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STATE OF WASHINGTON

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NO. 82950-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CHERYL FORBES,

Petitioner,

v.

MARY SCHULTZ,

Respondent.

CORRECTED

SUPPLEMENTAL BRIEF OF PETITIONER
CHERYL FORBES

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I. INTRODUCTION

Mary Schultz, a lawyer practicing in Spokane, WA, undertook the representation of Cheryl Forbes, the plaintiff in an employment discrimination case in the Spokane County Superior Court.

There is no question that Ms. Schultz obtained a good result for Ms. Forbes in the actual underlying litigation, and the quality of her litigation work is not at issue here.

Instead, what *is* at issue in this matter is the gross breach of the fiduciary duty Ms. Schultz owed to Ms. Forbes, and the manner in which the entirety of the business relationship between them can fairly be characterized by Ms. Schultz' avarice, which resulted in her placing her financial interests well ahead of Ms. Forbes' best interests.

In its decision in *Forbes v. American Building Maintenance Company West, et al. and Mary Schultz*, 148 Wn.App. 273, 198 P.3d 1042 (2009), the Court of Appeals determined that Ms. Schultz was only entitled to a contingent fee of **40%**, not the **44%** she had been seeking.

What remains a mystery, however, is that the Court of Appeals went on to determine that the 40% fee would be calculated on the basis of the amount stated in the "Satisfaction of Judgment" filed in the

Spokane County Superior Court, as opposed to the amount *actually received* in settlement by Ms. Forbes. The Court of Appeals, perplexingly, and despite evidence to the contrary presented to it in pre-decision briefing and again in a Motion for Reconsideration, held that Ms. Forbes had not presented *any* evidence of what she had *actually* received in settlement, and that the “Satisfaction of Judgment” was therefore the most reliable indicator. *Id.* at 289-90.

What the Court of Appeals failed to appreciate is that a party-opponent such as American Building Maintenance (hereinafter “ABM”) will agree, as it did here, to pay a smaller amount in immediate cash for the benefit of clearing off its books a greater debt. In other words, prior to the settlement, ABM owed a debt of \$5.655 million to Ms. Forbes, which it undoubtedly carried on its books as a liability. In exchange for a cash payment in a discounted amount (i.e., \$5 million), ABM had its full \$5.655 million debt forgiven.

It made complete sense for ABM to want to do that, and it is likely that neither Ms. Forbes nor her attorneys appreciated at the time that that concession to ABM could come back to haunt Ms. Forbes, in that an appellate court would later rule that the greater (and illusory)

amount would serve as the basis for a calculation of the contingent fee owed to Ms. Schultz.

Moreover, the Court of Appeals engaged in pure speculation to contemplate the *possibility* that the difference between the \$5 million received by Ms. Forbes, and the \$5.655 million described in the "Satisfaction of Judgment," constituted interest paid by ABM to Ms. Forbes (which was completely untrue and unsupported by anything in the record).

Thus, per the decision from the Court of Appeals, Ms. Schultz was entitled to a legal fee of approximately \$2,262,070 (i.e., 40% of \$5,655,177, the amount stated in the Satisfaction of Judgment), plus the additional fees and costs (including prejudgment interest on the contingent fee amount that had been deposited into the court registry) as determined by Judge Leveque in the Spokane County Superior Court.

Ms. Schultz timely filed a Petition for Review in this Court, as did Ms. Forbes. Before this Court, Ms. Schultz asserted her entitlement to the prevailing party attorney's fee award of \$504,736, *as well as* a 44% fee on the remaining judgment amounts recovered, including the

figure determined by the Court of Appeals based upon the Satisfaction of Judgment filed in the Superior Court.

Ms. Forbes' position before this Court has been that *at most* (assuming this Court did *not* wish to revisit the ethical issues litigated below and Ms. Schultz's entitlement to fees generally), Ms. Schultz was only entitled to a contingent fee based upon the amount Ms. Forbes was *actually paid* by ABM (i.e., \$5 million), and not the greater amount of \$5.655 million as reflected in the Satisfaction of Judgment.

Moreover, it has been Ms. Forbes' position before this Court that it was error to charge her with prejudgment interest on the contingent fee that had been placed in the court registry *by ABM* (at the insistence of Ms. Schultz so that she could seek enforcement of her attorney's fee lien), which meant that Ms. Forbes *never* possessed the funds, and *never* had "use value" of the funds at all, much less that she exercised improper control over the funds.

Ms. Schultz's Petition was denied. Ms. Forbes' Petition was granted, with this Court indicating it only wished to consider the issues of the trial court's award of prejudgment interest and the Court of Appeals' decision to modify the settlement amount.

The Court of Appeals was completely wrong in both respects, and this Court should reverse the Court of Appeals with regard to both issues.

II. SUPPLEMENTAL STATEMENT OF THE CASE

With the Hon. Jerome J. Leveque presiding, a Spokane County jury awarded Ms. Forbes \$4 million against American Building Maintenance.

ABM appealed, primarily on evidentiary grounds. Ms. Forbes cross-appealed, contesting the trial court's denial of her motion for an award of prejudgment attorney's fees. The unpublished decision in *Cheryl Forbes v. ABM Industries, et al.*, 127 Wn.App. 1003 (2005), has a complete and detailed description of the evidence and arguments presented at the trial court level and on appeal, but the result essentially was that the Court of Appeals affirmed the judgment, but reversed the denial of the additional fees.

What ensued thereafter was an unseemly attempt by Ms. Schultz to position herself to be paid more in fees than she was logically, legally, and ethically entitled to receive.

Ms. Forbes' "Petition for Review," her "Reply to Schultz' Answer to Petition for Review," and her "Answer to Schultz' Petition

for Review” set out in detail the tangled history of the multiple fee agreements she entered into with Mary Schultz over the course of several years, so it should suffice to point out here that Mary Schultz prevailed upon Ms. Forbes to enter into about five separate fee agreements, each one progressively more lucrative for Ms. Schultz than the previous one. (CP 911, 916-17, 949-52, 960-65, 967-73, 2006).

What is noteworthy is that the engagement progressed from a simple arrangement on a modest hourly basis to an engagement in which Ms. Schultz’ expected fee increased, first, to 33.3% of the recovery, then to one that purported to pay her 40% of the recovery, and then to one Ms. Schultz asserted entitled her to receive *44%* of the recovery. *Id.*

The case went to trial beginning on March 31, 2003, and the jury reached its verdict on May 19, 2003. What followed was a series of post-trial motions, all of which were resolved by a “Judgment Summary, Judgment on Verdict, and Orders on Post Trial Motions,” entered by Judge Leveque on January 21, 2004.

It is noteworthy that based on what had been presented to him by Ms. Schultz in her fee request, Judge Leveque, at ¶¶ 15-16 of his Order, awarded prevailing party attorney’s fees at the rate of \$250.00

per hour for Ms. Schultz, and the associates at \$175.00, notwithstanding the fact that the prior fee agreements with Ms. Forbes set Ms. Schultz's rate at \$200 and associates' time at \$150.00.

As noted above, ABM appealed from the judgment on the verdict. When Ms. Schultz reviewed the November 4, 2002 fee agreement (the last of the five or so agreements), she determined that although the language (which *she* had drafted) was ambiguous, she believed the contract provided that Ms. Forbes would have to pay her to defend the appeal on an hourly basis. She also interpreted the contract to allow her to collect a 44% contingent fee on the amount awarded at trial, and *an additional* 44% based on a recovery obtained after a successful resolution on appeal (CP 918, 974, 979-80).

Ms. Schultz and Ms. Forbes got into an argument about the meaning of the contract. Ms. Forbes argued that she interpreted the contract to indicate that Ms. Schultz could not charge extra for the appeal, but that, rather, Ms. Schultz' compensation for handling the appeal would be on the same terms and conditions as the existing contract.

On April 21, 2005, the Court of Appeals announced its decision. As noted above, the Court of Appeals affirmed the judgment, but ruled

in Ms. Forbes' favor on the prejudgment fees incurred after September 23, 2003. The matter was remanded to Judge Leveque for entry of a supplemental order.

On May 5, 2005, Ms. Schultz directed Ms. Forbes to execute a "Notice of Assignment of Beneficiary Terms," the result of which was to authorize ABM to pay any funds it might tender in settlement or upon entry of a final judgment to Ms. Schultz and not to Ms. Forbes. Additionally, in May, 2005, ABM filed a Petition for Review in this Court.

On July 26, 2005, Ms. Schultz forwarded to Ms. Schultz via e-mail a settlement offer from ABM in the amount of \$5,000,000.00 (CP 927), and advised Ms. Forbes that ABM wanted to have an answer prior to its August 2, 2005 Board meeting (CP 2025). Ms. Schultz also advised Ms. Forbes that any settlement with ABM would require that Ms. Schultz receive the prevailing party attorney's fees awarded by Judge Leveque, plus interest, *before* calculating her 44% contingent fee on the recovery (CP 1038, 1043).

What followed was a further exchange of e-mails between Ms. Schultz and Ms. Forbes, which makes clear that Ms. Schultz' entire approach was geared toward maximizing her recovery. While Ms.

Schultz wished to counter the \$5 million offer with a counteroffer of \$6 million, Ms. Forbes indicated that she wanted to counter with an offer of \$5.8 million, and instructed Ms. Schultz to do so (CP 1042).

In a continuing e-mail exchange, Ms. Schultz made it clear that she would not, and did not have to, communicate Ms. Forbes' desired counter-offer to ABM. Instead, she held that communication hostage to Ms. Forbes' agreement as to how the recovered fees would be allocated and distributed between them (CP 1043).

Finally, by e-mail sent on the afternoon of Monday, August 1, 2005, having determined that Ms. Schultz was not forwarding the counter-offer, and being desperately concerned that Ms. Schultz' intransigence was putting the settlement offer in jeopardy, Ms. Forbes terminated Ms. Schultz' services, effective immediately, and directed Ms. Schultz to have no further communications on her behalf with ABM (CP 1047). In addition, she contacted ABM, accepted the \$5 million settlement offer, and notified ABM that all further dealings with her should be directed to her new lawyers at the Spokane law firm of Lukins & Annis (CP 930, 1048).

If Ms. Schultz had agreed that per the terms of the November 4, 2002 contract, she was entitled to 40% of \$5 million recovered in

settlement (or roughly \$2,000,000), it is entirely possible the matter would have ended there. Instead, on August 2, 2005, Ms. Schultz filed a Notice of Lien against the recovery in the amount of \$2,213,545 (a 44% contingent fee based on the post-trial judgment, plus \$589,115 for prevailing party fees and costs, plus \$92,958 for post-trial and appellate fees, plus interest on all of those amounts)(CP 458, 1048).

Then, on August 29, 2005, Ms. Schultz filed:

1. A motion that would have required that she be paid as a condition of her withdrawal, notwithstanding the fact that she had been terminated;
2. A motion for “Judgment Against Funds in Hand;” and
3. An Order directing that settlement proceeds be paid into the court registry.

On September 16, 2005, Ms. Forbes filed a “Satisfaction of Judgment” for \$5,655,177, which is the amount her counsel and ABM calculated to be the amount for which ABM *would have been* liable (per the terms set forth in Judge Leveque’s “Judgment Summary” entered on January 21, 2004. It was *not*, however, the amount Ms. Forbes actually recovered, which was a flat \$5 million. On September

30, 2005, the trial court entered an Order vacating the outstanding judgment.

On September 23, 2005, Ms. Forbes filed a motion seeking a determination of the reasonableness of fees. The matter was briefed, and then heard by Judge Leveque in a week-long hearing in March, 2006.

In Findings of Fact and Conclusions of Law entered in May, 2006, Judge Leveque ruled that Ms. Schultz was only entitled to 40% of the settlement amount, plus fees on appeal, post-trial fees, and costs. He directed Ms. Forbes to pay Ms. Schultz 12% prejudgment interest on the contingent fees *from the date of settlement*.

As noted above, Ms. Schultz appealed that ruling, and Ms. Forbes cross-appealed. The Court of Appeals determined that Ms. Schultz was only entitled to a contingent fee of 40%, not the 44% she had been seeking.

As further noted above, the Court of Appeals went on to determine that the 40% fee would be calculated on the basis of the amount stated in the full "Satisfaction of Judgment," as opposed to the amount Ms. Forbes testified she actually received in settlement from ABM.

III. ARGUMENT

A. The Court of Appeals Erred in Modifying the Settlement Amount, for Purposes of Calculating Ms. Schultz' Contingent Fee

The only possible conclusion that can be reached is that the Court of Appeals did not pay adequate attention to the evidence that was actually presented by Ms. Forbes regarding the amount of money she received in settlement from ABM.

As summarized in her Petition for Review, Ms. Forbes presented evidence in the following forms:

1. In the "Statement of the Case" in her Brief of Respondent/Cross-Appellant, Ms. Forbes noted that she had settled her suit against ABM and accepted \$5 million to fully resolve all of her claims (CP 930, 1048);
2. Ms. Forbes presented her letter to ABM accepting its offer of \$5 million, as well as ABM's written confirmation of Ms. Forbes' acceptance of its \$5,000,000.00 offer;
3. Ms. Forbes testified she received a flat \$5 million (RP 364); and

4. Ms. Forbes presented the Settlement Agreement and Release, which provided that ABM would pay “a total of \$5,000,000.00 (Five Million Dollars)(the ‘Settlement Amount’),” which was also described as the “sole compensation to Forbes” (CP 1947).

Moreover, Ms. Schultz never contested the validity of the \$5 million figure, possibly because she knew it to be the truth. In fact, Ms. Schultz testified, “It doesn’t matter to me what she received. I’m not challenging or not challenging it. It is not an issue here.” (RP 703).

What is most significant, though, is that the Court of Appeals considered no *evidence* that controverted Ms. Forbes’ testimony and the exhibits she offered, *because there was none*.

Instead, for reasons that remain unclear, the Court of Appeals engaged in pure speculation about the significance of the Satisfaction of Judgment, and articulated its idea that “*apparently* the satisfaction of judgment amounts includes interest.” *Id.* at 290 (emphasis added). The Court of Appeals completely ignored the trial court’s finding that a “settlement of \$5,000,000.00 resolved the case” (CP 1810-11), and substituted its judgment for the trial court’s, but with no evidence to support that substitution.

This Court has held that findings of fact are reviewed for substantial evidence, and that “if substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court.” *See, e.g., Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

“Substantial evidence” has been defined as evidence sufficient to persuade a fair-minded person of “the truth of the declared premise.” *See, e.g., In re Marriage of Bernard*, 165 Wn.2d 895, 903, 204 P.3d 907 (2009), quoting with approval from *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). *See, also, Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.2d 369 (2003).

In the instant case, the Court of Appeals, while quoting the appropriate cases, and repeating the verities of those holdings, did exactly what this Court has made clear it may not do. It completely ignored the evidence that was properly considered by the trial court about the correct amount of settlement, and completely ignored the evidence presented to it by Ms. Forbes.

It then engaged in rank speculation about what the underlying components that constituted the \$5.655 million figure in the

Satisfaction of Judgment, and wondered aloud if that figure could have included interest paid to Ms. Forbes, i.e., that “*apparently*,” the \$655,000 included or was fully comprised of interest on the \$5 million.

With no evidence that the \$655,000 was interest (from which Ms. Schultz would claim entitlement to a contingent fee), the Court of Appeals unabashedly substituted its judgment for the judgment of the trial court, and, in effect, sent a huge bill to Ms. Forbes (for more than \$262,000) in the process.

If the Court of Appeals had *any* doubt about the meaning or significance of the \$655,000, it should have remanded the matter to Judge Leveque, who would have disposed of the question quickly.

Instead, the Court of Appeals ignored clear rulings of this Court, as well as countless decisions of Courts of Appeals around the state, by applying either an incorrect standard of review, or, possibly, *no* standard of review. That action must be reversed.

B. The Court of Appeals Erred in Awarding Prejudgment Interest on the Contingent Fee Payable to Ms. Schultz

This Court has held that prejudgment 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,

meaning that the amount at issue can be calculated with precision and without reliance on opinion or discretion. *See, e.g., Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968).

This Court has also held that the “touchstone” for an award of prejudgment interest is that a party must have or control the “use value” of the money improperly. *See, e.g., Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986).

In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), this Court reiterated that **both** requirements **must** be met in order for a court to award prejudgment interest, i.e., the amount claimed must be liquidated or must be determinable with precision and without recourse to opinion or the exercise of discretion., and the party against whom the award is made must have improperly retained the “use value” of the money belonging to another.

The underlying theory of the holding is that only a party who **wrongfully** holds money should be compelled to disgorge the benefit of the wrongful withholding from the entitled party. *Id.* at 429-30.

In the decision below, the Court of Appeals cited the correct cases, and accurately described the holdings of those cases, but

completely misapplied the holdings of those cases to the facts of this case.

First, it must be remembered that ABM deposited the funds into the registry of the trial court *as directed by Ms. Schultz* (CP 487-89, 499). Once the money was so deposited, the Spokane County Superior Court became the custodian of the funds, and Ms. Forbes was without authority to control them. *See, e.g., Wilson v. Henkle*, 45 Wn.App. 162, 169, 724 P.2d 1069 (1986). Certainly, she could not spend them. Certainly she could not insist upon the release of the funds to Ms. Schultz, short of confessing to the court Ms. Schultz's entitlement to the fees she demanded.

The Court of Appeals made far too much of the fact that Ms. Forbes gave the court clerk her social security number, and asked that the funds be placed into an interest-bearing account. Because it takes an affirmative step by *one* of the litigants to move funds from a non-interest-bearing status into an interest-bearing account, *see* RCW 36.48.090, it was sensible that Ms. Forbes would try to put the money to work, rather than have it lose value by sitting in a non-interest bearing account. It was, of course, theoretically possible that Ms. Schultz would ultimately be the beneficiary of that decision to attain

interest on the funds, but the fact that Ms. Forbes made that possible in no way cloaked her in the mantle of having control, or use of the funds.

Prejudgment interest is referred to as a “make-whole” remedy, and an award of such requires a showing that one party was *denied* “use value of the money withheld.” *See, e.g., DeWolf, Allen, & Caruso, Contract Law And Practice*, 25 Wash. Prac., §14:12 (2009).

As noted in *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 115 P.3d 349 (2005), when the disputed amount of money is tendered into the registry of the court, prejudgment interest is tolled on the amount deposited. *Id.* at 776.

The fact is that Ms. Forbes had no authority to dispose of the funds in any way, and thus, there is no logical way she could be found to have wrongfully held the funds, or that she ever had control of the “use value” of the money. Moreover, Ms. Schultz can hardly claim she was denied the use value of the funds wrongfully, when it was *she* who demanded the funds be tendered into the court registry.

The Court of Appeals’ logic would suggest that any time a party objects to the demand of the opposing party for money that is controverted, and consents to the funds being tendered to the court’s registry, the objecting party has exerted wrongful control over the

funds. That logic is strained and absurd, and would impose a chilling effect on a party's desire to have her rights vindicated.

IV. CONCLUSION

For reasons that remain unclear, the Court of Appeals blundered in this case in two significant respects.

One, it substituted its judgment for the judgment of the trial court when it awarded a windfall to Mary Schultz (i.e., a 40% fee on \$655,000 more than the settlement amount of \$5 million) with *no* evidence to support its speculation that ABM paid anything more to Cheryl Forbes than the \$5 million.

In engaging in that type of unwarranted substitution of judgment, the Court of Appeals ignored the substantial evidence in the record of the true settlement amount actually recovered by Ms. Forbes, to which Ms. Schultz had an arguable claim of entitlement to fees.

Two, the Court of Appeals erred in awarding Ms. Schultz prejudgment interest on the disputed contingent fee, when the funds had been tendered into the court registry at her insistence, and under circumstances that denied Ms. Forbes any "use value" or control over those funds.

Both holdings below must be reversed.

DATED this 6th day of January, 2010.

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