

NO. 75014-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FREDRICK PETERSON,

Appellant,

v.

DAVIS WRIGHT TREMAINE, LLP,

Respondent.

RESPONDENT'S BRIEF

Anthony S. Wisen, WSBA No. 39656
Davis Wright Tremaine LLP
Attorneys for Respondent
Davis Wright Tremaine LLP

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 Phone
206.757.7700 Fax

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I. INTRODUCTION

This case involves a fee dispute between a law firm, Davis Wright Tremaine LLP (“DWT” or “Respondent”), and DWT’s former client, Frederick Peterson (“Mr. Peterson” or “Appellant”).

On July 28, 2010, Mr. Peterson and a co-defendant were sued in *Meilinger, et al. v. Mr. Peterson, et al.*, King County Superior Court, No. 10-2-27584-3 SEA (the “Meilinger Lawsuit”). The Meilinger Lawsuit was a complex case that required significant work. It involved a broad variety of counterclaims, cross-claims, and a third party complaint, substantial discovery (including discovery motions practice), and significant efforts to try to mediate and settle the dispute. Mr. Peterson was intimately involved in all aspects of DWT’s efforts on his behalf, and directed DWT to “push hard” and to otherwise pursue his claims and defenses as vigorously as possible.

Even though Mr. Peterson specifically urged the aggressive approach DWT took in the Meilinger Lawsuit—and fully understood the financial cost of doing so—he began to fall behind in the payment of DWT’s invoices. By February 2012, Mr. Peterson stopped paying DWT altogether, and an outstanding balance of more than \$80,000 eventually accumulated. DWT was eventually forced to withdraw due to the unpaid bills. As a last resort, DWT brought the underlying fee litigation.

Following a three day bench trial, King County Superior Court Judge Carol A. Schapira rejected Mr. Peterson's argument that he did not owe DWT any money. Judge Schapira conducted a fine-toothed comb review of every charge claimed by DWT and heard testimony from six witnesses. She determined that Mr. Peterson's failure to pay DWT was a breach of contract, and that \$83,860.40 was a reasonable recovery. Judge Schapira also awarded DWT contractual attorneys' fees as the prevailing party under the contract.

Mr. Peterson now seeks reversal under RPC 1.5 on the ground that DWT "charged" him an unreasonable fee: the portion of the bill that Judge Schapira found Mr. Peterson did not have to pay. The inevitable—but absurd—end point of his argument is that the ethical rules prohibit a lawyer from receiving a reasonable fee if *any* portion of the client's bill is set aside. The argument finds no support in the ethical rules or the caselaw governing the lodestar computation of fee awards in Washington. It also mischaracterizes DWT's efforts to receive fair payment for the services it rendered. The Court should decline Mr. Peterson's invitation to re-write the law, and uphold the results of the trial, for the following essential reasons:

First, this appeal arises from a bench trial. The trial involved DWT's claim for breach of contract, and resulted in a determination that

Mr. Peterson was in breach. Mr. Peterson now takes the perilous course of appealing Judge Schapira's findings and asks this Court, on a cold record, to usurp the trial court's role as fact-finder. Moreover, each ostensible legal error requires the re-litigation of intensely factual issues that the trial court decided—based on considerable evidence—against Mr. Peterson. Mr. Peterson has provided no legitimate reason to upend the deference this Court owes to a trial court.

Second, there is no dispute that the trial court conducted a rigorous lodestar analysis and determined that some, but not all, of the fees claimed by DWT were reasonable. On appeal, Mr. Peterson tries to turn this unremarkable mixed result into a *per se* ethical violation. But courts can obviously reduce an attorney's bill without sanctioning or disciplining the attorney for presenting the charge in the first place. Attorney discipline is also not the role of the trial courts. Judge Schapira was therefore careful to explain that her lodestar reductions should not be construed as a finding that DWT had done anything unethical.

Third, the question of whether a party prevailed for purposes of contractual fee-shifting is well-settled law in Washington, and Judge Schapira did not err when she determined that DWT was entitled to its reasonable fees litigating the underlying fee dispute with Mr. Peterson. DWT obtained a judgment in its favor on the only claim raised in the

lawsuit; this made DWT the prevailing party. Furthermore, DWT was awarded a substantial recovery from Mr. Peterson—\$83,860.40 of the \$122,415.90 that it originally claimed. Judge Schapira did not abuse her discretion when she concluded that DWT was the prevailing party.

Fourth, Mr. Peterson’s argument that DWT should be punished for charging a fee that was later reduced by the trial court elides the fact that DWT made aggressive attempts to settle the case—offers that, if accepted, would *not* have resulted in the payment of any “unreasonable” fees. Indeed, before this lawsuit was filed, DWT offered to write off half of its outstanding fee and settle the case, but Mr. Peterson declined.

Fifth, Mr. Peterson raises a number of other arguments related to alleged deficiencies in the trial court’s factual findings and legal and procedural rulings, but none have any merit. This was a three-day bench trial over approximately \$120,000 in legal fees, and Judge Schapira had ample evidence to support each of her findings. The legal and procedural rulings that Mr. Peterson contests—such as Judge Schapira’s refusal to find an ethical violation and disgorge (additional) fees, and her refusal to dismiss the case under CR 41(b)(3)—were all legally correct. The trial court did not commit any reversible error.

II. STATEMENT OF THE CASE

A. The Meilinger Lawsuit

On July 28, 2010, Trent Meilinger, Larry Westling, and Tower and Cabling Services, Inc. brought suit against Mr. Peterson and Patrick McHugh in a case styled *Meilinger, et al. v. Mr. Peterson, et al.*, King County Superior Court, No. 10-2-27584-3 SEA (the “Meilinger Lawsuit”). CP 2 ¶ 4. In the Meilinger Lawsuit the plaintiffs alleged that Mr. Peterson failed to fulfill his duties under an Interim Operating Agreement, including failing to provide financing of up to \$2,000,000 to the plaintiffs. *Id.* The Meilinger Lawsuit plaintiffs sought damages for the alleged breach of contract, including consequential damages and attorneys’ fees. *Id.*

In mid-September 2010, Mr. Peterson mentioned the Meilinger Lawsuit to Greg Hendershott, a partner at DWT. CP 188-89. Mr. Hendershott suggested that John Theiss, another partner at DWT with experience in construction litigation, might be able to advise Mr. Peterson on the case. *Id.* Mr. Theiss and Mr. Peterson discussed the lawsuit, and Mr. Peterson asked DWT to represent him. CP 193. John Theiss filed and served a Notice of Appearance for Mr. Peterson on October 8, 2010. CP 196-98. Mr. Theiss was assisted by a litigation associate, Carly Summers,

who ultimately did the vast majority of the work on Mr. Peterson's behalf. CP 492 ¶ 40-41.

From the outset of the case, Mr. Peterson understood that the case would likely be extremely expensive and time-consuming. In his deposition, Mr. Peterson admitted that when he discussed rates with DWT, DWT told him up front: "Well, you know the nature of the discussion was, you could spend a million dollars in this." CP 359 at 33:16-17. Or, as Mr. Peterson put it to Mr. Hendershott, "I got kind of a hairy mess." App. Br. at 4; RP 62:12-16.

DWT agreed to represent Mr. Peterson in the Meilinger Lawsuit under the terms described in a letter emailed to Mr. Peterson on October 14, 2010 (the "Engagement Letter"), and DWT's Standard Terms of Engagement for Legal Services (the "Terms of Service"). Ex. 2. The Terms of Service explained how the fees DWT charged would be set, and included specific reference to the RPC 1.5 factors. *Id.* at 5. For his part, Mr. Peterson was obligated to make payments within 30 days of receiving an invoice from DWT. *Id.* at 8. Mr. Peterson further agreed to pay the expenses DWT incurred in collecting any unpaid debt from him, including court costs, filing fees, and a reasonable attorney's fee. *Id.* In the event of a fee dispute, Mr. Peterson also had the right to arbitrate with the state or county bar. *Id.*

B. DWT Performs Extensive Legal Services for Mr. Peterson in the Meilinger Lawsuit.

Mr. Peterson asked DWT to act aggressively in the Meilinger Lawsuit. CP 177 ¶ 9, Ex. 55, 490 ¶ 29. At his request, DWT investigated and filed a broad variety of counterclaims, cross-claims, and a third party complaint against Trent Meilinger, Larry Westling, Patrick McHugh, Trent Meilinger's parents, and officers of T&C Corporation. CP 175-76 ¶ 7, 490 ¶ 29. These claims included breach of contract, breach of fiduciary duties, securities fraud, fraudulent misrepresentation, conversion, and unjust enrichment. CP 2 ¶ 5, 175-76 ¶ 7, 483 ¶ 4.

Due to the large number of claims and counterclaims, inclusion of six separate parties, and relatively large (over \$2.2 million) amount in controversy, the Meilinger Lawsuit was a complex case requiring significant work. DWT had to research the viability of numerous claims, including claims for securities fraud. CP 485 ¶ 4; CP 175 ¶ 7. Thousands of documents were reviewed and produced in the litigation. CP 490 ¶ 29. DWT and Mr. Peterson communicated via email hundreds of times and also engaged in numerous phone calls and in-person meetings. *See, e.g.*, Exs. 106-120. Among other work, from October 2010 through September 2012, DWT performed the following services for Mr. Peterson in the Meilinger Lawsuit:

1. Researching and answering the Meilinger Complaint;
2. Researching, drafting, and filing cross-claims, counterclaims, and a third-party complaint;
3. Serving initial disclosures;
4. Serving and responding to discovery requests, including interrogatories and document production requests;
5. Managing the production documents;
6. Reviewing hundreds of documents produced by other parties to the Meilinger Lawsuit;
7. Participating in witness depositions;
8. Engaging in numerous discovery conferences with the other parties to the Meilinger Lawsuit;
9. Successfully moving to compel discovery from the plaintiffs;
10. Drafting a mediation statement and engaging in mediation;
11. Drafting multiple proposed settlement agreements and engaging in numerous settlement discussions with the plaintiffs, cross-claim defendant, and third-party defendants.

CP 176.

DWT kept Mr. Peterson abreast of its actions in the Meilinger Lawsuit, emailing him draft documents for his review and approval, and discussing case strategy with him. CP 176-77 ¶ 9, 293-304. Mr. Peterson did not suggest that DWT performed too much work on his case. CP 177 ¶ 9. To the contrary, he asked DWT to “push hard.” *Id.* & Ex. 55. DWT also accurately recorded the time each attorney, paralegal, and document clerk worked on Mr. Peterson’s case, and their hourly rate. CP 3 ¶ 9.

DWT communicated this information to Mr. Peterson when it sent him invoices for legal services performed. Exs. 106-120.

Many of these tasks were complicated by Mr. Peterson's own shifting priorities, as well as his record-keeping practices. For example, Mr. Peterson repeatedly found additional batches of potentially relevant documents after DWT performed its first review and production of documents on his behalf. CP 177 ¶ 10. Because Mr. Peterson kept his records in hard copy boxes in his office, this required Ms. Summers to engage in multiple review sessions. *Id.*

Likewise, the opposing parties' actions in discovery during the Meilinger Lawsuit led to additional complications. Opposing counsel repeatedly failed to produce documents on the required dates, and then failed to produce the documents after discovery conferences setting new dates for production. *Id.* ¶ 11. Ultimately, DWT was forced to move to compel discovery (and it prevailed on the motion). *Id.* & Ex. 25.

C. Mr. Peterson Refuses to Pay his Bills, DWT Withdraws Its Representation of Mr. Peterson, and the Meilinger Lawsuit Concludes.

DWT routinely sent Mr. Peterson detailed invoices for the Meilinger Lawsuit. CP 486 ¶ 14. From October 2010 through September 2012, these invoices amounted to a total of \$122,415.90, consisting of \$119,779 in fees and \$2,636.90 in costs and other expenses for work

relating to the Meilinger Lawsuit. Exs. 106-120. However, Mr. Peterson paid DWT only \$40,817.27, and stopped making any payments to DWT after February 27, 2012. CP 178 ¶ 14. In March 2012, Mr. Hendershott explained to Mr. Peterson that DWT could not conduct further work for Mr. Peterson without compensation. CP 681-82 ¶ 3, 686-87.

DWT was eventually forced to withdraw its representation of Mr. Peterson in the Meilinger Lawsuit due to his failure to pay his bills. However, Mr. Peterson continued to use the fruits of DWT's labor after DWT withdrew. Through his new counsel, Mr. Peterson filed an ER 904 notice offering almost one hundred documents DWT obtained through discovery into evidence. CP 177 ¶ 12, 313-19, 487 ¶ 18. Mr. Peterson also moved for summary judgment using documents and deposition testimony DWT obtained in discovery. CP 178 ¶ 12, 321-40, 487 ¶ 19. The parties to the Meilinger lawsuit subsequently stipulated to the dismissal of all claims, counterclaims, and third-party claims with prejudice on May 17, 2013. CP 347-49.

D. DWT Makes Repeated Efforts to Resolve the Fee Dispute on Reasonable Terms, but Mr. Peterson Refuses, Leading to this Lawsuit.

Mr. Peterson characterizes DWT's actions in this case as "an attempt to collect an unreasonable fee from [Mr. Peterson]." App. Br. at 22. However, Mr. Peterson fails to tell the Court about DWT's

extraordinary efforts to settle this dispute short of litigation. He also overlooks the substantially positive result that DWT achieved at trial.

First, in an attempt to avoid litigation, Mr. Hendershott approached Mr. Peterson in April 2013 and suggested settling the fee dispute for \$41,000—i.e., just less than the net amount awarded by the Court after trial. CP 682 ¶ 4, 689; CP 492 (awarding \$43,043.13). However, Mr. Peterson rejected this proposal and countered with something in the vicinity of \$5,000. CP 682 ¶ 4.

On January 22, 2014, DWT therefore brought suit against Mr. Peterson. CP 1-7. DWT's Complaint alleged that Mr. Peterson owed a total of \$122,415.90 (\$119,779 in fees and \$2,636.90 in costs), and sought recovery of the unpaid balance of \$81,630.97, along with related relief (including prevailing party attorneys' fees). *Id.* Mr. Peterson responded on March 11, 2014 in an answer that included thirteen (13) affirmative defenses (including an RPC 1.5(a) defense), but no counterclaims. CP 8-15.

Mr. Peterson's Answer states that DWT's fee request "must be limited to a reasonable fee," and seeks disgorgement of "all amounts [DWT] collected *in excess of a reasonable fee.*" CP 13 (emphasis added). Thus, Mr. Peterson did not plead a claim or request for disgorgement of

DWT's *reasonable* fees. Mr. Peterson, like DWT, also sought prevailing party attorneys' fees. *See* CP 13 (Aff. Def. No. 10), CP 14.

On March 5, 2015, King County Superior Court Judge Marianne Spearman held a hearing on Mr. Peterson's motion for summary judgment. CP 399, 400. Judge Spearman denied Mr. Peterson's motion with respect to DWT's breach of contract claim against Mr. Peterson. CP 400. The Court also dismissed DWT's promissory estoppel and unjust enrichment claims against Mr. Peterson because it held that DWT had a contract with Mr. Peterson. *Id.*

At this point, DWT offered to settle the entire case for \$65,000. CP 512 ¶ 17, 630-32. This settlement would have covered the amount Mr. Peterson owed DWT for the Meilinger lawsuit and DWT's fees and expenses incurred to that point in the collection action. CP 513. Although the offer was received by Mr. Peterson's attorneys, CP 634-35, DWT received no response to the offer. CP 513.

The case proceeded to trial before Judge Schapira. Judge Schapira heard testimony from several witnesses, including Mr. Thiess and Ms. Summers, the DWT lawyers who performed substantially all the legal work in the Meilinger Lawsuit. RP 111:20-289:6. Greg Hendershott, the DWT lawyer who handled Mr. Peterson's engagement, also testified. RP 58:8-110:20. Mr. Peterson presented three witnesses, including attorney

David Nold, who testified as an expert. RP 370:15-452:7; CP 133. Fifty-five exhibits were admitted into evidence. Sub No. 57. The exhibits principally consisted of the invoices DWT presented to Mr. Peterson. Exs. 106-120; RP 65:19-67:14. The testimony on the charges contained in those invoices was extensive. RP 70:6-21, 81:1-86:18, 113:20-121:1, 121:12-20, 140:4-147:23, 175:11-176:2, 245:3-266:13.

E. DWT Prevails at Trial and is Awarded Prevailing Party Attorneys' Fees.

After hearing all the evidence, Judge Schapira ruled in favor of DWT. CP 482-93. On August 25, 2015, Judge Schapira entered Findings of Fact, Conclusions of Law, and Judgment (“Findings and Conclusions”) in which she found that Mr. Peterson’s failure to pay DWT constituted a breach of contract. CP 489. The Court conducted a detailed lodestar analysis and determined that DWT was entitled to \$83,860.40 in reasonable fees and costs in the Meilinger Lawsuit. CP 489-92.¹ Judge Schapira also found that DWT was the prevailing party in the lawsuit, and therefore entitled to its contractual attorney’s fees. CP 493. DWT was subsequently awarded an additional \$90,000 as a reasonable fee. CP 693.

This appeal followed.

¹ After the payments Mr. Peterson had previously made were subtracted, DWT received a net award of \$43,043.13. CP 492.

III. ARGUMENT

A. The Results of a Bench Trial are Entitled to Substantial Deference.

Mr. Peterson effectively asks this Court to re-try intensely factual issues resolved by the trial judge after a bench trial. Yet he fails to acknowledge the heavy burden he faces.

On appeal from a bench trial, this Court's scope of review is particularly narrow. "[W]here the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment." *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *see also State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) (review is "deferential" where "judge considered testimony"); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).

Substantial evidence is "the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). This Court "will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently." *Id.* at 879-80; *Ridgeview Props.*, 96 Wn.2d at 720 ("We cannot substitute our judgment

for that of the trial court.”). The Court also applies “*a presumption in favor of the trial court’s findings*, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.” *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007) (emphasis added); *see also Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Adamec v. McCray*, 63 Wn.2d 217, 219, 386 P.2d 427 (1963); *O’Byrne v. City of Spokane*, 67 Wn.2d 132, 406 P.2d 595 (1965); *Messer v. Snohomish Cnty. Bd. of Adjustment*, 19 Wn. App. 780, 787, 578 P.2d 50 (1978) (appellate body not empowered to substitute its judgment for that of the original finder of fact).

Every issue Mr. Peterson raises on appeal involves a high level of deference to the trial court. “Whether a party has breached a contract”—the core issue in this case—“is a question of fact,” also reviewed for substantial evidence. *Frank Coluccio*, 136 Wn. App. at 762 (citing *Palmiero v. Spada Distrib. Co.*, 217 F.2d 561, 565 (9th Cir. 1954)). Moreover, “if the judgment of the trial court can be sustained upon any ground, whether it is based on the grounds stated by the trial court or not,” the Court must affirm. *State v. Morales*, 173 Wn.2d 560, 580, 269 P.3d 263 (2012) (quotation marks and alterations omitted).

Here, the trial court’s factual findings are supported by substantial—indeed, overwhelming—evidence, including many pages of detailed findings that more than support its conclusions. Judge Schapira did not abuse her significant discretion in concluding that Mr. Peterson was in breach of contract, or in crafting a reasonable award of fees flowing from that breach. Nor did the court manifestly abuse its discretion in awarding DWT its prevailing party reasonable attorney fees.

B. The Trial Court Properly Analyzed the RPC 1.5 Factors Contained in the Fee Agreement and the Lodestar Test.

Mr. Peterson does not overtly challenge the trial court’s determination that \$83,860.30 was a reasonable fee for the work DWT performed in the Meilinger Lawsuit. Rather, Mr. Peterson claims that DWT violated the ethical rules—in hindsight—because it presented him with invoices that incontestably “charged” him more than \$83,860.30. Mr. Peterson’s novel theory fails to pass the test of common sense, while also highlighting the wisdom of separating lawyer disciplinary proceedings from routine civil litigation.

Lawyers are entitled to receive a reasonable fee for their services, a point that not even Mr. Peterson disputes. But when a client refuses to pay and litigation ensues, close scrutiny of the lawyer’s invoices under a lodestar analysis may—and often does—result in the disallowance of

some charges by virtue of its RPC 1.5 backdrop. This ensures that the lawyer's entitlement to be paid for her services remains consistent with the ethical obligations that the lawyer accepts for the privilege of practicing law in this state. *See, e.g., In re Belsher*, 102 Wn.2d 844, 854, 689 P.2d 1078 (1984) (recognizing that “the practice of law is a privilege, not a right. This privilege is burdened with certain conditions ...”) (citations omitted).

Here, the trial court heard all the evidence—including all the facts that Mr. Peterson could muster in support of his argument that DWT had charged him too much—and found that Mr. Peterson had breached his contract, and that \$83,860.30 was a reasonable amount of fees and costs. The trial court's decision to trim DWT's fees was not legally improper, or even especially novel. Judge Schapira also properly declined Mr. Peterson's invitation to turn this straightforward fee dispute into a disciplinary proceeding. RPC 1.5 was not overlooked, however. The Terms of Service and the lodestar test both expressly incorporate the RPC 1.5 factors, and Judge Schapira properly considered them to determine a reasonable fee. Mr. Peterson's disagreement with the trial court's assessment does not create an issue for appeal.

1. The Trial Court Correctly Refused to Transform the Lawsuit into a Disciplinary Proceeding.

The trial court did not intend for its lodestar reduction of DWT's fees to be twisted into the ethical argument that Mr. Peterson makes on appeal. When Mr. Peterson attempted this line of argument at trial, Judge Schapira responded that "a dispute about fees doesn't mean somebody did something unethical." RP 625:2-23; CP 669-70 ¶ 6. The trial court did *not* find DWT charged an unethical fee in the Meilinger Lawsuit, despite Mr. Peterson's requests that it do so. RP 624:14-645:1.²

It also would not have been appropriate for the trial court to adjudicate the question.³ The Washington Rules of Professional Conduct specify that a "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Wash. Rules of Prof. Conduct, Preamble & Scope, cmt. 20, *available at*

² Notably, in the event of a fee dispute, the Terms of Service gave Mr. Peterson "the right to request arbitration under supervision of the state or county bar associations for the jurisdictions in which we practice, and we agree to participate fully in that process." Ex. 2 at 9. However, Mr. Peterson chose not to invoke that right.

³ As a technical matter, Peterson waived the argument because he included no counterclaims against DWT in his Answer. CP 8-14. There is therefore no express language in the Findings and Conclusions dismissing Peterson's purported breach of contract and breach of RPC 1.5(a) claims—they were never pled. Moreover, Mr. Peterson never listed breach of contract as an affirmative defense. *See* CP 12-13. Nor did Mr. Peterson's affirmative defense claiming DWT violated RPC 1.5(a) request disgorgement of "reasonable" fees; it merely argued DWT's fee request should be limited to a reasonable fee. *See* CP 13 Aff. Def. No. 8.

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpcpreamble (last visited Sept. 15, 2016). The RPCs are “not designed to be a basis for civil liability [and] the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” *Id.* (further explaining that even after an attorney is found to have violated an RPC, that does not create standing to an antagonist in a collateral proceeding to seek enforcement of the RPC).

Reasonable fees under the ethical rules and pursuant to a lodestar calculation are related, but not co-extensive concepts. *See, e.g., Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn.2d 145, 150, 768 P.2d 998 (1989) (“RPC 1.5(a) may be used as a **guideline** for determining reasonable attorneys’ fees”) (emphasis added). The trial court correctly recognized that it was not the proper venue for an analysis of, fact-finding under, or disgorgement pursuant to RPC 1.5(a).⁴ The Washington Supreme Court “exercises plenary authority in matters of attorney discipline.” *In re Botimer*, 166 Wn.2d at 767; *see also* Rules for Enforcement of Lawyer Conduct (“ELC”) 2.1 (“exclusive responsibility in

⁴ In any disciplinary hearing under the ELC, the WSBA carries the burden of proof and must establish attorney misconduct by a “clear preponderance of all the facts proved.” *In re Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 767, 214 P.3d 133 (2009). In the underlying action, DWT carried the burden of proof and established by a preponderance of the evidence that a large portion of the fees charged Mr. Peterson were reasonable. No party established by a “clear preponderance” of the evidence that any of DWT’s fees were unreasonable in violation of RPC 1.5(a). *See also* Wash. Rules of Prof. Conduct, Preamble & Scope, cmt. 20.

the state to administer the lawyer discipline and disability system”); *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 812, 72 P.3d 1067 (2003) (explaining that while certain responsibilities have been delegated to the WSBA, “ultimate responsibility and authority for determining the nature of lawyer discipline rests with this court”).

Under the ELC, the Supreme Court delegated some of this authority to the WSBA through its Disciplinary Board, hearing officers, and the Office of Disciplinary Counsel. The ELC creates the exclusive system by which attorneys may be sanctioned for violations of the Washington Rules of Professional Conduct. The system provides for the investigation of grievances, disciplinary hearings allowing responding attorneys the opportunity to present witness testimony and documentary evidence in their own defense, and an appeal to the Disciplinary Board and ultimately to the Washington Supreme Court. *See generally* ELC Title 5, 6, 10, 11, 12, *available at* http://www.courts.wa.gov/court_rules/fa=court_rules.list&group=ga&set=ELC (last visited Sept. 15, 2016).

Division One recently overturned a trial court that allowed the RPC’s to infect litigation between a lawyer and a former client. *See Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016). *Chism* involved a former in-house lawyer who sued after his employer withheld promised bonuses and other payments. *Id.* at 822. The lawyer

was awarded \$750,000, but “the trial court then dramatically reduced [lawyer’s] recovery, premised on findings that [lawyer] violated Washington’s Rules of Professional Conduct...” *Id.* However, Division One reversed, finding that “the trial court exceeded the disciplinary authority delegated to it by our Supreme Court.” *Id.* at 822, 839 (citing RPC comment 20).

The *Chism* court explained that “violations of the RPC’s may be *relevant* to litigation between private parties,” and in some cases a trial court’s imposition of a “public remedy” may be justified. *Id.* at 839 (emphasis added) (violation of RPC’s in *formation* of contract may render contract unenforceable; disgorgement of fees may also be appropriate remedy).⁵ The Court then explained that “[i]t bears repeating that the Supreme Court’s disciplinary authority is ‘plenary.’” *Id.* at 841. As to the client/employer’s RPC 1.5 argument, the Court had no trouble upholding the trial court’s summary judgment dismissal of the claim, particularly given the “lack of authority supporting [client’s] position.” *Id.* at 846.

Here, the trial court properly analyzed the RPC 1.5 factors to arrive at a reasonable fee under the Terms of Service and the lodestar test. The

⁵ See also *Barr v. Day*, 124 Wn.2d 318, 331, 879 P.2d 912 (1994) (“fee agreements which violate the Rules of Professional Conduct are against public policy and will not be enforced by the courts.”). Here, in contrast, the trial court made unalterable factual findings that the fee agreement was “fair” and provided “full and fair disclosure of the contract terms.” CP 485.

trial court could not go further without improperly invading the Supreme Court's plenary authority over attorney discipline.

2. Mr. Peterson's RPC "Claim" Fails as a Matter of Law.

It was not within the trial court's province to adjudicate Mr. Peterson's (unpled) claim of attorney misconduct. The argument also lacks any legal merit. The commonplace reduction of a lawyer's fee following a court's lodestar analysis does not result in a breach of ethics such as to invoke the protections of the RPC's, and Mr. Peterson elides well-settled law when he suggests otherwise.

Indeed, courts frequently disallow portions of a lawyer's fee without finding a breach of ethics or disgorging the portion of the fee that was deemed reasonable. For example, in *Holmes v. Loveless*, Division One concluded that a fee agreement was "no longer enforceable" because additional payments would constitute an excessive fee in violation of RPC 1.5. 122 Wn. App. 470, 484, 94 P.3d 338 (2004). However, the fees paid up to that point (which totaled approximately \$380,000) were not challenged by the client or disturbed by the Court. *Id.* at 474, 479. Under Mr. Peterson's theory, those fees should have been disgorged by virtue of the lawyer's efforts to charge and collect an unreasonable fee.⁶ *See also*

⁶ Mr. Peterson confusingly states in a footnote that he is "not contesting the \$43,713.63 judgment because the trial court could have re-instituted DWT's *quantum meruit* claim

Dailey v. Testone, 72 Wn.2d 662, 664, 435 P.2d 24 (1967) (attorney awarded \$750 instead of requested amount of \$1,750); *In re Settlement/Guardianship of AGM & LMM*, 154 Wn. App. 58, 79, 223 P.3d 1276 (2010) (attorney awarded \$15,000 as reasonable fee rather than \$33,333.33). These and other cases show that even a substantial fee reduction does not warrant discipline under the RPC's.⁷

Mr. Peterson also lacks authority for his argument that the fee-shifting language in the parties' contract should be excised due to DWT's alleged RPC 1.5 violation. *See* App. Br. at 2 (AOR 1). The thrust of Mr. Peterson's argument is that the Terms of Service violate the RPC's because, even though all nine RPC 1.5 factors are listed, "undue emphasis" is placed "on 'the time and effort required.'" App. Br. at 18-19.

... yielding the same result." App. Br. at 21, fn. 70. But elsewhere Mr. Peterson suggests that both the underlying judgment *and* the prevailing party fee award should be reversed. *See, e.g.*, App. Br. at 28. Whatever the case, there is no ethical breach, and thus no basis to upset on that basis either the fee award relative to the Meilinger Lawsuit, or the related prevailing party fee award. In addition, straightforward non-RPC law strongly supports the trial court's findings that Mr. Peterson breached his contract and that DWT was the prevailing party in the lawsuit.

⁷The disciplinary cases involving excessive fees typically present egregious factual situations that are radically different from the disagreement that existed between DWT and Mr. Peterson. *See In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 580, 70 P.3d 940 (2003) (lawyer charged client \$36,663 to prepare quitclaim deed although he had charged other clients as little as \$50 for similar work); *In re Disciplinary Proceeding Against Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999) (client "was grievously overcharged by almost 1,000 percent"), *implied overruling recognized on other grounds by In re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 197 P.3d 1177 (2008).

For starters, no RPC violation has been litigated or proved, and so there is no basis to punish DWT. The argument also fails because Mr. Peterson did not raise it below. Indeed, at trial Mr. Peterson’s lawyers did not ask a single question about the “time and effort” language in the Terms of Service. There also is no mention of it in his trial brief. Sub No. 43. It is well-settled that failing to raise an issue before the trial court precludes the party from raising it on appeal. *See, e.g., Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *State v. O’Connell*, 83 Wn.2d 797, 822, 532 P.2d 872 (1974). “Without a showing that the contention was presented to the court below, it cannot be considered here.” *Boeing Co. v. State*, 89 Wn.2d 443, 450, 572 P.2d 8 (1978). Because “[a]n issue, theory or argument not presented at trial will not be considered on appeal,” this Court should summarily reject Mr. Peterson’s theory as waived. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

The argument fails too because it dashes up against the trial court’s factual findings. Although the “time and effort” language is not specifically referenced—because Mr. Peterson never brought it up—the trial court did make the following finding of fact: “DWT’s contract with Mr. Peterson, including the Engagement Letter and Terms of Service, *was fair ... [and] provided full and fair disclosure of the contract’s terms.*” CP 485 (emphasis added). The finding of fact that the contract was fair is

entitled to substantial deference, and cannot be reconciled with Mr.

Peterson's argument that fee shifting is not available because the Terms of Service unfairly emphasized some RPC 1.5 factors over others.

Mr. Peterson also ignores the fact that whether a fee is reasonable cannot be determined until the fee has been litigated and subjected to a lodestar analysis. Therefore, Mr. Peterson starts by concluding that DWT charged an unreasonable fee, and asks the Court to work backward and infer that the fee agreement must have allowed an unreasonable fee. But there is nothing in the Terms of Service that even remotely suggests that DWT is entitled to an unreasonable fee. *See* Ex. 2 at 3-10. To the contrary, the inclusion of all nine RPC 1.5 factors shows otherwise. *Id.* at 5.

Mr. Peterson's argument also fails as a matter of contract interpretation. The reference to "time and effort" did not manifest an intention to "allow[] [DWT] to deviate from RPC 1.5 and charge [Mr. Peterson] an unreasonable fee." App. Br. at 17-18. As Mr. Peterson concedes, the Terms of Service identified all nine of the relevant RPC 1.5 factors. *Id.* at 18. Furthermore, the "time and effort" language simply refers to the fact that DWT normally calculates its bills based on upon billable hours incurred—i.e., in contrast to contingency cases (which DWT does not generally handle). If anything the language provides

commendable candor, by reminding DWT clients that they will be subject to hourly billing.

Finally, Mr. Peterson makes a public policy argument to the effect that the inclusion of fee-shifting clauses in attorney fee agreements is unfair because the client might be dissuaded from disputing an unreasonable fee. *See* App. Br. at 23. But language providing for a fee award should *encourage* clients who have legitimate claims. *See, e.g., Bogle & Gates, PLLC v. Holly Mountain Res.*, 108 Wn. App 557, 32 P.3d 1002 (2001) (when former law firm unsuccessfully sought to collect amounts allegedly owed under an engagement agreement, the prevailing party was entitled to its fees under the alleged contract sued upon).

C. The Trial Court Properly Evaluated DWT's Claim as a Breach of Contract, and Concluded that \$83,860.40 was a Reasonable Fee after Conducting a Lodestar Analysis.

It is settled fact that the fee contract was fair. CP 285 ¶ 10.

Therefore, the thrust of Mr. Peterson's argument on appeal is that some or all of the fees Judge Schapira awarded to DWT should be disgorged as a sanction or penalty under the RPC's. *See, e.g.,* App. Br. at 1. That argument is unavailing for the reasons discussed *infra*. Mr. Peterson's emphasis on the RPC's also distracts from the straightforward issues that were actually litigated (and decided) below. This was a breach of contract lawsuit based on Mr. Peterson's failure to pay his bills. *See, e.g.,* CP 489-

490. Of course the RPC's are relevant because Mr. Peterson's obligations run to a law firm, but the necessary starting point is still contract law. *See, e.g.,* Tom Andrews et al., *The Law of Lawyering in Washington*, Ch. 9, § I (Wash. State Bar Assoc. 2012) (“agreements with clients regarding the terms of legal representation must comply with applicable contract law”).

Lawyers, like any other professional, are entitled to reasonable compensation for their services. “[A]lthough a client may fire his attorney at any time, the client has no right to pay less than the attorney has earned.” *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997); *see also* 7 Am. Jur.2d *Attorneys at Law*, § 239 (“Lawyers are entitled to compensation for services rendered to their clients ...”); Tom Andrews et al., *The Law of Lawyering in Washington*, Ch. 9, § I (Wash. State Bar Assoc. 2012) (“As agents of their clients, and subject to any agreement between them, lawyers are legally entitled to compensation for services they render to clients.”).

Even when a fee arrangement is found to violate the RPC's—which is *not* the situation here—the attorney is normally still entitled to reasonable compensation. For example, in *Barr v. Day*, which involved a dispute over a lawyer's entitlement to a contingent fee, the Court declined to enforce the fee agreement because it violated the ethical rules, while also holding that the lawyer “is entitled to compensation on a quantum

meruit basis.” *Id.* Furthermore, “holding clients to the obligations they have undertaken is not a punishment.” *Taylor*, 84 Wn. App. at 730.

Here, moreover, DWT’s compensation was agreed to pursuant to a written contract, which is the preferred method for documenting the terms of the attorney-client relationship in Washington. *See* RPC 1.5(b) (“The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing, before or within a reasonable time after commencing the representation.*”)⁸ (emphasis added).

The trial court did not err when it awarded fees to DWT under its written contract with Mr. Peterson.

1. The Trial Court did not Err when it Found that Mr. Peterson Breached his Contract to Pay DWT for Legal Services.

At trial, Mr. Peterson sought to avoid payment by claiming that DWT represented Retaining Wall Northwest, Inc. rather than himself, that he never signed the Engagement Agreement, and that DWT’s fees were unreasonable. On appeal, Mr. Peterson focuses on the third argument, but improperly tries to twist the trial court’s lodestar determination into an ethical violation (as discussed above). Mr. Peterson’s challenge to the

⁸ Here, Mr. Peterson received the Terms of Service no more than a week or so after the representation commenced. CP 483, 484 ¶¶ 5-6.

core finding that Mr. Peterson breached his contract with DWT is also unavailing.

The trial court found that a contract existed, that the contract was fair, and that Mr. Peterson breached, entitling DWT to a reasonable fee. All of the trial court's determinations are supported by detailed written findings and an exhaustive trial record. CP 482-93; RP 71:2-73:11, 75:12-79:9, 87:20-88:8, 107:10-108:7, 130:25-131:6, 137:21-138:13, 153:16-155:17, 170:21-172:16, 266:14-267:5. Mr. Peterson nevertheless argues that the trial court lacked sufficient evidence for its determinations that Mr. Peterson breached the fee agreement (AOR 2) and that DWT was the prevailing party (AOR 3). Mr. Peterson also claims that the trial court lacked substantial evidence for its factual finding regarding the timing of DWT's engagement in the Meilinger Lawsuit (AOR 4). None of the assertions are borne out by the record.

a. The Trial Court's Determination that Mr. Peterson Breached the Fee Contract was Properly Supported by the Evidence.

This Court should reject Mr. Peterson's invitation to upset the trial court's determination that Mr. Peterson breached his contract with DWT.

See App. Br. at 2 (AOR 2).⁹ Mr. Peterson’s breach of contract is supported by overwhelming evidence.

At trial, Mr. Peterson argued that the terms of the Engagement Agreement did not apply because he did not sign it. See also App. Br. at 7. However, as the Findings and Conclusions explain, “[s]ignatures of the parties are not essential to the determination” that a contract was formed. CP 488 (citing cases).¹⁰ As the Findings and Conclusions (CP 488) also explain, “Courts will enforce a contract when a party expresses the terms of an offer in writing, and the offeree remains silent but accepts the benefits of the offer. See *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 169, 298 P.2d 849 (1956).” Judge Schapira therefore determined that “Mr. Peterson contracted with DWT for legal services under the terms of the Engagement Agreement and the enclosed Terms of Service.” CP 488.

The finding of breach rests on ample evidentiary support. Over the space of five paragraphs, Judge Schapira describes the facts and circumstances surrounding Mr. Peterson’s receipt, and acceptance of, the

⁹ Mr. Peterson’s breach is a question of fact, not law. *Frank Coluccio*, 136 Wn. App. at 762. Although the Findings and Conclusions address Mr. Peterson’s breach both under the section labeled Findings of Fact, see CP 485 (finding that “DWT’s contract with Mr. Peterson ... was fair”), and the section labeled Conclusions of Law, see CP 488-490, the form of findings of fact and conclusions of law does not control over substance. See, e.g., *Kane v. Klos*, 50 Wn.2d 778, 788, 314 P.2d 672 (1957) (“Findings of fact are not made [conclusions of law] by label or by commingling with findings of fact.”).

¹⁰ Notably, although encouraged, RPC 1.5(b) does not require an attorney’s fee agreement to be in writing.

Engagement Letter and the Terms of Service; the key terms of those agreements (including the RPC 1.5 factors); the way DWT recorded its time and how it communicated with Mr. Peterson about the bills; the payment terms under the Terms of Service; and the fact that the fee contract “was fair” and “provided full and fair disclosure of the contract’s terms.” *See* CP 484-85. These facts were all supported by extensive testimony and evidence at trial. *See, e.g.*, RP 71:2-73:11, 75:12-79:9, 87:20-88:8, 107:10-108:7, 130:25-131:6, 137:21-138:13, 153:16-155:17, 170:21-172:16, 266:14-267:5.

There was more than substantial evidence in this case to support a finding of breach of contract.

b. Mr. Peterson’s Contractual “Good Faith and Fair Dealing” Argument Lacks Merit.

Mr. Peterson’s “good faith and fair dealing” argument (App. Br. at 20) is also misplaced. For starters, Mr. Peterson did not raise the issue in his trial brief or plead it below. *See* Sub No. 43; CP 12-13. Moreover, “the determination of good faith and fair dealing is an issue for the trier of fact.” DeWolf, Allen, and Caruso, 25 Wash. Prac., *Contract Law and Practice* § 5:13 (3rd Ed.). The trial court made no factual determination because Mr. Peterson never raised the issue.

The argument also fails on the merits. There is, of course, a duty of good faith and fair dealing implied in every contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). “This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Id.* In other words, the covenant ensures that neither party may injure the right of the other party to receive the benefits of the agreement. However, “the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.” *Id.* “Nor does it ‘inject substantive terms into the parties’ contract.” *Id.* (quoting *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 635 n.6, 700 P.2d 338 (1985)). Instead, “it requires only that the parties perform in good faith the obligations imposed by their agreement.” *Id.* “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Id.* at 570.

Here, the written Terms of Service provided that Mr. Peterson would be charged for the legal services provided by DWT (consistent with the RPC 1.5 factors). *See* Ex. 2 at 5. Mr. Peterson, in turn, agreed that he would “make payment within 30 days of receiving our statement.” *Id.* at 9. The trial court agreed that these terms were applicable, and applied a lodestar calculation to arrive at the amount of an award. CP 489. Just as

DWT's pursuit of its claim against Mr. Peterson did not create an ethical violation, it also did not retroactively create a breach of the duty of good faith and fair dealing. Mr. Peterson cites no authority in support of this proposition, or his argument that a post-hoc lodestar determination "suspends or discharges the client's obligation to pay..." App. Br. at 20. An appellant's assignment of error that lacks legal citation should not ordinarily be considered on appeal. *See, e.g., State v. Murray*, 110 Wn.2d 706, 714, 757 P.2d 487 (1988).

c. The Trial Court Properly Made an Award of Reasonable Fees.

The trial court correctly determined that Mr. Peterson breached his fee contract with DWT, and correctly evaluated that amount of the award pursuant to a lodestar analysis. *See, e.g., In re AGM*, 154 Wn. App. at 79 (lodestar method is "the clearly preferred method for calculating attorney fees in Washington); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995) ("Whether or not a fee is reasonable is an independent determination to be made by the awarding court."); *Ross v. State Farm Mut. Auto. Ins. Co.*, 82 Wn. App. 787, 799, 919 P.2d 1268 (1996), *rev'd on other grounds*, 132 Wn.2d 507, 940 P.2d 252 (1997). "The lodestar award is arrived at by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter."

Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 149-51, 859 P.2d 1210 (1993).¹¹

Here, there was little dispute over the hourly rates charged by DWT. An attorney's standard hourly rate is presumptively reasonable for purposes of calculating the lodestar amount. *Bowers v. TransAmerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). DWT charged Mr. Peterson its standard established rates for the attorneys that performed services on his behalf. CP 178-79 ¶¶ 17-18, CP 490 ¶ 28. In his deposition, Mr. Peterson's own expert admitted that DWT's hourly rates were reasonable. *See* CP 370-72 at 35:21-36:3; 38:19-19-23. The trial court also concluded that DWT's standard hourly rates were reasonable. CP 489 ¶ 26.

Instead, the trial court decided to reduce the fees claimed by DWT because it concluded that DWT spent too much time working on the case. CP 489 ¶ 26. In particular, the trial court observed that "Carly Summers was a relatively new associate when she represented Peterson" (CP 490 ¶ 28), and that Ms. Summers therefore lacked experience. CP 491 ¶ 38. The trial court thus reduced Ms. Summers' hours by one-third "for some

¹¹ *But see Gruhin & Gruhin, P.A. v. Brown*, 338 N.J. Super. 276, 281, 768 A.2d 822 (2001) ("A client who has retained an attorney and promised to pay him stands on a completely different footing from the recipient of a fee-shifting allowance. As between attorney and client, their agreement ordinarily controls unless it is overreaching or is violative of basic principles of fair dealing or the services performed were not reasonable or necessary.").

duplication ... and considerable hours wasted because of inexperience, unproductive claims, or lack of client management.” CP 492 ¶ 40.¹²

There was no finding, however, that Ms. Summers’ or DWT’s actions were unethical in any respect. Indeed, given the complexity of the Meilinger Lawsuit, DWT maintains that it spent a reasonable amount of time working on Mr. Peterson’s case, notwithstanding Ms. Summers’ inexperience. DWT ultimately billed Mr. Peterson only \$122,415.90 in fees and costs for both prosecuting his claims and defending him from the plaintiffs’ \$2 million lawsuit through the close of discovery, mediation and settlement discussions. Judge Schapira was certainly well within her discretion to award \$83,860.40 to DWT.

2. The Trial Court’s Conclusion that DWT was the Prevailing Party is Properly Supported by the Facts.

Mr. Peterson’s breach of contract also rendered DWT the prevailing party in the lawsuit. Washington courts have defined “prevailing party” as “the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case.” *Ennis v. Ring*, 56 Wn.2d 465, 473, 353 P.2d 950 (1959); *see also, Schmidt v. Cornerstone Inves., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990) (“a prevailing party is generally one who receives a judgment in its favor”). Therefore, the

¹² The fees billed by Mr. Theiss were not reduced. CP 490 ¶ 30, CP 492 ¶41.

inquiry focuses on which party *prevailed on its claims*, not on the remedy ultimately awarded. *See Hawkins v. Diel*, 166 Wn. App. 1, 10-13, 269 P.3d 1049 (2011) (awarding fees to plaintiff even where plaintiff failed to obtain general damages). “Under RCW 4.84.330,¹³ ‘prevailing party’ means the party in whose favor the court rendered final judgment.” *Id.* (citing *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)); *see also Harmony at Madrona Park Owners Assoc. v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 739-40, 253 P.3d 101 (2011) (“[i]n Washington, a prevailing party or substantially prevailing party is the one that receives judgment in its favor at the conclusion of the entire case”).

Here, DWT entirely prevailed on its breach of contract claim; the trial court held Mr. Peterson breached his written contract with DWT and entered judgment in DWT’s favor. CP 489 ¶ 25. Mr. Peterson cannot contest that DWT received an affirmative judgment in its favor. *Id.* The fact that the trial court awarded less than DWT sought does not alter DWT’s status as the prevailing party. Mr. Peterson did not file a counter suit against DWT; he sought and obtained no affirmative relief from the

¹³ RCW 4.84.330 provides, in relevant part, “[i]n any action on a contract or lease ... where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party ... shall be entitled to reasonable attorneys’ fees in addition to costs and necessary disbursements. ... As used in this section ‘prevailing party’ means the party in whose favor final judgment is rendered.”

Court.¹⁴ “In the whole of the litigation, the court awarded affirmative relief only to [DWT]. Thus, [DWT is] the only prevailing party” *Hawkins*, 166 Wn. App. at 12-13. Of course, there are cases in which determining the “prevailing party” presents a more complicated question. In this case, though, the trial court did not have to resort to a complicated assessment. *See* CP 493.

Moreover, in this case DWT did not just prevail on its claim for breach of contract (which should suffice), *it obtained a substantially favorable result*. Notwithstanding the fact that Mr. Peterson had made some payments, DWT’s entire claim of \$122,415.90 was put at issue in the lawsuit, *see* CP 4 ¶ 12; CP 489 ¶ 25, and it was eventually awarded \$83,860.40 of that amount. That DWT was the prevailing party is not a close question.

3. The Trial Court Properly Awarded Prevailing Party Attorneys’ Fees to DWT.

Washington courts readily enforce contractual attorneys’ fees provisions. *See, e.g., Seattle First Nat’l Bank v. Wash. Ins. Guar. Ass’n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). In fact, “[i]f a contract provides for fees and costs, the trial court is *statutorily required* to award those fees and costs to the prevailing party.” 25 Wash. Practice, Contract

¹⁴ However, it is noteworthy that the trial court rejected Mr. Peterson’s unpled RPC 1.5 “claim.”

Law & Practice § 14:20 (3d ed. 2013 & Supp. 2014) (emphasis added) (citing, *inter alia*, *Hill v. Cox*, 110 Wn. App. 394, 411, 41 P.3d 495 (2002)) (prevailing party entitled to attorneys' fees).

“[W]hether there is a legal basis for awarding attorney fees by statute, under contract, or in equity” is reviewed de novo. *In re Wash. Builders Benefit Trust v. Building Indus. Ass'n of Wash.*, 173 Wn. App. 34, 83, 293 P.3d 1206 (2013). “Once we have established that a legal basis exists for the award, we then review the amount of the award under the abuse of discretion standard.” *Lindsay v. Pac. Topsoils, Inc.*, 129 Wn. App. 672, 684, 120 P.3d 102 (2005); *see also Johnson v. State Dep't of Transp.*, 177 Wn. App. 684, 692, 313 P.3d 1197 (2013) (“This court will not disturb a trial court’s decision denying, granting, or calculating an award of attorney fees absent an abuse of discretion.”).

An abuse of discretion exists only when the court exercises its discretion on manifestly unreasonable grounds. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996); *see also Johnson*, 177 Wn. App. at 692 (quoting *Marina Condo. Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 263, 254 P.3d 827 (2011)) (“A trial court abuses its discretion if its order is manifestly unreasonable or is based on untenable grounds.”).

Here, the existence of a contract and Mr. Peterson's breach are settled facts. Thus, the de novo portion of this Court's review involves reading the contract to determine if it contains fee-shifting language. It unambiguously does. The Terms of Service specifically provide that in any action to enforce payment, "you agree to pay the expenses of collecting the debt, including court costs, filing fees and a reasonable attorney's fee." Ex. 2 at 9. DWT's entitlement to a fee award is also amply supported by the Findings and Conclusions (*see* CP 484-85, 493), as well as other evidence (Ex. 2 at 9). Judge Schapira then heard considerable additional evidence on the proper amount of a reasonable fee award, and arrived at a figure of \$90,000. CP 724. This was not an abuse of discretion.¹⁵

D. The October 2010 Engagement Request Date is Supported by Substantial Evidence.

In his third and final challenge to the Findings and Conclusions, Mr. Peterson claims that the trial court lacked support for its finding that he requested DWT's representation in "October 2010." App. Br. at 2

¹⁵ The fact that DWT was awarded fees (slightly) greater than the amount recovered at trial also does not make DWT's fees unreasonable. Washington courts consistently hold attorney fee awards are not limited by the amount recovered. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998) ("We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small."); *Steele v. Lundgren*, 96 Wn. App. 773, 783-84, 982 P.2d 619 (1999) (affirming \$240,000 fee award after plaintiff obtained \$43,500 in damages in civil rights case); *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 409-10, 759 P.2d 418 (1988) ("The size of the attorney fees in relation to the amount of the award is not in itself decisive.").

(AOR 4); 26-27.¹⁶ This argument also presents a factual determination, requiring the Court to look at the record and determine whether the decision was supported by substantial evidence. *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 687-88, 26 P.3d 943 (2001); *see also infra*.

Judge Schapira's findings and conclusions found that "In October 2010, Mr. Peterson requested that DWT represent him" CP 483. This finding is supported by substantial evidence. For starters, the earliest date that appears on a DWT invoice is October 5, 2010. Ex. 106. DWT's Notice of Appearance was filed on October 8, 2010. CP 196-97. And it is undisputed that DWT sent the Engagement Letter and the Terms of Service on October 14, 2010. Exs. 1 & 2. *See also* RP 63:3-64:18, 72:4-15, 136:9-20, 140:4-15, 163:1-4. Given these facts, Judge Schapira was justified in determining that Mr. Hendershott's earlier social meeting with Mr. Peterson (or his preliminary introduction to Mr. Theiss) did not manifest an earlier engagement date. Moreover, "[t]he trial court is in a better position than this court to weigh the credibility of testifying witnesses." *Taylor*, 84 Wn. App. at 730.

¹⁶ Mr. Peterson's brief does not address what difference a mid-September 2010 vs. an October, 2010 date would make.

E. DWT’s Efforts to Resolve the Fee Dispute with Mr. Peterson were Entirely Reasonable and did not Violate Public Policy.

Mr. Peterson’s legal arguments are unavailing for the reasons discussed above. They also rest on a fiction. What happened, according to Mr. Peterson, is that DWT improperly pursued litigation against him in an “attempt to collect an unreasonable fee.” App. Br. at 22. To this end, DWT is repeatedly painted as a unjustifiably trying to force Mr. Peterson into paying DWT an “unreasonable” fee. *See, e.g., id.* Having set up this straw person, Mr. Peterson argues that “[i]f the fee a lawyer charges is unreasonable, then the client should be able to dispute the unreasonable fee without having to worry that he or she might have to pay the Lawyer more in attorney fees than the fee amount in dispute.” App. Br. at 23.

Mr. Peterson’s argument overlooks the fact that DWT bent over backward to resolve the case, and was in fact willing to settle for a sum that matched—almost to the dollar—the sum that the trial court eventually ruled was a reasonable fee. DWT was perfectly willing to accept a fair sum for its services, while it was Mr. Peterson who refused to pay a reasonable fee. Indeed, it is *settled fact* that “DWT expended considerable effort in attempting to resolve the unpaid invoices, which efforts were rejected.” CP 486 ¶16 (emphasis added).

When Mr. Peterson raised this argument in the trial court, he claimed that DWT should not be awarded its attorney fees in this litigation—or perhaps should not have brought its breach of contract action at all—because he offered DWT \$9,200 cash and the opportunity to try to settle a portion of the Meilinger Lawsuit for an additional \$25,000 in February 2012. *See* CP 652-53 ¶¶ 12-13, Ex. 54. In Mr. Peterson’s eyes, this offer of just over \$34,000 rendered the fee litigation unreasonable, because DWT ultimately obtained a net judgment for a somewhat larger figure, \$43,043.13. CP 693. However, Mr. Peterson failed to explain that he had not yet entered into the purported \$25,000 settlement and that DWT would have to provide Mr. Peterson with uncompensated legal services to complete the settlement. CP 681-82 ¶ 3. If DWT was successful, it could apparently retain the settlement proceeds in partial recompense for Mr. Peterson’s now increased unpaid balance. If the settlement never materialized, presumably DWT would receive only the \$9,200 cash. In March 2012, Mr. Hendershott explained to Mr. Peterson that DWT could not conduct further work for Mr. Peterson without compensation. CP 682 ¶ 3, 686-87.

Nevertheless, in an attempt to avoid litigation, Mr. Hendershott went back to Mr. Peterson in 2013 and suggested settling the fee dispute for an additional \$41,000—i.e., just under the amount awarded by the

Court after trial. CP 682 ¶ 4, 689. Thus, Mr. Peterson could have resolved the lawsuit before it began without paying a penny in “unreasonable” fees.¹⁷ However, Mr. Peterson rejected this proposal and countered with something in the vicinity of \$5,000. CP 682 ¶ 4. This counterproposal reflected a *hardening* of Mr. Peterson’s position compared to a lowball offer that he made in February 2012. This litigation resulted.

DWT’s efforts to bring the dispute to a fair resolution did not stop once litigation began. For example, on March 13, 2015, after the Court denied Mr. Peterson’s Motion for Summary Judgment, DWT offered to settle the entire litigation for \$65,000. CP 512-13 ¶ 17, 631-32. This settlement would have covered the amount Mr. Peterson owed DWT for the Meilinger lawsuit and DWT’s fees and expenses incurred in this collection action, which at that time totaled approximately \$55,000. *Id.* Although the offer was received by Mr. Peterson’s attorneys, CP 634, DWT received no response to the offer; as a result, the case went to trial.

DWT was thus presented with a former client who refused to pay his bill, and declined all good faith efforts to resolve the dispute short of trial. Under the circumstances, public policy and the ethical rules did not prohibit DWT from pursuing the unpaid bill. *See, e.g., Birkenwald*

¹⁷ Mr. Peterson suggests that he would have been better off paying an “unreasonable” fee, *see* App. Br. at 23, but it is demonstrably untrue that he would have been required to pay any fee that the trial court later deemed “unreasonable.”

Distrib. Co. v. Heublein, Inc., 55 Wn. App. 1, 12, 776 P.2d 721 (1989)

(“Asserting one’s rights to maximize economic interests does not create an inference of ill will or improper purpose.”).

F. The Trial Court did not Err when it Denied Mr. Peterson’s Involuntary Motion to Dismiss.

Mr. Peterson raises a final, procedural, argument—that the trial court erred when it did not grant his “half-time” motion to dismiss under CR 41(b)(3). App. Br. at 2 (AOR 5). Mr. Peterson’s motion—and his argument on appeal—hinges on the idea that it was mandatory for DWT to procure an expert witness to opine on the reasonableness of its fee request. *See* App. Br. at 1-2 (“[f]ailing any expert testimony on [reasonableness], the lawyer’s claim for unpaid fees should be dismissed for failing to meet his or her burden of proof on the reasonableness test.”).¹⁸ Given the absence of expert testimony, Mr. Peterson relatedly claims that DWT entirely failed to present evidence establishing the reasonableness of its fees. *See* App. Br. at 10-13.

A defendant may move for dismissal under CR 41(b)(3) following the close of the plaintiff’s case “on the ground that upon the facts and the

¹⁸ The argument is ironic given that procuring an expert witness would have dramatically increased the costs of litigating the fee dispute with Mr. Peterson—costs that Mr. Peterson now strenuously objects to paying. Indeed, if DWT *had* procured an expert, Mr. Peterson would have had a non-frivolous argument that DWT’s use of an expert was an unreasonable cost he should not have to pay for under the case law making the use of experts optional, and given the amounts at issue in the case. DWT—and parties litigating fee disputes in the future—should not be punished for their efforts to be efficient.

law the plaintiff has shown no right to relief.” CR 41(b)(3). “[D]ismissal is proper ‘if there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.’” *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937 (2009) (quoting *Willis v. Simpson Inv. Co.*, 79 Wn. App. 405, 410, 902 P.2d 1263 (1995)).

Here, the trial court properly denied Mr. Peterson’s motion because DWT was not required to prove its case by expert testimony. As Washington Practice explains:

Ordinarily, at least, it is not necessary to procure expert testimony to support a claim that a fee is reasonable. The trial judge has the training and expertise necessary to make the determination without help from an expert.

14A Wash. Prac., *Civil Procedure* § 37:15 (2d ed.) (citing *Brown v. State Farm Fire & Cas. Co.*, 66 Wn. App. 273, 831 P.2d 1122 (1992)); 7 Am. Jur. *Attorneys at Law* § 307 (2d Ed. 2007) (“[t]he opinion evidence of expert witnesses as to the value of an attorney’s services is not conclusive or binding either on the court or on the jury”); *Id.* at § 306 (“courts are deemed to be experts on the question of the reasonableness of an attorney’s fee ... [therefore] the testimony of expert witnesses is not essential”).

Mr. Peterson also (again) fails to produce any relevant authority in support of his argument. Indeed, the only authority that he cites is *Dailey*

v. *Testone*, 72 Wn.2d 662, 665, 435 P.2d 24 (1967). See App. Br. at 25-26. *Dailey* involves a fee dispute between a lawyer and a former client, however it *does not even say whether an expert testified at trial*. 72 Wn.2d at 665. Needless to say, it contains no analysis—or conclusion—that expert testimony is required.¹⁹

Mr. Peterson also lacks authority for his related argument that DWT’s claims fail for a general lack of evidence. However, because the court is the ultimate judge of whether a fee is reasonable, lay testimony on that legal question is also not required:

The court, either trial or appellate, is itself an expert on the question of the value of legal services, and may consider its own knowledge and experience concerning reasonable and proper fees, and may form an independent judgment either *with or without the aid of testimony of witnesses as to value*.

Brown, 66 Wn. App. at 283 (quoting S. Speiser, *Attorneys Fees* § 18:14, at 478 (1973)) (emphasis added).

Mr. Peterson also elides the fact that there was *substantial* testimony on DWT’s fees. Mr. Hendershott, Mr. Theiss, and Ms. Summers testified for hours about DWT’s fees, which testimony included extended discussions of specific invoices and the charges therein. See,

¹⁹ Notably, the *Dailey* court found that \$750 was a reasonable fee (as against a claim of more than \$1,750). *Id.* at 665. At the same time, the Court accepted the trial court’s conclusion that the lawyer had not acted “fraudulently or maliciously,” and as a consequence refused to find a “complete defense to the attorney’s action for fees.” *Id.* at 664, 665.

e.g., RP 70:6-21, 81:1-86:18, 113:20-121:1, 121:12-20, 140:4-147:23, 175:11-176:2, 245:3-266:13. The purpose of all of the testimony, and all of the documentary evidence, was to show that DWT's fees were reasonable. *See, e.g.*, CP 490 ¶ 27 (trial court finding credible testimony "on hourly rates being reasonable").

It can hardly be claimed that the trial court lacked the factual support she needed to make a determination on the reasonableness of DWT's fees, and the trial court therefore did not err when it denied Mr. Peterson's CR 41(b)(3) motion to dismiss.

IV. DWT IS ENTITLED TO ADDITIONAL ATTORNEYS' FEES AND COSTS ON APPEAL

The parties' contract provides for prevailing party attorney's fees, as discussed above. *See also* Ex. 2 at 9. DWT was awarded its reasonable fees and costs as the prevailing party through entry of final judgment on October 30, 2015. CP 693-94. If DWT prevails on appeal, then, pursuant to RAP 18.1, it should similarly be awarded its fees as the prevailing party on this appeal. *See Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007) ("In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if [she] prevails on appeal.").

V. CONCLUSION

The basis for DWT's breach of contract claim against Mr. Peterson was straight-forward: DWT contracted with Mr. Peterson to represent him in the Meilinger Lawsuit. Based on its contract—the terms of which are described in the Terms of Service—DWT performed extensive services for Mr. Peterson. Mr. Peterson breached the contract by failing to pay DWT for the services it provided. This entitled DWT to an award of its reasonable fee, and, under the parties' contract, an award of prevailing party attorneys' fees.

Although DWT would have preferred not to sue Mr. Peterson—and made extraordinary efforts to avoid it— “[a] litigant has the right to go to court and litigate a nonfrivolous claim or defense.” *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 527, 280 P.3d 1133 (2012). DWT had a non-frivolous claim to the full amount described in its invoices, and that fact is not changed simply because Mr. Peterson was a former client. Mr. Peterson lacks any authority to the contrary, and his arguments cannot sustain a reversal of the bench trial below.

RESPECTFULLY SUBMITTED this 16th day of September, 2016.

Davis Wright Tremaine LLP
Attorneys for Respondent

By 

Anthony S. Wisen, WSBA #39656
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: 206.622.3150
Fax: 206.757.7700
E-mail: tonywisen@dwt.com

CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2016, I caused a true and correct copy of this Respondent's Brief to be served on the following in the manner indicated below:

Dennis J. McGlothin	<input type="checkbox"/>	U.S. Mail
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Washington Law Group, PLLC	<input checked="" type="checkbox"/>	Legal Messenger
7500 212 th Street S.W., Suite 207	<input type="checkbox"/>	Hand Delivery
Edmonds, WA 98026		



Gail Kataoka