

67459-5

NO. ~~84527-1~~

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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JOHN BEHNKE and CARL BEHNKE as Trustees and on behalf of  
the G.W. SKINNER CHILDREN'S TRUST and the G.W. SKINNER  
TRUST NO. 2,

Petitioners,

v.

EDWARD AHRENS and TERI AHRENS, et. al.,

Respondents.

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**REPLY BRIEF OF PETITIONERS**

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## INTRODUCTION

The trial court made findings in this case that Ahrens fails to challenge. They are dispositive verities here. Determinations that Ahrens breached his fiduciary duties to the Trusts, that “but for” Ahrens’ non-disclosure the Trusts would not have become involved with his tax plan, and that Ahrens was not credible, all render his struggle to re-cast the facts both ineffective and irrelevant.

The trial court erred in dismissing the CPA claims because – notwithstanding Ahrens’ irrelevant arguments about entrepreneurial aspects and his abusive tax plan – questions of fact precluded summary judgment. Even the wealthy may bring a CPA claim.

Despite reserving “all elements” of the Trusts’ RPC breach of fiduciary duty claim to itself, the trial court failed to award the Trusts their undisputed out-of-pocket damages in a mistaken reading of *Eriks* and *Cotton*. The plaintiffs in those cases simply did not ask for consequential damages as part of their claims, so *Eriks* and *Cotton* are silent on the issue. This Court should reaffirm trial courts’ broad equitable discretion to fashion appropriate relief for breaches of fiduciary duty.

The Court should reverse and remand for trial of the CPA issues and a proper determination of the Trusts’ damages.

## REPLY RE STATEMENT OF THE CASE

The trial court found the facts relevant to the five legal issues raised in this appeal based on the substantial evidence cited in the Trusts' opening brief. BA 13-20 & App. (CP 6369-81). Ahrens has not cross-appealed from those Findings, so he cannot challenge them here. The unchallenged Findings are verities. See, e.g., **Merriman v. Cokelely**, 168 Wn.2d 627, 631 ¶ 7, 230 P.3d 162 (2010); **State v. Reader's Digest Assoc., Inc.**, 81 Wn.2d 259, 263-64, 501 P.2d 290 (1972).

The trial court rejected the other evidence Ahrens recites at length, so it may not be considered here. See, e.g., CP 6377, ¶ 21 (Ahrens' testimony not credible); **Ringhouse v. Dep't of Labor & Indus.**, 2 Wn. App. 814, 819, 470 P.2d 232 (1970) (unchallenged findings "are verities on appeal and do not support the conclusion respondent now urges we adopt. There being no findings to support respondent's contention, it cannot be considered"). Ahrens' purported facts contradict the trial court's findings (*compare, e.g.*, BR 6-15 (causation argument) *with* CP 6376 (but for Ahrens' breach, the Trusts would not have proceeded)). His blatant attempts to impugn a distinguished family are hypocritical, at best. This Court must and should disregard his allegations.

## REPLY RE ARGUMENT

**A. The trial court erred as a matter of law in dismissing the Trusts' CPA claim because that Act protects all Washington citizens – even the wealthy – and because anyone could be misled by Ahrens' deceptive acts.**

The Trusts first explained that the trial court erred as a matter of law in granting summary judgment dismissing the Trusts' CPA claim, for two principal reasons. BA 21-28. First, the trial court's ruling that the Act does not protect "millionaires" contradicts the central purposes of the CPA and is fundamentally unjust. Second, representing clients without disclosing substantial personal business and financial interests in the subject matter of the representation is an unfair and deceptive practice that has the potential to injure a substantial portion of the public. Each of these legal errors is sufficient to require reversal and remand.

Ahrens fails to respond directly to the Trusts' CPA arguments. BR 19-29. He instead first argues that the "evidence on summary judgment" is dispositive. BR 19-20. If Ahrens' disputed facts<sup>1</sup> were as relevant as he claims, then the trial court

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<sup>1</sup> Ahrens claims his factual assertions were "undisputed," but that is simply false. See, e.g., CP 952-1635 (Trusts' evidence submitted on summary judgments). Indeed, the jury and the trial court plainly rejected Ahrens' disputed version of the facts, finding that he breached his fiduciary duties to the Trusts. See, e.g., CP 6376 (FF 16) (Ahrens' failures to disclose), 6377 (FF 21) (Ahrens' testimony not credible).

erred as a matter of law in granting summary judgment. See, e.g., CR 56(c) (summary judgment appropriate only where there are no genuine issues of material fact).

Ahrens also alleges that the Trusts' CPA claim did not involve the entrepreneurial or commercial aspects of his practice because he did not "believe" he would receive the same millions of dollars in royalties that he received every other time Heritage used his "752" plan. BR 19-20. Whether Ahrens "acted for entrepreneurial purposes is a question of fact," requiring trial. *Eriks v. Denver*, 118 Wn.2d 451, 465, 824 P.2d 1207 (1992) (following *Quimby v. Fine*, 45 Wn. App. 175, 182, 724 P.2d 403 (1986), rev. denied, 107 Wn.2d 1032 (1987)). Moreover, the issue is not whether he had "entrepreneurial motives" (BR 28), but rather whether (as here) the Trusts' claims "primarily challenge . . . the way the firm obtains, retains, and dismisses clients." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984).

In any event, Ahrens' repeated claim (at BR 20, 22, 24 & 28) that it was "undisputed" on summary judgment that he did not "believe" he would receive royalties from the transaction with the Trusts is both false and misleading. The Trusts did dispute this claim on summary judgment. See, e.g., CP 879, 955-56, 1228-29,

3052-54. And Ahrens' own citations (at BR 20) are largely irrelevant to this issue.<sup>2</sup> The one cite that even comes close to supporting his contention, CP 1729-30, is apparently based on his disclosures to other clients in the engagement letters at CP 2864-81. As with the Trusts, in numerous other engagement letters Ahrens failed to make these disclosures. CP 4002-4048. Ahrens' repeated unsupported claims are false.

They are also misleading because the Trusts' real CPA claim – and the trial court's finding based on Ahrens' admissions at trial – was specifically that Ahrens referred clients like the Trusts to Heritage specifically because he knew that his receipt of licensing fees from Heritage wholly depended on the goodwill and discretion of Heritage's owner. CP 6376 (FF 18); RP 1789-91. Ahrens' specific violation – referring the Trusts to Heritage without fully disclosing their relationship – was directly in furtherance of Ahrens' entrepreneurial interest in obtaining clients. See, e.g., *Eriks*, 118

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<sup>2</sup> See CP 200-01 (Ahrens claims he disclosed that he had previously represented Heritage; 1259-60 (Ahrens acknowledges that FWP received income from Heritage); 1274-75 (Ahrens admits he had a duty to disclose that he represented Heritage and continued to be paid by them, but did not see the need to disclose FWP and the money received there because that money related to other clients, not the Trusts); 2864-81 (engagement letters with other clients).

Wn.2d at 465. To the extent the trial court granted summary judgment on this basis, it erred as a matter of law.

Ahrens further argues three of the five elements of a CPA claim – for the first time on appeal. *Compare* CP 873-74 (Ahrens' motion raising only two elements – unfair and deceptive act, and public-interest affect) *with* BR 21-29 (arguing three elements). On the deceptive act element, Ahrens incorrectly argues that the Trusts had to show that other people were actually deceived by him. BR 22-24 (relying on ***Burns v. McClinton***, 135 Wn. App. 285, 302-303, 143 P.3d 630 (2006), *rev. denied*, 161 Wn.2d 1005 (2007)). As Ahrens admits, however, a CPA claimant must show only that “the alleged act had the *capacity* to deceive a substantial portion of the public,” not that it actually did so. ***Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.***, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (emphasis in original). Failing to disclose private business dealings worth millions funneled through a shell corporation, in conflict with his new clients' interest, has the capacity to deceive a substantial portion of the public. In Ahrens' terms, his acts “could deceive anyone else . . . .” BR 22.

When Ahrens finally addresses the Trusts' primary issue – the trial's court's ruling that the very wealthy are too few to merit

CPA protection – he misstates both the issue here and the holdings in *Malone v. Clark Nuber, P.S.*, 2008 U.S. Dist. LEXIS 48461 (W.D. Wash. June 23, 2008)), and *Schwartz v. KPMG L.L.C.*, 401 F. Supp. 2d 1146 (W.D. Wash. 2004), *affirmed in part*, 476 F.3d 756 (9th Cir. 2007). BR 22-23. As the portion of *Schwartz* quoted at BR 23 states, those courts erroneously held that there are simply too few people seeking significant tax shelters to constitute a substantial portion of the public. But the unfair and deceptive act at issue here is not the tax shelter Ahrens created – as problematic as that was. Rather, the issue is Ahrens’ undertaking representation without fully disclosing ongoing business dealings that conflict with his potential clients’ interests. This sort of concealment has the capacity to deceive a substantial portion of the public.

On the other element – public interest affect – Ahrens again argues about his abusive tax-shelter advice, which is not the relevant unfair and deceptive act. BR 25-27. As the opening brief plainly stated: “any person – no matter how wealthy, sophisticated, or brilliant – could easily be deceived by a lawyer who fails to disclose conflicts of interest like these.” BA 26. Since Ahrens completely fails to address the Trusts’ actual claim, his arguments miss the point and are irrelevant.

Finally on this element, Ahrens attempts to distinguish both **Eriks** and **Cotton v. Kronenberg**, 111 Wn. App. 258, 44 P.3d 878 (2002). BR 26-27. **Eriks** is “fundamentally on all fours” in the sense that it too involved a tax-shelter lawyer representing both the promoter and the investors without disclosing his conflict of interest to the investors. 118 Wn.2d at 460-61. Like the trial court here, the trial court in **Eriks** found this a breach of fiduciary duty as a matter of law. *Id.* at 461. Unlike here, however, the **Eriks** trial court denied the investors’ motion for summary judgment on the CPA due to disputed issues of fact and permitted the CPA claims to go to trial. *Id.* at 465. As noted above, **Eriks** holds that whether the lawyer “acted for entrepreneurial purposes is a question of fact,” requiring trial. *Id.* (following **Quimby**, *supra*). The trial court erred in granting summary judgment.

In any event, **Cotton** holds that the “public interest element presents a disputed material issue of fact,” so summary judgment “was improper.” 111 Wn. App. at 275. The **Cotton** court remanded for trial of the CPA claim. *Id.* at 276. By contrast, the trial court here erred in failing to give this issue to the jury.

Ahrens acknowledges the four non-exclusive **Hangman Ridge** elements for determining whether a private dispute affects

the public interest (BR 25) but he fails to acknowledge that none of the factors is dispositive. 105 Wn.2d at 790-91. As discussed in the opening brief, Ahrens' failure to properly disclose was obviously committed in the course of his business, Ahrens actively solicited the Trusts to do business with Heritage using Ahrens' own tax plan, and a non-disclosing lawyer is unquestionably in an advantaged position *vis a vis* his uniformed client. BA 27-28. Ahrens quibbles over relative bargaining power, but tacitly concedes most of the other factors. BR 25. This Court should reverse and remand.

Remarkably, for the first time on appeal Ahrens purports to argue that he did not commit his unfair and deceptive act – failing to disclose his conflict of interest in order to ensure his future royalties – in the course of trade or commerce. BR 27-29. Such an argument would be absurd. See *e.g.*, **Cotton**, 111 Wn. App. at 274 (“the first factor is present – the act was committed in the course of [the lawyer’s] business”). But what Ahrens actually argues is a mere recasting of his “entrepreneurial aspects” argument, dismissed above. BR 28. Again, whether Ahrens’ deceptive acts were done for entrepreneurial purposes is a question of fact. **Eriks**, 118 Wn.2d at 465. The trial court erred.

**B. Ahrens' conflict of interest was not waivable, so the Court should reverse and remand for a proper determination of damages.**

The Trusts next explained that Ahrens' conflict was unwaivable as a matter of law because a disinterested lawyer would never advise the Trustees to retain Ahrens to steer them to a tax-plan promoter with whom he had secret business dealings worth millions. BA 29-31. As the trial court found, the Trusts would not have gone to Heritage but for Ahrens' advice (CP 6376, ¶ 17), so the millions of dollars in damages they suffered by taking Ahrens' advice flowed directly from his breach of fiduciary duty. BA 31. The trial court erred in failing to rule on summary judgment that Ahrens breached his fiduciary duty from the outset and to either instruct the jury that all of the Trusts' damages flowed from this breach, or to grant those damages itself. *Id.*

Ahrens is forced to admit that he "never disputed that the [Trusts] incurred the costs they claimed as damages." BR 29. But he delays his response and claims harmless error. BR 44-47. Ultimately, Ahrens fails to respond to the core principle that no disinterested lawyer would advise this representation. *Id.* He also fails to cite a single authority supporting his arguments, much less authority for his baseless claim that a harmless error analysis could

apply to an erroneous legal ruling so plainly affecting the jury's verdict. *Id.* He also claims that the non-waiver "doctrine" is "narrow" and that the "sophistication" of the client should matter, but again he cites no authority supporting his bald assertions. *Id.*

The trial court erred as a matter of law in failing to rule on summary judgment that Ahrens' conflict was non-waivable. This resulted in the trial court failing to properly instruct the jury on damages or (as discussed immediately below) to itself grant the damages.<sup>3</sup> This Court should reverse and remand for imposition of the Trusts' undisputed damages.

**C. Trial courts should have broad authority to award actual damages proximately caused by a breach of the fiduciary duty of undivided loyalty.**

Rather than putting the damages issue to the jury, the trial court reserved this issue to itself, and yet later ruled that it could not award full damages due to *Eriks* and *Cotton*. BA 31-38. These cases do not support the trial court's rulings depriving the Trusts of their right to consequential damages. *Id.* Equity and justice require

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<sup>3</sup> Ahrens misleadingly argues that the jury "**was**" instructed on proximate cause and damages (BR 47); but the point is that the advisory jury was not instructed that Ahrens' breach preceded his representation, so all of the Trusts' damages flowed from that breach. BA 31.

no less. *Id.* This Court should reverse and remand for a proper award of damages. *Id.*

Ahrens never directly confronts this argument, but rather randomly attacks various statements taken out of context, in classic straw-man fashion. BR 29-42. Many of his claims are self-contradictory. For instance, Ahrens quickly (and repeatedly) admits that “there was no dispute the [Trusts] paid various expenses and fees,” affirming the Trusts’ point that the amount of their consequential damages was undisputed. BR 7, 29. Yet deep in his brief, Ahrens claims that it is “somewhat disingenuous to call these damages ‘undisputed consequential damages.’” BR 30. Ahrens had an unwaivable conflict, but for which the Trusts would never have purchased his abusive tax shelter from Heritage, yet the trial court neither told the jury that, nor awarded the undisputed damages. The Trusts were deprived of a fair trial on damages.

Ahrens attacks *Eriks* and *Cotton* on the basis that they do not hold that the trial judge may award consequential damages for a breach of fiduciary duty that violates the RPCs. BR 38-40. The point in the opening brief is that these cases also do not hold to the contrary, or even address the question. BA 32-33. That is why this Court should address this “issue of first impression.” BA 33.

Ahrens also raises *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). BR 38-40. As noted in the Trusts' opening brief, however, *Hizey* expressly did not "alter or affect" *Eriks*. *Hizey*, 119 Wn.2d at 264; accord *Cotton*, 111 Wn. App. at 265-66 ("*Eriks*, not *Hizey*, controls"). *Eriks* held that the "trial court properly considered the RPCs to determine whether [the lawyer] breached his fiduciary duty to [the client] in this action to recover attorney fees." *Cotton*, 111 Wn. App. at 266. But the issue presented here – whether a trial judge who reserved "all elements" of a breach of fiduciary duty claim under the RPCs (CP 6373, ¶ 7) may award undisputed consequential damages – was not addressed. This Court should hold that the judge may do so under his broad equitable powers to remedy breaches of fiduciary duty. BA 33-38.

Ahrens claims that these well established broad equitable powers do not apply here because the Trusts "fully presented their breach of fiduciary duty claim before the jury." BR 34 (no citation in original). But the trial court expressly reserved "all elements" of this equitable determination. CP 6373, ¶ 7. It is not possible for the trial court both to give this issue to the jury and to reserve it to itself, unless, as noted at BA 35, the jury's verdict was merely advisory under CR 39(a)(1)(A):

The trial of all issues so demanded shall be by jury, unless (A) the parties or their attorneys of record, . . . by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury . . . .

This is exactly what happened here (CP 6373, ¶ 7):

In open court on November 12, 2009, the Court ruled and counsel for Plaintiffs and Defendant agreed that the Court would decide all elements of this fiduciary breach claim and that the jury would be released after rendering its verdict.

Ahrens fails to address the Court Rule or his counsel's stipulation in open court. His apparent claim that this is somehow "false" is baseless. BR 35-36.<sup>4</sup>

Ahrens fails to address the Trusts' key point that the bifurcated system under *Hizey* has created confusion and has resulted here in no one awarding its undisputed consequential damages. BA 36-38. As noted above, he does claim that the jury considered this claim, but he fails to acknowledge his counsel's stipulation that "all elements" of the fiduciary breach claim were reserved to the court. BR 35-36. The trial court reserved the entire issue, but then erroneously ruled that *Hizey* and *Cotton* barred it from awarding all of the damages. BA 37. This Court should

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<sup>4</sup> Ahrens also fails to disclose that he admitted to the trial court that "in cases involving truly equitable claims, the Court has the authority to use the jury's verdict as advisory." CP 5759 (citing *In re Estate of Oney*, 31 Wn. App. 325, 329 n.3, 641 P.2d 725 (1982) ("a trial court sitting in equity may use a jury in an advisory capacity"))).

reverse and remand for a proper determination of the Trusts' damages.

Ahrens also completely fails to address the Supreme Court's recent decision in ***Shoemake v. Ferrer***, 168 Wn.2d 193, 225 P.3d 990 (2010). The Court noted that breach of fiduciary duty damages appropriately include an element of deterrence and that "[o]ur legal system has a particular interest in deterring lawyers from breaching their ethical duties to their clients." *Id.* at 203. The trial court here erroneously believed it was barred from awarding such damages even though it had reserved "all elements" of the breach of fiduciary duty claim: "if there was a broader remedy than disgorgement available in these circumstances, the Supreme Court in ***Eriks v. Denver***, *supra*, and the court of appeals in ***Cotton v. Kronenberg***, *supra*, would have made that clear." CP 6379 (C/L 5). But this issue was not even before those courts. This Court should take this opportunity to make clear that trial courts have broad discretion to fashion equitable remedies and to deter fiduciary breaches in violation of lawyers' ethical obligations.

**D. The advisory jury's verdict plainly evinces prejudice against the wealthy.**

Finally, the Trusts were deprived of a fair trial on damages. BA 38-43. In the face of both (a) the jury's and the trial judge's determinations that Ahrens breach his fiduciary duties to the trust, and (b) the Trusts' undisputed out-of-pocket damages in excess of \$3.4 million, the jury awarded only \$6,162.25. *Id.* The judge awarded double that amount. CP 6379. Such grossly inadequate damages awards omitting the entire category of consequential damages unmistakably indicate passion or prejudice on the part of the jury, and legal errors on the part of the judge. BA 38-43. The ruling that the Trusts have a right and an injury but no remedy is an aberration. This Court should reverse and remand for an appropriate damages award.

Ahrens' response amounts to little more than "no, it doesn't." BR 42-44. He cites no cases supporting his position, and infers jury motives that plainly inhere in the verdict. *Id.* As Ahrens acknowledges, the issue here is whether a verdict omitting undisputed consequential damages and amounting to roughly .002% of those undisputed amounts unmistakably indicates passion or prejudice. BR 43 (citing *Brundridge v. Fluor Fed.*

*Servs., Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008)). The only conceivable answer is yes, it does.

Incredibly, Ahrens claims that the jury “did not” find that his “breach of fiduciary duties proximately caused harm” as alleged on appeal, citing the Verdict Form. BR 31 (citing CP 5413-16). Yet that form says exactly the opposite:

**QUESTION 3:** Did Defendants breach a fiduciary duty owed to Plaintiffs that was a proximate cause of Plaintiffs’ damages?

**ANSWER:** [] Yes [ ] No

CP 5414. Since the amount of the Trusts’ damages was undisputed, and as a matter of law all of those damages flowed from Ahrens’ non-waivable breach of fiduciary duty, the jury’s \$6,162.25 award defies law and logic. But the jury was not instructed that Ahrens breached his fiduciary duties from the outset of the representation, so it improperly omitted the undisputed consequential damages that flowed entirely from that breach.

In another troubling assertion, Ahrens claims that the jury “did not credit Carl Behnke’s testimony that, had they known more about Mr. Arhens’ relationship with Heritage, they never would have proceeded.” BR 32. Ahrens again has no basis for this assertion, and what testimony the jury did or did not “credit” inheres in the

verdict in any event. But Ahrens' assertion is also directly contrary to the trial court's unchallenged finding that the Trusts would not have proceeded but for Ahrens' conflicted referral to Heritage. CP 6376, ¶17. That finding is a dispositive verity here.

**E. Ahrens' purported "alternate grounds" are unpreserved and baseless.**

Ahrens also makes a desperate bid to raise issues that the trial court heard and rejected. BR 47-49. Ahrens did not cross appeal, so he cannot now raise arguments that the trial court expressly rejected. In any event, none of these issues has merit.

Ahrens first re-raises judicial estoppel, which he thrice raised below, and the trial court soundly rejected. *Compare* BR 47-48 with CP 4720-21 (trial brief), 4936 (JAML motion); 5474 (re-raising JAML); RP 1666 (trial court's equitable ruling that "sufficient facts in the record" make it unjust to apply judicial estoppel); CP 5714-17 (order denying JAML). Although he fails to disclose to the Court that the trial judge actually ruled on this issue, Ahrens does admit that he had to cross appeal in order to seek affirmative relief (such as reversing the trial court's rulings). BR 47.

This concession is both compelled and dispositive. *See, e.g.,* RAP 2.4(a), 5.1(d); ***State v. Sims***, 171 Wn.2d 436, \_\_\_ P.3d \_\_\_

(2011) (in the absence of a cross appeal, respondent may not seek affirmative relief, such as reversal of a trial court order; *citing, inter alia, In re Arbitration of Doyle*, 93 Wn. App. 120, 127, 966 P.2d 1279 (1998) (when respondent “requests a partial reversal of the trial court’s decision, he seeks affirmative relief”); *N. Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 647 & n.19, 151 P.3d 211 (2007) (“a party must seek review of the court’s order before this court will entertain an appeal arising from that order” (*citing Ortblad v. State*, 88 Wn.2d 380, 385, 561 P.2d 201 (1977); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 212-13, 680 P.2d 425 (1984))).<sup>5</sup> Simply put, the trial court’s unappealed order rejecting Ahrens’ judicial estoppel issue precludes review here. This Court should not consider this issue.

On the merits – *arguendo* – Ahrens claimed that the Trusts’ blaming Heritage for its losses in a Texas litigation is somehow “inconsistent” with their claim here that Ahrens breached his fiduciary duty in failing to properly disclose his conflict of interest. CP 4720-21; BR 47-48. The positions are not inconsistent. If the

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<sup>5</sup> Ahrens seems to suggest that he may raise these issues lest the trial court’s rulings be “repeated” on remand. BR 47. But all of Ahrens’ arguments go to duty, breach and causation, on which the Trusts prevailed, and from which no one has appealed. Remand here should be solely on the CPA and damages. The trial court’s unappealed rulings are final, and no further proceedings will be had on them.

Trusts successfully blamed Heritage for its use of Ahrens' abusive tax plan without also blaming Ahrens, that hardly contradicts the Trusts' argument here – or the trial court's unchallenged finding – that but for Ahrens' breach of fiduciary duty, the Trusts never would have gone to Heritage in the first place.

Moreover, Ahrens' claim is entirely based on his factual argument (at BR 6-15) contradicting the trial court's unchallenged finding – a verity here – that but for Ahrens' breach of fiduciary duty, the Trusts never would have proceeded. CP 6376, ¶ 17. Notwithstanding Ahrens' Herculean efforts formulate a version of the facts contrary to the trial court's unchallenged findings, they are verities here. Ahrens – whose testimony the trial court rejected as not credible (CP 6377, ¶ 21) – cannot rely on his own rendition of the facts.

The above analyses are equally (if not more) applicable to Ahrens' arguments based on ***Carroll v. LeBoeuf, Lamp, Greene & MacRae, LLP***, 623 F. Supp. 2d 504 (S.D.N.Y. 2009). BR 48-49. Ahrens raised the issue in his JAML motion (CP 4954-56); and the trial court considered and rejected it, both orally (RP 1662) and in a

written order (CP 5714-17). Ahrens' failure to cross appeal bars consideration of this issue here, as discussed above.<sup>6</sup>

Addressing *arguendo* the merits, Ahrens argues (based solely on **Carroll**) that the Trusts could not prove proximate cause because they settled with the IRS. BR 48-49. But the trial court expressly noted that **Carroll** is materially distinguishable. RP 1662. Specifically, the Behnkes' testimony that they would not have proceeded at all but for Ahrens' failures to disclose his conflicts of interest – testimony that both the advisory jury and the trial judge accepted in finding proximate cause – distinguishes **Carroll**. *Id.* Moreover, the IRS did not reject the strategy involved in **Carroll**, but Ahrens' "752" Strategy was a listed transaction, and the IRS had prevailed in court on Ahrens' shelter before the Trusts settled. See, e.g., CP 5020 (citing **Kornman & Assoc. v. United States**, 527 F.3d 443 (5<sup>th</sup> Cir. 2008), *aff'g sub nom. COLM Producer, Inc. v. United States*, 460 F. Supp. 713. (N.D. Tex. 2006)). Unlike the plaintiffs in **Carroll**, the Trusts were injured when they filed their amended return, and they were entitled to mitigate their damages

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<sup>6</sup> There are rare (and in light of the jurisdictional nature of a notice of appeal, quite questionable) instances in which our courts have "waived" the cross-appeal requirement due to the "necessities of the case." See, e.g., **Sims**, 171 Wn.2d at 443-49. Ahrens has not raised or briefed this issue, and this is not such a case, so the Court should not consider the issue.

under Washington law. See, e.g., CP 5019-22 (citing and discussing ***VersusLaw, Inc. v. Stoel Rives, L.L.P.***, 127 Wn. App. 309, 329 & n.24, 111 P.3d 866 (2005); ***Jaeger v. Cleaver Const., Inc.***, 148 Wn. App. 698, 714-15, 201 P.3d 1028 (2009)). The trial court did not err in rejecting Ahrens' ***Carroll*** argument.

In his 20<sup>th</sup> footnote, Ahrens purports to raise two more arguments – regarding “ABC” attorney fees and allocation of fault to third parties – that the trial court rejected. Compare BR 49-50 n.20 (citing CP 4958 (his JAML motion) and ***Jain v. J.P. Morgan Secs., Inc.***, 142 Wn. App. 574, 587, 177 P.3d 117, *rev. denied*, 164 Wn.2d 1022 (2008); and on fault allocation, RP 2647-49, 2884-85) with RP 2642 (oral ruling rejecting JAML on ABC rule because fees as damages is a jury question); RP 2867-70 (denying Ahrens' proposed jury instructions on allocation of fault); CP 5714-17 (order denying JAML). These arguments too are not properly before this Court for the reasons stated above, and Ahrens' footnote is not adequate briefing to preserve these two issues in any event. The Court should not consider these issues.

Again addressing the merits *arguendo*, Ahrens first claims that the ABC rule on fees does not apply because the Behnke's had some unidentified role in becoming involved in litigation with

Heritage. BR 50 n.20. But the trial court unequivocally found that the Trusts would not have entered into any transaction with Heritage but for Ahrens' conflicted representation. CP 6376, ¶ 17. This unchallenged finding is a verity here.

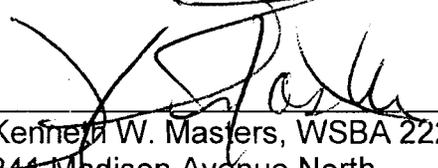
Ahrens' footnote also purports to raise the fault of non-parties. BR 50 n.20. The trial court rejected this argument because Ahrens failed to present sufficient evidence of fault of a non-party. RP 2869-70. Ahrens cannot raise a sufficiency of the evidence claim in the face of the trial court's unchallenged findings that he alone caused the Trusts to enter into the transaction with Heritage. Again, the Court should reject this baseless claim.

### CONCLUSION

For the reasons stated above and in the opening brief, the Court should reverse and remand for trial on the Trusts' CPA claim, and for a proper determination of the Trusts' damages.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of July, 2011.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF OF PETITIONERS** postage prepaid, via U.S. mail on the 15<sup>th</sup> day of July 2011, to the following counsel of record at the following addresses:

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