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No. 728440

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

GEOFFREY CHISM,

Appellant,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Respondents.

CROSS-APPELLANTS' REPLY BRIEF

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Repeatedly before trial and consistently throughout trial, Chism insisted that determining whether he had breached his RPC duties was exclusively the province of the trial court, requiring that the trial judge adjudicate those issues after a jury determination of Chism's legal causes of action.[1] Accordingly, the trial court kept all reference to Chism's RPC duties from the jury, and kept all relevant RPC standards out of the jury instructions.

The trial court submitted three advisory interrogatories to the jury on whether Chism's contract terms were fair, based upon the parties explicitly agreeing that the jury's responses would be merely advisory to the court in its adjudication of Chism's alleged RPC violations.[2] Had Chism not agreed that the jury's responses were only advisory, the trial court would not have submitted even the generic "fairness" questions that it did for the jury to respond to.[3]

The jury ruled for Chism on his legal causes of action. The trial court then took up adjudication of his RPC violations. But at that point Chism reversed his position, and began to argue the proposition that is the foundation of his position on appeal: That the jury verdict on his legal causes of action blocked adjudication of his RPC violations. Chism

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1 See record citations in Brief of Respondents, footnotes 134-138.
2 RP (5/29/14):148; RP (9/30/14):49.
3 RP (9/30/14):49.

argued that the trial court could not determine him to have violated his ethical duties, and that (once the trial court *did* determine he had violated those duties) the court lacked the authority to impose equitable relief against him.

In this appeal Chism argues that by adjudicating his "ostensible violations"[4] the trial court "concocted"[5] legal duties he should not have been bound by, "made a mockery"[6] of the RPCs by holding Chism to the same professional obligations that bind every other attorney in the State, and was "nit-picking"[7] in finding ethical breaches that the jury (which knew nothing of Chism's ethical obligations) had not itself found.

That position is not only the basis for Chism's affirmative appeal, it is the basis for his opposition to Tri-State's cross-appeal. Because it fundamentally miscasts the constitutional power of the Washington Supreme Court, Chism's argument fails. The trial court's authority to craft equitable relief in response to Chism's ethical violations included discretion to deny punitive damages, prejudgment interest, and attorney fees that a non-attorney (who would not have had Chism's professional duties) could have recovered by statute. The trial court was mistaken in

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4 Reply Brief of Appellant at 45.

5 *Id.*

6 *Id* at 31.

7 *Id* at 46.

believing it lacked that authority, and that conclusion of law by the trial court was error.

I. The Supreme Court Has Absolute, Unconstrained Authority To Establish Ethical Standards For Washington Attorneys, And To Discipline For Their Breach.

> This court is ultimately responsible for lawyer discipline in the state of Washington *and holds plenary authority in that regard.*

In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774, 781, 214 P.3d 897, 900 (2009), *quoting In re Disciplinary Proceeding Against Perez-Pena*, 161 Wash.2d 820, 829, 168 P.3d 408 (2007) (emphasis added). If the Court's authority to find and discipline professional misconduct was constrained by a jury's verdict on a legal cause of action, the Court's authority would not be 'absolute,' 'unlimited,' 'unrestricted,' 'unconditional,' nor any of the other dictionary definitions for "plenary." It would instead be limited, subservient, and deferential.

The Supreme Court's authority to find and discipline attorney misconduct is absolute because the Washington Constitution vests that authority in the Supreme Court. *See Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 452, 635 P.2d 730, 735 (1981) ("It is a well established principle that one of the inherent powers of the judiciary is the power to regulate the practice of law."); *Short v.*

Demopolis, 103 Wn.2d 52, 62, 691 P.2d 163, 169 (1984) ("The Supreme Court has an exclusive, inherent power to admit, enroll, discipline, and disbar attorneys.").

II. The Supreme Court Vests In Trial Courts Broad Equitable Authority To Discipline The Violation Of An Attorney's Professional Duties As Part Of Crafting Civil Judgments Involving Attorney Litigants.

When an attorney is a civil litigant and the dispute involves alleged breach of his professional obligations, the trial court adjudicates those issues, and the adjudication is ultimately subject to appellate review by the Supreme Court. In *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), an attorney represented multiple clients (with potentially differing interests) in tax proceedings over their tax shelter investments. The investor clients sued, alleging breach of the attorney's professional duties by failing to disclose the conflict they had with the interests of the promoter clients, and by proceeding with joint representation without the clients' informed consent.

The trial court found breach of the attorney's professional obligations by partial summary judgment. In the face of those violations, the trial court ordered complete disgorgement of all fees paid by the investor clients. 118 Wn.2d at 455-56.

The Supreme Court declared its appellate review to be an appropriate platform to both affirm and endorse the trial court's equitable authority to craft civil judgments disciplining attorneys for professional misconduct. "Today, we reaffirm this Court's commitment to interpreting attorney discipline rules for the benefit of the public." 118 Wn.2d at 461.

The Supreme Court then affirmed the trial court's determination that the attorney had in fact violated his professional duties. "The trial court properly granted the investors' motion for partial summary judgment since it correctly concluded that, as a matter of law, Denver violated the CPR." 118 Wn.2d at 461, 824 P.2d at 1212. The Supreme Court likewise affirmed the trial court's order of disgorgement, explicitly recognizing the broad equitable authority granted to the trial court to enforce the judiciary's disciplinary power over Washington attorneys:

> The trial court ordered [the defendant-attorney] to return all of the fees, plus prejudgment interest, paid by his investor clients. . . . The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized. . . . Disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." *Such an order is within the inherent power of the trial court to fashion judgments.*

118 Wn.2d at 463 (emphasis added; internal citations omitted).

Chism was entitled to a jury trial adjudicating his legal claims for breach of contract. He received that trial. But his constitutional right to a jury trial of legal claims is no impediment to the judiciary's power to find and discipline the professional misconduct of an attorney. Chism cites no authority to the contrary because none exists. *Eriks v. Denver* is controlling precedent in this case.

III. The Trial Court Erred By Concluding That Its Equitable Authority Could Not Extend To Disgorgement Of Statutory Punitive Damages, Interest, Or Attorney Fees That A Non-Attorney Litigant Might Otherwise Have Been Entitled To Retain.

Chism talked his client into the 'bonus' arrangements that he later sued to enforce by trading on decades of trust and confidence that his client placed in him as their long time General Counsel. Chism converted that trust into unreasonable payment terms that exposed Tri-State to disputes over whether and what their General Counsel was legitimately entitled to demand of them when their relationship ultimately fell apart.

The ethical breaches found by the trial court include Chism's serial misrepresentations that served as the basis for the compensation he ultimately sued to enforce; his failure to keep records to establish or verify the amount and value of his professional legal work[8]; his failures to

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[8] Chism claims that his services "saved Tri-State . . . at least $27 million." Reply Brief of Appellant at 39. That is false. The bond posted by Tri-State for the Canada project was for $27.5 million. RP (5/12/14):175. Had Tri-State defaulted on the project, the bond might have faced a claim of up to that amount. *Id.* But rather than defaulting,

disclose that in urging excessive and unreasonable compensation terms from Tri-State he was not acting in his client's interests; and his failures to recommend that Tri-State obtain independent counsel before agreeing to Chism's proposals.

As the company's General Counsel (both before and after the various compensation arrangements that Chism talked his client into), one of Chism's professional duties was to protect his client from foreseeable disputes. Indeed, advising a client to seek independent counsel before agreeing to transactions with the client's long time attorney is vital in large part to protect the client from getting into expensive disputes with that very attorney. By disregarding his professional obligations, Chism led Tri-State into the very sort of expensive, protracted attorney-client dispute that RPCs 1.5, 1.7, 1.8, and 8.4 exist to prevent.

The Court in *Eriks* recognized exactly this point, in the context of an attorney undertaking representation of multiple clients without complying with the professional obligations required for such representation. By failing to disclose and explain (and get consent in light of) the potential conflicts among his clients, they became exposed to extra costs in the event those conflicts became manifest, which they eventually

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Tri-State completed the project at a loss of $27 million, which Tri-State and its owners shouldered. CP 4935 (Revised Finding of Fact 79). Chism, who had negotiated what proved to be a disastrous contract for that project, (*see* RP (5/12/14):88-89; RP (5/19/14):196-97; RP (5/20/14):20), paid none of that loss.

did. "[T]he evil the rules were designed to prevent actually came about in this case. . . . Both the investor and promoter clients were forced to obtain new counsel, with all the resulting hardships and expenses such actions inevitably entail." 118 Wn.2d at 459.

In persuading Ron Agostino to go along with his proposals for extra compensation, Chism knew that Agostino believed he was acting as the company's General Counsel and was looking out for Tri-State's interests.[9] Had Chism advised Tri-State to get independent counsel (as he was required to do), *no* competent attorney would have advised Tri-State to go along with what Chism was proposing.[10]

Chism's misconduct deprived Tri-State of the independent advice that would not only have forestalled the obligations that Chism later sued to enforce, but would have protected Tri-State from exposure to punitive damages, interest and attorney fees from the parties' eventual dispute over whether the arrangements Chism convinced his client to agree to were reasonable, and whether they resulted from attorney misconduct.

In *Eriks*, the Supreme Court emphasized that the trial court's equitable authority to compel disgorgement of what an attorney would

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[9] CP 2454 (Finding of Fact No. 59) ("As Mr. Chism could have predicted, Ron never considered obtaining independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest."); CP 2461 (Finding of Fact Nos. 85-86); RP (5/20/14):33-34.

[10] CP 2482 (Conclusion of Law No. 33).

otherwise be entitled to flows from the judiciary's power to discipline attorneys, and is specifically a mechanism "to discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." 118 Wn.2d at 451. The basis for the court's power is not constrained by the type of benefit that is subject to disgorgement, nor even to whether the attorney misconduct caused damage to the client. *See Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729, 738 (2012) ("A finding of causation and damages is not required to support an order of disgorgement.").

Instead, the equitable authority of the trial court is broad enough to declare as entirely unenforceable compensation agreements tainted by misconduct. *See LK Operating, LLC v. Collection Group*, 181 Wn.2d 48, 85, 331 P.3d 1147, 1163 (2014) ("We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render that contract unenforceable as violative of public policy."); *Cotton v. Kronenberg*, 111 Wn. App. 258, 269 & 275, 44 P.3d 878, 884 & 887 (2002) ("Attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are unenforceable. . . . It was entirely within the trial court's proper exercise of discretion to order complete disgorgement of the fees here.")

The trial court did not reach the issue of whether Chism should as a result of his misconduct disgorge his punitive damage award of $200,000 for what the jury determined was a "willful" withholding of wages. The trial court declined to reach that issue because it concluded it lacked the legal authority to do so.[11] That was an error of law for two separate, though related, reasons.

First, the court's equitable authority to order disgorgement is not constrained by the *type* of damages that a non-attorney (or an ethical attorney) would otherwise be entitled to recover on a legal claim. Instead, the court's authority is to be exercised in light of the attorney's actual misconduct, the actual or potential harm to the public, and the judiciary's interest in preventing similar misconduct in the future.

Second, Chism had no entitlement to punitive damages for compensation withheld in connection with a bona fide dispute. "An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where he has a bona fide belief that he is not obligated to pay them." *McAnulty v. Snohomish School District*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973). The finding of willful withholding came solely from the jury, which by design was unaware of the entire dispute over Chism's

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[11] CP 4342 ("[T]he equitable and RPC claims this Court determined are not defenses to a determination of willfulness under RCW 49.52.070

failure to comply with his RPC obligations. Tri-State not only had a bona fide dispute with Chism over that issue, but ultimately prevailed in that dispute.

Both because Tri-State had a bona fide dispute that it did not owe what Chism was claiming, and because the trial court's authority included the power to compel complete disgorgement of what Chism obtained (and was seeking to obtain) under his compensation agreements with Tri-State, the trial court made an error of law in concluding it had no authority but to defer to the jury determination that Tri-State's withholding was "willful."

For the same reason, the trial court erred as a matter of law in believing it was required to grant Chism an award of his attorney fees, despite the large majority of them having been incurred litigating the parties' dispute over his breach of fiduciary obligations. By failing to consider whether Chism's misconduct rendered a complete or partial disgorgement of attorney fees appropriate, the trial court declined to address that issue based upon the mistaken premise that it lacked the authority to reach it. That was legal error.

Finally, the trial court erred by awarding Chism prejudgment interest. As part of adjudicating Chism's breach of his RPC obligations the trial court necessarily reviewed the reasonableness of the transactions that Chism sought to enforce. Where a determination of reasonableness is

required to adjudicate a claim, the claim is not liquidated and prejudgment interest is not allowed (absent an agreement of the parties to pay interest, which was not present in this case).

> Damages are liquidated if the evidence furnishes data that, if believed, made it possible to compute the amount owed with exactness. That is, that the defendant at the time of the transaction was able to ascertain the amount owed. A claim is unliquidated if the facts proved did not permit an exact sum to be fixed. *A claim is unliquidated, for instance, if the amount must be arrived at by a determination of reasonableness.*

McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 536, 128 P.3d 128, 133 (2006) (citations omitted, emphasis added). The trial court not only needed to adjudicate the reasonableness of the arrangements Chism sued to enforce, but determined that those arrangements were in fact not reasonable.[12]

IV. Conclusion

Chism's claims were subject to a bona fide dispute, in which Tri-State substantially prevailed. Indeed, had Chism not breached his professional obligations, Tri-State would not have found itself in a dispute

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[12] CP 2457 (Finding of Fact No. 67) (Chism's proposal for $310,000 bonus "was neither fair nor reasonable."); CP 2478-79 (the basis for Chism's compensation claims was "unfair and unreasonable to Tri-State"); CP 2490 ("Mr. Chism failed to meet his burden of proving that the transaction he proposed to Larry in March 2012 was fair and reasonable to Tri-State.").

with its long-time attorney over whether and how much additional compensation it was required to pay him. Tri-State's failure to pay the $200,000 ultimately adjudged to be owing was therefore not 'willful,' and the trial court erred by imposing punitive damages in an equal amount.

The claims that led to the $200,000 award required the trial court to make determinations of reasonableness. Those claims were therefore not liquidated. Both for that reason, and because the trial court erred in concluding it lacked the equitable authority to deny interest to Chism even if he was legally entitled to it, the award of $72,460.27 in prejudgment interest was error.

The trial court also erred in concluding it lacked authority to consider Chism's misconduct as a basis for partial or complete denial of an award of litigation expenses. This court should either remand with direction that the trial court award only attorney fees and expenses unrelated to the RPC/fiduciary duty issues in the case, or deny fees altogether.

RESPECTFULLY SUBMITTED this 28th day of December, 2015.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing *Cross-Appellant's Reply Brief* has been made this 28th day of December, 2015, by sending copies thereof to counsel in the manner indicated below:

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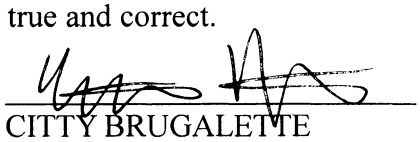

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