IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

MICHELLE BRAUN, on behalf of herself and all others similarly situated, PLAINTIFF,	:	
v.	:	MARCH TERM, 2002
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc., DEFENDANTS.	:	NO. 3127 CLASS ACTION
DOLORES HUMMEL, on behalf of herself and all others similarly situated, PLAINTIFF,	:	
v.	:	AUGUST TERM, 2004
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc., DEFENDANTS.	:	NO. 3757 CLASS ACTION

OPINION

Introduction

Plaintiffs' Petition for an Award of Attorneys' Fees and Expenses pursuant to the mandatory attorney fees provision of the WPCL and the Pennsylvania common law "common fund doctrine", comes before the court after over five years of litigation, a successful jury verdict for plaintiff and the award of statutory liquidated damages and interest.

This class action lawsuit was initially filed by Plaintiff Braun against Wal-Mart in March, 2002. A subsequent lawsuit was filed by Plaintiff Hummel against Wal-Mart in August, 2004. Plaintiffs and Defendants litigated each case separately until the cases were consolidated for trial in September, 2006. Extensive discovery was conducted and

countless motions were filed by both Plaintiffs and Defendant, as evidenced by the voluminous dockets which extend for 183 pages. The defense forced plaintiffs to file innumerable successful motions to compel discovery. Separate, two-day class certification hearings were held in each case. The Notes of Testimony of the Certification Hearings alone consist of 4. Extensive pre-trial motion practice, pre-trial memorandum, witness and exhibit lists were produced and submitted to the court. Thirty-five motions *in limine* were filed in the month before trial. Finally, on the Saturday before trial, Defendant Wal-Mart served notice on Plaintiffs of sixty never previously identified fact witnesses who they intended to call at trial.[1]

Trial in the case of *Braun v. Wal-Mart*, March Term 2002, No. 3127 and *Hummel v. Wal-Mart*, August Term 2004, No. 3757 began on September 8, 2006. The cases were formally consolidated on the morning of trial. Trial lasted for thirty-two full trial days. The Notes of Testimony of the trial comprise 40 volumes and 3645 pages. The trial resulted in a jury verdict for Plaintiffs. The jury found for Plaintiff class and against Wal-Mart on Plaintiffs' Wage Payment and Collection Law claims finding that Wal-Mart failed to pay workers for all the work they performed and refused to allow workers to take their paid mandatory rest breaks. The jury found for the plaintiff class on common law claims. The Jury awarded total damages of $78,747.414.35. Subsequent to the jury verdict, litigation continued on the issue of entitlement to statutory liquidated damages. By Order dated October 3, 2007 liquidated damages in the amount of $62,253,000.00 were awarded. By Order dated November 14, 2007 interest in the amount of $10,163,863.00 was awarded.

[1] N.T., 4/5/07, p. 33, line 9. In fact, none of these witnesses were called to testify at trial.

The Wage Payment and Collection Law (WPCL)[2] provides: "[t]he court in any action brought under this section shall . . . allow costs for reasonable attorneys' fees of any nature to be paid by the defendant." Plaintiffs' counsel filed a Petition for an Award of Attorneys' Fees and Expenses on October 30, 2006. In support of that Petition, Plaintiffs' included detailed fee and expense reports for all firms involved in the case since its inception. These detailed attorney fee reports factually explain the hours spent by each of the five firms involved in the litigation delineated into eleven categories of work together with each firm's customary hourly rates and contained a description of the firms and attorneys involved.[3] A separate detailed summary expense report explains the expenses incurred by each of the law firms.[4] Plaintiffs' Fee Petition contains affidavits from: Michael Donovan, Esq. of the Philadelphia firm of Donovan Searles, LLC; Judith Spanier, Esq. of the New York firm of Abbey Spanier Rodd Abrams & Paradis, LLP; Franklin Azar, Esq. of the Denver, Colorado firm of Franklin D. Azar & Associates, P.C.; Gerald Bader, Jr., Esq. of the Denver, Colorado firm of Bader & Associates, LLC, and; John Smalley, Esq. of the Dayton, Ohio firm of Dyer, Garofalo, Mann & Schultz.

Defendant filed an Answer to Plaintiffs' Fee Petition. Plaintiffs filed a Reply Memorandum of Law in support of their petition. Plaintiffs' Reply Memorandum contained Verifications of Cary Flitter, Esq., Joseph Podraza, Esq. and Michael Donovan, Esq., which attested that the hourly rates charged by lead class counsel and his partner Mr. David Searles were both appropriate and fair market rates in Philadelphia for litigation of this complexity. Pursuant to plaintiffs' request, the Court required the

[2] 43 P.S. § 260.9a
[3] Fee Petition.
[4] Fee Petition. Plaintiffs also attached five Certifications by Philadelphia class action attorneys that were submitted in connection with the fee petition in *Samuel-Bassett v. Kia Motors America, Inc.*.

defense to reveal the aggregate fees expended in defense of these claims. The defense fees and costs incurred were comparable to plaintiffs' request. Defense fees and costs incurred were in the amount of $17,055,926.00.[5]

Hearings on the Fee Petition were held on February 27 and 28, 2007 and on April 5, 2007. At the February hearing, Defendant offered testimony to contest the reasonableness of Plaintiffs' fees request. Mr. Marquess, a self-proclaimed "fee auditor" is President of Legal Cost Control, Inc. a Corporation whose business is "Controlling Managing and Reducing Legal Fees".[6] Mr. Marquess is paid to provide insurance companies and other large purchasers of legal services a basis to refuse to pay legal bills because his idiosyncratic standards for explanation detail have not been met. Apparently Mr. Marquess makes no effort to ascertain a factual basis grounded in the litigation for fee cutting.[7] No part of Mr. Marquess's business includes any participation, control or even monitoring of litigation itself. He claims no expertise in reducing costs by the efficient management of litigation and makes no cost-saving suggestions to his client or litigation counsel. Mr. Marquess's only function is to criticize the bills of attorneys who actually face a Judge and jury, in this case the attorneys who actually had responsibility for trying a three month class action trial to verdict.

Mr. Marquess is well paid, generally receiving a percentage of the bills he reviews. Accordingly, he has the strongest financial incentive to find excuses for non-payment. He succeeds by pretending that paperwork rather than legal work is the proper criteria for judging legal fees. In this case his testimony revealed he made no effort to

[5] $10,048,944.00 in "law firm fees" through December 31, 2006 and total expenses of $7,006,982.00.
[6] N.T., 2/27/07, p.5, lines 16-20.
[7] His "expert opinion" clearly fails to meet the requirements of Pa. R. Evid. 705.

ascertain the requirements of, or the work performed in the actual litigation he supposedly evaluated.

Mr. Marquess has never taken an academic course in fee auditing. He claims that no certification exists for his created field. There are no professional associations. No peer reviewed journals relate to his profession. No journal of any kind exists in this area.[8]

Mr. Marquess claims no expertise on the staffing requirements of a plaintiff's firm in a class action.

> "Q: It is a true statement, is it not, sir, that you do not consider yourself to be an expert on what it takes to staff a class action case of this sort on behalf of the plaintiff, correct?
>
> A: That would be correct."[9]

Nonetheless, because the standard for qualifying an expert witness in Pennsylvania is unreasonably lax, requiring only a "reasonable pretension to specialized knowledge,"[10] he is qualified to provide expert opinion testimony in the "fee auditing" work for which insurance companies pay him. Although qualified to offer "expert opinion testimony," the sincerity with which he conducts his "evaluation," the methodology or lack thereof, the factual basis on which his opinion is based, his candor, self-interest and bias are all matters for the finder of fact to consider in judging credibility and determining whether to accept all or some or none of his testimony.

His testimony revealed a cavalier disregard for legitimate expert inquiry, and a callus disregard for candor before the Court. He was questioned about his testimony in a different case:

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[8] The "area of expertise" cannot be called a "field of expertise."
[9] N.T. 2/27/07, p. 59 line 23- p. 60 line 3.
[10] See *Miller v. Brass Rail Tavern*, 664 A.2d 525, 541 Pa. 474 (1995).

"Q: Well, you testified in that case, did you not, under oath that your analysis was done in accordance with generally accepted auditing principals. Then you admitted to the Court that there was no such thing as generally accepted legal auditing principals?"

A: Sounds right." [11]

After the remarkable revelation that he had previously sworn under oath that his analysis had been performed according to principals he knew didn't exist, the Court asked him how that was possible. His disregard for the truth finding obligation of a Court proceeding was disclosed by his callous answers:[12]

"The Court: How could you perform an analysis in accordance with something that doesn't exist?

The Witness: I don't remember saying that, but he is representing it. I guess I did.

The Court: You mean anything he tells you, you are just going to agree even though under oath you swore to tell the truth? Start over.

[To the lawyer]: I don't know what was just testified to because he apparently only said "Yes" because you are asking a question about something. Back up to the very beginning.

[To the Witness]: Let me direct you that you are to tell the truth.

The Witness: I understand that.

The Court: Did you tell the truth when you simply said you agreed with him because he seemed to be reading something. Was that the truth or an accommodation?

The Witness: Accommodation.

[11] N.T., 2/27/07, p. 11, lines 11-17.
[12] N.T., 2/27/07, p. 11, line 18-p. 12, line 20.

The Court: You are not to accommodate. Answer the questions truthfully. Do you understand that?

The Witness: Yes."

In the ensuing questioning, Mr. Marquess claimed a remarkable failure to recall his testimony in the "World-Wide Direct Bankruptcy case."[13] He also claimed not to remember testifying in a fee petition hearing in the class action *Bassett v. Kia*[14]over which this court presided. He claimed not to recall that in the *Bassett v. Kia* case he offered the equally memorable "expert" opinion that no fee should be paid to any plaintiff lawyer for time spent in Court at a trial which resulted in a multimillion dollar verdict.

At other times, the content of his testimony rapidly fluttered.

First he claimed he read the trial transcript in preparation for his opinion.[15]

"Q: Have you read the trial transcript *Braun/Hummel* trial?

A: I did.

Q: When did you do that?

A: Sometime in the last three weeks.

Q: How long did it take you to do that?

A: Long time.

Q: Tell me. How long?

A: I don't remember. I don't keep time records."

[13] *In re Worldwide Direct, Inc.* 316 B.R. 637 (2004). The Court rejects his feigned lack of memory as incredible. The Judge in that case wrote in his opinion: "Although the Fee Auditor asserted that his analysis was done in accordance with 'generally accepted legal auditing principles,' he acknowledged that there is no such thing." Such a rebuke in a Judicial opinion is memorable.
[14] The verdict has been recently affirmed by the Superior Court.
[15] N.T., 2/27/07, p. 19, lines 11-20.

However, upon the most minimal additional inquiry, he admitted that he had not reviewed the entire transcript:

"A: I reviewed whatever I was supplied regarding the trial.

Q: They provided you the entire trial transcript?

A: I don't know if it was the entire trial.

Q: How many volumes were there?

A: I don't recall.

Q: How many days of testimony did you review?

A: I don't remember."

He then professed an inability to answer the most simple question:[16]

"Q: One volume for one day?

A: I don't remember."

Yet when the Court asked whether it could possibly have been only one volume, he was remarkably able to answer the exact same question:

"Q: Could it have been one volume?

A: No."

Upon cross-examination, he even pretended to be unable to recall whether he had read more than a single page:

"Q: More than one page?"

"A: I don't recall."

Yet when the Court appropriately expressed incredulity at yet another memory lapse, he was remarkably able to answer:

[16] N.T., 2/27/07, p. 20, line 24

"Q: You don't recall whether it was more than one page?"

"A: "Whatever I got was more than one page, clearly."[17]

The Court sought to clarify his understanding of his oath to tell the truth: "Why did you testify that you don't recall whether it was more than one page when it's not an accurate answer."

The Witness said: "I don't know. I clarified it."

This Court rejects the proposition that being caught in devious testimony is justified if the distortion of the truth can be characterized by the word: "clarify."

Substantively, Mr. Marquess claimed that he was unable to determine the nature of work performed by Plaintiffs counsel from the records he was given by Defense counsel and therefore plaintiffs' attorneys should not be paid. His inability to "determine" whether plaintiffs' counsel actually performed the documented legal work is the result of his biased and inadequate review.

Mr. Marquess claims that no fee should be awarded for what he characterized as "non-participating attorneys" billing for trial days. Yet he made no effort whatsoever to determine whether their attendance at trial had in fact been needed to assist the trial team. He made no effort to ascertain whether those attorneys had participated in any of the dozens of depositions in this case. He made no effort to determine whether these individuals had specialized knowledge of the case in areas which may have arisen during the trial day or knew the location or significance of critical documents which may become relevant. He did not even analyze the detailed explanation of the work these attorneys performed outside of the courtroom on those very days.

[17] N.T., 2/27/07, p. 22, lines 10-13.

Mr. Marquess opined that the Dyer firm should receive no fee because he made no effort to ascertain, by even the most minimal effort of asking his employer, defense counsel herein, which depositions members of that firm attended.

This "opinion" has no factual basis whatsoever.[18] In fact cross-examination revealed that his "opinion" should not even be characterized as an opinion. It was nothing more than purchased testimony. He was asked[19]:

"Q: Were you aware that those non-participating attorneys were doing work to benefit the class."

A: I don't know.

Q: You were provided their detailed time records, you saw exactly what they were doing. Is it not the truth that they were doing things that benefited the class that ended up in that the class obtained the judgment that it did?

A: I don't know.

Q: You don't have an opinion one way or the other.

A: No."

He even admitted that he had no opinion and recanted his testimony that they should not be paid at[20]:

"Q: You cannot testify under oath that it's your opinion that the fees that were generated are incurred for the time what you call non-participating attorneys, you cannot say under oath that time was not reasonable and necessary to obtain the result that was obtained in this case, can you?

A: That's correct.

[18] N.T., 2/27/07, p. 47, line 23-p. 48, line 7. An expert opinion must have a factual basis. The Court rejects expert opinion grounded in a selective review of factual material whether that selective review is because counsel has supplied inadequate factual material or the expert has chosen to ignore, or not seek relevant information. *See, Factor v. Bicycle Technology, Inc.,* 707 A.2d 504 (Pa. 1998).
[19] N.T., 2/27/07, p. 45, lines 6-17.
[20] N.T., 2/27/07, p. 45, line 24-p.46, line 6.

Q: You can't say that it's unreasonable to submit that time and ask to be compensated for that time, can you because you don't know what they did?

A: That's correct."

This "expert's" oblivion to factual support was pervasive[21]:

"Q: You don't know for example that Wal-Mart had 200 witnesses identified, did you?

A: No.

Q: You didn't know that on the Saturday before this trial commenced that Wal-Mart served on us a whole new list of fact witnesses they intended to call, do you?

A: No."

And[22]:

"Q: How many experts did Wal-Mart designate?

A: I don't recall.

Q: How much time did what you call non-participating associates put in to help the trial counsel sitting at this trial cross exam witnesses that never showed up?

A: No idea."

And[23]:

"Q: How many depositions were taken in this case.

A: I don't know.

Q. How many were taken by the non-participating associates whose time you criticized.

A. I don't know."

[21] N.T., 2/27/07, p. 46, line 11-18.
[22] N.T., 2/27/07, p. 47, line 5-11.
[23] N.T., 2/27/07, p. 50, line 22-p.51, line 3.

And[24]:

"Q: You don't have any opinion as to what part of that $278,200.00 was incurred for compensable, recoverable attorney's fees on behalf of the class, do you?

A: No.

Q: You don't know how much of the time the Dyer Firm spent taking depositions?

A: No."

Likewise, the "expert" did not know or make any effort to determine whether the attorneys he says should not be paid had been dealing with clients, reviewing potential witnesses, reviewing pleadings, or discovery material, analyzing testimony, locating documents, preparing for the next day, or any other necessary activity for the prosecution of the case. Mr. Marquess viewed his job as limited to finding insufficient explanations in the time records as compared to his idiosyncratic standards.[25]

He did not even know that the Braun litigation was related to the Hummel litigation[26].

"Q: You don't know whether the class work on behalf of Braun was in any way related or intertwined with that of Hummel, do you?

A: No."

Mr. Marquess believes that plaintiff's counsel should not be entitled to have any supporting attorneys, paralegals, law students, or other personnel in the Courtroom. His opinion is that only attorneys who question witnesses, or argue before the Court should be paid. Were it not that the totality of his testimony was clearly disingenuous and had

[24] N.T., 2/27/07, p. 51, line 18-25.
[25] In the *Worldwide* case he claimed his standards were proprietary and not subject to discovery.
[26] N.T., 2/27/07, p. 60, line 4.

he not demonstrated total disregard for the sanctity of the truth finding process in the courtroom, one might conclude that he was only ignorant or naïve.[27] It is indeed ironic that in a case in which the jury found that Wal-Mart had failed to pay its workers millions of dollars in earned wages, defendant would use this expert to attempt to do the same thing to the attorneys who represented the class.

Mr. Marquess declined to offer an opinion about what fees had been earned. However, when provided with a calculator in the courtroom he could easily calculate the never previously expressed opinion that he offered no criticism of a fee of $10,359,200.00.[28] His criticism such as it is, is limited to $277,200.00 claimed by the Dyer firm, $550,505.00 in what he calls "duplicate attorneys" at trial and $202,991.00 for intern and law clerk work.

Mr. Marquess's opinion is totally and entirely rejected on the basis that he had no pretense to knowledge of what a plaintiff's firm needs to do to prepare and try a class action jury trial to verdict and has no factual basis to evaluate the work performed in this case. His testimony is rejected as grossly lacking in necessary and readily obtainable facts.[29] His testimony lacks all credibility, repeatedly demonstrating an unwillingness to have his statements cross-examined, by providing misleading and transparently disingenuous answers in a conscious effort to obfuscate.

In contrast, the Court heard honest defense testimony from Mr. Wellington, admitted as an expert on reasonable fees for counsel and employees of a law firm. Mr.

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[27] In fact, if an honest appraisal was desired by the client, attorneys or expert, countless documents could have been considered. A simple review of the dockets or the appearance of counsel at deposition may have resolved many "questions" conjured by Mr. Marquess. In fact, he could have simply consulted with defense counsel or actually reviewed the notes of testimony which had been daily transcribed.
[28] N. T., 2/27/07, p. 71, lines 17-23.
[29] See Pa. R. Evid. 705.

Wellington had no criticism of the number of attorneys involved, the work performed and the hours spent by Plaintiffs' litigation team.[30] Mr. Wellington affirmed most of the hourly rates claimed by class counsel.[31] Mr. Wellington's actual criticisms concerning rates claimed was rendered in part upon his knowledge of recent cases in which his own firm had been involved. None of those cases had been class action litigation.

In contrast to Mr. Marquess testimony, Mr. Wellington is highly qualified and sincerely evaluated relevant material and testified ethically. His opinion, however, differs from opinions expressed by other highly qualified and ethical counsel. The trial court as finder of fact must evaluate the affidavit testimony of Plaintiffs' counsel and experts as to the reasonableness and necessity of the legal services provided. In evaluating conflicting evidence, the Court must make a factual determination. The Court finds that the rates requested by plaintiff counsel and the allocation of work performed by lead counsel, partner-level counsel, associates, paralegals and law students is reasonable for a plaintiffs consortium of law firms litigating, on a contingent basis, a class action of this magnitude against a determined and well-financed defendant.

In *Rode v. Dellarciprete*,[32] the Third Circuit Court of Appeals reviewed a trial attorneys' fee award in a civil rights action. The Third Circuit outlined general legal principles to properly guide a determination of reasonable attorneys' fees. The Third Circuit held that in a statutory fee case, the party seeking attorneys' fees has the initial burden of proving that its fee request is reasonable. To meet this burden, the fee petitioner must submit evidence which supports both the hours worked and the rates

[30] *See* N.T., 2/27/07, p. 78, lines 2-12.
[31] N.T., 2/27/07, p. 79 lines 11-16.
[32] 892 F.2d 1177 (3d Cir. 1990). This claim had been brought under 42 U.S.C. 2000e-3 which prohibits unlawful employment practices. Much like the WPCL, 42 U.S.C. 1988 provides that in civil rights actions, the court, in its discretion, determines a reasonable attorney's fee.

claimed.[33] Once the fee petitioner has met this initial burden however, the burden shifts to the party opposing the fee award to challenge the reasonableness of the requested fee with sufficient specificity.[34] This same analysis applies to Pennsylvania fee shifting statutes including the WPCL.

Wal-Mart requests the Court allocate time spent on WPCL claims and non-WPCL claims, and further requests reductions to Plaintiffs' base fee on the basis of the testimony of Mr. Marquess.[35] Mr. Marquess's review of the case was biased and intentionally restricted factually. Although the defense claims: "the expert could only work with the time records he was given," the Court rejects the concept that an expert is only a hired gun who applies "expertise" to the limited material provided by counsel without having any responsibility to request available information reasonably required to render an honest, valid opinion.[36]

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[33] *Id*. at 1183. *See also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates").

[34] *Id., citing Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989).

[35] N.T., 4/5/07, p. 51, lines 5-11.

[36] The integrity and honesty of expert witnesses is the bedrock of the Federal philosophy of Evidence incorporated in part into the Pennsylvania Code of Evidence Rule 703. Pennsylvania Rule 703 permits an expert to transcend the rules incorporated into all other rules of evidence by relying on material "inadmissible" into evidence if they testify that it is "routinely used in their profession." The professional witness testifying without integrity, saying whatever their masters pay them to say, makes a mockery of the integrity of our system of justice. Pennsylvania Rule 705 requires that the expert reveal rather than obfuscate or conceal his factual basis. Pennsylvania Rule 705 requires an expert to testify as to "the facts or data on which the opinion or inference is based." Numerous appellate Court decisions have rejected expert opinion testimony not appropriately grounded on facts of records. In, *Viener v. Jacobs*, 834 A.2d. 546 (Pa. Super 2003) expert evaluation testimony was precluded because that expert's factual understanding was not supported by evidence of record. The Superior Court said: "It is well settled that expert testimony is incompetent if it lacks an adequate basis in fact." In *Jones v. Wilt*, 871 A.2d. 210 (Pa. Super 2005) expert opinion grounded in facts not supported by any evidence as to the intent of the decedent was precluded saying: "It is well settled law ….that an expert may not express his opinion upon facts which are not warranted in the record regardless of the expert's skill and experience." In *Kelly v. Thachery*, 874 A.2d. 649 (Pa. Super 2005) expert testimony was rejected in a products liability case because it was grounded in an inaccurate understanding that defendants "had control of the rigging and hoisting." Since the facts did not support the expert's assumptions, the opinion was stricken. In *Hutchinson v. Penske*, 876 A.2d. 978 (Pa. Super 2005) expert testimony as to the crashworthiness of the cab of a truck was inadequately grounded upon National Highway Traffic Safety Administration Reports, University of Michigan Transportation Research Institute reports and Society of Automotive Engineers Reports. The

Pennsylvania cases address the standards for the award of attorney's fees pursuant to the WPCL statute. In addition there are Pennsylvania and Federal court cases evaluating and awarding attorney fees under comparable fee-shifting statutes. The reasoning of those opinions is instructive.

In *Oberneder v. Link*,[37] the Pennsylvania Supreme Court clearly held that employees prevailing under the WPCL were entitled to attorney fees. The award of attorney fees is not discretionary. The Supreme Court Said: "…an award of attorney's fees to a prevailing employee in an action brought under the Wage Payment and collection law is mandatory."[38] The Supreme Court held that the statute mandated *reasonable* attorneys' fees and that the trial court exercise discretion to determine the propriety of fees to be awarded.[39]

To determine reasonable fees to be awarded, the court must determine whether the hours claimed by the fee petitioner were actually and reasonably expended[40] and whether the hourly rate requested is reasonable. A reasonable hourly rate is calculated based on the prevailing market rates in the relevant communities, and comparing the rates requested by the prevailing party with rates of lawyers of reasonably comparable skill,

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testimony was stricken because there was no demonstration that any of the accidents or vehicles which formed the factual basis for these reports were similar to the accident before the court.

While the basic principal of law that an expert opinion has value only if the jury accepts the facts on which it is based (Standard Civil Jury Instruction 5.31) has received renewed interest subsequent to adoption of the Pennsylvania Rules of Evidence, it is not a new concept. In 1998 the Supreme Court rejected expert testimony that a bicycle was defective because the bicycle which the expert had examined had been materially altered after the accident. *Factor v. Bicycle Technology, Inc.*, 707 A.2d. 504 (Pa. 1998). It is also obvious that an expert may not bootstrap facts into the record through purported analysis or opinion. *See Commonwealth v. Smith*, 861 A.2d. 892 (Pa. 2004).

[37] *Oberneder v. Link Computer Corp., 696 A.2d 148 (Pa. 1997).*

[38] 696 A.2d 148, 151 (Pa. 1997).

[39] *Id*. at 151, n.4.

[40] *Rode*, 892 F.2d at 1183. Although the Plaintiffs in this case were not successful on all claims, the claims were intertwined and not distinct. The defense resistance to discovery and their claim that their own employee computer records could not be used to prove any of plaintiff's claim including those which were successful permeated the entire case.

experience and reputation. The court must then multiply the reasonable hourly rate by the reasonably required hours expended. This calculation reveals a base attorney fee sometimes called a lodestar fee.

The court has discretion to adjust the lodestar. A party seeking an adjustment to the lodestar has the burden of proving that an adjustment is appropriate. The court can adjust the lodestar by applying a contingency multiplier if the case was taken on a contingent basis.[41] A contingency multiplier is warranted if the Court concludes that this contingent fee case presented significantly higher risks to counsel than hourly fee cases, and requires a determination of what contingent fee would be necessary to attract competent counsel and, whether the prevailing party would have faced substantial difficulties finding counsel without the potential of an adjustment because of the risk taken.[42]

The Pennsylvania Superior Court addressed just such an adjustment in the case of *Signora v. Liberty Travel, Inc*., involving attorneys' fees under the WPCL.[43] The *Signora* trial court applied a contingency multiplier to the earned attorneys' fees. Examining the fee awarded, the Superior Court considered the degree of success as a critical consideration. The Superior Court in *Signora* specifically affirmed the discretion of the trial Court to adjust the lodestar fee because of the contingency of the fee.

The *Signora* Court analyzed Pennsylvania Rule of Civil Procedure 1716 controlling the award of counsel fees in class action litigation.[44] Pennsylvania Rule of Civil Procedure 1716 reads:

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[41] *Signora v. Liberty Travel, Inc.*, 886 A.2d 284 (Pa. Super. 2005).
[42] *Rode*, at 1184.
[43] 886 A.2d 284 (Pa. Super. 2005).
[44] *Id*. at 293.

> "In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors: (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success."

Other relevant factors include the size of the fund created, the number of persons benefited; the skill and efficiency of the attorneys involved; the complexity and duration of the litigation; the risk of nonpayment; the amount of time devoted to the case by plaintiffs' counsel; and awards in similar cases. In *Logan v. Marks*[45], the Superior Court said:

> "A comparison of the size of the award to the objectives of the litigation is highly relevant to determining the degree of success obtained, the critical inquiry in determining the reasonableness of a requested fee."

In *Signora* the Superior Court found that class counsel's records and attorney resumes had properly substantiated the hourly rate requested and using the "lodestar" method properly granted class counsel a 1.5 contingency multiplier to that base or lodestar fee.[46] Courts have frequently found a multiplier of three or greater to be reasonable in contingency class action litigation.

Plaintiffs' counsel herein have *prima facie* demonstrated that their requested attorneys' fees and costs incurred are reasonable for the litigation of this case. Plaintiffs' attorney team has extensively detailed the time expended by 26 lawyers and 17 paralegals over five years of litigation. Plaintiffs' counsel has submitted extensive evidence of the hours worked contained in several volumes of detailed time reports described by individual attorney and task. The qualifications of the individual lawyers and firms involved have been documented.

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[45] 704 A.2d 671, 673 (Pa. Super. 1997).
[46] *Signora*, 886 A.2d at 293-294.

Having presided over this litigation for years, this Court can personally confirm the extensive work, time, and effort devoted by both sides and specifically plaintiffs' lawyers, pre-certification, at certification, pre-trial, trial and post-trial. The reasonableness of Plaintiffs' fee request is established by its detailed documentation and the observations.

The reasonableness of plaintiffs' counsels' time and attorney rates may be verified by comparison to attorneys' fees actually approved in comparable litigation. A Court could scour reported cases and as in real estate appraisal find "comparables" in which fee awards were granted. A Court could then apply its own experience and expertise to compare this case to the "comparables" and reach a proper fee award. Fortuitously, the Court has before it an exact "comparable."[47] This Court ordered the defense to reveal its attorney fees and expenses in an exactly comparable case, this same case. The defense attorney fees were in the amount of $10,048,944.00 and their costs were $7,006,982.00.[48] Work which must be performed by plaintiffs' counsel such as strategy, coordination, learning facts, witnesses and data can to an unknown extent be performed by defense in house employees and in house counsel and not reflected in the fees paid to externally retained attorneys. It is also generally true that the party which controls the documents and data and therefore knows what exists and its contents can

[47]This Court notes that all defense counsel involved in the case including Pro Hoc Vice New York counsel, the excellent local counsel who replaced them after the certification hearing and the Houston Pro Hoc Vice counsel team which tried the case with the admirable assistance of Mr. Flaherty of the firm of Wolf, Block, Schorr and Solis-Cohen, LLP were comparable in skill and reputation to plaintiff's discovery, certification and trial attorneys.

[48] N.T., 4/5/07, p. 32 lines 13-15. No detailed time or expense records were required and thus it is impossible to determine what time was assigned to the Pennsylvania class action as opposed to other class action litigation around the country resulting in savings in litigation fees and costs in this case nor to determine what basic legal and analytic work performed by corporate legal and non-legal employees underlying the entire national litigation.

have lower attorney fees than plaintiffs who must ascertain both what exists and what it contains and as in this case must repeatedly obtain court orders to secure access.

The prima facie reasonableness of plaintiffs' lodestar fee request is verified by reference to defense counsel fees and costs. It is verified by the fact that the Defendant litigation team expended the same order of magnitude of legal fees and costs despite not having no burden of proof and not facing the contingency of no recovery.

Another approach to evaluating the reasonableness of a fee request can be called the percentage of recovery method. In that evaluation the court first calculates the value of the total recovery and the relationship between recovery and fee. That percentage of recovery can then be weighed against all the relevant factors to determine reasonableness.

The reasonableness of this fee request is further verified by the contingency analysis. The jury verdict was $78,747,414.35. The requested $12.3 million fee represents a contingency equivalent of only 16 percent of the jury award. When the WPCL mandatory statutory penalty of $62,000,000.00 and the $10,163,863.00 interest award are added, the requested fee represents a contingent fee of only 8%. No Plaintiff's firm would have accepted this case on such a contingency. No plaintiff's firm would accept any contested liability claim on such a low contingency fee. No competent firm would ever have accepted this case on less than a one-third contingency had they recognized that over $3,000,000.00 would have to be advanced and litigation prior to appeal would extend over 5 years.

The contingency factor in this complex case justifies an award of at least one third of the recovery. Plaintiffs' counsel had a high degree of success in this case. Plaintiffs won a verdict of $151,164,277.35 on a claim which was actively and zealously contested

on every discovery, trial, and post trial issue. Plaintiffs' high degree of success has benefited 186,000 class members, restoring to them earnings they had earned. Plaintiffs' success has delivered a message to employees and employers across the Commonwealth, which proclaims that work without pay is not tolerated in Pennsylvania.

Plaintiffs' counsel is requesting a contingency multiplier of 3.7 on their earned hourly base or lodestar fee. Their request for a total fee $45.6 million in fees is reasonable taking into serious consideration all appropriate factors, including those specifically detailed in Rule 1716.

This award is reasonable. The fees awarded herein represent 31% of the total value of recovery exclusive of fees. The contingency multiplier requested is appropriate because of the exceptionally high degree of difficulty in the case and the remarkable success achieved.

An allocation must be made between WPCL and non-WPCL claims because the fees awarded pursuant to the successful WPCL claims must, by statute, be added to the verdict while the fee earned from the non-WPCL award must be paid by class members out of the common fund created. In the case of *Tambay v. Peer*[49], the Eastern District Court of Pennsylvania awarded attorneys' fees under the WPCL. That case involved both WPCL and non-WPCL claims. In awarding fees, that court decided that it should make a reasonable allocation of the total fee award based on the WPCL claim as opposed to the non-WPCL claim. In this case, WPCL claims account for over $111 million of recovery on behalf of the class. Non-WPCL claims account for over $39 million.

[49] No. 03-4499, 2006 U.S. Dist. LEXIS 48637 (July 17, 2006 E.D. Pa.).

Litigation of the two claims has always been inexorably intertwined.[50] Accordingly, the total attorneys' fee awarded is allocated in the exact proportion as the recovery for WPCL and non-WPCL claims.

Accordingly, a Judgment in the amount of $187,648,589.11 is entered, calculated as follows:

WPCL verdict:	$ 49,568,541.00
Common Law verdict:	$ 29,178,873.35
Statutory Interest:	$ 10,163,863.00
WPCL penalty:	$ 62,253,000.00
WPCL attorney fees:	$ 33,813,986.24
WPCL expenses:	$ 2,670,325.52
Total:[51]	$187,648,589.11

A Judgment is hereby entered in the amount of $187,648,589.11.

Unless an appeal is taken, counsel are directed to meet and confer on the fair method of distribution to class members with 40 days hereof.

BY THE COURT

_____ _____

DATE MARK I. BERNSTEIN, J.

[50] The attorney which would be incurred to ascertain point by point what time could be exclusively allocated to the non-WPCL claims, if possible, would itself cost millions in wasted additional attorney fees.
[51] Attorney fees in the amount of $11,880,589.76 and expenses of $938,222.48 shall be paid from the Common Law fund created.