FILED
November 5, 2015
Court of Appeals
Division I
State of Washington

72844-0

No. 72844-0-I

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

GEOFFREY CHISM,

Appellant/Cross-Respondent,

vs.

TRI-STATE CONSTRUCTION, INC., and
LARRY AGOSTINO,

Respondents/Cross-Appellants.

APPELLANT'S REPLY BRIEF/
BRIEF OF CROSS-RESPONDENT

Thomas Breen, WSBA #34574
Lindsay L. Halm, WSBA #37141
Schroeter Goldmark & Bender
810 3rd Avenue, Suite 500
Seattle, WA 98104-1657
(206) 622-8000

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellant/Cross-Respondent Chism

TABLE OF CONTENTS

Page

Table of Authorities ..... iii-vi

A. INTRODUCTION 1

B. RESPONSE TO STATEMENT OF THE CASE 2

(1) Key Undisputed Facts 2

(2) Chism Sought and Received Bonuses for Extraordinary Work 5

(3) Ron's Medical Condition Did Not Deprive Him of the Ability to Negotiate with Chism on Other Chism Bonuses 7

(4) Tri-State Willfully Withheld Chism's Compensation 12

C. ARGUMENT 13

(1) The Trial Court Erred In Overturning the Factual Determinations of the Jury that Tri-State Willfully Withheld Compensation to Chism in the Amount of $750,000 15

(2) Chism Did Not Breach Any Fiduciary Duties to Tri-State As He Did Not Violate the RPCs 27

(a) The Trial Court Properly Found No Duty Under RPC 1.5 35

(b) There Was No Duty or Breach of Duty Under RPC 1.7 39

(c) There Was No Duty Nor Breach of Duty Under RPC 1.8 42

(d) There Was No Breach of RPC 8.4(c).....45

(3) The Trial Court Did Not Abuse its Discretion in Upholding \the Jury's Factual Determination that Tri-State Willfully Withheld Compensation to Chism Within the Meaning of RCW 49.52.070 48

(4) The Trial Court Properly Awarded Prejudgment Interest to Chism 53

(5) The Trial Court Did Not Abuse Its Discretion in Making Its Attorney Fee Award under RCW 49.48.030 and RCW 49.52.070 to Chism 58

D. CONCLUSION.....64

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Bates v. City of Richland, 112 Wn. App. 919, 51 P.3d 816 (2002) 50
Berryman v. Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014) 58
Brandt v. Impero, 1 Wn. App. 678, 463 P.2d 197 (1969) 61
Bright v. Frank Russell Investments, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 6681033 (2015) 63
Cannon v. City of Moses Lake, 35 Wn. App. 120, 663 P.2d 865, *review denied*, 100 Wn.2d 1010 (1983) 51
Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) 58
Durand v. HIMC Corp., 151 Wn. App. 818, 214 P.3d 189 (2009), *review denied*, 168 Wn.2d 1020 (2010) 51
Failla v. Fixture One Corp., 181 Wn.2d 642, 336 P.3d 1112 (2014) 51
Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 111 P.3d 1192 (2005), *review denied*, 156 Wn.2d 1030 (2006) 50, 51, 62
Forbes v. American Building Maintenance, 148 Wn. App. 273, 198 P.3d 1042 (2009), *aff'd in part*, 170 Wn.2d 157, 240 P.3d 790 (2010) 32, 52, 56
Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795 (2000) 23, 24
Hansen v. Rothaus, 107 Wn.2d 468, 730 P.2d 662 (1986) 54, 55, 57
Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) 25
House v. Estate of McCamey, 162 Wn. App. 483, 264 P.3d 253, *review denied*, 173 Wn.2d 1005 (2011) 35
Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994) 63
Humphrey Indus. Ltd. v. Clay Street Assocs., LLC, 176 Wn.2d 662, 295 P.3d 231 (2013) 56
In re Disciplinary Proceedings Against Blauvelt, 115 Wn.2d 735, 801 P.2d 235 (1990) 36
In re Disciplinary Proceedings Against Boelter, 139 Wn.2d 81, 985 P.2d 328 (1999) 46

In re Disciplinary Proceedings Against Dann,
136 Wn.2d 67, 960 P.2d 416 (1998) 46
In re Disciplinary Proceedings Against Haley, 156 Wn.2d 324,
126 P.3d 1262 (2006) 32
In re Disciplinary Proceedings Against Huddleston,
137 Wn.2d 560, 974 P.2d 325 (1999) 46
In re Pers. Restraint of Adams, 178 Wn.2d 417, 309 P.3d 451 (2013) 37
Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett,
146 Wn.2d 29, 42 P.3d 1265 (2002) 60, 62
Jumamil v. Lakeside Casino, LLC, 179 Wn. App. 665,
319 P.3d 868 (2014) 51
Kennedy v. Clausing, 74 Wn.2d 483, 445 P.2d 637 (1968) 19, 26, 27
King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706,
846 P.2d 550 (1993) 59
*King County Fire Protection Dists. No. 16, No. 36 and
No. 40 v. Housing Authority of King County*,
123 Wn.2d 819, 872 P.2d 511 (1994) 30
Lewis v. Estate of Lewis, 45 Wn. App. 387,
725 P.2d 644 (1986) 14
Lillig v. Benton-Dickinson, 105 Wn.2d 653, 717 P.2d 1371 (2002) 51
L.K. Operating, LLC v. Collection Group, LLC, 181 Wn.2d 48,
331 P.3d 1147 (2014) 43, 44, 45, 52
Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998) 59, 62
Martinez v. City of Tacoma, 81 Wn. App. 228,
914 P.2d 86, *review denied*, 130 Wn.2d 1010 (1996) 62
Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006) 63
McConnell v. Mother's Work, Inc., 131 Wn. App. 525,
128 P.3d 128 (2006) 55
Miller v. Kenny, 180 Wn. App. 772, 325 P.3d 272 (2014) 63
Moran v. Stowell, 45 Wn. App. 70, 724 P.2d 396, *review denied*,
107 Wn.2d 1014 (1986) 51
Morgan v. Kingen, 166 Wn.2d 526, 210 P.3d 995 (2011) 51
Nguyen v. City of Seattle, 179 Wn. App. 155,
317 P.3d 518 (2014) 60
Nursing Home Bldg. Corp. v. De Hart, 13 Wn. App. 489,
535 P.2d 137, *review denied*, 86 Wn.2d 1005 (1975) 35
Polygon Northwest Co. v. American Fire Ins. Co.,
143 Wn. App. 753, 189 P.3d 777, *review denied*,
164 Wn.2d 1033 (2008) 55, 56, 57
Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25,
442 P.2d 621 (1968) 54, 55

Schilling v. Radio Holdings, Inc., 140 Wn.2d 291, 961 P.2d 371 (1998) ..... *passim*
Schoonover v. Carpet World, Inc., 91 Wn.2d 173, 588 P.3d 729 (1978) 60, 62
Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 145 P.3d 371 (2006) 55, 57
Scott v. Trans-System, Inc., 148 Wn.2d 701, 64 P.3d 1 (2003) 35
SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 331 P.3d 40 (2014) 14
State v. Carter, 18 Wn.2d 590, 142 P.2d 403 (1943) 50
State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995) 14
Taylor v. Shigaki, 84 Wn. App. 723, 930 P.2d 340, *review denied*, 132 Wn.2d 1009 (1997) 56
TJ Land Co. LLC v. Harley C. Douglass, Inc., 186 Wn. App. 249, 346 P.3d 777, *review denied*, 357 P.3d 666 (2015) 55
Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736, 153 P.3d 186 (2007) 26
Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 754 P.2d 120 (1988) 27
Weiss v. Lonnquist, 173 Wn. App. 344, 293 P.3d 1264, *review denied*, 178 Wn.2d 1025 (2013) 24

Federal Cases

Bertelsen v. Harris, 537 F.3d 1047 (9th Cir. 2008) 27, 32

Other Cases

Nordling v. N. States Power Co., 478 N.W. 2d 498 (Minn. 1991) 34

Statutes

RCW 4.76.030 24
RCW 49.42.070 15
RCW 49.48.030 ..... *passim*
RCW 49.52.070 ..... *passim*

Codes, Rules and Regulations

CR 59(a) 24
RAP 1.2(a) 14
RAP 2.5(a) 54
RAP 10.3(a)(5) 2
RAP 10.3(a)(6) 48
RAP 10.3(g) 14, 58
RAP 18.1(a) 64
RPC 1.13 29
RPC 1.13(a) 29
RPC 1.15A 29
RPC 1.15B 29
RPC 1.5 ..... *passim*
RPC 1.5(a) 16, 35, 37, 56
RPC 1.5(b) 33
RPC 1.7 ..... *passim*
RPC 1.7(a) 41
RPC 1.7(a)(1) 41
RPC 1.8 ..... 28, 43, 45, 64
RPC 1.8(a) ..... *passim*
RPC 1.8(a)(1) 19
RPC 1.8(a)(2) 20
RPC 1.9 41
RPC 4.2 32
RPC 5.4 34
RPC 8.4 ..... 18, 19, 29, 64
RPC 8.4(c) 30, 45, 46, 47

Other Authorities

ABA Formal Opinion 00-418, *Acquiring Ownership in a Client in Connection with Performing Legal Services* (2000) 40, 43
ABA Formal Opinion 11-458, *Changing Fee Arrangements During Representation,* 2011 33
http://www.seattletimes.com/business/microsoft/ microsoft-appoints-general-counsel-brad-smith-as-president/ 38
Restatement (Third) of the Law Governing Lawyers (2000) 28, 35
WSBA Opinion #1045 40
www.yourdictionary.com 37

A. INTRODUCTION

Tri-State Construction, Inc.'s ("Tri-State") brief is remarkable for its misrepresentation of the facts in this case and its effort to torture the law of fiduciary duty and our Rules of Professional Conduct ("RPCs"), and to undercut the fact-finding function of the jury here.

Tri-State tries to glossover the fact that it owes its continued existence to Geoff Chism, who saved it from its disastrous Bear Hydro project and imminent financial ruin. It implies that Chism took advantage of Ron Agostino in negotiating his compensation as a Tri-State general counsel/executive when Ron[1] denied that assertion in his trial testimony and the Tri-State board of directors, including respondent Larry Agostino, were specifically informed about Chism's compensation. It ignores Larry's hardball, bad faith tactics designed to get Chism to accept a smaller amount for his promised compensation.

Tri-State cannot explain away the constitutional and legal affirmities attendant upon the trial court's decision to reducing Chism's compensation, compensation he was promised and fully earned.

By contrast, Tri-State's contention on cross-appeal that its withholding of compensation to Chism was not willful defies the jury's

[1] The Agostinos are referenced hereafter by their first names for clarity.

explicit verdict in this case that Tri-State willfully deprived Chism of promised compensation. The trial court correctly ruled that Chism was entitled to prejudgment interest, a point Tri-State never disputed below. The trial court's fee decision must also stand where Tri-State has not assigned error to any of the trial court's key findings on fees and Chism was entitled his reasonable fees from Tri-State under RCW 49.52.070.

B. RESPONSE TO STATEMENT OF THE CASE

Rather than offer a point-by-point refutation to Tri-State's often erroneous statement of the case that is replete with argument, often unsupported by the record in violation of RAP 10.3(a)(5),[2] Chism relies on the accurate statement of the case in his opening brief and focuses here on undisputed key facts in this appeal and the major mischaracterizations of the record by Tri-State in its brief.

(1) Key Undisputed Facts

As a threshold matter, Tri-State does not dispute that while in private practice, Chism and Tri-State entered into an agreement to pay

[2] Tri-State's statement of the case contains almost no citations to the actual evidence and trial record. Instead, it is replete with citations to the trial court's findings and conclusions. It is the same Tri-State "story" told to the jury. It is telling that not until page 37 of its brief of respondents does Tri-State admit that the jury rejected in its entirety Tri-State's version of events, nor does it appeal the trial court's determination that "substantial evidence" supported the jury's findings and verdict.

Chism a flat fee to handle Tri-State matters except for litigation.[3] The amount paid was for part-time work by Chism, about one and a half hours per day, with no requirement to bill hourly. This arrangement began in 2002. Tri-State also does not dispute that when Chism went in-house and became an employee of Tri-State in 2009, he essentially had the same arrangement. He was to receive comparable pay plus employee medical for the same part-time work commitment. Tri-State does not dispute that when he initially went in-house, the arrangement worked as contemplated.[4]

Tri-State does not dispute that beginning in 2010, Chism's workload dramatically increased. Eventually, instead of a part-time position, Chism worked more than full-time. RP (5/7/15):90, 141-42.

---

[3] Tri-State faults Chism for citing to his declaration (CP 83-108) in support of the facts in his brief. Br. of Resp'ts at 41. Tri-State appealed the summary judgment order issued after the trial court considered the Chism declaration. Thus, any concern about the propriety of the declaration being considered as evidence is moot. In addition, the trial court ruled for purposes of its decision on RPC breach of fiduciary duty issues the parties could rely upon the record in the trial court. CP 2612. Tri-State could not identify any significant differences between Chism's testimony at trial and his testimony in his declaration. To allay any concerns in that regard, attached as an appendix to this brief is Chism's Statement of the Case supplemented with citations to his trial testimony that establishes Chism testified identically in pre-trial proceedings and at trial.

[4] Tri-State never made a claim based upon the compensation to be paid Chism when he went from private practice (on a flat fee/retainer basis for part-time work) to in-house counsel status for essentially the same compensation of $190,000 plus benefits for part-time work. Ms. Barron stated: "We're not making a claim based upon that [negotiating the deal and going in-house]." RP (5/23/14):32-33. The jury had no reason to consider it. Tri-State cannot claim that Chism breached any alleged RPC-based or common law fiduciary duties by going in-house at Tri-State.

This fact is based not only on Chism's testimony, but on testimony of other Tri-State employees. Kristi Middleton, Tri-State's former chief financial officer, testified that Chism worked *seven days a week* on that project and it was not an ordinary part of his job. RP (5/7/14):178-79.

Tri-State president Ron also recognized that the Bear Hydro project in Canada was not ordinary work for Chism. He called the project a "disaster" because the designer "blew the budget" and "The owner was not nice, very hard, ruthless." RP (5/20/14):70. He also testified that when things "got really bad with the ruthless owner," Ron brought Chism into the mix because he needed him. RP (5/20/14):76-77. Ron testified the future of Tri-State was at stake and Chism did whatever he needed to do to save the project and the company; in the end, Chism did exactly what was needed. RP (5/20/14):77.

> Q. And you didn't have any complaints about the work Geoff did on the project?
>
> A. No.

Id.

It is undisputed that Chism began working on the Bear Hydro project in 2010. Problems with the project arose in the spring of 2011 and by October 2011, Tri-State asked Chism to take over as president of TRP,

Tri-State's subsidiary and joint venture handling the project.[5] RP (5/20/14):75. Chism continued in that role until the project problems were resolved in March 2012. RP (5/7/14):180; (5/12/14):149-50.[6] Yet Tri-State's brief, like the findings of fact on which it is premised, pay scant attention to Bear Hydro.[7] That omission does not alter the indisputable facts that Chism saved the company while acting as TRP president and, in doing so, he acted not as legal counsel, but as a *corporate executive*.[8]

(2) Chism Sought and Received Bonuses for Extraordinary Work

Tri-State asserts that Chism's in-house counsel's compensation arrangement with Tri-State was that he would do "whatever it takes" to get the job done, equating that concept with an agreement to work an

---

[5] It is telling that Tri-State even tries to blame Chism for Tri-State becoming involved in Bear Hydro. Br. of Resp'ts at 14-15. Chism had no role in deciding to do the project or how it was bid. That was the province of Ron and other experienced construction managers and bidders at Tri-State; the project was approved by Tri-State's board. RP (5/7/14):167-68.

[6] Contrast Chism's intense work in successfully resolving the Bear Hydro crisis that imperiled the future of the company and the financial well being of the Agostino family with Larry's involvement. He freely admitted he did *nothing*: "I was one of those trusted people, but I was not up on that project [Bear Hydro], if that's what you're getting at." RP (5/22/14):116. He chose to spend half-time at his home in Santa Barbara, California. RP (5/7/14):179. While Ron, Chism, and other Tri-State employees were busy saving the company in Canada, Larry characterized their efforts to brother Tom as having "fun," wanting to appear "important," and using up their retirement funds as they engaged in a "pathetic game." RP (5/22/14) 152-53.

[7] FF 79 does acknowledge that Chism helped Tri-State stay in business, preserved its bonding capacity, and saved $27 million. CP 4935.

[8] Thus, the trial court "disgorged" not just Chism's general counsel compensation, but compensation for FY 2012 when he served as a corporate executive, service over which the trial court had no authority.

unlimited number of hours and change a part-time job into an all consuming full-time position with no need for any change in compensation. Br. of Resp'ts at 11. At trial, Tri-State president Ron refused to support Tri-State's interpretation of the agreement with Chism. As noted above, he, as well as Middleton, recognized the demands of Bear Hydro far exceeded Chism's prior responsibilities as counsel. Moreover, Ron equated doing "whatever it takes" to mean doing what the company asked him to do and getting results. RP (5/20/14):68.

In light of its ever increasing demands on Chism, Tri-State agreed to a change in employee compensation to provide that Chism was eligible for a discretionary bonus beginning in FY 2010.[9] Chism memorialized the arrangement in a September 20, 2010 formal memorandum that stated any bonus was for any effort over the 1.5 hours a day base that had been the basis for Chism's part-time compensation arrangement. Ex. 57. Chism was not required to keep time records, only to give his "best estimate" of the total amount of time spent at the end of the fiscal year. *Id.* Tri-State had the right "to cancel or modify the arrangement at any time." *Id.* No bonus was required to be paid, it was entirely discretionary with Ron: "I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hour a day base." *Id.*

[9] Tri-State's fiscal year ended at the end of September. RP (5/7/14):152.

If Ron found the memo consistent with the discussion, he was to initial it, and give it to Kristi for the company records. Ron did so. *Id.* Ron also provided the September 30 memo and a cover email by Chism that again stated the arrangement could be cancelled or modified at any time, to the other members of the Tri-State board that included Tom and Larry. Ex. 58; RP (5/20/14):34. At the end of the fiscal year, September 30, Chism sent Ron an email with a time estimate over the base amount that he reduced for purposes of considering a bonus. Ex. 9. That email was also forwarded by Ron to Tom and Larry. Ron discussed it with his brothers. RP (5/20/14):35. Ron decided upon a $310,000 bonus. Ex. 11.

As will be noted *infra*, Chism earned other bonuses from Tri-State.

(3) Ron's Medical Condition Did Not Deprive Him of the Ability to Negotiate with Chism on Other Chism Bonuses

Ron testified at trial that his medical condition after the September 2010 memos did not affect his ability to decide right from wrong or fair from unfair. RP (5/20/14):61. He testified he could recall the events of 2010. RP (5/19/14):128. He recalled having an "actual memory" of Ex. 9 (the exhibit the jury was instructed on) at the time and was not confused by it. RP (5/20/14):25. The Tri-State board ratified the bonus compensation arrangement with Chism and the FY 2010 $310,000 bonus

when it approved Ron's acts of the previous year. Ex. 11; RP (5/7/14):163.

Ron gave Chism a bonus of $500,000 for FY 2011. Ron and Chism discussed a FY 2011 bonus on October 20, 2011 right after the close of Tri-State's fiscal year in the car returning from meetings in Canada on Bear Hydro. RP (5/20/14):92. Ron testified that he did not feel pressured or cornered, or that the discussion was in any way inappropriate: "I remember telling Geoff that I appreciated all the work he was doing, and then we talked about compensation..." RP (5/20/14):42. He also testified he was fully aware of the arrangement with Chism: "That I could decide what to pay him there, what would be fair." *Id.* at 45, 88, 96. Ron never testified he felt Chism had taken advantage of him. RP (5/20/14):93.

Tri-State admits that both Tom and Larry found out about the $500,000 bonus from Ron, and that Ron promised Chism the bonus. RP (5/21/14):80. Larry testified that as president of the company, Ron was authorized to bind Tri-State. RP (5/22/14):166.[10] Middleton testified the Tri-State board then decided to change the bonus, reducing it to $400,000

[10] This authority is specified in Tri-State's bylaws. Ex. 153.

on the company ledger, but not telling Chism that it had been done while he was in the midst of the Bear Hydro effort. RP (5/7/14):143-47.[11]

In March 2012, Ron stepped down as president, succeeded by Larry. RP (5/27/14):12. Chism met with Larry on March 28, 2012 to discuss compensation. RP (5/13/14):125. Chism's entire compensation arrangement was modified at that meeting. Tri-State would pay Chism a $750,000 bonus for work performed through that date, including the $500,000 FY 2011 bonus promised by Ron. RP (5/13/14):126-27. Chism wrote a confirming email and memorandum. Exs. 20, 21. Larry disputed an aspect of the agreement in an email response, ex. 22, but he never said the $750,000 amount was incorrect. RP (5/22/14):57, 193. At trial, Larry denied agreeing to pay $750,000 to Chism stated in exhibit 21. Larry summarized the dispute:

> Q. All right. Now, you understand that this is your word or his; it's either what you say or he says; there's no middle ground here?
>
> A. That's right. One of us is a liar.

RP (5/22/14):194. The jury found Tri-State owed $750,000.[12]

---

[11] This was hardly an act of good faith on Tri-State's part.

[12] As noted in his opening brief, Chism's compensation was based on his former hourly rate as Tri-State's outside counsel. While complaining about Chism's hourly rate of $500 an hour, Tri-State independently hired three lawyers at a $500 hourly rate. RP (5/27/14):36-37. Tri-State had already hired another lawyer before the meeting between Larry and Chism on March 28, Greg Russell. CP 2336. Larry claimed Russell was only

The bonuses paid to Chism were not extraordinary for Tri-State. It had a long history of paying bonuses to its employees as Ron testified: "So I guess it was just my calculation of sharing some of the income with them and maintaining my employees." RP (5/20/14):30. In profitable years, the company paid bonuses to many of its staff. *Id.*

Senior executives like the Agostinos were also paid handsome bonuses. In FY 2009, a year Chism received no bonus, Ron, Tom, and Larry each were paid $525,000 above their salaries. RP (5/7/14):153. In FY 2010, the year Chism received a $310,000 bonus (of which the trial court "disgorged" $292,000), each of the Agostinos were paid a $500,000 bonus. *Id.* at 157. Larry testified Ron participated in the $500,000 bonus decision. RP (5/22/14):103. In addition, with Ron's approval, Larry took out a $1 million "loan" from Tri-State to build his house in Santa Barbara. *Id.* at 105-106. In FY 2011, when Ron agreed to pay Chism a bonus for all his work in trying to salvage Tri-State from the Bear Hydro "disaster," Larry never paid back any of the million dollar loan to help company cash flow as it struggled to meet its obligations. *Id.* at 107, 110-11. That was because while letting Chism and Ron handle Bear Hydro, Tri-State officer and corporate treasurer Larry was focused on building his California beach

---

going to advise on "corporate matters," but Russell could have advised on corporate liability for unpaid corporate debts to employees.

house and protecting his personal financial position.[13] Larry did not feel any need to involve himself in the Bear Hydro "disaster" because Ron had Chism and two others to assist him. RP (5/22/14):114, 117.

In the trial court, Larry asserted in his testimony that Ron was "very vulnerable in 2010 and 2011." RP (5/22/14):106. Yet Larry testified he did not have any concerns about Ron when he got a $500,000 bonus and million dollar "loan" in FY 2010. *Id.* at 103, 107. Of the countless decisions Ron made in 2010 and 2010, the *only* ones Tri-State questioned are those relating to Chism's compensation. RP (5/27/14):13-14.[14]

In sum, Ron's condition was not such that his decisions as company president generally or his specific decisions regarding Larry's

---

[13] "Q. And my point here, sir, is the fact that Ron Agostino didn't go to you and say, look, look at, brother, you've got a 2 million plus house in Santa Barbara, how about taking out a million dollar mortgage and giving us the million bucks and we can pay people faster. That wasn't a problem, right? A. Like I said, it would be an unwise business decision. Q. For you it would be an unwise business decision. A. For most people. Q. For you it's better not to give your money to Tri-State, right? A. It's better not to have the chance that the bonding company took it. Q. Yeah. Because that was a real threat, the bonding company was going to come in, right? A. Would you personally put your house up, offer it in there?" RP (5/22/14):112-14.

[14] Tri-State attempts to claim Chism viewed Ron's condition as growing progressively worse in 2011, relying on findings 71-78 and an August 4, 2011 memo Chism wrote to Tri-State's accountant. Br. of Resp'ts at 27-28. Any fair reading of that memo is that Chism was not expressing a view that Ron was incompetent, but that other senior Tri-State management should step-up and help instead of leaving it to Ron, Chism, and a couple of other Tri-State mangers to deal with the Bear Hydro disaster and to help save the family business. Tri-State does admit the memo's purpose was "to provide more support for Ron." *Id.* Doing so would necessarily entail minimizing Tom and Larry's avocations (car collection and Santa Barbara).

loan and bonuses were subject to question. More critically, the Chism bonuses were not Ron's decision alone; the entire Tri-State board, including Larry, knew of and ratified the bonuses.

(4) Tri-State Willfully Withheld Chism's Compensation

Tri-State hopes to persuade this Court that it did not willfully withhold Chism's compensation because it had a "bona fide" dispute with him over his entitlement to bonuses, br. of resp'ts at 61-65, but that assertion is belied by its bad faith conduct, conduct that prompted the jury to find that Tri-State willfully withheld compensation due to Chism.[15]

Perhaps the most damning evidence of Tri-State's willfulness came from Larry, who made the decision not to pay Chism. He acknowledged at trial that Tri-State owed Chism money, but Tri-State's refusal to pay was a *negotiating tactic*. Larry's tactic was not limited to the $750,000 bonus Larry agreed to pay Chism on March 28, 2012 but also involved a retroactive attack on the $310,000 bonus that Chism had earned and had been paid years before. RP (5/22/14):74-75, 81. Larry testified:

> Q. Right. And if you thought you didn't owe him the money, then you wouldn't have anything to negotiate about, would you?
>
> A. That is correct.

[15] At Tri-State's urging, the question of willfully withholding was submitted to the jury, along with Tri-State's "bona fide dispute" defense. CP 4342. The jury found for Chism. The trial court found substantial evidence supported the jury's determination. *Id.*

Q. Okay. And so one of the ways you negotiate is you have this $500,000 number and you turn to Mr. Chism and you say to Mr. Chism, will you take less, and that's one of your strategies, isn't it?

A. That's fair to say.

Q. Yeah. So, you know, you hold back the money. If you hold back the money and keep it from Mr. Chism, maybe, maybe eventually he'll say, God, geez, fine, give me 450,000; that would give you a discount, wouldn't it?

A. That would give us a discount or I thought maybe Geoff would see we're in dire financial straits and that he would give up a little money.

Q. And again, right, and the longer you hold onto it and don't give him what your company, what you said, probably agreed to, the better you might improve your position, right; he may eventually give up?

A. That is one possible solution.

Q. And that's the way you do business, isn't it?

Ms. Barron: Objection. Argumentative.

The Witness: It is in this piece of litigation, yes, in this piece, yes.

Id. at 84-85. Tri-State waited until Chism's last day at work to tell him he would not be paid under the agreement Tri-State had negotiated with him. RP (5/22/14):127. Chism then resigned.

C. ARGUMENT[16]

[16] Tri-State asserts that Chism's opening brief did not preserve his claimed errors for appellate review. Br. of Resp'ts at 40-43. It makes this baseless assertion

predicated upon the misguided belief that Chism needed to discuss each and every finding of fact from which appeal is taken or the assignments or error are abandoned. Tri-State further asserts that Chism was required to discuss how each conclusion of law was not supported by the findings of fact. Were that the legal standard for meaningful appellate review, the opening brief would have had to be hundreds of pages to discuss 129 errors identified by Chism. In making this argument, Tri-State ignores what the Rules of Appellate Procedure and case law provide as to meaningful appellate review.

RAP 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made. This Court will only review a claimed error that is disclosed in a statement of error or clearly disclosed in the associated issue pertaining to it. *Lewis v. Estate of Lewis,* 45 Wn. App. 387, 389, 725 P.2d 644 (1986) (appellate review is allowed when it was disclosed in the associated issue pertaining to it); *State v. Olson,* 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (appellate review is precluded only when an appellant "fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation."). The *Olson* court made clear that the letter and spirit of RAP 1.2(a) controls and any "technical flaws" should not prevent resolution on the merits, and discretion should exercised to reach the merits of the case unless there were "compelling reasons not to do so." *Id.* at 323. *Accord, SentinelC3, Inc. v. Hunt,* 181 Wn.2d 127, n.4, 331 P.3d 40 (2014).

Chism complied with RAP 10.3(g). Chism's opening brief assigned error to the findings and conclusions. Br. of Appellant at 2-12. Moreover, Chism's opening brief stated the "Issues Pertaining to Assignments of Error" with specific reference to each assigned error. *Id.* at 12-13. Of particular significance are Chism's issues 1 and 2.

Issue 1 related to whether there is a breach of fiduciary duty cause of action under the RPCs as a matter of law when a corporation could not establish one by its in-house counsel under the common law. Chism discussed this issue, in his brief at 46-70. Issue 2 addressed whether the trial court could make factual findings under an RPC-based breach of fiduciary claim that contradict actual and implicit factual findings the jury made in rendering its verdict on the legal claims submitted to it. Chism discussed this issue in his brief at 37-46. As that discussion makes clear, Chism's argument is the trial court impermissibly invaded the province of jury and denied Chism's constitutional right to a jury when the trial court, in the guise of exercising its equitable powers, became a second finder of fact and made findings directly contrary to those of the jury. In short, the trial court had no right to substitute its judgment for that of the jury and make the identified findings to which error was assigned and upon which its conclusions are based. Tri-State does not appeal the portion of its renewed CR 50 motion relating to the jury's verdict except as to willful withholding, conceding that substantial evidence supports the jury's verdict.

Tri-State can show no prejudice here. Its brief demonstrates it knew what issues Chism raised. Its procedural argument is a make-weight effort to sidestep the substance of the important issues Chism raised in his opening brief making a contrived argument that this Court should not look at the forest (the impermissible nature of the trial court's findings and conclusions in their entirety), and instead focus on the 129 individual trees.

(1) The Trial Court Erred In Overturning the Factual Determinations of the Jury that Tri-State Willfully Withheld Compensation to Chism in the Amount of $750,000

As Chism noted in his opening brief at 37-51, the trial court erred in invading the province of the jury by effectively overturning factual determinations necessarily made by the jury to establish that Tri-State willfully withheld $750,000 in compensation promised by Tri-State to, and earned by, Chism.

To understand precisely why the trial court's fiduciary duty decisions invaded the fact-finding province of the jury, it is important to note how this case evolved in the trial court. Chism sued Tri-State and Larry on two legal claims: breach of contract and for willfully withholding wages under RCW 49.42.070. CP 1-7, 31-38. They answered, denying the allegations and alleging affirmative defenses and counterclaims. CP 39-54. Those affirmative defenses and counterclaims alleged common law breach of fiduciary duty and breach of fiduciary duty for violation of "Professional Conduct Rules." CP 45-45, 52-53. The contract defense of undue influence was at the heart of their breach of fiduciary duty claim, CP 52, and this blending of undue influence with

breach of fiduciary continued through trial.[17] The jury heard all of Tri-State's evidence[18] relating to breach of fiduciary duty under the rubric of undue influence, an issue the jury decided.[19]

Chism then moved for an order for partial summary judgment on the applicability of RPC 1.5. CP 3849-76. Judge Michael Trickey heard the motion, and granted it, ruling as a matter of law that Chism's status as in house counsel rendered the disgorgement of "fees" based upon alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for Tri-State. He noted that no Washington case supported Tri-State's legal position. CP 606. Tri-State appealed that order. Br. of Resp'ts at 3.[20]

---

[17] For example, Tri-State's counsel stated: "I don't think we can do that [expert] hearing until we've put on our case. I mean our case is going to cover undue influence and fiduciary duty. They're interrelated." RP (5/7/15):16.

[18] After trial, Tri-State asserted neither party could submit additional evidence to the trial court that was not introduced during the jury trial. CP 2612. The court allowed Chism to submit additional evidence, and provided the opportunity to rebut any post-jury trial evidence. As discussed below, Chism presented some evidence. CP 2293-2354. Tri-State presented no additional evidence. As discussed below, expert testimony at hearings on May 16 and 23 related to duty, an issue of law, and these experts provided no factual evidence. The court's decision on fiduciary duty was also to include the record on file with the court. CP 2612.

[19] The trial court dismissed Tri-State's common law breach of fiduciary theory as a matter of law because it could not establish any harm. It has not appealed the dismissal.

[20] In its extensive findings and conclusions, CP 2438-2505, the trial court never specifically applied the factors for a "reasonable" fee in RPC 1.5(a), but the trial court, in fact, made a reasonableness determination in the guise of finding breaches of other RPC provisions, as Tri-State acknowledges: "The trial court found that Chism's proposal for his new bonusing arrangement, including the $310,000 bonus, was unfair and

Chism moved for partial summary judgment below on the other alleged RPC violations under RPC 1.7 and 1.8, CP 615-33, but the motion was denied, as was his motion for reconsideration. CP 1142-50, 1876-79. In doing so, the trial court never articulated the nature of the duty, if any, owed by an in-house counsel under the RPCs in negotiating compensation as an employee with the employer. That was left for trial.

Contrary to Tri-State's claims, it, not Chism, demanded a jury trial. CP 194. At Tri-State's urging, the court determined that the jury would decide the legal claims (Chism's breach of contract and willful withholding claims, and Tri-State's legal defenses including common law breach of fiduciary duty). CP 4342; RP (5/23/14):30. The trial court instructed the jury on the issues, but the jury was not instructed on common law tort of breach of fiduciary duty, a claim that was largely addressed in the context of undue influence, as noted *supra*.

The trial court reserved to itself breach of fiduciary duty arising out of alleged RPC violations. CP 2439. However, in deciding it would hear the RPC-based breach of fiduciary duty claim, the trial court did not specify for the parties what duty, if any, existed under the RPCs for in-house counsel negotiating compensation with an employer, largely

---

unreasonable to Tri-State." Br. of Resp'ts at 25. The trial court found that Chism's $500,000 bonus proposal was neither fair nor reasonable." *Id.* at 31.

ignoring Judge Trickey's earlier RPC 1.5 ruling. It decided to hear expert testimony on the duty issue.[21] Apart from that testimony, the court indicated that it would not consider any other evidence for its RPC-based breach of fiduciary duty decision than the evidence provided to the jury.[22] Tri-State agreed.[23]

However, on appeal, it now implies that the jury was not instructed nor allowed to consider some special obligations of attorneys that exist under the RPCs. Br. of Resp'ts at 62-63.

The trial court record here is clear that not only did Tri-State present all its factual evidence on any alleged breach of fiduciary duty to the jury, the jury was instructed on the law in connection with the Chism's contract claims and Tri-State's defenses in such a fashion as to demonstrate the jury decided no breach of fiduciary duty by Chism to Tri-

---

[21] As to that expert testimony, the court stated: "I'm here to establish whether or not there was a duty as a matter of law." RP (5/16/14):35. Experts did not testify to facts. RP (5/23/14):46-47 ("I am not here to say what the facts are. That's correct.").

[22] Tri-State was allowed to present to the jury *all its factual evidence* regarding breach of fiduciary duty. On appeal, it cannot identify any evidence it desired to present to the jury and was precluded from offering. Although given the opportunity to present more evidence to the court when it was considering the alleged RPC violations, *it presented no new evidence.* In short, the jury heard all the factual evidence Tri-State wanted it to hear regarding its defenses.

[23] When Chism's counsel protested "they don't get a second bite at the apple." RP (5/23/14):30. Tri-State's counsel stated: "That's not what the case law says. They're [common law and RPC] equivalent. You take a look at the [inaudible] case." *Id.* Tri-State's counsel also admitted that there was no difference under RPC 8.4 that prohibits "misrepresentation" or "deceit" between how those terms are used in the ordinary sense and how they relate to attorneys. RP (5/23/14):28.

State occurred here. The jury was appropriately instructed on contract law relating to this dispute. CP 2203-13 (Instructions 11-21). Tri-State did not object to the giving, or failure to give, instructions on that or any other issue. RP (5/29/14):135-45.

Moreover, the jury was instructed on factual matters fully relevant to Tri-State's claims of breach of fiduciary duty. Instruction 10 specifically dealt with the modified compensation agreement in September 2010 allowing Chism to receive bonuses, which for FY 2010 was $310,000. CP 2202. That instruction placed the burden on Chism to prove:

> (1) That Tri-State entered into a contract with him; and
>
> (2) That the terms of the contract were fair and reasonable, free from undue influence, and after a fair and full disclosure of the fact on which it is predicated.

Id.[24]

---

[24] This instruction was based upon the factors set forth in *Kennedy v. Clausing*, 74 Wn.2d 483, 445 P.2d 637 (1968), a case dealing with the circumstances an *attorney* could change the financial terms of the attorney-client relationship during that relationship. Thus, the jury was specifically instructed as to special obligations of attorneys. On each and every point (fair and reasonable; free from undue influence; made after a full and fair disclosure of the facts upon which the contract was made), the jury answered specific interrogatories finding in Chism's favor. Tri-State conceded that terms like "fair and reasonable" and "full and fair disclosure" have their ordinary meaning when applied to attorneys. Full and fair disclosure precludes a finding of "misrepresentation," and requirement of RPC 8.4. "Fair and reasonable" is the principle requirement of RPC 1.8(a)(1). Even without these specific instructions relating to attorneys, Instruction 19 instructed the jury "A duty of good faith and fair dealing is implied in every contract." CP 2211.

In order for the jury to determine if there was a breach of contract, the jury necessarily first had to determine if there was a contract that allowed Chism to obtain a

The jury was also instructed in Instruction 23 (on undue influence) that a contract could be rescinded if undue influence is proved by a person being "unfairly persuaded to enter the contract by a person who either dominated or had a confidential relationship with the party." CP 2215. The jury was instructed attorney-client relationships are confidential relationships. *Id.* The jury was instructed to consider "the availability of independent advice." Given that instruction, the jury was aware of the special role of the attorney-client relationship as it relates to undue influence, and the availability of independent advice implicates whether or not the Tri-State could have obtained the advice of independent counsel, a factor under RPC 1.8(a)(2).

The jury was also instructed in Instruction 24 that undue influence renders a contract voidable, but not void, and that a party could subsequently ratify the contract. CP 2216.

Both undue influence and ratification[25] were submitted to the jury with regard to Chism's wage claims. The jury expressly found by special

---

bonus; thereafter, the jury could determine whether Chism proved his claim for breach of contract for FY 2011 (Q 4 CP 2228) and FY 2012 (Q 9 CP 2229) and, if so, the damages (Q 5 and 10 *Id.*). Thus, mutual modification of the compensation arrangement was before the jury. In Instruction 10, the jury was specifically instructed to determine if Chism had a contract with Tri-State based on events in and around September 2010, whether based on exhibit 9 or otherwise, covering the initial $310,000 bonus. CP 2202. The jury could not have found Chism breached this duty (by misrepresentation, undue influence, or not being fair and reasonable) when it found he had a binding contract with Tri-State that it breached.

[25] The jury was not asked a special interrogatory as to ratification.

interrogatory (Question 7) that Tri-State had not proven undue influence so as to rescind the contract for a $500,000 bonus. CP 2229. The jury by special interrogatories (Questions 9 and 10; CP 2229) found Chism had proven his claim for both the $500,000 and $250,000 bonuses.[26] These were *factual* findings.[27]

Tri-State was able to argue the entirety of its case to the jury. Even though the jury was not instructed on common law breach of fiduciary duty, as noted above, Tri-State equated breach of fiduciary duty with undue influence. It did so in its answer, on summary judgment, and at trial. The trial court let Tri-State argue all of its claims of Ron's vulnerability and Chism's alleged misrepresentations. RP (5/5/14):70, 210 (Tri-State's opening argument to jury).

After the jury rendered its verdict, the trial court conducted its "equitable" proceeding adjudicating the breach of alleged RPC-based fiduciary duties with a remedy of "disgorgement." As noted above, Tri-

---

[26] The jury was not asked a special interrogatory as to when the contract to pay Chism a $500,000 bonus for FY 2011 was entered into by Tri-State, but Chism's testimony and corroborating documentation was that in addition to being promised it by Ron, it was incorporated into the $750,000 bonus promised by Larry in their March 28, 2012 agreement.

[27] The trial court and Tri-State counsel never claimed the jury answers to questions 7, 9, and 10 were "advisory." Tri-State does not appeal the jury's verdict finding breach of contract and damages of $750,000.

State adduced no additional factual evidence.[28] Its experts never testified to facts, but opined only on legal duty.

Tri-State claims that Chism has "reversed" his position on the trial court's role. Br. of Resp'ts at 43-44. That is highly inaccurate. Chism did say below that the determination of Tri-State's breach of fiduciary duty claim based upon RPCs violations was the province of the trial court, but Chism also told the trial court it was not allowed to be a separate fact finder from the jury whose explicit or implied findings inhered in its verdict because to do so would violate Chism's constitutional right to a jury trial. CP 2629-31. Chism submitted proposed findings commensurate with the findings of the jury. CP 2609-42. Thus, it is not accurate to claim, as Tri-State does, that the trial court's findings and conclusions (CP 2438-2505) were "uncontested."

The trial court's post-trial findings explicitly and implicitly contradict the jury's factual findings on the very *same evidence.* By doing so, the trial court granted Tri-State "two bites of the apple." In light of the trial court's findings and conclusions, adopting almost wholesale Tri-State's proposed findings and conclusions, Tri-State then brought a renewed CR 50 motion, CP 2585-98, specifically asserting that there was

[28] The *only* additional factual evidence came from Chism with the attachments to the Halm declaration. CP 2293-2354. The most significant evidence is Larry's deposition where he testified he hired another lawyer, Gregory Russell, to advise him prior to his March 28, 2012 agreement with Chism. CP 2334, 2336.

insufficient evidence to support the jury's findings of enforceable contracts for a $500,000 FY 2011 bonus and a $250,000 FY 2012 bonus, or that Tri-State willfully withheld wages. CP 2587-88. The trial court denied the motion, finding substantial evidence to support all of the jury's findings, including the implied factual findings of the jury based upon the evidence presented at trial. CP 4340-42.[29]

Given this factual background on the genesis for the trial court's fiduciary duty decision that invaded the province of the jury and Chism's argument in his opening brief, Tri-State presents *no law* contradicting the authorities cited by Chism that the trial court lacked authority to substitute its judgment on the facts for that of the jury, *conceding* Chism's argument that a violation of constitutional magnitude has occurred. The *only* case cited by Tri-State relating to the respective role of the court and the jury is *Green v. McAllister,* 103 Wn. App. 452, 14 P.3d 795 (2000). Tri-State's reliance on *Green* is misplaced; *Green* support's Chism's position here. In *Green,* the trial court relied upon its equitable power to take a different view about the value of property in a partnership dispute than the jury did.

[29] Tri-State does not appeal from the trial court's order relating to the contract claims, only that portion relating to willful withholding. Br. of Resp'ts at 4. Thus, procedurally, the jury's verdict is supported by substantial evidence, yet the trial court exhaustively *rejected* all the jury's findings, substituted its own, and penalized Chism $1.1 million for alleged breaches of RPC-based fiduciary duties in the post-trial proceedings.

However, this Court *reversed* the trial court's reduction of the jury's award on breach of contract, holding the trial court had no power to reduce those damages. *Id.* at 461-66. Just as here, the trial court reduced the jury's determination of damages, effectively granting a $1.1 million remittitur, in the name of equity.[30]

In an effort to avoid being bound by the jury, Tri-State claims, as the trial court does in its findings and conclusions, that disgorgement is a discretionary equitable remedy rooted in the judiciary's inherent power to regulate the practice of law and its disciplinary power.[31]

Tri-State attempts to buttress is argument by asserting that below Chism asserted breach of fiduciary duty obligations under the RPCs were properly tried to the court.[32] Chism was correct. Accordingly, he brought

---

[30] In *Green,* this Court specifically considered RCW 4.76.030 and noted remittitur was only available if the jury's verdict resulted from passion and prejudice and there was no substantial evidence to support it. CR 59(a) has similar requirements. Here, the trial court found substantial evidence to support the jury's determination that a contract for a modified compensation scheme with the possibility of bonus was formed, Tri-State made contracts for bonuses, breached those contracts, and damages resulted from the breach. Tri-State does not appeal that determination. Thus, the jury's determinations are final, and, as in *Green*, its determination of damages cannot be disturbed.

[31] In making that argument, Tri-State ignores that the constitutional power to regulate the practice of law is exclusively vested in the Washington Supreme Court which has created a lawyer disciplinary process through its agent, the Washington State Bar Association (ELC Rule 2.1). Indeed, that process was deemed adequate to preclude a civil claim for wrongful termination in violation of public policy in *Weiss v. Lonnquist,* 173 Wn. App. 344, 357-61, 293 P.3d 1264, *review denied*, 178 Wn.2d 1025 (2013).

[32] Tri-State cites to Chism's trial brief before trial began. Br. of Resp'ts at 44-45.

a motion in limine to exclude evidence related to Tri-State's RPC-based claims from the jury. CP 1249-51. When that happened, the trial court had the option of conducting a true bifurcated trial, hearing the evidence, being the fact finder, and adjudicating Tri-State's claims, *but the trial court denied Chism's motion.* CP 1911. It went a different route. It decided the jury would hear all of the evidence relating to breach of fiduciary duty,[33] and ultimately experts (Boerner and Lachman) would testify to the court only on whether a legal duty under the RPCs existed *as a matter of law.*

Having allowed Tri-State to present all evidence it wanted on breach of fiduciary duty (fair and reasonable, free from undue influence and made after full and fair disclosure), the trial then faced the issue of how it was going to instruct the jury. If the trial court had decided to generically instruct the jury on breach of contract so it could later assert it had an independent right to be a second fact finder and to contradict the jury's findings, perhaps it could have done so. But that is not what the trial court did. As noted above, it decided to instruct the jury on the *Kennedy*

---

[33] While the jury did not hear testimony specifically relating to the RPCs, that is nothing unusual. Juries are precluded from hearing about RPCs in a legal malpractice case under *Hizey v. Carpenter,* 119 Wn.2d 251, 830 P.2d 646 (1992), which is premised on the Scope [20] provision of the RPCs that states: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."

factors for a change in a fee agreement after that it had been entered into between the lawyer and client.[34]

Tri-State asserts, as it did below CP 2439, that the jury's answers to Question 1-3 were merely "advisory" so they could not bind the court. That is error. The law is clear[35] that once the issue of an enforceable contract was before the jury on the *legal* claims it was to adjudicate, the trial court is barred from usurping the jury's fact-finding function under article I, § 21 of our Constitution. It is irrelevant if the trial court and the parties thought differently at the time the instructions were given. No appeal was taken from the instructions. The jury's answers to Questions 1 – 3 made explicit its *legal* determination regarding the Tri-State/Chism contract and its breach pursuant to the *Kennedy* factors applicable to lawyers.[36]

---

[34] The trial court actually went beyond *Kennedy*. It determined *Kennedy* was still good law, relied upon by the Supreme Court in *Valley/50th Avenue, LLC v. Stewart,* 159 Wn.2d 736, 153 P.3d 186 (2007). RP (5/28/14):139-40. As in *Valley/50th*, not *Kennedy,* it placed the burden on lawyer Chism to prove the *Kennedy* factors. Inst. 10, CP 2202.

[35] Br. of Appellant at 40-46.

[36] It is telling that the trial court still found an enforceable contract arose, substantial evidence supported the jury's verdict, and that it was bound by other findings of the jury. Tri-State takes no appeal from the jury's interrogatory finding on the contract issues, nor its award of damages, nor the trial court's conclusion that a verdict was properly entered for Chism on breach of contract. Br. of Resp'ts at 3-4.

Tri-State's failure to appeal also allows this Court to affirm the entirety of the jury's verdict without the necessity of addressing the novel RPC claims Tri-State asserted and the trial court embraced. The jury's findings on the *Kennedy* factors resolve any breach of fiduciary duty claim as to the compensation modification and $310,000 FY 2010 bonus.[37] No one can claim Larry was under "undue influence." The jury's damage award, and answer that Tri-State failed to prove undue influence, can be based upon a finding that Larry, not Ron, made an agreement on March 28, 2012 to pay Chism a $750,000 bonus ($500,000 and $250,000) and then had Tri-State breach it.[38]

The jury's factual determinations here should control the outcome in this case.

(2) Chism Did Not Breach Any Fiduciary Duties to Tri-State As He Did Not Violate the RPCs

---

[37] *See Bertelsen v. Harris,* 537 F.3d 1047, 1055 (9th Cir. 2008) (holding no breach of fiduciary duty when the *Kennedy* factors are satisfied, citing *Ward v. Richards & Rossano, Inc.,* 51 Wn. App. 423, 754 P.2d 120 (1988) that imposed the same factors as *Kennedy*).

[38] When Larry negotiated the agreement with Chism in March 2012, he promised to pay him $750,000. Tri-State began performance of that agreement by paying Chism at a rate of $300 per hour going forward. RP (5/12/14):27. Larry was fully aware of the circumstances — he received the September 2010 memos as to the bonus arrangement; he was informed of the $500,000 bonus agreement for FY 2011; he made the agreement to pay the $750,000 bonus that encompassed the FY 2011 bonus Ron promised and $250,000 for FY 2012.

If the Court reaches the RPC issues, Tri-State's argument in regard to ostensible legal duties owed by in-house counsel under the RPCs to their employers negotiating compensation is notable for its lack of authority.[39] This is a case of first impression.

Before turning to the specific RPC provisions deemed by the trial court to have been breached, it is key to consider the special status of in-house counsel. Tri-State's argument is also notable for its over-simplification. It claimed below that because Chism acknowledged that as in-house counsel he was governed by the RPCs, CP 2848, he is bound. Tri-State repeats its argument claiming Chism's position is that the RPC's "don't apply to *him.*" Br. of Resp'ts at 51. Tri-State's argument is not only a distortion of Chism's position, but of the RPCs.

The RPCs are clear that they apply to all lawyers, but make equally clear *they do not all apply to all lawyers in all situations.* Their application varies depending on whether it is a matter involving a lawyer's personal conduct, whether the lawyer is practicing law or not, and if so, the type of practice in which the lawyer is engaging.[40]

---

[39] Tri-State admitted: "TSI has found no case law applying RPC 1.5 to in-house legal counsel." CP 2848. It provides no Washington case authority in regard to the application of RPC 1.7 and 1.8 because there is none. Both experts so testified. RP Boerner (5/16/14):47; Lachman (5/16/14):98.

[40] The RPCs do not apply to Chism's work as a corporate executive. *Restatement (Third) of the Law Governing Lawyers* § 14 cmt. c. The RPCs' preamble

The scope section of the RPCs also gives guidance on their proper interpretation. [14] states: "the Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[41] [15] states: "The Rules presuppose a larger legal context shaping the lawyer's role." [20] provides that a violation of a Rule does not itself give rise to a civil cause of action, nor necessarily warrant discipline.

Any review of the RPCs clearly reveals many rules would have no application at all to in-house counsel, or would apply only in part.[42] The only rule with universal application is RPC 8.4.

Chism properly raised the issue of applicability of certain rules to in-house contract. That is how the RPCs were designed. Tri-State's

---

and scope [3] make clear that some rules only apply to third party neutrals and some "that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. Washington revision [4] makes clear the core duties in "all professional functions" are competence, diligence, communication, and confidentiality. None of those are implicated here.

[41] In so defining the scope of the RPCs, our Supreme Court emphasized the importance of the rules as "guidance." "The Rules are designed to provide guidance for lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." *Id.*

[42] RPC 1.15A and B relating to trust accounts are not applicable. Most of the rules in Title 3 only apply if the in-house lawyer is involved in litigation. Rule 5.4 relating to professional independence is largely inapplicable since it relates to nonlawyer ownership of law firms. The Rules in Title 7 "Information About Legal Services" are by-and-large inapplicable to in-house counsel since they do not advertise, solicit business, communicate specialties, or have firm letterheads. One rule has particular important to in-house counsel: RPC 1.13 Organization as Client. RPC 1.13(a) makes clear who the client is. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

mantra that if a party is subject to the RPCs, all rules apply in every situation is preposterous and rejected by the express language of the RPCs themselves.

The trial court found Chism owed duties to Tri-State under RPC 1.7 (conflicts of interest) and RPC 1.8(a) – (business transaction with client). Although it found breaches of RPC 8.4(c), those findings are inextricably bound with its findings and conclusions related to RPCs 1.7 and 1.8(a), and also directly contrary to what the jury found.

The trial constructed the concept of Chism's putative duty to Tri-State regarding compensation out of thin air. On summary judgment and at the beginning of trial, the trial court did not articulate the duty under the RPCs or common law in regard to negotiating a change in compensation by in-house counsel. No case authority supports such a duty. No ethics opinions or other secondary sources do not do so either. Only Tri-State's expert David Boerner believed such a duty to exist,[43] albeit with no basis for doing so.

---

[43] Boerner's legal conclusion is suspect. First, experts may not testify to legal conclusions. *King County Fire Protection Dists. No. 16, No. 36 and No. 40 v. Housing Authority of King County,* 123 Wn.2d 819, 826, 872 P.2d 511 (1994). That is the province of the courts. Second, in a legal career that has spanned half a century, Boerner worked two years in private practice, and never as an in-house counsel. RP (5/16/14):10-11. A law professor since 1981, Boerner has not taught professional responsibility in the last several years. *Id.* at 10. When he came up with his "opinions" on duty prior to his deposition, he had spent no more than 1.5 hours on the case, and did not do extensive research on the issue. *Id.* at 44. Nor did he consult any in-house lawyers before reaching his conclusions; he did not consult any corporations that employ in-house lawyers, he did

Under the specific rules, there is no duty arising under the RPCs for in-house counsel's compensation negotiations. It is undisputed, however, that such a duty, if it exists, could not be articulated by two Superior Court judges, and the trial court required two days of testimony on legal issues from experts to craft it. After it did so, the trial court then penalized Chism $1.1 million for violating duties *that had never before been articulated anywhere*. This makes a mockery of the RPCs principal purpose of providing "guidance" to lawyers. If it takes two days of expert testimony and copious briefing and argument to unearth some heretofore never articulated duty in a case of first impression, then no lawyer could know beforehand what was the duty was the lawyer was called upon to

---

not research authority from other states when he discovered Washington had no decisions on the matter; he did not review any law review articles or ethics opinions, he did not read Ron's deposition, only Larry's. He testified he was not aware of any in-house lawyer doing what Boerner suggested was their legal duty. *Id.* at 50-51. The underpinnings of Boerner's opinions on duty, adopted by the trial court, are:

> Q. Dave Boerner on principles governing lawyer-client relationships?
>
> A. That's why I'm here.

Id. at 65.

Contrast Boerner's approach with that of Chism's expert, Art Lachman, who has extensive experience in private practice, authored part of *The Law of Lawyering in Washington,* researched ethics opinions, taught professional responsibility at the UW and who actually sought out information from the Association of Corporate Counsel and a practicing in-house lawyer. RP (5/16/14):91-92, 97. Lachman found there was no duty under RPC 1.7 and 1.8(a) in regard to negotiating compensation.

honor. Washington law does not countenance such a result, even in discipline.[44]

Imposing a sanction like disgorgement of compensation earned where there has been no prior articulation of a duty is an abuse of discretion. Even if RPC duties are ultimately found to exist as a matter of law, Tri-State never suffered any "harm."

Additionally, no disgorgement is merited here where Tri-State never criticized the quality of Chism's work or his spectacular result in Bear Hydro that saved the company. His services had already been rendered when Tri-State made its discretionary bonus decisions. Washington law further recognizes that even when there has been a breach of fiduciary duty, no disgorgement is required or should be when the client has received the benefit of quality results obtained by the lawyer. *Forbes v. American Building Maintenance,* 148 Wn. App. 273, 198 P.3d 1042 (2009), *aff'd in part,* 170 Wn.2d 157, 240 P.3d 790 (2010); *Bertelsen, supra.*

---

[44] *See In re Disciplinary Proceeding Against Haley,* 156 Wn.2d 324, 338-39, 126 P.3d 1262 (2006) holding that interpretation of RPC 4.2 would apply "prospectively only" where the Court had not "previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question." The only WSBA opinion remotely on point, Opinion #1045, involved a lawyer taking stock in a client corporation as part of compensation when becoming in-house counsel. The opinion found it was not a business transaction with a client, finding the dealings to be at arm's length. It supports Chism's position, not Tri-State's.

In addition to oversimplifying the RPCs, Tri-State argues that nothing changed in regard to the fiduciary duties owed by Chism when he went from private practice to in-house. Tri-State is factually and legally wrong. The amount of time he spent working *radically increased* from a part-time position to unrelenting full time involvement as TRP president in working to salvage Tri-State from ruin stemming from Bear Hydro. He was corporate officer as the president of TRP, not a practicing lawyer.

The RPCs do not govern compensation negotiations for lawyer employees. Even if they did, while midstream changes in fee arrangements for a private practice engagement are specially scrutinized, they are not prohibited under the common law or the RPCs. RPC 1.5(b) provides: "Any changes in the basis or rate of the fee or expenses shall also be communicated." Thus, private practice changes in fee agreements are clearly contemplated by the Rules. *Accord,* ABA Formal Opinion 11-458, *Changing Fee Arrangements During Representation,* 2011. ABA Opinion 11-458 opines that changes in circumstances "occurring after the client-lawyer relationship was formed may cause the client, the lawyer, or both, to seek to revisit the fee arrangement." If change in circumstance is a permissible basis to allow a fee agreement modification for private practitioners, even in light of the reasons why they are given special

scrutiny, then change of circumstances is clearly allowable for in-house counsel in the give-and-take of the corporate employment relationship.

Moreover, the law makes vital distinctions between employees, including in-house lawyers, and outside counsel. Tort law, contract law, and a variety of statutory schemes, including willfully withholding wages present here, whistleblower laws, and anti-discrimination laws apply to in-house counsel. Washington employment protections are liberally construed to "protect employee wages and assure payment. *See Schilling v. Radio Holdings, Inc.*, 140 Wn.2d 291, 300, 961 P.2d 371 (1998).

Most significantly, an employer's *discretionary* decision to award a bonus, increase an employees' compensation, or alter an employee's fringe benefits is simply not analogous to an outside lawyer changing a fee agreement to his or her advantage in the middle of a representation. *In-house counsel are different.* Unlike private practice clients, corporations have a much greater ability to protect themselves. They have control.[45] Moreover, in-house counsel perform functions beyond legal services. The RPCs recognize that.[46] Here, Chism as a corporate officer, especially as

---

[45] RP (5/16/14):8-9.

[46] RPC 5.4, on the professional independence of a lawyer, precludes any ownership by a nonlawyer in a law firm and precludes a nonlawyer to direct or control the professional judgment of a lawyer. Yet in-house counsel, as here, report to, and are supervised by, nonlawyers. In *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 501 (Minn. 1991), the Minnesota Supreme Court noted that on certain matters, an in-house

TRP president and the $250,000 FY 2012 bonus for successfully wrapping up the Bear Hydro disaster, did not perform simply lawyer duties.

(a) The Trial Court Properly Found No Duty Under RPC 1.5

In its cross-appeal, Tri-State asserts that Chism had a duty under RPC 1.5(a) not to "make an agreement for, charge, or collect an unreasonable fee. Br. of Resp'ts at 67-71. Tri-State offers no authority that Judge Trickey committed error when he ruled as a matter of law that there is no case law supporting Tri-State's position; it cannot cite a *single case* applying RPC 1.5(a) to in-house counsel's compensation negotiations.[47] Instead, Tri-State only offers its usual bald assertion that nothing had changed from when Chism was in private practice and his bonus was exclusively based in hourly billings. Tri-State even claims Chism was only a "nominal" employee. *Id.* at 68. True to course, Tri-

---

lawyer is "like any other corporate employee at the executive level ...His employer controls the hours he works, the salary and benefits he receives, and the work to which he is assigned." The *Restatement (Third) of the Law Governing Lawyers*, §37 (2000), cmt. E ("Employers, moreover, are often in a better position to protect themselves against misconduct of their lawyer-employees through supervision and other means." This Court in *Nursing Home Bldg. Corp. v. De Hart,* 13 Wn. App. 489, 498, 535 P.2d 137, *review denied,* 86 Wn.2d 1005 (1975) indicates that courts should be reluctant to interfere with internal management of corporations and should generally refuse to substitute their judgment for that of directors. *Accord, Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003).

[47] This Court may presume there is no such authority given Tri-State's failure to cite authority. *House v. Estate of McCamey*, 162 Wn. App. 483, 492, 264 P.3d 253, *review denied,* 173 Wn.2d 1005 (2011).

State ignores that Chism was formally employed, served as the president of the TRP joint venture, his duties had greatly expanded, and the agreed structure was not one requiring meticulous time-keeping as is required in private practice, but allowed "estimates" of time spent, which Ron could use in his discretion regarding a bonus.[48] Moreover, there is no doubt Ron thought he was evaluating Chism's performance, in addition to hours spent. "I remember telling Geoff that I appreciated all the work he was doing." RP (5/20/14):42. "That I would decide what to pay him there, what would be fair." *Id.* at 45.

In addition to providing no authority for the unprecedented expansion of legal duty Tri-State seeks, it offers no analysis of Rule 1.5 and why it should apply to in-house counsel. The title of the Rule is "Fees." The reasonable requirement of subsection (a) speaks of fees. There was no evidence submitted by Tri-State at trial that in-house counsel or the corporations they work for thought in-house counsel charged their employers "fees." Employee compensation is simply not a fee.[49]

---

[48] Chism greatly discounted hours, removing any concern his estimate included time spent doing more mundane tasks usually performed by others in private practice.

[49] When interpreting the meaning of any RPC, courts must apply settled principles of statutory construction. *In re Disciplinary Proceeding Against Blauvelt,* 115 Wn.2d 735, 741, 801 P.2d 235 (1990). Words are given their ordinary meaning as set forth in a dictionary. *Id.* The goal is to give effect to the intent behind the rule, which is

In addition, the balance of Rule 1.5 demonstrates it is inapplicable to in-house counsel. An in-house counsel does not define the "scope of representation" and the "fee" related to it under Subsection (b). The corporate client decides scope and compensation. In-house counsel do not charge their clients contingent fees as discussed in Subsections (c) and (d),[50] split fees between lawyers in different firms or with a lawyer referral service provided for in Subsection (e), and do not maintain trust accounts for "advance fee deposits," charge retainers, or have flat fee agreements as contemplated in Subsection (f). In short, every other provision of RPC 1.5 is inapplicable to in-house counsel. That, along with the use of the word "fee" clearly indicates the rule is not applicable to in-house counsel.

Moreover, there are compelling policy reasons not to make RPC 1.5 applicable to in-house counsel. Companies themselves are much better placed to determine what is appropriate compensation. The factors contained in RPC 1.5(a) relate to evaluating fees in the normal context, particularly litigation. Courts have expertise in that regard. They have *no expertise* in evaluating executive pay which is what is implicated here.

---

discerned from the plain language of the rule at issue in the context of the RPCs as a whole. *In re Pers. Restraint of Adams,* 178 Wn.2d 417, 423, 309 P.3d 451 (2013). Under no stretch of the language in Rule 1.5(a) is employee compensation a fee. A fee is a "charge for a professional service" according to www.yourdictionary.com.

[50] Chism's bonus arrangement was contingent only in the sense that whether he received anything was entirely discretionary.

Tri-State's position, if adopted, would allow the courts to retroactively decide whether a corporate executive's compensation was "unreasonable" merely because he or she was a lawyer.[51] Adopting Tri-State's position and applying RPC 1.5 to in-house counsel could open a Pandora's box allowing disgruntled shareholders to sue over corporate compensation decisions. Retroactive application was embraced by the trial court here. It reached back four years to disgorge almost the entirety of the FY 2010 bonus that had been paid to Chism. The trial court's findings and conclusions open the door to second guessing,

The RPCs also provide no standards upon which a reasonableness determination in the compensation context can be properly made. The trial court certainly had no meaningful methodology when it made its impermissible determinations that Chism's compensation was "unreasonable."[52]

---

[51] Microsoft recently announced that Brad Smith, its general counsel, would also become Microsoft president. http://www.seattletimes.com/business/microsoft/microsoft-appoints-general-counsel-brad-smith-as-president/. Tri-State's position is that courts should be able to retroactively decide the Microsoft's president's compensation was "unreasonable."

[52] The only evidence the trial court received from was a headhunter's testimony that based upon in-house counsel "market surveys" Chism's compensation was too high. RP (5/28/14):83, 100. That is akin to saying that a market survey of lawyers in private practice establishes that an effective plaintiff personal injuries attorney or a partner at a large law firm makes too much money. These surveys also did not consider whether in-house received stock options or other types equity compensation. *Id.* at 134-35. Even headhunter Kamisar testified that a significant factor to be considered was what other

Most striking is the lack of significance given to the fact that Chism's work saved Tri-State, the Agostinos' future income from the company, and at least $27 million.[53] If RPC 1.5 is applicable, a factor is "(4) the amount involved and the results obtained." If the Tri-State position is adopted, courts will be required to delve into a determination of countless matters involving in-house lawyers and to make reasonableness decisions about base compensation, fringe benefits, and bonuses they are ill-equipped to make.[54]

The trial court's order that RPC 1.5 did not apply here was correct.

(b) There Was No Duty or Breach of Duty Under RPC 1.7

Tri-State spends little time in its brief addressing RPC 1.7., br. of resp'ts at 53-55, and cites no authority in connection with its argument. RPC 1.7 deals with conflict of interest. Tri-State offers no support for its contention that the negotiation of compensation by in-house counsel is a conflict of interest with the corporation. It ignores that what is involved

---

corporate executives were being paid. *Id.* at 88. What Chism was paid clearly fell into the same range as the other Tri-State executives. Yet that was essentially ignored.

[53] Amended FF 79; CP 4935.

[54] Applying RPC 1.5 to in-house counsel would also create an unnecessary morass for in-house counsel and their employees. When should in-house counsel know when their compensation is unreasonable? What procedures must apply to compensation negotiations? How is the determination of reasonable compensation to be made? The application of RPC 1.5 and the other claimed RPC breaches cannot be limited to the facts of this case.

here is *cash* compensation that differs from other types of compensation such as receiving stock.

Tri-State, like the trial court, accepts the notion that there is a inherent conflict of interest or "adversity" because employees like to make more money and companies want to pay them as little as possible. While that may be a general theoretical proposition underlying capitalism, it is not applicable to all business enterprises.[55]

Even in the area of obtaining stock ownership in an enterprise, the ABA determined:

> A lawyer's representation of a corporation in which she owns stock creates no inherent conflict of interest under Rule 1.7. Indeed, management's role primarily is to enhance the value for the stockholders. Thus, the lawyer's legal services in assisting management usually will be consistent with the lawyer's stock ownership.

ABA Formal Opinion 00-418, *Acquiring Ownership in a Client in Connection with Performing Legal Services* (2000) at 9. *Accord* WSBA Opinion #1045.

---

[55] Walmart, for example, is said to minimize employee compensation; Costco does not. A company can determine that its business model is best served by having satisfied employees who stay long term (avoiding turnover and its attendant costs). That is how Tri-State operated with its bonus structure. A company can also determine that an employee is performing excellent service, is saving the enterprise, is vital to company operations, and those efforts should be recognized by providing excellent pay even in a time of economic distress. In such a situation, as is present here, the interests of the employer and employee compliment each other and are not adverse.

The language of RPC 1.7 precludes a finding of conflict. RPC 1.7(a)(1) defines a concurrent conflict interest when "the representation of one client will be *directly* adverse to another client." The rule requires more than just some adversity. It does not even adopt "material" adversity, a concept applied to former clients under RPC 1.9. It requires "direct" adversity and reaching an agreement as to a compensation level and continuing exemplary service to the company is hardly "directly" adverse to Tri-State's position.

In addition, there is no evidence Chism, whose subjective belief controls, ever thought he was engaged in a representation with himself as a "client" in discussing compensation with his boss. There is no evidence that anyone at Tri-State thought that either. But if Tri-State's interpretation is adopted, then every in-house counsel will have a "conflict of interest" as it relates to compensation discussions.[56]

Tri-State then tries to conjure a duty under RPC 1.7(a) by claiming Chism's representation of Tri-State was somehow "materially limited" by his own personal interest. It cannot point to *any* material limitation in Chism's work. He did an exemplary job representing Tri-State, a fact Tri-

[56] Boerner tried to eschew such a result by coming up with some "sliding scale" that at some undefined point the amount of the bonus triggers some conflict duty. RP (5/16/14):64. Exactly where that line should be drawn, or where any future in-house counsel would no where it was, was not articulated by that academic. As Lachman testified, such a sliding scale was just not workable. RP (5/16/14):14.

State does not contest. Tri-State suffered no harm from his representation, a finding Tri-State does not appeal. Moreover, when bonuses were discussed, his work for the prior year had been completed. Thus, there was no limitation, material or otherwise, of his representation.

Tri-State's argument is essentially that Chism was "representing" Tri-State in negotiating his compensation. Yet no evidence supports such a proposition, and neither Ron nor Larry so testified. No violation of RPC 1.7 was present here.

(c) There Was No Duty Nor Breach of Duty Under RPC 1.8

In its effort to make RPC 1.8(a) applicable to in-house counsel compensation negotiations, Tri-State again ignores the plain language and purpose of that rule in making its abbreviated argument on it. Br. of Resp'ts at 55-57. For private practitioners who have "fee agreements," the rule does not apply to ordinary fee agreements. Comment [1]. Here, the rule only applies, as Tri-State concedes,[57] if the lawyer "obtains a pecuniary interest adverse to the client." But *cash* compensation is not some "pecuniary interest" like a deed of trust to secure legal fees the rule seeks to prevent. Cash compensation is qualitatively different than taking stock, other equity positions, or obtaining rights over client properties.

[57] Br. of Resp'ts at 55, bolded section.

The reason why is that a cash payment does not enmesh a lawyer in a client's on-going financial affairs.[58]

Tri-State tries to expand the language of RPC 1.8 to be an all-encompassing, nebulous concept embracing in-house counsel compensation. Taken at face value, Tri-State's view is that any payment to a lawyer is a pecuniary interest and every lawyer who receives compensation, be it a salary, fringe benefits, or a bonus, violates RPC 1.8. Yet a plain reading of RPC 1.8, common sense, and the law do not support such an extreme position.

Tri-State cites to *L.K. Operating, LLC v. Collection Group, LLC,* 181 Wn.2d 48, 331 P.3d 1147 (2014), reading far too much into the opinion. Far from vitiating rule language, the Supreme Court re-affirmed normal principles of RPC construction. *Id.* at 75. The case also involved a unique set of facts with two separate transactions, one involving two nonlawyer entities in a joint venture, and the other an agreement arranging for the provision of legal services. Thus, the Supreme Court made its holding on the scope of RPC 1.8(a) and what was a business transaction

[58] For instance, taking an ownership interest, although not an inherent conflict, can lead to situations where the lawyer's personal interest can diverge from a client or cloud their independent professional judgment. For those reasons, the ABA opined compliance with Rule 1.8(a) is required. ABA Formal Opinion 00-418. Thereafter, the ABA changed its Model RPC 1.8(a) to cover lawyers taking "an interest in a client's business or other nonmonetary property." The Washington Supreme Court adopted the change in Comment [1] in 2006. Thus, the Rule is clear that it is concerned with "nonmonetary" compensation, not cash payments that are made and completed.

"under the particular factual circumstances presented." *Id.* at 78. The Court stated it was confronted with "an unusually convoluted set of facts." *Id.* at 92. It went out of its way to stress it was not adopting some all encompassing rule, as Tri-State seeks here. It grounded its opinion not only in the unique facts of the case, but it determined that voiding a contract for an RPC 1.8(a) violation is only allowed when public policy is violated:

> We explicitly recognize that a contract is not automatically unenforceable based solely on the fact that it has some connection to some RPC violation. Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public – the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney discipline proceedings. It would also ignore the clear admonishment that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. Model Rules, Scope, para. 20.

Id. at 88.

Here, Tri-State claims that the trial court was allowed to disgorge "fees" in the exercise of a disciplinary function. Br. of Resp'ts at 47. Yet the exercise of this "disciplinary function" was expressly disavowed by the *L.K. Operating* court. The public was not harmed here. Tri-State was not harmed. Public policy is not implicated, allowing modification of Chism's promised bonuses awarded him by the jury.

The trial court undertook an indirect reasonableness determination and concocted duties never before articulated; it used the ostensible violations of its newly found RPC duties to overrule the jury's determinations. This is exactly the subversion of the RPCs the Supreme Court warned against in *L.K. Operating.*[59]

Moreover, public policy would be ill served by applying in-house compensation decision to RPC 1.8(a) for the reasons discussed above. Any monetary compensation agreement could be deemed a "business transaction" with the client. So too obtaining a change in employee benefits. Worse, no in-house counsel would have clear guidance about where the line must be drawn in regard to the application of RPC 1.8(a).[60]

Chism did not violate RPC 1.8.

(d) There Was No Breach of RPC 8.4(c)

---

[59] Tri-State also claims expert Lachman predicted the application of RPC 1.8(a) here by the result in *L.K. Operating* in his treatise *The Law of Lawyering Washington,* article. Br. of Resp'ts at 56. As Lachman testified, in-house compensation is not fees and thus do not result in fee agreements. RP (5/16/14):110.

[60] Would the in-house lawyer always have to advise of the desirability of obtaining independent counsel? Boerner was nebulous on that subject. When asked if there is a specific duty in all cases to advise to seek independent counsel, he replied: "Not necessarily to seek independent counsel." RP (5/23/14):78. Thus, in-house counsel would have no way of knowing when independent counsel should be advised or was necessary and could be subject to second guessing if they did not follow all of the strictures of RPC 1.8(a), just like Chism has. The irony here is that when Chism negotiated compensation with Larry in 2012, Larry had already hired outside counsel for Tri-State. There was *no* evidence that independent counsel would not have recommended approval of bonuses to a key company executive saving the company.

Without citation of any authority, Tri-State claims there was been gross misrepresentation by Chism in regard to his employment relationships with Tri-State. Br. of Resp'ts at 57-58. The jury heard that contention, considered it, and rejected it. It specifically found to the contrary in regard to "unfair persuasion" relating to the $500,000 bonus. CP 2215, 2229. Accordingly, the jury's findings preclude contrary findings by the trial court under RPC 8.4(c).

Tri-State claims in response that Chism failed to discuss each individual conclusion (60-67, CP 2494-97) relating to RPC 8.4(c). Br. of Resp'ts at 58. Those conclusions demonstrate how far afield the trial court went in its zeal to countermand the jury. The trial court blatantly found Chism violated his duty under the "common law" when the issue was never before the court. The conclusions, like the findings on which they are based, are essentially an exercise in the trial court's nit-picking and second-guessing of the jury's decision.[61]

Chism had dealt with Ron regarding his compensation for twenty years. Ron was a sophisticated client who knew what arrangements he

---

[61] The trial court relied on disciplinary cases like *In re Disciplinary Proceedings Against Boelter,* 139 Wn.2d 81, 985 P.2d 328 (1999); *In re Disciplinary Proceedings Against Huddleston*, 137 Wn.2d 560, 974 P.2d 325 (1999); *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998), CP 2494-95, where the WSBA proved by the higher burden of proof attendant upon bar discipline that the attorney engaged in deliberately deceitful or fraudulent conduct. Tri-State did not establish that Chism engaged in deliberately deceitful or fraudulent conduct and certainly not by such a burden of proof.

had made on behalf of Tri-State for Chism's services. The findings and conclusions set up straw men. There is no significance if the compensation arrangement was set up eight years prior to Chism's 2010 memo as distinct from ten years ago, or that the bonus arrangement was a little over a year ago, as distinct from two years ago? None. Every misstatement is not a misrepresentation. Principles of materiality apply. Ron was aware Chism did not keep time records and was basing his information on "estimates." That was a significant part of the agreement. Ron had not received an hourly billing from Chism for non-litigation work since 2002. Larry had received the memos outlining Chism's change in compensation and the 2010 bonus. The memos were in the company records and available to him. He had discussed it with Ron. He was specifically aware of the promise to pay $500,000 because he had a hand in secretly changing the company books to make it $400,000 and not tell Chism. Yet, according to the trial court, it was Chism who was guilty of misrepresentation and violated his fiduciary duties by not telling Larry what he already knew, that bonuses were discretionary.

The trial court's findings and conclusions relating to a violation of RPC 8.4(c) are unsupported.

(3) The Trial Court Did Not Abuse its Discretion in Upholding the Jury's Factual Determination that Tri-State Willfully Withheld Compensation to Chism Within the Meaning of RCW 49.52.070[62]

Completely *ignoring* the jury's express determination that Tri-State willfully withheld compensation to Chism, a finding supported by *ample* evidence,[63] and the trial court's order denying its motion for judgment as a matter of law,[64] Tri-State argues in its brief at 58-65 that this Court should

---

[62] Chism argued in his opening brief at 70-71 that even if the trial court was correct that his compensation must be reduced due to alleged breaches of fiduciary duty, the trial court miscalculated the double damages award under RCW 49.52.070. The trial court should have doubled the full amount Tri-State deliberately withheld from Chism, not the net amount. Tri-State *nowhere* answers this argument in its brief, thereby *conceding* it. RAP 10.3(a)(6) (argument must include citations of authority and references to the record). Any belated argument on this issue by Tri-State on reply should be disregarded.

[63] *See* Br. of Appellant at 21-28. As noted *supra*, Tri-State officers, including the Agostinos, received bonuses. Larry received a $1 million loan for his personal California home while Chism was saving the company in the Bear Hydro debacle. He secretly cut Chism's bonuses while telling him to his face that they would be paid, and then reneged on that promise to Chism.

[64] The trial court specifically stated in that order:

> Defendants other primary argument is that there was insufficient evidence to allow the jury to find that Defendants willfully withheld Plaintiff's wages within the meaning of RCW 49.52.050. Again, Plaintiff points to evidence that there was no bona fide dispute over the existence of an obligation to pay him those wages at the time Tri-State made the decision to withhold those wages. Tri-State entered into two enforceable contracts to pay Plaintiff $500,000 and $250,000 respectively. Even Tri-State's current president testified that Tri-State owed Plaintiff some amount; he was concerned Tri-State's cash position would not allow for full payment and he wanted to negotiate payment of less than the full $750,000. Plaintiff also argues persuasively that Defendants sought to have this question decided by the jury, which it did. Finally, Plaintiff contends correctly that the equitable and RPC claims this Court determined are not defenses to a determination of willfulness under RCW 49.52.070.

hold that the trial court's reduction in the jury's award on fiduciary duty grounds compels the vacation of the trial court's award of double damages under RCW 49.52.070. Tri-State should not be rewarded for its deliberate, inequitable effort to withhold compensation to Geoff Chism, an effort the jury recognized.

First, there was no "bona fide" dispute within the meaning of RCW 49.52.070 because, as explained in Chism's opening brief at 46-70 and *supra*, the trial court erred in reducing the jury's award to Chism where Chism breached no fiduciary duty to Tri-State.

Second, even assuming that a reduction in the jury award was merited (and it was not), Tri-State fails to establish that a bona fide dispute was present within the meaning of the cases interpreting the bona fide dispute provision of RCW 49.52.070.

Case law addressing the existence of a bona fide dispute within the statute's meaning demonstrates that this exception must be *narrowly* construed because it subtracts from the overarching reason for claims under RCW 49.52.070 — the protection of employee wages and the

---

CP 4341-42. Tri-State assigned error in only a limited fashion to the denial of its CR 50 motion, not referencing the trial court's ruling on substantial evidence. Br. of Resp'ts at 4. Consequently, it is the law of this case that substantial evidence supported the jury's willfulness conclusion.

assurance that employers will pay them.[65] The Supreme Court in *Schilling*, 136 Wn.2d at 157-59, carefully delineated that the statute must be liberally construed in favor of employees to effectuate its intent. The Court noted with approval at 159 the articulation of the statute's purpose in *State v. Carter*, 18 Wn.2d 590, 621, 142 P.2d 403 (1943):

> [T]he fundamental purpose of the legislation, as expressed in both the title and body of the act, is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. The act is thus primarily a protective measure, rather than a strictly corrupt practices statute. In other words, the aim or purpose of the act is to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and further, to see that the employee is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages.

The *Schilling* court articulated a broad conception of willfulness equating it with volitional conduct. *Id.* at 160. That court also discussed the bona fide dispute exception to the double damages provision and declined to adopt a "financial inability" exception the Legislature had not specifically adopted. *Id.* at 164-65.

---

[65] Any exception to RCW 49.52.070's double damage provision should be narrowly construed, as are any exceptions to the statute providing for recovery of fees for refusal to pay wages. RCW 49.48.030. *See Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005), *review denied,* 156 Wn.2d 1030 (2006); *Bates v. City of Richland*, 112 Wn. App. 919, 939, 51 P.3d 816 (2002).

At its core, RCW 49.52.070 is a statute that recognizes employers should not be unjustly enriched at the expense of their employees when they deliberately or in bad faith refuse to pay compensation due such employees. *E.g., Flower, supra* at 34-37 (failure to pay promised bonuses because federal law preempted RCW 49.52.070 not "fairly debatable"); *Morgan v. Kingen*, 166 Wn.2d 526, 533-38, 210 P.3d 995 (2011) (corporate officers held liable for double damages where they willfully failed to pay employee wages despite being in a Chapter 11 bankruptcy proceeding).[66] *Failla v. Fixture One Corp.*, 181 Wn.2d 642, 336 P.3d 1112 (2014) (failure to pay commissions was willful as a matter of law); *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 319 P.3d 868 (2014); *Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009), *review denied,* 168 Wn.2d 1020 (2010).

Setting the public policy of RCW 49.52.070 on its ear, Tri-State argues that despite its deliberate withholding of compensation it knew was

[66] The cases cited by Tri-State do not help it. For a dispute to be bona fide, the issues in it must be fairly debatable, connoting an element of good faith. Unlike the situation here where Tri-State *conceded* that it withheld compensation due to Chism as a negotiating tactic to reduce the amount of the bonuses it had previously agreed to, in the cases cited by Tri-State, there were legitimate reasons for a dispute. *Lillig v. Benton-Dickinson*, 105 Wn.2d 653, 717 P.2d 1371 (2002) (both whether an enforceable agreement to pay bonus and amount of discretionary bonus were at issue); *Moran v. Stowell*, 45 Wn. App. 70, 724 P.2d 396, *review denied,* 107 Wn.2d 1014 (1986) (collective bargaining agreement foreclosed payment of unused sick leave); *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 663 P.2d 865, *review denied,* 100 Wn.2d 1010 (1983) (dispute over police officers' compensation for vacation leave in light of LEOFF).

due to Chism and that he earned, if even one dollar of that compensation was reduced by court action, then the public policy of RCW 49.52.070 must be ignored.[67] Such an argument is fallacious and not supported by any authority. The cases it cites, such as *LK Operating, supra*, merely affirm the well-understood principle that a court may order fee disgorgement if an attorney breaches his or her fiduciary duty to a client. In fact, the presence of a fiduciary duty does not compel the negation of an attorney's right to recover fees from a client. *Forbes*, 148 Wn. App. at 294-95 (alleged misconduct of attorney in violation of RPCs did not merit voiding fee contract, in light of attorney's "exemplary service;" issue of what impact, if any, attorney misconduct had on fee claim was within trial court discretion).

Ultimately, as the trial court correctly discerned in denying Tri-State's CR 50 motion for judgment as a matter of law, there is no real dispute here that Tri-State deliberately withheld compensation due to Chism, as the jury concluded in finding that Tri-State acted willfully. The only question was *how much* — Larry *knew* Chism was owed compensation, but he merely hoped to cut a deal on a lesser amount. Such a hard ball negotiating ploy was not a bona fide dispute. To hold

[67] By analogy, a party remains a prevailing party or a claim may be liquidated even if it does not recover all of the sums it pleaded in its complaint. There is no doubt that Chism prevailed against Tri-State, as the trial court noted with regards to fees. *See infra.*

otherwise would create a significant loophole in RCW 49.52.070, incentivizing employers to withhold employee compensation to "cut a deal," thereby undercutting the public policy inherent in RCW 49.52.070 to require employers to pay full compensation owed to employees.

In sum, the trial court did not err in applying the jury's determination that Tri-State willfully withheld compensation due to Chism. Although the trial court decided (erroneously) to reduce the amount of the compensation willfully withheld by Tri-State for Chism's alleged breaches of fiduciary duty, the willfulness of Tri-State's withholding of compensation to Chism was clear to the court. A penalty imposed upon Chism for perceived breaches of fiduciary duty to Tri-State did not render the officers' conspiracy to willfully withhold bonuses he was due a "bona fide" dispute, or the misappropriation of money Chism was due any less willful. The trial court correctly awarded double damages to Chism.[68]

(4) The Trial Court Properly Awarded Prejudgment Interest to Chism

The trial court here awarded prejudgment interest to Chism on the sum that it determined to be due him as compensation from Tri-State, less

[68] On remand, if Chism is correct on the fiduciary duty issue here, he will be entitled to double damages on the jury's full award. Br. of Appellant at 73.

any amounts it ordered disgorged for Chism's alleged breaches of his fiduciary duty to Tri-State. CP 4991.[69] Tri-State now contends that the trial court erred in allowing interest at all, asserting that Chism's claim against Tri-State was "unliquidated." Br. of Resp'ts at 71-73.[70] Tri-State's simplistic analysis is wrong.

In Washington, the nature of the claim, not its characterization as sounding in tort or contract, controls for the prejudgment analysis. *Hansen v. Rothaus,* 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Awards of prejudgment interest are ultimately predicated on the principle that a party "who retains money which he ought to pay to another should be charged interest upon it." *Id.* at 473 (quoting *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968)). Courts must award a party prejudgment interest when the claimed amount is "liquidated" or when an unliquidated claim is otherwise determinable by reference to a fixed contractual standard, without reliance on opinion or discretion. *Id.* at 107 Wn.2d at 472. A claim is liquidated when the amount of prejudgment

---

[69] Chism argued in his opening brief that the reduction of the amounts he was due was not appropriate. Br. of Appellant at 46-70. If this Court agrees, on remand, Chism should be entitled to prejudgment interest on the full amount awarded him by the jury. *Id.* at 73.

[70] Tri-State never made this claim below. Its pleadings pertaining to the trial court's entry of judgment and its post-trial motion *nowhere* contend prejudgment interest was improperly awarded. It is not entitled to make this belated new argument for the first time on appeal. RAP 2.5(a).

interest can be computed with exactness from the evidence, without reliance on opinion or discretion. *Prier*, 74 Wn.2d at 33; *Hansen*, 107 Wn.2d at 472. The fact that an amount is disputed does not render the amount unliquidated. *Forbes*, 170 Wn.2d at 166. A party's entitlement to prejudgment interest is reviewed for an abuse of discretion. *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).[71]

Chism's claims were liquidated, based on specific promised bonuses by Tri-State, and were capable of mathematical calculation. In rendering its verdict, the jury was not asked to make a reasonableness determination as to the amount of the bonuses. CP 2201 (Instruction 9). There was never a dispute over the *amount* of Chism's bonuses; those figures were clearly understood by Chism, Tri-State, and the jury from the verdict form itself that referenced the dollar amount of Chism's promised bonuses. CP 2228-30.

---

[71] Tri-State cites *McConnell v. Mother's Work, Inc.*, 131 Wn. App. 525, 128 P.3d 128 (2006) for the proposition that the standard of review is de novo. Br. of Resp'ts at 71. A simple Westlaw search would have revealed that this Court in *Polygon Northwest Co. v. American Fire Ins. Co.*, 143 Wn. App. 753, 790, 189 P.3d 777, *review denied*, 164 Wn.2d 1033 (2008) applied the correct standard of review in light of Supreme Court precedent. *Id.* at 790 n.13. *Numerous* cases subsequent to *Scoccolo* and *Polygon* have applied an abuse of discretion standard of review. *E.g., TJ Land Co. LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 255-56, 346 P.3d 777, *review denied*, 357 P.3d 666 (2015).

Tri-State now contends that because the trial court exercised its equitable authority to require Chism to relinquish some of the bonuses promised to him by Tri-State that he earned as a penalty for what the trial court perceived were fiduciary duty transgressions, Chism must be denied prejudgment interest; Tri-State's argument is ultimately a simplistic one resting on the proposition that what is at stake here is the reasonableness of an attorney fee award. Br. of Resp'ts at 72.[72]

The better analysis is to consider the nature of the claim. What was at stake here was an action by Chism to compel Tri-State to pay specific, promised bonuses. Those bonuses were liquidated sums. The jury awarded them to Chism.

The real issue whether the trial court's exercise of equitable authority to reduce the bonuses awarded by the jury rendered the final result unliquidated. It did not. Perhaps the best analysis of this issue was by this Court in *Polygon Northwest*. There, primary insurers who had paid a settlement sought equitable contribution from an excess carrier. This Court awarded prejudgment interest to the successful insurer. The amount

---

[72] Merely because attorney fees are at stake does not itself foreclose prejudgment interest. Ultimately, any fee must be reasonable. RPC 1.5(a). But in cases like *Forbes*, *supra* and *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340, *review denied*, 132 Wn.2d 1009 (1997), attorneys recovered prejudgment interest when clients failed to honor fee agreements. *See also, Humphrey Indus. Ltd. v. Clay Street Assocs., LLC*, 176 Wn.2d 662, 295 P.3d 231 (2013) (prejudgment interest should have been awarded on the interest paid on a fee award where Supreme Court reversed a trial court's fee award in favor of the corporation against a dissenting shareholder in a RCW 23B.13 proceeding).

of the settlement was known. Although there were several disputed approaches to how the settlement should be equitably apportioned between the insurers by the court, that did not render the claim ultimately unliquidated. 143 Wn. App. at 792-93.[73] It was no different here where the trial court reduced Chism's compensation award.

Moreover, to deny Chism prejudgment interest would be inequitable. At its core, prejudgment interest is an equitable doctrine rooted in unjust enrichment, or, as the *Hansen* court made clear, the fact that one party enjoyed the "use value" of another's money.[74] There can be little doubt that Tri-State here fully enjoyed the use of money it expressly

---

[73] Further, merely because a court reduces the amount of the litigant's requested claim does not render it unliquidated. *Scoccolo*, 158 Wn.2d at 520; *Polygon Northwest*, 143 Wn. App. at 792.

[74] This Court stated in *Polygon Northwest*:

> ...an award of prejudgment interest is in the nature of preventing the unjust enrichment of the defendant who has wrongfully delayed payment. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 3.6(3), at 438-49 (2d ed. 1993) ("in many cases the interest award is necessary to avoid unjust enrichment of a defendant who has had the use of money or things which rightly belong to the plaintiff"). If anything, the application of this principle is particularly well-suited to cases brought in equity insofar as it deters further wrongful delay of payment by the defendant. *See* DOBBS, *supra*, at 350 ("if the defendant is literally making money by nonpayment, he may have incentive to delay"). It is the accepted rule that, "[w]hen a court appropriately applies the doctrine of unjust enrichment, the unjustly enriched party is generally liable for interest on the benefits received." *Martinez v. Cont'l Enters.*, 730 P.2d 308, 317 (Colo. 1986) (citing DOBBS, *supra*, § 3.5). The equitable principles underlying an unjust enrichment claim and a claim for equitable contribution are striking similar.

143 Wn. App. at 793.

promised to Chism for his exemplary service, including the actual preservation of the company.

The trial court did not err in awarding prejudgment interest to Chism.

(5) The Trial Court Did Not Abuse Its Discretion in Making Its Attorney Fee Award under RCW 49.48.030 and RCW 49.52.070 to Chism

Tri-State argues in its brief at 65-73 that the trial court erred in making a fee award to Chism.[75] Tri-State is wrong in that it ignores the policy rationale for fee awards under RCW 49.48.030 and RCW 49.52.070 and it has failed to preserve a basis for appellate review of the fee award in large measure.[76]

First, Tri-State has not assigned error to *any* of the trial court's twenty findings of fact, CP 4962-68,[77] and thereby *concedes* a number of fundamental factual points relating to the trial court's fee award:

---

[75] Tri-State neglects to address this Court's standard of review for a fee decision. This Court reviews the calculation of a fee award for an abuse of discretion by the trial court. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014). The trial court's thorough and comprehensive findings document that it did not abuse its discretion.

[76] There is a certain irony in the fact that Tri-State has carped about whether Chism effectively preserved issues for appellate review by too often assigning error to the trial court's findings, br. of resp'ts at 40-41, when Tri-State did not assign error to *any* of the trial court's fee-related findings and only one fee-related conclusion of law.

[77] The failure to assign error to a finding of fact by the trial court renders the finding a verity on appeal. RAP 10.3(g); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

- after reducing Chism's jury-awarded recovery for alleged breaches of fiduciary, the trial court "left intact the jury's findings of breach of contracts for wages and willful withholding of wages." CP 4962 (FF 4);

- the court also found Chism was entitled to recover costs beyond statutory costs, CP 4969 (CL 25), and his claimed costs were reasonable, CP 4966 (FF 14-15), but Tri-State has not assigned error in its brief to Chism's entitlement to such costs, br. of resp'ts at 4-5, nor has it so argued in its brief when discussing fees. *Id.* at 65-67;

- the trial court found the overall lodestar fee requested by Chism's counsel to be reasonable. CP 4962-66 (FF 5-13);[78]

- the trial court specifically determined that Chism's counsel's time in presenting his statutory wage claims was "inseparable" or "inextricably intertwined" with the time spent in defending Tri-State's defenses/counterclaims so that any segregation of time between the wage claims and the fiduciary duty defense was impossible and impermissible. CP 4967-68 (FF 16-20);

- the trial court determined Chism was the prevailing party in the litigation, even though he did not recover the full amount he sought. CP 4968-71 (CL 21-28, 31).[79]

---

[78] Tri-State has not assigned error to any of the trial court's findings on the calculation of the lodestar fee, thereby conceding that the trial court's overall conclusion that the fee sought by Chism was reasonable. Tri-State only asserts that the lodestar fee should be reduced in some unspecified fashion. Br. of Resp'ts at 65-67. In finding 11, CP 4965, the trial court found the time spent by Chism's lawyers in the case to be reasonable after earlier determining in finding 8 that the hourly rates of those attorneys were reasonable, a point uncontested by Tri-State. CP 4964. The court further stated in finding 11: "... Tri-State does not contest the overall reasonableness of the hours spent on any particular task. In fact, Tri-State has declined to reveal its own billings, and thus, the Court infers that Tri-State's own expenditures were not significantly less than those of Mr. Chism." CP 4965. If Tri-State neither contested the reasonableness of the rates nor the hours spent, it did not dispute the reasonableness of the lodestar, derived from the multiplication of those two sets of figures. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

[79] The failure to assign error to trial court conclusions of law renders those conclusions the law of the case. *King Aircraft Sales, Inc. v. Lane,* 68 Wn. App. 706, 716,

Thus, Tri-State has not effectively preserved its contentions relating to Chism's fee award, given the trial court's determination that Chism prevailed on his wage claims for purposes of RCW 49.48.030/RCW 49.52.070 and its factual verities on appeal that his counsel's fees were reasonable and any apportionment of fees was impossible.

Second, even if Tri-State somehow preserved any alleged error on the fee award, its argument that Chism's fee award must be restricted is unsupported. RCW 49.48.030 and RCW 49.52.070 are both remedial statutes, liberally construed to effectuate their plain purpose to compel the payment of compensation due to employees from their employers. *Schilling*, 136 Wn.2d at 157-59 (RCW 49.52.070); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (RCW 49.48.030). Critically, attorney fees are recoverable under RCW 49.48.030 against an employer that failed to pay wages even if a bona fide dispute existed between the employer and employee over the payment of wages. *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 181, 588 P.3d 729 (1978).

---

846 P.2d 550 (1993); *Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

The *bottom line* here is that Chism prevailed in recovering at least $200,000 Tri-State failed to pay him as promised. That alone is enough to justify the trial court's fee award because the amount recovered is not relevant for purposes of a fee award. Case law arising under RCW 49.48.030 and RCW 49.52.070 has long held that the attorney fees are to be awarded under those statutes even if the amount recovered is small under the liberal interpretation imperative for those remedial statutes. The Court of Appeals in *Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969) stated: "wage amounts wrongfully withheld may be small. The provision for attorneys' fees was undoubtedly intended to prevent the wrongful withholding of wages and to provide a remedy thought adequate for that purpose." *Accord*, *Schilling*, 136 Wn.2d at 159 (citing *Brandt*). Of course, a recovery of $200,000 (assuming the trial court was correct in reducing the jury's award) is hardly "small," in any event.

Tri-State's entire argument on appeal in its brief at 65-68 is essentially a revisitation of its argument below that there must be a "degree of success" exception to RCW 49.48.030/RCW 49.52.070. That assertion was properly rejected by the trial court in conclusions of law 21-24, CP 4968-69, *to which Tri-State failed to assign error*. In any event,

such an argument for a new exception to such wage statutes, *nowhere provided for by the Legislature*, is baseless.[80]

Any exceptions to a remedial statute subject to a liberal construction are *narrow,* given the statutory purpose. *Fire Fighters*, 146 Wn.2d at 34; *Flower*, 127 Wn. App. at 35. Our Supreme Court has *rejected* the creation of new exceptions to the legislative policy. *Schilling*, 136 Wn.2d at 163-65 (rejecting an "inability to pay" exception to RCW 49.52.070 not enacted by the Legislature); *Schoonover*, 91 Wn.2d at 181 (no "bona fide dispute" exception to RCW 49.48.030). This Court should similarly reject Tri-State's new-found "inherent court authority" exception to RCW 49.48.030/49.52.070 it now seeks to craft.

Finally, Tri-State complains about the trial court's alleged refusal to segregate fees spent on various activities, citing to its objection to

---

[80] Tri-State dresses up its "degree of success" exception as an "inherent court authority" exception, claiming in its brief at 65-66, without citation to the record, that the trial court believed itself without the authority to reduce the statutory fee award on that basis. Tri-State made such an inherent authority argument in its trial court fee pleadings, CP 4738-39, but it *admitted* there that it had no authority for its position. CP 4739. Little wonder if the trial court might have thought it lacked authority to engraft a new judicial exception upon RCW 49.48.030/RCW 49.52.070. But the trial court in fact, *never said* it backed inherent authority anywhere in its extensive findings and conclusions, as Tri-State must admit by not citing to the record. Moreover, if the trial court was "unaware" of its alleged inherent authority here, the fault rests with Tri-State's failure to apprise the court of that alleged authority.

In any event, the degree of a party's success in litigation is *a* factor in calculating a lodestar fee, but not *the* sole factor for assessing the reasonableness of a fee request. *Mahler*, 135 Wn.2d at 433. Specifically, in the employment context, over emphasis on degree of success constitutes *reversible error. Martinez v. City of Tacoma*, 81 Wn. App. 228, 241-42, 914 P.2d 86, *review denied*, 130 Wn.2d 1010 (1996).

conclusions of law numbers 29-30. Br. of Resp'ts at 66. Tri-State neglects to mention, however, that it failed to assign error to the trial court's *extensive findings of fact* that specifically found Chism's claims and his defense of Tri-State's affirmative defenses to be "inseparable" because they arose "from the same transactions and [were] inextricably intertwined." CP 4967 (FF 16). *See generally,* CP 4967 (FF 16-20).[81] The trial court specifically found that Tri-State's own defense counsel's statements and litigation strategy indicated that no segregation was possible or permissible because its fiduciary duty argument was, in fact, a *defense* to Chism's wage claim, based on the same evidence presented to the jury. CP 4967 (FF 18). No segregation of time was necessary. CP 4968 (FF 20).[82]

---

[81] Nor does Tri-State assign error to conclusions of law 26 and 28, CP 4969-70, wherein the trial court concluded the claims were inextricably intertwined and based on a common core of facts and related legal theories.

[82] In calculating a lodestar fee under a fee-shifting statute, Washington courts have routinely concluded that in examining the reasonableness of the attorney hours spent obtaining the successful result for the client, a court need not segregate time spent on various legal theories or activities if the court concludes the time arose out of a common core of facts or involved inextricably intertwined theories of recovery. *E.g., Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 692-93, 132 P.3d 115 (2006). Recently, in *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 272 (2014), this Court reaffirmed this principle, explicitly noting at 824 that the trial judge is in the best position to assess whether a successful party's claims are intertwined or arise out of a common core of facts. *See also, Bright v. Frank Russell Investments*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 6681033 (2015).

In sum, the trial court's extensive, meticulous findings on its fee award evidence that it did not abuse its discretion and the fee award should be affirmed.[83]

D. CONCLUSION

Nothing in Tri-State's brief should dissuade this Court from reversing the trial court's usurpation of the jury's fact-finding function where the jury properly concluded that Tri-State deliberately withheld compensation it had promised to pay Chism, and Chism earned. The trial court should not be permitted to undercut the jury's decision by conducting a disguised RPC 1.5 reasonableness determination when RPC 1.5 does not apply to in-house counsel's compensation negotiations with a corporate employer.

The trial court correctly determined RPC 1.5 was not violated here, but erred when it concluded that Chism breached fiduciary duties to Tri-State and could thereby be deprived of the bonuses promised to him by Tri-State that the jury agreed he had earned, misapplying the provisions of RPC 1.7, 1.8, and 8.4. Tri-State and its management were fully informed of the compensation deal struck in 2010, and the bonuses awarded in all three years. Tri-State significantly benefitted from Chism's work. The

[83] Chism reaffirms his request for an award of fees on appeal. RAP 18.1(a). Br. of Appellant at 71-72.

trial court's disagreement with the compensation approved by the jury was not a basis to discount that compensation.

The trial court correctly awarded double damages under RCW 49.52.070 where the jury concluded Tri-State willfully withheld compensation to Chism, a determination amply supported on this record.

The trial court's decision on fees should stand where Tri-State did not assign error in its cross-appeal to any of the trial court's extensive findings on fees.

This Court should reverse the trial court's disgorgement decision and remand the case to the trial court for entry of a judgment based on the jury's verdict with exemplary damages as contemplated by RCW 49.52.070, and interest on the compensation from April 2012 when they were due. The Court should also affirm the trial court's fee decision. Costs on appeal, including reasonable attorney fees, should be awarded to Chism.

DATED this 5th day of November, 2015.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8896
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Thomas Breen, WSBA #34574
Lindsay L. Halm, WSBA #37141
Schroeter Goldmark & Bender
810 3rd Ave., Suite 500
Seattle, WA 98104-1657
(206) 622-8000
Attorneys for Appellant/
Cross-Respondent Chism

APPENDIX

C. STATEMENT OF THE CASE

Geoffrey Chism has been licensed to practice law in Washington since 1977. CP 83; RP (5/12/14):44. During his career,[1] Chism handled substantial disputes involving major construction claims and litigation, "workouts" on troubled projects, and surety/bonding matters including defaults on large development projects; he also advised companies on internal management issues like succession planning and financial strategy. CP 84; RP (5/12/14):46-47.[2] Owing to his depth of knowledge and experience, he also served as mediator and arbitrator on construction-related disputes. CP 85; RP (5/12/14):49.

In private practice, Chism charged clients on an hourly basis, with the exception of his arrangement with Tri-State, discussed *infra*. CP 106; RP (5/12/14):48. Like any other lawyer, he adjusted his hourly rate

---

[1] Chism advised and represented clients almost exclusively on construction and development-related matters. CP 84; RP (5/12/14):46. He spent the first decade of his career with Seattle's preeminent construction firm, now known as Oles Morrison & Baker, where he was a partner. CP 83-84; RP (5/12/14):45. Chism then founded and was managing partner at Stanislaw, Ashbaugh, Chism Jacobson & Riper, as well as successor firms Chism, Jacobson & Johnson and Weinstein, Chism & Riley. CP 84; RP (5/12/14):45. In September 2000, he joined the firm of Chism, Thiel, McCafferty & Campbell, where he remained until his retirement from private practice in 2009. CP 84; RP (5/12/14):44-46.

[2] Chism's clients were representative of the full spectrum of construction-related services he provided, including international outfits (ABB, the world's largest electrical contractor, Ledcor and Hensel Phelps Construction Company); local family-owned contractors (Tri-State, Rivera and Green, Versatile Drilling); government agencies (City of Seattle), development and construction lenders (Washington Federal), architects and engineers (John Graham Company). CP 84.

periodically to reflect market conditions and his rising skill and experience level. CP 106; RP (5/12/14):49-50. Chism's hourly rate was never deemed unreasonable or excessive by any court or tribunal. CP 106-07.[3]

Tri-State's founder, Joe Agostino, retained Chism to serve as its outside lawyer in 1981. CP 85-86; RP (5/12/14):60. In the mid-1990s, Agostino chose his middle son, Ron, to take over Tri-State's operation. CP 86; RP (5/12/14):63. Ron Agostino, in turn, retained Chism as Tri-State's chief legal advisor for the next two decades. CP 86; RP (5/12/14):78; *see also*, CP 9. Over those three decades of representation, Chism was involved in numerous matters for Tri-State, and he developed an intimate knowledge of its business, the type of legal issues the company faced, and its personnel. Chism shared a relationship with Joe and Ron Agostino built on trust and loyalty – a fact that Tri-State did not dispute below. *Id.*[4]

Ron Agostino was Tri-State's president until March 7, 2012; he then became its secretary, treasurer, and chairman. CP 2, 8. Larry Agostino, Joe's youngest son, became the president and primary decisionmaker at Tri-State. *Id.* Prior to the instant dispute that arose on April 10, 2012 (just

---

[3] In fact, after becoming Tri-State's general counsel, Chism's hourly rate was twice accepted as reasonable: (1) the Honorable Karen Overstreet granted fees based on Chism's then hourly rate of $325 per hour as special trial litigation counsel; and (2) arbitrator Christopher Soelling granted fees based on Chism's then hourly rate of $400 per hour. *Id.*; CP 113-25. Although Chism's rate had in fact increased to $500 per hour by 2008, Chism charged Tri-State $400 per hour. CP 107; RP (5/12/14):49.

[4] Chism described working for Tri-State as "an honor." CP 85.

weeks into Larry Agostino's turn as President) the parties had not a single disagreement over compensation or any other aspect of Chism's representation. CP 105; RP (5/13/14):189. Until Ron resigned his position as Tri-State's president, he negotiated and managed Chism's compensation and his work; Ron trusted Chism completely, and testified that Chism never took advantage of him. RP (5/20/14):93. Ron communicated financial matters to Tri-State's board, including Chism's compensation. RP (5/7/14):144.

Tri-State builds huge complex construction projects, including roads, highways, airports, landfills, and dams, moving dirt and setting utility lines. CP 85; RP (5/7/14):101-2. The nature of the work creates complicated legal issues that must be successfully resolved: complex construction contracts, subcontractor agreements, construction claims, environmental and other regulatory compliance, disadvantaged business contracting requirements, employment, safety, and injury issues. The company experienced tremendous success over the years; Tri-State was one of the largest businesses of its kind in the Northwest, employing more than 300 employees during its peak. CP 85, 139; RP (5/22/14):5.

Up until 2002 when Chism was in private practice, he charged Tri-State on an hourly basis, at his usual hourly rate, just as he did for all other clients. RP (5/12/14):76. Sometime in the fall of 2002, Joe and Ron

Agostino and Chism met to discuss the company's growing legal needs. CP 87; RP (5/12/14):78-79. The Agostinos expressed their desire to put Chism's skills to use more proactively by having him consult directly with Tri-State managers in order to reduce or eliminate problems altogether and to obtain his services on a priority basis. *Id.* The result was a new arrangement: Chism would continue to work in private practice and represent other clients, but he would make Tri-State his priority and would be paid a flat fee each month for all non-litigation (or, "general counsel") services. CP 87-88, 159-61; RP (5/12/14):78-80.[5] After this arrangement was in place, Chism limited taking on new clients or matters. RP (5/12/14):80. By this point in their relationship, the parties had a keen sense of the company's legal needs and the corresponding cost of legal services for an average month. CP 87-88; RP (5/12/14):78-79. The parties arrived at a figure they deemed fair: $10,000 per month, the rough equivalent of a full day per week of Chism's time if he had he charged hourly at his then rate of $325, excluding litigation. CP 87; RP (5/12/14):78.

The arrangement worked as envisioned. Chism was generally available whenever and wherever the company needed him, up until the day

---

[5] Chism billed hourly and separately for any time spent on matters that were in litigation (or arbitration), as such time varied wildly from month to month. CP 87; RP (5/12/14):77-78. The trial court did not conclude that this change in Chism's relationship with Tri-State violated the RPCs. CP 2468-98.

he resigned in 2012.[6] CP 88-89, 138; RP (5/12/14):80; (5/13/14):58, 189. Chism's efforts benefited Tri-State and minimized attorney fee expenditures because Tri-State was able to avoid having disputes ripen into litigation. CP 9; RP (5/13/14):189-90. The arrangement was attractive to Chism, too. After decades of having to keep a time sheet billing every tenth of an hour, he could forgo it for this favored client. CP 87-88; RP (5/13/14):189, 191, (5/14/14):59-60. It also allowed and, in fact, *required* Chism to scale back his hectic private practice to prioritize Tri-State's needs. CP 87-88; RP (5/12/14):79-80.[7]

Chism routinely worked at least 7 hours a week advising, counseling and trouble-shooting for Tri-State. CP 87; RP (5/12/14):79. Between 2002 and 2007, Tri-State agreed to three upward adjustments of Chism's general counsel fee to reflect the increased time he spent on Tri-State matters[8] and

---

[6] *E.g.*, CP 169 (Vice President referring to Chism as "Geoff 24/7"); CP 138 (attesting that Chism did what he was asked to do and was there when the company needed him).

[7] During his first twenty years in practice, Chism routinely billed at least 2200 hours per year and consistently brought in more business than he could handle by himself. CP 84.

[8] For example, in 2007, Tri-State increased the monthly amount paid to Chism for additional effort and time spent on one particularly complex project – namely, a $91 million dollar contract for the design and construction of a portion of Interstate 405. CP 89-90; RP (5/12/14):81.

the increase in his hourly billing rate.[9] By the end of 2007, the monthly general counsel fee was $17,000. CP 90; RP (5/12/14):83.

In the fall of 2008, Chism decided to retire from private practice at year's end, and he so advised Ron Agostino. CP 90; RP (5/12/14):82-83.[10] On hearing the news, Ron Agostino asked Chism to remain as Tri-State's general counsel. CP 90; RP (5/12/14):82-83. From a business perspective, Tri-State would not have been able to find any other lawyer as experienced or as familiar with its operations as Chism. Although he would not have done so for any other client, Chism agreed to continue to serve Tri-State. CP 90-91; RP (5/12/14):83.

Ron Agostino and Chism discussed the option of: (a) continuing on as before with the flat monthly fee arrangement, or (b) employing Chism for the monthly general counsel fee, less the company's share of taxes and health care contributions. CP 91, 166; RP (5/12/14):83.[11] Chism accepted the offer to become a Tri-State employee beginning January 1, 2009. CP

---

[9] By January 2005, Chism was charging $400 per hour to his hourly-paying clients and the general counsel fee increased to $12,000. CP 89; RP (5/12/14) 81.

[10] Chism had handed off primary responsibility for most of his clients to other lawyers in his office, and planned to limit his time to occasional arbitrations/mediations, and advising a handful of long-term clients on non-litigation matters and spending more time with his family. CP 90; RP (5/12/14) 80.

[11] Chism's initial salary was roughly commensurate with Chism's then hourly rate ($500) that he had been billing. CP 91; RP (5/12/14):83.

91; RP (5/12/14):82-83.[12] As Chism's employer, Tri-State did not require him to keep track of the time spent working on Tri-State matters, just as it had never done in the seven years it paid him a flat monthly fee for general counsel services. CP 87, 91.

Chism was actively involved in Tri-State's key matters and he reported directly to its executives who oversaw his work; they knew what he was doing, whether it met their needs and made the company succeed, and they retained the right to discharge him for any reason. CP 89, 91; RP (5/14/14):156. Just as before, he received his assignments from Ron Agostino. The two worked closely to review significant matters and they meet at least weekly. CP 91; RP (5/12/14).85-86. Like Tri-State's other salaried employees, Chism was not required to enter into a formal written employment contract. RP (5/8/14):155.

Beginning in 2010, Tri-State's demands on Chism's time steadily increased. CP 91; RP (5/12/14):90. The economic downturn had impacted the local construction industry. Several matters bloomed into active litigation. CP 91-92; RP (5/12/14):91-93. Partly in response to this economic pressure, Tri-State bid on a major hydroelectric project in Canada

[12] Chism no longer charged Tri-State fees because he was an employee working for compensation. The arrangement did not, however, contemplate that Chism would work full time. Rather, the parties contemplated he would continue to provide part-time services as needed, similar to those that Tri-State had been receiving under the outside general counsel arrangement to its satisfaction. There was essentially no change in the compensation Tri-State paid and the services Chism provided. RP (5/12/14):83.

("Bear Hydro"). CP 92; RP (5/12/14):88-89. A foreign project was a first for Tri-State, and Chism was tasked with sorting out the legal, tax, accounting and many practical aspects of performing work in a remote area of western British Columbia. CP 93; RP (5/12/14):96. What he was tasked to do on Bear Hydro went well beyond providing legal services; Chism performed the roles of counsel plus construction firm business executive. CP 96-100, 102-04; RP (5/8/14):10-20. The Bear Hydro matter was complex and its stakes were high for Tri-State; the project involved a demanding owner, a contentious design engineer, two other partners, four separate corporate entities, a Canadian lender, one bonding company, and, at any given time, 10 or more different lawyers from two countries. *Id.* This was a "bet the company" venture; it required an intense and large expenditure of resources and a singular focus. *Id.* From May to September 2010, negotiations over the Bear Hydro project contract (involving 127 pages plus 23 lengthy and technical exhibits) in addition to other Tri-State matters, kept Chism busy more than full-time. CP 93; RP (5/12/14):89.[13]

One night in August 2010, Chism and Ron Agostino were in the office together hammering out Bear Hydro contract details, when Agostino suggested that they revisit Chism's compensation arrangement. CP 94; RP

[13] Tri-State's Canadian counsel at the firm of Fasken Martineau alone billed over $400,000 to assist Tri-State in obtaining the contract. CP 93; RP (5/13/14):98-100.

(5/13/14):96-98. Agostino told Chism he thought it unfair that the Canadian lawyers were getting all the money when Chism was "doing all the work." *Id.* The limited, part-time (approximately 7-10 hours per week) general counsel arrangement of 2002 had evolved into a demanding, essentially full-time, position. CP 31; RP (5/12/14):90. Tri-State's work and legal requirements would require Chism to continue the very substantial work commitment well into the foreseeable future.

In September 2010, Tri-State and Chism entered into a new arrangement, memorialized in writing,[14] to balance out the inequity between the amount of hours Chism was working and his compensation. CP 94-95; RP (5/13/14):102-03. At that point, Ron Agostino had dealt with employees and lawyers for decades. The change in compensation called for Tri-State to award Chism a "bonus/adjustment" for his effort at the end of the year after services were performed, and it left to Ron Agostino's unfettered judgment as to what amount would be "appropriate." CP 95, 173; RP (5/14/14):119, 155. *See also*, CP 140-41 ("...I decide what he should get...I always had a choice.").[15] Thus, the employer was left with total discretion whether to pay a bonus, and if it did, to unilaterally

[14] Because the agreement was in writing, it was fully disclosed. Ex. 9.

[15] This change in the compensation arrangement was the central event upon which Chism's contractual claims are submitted to the jury by the trial court. The change in the relationship was instituted by Ron Agostino, not Chism.

determine the amount of the adjustment which would be determined at the end of each fiscal year and could be paid sometime the following year when it was convenient to the company. *Id.*[16]

As required by the agreement, at the end of FY 2010, Chism gave Ron Agostino a conservative estimate of how much he had worked during the prior year and trusted Ron to do what he thought was fair. CP 95, 175; RP (5/13/14):106-07. To compensate Chism for his additional efforts, Ron approved a bonus/adjustment in the amount of $310,000 which was subsequently paid in installments over two years. CP 95, 176-79;[17] RP (5/13/14):108, 110-11.

In FY 2011, Chism dedicated a significant amount of time assisting Tri-State in preparing a $15 million claim arising out of the I-405 project, defending a lawsuit filed by a departing manager who alleged fraud against Tri-State regarding this same claim, and advising the company on Bear

---

[16] Admittedly, this was an unusual arrangement: it is difficult to imagine any employee, especially a lawyer, to leave it in the hands of an employer to choose the amount of compensation and then defer payment of it until long *after* the work was performed, but Chism trusted Ron Agostino completely. CP 95; RP (5/13/14) 122-23.

[17] It was not unusual for Tri-State employees to receive very large bonuses; the controller's bonus, for example, made up to 25-50% of her salary and certain managers received 5% of profits on project, which in 2010 meant bonuses topping $250,000. CP 699-701, 706-07. Even when profits plummeted in 2011, Ron Agostino rewarded top employees with year-end bonuses. *Id.* Larry Agostino took substantial bonuses and a "loan" for $1 million in 2011 while the company was struggling to meet payroll. RP (5/22/14):111. The idea of taking good care of employees and rewarding them well was a touchstone of Joe Agostino's legacy. CP 708-09. It also demonstrates that minimizing employee compensation was not a goal of the company, obviating any direct conflict with employee desire to be adequately compensated.

Hydro-related and other project matters. CP 95-99. Chism worked for Tri-State on a more than full-time basis, confident in the knowledge that Tri-State would compensate his effort with a fair bonus/adjustment at the end of the fiscal year. CP 101; RP (5/13/14):108.

By October 2011, Bear Hydro was significantly over budget and behind schedule. CP 96-103; RP (5/12/14):99. The project owner informed TRP, Tri-State's Canadian business entity, that no more payments would be made until the project was brought back on schedule and budget shortfalls were addressed. CP 98-99; RP (5/12/14):102. The project was headed toward default; Tri-State was at risk of bankruptcy. CP 100-03, 137; RP (5/12/14):105; (5/22/14):152. On October 12, 2011, Ron and Tom Agostino asked Chism to take over responsibility for the Bear Hydro project, and become TRP's president. CP 100; RP (5/12/14):108. This was an additional title for Chism with added stress and responsibility. Seeing no other alternative, Chism agreed to take on the role of TRP's president. CP 100; RP (5/12/14):107-08, 130.

Nine days later, Ron Agostino and Chism discussed the amount of time spent and results achieved for the prior fiscal year. RP (5/20/14):42; CP 101. Chism told Ron Agostino what everyone already knew: he had been working full time in critical circumstances. *Id.* A bonus/adjustment in the amount of $500,000 was proposed by Ron Agostino, which Chism

accepted as fair. *Id.* Chism memorialized the agreement in a November 1, 2011 memorandum and sent it to Ron Agostino who signed it and provided it to Kristi MacMillan, Tri-State's controller and CFO, to record as a company obligation. CP 185.

In late January 2012, the Agostino brothers, MacMillan, Tri-State's "workout" consultant Mike Moroney, and Tri-State's accountant Jeff Williamson met to discuss Tri-State's financial troubles and to consider various cost-cutting measures. It was at that point, Larry Agostino began his efforts to renege on paying Chism. Unbeknownst to Chism, the Agostinos concluded in the meeting that they would only pay Chism $400,000 of the $500,000 bonus promised to him. MacMillan was directed to record the $400,000 obligation in the company's general ledger. CP 178;[18] RP (5/7/14):145-47.

While Tri-State was secretly cutting the compensation it promised him, Chism was busy staving off disaster on Bear Hydro. RP (5/8/14):22-26. On March 5, 2012, Chism finalized a global Bear Hydro agreement that would prevent a myriad of brutal financial consequences to Tri-State.

---

[18] Nobody told Chism that the company had reduced the compensation it had promised him. RP (5/7/14):147. He was busy working 80-hour workweeks expecting the company would honor the agreements already made and that likewise he would be compensated fairly in the future, just as before. After Chism resigned, Tri-State directed that the general ledger entry memorializing his compensation be revised. RP (5/7/14):148. Tri-State's conduct in this regard is a prime example of the fact that Tri-State lacked "clean hands" in invoking the trial court's equity jurisdiction.

Remarkably, and despite the odds, TRP avoided going into default on Bear Hydro; it met payroll every week, and eventually, it completed the hydroelectric project in Canada. CP 103-04; RP (5/12/14):150-51?, (5/13/14):38. A default on the construction project would have had draconian consequences to Tri-State including the forfeiture of at least $27 million on the bond it posted on the Bear Hydro project and loss of its future bonding capacity. CP 103-04; RP (5/12/14):139-40; (5/13/14):38, 56.[19] The five months leading up to the deal, were the most stressful, professionally challenging, and difficult period of Chism's legal career. CP 101.[20] Tri-State exists today because it survived Bear Hydro – an outcome that could not have occurred without Chism's efforts. RP (5/7/14):182.

On March 7, 2012, Larry Agostino took over as Tri-State's president. CP 104; RP (5/13/14):120. The decision to step down as president was Ron Agostino's. Ron had received the crushing news that he had precursor symptoms to Alzheimer's disease. RP (5/8/14):48.

On March 28, 2012, Larry Agostino met with Chism to discuss his compensation. CP 104; RP (5/13/14):125-29. In the meeting, Larry Agostino reaffirmed that the full $500,000 due for 2011 would be paid to

---

[19] The trial court's findings only touch briefly on this amazing result noting that "Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, could have cost Tri-State a minimum of 27 million dollars." CP 103, 2459, 4935; RP (5/7/14) 173-77, 180-82.

[20] Chism took not a single day off in that period. CP 101; RP (5/13/14):120.

Chism, and agreed to award a bonus/adjustment for the first six months of the 2012 fiscal year at the very same rate ($250,000). Exs. 20, 121-22; CP 105, RP (5/13/14):125-35. Agostino further proposed that they abandon the retroactive bonus arrangement and simply pay Chism every week at a rate of $300 per hour, starting April 1. CP 188. For a variety of reasons, Chism accepted the proposal as it was "cash-in-hand," would not significantly reduce his overall compensation, and it avoided having to rely on a new president's judgment and discretion. At the close of the meeting, Larry Agostino extended his hand to Chism, looked him in the eye, and said "deal." Chism shook his hand in confirmation and said "deal." RP (5/13/14):129.[21]

Later that evening, Chism memorialized the agreement in a memorandum. CP 188. On receiving it the next morning, Larry Agostino voiced his disagreement with only one aspect of Chism's summary, the part relating to Chism's rights to a company car. CP 189. He took no issue with Chism's summary of the remaining terms. *Id.* Indeed, he began paying Chism at the hourly rate of $300 even prior to the effective date of the new arrangement on April 1. CP 191; RP (5/13/14):137-38.

---

[21] The parties also discussed and agreed to a severance-type package in the event Chism left the company, which included a company car that Chism returned after his resignation. RP (5/13/14):146.

After he implemented the terms of the new deal, Larry Agostino attempted to renege on it. CP 105; RP (5/13/14):142. At an April 12 meeting, he told Chism that he would not honor the agreement, except for the $500,000 that had been promised for fiscal year 2011. *Id.* Chism resigned. RP (5/13/14):142. A month later, at the direction of its trial counsel,[22] Tri-State reversed the $400,000 accrual on its books. CP 192-93; RP (5/7/14):148.

When Tri-State did not pay Chism the $500,000 for his work during the 2011 fiscal year or the $250,000 promised for his work during the first part of the 2012 fiscal year, Chism sued Tri-State and Larry Agostino on October 3, 2012 in the King County Superior Court to recover the compensation upon which the parties had agreed. CP 1-7. Tri-State answered and alleged numerous affirmative defenses, including that Chism exerted "undue influence" on Ron Agostino and that Chism breached his common law fiduciary duty and a second cause of action for breach of fiduciary duty based upon alleged violations of RPC 1.5, 1.7, 1.8, and 8.4 as well. CP 53. Tri-State sought a disgorgement of the $310,000 paid to Chism for FY 2010, and asked to be excused from paying the later

[22] Larry Agostino/Tri-State had already obtained other counsel relating to Chism prior to April 12 discussions with Chism. The purpose of hiring new counsel was to replace Chism. CP 2337-38. When the company booked the $400,000 it was going to pay Chism, as distinct from the promised $500,000, it realized he was a potential creditor. RP (5/23/14):85-88.

bonuses to Chism. CP 53. The case was initially assigned to the Honorable Michael J. Trickey.

Chism moved for a partial summary judgment on the reasonableness of his fee agreement with Tri-State under RPC 1.5. CP 56-81. The trial court granted that motion on December 16, 2013, stating:

> The Court concludes as a matter of law that Plaintiff's status as in-house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for the Defendants. No Washington case supports the Defendant's legal position on this issue. The Court's ruling does not affect the other alleged RPC violations in the case.

CP 606.

Chism moved for summary judgment as well on Tri-State's RPC 1.7 and 1.8 contentions. CP 615-33. The trial court denied that motion. CP 1142-43. The court also denied Chism's motion for reconsideration/clarification of that order. CP 1876-78.

With the elevation of Judge Trickey to this Court, the case was re-assigned to the Honorable Kenneth Schubert. Tri-State demanded a jury. CP 194. At no time below, from the denial of the summary judgment order, prior to and during trial, to the post-verdict fiduciary duty hearings did the trial court identify exactly what "duty" under the RPCs or otherwise Chism owed to Tri-State in negotiating his own employee compensation; the closest the trial court came to doing so was when it

stated:

> And to me, at that point in time, when he renegotiated in 2010, and in 2011, and in 2012, at each of those intervals, he owed Tri-State a fiduciary duty. And he owed them that duty, and it was to fully and accurately apprise Tri-State as to all circumstances known to him affecting that arrangement.

RP (5/28/14):32.

The case was tried to a jury over a month. CP 2438. As discussed more *infra*, the jury was instructed on Chism's claims of breach of contract and willful withholding of wages and Tri-State's defense of undue influence. CP 2191-2224. The jury was not instructed on breach of fiduciary duty because after having heard Tri-State put on its entire breach of fiduciary duty case before the jury, the trial court determined Tri-State had suffered no "harm," an element of the tort of fiduciary duty, thus effectively dismissing Tri-State's breach of fiduciary duty claim. RP (5/28/14):26. Indeed, although it proposed a breach of fiduciary duty instruction based on WPI 107.10, CP 2008, Tri-State never objected to any of the relevant instructions or the failure to give its breach of fiduciary duty instruction. RP (5/29/14):135-45.

The jury ruled entirely in Chism's favor rejecting any contention that the parties' employment agreement and attendant bonuses were the product of undue influence or overreaching. CP 2228-29. The jury

specifically found the September 2010 modification of Chism's compensation was the subject of "a full and fair disclosure of the facts upon which the contract was predicated" by Chism to Tri-State. *Id.* It also found the contract was "fair and reasonable." *Id.* The jury further concluded that Chism was entitled to the $750,000 promised him by Tri-State that he earned. CP 2228-29. The jury also concluded Tri-State deliberately withheld Chism's wages under RCW 49.52.070 and Tri-State's withholding of the bonuses was not due to a bona fide dispute over the amount due to Chism. CP 2230.

Tri-State moved for judgment as a matter of law under CR 50(b) or a new trial, CP 2585-98, but the court denied that motion. CP 4340-43; RP (5/29/14):151-53. But rather than simply entering judgment on the jury's verdict, the trial court determined that it must decide as a matter of law whether there was a breach of fiduciary duty by Chism based on alleged RPC violations, which would then allow it to compel Chism to "disgorge" the compensation awarded him by the jury. CP 2439; RP (5/28/14):22, 23-25.

The court determined that it would make this decision based on evidence adduced at the trial and upon further briefing and argument of counsel, but the evidence the court considered was essentially the same as the jury. The trial court justified its deviation from the jury's verdict by

claiming that it heard from two legal experts that the jury did not. CP 2439. But their testimony was essentially on duty; both experts offered opinions on the law, *e.g.*, RP (5/16/14):9-90, 91-124; (5/23/14):4-73, 74-112,[23] a matter exclusively within the courts' purview. *See, e.g., Stenger v. State*, 104 Wn. App. 393, 407-08, 16 P.3d 655 (2001). Neither expert testified to factual matters.[24]

In the course of that hearing, the trial court repeatedly evidenced its disregard for the jury's decision. *See, e.g.,* RP (6/30/14):51, 77-79, 104-06. As but one example, in the June 30, 2014 hearing, the trial court criticized the jury's decision on the *Kennedy* factors, stating:

> ... I don't know why the jury didn't appreciate that. I don't know why the jury didn't understand that it wasn't a full and fair disclosure. I don't know why they didn't understand that that was actually a misrepresentation.

RP (6/30/14):106.

After the hearings on fiduciary duty, the court entered extensive findings and conclusions, CP 2438-2505, 4934-36, ruling that Chism was entitled to recover for Tri-State's breach of his employment agreement.

---

[23] The only other evidence the court considered was submitted by Chism, and, thus, was not supportive of the court's findings. CP 2413, 2336.

[24] On a key trial concern, expert witnesses testified as well that the ethical rules do not require specific time record keeping or reporting to the client unless an hourly fee arrangement existed, which everyone agreed was not the case here. *See, e.g.,* RP (5/23/24):97.

However, it ruled that Chism had to disgorge $550,000 of the $1,060,000 to which he otherwise would have been entitled. In so doing, the trial court specifically overruled the jury in regard to the 2011 and 2012 bonuses.[25] For 2011, the jury awarded Chism $500,000; the trial court cut that by $165,000. For 2012, the jury awarded Chism $250,000; the trial court cut that by $113,000. The trial court even reached back and cut Chism's 2010 bonus from $310,000 to $38,000. Since Tri-State had already paid the $310,000, it was only required to pay $200,000 more under the trial court's decision. CP 2502-05. The court determined that Chism was entitled to double damages under RCW 49.52.070 in accordance with the jury's verdict and an award of reasonable attorney fees under RCW 49.48.030 and RCW 49.52.070. CP 2503-05. However, the court applied the doubling to the net wage award (after disgorgement) rather than the amount the jury determined was wrongfully withheld. CP 2712-13, 4991.

Upon the presentation of a judgment, Tri-State again asserted that Chism was not entitled to recover anything, despite the jury's verdict, based on the putative RPC 1.7 and 1.8 violations. The trial court rejected

---

[25] The Court's findings taken as a whole demonstrate that the Court really engaged in a thinly-disguised reasonableness analysis of Chism's "fee" rooted in an incomplete lodestar type calculation. Its finding of breach of fiduciary duty, a duty it could not or would not identify until after trial constantly rebuffing efforts to have it articulated, was merely a vehicle to collaterally attack Judge Trickey's RPC 1.5 ruling on summary judgment.

these arguments and entered findings of fact and conclusions of law on November 14, 2014. CP 2438-2505, 4934-36. Chism appealed to this Court. CP 2644-2714, 2741-2811. Tri-State cross-appealed.

Subsequently, the trial court entered findings of fact and conclusions of law on April 10, 2015 awarding Chism the overwhelming bulk of his fees incurred in this case. CP 4961-73. The court rejected Tri-State's contention that the fee award for its deliberate withholding of Chism's wages should be reduced in light of its fiduciary duty ruling. CP 4970-71. The court entered its judgment on April 24, 2015 to reflect its fee decision. CP 4990-92. Both Chism and Tri-State filed amended notices of appeal from that judgment.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Appellant's Reply Brief/Brief of Cross Respondent in Court of Appeals Cause No. 72844-0-I to the following:

Jillian Barron
Tina Aiken
Sebris Busto James
14205 SE 36th St. Ste. 325
Bellevue, WA 98006-1505

Thomas Breen
Lindsay Halm
Schroeter Goldmark & Bender
810 3rd Ave. Ste. 500
Seattle, WA 98104-1657

John S. Riper
Sarah E. Cox
Ashbaugh Beal
701 Fifth Avenue, Suite 4400
Seattle, WA 98104

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

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

DATED: November 5th, 2015, at Seattle, Washington.

Kelley Carroll, Legal Assistant
Talmadge/Fitzpatrick/Tribe