

65740-2

No. 65740-2-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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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BRIEF OF RESPONDENTS

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## **A. INTRODUCTION**

This is an appeal from a verdict in the amount of \$1,139,111.47 in a legal malpractice case tried to The Honorable Richard D. Eadie of the King County Superior Court. Plaintiffs are several union electrical worker ERISA trusts collectively referred to as PSEW. The defendants, a law firm and its successor, are the former collection attorneys for the trusts. The lawyer at the firm primarily responsible for the PSEW collections was Michael Korpi.

The evidence in the case related to seven large delinquent accounts; the delinquencies the result of electrical contractors who used union electricians on projects failing to make contributions to the trusts as mandated by a collective bargaining agreement.

The court found that the law firm was negligent in its handling of all seven account delinquencies but found a failure of proof of damages as to one and, therefore, awarded damages on six of the seven claims.

PSEW presented detailed evidence of standard of care violations by the law firm in its responsibilities to collect delinquent contributions and the losses to the trusts as a proximate result. Mr. Korpi testified at length and his story was fully considered by the court. Each of the six damage awards is supported by substantial evidence and the verdict is wholly sustainable.

## **B. COUNTERSTATEMENT OF ISSUES**

1. Whether substantial evidence supports the trial court's damage award where:

a. The court heard and considered extensive testimony from an experienced ERISA trust collection lawyer hired by the trusts to audit the Law Firm's collection efforts from January, 2000 – March of 2005, which testimony included a discussion of collection remedies available to ERISA trust collection lawyers, specific standard of care violations related to each of the 7 files at issues and the losses to PSEW as a result thereof; and

b. The court also heard and considered extensive testimony from Michael Korpi, the lawyer at the Firm responsible for the collections and whose testimony included a full discussion of the work that he did and a discussion of issues related to federal preemption of two of the remedies available to ERISA trust collection lawyers.

2. Whether substantial evidence supports the trial court's application of 85% as the reasonably recoverable percentage as to one portion of the uncollected delinquency in single matter (the Fox Electric file) where;

a. An experienced ERISA Trust collections lawyer testified as that 90% was a reasonable amount to be recovered using reasonably prudent collection efforts;

b. Over a nearly 5 year period the Law Firm collected 57% of the delinquencies referred to it whereas successor counsel in the subsequent nearly 5 year period collected 87%; and

c. Washington courts regularly admit statistical evidence as proof, and the evidentiary ruling was a reasonable exercise of the trial judge's discretion.

3. Whether substantial evidence supports the trial court's finding that the standard of care was to foreclose retainage and performance bonds simultaneously where:

a. An experienced ERISA trust collection lawyer testified that the standard of care required filing and foreclosing the performance bond and retainage bond claims simultaneously;

b. The Law Firm's "Collections Procedures Manual" prescribed filing and foreclosing on both bonds simultaneously;

c. The Law Firm's expert witness testified that he could not identify one instance where firm did not file and foreclose both bonds simultaneously;

d. Attorney Michael Korpi admitted that the Law Firm's practice was to file and foreclose both liens at the same time, that they did so 100% of the time and that it was "better practice" to do so;

e. Failing to foreclose the liens at the same time allows the party liable on the un-foreclosed lien to raise the defense of impaired security; and

f. The Law Firm admits that the degree of care actually practiced is evidence of what is reasonably prudent.

4. Whether substantial evidence supports the trial court's finding of proximate cause in a legal malpractice action, and no allocation of responsibility to a successor law firm, where:

a. An experienced ERISA trust collection lawyer who conducted an audit of the Law Firm's collection efforts testified to specific standard of care violations and damage as to each of the 7 delinquent accounts at issue in the case;

b. Although the Law Firm concedes that to obtain allocation of responsibility to a non-party in a legal malpractice case a defendant must present evidence of negligence of the non-party through expert testimony, the Law Firm did not present any expert testimony that the successor attorneys violated the standard of care or caused any damage to the trusts; and

c. The Law Firm concedes that there may be more than one proximate cause of a loss.

5. Whether substantial evidence supports the trial court's damage award to the trusts where an experienced ERISA trust collection lawyer who had conducted an audit of the Law Firm's collection efforts, testified to specific standard of care violations and damage as to each of the 7 delinquent accounts at issue in the case.

6. Whether substantial evidence supports the trial court's award of \$128,000.00 to the trusts for audit costs incurred when the evidence was undisputed that:

a. Attorney-fiduciary Michael Korpi knowingly concealed from the trustees of the trusts for 7 months an error by him which caused the trusts a loss;

b. The Law Firm admitted Korpi's breach of fiduciary duty;

c. The Law Firm agreed to and encouraged the audit;  
and

d. The trustees of the PSEW trusts are fiduciaries to the beneficiaries of the trusts and, given the concealment by Korpi could not, consistent with those duties, fail to examine the law firm's collection efforts.

### **C. COUNTERSTATEMENT OF THE CASE**

The plaintiffs in this legal malpractice case are several electrical worker trust funds, collectively known as Puget Sound Electrical Worker Trust Funds, or PSEW. The trusts are ERISA trusts established pursuant to the Taft Hartley Act. The purpose of the trusts is to collect and administer contributions to various electrical workers' trust funds (health and welfare, pension, annuity, retirement, vacation) that electrical contractors employing union electricians are required to make pursuant to the collective bargaining agreement between the local No. 46 of the International Brotherhood of Electrical Workers (IBEW) and the Puget Sound Chapter of the National Electrical Contractors Association (NECA). The contributions are due on the 15th of the month following the date that the contributions were withheld from the worker's

paycheck. Each trust is administered by an equal number of labor and management representatives. The trustees of the trusts are fiduciaries to the plans, required by ERISA to discharge their duties prudently and solely in the interests of the beneficiaries and the participants of the trusts. The trustees are required to pursue delinquencies through a systematic, reasonable and diligent collection plan. The defendants are Seattle law firms, one the successor to the other, who have generally limited their practice to the representation of labor - management employee benefit trust funds. The forgoing is based upon Findings of Fact 1-9 and numbers 12, 14, 17 and 21 which are uncontested by the law firm in this appeal. CP 1322-1326. As such, they are verities. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

This case had its genesis in a January 2005 letter sent by attorney Michael Korpi to two union and management representative for the trusts. Ex. 1. In the letter, Mr. Korpi admitted that he mishandled the collection of delinquent pension contributions by the electrical contractor Trans World Electric by failing to preserve lien claims on three public works projects on which Trans World had used union electricians. Ex.1. Mr. Korpi accepted responsibility for the error and promised to make the trusts whole in the amount of \$55,332.42. Ex. 1. Mr. Korpi also admitted that he had known about the mistake since May of 2004, but had concealed it from the trustees.

Mr. Korpi states in his letter, inter alia, that:

Sometime in May 2004, however, my legal assistant advised me that she had missed the deadline for filing a fifth amended lien claim notice. The result, of course, was the loss of the Trusts' right to foreclose their liens...

We realize that we should have disclosed this situation [the failure to timely file lien claim notices] last summer when I became aware of the missed filing deadline and it became clear that the general contractor did not intend to make payment. We apologize for the omission and we accept responsibility for it. Accordingly, we are prepared to make the necessary arrangements to make the Trusts whole. We have also revised our calendaring procedures to insure that the problem will not recur." Ex.1.

Mr. Korpi told the trustees that, as a result of the missed deadlines, the account was uncollectible. Ex. 1. The Law Firm does not contest the award by the court, embodied in Finding of Fact No. 21 that PSEW is entitled to \$55,332.42 (the amount admitted to in Mr. Korpi's letter) plus prejudgment interest in the amount \$15, 606.08 calculated from the date the court found that disclosure of the error should have been made. CP 1326, FF 21.

Mr. Korpi's letter is important for several reasons but, perhaps most importantly, because he assumes that the rights to foreclose on both the RCW 39.08 and RCR 60.28 liens have expired (discussed *infra*). This is contrary to the position the law firm now takes, that an RCW 39.08 lien is valid for 6 years.

Based on Mr. Korpi's letter and their dissatisfaction with the collections, the trusts discharged the Law Firm as to some accounts in

December, 2004 and the remainder of March, 2005. Because of the admitted mistake, the admitted non-disclosure of the mistake, because the trustees had noticed a pattern that several accounts with large sums of money owing seemed to be in the same posture each time Mr. Korpi reported to the Board, and because of reports by the Ekman Bohrer firm that several large accounts were uncollectible, the trustees, fiduciaries to the trusts, believed it was their responsibility have an audit performed of the accounts handle by Mr. Korpi. RP I 80-84. Mr. David Barlow of the Law Firm wrote the trustees and endorsed the idea of an audit. Ex. 12. Mr. Barlow wrote: “To that end we welcome the action by the Pension and Annuity Trustees to retain outside counsel to review the matters raised by EBT [successor counsel Ekman Bohrer Thulin] and we will fully cooperate with that review.” Ex. 12. Mr. Barlow, in fact, expressed his opinion that the audit should be conducted by “an attorney or firm with expertise in trust fund collection matters because of the specialized knowledge required to provide you with a meaningful evaluation of our performance.” Ex. 12.

Although Mr. Barlow suggested the names of three lawyers to perform the audit, the trustees chose Seattle attorney Sanford (Sandy) Levy. The Law Firm was aware of that decision by December 2005 and did not voice an objection. Ex. 12, Ex. 2, Ex. 3.

Mr. Levy has been licensed to practice in Washington state since 1980 and has done ERISA trust collection work since he was admitted to the Bar, performing collections for “virtually all of the construction trade

unions in the state of Washington...” RP II 45-47. He was contacted by PSEW on the spring of 2005 and asked to audit the work of the law firm. RP II. Once Mr. Levy had the files he noted the date of the referral and then, on a spreadsheet, documented every act by the law firm “from that point forward.” RP II 50. Mr. Levy audited “30-32” files and testified at trial regarding 7. RP II 58. Mr. Levy opined that a reasonably prudent law firm doing ERISA trust collection work should have achieved a 90% collection rate. RP II 59-62. He found that during the period of time he audited the law firm, from January 2000 - March of 2005, it collected 57% of the delinquent contributions referred to it for collection. RP II 60-61. Mr. Levy performed the same analysis for the successor firm, Ekman, Bohrer which revealed that the Ekman firm collected 87% of the delinquent accounts referred to it for collection. RP II 138-139. Mr. Levy’s work product from the audit was admitted as Exhibits 106 and 107 and it totals over 700 pages.

The first file audit Mr. Levy testified regarding was Trans World Electric and he found that the amount of the loss as disclosed by Mr. Korpi in Exhibit 1 was not accurate. RP II 88-89. From his review of the file Mr. Levy found that “there was \$151,000 in contributions owing plus liquidated damages of approximately \$50,000 as well as interest and attorney’s fees obtained on a judgment.” RP II 89. Mr. Levy testified to the following standard of care violations: The case was referred in October 2001 and the law firm should have filed suit within 30 days but they waited 9 months; it was almost a year before they obtained an audit

of the amounts owing, raising the delay to close to two years; in addition to not renewing lien claims and described in Mr. Korpi's letter there were jobs on which they didn't file liens at all; they didn't properly track project acceptance dates; that as of July 2002, the law firm had a report of unpaid collections totaling \$170,000.00 and they "didn't do anything with the information." Finally, the law firm simply kept amending liens long after the time periods allowed for amending the liens - within 30 days of acceptance of the project. RP II 89-93. Based on Mr. Levy's testimony, the court awarded \$166,930.54 in damages for the Trans World account negligence, including \$15,606.08 in liquidated damages on the \$55,332.42 loss disclosed in Mr. Korpi's letter to the trustees. Ex. 1. CP 1324-1326 FF 15-21; CP 1334 CL 14.

The next file Mr. Levy testified to and for which the court awarded damages was Fox Electric. RP II 94-104. Mr. Levy testified that the Fox Electric account was referred on July of 2003, that suit was not filed until February 2004 and that was a violation of the standard of care not to file suit within 30 days of the referral. Further, the case was dismissed for want of prosecution in November 2004. RP II 94-95. Mr. Korpi claimed not to have known of the dismissal. In December 2004, after the case was dismissed, Mr. Korpi told the trustees to turn down an offer by Fox of 50 cents on the dollar which would have resulted in a \$281,000.00 recovery. RP II 100. Mr. Levy testified that the advice was below the standard of care whether or not Mr. Korpi knew of the dismissal and the court found that Mr. Korpi knew or should have

known. RP II 100. CP 1329. It should be noted that the Law Firm makes the statement at page 37 of its brief (highlighting it in italics for emphasis) that: *“Nothing in the record indicates that the \$281,000.00 was no longer available when Fox met Bohrer.”* The affidavit of James Fox, contained in Exhibit 107, page SL0521. The statement is not accurate; Mr. Fox’s affidavit provides in part that: “In September 2004 my attorney Bruce Cohen contacted Mr. Korpi about a possible settlement. I offered to make a one-time payment of \$281, 586.17. While this amount was not the total amount sought by the Trust Funds, it was significant percentage share of the amount that I was able to collect from DPR Construction. However, Mr. Korpi never responded to my offer. Therefore, I used the money to pay other creditors.”

According to the law firm’s December 2004 collection status report by that date unpaid Fox Electric contributions totaled \$407,285.25; liquidated damages \$82,618.34, and; interest \$48,453.98. Ex. 40 p. 15. The trustees fired the law firm from the account in December 2004 and thereafter, the Ekman Bohrer firm (the successor firm) settled with Fox for an initial payment of \$59,476.72, two payments of \$50,000.00 and \$2000.00 per month. There is no obligation to pay after Mr. Fox, who is in his 70’s, passes. Fox Electric is the file for which the court applied an 85% recovery rate as to a portion of the damages. CP 1330 - 1331. The court awarded the full amount of the offer made by Fox with Mr. Korpi advised be turned down (\$281,586.17) plus 85% of the remainder of the December 2004

delinquency minus the \$281,586.17, minus amounts recovered and any further amounts received by the trusts pursuant to the \$2000.00 payment agreement. CP 1328-1331 FF 30-32. The total award for Fox was \$353,227.98 with the law firm receiving a credit for all payments received from Fox in the future. CP 1335 CL 14 and 15.

The third account Mr. Levy testified regarding and for which the court awarded damages was Pacific Electric. RP II 104-114. Mr. Levy testified that the case was referred in March of 2003, that suit wasn't filed until July of 2004 and that the delay was below the standard of care. RP II 104. In addition Mr. Korpi advised the trusts to accept a promissory note in the amount of \$238,780.79 secured by a deed of trust on real estate without first verifying that Pacific Electric owned any real estate. EX. 32-37. Pacific Electric did not, in fact, own any real estate. Mr. Levy testified that the trusts gave up a valid and enforceable federal Miller Act claim in exchange for the unsecured note. RP II 109. Mr. Levy testified that it was below the standard of care for a lawyer to advise his client to settle a claim for a promissory note secured by real estate without first verifying the existence of the real estate. RP II 104-105. The court awarded damages for the uncollectible portion of the note, \$178,109. CP 1327 FF 25-28, CP 1334 CL 14.

The fourth account Mr. Levy testified regarding was Baird Weber. Although the trusts wrote off \$257,110.00, and Mr. Levy testified that damages amounted to \$127,790, the court awarded in the amount of \$77,697.95. The court found, based on Mr. Levy's testimony,

the following standard of care violations: there were seven public works jobs on which there was a failure to timely file a lien, four jobs on which claims were not foreclosed by timely filing suit and a failure by that the law firm to track project acceptance dates on three public works jobs and were therefore unaware of when the date for filing or foreclosing liens had passed. RP II 114-117. CP 1326 FF 22-23; CP 1334 CL 14.

The fifth account about which Mr. Levy testified and for which the court awarded damages was CAE Electric. RP II 127-132. The delinquencies for this account developed on the Seahawk Stadium project and several other projects. When asked if the law firm timely filed the complaint in the case, Mr. Levy replied “not even close.” RP II 127. With regard to the Seahawk project, Mr. Levy testified that the “primary sub electrical contractor” was Cochran Electric (CAE was a subcontractor). RP II 129. Cochran had actually contacted the trust office in August of 2002, indicated that it would pay on behalf of CAE and provided certified payroll records of \$110,000 but Mr. Korpi never followed up. RP 129-130. Mr. Levy testified that the damages were \$133,532 and the court awarded \$110,487. CP 1327-1328 FF 28; CP 1334 CL 14.

The sixth account for which the court awarded damages was Atkinson Bell/Lunde. RP II 124-127. Mr. Levy testified that there were several referrals beginning in May of 2000. RP II 124. Suit was not filed until July of 2003. RP 125. In January 2004, the Law Firm was told that the contractor wanted to enter into a payment plan secured by

real estate but Mr. Korpi did not follow up. RP II 124-125. According to Mr. Levy, the Law Firm never filed a lien although they identified 76 jobs on which the companies worked. Lunde dissolved itself in August 2004 and Atkinson Bell a few months later. RP II 125. The court awarded \$124, 659, the amount the trusts wrote off. CP 1326 FF 24; CL 14.

Mr. Levy's fees for the independent audit totaled approximately \$128,000.00 and the court awarded those as damages. EX.71. Mr. Levy's charges do not contain any amount for expert witness consulting in the case- the charges submitted were purely limited to the audit charges. RP II 63.

The law firm called two witnesses, Mr. Korpi and Oregon lawyer Charles Colett, who testified as an expert. Mr. Colett's very brief testimony is found at RP III p.141-187 (approximately 20 pages for direct). Mr. Colett testified that RCW 39.08 has a six year statute of limitations but also testified that in his review of the documents he did not see one instance where the law firm ever foreclosed RCW 39.08 and 60.28 liens separately. RP III 174-176 and 180.

Mr. Colett also testified, agreeing with Mr. Levy, that a lawyer may not keep filing liens within 4 months of each other (Mr. Korpi's practice) in order to keep the right to foreclose valid even years after the project was accepted. RP III 178-179. Mr. Colett was asked: "Q. Okay. So then let's say that I'm not ready to do that yet [foreclose] and I file another lien—I file another lien and then I wait, you know, four months.

File another lien, wait four months. Can I keep filing—renewing the liens for, say, two or three years after the project is accepted to preserve my foreclosure remedies? A. No. Q. Why not? A. There are ultimate statute of limitations on these retainages and the maximum appears to be four months for foreclosure from the date of your notice of claim of lien. So you can't just keep extending them out.” RP III 178-179. Mr. Colett agreed that, because the municipality would want to release the retainage funds it didn't make sense to be allowed to keep filing liens every four months ad infinitum and that the foreclosure had to take place within four months from the date the project was accepted. RP III 179.

Mr. Colett also testified that if a lawyer does not file the retainage lien within 30 days of the project is accepted the right to foreclose under the retainage is lost and if the lawyer does not foreclose within four months of the date the project is accepted that the right to foreclose under RCW 60.28 is lost. RP III 180. Mr. Korpi's habit was to continue to file liens within four months of each other, believing that the time to foreclose could be extended indefinitely. Mr. Korpi was only lawyer who testified that retainage and contractors' bond liens could be renewed forever. His explanation on why his own expert disagreed with him was that “he's from Oregon and hasn't dealt with these lien claims.” RP IV 173. His explanation on why Mr. Levy and Mr. Bohrer disagreed with him is that they had “axes to grind.” RP IV 173.

Mr. Korpi testified extensively and story was fully heard by the court. RP IV 11-231. He addressed each of the files at issue, his

collection practices and the effect of the Washington State Supreme Court cases which held that ERISA preempted two of the remedies available to ERISA trust collection lawyers. RP IV 11-231.

Mr. Korpi also testified that the law firm always files and forecloses the performance bond and the contractors bonds simultaneously and always within 4 months of the date the lien was filed. RP IV 193. He admitted that the “better practice” was to do it that way and the law firm does it that way one hundred percent of the time. RP IV 194. He admitted that after the April 2001 Ninth Circuit Court of Appeals decision in *NECA v. Standard Electric* (discussed infra), the firm filed retainage and contractors bonds liens in Federal Court. RP IV 25-27.

In addition, Mr. Colett agreed that from his review of Exhibit 1 (Mr. Korpi’s delayed disclosure of his Trans World error) that Mr. Korpi’s’ statement that the trusts had lost the right to foreclose the liens meant both the RCW 39.08 and RCW 60.28 liens and that indicated that Mr. Korpi believed that both liens, when filed simultaneously had to be foreclosed within 4 months. RP III 181-182.

#### **D. SUMMARY OF ARGUMENT**

It is not a coincidence that, a few weeks after the Trans World file was referred to the Ekman Bohrer firm, in December of 2004, Mr. Korpi confessed that he missed dates and caused losses to the trusts. He did so not because of honesty or a sense of obligation or duty - he did so because he knew he would was going to get caught. He admitted he had

known about the error for 7 months. After admitting to a breach of fiduciary duty, concealment of the breach and damage and; after agreeing to and encouraging an audit precipitated as a result, the Law Firm-fiduciary doesn't want to pay the bill incurred by the trusts as a result of the Firm's intentional, wrongful conduct.

The Law Firm accuses successor counsel of failings but offers no proof. The Firm argues that a six year statute of limitations applies to claims brought pursuant to contractors' bonds liens under RCW 39.08 while knowing (and admitting) that the Firm, like all other ERISA trust collection lawyers always files and forecloses both retainage and contractors bonds liens simultaneously so as not to create a defense based on impairment of security.

When even Mr. Korpi's own expert agreed that RCW 60.28 retainage liens cannot be extended out indefinitely by continuing to file them every four months and that they must be foreclosed within four months of filing, he was dismissed by Mr. Korpi as being "from Oregon." Mr. Korpi accused the other two lawyers who so testified as having "axes" to grind.

The trial court heard and weighed all of the evidence and the Law Firm was given a full opportunity to tell its story. It is unhappy with the result and wishes to re-try the case before this Court but the truth is that each and every claim was supported by specific violations of the standard of care and reasonably certain damages.

## E. ARGUMENT

### 1. Standard of Review

Findings of fact are reviewed under a substantial evidence standard, defined as evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Judgment having been entered, this court may not weigh conflicting evidence but, with respect to factual findings, determine only whether there is substantial evidence to support the findings of fact entered by the court and review the correctness of legal issues. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 222, 797 P.2d 477 (1990). A trial court is entitled and required to weigh evidence and the failure to make a finding on a material issue is construed against the person in whose favor the finding would have been made. *Golberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347, (1982); *Batten v. Abrams*, 28 Wn. App. 737, 744, 626 P.2d 984 (1981). All evidence is viewed in the light most favorable to the prevailing party and deference is given to the fact finder. *Quinn v. Cherry Lane Auto Plaza*, 153 Wn. App. 710 717, 225 P.2d 266 (2009).

With respect to conclusions of law, renewed de novo, the question to be resolved is whether they are supported by the findings of fact. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). A conclusion of law is a “determination

[that] is made by a process of legal reasoning from facts in evidence.”  
*State v. Niedergang*, 43 Wn. App. 656, 657, 719 P.2d 576 (1986).

A conclusion of law is a conclusion of law wherever it appears, even if it is erroneously labeled a finding of fact. *Kane v. Klos*, 50 Wn.2d 778, 788, 314 P.2d 672 (1957); *Local Union 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975).

An unchallenged conclusion of law becomes the law of the case and precludes review on appeal. *Halvorsen v. Ferguson* 46 Wn.App. 708,722, 735 P.2d 675 (1987).

The law firm contends that “many of the trial court’s findings are actually conclusions of law,” specifically asserting that the court’s findings that “assume” or “address” the standard of care are such. *Brief of Appellants*, p 17. Appellants make the following statement: “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).” *Sheikh* does not support the statement made. *Sheikh* holds at 448: “The elements of negligence include the existence of a duty to the plaintiff, breach of that duty, and injury to the plaintiff proximately caused by the breach. (citation omitted). *Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo.*” (citation omitted, emphasis added).

In an attempt to obtain de novo review of fact issues, Appellants incorrectly conflate the elements of duty and breach and do so by citing a case that does not stand for the proposition asserted. There is no issue regarding whether the law firm owed a duty of care to PSEW in the matters in which negligence was alleged, PSEW presented expert testimony on the standard of care and breach thereof, and; it was for the court in his capacity as fact finder to determine whether there was a breach of the standard of care.

**2. The Standard of Care of a Lawyer**

The standard of care to which a Washington lawyer is held is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in the State of Washington. *Walker v. Bangs*, 92 Wn.2d 854, 859, 601 P.2d 1279 (1979). It is a state-wide standard – there is no “locality” rule. *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 685 (1968). An attorney is expected to know the law or to research and determine the applicable law to avoid falling below the standard of care. *Bush v. O'Connor*, 58 Wn. App. 138, 148, 791 P.2d 915 (1990). The standard of care that should have been exercised and the scope of the attorney's duty to the client are determined as of the time the services are rendered. *Martin v. Northwest Washington Legal Services*, 43 Wn. App. 405, 408, 717 P.2d 779 (1986). Expert testimony on the standard of care is necessary in an action for legal negligence, unless the negligence is within the common knowledge of lay persons or the negligence is

"obvious." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 587 6775 P.2d 193 (1983).

The law firm did not assign error to Conclusions of Law 1-3 which correctly establish the elements of a claim for legal malpractice (COL 1) and the standard of care as "...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." CP 1332 COL 3. See also, *Evans v. Steinberg*, 40 Wn. App. 585, 588 699 P.2d 797 (1985) and *Walker v. Bangs*, 92 Wn.2d 854, 859 601 P.2d 1279 (1979).

The firm also did not contest that "the degree of care actually practiced by members of the legal profession is evidence of what is reasonably prudent." CP 1333 CL 7.

**3. The Fiduciary Relationship Between an Attorney and a Client**

As a matter of law, a fiduciary relationship exists between an attorney and a client. The fiduciary relationship is one of special trust and confidence and bestows upon an attorney the "highest" duty of fidelity, good faith and undivided loyalty. *In the Matter of Estate of Larson*, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985); *Perez v. Pappas*, 98 Wn.2d 835, 839-840 659 P.2d 475 (1983); *Liebergessell v. Evans*, 93

Wn.2d 881, 890 613 P.2d 1170 (1980); *Transcontinental Ins. Co. v. Faler*, 9 Wn. App. 610, 612 513 P.2d 864 (1973). It requires the "undeviating fidelity" of the lawyer to the client. No exceptions can be tolerated. *Van Dyke v. White*, 55 Wn.2d 601, 612-13, 349 P.2d 430 (1960). A breach of fiduciary duty may support a finding of negligence. See *Hansen v. Wightman*, 14 Wn. App. 78, 92-93, 538 P.2d 1238 (1975). In addition, violation of a fiduciary duty gives rise to an independent cause of action for breach of fiduciary duty. See *Trask v. Butler*, 123 Wn. 2d. 835, 843-844, 872 P.2d 1080 (1994); *Cotton v. Kronenberg*, 111 Wn. App., 258, 263-270, 44 P3d 878 (2002), and; *Cummings v. Guardianship Services*, 128 Wn. App. 742, 802-804, 110 P.3d 796 (2005).

The law firm did not contest the trial court's finding of Fact No. 17 that: "The standard of care and the fiduciary duties of an attorney require that a lawyer immediately report know errors to a client." In fact, although Mr. Korpi had known about the error for seven 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 duty of full disclosure." CP 1325 FF 17. In addition, the Law Firm does not contest the trial court's award of the amount of losses Mr. Korpi

admitted to in Exhibit 1 nor the liquidated damages the court awarded on that sum. CP 1326, FF 21.

Once the plaintiff has proven each element of a breach of fiduciary duty claim the burden shifts to the fiduciary to “disestablish the causal connection” between the default and the damages. *Austin v. U.S. Bank* 73 Wn. App 293, 307 (1994).

#### **4. Causation in a Legal Malpractice Action**

As in most negligence cases, causation in a legal malpractice case is usually an issue for the trier of fact. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 712-13 (1986). It is only when the facts are undisputed and inferences there from are plain and incapable of reasonable doubt or difference of opinion, causation is a question of law for the court. *Daugert v. Pappas*, 104 Wn.2d 254, 257 (1985); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d. 581, 590 (1983).

In *Martin v. Northwest Washington Legal Services*, 43 Wn. App. 405 (1986), the Court of Appeals affirmed a judgment against a legal services organization finding that the organization had negligently failed to seek a division of a military pension in a dissolution action and that such failure resulted in monetary damages to the client. The defendant argued that its negligence was not a proximate cause of loss to the client. In support of this argument, the defendant alleged that the client caused or aggravated her own damages by failing to seek relief under the Uniform Services Former Spouse's Protection Act (USFSPA). The *Martin* court held that the client proved her burden of causation by establishing that

she "would have prevailed or achieved a better result" if her attorney had performed competently. The *Martin* court further held that there was substantial evidence in the record to support the finding of proximate cause, and that the client's conduct did not "rise to the level of a superseding cause." *Id.* at 410.

Washington requires that the plaintiff prove collectability of an underlying claim or debt when alleging that an attorney's negligence caused the loss of its value. *Tilly v. John Doe*, 49 Wn. App. 727, 732-33 (1987), *cert. denied*, 110 Wn.2d 1022 (1988). The justification for the Washington State position, that the burden of collectability should be on the plaintiff, is that collectability "is essentially an extension of the proximate cause analysis. . . ." *Id.* at 732. As in other negligence cases, "the law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiffs to damages there for." *Ward v. Arnold*, 52 Wn.2d 581, 584 (1958).

##### **5. Certainty of Proof Damages**

With regard to damages, the fact of loss must be proved with sufficient certainty to afford a reasonable basis for estimating the loss. *Mason v. Mortgage America*, 114 Wn.2d 842, 849-850, 792 P.2d 142, 147 (1990). The precise amount of damage need not be shown, as long as there is sufficient proof that the trier of fact does not rely on speculation or conjecture. *ESCA Corporation v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228, 1223-1224 (1997). The "doctrine respecting the matter of certainty, properly applied, is concerned more

with the fact of damage than with the extent or amount of damage.”  
*Gaasland Company, Inc. v. Hyak Lumber and Millwork Inc.*, 42 Wn.2d  
705, 712-713, 257 P.2d 784 (1953).

Once the fact of damage is shown, the precise amount need not  
be established with mathematical certainty. Evidence is sufficient if it  
affords a reasonable basis for estimating the loss so that the trier of fact  
need not resort to speculation or conjecture. *Haner v. Quincy Farm  
Chemicals*, 29 Wn. App. 93, 97-98 (1981).

The trier of fact has discretion to award damages which are  
within the range of relevant evidence. An appellate court may not  
disturb an award of damages made by the fact finder unless it is outside  
the range of substantial evidence in the record, or shocks the conscience,  
or appears to have been arrived at as the result of passion or prejudice.  
*Federal Signal Corp. v. Safety Factors, Inc.* 125 Wn.2d 413, 886 P.2d  
172 (1994).

#### **ISSUE 1 - PREEMPTION OF CONTRACTORS' BOND AND RETAINAGE LIEN FORECLOSURES**

The law firm contends, in a wholly argumentative statement of  
the issue, whether the standard of care required “the filing of foreclosure  
lawsuits despite the risk that such filing was frivolous?” The court’s  
decision cannot be read as so holding. The issue relates only to two  
collection remedies, RCW 60.28 and RCW 39.08. It is important to  
remember that this case began when Mr. Korpi, seven months after the  
fact, alerted the trustees that he had missed lien filing deadlines.

Although the firm argues that because of preemption issues, filing liens in Federal Court was not “permissible” until 2007, Mr. Korpi himself admitted that he began filing liens in Federal court in April 2001. RP IV 26; Brief of Appellants p. 25.

RCW 60.28.011 requires public bodies to retain 5% of the price of a public works contract to pay providers of services or material for the project. This is known as the “retainage” or the “retainage fund.” RCW 39.08 governs recovery against the contractor’s performance bond. RCW 39.08 and RCW 60.28 are two ERISA trust collection remedies that were circumscribed by the Washington State Supreme Court’s decisions in *Puget Sound Electrical Workers Health and Welfare Trust v. Merit Co.*, 123 Wn. 2d 565, 870 P.2d 960 (1994) and *IBEW Local 46 v. Trig Construction Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000). *Merit* held, and *Trig* re-affirmed that foreclosure of retainage and contractors’ bonds liens were preempted by ERISA. *Trig*, supra, 442-443, 628. In April of 2001, the Ninth Circuit Court of Appeals, interpreting California payment bond and “stop notice” statutes, held that ERISA did not preempt the state law remedies. *Southern California IBEW-NECA Trust Funds v. Standard Industrial*, 247 F 3d. 920, 929 (2001).

The audit of the law firm’s files conducted by Mr. Levy covered the period from January 2000 through March of 2005. RP II 60. As indicated above, Mr. Korpi testified that his firm began filing liens again, in Federal court, in April 2001 so the limitation of the two remedies was for approximately one and one-half years on the 5 year period.

The trial court found, based on the testimony of Mr. Levy, in Conclusion of Law No. 4, CP 1332-1333, that: “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 Sandy 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 acceptance dates.”

There is no basis to argue, much less for this court to conclude that any competent of the trial court’s decision hinges on the failure to file “frivolous” liens.

**ISSUE 2 - 85% COLLECTION RATE FOR A PORTION OF THE DELINQUENT, UNCOLLECTED FOX ELECTRIC ACCOUNT**

As described in detail in the Counterstatement of the Case, the trial court, based on testimony by the ERISA trust collection attorney Sandy Levy that a reasonable rate of collection is 90% and that the law firm, in the 5 year period audited by Mr. Levy collected on 57%. The collected successor firm 87%. The court applied a slightly lower, 85% rate to calculate of portion of the damages for the Fox Electric account.

The court's decision to admit and consider the 85% as a reasonable collection rate based on Mr. Levy's opinion is an evidence ruling. Appeal of a trial court's ruling admitting or excluding evidence is reviewed by the abuse of discretion standard and the ruling will not be overturned unless it is found to be manifestly unreasonable or based on untenable grounds or reasons, i.e., the court applied the wrong legal standard or relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 669, 230 P.3d 583 (2010).

In Washington, statistical evidence is admitted as proof in a variety of issues.

The following is from 5B WA PRAC § 702.42:

In proceedings seeking to have the respondent committed as a sexually violent predator (SVP), actuarial evidence has been held admissible on the issue of whether the respondent is likely to re-offend. The admissibility of statistical evidence other than statistical probabilities has been less controversial. Admissibility simply turns on general principles of relevance. Theoretically, at least, the admissibility of statistics as substantive evidence should be distinguished from the use of statistics as a basis for an expert's opinion. In the latter situation, it is the expert's opinion that is the evidence, rather than the statistics, and the courts have been more inclined to permit the use of statistics for this purpose.

Even in sexually violent predator proceedings, with the attendant constitutional rights, the risk of confinement and the requirement of proof beyond a reasonable doubt, our courts admit expert witness

testimony based on statistics on the issue of whether a SVP is likely to reoffend. In *In Re Detention of Thorell. et al.*, 149 Wn.2d 724, 73 P.3d 708 (2003) the “. . .final issue presented by two of the petitioners is whether actuarial instruments may be admitted to aid in the prediction of future dangerousness.” Our Supreme Court ruled that the statistics were not novel scientific evidence such that a Frye hearing was required and that they were admissible “as an aid to expert testimony” to be assessed under ER 702 and ER 703. *Id.*, 753-758.

In *Herskovits v. Group Health* 99 Wn.2d 609, 664 P.2d 474 (1983) the Washington State Supreme court held that expert opinion testimony that a cancer patient’s chances of survival were reduced from 39% to 25% was sufficient to allow the jury to consider the issue of proximate. *Id.*, 618.

Finally, in *Haner v Quincy Farm Chemicals* 29 Wn. App. 93, 627 P.2d 571 (1981) Division III upheld a damage award by a trial court to a farmer who had experienced reduced wheat yields as a result of bad seed from a challenge that proof of damages was insufficient because, in assessing damages, the trial court used the yield of a neighboring field for comparison and awarded the difference between the two fields, attributing the reduced yield to the bad seed. *Id.*, 96-98.

Here, Mr. Levy based his opinion on his vast experience as an ERISA trust collection lawyer and the additional comparative of the two law firms (defendants and the successor) collecting for the same trusts in the same industry over similar time periods. The court would have been

well within its discretion to base its entire award of damages on 85% of the amount written off by the trusts on all accounts.

### **ISSUES 3 and 4 - SUCCESSOR LAW FIRM LIABILITY**

From pages 29 - 40 of the law firm's brief, it argues that the successor collection firm for the trust, Ekman Bohrer Thulin, had responsibility for the trusts' losses. The successor firm was not a party to the lawsuit and the Law Firm did not present expert testimony that the firm breached the standard of care with respect to specific files so the issue should not be considered by this court.

The law firm appears to allege two bases for its argument that the successor firm was responsible for some of the losses to the trust: (1) that the successor firm had a "misperception" regarding the applicable statute of limitations with respect to RCW 39.08 and RCW 60.28, two statutes that provide lien and foreclosure remedies to the trusts, and; (2) the successor firm had responsibility for the Fox Electric account.

At the outset, it should be noted that the Law Firm did not assign error to Conclusion of Law Number 2 which provides: "Unless the negligence is obvious, the standard of care of a lawyer must be established by expert testimony. **This applies to a 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 4.22.70 is not self executing.**" (Emphasis added). CP 1332. Likewise, the law firm did not assign error to

Conclusion of Law No. 6 which provides in part that “the negligence of the lawyer need not be the sole proximate cause of the damage.” CP 1333. CLs 2 and 6 are consistent with Washington law.

RCW 4.22.070(1)(b) provides in part that...

“...[i]n all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant’s damages. Any fault attributable to nonparty “entities” reduces the plaintiff’s recovery proportionally.”

As stated by the Supreme Court in *Adcox v. Children’s Orthopedic Hosp. and Medical Center*, 123 Wn2d 15, 25-26, 864 P.2d 921 (1993):

RCW 4.22.070 is not self-executing. It does not automatically apply to each case where more than one entity could theoretically be at fault. Either the plaintiff or the defendant must present evidence of another entity’s fault to invoke the statute’s allocation procedure. Without a claim that more than one party is at fault, and sufficient evidence to support that claim, the trial judge cannot submit the issue of allocation to the jury. Indeed, it would be improper for the judge to allow the jury to allocate fault without such evidence. If the plaintiff signals an intention to present evidence of fault solely against one defendant, as in this case, it is incumbent upon the defendant to provide proof that more than one entity was at fault. The Hospital failed to present any evidence of the possible negligence of Dr. Lush and Dr. Herndon. Instead, the Hospital chose the legal theory that there was no negligence in this case. Moreover, the Hospital did not even take a clear position on the issue of

whether allocation of fault was required under Washington's statutes. The Hospital cannot now be heard to complain it was not afforded allocation. There is no basis for this court to consider any issue with respect to the liability of the successor firm. The law firm did not present expert testimony, which the firm admits was necessary, so the trial court did not have a basis for allocating responsibility.

Therefore, by its failure to present evidence that the successor firm caused any specific loss as a result of any negligence by the successor firm was waived by failing to present any competent evidence on the issue.

#### **The Six Year Statute of Limitations Issue**

Every lawyer who testified, including Mr. Korpi, stated that the standard of practice was to file both the retainage and contractors bonds liens at the same time and to foreclose them at the same time. The law firm's expert, Mr. Colett testified that, in his review of the firm's files- in every instance they filed and foreclosed the two liens claims at the same time. Mr. Korpi testified that he did it that way and it was the "better practice." The law firm's collection manuals admitted into evidence as Exhibits 9 and 10 mandate that the firm always file and foreclose the liens simultaneously. The following is a direct quote from one of manuals admitted as Exhibit 9, pages MR 07430 and MR 07431.

**"State and Local Public Works Payment and Performance bond and Retainage: RCW 39.08 and 60.28:**

1. **When to file:** Within 30 days after "final acceptance" by the government agency, we must file a notice of claim. We

have four months from the date we filed our lien to bring suit to foreclose against the retention. Here, the government is the defendant. While we have additional time following the date of filing to sue the surety (bond company), **we should always foreclose against the government and the surety at the same time.**” (Emphasis added.)

The second manual, Exhibit 10, at pages MR 07768 and MR 07769 provides in part as to RCW 39.08 and RCW 60.28 liens that: “Claims should be made against the retained percentage (lien against retained monies) and against the payment and performance bond contemporaneously.” And: “We have four months from the date our Notice of Lien was filed or received to bring suit to foreclose against payment and performance bond and the retention.”

The fact that a six year statute of limitations applies to lawsuits brought pursuant to RCW 39.08 as set out in *Industrial Coatings Company v. Fidelity and Deposit Company* 117 Wn.2d 511, 817 P.2d 393 (1991) has nothing to do with the universal ERISA trust collection standard of practice of filing and foreclosing both contractors’ bond and retainage liens simultaneously. In addition, the suit in *Industrial Coatings* does not appear to have been a lien foreclosure action-it appears to have been a direct action on the bond. The case simply holds that a bond is a written contract on which there is 6 years to sue. The reason that Mr. Korpi and all ERISA collection attorneys do so is because of the decision in *Inland Ryerson Construction Products Company, Inc. v. Brazier Construction Co., Inc.*, 7 Wn. App. 558, 500, P.2d 1015 (1972). In *Inland*, a subcontractor submitted a lien notice

making claims against both the retainage fund and the surety bond. Thereafter, the claimant released the lien against the retainage fund in exchange for partial payment and promise from the general contractor of full payment later. However, the general contractor never made good on that promise, leaving the claimant to lose \$62,000. To avoid that loss, the claimant then filed to foreclose on its bond claim. The trial court dismissed the claim finding that “the subcontractor prejudiced the surety’s position by releasing its interest in the retainage fund.” *Id.* at 561. The Court relied on the Restatement of Security §132 (1941) which states that a “surety’s obligation is reduced pro tanto if the creditor [the lien claimant]:

- (a) surrenders or releases the security, or
- (b) willfully or negligently harms it, or
- (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.”

See *Inland Ryerson*, 7 Wn. App. at 563. The Court found that by surrendering and releasing its lien against the retainage fund, the surety lost the value of the fund which might otherwise have been used for subrogation, thereby prejudicing the surety and excusing its performance under the bond.

Given the record, the “misperception” of the statute of limitations issue is frivolous.

### **Fox Electric**

Regarding Fox Electric, it is difficult to discern what the Law Firm believes the successor firm did wrong and there is no expert testimony to support such a finding. The truth is that the successor firm did an amazing job concluding the settlement that it did.

What the record, described above in the Counterstatement of the Case does establish, is that Mr. Korpi failed to timely file suit and then did nothing, so that the case was dismissed at a time when the trusts were owed hundreds of thousands of dollars. Then, on December 4, 2004, he told the trustees to turn down a \$281,586.17 offer but did not tell them that the case was dismissed. Ex. 255 consists of trust board minutes from meetings in September and December 2004 and March 2005. The December 13, 2004 minutes from the PSEW Health and Welfare and vacation trust, at page 3 document Mr. Korpi's advice to turn down the offer of settlement.

At page 39 of its brief, the law firm makes the misleading statement that Mr. Korpi "had no duty" to accept the settlement offer because the trustees instructed him to turn it down but the record is clear that it was on Mr. Korpi's advice that the offer was rejected and the trustees were not told that the case had been dismissed because of Mr. Korpi's neglect. It was not the H and W trust that terminated Mr. Korpi that day but the Retirement Annuity Trust. EX 255, IBEW Retirement Annuity trust board meeting minutes, p.3. It was also the day the Trans World account was turned over to Ekman Bohrer which led to Mr.

Korpi's epiphany that he should probably disclose his errors 7 months earlier on that account.

#### **ISSUE 5 - CERTAINTY OF DAMAGES**

The Firm begins by stating at page 40 of its Brief that: "For some of the accounts the trial court looked at what the trusts wrote off and applied an arbitrary 85% factor to establish damages. CP 1331 (FF 32)." The "for some" is, in truth one- Fox Electric and then only as to a portion of the damages. The remainder of the firm's argument is a brief recitation of the little work that Mr. Korpi did and the small amounts that he collected. Mr. Levy identified the standard of care violations and described the sources of recovery.

Mr. Korpi himself attested to the efficacy of collection efforts when he conceded the value of the liens he failed to timely renew in the Trans World case. The Baird Weber damages were the result of failing to properly lien public works claims; CAE failing to get a joint check arrangement and failing to respond to a contractor who offered to pay; Pacific Electric is indefensible - the lawyer failed to determine if there was real estate to secure the promissory note and the trusts gave up a valid Federal Miller Act claim. Each claim was supported.

The burden on the trusts was not scientific certainty. The court's damage awards on the 6 claims are well within the range of the evidence and entirely supportable.

### **ISSUE 6 - SANDY LEVY AUDIT FEES**

The trustees of the PSEW trusts owe fiduciary duties to the beneficiaries and Mr. Korpi was a fiduciary to his client. Once the trustees learned that Mr. Korpi had concealed known errors from them for 7 months, it was their fiduciary responsibility to conduct an audit to determine if there were other losses. The record establishes that the Law Firm agreed and, in fact, encouraged the audit. The Firm also admitted that Mr. Korpi breached his duty of full disclosure, and that the trusts were damaged thereby.

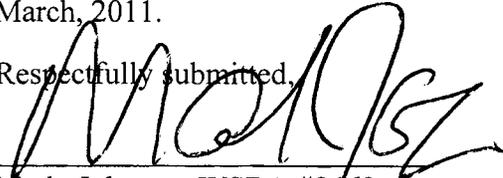
The court acted well within its discretion in compensating the trusts for Sandy Levy's audit fees. None of the sum awarded was for consulting or testifying in the malpractice case and given the amount of work that Mr. Levy did, and the opinions it would have been a waste of trust resources to retain another lawyer to duplicate Mr. Levy's work and to testify in the case.

#### **F. CONCLUSION**

PSEW requests that this court affirm the verdict of the trial court in all respects.

DATED this 17<sup>th</sup> day of March, 2011.

Respectfully submitted,



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