

62334-6

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Original

NO. 62334-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEVIN & STEIN,

Appellant,

v.

MEADOW VALLEY
CONDOMINIUM OWNERS ASSOCIATION,

Respondent.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Nothing in the brief of the Meadow Valley Owners Association (“MVOA”) should dissuade this Court from reversing the trial court’s judgment on the fees owed by MVOA to the law firm of Levin & Stein (“L&S”) for the services it rendered in pursuing construction defect claims against condominium developer Meadow Valley LLC (“MVLLC”) and various contractors that built the project.

The record here does not support the extravagant and melodramatic findings of fact and conclusions of law drafted by MVOA’s trial counsel.¹ Indeed, MVOA’s brief concedes a variety of facts set forth in L&S’s opening brief by failing to address them.

MVOA took advantage of Judge White’s determination that L&S’s fees were reasonable, a ruling affirmed by this Court and a federal court in a later coverage/bad faith action, only to turn around and argue to Judge McCarthy that L&S’s fees were unreasonable. MVOA’s arguments on the specific reasons Judge McCarthy employed to reduce L&S’s fees and to award attorney fees to MVOA in the RCW 4.24.005 proceeding are equally unpersuasive.

¹ As noted in L&S opening brief, the findings and conclusions entered by Judge McCarthy are perhaps the most inflammatory and intemperate this Court is ever likely to encounter, overflowing with innuendo, improper imputations of motive, and unsubstantiated implications of wrongdoing and unethical behavior.

B. RESPONSE TO MVOA STATEMENT OF THE CASE

It is difficult to respond to MVOA's statement of the case since it fails to address much of L&S's argument in its opening brief and instead focuses on irrelevant matters.² MVOA also takes matters out of context and fails to cite to the record for the propositions it is making in violation of RAP 10.3(a)(5).³

Most critically, MVOA fails to address factual statements offered in L&S's opening brief; such a failure *concedes* that the factual statement is true and is the law of the case. *State v. Evans*, 129 Wn. App. 211, 221 n.7, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007); RAP 10.3(a)(5), (b). Those *conceded* facts include:⁴

- L&S expended 4,845 hours on this case, 4000 hours in phase one and 845 hours in phase two. Br. of Appellant at 19, 28-29.
- L&S worked up the case for trial, a case that was hard fought, with over thirty discovery depositions taken. *Id.* at 19.

² For instance, MVOA's fact section makes reference to the L&S fee agreement, but MVOA fails to dispute any of the reasons offered by L&S as to why there is no basis to find a breach of fiduciary duty or forfeiture of fees for anything relating to the fee agreement.

³ Brief of Resp't at 5, 8, 9, 10, 12, 17.

⁴ MVOA contends Judge McCarthy's finding on witness credibility is critical. Br. of Resp't at 21-22. Judge McCarthy found that virtually everyone associated with L&S lacked credibility and everyone associated with MVOA had credibility. This was emblematic of Judge McCarthy's bias toward L&S. However, witness credibility has nothing to do with the now conceded facts, and L&S's legal arguments that are the basis for reversal.

- Three mediations were conducted before the case settled, and, at the first two mediations, MVLLC and the contractors never made any offer of settlement. *Id.* at 20.
- L&S never made a settlement demand on behalf of MVOA that was less than the amount necessary to fix all the defects in MVOA's building, based upon the cost estimates, as well as MVOA's fees and costs. *Id.* at 65.
- L&S used the 408 Agreement to identify construction defects and the cost to remedy such defects. MVOA had the right to withdraw from the agreement, which it did. It subsequently agreed to and entered into a second 408 agreement. The 408 process did not preclude discovery, which was extensive in this case. *Id.* at 45, 64.
- L&S was successful with a summary judgment motion establishing MVLLC's liability for a large percentage of the construction defects. *Id.* at 19.
- There is a distinction between proving construction defects that was the basis of the MVOA lawsuit and whether such defects are covered by applicable insurance; MVLLC's insurance covered property damage, but not all construction defects are the type of property damage covered by insurance policies. *Id.* at 23, 27.
- MVOA voluntarily entered into the settlement that led to the covenant judgment. It never contended at trial in this matter, or any other proceeding, that it had been damaged by entering into the settlement. *Id.* at 20, 21.
- Under the amended fee agreement ("AFA"), L&S was granted permission by MVOA to hire counsel to assist it with L&S paying for such services. L&S hired Stafford Frey Cooper ("Stafford Frey") to assist on insurance coverage, and hired Rick Beal for other services. MVOA was aware of Stafford Frey's and Beal's involvement. *Id.* at 23, 58, 59.

- In presenting the settlement to Judge White for a determination of its reasonableness, L&S received advice from Stafford Frey about how much to allocate in the covenant judgment for attorney fees. Since attorney fees would be categorized as a recoverable “cost” in actions against the carriers, the larger the amount allocated to attorney fees, the easier to establish an entitlement to recovery in the coverage lawsuit. The amount Stafford Frey recommended was \$2.4 million. *Id.* at 21.⁵
- The amount MVOA would ultimately be able to recover against the insurers would depend on the applicable insurance. When the St. Paul case was tried before Judge Zilly, the jury found only a small percentage of the construction defects to be covered by the policies. *Br. of Appellant* at 25, 26.
- The covenant judgment gave MVOA, by assignment from MVLLC, a right to proceed against MVLLC’s insurance broker. Without the settlement, MVOA would never have been able to make claim against MVLLC’s and the contractors’ broker. MVOA recovered \$500,000 from the broker as a result of the assignment obtained by L&S. *Id.* at 20, 25.
- The fee agreements between L&S and MVOA provided for a contingent fee based upon what was “recovered.” At the time the initial fee agreement was entered into, the extent of damages was not known nor did anyone know what could ultimately be recovered. L&S therefore took a risk that even though it prevailed for MVOA on liability, recovery might be limited because of available insurance and whether MVLLC and the contractors would have assets that could be successfully reached. *Id.* at 18, 20, 21, 23, 25, 47.
- The original fee agreement provided there would be fee splitting between L&S and the Law Offices of James

⁵ By reducing the amount allocated to attorney fees from \$2.4 million to \$1.6 million, Judge White’s decision did not cause MVOA to “lose” \$800,000. *Br. of Resp’t* at 13.

Strichartz, which took joint responsibility for the representation. The AFA also provides for fee splitting between L&S and the Law Offices of James Strichartz. The draft of the AFA prepared by L&S disclosed the actual fee split. That provision was removed at the direction of Linda Gilman, the MVOA representative. At all times MVOA knew of fee splitting, what the fee split would be, and consented to it. *Id.* at 50, 51.

- MVOA, not L&S, sought amendment of their fee agreement while the representation was on-going. The changes made to the fee agreement benefitted MVOA, including L&S paying all the out of pocket expenses. MVOA was informed in the AFA of the desirability of having independent counsel, and had the benefit of independent counsel before entering into the AFA. *Id.* at 18, 46, 47, 48, 56.
- The reasonableness of the settlement as executed in the covenant judgment was addressed by Judge White. MVLLC's and the contractors' insurers were represented and contested the settlement's reasonableness, including the reasonableness of L&S's fees. The insurers were provided copies of L&S's billing records. All pleadings contesting the reasonableness of L&S fees were filed in the case and were provided to MVOA. *Id.* at 22.
- Judge White properly determined the reasonableness of the settlement, including a proper calculation of MVOA's attorney fees using both the lodestar method and the factors under RPC 1.5. *Id.* at 22, 23.
- After Judge White made his determination of reasonableness, both L&S and Stafford Frey continued to work on the case. L&S paid Stafford Frey's fees and costs. At the same time, MVOA determined to fire L&S, and MVOA and Stafford Frey secretly agreed that it would take over the representation once L&S had been terminated. L&S continued to work on the case with no disclosure by MVOA or Stafford Frey that L&S was to be terminated.

Stafford Frey agreed to a lower contingency percentage in its fee agreement with MVOA because of the significant amount of work performed by L&S. Some of the same provisions in the fee agreement MVOA claims are a breach of fiduciary duty and a basis to reduce L&S fees are contained in Stafford Frey's agreement with MVOA. *Id.* at 23, 24.⁶

- When L&S was terminated, Linda Gilman advised the MVOA board it could terminate L&S without having to pay them anything for their representation. *Id.* at 48 fn.35.
- After L&S was terminated, Stafford Frey represented MVOA in defending the covenant judgment before this Court and in federal court. Ken Hobbs of Stafford Frey filed pleadings in the federal action specifically stating that the amount of the L&S fees as determined by Judge White was reasonable. Stafford Frey presented some L&S fees for phase two work for an *Olympic Steamship* recovery in the federal action. *Id.* at 17, 23, 24, 25, 32, 34.
- While representing MVOA in federal litigation in which it was claiming the L&S fees and the judgment for \$1.6 million entered by Judge White were reasonable, Stafford Frey assisted MVOA and its counsel in this action to assert the L&S fees were not reasonable. *Id.* at 21, 23, 24, 25, 27.
- The provisions of AFA regarding fee splitting, payment upon termination, and the drafting of the AFA itself were not breaches of L&S's fiduciary duty. *Id.* at 48, 49, 53, 57.
- MVOA's waiver of any known misconduct by Siegel committed prior to the execution of the AMA as the basis

⁶ If MVOA's argument that *any* conduct of counsel adverse to a client's interest is a breach of fiduciary duty justifying disgorgement of an attorney's fee were correct, then presumably under such an extreme interpretation of the law Stafford Frey would be required to forfeit fees because its fee agreement mirrored L&S's in many instances and it was sanctioned by this Court for late submission of its brief.

of “good cause” for termination was not a breach of RPC 1.8(h) and I.15. *Id.* at 51-53.

- Judge McCarthy reconsidered the earlier determination of Judge White. *Id.* at 27, 28.

MVOA further concedes in its own brief that:

- St. Paul was estopped from contesting the reasonableness of L&S’s fees. Br. of Resp’t at 31.
- Judge McCarthy adopted Judge White’s lodestar figure for calculating fees for phase one. *Id.* at 34.
- MVOA agreed to a covenant judgment obtained by L&S for \$7.2 million. *Id.* at 12.
- Judge McCarthy found L&S had reasonably billed more than 800 hours for phase two, but reduced the award for alleged breaches, most of which had no relation to phase two. *Id.* at 36, 37.
- A fee multiplier is appropriate to compensate attorneys for the high risk that they will receive nothing as compensation. *Id.* at 40.
- L&S, rather than MVOA, paid Stafford Frey’s fees prior to L&S’s dismissal. *Id.* at 26.
- The federal court ruled that L&S’s \$1.6 million fee was a taxed cost recoverable from the insurers. *Id.* at 18.
- The common elements between reasonableness proceedings and *quantum meruit* proceedings are the lodestar calculation and the application of the factors in RPC 1.5(a). *Id.* at 26.
- L&S usually earns more under its contingency fee agreements than the value of the hours it bills. *Id.* at 43 fn.19.

In addition to those points raised by L&S in its opening brief that MVOA did not address, or that MVOA conceded in its own brief, MVOA offers “facts” to this Court that are simply not supported by the record. Those facts are discussed in greater detail in the Argument section of this brief.

C. ARGUMENT

(1) MVOA Is Estopped From Relitigating the Reasonableness of L&S’s Fees

MVOA argues in its brief at 22-34 that it is not estopped to deny Judge White’s determination of an award of \$1.6 million in fees for L&S’s work was reasonable. MVOA, however, tortures the law of estoppel to arrive at this conclusion, basing its position on the proposition that its own entitlement to fees “from the construction defect defendants under the WCA is not the same issue as L&S’s entitlement to *quantum meruit* compensation from MVOA.” Br. of Resp’t at 23. MVOA’s argument borders on the frivolous.

MVOA is estopped to deny the reasonableness of L&S’s fees, whether principles of judicial estoppel or collateral estoppel are applied. MVOA does not dispute the authorities cited in L&S’s opening brief on judicial and equitable estoppel, thus *conceding* that those doctrines are accurately articulated. *See also, Ensley v. Pitcher*, ___ Wn. App. ___, ___

P.3d ___, 2009 WL 2882836 (2009) (discussing factors for res judicata analysis).

At its most basic, MVOA took the opposite position before Judge McCarthy than it did before Judge White and this Court, and in federal court. In MVOA's argument to Judge White and this Court on the reasonableness of the settlement with the developers and in its argument to the federal court in the coverage/bad faith litigation, MVOA argued L&S's fees were reasonable. Moreover, the measure for recovery if those fees before Judge White and Judge McCarthy was *identical*, as MVOA *concedes*. Br. of Resp't at 26.

MVOA asserts that the \$1.6 million in attorney fees was awarded to MVOA not L&S, and that there is no correlation between a party's entitlement to attorney fees and an attorney's entitlement to those fees from the client. Br. of Resp't at 23-24. Aside from not citing to any authority for this proposition, MVOA sidesteps the requirements of RPC 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee. . ."), which apply to *any* fee request, as well as its concession that the lodestar method for calculating fees applied in the reasonableness hearing, just as it did in the quantum meruit analysis.

MVOA represented to Judge White that the fees were reasonable.⁷ Which party was actually awarded the fee is not relevant to determining whether the fees were reasonable.

MVOA relied upon Judge White's fee award on appeal to this Court and in the federal coverage litigation. It could not then deny the reasonableness of those same fees to Judge McCarthy. Whether the fees were awarded directly to L&S or to MVOA which had an obligation to pay its counsel, is irrelevant to the issues of estoppel and reasonableness. If Stafford Frey knew the fees were unreasonable and it was going to get a percentage of the recovery based upon L&S's fees, it had a duty under RPC 1.5(a) to alert all the courts before which it appeared in this matter to their unreasonableness. It did not do so, and MVOA and Stafford Frey are thus estopped from disputing the reasonableness of L&S's fees.

MVOA argues that the criteria for awarding attorney fees under a "fee shifting statute" are different from the criteria for awarding fees under quantum meruit. Br. of Resp't at 25.⁸ But, just one page after making that assertion, MVOA concedes that

⁷ At no time during the reasonableness hearing did MVOA or Stafford Frey contest the reasonableness of L&S's fees. Stafford Frey had even recommended that the fees should have been \$2.4 million. CP 365. St. Paul and Admiral, the two insurers in the case, contested the reasonableness of the fees. CP 37.

⁸ MVOA appears to also argue that the amount awarded L&S was inappropriate because the amount of fees awarded must be limited to fees incurred to pursue or defend successful claims for which a right to recover fees exist. Br. of Resp't at 27. This

The only common elements between the earlier covenant judgment reasonableness proceeding and the later quantum meruit compensation proceeding were the actual lodestar calculation and application of factors under RPC 1.5(a).

Br. of Resp't at 26.

In this, MVOA is absolutely correct, although its concession stands its own argument on its head.⁹ The lodestar method set in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983), arrives at the award by multiplying the reasonable number of hours expended by a reasonable fee per hour, then allows a discretionary reduction or increase, as may be appropriate. *Travis v. Washington Horse Breeders Ass'n, Inc.*, 47 Wn. App. 361, 367-68, 734 P.2d 956 (1987). The contingent nature of the fee justifies a multiplier. *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 1976 (2007). This method is the default rule for calculating fees in

requirement is entirely irrelevant, as MVOA claims that L&S's fees were *excessive*, not that they were awarded for prosecuting unsuccessful claims for which it had no right to recover fees. This is also not a case of shifting fees to an opposing party. It is a determination of the amount a client owes its own attorneys.

MVOA also argues that Judge McCarthy would have had the discretion to deduct from L&S's award an additional \$742,000 for Stafford Frey's fees in pursuing the insurance coverage litigation. Br. of Resp't at 28. This is another red herring, as L&S's \$1.6 million fee had nothing to do with the coverage litigation where MVOA recovered attorney fees, including the Stafford Frey fees, from the insurers under *Olympic Steamship*. CP 871.

⁹ MVOA states that Stafford Frey's fees constituted an offset against the reasonable value of L&S's services. Br. of Resp't at 26. This is not correct, as L&S, not MVOA paid those fees. Exs. 492, 520, 551, 564, 567, 578, 661; 10/9 RP 1908. MVOA also states that Judge White had not considered L&S's alleged breaches of duty, as "many of the issues did not yet exist." Virtually every alleged "breach" occurred by the time of Judge White's reasonableness hearing.

Washington. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998).

The same lodestar methodology applies in a quantum meruit fee calculation. The *Bowers* court's approval of the lodestar method was the direct result of its *disapproval* of the use of factors articulated in the predecessor to RPC 1.5(a) to calculate fees in quantum meruit cases. 100 Wn.2d at 596. The Court criticized the "factors" approach because it gave too little guidance to trial judges. *Id.* Instead, the *Bowers* court directed that the lodestar method be used to calculate a reasonable fee. The Supreme Court clearly intended that the lodestar method be used for quantum meruit cases. The Ninth Circuit, likewise, recognizes that the lodestar method is appropriately applied in cases in equity. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 109 F.3d 602, 607 (9th Cir. 1997). *See also, U.S. Postal Service v. Hazelrig Corp.*, 349 F. Supp.2d 955 (D. Md. 2004) (lodestar applies to quantum meruit recovery for discharged attorney); *In re Masterwear Corp.*, 233 B.R. 266 (S.D. NY 1999) (lodestar applied to quantum meruit attorney fee recovery in bankruptcy); *Ginberg v. Tauber*, 678 A.2d 543 (D.C. 1996) (lodestar applied to quantum meruit recovery for discharged attorney). MVOA claimed the benefit of L&S's reasonable fees when the argument suited it, before Judge White, this Court, and the federal court.

It cannot then deny the reasonableness of the very same fees when L&S asked to be paid for its services.

An additional reason that MVOA is estopped to deny the reasonableness of MVOA's fees as determined by Judge White arises from its own argument in its brief. It is well-recognized in Washington that following a reasonableness hearing and entry of a stipulated judgment, an insurer is bound by the findings, conclusions, and judgment entered in that hearing when it has notice and an opportunity to intervene in the underlying action. *Mutual of Enumclaw Ins. Co. v. T & G Construction, Inc.*, 165 Wn.2d 255, 263, 199 P.3d 376 (2008) (Insurer in construction defect case could not relitigate defense as coverage dispute would turn on same facts and law that were litigated in underlying action.).

MVOA essentially concedes that it too is barred from contesting the reasonableness of L&S's fees. Br. of Resp't at 31. Because St. Paul intervened and fully participated in the reasonableness hearing, MVOA asserts that St. Paul was estopped to deny the reasonableness of L&S's fees in the federal coverage litigation. *Id.*¹⁰ Implicit in MVOA's

¹⁰ In the federal action, Stafford Frey vigorously defended L&S's fees, arguing to the court that MVOA was entitled to the entire \$1.6 million fee assessed against MVLLC, Ex. 643 at 6. The federal court found St. Paul liable for \$1.6 million in fees. CP 858-59, 870-71. *In addition*, Admiral's settlement with MVOA included \$900,000 in L&S fees. Ex. 729.

argument is the proposition that if St. Paul was estopped from contesting the fees, MVOA is also estopped to deny the reasonableness of the fee. MVOA claims that neither the parties' briefs nor this Court's previous decision addressed White's calculation of attorney fees, so that the fees were not an issue, br. of resp't at 23, but this argument ignores the fact that MVOA participated fully in the reasonableness hearing, and that it explicitly argued MVOA/L&S were entitled to the entire \$1.6 million. Ex. 643 at 6. Just as St. Paul was estopped to deny the reasonableness of L&S's fees in the federal action, L&S was estopped as well.

Finally, MVOA argues that L&S may not rely on principles of estoppel because of its allegedly "unclean hands," accusing L&S of unnamed and unspecified "multiple breaches of fiduciary duty and its misrepresentations before Judge White." Br. of Resp't at 32. MVOA does not elaborate on those inflammatory charges. But it was Stafford Frey which took over the handling of the case from L&S and had custody of all relevant documents, including L&S's file copies of pleadings related to the underlying construction defect litigation. Ex. 643 at 2. It was Stafford Frey who represented to the federal court that the fees were reasonable and due as "costs taxed." Ex. 643 at 6. In support of its request for fees, Stafford Frey submitted to the federal court the relevant portions of Judge White's findings of fact and conclusions of law

regarding L&S's fees. Ex. 644 at 2. It was Stafford Frey who affirmatively represented to this Court that the attorney fee award by Judge White was reasonable.

In sum, MVOA's assertion that it is not estopped from disputing the reasonableness of L&S's fees is illogical and without merit.

(2) Judge McCarthy Abused His Discretion in Reducing L&S's Fees

MVOA contends that Judge McCarthy was correct in reducing the fee determined by Judge White to be reasonable. Br. of Resp't at 34. If this Court agrees with L&S on the estoppel argument, it need not reach these issues. Judge McCarthy should not have reduced the fee Judge White determined was reasonable. In any event, MVOA is wrong in its claim that L&S's alleged "breaches of fiduciary duty" to MVOA justified any reduction in the fee Judge White determined to be reasonable.¹¹ Moreover, Judge McCarthy's decision to further punish L&S by awarding

¹¹ MVOA contends that *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) justifies reduction of L&S's fee. Br. of Resp't at 37, 47. In *Eriks*, the Supreme Court held that an attorney breached his fiduciary duties by representing both the promoters of a tax shelter scheme and the investors in the scheme. *Id.* at 458-59. The conflict of interest in such an arrangement, where the promoters were aware of the conflict, and the clients were not, was so egregious the attorney had to disgorge all fees. *Id.* at 462-63. None of L&S's alleged breaches of fiduciary duty are in any way comparable to those described in *Eriks*. In fact, as indicated in L&S's opening brief at 42, 43, disgorgement of fees is merited only in extreme cases of attorney misconduct. *See also, Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 292, 198 P.3d 1042 (2009) (no reduction of fees for attorney's alleged ethical misconduct).

it a ridiculously small fee for phase two work he determined was appropriate and benefitted MVOA is unjustified.

L&S here addresses various reasons articulated by MVOA for reducing L&S's fee.

(a) L&S's Blended Rate Was Appropriate

MVOA scarcely addresses L&S's briefing on the blended rate adjustment, beyond noting that Judge McCarthy adopted Judge White's \$1.1 million blended rate calculation and then reduced it by \$100,000. Br. of Resp't at 34. MVOA ignores L&S's detailed analysis of the blended rate in its opening brief, which L&S will not repeat here. Br. of Appellant at 58-60. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

(b) Judge McCarthy Abused His Discretion in Further Reducing the Lodestar Fee For Alleged Unproductive Time and Duplication of Services

MVOA notes that Judge McCarthy further reduced Judge White's lodestar calculation by \$13,375 for approximately 40-65 hours of work he classified as "paralegal" in nature. Br. of Resp't at 35-36. But in justifying this reduction, MVOA recites a litany of billing hours it describes as inefficient, unnecessary, or questionable for which Judge

McCarthy *made no reduction*. Br. of Resp't at 35. This argument is *irrelevant*, as MVOA has not cross-appealed here. In any event, MVOA only cites to the hyperventilating findings of fact drafted by MVOA's trial attorney, for which Judge McCarthy made no further reductions. The list merely continues MVOA's strategy of impugning L&S by framing the findings and conclusions in the most inflammatory way possible.

(c) Judge McCarthy Abused His Discretion in Addressing the Multiplier Issue

Contravening Judge White's award, Judge McCarthy concluded as a matter of law that a multiplier could not be awarded in quantum meruit and deducted the \$500,000 multiplier awarded by Judge White. CP 2277-78, 2282, 2286-87 (FF 210, 213; CL "E," "M," "N," and "P"). MVOA claims, with no citation to authority, that multipliers are not appropriate in determining a quantum meruit recovery because the compensation to be paid is not contingent. Br. of Resp't at 40. This is contrary to Washington law.

As discussed above, the *Bowers* court specifically determined that once a lodestar is calculated by multiplying a reasonable hourly rate times the reasonable number of hours, it may be adjusted upward or downward by the court. 100 Wn.2d at 598. *See also, Mahler*, 135 Wn.2d at 434. The upward adjustment, or multiplier, is part of the lodestar method. The

contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk. *Pham*, 159 Wn.2d at 541.

The very same considerations for a multiplier apply to a quantum meruit recovery. L&S received nothing from MVOA, and in fact was severely out of pocket, *for years*.¹² MVOA concedes that the risk an attorney will receive no compensation is one of the considerations in applying a multiplier. Br. of Resp't at 40. But MVOA's argument addresses only the quality of representation while ignoring the risk and delay which also justify the application of a multiplier.

MVOA points to no authority whatsoever that multipliers are inappropriate in quantum meruit cases. Its insistence that multipliers are not appropriate is not merely contrary to case law, it is unsupported by any authority at all. MVOA cites *Travis* and *Pham*, but neither case says multipliers are unavailable in quantum meruit cases. The *Travis* court reversed a multiplier because the client's counsel hired a third attorney to act as lead trial counsel at a fixed rate of \$100 per hour, \$1,000 per day of trial and costs. *Travis*, 111 Wn.2d at 412. Under those circumstances,

¹² Under the AFA in this case, L&S advanced all costs. CP 266-71. Even after recovering its out-of-pocket costs, MVOA delayed reimbursing L&S, finally paying a remaining balance of \$87,000 in costs just before trial.

there was no “contingent risk.” *Id.* No comparable circumstance exists here where L&S bore the lion’s share of responsibility in litigating the construction defect case for which Judge White awarded it fees. MVOA characterizes the holding in *Pham* as one that “declined to abandon contingency multipliers altogether.” Br. of Resp’t at 42. In fact, the Supreme Court specifically affirmed the principle of contingent risk multipliers. *Pham*, 159 Wn.2d at 542.

In addition to denying L&S the contingent risk multiplier, awarded by Judge White, Judge McCarthy also ruled that L&S’s original lien amount of \$1.6 million that included a multiplier constituted a breach of fiduciary duty. CP 2262-63, 2268-69. MVOA has not offered *any argument* that Judge McCarthy was correct on this point. Nor could it. It is difficult to discern how it is a breach of fiduciary duty to request relief of a court when case law like *Bowers* supports it, case law does not affirmatively preclude such relief (as Judge McCarthy himself acknowledged), and a prior court had determined the amount was reasonable.

(d) Alleged Breaches of Fiduciary Duty

In its brief at 46, MVOA attempts to justify Judge McCarthy’s reduction of L&S’s fees by hundreds of thousands of dollars. As noted in L&S’s opening brief, Judge McCarthy reduced L&S’s lodestar award

because he believed that L&S breached “fiduciary duties” owed to MVOA. Judge McCarthy erred not only by repeatedly sanctioning for the same conduct, but he also erred as a matter of law in finding breaches of fiduciary duty. Judge McCarthy approached this case if it were a legal malpractice case, examining the relationship of L&S and MVOA, rather than focusing on the reasonable value of L&S’s services. *See* CP 2214 (FF 7). Judge McCarthy repeatedly reduced the L&S fee for the *same alleged breaches of fiduciary duty*. He first deducted \$100,000 from Judge White’s \$1.1 million lodestar base, and another \$400,000 for breaches undifferentiated from those used to justify the initial \$100,000 deduction. He then awarded a mere \$10,000 for 845 hours of phase two work, justifying the paltry sum as penalty for the same breaches.

(e) John Siegel’s Signing of the ER 408 Agreement

MVOA describes that L&S’s explanation of Siegel’s involvement with the ER 408 agreement as “sidestepping Judge McCarthy’s finding that [he] behaved defensively and evasively when questioned.” Br. of Resp’t at 46. It then concedes that MVOA withdrew from the original agreement, but then *promptly authorized a new ER 408 agreement*. *Id.* at 47. In other words, MVOA returned to the status quo, and suffered absolutely no harm. MVOA again cites *Eriks* for its argument. Br. of Resp’t at 47. *Eriks*, however, makes clear that to justify a reduction in a

fee, a lawyer's breach of fiduciary duty must cause more than minor pecuniary harm to the client. The conduct must threaten the integrity of the justice system. *Ross v. Scannell*, 97 Wn.2d 598, 604-10, 647 P.2d 1004 (1982). Here, Seigel's representations regarding the ER 408 agreement *caused MVOA no harm whatsoever*. In fact, MVOA stipulated before Judge McCarthy that Siegel's signing of the 408 Agreement was not a breach of fiduciary duty or a basis for a fee reduction. 10/18 RP 3094, 10/4 RP 1382. Judge McCarthy abused his discretion in reducing L&S's fees on the basis of the ER 408 agreement.

(f) Renegotiation of the Fee Agreement

MVOA essentially ignores L&S's arguments regarding the renegotiation of the fee agreement, choosing instead to assert, without citing to any authority to support its argument, that a fee reduction is justified by L&S's alleged improper conduct in modifying the agreement. Br. of Resp't at 46-47. MVOA asserts it is immaterial if the modifications benefited MVOA over L&S, and that it is likewise immaterial whether it was MVOA rather than L&S who instigated the renegotiation. *Id.*

The change in the fee agreement here was requested by MVOA, not L&S, and the changes made in the AFA benefitted MVOA, not L&S. Exs. 72, 74, 84. The AFA made three basic changes which directly benefited MVOA: L&S advanced all costs; the contingent fee percentage

was reduced; and the contingent fee percentage was calculated on the amount remaining after the deduction of costs. CP 266-71.

Modification of a fee agreement requires a meeting of the minds and consideration separate from that of the original contract. *Forbes*, 148 Wn. App. at 295. Where MVOA instigated and *benefitted* from the renegotiation of the fee agreement, MVOA received consideration.

MVOA ignores entirely that under the then-applicable language of RPC 1.8(a) when a lawyer and a client renegotiate their fee arrangement, the client had a right to have independent counsel.¹³ Br. of Appellant at 44. That rule, however, had no requirement that the client be even advised to have independent counsel, much less that one was actually required. RPC 1.8(a)(2) stated: “The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction.” No Washington case requires such independent counsel. *See, e.g., Perez v. Pappas*, 98 Wn.2d 835, 639 P.2d 475 (1983); *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 754 P.2d 120 (1988). Neither case holds that independent counsel is *required* in every fee agreement renegotiation, particularly in a situation when the changes benefit the

¹³ When the RPCs were amended in 2006, Rule 1.8(a)(2) was changed to include a requirement that the client be advised in writing of the desirability of seeking the advice of independent counsel. The rule’s current version does not require that a client have independent counsel. The AFA contained such a clause. CP 271.

client as it did here. In any event, L&S satisfied its fiduciary duty by plainly advising MVOA to seek independent counsel in the AFA itself. Paragraph 27 of the AFA states: “Clients have been advised that they have a right to consult with an independent attorney prior to entering into this Agreement.” CP 271.

Judge McCarthy’s FF 208 *is directly contrary to RPC 1.8*. In the finding, Judge McCarthy asserts that a lawyer “must ensure” the client understands why independent counsel is important and “insist” the client has a meaningful opportunity to get independent legal advice. Br. of Resp’t at 48; FF 208. MVOA provides no authority for this expansive interpretation of RPC 1.8(a), and Judge McCarthy erred in making it.

(g) Alleged Misrepresentations to Judge White

MVOA claims in its brief at 48 that a reduction in L&S’s fee is merited because L&S “misled” Judge White. That assertion is merely a clumsy sleight of hand. MVOA first accuses Jerry Stein of misleading Judge White about the firm’s blended rate. Br. of Resp’t at 48. Judge White inquired about the nature of L&S’s blended billing rate of \$275 an hour. Exs. 1137-40. In response to the court’s inquiry, Stein explained that L&S had used the blended rate for many years because it had historically found that customers preferred to have a single, blended rate when communicating with firm attorneys, rather than having the rate

broken down, and that customers did not want to worry about paying a premium to speak with a senior partner. *Id.* at 40-41. “You have to establish rates,” he said, “which would be attractive to the client.” *Id.* at 40. Stein then went on to explain that L&S’s rates were lower than other firms, and specifically lower than Stafford Frey’s which ranged from a low of \$275 to a high of \$350. *Id.* In no way can this discussion be described as an intentional misleading of Judge White.

MVOA’s assertion that Stein misled White concerning the construction companies’ assets is equally misleading. Br. of Resp’t at 49. MVOA cites to a *draft* declaration sent by L&S to Roger Hebert (“Hebert”), an officer of Hebert Construction, Inc. (“HCI”). Ex. 1271. The draft left a blank where Hebert could fill in HCI’s assets. *Id.* at 3. Hebert’s attorney told L&S that HCI had assets of about \$1.9 million and would not be able to satisfy the judgment. CP 3324-25. Stein was concerned that the \$1.9 million might prove illusory, as the money might have been encumbered or pledged in some other fashion. CP 3328-29. Thus, the declaration Hebert ultimately filed did not specify HCI’s assets but stated that HCI’s unencumbered assets were nowhere near the confessed judgment amount, and would have been grossly inadequate to respond the MVOA’s cost of repair. Ex. 469 at 3. This is far from a misrepresentation to the court.

When Stein discussed HCI's ability to pay with Judge White, he cited to *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (2004), *review denied*, 153 Wn.2d 1009 (2005), where the court approved a covenant judgment based in part on a letter from the defendant's accountant stating in general terms that the defendant was unable to pay the judgment. *Id.* at 381. Stein's citation to Washington case law on the issue reveals how specious MVOA's accusation that he misled the court really is. That HCI did not have sufficient assets was incontrovertible: The judgment, MVOA acknowledges, was for \$7.2 million. Br. of Resp't at 12. HCI had only \$1.9 million in assets which may or may not have been encumbered. CP 3328-29. Stein relied on relevant case law in his appearance before Judge White. Judge McCarthy did not make a finding that Stein's representations in this regard were a violation of any RPC. FF 189. Yet MVOA insists this purported misrepresentation justifies a draconian reduction in L&S's fees. CP 2292.

Finally, MVOA does not address L&S's alleged misrepresentation about paralegal time. Br. of Appellant at 37. Judge McCarthy found a misrepresentation because a minute amount of associate time was allegedly "paralegal" in nature. CP 2267. This was not a misrepresentation by L&S.

(h) L&S's Alleged Failure to Communicate with MVOA

MVOA asserts that L&S did not disclose all communications, despite “clear instruction to be copied on *all* correspondence.” Br. of Resp’t at 49-50 (emphasis in original). It then lists 10 bullet points of supposedly improperly undisclosed communications. None of the incidents cited were found by Judge McCarthy to be breaches of the RPCs, and none represent a breach by L&S of its fiduciary duty to MVOA. The record before this Court contains hundreds of emails and phone logs between L&S and MVOA. *See, e.g.*, Exs. 228, 230, 266, 274, 312, 318, 321, 361, 370, 596; 10/4 RP 1594-95, 1646, 1654-55. MVOA’s assertion that it was kept in the dark is absurd on its face. Indeed, within just two paragraphs of finishing its conclusory argument that L&S improperly withheld communication, it accuses the firm of “bombarding” it “with four memos just days prior to the last mediation.” Br. of Resp’t at 51. That bombastic complaint is utterly at odds with MVOA’s assertion that it and Gilman were somehow being kept out of the loop.

L&S was under no obligation to send Gillman and MVOA copies of *all* correspondence related to its case or inform them of absolutely everything related to the case. A lawyer will not ordinarily be expected to describe trial or negotiation strategy in detail. RPC 1.4, comment[5]. The

lawyer must keep a client *reasonably* informed and respond to *reasonable* requests for information. RPC 1.4(a). RPC 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions. *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 574, 99 P.3d 881 (2004) (attorney disciplined where he failed to communicate with clients at all for long periods).

RPC 1.4 does not impose a duty to copy a client on every piece of correspondence generated in a case, and certainly does not require that internal communications, especially those addressing litigation strategy must be regularly and consistently transmitted to the client. Judge McCarthy himself pointed out that “quite a number” of exhibits had been offered tending to show that L&S had provided information to Gilman, saying, “I think that you have made that point quite adequately about the information supplied to her.” CP 1699.

MVOA was regularly informed of every aspect of the case. Gilman received literally hundreds of emails from L&S keeping her up to date, and her testimony demonstrates she was involved in micromanaging the work of the L&S lawyers. *Id.* 10/8 RP 1594-95, 1646, 1654-55. Compare this extensive record of regular, extensive communication with, for example, *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004), where the Court held an attorney violated RPC

1.4(a) and 1.4(b) when he failed to communicate with the client about continuances, the decision to voluntarily dismiss the client's suit, the decision to pursue mandatory arbitration, the request for trial de novo, and a motion to withdraw. *Id.* at 755. *See also, In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004) (attorney disciplined for failing to inform client he was no longer representing him and failed to communicate with the client at all until the case was dismissed. *Id.* at 577.

MVOA complains that L&S utilized the assistance of attorney Rick Beal and did not fully communicate his views to MVOA. Br. of Resp't at 50. Beal was hired by L&S and the fee agreement allowed L&S to associate with other counsel. CP 270. Even Gilman herself stated it was not improper for L&S to consult with Beal nor was it necessary for L&S to inform MVOA that it was doing so. CP 1175.

Finally, MVOA also claims it sought copies of L&S's time entries and never received them. Br. of Resp't at 49. MVOA attempts to give the impression that this request was in the context of Judge White's determination of reasonableness. It was not. MVOA's request was at the time of the negotiation of the AFA, years before the reasonableness hearing, when L&S's fee was contingent. At the time of the reasonableness hearing, copies of L&S's billings were provided to St. Paul and available to MVOA. Exs. 461, 1137 at 40.

(i) L&S's Alleged Failure to Follow MVOA's Objectives

MVOA contends L&S failed to follow its objectives, Br. of Resp't at 51, but it confuses that concept with L&S's ethical obligation to give it an objective evaluation of the case and its settlement value. Richard Levin communicated his professional evaluation of the case to the MVOA board. CP 343. What MVOA describes in its brief at 51-52 as a "bombardment" of memos are letters from Levin to the board discussing the relative merits of going to trial and providing a comprehensive evaluation of the risks and value of the case. *See* Exs. 337, 338, 344.¹⁴ In this, Levin was fulfilling his obligation to provide his clients with his independent professional judgment and candid advice. RPC 2.1. MVOA's assertion that L&S "failed to communicate" rings hollow in light of this contention.

Apparently the client objective L&S allegedly failed to follow is that MVOA wanted to collect every cent it claimed plus all of its costs, attorney fees and expenses. Br. of Resp't at 51. Of course, every client desires such a grand slam victory, but such success is not always secured, or even realistic. The fee agreement MVOA entered into provided that it contracted to act "reasonably" in regard to settling the case. Ex. 270. L&S worked up the case and was ready for trial to achieve such a

¹⁴ Ex. 338 is merely a copy of the mediation letter.

favorable result for MVOA. L&S never made a settlement offer for less than the result MVOA desired.

Richard Levin gave his evaluation of the case to the mediator. In doing so, he stated that his opinion would probably carry no weight with MVOA. Ex. 1235. Levin owed a high duty of candor in presenting his evaluation to the mediator. *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002) (RPC 3.3(f) refers to communications with tribunal, a term broader than judges). There is no evidence this evaluation was ever communicated to the defense by the mediator. Since the insurers never offered a dime in settlement, it obviously had no effect on the defense. There is no evidence receiving this information affected or hampered the experienced mediator, Chris Soelling, from performing his job.¹⁵

(j) Judge McCarthy Erred in Compensating L&S for its Phase Two Lodestar

¹⁵ In its brief at 50-51, MVOA produces a laundry list of L&S's alleged failure to communicate, none of which were found by Judge McCarthy to be breaches of the RPCs, and none of which were breaches of L&S's fiduciary duty to MVOA. L&S will not answer each point in detail, but a brief examination reveals how slender a reed MVOA ties its argument to. L&S did not meet with defense attorneys "to coordinate a 'mediation strategy'" as MVOA alleges. L&S met to ensure that defense counsel was prepared to proceed with mediation, had all the information it needed, was ready to deal with the subcontractors, and was prepared to make reasonable settlement offers. 10/1 RP 772-81; Ex. 282. All the allegations concerning Beal are irrelevant. As noted, the AFA permitted L&S to associate with other counsel, and even Gilman herself agreed that it was appropriate for L&S to consult with Beal and that it was not necessary for L&S to inform MVOA that it was doing so. CP 270, 1175. The analysis MVOA complains was not shared with it (Ex. 1246) was a memo from Sudweeks to Stein – a purely internal document.

Judge McCarthy calculated that L&S had earned between \$124,400 and \$155,500 in phase two time, depending on the calculation of the rate for the attorneys working during that period. CP 2272-73. However, he awarded L&S only \$10,000 for 845 billing hours *he deemed reasonable and necessary to MVOA's successful result*, an effective hourly rate of just over \$11 an hour, or less than 10% of the lowest fee. CP 2272-73 (FF 200). This was an abuse of discretion. MVOA describes this shockingly parsimonious fee as “a modest award of compensation,” br. of resp't at 37, citing *Eriks* to justify this reduction as a penalty for alleged breaches of fiduciary duty. This award constituted an abuse of discretion by Judge McCarthy where MVOA has failed to identify a single alleged breach of fiduciary duty associated with the phase two work of L&S that harmed MVOA.

MVOA also attempts to defend Judge McCarthy's reduction in L&S's fees by claiming L&S was faced with little risk in pursuing MVOA's claims. L&S undertook to represent MVOA on a contingent basis. Given the vigor with which the developers defended the case, this was no small risk. As the thousands upon thousands of pages in the record demonstrate, and Judge White found, the construction defect case and the subsequent insurance actions were all vigorously contested.

Finally, MVOA offers a vague and unsupported “suspicion” – namely that L&S billed for work it did not actually perform to justify denial of fees to support its entirely spurious inference that “the temptation was great for L&S to record hours in excess of what is reasonable in quantum meruit.” Br. of Resp’t at 38. Yet, *MVOA provides not one shred of evidence to support the notion that L&S yielded to this imaginary temptation*. Even Judge McCarthy made no such finding. He found 845 hours to be *reasonable*.

(3) The Trial Court Abused Its Discretion in Awarding MVOA Its Fees at Trial When It Was Not the Prevailing Party

MVOA contends in its brief at 53-59 that it was the “prevailing party” in L&S’s lien foreclosure action. It focuses exclusively on the question of whether it was a prevailing party and fails to distinguish the authority cited in L&S’s opening brief at 67, 69 indicating that MVOA had no contractual or equitable basis for the recovery of attorney fees. MVOA was not entitled to recover its fees at trial in the RCW 4.24.005 proceeding.

(a) The American Rule on Attorney Fees Precludes a Recovery of Fees by MVOA

Judge McCarthy authorized MVOA to recover \$492,000 in fees for its participation in the RCW 4.24.005 proceeding on the basis of RCW 4.84.330 and “equitable principles.” CP 2834-41. As noted by L&S in its

brief at 69, Judge McCarthy never identified which recognized equitable exception to the American Rule¹⁶ on attorney fees applied to MVOA. MVOA has *no answer* to L&S's argument on this point, effectively *conceding* it.

MVOA apparently now contends that the L&S contingent fee contract afforded it a basis to recover attorney fees below. But MVOA makes two huge concessions in its brief. It concedes “[t]he contingent fee agreement provides for recovery of attorney fees by the prevailing party *if litigation is instituted to enforce its terms.*” Br. of Resp’t at 53 (emphasis added). It further concedes that L&S did not seek enforcement of the contingent fee agreement below: “In the trial court, L&S argued the parties’ contingent fee agreement was *no longer operative* and therefore could not provide a basis for *either* party to recover attorney fees (CP 2346, 2351-55).” *Id.* (emphasis added).¹⁷

Simply stated, MVOA cannot point to a single Washington case in which the parties *agreed* that the action was not based upon a contract where a court has allowed recovery of fees to a party based on the contract

¹⁶ Under the American Rule on attorney fees, the parties bear their own legal expenses, unless a statute, contract, or recognized equitable exception to the Rule authorizes the recovery of fees. *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

¹⁷ L&S has been consistent in its argument on this point. It did not seek a RAP 18.1 fee award in its opening brief.

or RCW 4.84.330. As noted in L&S's opening brief, our Supreme Court has allowed the recovery of attorney fees under the contractual exception even where the contract containing the fee provision is voided by the court. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (parties actively contested enforceability of noncompete agreement); *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003) (enforcement of wine distribution agreement contested). However, in both *Labriola* and *Mt. Hood Beverage Co.*, a party sought to enforce the contract, but the courts ultimately declined to do so. Nevertheless, the Supreme Court felt that the mutuality principle of RCW 4.84.330 was so important that the prevailing party in such litigation was still entitled to recover fees.

Here, both parties *concede* the present action is not on a contract. The only basis upon which L&S sought recovery against MVOA was on the basis of quantum meruit, an equitable principle. Because this was neither an action on a contract (as MVOA concedes) nor one in which a recognized equitable exception to the American Rule applies (as MVOA concedes), Judge McCarthy erred in awarding fees at all to MVOA.

- (b) MVOA Was Not the Prevailing Party, Even if It Was Entitled to Fees under an Exception to the American Rule

MVOA essentially argues that it was the “prevailing party” in the RCW 4.24.005 proceeding because it was successful in reducing the amount of L&S’s quantum meruit recovery against it. It offers a series of arguments that do not accurately portray the case law on calculating a fee award. Moreover, it concocts an entirely unsupported argument that it was entitled to a fee award on a basis akin to CR 68, or RCW 4.84.250, et seq. because it allegedly made an offer of settlement to L&S.¹⁸ Judge McCarthy erred in making a one-sided award to MVOA of its fees, without properly applying well-established rules for calculating fees.

First, MVOA was not the prevailing party here because it did not recover a judgment *in its favor*. MVOA has *no answer* to the actual language of RCW 4.84.330 that requires a prevailing party to recover a judgment in its favor, or cases like *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 160 P.3d 39 (2007), *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987), or *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1973) that confirm this rule. *See also, Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (no recovery under RCW 4.84.330 where party voluntarily dismissed action; voluntary dismissal is not a final judgment).

¹⁸ Judge McCarthy improperly considered such settlement offers under ER 408 (statements made in compromise negotiations inadmissible) and the Uniform Mediation Act, RCW 7.07.030 (mediation communications privileged from disclosure).

Similarly, MVOA has *no answer* to cases like *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.3d 773, *review denied*, 101 Wn.2d 1021 (1984) or *Burman v. State*, 50 Wn. App. 433, 749 P.2d 708 (1988), cited in L&S's opening brief, that hold a party prevails in a case even if its recovery is less than what it initially sought. Thus, L&S, not MVOA, was the prevailing party because Judge McCarthy awarded L&S a quantum meruit recovery, even though he did not award L&S all that it was seeking from MVOA.

Even if both L&S and MVOA prevailed on aspects of their contentions, Washington law, including cases cited by MVOA, hold that where both parties prevail on their contentions, there is *no prevailing party* entitled to fees. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 772-73, 750 P.2d 1290 (1988); *Rowe v. Floyd*, 29 Wn. App. 532, 535-36, 629 P.2d 925 (1981). *See also, American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990) (on appeal). As both L&S and MVOA prevailed on arguments related to fees, at worst, there was no prevailing party and MVOA again should not have recovered its fees.

Second, MVOA cites the Division III decision in *Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997) for the proposition that it was the "substantially prevailing party." Br. of Resp't at 54-55. This Court has

been critical of Division III's *Hertz* decision because it failed to apply this Court's decision in *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993). See *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 218-19, 130 P.3d 892 (2006); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 9, 970 P.2d 343 (1999). In *Marissi*, this Court held that where parties in a contract case each recover on distinct and severable contract claims, the courts should allow each party to recover fees and then offset the awards. Assuming *Marissi* applies here, Judge McCarthy failed to allow L&S to recover its fees. MVOA's argument for fees based on a Division III case *rejected* by this Court should itself be rejected.

Finally, MVOA concocts an argument that it was somehow the prevailing party because L&S did not recover more at trial than what had been offered to it in settlement. Br. of Resp't at 54-59. Initially, this argument is simply incorrect factually. L&S recovered \$596,350, CP 2892, even under Judge McCarthy's erroneous calculation of the quantum meruit recovery. Moreover, L&S defeated MVOA's argument, CP 1631, that it should disgorge its entire fee for its representation of MVOA. MVOA points out one alleged offer of \$500,000 to which Judge McCarthy referred, despite ER 408's bar on evidence from compromise negotiations. CP 2857-58 (Br. of Resp't at 58-59). Even under CR 68/RCW 4.84.250,

et seq. principles, L&S prevailed as it *recovered more than what MVOA offered in settlement*.

The cases cited by MVOA in its brief in support of its new rule for determining the prevailing party are inapposite. None indicates that settlement offers are the only dispositive factor in making a fee award. In fact, in *Marine Enterprises, Inc.*, settlement offers were not even an animating factor in this Court's decision. The parties' contract provided for an award of attorney fees to the substantially prevailing party. MVOA does not disclose that the Court of Appeals found neither party substantially prevailed, and invalidated a fee award to a party that minimally prevailed. Thus, *neither* party recovered fees at trial. In *Lane v. Wahl*, 101 Wn. App. 878, 6 P.3d 621 (2000), both parties prevailed on aspects of their case. The court affirmed a trial court ruling that one party substantially prevailed.

In sum, Judge McCarthy erred in making a fee award here as the American Rule, and none of its exceptions, applied to bar a fee award to MVOA. If the contractual exception to the American Rule applies, MVOA was not entitled to fees because L&S was the prevailing party below. The mere fact that a party does not recover the full amount that it sought does not disable it from being the prevailing party. L&S, not MVOA, was the prevailing party as it was the only party in whose favor

judgment was entered. It defeated MVOA's argument that it should have disgorged its entire fee. At worst, for L&S, both L&S and MVOA prevailed in the action; either there is no prevailing party in the action or the parties should both recover fees.

(4) MVOA Is Not Entitled to Attorney Fees on Appeal

MVOA contends that it is entitled to attorney fees on appeal pursuant to RAP 18.1 because a "contractual provision" authorized it to recover such fees. Br. of Resp't at 59. For the reasons enumerated in the prior section, this is *not* a contractual action and the action is not based on the contingent fee agreement, as both L&S and MVOA agree. MVOA is not entitled to its fees on appeal.

D. CONCLUSION¹⁹

Nothing in MVOA's brief should dissuade this Court from reversing Judge McCarthy's judgment.

This Court should reverse the trial court's judgment and remand the case to the trial court for a new trial before a different judge. At a minimum, L&S should receive \$1.6 million in fees for its services through May 31, 2005, plus prejudgment interest and the reasonable value of its

¹⁹ MVOA has *no answer* to the argument in L&S's opening brief at 70 n.44 that the case should be remanded to a new judge, thereby *conceding* that this is the proper disposition.

phase two time. MVOA is not entitled to a fee award. Costs on appeal should be awarded to L&S.

DATED this 7th day of October, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U.S. mail true and accurate copies of: Motion for Over-length Reply Brief and Reply Brief of Appellant in Court of Appeals Cause No. 62334-6-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 7, 2009, at Tukwila, Washington.



Christine Jones
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