

FILED
July 28, 2016
Court of Appeals
Division I
State of Washington

No. 75014-3-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

Davis Wright Tremaine, LLP,

Respondent,

v.

Fredrick Peterson,

Appellant

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Carol A. Schapira)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Lawyers who charge and attempt to collect unreasonable fees from their client should not be rewarded. RPC 1.5 makes it unethical for a lawyer to charge or attempt to collect an unreasonable fee from his or her client. Lawyers who violate RPC 1.5 by charging and attempting to collect an unreasonable fee from their client should not be allowed to enforce a contract provision entitling them to attorney fees when the client successfully proved the fees were unreasonable.

Unlike a summary fee shifting motion between adverse parties that were involved in litigation allowing for an attorney fee award, a lawyer occupies a fiduciary relationship with his or her client while the lawyer is charging the client attorney fees. Due to this fiduciary relationship, a lawyer who sues his or her client for allegedly unpaid fees must prove that the fees he or she charged while the lawyer was a fiduciary were reasonable. As with any other litigation involving a reasonable charge for services rendered, this requires the Lawyer to provide expert evidence on whether the attorney fees are reasonable. Failing any expert testimony on this issue, the lawyer's claim for unpaid fees should

be dismissed for failing to meet his or her burden of proof on the reasonableness issue.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it enforced an attorney fee provision against a Client that was contained in the Lawyer's standard form adhesion contract when the Client successfully proved that the fees being charged under the contract were unreasonable.
2. The trial court's conclusion of law that the Client breached the Lawyer's fee agreement is not supported by the court's findings of fact.
3. The trial court's conclusion of law that the Lawyer was the prevailing party is unsupported by the Court's findings of fact.
4. The trial court's finding of fact that the Client requested that DWT represent him in his defense of the Meilinger Lawsuit in October 2010 is unsupported by substantial evidence.
5. The trial court erred when it denied the Client's involuntary motion to dismiss at the conclusion of the Lawyer's case-in-chief when the Lawyer failed to meet its burden to prove the fees it was attempting to collect were reasonable.

III. STATEMENT OF THE ISSUES

1. Whether the Lawyer's standard form adhesion contract is unenforceable when it deviates from RPC 1.5(a) and allows the Lawyer to charge an unreasonable fee to the Client. (AOE 1,2 and 3)
2. Whether all fee agreements between lawyers and their clients contain an implied covenant not to charge the Client an unreasonable fee. (AOE 1,2 and 3).
3. Whether the Lawyer breaching the implied covenant not to charge an unreasonable fee suspends or discharges the

Client's obligation to pay the unreasonable fee the Lawyer is charging pursuant to the contract. (AOE 1,2 and 3).

4. Whether public policy requires courts not to deter clients from challenging the reasonableness of the fees their lawyer might charge them by requiring clients to pay their lawyer's attorney fees when the clients successfully prove the lawyer tried to charge them an unreasonable fee. (AOE 1,2, and 3)
5. Whether the trial court's finding of fact that the Client requested the Lawyer to represent the Client in *October* 2010 is unsupported by substantial evidence. (AOE 4).
6. Whether the Lawyer's Complaint against the Client should have been dismissed after the Lawyer rested its case-in-chief because the Lawyer produced no evidence establishing that the fees it was charging the client were reasonable.

IV. STATEMENT OF THE CASE¹

1. Trent Meilinger et. al. sued the Client alleging failure to fund Tower & Cabling Services, Inc.

On July 20, 2010, Trent Meilinger, Larry Wrestling and Tower & Cabling Services, Inc. ("TCS") filed a breach of contract lawsuit ("Meilinger lawsuit") against Frederick Peterson ("the Client").²

The Meilinger Plaintiffs alleged that the Client breached an agreement to continue funding their start-up company, TCS, even

¹ 1RP is Verbatim Report of Proceedings dated March 24, 2015 (Pages 1-123); 2RP is Verbatim Report of Proceedings dated March 24, 2015 (Pages 125-226); 3RP is Verbatim Report of Proceedings dated March 25, 2015 (Pages 227-413); 4RP is Verbatim Report of Proceedings dated March 26, 2015 (Pages 415-599); 5RP is Verbatim Report of Proceedings dated July 17, 2015 (Pages 601-660).

² CP 42-46 (Meilinger Complaint).

though Trent Meilinger had failed to sign a guarantee and promissory note that was required for continued funding.³

2. Appellant Peterson agreed to hire DWT before September 13, 2010.

Davis Wright Tremaine (“the Lawyer”) Partner Gregory Hendershott testified that he first learned about the Meilinger Lawsuit when he was at a social meeting with the Client. According to Mr. Hendershott, the Client said: “I got kind of a hairy mess. I finally got something I need you guys for.”⁴ Mr. Hendershott did not testify further about what happened at that social meeting. He, however, admitted that, on September 13, 2010, he sent Appellant Peterson an email stating that his law partner John Theiss would be a “good fit for your company.”⁵

The Client’s unrefuted testimony about the initial meeting regarding the Meilinger Lawsuit was more detailed, but consistent with Mr. Hendershott’s testimony. The Client testified that he described the entire situation to Hendershott, and told him that the Promissory Note was central to the case.⁶ Appellant Peterson added that Mr. Hendershott provided legal input on how he viewed

³ *Id.* See *infra*.

⁴ 1RP 62: 12-16.

⁵ 1RP 90: 7-14.

⁶ 3RP 303: 19-20.

the matter. He reviewed materials that Appellant Peterson had brought with him and they informally discussed the issue, then Mr. Hendershott recommended DWT.⁷ Mr. Hendershott assured Appellant Peterson that he would pay “what is fair and reasonable.” Having been assured about the fees, Appellant Peterson agreed to DWT’s representation.⁸ Appellant Peterson opined that he believed that he hired DWT during his initial social meeting with Mr. Hendershott.⁹

Shortly after this initial social meeting, Mr. Hendershott sent Appellant Peterson an email wherein he recommended DWT Partner John Theiss as a good fit for the Meilinger litigation.¹⁰

3. DWT partner, John Theiss, became the lead attorney at DWT on the Meilinger Lawsuit.

Appellant Peterson next had a lunch meeting with Messrs. Theiss and Hendershott at the Retaining Walls Northwest Office, approximately one week after the Appellant Peterson received the January 13, 2010 email.¹¹ Appellant Peterson provided Messrs. Theiss and Hendershott with a detailed letter of the facts and made sure that Mr. Theiss knew that the promissory note was

⁷ 3RP 303: 25 – 304: 3.

⁸ 4RP 453: 25 – 454: 10.

⁹ 3RP 306: 15-16 (“I told Greg I’d go ahead after he made the suggestion.”)

¹⁰ Exhibit 100 and 3RP

¹¹ 3RP 306: 7-12.

central to the case.¹² Following this initial meeting, Mr. Theiss subsequently became the managing attorney handling the Meilinger Lawsuit.¹³ Mr. Theiss testified that he began billing on the Meilinger Lawsuit on October 5 and 6th.¹⁴

4. Appellant Peterson later received an Engagement Letter and a written Fee Agreement by email, but Appellant Peterson never signed the Fee Agreement.

After the Lawyer began representing the Client, Mr. Hendershott sent the Client a written Engagement Letter and an attachment containing the Lawyer's standard pre-printed form entitled, "Standard Terms of Engagement for Legal Services"¹⁵ This "Standard Terms of Engagement for Legal Services" that was attached to the email and Mr. Hendershott's October 14, 2010 Engagement Letter was in fine print and contained a provision requiring the Client to pay for the Lawyer's time if the Lawyer sued the Client for unpaid fees pursuant to the agreement, stating

We will give you prompt notice if your account becomes delinquent, and you agree to bring the account or the retainer deposit current. If the delinquency continues and you do not arrange satisfactory payment terms, you agree that we may withdraw from the representation and pursue collection of your account. You agree to pay

¹² 3RP 306: 20 – 307:2.

¹³ *See supra*.

¹⁴ 2RP 162: 25- 163: 4.

¹⁵ CP 49.

the expenses of collecting the debt, including court costs, filing fees and a reasonable attorney's fee.¹⁶

The fee shifting provision was never previously discussed or agreed to between the DWT and Appellant Peterson.¹⁷ The Client never signed the Engagement Letter agreeing to the terms contained in Mr. Hendershott's letter or the Lawyer's standard form adhesion contract because he already had an agreement with DWT that he would pay what is fair and reasonable.¹⁸ Lawyer made no effort to get the Client to sign the Engagement Letter or agree to the terms and conditions in the Lawyer's standard form adhesion contract.¹⁹

5. Despite John Theiss being the managing attorney, nearly 90% of the work billed by DWT in the Meilinger Lawsuit was by an inexperienced junior attorney.

Despite John Theiss being the partner in charge of the Meilinger Lawsuit case,²⁰ he assigned primary responsibility for the case to a first/second/third year junior associate attorney, Carly Summers ("Ms. Summers"). Ms. Summers had little or no experience handling commercial litigation matters like the

¹⁶ Trial Exhibits 1 and 2 (CP TO BE SUPPLEMENTED); 1RP 63: 3 – 64:10.

¹⁷ 1RP 96:22 – 97:18 (Hendershott admits that he did not discuss possibility of a suit to collect fees under the DWT fee agreement).

¹⁸ 3RP 307: 5-8.

¹⁹ 1RP 110: 1-20.

²⁰ 2RP 143: 15-18.

Meilinger Lawsuit.²¹ Despite that she billed approximately 90% of the 382.8 hours billed on the case.²²

6. Appellant Peterson complained about the amount of the bills he was receiving from DWT.

Over the year-and-a-half the Lawyer represented the Client, the Client complained about the manner in which the case was being handled and the unreasonable fees the Lawyer was charging.²³ John Theiss admitted that the Client expressed concerns about DWT's fees and said numerous times: "I shouldn't have to pay that kind of money."²⁴ The Client was particularly disturbed that so much money was being spent to pursue an insolvent company, TCS.²⁵

The Client's unrefuted testimony also showed the Client believed the Lawyer was not advancing his case. He requested that the Lawyer collect on the promissory note and move on.²⁶ He said he talked to the Lawyer about how to end the case because

²¹ 3RP 390: 25 – 391: 5 (Billing entries show Ms. Summers "lacked the sophistication necessary to represent sophisticated people in a commercial action such as this one...." Ms. Summers nor Mr. Theiss provided no testimony regarding Ms. Summers' experience in commercial litigation. The Court stated in Conclusion of Law Paragraph 38: "The allegations ranged from breach of contract to breach of fiduciary duty to securities fraud. **Ms. Summers had no experience in these matters, particularly securities fraud.** Emphasis added. CP 491: 19-23.

²² CP 492: 3-10.

²³ 4RP 315: 4-14.

²⁴ 2RP 153: 18-22.

²⁵ 4RP 313: 1-3; 313: 6-8.

²⁶ 3RP 315: 4-11.

the promissory note had not been signed.²⁷ Ms. Summers admitted during her testimony that the Promissory Note was one of the first things she reviewed and summarized.²⁸

7. Three weeks before trial, Appellant Peterson decided to move forward without DWT and DWT withdrew from the case.

Three weeks before trial, the Client had a face-to-face meeting with the Lawyer. By this time, the Client had already paid DWT over \$40,000.00. At the meeting, the Lawyer presented the Client with a bill that charged the Client an additional \$60,000.00 for services allegedly already rendered.²⁹ At that meeting, the Lawyer also told the Client that it would charge the Client approximately \$90,000.00 - \$100,000.00 to get the case prepared for trial. This projected amount did not include expenses for representation at trial and beyond.³⁰ The Client was in a difficult situation with trial looming, but decided not to move forward with the Lawyer's services.³¹ The Lawyer then withdrew from the case on the eve of trial.³²

²⁷ 4RP 470: 16-20. ADDITIONAL CITATION TO BE SUPPLEMENTED.

²⁸ 3RP 275: 14-19.

²⁹ 4RP 465: 4-14.

³⁰ 4RP 465: 13-18.

³¹ 2RP 153: 22 – 154: 3 and 4RP 465: 4 – 18.

³² 3RP 319: 15-17.

The Client subsequently hired the Olympic Law Group, PLLP to replace the Lawyer.³³ The Olympic Law Group concluded the Meilinger Lawsuit by summary judgment simply by asserting that Mr. Meilinger never signed the required promissory note.³⁴

8. DWT sued former client, Appellant Peterson, for alleged unpaid fees related to the Meilinger lawsuit.

In an attempt to collect the attorney fees it charged the Client pursuant to the fee agreement, the Lawyer filed a lawsuit against the Client for the allegedly unpaid fees.³⁵

9. At trial, the Lawyer presented no evidence in its case-in-chief that the fees it had charged and was attempting to collect from the Client were reasonable.

At trial, the Lawyer did not testify that the fees it was charging the Client were reasonable. To be sure, it produced no expert opinion that its fees were reasonable. Instead, the Lawyer relied solely on the self-serving testimony of its three attorneys Hendershott, Theiss, and Summers.³⁶

These attorneys did not testify that their fees were reasonable. They testified they were involved with either reviewing

³³ 3RP 319: 22-23.

³⁴ 3RP 328: 21 – 329: 11.

³⁵ CP 1 -7 (Complaint for Breach of Contract, Promissory Estoppel, and Unjust Enrichment).

³⁶ Testimony of DWT Partner Greg Hendershott 1RP 58 - 109; Testimony of DWT Partner John Theiss 1RP 111-121 and 2RP 130-181; and Testimony of former DWT junior associate Carly Summers 2RP 182-224 and 3RP 231-288.

billing, managing or working on the Meilinger Lawsuit.³⁷ The only person who even mentioned the fee amounts that the Lawyer charged and was attempting to collect from the Client was John Theiss. He was shown numerous invoices and testified that those invoices contained time entries by him and Ms. Summers.³⁸ He added that he billed at his standard hourly rate³⁹ and Ms. Summers billed at her hourly rate.⁴⁰ Mr. Theiss further testified

³⁷ 1RP 65: 14-18 (Mr. Hendershott was the billing attorney for the case and reviewed pre-bills); 1RP 119:21-23 (Mr. Theiss reviewed all of Ms. Summers billings in the case); 2RP 143: 17-18 (Mr. Theiss was in charge of the case); 2RP 148: 6-8 (Ms. Summers worked on the Meilinger Lawsuit); 1RP 119:21-23 (Mr. Theiss reviewed all of Ms. Summers billings in the case).

³⁸ 2RP 140:4-15 (Mr. Theiss testifies that the invoices are for the Peterson case and they are accurate); 2RP 141:22 -142: 7 (Mr. Theiss testified that the invoice is for work he did in November 2010 and time is accurate); 2RP 142:10-14 (Mr. Theiss confirms that the invoice is for work performed in December 2010 and hours are accurate); 2RP 142: 18-25 (Mr. Theiss confirms the invoice is dated May 17, 2011 with entries by Mr. Theiss and Ms. Summers and the entries are accurate); 2RP 143:25 – 144:12 (Mr. Theiss confirms it is an invoice with time entries for him and Ms. Summers; he testifies that his entries are accurate); 2RP 144: 13-22 (Mr. Theiss confirms that this is an invoice for work performed in June 2011 with time entries by Ms. Summers); 2RP 145: 1-4 (Theiss confirms this is another invoice in the Peterson case with entries from him and Ms. Summers and that the time entries appear to be accurate); 2RP 145: 13-20 (Mr. Theiss testified that Mr. Hendershott wrote off two months of invoices); 2RP 145:21 – 146: 1 (Theiss testifies these are time entries by Mr. Theiss and Ms. Summers which accurately reflect the tasks performed); 2RP 146: 2-7 (Theiss testified that the documents shows time entries by him and Ms. Summers and show time spent on various tasks); 146: 24 – 147: 3 (Mr. Theiss says the documents shows the time spent by him and Ms. Summers on the Peterson case and the entries accurately state the time spent on the tasks); 2RP 147: 4-8 (Mr. Theiss says the invoice shows time spent by him and Ms. Summers on the Peterson case and the entries accurately state the time he spent on the tasks); 147 9-13 Mr. Theiss says the invoice shows time spent by him and Ms. Summers on the Peterson case and the entries accurately state the time he spent on the tasks); 147: 20-23 (Theiss testified that this invoice shows hours Ms. Summers worked on the case).

³⁹ 2RP 114: 13-15; 2RP 121:18-20.

⁴⁰ 2RP 119:19-20.

that he reviewed Ms. Summers billings⁴¹ and he believed the time Ms. Summers spent on tasks was reasonable compared with other associates *that worked for the Lawyer*.⁴² Mr. Theiss, however, did not provide any testimony as to how Ms. Summers' hours compared with other similar lawyers in the area. Mr. Theiss also did not specifically opine on any of Ms. Summers' specific billing entries. Tellingly, Mr. Theiss testified that directed Ms. Summer an extraordinary amount of times: "suggesting things to do, things not to do, areas to do research, areas to investigate."⁴³ Mr. Theiss offered no testimony that any adjustments had been made to Ms. Summers' billing and did not reference the RPC 1.5(b) factors.

Ms. Summers testified that regarding the numerous invoices she was shown at trial that she made the entries and that they were accurate.⁴⁴ She did not testify that the hours she spent were reasonable.

⁴¹ 2RP 119: 21-23.

⁴² 2RP 156: 13-19.

⁴³ 2RP 137: 13-17.

⁴⁴ 3RP 245: 22 – 246: 13 (Ms. Summers testified that there are time entries by her and that they are accurate); 3RP 250: 7-18 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 351: 18-24 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 254: 9-17 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 255: 10-19 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 257: 2-10 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 258: 15-21 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 261: 19-25 (Ms. Summers testified that the entries in the invoice are accurate); 3RP 263: 25 – 264: 10 (Ms. Summers testified that the entries in

The sole testimony, by the Lawyer's three attorneys regarding a downward adjustment to billing was a \$10,000.00 write-off in the July 2011 billing that was approved by Mr. Hendershott in response to a request from the Client.⁴⁵

10. The Client brought, and the trial court denied, a motion for involuntary dismissal when the Lawyer rested its case-in-chief.

After its three attorneys testified, the Lawyer rested its case-in-chief, and the Client requested the trial court involuntarily dismiss the Lawyer's case because the Lawyer did not meet its burden to prove the fees it had charged the Client and that it was attempting to collect from the Client were reasonable.⁴⁶ The Court denied the motion.⁴⁷

11. Appellant's expert witness, David Nold, concluded that the fees charged by DWT to Appellant Peterson were grossly unreasonable.

After the trial court denied the Client's motion for involuntary dismissal, the Client proceeded to prove his affirmative defense that the Lawyer's fees were unreasonable. The Client offered opinion testimony from his expert David Nold who was the only

the invoice are accurate); 3RP 265: 1-10 (Ms. Summers testified that the entries in the invoice are accurate);

⁴⁵ 1RP 81: 3 – 82: 2 and 1RP 82: 23-25.

⁴⁶ 3RP 290: 23- 291: 4.

⁴⁷ 3RP 298: 4.

third-party expert who provided an opinion on whether the Lawyer's fees it had charged and was attempting to collect from the Client were reasonable.⁴⁸ Mr. Nold ultimately concluded that the total fees (not the hourly rates) charged to the Client were grossly unreasonable because they showed poor management, poor staffing, poor strategy and overbilling.⁴⁹ Mr. Nold bolstered his opinion and testified that the Lawyer should have simplified the case and done what the Olympic Law Group did, which was move for summary judgment on the undisputed fact that Trent Meilinger had not signed the promissory note.⁵⁰

12. The trial court found the Lawyer's standard form adhesion contract was binding on the Client even though the Client did not sign it and that the contract's terms deviated from RPC 1.5 and allowed the Lawyer to charge an unreasonable fee for its services.

The trial court found that the Lawyer's standard form adhesion contract was binding on the Client even though the Client did not sign it. Moreover, its findings as a whole show the Lawyer's standard form adhesion contract deviated from RPC 1.5 and allowed the Lawyer to charge the Client an unreasonable fee. In its Finding number 6, the trial court found, "[t]he terms of the

⁴⁸ 3RP 370: 22 and 373: 15-18.

⁴⁹ 3RP 376: 13-16.

⁵⁰ 4RP 448: 10-13.

engagement provided that Mr. Peterson was to pay *DWT at its normal hourly rates for legal services performed by DWT's attorneys...(without regard to reasonableness).*⁵¹ (Emphasis added). Finding number 7 found that the Lawyer's standard form adhesion contract allowed the Lawyer to weigh "*the time and effort*" it spent "*most heavily*" when determining the fee it would charge the Client.⁵² (Emphasis added).

13. The trial court found and concluded that the Lawyer's fees it had charged the Client were unreasonable and reduced the Lawyer's claim by one-half.

The trial court found and concluded that the Client's "argument that [the Lawyer's] fees are unreasonable has merit....Here, [the Lawyer's] hourly rates were generally reasonable but hours spent on the matter by the associate were too high, in light of [the Lawyer's] standard billing rates, reputation, quality of work product, the complexity of the case, and the amount in controversy...."⁵³ As a result, the trial court cut the Lawyer's claim in half.⁵⁴

14. After finding and concluding the Lawyer's fees were unreasonable and reducing the Lawyer's claim by one-half, the trial court concluded the Client was required to

⁵¹ This is part of the larger entry. CP 484: 6-9.

⁵² Emphasis added.

⁵³ CP 1-7; CP 489: 7 and 13-15.

⁵⁴ CP 492: 9-14.

pay the Lawyer for the Lawyer's time in attempting to collect the unreasonable fees it had charged the Client.

After finding and concluding the Lawyer's fees were unreasonable and reducing the Lawyer's claim by one-half, the trial court concluded the Client was required to pay the Lawyer for the Lawyer's time in attempting to collect the unreasonable fees it had charged the Client. The basis for this conclusion was that the Contract allowed the fee award and that the Lawyer was the "prevailing party" because it received a judgment in its favor.⁵⁵

15. After reducing the Lawyer's attorney fees by more than \$40,000 in order to make them reasonable, the trial court awarded the Lawyer \$90,000 in attorney fees.

On September 4, 2015, the Lawyer filed a motion for fees and costs requesting \$130,285.74 in attorney fees and expenses for its attorney fees and costs related to its lawsuit against Appellant Peterson.⁵⁶ Again, the trial court found and concluded the Lawyer's fees were unreasonable and reduced them to \$90,000, but still entered a judgment against the Client for the \$90,000 for time that the Lawyer had reasonably spent in attempting to collect unreasonable fees from the Client.⁵⁷ The Final Judgment in this case was entered on October 29, 2015.⁵⁸

⁵⁵ CP 493: 1-4.

⁵⁶ CP 494: 19-21.

⁵⁷ CP 712-713.

⁵⁸ CP 690-695.

16. The Client timely filed his notice of appeal challenging the Final Judgment and Order Awarding Attorney Fees in this case.

On November 25, 2015, Appellant Peterson timely filed a notice of appeal that appealed (1) the October 29, 2015, Order Granting DWT's Motion for Attorney Fees and Expenses; (2) the October 29, 2015, Judgment in Favor of Davis Wright Tremaine LLP and Against Frederick Peterson; (3) the August 25, 2015, Findings of Fact, Conclusions of Law, and Judgment; and (4) the March 5, 2015, Order Denying Defendant's Motion for Summary Judgment.⁵⁹ On November 25, 2015, the Final Judgment was satisfied.⁶⁰

V. ARGUMENT

1. The Client should not have to compensate the Lawyer for its time attempting to collect an unreasonable fee it charged even when the Lawyer's standard form adhesion contract contained a fee shifting provision.

a. The Lawyer's standard form adhesion contract is unenforceable because it deviated from RPC 1.5 and allowed the Lawyer to charge an unreasonable fee.

The Lawyer's Engagement Letter and standard pre-printed form entitled Terms of Service are unenforceable because they

⁵⁹ CP 725.

⁶⁰ CP 750-51.

allowed Lawyer to deviate from RPC 1.5 and charge the Client an unreasonable fee.⁶¹ A fee agreement that violates the Rules of Professional Conduct (RPC) is against public policy and unenforceable.⁶² Deciding whether "an attorney's conduct violates the relevant Rules of Professional Conduct is a question of law."⁶³ Review is, therefore, de novo.

The purported fee agreement between the Lawyer and the Client violated RPC 1.5 because it allowed the Lawyer to place undue emphasis on the hours each attorney spent working on the Client's case, and this resulted in the Lawyer charging the Client an unreasonable fee. RPC 1.5(a) states: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."⁶⁴ RPC 1.5(a) identifies nine *equally-weighted* non-exclusive factors a lawyer should consider when deciding what to charge a client. While the Lawyer's Terms of Service identified these nine factors, it did not equally weight the nine factors. To be sure, it specifically placed undue emphasis on

⁶¹ The Client asserted the following affirmative defense: "that the cause of action and the fee agreement are void as against public policy because they violated the RPCs." CP 13: 14-15; 5RP 605: 20-22.

⁶² *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004) *citing* *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 909, 988 P.2d 467 (1999).

⁶³ *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992).

⁶⁴ *Emphasis added.*

“the time and effort required.”⁶⁵ This allowed the Lawyer to charge the Client an unreasonable fee, and the Lawyer based its fee on the hours it took each attorney to perform each task. This resulted in the Lawyer charging the Client an unreasonable fee, as found by the trial court.⁶⁶

The testimony of all three of the Lawyer’s witnesses were consistent with the time and effort focus in the Lawyer’s pre-printed standard form Terms of Service. Despite Mr. Hendershott reviewing the billings in the case, he offered no testimony that he in any way reduced the billings on the basis of any of the factors listed in RPC 1.5(a).⁶⁷ Mr. Theiss, who reviewed Ms. Summers’ billings, merely testified that the entries were accurate. He did not reduce the fees in any way using the factors listed in RPC 1.5(a) or reference the factors at any point in his testimony. Ms. Summers’ testimony was limited to verifying that her time entries were accurate.

b. Even if there was an enforceable fee agreement between the Lawyer and the Client, the Lawyer breached an implied covenant that prohibited the Lawyer from charging the Client an unreasonable fee

⁶⁵ CP 53.

⁶⁶ CP 489: 7 and 13-15.

⁶⁷ Hendershott testified that he did write-off \$10,000.00 from Appellant Peterson’s bill at the client’s request. See supra.

i. Fee agreements between lawyers and their clients contain an implied covenant prohibiting the Lawyer from charging the Client an unreasonable fee.

All contracts in Washington have implied covenants. For instance, all contracts in Washington have an implied covenant of good faith and fair dealing.⁶⁸ As applied to fee agreements between a lawyer (a fiduciary) and a client, the implied covenants should include a covenant to charge only a reasonable fee. This implied covenant can either be a subset of the implied covenant of good faith and fair dealing or it can be a stand-alone implied covenant. The result is the same: when a Lawyer breaches the implied covenant not to charge an unreasonable fee, it suspends or discharges the client's obligation to pay, and there client cannot breach the contract by failing to pay the lawyer's invoice.

ii. Lawyer breached the implied covenant to not charge an unreasonable fee.

Here, the Lawyer breached the implied covenant not to charge an unreasonable fee. The trial court found the fee that the Lawyer charged the Client was unreasonable.⁶⁹

⁶⁸ *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966).

⁶⁹ CP 491: 4-13.

iii. The Lawyer's breach of the implied covenant to not charge an unreasonable fee suspended or discharged the Client's obligation to pay the unreasonable fee.

“A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty.” Jacks v. Blazer, 39 Wash. 2d 277, 285, 235 P.2d 187, 191 (1951). Here, the Lawyer's breach of the implied covenant not to charge an unreasonable fee discharged the Client's obligation to pay the amount claimed by the Lawyer and, thus, the Lawyer could not successfully bring a breach of contract action against the Client. As such, the Lawyer could not enforce the fee shifting provision in the Lawyer's Terms of Service against the Client.⁷⁰

⁷⁰ Appellant Peterson is not contesting the \$43,713.63 judgment because the trial court could have re-instituted DWT's *quantum meruit* claim that had been dismissed on summary judgment, yielding the same result.

c. Public policy demands that Client not be responsible to compensate the Lawyer for the effort it spent attempting to collect an unreasonable attorney fee because the lawyer was violating the Rules of Professional Conduct.

Professional misconduct may be grounds for denying an attorney his fees. *Ross v. Scannell*, 97 Wash. 2d 598, 610, 647 P.2d 1004, 1011 (1982). It is professional misconduct to charge the client an unreasonable fee. RPC 1.5(a); and *Ross*, 97 Wash.2d at 609-10. It is also professional misconduct to collect an unreasonable fee from a client. RPC 1.5(a) RPC 8.4(a) makes an attempt to violate the Rules of Professional Conduct an independent violation of the Rules. Here, the Lawyer was found to have charged the Client an unreasonable fee. The Lawyer's lawsuit was an attempt to collect an unreasonable fee from the Client. This is professional misconduct, and it may be grounds to deny the Lawyer its fees. While there is authority to deter professional misconduct by causing the Lawyer to forfeit or disgorge its fee, there is no authority that allows a lawyer who charges an unreasonable fee to be rewarded by being compensated by the Client for the efforts the Lawyer spent in attempting to collect the unreasonable fee.

The policy is clear. Clients should not be deterred from challenging or disputing a lawyer's fees. If the fee a lawyer charges is unreasonable, then the client should be able to dispute the unreasonable fee without having to worry that he or she might have to pay the Lawyer more in attorney fees than the fee amount in dispute.

That is exactly what happened here. The Client disputed the over \$80,000 in fees the Lawyer charged and was trying to collect from the Client. The Lawyer brought suit in an attempt to collect the over \$80,000 in unpaid fees it charged the Client. The Client disputed that the amount the Lawyer was attempting to collect was reasonable. The Lawyer failed to show the fees it charged the Client and was attempting to collect from the Client were reasonable. The Client succeeded in showing that the Lawyer's claimed fees were unreasonable. The Client was, thus, successful in having the trial court cut the Lawyer's claim by \$40,000.

The Client's success, however, was short-lived. The trial judge, after finding the Lawyer's fees were unreasonable and cutting them in half, then awarded the Lawyer \$90,000 in attorney fees pursuant to a contract the Client never signed. The Client, therefore, ended up paying \$50,000 more to the Lawyer than if the Client had just paid the Lawyer the unreasonable fee in the first instance. This result is both unfair and against public policy.

2. The trial court's conclusion of law that DWT was the prevailing party is unsupported by necessary findings of fact.

Because the trial court has weighed the evidence, with regard to the trial court's conclusions of law, this Court must determine whether the findings support the conclusions of law and the judgment.⁷¹ Here, the trial court wrote in Conclusion of Law IV: "Having found in favor of the Plaintiff, the Court finds that Plaintiff is the prevailing party under the Billing Arrangements and Terms of Payments Section of the Engagement Agreement and Terms of Service and is entitled to recover attorney's fees."⁷² Here, the Client was the one who prevailed in his affirmative defense that the fees the Lawyer sought were unreasonable. The Client succeeded in getting the trial court to cut the Lawyer's fee claim in half. The trial court never analyzed the parties' respective positions and the results achieved in determining who was the prevailing party. This Court should, therefore, reverse the trial court's conclusion that the Lawyer was the prevailing party and reverse its award of attorney fees and costs based on this unsupported conclusion of law.

⁷¹ *In re Foreclosure of Liens*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994).

⁷² CP 493: 1-4.

3. The trial court should have granted the Client's motion for involuntary dismissal when the Lawyer rested its case-in-chief because the Lawyer produced insufficient evidence that its fees were reasonable.

Lawyers have the burden to produce evidence on both the services rendered and the reasonable value thereof.⁷³ The Lawyer did not produce any evidence as to the reasonableness of its fees in its case-in-chief. The Lawyer presented three witnesses: Its partner Greg Hendershott, its partner John Theiss, and its former associate Carly Summers. Mr. Theiss and Ms. Summers offered testimony regarding the services rendered and to the accuracy of their billings and Mr. Hendershott testified that he reviewed pre-bills, but none of these witnesses testified regarding the reasonableness of the fees charged to the Client.

Despite the Lawyer patently failing to meet its burden, the trial court denied the Client's half-time CR 41(b)(3) motion to dismiss. Under CR 41(b)(3), dismissal is appropriate " 'if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.' " Here, the Lawyer failed to present any evidence supporting an essential element of its claim. Therefore, there was no evidence or reasonable inferences

⁷³ *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967) citing *Kimball v. Public Utility Dist. No. 1 of Douglas County*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964).

therefrom to support a judgment in its favor at the end of its case-in-chief. The trial court, thus, erred when it denied Appellant Peterson's CR 41(b)(3) motion to dismiss.

4. The trial court's finding of fact that the Client requested the Lawyer represent him in his defense of the Meilinger Lawsuit in October 2010 is unsupported by substantial evidence.

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, this Court must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, this Court must next decide whether those findings of fact support the trial court's conclusions of law.⁷⁴ "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."⁷⁵

The first sentence of the trial court's Finding of Fact No. 5 states: "In October 2010, Mr. Peterson requested that DWT represent him in his defense of the Meilinger Lawsuit."⁷⁶ Here, the testimony at trial unequivocally showed that Mr. Hendershott and the Client met sometime prior to September 13, 2010. The

⁷⁴ *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

⁷⁵ *Id.* at 389 (quoting *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985)) (internal quotation marks omitted).

⁷⁶ This is sentence from the longer entry. CP 483: 22 – 484: 3.

uncontested testimony about what happened at that meeting was provided by the Client who testified that he agreed to hire the Lawyer upon recommendation by Mr. Hendershott. Mr. Hendershott testified that he sent an email to the Client on September 13, 2010 stating that Mr. Theiss was a good fit for the Client's company. Because the uncontested evidence shows the Client agreed to the Lawyer's representation in the Meilinger Lawsuit prior to September 13, 2010, the first sentence of the trial court's Finding of Fact No. 5 is unsupported by substantial evidence. Because no evidence was presented to persuade a fair-minded person of any other determination other than Appellant Peterson requested DWT's representation prior to September 13, 2010, the first sentence of Finding No. 5 is unsupported by substantial evidence and should be disregarded.

5. The Client is entitled to an award of his appellate fees.

RPC 18.1 allows this Court to award appellate attorney fees. The Client, having defeated the enforceability of the purported contract, is entitled to an award of attorney fees pursuant to the fee shifting provision in the purported contract. In Washington, an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract

is central to the dispute. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wash. App. 203, 235, 242 P.3d 1, 18 (2010). The purported contract in this case was and is central to the dispute in this appeal. Despite the attorney fee provision being one-sided, RCW 4.84.330 makes it bilateral. The Client should be awarded his appellate attorney fees.

VI. CONCLUSION

For the above reasons, this court should reverse the court's judgment and order with instructions to enter judgment in the Client's favor. At the very least, this Court should vacate the order granting the Lawyer \$90,000 in attorney fees. In either case, this Court should award the Client his appellate attorney fees.

DATED this 28th day of July 2016.

/s/ Robert J. Cadranel

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below written date, I caused delivery of a true copy of Peterson's Opening Brief to the following via electronic transmission:

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