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SUPREME COURT
OF THE STATE OF WASHINGTON

F I L E D
APR 29 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CHERYL FORBES and COLLEEN MYERS,

Petitioner/Cross Appellant

v.

AMERICAN BUILDING MAINTENANCE COMPANY WEST;
ABM JANITORIAL SERVICES; ABM INDUSTRIES INC.,

Defendants,

and

MARY E. SCHULTZ and ASSOCIATES, P.S.,

Intervenor/Respondent to Petition

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ANSWER TO FORBES'S PETITION FOR REVIEW

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I. PROCEDURAL BACKGROUND

Cheryl Forbes petitions for review from the published case of *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. 273, 198 P.3d 1042 (Div. III, 2009). Respondent to this petition is Intervenor Mary Schultz.¹

II. INTRODUCTION

The three issues identified by Forbes in her Petition for Review do not meet the criteria of RAP 13.4(b) for discretionary review. Forbes requests review of discretionary rulings made by a trial court, where discretion was exercised consistent with Supreme Court precedent and statutory law. Her petition should be denied.

III. RESPONSIVE STATEMENT OF THE CASE

Intervenor Attorney Mary Schultz, Respondent to this petition, Appellant/Cross-Respondent in the court below, provided Petitioner Cheryl Forbes legal representation in a high risk employment discrimination case pursuant to a contingency fee contract. *CP 1844, finding 7; CP 1845, findings 8, 9, 14; CP 1853, finding 72; CP 1857, finding 91*. Schultz successfully performed a six week trial for Forbes, resulting in \$4,000,000 of verdicts in Forbes's favor. *CP 382-391*. Schultz continued to represent

¹ Intervenor Schultz has independently petitioned for review from this same ruling regarding contractual construction holdings made by the Division III Appellate Court.

Forbes in post trial motions, garnering an additional \$1.7 million in judgments for Forbes. *Id.* Schultz's work produced total judgments in Forbes's favor of \$5.7 million following trial, which judgments ran at statutory interest. *CP 390.*²

Schultz continued to work for Forbes on appeal, and obtained Appellate Court affirmation of all verdicts and judgments on appeal. *Forbes v. American Bldg. Maintenance Co. West*, 127 Wn. App. 1003, 2005 WL 914836 (2005). When Defendant ABM Industries, Inc. filed a petition for review, Schultz responded to that petition on Forbes's behalf. Schultz's work produced an opening settlement offer to Forbes from Defendant ABM Industries of \$5,000,000 on what was by then \$7,000,000 of verdict value. *Forbes v. ABM American Bldg. Maintenance Co. West*, 148 Wn. App. at 282; *CP 1856, finding 86; CP 1851, finding 58; CP 520, para. 4 (\$7,069,550.30 of value including post judgment interest).*

Unbeknownst to Schultz, as Schultz continued working for Forbes, once the Appellate Court affirmed Forbes's verdicts, Forbes began working with other undisclosed counsel. *CP 1850, finding 51; CP 1852, finding 61.*

On July 29, 2005, after meeting with her still undisclosed attorneys, Forbes sent an email that Schultz believed someone else wrote. *RP 928, Ins.*

² During the same period, Schultz also successfully represented Forbes in an independent matter. *CP 1845, finding 13; CP 1849, finding 43.*

7-17. Schultz responded with an e-mail that she referred to as “casting a fly onto the surface.” *RP 935*. Schultz did not intend to usurp settlement authority, notwithstanding the language of the email – the e-mail was sent for other purposes. *RP 932-941, 947-950*. Schultz never acted on her July 29th responsive e-mail. Forbes met with her undisclosed counsel, constructed an email with the assistance of those attorneys, and discharged Schultz by email. Forbes immediately settled the case, *RP 455, ln. 12; CP 1852, finding 62*, while Forbes’s new counsel advised Schultz by letter not to contact Forbes. *CP 1852, finding 63*. Schultz contacted Forbes’s new counsel to caution them about trying to act without a proper understanding of the litigation, and proposed working together. *CP 550, para. 131*. Schultz was told that she was fired, and would be paid only an hourly fee for her contingent work, noting that she would need to “prove (her) hours.” *CP 551, para. 132, 133; CP 1852, finding 64-65*. Forbes would later claim Schultz’s hourly fee to be “\$369,234.” *CP 1432, lns. 1-2*. In other words, by firing Schultz, Forbes intended to recover \$4.6 million of the \$5 million offered in settlement—over a million dollars more than Forbes would have received had all verdicts been recovered, and Schultz properly paid.

Schultz was thereafter told that unless she both accepted Forbes’s hourly fee proposal and waived all claims against Forbes and her new

counsel, Forbes would accuse Schultz of professional misconduct, move to void the fee agreement, and attempt to disgorge all of Schultz's fees. *CP 509, para. 11; CP 552, para. 137.*

Forbes unilaterally completed all settlement negotiations and processes through her new counsel. Schultz received no communication from or proof of what Forbes ultimately received in full settlement from ABM Industries, Inc. *RP 699, lns. 6-15; RP 700, ln. 14; RP 703, ln. 17; RP 749, ln. 13; RP 751, ln. 75.* But on September 16, 2005, Forbes filed a Satisfaction of Judgment as to Defendant ABM, Inc. in the Spokane County Superior court, identifying her recovery. *CP 497-498, attached at Appendix A-1 – A-2.*

Schultz moved to intervene in the trial court. She requested that her contingency fee agreement be enforced. Forbes thereupon asserted that she had terminated Schultz, that Schultz's July 29 email was misconduct, and that the trial court should disgorge Schultz's fees entirely, or award Schultz only an hourly fee.

Six months later, in January 2006, Forbes would submit a lengthy declaration from her proposed ethics expert, John Strait. *CP 862-884.* Strait had reviewed only the version of events offered by Forbes.³ Schultz

³ Strait failed to review any declarations, depositions or pleadings from Schultz. *CP 864-865.*

disputed Strait's opinions point by point. *CP 1250 - 1275*. Schultz's proposed expert, David Boerner, also submitted a declaration opining that there was nothing presented in the evidence that would justify less than an award of fees consistent with the contract terms. *CP 1131, lns. 5-10*.

A. Trial Court Ruling.

Following trial on the fee dispute, the trial court found that Schultz had "provided exemplary service and professional expertise...at great risk." *CP 1853, finding 72*. It found no impropriety in any of the contract negotiations between Forbes and Schultz. *CP 1847, findings 24-27*. The court did find, however, that Schultz's e-mail of July 29 conveyed an inappropriate position, and that Schultz's conduct in that exchange "did not rise to the level of her litigations skills or professional mandate." *CP 1854, findings 72-73 & 77*. Balancing this, the trial court found that while Schultz's July 29 email was improper, the motive was one of betrayal that was understandable. *CP 1853, finding 73*. The trial court found Forbes's conduct following the settlement offer suspicious and lacking in candor. *CP 1853, finding 73; CP 1855, finding 78*. It found Forbes's conduct "arguably calculated to ... stiff her attorney," *CP 1853, finding 73, emphasis in original*. It found Forbes to be engaged in self-dealing, and that "some would say (Forbes) deliberately fired Ms. Schultz to maximize (Forbes's) share of the generous verdict." *CP 1855, finding 78, 81*. The

trial court found that Schultz's conduct was a failure to professionally respond to Forbes's conduct. *CP 1855, para. 81*. Regardless, the trial court also found that Forbes's firing of Schultz was "certainly unwarranted," "not justified," and "plain bad judgment." *CP 1854, finding 77; CP 1857, finding 93; CP 1854, finding 73*.

The trial court declined to reduce Schultz's fee because of this ending email exchange. It awarded Schultz a contingency fee against Forbes's settlement of the case, based on what it deemed to be a contractual ambiguity. *CP 1858, conclusion 98*. As Forbes had invested all funds under her own name with her own bank while the matter was pending, the trial court also awarded Schultz prejudgment interest on the funds deemed contractually owed. *CP 1859, para. 103*.

B. Appellate Court.

On Appeal, Division III upheld the above rulings, but further held that the contractual contingency should be applied against the value identified by Forbes in her Satisfaction of Judgment filed on Sept. 16, 2005, not the value of her recovery as offered by her self-serving testimony. *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. at 289-290.

IV. ARGUMENT

- A. A trial court has discretion as to whether attorney misconduct, if found, should impact fees. No basis for Supreme Court review exists when this discretion is properly exercised.

Supreme Court precedent allows a trial court the discretion to consider misconduct as impacting fees earned. *See, e.g., Ross v. Scannell*, 97 Wn.2d 598, 609-610, 647 P.2d 1004 (1982); *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992); and *Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 266, 44 P.3d 878 (2002). Whether an act of an attorney is a violation of the Rules of Professional Conduct is an issue of law. *Eriks v Denver*, 118 Wn. 2d. at 457-458. But whether a proven violation of the Rules should be cause for a fee reduction is an act of discretion—fee reduction is a remedy which can be used within the inherent power of the trial court. *Id.*, at 463; *Ross*, 97 Wn. 2d at 610; *Cotton*, 111 Wn. App. at 266. Acts of discretion by a trial court are not to be disturbed absent a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775, 784 (1971).

Contrary to Forbes's petition for review, the trial court considered Forbes's claims of ethical misconduct, and made findings on her claims.

Forbes v. American Bldg. Maintenance Co. West, 148 Wn. App. at 292. The trial court found that what had occurred here was Schultz's failure to professionally respond to self dealing conduct of a client at the end of four and a half years of exemplary service to that client. *CP 1855, para. 81*. In its discretion, the trial court declined to reduce Schultz's fee. The Appellate Court not only upheld that decision as a proper use of trial court discretion, but seemingly upheld it as well its own conclusion. *Id.*, at 294-295.

And indeed, where proven misconduct has been used to impact fees, the misconduct has been such that it essentially prevents or impacts full performance from the attorney. *Ross v. Scannell*, 97 Wn.2d 598, 609-610, 647 P.2d 1004 (1982)(where the attorney was discharged before successful prosecution of the suit); *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992)(where the attorney violated conflict of interest rules with joint representation which materially impacted the attorney's ongoing ability to adequately represent both clients); and *Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 266, 44 P.3d 878 (2002)(where the attorney never took the case to trial). And *Ross* holds that when an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy, a client may have a complete defense to the attorney's action for fees. *Ross v. Scannell*, 97 Wn.2d. at 610.

Forbes argues that because her hired expert John Strait offered opinions, his testimony makes it mandatory that the trial court reduce Schultz's fee. This assertion is contrary to *Eriks v. Denver*, 118 Wn.2d. at 458. A court may properly disregard expert affidavits that contain conclusions of law. *Id.* Whether a violation of the RPCs exists is a matter of law. *Id.*, at 457-458. Strait's declaration is not determinative of the existence of violations, or proper remedies.

Forbes's companion claim seems to be that a trial court is required to identify and discuss certain evidence. Again, no precedent is offered to support this claim. Even in matters which involve statutory factors, a court is not required to enter written findings on each factor—the court's consideration of those factors must simply be evident from the court's ruling. *See e.g. In re Marriage of Murray*, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981).

In sum, the trial court considered Forbes's ethics charges, but made a finding of exemplary service by the attorney. It exercised its discretion to refuse to disgorge or impact the fee owed because of the ending email exchange between the parties. The ruling is consistent with precedent. No basis exists under RAP 13.4(b) for Supreme Court Review.

B. An award of prejudgment interest is within the trial court's discretion for a party's withholding and investing of funds owed another.

Forbes seeks review of the trial court's award of prejudgment interest to Schultz on the fees owed her from Forbes. The decision of whether to award prejudgment interest is also subject to an abuse of discretion standard. *Hadley v. Maxwell*, 120 Wn. App. 137, 141, 84 P.3d 286 (Div. III, 2004); *Crest, Inc., v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (Div. I, 2005).

The law is well settled as to the application of prejudgment interest. Such interest is allowed in civil litigation when a party to the litigation retains funds rightfully belonging to another and the amount of the funds at issue is liquidated; that is, the amount at issue can be calculated with precision and without reliance on opinion or discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 429-430, 957 P.2d 632 (1998), citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968). If an amount claimed is unliquidated, but is determinable by computation with reference to a fixed standard in a contract, it is also subject to prejudgment interest. *Hadley v. Maxwell*, 120 Wn. App. at 142; *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d at 32 (holding that prejudgment interest properly applies where the evidence furnishes data which, if

believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion).

In Forbes, Division III rules consistent with Division I in *Taylor v. Shigaki*, 84 Wn. App. 723, 732, 930 P.2d 340 (Div. I, 1997), where the latter Appellate Court held that a contingency fee agreement has two contractual fee provisions, and dispute can arise over which to apply, but “(B)oth clauses provide an amount that can be computed without exercising discretion.” In *Taylor*, a client also claimed the attorney was only entitled to an hourly fee. 84 Wn. App. at 728-29. The claim was insufficient to defeat prejudgment interest.

The authority Forbes cites to the contrary does not involve contractual fees. In *Flint v. Hart*, 82 Wn. App. 209, 226, 917 P.2d 590 (1996), the court was addressing whether prejudgment interest is proper on damages arising from a negligence claim, not a fee contract.

Forbes claims that her dispute over what was owed renders prejudgment interest improper. Again, this theory has been historically rejected. Differences of opinion as to what is owed, including claims that nothing at all is owed, have never been held to properly excuse a party from paying for work performed for them. *Taylor*, 84 Wn. App. at 732, quoting *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d at 34. Moreover, dispute over the whole or part of the claim does not convert a liquidated

claim to an unliquidated claim. *Hadley v. Maxwell*, 120 Wn. App. at 143-144, citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 685, 15 P.3d 115 (2000); *Prier*, 74 Wn.2d at 33. And a liquidated claim remains so even if a party is partially successful in reducing his or her share of liability. *Hadley*, 120 Wn. App. at 144, citing *Weyerhaeuser*, 142 Wn.2d at 685, 15 P.3d 115; *Prier*, 74 Wn.2d at 33, 442 P.2d 621.

Here, the character of Schultz's claim is for fees owed under a contract containing specific fee provisions which can be computed without exercising discretion as applicable to the scenarios which evolve in the performance of the agreement. Prejudgment interest was properly applied in the discretion of the trial court.

Forbes then claims that the Defendant's deposit of funds into the Court Registry protects her from application of prejudgment interest against her. She misreads consistent precedent to the contrary.

The touchstone for an award of prejudgment interest is that a party must have the "use value" of the money improperly. *Mahler v. Szucs*, 135 Wn.2d at 430, (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)). Even a party's holding funds owed another in their own counsel's trust account gives them the use value of such funds, as that party is free to invest those funds even while held in their counsel's trust. *Id.*

Here, per *Mahler*, Forbes not only took control of disputed funds, but she *did* invest all of the funds. When Defendant ABM deposited the disputed funds into the registry, *RP 692, ln. 5-11*, Forbes directed the court clerk to issue her a check transferring all the funds to Forbes's selected bank. *CP 2105-2106; 2108-2109*. Forbes used her own personal banker to invest the contested funds into a money market fund under Forbes's sole name and social security number, for Forbes's benefit, in a selected investment mechanism of Forbes's choice, at Forbes's chosen rate of interest. *Id.* She was properly assessed prejudgment interest under the foregoing precedent.

Forbes then claims that even though she was investing all of the funds at her own bank under her name, she is protected from interest because she couldn't actively spend the funds without an order. There is no precedent supporting such a concept. To the contrary, the "Registry" mechanism provides protection from prejudgment interest only for those who tender such proceeds into the Registry as amounts offered to the person owed funds. Illustrative is *Richter v. Trimberger*, 50 Wn. App. 780, 782, 750 P.2d 1279 (1988). In *Richter*, the Trimbergers offered Richter \$12,000, and deposited that offer into the registry of the court, allowing Richter access to funds. The court properly found that Richter had "use value" of the funds – he simply chose not to exercise that access.

Richter was thus not entitled to prejudgment interest. *Id.* at 785. Had the Trimbergers' tendered the funds, but made acceptance or use of such funds conditional, it would have entitled Richter to prejudgment interest. *Crest, Inc. v. Costco*, 128 Wn. App. at 766. A conditional offer of funds does not give the party owed the funds the use value of the funds unless and until they agree to the contingencies. *Id.*, at 775. Any such "release" requirement is held to compromise the rights of the party owed the funds, and will thus not act to toll prejudgment interest. *Id.*, at 775-776.

Here, Forbes did not use the Registry as a depository for tendered funds. She made no tender of any funds to Schultz at any time. Schultz had no use value of any such funds. Prejudgment interest was properly assessed against Forbes.

The trial and Appellate Court rulings on this issue are consistent with longstanding Appellate Court and Supreme Court precedent.

C. **The settlement sum agreed upon with, and recovered from, a third party defendant is properly controlled by a filed Satisfaction of Judgment, if the language of such identifies the recovery. Self serving testimony contrary to that figure is not determinative.**

Forbes asks this Court to accept review of the issue of the "fact" of whether or not she settled her suit for \$5 million. She misunderstands the

Appellate Court's reasoning. Division III determined that Forbes owed the contractual contingency against the amount Forbes listed in her own Satisfaction of Judgment document. This is a correct ruling of law.

A self-serving declaration as to what transpired between a party and a third party, even admitted without objection, is insufficient to establish the substance of that third party transaction—such declarations have no probative force. *W.W. Conner Co. v. McCollister & Campbell*, 9 Wn.2d 407, 413-414, 115 P.2d 370, 372 - 373 (1941); *Ziebarth v. Manion*, 161 Wn. 201, 206, 296 P. 561, 563 (1931). As recently as in *Fairchild v. Davis*, 148 Wn. App. 828, 832, 201 P.3d 1053, 1055 (Div. III, 2009), courts have held that self serving declarations of what occurred in a third party transaction, e.g., payment of expenses, is not sufficient proof of actual payment. “Adequate proof of incurred expenses is necessary to prevent ‘a windfall.’” *Id.*, citing *Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61 (2006) (quoting *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 687, 50 P.3d 306 (2002)).

Schultz testified that she never received proof from Forbes of what Forbes ultimately received in final settlement after final negotiation was done through her new counsel. *RP 700, ln. 14-RP 703, ln. 17; RP 749, ln. 13-RP 751, ln. 15*. Pre-settlement emails and negotiations are not the final embodiment of a recovery. The only settlement document Forbes

produced in discovery was redacted in material areas, making her representations of the transaction even more self serving. *Id.*, and see *CP 1947-1950, attached at Appendix A-3 – A-6.*

On appeal, Schultz asserted trial court error in its acceptance of Forbes's self serving testimony that she settled her case by recovering only \$5,000,000, while providing no legitimate proof of such. *Opening Brief, pp. 39-40, section d.* Indeed, Forbes's testimony was controverted by her September 16, 2005 Satisfaction of Judgment document, which affirmatively concluded her claim against ABM Industries in the Superior Court. *CP 497.* The language of the Satisfaction filed by Forbes was specific:

“Cheryl Forbes, Plaintiff and Judgment Creditor in this action, hereby acknowledges full satisfaction of the judgment recovered ... in the amount of \$5,655,176.70, together with interest, as this claim has been settled.”

CP 497, emphasis added, attached at Appendix A-1 – A-2.

A Satisfaction of Judgment document confirms for the third party the amount recovered, and thus inherently includes the involved third party's affirmation.⁴ *RCW 4.56.100.* A Satisfaction of Judgment is proof

⁴ *RCW 4.56.100* states in relevant part: “(1) When any judgment for the payment of money only shall have been paid or satisfied, the clerk of the court in which such judgment was rendered shall note upon the record in the execution docket satisfaction thereof Every satisfaction of judgment... shall clearly designate ... the amount or type of satisfaction, whether the satisfaction is full or partial, the cause number, and the date of entry of the judgment.” *CP 497.*

of payment and recovery. *RCW 4.56.100*. The very specific language of this Satisfaction document confirms that Forbes recovered \$5,655,176.70, “together with interest,” in her final settlement. *Id.* The Court of Appeals properly determined this document to be controlling as to the sum acknowledged as recovered by Forbes, and rejected self serving testimony to the contrary. *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn. App. at 289-290.

The decision is consistent with longstanding Supreme Court precedent, Division III’s own precedent, and *RCW 4.56.100*.

D. Sanctions are proper against a party for the insertion of new evidence into the record on a Petition for Review.

In her effort to generate Supreme Court review on the latter issue of the amount she recovered, Forbes improperly submits new evidence to this Court in violation of *RAP 10.3(8)*. The Division III Appellate Court rendered its decision on January 8, 2009. Recognizing the point of law made by the Appellate Court, on February 20, 2009, Forbes filed a new declaration. *Appendix A-7 – A-13*. She attached new evidence – an unredacted version of her settlement agreement—the very evidence she previously failed to provide to Schultz or present in the trial court. *Compare Appendix 10-13 (new evidence) with CP 1947-1950 (submitted to Schultz and the trial court record, also attached herein at Appendix A-3 –*

A-6). Schultz moved to strike this new evidence as improperly submitted following an appeal. No motion was made, nor order ever entered allowing Forbes to present such new evidence. Regardless, Forbes now inserts this new evidence into her Petition's Appendix 36-39. She omits notice to this Court of how this evidence got into the Appellate record. Instead, she argues from the new evidence and quotes its terms. *Petition for Review, p. 5 & p. 17.*

Such conduct should be cause for sanctions, not Supreme Court review. The very issue for which Forbes requests review is created by an improper insertion of new evidence into the appeal record. Review of this issue should be rejected as a proper sanction for such affirmative omission, and conduct.

V. RESPONSIVE ISSUES

In the event this court accepts Forbes's petition for review, Respondent requests that the issues she raises by petition for review filed concurrently herein also be reviewed, per RAP 13.4.

VI. CONCLUSION

The issues raised by Forbes's Petition for Review do not meet the criteria for review under RAP 13.4(b). Forbes's claims of ethical misconduct were presented, considered, and findings made. The trial court determined, in its discretion, that Schultz's failure to properly respond to

Forbes's self dealing was an insufficient basis upon which to reduce a fee following an otherwise exemplary representation spanning four and a half years. This decision is a proper exercise of trial court discretion consistent with Supreme Court precedent.

Forbes's dispute as to being assessed prejudgment interest on funds she owed, but withheld from, her counsel is also controlled by an abuse of discretion standard. Trial court discretion was exercised consistent with longstanding Supreme and Appellate Court precedent. Forbes presents no authority to the contrary.

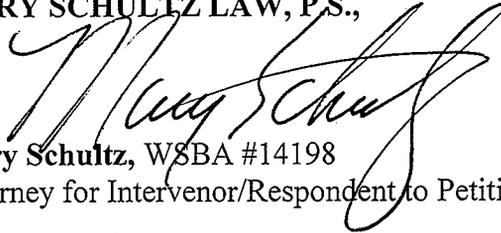
Finally, the amount of Forbes's recovery in settlement was properly held to be controlled by a satisfaction of judgment pleading filed by Forbes herself, with the approval of ABM Industries, Inc. – not by Forbes's non-probative self-serving testimony offering a different figure. This holding is consistent with longstanding Supreme Court precedent, Division III's own precedent, and statute. Moreover, this Supreme Court should not accept review of an issue which is created by the petitioning party improperly inserting new evidence into the appellate record and then arguing from it, while failing to disclose what has been done.

None of these issues raised by Forbes are new, or subject to conflicting precedent. Forbes's petition should be denied.

DATED this 27 day of April, 2009.

Respectfully Submitted,

MARY SCHULTZ LAW, P.S.,

A handwritten signature in black ink, appearing to read "Mary Schultz", written over the printed name and title.

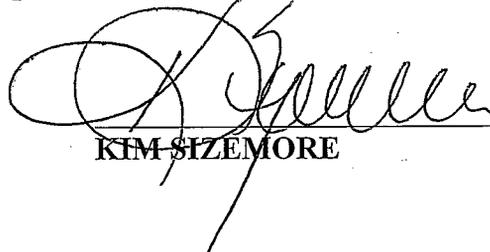
Mary Schultz, WSBA #14198
Attorney for Intervenor/Respondent to Petition

CERTIFICATE OF SERVICE

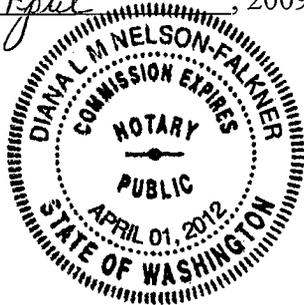
The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. On the 27th day of APRIL, 2009, I hand delivered a copy of the foregoing Answer to Forbes's Petition for Review upon the persons hereinafter named at the place of address stated below which is the last known address.

ATTORNEYS FOR PETITIONER/CROSS APPELLANT

**Bryce Wilcox
Michael Franklin
Lukins & Annis
Washington Trust Bank Building, #1600
717 West Sprague Avenue
Spokane, WA 99201**


KIM SIZEMORE

SUBSCRIBED AND SWORN to before me this 27th day of April, 2009.




NOTARY PUBLIC in and for the
State of Washington, residing in
Spokane.
Commission Expires: 04/01/12

APPENDIX
(A-1) – (A-13)

RECEIVED

SEP 15 2005

ALLEN & McLANE, P.C.

FILED

SEP 16 2005

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

CHERYL L. FORBES and COLLEEN A.
MEYERS,

Plaintiffs,

vs.

AMERICAN BUILDING MAINTENANCE
COMPANY-WEST, ABM INDUSTRIES,
INC.,

Defendants.

Case No. 99-2-05753-2

039038229
SATISFACTION OF JUDGMENT

(Clerk's Action Required)

KNOW ALL MEN BY THESE PRESENTS, that Cheryl L. Forbes, plaintiff and judgment creditor in this action, hereby acknowledges full satisfaction of the judgment recovered against American Building Maintenance Company-West and ABM Industries, Inc., defendants and judgment debtors, in the amount of \$ 5,655,176.70, together with interest, as this claim has been settled. Said judgment was entered in Spokane County Superior Court under the above-referenced cause number on January 16, 2004 and amended nunc pro tunc on January 21, 2004.

SATISFACTION OF JUDGMENT - 1

EDWARDS, SIEH, SMITH &
GOODFRIEND, P.S.
500 WATERMARK TOWER, 1109 FIRST AVENUE
SEATTLE, WASHINGTON 98101
(206) 624-0974 FAX (206) 624-0809

497
A-1

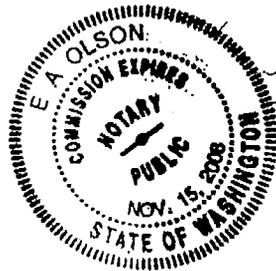
1 DATED this 14th day of September, 2005.

2
3 By: Cheryl L. Forbes
4 Cheryl L. Forbes,
5 Plaintiff and Judgment Creditor

6 STATE OF WASHINGTON)
7)ss.
8 COUNTY OF SPOKANE)

9 On this 14 day of September, 2005, before me, the undersigned, a
10 Notary Public in and for the State of Washington, duly commissioned and sworn
11 personally appeared Cheryl L. Forbes, to me known to be, or having shown
12 satisfactory evidence of being, the individual described in and who executed the
13 foregoing instrument, and acknowledged to me that she signed and sealed the
14 said instrument as her free and voluntary act and deed for the uses and purposes
15 therein mentioned.

16 WITNESS my hand and official seal hereto affixed the day and year in this
17 certificate above written.



18 E.A. Olson
19 NOTARY PUBLIC in and for the State of
20 Washington, residing at Spokane
21 My appointment expires 11/15/08
22 Printed Name: E.A. Olson

23 SATISFACTION OF JUDGMENT - 2

24 EDWARDS, SLEH, SMITH &
25 GOODFRIEND, P.S.
500 WATERMARK TOWER, 1109 FIRST AVENUE
SEATTLE, WASHINGTON 98101
(206) 624-0974 FAX (206) 624-0809

498

A-2

SETTLEMENT AGREEMENT AND RELEASE

Cheyl L. Forbes ("Forbes"), American Building Maintenance Co. West and ABM Industries Incorporated ("the Parties") enter into the following Settlement Agreement and Release ("Agreement"):

I. RECITALS

A. Forbes was employed by American Building Maintenance Co. West ("ABMCo.") as a Branch Manager until her employment terminated in February of 1999.

B. In September 1999, Forbes filed a complaint against ABMCo. in Spokane County Superior Court (Case No 99-2-05753-2). In her complaint, Forbes alleged gender discrimination in violation of the Washington Law Against Discrimination, RCW 49.60 et seq. Later, Forbes amended her complaint to add ABM Industries Incorporated as a defendant. Both ABMCo. and ABM Industries Incorporated (collectively "ABM"), denied her allegations, and thus denied that its actions with respect to Forbes were in any way unlawful. The case was tried to a jury who returned a verdict for Forbes. ABM appealed the resulting judgment to the Washington Court of Appeal. (Docket number 22656-5-III) The appeal was denied in a decision dated April 21, 2005. ABM has filed a petition for review by the Washington Supreme Court. (Case number 77154-5) and the parties await a decision on that petition (all proceedings described above hereinafter called "the Action").

C. The Parties now desire to settle their disputes and any claims stemming from Forbes's employment by ABM or the ensuing litigation.

II. AGREEMENTS

In consideration of the mutual covenants and promises contained herein, the Parties agree as follows:

A. ABM will pay a total of \$5,000,000 (Five million dollars) (the "Settlement Amount").

Payment shall be made as follows:

1. \$3,572,754.33, the amount specified in the August 16, 2005, Amended Notice of Lien filed by Forbes' former attorney Mary Schultz, shall be deposited into the registry of the Spokane Superior Court in an interest bearing money market fund. If it is determined by the Court that Mary Schultz or Mary Schultz & Associates is entitled to any portion of these funds, ABM shall issue a Form 1099 to Ms. Schultz and/or Mary Schultz & Associates reflecting said amounts.
2. \$35,613.33 to Talmadge Law Group. ABM shall issue a Form 1099 to the Talmadge Law Group to reflect this payment.

EXHIBIT G

3. 1988-89 directly to Forbes by wire transfer to the trust account of her current attorney, Lakas & Amis.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A-4

[REDACTED]

G.

[REDACTED]

H.

[REDACTED]

I.

[REDACTED]

J.

[REDACTED]

K.

[REDACTED]

A-5

[REDACTED]

L.

[REDACTED]

Clayton Folger
CHEER V.L. FORBES

9-14-05
DATE

ABM INDUSTRIES INCORPORATED

By George Sundry
George Sundry, Executive Vice President
Linda Kowalski, SENIOR

9/15/05
DATE

AMERICAN BUILDING MAINTENANCE CO - WEST

By Jack Smith
Jack Smith, Senior Vice President

9/19/05
DATE

A-6

RECEIVED
JAN 20 2009
MARYSCHULTZLAW

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

CHERYL FORBES,

Respondent/Cross-Appellant,

v.

AMERICAN BUILDING
MAINTENANCE COMPANY
WEST; ABM JANITORIAL
SERVICES; ABM INDUSTRIES,
INC.,

Defendants,

and

MARY E. SCHULTZ and
ASSOCIATES, P.S.,

Appellant/Cross-Respondent.

No. 253988- III

SUPPLEMENTAL
DECLARATION OF CHERYL
FORBES IN SUPPORT OF
OBJECTION TO
STATEMENT OF
AUTHORITIES

I, CHERYL FORBES, hereby make the following declaration:

1. I am over the age of 18 years, of sound mind, and competent to testify in this matter. I make this declaration of my own personal knowledge and/or belief.

2. I received a total of \$5 million in connection with my settlement with ABM. Not a penny more. Attached as **Exhibit A** to this declaration is a true and correct copy of an unredacted version of the

SUPPLEMENTAL DECLARATION OF CHERYL FORBES IN
SUPPORT OF OBJECTION TO STATEMENT OF
AUTHORITIES: 1

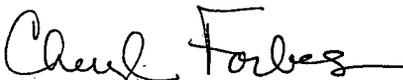
A-7

Settlement Agreement and Release I executed with ABM.

3. A redacted copy of the Settlement Agreement was provided to Ms. Schultz in connection with the fee dispute. It was redacted because of the sensitive tax issues addressed in the Agreement, which were not pertinent to my dispute with Ms. Schultz. All of this was explained to Mary Schultz and she did not file any motion with the trial court to compel production of an unredacted version.

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

SIGNED at Spokane, Washington, this 20th day of February, 2009.


CHERYL FORBES

SUPPLEMENTAL DECLARATION OF CHERYL FORBES IN
SUPPORT OF OBJECTION TO STATEMENT OF
AUTHORITIES: 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of February, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Ms. Mary E. Schultz	<input type="checkbox"/>	U.S. Mail
Mary Schultz Law, P.S.	<input checked="" type="checkbox"/>	Hand Delivered
Davenport Tower	<input type="checkbox"/>	Overnight Mail
Penthouse Suite 2250	<input type="checkbox"/>	Telecopy (FAX)
111 South Post		
Spokane, WA 99201		

Attorney for
Appellant/Cross-
Respondent


DEBBIE EVENOFF
Legal Assistant to
MICHAEL D. FRANKLIN

SUPPLEMENTAL DECLARATION OF CHERYL FORBES IN
SUPPORT OF OBJECTION TO STATEMENT OF
AUTHORITIES: 3

A-9

SETTLEMENT AGREEMENT AND RELEASE

Cheryl L. Forbes ("Forbes"), American Building Maintenance Co.-West and ABM Industries Incorporated ("the Parties") enter into the following Settlement Agreement and Release ("Agreement"):

I. RECITALS

A. Forbes was employed by American Building Maintenance Co.-West ("ABMCo.") as a Branch Manager until her employment terminated in February of 1999.

B. In September 1999, Forbes filed a complaint against ABMCo. in Spokane County Superior Court (Case No 99-2-05753-2). In her complaint, Forbes alleged gender discrimination, in violation of the Washington Law Against Discrimination, RCW 49.60 et seq. Later, Forbes amended her complaint to add ABM Industries Incorporated as a defendant. Both ABMCo. and ABM Industries Incorporated (collectively "ABM"), denied her allegations, and thus denied that its actions with respect to Forbes were in any way unlawful. The case was tried to a jury who returned a verdict for Forbes. ABM appealed the resulting judgment to the Washington Court of Appeal. (Docket number 22656-5-III) The appeal was denied in a decision dated April 21, 2005. ABM has filed a petition for review by the Washington Supreme Court. (Case number 77154-5) and the parties await a decision on that petition (all proceedings described above hereinafter called "the Action").

C. The Parties now desire to settle their disputes and any claims stemming from Forbes's employment by ABM or the ensuing litigation.

II. AGREEMENTS

In consideration of the mutual covenants and promises contained herein, the Parties agree as follows:

A. ABM will pay a total of \$5,000,000 (Five million dollars) (the "Settlement Amount"). \$4,254,476 of the settlement amount will be designated as emotional distress due to physical sickness. ABM is not in a position to make a technical tax determination as to whether Forbes' injuries qualify for exclusion under I.R.C. Sec. 104(a), but ABM does not dispute characterization of non-wage amounts received by Forbes under their agreement as emotional distress damages due to physical sickness. Payment shall be made as follows:

1. \$3,572,754.33, the amount specified in the August 16, 2005, Amended Notice of Lien filed by Forbes' former attorney Mary Schultz, shall be deposited into the registry of the Spokane Superior Court in an interest-bearing money market fund. If it is determined by the Court that Mary Schultz or Mary Schultz & Associates is entitled to any portion of these funds, ABM shall issue a Form 1099 to Ms. Schultz and/or Mary Schultz & Associates reflecting said amounts.
2. \$35,613.33 to Talmadge Law Group. ABM shall issue a Form 1099 to the Talmadge Law Group to reflect this payment.

A-10

EXHIBIT

A

3. \$1,188,861.24 directly to Forbes by wire transfer to the trust account of her current attorneys, Lukins & Annis, with \$745,524 of this amount designated as wages. \$202,771.10 will be withheld by ABM for payment of federal income taxes, Social Security and Medicare taxes and will be reported on a Form W-2. Payment shall be made within three business days of receipt of the following signed documents, which shall be filed contemporaneously with payment:

1. Stipulated Motion For Vacation of Judgment;
2. Satisfaction of Judgment;
3. Release of Talmadge Lien;
4. Affidavit and Indemnity Agreement for Cancellation of Letter of Credit;
5. Stipulated Motion for Dismissal of Review.

B. Forbes assumes responsibility for the payment of any and all taxes and applicable withholding obligations and shall hold harmless ABM against any and all claims, lawsuits, liabilities, taxes, interest, penalties and expenses, including but not limited to, reasonable attorneys' fees and litigation expenses, resulting from any liability or claim of liability for the payment or withholding of amounts assessed due to any federal, state or local governments or agencies in payment of any obligation resulting from the payment of the Settlement Amount to Forbes. The foregoing in no way limits ABM's obligation to pay the employer's share of any FICA, FUTA and Medicare taxes for which it is responsible as an employer on behalf of Forbes. Forbes agrees that ABM has not made and that she has not relied upon any representations about the taxability of any portion of the Settlement Amount paid pursuant to this Agreement.

C. Forbes assumes responsibility for the payment of any fees, costs, or litigation expenses incurred or claimed on her behalf by any and all former or current attorneys, experts or accountants, including any such claims arising from assignment of the judgment or any claim of lien.

D. The Parties will cause the Action to be dismissed with prejudice and without costs to either Party by executing and filing the Satisfaction of Judgment, the Stipulated Motion for Vacation of Judgment, and the Stipulated Motion for Dismissal of Review.

E. Forbes agrees not to apply for employment with, nor accept an offer of employment from, ABM or any of its parents, affiliated entities or subsidiaries.

F. Forbes hereby releases and forever discharges ABM and its parent corporations, affiliates, subsidiaries, successors, assignees, and their respective partners, agents, officers, directors, employees, associates, attorneys, insurers, and representatives, and former partners, agents, officers, directors, employees, associates, attorneys, insurers, and representatives, and ABM hereby releases and forever discharges Forbes (collectively "Released Parties"), from any and all claims, demands, liabilities, and causes of action of every kind, whether known or unknown, stemming from or in any way related to Forbes's employment by, and termination

from employment with, ABM, including, but not limited to, any and all claims which are, or may be based upon or connected in any manner with any of the matters referred to or encompassed in any of the pleadings, records, or other papers filed in the Action. This release specifically covers, but is not limited to, any whistleblower complaints; physical or mental disability claims under local, state, or federal law; any claims of discrimination based on race, color, national origin, sex, marital status, veteran status, or age (including claims under the federal Age Discrimination in Employment Act); any tort claims; any claims under state or federal law governing the payment of wages; and any claims under any express or implied contract. This release is intended to be all encompassing and includes any and all claims and causes of action that either Party may have against any of the Released Parties that arose on or before the date on which this Agreement is signed.

G. Neither this Agreement, nor the payment made hereunder to Forbes, shall in any way be construed as an admission by ABM that it has acted wrongfully with respect to Forbes or any other person.

H. The parties represent that other than the Action, they have no pending complaints, charges, lawsuits, or claims against the Released Parties with any government agency or any court.

I. The Settlement Amount described above constitutes the sole compensation to Forbes, and thus includes any and all costs and attorneys' fees that she might otherwise seek from ABM.

J. The Parties agree not to make any statements or take any actions to disparage, place in a negative light, or impair the reputation, goodwill, or commercial interest of the other party. Forbes acknowledges that during her employment with ABM she received or became aware of proprietary trade secrets and other confidential information not in the public domain ("Proprietary Information") including but not limited to specific customer data such as: (a) the identity of ABM's customers, former customers and sales prospects, (b) the nature, extent, frequency, methodology, cost, price and profit associated with its services and products purchased from ABM, (c) any particular needs or preferences regarding its service or supply requirements, (d) the names, office hours, telephone numbers and street addresses of its purchasing agents or other buyers, (e) its billing procedures, (f) its credit limits and payment practices. Forbes agrees that such Proprietary Information has unique value to ABM, is not generally known or readily available to ABM's competitors, and could only be developed by others after investing significant time and money. ABM would not have made such Proprietary Information available to Forbes unless ABM was assured that all such Proprietary Information would be held in trust and confidence by Forbes. Therefore, Forbes covenants to hold all such Proprietary Information and any documents containing or reflecting the same in the strictest confidence, and Forbes will not, disclose, divulge or reveal to any person, or use for any purpose any Proprietary Information, whether contained in the Forbes's memory or embodied in writing or other physical form.

K. Each Party has had a full and complete opportunity to review this Agreement. Forbes has been represented by independent counsel from Lukins & Annis who have reviewed this Agreement and negotiated its terms on her behalf. Accordingly, the Parties agree that the

common law principles of construing ambiguities against the drafter shall have no application to this Agreement.

L. This Agreement is intended to be a full and final resolution of this matter and sets forth the entire agreement between the Parties. Should it become necessary to enforce the terms of this Agreement, the Parties agree that any such action shall be brought in the state of Washington. In any such action, the substantially prevailing party shall be entitled to receive reasonable attorneys' fees and costs.

Cheryl L. Forbes
CHERYL L. FORBES

9-14-05
DATE

ABM INDUSTRIES INCORPORATED

By: Linda A. Stevens
George Sundby, Executive Vice-President
LINDA STEVENS, SENIOR

9/15/05
DATE

AMERICAN BUILDING MAINTENANCE CO. WEST

By: Jack Smith
Jack Smith, Senior Vice-President

9/19/05
DATE