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No. 65740-2- I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

PUGET SOUND ELECTRICAL WORKERS
HEALTH TRUST AND VACATION PLAN; PUGET SOUND
ELECTRICAL WORKERS PENSION TRUST; IBEW LOCAL 46
RETIREMENT ANNUITY TRUST; IBEW LOCAL 46
APPRENTICESHIP AND TRAINING TRUST;
AND PUGET SOUND ELECTRICAL JOINT
LABOR COOPERATION TRUST,

Respondents,

v.

McKENZIE ROTHWELL BARLOW & KORPI, P.S.;
SMITH McKENZIE ROTHWELL & BARLOW, P.S.,

Appellants,

and

MICHAEL H. KORPI; A. BRUCE McKENZIE;
DAVID S. BARLOW; AND CATHERINE A. ROTHWELL,

Defendants.

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A. INTRODUCTION

This is a professional negligence action brought by a group of Taft-Hartley Trusts (“Trusts”) against their former counsel of record (hereafter “the firm”) arising out of its representation of the Trusts to collect employer contributions for pension, health, and other benefits owed to the Trusts under applicable collective bargaining agreements (“CBA”) and other ancillary labor agreements. The Trusts claimed that the firm negligently failed to collect contributions and associated charges provided for in the CBAs. They also argued that but for the negligence of the firm they would have collected some or all of the contributions owed by the delinquent employers. The firm had represented the Trusts for many years prior to 2000 and was terminated in December 2004 as to some accounts, but as to all accounts by March 22, 2005.

The trial court’s judgment in favor of the Trusts cannot be sustained as a matter of law because the trial court erred in its understanding of the duty owed by the firm to the Trusts. In particular, the trial court did not appreciate that any claims under state lien statutes were preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (“ERISA”).

Further, the Trusts failed to establish causation for a professional negligence action where as of the time the firm was discharged, the

successor to the firm had the ability to pursue the collection actions on the Trusts' behalf, but chose not to do so based on its erroneous understanding of the law.

Finally, the trial court's decision on damages as to the amounts that would have been collectible, but for the firm's alleged negligence, is unsustainable given the speculative evidence on the amounts that were allegedly recoverable.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error¹

1. The trial court erred in making finding of fact number 10.
2. The trial court erred in making finding of fact number 13.
3. The trial court erred in making finding of fact number 15.
4. The trial court erred in making finding of fact number 16.
5. The trial court erred in making finding of fact number 18.
6. The trial court erred in making finding of fact number 19.
7. The trial court erred in making finding of fact number 20.
8. The trial court erred in making finding of fact number 22.
9. The trial court erred in making finding of fact number 23.
10. The trial court erred in making finding of fact number 24.

¹ The assignments of error are to the trial court's amended findings of fact and conclusions of law. CP 1321-1335. See Appendix.

11. The trial court erred in making finding of fact number 25.
12. The trial court erred in making finding of fact number 26.
13. The trial court erred in making finding of fact number 27.
14. The trial court erred in making finding of fact number 28.
15. The trial court erred in making finding of fact number 29.
16. The trial court erred in making finding of fact number 30.
17. The trial court erred in making finding of fact number 31.
18. The trial court erred in making finding of fact number 32.
19. The trial court erred in entering conclusion of law number
4.
20. The trial court erred in entering conclusion of law number
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21. The trial court erred in entering conclusion of law number
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22. The trial court erred in entering conclusion of law number
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23. The trial court erred in entering conclusion of law number
11.
24. The trial court erred in entering conclusion of law number
12.

25. The trial court erred in entering conclusion of law number 13.
26. The trial court erred in entering conclusion of law number 14.
27. The trial court erred in entering conclusion of law number 15.
28. The trial court erred in entering judgment on May 28, 2010.
29. The trial court erred in entering its order re: defendants' motion for reconsideration on July 14, 2010.

(2) Issues Pertaining to Assignments of Error

1. Where federal law foreclosed, or substantially limited, any state lien foreclosure remedies under RCW 39.08 and/or RCW 60.28 on public projects, did the standard of care for an attorney performing collection services on behalf of Taft-Hartley Trusts require the filing of foreclosure lawsuits despite the risk that such filing was frivolous? (Assignments of Error Numbers 1-29)

2. Did the trial court err in concluding that the standard of care for attorneys performing such collection services required the collection of at least 85% of the contributions due from contractors to the Trusts without regard for the work actually undertaken by the attorneys or

the legal impediments to collection? (Assignments of Error Numbers 17, 26-29)

3. Did the trial court err in concluding the standard of care for attorneys performing such collection services required the filing of foreclosure actions on lien claims under RCW 39.08 and RCW 60.28 within 4 months of an owner's acceptance of the project when the limitation period for such actions was actually 6 years? (Assignments of Error Numbers 1-3, 8, 19-20, 23, 26-29)

4. Did the trial court err in concluding that the Trusts established causation as to any damages associated with their legal malpractice action against the attorneys where the attorneys' successors had ample time in which to pursue foreclosure actions, but chose not to do so at the direction of the Trusts? (Assignments of Error Numbers 16, 24, 26-29)

5. Did the trial court err in calculating damages where the damages were based on speculative evidence of loss to the Trusts in the attorneys' alleged failure to collect contributions from contractors? (Assignments of Error Numbers 4, 6, 9-10, 13-14, 17-18, 22, 24-29)

6. Did the trial court err in allowing \$128,000 in fees of an attorney for an "audit" of all accounts on which the collection attorneys had performed services as damages when such services were actually costs

under RCW 4.84.010 because they were performed in anticipation of malpractice litigation and the attorney testified as the Trusts' key expert witness? (Assignments of Error Numbers 7, 21, 26-29)

C. STATEMENT OF THE CASE²

The plaintiffs in this legal malpractice case are Taft-Hartley Trusts established and managed for the benefit of the members of Local Union 46 of the International Brotherhood of Electrical Workers ("IBEW") to receive health and welfare, pension, retirement, annuity, vacation allowance and joint apprenticeship and training contributions from employers. CP 1322 (FF 1). The board of trustees of each Trust includes an equal number of labor and management representatives and the trusts are administered by a third party administrator. CP 1322 (FF 2). The trustees are charged with administering the Trusts and managing the funds solely in the interests of the beneficiaries. CP 1322 (FF 3).

McKenzie Rothwell Barlow & Korpi, P.S., is a law firm doing business as a professional service corporation; like its predecessor, it

² The trial in this case took place over several days. The court reporters generally numbered the pages for the Report of Proceedings anew each day. The RP will be referenced with a Roman numeral for each new volume such as RPI, RPII, etc.

“generally limits its practice to the representation of labor and management employee benefit trusts funds.” Ex. 10; CP 1322 (FF 4).³

Pursuant to the CBAs between Local 46 and the Puget Sound Chapter of the National Electrical Contractors Association (“NECA”), electrical contractors are required to make contributions to the Trusts based upon hours worked by IBEW electricians. CP 1322 (FF 6). The NECA employers had to make contributions to the Trusts no later than the 15th of the month following the month in which the hours were worked; contributions not made by the required date were delinquent and, in addition to the principal sum, were subject to interest, attorney fees and liquidated damages. CP 1323 (FF 7). If the employers were delinquent, the third party administrator for the Trusts usually sent letters to them reminding them that they were delinquent. RPIV:26. A failure by the employer to pay resulted in referral of the account to the firm for collection. *Id.*⁴

³ The individual lawyer defendants were dismissed at the start of the trial and the professional service corporations accepted vicarious liability for the acts and omissions, if any, of Michael Korpi, Lolita Pineda and other employees of the firm whose actions are at issue in this case. CP 1322 (FF 5).

⁴ The Trusts had written collection policies and procedures which the firm drafted for them. CP 1323 (FF 8). The firm also had internal collection manuals prepared in 1989 and 2008. CP 1323 (FF 11). The trial court found that the firm’s fee agreement with the Trusts “required” the filing of a lawsuit within 30 days of referral, CP 1323 (FF 10), but the language of exhibits 6-7 is far more measured than that, recognizing the reality of collection practice.

Upon receiving a referral, the firm made demands on the delinquent employer. RPIV:36-37. If the employer did not respond with a payment or arrangement to pay, the firm commenced an action and filed claim notices on the employer's public works projects. RPIV:39-42. The firm had an auditor ascertain the exact amounts due, both as to the employer's general delinquency and amounts due upon specific projects. RPIV:42-46.⁵ Upon receipt of the project-specific audit report during the periods at issue here, the firm amended its lien notices to reflect the exact amount due,⁶ and then commenced an action in federal court to foreclose on the lien if a settlement could not be reached. RPIV:37-38. The firm often served the state court collection suit without filing it, as permitted by CR 3(a) because that avoided payment of a filing fee and often prompted payment. RPIV:39-40. The goal was to file an action within 30 days of referral, but only in cases where the employer was not cooperating in making payments. RPIV:132-33 (trustees never raised concern re: allegedly tardy filings).

⁵ The auditor's report was important in federal court actions given those court's "laydown" discovery requirements, RPIV:45; RPV:70, and for summary judgment. RPV:70-73. This model was an acceptable one for collections. RPIII:155.

⁶ In *Shope Enterprises, Inc. v. Kent School Dist.*, 41 Wn. App. 128, 132, 702 P.2d 499 (1985), this Court specifically indicated that materialmen could keep a claim against the retention under RCW 60.28 current by refiling the notice of claim every four months. See also, *Airefco v. Yelm Comm. Schools No. 2*, 52 Wn. App. 230, 234, 758 P.2d 996, review denied, 111 Wn.2d 1029 (1988).

Prior to 1994, collection practice by attorneys representing Taft-Hartley Trusts was generally similar to collection practices for other construction industry commercial accounts. Various statutes ostensibly afforded remedies to the Trusts to recover delinquent subcontractor contributions from financial assets posted by those subs or general contractors in connection with a project -- RCW 39.08 (Public Works Contract Payment and Performance Bonds), RCW 60.04 (Mechanics Liens), RCW 60.28 (Public Works Contracts Retainage Funds), RCW 60.76 (Fringe Benefit Lien).⁷

But in March 1994, the Washington Supreme Court issued an opinion in which the Court held that the remedies in RCW 39.08 and RCW 60.28 were preempted by ERISA. RPIV:18.⁸ This decision deprived the Trusts of their most effective means of collecting contributions owed by delinquent employers because those employers were often insolvent or on the edge of insolvency and were essentially

⁷ These statutes generally afforded workers providing services on both public and private projects a lien for their services that may then be foreclosed in a legal action. RCW 39.08 requires contractors on public projects to provide performance bonds and RCW 60.28 mandates that general contractors on public works have "retainage funds" or bonds that will be available to satisfy subcontractor and materialmen claims. RPII:72-73. *See generally*, Marjorie Dick Rombauer, 27 *Wash. Practice: Creditors' Remedies* at § 4.87. RCW 60.04 and 60.76 are more general materialmen's lien statutes. *See Appendix.*

⁸ The only amounts which could be recovered by the Trusts from delinquent employers pursuant to RCW 39.08 bonds or RCW 60.28 retainage funds, in any event,

judgment-proof; the bonds or retainage funds were the more realistic source for recovery of delinquent contributions.⁹ In 2000, the Court reaffirmed its earlier opinion that ERISA preempted state remedies against public works bonds or retainage funds, and the United States Supreme Court denied certiorari. RPIV:23. Prior to 2002, no judicial remedy was available under state law. RPIII:159. The successor firm did not file foreclosure actions after *Trig*. RPIII:126.

Subsequently, in 2002 and thereafter, local federal courts made some recovery under RCW 39.08 possible if the diversity requirements of 28 U.S.C. §§ 1331 and 1332 were satisfied. RPIII:159; RPIV:51-52. None of the claims against the delinquent contractors that are the subject of this case met the new criteria for commencement of a federal court action. RPIV:51-52. In May 2007, a federal court removed most of the limits upon federal court authority to foreclose on RCW 39.08 bonds. Because the opinion effectively eliminated the need to comply with the diversity requirements of 28 U.S.C. §§ 1331 and 1332, the opinion also

were the contributions owed. Liquidated damages, interests, costs, and attorney fees were not recoverable from these sources. RPIV:53; RPV:39.

⁹ The use of such liens was ancillary to other legal procedures which were not preempted by ERISA, but the utilization of these remedies in the collection process was very significant because the potential recovery from third-party sources such as general contractors, hiring agencies or sureties was the only likely source of recovery where the employer was insolvent or on the verge of insolvency.

expressly allowed recovery against retainage funds under RCW 60.28 in federal court for the first time.

During its representation of the Trusts, the firm reported eight times a year in writing to the Trusts (4 times per year at staggered times to two Trusts), RPIV:65, reporting on each individual referral in a standardized, detailed format which in general reported actions taken, employer jobs, or projects which had been liened, lawsuits commenced, money collected and other relevant information needed by the trustees to adequately fulfill their fiduciary duties. Exs. 38-70, 109-34; RPI:72. In addition to the written reports, firm counsel appeared eight times a year before the trustees to respond to inquiries and questions and to provide additional detail as requested to supplement the information included in their written reports. RPI:72.

During the firm's representation of the Trusts, it kept the trustees advised of significant developments in federal and Washington state law bearing upon collection, including the ERISA preemption decisions of our Supreme Court. Ex. 101; RPIV:20, 27-28. Specifically, the firm advised the Trusts that the attorneys would no longer be able to utilize many of the usual collection procedures including foreclosure against mechanics liens, public works payment and performance bonds and public works retainage funds. RPIV:28.

Despite the Supreme Court decisions, after discontinuing lien claim filing for a period, RPIV:21, 24, the firm filed lien claims under RCW 39.08 and RCW 60.28 against bonds, funds and other property related to specific projects. RPIV:26-27. The firm believed lien claims could be used to leverage or pressure payment from third-parties in some situations even though the liens could not be foreclosed. RPIV:27. The Trusts accepted the firm's advice and authorized the firm to file liens where appropriate. RPIV:25-26. In accordance with the Trusts' directive, the firm undertook as a general policy to file a lien on identified public projects upon which delinquent contractors had employed IBEW electricians. RPIV:28-29.

The firm filed lien notices without a quantified dollar amount because such lien notices are effective to initially establish a claim against the RCW 39.08 bond and the RCW 60.28 retainage fund. RPIV:41. The firm renewed lien claims against RCW 60.28 retainage funds within four months of the last filing in order to maintain the right of commencing foreclosure actions against the retainage fund after the lien claim was quantified by an audit. RPIV:41-42, 49. The firm quantified the lien claim before a foreclosure action was commenced. RPIV:34, 41, 175.

Commencing in 2000, attorney Robert Bohrer represented the Puget Sound Electrical Workers Pension Trust in a general advisory

capacity, although he did not represent the Trusts on collection matters. RPIII:131. At the December 2004 Health Trust meeting, the trustees informed Korpi that the Trusts were transferring six open collection files to Bohrer's law firm ("the successor firm") for further action. RPI:82; RP111:101-02.¹⁰ Bohrer learned of that decision a few days later at the Pension Trust meeting. RPIII:101, 131; RPIV:64. Bohrer believed he was counsel for the Trusts on the collection files as of December, 2004. RPIII:100-01. The files were then transferred to the successor firm. RPIII:103-04.

In January 2005, Michael Korpi, the firm's attorney responsible for collecting delinquent contributions to the Trusts, sent a letter to two of the trustees identifying an error in the firm's handling of the Trans World account; Korpi accepted responsibility for missing a renewal deadline for two lien claim notices under RCW 60.28 in the total amount of \$55,332.42. Ex. 1; CP 1325. The letter did not agree to pay the \$55,332.42, but agreed to make the Trusts "whole." Ex. 1; RPIV:163-64.

After receiving Korpi's letter on Trans World, the trustees hired attorney Sanford Levy to conduct an audit of the collection cases assigned

¹⁰ The Trusts confined their claims to seven accounts of employers delinquent on CBA-mandated payments: Atkinson-Bell/Lunde Electric; Baird-Weber; CAE Electric; Fox Electric; Pacific Electric; Sun Innovations; Trans World Electric. CP 1324 (FF 14); RPI:14-15.

to the firm. CP 1325 (FF 20). Levy did so, charging the Trusts a fee of \$128,000. *Id.*¹¹

At the time of transfer of the files from the firm to the successor firm in March 2005, the total delinquent contributions owed to the Trusts on the accounts at issue in this case were approximately \$2.3 million. Ex. 11; CP 1331 (FF 33).

The Trusts commenced the present action against the firm in the King County Superior Court on June 17, 2008. CP 1-15. The case was assigned to the Honorable Richard Eadie for trial. The Trusts' principal witness was Levy. He testified that a Trust attorney who failed to collect 90% of any delinquent contributions breached the standard of care. RPII:61-62. He compared collections by the firm and its successor. Ex. 107. The firm had the expert testimony of Charles Colett, an experienced ERISA collection attorney, who testified that the firm met the standard of care. RPIII:163. Korpi also testified at length regarding firm collection practices.

¹¹ The information developed in the audit was not used by the Trusts or successor counsel to obtain any recovery on the seven accounts at issue in this case or any other accounts in which the Trusts had been represented by the firm. This lends further credence to the proposition that Levy's activities were less an "audit" than a forensic exercise.

The trial court found for the Trusts on six of the seven accounts,¹² and entered findings of fact and a judgment on May 28, 2010. CP 1173-92. The firm moved for reconsideration, CP 1200-06, which the trial court granted in part by an order entered on July 14, 2010. CP 1319. The Court entered amended findings and conclusions on August 13, 2010. CP 1321-35. This timely appeal followed. CP 1303-20.

D. SUMMARY OF ARGUMENT

The trial court in this legal malpractice action misstated the duty owed by the firm in collecting delinquent contributions from contractors due to the Trusts. The trial court failed to appreciate the limitation on the ability of such Trusts to use state collection statutes from 1994 to 2007 because of their preemption by ERISA. The court established an artificial 85% recovery rate as the standard of care and found that the firm should have filed lien foreclosure lawsuits, barred by ERISA's preemption, even though such filings would have subjected the firm and the Trusts to potential CR 11 and other sanctions. The court further erred in concluding that the standard of care required filing of lawsuits within an arbitrary

¹² The Trusts referred the Sun Innovations account to the firm in August 2001, CP 1328, some 4 ½ months after the firm went out of business. RPII:194-95; RPIV:107, 152. Levy testified that the Trusts had no lien claims under RCW 39.08, RCW 60.04 or RCW 60.28 because of the 4 ½ month delay. RPIII:71-73. The trial court nevertheless concluded that although the firm obtained a default judgment in September 2002, CP 1328 (FF 29), the firm should have researched the filing of liens. *Id.* The court apparently concluded that the late referral made collection impossible.

number of days even though the employer was cooperating with the firm in making payments.

The trial court also erred in its treatment of causation where the successor firm, based on a misperception of Washington law, failed to file actions to recover contributions. Moreover, the trial court erred in placing responsibility on the firm for one account where it had recommended rejection of a 50% settlement from the employer. That settlement remained available after the firm's termination as the Trusts' counsel, but the successor firm, nevertheless, failed to take steps to inform the employer of the Trusts' settlement position or to make a recommendation different than that of the firm.

The trial court erred in basing damages on speculative evidence and in sometimes employing an artificial figure of 85% of the Trusts' write-off on various accounts as the measure of damages. The court should not have allowed the Trusts' key expert's fee for what was described as an "audit" of various accounts to be recovered as damages when the audit was nothing more than a disguised expert witness fee, not recoverable as a cost under RCW 4.84.010, for expert work undertaken in anticipation of litigation.

E. ARGUMENT

(1) Standard of Review for Trial Court Decisions Here

The present case was tried to the bench. This Court reviews the trial court's findings of fact to determine if they are supported by substantial evidence. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). In turn, the Court reviews the findings to see if they support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Conclusions of law that are mislabeled as findings of fact are reviewed de novo, *Abbey Road Group LLC v. City of Bonney Lake*, 167 Wn.2d 242, 265, 218 P.3d 180 (2009), as are conclusions of law. *Sunnyside Valley Irrig. Dist.*, 149 Wn.2d at 880.

In this case, many of the trial court's findings are actually conclusions of law, particularly those such as numbers 13, 15, 18, 22, 25, 26, 28, 29, 30, and 31 that either assume the standard of care for attorneys or specifically address the standard of care. The duty or standard of care owed by a defendant in a negligence case is a question of law appropriate for a conclusion of law. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

(2) The Necessary Elements of a Professional Negligence Claim Against the Firm

To establish legal malpractice, once an attorney-client relationship is established, a plaintiff must prove the traditional tort elements of duty,

breach, proximate cause, and damage. *Hizey v. Carpenter*, 119 Wn.2d 251, 261-62, 830 P.2d 646 (1992); *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005).

For duty, the standard of care owed by the firm has been established in numerous Washington cases. “[A]n attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.” *Hizey*, 119 Wn.2d at 262. An attorney is not held to a standard of perfect judgment, but rather one of good faith and due diligence in the client’s representation. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717-20, 735 P.2d 675, *review denied*, 108 Wn.2d 1008 (1987) (when an attorney performs “reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment, . . . mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice;” malpractice action cannot be predicated on an adverse judicial decision rendered on a matter that was competently presented to the trial court).

Proximate causation in the legal malpractice setting is more complicated than in the traditional tort case. To establish causation generally requires a legal malpractice plaintiff to prove a “suit within a suit.” The plaintiff must show that but for its attorney’s negligence, it

would have obtained a better result. *Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985).¹³ In this case, the Trusts had to prove with reasonable specificity how much they would have recovered on each of the seven accounts “but for” the firm’s alleged negligence.

Finally, Washington courts have long held that the measure of damages for legal malpractice is the amount of loss *actually sustained* as a proximate result of the attorney’s negligence. In numerous cases, Washington courts have held that a plaintiff must prove that the damages the attorney’s negligence allegedly caused were *collectible*.¹⁴

(3) The Trial Court Erred in Determining the Standard of Care for Attorneys Performing ERISA Collection Work

¹³ *Accord Geer v. Tonnon*, 137 Wn. App. 838, 844, 155 P.3d 163 (2007), *review denied*, 162 Wn.2d 1018 (2008); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 854, 147 P.3d 600 (2006), *review denied*, 161 Wn.2d 1011 (2007); *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 591-92, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000); *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336, *review denied*, 96 Wn.2d 1001 (1981).

¹⁴ *Tilly v. Doe*, 49 Wn. App. 727, 732-33, 746 P.2d 323 (1987), *review denied*, 110 Wn.2d 1022 (1988) (action for malpractice in attorney failing to obtain and perfect security interest in collateral of business upon its sale; trial court properly admitted evidence that even if interest had been perfected, full claim could not have been collected in bankruptcy); *Matson v. Weidenkopf*, 101 Wn. App. 472, 484-85, 3 P.3d 805 (2000) (professional negligence claim against attorney retained to collect on three promissory notes; plaintiff had to prove collectability of notes); *Lavigne v. Chase Haskell*, 112 Wn. App. 677, 685-87, 50 P.3d 306 (2002) (professional negligence claim against firm hired to renew and collect on judgment; plaintiff bore burden of proving judgment was collectible); *Kim v. O’Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61 (2006), *review denied*, 159 Wn.2d 1018 (2007) (plaintiff failed to meet burden on collectability where client stipulated to judgment, assigning rights against insurer and his counsel to plaintiff, and received agreement from plaintiff not to execute against him on the judgment).

The trial court erred in its analysis of the duty owed by the firm to the Trusts.¹⁵ It did not expressly address the case law relating to the remedies available to attorneys doing ERISA collection work on behalf of the Trusts. Instead, the trial court simply ignored the difficulties created by federal preemption of state law remedies. The court concluded, without support, that

- the firm should have immediately filed collection lawsuits, even where the employer was cooperating in making payment;
- the firm should have filed lien foreclosure actions, even though the state lien statutes on which those actions were based were preempted by ERISA;
- the firm should have collected 85% of all outstanding contributions to meet the standard of care despite federal preemption of state law remedies;

Each of these legal conclusions buried in the findings of fact was wrong; the trial court's misstatement of the standard of care applicable to the firm constituted reversible error.

(a) State and Federal Court Foreclosure Remedies Were Barred in Large Part During the Time the Firm Represented the Trusts

The Trusts are Taft-Hartley Trusts created by federal law, 29 U.S.C. § 186(c). Collection and administration of all contributions paid

¹⁵ Duty is an issue of law, reviewed de novo by this Court. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

into the Trusts are governed by ERISA. Since its original enactment in 1974, the United States Supreme Court has broadly defined ERISA's preemptive scope.¹⁶ ERISA's preemptive effect profoundly affected collection actions on behalf of the Trusts here.

In 1992, the Trusts in this case were parties to a series of actions in the King County Superior Court to collect contributions owed by an insolvent electrical subcontractor. In *Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), our Supreme Court determined that ERISA preempted state collection statutes. The Trusts there sued general contractors on various public projects upon which the subcontractor/employer liability for contributions was incurred. In the same action, the Trusts sued the general contractors' sureties on the bonds required under RCW 39.08.¹⁷ The trial court dismissed the Trusts' action against the general contractors and their respective payment and performance bond sureties on summary judgment. The Supreme Court affirmed, holding that ERISA preempted the

¹⁶ That ERISA's preemptive scope is broad is confirmed by cases like *Egelhoff v. Egelhoff*, 532 U.S. 141, 146, 121 S. Ct. 1322, 149 L.Ed.2d 264 (2001) (ERISA preemption applies to Washington statute providing for automatic revocation upon divorce of any designation of spouse as beneficiary of nonprobate asset, overturning contrary Washington Supreme Court decision; Court noted ERISA preemption is "clearly expansive.").

¹⁷ Trusts have standing to bring an action under RCW 39.08. *Merit*, 123 Wn.2d at 568.

collection statutes. *Id.* at 573. The immediate practical effect of *Merit* was to preclude enforcement of employee benefit contribution claims through the normal state collection statutory schemes. Collection counsel's options were limited when pursuing a claim against an insolvent or marginally solvent electrical subcontractor.¹⁸

In 1998, the IBEW commenced an action seeking to overturn *Merit* relying upon what it believed to be a loosening of ERISA's preemptive effect in federal decisions.¹⁹ Our Court, nevertheless, reaffirmed *Merit* in *Internat'l Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431, 442-43, 13 P.3d 622 (2000), *cert. denied*, 532 U.S. 1002 (2001).

¹⁸ The effect of ERISA's preemption was summarized in Marc M. Schneier, "ERISA Preemption of State Law Remedies: Impact on Union Trust Fund Actions to Recover Unpaid Benefit Contributions," 15 *Construction Lawyer* 14, 20 (1995):

Although Congress may not have intended that ERISA preempt state laws allowing trust funds to use general collection mechanisms to recoup unpaid benefit contributions, courts have virtually unanimously interpreted ERISA's broad preemption language to prevent trust funds from invoking such state laws. As a result, the trust funds now have only a federal court action against a limited class of defendants, but with enhanced damages available. The rules have changed for one class of claims to construction project monies, and all parties must learn to play by the new rules.

¹⁹ See, e.g., *New York State Conference v. Travelers Insurance Company*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995).

After federal ERISA decisions more favorable to state collection remedies,²⁰ the Iron Workers District Council of Pacific Northwest filed an action against a delinquent subcontractor employer, the general contractor and its sureties, and the University of Washington's retainage fund in *Iron Workers District Council of the Pacific Northwest v. George Sollit Corp.*, 2002 WL 31545972 (W.D. Wash. 2002). In that case, after the University and its retainage fund claim under RCW 60.28 were dismissed on stipulation, Judge John Coughenour ruled that in certain circumstances state law remedies enforcing collection of contributions owed to Taft-Hartley Trusts could be secured in federal court. The court held that trusts could maintain a claim under RCW 39.08 against the general contractor's statutory public works payment and performance bond brought in conjunction with a direct ERISA claim against the

²⁰ See, e.g., *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Co.*, 247 F.3d 920 (9th Cir. 2001) (court held that a state statute will not be preempted by ERISA if it has merely a tenuous, remote, or peripheral connection with the ERISA plan, rather than precisely defining the relationship between the plans and parties and interests; California bond statutes under which employee benefit plans may enforce rights to contribution on behalf of construction workers against payment bonds posted on public construction projects were not preempted by ERISA, allowing enforcement of state law claims against an employer in federal court when brought as supplemental to a primary claim under ERISA).

employer, provided that those state law claims satisfied the diversity jurisdiction requirements of 28 U.S.C. §§ 1331-1332.²¹

Thus, following *Sollit*, although it was not precedential, Trusts filed collection actions in federal court against public works bonds ancillary to ERISA claims against the employer if the diversity jurisdictional requirements could be met. *Sollit*, however, had absolutely no effect on maintaining a bond foreclosure action in state court. *Trig* was still the law in state court and collection remedies including suit against the RCW 39.08 bond, were preempted by ERISA.

Although *Sollit* provided an avenue for recovery based on a state law remedy, it was a limited remedy. As acknowledged in *Sollit*, the general contractor would be a necessary party to enforce an action against its bond. To maintain complete diversity, the general contractor would have to be an out-of-state entity. Additionally, it is difficult for the contribution claims against an employer on a single project to meet the \$75,000 jurisdiction requirement.

In 2007, Judge Coughenour issued a ruling in *Board of Trustees of Cement Masons & Plasters Health and Welfare Trust v. GBC Northwest, LLC*, 2007 WL 1306545 (W.D. Wash. 2007), further expanding access to

²¹ The statute requires complete diversity as between the plaintiffs and the defendants involved in the state law claims and that the amount in controversy exceed \$75,000.

federal court to enforce state law remedies despite ERISA's preemptive effect. That ruling allowed the assertion of supplemental or ancillary state law claims in federal court even though diversity requirements could not be satisfied, expanding the availability of federal courts as the forum in which to enforce state law collection remedies under RCW 39.08 (public works payment and performance bonds) and RCW 60.28 (public works contract retainage funds).²²

Despite these decisions, Levy testified, and the trial court appeared to agree, that the firm breached the standard of care by not filing foreclosure actions, *even though federal law preempted any state court remedies under RCW 39.08 and RCW 60.28 and the claims did not meet federal jurisdictional requirements*. Levy believed that collection counsel was obligated to file a lien foreclosure action in federal court even though it was not until *GBC* in 2007 that full access to state lien remedies, despite ERISA, was allowed. RPII:149. Levy's assessment was that collection counsel must somehow anticipate changes in law by "reading the tea leaves." RPV:56-57.

First, it is not a breach of the standard of care for an attorney to decline to file a lawsuit when the law does not sustain the filing of such an action. At best, it is a judgment call on the attorney's part as to whether

²² The firm was counsel for the trusts in this action.

such an action is justified as an “extension of the law.” Such a judgment call is not actionable. *Halvorsen*, 46 Wn. App. at 717. In fact, this Court in *Halvorsen* reaffirmed the “virtually universal” rule that an attorney cannot be negligent in accepting as correct the Supreme Court’s interpretation of the law. *Id.*

Second, to pursue such an action when the law is firmly to the contrary, as announced by our Supreme Court, could subject the client and/or attorney to sanctions under CR 11. *See, e.g.*, Philip Talmadge, Emmelyn Hart-Biberfeld, Peter Lohnes, “*When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*,” 33 Seattle U. L. Rev. 437, 439-49 (2010) (discussing CR 11 in Washington law). Our Supreme Court *twice* held that the remedies of RCW 39.08 and 60.28 were ERISA-preempted. Mr. Levy’s opinion that a lawsuit should nevertheless be filed in the face of *two adverse Supreme Court decisions* was simply begging a court to sanction the firm under CR 11. RPIII:160. Far from breaching the standard of care by *not filing*, it would have been a breach of the standard of care *to file*.

Similarly, the filing of a facially invalid lien, as Levy contended should have been done by the firm in connection with CAE as to the Seahawks stadium, could subject the Trusts to similar sanctions under RCW 60.04.081(1). *See* Appendix. The Trusts had to pay an award of

attorney fees in a state court foreclosure action filed by the successor firm.
Exs. 143-57; RPII:190-92.

In sum, the trial court erred in articulating the duty owed by the firms to the Trusts when it was oblivious to the serious practical implications of the removal of state collection remedies due to ERISA's preemption of them.

While this was the core flaw in the trial court's treatment of the standard of care, the trial court also appeared to conclude in findings such as number 13 (CP 1324) that the filing of a lawsuit within 30 days of referral regardless of whether the employer was cooperating in making payment and without an auditor report quantifying the claim constituted a breach of the standard of care.²³ The trial court employed a "mechanical" analysis of the litigation process, oblivious to the long-established rule in Washington that disagreements over tactics, particularly in litigation, are not actionable. *Halvorsen, supra*.

(b) The Standard of Care as to Collections Cannot Be Established on a Percentage Basis

The best example of the trial court's "mechanical" approach to the standard of care is its percentage-of-collection analysis. The trial court

²³ Korpi testified extensively that the firm relied on auditors to quantify claims because such testimony was more reliable and particularly necessary in federal court, RPIV:42-46, 222-23; RPV:69-73, and that the firm did not file foreclosure actions against cooperating employers who made payments. RPIV:200, 206-07.

relied on Levy's testimony to find that a collection firm must recover 85% of all delinquent contractor contributions to meet for the standard of care. CP 1330 (FF 31).²⁴ This analysis is counterintuitive and unsupported under Washington law.

Too many variables beyond an attorney's control factor into the percentage of collections an attorney is able to secure. This artificial percentage was adopted without regard to the problem of ERISA preemption of state remedies 1994-2007, the vagaries in the litigation process such as a witness becoming unavailable, or a defendant seeking bankruptcy protection, none of which the firm could control. For example, this arbitrary percentage-of-recovery analysis of the standard of care is undercut by the trial court's determination that the firm breached the standard of care by not recommending acceptance of the Fox settlement of 50% of the contributions that were outstanding.

Moreover, Levy's 90% number simply does not pencil out. CP 1202-05, 1264-65, 1300-01. In exhibit 107, Levy's computation for the firm included the \$535,000 owed by Fox on which the Trusts had been paid \$255,476.72 as of trial and on which they were still receiving funds at the rate of \$2000 per month. Therefore, the Fox account should be

²⁴ Levy testified that the standard of care was a 90% collection rate. RPII:61-62.

removed from the calculation to more accurately reflect any potential losses experienced by the Trusts. By removing the Fox referral, the gross amount of referral prosecuted by the firm was \$4,413,952.53. The amount collected likewise must be reduced in the amount of \$17,952.84, which is the amount collected on the Fox referral by the firm, leaving gross collections in the amount of \$2,760,309.93. The effective collection rate by the firm is 62.5% of referrals. This percentage includes all “amounts written off.” Ex. 22. Levy’s computation regarding successor firm was 69.56%. Ex. 107. The firm’s percentage should be further adjusted to omit Sun from consideration since the Trusts referred that account to the firm was 5 ½ months after the delinquent employer had ceased operation. If the Sun account is deleted from consideration, the firm’s collection rate was 64.8%. *Id.*

In sum, the trial court erred in establishing an arbitrary percentage of recovery as the standard of care for collection attorneys.

(4) The Trial Court Erred in Concluding that the Trusts Established Causation as to Any Alleged Damages Where the Firm’s Successor Had Ample to Time to Commence Foreclosure Actions on the Trusts’ Behalf

As noted *supra*, the Trusts had to prove a “case within a case” to establish causation in their action against the firm.²⁵ The Trusts did not

²⁵ While “but for” feature of proximate cause in a legal malpractice is generally a question of fact, *Smith*, 135 Wn. App. at 602, whether the plaintiff would have obtained

prove this element because (a) at the time many of the accounts were transferred to the successor firm it had remedies it mistakenly chose not to pursue, recommending instead to the Trusts that they write off the sums, and (b) with respect to Fox specifically, the firm was terminated and bore no further responsibility regarding Fox's offer to the Trusts. The trial court apparently declined to address these issues because the firm allegedly did not present expert testimony on them. CP 1334 (CL 11). There was ample evidence on this issue, however, from Korpi and Colett.

(a) The Successor Firm Failed to Act on Accounts Based on a Misperception of the Applicable Statute of Limitations

The Trusts here discharged the firm, and all of its files upon which the Trusts now base their claims were transferred to the successor firm by March 22, 2005. With the exception of Fox Electric, the successor firm took no significant steps to realize or pursue any available potential remedies for the Trusts, and all files except Fox were closed by the Trusts on the successor firm's recommendation. The successor firm erroneously believed that claims against the RCW 39.08 bond had either a four-month or a one-year statute of limitation. RPIII:137-38. That belief was erroneous.

a more favorable judgment but for the attorney's alleged negligence is a question of law. *Geer*, 137 Wn.2d at 844-45.

First, this Court has determined that a single notice is sufficient to give notice against a general contractor's bond under RCW 39.08 and against the retainage fund under RCW 60.28. *Foremost-McKesson Systems Div. of Foremost-McKesson, Inc. v. Nevis*, 8 Wn. App. 300, 305, 505 P.2d 1284 (1973). The choice to file a single notice satisfying both statutory notice requirements is permissive, not mandatory.

Second, the statute of limitations under RCW 60.28 with respect to retainage claims is clear. A claimant must file a foreclosure action within four months of the filing of the lien claim although, as noted before, that lien claim could be renewed. RCW 60.28.030, *Shope Enterprises*, 41 Wn. App. at 132.

Third, the limitation period for a claim against the general contractor's bond under RCW 39.08 is settled law after *Industrial Coatings Co. v. Fidelity & Deposit Co. of Maryland*, 117 Wn.2d 511, 817 P.3d 393 (1991), where our Supreme Court held the applicable statute of limitations for a claim asserted against the statutory bond under RCW 39.08 is six years.²⁶ In that case, a materialman on a public work project was not paid. The supplier sued the general contractor and recovered a

²⁶ The *Industrial Coatings* court further held that an intended beneficiary of the bond, though not a party to the contract, was nevertheless entitled to the six-year statute of limitations. 117 Wn.2d at 518. Here, the trustees had standing to assert a claim against the contractors' bond because the employees are the intended beneficiaries of the

judgment. Unable to collect from that general contractor, the supplier filed suit against the general contractor's RCW 39.08 bond for the amount of the judgment against the general contractor. The surety, asserting that there was a three-year statute of limitations, moved for summary judgment which was granted by the trial court. The Supreme Court reversed, holding that a claim by a beneficiary of an RCW 39.08 public works contract payment and performance bond beneficiary was six years. *Industrial Coatings* remains the controlling authority on this issue.

Bohrer testified that where a single notice was given for claims under RCW 39.08 and RCW 60.28, any foreclosure action must be filed under the time limitations set forth in RCW 60.28.030. RPIII:137-38. Levy also testified mistakenly in his deposition on the statute of limitations for claims under RCW 39.08 and RCW 60.28. RP11:140-42. He later concluded that the four-month limitation period applied to any foreclosure action where a single claim notice had been given. RPII:73, 77. He admitted no case so holds. RPII:152-55. The testimony of Bohrer and Levy demonstrates that they were unaware of the Court's holding in *Industrial Coatings*, and therefore did not know the correct statute of limitations for a claim under RCW 39.08.

bond. See *Crabtree v. Lewis*, 86 Wn.2d 282, 285-86, 544 P.2d 10 (1975) (citing *United States v. Carter*, 353 U.S. 210, 1 L.Ed.2d 776, 77 S. Ct. 793 (1957)).

The major flaw in the premise of Bohrer and Levy's testimony is that no Washington case holds that the short statute of limitations of RCW 60.28.030 applies merely because a claimant filed a single claim notice as to claims both under RCW 39.08 and RCW 60.28. Nothing in the plain language of either statute suggests such an interpretation. In fact, RCW 60.28.030 contains a provision that makes clear that claims with their own statutes of limitations are preserved: "The four month limitation shall not, however, be construed as a limitation upon the right to sue the contractor or his surety where no right of foreclosure is sought against the fund."

The respective statutes of limitations in RCW 60.28.030 (for RCW 60.28 retainage claims) and RCW 4.16.040(1) (for RCW 39.08 bond claims after *Industrial Coatings*) applied regardless of whether a single notice was filed. Based on the holding in *Industrial Coatings*, at the time the files were transferred to the successor firm, the Trusts still had a viable claim on any available RCW 39.08 bond. The successor firm failed to appreciate that it could foreclose on the contractor's bond anytime within six years of the last timely filed notice, instead believing that the statute of limitations on these claims had already expired.

The trial court found in conclusion of law number 11 (CP 1334), that the standard of care *required* counsel for the Trusts to file a single notice for RCW 39.08/RCW 60.28 claims "simultaneously and to

foreclose them at the same time.” CP 1334. The court implicitly adopted the Trusts reading of *Inland-Ryerson Const. Prods. Co. v. Brazier Const. Co.*, 7 Wn. App. 558, 500 P.2d 1015 (1972) that the case barred pursuit of a claim against the surety bond unless a plaintiff also pursued its remedies against the retainage fund. This is a misreading of this Court’s decision. In *Inland-Ryerson*, the court held that where a claimant had a claim against both the RCW 39.08 bond and the RCW 60.28 retainage fund the voluntary release of the claim against the retainage fund *pro tanto* reduced the right of recovery against the bond, premising its decision on *Restatement of Securities* § 132 (1941).²⁷ This Court’s decision only addresses the impairment of security. *Nowhere* does the decision speak to the applicable limitations period.

To illustrate the practical effect of the trial court’s failure to properly apply the statute of limitations here, with respect to Trans World, the firm timely filed the original lien notice under both RCW 39.08.030 and RCW 60.28.010 for the work performed by Trans World on several projects. Exs. 213-16. Although the firm did not foreclose on the lien

²⁷ In any event, the decision does not impact the facts here. Section 132 of the *Restatement* provides that a surety’s obligation is removed if the creditor surrenders or releases the security, willfully or negligently harms it, or fails to take action to preserve it. None of these contingencies was present here as to the RCW 39.08 bonds. Moreover, as noted *supra*, any judicial remedy under RCW 60.28 was preempted until *GBC* was decided in 2007. Even on the RCW 60.28 claims, however, RCW 4.16.230 provides that

within 4 months as required by RCW 60.28.030, or file an amended lien notice at the time the successor firm assumed responsibility for the collection of contributions, the Trusts retained the right to foreclose on the contractors bond under RCW 39.08 any time within six years of the date that the notice of claim was timely filed. On March 8, 2005, well within the six-year statute of limitations, Bohrer nevertheless recommended to the Trustees that the Trans World file be closed as uncollectible. RPIII:96-97. This recommendation was approved by the trustees. *Id.* The successor firm's failure to investigate the appropriate statute of limitations for a claim under RCW 39.08, and its subsequent recommendation to the trustees that the account be closed as uncollectible, were the cause of the Trusts' damages.

(b) The Successor Firm Had Responsibility for the Fox Electric Account

Korpi did not advise the trustees that the lawsuit which he had filed against Fox Electric had been dismissed in November 2004 for want of prosecution. CP 1328 (FF 30). Korpi was not informed by the superior court that the dismissal had occurred. RPIV:164-65. While the Trusts initially argued the dismissal of their state court lawsuit against Fox for

commencement of a foreclosure against the retainage fund would be tolled until *GBC* provided a judicial remedy.

want of prosecution was the focus of their negligence claim,²⁸ they refocused their argument against the firm on its handling of alleged settlement proposals by the firm.

Korpi sent a letter to Fox in September 2003 making a demand on that employer for unpaid contributions, interest, liquidated damages, and attorney fees. RPIV:55. Fox sought a meeting to discuss settlement. *Id.* Four meetings occurred, but no firm proposal emanated from Fox. *Id.*

Korpi learned of a possible settlement by Fox with a general contractor, making funds available to Fox. RPIV:57-58. In September 2004, Fox made a firm settlement offer of \$281,586.17, or 52.4% of the outstanding delinquencies. Ex. 21; RPIII:118. The trustees addressed the settlement offer at their September 16, 2004 meeting where they voted to have Korpi conduct further investigation regarding possible acceptance of the settlement offer. Ex. 29; RPIV:60. Korpi advised the trustees of a possible Fox Electric bankruptcy. RPIV:59-61. Washburn claimed that he told Korpi that if Korpi couldn't get everything that was due the Trusts, he was to "take what you can." RPI:105-06. But Washburn's testimony was inconsistent with the trustees' long-standing policy of never accepting less than 100% of delinquent contributions if the firm was still in business,

²⁸ This dismissal was not the cause of any harm to the Trusts in any event where the successor firm filed and successfully prosecuted an ERISA action in federal court and Fox settled with the Trusts.

Exs. 6-7; RPIV:62,²⁹ and was inconsistent with the trustees' decision to *reject* the Fox offer. RPI:106. At the Health Trust meeting on December 13, 2004, the trustees voted to reject Fox's settlement offer. Ex. 29. At the same meeting, the trustees voted to transfer the Fox file to the successor firm for further handling. RPIV:63-64. The firm was discharged from any further responsibility for the Fox Electric account by the trustees' actions and did no work on the case after its termination. RPV:69.

Upon assuming responsibility for the Fox account in December 2004, RPIII:132, Bohrer understood that the trustees wanted him to collect the *full amount* that was due from Fox. RPIII:132. Bohrer met with James Fox, Fox's principal owner and proprietor, in January 2005. Ex. 107. Bohrer did not recall if he communicated the Board's rejection of the September 2004 offer to Fox or its counsel, RPIII:133-35, but he sent a letter to Fox's counsel on February 8, 2005 rejecting the September 2004 offer. CP 149. *Nothing in the record indicates the \$281,000 was no longer available in January 2005 when Fox met with Bohrer.* If the trial court was correct that the firm was negligent in failing to recommend

²⁹ Washburn testified equivocally about the authority of Trust attorneys to compromise lien claims. RPI:112; RPV:8-10. Korpi had no specific authority from the trustees to accept any offer that did not include a 100% recovery of the owed contributions.

acceptance of the settlement to the Trusts, the trial court offered no explanation why the successor firm was not negligent for failing to recommend settlement after Bohrer became fully apprised of the circumstances of the case.

The Trusts cannot establish causation on the Fox Electric account because, whatever happened regarding settlement, the firm was terminated as the Trusts' counsel on that account the *same day* the Board voted to reject the Fox offer. Upon its discharge, the firm was ethically obligated to withdraw. RPC 1.16(a)(3). Under CR 71, the firm's authority to act as the Trusts' counsel *terminated*. Service on the attorney is no longer effective. CR 71(a). Washington case law further makes clear that an attorney's withdrawal forecloses proof of causation in a legal malpractice case where the client or successor counsel can address the issues. *See, e.g., Lockhart v. Greive*, 66 Wn. App. 735, 741, 834 P.2d 64 (1992) (after an attorney informally withdrew from representation of the client, the client employed another law firm to represent him; the attorney, who had filed summons and complaint prior to the running of the three-year statute, and still had 90 days to effectuate service of process on the defendants, gave notice to the client and successor counsel of the need to timely serve the defendants. Successor counsel did not do so and the case was dismissed as time-barred. Because the attorney-client relationship had

been terminated prior to the running of the statute of limitations, the attorney was not a proximate cause of the client's claim being time-barred).

Moreover, Korpi had no duty to accept the settlement offer of \$281,586 because he was specifically instructed by his clients that the offer was rejected. *Id.* RPC 1.2(a) states in relevant part that “[a] lawyer shall abide by a client’s decision whether to settle a matter.” The firm did not breach its duty to the Trusts by failing to accept the settlement offer of September 2004 because it was carrying out its clients’ instructions.

Further, the authority to address the Fox offer fell to the successor firm. As noted above, it had ample time to assess the offer and advise the Trusts accordingly. Indeed, the successor firm negotiated a settlement with Fox. Ex. 20; RPIII:135.³⁰

A further reason that the Trusts could not establish causation is that claims against Fox were *uncollectible* in any event. The actions under RCW 39.08 or 60.28 were preempted by ERISA. Moreover, all of the contributions owed by Fox accrued while that company worked on the White River Amphitheater project located on the Muckleshoot Indian

³⁰ Fox has lived up to its obligations under the settlement. RPII:31; RPIII:117.

Reservation, and no state jurisdiction under the various state collection statutes could be asserted, as Levy conceded. RPII:94-95.

The Trusts failed to prove causation as to any loss allegedly occasioned by the firm's recommendation against the Fox settlement.

(5) Any Damages Allegedly Experienced by the Trusts Were Based on Speculative Evidence

The trial court's determination of damages was based on speculative evidence. Washington courts have routinely determined that legal malpractice awards may not be based on speculation and conjecture. *Daugert*, 104 Wn.2d at 260; *Johanson v. King County*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941) (recovery cannot be based on a claim of what "might have happened.").³¹

For some of the accounts, the trial court looked at what the Trusts wrote off and applied an arbitrary 85% factor to the sums written off to

³¹ See also, *Griswold v. Kilpatrick*, 107 Wn. App. 757, 758, 760, 27 P.3d 246 (2001) (plaintiff settled a medical malpractice claim and then sued her attorney, asserting that "the settlement figure would have been higher but for the attorney's delay in initiating settlement negotiations;" court upheld the summary judgment of dismissal for the lawyer because even with expert testimony that the case would have settled for a greater amount absent the attorney's breach of his duty of care, such evidence was "speculative and conclusory" and was "insufficient to create an issue of material fact."); *Smith, supra* (court rejects hypothetical assertions by a plaintiff in an affidavit that he would have done things differently had he been properly advised by his attorney); *Geer, supra* (court rejects the plaintiff's argument that he need only prove that he lost an opportunity to pursue a valid cause of action to sustain his claim against his attorney; rather, the court holds that the plaintiff must prove that he would have obtained a more favorable judgment against the underlying defendant); *Estep v. Hamilton*, 147 Wn. App. 344, 354, 195 P.3d 971 (2008), *review denied*, 166 Wn.2d 1027 (2009) (court affirmed a summary judgment dismissal of a legal malpractice claim based on the plaintiff's speculative assertion that she would have done better at trial than at settlement).

establish damages. CP 1331 (FF 32). The trial court never identified *specific* sources of recovery that would have been available to the Trusts but for the firm's alleged negligence.

A review of the trial court's decision on the various accounts demonstrates the speculative nature of the damages to the Trusts.

Trans World Electric. Trans World was referred to the firm in October 2001 and a foreclosure action was commenced in August 2002. Ex. 107. Apart from the error acknowledged by Korpi for missing a renewal deadline for two lien claim notices, the firm filed liens on eight projects. Other than the three liens referred to in Korpi's January 2005 letter involving the University of Washington and a de minimis claim against the Lakewood School District of questionable validity, the firm resolved all the lien claims and collected \$102,756.75. Ex. 11.

The trial court concluded that the firm breached the standard of care by not filing foreclosure actions within four months of project acceptance. CP 1325 (FF 18). The court found damages in the amount of \$151,324.46, without applying the 85% factor. CP 1325 (FF 19).

Baird Weber. The account was referred by the Trusts to the firm in August 2003 and the firm filed suit in November 2004. Ex. 107. There were 4 state public works projects that were lienable and 2 federal Miller Act claims. RPIV:109. The firm collected the two Miller Act claims,

RPIV:109, and filed lien claims on the other projects, leaving information on the account for the successor firm. RPIV:109-23. The firm did not file lien claims on 3 public works jobs which totaled \$21,710.03 in contributions owed. Ex. 245. During his audit, Levy concluded that errors on the Baird-Weber account resulted in losses to the Trusts in the amount of \$40,092.70. Ex. 107. Ultimately the Trusts wrote off \$257,110 in Baird Weber delinquencies including \$77,697.95 in lienable public works claims. CP 1326 (FF 23). The trial court allowed recovery on the \$77,697.95 without applying the 85% figure. *Id.*; CP 1334 (CL 14).³²

Atkinson Bell/Lunde. The Trusts referred delinquencies to the firm on May 26, 2000, March 5, 2001, July 12, 2002 and December 6, 2002; the firm filed suit in July 2003. CP 1326 (FF 24). The firm sent demand letters and commenced a suit against the employers, RPIV:125-26, but chose not to file lien claims or file a lien foreclosure action because the amounts at issue were too small and an action was not cost-effective. RPIV:127-28. Levy agreed that it might not be cost-effective to pursue small claims. RPV:62-63. There was an alternate source of

³² Within the \$77,697.95 which the Trusts could have recovered from available bonds and/or retainage fund was a claim against the Poulsbo Elementary School in the amount of \$33,559.38. The firm had filed lien claims and had renewed the same. The file was transferred to the successor firm in March 2005. The project was not accepted by the public entity until June 9, 2005. RPII:187-94; RPIII:120-23. Thus, the successor firm could have taken steps to collect under RCW 39.08 or RCW 60.28 but failed to do so, as Levy testified. RPII:189-90.

recovery as well--restitution in a criminal case against the employer's principals. RPIV:160-61; RPV:63-64. The amount of contributions owing by the employer Atkinson Bell/Lunde Electric amounted to \$74,774.31, comprised of \$38,264.67 owed by Lunde and \$36,509.64 owed by Atkinson Bell. Ex. 111. There were approximately 74 jobs in this account, but the only one identified was a Washington state ferry job that was not quantified and that the largest single job was in the amount of approximately \$4,500. RPV:63. During his audit, Levy concluded that the firm's errors on the Atkinson Bell/Lunde account resulted in losses to the Trusts in the amount of \$61,236.03. Ex. 107. Nevertheless, the trial court concluded that the Trusts were entitled to recover the full amount they wrote off in the amount of \$124,659, without applying the 85% figure. CP 1326 (FF 24); CP 1334 (CL 14).

Pacific Electric. After a meeting with the employer's CEO arranged by Washburn, an unusual procedure, RPI:114; RPIV:91, Korpi agreed on behalf of the Trusts to accept a promissory note from the employer based upon his understanding that it would be secured by a deed of trust on real estate of adequate value to secure the note, and then accepted a note that was not secured by a deed of trust on adequate real estate. Ex. 32; RPIV:92-93. Pacific Electric lied to Korpi as it never had any collateral sufficient to secure the debt evidenced by the promissory

note. Exs. 34-35; RPIV:94. Pacific Electric made eight \$5,000 payments and kept current on its contribution obligations to the Trusts through December 2003 until the trustees decided that any payments received had to be applied to the oldest delinquent contributions. Exs. 33, 36; RPIV:94-96. The firm obtained substantial payments from Pacific Electric, Ex. 11, even though that employer filed for Chapter 7 bankruptcy protection. RPIV:101.

The Trusts wrote off \$431,934.51 in delinquent payments but nevertheless received substantial payments from Pacific Electric; the balance due on the note was \$178,109, the sum the trial court ultimately allowed as damages. CP 1327 (FF 27); CP 1334 (CL 14). During his audit Levy concluded that the firm's errors in the Pacific Electric account resulted in no losses to the Trusts. Ex. 107. Again, the trial court did not apply the 85% factor. Again, the successor firm could have recovered from the employer after it received the account.³³

CAE. The ostensible reason for the trial court's decision as to CAE was that the firm failed to research a lien claim against the Seahawks

³³ The firm filed lien notices on various projects, which were renewed by the successor firm. RPIV:101-05. The lien notices filed by the firm were valid and claims against the respective bonds were still available as of the time that the file was transferred to successor counsel in March 2005.

Stadium³⁴ or pursue a joint checking arrangement with Cochran Electric, to whom CAE was a subcontractor. CP 1327 (FF 28). However, the Seahawks Stadium was not a public project to which RCW 39.08 or RCW 60.28 applied, RPIV:210, although the trial court never addressed this in its findings. CP 1327-28 (FF 28).

As for any arrangement with Cochran Electric, Korpi made a judgment call that no recovery was possible. The firm received certified payroll records indicating delinquencies of \$110,487, RPIV:67-68, but the only evidence of any potential fund or source of recovery for contributions owed by CAE was a potential \$80,000 balance owed by contractor Cochran Electric to CAE. Ex. 252. In conversations between Korpi, representing the Trusts and attorney Paul Cressman, representing Cochran Electric, Cressman, despite an earlier willingness to consider pro-rata payments of the \$80,000 owed between the Trusts and other project creditor CAE, if CAE agreed, subsequently advised Korpi that no funds would be paid to CAE or its creditors because of contract breaches by CAE, claims by secured creditors of CAE, and claims by the Washington State Department of Revenue. Ex. 252; RPIV:68-69. Korpi confirmed the existence of a perfected security interest in CAE's receivables. Ex. 246.

³⁴ The Trusts waived any claims as to the CAE contributions other than those associated with the Seahawks' stadium and the contributions in the amount of \$110,487.

During his audit, Levy concluded that any alleged errors and omissions by the firm regarding the CAE account resulted in no losses to the Trusts. Ex. 107.

Despite the foregoing, the trial court allowed recovery of the full \$110,487.00 without applying the 85% factor. CP 1328 (FF 28); CP 1334 (CL 14).

Fox Electric. As previously discussed, the trial court found the firm to have breached the standard of care for failing to recommend acceptance of Fox's \$281,000 settlement offer, representing a 50% recovery of delinquent contributions. All delinquencies accrued through June 2004 would have been covered by the proffered settlement payment in the amount of \$281,586. Ex. 111. Thus, the Trusts would have foregone a significant portion of the accrued delinquencies by settling.

It is for this reason that the trial court's finding number 32 (CP 1331), quite frankly, makes no sense. The trial court allowed the Trusts to recover the amount of the rejected settlement of \$281,000 *and* 85% of the accrued delinquent contributions, *contributions that would have been relinquished by the Trusts had they agreed to the settlement.*³⁵ This was error.

³⁵ The trial court's analysis was based on Levy's testimony that the Trusts could recover the difference between what the Trusts would have received had it accepted Fox Electric's offer of \$281,586 in December 2004 as compared with what the Trusts

In March 2006, Bohrer reached a “Payment Agreement” with Fox in the amount of \$673,499.75, which obligated Fox to make an initial payment of \$59,476.72 plus two additional \$50,000 payments, and paying \$2000 per month on an unsecured, no-interest note through 2030. Ex. 20; RPIII:117. The Trusts received \$255,476.72 and will continue to receive \$2000 per month until the full \$673,499.75 has been paid. *Id.*

Although the trial court modified its initial decision on reconsideration to allow the firm credit “for future payments received by Plaintiffs on the Fox Electric account,” CP 1319, it remains difficult to understand the court’s damages calculation if the harm was the failure to recommend a \$281,000 settlement in December 2004, given the terms of the March 2006 settlement.

The trial court erred in determining damages based on a speculative percentage of the amounts written off by the Trusts.

(6) The Trial Court Erred in Allowing the Trusts to Recover a Disguised Expert Witness Fee as Damages

The trial court allowed the Trusts to recover attorney Levy’s “audit” fees as damages. Those fees, incurred in anticipation of this

ultimately received after they settled with Fox in 2006. Ex. 20; RPIII:68-71. In offering his opinion on damages, Levy omitted the \$50,000 payment made pursuant to the settlement. RPIII:71.

litigation by an individual who became the Trusts' key trial witness, were disguised expert witness fees. Such fees are not recoverable as costs under RCW 4.84.010. Costs incurred in litigation in Washington are recoverable only to the extent they are enumerated in that statute. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). Expert witness fees are not a recoverable cost under RCW 4.84.010.

In *Estep, supra*, a legal malpractice action in which the plaintiff claimed her dissolution attorney negligently represented her, the defendant retained an expert to opine on the standard of care with respect to collection of life insurance proceeds to address her former husband's child support and maintenance obligations. The trial court awarded the expert's fee as a recoverable cost. Division III reversed, stating that there are no grounds for awarding expert witness fees as costs. *Id.* at 263. *See also, Wagner v. Foote*, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996) (court reversed damage award of one-half of the fee of expert retained to perform accounting on value of corporate interest); *Fiorito v. Goerig*, 27 Wn.2d 615, 620, 179 P.2d 316 (1947) (fee of expert hired to perform accounting of joint venture interest in joint venture not recoverable).

Despite the Trusts' assertion that the Levy "audit" was necessitated by the firm's alleged breach of fiduciary duty that is not enough to

overcome the clear standard of RCW 4.84.010. It is unambiguous that this “audit,” costing \$128,000, came in response to a letter from the firm stating it had made an error in failing to timely file a lien in connection with the Trans World account. CP 1325 (FF 20). It was clear that Levy’s audit was in anticipation of possible malpractice litigation against the firm; that was the only reason for it. Ex. 71. Moreover, Levy was the Trust’s central witness at trial. Contrary to the trial court’s finding number 20, this expert witness fee was not an appropriate item of “consequential damages.” CP 1325 (FF 20).

The trial court erred in allowing recovery of Levy’s exorbitant fee of \$128,000, a disguised expert witness fee, as damages.

F. CONCLUSION

The trial court here established a standard of care that was divorced from the reality of the law on collections. It further concluded that the firm’s successor bore no responsibility for the erroneous writing off of potential collections for the Trusts based on erroneous interpretations of the successor’s obligation and the time limits on collection efforts. Finally, the court made damage awards based on completely speculative evidence and permitted the Trusts to recover expert witness fees, disguised as damages, in violation of RCW 4.84.010.

This Court should reverse the trial court's judgment and remand the case to the trial court for a new trial. Costs on appeal should be awarded to the firm.

DATED this 16th day of December, 2010.

Respectfully submitted,



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APPENDIX

RCW 4.16.230:

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the commencement of an injunction or a prohibition shall not be part of the time limited for the commencement of the action.

RCW 39.08.010:

Whenever any board, council, commission, trustees, or body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the state, county, or municipality, or other public body, city, town, or district, such board, council, commission, trustee, or body shall require the person or persons with whom such contract is made to make, executed, and deliver to such board, council, commission, trustees, or body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services, or material was furnished to the original contractor. . .

RCW 60.04.021:

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.081(1):

Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who believes the claim of lien to be frivolous and made without reasonable cause, or clearly excessive may apply by motion to the superior court for the county where the property, or some part thereof is located, for an order directing the lien claimant to appear before the court at a time no earlier than six nor later than fifteen days following the date of service of the application and order on the lien claimant, and show cause, if any he or she has, why the relief requested should not be granted. The motion shall state the grounds upon which relief is asked, and shall be supported by the affidavit of the applicant or his or her attorney setting forth a concise statement of the facts upon which the motion is based.

RCW 60.28.011:

(1) Public improvement contracts shall provide, and public bodies shall reserve, a contract retainage not to exceed five percent of the moneys earned by the contractor as a trust fund for the protection and payment of: (a) The claims of any person arising under the contract; and (b) the state with respect to taxes imposed pursuant to Title 50, 51, and 82 RCW which may be due from such contractor.

(2) Every person performing labor or furnishing supplies toward the completion of a public improvement contract shall have a lien upon moneys reserved by a public body under the provisions of a public improvement contract. However, the notice of lien of the claimant shall be given within forty-five days of completion of the contract work, and in the manner provided in RCW 39.08.030.

...

(6) A contractor may submit a bond for all or any portion of the contract retainage in a form acceptable to the public body and from a bonding company meeting standards established by the public body. The public body shall accept a bond meeting these requirements unless the public body can demonstrate good cause for refusing to accept it. This bond and any proceeds therefrom are subject to all claims and liens and in the same manner and priority as set forth for retained percentages in this chapter.

The public body shall release the bonded portion of the retained funds to the contractor within thirty days of accepting the bond from the contractor. Whenever a public body accepts a bond in lieu of retained funds from a contractor, the contractor shall accept like bonds from any subcontractors or suppliers from which the contractor has retained funds. The contractor shall then release the funds retained from the subcontractor or supplier to the subcontractor or supplier within thirty days of accepting the bond from the subcontractor or supplier.

...

RCW 60.76.010:

Every employer who is required to pay contributions, by agreement or otherwise, into a fund of any employee benefit plan in order that his employee may participate therein, shall pay such contributions in the required amounts and at the stipulated time or each employee affected thereby shall have a lien on the earnings and on all property used in the operation of said employer's business to the extent of the moneys, plus any penalties, due to be paid by or on his behalf in order to qualify him for participation therein, and for any moneys expended or obligations incurred for medical, hospital, or other expenses to which he would have been entitled had such required contributions been paid.

FILED
KING COUNTY, WASHINGTON

AUG 13 2010

SUPERIOR COURT CLERK
BY ANDREW T. HAVLIS
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON STATE FOR KING COUNTY

PUGET SOUND ELECTRICAL WORKERS
HEALTH TRUST AND VACATION PLAN;
PUGET SOUND ELECTRICAL WORKERS
PENSION TRUST; IBEW LOCAL 46
RETIREMENT ANNUITY TRUST; NO. IBEW
LOCAL 46 APPRENTICESHIP AND
TRAINING TRUST; AND PUGET SOUND
ELECTRICAL JOINT LABOR COMPLAINT
FOR PROFESSIONAL COOPERATION
TRUST,

Plaintiffs,

vs.

McKENZIE ROTHWELL BARLOW & KORPI,
P. S.; SMITH McKENZIE ROTHWELL &
BARLOW, P. S.; MICHAEL H. KORPI; A.
BRUCE McKENZIE; DAVID S. BARLOW;
AND CATHERINE A. ROTHWELL,

Defendants.

NO. 08-2-20519-3 SEA

AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER was tried to the Court beginning March 22, 2010. Based on the
admitted evidence and the law, the Court makes the following Findings of Fact and
Conclusions of Law:

I. FINDINGS OF FACT

1. The plaintiffs in this legal malpractice case are several ERISA - Taft Hartley trusts (health and welfare, pension, retirement, annuity, vacation allowance and joint apprenticeship and training) established and managed for the benefit of the members of Local Union 46 (Local 46) of the International Brotherhood of Electrical Workers.

2. The board of trustees of each trust is comprised of an equal number of labor and management representatives and the trusts are administered by the third party administrator *Welfare and Pension Administration Service* (WPAS).

3. The trustees are fiduciaries to the beneficiaries and are charged with administering the trusts and managing the funds solely in the interests of the plan participants and beneficiaries.

4. The defendants are Seattle law firms (one a successor firm to the other), doing business as professional service corporations that generally limits their practices "to the representation of labor-management employee benefit trust funds." Plaintiffs' Exhibit 10, Bates Stamped page MR 07623.

5. The individual lawyer defendants were dismissed at the start of trial and the defendant professional service corporations have accepted vicarious liability for the acts and omissions, if any, of Michael Korpi, Lolita Pineda and other employees of the firms who worked on the collection matters for the trusts which are at issue in this case.

6. Pursuant to collective bargaining agreements between Local 46 and the Puget Sound Chapter of the National Electrical Workers (NECA), electrical contractors who are signatories to the collective bargaining agreements are required to make contributions to the trusts based upon hours worked by Local 46 member electricians. The contribution provisions are set out, generally, in Section 4 the collective bargaining agreements. (Plaintiffs' Exhibits 25, 26, 27 and 28).

7. The labor agreements require the NECA signatories to make contributions to the trusts no later than the 15th of the month following the month in which the hours are worked. Contributions not made by the required date are delinquent and, in addition to the principal sum, are subject to interest, attorneys fees and liquidated damages.

8. The trusts have written collection policies and procedures which were drafted on the trusts' behalf by the defendants. (Plaintiffs' Exhibits 7 and 8). Exhibit 7 was in effect from March 1992 though the adoption of Exhibit 8 which was adopted in December 2003. The 2003 manual recognizes the trustees' duty to "...establish a diligent and systematic program for the collection of all amounts owing to the Trust Funds..." (See Exhibit 8, page 1).

9. In 1990 when the trustees were interviewing firms to handle the collections, Kirk McKenzie of the predecessor firm to the defendants, told the trustees that the firm had, over the past five years, collected "95 to 100 percent of all delinquent amounts..." (Plaintiffs' Exhibit 5).

10. As of January 2005, Smith McKenzie had been the collection lawyers for the trusts for many years, with the last fee agreement entered into between the trusts and a predecessor of the defendants in July of 1996. One of the provisions of the fee agreement, which was drafted by the defendants, requires the law firm to institute a "collection lawsuit" within 30 days of referral of a delinquent account.

11. Two internal collection manuals authored and used at the defendant law firms were entered into evidence as Plaintiffs' Exhibits 6 and 7. Both the 1989 manual and the 2008 manual contain an exemplar "Trust Fund Collection Services Retainer Agreements (Contingency Fee Basis)", each of which contains the following provision: "When it appears that payment will not be forthcoming (but not later than thirty (30) days after the referral is received) the Law firm shall institute a collection lawsuit." Plaintiffs' Exhibit 6, Bates Stamped page MR 07454 and MR 07627.

12. Exhibit 6, the 1989 manual, provides at Bates Stamped page 07440 that the: "Summons and Complaint should generally be served no later than 30 days after the date of the referral unless there is good cause shown for not doing so".

13. While the Court does not find that the fee agreement between the trusts and the predecessor firm, the trusts two collections policies and procedures manuals and the defendants' two collection manuals including the exemplar fee agreements in them) set the standard of care such that every collection matter referred to the firm had to be filed within 30 days after the referral, the Court finds the evidence probative as to informing the standard of care, with regard to the need to pursue delinquent contributions with prompt, diligent, expeditious and persistent collection methods and procedures.

14. The evidence in the case related to 7 specific delinquent accounts: Trans World Electric, Fox Electric, Baird Weber, Atkinson Bell/Lunde, CAE, Pacific Electric and Sun Innovations.

15. Trans World Electric was referred to the defendants in October 2001 and defendants filed a collection action in August 2002; Fox Electric was referred in July 2003 and the lawsuit was filed in February 2004; Pacific Electric was referred in March of 2003 and suit was filed in July 2004; Baird Weber was referred in July of 2003 and suit was filed in November 2004; Atkinson Bell/Lunde was referred in July of 2002 and the lawsuit was filed in July of 2003; CAE was referred in June of 2002 and suit was filed in December of 2002; Sun Innovations was referred in August 2001 and suit was filed in December 2001. In none of the seven delinquent files was a lawsuit filed within 3 months of the referral and the court finds, in each case, that the failure to do so was below the standard of care.

16. In January 2005, Michael Korpi, the attorney at defendant law firms responsible for collecting delinquent contributions on behalf of the trusts sent a letter to two of the trustees identifying errors made in handling a delinquent collection involving

the electrical contractor Trans World Electric. Mr. Korpi accepted responsibility for a loss to the trusts of \$55,332.42. Plaintiffs' Exhibit 1. The letter acknowledges that Mr. Korpi had known about the error since May of 2004. He attributed the loss to missing the filing date for filing the "fifth amended lien claim notice" on two public works projects.

17. The standard of care and the fiduciary duties of an attorney require that a lawyer immediately report known errors to the client. In fact, although Mr. Korpi had known about the error for 7 months, he did not alert the trustees to the error until a few weeks after the Trans World collection had been referred by the trustees to another law firm because of the trustees' dissatisfaction with Mr. Korpi's collection efforts. The failure to disclose the Trans World error to the trustees immediately upon discovering it was a breach of Mr. Korpi's fiduciary duty of full disclosure.

18. The loss on the Trans World Electric account was due to the failure to initiate a foreclosure action within 4 months of acceptance of the projects by the contracting public bodies. The projects had been accepted in June 2003. The court finds the failure to file foreclosure actions in a timely manner to be a violation of the standard of care.

19. Trans World liens could have been filed for all of the contributions owing and because they were public jobs and they would have been collectible. Total damages proximately caused by the standard of care violations with respect to the Trans World Electric account are \$151,324.46.

20. After receiving the letter from Mr. Korpi belatedly disclosing the Trans World errors and because of the trustees concern regarding the status of several other files, the trustees felt it was their responsibility to have an audit conducted of the collection cases assigned to Mr. Korpi. The trusts hired Seattle attorney Sanford Levy to conduct the audit. Mr. Levy has significant experience in ERISA trust collection work. Mr. Levy's fees for conducting the audit were \$128,000.00 and the court finds those fees

to be reasonable, necessary and recoverable as consequential damages occasioned by the failure to timely disclose the errors.

21. In addition, the court finds that the plaintiffs are entitled to prejudgment interest on the \$55,332.42 in damages from the admitted errors from the date that Mr. Korpi should have disclosed the error, which the court finds to be June 1, 2004, through April 30, 2010; for a total of \$15,606.08.

22. The Baird Weber matter was referred in August of 2003 but suit was not filed until November 2004. There were 7 public works projects on which there was a failure to file a timely notice of lien, and four projects on which claims were not foreclosed by timely filing suit and the failure to do so was below the standard of care. In addition, the defendants failed to track the contract acceptance dates on 3 public works projects, and therefore were unaware of when the date for filing or foreclosing liens had passed and the failure to do so was below the standard of care.

23. Ultimately the trusts wrote off \$257,110.00 in Baird Weber delinquencies including \$77,697.95 in lienable public works claims. Mr. Levy testified that in his opinion \$127,790 would have been recovered on this account by a lawyer meeting the standard of reasonable care in filing liens and foreclosing on the retained percentage. The Court finds that the trust would have recovered \$77,697.95 from third parties through the lien filings, but would not have recovered liquidated damages and attorney fees from Baird-Weber.

24. With respect to Atkinson Bell/Lunde, the trusts referred several delinquencies to the defendants: May 26, 2000, March 5, 2001, July 12, 2002 and December 6, 2002. Defendants did not file suit until July 2003. The trusts wrote off \$124,659 which Mr. Levy testified in his opinion would have been recovered by a lawyer exercising reasonable care. The Court finds that Mr. Levy's testimony that collection efforts would have been successful to be persuasive.

25. With respect to Pacific Electric, Mr. Korpi did not meet the standard of care when he settled Pacific's delinquency by agreeing to accept a promissory note based upon his assumption that it would be secured by a Deed of Trust on real estate of adequate value to secure the note when, in fact, Pacific did not own any real estate. The trustees specifically directed Mr. Korpi to ensure that Pacific owned real estate adequate to secure the note and he failed to determine whether Pacific Electric owned or controlled real estate prior to having Pacific's representative sign the note. He then discontinued other collection action based on the unsecured note. Pacific Electric did not, in fact, own any real estate.

26. As a result, the trusts received an unsecured note and relinquished a valid and collectible Federal Miller Act claim. Mr. Korpi also stopped filing lien notices which could otherwise have secured funds for the trust because he assumed that the note settled the matter even though he did not have a deed of trust and this was below the standard of care.

27. Ultimately the trusts wrote off \$431,934.51 in delinquent Pacific Electric contributions accruing from July 2001 through February 2004. The balance on the promissory note was \$178,109 the sum which Mr. Levy testified were the damages suffered by the trust due to the failure to secure the note with a deed of trust on real property with adequate equity value or in the alternative to continue to seek recovery for the trusts through lien claims or other collection efforts. The Court is persuaded by this testimony.

28. With respect to CAE, Mr. Korpi did not research filing a lien on the Seahawks stadium project nor seek a joint check arrangement with Cochran Electric (CAE was a subcontractor to Cochran) although he received certified payroll records totaling \$110,487.00 and Cochran indicated that it would pay on behalf of CAE but Mr. Korpi did not timely follow up. The standard of care also required Mr. Korpi to obtain

and examine the stadium contract, and in particular its provisions on liens, and to advise the general contractor and Cochran Electric of the delinquencies and to demand payment or file suit but he did not do those things either. In September 2004, Mr. Korpi's assistant asked him if he was going to do anything on the Seahawks stadium project and he replied that there was nothing left to do. Certified payroll records in the files show that \$145,000 of the contributions were on 6 projects that were never liened. Mr. Levy testified that in his opinion a lawyer working to the level of the standard of care would have recovered damages on this account in the amount of \$133, 532. The court finds that the payroll records of \$110,487.00 and the overtures of both Cochran Electric and the general contractor, Turner Construction, to provide records and a certified payroll is sufficient evidence to support Mr. Levy's opinion that a lawyer acting in accordance with the standard of practice would have recovered contribution payments, but the court will adopt the \$110,487.00 figure as more certain of the amount, and the award to Plaintiff on the CAE account will be \$110,487.00.

29. With respect to Sun Innovations, the matter was referred for collection on August 20, 2001 for an audit covering September 1998 - March 2001. A default judgment was not obtained until September 10, 2002. There is no evidence of any effort to research lienable jobs until April 29, 2003, over a year and a half after the referral and in June of 2005, the trusts wrote off \$245,047.28. The court finds that there was a violation of the standard of care in administering this account but that there is insufficient evidence to support a finding of damages proximately caused by the negligence.

30. Fox Electric was referred to Mr. Korpi in July of 2003 and at that time Fox had been delinquent only since May. Mr. Korpi did not file suit, however, until February 2004 and in November 2004 the case was dismissed for want of prosecution. By December 2004, according to Mr. Korpi's December 13, 2004 status report to the Health, Welfare and Vacation Trust, Fox Electric had accrued approximately \$535,359.19 in

delinquent contributions plus an additional \$131,072.32 in interest and liquidated damages. (In the interim between the referral and the dismissal of the lawsuit, Mr. Korpi collected \$17,952.84.) Therefore, from July of 2003, when the matter was referred to Mr. Korpi, the small delinquency grew, by December 2004, to \$666,431.51 and, because of the delay in filing the case and the dismissal of the case, essentially no productive collection work had been accomplished and that was below the standard of care. Moreover, Mr. Fox did not contest the amount owing. Although the December 2004 status report referenced above indicates that suit had been filed against the employer, in fact, the case had been dismissed in November. In September 2004 Mr. Fox, through his lawyer, offered to settle for \$281,586.17, approximately one-half of the contributions and the offer was discussed at the December 2004 Health, Welfare and Vacation Trust meeting. The minutes of that meeting reflect that Mr. Korpi advised the trustees to turn down that offer and the court finds that did occur. He failed, however, to advise the trustees that the lawsuit which he had filed against Fox had been dismissed, a fact that Mr. Korpi either knew or should have known when he advised the Trustees in December to reject the offer to pay one-half of the outstanding balance. The dismissal of the collection lawsuit was a material fact that the Trustees had a right to know in evaluating Mr. Korpi's recommendation and in deciding to reject Fox Electric's offer. It was below the standard of care to fail to provide complete information to the Trustees when Mr. Korpi recommended rejection of the offer made by Fox Electric in December 2004 and it was below the standard of care to advise the trustees to reject the offer. Fox Electric subsequently spent the money that would have funded his offer to the trusts. In December 2004, because of dissatisfaction with Mr. Korpi's collection efforts, the trusts referred the Fox collection, and several other matters, to the Ekman Bohrer law firm. In March of 2006, attorney Robert Bohrer of that firm reached a "Payment Agreement" with Fox Electric in the amount of \$673, 499.75. The agreement contains the obligation to

make to an initial payment of \$59,476.72 plus two \$50,000.00 payments and those payments have been made. The agreement also requires a payment of \$2000.00 per month and Fox has been making those payments. Apart from the \$159,476.72 and the \$2000.00 per month until Mr. Fox, who is in his 70's, dies, there is no further obligation by Fox to pay on the delinquent sum. The \$2000.00 is not sufficient to cover the monthly interest on the amount of the delinquency.

31. With respect to damages on the Fox matter, Plaintiffs' have presented evidence that a reasonably prudent attorney doing ERISA collection work should collect 90 per cent of the delinquent contributions. The Ekman Bohrer firm recovered close to this rate (approximately 87%) in the 4 plus years after it took over the collections and Mr. Levy testified that 90% is the standard of care. In addition, when the predecessor firm to the defendants was retained, its representative Mr. McKenzie told the trustees that the firm had collected 95 – 100 % of the delinquent accounts. Based upon all of the evidence, the court finds that 85% is a reasonable collection rate to expect from a firm meeting the standard of care in ERISA trust collection work. This rate is based on the evidence that the successor law firm achieved a recovery rate on the same type of accounts for the same client at a somewhat higher rate, the defendant law firm's representations that it historically achieved an even higher rate of recovery, and on the testimony of Sanford Levy that a 90% rate of recovery would have been reasonable and expected in the exercise of due care. Based on a balancing of these historic rates of recovery and the specific facts of the claims presented here the court will apply an expected recovery rate of 85% to the Fox collection. The 56 % collection rate by the defendants in the 5 years preceding their termination as collection lawyers for the trusts is significantly below that level and, together with the other evidence, including the evidence of the specific standard of care violations, the lack of documentation of

collection efforts outside of simply sending demand letters and filing lien notices, the delays in filing suit and foreclosing liens is probative evidence of lack of diligence.

32. Mr. Levy testified that, in his opinion, a lawyer practicing to the standard of care would have recovered damages on the Fox matter in the amount of \$374,000.00, exclusive of the amounts paid pursuant to the March 2006 payment agreement and that is a reasonable basis for finding the losses. The court finds, however, that damages are the full amount of \$281,586.17 tendered by Fox prior to December 2004 plus 85 % of the remainder of the \$666, 431.51 December 2004 delinquency ($\$666,431.51 - \$281, 586.17 \times 0.85 = \$327,118.53$; $\$281,586.17 + \$327,118.53 = \$608, 704.70$) that could reasonably have been expected to be recovered through reasonable collection efforts, minus what has been received from the March 2006 Payment Agreement (\$255, 476.72) for a total of \$353,227.98.

33. According to a status memo prepared by defendants at the time they were relieved of their duties for the trusts in March, 2005 and summarized by attorney Levy (Document SL 0412 to Defendants, Exhibit 106), exclusive of the Trans World matter, (which is not listed on document SL 0412) the 6 other files had outstanding balances of delinquent collections totaling \$2,033, 987.68 in March 2005. In December 2004, the Trans World account had a delinquent balance of \$258, 676.26 so the total amount of the delinquencies was \$ 2,292,663.94. With the exception of Fox Electric, all of the companies were out of business as of March 2005 and nothing further could be collected.

34. According to Plaintiffs' Exhibit 22, the *Puget Sound Electrical Workers Trust Funds Waiver Log- Amounts Written Off/Uncollectible* the Trusts wrote off as uncollectible (delinquent contributions, costs, liquidated damages and attorneys' fees) \$151, 324.46 on Trans World on March 8, 2008; \$195, 918.08 for CAE on October 7, 2005; Atkinson Bell/Lunde- \$ 124,659.58 on 12/12/06 for the period 10/01-10/04; Pacific Electric \$431,934.52 on July 7, 2008 and for the period July 2001- February 2004; Baird

Weber- \$257,110.08 for the period June 2001- August 2003 was written off on March 9, 2006; Sun Innovations- \$245, 047.28 for the period of September 1999- March 2001 was written off on June 7, 2005. The waiver log does not include Fox Electric. The total written off by the trusts as uncollectible and for the period of time the defendant law firms were collecting on the accounts is \$1,405,993.90.

II. CONCLUSIONS OF LAW

1. The elements of a claim for legal negligence are those associated with all negligence actions: duty, breach, causation and damage. The burden of proof is a preponderance of the evidence.

2. Unless the negligence is "obvious" the standard of care of a lawyer and the breach of that standard must be established by expert testimony. This applies to the plaintiffs' prima facie case against a defendant lawyer or law firm and to a defense which alleges that a subsequent lawyer was negligent in his or her handling of a matter at issue. The allocation of responsibility by the fact finder pursuant to RCW 4.22.070 is not self executing.

3. The standard of care is that degree of care, skill diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in Washington State in the same or similar circumstances. The standard of care includes legal knowledge, skill, thoroughness, preparation, diligence and calendaring procedures reasonably necessary for the representation.

4. Diligence and persistence are extremely important in collection work and the standard of care includes more than simply filing lien notices, it also includes, contacting employers and union agents, and obtaining joint check arrangements with the general contractor. Delay in filing and foreclosing liens and filing suit can result in lost opportunities to collect. Attorney Sanford Levy testified that the defendants followed a set of mechanized procedures but took little, if any, initiative to contact employers,

general contractors, and union agents to identify and to secure all available sources of recovery, did not timely file suit and did not track public work contract acceptance dates.

5. Further, the attorney – client relationship is, as a matter of law, a fiduciary relationship which includes fiduciary duties of good faith, loyalty, honesty and a strict duty of full disclosure. Although a breach of a fiduciary duty may give rise to an independent action, fiduciary duties are also a “component” of the standard of care.

6. The plaintiffs bear the burden of proving causation and they may meet that burden by evidence which shows that they would have prevailed or achieved a better result had the attorney met the standard of care. As in other negligence actions the negligence of the lawyer need not be the sole proximate cause of the damage.

7. With respect to the representation of plaintiffs on the trust collection matters discussed herein above, defendants and their agents, including attorney Korpi, owed plaintiffs a duty of that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer. The degree of care actually practiced by members of the legal profession is evidence of what is reasonably prudent.

8. The defendants, through their employees, including Michael Korpi, breached that duty by the acts and omission described herein as to each of the 7 delinquent matters described above and the plaintiffs presented sufficient evidence that they would have collected more money on the accounts had the defendants met the standard of care.

9. Because the trustees had a fiduciary duty to ensure proper administration of trust assets and because of the delayed disclosure of an admitted error by Mr. Korpi it was prudent for the trustees to conduct an audit of the collection accounts. The audit fees of Sanford Levy are reasonable in amount and are recoverable as consequential damages.

10. With regard to damages, the fact of damage, as opposed to the amount, must be shown with sufficient certainty to afford a reasonable basis for estimating the loss. Damages need not be proven with mathematical certainty.

11. The standard of care of an attorney representing ERISA Taft Hartley trusts in collection proceeds in a situation involving public works projects is to file the notices of lien for both the retainage (RCW 60.28) and the contractor's bond (RCW 39.08) simultaneously and to foreclose them at the same time.

12. The defendants did not present any expert testimony that Ekman Bohrer committed any standard of care violations that caused damage to the trusts, nor did they do so with respect to any other non party or entity so the court will not reduce the damages pursuant to RCW 4.22.070.

13. Sanford Levy testified that he believed the damages were \$1,428,461 but he neglected to include the initial \$59,476.72 payment by Mr. Fox. The amount of the delinquencies outstanding on all of the accounts at the time the defendants were terminated was \$2,292,663.94. The amount written off by the trusts, with the exception of Fox, which is still considered to be an active account, was \$1,405,993.90.

14. The court, therefore, awards the following damages:

Sanford Levy audit fees - \$128,000.00

Trans World Electric - \$151,324.46 with prejudgment interest on \$55,332.42 of that amount (\$15,606.08) calculated from June 1, 2004 through April 30, 2010 for a total of \$166,930.54.

Baird Weber Electric - \$77,697.95

Pacific Electric - \$178,109.00

Atkinson Bell/Lunde - \$124,659.00

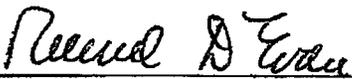
CAE Electric - \$110,487.00

Sun Innovations - \$0.00

Fox Electric - \$353,227.98

15. Considering all of the evidence, the court concludes that Plaintiffs' damages, proximately caused by Defendants' failure to exercise the standard of care required of them in the cases identified above are \$1,139,111.47 and judgment will be entered accordingly, provided: After the entry of the judgment, the defendants shall be entitled to a credit for all payments received from Fox Electric in satisfaction of the amount awarded by the court on the Fox Electric claim.

Dated this 13th ^{August} day of ~~July~~, 2010



The Honorable Judge Richard Eadie

THE HONORABLE RICHARD D. EADIE
Hearing date: Monday, April 19, 2010
Hearing time: 8:30 a.m.

FILED
KING COUNTY, WASHINGTON

MAY 28 2010

SUPERIOR COURT CLERK
BY ANDREW T. HANES
DEPUTY

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IN THE SUPERIOR COURT OF WASHINGTON STATE FOR KING COUNTY

PUGET SOUND ELECTRICAL WORKERS
HEALTH TRUST AND VACATION PLAN;
PUGET SOUND ELECTRICAL WORKERS
PENSION TRUST; IBEW LOCAL 46
RETIREMENT ANNUITY TRUST; NO. IBEW
LOCAL 46 APPRENTICESHIP AND
TRAINING TRUST; AND PUGET SOUND
ELECTRICAL JOINT LABOR COMPLAINT
FOR PROFESSIONAL COOPERATION TRUST,

Plaintiffs,

vs.

McKENZIE ROTHWELL BARLOW & KORPI,
P. S.; SMITH McKENZIE ROTHWELL &
BARLOW, P. S.; MICHAEL H. KORPI; A.
BRUCE McKENZIE; DAVID S. BARLOW;
AND CATHERINE A. ROTHWELL,

Defendants.

NO. 08-2-20519-3 SEA

JUDGMENT FOR PLAINTIFF
SUMMARY OF JUDGEMENT

SUMMARY OF JUDGMENT

1. **Judgment Creditor:** Puget Sound Electrical Workers Health Trust and Vacation Plan;
Puget Sound Electrical Workers Pension Trust; IBEW Local 46 Retirement Annuity Trust;
No. IBEW Local 46 Apprenticeship and Training Trust; and Puget Sound Electrical Joint
Labor Complaint for Professional Cooperation Trust.

JUDGMENT FOR PLAINTIFF
SUMMARY OF JUDGMENT - 1

JOHNSON | FLORA

2505 Second Avenue, Suite 500
Seattle, WA 98121
(t) 206.386.5566 (f) 206.882.0675

THE HONORABLE RICHARD D. EADIE
Hearing date: Monday, April 19, 2010
Hearing time: 8:30 a.m.

IN THE SUPERIOR COURT OF WASHINGTON STATE FOR KING COUNTY

PUGET SOUND ELECTRICAL WORKERS
HEALTH TRUST AND VACATION PLAN;
PUGET SOUND ELECTRICAL WORKERS
PENSION TRUST; IBEW LOCAL 46
RETIREMENT ANNUITY TRUST; NO. IBEW
LOCAL 46 APPRENTICESHIP AND
TRAINING TRUST; AND PUGET SOUND
ELECTRICAL JOINT LABOR COMPLAINT
FOR PROFESSIONAL COOPERATION
TRUST,

Plaintiffs,

vs.

McKENZIE ROTHWELL BARLOW & KORPI,
P. S.; SMITH McKENZIE ROTHWELL &
BARLOW, P. S.; MICHAEL H. KORPI; A.
BRUCE McKENZIE; DAVID S. BARLOW;
AND CATHERINE A. ROTHWELL,
Defendants.

NO. 08-2-20519-3 SEA

JUDGMENT FOR PLAINTIFFS

This matter was tried by the Court without a jury from March 22, 2010 to March 31, 2010, the Honorable Judge Richard D. Eadie presiding. Plaintiffs Puget Sound Electrical Workers Health Trust and Vacation Plan; Puget Sound Electrical Workers Pension Trust; IBEW Local 46 Retirement Annuity Trust; No. IBEW Local 46 Apprenticeship and Training Trust; and Puget Sound Electrical Joint Labor Complaint for Professional

JOHNSON | FLORA

1 Cooperation Trust appeared through its managing agent, Steven Washburn and through its
2 their attorney of record Mark Johnson of the law firm of Johnson | Flora, PLLC. Defendants
3 McKenzie Rothwell Barlow & Korpi, P. S. and Smith McKenzie Rothwell & Barlow, P. S.
4 appeared through Michael Korpi and through their attorney of record Sam Franklin of the
5 law firm of Lee Smart, P.S., Inc.

6 The Court received the evidence and testimony offered by the parties, considered the
7 pleadings filed in the action and heard the oral argument of the parties' counsel. On March
8 31, 2010, at the conclusion of the trial, the Court rendered an oral decision in favor of ⁽²⁹⁾
9 plaintiffs. The Court made findings of fact and conclusions on the 28th day of ~~April~~ ^{May}, which
10 were entered on MAY 28, 2010.

11 Consistent with its oral decision and its findings and conclusions of ~~April~~ ^{May 28}, 2010,
12 the Court enters final judgment in this matter as follows:

13 1. Plaintiffs Puget Sound Electrical Workers Health Trust and Vacation Plan;
14 Puget Sound Electrical Workers Pension Trust; IBEW Local 46 Retirement Annuity Trust;
15 No. IBEW Local 46 Apprenticeship and Training Trust; and Puget Sound Electrical Joint
16 Labor Complaint for Professional Cooperation Trust are awarded judgment against
17 defendants Mckenzie Rothwell Barlow & Korpi, P. S. and Smith Mckenzie Rothwell &
18 Barlow, P. S. in the amount of \$ 1,139,111.47.

19 2. Costs \$ 3168.57.

20 Total amount of Judgment is for \$ 1,142,279.98 —

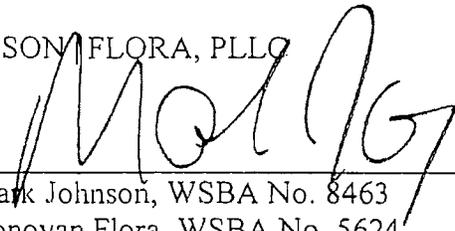
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22 DATED this 28th day of ~~April~~ ^{MAY}, 2010.

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24 Richard D Eadie
25 HONORABLE RICHARD D. EADIE
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Presented by:

JOHNSON FLORA, PLLC

By 

Mark Johnson, WSBA No. 8463

Donovan Flora, WSBA No. 5624

Attorneys for Plaintiff Mark Phillips

Approval

LEE SMART, P.S., INC.

By _____

Sam B. Franklin, WSBA No. 1903

Attorneys for Defendants

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TALMADGE/ FITZPATRICK

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

PUGET SOUND ELECTRIC, etc. et al.,

Plaintiffs,

v.

MCKENZIE ROTHWELL, et al.,

Defendants.

NO. 08-2-20519-3 SEA

ORDER RE: DEFENDANTS'
MOTION FOR
RECONSIDERATION

The Court has considered Defendants' motion for reconsideration, and concludes that pursuant to CR59 the findings of fact and judgment should be amended to provide a means to credit Defendants for future payments received by Plaintiffs on the Fox Electric account, or in the event the Defendants fully satisfy the judgment against them, to assign the stipulated judgment with Fox Electric to Defendants.

Plaintiff shall note an amendment to the Findings and Conclusions and Judgment. The Defendant's motion for reconsideration is in all other respects DENIED.

DATED this 14th day of July, 2010.

RICHARD D. EADIE

RICHARD D. EADIE, JUDGE