the one claiming such fees." *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N),* 119 Wash.App. 665, 690, 82 P.3d 1199, *review denied,* 152 Wash.2d 1023, 101 P.3d 107 (2004); *Kastanis v. Educ. Employees Credit Union,* 122 Wash.2d 483, 501-02, 859 P.2d 26, 865 P.2d 507 (1993).
>
> Here, the trial court specifically found in its oral ruling that the Ives Estate's trial attorney deducted a small portion of the fees related to the limited partnership investments and that the legal issues involved in all of the investments were the same and, accordingly, failing to prevail on four of them did not impact the time and fees necessary to prevail on the fifth.

Ives v. Ramsden, 142 Wn.App. 369, 397, 174 P.3d 1231 (2008).

As in *Ramsden*, the DeCourseys have deducted over $100,000 in fees related to the prosecution and settlement of claims against [redacted] and [redacted] However, segregating fees for proving claims under the CPA and claims for conflict of interest in this matter cannot be practically segregated. Therefore, DeCourseys are entitled to recover the amounts incurred prosecuting their claims in this matter against Windermere and Stickney.

H. DeCourseys Are Entitled to a Multiplier of 1.5.

This lodestar fee may be adjusted up or down "based upon the contingent nature of success (risk) and, in exceptional circumstances, based also on the quality of work performed." *Fisons*, supra. The burden for obtaining a modifier rests with the party requesting it. *Id.*, 122 Wn.2d at 335. (**"Trial court's are granted broad discretion in fixing an attorney fee; the trial court's grant of an attorney fee will not be overturned but for an abuse of discretion."**) *Id.* (emphasis added).

As noted in *Fisons*, two major types of modifiers are recognized: modifiers for riskiness of representation and modifiers for quality of work.

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The grant of an upward modifier for a party prevailing in especially risky litigation is grounded in public policy. The grant of such increases incentivizes attorneys to engage in representation that they would otherwise decline for fear of nonpayment. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598 675 P.2d 193 (1983) (citing Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U.Pa.L.Rev. 281, 284 (1977)). Although most obviously applicable where an attorney is to receive a contingent fee, this principle also applies where the client will be without funds to pay his attorney in the absence of receiving an award.

In *Broyles*, an employment discrimination case, the court awarded the plaintiffs an upward modifier of 1.5 times the lodestar fee based on the contingent nature of the representation but also on the amount of time expended by the attorneys, the fact that the attorneys were not able to take on additional work and the novel issues involved. *Broyles v. Thurston County*, 195 P.3d 985, 1006 (2008). The Broyles court concluded that the upward modifier was awarded because the case involved "substantial risk of no recovery," and "at the time of accepting the case it was a significant risk." *Id.* Although *Broyles* involved a contingent fee agreement, an attorney representing a client on an hourly basis may also face reduced opportunities for additional, less risky work and the likelihood of nonpayment.

In *Somsak*, the Court of Appeals clarified what is meant by "contingent" in the context of lodestar multipliers. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn.App. 84, 98-99, 52 P.3d 43 (2002). The court wrote that:

> "Given the contingent difficulty of the appeal, the significant risk of defeat that Ms. Somsak's attorneys would ever be paid for their services, the insignificant monetary amount of recovery to [Somsak] and the undesirability of the case to [Somsak's] counsel, it is reasonable to apply the lodestar multiplier of [1.5] to the lodestar calculations for [Somsak's attorneys].
>
> The record contains no indication that the hourly rate claimed by Somsak's attorneys already took into account the factors relied upon by the superior court."

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Id. Thus, "contingent" in *Somsak* referred to the extreme risk of the litigation, not the structure of the fee agreement. Indeed, the defendants in *Somsak* not only disputed the award of an upward modifier but also disputed the "hourly rate" claimed by Somsak's attorneys. Id. Given that Somsak's attorneys were claiming an hourly rate, it is difficult to understand how "contingent" could refer to the nature of the fee agreement. Thus, *Somsak* stands for the principle, wholly consistent with the public policy considerations discussed in *Bowers*, that a multiplier incentivizes attorneys to take litigation where the failure of their client to prevail imposes a large risk that the attorney will go uncompensated. Sometimes the attorney might go uncompensated because he has entered into a contingent fee agreement, other times he might go uncompensated because, in the absence of an award, his client will be unable to pay his agreed upon hourly rate.

In addition to riskiness, the other factor considered when granting lodestar multipliers is the quality of the representation. Although it is acknowledged that an attorney's hourly rate usually factors in the degree of skill and quality that that he brings to the matter, courts have granted upward modifiers where the quality of representation was especially high. *Bowers*, 100 Wash.2d at 599. Although the presence of novel issues alone will not support the grant of an upward modifier, courts have granted upward modifiers where an attorney facing a financially risky representation has had to confront undecided and uncertain legal questions. *See Bloor v. Fritz*, 143 Wn.App. 718, 748-749, 180 P.3d 805 (2008) (grant of lodestar multiplier upheld based on riskiness nature of representation and the presence of novel issues). Courts have also considered the intractability of opposing counsel when granting a lodestar multiplier.

Here, the DeCourseys have incurred substantial costs in pursuing their claims against Windermere in addition to attorneys' fees. *See Declarations of Richard Edwards and Mark DeCoursey.* Unlike Windermere, DeCourseys did not have insurance to cover defense costs, nor did they have the financial wherewithal to prosecute their claims without undertaking

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risks of total financial ruin. Among other things, DeCourseys incurred substantial debt in order to finance the lawsuit. *See Edwards Declaration.* Under traditional theories of equity, DeCourseys, like most Windermere clients, should be compensated for undertaking such a risk to have access to the courts – particularly where, as here, the jury found that the resulting damages, both physical and financial, arising from the complained of conduct were so extensive.

Likewise, Lane Powell's financial risk in this was extensive. In the event that the DeCourseys did not prevail, they would be left without the ability to correct the deficiencies in their home or to pay their fees incurred as against Windermere and Stickney. Although the DeCourseys and Lane Powell have an hourly fee agreement, it became clear early in 2008 that this would become a *de facto* contingent fee representation; the DeCourseys had no hope of fully compensating Lane Powell for their services if they did not prevail. Under these circumstances, multipliers are entirely appropriate to provide incentives for law firms to represent clients similarly situated to the DeCourseys. Moreover, the award of such a multiplier is within the discretion of this Court.

IV. CONCLUSION

Case law, secondary sources and the language of the statute support the interpretation that a trial court does not have the discretion to deny a prevailing private plaintiff attorney fees under the CPA. Similarly, no Washington courts have ever upheld a ruling that a waiver of such attorney fees has occurred. Because it is unlikely that the DeCourseys' language and conduct in the August 23, 2007 hearing constituted such a waiver and because of the CPA's strong policy mandating attorney fees, the ruling that the DeCourseys have waived their rights to an award of costs, including attorney fees, should be revised under Rule 54(b) and they should be able to recover the costs of the suit including reasonable fees since they have prevailed on the merits of their CPA claim.

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