Washington Supreme Court No. 98890-1

Court of Appeals No. 80571-1-I
Court of Appeals No. 79173-7-I

IN THE SUPREME COURT OF STATE OF WASHINGTON

EMILY RAINS, ET AL.,
Petitioners,

v.

KEYSTONE WINDOWS AND DOORS,
Respondent.

On Review from the Washington Court of Appeals Division
and King County Cause No. 12-2-40707-0 SEA

PETITION FOR REVIEW

Emily Sharp Rains
Attorney for Petitioners
4760 South Highland Drive
No. 402
Salt Lake City, Utah 84117

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1. Identity of Petitioners

The Petitioners are Emily Rains, Michael Rains, and Rains Law Group. (the "Petitioners"). The Petitioners were the Defendants in King County, and the Appellants before Division I.

2. Citation to Court of Appeals Decision

Petitioners seek review of the Court of Appeals decision in *Rhodes v. Rains*, 80571-1-I (June 22, 2020)(attached hereto), and *Rhodes v. Rains*, 79173-7-I (July 27, 2020)(attached hereto).

3. Issues Presented for Review[1]

A. Appeal no. 80571-1-I

1. Does the court's narrow definition of fraud conflict with earlier appellate CR 60(b)(4) cases?

2. Does the court's failure to resolve the question of fraud conflict with earlier appellate cases which hold that the question of fraud must be resolved first, before deciding whether a CR 60(b)(4) motion was timely?

3. Is the public policy against fraud on the courts undermined by the court's approach in this appeal because the question of fraud will rarely be decided and therefore, not deterred?

4. Does the court's award of sanctions pursuant to RAP 18.9 conflict with *Green River Comm. Coll. Dist. No. 10*?

B. Appeal no. 79173-7-I

[1] The 2014 trial transcript will be referred to herein as "RP1", the 2018 trial transcript as "RP2", and the transcript of the CR 60 hearing as "RP3".

1. Did the court err when it failed to resolve the question of fraud and instead relied on the fraud to decide the appeal against Rains, the innocent party?

4. Statement of the Case

A. Procedural History

Keystone, and its sole owner, Michan Rhodes, filed this lawsuit against the Defendants for breach of fiduciary duty, malpractice, and violation of the Washington Consumer Protection Act. CP 1-13. The malpractice and CPA claims were dismissed at summary judgment, and the breach of fiduciary duty claim proceeded to trial in August 2014. *Rains' Op. Br. Appx. App. No.* 80571-1-I, p. 19-22. Fraud at the trial resulted in a verdict for Keystone. CP 2588-2591, CP 2166-2169. But Rains prevailed on her wage claim against Keystone. Id.

After the 2014 trial, Rhodes filed an appeal seeking to reverse the trial court's summary judgment dismissal of the CPA claim. *Rhodes v. Rains*, 195 Wash. App. 235, 381 P.3d 58 (2016). Rhodes prevailed (again, because of fraud) and the CPA claim was remanded for trial. *Id; Rains' Op. Br. App. No.* 80571-1-I.

In the 2018 trial, Rhodes engaged in the same fraud. *Id.* This resulted in a verdict for Keystone against Emily and Michael Rains, individually (but not against Rains Law Group[2]). *Id.*; CP 200-202.

After the 2018 trial, Rains filed a CR 60(b)(4) motion asking the trial court to set aside the 2014 judgment based on fraud. CP 702-790. The motion was denied. CP 2765-2767. Rains appealed and the Court of Appeals concluded that Rains' motion was not timely, but it did not address the fraud. *Rhodes*, No. 80571-1-I, p. 9, fn. 8. Rains also appealed the 2018 judgment in which she, again, raised the issue of fraud. *Rains Op. Br. App. No. 79173-7-I.* This appeal also included a motion to recall the September 19, 2016 mandate remanding the CPA claim.[3] *Id.* The second court, like the first court, did not resolve the question of fraud either. *Rhodes*, No. 79173-7-I, unpublished *(no discussion)*. Instead, it relied on the fraud to decide the appeal against Rains. *Id.*; *see also* p. 5, fn. 4.

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[2] The verdict against Rains Law Group in 2014, was based on false testimony given by Rhodes at trial, coupled with misleading evidence (partial telephone records). RP1 281:7-25, RP1 282:1-20. Notably, in the 2018 trial, Rhodes changed her testimony about the billing allegation against Rains Law Group and the partial phone records were excluded when Rains' objection was sustained, resulting in a verdict in favor of Rains Law Group on the same allegations, but this time, for the CPA claim. (2018 trial) RP2 40-47, RP2 635:20-25, RP2 636:1-19; CP 206; see also *Rains' Op. Br. App. No.* 80571-1-I, pp. 8-9.

[3] The Court of Appeals asked Rains to re-brief her motion to recall the September 19, 2016 mandate in appeal no. 80571-1-I., which she did, and then it relied on the outcome of this appeal instead of resolving the question itself. *Rains' Op. Br. App. No.* 80571-1-I, p. 1.

B. The Fraud

At both trials, fraud by Rhodes, which included a forgery and false testimony by Rhodes, and her key witness, Grace Alonzo, resulted in verdicts against Emily Rains, individually. *Rains' Op. Br. App. No.* 80571-1-I, pp. 1-11; *Rains' Op. Br.* 79173-7-I, pp. 22-22. Alonzo was a former R&R[4] bookkeeper who was hired to work on Keystone's books. CP 508, ¶¶ 2-4. In March 2012, after R&R closed, Alonzo went to work for Keystone directly. CP 1368-1395. In April 2012, Alonzo left Keystone (with a grudge). CP 512, ¶12. On October 17, 2012, Rains quit. CP 1411-1416. In 2013, almost a year after Rains' resignation, Rhodes re-hired Alonzo to "assist" her with this litigation against Rains. CP 510, ¶8, CP 1678-1679; RP2 681 (Rhodes); RP2 486:3-4 (Alonzo); RP3 15. The evidence which supports Rains' motion to vacate proves that Rhodes and Alonzo went into Keystone's Quickbooks (after Emily Rains quit working for Keystone) and created a fake document which Rhodes offered at trial to support Alonzo's testimony that she had knowledge of double-

[4] R&R is the short name for Rains & Rains (formerly Rains Strategic Accounting). R&R was a Washington limited liability company owned by Emily, Michael, and an unrelated third party. R&R provided bookkeeping and accounting services. R&R has never been a party to this lawsuit. Nor have the Plaintiffs ever taken any action to pierce the veil to overcome the protection provided by RCW 25.15.126 and establish personal liability of the members. *Curtis v. Milosavljevic,* Appeal No. 78248-7-I, unpublished (2019).

billing by R&R. This document was entered in the litigation records as exhibits 30, 7, 97, and A. CP 1696-1728, 515-19 (copy of exhibits); CP 510 ¶8, CP (Alonzo SJ Decl. testimony); RP2 483-89 (Alonzo's 2018 trial testimony/deposition); RP1 582:9-25, RP1 583-87 and CP 1677-1679 (Alonzo's 2014 trial testimony).

During summary judgment Alonzo gave the following declaration testimony about the document:

> "Emily had me reconcile all the Rains companies to make sure there were no duplicate invoices. When I did find a duplicate, I printed it out and emailed it to Emily, who in turn told me to contact Michael. So I emailed Michael the duplicate invoice number and asked him to contact me. When Michael finally called me back, he asked me to show him where the duplicate invoice was in Quickbooks. Although I had printed it out and it was in front of me on my desk, it was no longer in Quickbooks. I ended up researching this missing invoice by pulling a report called the audit trail and found that he had voided the invoice. This is Keystone Quickbooks 3/9/12 Invoice #20120219-20120303-40877-009, a copy which is attached as exhibit A. The word "void" is clearly shown in the highlighted area. This invoice was entered back into Keystone's Quickbooks on July 27, 2012 with the word "void" still showing. (I noticed this in late 2013, when I reviewed Keystone's financial records for Michan). I did not know why Michael was acting in such an unprofessional manner and bluntly *lying* that the invoice did not exist when in actuality he had just voided it out." CP 509-510. *(emphasis added)*

Alonzo would go on to give, almost verbatim, the same testimony about this document during the 2014 trial, except that she also claimed *for the first time* that after the duplicate invoice was re-

entered into Keystone's Quickbooks in July 2012, it was then paid.[5] RP1 582:9-25, RP1 583-87, CP 1677-1679. Alonzo's declaration was relied on by the Court of Appeals in 2016 when it decided to remand the CPA claim. Then, during the 2018 trial, over Rains' objection, Plaintiffs were allowed to read Alonzo's entire deposition transcript into the record which included the forged invoice and Alonzo's perjury related to it.[6] RP2 483-89. Shortly, before the 2018 trial, Rains found a back-up copy of Keystone's Quickbooks that she had brought with her to trial to impeach Alonzo's and Rhodes' testimony. She also brought with her all the R&R work logs[7] for the bookkeepers who had worked on Keystone's account, including Alonzo's logs.[8] But, because Alonzo did not testify in-person, Rains was denied the opportunity to cross examine her using the evidence. RP2 422-531.

After the second trial in 2018, Rains consulted two forensics experts. CP 732-735; CP 791-851. They analyzed Rains' back-up copy

[5]Neither Rhodes, nor Alonzo have ever presented a copy of a check drafted against Keystone's bank account proving multiple payments for a single R&R invoice.
[6] Rains' attorney did not attend Alonzo's deposition because Alonzo had no personal knowledge related to the claims made against Defendants based on the allegations in the complaint or Rhodes' answers to Rains' interrogatories. RP2 429-531 cf. CP 1-13, CP 1064-1092.
[7] The bookkeepers reported their work on excel spreadsheets. CP 1675-1678. This is how the bookkeepers got paid and how clients were billed. *Id.*
[8] Rains has been an out-of-state litigant since 2013 (SLC, UT). During the 2014 trial, the work logs and related paychecks which she needed to impeach Alonzo were back in Utah (and Rains did not recall having a copy of Keystone's QuickBooks).

of Keystone's Quickbooks. CP 792, ¶3; CP 814; CP 821, ¶4. In their declarations in support of Rains' CR 60(b)(4) motion, both of the experts testified that no one had gone into Rains' copy of Keystone's Quickbooks and added, removed, or changed any information since the date of its back-up.[9] *Id.* Rains' experts testified that the duplicate invoice (and the related transactions) that Alonzo repeatedly testified about did not exist in Keystone's Quickbooks prior to October 18, 2012 (the day following Rains' last day of work). CP 791-794, 813-819, 820-823, 825-833. If the duplicate invoice (and the related transactions) were not in Keystone's Quickbooks as of October 18, 2012, then Alonzo and Rhodes went into Keystone's Quickbooks after Rains' employment ended, created the duplicate invoice and back-dated it to make it look like it was a document that existed in Keystone's Quickbooks during the time Emily worked for Keystone. In short, Alonzo's testimony couldn't be true if the document (and the related transactions) did not exist until after Emily's employment ended with Keystone.

After Rhodes was confronted with the experts' testimony, Rhodes' attorney, Dan Young, *admitted* during the CR 60 hearing that

[9] Rains did ask Rhodes' attorney to produce a copy of Keystone's Quickbooks so that her experts could examine it and pinpoint the fraud, but Young refused. CP 913, CP 1962-1966.

the duplicate invoice did *not* exist in 2012 while Emily was employed by Keystone. Here is what he said:

> "...[I]n her deposition, [Alonzo] talks about it, in three different places, how she came back in 2013 and reviewed Keystone's financial records to help try to straighten everything out, they were in such a mess. So it is pretty clear from her testimony that she never made the claim that these things, that these records came from the 2012 QuickBooks file. She never made that claim. We never made that claim. I'm not making the claim now." RP3 15:5-23 through RP3 16-1-2. "I don't disagree with their -- necessarily their expert, quote-unquote, declarations about these documents weren't in the QuickBooks files in 2012. Okay. So what? We never claimed they were." RP3 15:24-25 through RP3 16:1-2.

But Young's position, *after* the experts testified, is in direct conflict with Alonzo's testimony, *before* the experts testified. CP 510 ¶8 (Alonzo SJ Decl.); RP2 483-89 (Alonzo's 2018 trial testimony/deposition); RP1 582:9-25, 583-87, CP 1677-1679 (Alonzo's 2014 trial testimony). Young's admission is hardly a "so what?" Especially since Rhodes and Keystone benefitted multiple times from the use of the forgery and perjury (e.g. 2014 verdict, remand on appeal no. 72801-6-I, 2018 verdict, CR 60 hearing, and now app. nos. 79173-1-I). Apart from the forged invoice and the perjury related to it, the only evidence offered in support of Rhodes' billing allegation against R&R was false testimony by Rhodes and Alonzo.

Alonzo testified that R&R's invoices, on their face, contained evidence of double billing, anytime a work description was used more than once on an invoice because it was a company policy that all entries on a bookkeeper's work log be unique.[10] CP 1680-1682; RP1 581:13-25, RP1 582:1-3, RP1 590:19-25, 591:1-5, RP1 592-96; RP2 499:13-25, RP2 500:1-3, RP2 505:12-13; RP1 576:8-9. The bookkeepers' work logs prove that all the items on the R&R invoices, including those that Alonzo asserts are examples of double billing, was work performed by either Alonzo, or one of the other three bookkeepers.[11] CP 1368-1395 (R&R invoices), 1417-1418 (fee breakdown), 1530-1570 (Pehrson's logs), 1572-1582 (Ying's logs), 1583-1624 (Alonzo's logs), 1625-1656 (Christensen's logs).

In addition, Rhodes testified that not a single change was made to Keystone' Quickbooks, meaning that R&R did no work. RP2 685:1-6. But this testimony is contradicted by the experts' testimony. CP 794, ¶8; CP 814; CP 823, ¶8; CP 833. Both experts testified that there

[10] The bookkeepers' work logs were created using excel. If a bookkeeper performed work on day one and then performed the same work on day three, when the bookkeeper goes to enter the description into their work log, Excel will auto complete the description to save time. This is not evidence of double-billing.

[11] All the time reported by the bookkeepers on the work logs was paid for by R&R. CP 1368-1395 (R&R invoices) *cf.* CP 1530-1570 (Pehrson's logs), CP 1572-1582 (Ying's logs), CP 1583-1624 (Alonzo's logs), CP 1625-1656 (Christensen's logs). By contrast, Keystone never paid for all the services invoiced by R&R. CP 1417-1418 (fee breakdown).

were more than 8,000 transactions entered into Keystone's Quickbooks during this time, which means a *substantial* amount of work had been done. *Id.* Rhodes also testified that she never received a single invoice. CP 1124; RP2 664:14-21. And, Alonzo testified that none of R&R's invoices were entered into Keystone's Quickbooks until August 2012. RP1 575:24-25, 576:1-5. Again, the experts' testimony proves that these were lies.[12] CP 792-93, ¶4, CP 817-818; CP 882, ¶5; CP 832.

Rains' motion to recall the mandate wasn't just based on the forgery and perjury by Rhodes and Alonzo in their declarations. *Rains' Op. Br. App. No.* 80571-1-I pp. 16-18; *Rains' Reply Br. App. No.* 80571-1-I, p. 11 fn. 12; *Rains' Op. Br App. No.* 79173-7-I pp. 8, 10-33, *Rains' Reply Br. Appeal No.* 79173-7-I, p. 1. It was also based on perjury by Duce in his summary judgment declaration. *Id.* But Rains did not get the evidence of this perjury until the 2018 trial.[13] Thus, her motion was timely.

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[12]Rains' forensic experts testified that all of R&R's invoices were entered on the invoice date or within a couple of days of the invoice date, which means Rhodes had between 1.5 years to 7 months (depending on the invoice) to review invoices. CP 792-93, ¶4, CP 817-818; CP 882, ¶5; CP 832.This is important because Rhodes had ample time to review the invoices and object, but she never did.

[13] Rhodes' summary judgment declaration directly conflicted with her testimony in both the 2014 and 2018 trials, and Duce's declaration directly conflicted with his 2018 trial testimony. *Rains Op. Br. App. No.* 80571-1-I, p. 16-18; *Rains Op. Br. App. No.* 79371-7-I, p. 8-34 *cf.* CP 438-506 (Rhodes's SJ Decl. testimony), CP 507-548 (Alonzo's SJ Decl. testimony), and CP 549-551 (Duce's SJ Decl. testimony).

5. Argument Why Review Should be Granted

A. Appeal no. 80571-1-I

Rains' Petition for Review should be granted because the Court of Appeals decision in appeal no. 80571-1-I, not only conflicts with earlier appellate decisions *(see discussion supra)*, but it will be relied on as persuasive authority by future courts deciding CR 60(b)(4) motions where, even though fraud permeates the record, the courts never reach the question of fraud, so the fraud and its fruits stand indefinitely. This will undermine the public policy against fraud on the courts and the public's faith in a system that is set-up to protect and safeguard them. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 246 (1944).

i. The court's narrow definition of fraud conflicts with earlier appellate cases.

This Court has held that [p]erjury is "fraud on the court." *State v. Berrysmith*, 87 Wash.App. 268, 272, 944 P.2d 397 (1997). "Perjury...is the deliberate testifying to something as true which is not, in fact, true. *In Re Jett*, 6 Wash.2d 724, 728, 100 P.2d 635 (1940). The *Petett* Court held that the use of a forgery is fraud on the court.[14] *Pettet*

[14] "[M]isrepresentation or other misconduct' would also justify vacation of the judgment under CR 60(b)(4)." *Mitchell v. WSIPP*, 153 Wash. App. 803, 825, 225

v. Wonders, 23 Wn.App. 795, 599 P.2d 1297 (1979), review denied 93 Wn.2d 1002 (1979). And, numerous appellate cases have found that a wide array of acts/omissions justify a set aside pursuant to CR 60(b)(4). *Wingard v. Heinkel*, 1 Wash. App. 822, 823, 464 P.2d 446 (1979)("plaintiff failed to disclose to the court relevant facts within his knowledge"); *OB-1, LLC v. Pinson*, No. 29077-8-III, unpublished (2011)(non-moving party failed to disclose all relevant facts to court); *Thorn v. Cromer*, No. 32585-7-III, unpublished (2015)(wife's false statements about husband's income led to entry of order, court of appeals reversed), review granted 189 Wash. App. 1032 (2016); *Marriage of Maddix*, 41 Wn. App. 248, 253, 702 P.2d 1061(1985)(non-moving party failed to disclose value of business leading to interest in business being awarded to nonmoving party); *Suburban Janitorial v. Clarke American*, 72 Wn. App. 302, 309, 863 P.2d 1377 (1993)(silence); *Marriage of Himes*, 136 Wash. 2d 707, 736, 965 P.2d 1087 (1998)(false affidavit for service by publication in non-moving party's dissolution action where non-moving party was always aware of moving party's address); *In Re of Marriage of Mahalingam*, 21 Wn. App. 228, 584 P.2d 971 (1978)(moving party

P.3d 280 (2009); *citing In re Marriage of Maddix*, 41 Wash.App. 248, 252, 703 P.2d 1062 (1985).

was defrauded into signing a separation agreement and the court, believing the agreement was mutual, entered a final order); *Mitchell v. Washington,* 153 Wash. App 803, 813, 225 P.3d 280 (2009)(false documentation used to support a cost bill); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989)(misrepresentation of findings of fact); and *Pettet v. Wonders,* 23 Wn.App. 795 (a document with a false signature and an employee's perjury in relation to it), review denied 93 Wn.2d 1002 (1979).

Like *Pettet*, Rains' motion to vacate was based on a forgery and the perjury given in relation to it by Rhodes' employee, Alonzo.[15] CP 510 ¶8, CP (Alonzo SJ Decl. testimony); RP2 483-89 (Alonzo's 2018 trial testimony/deposition); RP1 582:9-25, RP1 583-87; CP 1677-1679 (Alonzo's 2014 trial testimony). Though the forgery in this case is different from the forgery in *Petett*, it is nonetheless a forgery because a forged instrument includes any "written instrument which has been falsely made, completed, or altered … which is put off as a true written instrument." RCW 9A.60.010, RCW 9A.60.020.

Unlike *Petett*, Rains doesn't even have to prove that it is a forgery, because now that Rhodes has been confronted with evidence

[15] The motion to recall the September 19, 2016 mandate was based on the forgery and perjury by Alonzo, Duce, and Rhodes in their summary judgment declarations.

she admits that the "duplicate invoice" which was repeatedly offered as "real" was not a genuine document from the period of Rains' employment.[16] RP3 15:5-25 to 16:1-2. If Alonzo was willing to forge a document and perjure herself in relation to it, it follows that all of Alonzo's testimony would be suspect. *Petett,* 23 Wn. App. at 800. After all, *falso in uno, falso in omnibus*.

ii. The court's decision in this appeal conflicts with earlier appellate cases which require that the issue of fraud be addressed first as a fact and circumstance in determining whether a CR 60(b)(4) motion is timely.

Here, relying on *Luckett*, the Court of Appeals did not decide the fraud issue first. Instead it resolved the timeliness issue first, which resulted in the fraud issue not being decided at all. *Rhodes*, No. 80571-1-I, p. 9, fn. 8; *Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 114 (1999). Thus, the court's decision conflicts with numerous appellate cases that previously decided CR 60(b)(4) motions. *Wingard*, 1 Wash. App. 822; *OB-1, LLC*, No. 29077-8-III, unpublished; *Thorn*, No. 32585-7-III, unpublished; *Marriage of Maddix,* 41, Wn. App. 248; *Suburban Janitorial v. Clarke American*, 72 Wn. App. 302; *Marriage*

[16] Rhodes' attorney considered the forgery and perjury related to it sufficiently material that he caused it to be entered into the litigation record five separate times. This wasn't accidental, it was a deliberate plan by Rhodes and Alonzo to deceive the courts. But it is immaterial whether the misrepresentation was innocent or willful because the effect is the same. *Peoples State Bank v. Hickey*, 55 Wn. App. 372.

of Himes, 136 Wash. 2d 707; *In Re of Marriage of Mahalingam*, 21 Wn. App. 228; *Yankee v. Jerome Pierre, M.D.*, No. 77544-8-I, unpublished (2019); *Mitchell v. Washington*, 153 Wash. App. 803; and *Pettet v. Wonders*, 23 Wn.App. 795. In each of these cases, before reaching the question of whether the motion was timely, the courts decided whether fraud occurred. Now, the court's decision in this appeal will be the persuasive lens from which future CR 60(b)(4) motions are decided, which means the issue of fraud will rarely (if ever) be reached.[17]

Rains does not challenge the holding in *Luckett*, Rains challenges the misapplication of *Luckett* to cases like hers, where fraud is a fact and circumstance of the case. *Luckett*, 98 Wn. App. at 310 (fraud was not alleged in *Luckett*). If the Court of Appeals had properly applied *Luckett* to the facts of this case (which does involve fraud) it would have reached the same conclusion as the *Pettet* court. In *Pettet*, the Court said:

> "The factual question which the district court failed to answer is, 'Was the judgment obtained in part by the use of perjury?' If it was, then it was clearly the duty of the district court to set aside the judgment, because poison had permeated the fountain of justice….[h]er neglect to act in her own interest, and her

[17] This approach is becoming a trend in the Court of Appeals Division I. See e.g. *Palmer II. v. King County*, No. 77557-0-I, unpublished opinion (2019), where the Court of Appeals, relying on *Luckett*, does not address the fraud raised by the appellant.

> lack of diligence in discovering the new evidence which she now proffers are overcome in our view by the proffer of evidence to show that an employee of plaintiff signed the Continuing Guaranty on the line opposite her purported signature as witness to her signature. If the purported signature is in fact a forgery, as she claims, then an employee of plaintiff participated in some degree in the fraud of misrepresentation. We deem this sufficient misconduct of an adverse party to support the grant of relief." *Pettet*, 23 Wn. App. at 800-801.

Where, as here, there is clear and convincing evidence that a party has engaged in fraud, the court should have confronted the fraud. When fraud occurs the court should not be concerned with whether the party who committed fraud will be prejudiced by granting a new trial to the innocent party. Further, as the *Taylor* court held:

> "A new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial. CR 60(b)(4). [I]t cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Taylor v. Cessna*, 39 Wash. App. At 828, 836-837, 696 P.2d 28, (1985)*(interlineated citations omitted).*

It was Rains (the innocent party) who was deprived of finality when she was forced to defend against Rhodes' fraud at a second trial.[18] Not only did Rhodes defraud the trial court again in 2018, but

[18] Contrary to the Court of Appeals position in 80571-1-I, based on Alonzo's 2014 testimony, Rains' possession of the original invoice and the forgery part way through

the 2014 judgment was treated as a verity in the 2018 trial, which led to a misleading jury instruction for breach of fiduciary duty as an element of the CPA claim. *Rhodes*, No. 79173-7-I, p. 12. These are all facts and circumstances that should have been considered by the court when it decided the timeliness issue. Further, only after deciding the fraud issues related to both of Rains' motions, can the court determine whether: (1) prejudice to the nonmoving party would result due to the delay; and (2) whether the moving party had good reason for not taking action sooner."[19] *Luckett,* at 310. Otherwise, *Pettet* becomes a dead letter and the Court of Appeals misapplication of *Luckett* will stand. And, this would be unfortunate, for as the Court in *Hazel-Atlas Co.* observed: "No fraud is more odious than an attempt to subvert the administration of justice". *Hazel-Atlas Co.,* 322 U.S. at 251.

iii. The court's approach in this appeal undermines the public's interest in deterring fraud on the courts.

Perjury, bribing a witness, and tampering with evidence are crimes under RCW 9A.72. This is evidence of the strong public policy against fraud on the courts. But, criminal prosecution is not the only

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the 2014 trial was not sufficient to impeach Alonzo's or successfully challenge the validity of the forgery. RP2 485-489. Rains needed Keystone's Quickbooks and Alonzo's work logs and paychecks.

[19]It wasn't until *after* Rhodes and Duce testified at the 2018 trial and materially contradicted their earlier testimony, that Rains had all the evidence she needed to bring her motion to recall the mandate. Thus, her motion was timely.

means to ensure that the integrity of the courts are maintained. The courts, themselves, are empowered to address fraud when confronted with it. Here, the court did not confront the fraud—period.[20] Its approach in this case, of deciding timeliness first (and fraud, not at all) resulted in the nonmoving party being rewarded (six times) for their fraud. If other courts follow this approach, fraud will beget fraud. A justice system where fraud is generally perceived as an effective litigation strategy, where the fraudster is more commonly than not, seen to profit from his conduct, will only encourage more litigants to engage in this behavior. And RCW 9A.72 will be rendered nothing more than a paper tiger. As the Court said in *Peoples State Bank v. Hickey*:

> "Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Peoples State Bank v. Hickey*, 55 Wn. App. 374, *citing Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238.

iv. The court's decision to award RAP 18.9 sanctions is inconsistent with a Supreme Court case.

[20] This is true of both appeal no. 79173-7-I and appeal no. 8571-1-I.

Contrary to *Green River Community College District No. 10. V. Higher Educ. Personnel Board,* 107 Wn.2d 427, 442-443, 730 P.2d 653 (1986), the Court of Appeals failed to consider the record as whole. And reasonable minds may differ on whether the lower court properly applied *Luckett*. Thus, all doubts should have been resolved in favor of Rains.

B. Appeal no. 79173-7-I

i. The court erred when it failed to resolve the question of fraud by Rhodes and instead relied on the fraud and decided the appeal against Rains.

The outcome of appeal no. 79173-7-I was only possible because the fraud raised by Rains was not decided by the panel in 80571-1-I or in 79173-7-I. "But for" the fraud throughout the litigation, there wasn't sufficient evidence to support a CPA claim against the Defendants. And, the fraud, coupled with the misleading jury instruction, prejudiced Emily and Michael Rains at trial in 2018, which was a reversible error. If this Court finds fraud, then Rains' appeals should be granted. *Pettet v. Wonders,* 23 Wn.App. at 800.

6. Conclusion

This Court should accept this Petition, vacate both appellate decisions, remand the parties to retry the breach of fiduciary duty

claim, and recall the mandate or, in the alternative, remand the CPA claim for trial.

Respectfully submitted this 12th day of August, 2020.

/s/Emily Sharp Rains
Emily Sharp Rains
Petitioners Attorney
WSBA#35686

APPENDIX

A: Denying Motion to Publish
(July 20, 2020)(Appeal No. 80571-1-I)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 20, 2020

Igor Lukashin
POB 5954
Bremerton, WA 98132
igor_lukashin@comcast.net

Michael Rains
4760 South Highland Drive
#402
Salt Lake City, UT 84117

Emily Sharp Rains
Emily Sharp Rains Esq
4760 S Highland Dr #402
Salt Lake Cty, UT 84117
mail@emilyrains.com

Dan Robert Young
Attorney at Law
1000 2nd Ave Ste 3200
Seattle, WA 98104-1074
dan@truthandjustice.legal

CASE #: 80571-1-I
Michan Rhodes, et ano, Respondents v. Emily Sharp Rains, et al, Appellants

Counsel:

Enclosed please find a copy of the Order Denying Motion to Pubish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

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

MICHAN RHODES, an individual; KEYSTONE WINDOWS AND DOORS, INC., a Washington corporation,

Respondents,

v.

EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community; RAINS LAW GROUP, PLLC, a professional limited liability company,

Appellants.

No. 80571-1-I

ORDER DENYING MOTION TO PUBLISH

A pro se nonparty, Igor Lukashin, has filed a motion to publish. The panel has considered the unpublished opinion filed for the above entitled matter on June 22, 2020. Finding that it is not of precedential value the panel has determined that the motion to publish should be denied. Now, therefore, it is

ORDERED that the motion to publish is denied.

Lippelwick, J.
Judge

APPENDIX

B: Opinion in Appeal No. 80571-1-I (June 22, 2020)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

June 22, 2020

Dan Robert Young
Attorney at Law
1000 2nd Ave Ste 3200
Seattle, WA 98104-1074
dan@truthandjustice.legal

Michael Rains
4760 South Highland Drive
#402
Salt Lake City, UT 84117

Emily Sharp Rains
Emily Sharp Rains Esq
4760 S Highland Dr #402
Salt Lake Cty, UT 84117
mail@emilyrains.com

CASE #: 80571-1-I
Michan Rhodes, et ano, Respondents v. Emily Sharp Rains, et al, Appellants

King County, Cause No. 12-2-40707-0 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the trial court's denial of Rains's CR 60(b) motion and deny her motion to recall the mandate in appeal no. 72801-6-I, Rains, 195 Wn. App. 235. We award Rhodes attorney fees and costs."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Samuel Chung

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAN RHODES, an individual; KEYSTONE WINDOWS AND DOORS, INC., a Washington corporation, Respondents, v. EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community; RAINS LAW GROUP, PLLC, a professional limited liability company, Appellants, HEATHER CHRISTIANSON and JOHN DOE CHRISTIANSON, and their marital community, Defendants.	No. 80571-1-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Rains appeals the trial court's denial of her CR 60(b) motion. She argues the trial court abused its discretion in finding that she did not bring her motion within a reasonable amount of time, and that she did not prove fraud by clear and convincing evidence. We affirm.

FACTS

Michan Rhodes is the former owner of Keystone Windows and Doors Inc. In 2011, Rhodes approached Emily Rains for assistance with Keystone's financial

planning and accounting. Rains is the owner of Rains Strategic Accounting LLC[1] and Rains Law Group PLLC.

In December 2012, Rhodes and her company, Keystone, brought suit against Rains, her husband Michael Rains, and others for a series of wrongs she alleged were committed during their business relationship. She asserted three claims: (1) legal malpractice; (2) breach of fiduciary duty; and (3) breach of the Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court dismissed claims (1) and (3) on summary judgment. Only the breach of fiduciary duty claim went to trial. A jury found Rains liable on this claim in September 2014. Judgment was entered on November 5, 2014.

Both sides appealed to this court. We dismissed Rains's cross appeal and considered only whether the trial court erred in dismissing Rhodes's CPA claim on summary judgment. See Rhodes v. Rains, 195 Wn. App. 235, 250, 381 P.3d 58 (2016). We concluded that the trial court had erred and remanded for a trial on the CPA claim. See id. at 250-51.

While preparing for the 2018 trial[2] Rains "discovered" what she believed to be evidence of fraud in the first trial. The evidence was a backup copy of

[1] Appellants admit that at some point, Rains Strategic Accounting changed its name to "Rains and Rains Consulting [LLC]." For clarity, we refer to the entity as RSA-R&R throughout the opinion.

[2] We refer to the second trial, on the CPA claim, as the 2018 trial, and the first trial, on the breach of fiduciary duty claim, as the 2014 trial for clarity. The trials had different judges. A jury found Rains liable for the CPA claim in the 2018 trial. Her appeal of that trial is pending before this court. Rhodes v. Rains, No. 79173-7-I.

QuickBooks[3] records from her last day working at Keystone on October 17, 2012. She admits the backup was in her possession and has apparently been in her possession since October 17, 2012, well before the start of the first trial. She claims she had no time to have an expert examine the files prior to the second trial, but that she printed out an audit trail and sought to introduce it as an exhibit at that trial.

After the conclusion of the 2018 trial, Rains received the reports of two experts she had hired to analyze the QuickBooks backup in her possession. Rains claims their findings prove that Rhodes falsified exhibits at the first trial. Specifically, she claims her backup file proves that QuickBooks entries presented as exhibits 30 and 97[4] at the first trial were created after Rains left Keystone. This is so because the experts determined that those specific entries do not appear in Rains's backup of Keystone's QuickBooks records.

Grace Alonzo was a bookkeeper for Rains and later "help[ed]" Rhodes. Exhibits 30 and 97 were introduced at the first trial and supported her testimony. She testified that during the time she was doing bookkeeping on the Keystone account, she found in QuickBooks an invoice from RSA-R&R which contained duplicative billing. She reported this invoice to Rains and was told to report it to

[3] QuickBooks is an accounting software package that Keystone used to keep track of its finances.

[4] Exhibit 97 is sometimes referred to as exhibit 7, its designation during Grace Alonzo's deposition. Because the exhibit was marked as 97 for trial, we refer to it as such.

Michael.[5] She printed out a physical copy of the invoice and sent an e-mail to Michael with the invoice number. Once she had done so, Michael called her and told her the bill did not exist. Alonzo went back into the system and discovered that the invoice had been voided out of the system. But, when Alonzo went through the books with Rhodes a year later, she discovered that the invoice had been put back in the system and paid. She testified that page 75 of exhibit 30 was evidence of the now-paid invoice she found in QuickBooks.

Pages 1 and 2 of exhibit 97 are an invoice from RSA-R&R to Keystone. That invoice details charges for about 129.86 hours worked by RSA-R&R employees. The invoice billed all hours at an hourly rate of $37.50, for a total of $4,863.79. It appears to have duplicate entries. Rains's experts do not challenge the legitimacy of this invoice. Further, Rains's experts agree that the invoice was entered into QuickBooks on March 9, 2012. It appears in the QuickBooks backup in Rains's possession as invoice number 20120219-20120303. Rains's QuickBooks backup indicates that RSA-R&R was only paid $3,504.31 on the invoice.

Pages 4 through 9 of exhibit 97 are screen captures of a QuickBooks entry that depicts a QuickBooks picture of a check dated March 9, 2010, made payable to RSA-R&R in the amount of $3,504.31. The details pictured in the screen capture for that check shows 93.4 hours at $37.50 per hour. The memo line of the pictured

[5] We refer to Michael Rains by his first name for clarity.

check says that it was voided but the there is a paid stamp on the picture of the check. The line item descriptions in the screen captures appear to be identical to those in the invoice at pages 1 and 2 of exhibit 97. The reference number, 20120219-20120303, is identical to the version that appears in Rains's backup.

Pages 75 through 77 of exhibit 30 are also screen captures of a QuickBooks entry. It is slightly different than that at exhibit 97, but the reference number, line item descriptions, hours, hourly rate, and the resulting amount is the same.

Rains's experts determined that the versions of the QuickBooks entries that appear at exhibit 97 pages 4 through 9 and exhibit 30 pages 75 through 77 do not appear in Rains's QuickBooks backup. The version in the exhibits is different than the version in Rains's backup[6] in two ways. First, although the work descriptions are the same, the Alonzo version shows the hours for each entry as "0," except for the first entry, which had been changed to "93.4." Which, when multiplied by the hourly rate of $37.50, equals $3,504.31, the total amount that had been paid on the RSA-R&R invoice. Second, the Alonzo version shows a balance due to RSA-R&R of $0, whereas the version in Rains's backup shows a balance due to RSA-R&R on the invoice.

Believing this evidence proved that Rhodes had committed a fraud upon the court in the 2014 trial, Rains filed a CR 60(b) motion to vacate the judgment in that

[6] He does not provide a copy of the "version" in the "QuickBooks file" that he discusses in his report and we do not find them in the record. The only evidence of an invoice in the record is the invoice at exhibit 97 page 1 and 2.

case. She filed her motion with the trial judge in the 2014 trial after the conclusion of the 2018 trial. Rains also claims that she asked the trial judge in the 2014 trial to vacate the judgment in the 2018 trial as part of her CP 60(b) motion. Claiming that the alleged fraud also affected the appeal of the first trial, she also filed, in this court, a motion, under RAP 12.9, to recall mandate for appeal no. 72801-6-I, Rains, 195 Wn. App. 235. The trial court denied her CR 60(b) motion for the first trial and did not address her request to vacate the judgment in the second trial.

Rains appeals the trial court's denial of her CR 60(b) motion. Her motion to recall the mandate in appeal no. 72801-6-I, Rains, 195 Wn. App. 235 is still pending before this court.

DISCUSSION

Rains argues that the trial court abused its discretion in finding that her CR 60(b) motion was untimely and rejecting it on the merits. She also argues the trial court erred in declining to consider her request to have the second trial vacated as well. Last, she urges this court to recall the mandate in the appeal of the first trial, no. 72801-6-I, Rains, 195 Wn. App. 235. We review the trial court's denial of a CR 60(b) motion for abuse of discretion. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 114 (1999).

I. Timeliness

Rains argues that the trial court erred in finding that she did not bring her CR 60(b) motion within a reasonable time. Rains sought relief from judgment

under CR 60(b)(4) and (11). A CR 60(b) motion under these subsections must be made within a reasonable time. What constitutes a reasonable time depends on the facts and circumstances in each case. Luckett, 98 Wn. App. at 312. Major considerations in determining timeliness include the prejudice to the nonmoving party due to the delay and whether the moving party had good reasons for not taking appropriate action sooner. Id.

Both factors weigh against Rains here. Rains waited almost five years from the judgment date of the first trial to file her motion. During that time, this case has gone through an appeal, another trial, and has another appeal pending. See Rains, 195 Wn. App 235; Rains, No. 79173-7-I. Considerable prejudice to Rhodes would result in relitigating these issues. More importantly, Rains has provided no satisfactory explanation for why she waited so long to file her motion.

Rains claims she "discovered" the QuickBooks backup before the 2018 trial. Newly discovered evidence is that which could not have been discovered with due diligence. CR 60(b)(3). Parties seeking relief on this ground are required to show that the exercise of such diligence would not have uncovered the evidence. Jones v. City of Seattle, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). But, Rains admits the backup files were in her possession and have been since October 17, 2012, well before the start of the first trial. Her only explanation is that she "did not know she had [it]."

The discrepancies between the invoice in her backup file and the screenshots she now claims are fraudulent were plain on the face of the exhibits at the time of the first trial. Her own expert acknowledges that the invoice that appears in her records also appears on the very first two pages of the exhibit she now claims is fraudulent. He goes on to point out that the allegedly fraudulent QuickBooks entries appear on the following seven pages of the exhibit. Nothing in the record suggests that Rains, or someone at her direction, could not have made these same comparisons at the first trial. Rains did not exercise due diligence. The discrepancy in the documents Rains relies on is not newly discovered evidence. She may not rely on that discrepancy to excuse her delay in seeking relief under 60(b).

Rains seeks to excuse her lack of diligence by arguing that the fraud affected both the 2018 and 2014 trials.[7] Thus, she claims, she "promptly filed after receiving the 2018 trial transcript evidencing the fraud." But, her diligence is not evaluated by the timeliness of her actions relative to the experts' reports. Her diligence must be evaluated based on what she knew at the first trial. In 2012, she

[7] Rains claims the trial court erred in declining to consider her request to vacate the 2018 judgment, which she requested in the reply brief in support of her CR 60(b) motion to vacate the judgment in the 2014 trial. Rains cites no authority that would give the judge in the first trial the authority to vacate the judgment in the second trial. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). We find that the trial court did not err in declining to consider her request.

had the only evidence she needed to make her claim, the exhibits offered at the first trial and her own QuickBooks backup.

Rains appears to argue that Pettet v. Wonders stands for the proposition that the reasonable time bar does not apply if there is perjury in a case. 23 Wn. App. 795, 800, 599 P.2d 1297 (1979). We disagree. The Pettet court was faced with claims of forgery and perjury. Id. at 801. It nonetheless weighed the reasonableness of the time it took to file a 60(b) motion based on the facts and circumstances of the case. Id. It did not establish an exception to the rule. It would not excuse Rains's delay in this case, even if she had raised sufficient evidence of fraud.

Given Rains's unsatisfactory reason for her delay and the prejudice to Rhodes that would result from it, the trial court did not abuse its discretion in finding Rain's motion untimely.[8] For these same reasons, her motion to recall the mandate on appeal is also untimely.[9]

[8] Because the issue of timeliness is dispositive, we need not reach the issue of whether Rains proved fraud by clear and convincing evidence. CR 60(b)(4) requires a party to show that the fraudulent conduct caused entry of the judgment such that the losing party was prevented from fully presenting their case or defense. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). All the evidence necessary to raise the claim of fraud she seeks to assert was in Rains's possession at trial. She therefore is unable to show that Rhodes prevented her from asserting this claim at trial.

[9] A motion to recall the mandate on appeal must be made within a reasonable time. RAP 12.9. Our determination that the motion was not made in a reasonable time is independent of the trial court's determination that the CR 60(b) motion was not made in a reasonable time.

II. Attorney Fees

Both sides request attorney fees and costs on appeal under RAP 14.2 and 18.9. Because Rhodes has substantially prevailed on review, we award her costs under RAP 14.2. Because we find Rains's appeal is frivolous, we also award Rhodes attorney fees under RAP 18.9.

We affirm the trial court's denial of Rains's CR 60(b) motion and deny her motion to recall the mandate in appeal no. 72801-6-I, Rains, 195 Wn. App. 235. We award Rhodes attorney fees and costs.

Appelwick, J.

WE CONCUR:

Chun, J.

Mann, C.J.

APPENDIX

C. Opinion in Appeal No. 79173-7-I (July 27, 2020)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 27, 2020

Michael Rains
4760 South Highland Drive
#402
Salt Lake City, UT 84117

Dan Robert Young
Attorney at Law
1000 2nd Ave Ste 3200
Seattle, WA 98104-1074
dan@truthandjustice.legal

Emily Sharp Rains
Emily Sharp Rains Esq
4760 S Highland Dr #402
Salt Lake Cty, UT 84117
mail@emilyrains.com

CASE #: 79173-7-I
Emily Rains, et al., Apps/Cross-Resps v. Keystone Windows & Doors, Resp/Cross-App.

King County, Cause No. 12-2-40707-0 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "For the forgoing reasons, we affirm in part. But we reverse and remand for the trial court to reinstate the full $80,000 damage award on Keystone's CPA claim."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Veronica Galvan

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAN RHODES, an individual; KEYSTONE WINDOWS AND DOORS, a Washington corporation, Respondents/Cross-Appellants, v. EMILY SHARP RAINS and MICHAEL RAINS, individually and their marital community; RAINS LAW GROUP, a professional limited liability company, Appellants/Cross-Respondents, HEATHER CHRISTIANSON and JOHN DOE CHRISTIANSON, and their marital community, Defendants.	No. 79173-7-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Michan Rhodes and her now defunct company, Keystone Windows and Doors (Keystone), sued Emily Rains,[1] her husband, Michael Rains, and Emily's business, Rains Law Group, for alleged wrongs committed during the course of a business relationship. This is the third appeal following two separate trials. In the first trial, a jury found that Emily breached her fiduciary duty to Keystone and Rhodes. In the second trial and at issue in this appeal, a jury found the Rainses liable to Keystone under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW.

[1] For clarity, we refer to Emily and Michael by their first names throughout.

Following the jury's verdict, the trial court offset the jury's damages award by the award in the first trial. The Rainses then moved for judgment as a matter of law, or in the alternative, for new trial and/or remittitur. The trial court denied the motions.

The Rainses appeal the orders denying their motions for judgment as a matter of law and a new trial. And Keystone appeals the trial court's entry of judgment, which offset the damages. Because Keystone presented sufficient evidence for a reasonable jury to find for it on each element of its CPA claim, we conclude that the trial court did not err when it denied the Rainses' motion for judgment as a matter of law. Additionally, because there were no irregularities at trial that prejudiced the Rainses, the trial court did not err when it denied the motion for a new trial. However, we conclude that the trial court abused its discretion when it offset the damages award. Therefore, we remand for reinstatement of the full damages award.

FACTS[2]

In 2011, Rhodes was told that Keystone would soon go bankrupt. In need of assistance and having received a referral for Emily's company, Rhodes approached Emily for help with Keystone's accounting and planning. Emily promised that she could help with Keystone's financial situation and that she would provide expert financial services. After Rhodes researched Emily's

[2] Keystone moves this court to strike various parts of the record and the Rainses' briefs. We exercise our discretion to review the record and briefs in their entirety. See, e.g., RAP 10.7 (providing this court discretion to accept an improper brief).

credentials, Rhodes hired Emily as a consultant and later an employee of Keystone.[3] Emily also hired Heather Christianson, her sister, to assist with accounting and Michael to assist with information technology. Various conflicts occurred between Emily, Michael, and Rhodes, the details of which are disputed. Following one such issue, Emily resigned on October 17, 2012. Keystone later went bankrupt.

In December 2012, Rhodes and Keystone sued the Rainses and Rains Law Group for legal malpractice, breach of fiduciary duty, and violation of the CPA. Emily counterclaimed that Keystone willfully withheld her wages. On the Rainses' motion for summary judgment, the trial court dismissed the legal malpractice and CPA claims. In 2014, Keystone's breach of fiduciary duty claim and Emily's wage claim proceeded to trial (2014 trial). A jury found Emily, acting through Rains Law Group, liable to Keystone or Rhodes. And it found Keystone liable to Emily for withheld wages. It awarded Keystone $88,764.38 for Emily's conduct as an in-house officer of Keystone and $7,685.29 for her conduct as an outside attorney. The jury also awarded Emily $18,780.08 for willfully withheld wages. After adding interest and attorney fees, doubling the wage claim damages, and calculating the offset, the trial court entered a net judgment of $40,162.89 for Keystone.

In 2016, Rhodes and Keystone appealed the order granting summary judgment in favor of the Rainses. We held that there were "genuine issues of

[3] Rhodes later testified that she did not hire Emily as an employee of Keystone but that Emily made herself an employee.

material fact with respect to all five elements of" the CPA claim. Rhodes v. Rains, 195 Wn. App. 235, 238, 381 P.3d 58 (2016) (Rhodes I). We therefore reversed and remanded for trial on Keystone and Rhodes' claims that Emily, Michael, and Rains Law Group violated the CPA. Rhodes I, 195 Wn. App. at 251.

In August 2018, the CPA claim proceeded to trial (2018 trial). A jury found that Emily and Michael violated the CPA and owed damages to Keystone totaling $80,000. Accordingly, Keystone submitted its proposed entry of judgment. In their reply, the Rainses argued that the trial court should offset the damages in the 2018 trial by those in the 2014 trial because the damages were duplicative. On entering judgment, the court held, "With regards to the $80,000, the Court finds that that is indeed duplicative, and . . . [it] should be offset by the damages that were awarded in the first trial." The trial therefore awarded Keystone $0.00, except that the court awarded Keystone $25,000 in enhanced damages.

In October 2018, the Rainses moved for judgment as a matter of law, and/or a new trial and/or remittitur. The trial court denied the Rainses' posttrial motions. And in November 2018, the Rainses and Keystone appealed the trial court's rulings and entry of judgment regarding the CPA claim (current appeal).

In June 2019, the Rainses moved the 2014 trial court for relief from the jury verdict and final judgment pursuant to CR 60. The trial court denied the motion, finding that the motion was untimely. The Rainses appealed, presenting three claims of error: (1) the trial court abused its discretion when it rejected her CR 60(b) motion as untimely and meritless, (2) the trial court erred when it

denied her motion to vacate the 2018 trial, and (3) we should recall our mandate from the appeal of the 2016 appeal. Rhodes v. Rains, No. 80571-1-I, slip op. at 6 (Wash. Ct. App. June 22, 2020) (unpublished), http://www.courts.wa.gov/opinions/pdf/805711.pdf (Rhodes II). We held that the Rainses' CR 60(b) motion was untimely and that the trial court therefore did not err. Rhodes II, slip op. at 9. Similarly, we concluded that the Rainses' motion to recall our mandate from the 2016 appeal was untimely.[4] Rhodes II, slip op. at 9. Therefore, we affirmed the trial court's order denying the CR 60 motion and denied the motion to recall our mandate.

Before us in this appeal, the Rainses contend that the trial court erred when it denied her posttrial motions, and Keystone contends that the trial court improperly offset damages.

ANALYSIS

Judgment as a Matter of Law[5]

The Rainses contend that the trial court erred when it denied their motion

[4] In this appeal, the Rainses seek to recall the mandate for other reasons. Because we denied the motion in our most recent opinion, we decline to address novel theories here. See, e.g., Reeploeg v. Jensen, 81 Wn.2d 541, 546, 503 P.2d 99 (1972) (noting that to "'require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice'" (quoting Kosten v. Fleming, 17 Wn.2d 500, 505, 136 P.2d 449 (1943)).

[5] Keystone contends that the law of the case doctrine applies and prevents review of the Rainses' motion for judgment as a matter of law. We disagree. "[T]he law of the case doctrine precludes this court from reconsidering the same legal issue already determined as part of a previous appeal." Lian v. Stalick, 115 Wn. App. 590, 598, 62 P.3d 933 (2003). In Rhodes I, we reviewed—and the 2014 trial court granted—the motion for summary judgment based on affidavits that were not presented to the jury as evidence in the 2018 trial.

for judgment as a matter of law under CR 50. Specifically, they contend that Keystone failed to present sufficient evidence that (1) the Rainses engaged in any unfair or deceptive acts (2) that affected the public interest, (3) which caused an injury to Keystone. We disagree.

We review orders denying judgment as a matter of law de novo. Leren v. Kaiser Gypsum Co., 9 Wn. App. 2d 55, 70, 442 P.3d 273 (2019), review denied sub nom. Leren v. Elementis Chems., Inc., 194 Wn.2d 1017 (2020). Under CR 50, "[i]f . . . a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find . . . for that party with respect to that issue," then the court may grant judgment as a matter of law "against [that] party on any claim . . . that cannot under the controlling law be maintained without a favorable finding on that issue." In other words, the court must conclude, "'as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.'" Paetsch v. Spokane Dermatology Clinic, P.S., 182 Wn.2d 842, 848, 348 P.3d 389 (2015) (quoting Indus. Idem. Co. of Nw v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)). And substantial evidence is defined "as evidence 'sufficient . . . to persuade a fair-mind, rational person of the truth of the declared premise.'" Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (alteration in original) (quoting Helman v. Sacred Heart Hosp., 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

Therefore, there is no basis upon which we could apply the law of the case doctrine.

Additionally, in ruling on a CR 50 motion, we interpret the evidence and all reasonable inferences therefrom "'most strongly against the moving party and in the light most favorable to the opponent.'" Lock v. Am. Family Ins. Co., __ Wn. App. 2d __, 460 P.3d 683, 693 (2020) (quoting Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290 (1995)). To this end, the Rainses "admit[ ] the truth of [Keystone's] evidence and all inferences that can be reasonably drawn therefrom." Lock, 460 P.3d at 693. And to prevail on its CPA claim, Keystone was required to provide sufficient evidence to "prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

With regard to unfair and deceptive practices, Keystone presented sufficient evidence for a jury to find Emily and Michael engaged therein. Emily promised to provide expert financial assistance to Keystone. She also described herself online in various biographies and company profiles as having a "strong financial accounting background" and as having managed and directed multimillion dollar companies successfully "through various growth stages and transitions."[6]

But Emily did not do "any of the financial work that . . . needed to be done for" Keystone, including failing to pay vendors, insurance, gas cards, and phone

[6] The Rainses contend that "Keystone is equitably estopped from raising a new allegation on appeal" with regard to website information. Keystone presented this argument throughout this litigation. Therefore, the Rainses' contention is unpersuasive.

bills. Emily provided no financial reports to Rhodes, overbilled Keystone for her work, and failed to properly maintain financial records. Furthermore, Emily admitted at trial that she took no accounting courses as an undergraduate, never worked in accounting, and was never a certified professional accountant. She also hired her husband, Michael, despite Rhodes being uncomfortable, and, without Rhodes' knowledge, she hired her sister, Heather. Emily attempted to gain ownership interests in the company and held herself out as treasurer of Keystone in the registration details with the Secretary of State Corporations Division. And in the spring of 2012, Emily told Rhodes that the company was doing well and increased Emily and Rhodes' salaries. Finally, the Rainses also convinced Rhodes to sign a number of blank checks for their use.

In short, Emily's promise to provide expert financial management services had "the capacity to deceive a substantial portion of the public." Panag, 166 Wn.2d at 47 ("A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public."). And based on the evidence described above, which we have taken as true and in favor of Keystone, there was sufficient evidence for a reasonable juror to find that Emily and Michael mislead or misrepresented their skill or expertise, which was the reason why Rhodes hired Emily. See Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) ("Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance.").

With regard to the public interest element, a plaintiff "establish[es] that [an]

act or practice is injurious to the public interest" by evidence that the act injured others, or has or had "the capacity to injure others." RCW 19.86.093(3)(a), (c). Here, taking the evidence in the light most favorable to Keystone, there was substantial evidence that Keystone's claim affects the public interest. Specifically, at trial, Keystone presented testimony of Kyle Duce, who had previously worked with Emily and Michael. Duce testified that Emily and Michael similarly injured his business when Emily asserted that she could assist with his restaurant's taxes and accounting. After being hired, Emily did not pay the restaurant's taxes for three months, charged the restaurant nearly double what Duce expected as the cost for her accounting services, never provided financial statements, and took a 10 percent ownership interest in the restaurant when Duce was unable to pay the bill. Additionally, Emily convinced Duce to hire Michael. Therefore, Keystone presented sufficient evidence for a reasonable juror to find that the Rainses' actions injured or had the capacity to injure others.[7]

With regard to injury and causation, "[i]t is sufficient to establish [that] the deceptive act or practice proximately caused injury to the plaintiff's 'business or property.'" Panag, 166 Wn.2d at 63-64. With regard to causation, "[a] plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 84, 170 P.3d 10 (2007). And "the

[7] The Rainses contend that Duce perjured himself and that Keystone procured his testimony by fraud. The jury made a credibility determination and assumedly found Duce's testimony credibility. On a motion for a judgment as a matter of law, we do not make credibility determinations. Faust v. Albertson, 167 Wn.2d 531, 543, 222 P.3d 1208 (2009). Therefore, we are not persuaded.

injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" Panag, 166 Wn.2d at 57 (quoting Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990)).

Because there was evidence that the Rainses injured Keystone by inadequately managing its finances and overbilling, a reasonable juror could find that Keystone was injured. And because "[p]roximate cause is typically a question of fact for the jury," we will not disturb the jury's finding that those injuries were caused by the Rainses alleged unfair and deceptive acts and practices. Holiday Resort Cmty. Ass'n, 134 Wn. App. at 227.

The Rainses contend that Keystone presented no evidence to support its CPA claim or that the evidence presented was fraudulent. For example, the Rainses contend that (1) Emily did not secretly hire her sister, yet they admit that Rhodes testified that she was not aware that Emily hired Christensen until a significant time after the hiring occurred, (2) Emily did not falsely claim ownership or treasurer status, but Rhodes testified to the contrary, (3) Emily did not overbill Keystone, but Rhodes testified to the contrary, and (4) Emily did not file Keystone's tax returns late, but Rhodes testified that over $10,000 in taxes and penalties were paid after Emily came aboard. In reviewing a motion for judgment as a matter of law, we take evidence and all reasonable inferences in the light most favorable to Keystone and do not make credibility determinations or weigh the evidence. Faust, 167 Wn.2d at 543. Therefore, the Rainses' assertions are unpersuasive.

In short, because we take the evidence and all reasonable inferences in the light most favorable to Keystone, we conclude that Keystone presented substantial evidence sufficient for a reasonable juror to find for it on each element of the CPA claim. Accordingly, the trial court did not err when it denied the Rainses' motion for judgment as a matter of law.

Motion for a New Trial

The Rainses contend that the trial court erred when it denied their motion for a new trial. We disagree.

We review a trial court's ruling on a motion for a new trial for abuse of discretion. Rookstool v. Eaton, 12 Wn. App. 2d 301, 307, 457 P.3d 1144 (2020). A trial court may grant a motion for a new trial when an "[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion," "materially affect[ed] the substantial rights of" the moving party and "by which such party was prevented from having a fair trial." CR 59(a)(1). But trial courts "should grant a mistrial only when nothing the court can say or do would remedy the harm caused by the irregularity." Kimball v. Otis Elevator Co., 89 Wn. App. 169, 178, 947 P.2d 1275 (1997). And "[t]rial courts have broad discretionary powers in . . . dealing with irregularities that arise." Kimball, 89 Wn. App. at 178.

Here, the Rainses point to three supposed irregularities. Specifically, they contend that the trial court erred when it (1) provided jury instruction 5, (2) "unreasonably allocate[d] trial time between the parties[and] den[ied] Rains . . . an opportunity to present witnesses and exhibits," and (3) allowed Keystone

to present "expert witnesses not properly disclosed under [King County Superior Court Local Civil Rule (KCLR) 26], irrelevant evidence, falsified documents, and perjured testimony." We disagree.

First, "[j]ury instructions are reviewed de novo for errors of law," and "'[j]ury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole[,] properly inform the trier of fact of the applicable law.'" Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). "If any of these elements are absent, the instruction is erroneous." Anfinson, 174 Wn.2d at 860. "An erroneous instruction is reversible error only if it prejudices a party." Anfinson, 174 Wn.2d at 860. And "[p]rejudice is presumed if the instruction contains a clear misstatement of law[, but] prejudice must be demonstrated if the instruction is merely misleading." Anfinson, 174 Wn.2d at 860.

Here, jury instruction 5 described an attorney's fiduciary duty to their client. Specifically, the instruction explained that "[t]he fiduciary duty of an attorney toward his or her client includes a duty to render candid advice, avoid a conflict of interest; charge a reasonable fee; avoid engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and acting with reasonable diligence and competence." We agree that the instruction may have been misleading insofar as it discussed a duty that is not relevant to the CPA claim.[8]

[8] Keystone disagrees and relies on In re Disciplinary Proceedings Against Dann, 136 Wn.2d 67, 960 P.2d 416 (1998), and WPIC 107.09. However, both In re Dann and WPIC 107.09 pertain to a breach of fiduciary claim against

However, the Rainses do not contend that it is an inaccurate description of an attorney's fiduciary duty. Rather, the Rainses—without citation to legal authority—make only a conclusory assertion that the instruction is an incorrect statement of the law. Therefore, we conclude it is merely misleading.

Because the instruction was misleading, the Rainses must show that it resulted in prejudice. They failed to do so, and we find no evidence of prejudice. The remaining instructions did not allow the jury to premise the Rainses' CPA liability on Emily's breach of fiduciary duty because nowhere else did the instructions mention that duty. See Keller v. City of Spokane, 146 Wn.2d 237, 251, 44 P.3d 845 (2002) (holding that an instruction was inherently misleading and legally erroneous only to the extent that it allows juries to premise liability on an incorrect interpretation of the law). Moreover, as discussed above, without consideration of her duty as an attorney, there was substantial evidence for a jury to find that the Rainses violated the CPA. Therefore, while we find that the instruction was an irregularity, it is not reversible error because the Rainses have not shown prejudice.

Second, the Rainses cite no authority to support their proposition that the trial court improperly deprived them of time and violated their rights to due process. We are not required to search for such case law but may assume that the Rainses were unable to find any. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in

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an attorney. Because Keystone alleged a CPA violation in this trial, the instruction could be construed as misleading.

support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Nonetheless, we note that, generally, a court "may impose reasonable time limits on a trial," Gen. Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1508 (9th Cir. 1995), and "[t]rial courts have broad discretionary powers in conducting a trial." Kimball, 89 Wn. App. at 178. The Rainses have pointed to no evidence that the time limits placed on them or Rhodes were unreasonable or what, if any, specific evidence or testimony they were unable to present due to such time limits.[9] Therefore, we find no irregularity.

Finally, with regard to Keystone's failure to disclose witnesses, the Rainses provide only a quotation of KCLR 26 and a statement that Keystone did not follow it. They did not provide specific argument on this point, and "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)); see also RAP 10.3(a)(6). Moreover, the trial court, at one point, offered the Rainses time to prepare for an allegedly unexpected witness. But the Rainses declined to utilize the time. Therefore, we again conclude there was no irregularity warranting a new trial.

Because we hold that no irregularity at trial prejudiced the Rainses, we conclude that the trial court did not err in denying their motion for a new trial.

[9] In fact, when Emily was eliciting the testimony of witnesses, the court below spent a significant amount of time explaining the rules surrounding evidence and its admission.

Cross Appeal

In Keystone's cross appeal, it contends that the trial court erred when it concluded that Keystone received double recovery and offset its damages award. We agree.

The trial court's determination that the damage award for the CPA claim should be reduced by the amount that Emily paid under the breach of fiduciary duty claim is a mixed question of law and fact. Accordingly, "our review is de novo, but we defer to the trial court's factual findings that are supported by substantial evidence." In re Estate of Cordero, 127 Wn. App. 783, 787, 113 P.3d 16 (2005). "It is a basic principle of damages . . . that there shall be no double recovery for the same injury." Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 702, 9 P.3d 898 (2000). However, "[t]he jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact." Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Here, both jury instructions included damages for, among other things, "excessive legal and accounting fees," property and services used and not paid for, and "IRS penalties and bank overdraft fees." In the 2014 trial, based on these instructions, the jury found that $88,764.38 resulted from Emily's breach of fiduciary duty while she was employed in-house as an officer of Keystone. The jury also found that $7,685.29 of damages proximately resulted from Emily's breach of fiduciary duty to Rhodes or Keystone. But there is not substantial evidence to support the determination that the jury awarded these same

damages in the 2018 trial. In fact, the jury in the 2018 trial could have awarded damages for injuries wholly distinct from those awarded in the 2014 trial.

In the 2018 trial, Keystone and Rhodes requested damages of $540,000. The jury awarded Keystone $80,000 based on Emily and Michael's CPA violations. And the instruction in the 2018 trial also included future economic damages, monies paid that produced no value to Keystone, and the "reasonable value of earnings to Keystone . . . with reasonable probability to be lost in the future if Keystone had remained in business." Additionally, the 2014 trial included *Emily's* damages to both Rhodes and Keystone. Here, the jury found that *Emily and Michael* owed damages to only Keystone. Accordingly, to justify offsetting the damages award, the trial court had to assume that the damages were for the same injury by the same party. But we do not have substantial evidence to that effect, and "[w]e strongly presume the jury's verdict is correct." Bunch, 155 Wn.2d at 179. Therefore, we conclude that the trial court erred when it offset the damages in the 2018 trial by the damages award in the 2014 trial.

Attorney Fees and Costs on Appeal

As a final matter, both parties contend they are entitled to attorney fees and costs on appeal. Because Keystone is the prevailing party, we award it fees on appeal subject to its compliance with RAP 18.1.

For the forgoing reasons, we affirm in part. But we reverse and remand for the trial court to reinstate the full $80,000 damage award on Keystone's CPA claim.

WE CONCUR:

EMILY SHARP RAINS ESQ PLLC

August 12, 2020 - 1:59 PM

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