Supreme Court No. 91712-4

Court of Appeals No. 71103-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FLIGHT SERVICES & SYSTEMS, INC.,

Petitioner,

v.

AIR SERV CORPORATION,

Respondent.

PETITION FOR REVIEW

Attorneys for Petitioners:

LIVENGOOD ALSKOG, PLLC
Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739
121 Third Avenue
PO Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Washington Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Secondary Authorities

Out of State Cases

TABLE OF AUTHORITIES

Page

Federal Cases

I. IDENTITY OF PETITIONER

Flight Services & Systems, Inc. ("Flight Services") provides airplane cabin cleaning services at Seattle-Tacoma International Airport.

II. CITATION TO COURT OF APPEALS DECISION

Flight Services respectfully petitions this Court for review of an important legal issue raised in the Court of Appeals' opinion filed on April 6, 2015. A courtesy copy of the opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Whether Washington recognizes "disgorgement of profits" as an alternative measure of restitution for unjust enrichment. Contrary to the Court of Appeals' opinion (Slip Op. at 4), the seminal case for unjust enrichment, *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008), does not adopt "disgorgement of profits" as a measure of restitution for all cases involving services. In fact, no Washington court has addressed if, when or how such a restitution theory would apply. Courts in some other jurisdictions have found it to be punitive, not compensatory, and, therefore, unavailable as a measure of restitution. *See, e.g., Kleinman v. Merck & Co.*, 417 N.J. Super. 166, 186, 8 A.3d 851 (2009).

B. If "disgorgement of profits" is an alternative theory of restitution, should Washington adopt the legal framework for an innocent recipient of services detailed in the Restatement (Third) of Restitution and Unjust Enrichment, §§ 49 & 50 (2011) for when and how restitution should be applied here? The detailed legal analysis and guidance provided

in the Restatement (Third) of Restitution and Unjust Enrichment, §§49-52 was published in 2011, after the Court's 2008 decision in *Young* and no Washington courts have evaluated the Restatement on this issue.

IV. STATEMENT OF THE CASE

Flight Services entered into a three-year airplane cabin cleaning contract with Delta Airlines for domestic and international flights at Seattle-Tacoma International Airport ("Sea-Tac"). Tr. Ex. 51. In May 2011, shortly before the contract commenced, Flight Services learned a separate federal compliance agreement was required for cleaning the international flights. CP 932; Tr. Ex. 65. It immediately started the process for obtaining the compliance agreement, a process originally estimated to take "up to 6-8 weeks." CP 907-08.

In the interim, the federal agency agreed to let Flight Services continue cleaning international flights so long as another company with a compliance agreement provided a supervisor to monitor the trash handling. *Id.* Without negotiating price or consulting with Flight Services, Delta Airlines arranged to have Respondent Air Serv Corporation ("AS") provide a supervisor to monitor the trash handling—a process of the cleaning operation taking about 10 minutes to complete. CP 1581. Flight Services continued to perform all the cleaning operations, which required between 6-14 employees per plane. CP 907-08. It sent crews of trained, supervised cleaners to each international flight without any incidents, infractions, or liabilities. CP 908 & 1688 (76:7-12).

Ten days after providing services, AS began demanding payment. CP 912, 923; Tr. Ex. 64. It demanded $175 per plane, much more than Flight Services' negotiated $14.05 hourly rate for out of scope services in its contract with Delta Airlines. Tr. Ex. 51 (p.5). The inflated sum even exceeded the unburdened unit charge *for performing all cleaning operations*.[1] Tr. Ex. 66; Tr. Ex. 51. Flight Services objected to AS' price, but agreed to pay the contractual $14.05 hourly rate. Tr. Exs. 17 & 57; CP 917; VRP 346-358. In September 2011, Flight Services obtained its own compliance agreement. Tr. Ex. 1; CP 918. This action then ensued.

On summary judgment, the pre-trial judge dismissed AS' claims of breach of contract, account stated, and violation of the Consumer Protection Act and held that AS could seek restitution on its claims of quantum meruit and unjust enrichment. CP 1581-84. The unchallenged findings show that AS' services were arranged by Delta Airlines; that "the parties disputed the price of the services over several months"; and that "[t]here was never a meeting of the minds as to price...." CP 1581-82.

AS elected not to present any evidence of fair market value at trial. Resp't Br. at 32 (AS acknowledging that it failed to "provide any rate beyond the figure it was willing to accept for payment" and that "no market was ever identified [at trial].)" Resp't Br. at 32. Instead, AS argued that it was entitled to "the higher of" either its $175 per plane offer or all

---

[1] The unburdened unit charge is the contracted payment for all cleaning services less management fees, equipment charges, and start-up expenses. Tr. Ex. 51 (pp. 2-5).

Flight Services' "gross revenues" for the international flights. VRP 374-77. AS argued that Flight Services' profits were equivalent to its gross revenues—between $132,241.90 and $159,345.59 (the entire contracted per airplane charge for cleaning plus either 65% of the management fees, equipment costs and start-up expenses or 100% of those expenses).[2] *Id.* AS further argued that although it knew Flight Services incurred significant costs for providing the cleaning services, no reduction for costs need to be made to determine profits because Flight Services did not maintain cost data for cleaning Delta international flights.[3] *Id.*

The trial court[4] did not adopt AS' inflated disgorgement of profits restitution theory. In the preamble to its findings and conclusions, the trial court stated that the only issue for trial was the determination of the reasonable value of AS's services. CP 2180-81. But, the trial court then applied a wholly different measure of relief. CP 2182-84. It awarded $83,300 ($175 per plane) based upon AS's invoices, draft contracts, and party representations, grounds previously rejected and dismissed by the pre-trial judge on partial summary judgment. CP 1581-82.

The Court of Appeals found that the trial court's findings were inadequate to review the determination of reasonable market value and

---

[2] AS took this position even though management fees, equipment costs, and start-up expenses were only incurred by Flight Services.

[3] AS took over the Delta aircraft cabin cleaning contract at Sea-Tac in November 2011 (after it was rebid) and had the ability to estimate costs. Tr. Ex. 61. The primary reason AS offered to assist Delta was because it wanted this lucrative contract.

[4] The case was reassigned to a new Superior Court Judge just before trial.

remanded for further findings. Slip Op. at 3. But it then went on to misread *Young* as directly recognizing "disgorgement of profits" as an alternative measure of restitution for all cases involving services. Slip. Op. at 4. In addition, even if such a punitive theory was recognized in Washington, the Court of Appeals only generally identified the restitution theory without providing any legal framework for when and how such a restitution theory should be applied by Washington courts. *Id.*

V. AUTHORITY

A. Court of Appeals adopts a "disgorgement of profits" restitution alternative never before recognized in any unjust enrichment/quantum meruit case in Washington.

The Court's opinion includes a number of conclusions about the law of unjust enrichment and quantum meruit.[5] Significantly, the Court of Appeals enunciated the following principle of law:

> The measure of recovery for unjust enrichment to a faultless claimant is either (1) "the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in plaintiff's position," or (2) "the extent to which the other party's property has been increased in value or his other interests advanced." When services have been provided, the first measure is typically represented by the market value of the services rendered, *while the second measure involves disgorgement of the profit the defendant received as a result of the services rendered.*

Slip Op. at 4 (footnotes omitted; quotes in original, italics added).

Citing without analyzing *Young*, the Court of Appeals assumed

---

[5] *Cf. Bank of America, N.A. v. Owens*, 177 Wn. App. 181, 189-90, 311 P.3d 594 (2013) (trial court cannot ignore appellate court's specific holdings and directions on

incorrectly the following two critical premises: (1) that market rate applies only to the first measure of restitution, *i.e.*, the cost to obtain similar services from another provider, but not to the second measure (increase in property value or other interests), and (2) that "disgorgement of profit" is permitted under the second measure of recovery for the increase in property value or other interests. Throughout its opinion, the Court of Appeals appears to assume that disgorgement of profits is a valid measure of restitution, and the only issue is how to calculate the precise amount of profits to which Flight Services benefitted from AS' services. *See* Slip Op. at 6-10. Discussing revenue figures of between $77,730.50–$400,000 as potentially "within the range under a disgorgement theory," Slip Op. at 7-8, the Court of Appeals left it up to the trial court to make "precise findings" on whichever measure it found appropriate "whether under a market value, modified disgorgement of profit, or some other 'rare circumstances' measure of the value of services...." *Id.* at 10.

Because the Court of Appeals' unprecedented and erroneous general adoption of "disgorgement of profits" as an alternative measure of restitution will have far reaching consequences in this case and all other unjust enrichment cases involving services, Flight Services requests review to correct this error of law. Secondly, because the case is being remanded to the same trial court who the Court of Appeals found

---

remand, including those enunciating a principle of law, which must be followed in later stages of the same litigation).

demonstrated difficulty drawing distinctions, following the law, and applying correct legal remedies, review would be appropriate to send the case down with clear instructions on how restitution should be applied.

B. Petition Involves an Issue of Substantial Public Interest.

Bringing a disgorgement of profits theory of restitution into every unjust enrichment/quantum meruit case affects every commercial transaction where the parties fail to form an enforceable express contract. The consequences will be enormous: as AS did in this case, no claimant will bother proving fair market value of services if they automatically have a right to claim the recipient's revenues and profits, which in many cases will far exceed the market value of those services.

The Court of Appeals all but invites AS to pursue a disgorgement of profits restitution theory that has no validity under Washington law or in the majority of other jurisdictions. A disgorgement theory provides yet another opportunity for AS to demand an inflated award grossly out of proportion to the small amount of services rendered. Instead of arguing over a *market value* recovery between $3511 ($14.05 per hour) and $11,900 ($25 per hour), AS can argue over Flight Services' *revenues and profits* in the range of $77,730 – $400,000.

C. Court of Appeals' Opinion is In Conflict With a Decision of Washington's Supreme Court—the *Young* case.

According to the Washington Supreme Court in *Young*, unjust enrichment "is measured in one of two ways": (1) "the amount which the benefit conferred would have cost the defendant had it obtained the benefit

from some other person in the plaintiff's position," or (2) "the extent to which the other party's property has been increased in value or his other interests advanced." *Young*, 164 Wn.2d at 487. Both measures—cost and increased value—involve "the market value of the services rendered." *Id.* The "reasonable value" of AS services depends on what Flight Services would have had to pay another provider of similar services. *See Young*, 164 Wn.2d at 490. In *Young*, the claimant produced expert testimony to show market value. *Id.* at 482. Noting the appeals court had "remanded for an award based on the full amount it would have cost [the recipient] to pay a third-party to make the improvements," namely, the first measure of recovery, the Supreme Court affirmed this ruling. *Id.* at 482-483, 491.

The proper measure is not, and never has been, "disgorgement of profits," a separate theory of damages not even mentioned in *Young* and not found in any Washington cases involving unjust enrichment for an implied contract. Disgorgement is not *of profits*, but "the value of the received benefit." *Young*, at 489; *id.* at 490 ("Phrased alternatively, [the recipient] must *disgorge the entire value of the benefit she received* as determined by either the fair market value of the services rendered or the amount the improvements enhanced the value of the property.").[6] The "increased value" measure is limited to the value directly and proximately

---

[6] *Cf.* Restatements of the Law 3d, *Restitution and Unjust Enrichment*, § 49(4) (2011) ("When restitution is intended to strip the defendant of a wrongful gain, *the standard of liability is not the value of the benefit conferred* but the amount of the profit wrongfully obtained." [italics added]). The current Restatement is referred to herein as "Rest.3d."

"attributable" to the services rendered by the claimant, not profits. *See Young*, at 482; *cf. Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 653 P.2d 1331 (1982) (contractors whose work to complete water system enhanced value of land being developed for a shopping center acquired by lender at foreclosure awarded unjust enrichment benefit measured by contract prices rather than lender's profits).

In *Young*, the Washington Supreme Court looked to Restatement (Second) of Contracts § 371 (1981) for guidance on the proper measure of recovery. *Young*, 164 Wn.2d at 487-488. The two measures of recovery—cost to the recipient or increased value—come from § 371:

> § 371 Measure of Restitution Interest
> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either
> (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
> (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Restatement (Second) of Contracts § 371(b) (1981). § 371(a) and (b) are alternative measures. *Young*, 164 Wn.2d at 487. But § 371(b) is not a license for courts to award a plaintiff a percentage of profits as "the extent to which the other party's ... other interests advanced." *See Young*, 164 Wn.2d at 490, *quoting* Restatement of Restitution § 155, cmt. d (1937) (for "services or improvements" value does not depend on "pecuniary advantage, **and normally he would be required to pay the market price of such services**..." [bold added]); § 371 cmt. b (Illustration 2 - primacy

of market price over "increased value"). There is nothing extraordinary in this case that requires departure from the "normal."

Because the Court of Appeals and trial court are confused about the measure of recovery for unjust enrichment and/or quantum meruit, this Court should accept review to provide clarity.

> If the law were clear as to when the reasonable value of plaintiff's services is the appropriate remedy and when the value to the defendant is the appropriate remedy, then settlements might be more likely. Eliminating some excess litigation would save resources both of the parties and the judicial system.

Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment,* 27 Rev. Litig. 127, 132 (2007).

D. Court of Appeals' Opinion Conflicts with other Washington cases where Disgorgement of Profits is awarded.

This case is unlike any Washington cases where disgorgement of profits has been allowed. *See J & J Celcom v. AT & T Wireless Services Inc.*, 162 Wn.2d 102, 113, 169 P.3d 823 (2007) (duty of loyalty required partner to disgorge profits obtained from transaction connected with the partnership without consent of the other partners); *Golberg v. Sanglier*, 96 Wn.2d 874, 887-88, 639 P.2d 1347 (1982) (to deter fraudulent conduct in sale of partnership interest to remaining partners induced by fraud, breach of partnership agreement, and breach of fiduciary duty); *In re Washington Builders Benefit Trust*, 173 Wn. App. 34, 82, 293 P.3d 1206 (2013) (trustees who retained interest earned on deposited funds, commingled funds, and failed to account must disgorge interest wrongfully retained

since no trustee can profit from breach of fiduciary duty); *Staff Builders Home Healthcare, Inc. v. Whitlock*, 108 Wn. App. 928, 33 P.3d 424 (2001) (awarding lost profits for damages and recoupment of unjust enrichment where former employee breached noncompetition agreement and violated Uniform Trade Secrets Act by providing services to client of former employer).[7]

As competitors participating in an arm's length business transaction arranged by Delta Airlines, Flight Services and AS did not have a confidential or fiduciary relationship. *See Annechino v. Worthy*, 162 Wn. App. 138, 143, 252 P.3d 415 (2011), *aff'd*, 175 Wn.2d 630, 636, 290 P.3d 126 (2012).[8] AS has no legally protected interest in Flight Services' revenues or profits under its cleaning contract with Delta Airlines. *See* Rest.3d § 2 cmt. b ("To be the subject of a claim in restitution, the benefit conferred must be something in which the claimant

---

[7] AS cited two Washington cases to support its disgorgement of profits theory—neither case does. *See Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 275 P.3d 339 (2012) (enforcing intent of parties under express oral agreement, court affirmed order requiring return of life insurance policies to rightful owner under constructive trust theory to avoid unjust enrichment); *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 285, 173 P.2d 652 (1947) (owner of egg-washing machine awarded "reasonable value of defendant's use of the machine," measured by "saving in labor cost" ($25 per month for 36 months) to user who converted machine for own business use, not the tortfeasor's revenues or profits from the sale of eggs washed by the owner's machine).

[8] *See Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1096 n. 7 (Fed. Cir. 2003) ("a fiduciary relationship seems unlikely[...]Rambus and Infineon are competitors"); *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So.2d 536, 541 (Fla.App. 2003) ("the facts of the instant case dispels the notion that a fiduciary relationship existed between Taylor and Heathrow. Taylor and Heathrow were competitors..."); *Security Title Guarantee Corp. of Baltimore v. United General Title Ins. Co.*, 935 F.Supp. 816, 818 (E.D.La. 1996) ("United General does not allege the existence of any confidential or fiduciary relationship among the parties. On the contrary, these three companies were competitors.").

has a legally protected interest, and it must be acquired or retained in a manner that the law regards as unjustified."). "[T]he received benefit [must be] *at the plaintiff's expense*." *Young*, 164 Wn.2d at 484-485 (italics added). By requiring the received benefits be "at the plaintiff's expense," the intention of the law is to restore to the claimant that which it has lost,[9] *i.e.*, the value of the services provided that saved the recipient from having to pay a third party to provide, or, viewed another way, the value of the services the claimant could have sold on the open market to a buyer of such services. The claimant has no claim to, or interest in, the recipient's profits. "Unjust enrichment of a person occurs when he has and retains money or *benefits which in justice and equity belong to another*." *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 159-160, 810 P.2d 12 (1991) (italics added); *see also Young*, 164 Wn.2d at 484, quoting this language from *Bailie*).

Flight Services' profits do not "belong to" AS. Those profits belong solely to Flight Services, resulting from its own preexisting airplane cleaning contract with Delta Airlines. AS never asked nor expected to be compensated on a percentage of profits basis arising from the Delta-Flight Services cleaning contract. Retaining the revenues of its

---

[9] The remedial goal of restitution is to "restor[e] something to someone, or restor[e] someone to a previous position. It may do the former by restoring the very property that the claimant gave up, or by granting substitute property rights. It may restore someone to a previous position by restoring property, or a substitute, or a money equivalent." Rest.3d § 1 cmt. e (1); *see also Olwell*, 26 Wn.2d at 286, *quoting* Restatement of the Law, *Restitution* (1937).

labor under a preexisting contract procured solely by Flight Services, when it was Delta that retained AS, cannot be considered unjustified enrichment. Flight Services took nothing from AS that prevented AS from obtaining its own revenues and profits under its cleaning contracts with other airlines, or with other vendors.

E. Disgorgement of Profits is Not Supported by the Current Restatement or Commentators.

"Unjust enrichment from requested benefits is measured by their reasonable value to the recipient." Rest.3d § 50(2)(b) ("Reasonable value is normally the lesser of market value and a price the recipient has expressed a willingness to pay.").

> Where the recipient has requested the benefits in question, without specifying a price, the presumptive measure of enrichment is the market price.

Rest.3d § 49 cmt. d; *id.* cmt f ("[T]he market value of goods or services ... is the usual measurement of enrichment in cases where nonreturnable benefits have been furnished at the defendant's request, but where the parties made no enforceable agreement as to price..."). "Reasonable value in such a case *is uniformly determined by reference to a market price or "going rate," without consideration of alternatives such as cost to the claimant or value in advancing the purposes of the defendant.*" Rest.3d § 50 cmt d (italics added).[10]

---

[10] "The reasonable market value of the plaintiff's services is the only remedy necessary." Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Amer. U.L.Rev. 547, 560 (1986), cited by the Supreme Court in *Young*, 164 Wn.2d at

Disgorgement of profits is not the measure. *See* Rest.3d § 50(5) ("An innocent recipient may be liable in an appropriate case for use value or proceeds, but not for consequential gains"); § 53(2) ("'Consequential gains' are profits realized through the defendant's subsequent dealings with such an asset, or through the defendant's interference with the claimant's rights."); § 53(3) ("A conscious wrongdoer or a defaulting fiduciary is liable for proceeds and consequential gains that are not unduly remote."). "Liability to disgorge profits is ordinarily limited to cases of... "conscious wrongdoing[]" because the disincentives that are the object of a disgorgement remedy are not required in dealing either with innocent recipients or with inadvertent tortfeasors..." Rest.3d, § 3 cmt a.[11]

Flight Services committed no tort and is not a wrongdoer. AS's attorney admitted on the record: "There is no way the court can assume that this is a fraudulent contract when we have two sophisticated parties who know much more than we do about this industry...[a]ll there is is silence and inaction." VRP (June 14, 2013) at 10:22–11:6. Without an agreement, vague assurances of payment do not constitute wrongdoing. *Cf. Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223

---

486. "Reasonable value of the plaintiff's services is a workable and perhaps the only workable measurement for recovery...The defendant's gain is more subjective and thus more difficult to measure." *Id.* at 611.

[11] "[A] claim for..."disgorgement" of the profits of conscious wrongdoing... normally incorporates as its predicate the substantive elements of a cause of action for tort or other breach of duty." Rest.3d § 1 cmt e(3). "Misconduct" means "actionable interference by the defendant with the claimant's legally protected interests for which the defendant is liable." *Id.* at § 51(1) & (3).

(2002) (breach of contract "is neither immoral nor wrongful; it is simply a broken promise" and punishment has no justification on either economic or other grounds); *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 679, 681 P.2d 1312 (1984) (service provider correctly awarded quantum meruit recovery for reasonable value of services, rather than unjust enrichment, where "Engelcke repeatedly assured Eaton he would be paid for the work, but an agreement as to the amount was never reached").

Confusion of quantum meruit and unjust enrichment recovery is often rooted in applying these causes of action "in two fields: restitution and contract." *Certified Fire Prot. v. Precision Constr.*, 283 P.3d 250, 256 (Nev. 2012), *quoting* Kovacic-Fleischer, 27 Rev. Litig. at 129. "But while [r]estitution may strip a wrongdoer of all profits gained in a transaction with [a] claimant ... principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off ... than if the transaction with the claimant had never taken place." *Certified Fire*, 283 P.3d at 257, *quoting* Rest.3d § 1 cmt. d.[12]

Imposing a disgorgement of profits recovery leaves Flight Services worse off than if the transaction with AS had never taken place. AS had no property interest in Flight Services' profits. Confusing restitution with

---

[12] "Quantum meruit, then, is "the usual measurement of enrichment in cases where nonreturnable benefits have been furnished at the defendant's request, but where the parties made no enforceable agreement as to price." *Certified Fire*, 283 P.3d at 256-257, *quoting* Rest.3d § 49 cmt. f. "The actual value of recovery in such cases is "usually the lesser of (i) market value and (ii) a price the defendant has expressed a willingness to pay."" *Certified Fire*, 283 P.3d at 257 n. 3, *quoting* Rest.3d § 31 cmt. e.

unjust enrichment, the Court of Appeals imposes a "forced exchange"[13] on the recipient in every unjust enrichment case (regardless of fault) when profits are deemed the equivalent of "increased value."

F. Court of Appeals' Opinion Violates Public Policy.

By compensating the claimant for more than it lost, an award of Flight Services' profits amounts to punitive damages not authorized by Washington law. *See Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996) ("[T]his court has consistently disapproved punitive damages as contrary to public policy...Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation."); *cf. Kleinman v. Merck & Co., Inc.*, 8 A.3d 851, 863 (N.J.Super.L. 2009) ("Disgorgement of profits is a punitive, not a compensatory, form of damages. There is no law in New Jersey that allows such a recovery in this type of claim."). Since "restitution [is] not punitive," *Olwell*, 26 Wn.2d at 286, awarding more than "an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit," *id.*, amounts to punitive damages and a windfall for the plaintiff.

---

[13] Allowing "disgorgement of profits" under an implied contract when the express contract fails subjects the recipient to a "forced exchange ... in other words, an obligation to pay for a benefit that the recipient should have been free to refuse." *See* Rest.3d § 2(4); *id.*, cmt e ("Proof that a forced exchange is in the recipient's interest, or that the transaction is economically efficient, does not justify the claimant's failure to obtain the recipient's agreement to pay.").

Since Washington is a non-punitive damages state, no Washington court has ever adopted disgorgement of profits as a remedy in any unjust enrichment/quantum meruit case.[14] The Court of Appeals is reading into *Young* what is not there. At most, even if it did apply in Washington, the Restatement's "conscious wrongdoer" rules should apply to any such disgorgement claim, facts which are not present in this case.

Exceeding the "value" measure of recovery set forth in *Young*, disgorgement of profits also violates Washington public policy against double recoveries.[15] *Cf. Rochow v. Life Insurance Co. of N.A.*, 780 F.3d 364, 373-75 (6th Cir. 2015) (in ERISA breach of fiduciary duty case, rejecting disgorgement of profits as impermissible double recovery that is more than necessary to make the plaintiff whole);[16] *Miller v. Bank of America, N.A.*, 326 P.3d 20, 33 (N.M.App. 2013) ("any additional recovery for disgorgement [of profits] would amount to a double recovery and improperly impose a penalty on the Bank").

---

[14] A Westlaw search of Washington cases turns up only one decision that includes the terms "disgorgement of profits" and "unjust enrichment" in the same opinion: the Court of Appeals' April 6, 2015 decision that Petitioner is asking be reviewed.

[15] "Washington courts have consistently implemented rules designed to prevent double recoveries." *Rekhter v. Dep't of Social & Health Services*, 180 Wn.2d 102, 121, 323 P.3d 1036 (2014). ""Double recovery" is recovery that exceeds the applicable measure of damages." *Maziarski v. Bair*, 83 Wn. App. 835, 844, 924 P.2d 409 (1996). "It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury." *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000).

[16] "[D]isgorgement [of profits] is generally geared toward deterring future misconduct." *Rochow v. Life Insurance Co. of N.A.*, 780 F.3d 364, 380 (6th Cir. 2015) (White, C.J., concurring in part and dissenting in part). "[D]isgorgement of profit should be used sparingly and only when equity requires it." *Rochow*, 780 F.3d at 395 (Stranch, C.J., dissenting).

G. Adopting "disgorgement of profits" violates burden of proof rules by allowing any claimant to ignore fair market value and lay claim to the recipient's profits.

At trial, AS provided no proof of fair market value other than its own self-serving testimony about its price demands.[17] The trial court made no finding there was no market for the services at issue. The Court of Appeals opinion allows the claimant to ignore fair market value and lay claim to the recipient's profits. This is entirely inconsistent with *Young* and other implied contract cases in Washington that hold the party claiming under an implied contract has the burden of proof.[18]

When fair market value is the presumptive measure of damage (*see Young* & Rest.3d § 49 cmts. d and f), the plaintiff who wants to establish another measure of damage "must produce evidence showing that the [service] does not have a fair market value." *Cf. Sherman v. Kissinger*, 146 Wn. App. 855, 874, 195 P.3d 539 (2008) (for damage to personal

---

[17] AS argued it didn't know what the market value was, and anyway it was irrelevant. "So Air Serv doesn't know what other companies think the reasonable value of services are. All they know is the price and how they came up with the price point that they were going to provide the services to FSS...." VRP 51-52. Based on speculation, AS argued "[FSS] might have been willing to pay half the contract to make sure that somebody could get those flights off the ground or face losing a multimillion dollars contract with Delta in the process because they failed to be compliant." VRP at 50-51. *But see Dillon v. O'Connor*, 68 Wn.2d 184, 186, 412 P.2d 126 (1966) (fair market value not based on desperation or duress conditions); WPI 150.08 (fair market value based on willing buyer and seller, neither of them compelled to do business with each other).

[18] *See Young*, 164 Wn.2d at 486; *Dailey v. Testone,* 72 Wn.2d 662, 664, 435 P.2d 24 (1967) (claimant bears burden of establishing reasonable market value for services rendered); *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 277, 135 P.3d 955 (2006) (plaintiff met burden of proving reasonable value of services with "evidence from another development coordinator showing six percent of total project costs as an acceptable development fee"); *Don L. Cooney, Inc. v. Star Iron & Steel Co.*, 12 Wn. App. 120, 123-24, 528 P.2d 487 (1974) (burden of proving value of the benefit is on the party claiming it); *Golob v. George S. May Intern. Co.*, 2 Wn. App. 499, 508, 468 P.2d 707 (1970) (burden of showing unjust enrichment value is on claimant).

property, measure of damages usually depends on fair market value, unless none exists); *see also Russell v. City of New Bedford*, 910 N.E.2d 404, 411 (Mass. App. 2009) ("evidence must support the inference" that fair market value is not fair or adequate measure, *i.e.*, in cases of "service-type property" where there may not be active market from which market value can be determined).

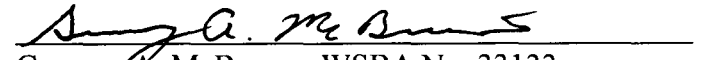
The Court of Appeals incorrectly concluded the trial court "did not identify any particular theory of damages under either unjust enrichment or quantum meruit." Slip Op. at 7. The trial court explicitly found the appropriate measure of recovery is "the reasonable value of the services rendered." CP 2180. Thus, the Court of Appeals erred by failing to dismiss after agreeing that AS failed to present any evidence of market value. *See* Slip Op. at 5.

VI. CONCLUSION

For the foregoing reasons, Flight Services respectfully asks the Court to accept review to address these legal issues.

RESPECTFULLY SUBMITTED this 6th day of May, 2015

LIVENGOOD ALSKOG, PLLC



Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739
Attorneys for Petitioner Flight Services & Systems, Inc.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Division I Court of Appeals 600 University St. One Union Square Seattle, WA 98101-1176 Phone: 206-464-7750	Messenger Service ☒ First Class U.S. Mail ☒ Electronic Mail ☐ Facsimile ☐
David Crowe Rohde & Van Kampen, PLLC 1001 Fourth Avenue Ste 4050 Seattle, WA 98154-1000 dcrowe@rvk-law.com Phone: (206) 436-8339	Messenger Service ☒ First Class U.S. Mail ☒ Electronic Mail ☐ Facsimile ☐

DATED: May 6, 2015, at Kirkland, Washington

Karen H. Suggs

Karen H. Suggs

APPENDIX A

Court of Appeals' Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

AIR SERV CORPORATION, Respondent, v. FLIGHT SERVICES & SYSTEMS, INC., Appellant.	)	No. 71103-2-I UNPUBLISHED OPINION FILED: April 6, 2015

VERELLEN, A.C.J. — In a bench trial to determine damages for unjust enrichment or quantum meruit, findings of fact and conclusions of law must specify the measure and quantity of damages. Here, the trial court entered judgment for Air Serv Corporation (Air Serv) against Flight Services & Systems, Inc. (FSS) for $200,000, including attorney fees, and ordered an additional amount of $35,000 as sanctions for violations of various court rules. FSS appeals, contending that the trial court applied the wrong measure of damages, improperly excluded evidence, and erred in imposing an attorney fees award and sanctions. Because we cannot discern from the trial court's findings the basis for the award, we remand for further findings on the existing record.

FACTS

On April 14, 2011, FSS entered into a contract with Delta Airlines to provide cabin cleaning services at Seattle-Tacoma airport for Delta's domestic and international flights. FSS was to begin providing these services on May 17, 2011. In order to provide

cleaning services for international flights, FSS was required to obtain a federal compliance agreement from the United States Department of Agriculture.

Sometime in May 2011, the United States Customs and Border Protection (CBP) notified Delta that FSS would not be permitted to board Delta's international flights because it did not have the required compliance agreement. CBP identified other companies that were in compliance, including Air Serv. Because FSS was unable to obtain a compliance agreement for at least another six to eight weeks and Delta had an immediate need for cleaning services on international flights beginning the next day, Delta consulted with CPB about having Air Serv provide temporary services until FSS obtained its own compliance agreement.

CPB agreed to allow FSS to provide the cleaning services without the compliance agreement so long as Air Serv supervised those services. Specifically, Air Serv would be required to supervise the handling and transfer of trash collected on the plane. Air Serv agreed to do so, and beginning on May 28, 2011, provided supervision of FSS's handling and transfer of the trash during cleanings.

Approximately two weeks later, Air Serv proposed to FSS a rate of $250 per plane for its services. After FSS objected to this amount, Air Serv proposed a lower rate of $175 per plane. Beginning in July 2011, Air Serv sent invoices to FSS at this price, for a total of 476 flights that were serviced during the temporary arrangement.

FSS did not pay the invoices, but Air Serv continued to provide the temporary services until FSS obtained its federal compliance agreement in September 2011. On September 2, 2011, Air Serv ceased providing its supervisory services to FSS. FSS did not pay the invoices, which totaled $83,300. On September 20, 2011, FSS disputed the

amount on the invoices and informed Air Serv that it would only pay a total of $3,511.10, based upon an hourly rate of $14.05.

On January 6, 2012, Air Serv filed a complaint against FSS seeking damages for breach of contract, consumer protection act violations, unjust enrichment and quantum meruit. The trial court dismissed the consumer protection and breach of contract claims on summary judgment, finding that there was no meeting of the minds on the price for the services rendered by Air Serv. But the trial court granted partial summary judgment for Air Serv for liability under the unjust enrichment and quantum meruit theories, with damages to be proven at trial.

After a bench trial on damages, the trial court found that FSS owed $83,300 to Air Serv for its services and $116,700 in attorney fees, for a total judgment award of $200,000. The court further ordered an additional $35,000 in sanctions against FSS based on "numerous violations of the rules of the Court, including, but not limited to CR 11, CR 26(g), CR 37(b) & (d), CR 56(g) and the Court's local rules."[1] FSS appeals.

DISCUSSION

Measure of Damages

FSS contends that the trial court applied the wrong measure of damages. FSS argues that instead of basing the damages award on the reasonable market rate, the trial court erroneously awarded expectation damages, a contract remedy that is unavailable here because the breach of contract claim was dismissed. Because the trial court's findings are inadequate for us to review this claim, we remand for further findings.

---

[1] Clerk's Papers (CP) at 2303. The trial court awarded attorney fees alternatively as part of a "make whole" theory of damages, or as part of the sanctions for FSS's violations of court rules.

Unjust enrichment and quantum meruit are methods of recovery for contracts "implied in law" and contracts "implied in fact."[2] Unjust enrichment is founded on notions of justice and equity and implies a contract in law to allow recovery for the value of a benefit conferred absent any contractual relationship when "fairness and justice require it."[3] Quantum meruit is founded in the law of contracts and implies a contract in fact when the defendant requests work, the plaintiff expects payment for the work, and the defendant knows or should know the plaintiff expects payment for the work.[4] Accordingly, recovery for quantum meruit is limited to the value of services rendered, while "'unjust enrichment applies to a far broader category of cases.'"[5]

The measure of recovery for unjust enrichment to a faultless claimant is either (1) "'the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in plaintiff's position,'" or (2) "'the extent to which the other party's property has been increased in value or his other interests advanced.'"[6] When services have been provided, the first measure is typically represented by the market value of the services rendered, while the second measure involves disgorgement of the profit the defendant received as a result of the services rendered.[7]

---

[2] Young v. Young, 164 Wn.2d 477, 483, 191 P.3d 1258 (2008).

[3] Id. at 483-84.

[4] Id. at 486.

[5] Id. at 486 (quoting Bailie Commc'ns Ltd. v. Trend Bus. Sys. Inc., 61 Wn. App. 151, 160, 810 P.2d 12 (1991)).

[6] Id. at 487 (quoting Noel v. Cole, 98 Wn.2d 375, 383, 655 P.2d 245 (1982)).

[7] See id. at 487-88.

Quantum meruit damages are measured by "the reasonable value of services."[8] While also typically represented by the market value, this measure can be calculated in a variety of ways.[9]

Here, the parties presented limited evidence to the trial court to establish the measure of damages under either theory. On market value, Air Serv took the position that the services were unique and that there was no market. In its discovery responses, FSS pointed to a single example of a "subcontractor" for cleaning services and alleged a custom and practice in the industry.[10] But in depositions, FSS's designated speaking agent Robert P. Weitzel could not recall the names of any companies that provided such services in the past and could not recall or was not aware of the responses of other companies to FSS's inquiries to provide the service Air Serv provided. While Weitzel stated he was aware of one prior occasion when FSS was involved in a similar arrangement long ago, he could not recall which company was involved or the price for such services. Because FSS did not provide discovery related to a market value, the trial court granted Air Serv's motion in limine to preclude FSS from offering evidence of market value.[11]

At trial, Air Serv presented evidence of how it arrived at the $175 price per plane that was invoiced but ultimately rejected by FSS. Toan Nguyen, who handled pricing for

---

[8] Id. at 485.

[9] See Losli v. Foster, 37 Wn.2d 220, 232, 222 P.2d 824 (1950) (actual cost of labor and materials); Irwin Concrete Inc. v. Sun Coast Properties, Inc., 33 Wn. App. 190, 653 P.2d 1331 (1982) (various contract prices); Modern Builders, Inc. v. Manke, 27 Wn. App. 86, 91, 93-95, 614 P.2d 1332 (1980) (fair market value of improvements or costs plus a reasonable profit).

[10] CP at 306-07.

[11] As discussed below, FSS's challenge to this ruling lacks merit.

Air Serv, testified that the pricing was based on labor, equipment, associated profit and liability, i.e., the financial and operational risk involved in allowing FSS to use its compliance agreement. Nguyen explained the breakdown of the first quote of $250 per plane as $60 for labor of three people, $30 profit, $10 for equipment and fuel maintenance, and $150 for risk of liability. He further testified that he lowered the price to $175 per plane to take into account that Air Serv would be providing supervisory services rather than actual cleaning based upon $20 for labor, no costs for equipment or fuel, a reduced price of $5 for profit, and $150 for liability risk. Air Serv also presented testimony, and the trial court found, that FSS told Air Serv it would pay the $175 per plane charge and that Air Serv relied upon that representation.

In support of its unjust enrichment theory based on disgorgement of profits, Air Serv presented evidence of revenues FSS received on the Delta contract during the period of time that Air Serv performed work for FSS. Air Serv presented invoices that FSS sent to Delta showing total charges for all services, domestic and international, of approximately $414,000. The charges for services itemized as "international" flights on these invoices totaled $77,730.50.[12] The invoices also listed additional charges, including "fixed fees." These were likely for services that were provided for both international and domestic flights but were not parsed out by FSS, despite discovery requests to do so.

[12] While FSS refers to invoices showing total gross revenues for international flights as $62,595.73, these invoices were never provided in discovery or submitted to the trial court and are therefore not part of the record for consideration by this court. Copies of these invoices have simply been appended to FSS's brief without any motion to supplement the record or any basis for doing so.

Air Serv also acknowledged in its trial brief, in its response to the half-time motion, and in closing argument that disgorgement of profits FSS received from its contract with Delta would normally require reducing the gross revenues by any "costs" FSS incurred to generate those revenues. Because FSS had refused to provide any cost information in interrogatory answers or document production and refused to arrange for a speaking agent able to address that topic, the court entered an order compelling discovery on costs. FSS did not provide any information on costs and instead took the position that it did not maintain cost information specific to the Seattle-Tacoma operation. As a result, no evidence of costs was produced in discovery or presented at trial.

The trial court entered findings and conclusions "quantifying the undisputed services" and concluding that FSS owed Air Serv "the reduced amount of $175/flight or $83,300 along with all associated attorney's fees and costs under both theories of quantum meruit and unjust enrichment."[13] But the trial court's findings and conclusions are incomplete. Specifically, other than reciting that the issue was to determine the reasonable value of services rendered by Air Serv to FSS, the court did not identify any particular theory of damages under either unjust enrichment or quantum meruit. The court's findings do not address whether market value was established under either an unjust enrichment or quantum meruit theory, or whether no market exists for the services Air Serv provided.

Nor are the court's findings sufficient to support a disgorgement of profit theory of unjust enrichment. The court made findings that FSS received "direct revenue" per

---

[13] CP at 2184.

plane paid by Delta as well as "fixed fees" paid each month by Delta. The court found that FSS received $77,730.50 in direct revenue due to Air Serv's actions from June to August 2011,[14] and a total amount of $77,439.09 for fixed fees.[15] The court further found that total revenues (domestic and international) FSS received from Delta were over $400,000. The court also made a finding that FSS intentionally failed to provide information regarding costs.

But the court made no finding or conclusion that because FSS intentionally withheld cost information, these revenues were the best the trial court could do to arrive at a disgorgement figure. There was no finding that $77,730.50, the full amount of direct revenue from international flights supervised by Air Serv from June through August, was a reasonable figure for revenue for all flights serviced (rounding off to exclude 15 additional flights in May and 10 additional flights in September). There was no finding of what portion of the fixed fees was properly allocated to work supervised by Air Serv and on what basis. There was no finding and no direct evidence that FSS was in any real jeopardy of losing its entire contract with Delta if it was unable to clean the international flights so that $400,000 total gross revenue paid by Delta has any significance in a disgorgement of profits theory. Conceivably, a figure of $83,300 could be within the range under a disgorgement theory, taking into account FSS's intentional

---

[14] This number corresponds to invoice billings for international flights only and does not include any direct revenue for cleaning the 15 international flights in May and 10 international flights in September that Air Serv supervised.

[15] This number appears to be based on Air Serv's calculation of fixed fees, which accounts for fixed fees of $10,373.03 in May, $18,528 in June, $20,746.06 in July, $18,528 in August, and $9,264 in September. See CP at 2428 (Air Serv's Trial Brief). The amount calculated for September is half of the monthly fees, although Air Serv stopped providing services on September 2. See Ex. 10.

withholding of cost information and the direct revenue from June to August, plus some additional revenue for 25 additional fights in May and September. But the court did not enter any specific findings supporting such a theory of recovery.

As previously noted, there is no finding or other determination by the trial court that $83,300 or any other dollar amount is the reasonable value of the services received by FSS, under any theory. Rather, at most, the findings suggest the trial court relied upon the price proposed by Air Serv at $175 per plane. This is problematic. Under either theory of unjust enrichment or quantum meruit, the price proposed by one party and rejected by another does not normally establish market or reasonable value. Air Serv provides no compelling authority that this evidence can serve as a back door measure of the reasonable value of services. To the extent that the trial court focused upon Air Serv's reliance upon FSS's representation that it would pay Air Serv the $175 per plane fee, that appears to be some form of estoppel or doctrine of account stated, theories that were not before the trial court.

CR 52 requires that the court make findings of fact and conclusions of law "[i]n all actions tried upon the facts without a jury."[16] "[F]indings must be made on all material issues in order to inform the appellate court as to 'what questions were decided by the trial court, and the manner in which they were decided.'"[17] When the findings are incomplete and "consideration of the legal questions involves speculation as to the legal theories the trial court pursued," the judgment must be set aside and the case

---

[16] CR 52(a)(1).

[17] Federal Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 422, 886 P.2d 172 (1994) (internal quotation marks omitted) (quoting Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 707, 592 P.2d 631 (1979)).

remanded with instructions to the trial court to enter or clarify the findings on material issues.[18]

Because the trial court did not identify a precise theory of damages or make findings of a reasonable value of the services or how the court arrived at such a reasonable value of the services, we remand for additional findings. We appreciate that the parties provided the trial court with limited information regarding value and profit, but the existing findings are inadequate. Even a general finding that the reasonable value of the services is $200,000 would have been inadequate. The trial court must articulate the specific measure of damages and make precise findings supporting such damages, whether under a market value, modified disgorgement of profit, or some other "rare circumstances" measure of the value of services appropriate based upon total circumstances.[19]

Attorney Fees as Damages

The trial court awarded attorney fees alternatively under a "make whole" theory of damages, or as part of sanctions imposed upon FSS. FSS contends that the court had no legal basis for imposing attorney fees as damages for claims of unjust enrichment and quantum meruit. We agree.

---

[18] Mayes v. Emery, 3 Wn. App. 315, 321-22, 475 P.2d 124 (1970).

[19] See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e ("In the rare case where there is no evidence of market, custom, or usage to settle the question, the reasonable value of the plaintiff's services—in a case within § 31, the amount 'necessary to prevent unjust enrichment'—is a question for the finder of fact, based on all the circumstances of the case.").

"Attorney fees will not be awarded as a part of the cost of litigation in absence of a contract, statute, or a recognized ground in equity."[20] Here, the trial court awarded attorney fees to Air Serv "as part of the remedy to make plaintiff whole in this matter under unjust enrichment and quantum meruit—a remedy fashioned to do substantial justice and put an end to the litigation . . . ."[21]

Air Serv offers no authority supporting an award of attorney fees and costs as "make whole" damages under unjust enrichment or quantum meruit. The award of attorney fees can only survive under the trial court's alternative rationale that the trial court has inherent authority to impose attorney fees as a sanction under CR 11 and other relevant rules.

Attorney Fees and Additional $35,000 as Sanctions

The trial court recognized an alternative basis for the award of $116,700 in attorney fees "as terms" and ordered $35,000 in additional sanctions against FSS payable to Air Serv.[22] The order awarding terms and sanctions includes several findings in support of the award. Additionally, the trial court's findings and conclusions include a section describing "procedural irregularities" involving the conduct of FSS counsel during trial.[23] And the April 15, 2013 order compelling discovery recites that FSS failed to comply with the case schedule without reasonable excuse or justification and that FSS has provided untrue statements in its discovery responses.

---

[20] Greenbank Beach and Boat Club, Inc. v. Bunney, 168 Wn. App. 517, 524, 280 P.3d 1133 (2012).

[21] CP at 2300.

[22] CP at 2300-01.

[23] CP at 2181-82.

"[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order."[24] This requires specific findings that "either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose."[25] Otherwise, remand is necessary for the trial court to "make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation."[26]

The trial court's findings here lack the specificity required to support the terms and sanctions award. Specifically, Finding (a) identifies eight pleadings as not well grounded in fact, filed without any reasonable investigation, and/or filed in bad faith and for improper purposes. While these recitations are required for CR 11 sanctions, the findings do not specifically identify the deficiencies in each of those documents. Finding (b) merely refers to "numerous improper filings" without identifying whether these are the same or in addition to those identified in Finding (a), and there is no indication what was improper.[27] Finding (c) recites that FSS failed to comply with the April 15, 2013 order compelling discovery, but offers no details, specifics, or even categories of failure.

Finding (d) states that FSS "intentionally failed to be appropriately prepared for its CR 30(b)(6) deposition" but again, provides no details or categories of inadequate preparation.[28] Finding (e) refers to FSS and its counsel intentionally certifying

---

[24] Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

[25] Id.

[26] Id. at 202.

[27] CP at 2299.

[28] CP at 2299.

unwarranted discovery responses but again, contains no specifics. Finding (f) refers to declarations FSS filed in support of its summary judgment motion that were made in bad faith, without clarifying whether this finding is limited to the declarations listed in Finding (a) or includes other declarations. Finding (g) refers to "misrepresentations to the Court during trial," without further details.[29] Finding (h) and (i) offer no further insight into the actions that were the basis for sanctions.[30]

The trial court's findings in support of the sanctions award are inadequate to allow for meaningful review. Accordingly, we remand to allow the court to make additional findings on the existing record to determine an appropriate award. We also note that, in addition to findings that the hourly rates and itemized time are reasonable, the lodestar analysis should include more details supporting any award of attorney fees as terms.

Finally, FSS challenges the trial court's rulings limiting testimony of defense witnesses and excluding evidence as a sanction for discovery violations. FSS contends that the trial court erred by failing to conduct the inquiry required by Burnet v. Spokane Ambulance before excluding evidence as a discovery sanction.[31] We find no merit to these claims.

In Burnet, the court held that before excluding a witness as a sanction for a discovery violation, the trial court must explicitly consider whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the

---

[29] CP at 2300.

[30] See CP at 2300 (providing for alternative award of attorney fees based on violations of court rules and finding that "[a]ll fees and expenses are reasonable and were necessarily incurred").

[31] 131 Wn.2d 484, 933 P.2d 1036 (1997).

violation substantially prejudiced the opponent's ability to prepare for trial.[32] If the Burnet standard applies, we may engage in harmless error analysis.[33]

Here, either Burnet has no application or any error was harmless. First, FSS contends that the trial court erred by refusing to allow FSS President Robert P. Weitzel to testify via Skype without conducting a Burnet inquiry before excluding the testimony. We disagree.

The court did not exclude a witness as a sanction for a discovery violation, thereby prompting a Burnet inquiry. Rather, the court was exercising its discretion to not permit Weitzel to testify remotely. Under CR 43(a)(1), the trial court has discretion to take testimony remotely from a witness who is not present in court. The trial court did not allow Weitzel to testify remotely after discovering that Weitzel was present in his office in Ohio rather than on a scheduled vacation. The court's decision that Weitzel failed to demonstrate good cause to testify remotely and that the defense had misrepresented to the court the reasons for his unavailability is not an exclusion of a witness for a discovery violation. Burnet has no application to this ruling.

Second, FSS contends that the trial court erred by not allowing Thomas Priola to testify as FSS's speaking agent (CR 30(b)(6) witness) because the court failed to conduct a Burnet inquiry before excluding the testimony. We disagree.

After the court ruled that Weitzel was unable to testify by Skype as FSS's CR 30(b)(6) witness, Air Serv moved in limine to limit defense witness Priola from testifying as the speaking agent for FSS because he was not designated as a

---

[32] Id. at 494; Jones v. City of Seattle, 179 Wn.2d 322, 338, 314 P.3d 380 (2014).

[33] Jones, 179 Wn.2d at 343.

CR 30(b)(6) witness. The trial court agreed, ruling that his testimony would be limited and denying FSS's request to call Priola. As the court explained:

> It's been denied because you failed to comply with the discovery rules, which requires that you as an attorney of record shall designate him accordingly, not when one witness is inconvenienced so then you just morph another witness into the 30(b)(6) at your convenience. We have rules for a reason and they need to be complied with, and they haven't been done so here.[34]

The record is clear that FSS did not designate Priola as FSS's 30(b)(6) witness. Air Serv had disclosed Priola as a witness to testify only about communications directly between FSS and Air Serv. FSS did not specifically disclose him as a witness but simply included on its primary witness list anyone included on Air Serv's list. While that would include Priola, it would only be to the extent he was called by Air Serv, i.e., to testify only about communications between FSS and Air Serv. "While a 'reservation of rights' is sufficient to disclose witness names, it is insufficient to disclose the substance of a proposed witness's testimony."[35] As in Jones, simply reserving the right to call any witnesses appearing on the other party's list of potential witnesses does not satisfy the requirements of the local rules for witness disclosure.[36]

The court's lack of a Burnet inquiry was at most harmless error. FSS did not make an offer of proof and identify the specific testimony it sought to provide through Priola; FSS simply requested to designate him as its speaking agent.[37] Thus, FSS is

---

[34] Report of Proceedings (RP) (June 25, 2013) at 370.

[35] Jones, 179 Wn.2d at 342.

[36] Id. at 343. The local rules require parties to provide a list disclosing primary and additional witnesses according to trial schedule deadlines and to include a brief description of the witness's relevant knowledge. Id. at 341; see KCLR 26(k).

[37] FSS simply cites to objections to questions that were sustained. See RP (June 25, 2013) at 345, 346, 350, 355-56, 357.

unable to demonstrate whether Priola had any relevant testimony to offer as a speaking agent for FSS and what effect, if any, preventing Priola from testifying as FFS's speaking agent had on the outcome of the case.

Finally, FSS contends that the trial court erred by failing to conduct a Burnet inquiry before preventing FSS from presenting evidence of industry standards or market rates as a sanction for failing to provide this in discovery. We disagree.

On the second day of trial, Air Serv filed a motion in limine to exclude evidence relating to costs incurred by FSS, revenues received by FSS other than the invoices provided, and any industry standard or market rate of the value of the services at issue. The basis for requesting the exclusion was FSS's failure to provide such information in response to repeated discovery requests and court orders compelling discovery. The trial court granted the motion on evidence of industry standard and market value, but reserved ruling on evidence of costs.[38]

Again, any error in failing to conduct a Burnet inquiry before granting the motion in limine was harmless. FSS did not make an offer of proof of evidence relating to industry standard or a market rate.[39] Indeed, the record reveals that the claimed "industry standard" was based on statements in declarations submitted by FSS that

---

[38] See RP (June 25, 2013) at 268, 270. FSS challenges only the exclusion of evidence of industry standard and market rate.

[39] During argument on the motion in limine, the court asked counsel for FSS if there was going to be testimony on this issue, to which counsel responded, "I don't recall any testimony on market rate." RP (June 25, 2013) at 267. The court again asked what evidence FSS had relating to industry standards or market rate, and counsel responded, "I don't think anybody has testified to industry standards or market rate," at which point the court noted, "Then you're . . . conceding." RP (June 25, 2013) at 269.

FSS was later unable to verify.[40] Thus, FSS fails to show that a ruling excluding such evidence had any effect on the outcome of the trial.

Bias

FSS argues that trial judge exhibited bias and this matter should not be remanded to the same judge. "Litigants 'must submit proof of actual or perceived bias to support an appearance of impartiality claim.'"[41] While FSS recites several instances of adverse rulings and accuses the trial judge of being "caustic" and "hostile," those rulings and comments were based upon the conduct of FSS and its attorneys. FSS fails to establish bias. Remand to the same trial judge for additional findings is appropriate.

We remand for further findings consistent with this opinion.

WE CONCUR:

[40] See CP at 306-07, 1462.

[41] GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 154, 317 P.3d 1074 (2014) (quoting Magana v. Hyundai Motor Am., 141 Wn. App. 495, 523, 170 P.3d 1165 (2007), rev'd on other grounds, 167 Wn.2d 570, 222 P.3d 191 (2009)).