No. 93220-4

SUPREME COURT
OF THE STATE OF WASHINGTON

GEOFFREY CHISM,

Respondent,

vs.

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

Petitioners.

CHISM'S ANSWER TO PETITION FOR REVIEW

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

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

Attorneys for Respondent Chism

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Constitution

Statutes

Codes, Rules and Regulations

Other Authorities

A. INTRODUCTION

This case involves the compensation owed by a corporation to one of its executives[1] who also served as its general counsel. The jury here determined that Tri-State Construction, Inc. ("Tri-State") willfully withheld bonuses due to Geoffrey Chism ("Chism") for his exemplary services that saved the corporation. Dissatisfied with the jury's decision, the trial court required Chism to forfeit a significant portion of the bonuses for an alleged breach of fiduciary duties to Tri-State based on putative professional rules violations; the trial court invaded the fact finding role of the jury, misinterpreting and misapplying the Rules of Professional Conduct ("RPCs") by finding that an employee attorney's negotiations with his corporate employer over compensation violated the RPCs. The Court of Appeals properly found that the trial court's conduct was reversible error.

Now, petitioners Tri-State Construction, Inc. and Larry Agostino ("Tri-State") fail to precisely articulate how this Court's RAP 13.4(b) criteria apply to merit review of that opinion. Rather, its petition is essentially an invitation to this Court to reconsider all facets of the Court

---

[1] The RPCs are inapplicable to business executives as such. *Restatement (Third) of the Law Governing Lawyers*, § 14 cmt. c.

of Appeals' opinion.[2] The Court of Appeals got it right. This Court should deny review. RAP 13.4(b).

B. STATEMENT OF THE CASE

The Court of Appeals extensively articulated the facts in its opinion. Op. at 2-19. While Chism does not universally agree with the court's factual recitation (largely drawn from the trial court's findings rather than those compelled by the jury's verdict), Chism addresses facts here only to the extent that Tri-State's petition either omits key facts or misstates the record. Pet. at 2-14.

First, perhaps the most glaring omission in Tri-State's petition is its studied refusal to acknowledge that it owes its continued existence to Chism, who saved it from its disastrous Bear Hydro project and imminent financial ruin. Op. at 11-12. Beginning in 2010, Chism's workload drastically increased largely due to that project. Eventually, instead of a

---

[2] Tri-State does this Court no service by offering only an amorphous, unnumbered recitation of the issues it presents for review. Pet. at 1-2. Also, it provides this Court no assistance in making a decision on review by failing to specifically document in its argument why review should be granted or precisely how the issues it attempts to raise meet the criteria of RAP 13.4(b). The failure to set out an issue in the statement of issues, required under RAP 13.4(c)(5), means a party has not "raised" an issue, and the issue may not be raised for the first time in subsequent supplemental briefing. *State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (The petitioner there also failed to present argument on the issue in its petition as required by RAP 13.4(c)(7)). It is no different if a party mentions an issue but then fails to address as is required by RAP 13.4(c)(7); it must be disregarded. *In re Detention of A.S.*, 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999) (in the absence of argument on an issue in a petition for review, Court will not consider the argument).

By not addressing them, Tri-State *waives* issues relating to RPC 1.5, 1.7, 8.4, and the trial court's fee award. RAP 13.7(b).

part-time position, Chism worked more than full-time. RP (5/7/15):90, 141-42. Kristi Middleton, Tri-State's former CFO, testified that Chism worked *seven days a week* on that project and it was not an ordinary part of his job. RP (5/7/14):178-79.

Chism began working on the Bear Hydro project in 2010. Problems with the project compelled Tri-State to ask Chism to take over as president of TRP, Tri-State's Canadian subsidiary for the project. RP (5/20/14):75.[3] Chism continued in that role from October 2011 until the project problems were resolved in March 2012. RP (5/7/14):180; (5/12/14):149-50. The trial court acknowledged Chism's role. CP 4935 (FF 79 (Chism helped Tri-State stay in business, preserved its bonding capacity, and saved at least $27 million)). In saving Tri-State while acting as TRP's president, he acted not as legal counsel, but as a *corporate executive* of a Canadian company.[4]

---

[3] Tri-State president Ron Agostino also recognized that the Bear Hydro project in Canada was not ordinary work for Chism. He called the project a "disaster" because the designer "blew the budget" and "The owner was not nice, very hard, ruthless." RP (5/20/14):70. He testified that when things "got really bad with the ruthless owner," Ron brought Chism into the mix because he needed him. RP (5/20/14):76-77. Ron testified the future of Tri-State was at stake and Chism did whatever he needed to do to save the project and the company; in the end, Chism did exactly what was needed. RP (5/20/14):77. All of Chism's work on Bear Hydro was for a Canadian subsidiary of Tri-State and could not, by definition, and as pointed out by Chism in writing to all concerned at the time, constitute the practice of law in Washington. Tri-State and its Canadian subsidiary had independent Canadian legal counsel at all times.

[4] Thus, the trial court "disgorged" not just Chism's general counsel compensation, but compensation for FY 2012 when he served as a corporate executive of

Second, Tri-State asserts that Chism's statement that he would do "whatever it takes" to get the job done was essentially an agreement to work an unlimited number of hours and change a part-time job into an all consuming full-time position with no need for any change in compensation. Pet. at 2-3, 4, 7. At trial, Ron Agostino refused to support Tri-State's interpretation of the agreement with Chism.[5]

Third, Tri-State implies that Chism's bonuses were somehow unusual. Pet. at 2-12. They were not. Tri-State had a long history of paying bonuses to its employees, including senior executives like the Agostino brothers. RP (5/20/14):30.[6]

Fourth, Tri-State implies in its petition at 5-6, 9 that Ron's medical condition deprived him of the ability to make important decisions like the bonus decisions, and that Chism took advantage of that medical condition.

---

a Canadian subsidiary, service over which the trial court had no authority. The Court of Appeals noted Tri-State's apparent tactical decision not to pursue damages or restitution from Chism, op. at 42-43, a tactic that was plainly risky given the undisputed evidence that Chism had saved the company. *Id.* at 43 n.35.

[5] As noted above, he, as well as Middleton, recognized the demands of Bear Hydro far exceeded Chism's prior responsibilities as Tri-State's in-house counsel. Moreover, Ron equated doing "whatever it takes" to mean doing what the company asked him to do and getting results. RP (5/20/14):68.

[6] The Agostinos were paid handsome bonuses. RP (5/7/14):153, 157. In addition, with Ron's approval, Larry took out a $1 million "loan" from Tri-State to build his house in Santa Barbara. RP (5/22/14):105-06. In FY 2011, when Ron agreed to pay Chism a bonus for all his work in trying to salvage Tri-State Bear Hydro, Larry never paid back any of the million dollar loan to help company cash flow as it struggled to meet its obligations. *Id.* at 107, 110-11. That was because while letting Chism and Ron handle Bear Hydro, Larry, Tri-State's treasurer, was focused on building his California beach house and protecting his personal financial position. *Id.* at 112-13.

That assertion is not supported by any evidence. Ron testified at trial that his medical condition did not affect his ability to decide right from wrong or fair from unfair, RP (5/20/14):61, he could recall the events of 2010, RP (5/19/14):128, and he recalled having an "actual memory" of Ex. 9 (the exhibit pertaining to bonuses for Chism) at the time and was not confused by it. RP (5/20/14):25. When Ron and Chism discussed a FY 2011 bonus on October 20, 2011 in the car returning from meetings in Canada on Bear Hydro, Ron testified that he did not feel pressured or cornered as to the FY 2011 bonus, or that the discussion was in any way inappropriate. *Id.* at 42, 92. He also testified he was fully aware of the arrangement with Chism: "That I could decide what to pay him there, what would be fair." *Id.* at 45, 88, 96. Ron never testified he felt Chism had taken advantage of him. *Id.* at 93.[7]

Tri-State's petition also omits a critical point: regardless of Ron's interactions with Chism as to any bonuses, *Chism's bonuses were Ron's only action among the numerous decisions he made as its president ever questioned by Tri-State; the bonuses were specifically authorized by Tri-State's board that included Larry.* RP (5/27/14):13-14. Chism's bonuses,

[7] Pointedly, Larry did not have any concerns about Ron when he got a $500,000 bonus and million dollar "loan" in FY 2010. RP (5/27/14):103, 107.

according to their specific terms, were discretionary with Tri-State. Ex. 57.

Tri-State's board knew of each bonus given Chism. It was fully apprised of the FY 2010 bonus. Exs. 9, 11. Ron discussed it with his brothers, RP (5/20/14):35, and Tri-State's board ratified it. RP (5/7/14):163. Both Tom and Larry Agostino also knew from Ron about the $500,000 FY 2011 bonus that Ron promised Chism. RP (5/21/14):80.[8] When Ron stepped down as president, Chism met with Larry on March 28, 2012 to discuss compensation. RP (5/13/14):125.[9] Chism's entire compensation arrangement was modified at that meeting. Tri-State would pay Chism a $750,000 bonus for work performed through that date; specifically, the $500,000 FY 2011 bonus promised by Ron and an additional $250,000 bonus for FY 2012 proposed by Larry. RP (5/13/14):126-27. Chism wrote a confirming email and memorandum. Exs. 20, 21. Larry questioned one aspect of the agreement (regarding a

[8] Middleton testified the Tri-State board then decided to change the bonus, reducing it to $400,000 on the company ledger, but not telling Chism that it had been done while he was in the midst of the Bear Hydro effort. RP (5/7/14):143-47. This was not an act of good faith.

[9] Tri-State had already hired another lawyer, Greg Russell, before the March 28 meeting between Larry and Chism. CP 2336.

company car) in an email response, ex. 22, but he never disputed the recitation about the $750,000 bonus. RP (5/22/14):57, 193.[10]

In sum, Ron's condition was not such that his decisions as company president were subject to question. More critically, the Chism bonuses were not Ron's decision alone; the entire Tri-State board, including Larry, knew of and ratified the bonuses; the $250,000 FY 2012 bonus was Larry's decision alone.[11]

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

Tri-State's petition is exceedingly skimpy in its articulation of why this Court should grant review of the careful, analytical opinion of the Court of Appeals. It does not come to grips with the criteria for review set forth in RAP 13.4(b).[12]

---

[10] Ultimately, Tri-State questioned Chism's bonuses *after* Chism performed the work, *after* the bonuses were paid or promised, and *after* Chism performed added work in reliance on them.

[11] Tri-State implies Chism viewed Ron's condition as growing progressively worse in 2011, relying on an August 4, 2011 memo Chism wrote to Tri-State's accountant as "lobbying" for Ron to step down. Pet. at 5-6. Any fair reading of that memo is that Chism was not expressing a view that Ron was incompetent, but that other senior Tri-State management should step up and help instead of leaving it to Ron, Chism, and a couple of other Tri-State mangers to deal with the Bear Hydro disaster and to help save the family business. Tri-State admitted below that the memo's purpose was "to provide more support for Ron." Br. of Resp'ts at 27-28.

[12] In fact, in its petition's section on why review should be granted, mandated by RAP 13.4(b)(7), Tri-State makes an exceedingly general argument without numbered sections, making it difficult for Chism to respond to its contentions, or for this Court to process the case. That alone is a basis for denying review.

(1) The Jury Determined Tri-State Deliberately Withheld Wages to Which Chism Was Entitled

Left largely unaddressed in Tri-State's petition is the jury's verdict. The jury's decisions on the *factual* issues foreclosed the trial court's efforts to subsequently circumvent those factual findings in the guise of making an "equitable" decision.

As the Court of Appeals correctly noted, op. at 17 n.10, the trial court instructed the jury on the compensation arrangement upon which Chism's contract claims were predicated; the Court's instruction, given without objection by Tri-State, RP (5/29/14):138, required Chism to carry the burden and to prove in the contract claim being submitted to the jury that the factors that could give rise to a breach of fiduciary claim did not exist.[13] In other words, the jury found, as a matter of fact, that Chism's compensation agreement with Tri-State was fair and reasonable, free of undue influence,[14] and made after a full and fair disclosure of the facts.

---

[13] Without any Tri-State objection, the trial court also instructed the jury that breach of contract applied to the $500,000 bonus (October 2011 – Instruction 11); the $250,000 bonus (March 2012 – Instruction 12); mutual assent and consideration (Instructions 13, 14, 15, 16); contract interpretation is to give effect to the intent of the parties (Instruction 17); and breach (Instruction 18). CP 2203-10.

[14] The trial court, also without objection, instructed the jury on Tri-State's affirmative defense of undue influence. CP 2215. The jury was instructed that a party could rescind a contract if it was unfairly persuaded to enter into a contract by a person with whom there was a confidential relationship. The jury was instructed an attorney-client relationship was a confidential relationship. *Id.* It was also instructed that in determining whether there was "unfair persuasion" it could consider "such factors as the unfairness of the content, if any, the availability of independent advice, and the

See Appendix.

The trial court did not like the jury's verdict on Geoff Chism's bonuses earned from Tri-State and it endeavored to undercut the jury's factual determination in the guise of fact-finding on the breach of fiduciary duty issue.[15] But the constitutional fact-finding function of the jury foreclosed the trial court's actions.[16] The trial court was not free to substitute its judgment on the facts for that of the jury.[17] These points are

---

experience or susceptibility of the party persuaded. *Id.* The jury found not only that Chism's agreement with Tri-State was not the product of undue influence, CP 2228, it found that Tri-State failed of its burden to prove the defense of undue influence. CP 2229.

[15] This is made clear in CL 82-84, CP 2460-61, 2502, where the trial court substituted its judgment on a fair bonus for that of Tri-State's president. The trial court even made up a theoretical contract that should have been entered into by the parties. CL 32; CP 2482.

[16] Wash. Const., art. I, § 21; CR 38(a). *See generally, Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-46, 771 P.2d 711 (1989) (jury fact finding role in damages); *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761 (2010). Indeed, that right is "jealously guarded by the courts." *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941).

[17] The jury's fact-finding role is core to the article I, § 21 jury trial right. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). The jury has the ultimate power to weigh the evidence and determine the facts. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). In *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), the trial court allowed a jury to make an advisory decision on a fiduciary breach claim, and a binding decision at law on a breach of contract claim. The court denied the fiduciary breach claim, granting a remittitur as to the jury's damage award. Division III reversed and reinstated the jury's full verdict, observing that the trial court was foreclosed from substituting its factual determination on damages for that of the jury. 103 Wn. App. at 462. *See also, Behnke v. Ahrens*, 172 Wn. App. 281, 296-97, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013) (court could not award damages for breach of fiduciary duty by attorney in excess of those awarded by jury for malpractice).

a critical backdrop to the Court of Appeals' opinion on the RPC/fiduciary duty issues.

(2) Chism Breached No Fiduciary Duty to Tri-State

The Court of Appeals correctly discerned that no RPC provision established a restriction on Chism's ability as in-house counsel to negotiate compensation with Tri-State. Op. at 26-43. Instead of addressing the court's actual decision, Tri-State sets up a strawman argument that the issue for this Court is whether the trial court had authority to require an attorney to disgorge a fee. Pet. at 14-18. Chism has never so argued, nor did the Court of Appeals so rule. Op. at 19-23.[18] Rather, the issue is whether Chism breached an RPC-based duty to Tri-State that was not articulated in any specific rule and thereby breached a fiduciary duty to Tri-State. He did not.[19]

---

[18] A breach of the Rules of Professional Conduct may constitute a basis for discerning a breach of such a fiduciary duty. *E.g., Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002), *review denied*, 148 Wn.2d 1011 (2004). In some instances of egregious misconduct disgorgement may be appropriate, *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598, *review denied*, 118 Wn.2d 1002 (1991), but that remedy need not apply in every case. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 87, 331 P.3d 1147 (2014); *Forbes v. American Building Maintenance*, 148 Wn. App. 273, 294-95, 198 P.3d 1042 (2009), *aff'd, in part*, 170 Wn.2d 157, 240 P.3d 790 (2010) (attorney misconduct in representing client did not justify voiding contingent fee agreement and denying her fees where attorney provided exemplary service to client).

[19] Tri-State argued to the Court of Appeals that Chism breached RPC 1.5 (pertaining to a reasonable fee), RPC 1.7 (relating to conflicts of interest), RPC 1.8 (relating to doing business with a client), and RPC 8.4 (relating generally to attorney misconduct). Tri-State's petition is silent on all of these rules except RPC 1.8, pet. at 15-16, thereby *waiving* any argument as to the other RPC provisions. The Court of Appeals

(a) Chism Could Not Have Breached a "Duty" under RPC 1.8(a) to Tri-State that Neither the Trial Court nor Tri-State Could Articulate

The Court of Appeals correctly noted that Chism could not have breached a duty under RPC 1.8 to Tri-State that neither the trial court nor Tri-State could articulate. Op. at 23-25. Tri-State could not offer *any authority* that would have put Chism on notice regarding a potential breach of duty to Tri-State. Tri-State has *no answer* to cases like *In re Disciplinary Proceedings Against Haley*, 156 Wn.2d 324, 126 P.3d 1262 (2006) or *In re Disciplinary Proceedings Against Halverson*, 140 Wn.2d 475, 998 P.2d 833 (2000) cited there. Op. at 30, 40-41.[20] Indeed, all available authority is contrary to Tri-State's position.[21]

---

correctly noted that neither RPC 1.5(a), 1.7 nor 8.4(a) created a clear duty for Chism to Tri-State. Op. at 26-30, 37-43. Chism therefore focuses this answer on RPC 1.8.

[20] The RPC-based duty arrived at by the trial court was never previously articulated by any court, and the trial court could only discern such a duty after a 2-day hearing with ethics experts who disagreed as to such a duty under the RPCs. And even Tri-State's own expert, David Boerner, admitted that he is unaware of a single in-house lawyer who has ever even tried to comply with the standard of conduct he claims is required under the RPCs. RP (5/16/14):50-51. If the trial court could not know of such duty without the assistance of conflicting expert testimony, how could a lawyer like Chism? If it is appropriate to apply RPC 1.8 to in-house counsel negotiating their compensation with their corporate or government employers, the appropriate forum for doing so is not this case, but the rulemaking process of GR 9. *See* ACC br. at 15-16.

[21] No Washington authority treats compensation paid to in-house lawyers as a conflicted business transaction, as Tri-State admitted, CP 2848; RP (5/16/14):47, and a WSBA's advisory opinion specifically *rejects* such a notion, even when the compensation includes *shares* in the business. *See* Appendix. That is also why the ABA concluded that providing stock options or other ownership interests to in-house counsel is *not* analogous to paying outside counsel for services, and the RPC 1.8 is not applicable. *See ABA Task Force Report on the Independent Lawyer, Lawyers Doing Business With Their Clients: Identifying and Avoiding Legal and Ethical Dangers,* at 55-59 (2001); Dzienkowski and

Moreover, on the merits, Tri-State's essential argument is that compensation paid to in-house counsel equates to fees paid to outside counsel in private practice. *Nothing* in RPC 1.13, the rule that deals with counsel employed by an organizational entity,[22] addresses this issue.[23] Rather, those situations are very different. An outside lawyer is not an employee of the client, does not report to non-lawyer executives at the company as in-house counsel does, and plays a different role. Outside counsel obviously wants to obtain successful results and benefit the client. However, outside counsel only performs discrete tasks for the client and his/her services constitute an expense the client would like to minimize or avoid if possible.

An in-house counsel is different. As part of the company, in-house counsel's job is to bring value every day and to help the company succeed. In-house counsel not only supervises outside counsel, they compete with outside counsel to build internal systems of lawyers and non-lawyers to

---

Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients,* 81 Tex. L. Rev. 405, 518 (2002).

[22] This rule applies both to in-house counsel of a corporation and lawyers employed by a governmental organization. Comment [9] to RPC 1.13. Conceivably, were Tri-State's argument to be adopted, the compensation negotiations of an assistant attorney general, deputy prosecutor, or public defender with her/his public employer would be subject to RPC 1.5/RPC 1.8(a).

[23] Comment [6] to RPC 1.13, however, states that nothing in the rule limits or expands a lawyer's responsibility under various rules including RPC 1.8. RPC 1.5, however, is *nowhere mentioned* in that list of rules.

obviate the need for outside counsel and consult on purely business as well as legal decisions.[24]

These clear differences are why compensation paid to in-house counsel is different than "fees" paid to outside counsel. Outside counsel's interest is to generate income to the law firm, an expense to the client. An in-house counsel's interest is to have the client succeed.[25] *See* ACC br.

Chism did not breach a duty where there was *no clear authority* contemporaneous with the negotiation of his compensation agreements with Tri-State suggesting that RPC 1.8(a) applied to the negotiation of compensation between an in-house counsel/corporate executive and the corporation. Op. at 32-33.

(b) Chism Did Not Violate RPC 1.8(a)

The Court of Appeals' determination that there was no authority that Chism breached RPC 1.8(a) is amply supported. Op. at 31-37.[26]

---

[24] RPC 1.8(a) also contemplates the interest of the lawyer being adverse to that of the client. Executive compensation is not necessarily adverse to the employer's interest. Well-compensated executives help the company succeed, as Chism did when he saved Tri-State from disaster. That is why in circumstances where general counsel have received stock options, giving the attorney an actual financial interest in the client, RPC 1.8 has been found inapplicable. *See ABA Task Force Report, supra.*

[25] The client company does not necessarily have an interest in minimizing compensation to the in-house counsel. Like other executives, the company's interest is to motivate them to achieve greater corporate success, as noted *supra.*

[26] *None* of this Court's recent RPC 1.8(a) decisions contemplate that an attorney employee "does business" with a corporate employer; rather, the rule contemplates an attorney-client relationship as a necessary factual predicate. *E.g., Valley/50th Ave., L.L.C.*

First, RPC 1.8 does not apply here at all.[27] RPC 1.8(a) applies to loans, investments, sales transactions and the like between a client and outside counsel, and not to compensation of an employee.[28] Because RPC 1.8(a) does not apply to ordinary fee agreements, it should not, by analogy, apply to an employee's cash compensation.

Further, it would be absurd to interpret RPC 1.8 to apply to the circumstances where a general counsel seeks to alter his/her compensation package for the policy reasons set forth *supra*. Boerner agreed. CP 2317 (Professor Boerner testified that a lawyer employee's request for a

---

v. Stewart, 159 Wn.2d 736, 153 P.3d 186, 188 (2007) (law firm performed legal services for several entities closely held by an individual client, without obtaining a representation agreement from the particular corporate entity). *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069, 1073 (2003) (attorney violated RPC 1.8(a) by obtaining an ownership interest in a current client's certificate of deposit); *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 173 P.3d 898, 906 (2007) (a lawyer obtaining loans from a client); *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338, 341 (2004) (attorneys received profits from a client's joint venture).

[27] Comment [1] to RPC 1.8 makes clear it is generally inapplicable to fee arrangements between lawyer and client ("It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the fee.").

[28] *See, e.g.*, RPC 1.8 cmt. 1; *LK Operating, supra* (joint venture agreement involving client, attorney, and manager of trusts for attorney's children for formation of debt collection business); *Valley/50th Avenue, supra* (deed of trust obtained from client to secure fees and costs owed by another client); *Holmes*, *supra* (attorneys receive ownership interest in joint venture of client).

compensation increase is not a business transaction with a client). *See* op. at 33-34.[29]

Next, although not a basis for the Court of Appeals' opinion, Tri-State did not prove a violation of RPC 1.8(a) by Chism in light of the jury's factual determinations noted *supra.* RPC 1.8(a)'s business transaction rule largely applies the factors enunciated in *Kennedy v. Clausing,* 74 Wn.2d 483, 445 P.2d 637 (1968).[30] Indeed, RPC 1.8(a) mirrors Instruction 10 here (*see* Appendix), prohibiting a lawyer from entering into a "business transaction" with a client unless the lawyer satisfies certain criteria to protect the client's interest; namely: (1) fair and reasonable terms to the client, disclosed in writing, (2) advice to seek independent counsel, also in writing, and (3) informed consent (again, in writing) including identification of whether the lawyer represents the client

---

[29] To construe the rule otherwise would mean that every raise, cost of living allowance, bonus, health insurance benefit improvement, increase in vacation time, 401(k) improvement, or betterment of child care for every in-house or government lawyer would trigger RPC 1.8(a)'s requirements of a written disclosure and advice to the employer to seek independent counsel. These are not the kinds of events covered by RPC 1.8, and the rule should not be construed to reach such absurd results.

[30] *Compare Kennedy* with factors set forth in *Valley/50th Avenue, LLC,* 159 Wn.2d at 745 (quoting *In re Disciplinary Proceeding Against McMullen*, 127 Wn.2d 150, 164, 896 P.2d 1281 (1995) and *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983)). In *Kennedy*, this Court there addressed the circumstances under which an attorney could change the financial terms of the attorney-client relationship during that relationship. The Court held that agreements made during the attorney-client relationship must be fair and reasonable, free from undue influence, and made only after a fair and full disclosure of the facts upon which the agreement is predicated. *Id.* at 491.

in the transaction. RPC 1.8(a)(1)-(3).

Tri-State ignores the jury findings made in response to Instruction 10 on the *Kennedy* factors. The jury here specifically found the contract on which the bonuses were awarded was fair and reasonable, free of undue influence and made upon full disclosure of the facts. CP 2228-29.[31] The jury's determination on those factors foreclosed a determination by the trial court that RPC 1.8 was breached.

In light of the jury's factual determinations, the trial court erred in concluding that Chism breached RPC 1.8 by seeking a bonus from Tri-State. CP 2389-2404.[32] That decision is unsupported in light of the jury's factual findings (the jury did not hear the experts' testimony here, but that evidence pertained solely to legal issues).

---

[31] The only RPC 1.8(a) requirement not fully addressed by the jury here is that the client must be informed of a right to independent counsel, although the jury considered it in the context of undue influence. *See* n.14 *supra*. But as noted above, the Agostinos knew they had that option, and, in fact, had other counsel. Even for situations requiring "informed consent," Rule commentary makes clear: "A lawyer need not inform a client or other person of facts or implications already known for the client." RPC 1.0 cmt. [6]. A factor to be considered is whether the client is experienced in legal matters generally and in making decisions of the type involved. *Id.*

[32] The trial court correctly found that Chism breached no fiduciary duties to Tri-State by accepting the general counsel job and the compensation package, when he came in-house. Tri-State's expert agreed. CP 2310. Tri-State's attempt to raise an issue regarding Chism's acceptance of in-house counsel status, pet. at 4-5, is baseless.

The Court of Appeals correctly interpreted RPC 1.8(a); Tri-State fails to document how it mistakenly applied the rule. Review is not merited. RAP 13.4(b).

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

In passing, Tri-State asserts that the trial court erred in upholding an award of double damages under RCW 49.52.070. Pet. at 19.[33] Again, Tri-State deliberately ignores the jury's express *factual* determination based on unobjected instructions on the law,[34] that it willfully withheld compensation to Chism, a finding supported by *ample* evidence. At trial, Larry *admitted* such a willful withholding was a *negotiating tactic*. RP (5/22/14):74-75, 81, 84-85. Tri-State also ignores the trial court's order denying its motion for judgment as a matter of law. CP 4341-42.

---

[33] Tri-State cites two cases that do not help it. For a dispute to be bona fide, the issues in it must be fairly debatable, connoting an element of good faith. Unlike the situation where Tri-State *conceded* that it withheld compensation due to Chism as a negotiating tactic to reduce the amount of the bonuses it had previously agreed to, in the cases cited by Tri-State, there were legitimate reasons for a dispute. *Lillig v. Benton-Dickinson*, 105 Wn.2d 653, 717 P.2d 1371 (2002) (whether an enforceable agreement to pay bonus and amount of discretionary bonus were at issue); *McAnulty v. Snohomish Sch. Dist. No. 201*, 9 Wn. App. 834, 515 P.2d 523 (1973) (no exemplary damages where district had genuine belief teacher had been legitimately discharged ending any wage entitlement). Here, there was no dispute that a compensation agreement existed or that Tri-State's board approved Chism's bonuses. Willfulness was a jury question. *Lillig*, 105 Wn.2d at 659 ("... a reviewing court will uphold the trier of fact when any reasonable view substantiated findings, even if there may be other reasonable findings.").

[34] Tri-State wanted the jury to decide willfulness and proposed instructions on that issue. *See* CP 2005-07, 2172.

The jury's determination was based on well-settled law developed in numerous cases by this Court and the Court of Appeals. The statue must be read expansively, *State v. Carter,* 18 Wn.2d 590, 621, 142 P.2d 403 (1943); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157-60, 961 P.2d 371 (1998), and any exceptions must be read narrowly. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 35, 111 P.3d 1192 (2005), *review denied,* 156 Wn.2d 1030 (2006). There was no "bona fide" dispute within the meaning of the bona fide dispute where disgorgement was improper. Op. at 43 n.36. Indeed, to allow trial courts to upset this powerful public policy in favor of paying compensation due to an employee in the absence of any explicit authority in the RPCs to address compensation of in-house counsel would be unwise. Op. at 40-43.

Tri-State should not be rewarded for its deliberate, inequitable effort to deny earned compensation to Geoff Chism. The Court of Appeals' decision is amply supported in Washington law and does not merit review. RAP 13.4(b).

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

Again, only in passing, Tri-State asserts that Chism is not entitled to prejudgment interest. Pet. at 19-20.[35] But again, although it never

[35] Tri-State cites a single Court of Appeals case in support of its argument.

argued in the trial court that prejudgment interest was unavailable to Chism,[36] it now offers exceedingly limited analysis in its petition to document how the Court of Appeals' analysis of pre-judgment interest here was flawed. Op. at 43.

Instead, as Chism noted below, reply br. at 53-58, the trial court's prejudgment interest decision was amply supported.[37] *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986); *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968). Prejudgment interest is an equitable doctrine rooted in unjust enrichment, or, as the *Hansen* court made clear, the fact that one party enjoyed the "use value" of another's money. There can be little doubt that Tri-State here fully enjoyed the use

---

McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 128 P.3d 128 (2006). That case does not help it. Prejudgment interest was allowed there in a dispute over wages even though jury had to evaluate disputed evidence over unpaid overtime. *McConnell* is of limited precedential value in any event because it applied an erroneous standard of review. *Polygon Northwest Co. v. American Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 796 n.13, 189 P.3d 777, *review denied*, 164 Wn.2d 1033 (2008).

[36] Tri-State did not object to Chism's submissions below on prejudgment interest, CP 4974-80, and did not object to prejudgment interest being a part of the trial court's judgment. CP 4981-82.

[37] The fact that an amount is disputed does not render the amount unliquidated. *Forbes, supra*, 170 Wn.2d at 166. Further, merely because a court reduces the amount of the litigant's requested claim does not render it unliquidated. *Polygon Northwest*, 143 Wn. App. at 792. In *Polygon Northwest*, primary insurers who had paid a settlement sought equitable contribution from an excess carrier. The court awarded prejudgment interest to the successful insurer. The amount of the settlement was known. Although there were several disputed approaches to how the settlement should be equitably apportioned between the insurers by the court, that did not render the claim ultimately unliquidated. 143 Wn. App. at 792-93. It was no different here where the trial court reduced Chism's compensation award.

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

Review of the Court of Appeals' decision on prejudgment interest is not merited. RAP 13.4(b).

(5) Chism Is Entitled to His Reasonable Fees in Responding to the Petition

Both the trial court and the Court of Appeals awarded Chism his reasonable attorney fees. RCW 49.48.030; RCW 49.52.070. Op. at 43. He is entitled to his reasonable fees in responding to Tri-State's meritless petition. RAP 18.1(j).

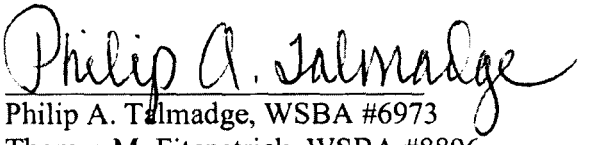
D. CONCLUSION

The Court of Appeals opinion correctly upheld the jury's verdict that Tri-State deliberately withheld compensation it had promised to pay Chism, and that Chism earned. Chism was entitled to that compensation, plus the double damages under RCW 49.52.070 and reasonable attorney fees. The Court of Appeals correctly determined that the trial court erred in ordering Chism to forfeit bonuses he earned where it faithfully applied the law on fiduciary duty, double damages under RCW 49.52.050/.070, and prejudgment interest.

Review of the Court of Appeals' opinion is not merited. RAP 13.4(b). Chism is entitled to his reasonable attorney fees. RAP 18.1(j).

DATED this 1st day of August, 2016.

Respectfully submitted,



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

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

APPENDIX

Instruction 10 states:

> As to the modification of Mr. Chism's compensation arrangement, based upon the events in or around September 2010, whether predicated on Exhibit 9 or otherwise, Mr. Chism has the burden of proving each of the following propositions:
>
> (1) That Tri-State entered into a contract with him; and
>
> (2) That the terms of the contract were fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated.

CP 2202.

RPC 1.8(a):

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Honorable Ken Schubert

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

GEOFFREY CHISM,

Plaintiff,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

No. 12-2-32541-3 SEA

VERDICT FORM

VERDICT FORM

We, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that Mr. Chism has proven, by a preponderance of the evidence, that the contract was fair and reasonable?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 2: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that the contract was free from undue influence?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 3: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that he made a full and fair disclosure of the facts upon which the contract was predicated?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 4: Has Plaintiff Geoffrey Chism proven his claim for breach of contract for a $500,000 bonus for work he performed during Fiscal Year 2011?

ANSWER: X YES ____ NO

INSTRUCTION: If you answer YES to Question 4, please proceed to the next question. If you answer NO, please skip to Question 6.

QUESTION 5: What is the amount of damages you award to Mr. Chism for breach of contract for a $500,000 bonus?
Amount: $500,000

INSTRUCTION: Please skip to Question 7.

QUESTION 6: If you find there is no enforceable contract between the parties for a bonus for work Mr. Chism performed during Fiscal Year 2011, what is the value of the services he performed during that time subtracting the reasonable value of amounts received him during that time:
Amount: $_____

INSTRUCTION: Please proceed to the next question.

QUESTION 7: Have Defendants proven their affirmative defense of undue influence so as to rescind a contract for a $500,000 bonus for work performed during Fiscal Year 2011?

ANSWER: ____ YES _X_ NO

INSTRUCTION: If you answer YES to Question 7, please proceed to the next question. If you answer NO, please skip to Question 9.

QUESTION 8: Has Plaintiff proved Defendants are estopped from asserting the affirmative defense of undue influence relating to the contract for a $500,000 bonus for work performed during Fiscal Year 2011?

ANSWER: ____ YES ____ NO

INSTRUCTION: Please proceed to the next question.

QUESTION 9: Has Plaintiff Geoffrey Chism proven his claim for breach of contract for a $250,000 bonus for work performed during Fiscal Year 2012?

ANSWER: _X_ YES ____ NO

INSTRUCTION: If you answer YES to Question 9, please proceed to the next question. If you answer NO, please skip to Question 11.

QUESTION 10: What is the amount of damages you award to Mr. Chism for breach of contract for a $250,000 bonus for Fiscal Year 2012?

Amount: $250,000

INSTRUCTION: Please skip to Question 12.

QUESTION 11: If you find there is no enforceable contract between the parties for a bonus for work Mr. Chism performed during Fiscal Year 2012, what is the value of the services he

performed during that time subtracting the reasonable value of amounts received him during that time:
Amount: $_____

INSTRUCTION: Please proceed to the next question.

QUESTION 12: Has Plaintiff proven his claim of willful withholding of wages?

ANSWER: X YES ____ NO

INSTRUCTION: If you answer YES to Question 12, please proceed to the next question. If you answer NO, please skip to the end.

QUESTION 13: Have Defendants proven that their nonpayment of wages to Plaintiff was the result of a bona fide belief that they are not obligated to pay.

ANSWER: ____ YES X NO

INSTRUCTION: Upon completion, the Presiding Juror should sign this verdict form and notify the bailiff.

DATE: 5/30/2014 SIGNATURE: _____
Presiding Juror KELLEY E MAECHER

WSBA

Advisory Opinion: 1045
Year Issued: 1986
RPC(s): RPC 1.8
Subject: Conflict of interest; negotiation of employment contract for legal services

---

A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

DECLARATION OF SERVICE

On said day below I electronically filed and served a true and accurate copy of Chism's Answer to Petition for Review in Supreme Court Cause No. 93220-4 to the following:

Jillian Barron
Tina Aiken
Sebris Busto James
14205 SE 36th Street, Suite 325
Bellevue, WA 98006-1505

Steven P. Caplow
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Thomas Breen
Lindsay Halm
Schroeter Goldmark & Bender
810 3rd Avenue, Suite 500
Seattle, WA 98104-1657

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

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

DATED: August 1, 2016, at Seattle, Washington.

Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

August 01, 2016 - 3:54 PM

Confirmation of Filing

Filed with Court:	Supreme Court
Appellate Court Case Number:	93220-4
Appellate Court Case Title:	Geoffrey Chism v. Tri-State Construction, Inc. and Larry Agostino

The following documents have been uploaded:

- 932204_20160801154927SC171577_1867_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to PFR.pdf

A copy of the uploaded files will be sent to:

- phil@tal-fitzlaw.com
- breen@sgb-law.com
- jriper@ashbaughbeal.com
- SCox@ashbaughbeal.com
- jbarron@sebrisbusto.com
- halm@sgb-law.com
- taiken@sebrisbusto.com
- matt@tal-fitzlaw.com

Comments:

Sender Name: Stephanie Nix-Leighton - Email: assistant@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20160801154927SC171577