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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 REPLY BRIEF - **AMENDED**

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A. There is No Deferential Standard of Review

There is no deferential standard of review in cases involving a bench trial in a civil breach of contract case. This court reviews a bench trial decision to determine whether the findings of fact are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *Sunnyside Valley Irrig. Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002), *aff'd* 149 Wn.2d 873, 73 P.3d 369 (2003). Moreover, the label applied to a finding or conclusion is not determinative as this court “will treat it for what it really is.” *The-Anh Nguyen v. Ciy of Seattle*, 170 Wn.App. 155, 163, 317 P.3d 518(2014).

Appellee Law Firm (the “Law Firm”)’s cited cases do not yield a different result. First, *State v. Neff*, 63 Wn.2d 453, 181 P.3d 819 (2008) is a plurality opinion where *only four justices* ascribed to the dicta that appellate review may be “deferential” when a “judge considered testimony.” A plurality opinion has limited precedential value and is not binding. *Lauer v. Pierce Cty.*, 173 Wn.2d 242, 258, 267 P.3d 988, 995 (2011). Second it was a criminal sentencing case, not a civil contract case. Third, *Standing Rock Homeowners Ass’n. v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001), is an equitable injunction decision where appellate courts give great weight to the trial court’s decision. There is no corollary deference in cases, like this one, involving a breach of contract.

B. The Issues on Appeal are Legal Conclusion Reviewed *De Novo*

Whether a party breaches a promise or covenant is a mixed question of law and fact. The nature and extent of the obligation imposed by each covenant presents a question of law; whether a party breached an obligation presents a question of fact. *Edmonson v. Popchoi*, 155 Wn. App. 376, 383, 228 P.3d 780, 784 (2010), *aff'd*, 172 Wn.2d 272, 256 P.3d 1223 (2011). That explains why some cases, like the ones cited by the Law Firm, state breach of contract is a fact question and some cases state it is a conclusion of law.¹

Here, the breach of contract issues the Client raised in its Opening Brief request this Court determine whether the Law Firm's standard form adhesion contract imposed an obligation on the Law Firm to charge the Client a reasonable fee and to prohibit the Law Firm from charging the client an unreasonable fee. As such, these issues are properly characterized as legal conclusions that are reviewed *de novo*.²

¹ *Silverdale Hotel Associates v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 767, 677 P.2d 773 (1984) (“The findings of fact support the trial court's conclusion that L & N breached its construction loan agreement with Silverdale.”)

² Neither party has appealed the trial court's findings that the Law Firm charged the Client \$120,000, the Client paid \$40,000, the Law Firm was claiming an \$80,000 balance, or that the Law Firm charged the Client an unreasonable fee.

C. The Trial Court Never Properly Analyzed the Client’s Unreasonable Fee Affirmative Defenses

The trial court never properly analyzed the Client’s unreasonable fee or public policy affirmative defense. The Client’s affirmative defense number 8 stated, among other things, “[The Law Firm] has breached RPC 1.5(a) by charging an unreasonable fee for its services. Plaintiff cannot collect an unreasonable fee for the services it may have rendered.” CP 13. Here, the trial court found: (1) The Law Firm charged the client \$120,000 for the services it rendered; (2) the Client paid \$40,000; and (3) the Law Firm claimed it was owed \$80,000 (CP 489, Par. 25). It also found that the Law Firm had charged the Client an unreasonable fee for its services, and reduced the Law Firm’s claim by about 50% to \$40,000.³ CP 492, Pars. 40 and 41. It then concluded that the Client breached the Law Firm’s standard, pre-printed form adhesion contract CP 489, Par. 25.

The trial court erred because it never addressed whether charging and attempting to collect an unreasonable fee provided an affirmative defense to the Law Firm’s breach of contract action. CR 8(c) requires parties to set forth affirmative defenses, which include “matters constituting an avoidance,” including either expressed or implied provisions in a contract that if the plaintiff did not comply with, then they would defeat the

³ For convenience, this brief rounded the amounts to the nearest \$10,000 instead of using the actual amounts to the penny.

plaintiff's breach of contract claim.⁴ That is exactly what the Client's unreasonable fee affirmative defense did. In simple terms, it alleged that if the Law Firm proved it had a contract with the Client requiring the Client to pay its invoices, then the Client did not have to pay the Law Firm's invoices because the Law Firm was charging an unreasonable fee. The trial court erred, however, because it never analyzed whether the Law Firm's charging the Client an unreasonable fee excused the Client from having to pay the Law Firm's invoices.

As a matter of law the trial court should have concluded that the Law Firm's standard preprinted form adhesion contract required the Law Firm to charge the Client a reasonable fee before the Client was obligated to pay the Law Firm's claimed fee. Had the trial court made this proper conclusion, then common contract principles would have excused the Client's obligation to pay the Law Firm's invoices. "[I]t is a condition⁵ of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." Restatement (Second) of Contracts § 237 (1981).

⁴ *Harting v. Barton*, 101 Wash. App. 954, 962, 6 P.3d 91, 95 (2000)

⁵ The Client also affirmatively defended the Law Firm's Complaint by alleging the Law Firm failed to comply with conditions precedent. CP 12, Par. 6.

Here, the Client exchanged his promise to pay the Law Firm's invoices in exchange for the Law Firm's obligation to not charge an unreasonable fee. The Law Firm did not comply with its obligation, and that excused the Client from paying the Law Firm's invoices until the Law Firm charged a reasonable fee.

Comment (a) to this Restatement provision makes this clear. It states that when one party to a contract does not comply with a material obligation, the first effect that noncompliance has is to prevent performance of the other party's "duty from becoming due, at least temporarily," until the first party complies with its obligation. The comment further explains that this rule is an implied rule dictated by fairness rather than an expressed agreement between the parties. ("The occurrence of conditions of the type dealt with in this Section is required out of a sense of fairness rather than as a result of the agreement of the parties.").

Washington case law has adopted this Restatement provision. In *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 765 P.2d 339, 343 (1988), the appellate court found that a contracting party, "had a right to suspend performance if [the other party's] breach was material." *Bailie*, 53 Wn. App. at 82.

A client should not be obligated to pay a lawyer's invoice if the lawyer's invoice does not charge the Client a reasonable fee. The correct contractual analysis is a two-step process. First, this court should hold that all fee agreements between a lawyer (a fiduciary) and a client have an implied obligation that the lawyer must charge no more than a reasonable fee for her or his services. Second, if the lawyer charges her or his client more than a reasonable fee; then this noncompliance by the lawyer is material, and the client's duty to pay the lawyer does not become due until the lawyer complies by charging the client only a reasonable fee.

This result is fair to both the client and the lawyer. It protects the client from having to pay a lawyer an unreasonable fee, especially where there is a prevailing party attorney fee provision. It protects the lawyer because the lawyer can still recover a reasonable fee for services.

D. Alternatively the Law Firm's Standard Form Adhesion Contract is Void Because it Violates Public Policy by Allowing the Law Firm to charge its Client an Unreasonable Fee.

If this Court does not want to hold that a client is excused from paying a lawyer's unreasonable bill until the lawyer charges the client only a reasonable fee, then it can achieve the same result in this case by holding that the Law Firm's standard preprinted adhesion contract is void because it violates public policy by allowing the Law Firm to charge the Client an unreasonable fee.

E. The Result Reached by the Trial Court is Unfair to Washington Citizens who Hire a Lawyer to Represent Them.

The results in this case are unfair to the Client and any other person who hires a lawyer. It is uncontested that a contract between a lawyer and a client is unenforceable if it violates the Rules of Professional Conduct. *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 445, 988 P.2d 467, 472 (1999), as amended on denial of reconsideration (Jan. 12, 2000), order amended on denial of reconsideration sub nom. Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan, 109 Wn. App. 436, 33 P.3d 742 (2000). Here, the trial court found that the Law Firm's standard pre-printed form adhesion contract specifically found: (1) that the Client was to pay the Law Firm at the Law Firm's normal hourly rates for legal services performed by the Law Firm's attorneys;⁶ (2) that the Law Firm's Terms of Service listed the RPC 1.5 factors that determine a reasonable fee, but also that the time and effort the Law Firm expended are weighted most heavily;⁷ and (3) that the Law Firm's invoices to the Client were consistent with the terms of their contract.⁸

In this case, it was weighing the time and effort the Law Firm expended more heavily than the other factors that caused the Law Firm to

⁶ CP 484, Par. 6

⁷ CP 484, Par.7. RPC 1.5 does not allow lawyers to weigh the time and effort they expend more heavily when determining a reasonable fee.

⁸ CP 489, Par. 25.

charge the Client an unreasonable fee. The Law Firm's fees were based solely on the actual time each lawyer that worked on the matter expended. This time is what the trial court found was unreasonable. CP 490-492, ¶¶ 31-36, 38, and 40. As a result the trial court reduced the Client's bill by 1/3 of the associate attorney's time spent. CP 492, Par. 40.

If there is no implied obligation that a lawyer is to charge his or her client only a reasonable fee, then the Law Firm's standard preprinted form adhesion contract violates the Rules of Professional Conduct and is unenforceable. Without the implied obligation, the Law Firm was allowed to weigh the time it expended representing the Client more heavily than the other factors, and that weighing resulted in an unreasonable fee. Charging an unreasonable fee violates RPC 1.5(a). Moreover, RPC 1.5 does not allow a lawyer to weigh the time it expended more heavily than the other RPC factors. The Law Firm's standard preprinted form adhesion contract is, therefore, void because it violates public policy by allowing the Law Firm to charge an unreasonable fee for its services.

F. The Law Firm was not the Substantially Prevailing Party at Trial Because the Client Successfully Proved the Fees the Law Firm was Trying to Collect Were Unreasonable.

Careful contract analysis is necessary to understand the trial court's error in concluding that the Law Firm was the prevailing party and entitled to attorney fees. This careful analysis is also necessary to prevent the

extremely unfair result assessing attorney fees against a client who successfully defends his or her lawyer's attempt to collect an unreasonable fee. This should be the rule because the lawyer should not be paid for the time he or she spends attempting to collect an unreasonable fee because that too violates the Rules of Professional Conduct.⁹

A trial court's determination of the prevailing party is often reviewed quite closely on appeal. *Eagle Point Condo. Owners Ass'n. v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). Whether a party is a prevailing party is a mixed question of law and fact that an appellate court reviews under an error of law standard. *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 2013, 231, 242 P.3d 1 (2010). If both parties prevail on major issues there may be no prevailing party. *American Nursery Prod. Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990); *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 320-21, 724 P.2d 1127 (1986). In such situations, neither party is entitled to an attorney fee award. *American Nursery*, 115 Wn.2d at 235; *Puget Sound*, 45 Wn. App. at 321. Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees. *Marine Enter., Inc. v.*

⁹ RPC 1.5(a) prohibits a lawyer from collecting unreasonable attorney fees. RPC 8.4(a) makes any attempt to violate the Rules of Professional Conduct an independent RPC violation.

Security Pacific Trading Corp., 50 Wn. App. 768, 772, 750 P.2d 1290, review denied 111 Wn.2d 1013 (1988).

Here, both parties received relief. Although the Law Firm prevailed on its claim for the existence of a contract and recovered a portion of the \$81,630.97 in damages it sought, the Client prevailed on his affirmative defense that the unpaid fees the Law Firm sought to collect were unreasonably high. Thus the Client prevailed on the major issue he raised, which was that the fees the Law Firm had charged and was attempting to collect were unreasonable. The trial court awarded the Law Firm only an additional \$43,713.63 in damages, which represented a 46% reduction of the damages it sought at trial. In other words, where the Law Firm claimed another \$81,630.97¹⁰ was owed, and the Client argued at trial that the \$40,817.27 he had already paid was a reasonable fee, the trial court split the disputed amount essentially down the middle. Because each party prevailed on its major issue, there is no singularly prevailing party, and neither party is entitled to attorney fees.

The Law Firm's argument that no further analysis of which party prevailed is required beyond the Law Firm having obtained a judgment leads to potentially absurd results. Had the court entered judgment for the

¹⁰ The Law Firm's insistence that the trial court "award[ed] \$83,860.40," Resp. Br. at 35, apparently including amounts the Client previously paid, is a misstatement of the trial court's actual award.

Law Firm for only \$1,000.00 and determined that the Law Firm was overcharging its client by \$80,630.97, it would make no sense to then deem the Law Firm to have prevailed and award it attorney fees for having attempted to overcharge its client by \$80,630.97.

G. The Law Firm's contract allows large fees for prosecuting its own client and is therefore contrary to public policy.

By including an attorney fee provision, the Law Firm's contract gives rise to substantial fees for prosecution of an attorney's own client. Courts outside our state have shown deep concern that such provisions can be used to silence a client's complaint about fees due to the client's fear of his attorney's retaliation for nonpayment of even unreasonable fees. *See, e.g., Lustig v. Horn*, 315 Ill. App.3d 319, 327, 732 N.E.2d 613 (2000). The *Lustig* court concluded,

“this provision very well could be used to silence a client's complaint about fees, resulting from the client's fear of his attorney's retaliation for nonpayment of even unreasonable fees. Such a provision is not necessary to protect the attorney's interests; on the contrary, it merely serves to silence a client should that client protest the amount billed.”

Lustig, 315 Ill. App.3d at 327. In Illinois, it is against public policy to allow an attorney to represent himself (as the Law Firm did in this case) and charge for professional services in his own cause. *In re Marriage of Tantiwongse*, 371 Ill. App.3d 1161, 1164, 863 N.E.2d 1188 (2007). This holds true even if a contract specifically allows for recovery of attorney

fees. *Id.* As here, in *Tantiwongse*, the law office represented itself in an action for attorney fees from a former client. *Id.* at 1162.

The Law Firm's argument that language providing for a fee award should encourage clients who have legitimate claims, Resp. Br. at 26, is defeated by this very case. As proven at trial, the Client had a legitimate claim that the Law Firm had overcharged him by nearly \$40,000.00, but the trial court's subsequent fee award to the Law Firm now serves only to discourage similarly situated clients from pursuing their claims. See also *Gruber & Colabella, PA, v. Erickson*, 345 N.J.Super. 248, 252, 784 A.2d 758 (2001), holding that an award of fees to the attorney would be

unwarranted and inappropriate in a case such as this where the plaintiff did not retain an attorney and has not incurred any financial obligation to pay for legal services. In this case, the enforcement of the collection provision in the retainer agreement would constitute an unfair penalty to the former client, as well as an unearned and unreasonable windfall to the plaintiff... Such a result would undermine public confidence in the judicial system.

Id. at 252–53; and *Trope v. Katz*, 11 Cal. 4th 274, 277, 902 P.2d 259 (1995), stating:

an attorney who chooses to litigate in propria persona and therefore does not pay or become liable to pay consideration in exchange for legal representation cannot recover “reasonable attorney's fees” under Civil Code section 1717 as compensation for the time and effort he expends on his own behalf or for the professional business opportunities he forgoes as a result of his decision.

Id. at 292.

H. Even if the Law Firm was the prevailing party, no prevailing party attorney fees were awardable under the Law Firm’s standard adhesion contract.

1. The trial court did not actually enforce the Law Firm’s contract as written but instead based its award on quantum meruit.

Finding ¶7 included that, “The Terms of Service indicated that among many factors, the time and effort required are typically weighted most heavily.” CP 484. Weighting the time and effort required more heavily is not authorized by RPC 1.5(a), and is contrary to it, because this RPC does not provide for weighting any of its listed factors more heavily than others. The Terms of Service included no provision requiring the Law Firm to charge a reasonable fee, although RPC 1.5 is clear that a lawyer “shall not make an agreement for, charge, or collect an unreasonable fee.” RPC 1.5(a). An attorney’s ethical obligation to avoid charging an excessive fee is continuous throughout the life of the agreement. *Holmes v. Loveless*, 122 Wn. App. 470, 478, 94 P.3d 338 (2004). In *Holmes*, the agreement became unenforceable when the payments to the attorney exceeded a reasonable fee, which was before the time of trial; the court held that if it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract but must reduce the fee. *Id.* at 478.

Here, although the trial court found the existence of a contract, it did not enforce the Law Firm’s standard adhesion contract, without explaining why, although it implied the reason was because the Client had succeeded in showing that the fees were unreasonable. The trial court’s unchallenged finding was that “[t]he terms of the contract provided that the Client was to pay the Law Firm at its normal hourly rates for legal services performed by the Law Firm’s attorneys and reimburse the Law Firm for out-of-pocket costs incurred in connection with the Meilinger Lawsuit.” Finding ¶6, CP 484. Had the trial court enforced this contract term, it would have performed a simple lodestar calculation of the number of hours worked multiplied by the hourly rates of the attorneys.

2. Prevailing party attorney fees were not awardable under the Law Firm’s standard adhesion contract.

The Client’s Affirmative Defense No. 11 was that “The cause of action and fee agreement are void as against public policy because they violate the Washington Rules of Professional Conduct.” CP 13. Although the trial court never specifically addressed this affirmative defense, it did conclude that “the Client’s argument that the Law Firm’s fees are unreasonable has merit,” Conclusion of Law ¶26, CP 489, and that “the Law Firm’s invoices to the Client were reasonable in part,” Conclusion ¶25, CP 489.¹¹

¹¹ Other relevant conclusions of the trial court include that the “hours spent on the matter by the associate were too high,” Conclusion ¶ 26, CP 489; that “DWT spent an excessive

If the invoices were reasonable only in part, it is impossible that the remaining part of the invoices be anything other than unreasonable. A conclusion that the fees were not reasonable is a conclusion that the fees violated RPC 1.5(a). Therefore, because they were unreasonable in part but consistent with the terms of the contract, the contract allowed for charging an unreasonable fee.

The trial court must therefore have believed that the Law Firm's Terms of Service included an implied covenant not to charge an unreasonable fee—and the Law Firm never disputed the existence of an implied covenant to charge a reasonable fee. If the contract included such a covenant, then the trial court's finding that the Law Firm did not charge a reasonable fee leads to the conclusion that the Law Firm breached the covenant by charging and seeking to collect an unreasonable fee. The Law Firm was supposed to apply RPC 1.5 to its contract terms and arrive at a reasonable fee. However, the Law Firm did not arrive at a reasonable fee.

Once the Law Firm breached the implied covenant not to charge an unreasonable fee, that breach discharged the client's duty to pay the unreasonable fee charged. The trial court never expressly addressed the implied covenant in its Findings of Fact regarding the contract terms (Findings of Fact ¶¶ 6–10, CP 484-85), never finding that the fees arising

amount of time working on Mr. Peterson's case," Conclusion ¶ 38, CP 491; and that "[t]he Lodestar will be limited to hours reasonably expended," Conclusion ¶ 26, CP 489.

under the contract were subject to reasonableness, although it should have made such a finding, and the trial court erred by not finding an implied covenant. If the contract fees were not subject to reasonableness, then it is violative of RPC 1.5, and at trial the court did not strictly enforce the contract. To strictly enforce the terms of the contract would have been to multiply the hourly rate multiplied by the number of hours worked, no matter how many hours that was. Instead, the trial court reduced the fees charged and based its award on a quantum meruit analysis.

In the alternative, if the Law Firm's Terms of Service included *no* implied covenant not to charge an unreasonable fee, then the contract is void as against public policy for violating RPC 1.5, and it is unenforceable. Agreements between attorneys and clients are different from ordinary business contracts; no agreement in violation of the RPC is enforceable. *Holmes v. Loveless*, 122 Wn. App. 470, 484, 94 P.3d 338 (2004). Thus either way—whether the Law Firm breached the implied covenant by charging an unreasonable fee, or whether the Law Firm's contract included no such covenant—there can be no fee award for the Law Firm under the contract.

An action to recover the reasonable value of services is predicated upon quantum meruit. *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967). The trial court performed a quantum meruit analysis and reduced

the hours of one associate attorney “by 1/3 for some duplication... and considerable hours wasted because of inexperience, unproductive claims, or lack of client management.” Conclusion ¶40; CP 492. Each invoice was unreasonable because each time entry by the associate was 1/3 too high. the Law Firm tries to characterize the trial court’s drastic reduction of the fees it was seeking to collect as a mere “trimming,” but in round numbers the trial court reduced the \$80,000.00 the Law Firm was seeking to collect by about half. In other words, half of what the Law Firm was attempting to collect was an unreasonable fee.

The Law Firm argues, and the Client does not dispute, that lawyers are entitled to reasonable compensation for their services, Resp. Br. at 27, or in other words, *quantum meruit*. But when a party recovers on a *quantum meruit* theory or claim rather than on a contract breach theory, there can be no contractual provision for prevailing party attorney fees.

Even if this Court believes the Law Firm’s Terms of Service included an express covenant not to charge an unreasonable fee, the same analysis applies. The Law Firm breached the covenant, at which point the contract became unenforceable, and there can therefore be no attorney fees awarded under the contract.

I. Courts can Consider RPC Violations When Determining What Fee, if any, a Lawyer Should Receive.

The Client is not claiming that the Law Firm violated ethical rules “in hindsight,” as the Law Firm’s response brief states. He raised the issue of a breach of RPC 1.5 as an affirmative defense (no. 8) in his answer to the Law Firm’s complaint. CP 13.¹²

The Law Firm is incorrect that it is inappropriate for a trial court to adjudicate whether an ethical rule, and in particular RPC 1.5, has been breached. Although charges of attorney unethical conduct are normally heard by a disciplinary committee of the WSBA, a trial court may consider such allegations, including the allegation of collecting a clearly excessive fee, in determining attorneys’ fees. *Ross v. Scannell*, 97 Wn.2d 598, 609-10, 647 P.2d 1004 (1982). It is within the trial court's discretion to decide what impact, if any, lawyer misconduct will have on a claim for attorney fees. *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991)

In *Ross v. Scannell*, the Washington Supreme Court expressly instructed the trial court on remand to consider the charges of unethical conduct in determining the amount of fees due to Ross, stating, “Professional misconduct may be grounds for denying an attorney his fees.” *Id.* at 610. The Court of Appeals reviews de novo whether an attorney’s conduct violates the Washington Rules of Professional

¹² Although it is true that Mr. Peterson did not request arbitration, there is no evidence that DWT ever requested arbitration before it sued its client to collect an unreasonable fee.

Conduct. *LK Operating, LLC v. Collection Group, LLC*, 168 Wn. App. 862, 872, 279 P.3d 448 (2012). The trial court never directly addressed any RPC violations in its findings of fact and conclusions of law, although it did state at the opening of trial that “the Court is mindful that every contract has a duty of good faith and there are fiduciary responsibilities from an attorney to a client.” RP 17:5–7.

Whether an attorney’s conduct violated the relevant RPCs is a question of law for the court to decide. *Behnke v. Ahrens*, 172 Wn. App. 281, 297, 294 P.3d 729 (2012). An appellate court reviews *de novo* whether an attorney’s conduct violates the Washington Rules of Professional Conduct. *LK Operating, LLC, v. Collection Group, LLC*, 168 Wn. App. 862, 872, 279 P.3d 448 (2012).

In *Eriks v. Denver*, the trial court concluded that, as a matter of law, Denver had violated the Code of Professional Responsibility, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992), and breached his fiduciary duty to his clients. *Id.* at 463. The trial court then ordered Denver to return all fees, plus prejudgment interest, paid by his investor clients. *Id.* at 462. On review, the Washington Supreme Court stated, “The general principle that a breach of ethical duties may result in denial or disgorgement of fees is will recognized.” *Id.* at 462. The Supreme Court went on to say:

Disgorgement of fees is a reasonable way to “discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.” *Such an order is within the inherent power of the trial court to fashion judgments.* Therefore, the trial court’s order is affirmed.

Id. at 463 (emphasis added) (citations omitted). The Supreme Court’s holding in *Denver* is contrary to the Law Firm’s assertion that the “ELC creates the exclusive system by which attorneys may be sanctioned for violations of the Washington Rules of Professional conduct” and that the trial court “is not the proper venue for analysis of, fact-finding under, or disgorgement pursuant to RPC 1.5(a).”

The Law Firm relies on *Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016) as an example of an appellate court reversing a trial court that exceeded its disciplinary authority. However, *Chism* is easily distinguishable. In that case, the trial court had ordered disgorgement of Chism’s *wages* as in-house counsel, not his fees, “based on novel interpretations of several RPCs” thus exceeding the disciplinary authority delegated it by our Supreme Court. *Id.* at 822. The *Chism* court noted that “[c]ourts may... deny or disgorge attorney fees in response to an RPC violation,” adding that the “general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.” *Id.* at 840. Indeed, even a trial court order disgorging all fees paid is a proper consequence of an attorney’s RPC violation. *Cotton v.*

Kronenberg, 111 Wn. App. 258, 272, 275, 44 P.3d 878 (2002). The issue before the *Chism* court was whether the superior court properly limited its application of punishment to misconduct for which the Supreme Court would itself impose sanctions. *Id.* at 842. It concluded, “The trial court exceeded its disciplinary authority by ordering Chism to disgorge a significant portion of the wages otherwise owed to him without either acknowledging that it was disgorging wages, not fees, or accounting for the strong legislative preference in favor of employers paying earned employee wages.” *Id.* at 860.

J. Fee Forfeiture Should Have Been Considered.

In his Affirmative Defense No. 8, the Client raised the issue of fee forfeiture. This Affirmative Defense reads in part, “Plaintiff’s fee request must be limited to a reasonable fee and all amounts Plaintiff collected in excess of a reasonable fee must be disgorged to Defendant.” Affirmative Defense No. 8, CP 13. The Client’s counsel argued the disgorgement issue at length during the presentation hearing on the court’s findings of fact and conclusions of law, RP 632–41, with the trial court finally stating, “I don’t mind including a reservation on the disgorgement issue.” RP 650:12–13.

Here, the Law Firm charged and attempted to collect some \$83,000.00. Its client defended, saying the fees violated RPC 1.5 because they were unreasonable. The trial court agreed, refusing to enforce the contract as

written, which provided for a strict lodestar calculation, and awarded only \$43,713.63 in fees, based on quantum meruit.

K. The Client is not Seeking Lawyer Discipline.

The Law Firm cites a number of cases in support of its argument that it should not have been disciplined along with the trial court's substantial fee reduction. However, the Client never sought attorney discipline, such as suspension or disbarment, but merely disgorgement of unreasonable fees, which the trial court should have considered. *In Dailey v. Testone*, 72 Wn.2d 662, 435 P.2d 24 (1967), no additional attorney fees were awarded over the reasonable value. As for *In re Settlement/Guardianship of AGM & LMM*, 154 Wn. App. 58, 223 P.3d 1276 (2010), no additional attorney fees were awarded to the attorney. In that case, the attorney demanded \$33,333.33; the contract allowed him to do so. The client challenged the amount claimed as unreasonable. The trial court agreed with the client; reduced the fee to \$15,000.00, and did not award the attorney any fee for trying to collect an unreasonable fee.

L. The Law Firm is incorrect when it says that the "time and effort" language is not referenced in the trial court's factual findings and when it says that RPC violation was not raised in argument below.

The Law Firm is incorrect when it states that “the ‘time and effort’ language is not specifically referenced” in the trial court’s factual findings. It appears in Finding of Fact No. 7.¹³ CP 484.

As for failure to raise the argument below, not only does it appear as the Client’s Affirmative Defense No. 11, unethical conduct and breach of RPC 1.5 was mentioned by the Client’s attorneys at trial, RP 15:18–16:1, and argued at length at the post-trial presentation hearing on the findings of fact and conclusions of law. *See, e.g.*, RP 605:11–23, 624:14–625:10, 627:9–629, and 638:17–20.

M. The Law Firm’s discussion of Various Settlement Offers Violates ER 408.

The Law Firm’s brief includes a discussion of some settlement offers made prior to and during litigation, which the Law Firm includes in its brief for the purpose of proving the Client’s liability. Resp. Br. at 41–43. The Law Firm’s use of this information is in violation of ER 408. This rule makes inadmissible in civil cases evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, to

¹³ “The Terms of Service explained that DWT considered a variety of factors in determining the amount of fees it would charge Mr. Peterson, including: the time and effort required... The Terms of Service indicated that among many factors, the time and effort required are typically weighted most heavily...” Finding of Fact No. 7, CP 484.

prove liability for or invalidity of the claim or its amount. Here, the Law Firm is using evidence of the furnishing of offers to compromise the disputed claim to prove that the Client is liable for the attorney fees it expended in its collection action. This violates ER 408 and the Court should not consider this information for the purpose offered.

N. The Law Firm was required to produce evidence of reasonableness, not just hours spent, and its argument that expert testimony was not needed is inapposite.

The Law Firm argues it was not required to provide expert testimony to prove its case for attorney fees, and that the court is an expert on the value of legal services. But the authorities the Law Firm cites¹⁴ relate to a post-trial motion for fees between opposing parties in litigation, not an attorney/fiduciary's claim against its own former client. Our Supreme Court has articulated a different standard for attorney-client fee disputes:

legitimate fee disputes often arise between clients and their attorneys concerning the reasonableness of the fee and whether the attorney earned the fee. In the absence of misconduct, such fee disputes are properly resolved in civil proceedings under a theory of quantum meruit, where the court hears expert witnesses on both sides to determine, by a preponderance of the evidence, the services performed by the attorney and the reasonable value of the services.

In re Disciplinary Proceeding Against Kagele, 149 Wn.2d 793, 816 n.2, 72 P.3d 1067 (2003) (citations omitted). The Client included cited *Kagele* in his "half-time" motion for dismissal. CP 804.

¹⁴ 14A Wash. Prac., Civil Procedure § 37:15 (2d ed.); *Brown v. State Farm Fire & Cas. Co.*, 66 Wn. App. 273, 831 P.2d 1122 (1992).

O. The Client's argument that the Law Firm violated RPC 1.5 was properly brought as an affirmative defense.

CR 8(c) does not require a formal counterclaim if the issue is raised in an affirmative defense. CR 8(c) states in relevant part:

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

As to counterclaims, CR 13(b) states, "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." An affirmative defense cannot be adjudicated separately from the claims to which it applies; a counterclaim can. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 388, 896 P.2d 1309 (1995).

The Law Firm violation of RPC 1.5 by charging an unreasonable fee was correctly brought as an affirmative defense or avoidance to the Law Firm's collection action. This RPC violation arose directly out of the transaction or occurrence that was the subject of the Law Firm's claim for non-payment of fees. Under CR 8(c), even if the RPC 1.5 violation was a counterclaim mistakenly designated as a defense, the court on terms, if justice so requires, must treat the pleading as if there had been a proper designation.

CONCLUSION

The issues involved in this appeal are far-reaching, a matter of first impression, and very important for both persons who contract for legal services in this state as well as members of the bar. The driving issue is whether a lawyer who sues his client in an attempt to collect an unreasonable fee should be compensated by his client for his litigation efforts when the client successfully proves that 46% of the lawyer's claimed fees were unreasonable. Under these circumstances, the answer should be no.

For the reasons expressed herein, the Client asks this Court to reverse the trial court's judgment, findings of fact and conclusions of law and order granting the Law Firm's attorney fee request with instructions for the trial court to enter orders consistent with this opening brief, including vacating the order granting the Law Firm's attorney fee request finding that the Law Firm was not the prevailing party under its standard preprinted form adhesion contract it had with its client. Finally, the Client requests an attorney fee award for its appellate attorney fees.

DATED this 1st day of November, 2016.

/s/ Robert J. Cadranell

Dennis J. McGlothlin, WSBA 28177
Robert J. Cadranell, WSBA 41773
Attorneys for Appellant, Fredrick Peterson

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of the Appellant's Amended Reply Brief on the following individuals:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Electronic Upload
Anthony Wisen Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Eservice or Email <input checked="" type="checkbox"/> Electronic Upload

DATED this 7th day of November, 2016 at Edmonds, Washington.

/s/ Lindsey Matter

Lindsey Matter, Paralegal