

**FILED**

**AUG 13 2007**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

82950-1

No. 253988-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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CHERYL FORBES and COLLEEN MYERS  
Plaintiffs/Respondent/Cross Appellant

v.

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

and

MARY SCHULTZ  
Intervening Party/Appellant/Cross Respondent

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APPELLANT'S OPENING BRIEF

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## I. SUMMARY OF THE CASE

This is an appeal of an order entered on May 18, 2006 resolving a fee dispute. *CP 1797 et.seq.* After nearly five years of advancing over \$600,000 of combined fees and costs for a client under a contingency fee agreement, litigating an employment discrimination claim through six weeks of trial, obtaining verdicts on all causes pled, obtaining affirmation of a then \$7,000,000 of judgments on appeal, and thereupon receiving a \$5,000,000 settlement offer from a defendant, an attorney's client settled the case herself at that opening value of \$2,000,000 less than judgment value, fired the attorney, and formalized settlement through a previously undisclosed law firm, telling her trial counsel that counsel would be paid an hourly fee for her work, and not the contingency of the trial fee agreement.

While the trial court properly determined that the attorney was entitled to the benefit of the contracted contingency fee in a post settlement fee dispute, it awarded only the contract's pretrial settlement contingency percentage as applied against the settlement value. It determined that when the client accepted an opening settlement figure, even if intending to avoid her attorney's contingent fee in doing so, the client's act rendered the fee agreement "ambiguous." The court then also ignored altogether a separate, additional and independent fee provision

which entitled the attorney to any statutory prevailing party fees that had been awarded. It determined this without comment or conclusion.

Intervenor submits that the court's interpretation of the fee agreement was error. While a client controls settlement of a case at any stage of the proceeding, any post judgment settlement made by a client while judgments remain in effect cannot diminish the earned value of services against the judgments obtained.

## II. STATEMENT OF THE CASE

Prior to August 1997, Plaintiff Cheryl Forbes, hereafter "Forbes," was having difficulty trying to obtain representation on what she felt was an employment discrimination claim against her prior employer, Defendant ABM, by whom she had been discharged. *Clerk's Papers, hereafter "CP," 147-148, paras. 2-3.* Attorney Steven Crumb ultimately accepted the case on a "consulting basis," but attorney Crumb told Forbes she "did not have a case." *CP 148, para. 4.* Crumb would not move forward with Forbes's claim until a co-plaintiff, Colleen Myers, came forward. *CP 148, para. 3.*

On December 1, 1998, Forbes, along with now co-plaintiff Colleen Myers, signed a contingent fee agreement with attorney Crumb to represent them jointly in an employment discrimination matter against

“American Building Maintenance.” *Forbes* (hereafter “F”) *Exhibit 2*. Ten months later, on October 4, 1999, Crumb filed the parties’ action against a local company, “American Building Maintenance Company West d/b/a ABM Janitorial Services,” and a number of individuals. *CP 1-7*. The case scheduling order imposed a trial date of April 2, 2001. *CP 8*.

By October 2000, Forbes and Myers had become dissatisfied with attorney Crumb. *CP 148, para. 6*. They sought to change counsel, and began pursuing Intervenor Attorney Mary Schultz, hereafter “Schultz,” to represent them. *CP 148, para. 7, Intervenor’s* (hereafter “I”) *Ex. I-3*. Schultz met with the clients for the first time on October 18, 2000, when trial was six months away. *Ex. I-3; CP 1798, para. 1*. Schultz was reluctant to take the case. *CP 148, para. 8*. Little had been done to develop a case theory for Forbes, and her case was uncertain in theory, facts and law. *CP 1798, findings 2 and 3*.

Forbes followed up in writing, trying to convince Schultz to take the case. *Exhibit I-4*. Schultz told Forbes that her case would have to be continued for Schultz to take the case. *CP 149, para. 10*. But on December 12<sup>th</sup>, Attorney Crumb withdrew from the representation of both Plaintiffs. *CP 9-10*. On December 18<sup>th</sup>, Forbes told Schultz that she had terminated attorney Crumb. *Ex. I-5*. She noted, “we realize that you have

not agreed 100% to take our cases but are doing everything in our power to make it attractive to you.” *Id.*

On January 17<sup>th</sup>, Schultz agreed to enter into an hourly “pre-retention inquiry” into both clients’ matters to determine the validity of their claims prior to agreeing to act as trial counsel. *Ex. I-14, para. 1-2; CP 1798, finding 4.* The last date to request a continuance of trial was January 8, 2001. *CP 8.* Forbes represented to Schultz that she was capable of keeping current on both fees and costs, and, based upon her salary history with her prior employer Defendant ABM, Schultz saw no reason to question that. *CP 532, paras. 33 and 34.*

On February 19, 2001, Schultz agreed to pursue the claims for Forbes and her co-plaintiff on a hybrid contingency basis. *Ex. I-15; CP 1798, finding 7.* Financing the case was a major issue for Schultz, particularly given the state of the case that late in the litigation. *Ex. I-15; CP 1825, finding 14.* The clients would pay a reduced hourly rate of \$100 per hour verses Schultz’s then \$250 per hour rate, in addition to 33% of any settlement or 40% after trial, plus prevailing party fees. *Ex. I-15; I-27; CP 1798, finding 7.* The clients would be reimbursed for all hourly payments made if they prevailed. *Ex. I-27, para 5, 6; CP 1798, finding 7.* Forbes was to be responsible for the costs and was to pay as the costs were incurred. *Ex. I-27, paras. 8-10; CP 1798, finding 7.* In its findings, the

trial court found that “Schultz recognized that the case was factually and legally difficult and risky, and that it would consume the majority of her time and effort until conclusion. Further, it would limit to a bare minimum her availability for other clients and cases.” *CP 1799, para. 8.* Schultz “understood the corporate Defendant(s) was well suited financially to sustain lengthy and difficult discovery in a long trial, and it would likely not settle.” *Id., finding 9.* Additionally, Defendants would be represented by extremely experienced and capable counsel.” *Id., findings 8 and 9.*

On February 27, 2001, Schultz filed an appearance in the action. *CP 12,* and by March 21, 2001, Schultz obtained a continuance of trial to December 3, 2001. *CP 14, CP 1799, finding 11.* During this period of discovery, Schultz met with substantial difficulty in obtaining support for Forbes’s assertions as to the facts. *CP 536, paras. 48-49.*

On May 14, 2001, Forbes was terminated from her job as a manager from Senske Lawn and Tree Service, based on her “management style.” *Ex. I-35, I-36.* This became an issue of “damage control” for Schultz in the ABM case. *RP 595, lns. 11-25; Ex. I-35.* Similarities existed between the reasons offered by Senske for terminating Forbes as a manager, and the reasons claimed by defendant ABM for her termination.

*Ex. I-35; Ex. I-104; RP 595, lns. 15-20.* Forbes wanted Schultz to represent her in a lawsuit against Senske. *Ex. I-35; I-36.*

A similar contract was used for the representation of Forbes on the Senske case. *CP 1799, finding 13; Ex. I-44, I-299.* The contracts were made consistent. *Ex. I-44.* By September 5, 2001, Schultz had requested an additional continuance of the ABM trial based upon the growing complexity of the case, the sheer number of witnesses that were becoming involved, the statistical information that was necessary in order to present the case, and the extensive discovery that would still be required. *CP 21-24.*

Schultz was to discover that the matter was not against a local company known as ““American Building Maintenance Company West d/b/a ABM Janitorial Services,” *CP 1-7,* but against a New York Stock Exchange company, American Building Maintenance Industries, Inc., (ABMI) based in San Francisco, California. The structure of the corporation was an intricate series of subsidiary divisions and subsidiary corporations, making discovery intricate and difficult. *CP 536, para. 50, and CP 1800, finding 21.* Schultz devoted substantial time to develop the case that she felt was in jeopardy by taking numerous depositions in the Northwest, Arizona and California. *CP 1799, finding 16.*

At the same time, statistics were being developed through discovery which tended to indicate some systemic discrimination within the company. *CP 536, para. 51*. The company was resistant to discovery and such was difficult to obtain. *CP 536, paras. 50-53*. Forbes's motion to continue her trial was denied. *CP 27-28*.

In the fall of 2001, Forbes stopped paying the required hourly fee payments to Schultz required under the initial contingent fee contract; she also ceased reimbursing her litigation costs. *CP 538, para. 58; CP 539, lns. 11-15*.

On September 28<sup>th</sup>, Schultz requested interlocutory review of a certain decision in the case in the Court of Appeals. *CP 29-31*. She then moved to amend the complaint and continue the trial date. *CP 32-52*. On December 14, 2001, the court continued trial and allowed the amendment of the pleadings. *CP 53 and 54*. Trial was continued to August 19, 2002. *CP 56*.

On January 7, 2002, Schultz met with Forbes and Myers to discuss the delinquency of their payment of fees and costs under the fee agreement. *CP 1800, finding. 19*. In May of 2002, Schultz met with the clients again to discuss financial concerns. *CP 1800, finding 20*. The parties entered into a general agreement involving, in relevant part, the following: Schultz agreed to formally waive all of Forbes's past defaults

on the required hourly fee payments, and moreover, Schultz agreed to go forward without further hourly fee. Schultz also agreed to pay all cost advances for the client as those costs became necessary. Schultz further agreed to join the parent corporation Defendant ABM Industries, Inc. as a party to the action. *CP 1800, para 20*. This would all be done in exchange for an increased contingency to Schultz of 44% at trial if she prevailed. *Id.* Forbes would now continue to simply use her “best efforts” to reimburse costs to Schultz, while remaining ultimately responsible for them. *Id.* The new contract was designed to allow Forbes to come into good faith compliance, and was intended to benefit the attorney/client relationship. *CP 542, lns. 4-9*.

Schultz embarked on discovery depositions, which included deposing the national corporation’s in-house counsel in San Francisco, their internal auditor in San Francisco, the Division Comptroller in Phoenix, etc. Schultz secured and paid for all of Forbes’s accounting and psychological experts to assess the economic and emotional damages, as well as experts on “corporate tactics” in discrimination. *CP 1801, finding 22*.

By July 2002, the trial court assisted in managing the complexity of the matter by scheduling weeks of depositions for the parties. *CP 74-76*. A new trial date of March 31, 2003 was imposed. *CP 76, para. j*.

In July, 2002, Schultz sent out a draft of the proposed amended contract to Forbes to formalize the earlier negotiations in May. *CP 1801, finding 24; Ex. I-109.*

On September 6, 2002, Schultz filed a new amended complaint intricately detailing the parent corporation liability sought from ABM Industries, Inc. *CP 78-83.* The theory behind Forbes's claim of discrimination was more descriptively detailed as a disparate treatment claim. *CP 87-97.*

On October 3, 2002, Schultz successfully obtained an order denying ABM's motion to sever Forbes's claim from that of Myers to allow both claims to operate as support for each other. *CP 104-107; CP 1801, finding 23.* She successfully obtained the joinder of the parent corporation, ABM Industries, Inc. as a party to the litigation over objection, and further obtained a "relation back" ruling, defeating the parent company's statute of limitation defense. *CP 110-13; CP 1801, finding 23.* Defendant ABM Industries, Inc. would continue to deny its parent company involvement or liability, asserting that the local subsidiary alone was the proper Defendant. *CP 117-124.*

By November 4<sup>th</sup> and 5<sup>th</sup>, 2002, the new amended contingency agreement was in place. *CP 543, para. 83; Ex. I-125 (amended contract November 4, 2002); CP 1802, finding 29.*

In February, 2003, right before the ABM trial, and contrary to Forbes's representation in June 2001, *Ex. I-104*, the EEOC found "no reasonable cause" for employment discrimination in Forbes's agency complaint against Senske. *Ex. I-305*. The same defense attorney represented both Senske and ABM. *Ex. I-104*.

Trial commenced in the above ABM matter on March 31, 2003, and extended through May 19, 2003, for a period of 6 trial weeks. *CP 1802, finding 33*.

Schultz obtained verdicts for Forbes on all grounds plead in the amended contract—including favorable verdicts for 1) failure to promote and/or disparate treatment claim; 2) hostile or abusive working environment claim; and 3) retaliation. *CP 143 (special verdict form)*. Moreover, Schultz proved a continuing violation to the jury on all grounds pled, including disparate treatment, retaliation and hostile work environment. *CP 144*. Schultz also proved parent corporation liability against ABM Industries, Inc.—the jury found that the verdict entered was to be considered the responsibility and the liability of ABM Industries, Inc. for its claimed subsidiary's employment discrimination. *CP 144*.

The verdict entered by the jury consisted of \$1,754,547 in lost wages, bonuses and future benefits; \$614,478 of lost wages, bonuses and

benefits to date; and \$1,625,975 in emotional distress damages, for a total of \$4,000,000 in damages to Forbes. *CP 144*.

Schultz thereafter moved for awards of prejudgment interest, *CP 146*, and for attorney fees consistent with the prevailing party statute. *See e.g. CP 151-344, and CP 345-355*. Schultz defended motions by Defendant ABM for a new trial or reduction of the verdict. *Forbes v. ABM Industries, Inc.*, 127 Wn.App. 1003 (2005).

On January 22, 2004, a nunc pro tunc judgment was entered. *CP 382-391*. The verdict of \$4 million was formalized, and additional separate judgments were entered in Forbes's favor, including a prejudgment interest judgment of \$270,890, and a taxable consequence judgment of \$759,893. *CP 382*. In addition, Schultz recovered a judgment for the attorney fees Forbes had previously paid to attorney Steven Crumb. *CP 382, Judgment B*. Schultz also recovered prevailing party fees and costs in the amount of \$504,736.89 and \$84,377.88 respectively. *CP 382, Judgment C*.<sup>1</sup>

The court applied a Lodestar to the fee determination, highlighting two factors—the risk to Plaintiffs' counsel as being significant, and “the quality of representation in this case from every angle was excellent.” *CP 386, para. 18*.

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<sup>1</sup> Total fees and costs expended by Schultz on behalf of Forbes exceeded \$611,000 by July 2003.

**A. Post trial**

Following entry of judgments, the situation between Forbes and Schultz deteriorated. *CP 1807, finding 62.*

Forbes was unable to find employment, and Schultz hired her in her office. *CP 1803, finding 36.* In part, Schultz believed that if she could help Forbes get into a position to help with costs, Forbes would do so, and it would help both parties. *RP 554, lns. 9-13.* Forbes would never provide any such assistance. *CP 539, lns. 11-17.* A co-worker of Forbes's, Kristie Auckerman, attested that Forbes was a negative personality in the workplace, and at some point, that negativity evolved into Forbes claiming that Schultz had been unfair to Forbes in the contingency fee contract "because [Forbes] had brought [Schultz] these 'two huge lawsuits that [Schultz] was going to make all sorts of money from.'" *CP 1447.* Forbes became very divisive in the work environment. *CP 1139-1148; 1223-1226.* Schultz was unaware of Forbes's actions. *RP 909, lns. 5-17.* Forbes began entering her computerized billing account and making adjustments to show that she had paid costs when she had not. *CP 1804, para. 49; CP 1225.* Fee billings were deleted in the system. *RP 639-649; RP 1393-1395.*

But throughout the appeal, Forbes raised no dispute with Schultz's trial fee agreement. *CP 547, para. 7-14.* To the contrary, in an effort to

get Schultz to work for her on appeal, Forbes affirmatively represented that Schultz's trial fee was reasonable and had been earned. *CP 1382, lns. 9-15; and CP 745.*

Defendants ABM appealed the verdict. *Forbes v. ABM Industries, Inc.*, 127 Wn.App. 1003 (2005). The November 2002 contingency agreement allowed Schultz to decline to represent Forbes on appeal. *See Ex. I-27, para. 16.* Schultz initially so declined, noting that she was, in part, financially exhausted. *CP 545, para. 95.* While declining, however, Schultz facilitated a written fee agreement between Forbes and an appellate counsel Philip Talmadge, *CP 545, para. 96; CP 743-744; Ex. I-189*, and, notwithstanding Forbes's failure to reimburse any costs, Schultz agreed to also advance Forbes's costs to Talmadge on her appeal. *CP 743, Ex. I-189, paragraph entitled "Payment of Costs and Fees)(("Because Client is presently unable to pay costs associated with this matter, Trial Counsel agrees to pay Associated Attorney's costs as an advance to Client.")*

But after two requests for continuance of the appellate brief, appellate counsel Talmadge withdrew at noon on the second due date for Forbes's response brief. *CP 546, para. 98; CP 1803, finding 42.* Schultz re-did the brief for Forbes and got it timely filed. *CP 546, lns. 6-9; CP*

1803, *finding 42*. Schultz argued the case on appeal. *CP 546, lns. 10-11; CP 1803, finding 42*.

In the summer of 2004, and notwithstanding the EEOC's negative conclusion as to the validity of Forbes's claim against Senske, *Ex. I-305*, Schultz favorably settled a Senske lawsuit she had filed for Forbes. *CP 1803, finding 43*. On September 17, 2004, Forbes received her first installment from the Senske structured settlement. *CP 1803, finding 43; CP 1388, para. 246*. On March 3, 2005, a second settlement check was received by Schultz for Forbes from the Senske case. *CP 1803, finding 44; CP 1391, para. 259*. Forbes did not reimburse any costs to Schultz advanced under the fee agreement on either installment. *CP 1388, para. 246; CP 1391, para. 259; CP 1803, finding 44*. Instead, after the second installment, Forbes took the Senske proceeds, and gave two weeks' notice of her intent to leave Schultz's office. *CP 1803, finding 44*. Even though Forbes would continue to receive lump sums in settlement from Senske on and after September 17, 2004, she reimbursed none of the costs Schultz had advanced her, as required by the fee agreement. *Id., and CP 509, para. 10; Ex. I-27, para. 8*.

On Thursday, April 21, 2005, this Appellate Court's opinion was issued affirming Forbes's verdicts on appeal. *See Forbes v. ABM Industries*, 127 Wn.App. 1003 (2005). *CP 1804, finding 45*. On the

following Tuesday, Forbes met with Lukins & Annis lawyers. *CP 1830, finding 51(a)*. This was for help in disputing Schultz's fee. *RP 93, lns. 21-22; RP 442, lns. 23-25; RP 449-450*. The meeting occurred without Schultz's knowledge. *CP 1804, para. 51; CP 1806, para. 61*. At no time throughout the appeal, while Schultz continued to work for her, had Forbes told Schultz that she intended to dispute her fee. *RP 102, lns. 2-13*.

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ABM filed a petition for review of the appellate ruling, and Schultz responded to the petition on Forbes's behalf. *CP 1804, findings 47, 48*.

On July 26, 2005, ABM forwarded a settlement offer of \$5 million to Forbes through Schultz. *CP 547, para. 112; CP 747-748*. Schultz believed that Forbes had substantial negotiating leverage. *CP 1805, finding 56*. Among other things, Schultz found that the company had taken a charge for \$6.3 million for the verdict on a required SEC form—she believed that this figure had been set aside to settle the case. *CP 1805, findings 56-57; CP 548, lns. 6-17*. At the time of this offer, the judgment values were “close to, if not greater than \$7,000,000.” *CP 1810, finding 86; CP 5-20, para. 4 (total value of judgments owed by ABM to Cheryl*

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<sup>2</sup>The trial court found that Forbes was engaged in “suspicious conduct following trial,” up to and including and beyond the time of settlement as evidenced by the contact with Lukins & Annis. *CP 1807, para. 73.*; The extent of information altered by Forbes on her case while she had been employed in the office would begin to evolve after she had left the office, and when the fee dispute arose. *RP 1393-1394; CP 1289-1290*.

*Forbes as of August 2, 2005 was \$7,069,550.30*). Schultz's trial fee against the value of the judgments obtained was \$3,500,000, including some \$600,000 of prevailing party fees and costs awarded. *CP 552, lns.9-11*. Schultz hired an accountant to create and submit various tax consequence scenarios to Forbes relative to any settlement Forbes might select. *RP 111, lns. 1-16; CP 1226-1227*. Schultz and her accountant copied Forbes on all communications. *Id., and see e.g. Ex. F-67 through F-73; Ex. I-264 through I-282*. But Forbes had forwarded the settlement offer to her Lukins & Annis attorneys, *RP 65-67*, and Forbes was instead meeting with her Lukins & Annis lawyers. After the July 26<sup>th</sup> settlement was received, Forbes met nine times with Lukins and Annis lawyers Michael Franklin and Michael Hines. *Ex. I-307; CP 1804-1805, finding of fact para 51*. Schultz was not told of these contacts. *CP 1806, finding 61; RP 949*.

On July 28<sup>th</sup> and 29<sup>th</sup>, 2005, Forbes met with Lukins & Annis attorney Michael Franklin and Michael Hines. *CP 1805, finding 51 (h); RP 105, ln. 17 – RP 106, lns. 6*. Forbes then emailed Schultz a message whereby if Schultz didn't comply with Forbes's "immediate" directive, Schultz could be fired; but if Schultz did comply, she would be negligent. *RP 939, lns. 3-6; RP 947, lns. 5-20, 950, lns. 23-25-RP 951, lns. 1-5, all citing Ex. F-73*. Schultz believed she was being "set up." *RP 951, lns. 1-*

5. Schultz responded by “trying to convey” that Schultz believe Forbes was working with someone. *RP 950, lns. 16-25*. She also advised Forbes (and whoever) that Schultz had an “earned fee” consistent of the trial contingency, prevailing party fees and her fees on appeal, and that any settlement needed to take into account these sums. *RP 931, lns. 13-19; RP 932, lns. 2-3, 18-25; RP 933, lns. 17-19*. Schultz would hear no more from Forbes until Monday afternoon, Aug. 1, 2005. *I-282; CP 1806, finding 60; CP 1291, paras. 27-29; CP 1310; CP 550, paras. 125, 126*.

On the interim Sunday, July 31, 2005, Forbes met with Lukins & Annis attorney Michael Franklin. *CP 1805, finding 51 (i); and RP 68, lns. 11-15*. In late morning on Monday, August 1, 2005, Forbes met with Lukins and Annis attorneys for over two hours about the fee dispute. *RP 71, lns. 5-24; RP 449, lns. 6-18*.

At 12:53 p.m. on Monday, Aug. 1, 2005, Forbes faxed a letter to Defendant ABM accepting its opening settlement proposal of \$5 million. *Ex. I-285, I-287*.<sup>3</sup> Forbes told ABM that Schultz was no longer her attorney, and directed Defendant ABM to communicate with her “new attorneys, Michael Hines and Bryce Wilcox of Lukins and Annis, P.S.” *Ex. I-285, CP 752*. Less than an hour later, Forbes fired Schultz by email.

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<sup>3</sup> A hearsay objection to ABM’s confirming this time was waived. *RP 437, lns. 8-9*.

*Ex. I-283.* Lukins & Annis lawyers helped her author the email. *RP 445, lns. 4-12.*

Schultz first became aware that Forbes had settled the case, and of the involvement of Forbes's new representation, upon receiving a letter later that evening from Michael Hines at Lukins & Annis, telling Schultz not to contact Forbes. *CP 550, para. 127-130; CP 1806, finding 63.* Schultz contacted Hines to try and make him aware of the significant interests of the client which were at stake at that stage, and the complication of the litigation history. *CP 1806, finding 64; CP 550, para. 131.* Hines informed Schultz that she was fired, and would be paid an hourly fee for her past work, if Schultz could "prove [her] hours." *CP 551, para. 133; CP 1806, finding 65.* Thus, by firing Schultz, the client intended to pay her only hourly fees under the contract. Forbes reaffirmed this belief in her deposition. *CP 1554, lns. 17-22; CP 1555, lns. 11-12.* Forbes would claim the hourly fees owed were "\$369,234.22." *CP 1431-1432.*<sup>4</sup> In other words, by firing Schultz while accepting \$5 million, Forbes's intent was to recover \$4.6 million of the settlement—over \$1.6 million more than what she could have received from her share of the full value of the judgments had she honored the terms of her contingency fee agreement. *CP 551, lns. 13-18.*

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<sup>4</sup> Of the \$87,614 of costs Schultz advanced for Forbes, Forbes felt \$43,076 were owed. *CP 1432, lns. 3-4; Ex. I-297*

Schultz was then told that she would be paid hourly only if she agreed to release Forbes and Lukins & Annis both from claims; if Schultz did not accept this, Lukins & Annis (and Forbes) would attempt to “disgorge” all of Schultz’s fees. *CP 552, para. 137*. On August 2, 2005, Schultz filed a formal lien for the amount of fees due and owing. *CP 458, 464 (amended)*.

On August 2, 2005, Forbes’s new counsel wrote to ABM’s counsel, Maria Miller, identifying the firm’s retention, advising ABM that Forbes had terminated her relationship with Schultz, and telling Defendant ABM to now communicate with Lukins & Annis only. *CP 750*. ABM approved the settlement on Aug. 8, 2005, *Ex. I-289*. Neither Forbes nor her counsel made any effort to contact Schultz to discuss the negotiating environment before settling the judgment for ABM’s opening offer. *CP 508, lns. 17-19*.

Forbes received a disbursal from ABM in violation of the assignment provision of her fee agreement. *Ex. I-125, para. 2, Ex. I-287; CP 499*. She threatened to accuse Schultz of professional misconduct if Schultz did not accept Forbes’s hourly fee proposal. *CP 509, para. 11, and see CP 508, para. 7*. Schultz did not accept. *CP 510, lns. 21-22*.

Schultz moved to intervene in the Forbes v. ABM matter through counsel Robert Dunn. *CP 472-473*.

**B. The fee dispute**

In the ensuing fee dispute trial, Forbes presented no evidence that the November 4, 2002 contractual fees were unreasonable or contrary to practices. Attorneys Richard Eymann and Roger Felice both filed declarations indicating that the contractual fees as agreed upon between the attorney and client were reasonable and appropriate under the circumstances of the case. *CP 854; CP 835, para. 24, 25; RP 976-977.* Both noted that the total owing under all terms of the contract was 50% or less of the total value of the judgments, as approved in state bar discussions on contingency fees. *Id.*

On May 18, 2006, the trial court entered its amended order on fees. *CP 1797, et seq.* The court found that the contingent percentage and other material elements of the November 4, 2002 fee agreement were reasonably and fairly disclosed to Forbes prior to her signing. *CP 1801, para. 27.* It found that Schultz had provided exemplary service and professional expertise to Forbes, and did so at great risk. *CP 1807, para. 72.* The court concluded that 44 % of judgment value was appropriate and intended against “any judgments,” *CP 1811, para 89.*

But the court then concluded that 40% of the settlement amount (\$5 million) was contractually provided for. *CP 1812, finding 98.* Forbes

was ordered to pay that 40% of the value for which she settled. *CP 1812, para. 101.*

The court entirely ignored the contractual provision requiring that Schultz receive all amounts of prevailing party fees awarded. *CP 1802, "recovery of fees" reference, verses CP 1812-1813.*

Schultz herein appeals the court's construction of the fee agreement in its order of May 18, 2006. *CP 1820.*

### **III. ASSIGNMENTS OF ERROR/ISSUES**

**1. The trial court erred in its interpretation of a contingent fee agreement by applying a settlement contingency percentage to a post trial/ post judgment settlement effected unilaterally by a client while those judgments remained outstanding.**

*Conclusions of Law 87, 88, 95, 96, 97, 98, and Order.*

Issue: The value of attorney services following a fully performed contingent fee agreement, resulting in judgments entered after trial, is the contract's trial contingency percentage applied against those judgments. *RCW 60.40 et seq.* So long as the judgments remain, even if on appeal, then the value of services in those judgments also remains. While a client may settle their case post judgment, the client remains responsible for the value of the fees owing in the judgments.

**2. The trial court erred in failing to award the prevailing party fees earned under a contract for services.**

*Issue:* A trial court may not ignore explicit compensation provisions of a reasonable and fully performed contingency agreement.

**3. The trial court erred in concluding that the attorney breached the terms of a fully performed contingent fee agreement.**

*Conclusions of law 92.*

*Issue:* No breach or repudiation of a contract can occur when a statement purporting to enforce the contract is made; and where all other statements and actions are contrary to any breach.

**4. The trial court erred in entering findings which were unsupported by evidence in the record. Findings 52, 70, 71, and 80.<sup>5</sup>**

#### IV. ARGUMENT

**A. The court erred in enforcing a pretrial settlement contingency against a post judgment settlement effected unilaterally by a client while judgments remained outstanding.**

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<sup>5</sup> To the extent these findings indicate or imply that Forbes had been actively engaged in disputing the fee agreement and settlement tactics for some time prior to her firing of Schultz on Aug. 1, 2005, there is no evidence in the record to support these findings prior to July 29, 2005, when Forbes sent her email to Schultz. The evidence is to the contrary. See RP 102, *Ins. 2-13*; RP 547, *para. 109*.

The question posed in this appeal is whether a fully performed contingent fee agreement entitles the trial attorney to the earned trial contingency, and secures that fee at its value in the judgments obtained from attempted post judgment manipulation by a client and/ or other law firms, while those judgments remain outstanding. The answer to this question must be yes.

Two means of analysis exist here—analysis of the contract terms, and analysis of statutory protections for attorney fees under RCW 60.40 et seq. *Appendix A*.

1. **The contract terms of this contingency fee agreement are not ambiguous as to the value earned by an attorney upon judgment after trial, read as a whole, and read consistent with statutory law.**

- a. Standard of Review:

De novo review applies to the existence of a contractual ambiguity, and to the trial court's interpretation of a contract. *Paradise Orchards General Partnership v. Fearing* 122 Wn.App. 507, 516-517, 94 P.3d 372 (2004), (citing *Stranberg v. Lasz*, 115 Wn.App. 396, 402, 63 P.3d 809 (2003)).

b. The contract provisions are not ambiguous

The operative November 2, 2004 contingency fee agreement between the parties reads as follows:

5. Contingency Fee: The attorney fees shall be a sum equal to 40% of any and each (if applicable in the event both cases are settled independently) amounts reached in settlement, and-or arbitration, and forty (44%)(sic) percent of any judgment after a trial on the merits and/or appeal by any part to the action, less payments made by the client pursuant to the hourly rate provision in paragraph 6.\* \*

\* \* \* “.....the attorney herein agreed and agrees to continue representation on the case on a contingent fee basis only, in exchange for the larger percentage of any amount reached in settlement reflected above, i.e. \$40%, and a larger percentage of the receipt following trial, i.e. 44%.”

*Ex. I-125 at p. 2.*<sup>6</sup>

The court concluded that, while 44% of the judgments was the appropriate and intended contingent percentage as to judgments, the judgments were never “enforceable” or executed. *CP 1811, conclusions 89, 95; CP 1810, para. 87.* The trial court concluded that the fee contract thus became “ambiguous” when the client settled the judgments two years

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<sup>6</sup> There was no dispute, and the court concluded, that 44% was intended. *CP 1811, conclusion 96.*

after the judgments were entered. *CP 1810, conclusion 88; CP 1811, conclusion 97.* This is error.

An ambiguity exists in a contract only if the language is fairly susceptible of two reasonable interpretations. *Smith v. Continental Cas. Co.*, 128 Wn.2d 73, 81, 904 P.2d 749 (1995). An ambiguity is not to be read into a contract where such can reasonably be avoided by reading the contract as a whole. *Green River Valley Foundation, Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970). An interpretation of a writing which gives effect to all of its provisions is to be favored over one which renders some of the language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

Here, the settlement contingency language in the contract can relate only to settlement which occurs before a judgment is entered, because the attorney's services under the contingent fee agreement are completed upon entry of judgments at the trial court phase. The scope of the fee agreement is for representation at the trial court level, where the attorney contracted to "prosecute" claims. *Ex. I-125, para. 1.* Within that scope, the "conclusion of the case" is defined as either "settlement" or "judgment after suit." *Ex. I-125 at para. 5.*<sup>7</sup> While one could argue that

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<sup>7</sup> "Any attorney fees due and owing on the full settlement or judgment amount, shall be due in a lump sum at the conclusion of the case, or as settlement is received on each matter it settled independently...conclusion of the case shall be deemed to include

this latter language does not exclude settlement after judgments, paragraph 11 of the contract applies the term “settlement” to an offer made prior to trial—i.e. a settlement offer which will, in all probability, not be improved upon by trial. *Ex. I-125, para. 11*. But most definitively, once the matter goes to appeal, the contract is completed—under para. 16 of the contract, the attorney is not obligated to pursue the matter through an appeal process for the client.<sup>8</sup> As a result, the attorney’s services under this contract were “concluded” by judgment after suit under the contractual provisions, and the value of the attorney’s services at that time of conclusion was the trial contingency. *CP 372 (Jan. 16, 2004 Judgment on Verdict, etc.)*.

Because of the scope of this contract, it cannot thus be said that this contract is “fairly” susceptible of two “reasonable” interpretations. *Smith v. Continental Cas. Co.*, 128 Wn.2d at 81. Even under the principle of construction against a drafter, construction of a contract must be a fair, reasonable, and sensible construction as would be given to the contract by

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settlement, judgment after suit, arbitration award, appeal award, or termination by the client.” *Ex. I-125 at para. 5*.

<sup>8</sup> **Appeal/Collection**

16. It is expressly understood and agreed that the attorney is not obligated to pursue the matter through an appeal or any collection process that may be required.....”

*Ex. I-125 at para 16*.

the average person. *Panorama Village Condominium Ass'n Bd. Of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 137-138, 26 P.3d 910 (2001) (*referencing exclusion clauses of an insurance contract*). Strained or forced construction is not to result. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005). Here, finding and construing an ambiguity per the trial court's method results in the conclusion that the value of services for a fully performed contract can be diminished by the recipient's arbitrary action. This construction would be akin to concluding that if a person crashed their vehicle into their just constructed new home, the builder's fee for building the home should be reduced for the damage caused by the recipient of those services. This would be neither a "fair" nor "reasonable" interpretation of a contingency contract's payment terms. Here, an ambiguity can reasonably be avoided by simply reading the contract as a whole. *Green River Valley Foundation, Inc. v. Foster*, 78 Wn.2d at 249.

- c. The contract provisions are not ambiguous when read consistent with the attorney lien statute.

In addition to consistency of the contractual provisions themselves, a court must interpret the contractual provisions in a manner consistent with statutory law. *Paradise Orchards General Partnership v. Fearing*

122 Wn.App. at 518-519. Here, read consistent with statutory law, the contract provisions are also unambiguous.

This state's legislature has created a body of lien law to ensure proper payment for attorney fees. Under RCW 60.40.010(1)(e), a lien for an attorney's fee is "upon the judgments to the extent of the value of the services performed." This type of lien is recognized as a charging lien, and is "upon the judgments obtained for the client as a result of the attorney's professional services to secure the attorney's compensation." *Ross v. Scannell*, 97 Wn.2d 598, 604, 647 P.2d 1004 (1982). In Washington, a charging lien can be applied only to judgments, not, as with some other states, to e.g. real property. *Id.*, at 605. Thus, the charging lien in the judgments becomes the attorney's only security for those services performed, and is "valued" upon entry of judgment. When the meaning of a statute is plain, the court is to give effect to that plain meaning as an expression of legislative intent. *Burns v. City of Seattle* 2007 WL 2199902, \*4 (Wn., 2007). Here, the plain language of RCW 60.40.010(i)(e) is consistent with the contract itself, which states that the attorney fees due and owing are due "at the conclusion of the case...", defined as the judgment after suit. *Ex. I-125, para. 5*. While the funds are obviously not yet available to pay the "due" fee at that time, the contract values the fee due upon that conclusion, consistent with RCW

60.40.010(i)(e), to secure the payment for the services now fully performed as recovery occurs.

Thus, the contract is not ambiguous when it is read consistent with RCW 60.40.010(i)(e).

- d. The client's reaffirmation of the trial contingency, post judgment, confirms lack of ambiguity as between the parties.

Contractual provisions must also be interpreted in a manner consistent with the objective evidence of the parties' actions. *Paradise Orchards General Partnership v. Fearing*, 122 Wn.App. at 518-519.

The client's own actions here demonstrated lack of ambiguity. To convince the attorney to continue working for the client on appeal, the client reaffirmed the attorney's earned interest in the judgment values. In an email to Intervenor Schultz on March 1, 2004, Forbes confirmed her understanding that Schultz had earned the 44% contingency "share of the verdict" plus the legal fees. *CP 745 (with the client noting "Our contract is pretty specific.")*

The court should not find ambiguities where none exist, based on the objective evidence. *See Panorama Village*, 144 Wn.2d at 137.

2. A client may not diminish the contingency value of services received after judgment by unilateral settlement while those judgments remain standing.

The trial court's conclusion that, because Forbes settled the case after judgment, the value of the attorney's service was devalued by the client's act, is also contrary to statute. A lien created by RCW 60.40.010(1)(d) is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full. *RCW 60.40.010(4)*. *RCW 60.40.010(1)(d)* specifically relates to a lien upon an "action and its proceeds" to the extent of the value of services performed in the action, or "if the services were rendered under a special agreement, for the sum due under such agreement." This section appears added by the legislature in 2004 to complement the already existing judgment lien section under RCW 60.40.010(1)(c). *Laws 2004, ch. 73, § 2*. While the amendment was focused on taxation issues, the legislature reaffirmed its intent: "Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases..." *Purpose--Intent--Application--2004 c 73*. To that end, the statute is to be liberally construed to effectuate its purpose. *Id.*

Section 1(d) of RCW 60.40.010 addresses the "gap" that might otherwise be caused between the initiation of attorney services, a verdict,

and a formal entry of judgment; or the gap that might occur even after judgment, if, e.g., a judgment were reversed on appeal, and remanded for trial. Compare *RCW 60.40.010(1)(d) and (1)(e)*. The sections compliment each other. In the latter case of a remand, section 1(d) would still preserve the lien for services, although the lien would be against the action, and no longer the reversed judgments. The point is made in *Cline Piano Co. v. Sherwood*, 57 Wn. 239, 242, 106 P. 742 (1910). After a client settled a case with a defendant after trial at a substantial discount before a formal judgment was entered, the trial attorney claimed a lien on the judgment rendered, which was more than the sum for which the client settled. *Id. at 240-241*. The appellate court concluded that a judgment lien could not attach until a judgment was formally entered. But it noted, “if attached, [the lien] cannot be affected by a subsequent compromise or settlement of the case by the parties made with notice of the lien.....” *Cline Piano Co.*, 57 Wn. at 242.

Here, entry of the judgments occurred. The attorney’s fee was thereupon valued by the contract “for the sum due under such agreement,” i.e. the trial contingency fee, on those judgments. The lien statute applied that lien to the judgment values. That earned fee was thereafter to be executed against whatever “proceeds” result from the action, until paid in full. *RCW 60.40.010(5)*.

In sum, read consistent with statutory lien law, this contract is not ambiguous as to the value of the attorney's services earned upon entry of judgment. So long as the judgments remain standing, the value of services is that contingency earned against the judgments.

- a. Precedent supports the statutory lien principle that a contractual party may not devalue an earned fee post-performance, i.e. post judgment.

Consistent with this state's lien statute, other state courts faced with the question of unilateral post judgment settlements by clients have consistently held that a settlement made without the consent of an attorney will not be permitted to affect the existing lien of that attorney when settlement is made after judgment. *See 7A CJS, Attorneys and Clients, § 475 supra, updated June 2007, citing various.*

In *Griggs v. Chicago, R.I. P.Ry. Co.*, 177 N.W. 185, 186 (Neb. 1920), a client settled a case while an appeal was pending and "undetermined." The settlement was for less than one fifth of the judgments obtained by the client's attorney, and was agreed upon without the consent of the attorney. The client then stipulated to dismissal of the action. The Nebraska Appellate Court held that the client's post judgment settlement and agreement to dismiss could not deprive the attorney of the lien agreed upon under the contract. The attorney's interest in the

judgment “became absolute upon rendition (of the judgments)” and the contract operated as an equitable assignment of that judgment to the extent of the attorney’s claim. The client could not thereafter, by settling, give a valid discharge of the judgment except as to their own unassigned interest, until payment of that lien. *Id.* at 186. The court held unequivocally that this was the case in the absence of reversal or modification on appeal. *Id.* (citing numerous rulings from various jurisdictions, including *Desaman v. Butler Bros.*, 118 Minn. 198, 136 N.W. 747 (1912)). As the Nebraska Court noted, “[t]he lien statute would be of little use to counsel, who had obtained judgment in favor of a client, if the parties might, without their knowledge or consent, come together outside of the jurisdiction and settle a judgment for a small fraction of the amount recovered.” *Griggs*, 177 N.W. 185 at 187.

In *Epstein v. Abrams*, 57 Cal.App.4th 1159, 1169, 67 Cal.Rptr.2d 555 (Cal.App. 2 Dist.,1997), the California appellate court also likened a charging lien to an “equitable assignment” of the client’s claim to the extent of the attorney’s lien. *Id.*, quoting *Haupt v. Charlie's Kosher Market, supra*, 17 Cal.2d 843, 845. The *Epstein* appellate court reversed a trial court which had approved a settlement, where that settlement appeared to defeat an attorney’s lien. Holding that it was “improper-and unwise-for respondents on their part to attempt to enter into such a

settlement agreement,” the *Epstein* court held that a contingent fee agreement “vests the attorney with an equitable interest in that part of the client's cause of action which is agreed upon as the contingent fee.” In that regard, no compromise could be made by the client or the defendant which would defeat the attorney's rights. *Epstein*, 57 Cal.App.4th at 1170. The same applies here.

On entry of the judgments, an equitable assignment of the amount due against those judgments, i.e. Schultz's “earned fee”, was accorded Schultz as security for her fees. Although appeal was pending by Defendant's petition for review to the Supreme Court, the judgments had been affirmed by this appellate court at the time of settlement, and remained outstanding. Upon settlement, the attorney's equitable interest in those judgments was preserved by the deposit of the earned fee into the registry, and by the trial court's own order that its order vacating the judgments at the client's request “shall not...impact rights the Intervening party...has...to enforce the terms of the employment agreement upon judgment as if judgment was not vacated.” *CP 504 (emphasis added)*. The court then erred in later compromising that earned equitable interest by deciding at trial that its own judicial approval of the client's unilateral settlement had also somehow now rendered the fee agreement ambiguous and reduced the attorney's equitable interest. *CP 1810, conclusion 84, 88;*

*CP 1811, [conclusions?] 89, 87.* The client's settlement was unable to affect the attorney's equitable interest in the judgments, under the reasoning of *Griggs and Epstein*, supra, because the client could only affect her own portion of the recovery by settlement—not her attorney's share.

Likewise in *Desaman v. Butler Bros.*, 118 Minn. at 201, the defendant also argued that a litigant retained the unrestricted right to settle the case for any value they chose, and that the attorney's fee would then be determined by that value for which the client settled. The court disagreed. While true *prior* to entry of a verdict, such was not true after a “verdict fixing the amount of a plaintiff's cause of action.” *Id.*<sup>9</sup>

In sum, parties who settle without the consent of the plaintiff's attorney do so at their own risk as to the attorney's lien. 7A CJS § 475, (citing *Schneider, Kleinck, Weitz, Damashek and Shoot v. City of New York*, 302 A.D.2d 183, 754 N.Y.S.2d 220 (2002)). Here, it was error for the trial court to hold that a client's unilateral post judgment settlement with a Defendant while judgments remained outstanding compromised the attorney's equitable interest in the judgment, and reduced that interest to

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<sup>9</sup> The court also noted that a secret and collusive compromise between litigants does not affect the amount of the attorney's lien. The *Desaman* court cited *Crowley v. Le Duc*, 21 Minn. 412 (1875), where a court likewise held that if a plaintiff settled without the knowledge of an attorney who had not been paid, then it was proper to enter a judgment for the agreed value of services, even if that judgment was in excess of that entire settlement amount. *Desaman*, 118 Minn. at 202-203.

not only the settlement contingency, but to that contingency against the value for which the client chose to settle.

- b. The court's holding violates the court's duty to ensure that fee manipulation does not occur.

Washington courts have also long adhered to the proposition that fraudulent or collusive efforts to manipulate fees are not to be accommodated by the courts, even to the extent of the court refusing to accept the settlement. In *McRea v. Warehime*, 49 Wn. 194, 197, 94 P. 924 (1908), the Supreme Court addressed a situation which did not involve allegations of the client in collusion with another law firm, but it nonetheless commented that, while a client may at any stage of the case compromise their suit over an attorney's objection—even *that* principle may not apply “where it manifestly appears that such settlement is with collusive and fraudulent purpose of defrauding counsel of their reasonable compensation.” *McRea*, 49 Wn. at 197. And as noted by Minnesota's *Desaman* court, *supra*, “it may be said that the very fact of making a settlement behind the back of the attorney suggests collusion.” *Desaman*, 118 Minn. at 202-204.

In this fee dispute, this trial court found that the client's election to terminate her attorney was not only harmful to the client herself, but “arguably calculated to [using street terms] *stiff* her attorney....” *CP*

1749, para. 73 (brackets in original). It found that the client's actions suggested that she deliberately fired her counsel to maximize her share of the verdicts. CP 1809, finding 78. And indeed, it should be hard to ignore that the client's stated belief was that by firing her counsel, she would only have to pay that counsel an hourly fee. CP 1554, lns. 17-22; CP 1555, lns. 11-12. The testimony as to intent is clear—by taking a substantially reduced sum from the defendant while firing the attorney, the client's intent was to recover substantially more money for herself. She simply took the funds away from her own counsel, not the defendant. CP 1431-1432.

It was improper for the trial court to thereupon reduce the value of the attorney's services because of the intended self dealing of the client. CP 1809, finding 81. Such a result is precluded by the fee contract, universal precedent, and by RCW 60.40.010. It is also poor policy. Every contract carries with it an implied duty of good faith and fair dealing. This duty obligated the parties to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)(emphasis added, citations omitted). Here, while the client could certainly reduce her own share of recovery to settle the case, she could not reduce the attorney's share earned by full performance.

This trial court erred in allowing the client's post performance behavior to create an "ambiguity" in the contract which it used to devalue the attorney's fee, and to reduce the equitable interest earned by the attorney in the judgments.

- c. The trial court's conclusion that the judgments were not recovered was error.

In support of its holding that a settlement contingency would apply, the trial court concluded that the trial judgments were "unenforceable" while the defendant continued to appeal them, and that the judgments were "never enforced." *See Order, CP 1811, conclusions 87—89, 95.* But the fact that judgments remain on appeal is irrelevant to the calculation of the attorney's lien. So far as the question of any attorney's lien is concerned, the lien exists from the time the judgment is ordered to be entered. *7A CJS § 475 (citing Young v. Dearborn, 27 N.H. 324, 1853 WL2478 (1853)).* So long as the judgments remain, even if on appeal, then the value of services in those judgments also remains. *RCW 60.40.010(1)(e).* That value is simply to be collected against proceeds which might be recovered. *RCW 60.40.010.*

But moreover, these judgments were enforced. On September 16, 2005, Forbes filed a satisfaction of judgment with the Spokane County Superior Court acknowledging "full satisfaction of the judgment recovered

against (Defendant)..." CP 497. These judgments were therefore both recovered and "satisfied."

And further, on September 30, 2005, the trial court itself held that the parties' stipulated order vacating these satisfied judgments was not to impact any of the attorney's rights in the terms of the employment agreement, as against the judgments. CP 504. This conclusion is supported, as identified above, by the state's lien law—RCW 60.40.010, as well as judicial precedent on post judgment settlements.

It was error for the trial court to not only hold that these judgments were not recovered, when irrefutable evidence showed that they were recovered, but to also reverse its own proper unappealed ruling holding that the court's acceptance of the client and defendant's settlement would not affect the excluded attorney's interest. This reasoning does not properly support a reduction of an earned fee.

- d. Even if the contingency fee was properly based on a settlement value, the court failed to properly impose the contingency against the settlement received.

This court found that Forbes settled her judgments for \$5,000,000. CP 1810, *finding/conclusion* 87. Such a finding was abuse of discretion in light of an unexplained formal record.

On September 16, 2005, Forbes filed a satisfaction of judgment with the Spokane County Superior Court acknowledging receipt of \$5,655,176.70. *CP 497*. This document formally confirmed the client's receipt as between the parties to the action, and closed the action.<sup>10</sup> Even if the trial court decided that Schultz's fee was to be calculated on the basis of settlement, it erred in failing to apply that percentage against the value formally acknowledged by Forbes in the record on file with the Superior Court as the amount used to settle the case.

At a minimum, the attorney is entitled to calculation based on the acknowledged receipt.

**3. The court erred in ignoring the prevailing party fee compensation terms earned.**

As noted by the trial court itself, in addition to the contingency fee provision of the fee agreement, paragraph 7 of that agreement, provides as follows:

7. **Recovery Fees:** Additionally, in an action for a violation of civil rights..., and in the

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<sup>10</sup> Intervenor Schultz never received proof of what Forbes had actually received in settlement—knowing only what she had heard. *See RP 699, lns. 6-15 (the settlement agreement Schultz had ultimately been provided was redacted, Id. at lns. 11-12); RP 700, lns. 13-14.* Schultz attested that she had seen a figure other than \$5,000,000 on a document “somewhere” that had a “\$5.6 number in it.” *RP 701, RP 749-752.* Schultz was not concerned with the exact figure, because Schultz believed Forbes' settlement was not to be used to calculate her fee, in any event. *RP 703, lns. 21-23.* Schultz was vaguely recalling the satisfaction of judgment document on file. *CP 497.*

event that prevailing party attorney fees and/or costs are awarded to either the client or the attorney, all such fees shall be paid directly to the attorney in full in addition to the terms of provisions in paragraphs 5 and 6 of this agreement. Said statutory fees and costs will be reduced by any amount previously paid to the attorney by the client for the specific recovered costs only.

*CP 1802, finding 28, and see Ex. I-125, para. 7.*

These statutory/prevaling party fees were awarded as a judgment following trial. *CP 373, Judgment Summary C, including attorney fees of \$504,736.89, and costs of \$84,377.88.* No ambiguity exists in provision 7 relative to those attorney statutory fees being earned; nor did the court find any such ambiguity in this fee provision. In the court's initial decision, it awarded these statutory fees. *CP 1739, original findings of fact at para. 104, CP 1754.* But on a motion for reconsideration by Forbes, *CP 1778,* the court entered amended findings deleting those statutory fees, without comment. *CP 1812-1813.* This is error. A trial court has no authority to simply ignore fee provisions of a fully performed fee agreement.

A contract for attorney fees is enforceable according to its terms, unless that contract is contrary to law or public policy. *23 Williston on Contracts, § 62:7 (4<sup>th</sup> Ed).* There was no argument or evidence presented by Forbes that this provision of the fee agreement was either contrary to law or public policy. There was no finding by the court, nor any

conclusion of such. **“It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.”** *Panorama Village Condominium Ass’n Board of Directors v Allstate Ins. Co*, 144 Wn.2d at 137 (bold in original), quoting *Chaffee v. Chaffee*, 19 Wn.2d 607, 625 (1944), citing *12 Am.Jur.Contracts, sec 228* at 749. Courts can neither disregard contract language which the parties have employed, nor revise the contract under a theory of construing it. *Cf. Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

The trial court was required to enforce both compensation provisions of the fee agreement as were agreed between the parties and written into the contract at the inception. All such fees owed became an equitable interest in the judgments, secured by a lien under RCW 60.40.010 upon entry of the judgments for such fees. The court made no findings or conclusions which would properly support removing this earned compensation provision from the attorney.

This court should reverse and remand for entry of judgment on the prevailing party fee provision.

- a. A trial court's intentional indifference to reasonable contractual terms constitutes unconstitutional contractual impairment.

If the trial court's unexplained decision to ignore the prevailing party fee provision was somehow implicitly based on a belief that it could determine its own reasonable fee under its inherent authority of Rules of Professional Conduct (RPC) 1.5, at the urging of the client, then such would be error of law rising to the level of constitutional violation.

Under Article I, Section 10 of the U.S. Constitution and Article I, Section 23 of the Washington State Constitution, "any form of legislative action" that impairs the obligations of contracts is presumed unconstitutional. *Johanson v. Department of Social and Health Services, State of Wash.*, 91 Wn.App. 737, 744, 959 P.2d 1166(1998)(case cites omitted).<sup>11</sup> In *Keene v. Board of Accountancy*, 77 Wn.App. 849, 854, 894 P.2d 582 (Div. II, 1995), the court applied constitutional protections to professional disciplinary rules. And in *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 727, 818 P.2d 1062 (1991), the court concluded that the statutory act which created the medical disciplinary board and the rules

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<sup>11</sup> U.S. Const., art. 1, § 10. reads: "[n]o state shall ... pass any ... law impairing the obligation of contracts...." ; Washington State Const. art. I, § 23 reads: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."

to be enforced was implemented by the legislature “in the exercise of the State's police power to promote the public welfare and to create an administrative agency mandated to act as a disciplinary body for (medical professionals.)” The legislature has likewise imposed the attorney code of ethics under RCW 2.48.230. The RPCs, including RPC 1.5, are thus imposed as a function of the legislature for the public good, and constitute “legislation” for the purpose of the contracts clause.

In *Pierce County v. State*, 159 Wn.2d 16, 27, 148 P.3d 1002 (2006 WL 3513494, Wn., 2006), a contractual impairment occurs when the terms of a contract are altered, new conditions are imposed, or the value of the contract is lessened. *Pierce County*, 159 Wn.2d at 30 (citing *Retired PUB Employee's Council of Washington v. Charles*, 148 Wn.2d 602, 625, 62 P.3d 470 (2003)). A three part test applies to determine if an impairment exists: 1) does a contractual relationship exist; 2) does the legislation substantially impair the contractual relationship; and 3) if there is substantial impairment, is it reasonable and necessary to serve a legitimate public purpose? *Pierce County*, 159 Wn.2d at 28 (citing various).

Here, a contractual relationship clearly existed. The trial court's ignoring the prevailing party compensation term of the contract substantially lessened the value of that contractual relationship. The

question thus becomes whether that “impairment” was reasonable and necessary to serve a legitimate public purpose. It was not.

As noted supra, a contract for attorney fees is enforceable according to its terms, unless that contract is contrary to law or public policy. *23 Williston on Contracts § 62:7*. RPC 1.5’s “reasonableness provision” serves a legitimate public purpose. But once a trial court has found a written contract reasonable, the rule conveys no authority upon that trial court to then ignore the terms of the contract it found reasonable to create its own contract for the client. Such an interpretation would create a conflict between RPC 1.5 and the right of an attorney to contract for services at a value believed appropriate for the risk, and to agree to perform such work only in exchange for a specific sum. RPC 1.5(a) does not authorize a court from going beyond the determination of whether a fee agreement executed was reasonable at the time of its execution, to allow it to create its own fee after full performance. Any such extension would result in conflict between the rule and the constitution, unnecessary to serve any public interest. RPC 1.5 does not authorize contractual impairment unless the fee contracted for is unreasonable. Here, it was not. The court’s failure to award the prevailing party fee compensation term contracted for was improper.

4. **The trial court erred in its conclusion that the attorney breached the terms of the fee agreement.**

Without reference to specific findings, the trial court concluded that the attorney (and the client both) breached the terms of the fee agreement. *CP 1811, conclusion 92*. This conclusion was error.

An anticipatory breach can be said to occur when one of the parties to a bilateral contract either “expressly or impliedly repudiates the contract prior to the time for performance.” But the law requires evidence of a positive statement or action indicating distinctly and unequivocally that the repudiating party will not substantially perform his contractual obligations. *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. 601, 620, 821 P.2d 63 (1991)(emphasis added)(citing *Lovric v. Dunatov*, 18 Wn.App. 274, 282, 567 P.2d 678 (1977)). In *CKP*, a contractor performed work over and above what was contracted for, but, as the parties were unable to agree on a contract modification, the defendant threatened to withhold payment unless CKP agreed to terms it proposed. *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. at 605. This threat was deemed a breach of contract; but notably, the threat was occurring while that threatened breach was being actively carried out, i.e. the work had been performed and the Plaintiff was not paying for it, while threatening to withhold payment.

Here, the attorney fully completed the trial contingency agreement, and the court found that the attorney's representation of the client was exemplary. *CP 1807, para. 72*. Following entry of judgments, the only relevant post-performance contractual provision which would still bind the attorney would be a provision requiring that the attorney *not* act—i.e. the contract's provision prohibiting the attorney from settling the case without the consent of the client. *Ex. I-125, paras. 3-4*. The trial court's conclusions on breach, and criticism of the attorney's conduct, are focused on a July 29, 2006 email sent by the attorney. The court concluded that the attorney "had no right to convey to the client that the client's authority to not only become involved in the settlement but to make the final decision was primary." *CP 1807, conclusion 72; CP 1808, conclusion 73*. The portion of the email message from the attorney to the client to Forbes targeted by the court is at Ex. I-282:

The contract also gives me the authority to settle or compromise the claim, so long as I submit the compromise to you. Two things result. 1) Even though I am not required to obtain your agreement on the counter, I am trying to work with you on it...

*Ex. I-282.*

The court found that this language, even though motivated by a sense of betrayal that was understandable, was a failure "to professionally respond to the client's self-dealing." *CP 1809, finding 81, and CP*

1807, findings 72, 73; CP 1809, finding 80. But failure to professionally respond to self dealing differs from breach of a contract.

What is conveyed in the message by the attorney is not an intent to breach; to the contrary, the attorney is threatening to enforce the contract—she is simply misstating it. CP 282 (“the contract gives me the right to settle...”); see Ex. I-125, para. 3, but see para. 4; RP 827, Ins. 4-11. The comment did not indicate the attorney would breach. To the contrary, the same message segues into a discussion of how the client can compromise the claim, but needs to understand how the fee agreement will operate against that settlement to understand the net result of the figure urged as a counteroffer. *Id.* Moreover, the objective evidence of action around this message is also contrary to breach. Efforts were made by the attorney to involve the client in the settlement the entire week before the message was sent. Exs. I-269-280; Exs. F-68-72. And following the message, those efforts continued. Ex. I-282; CP 1806, finding 60, CP 1291, paras 27, 28, 29; CP 1310; CP 550, paras. 125, 126. Even after discharge, the attorney continued to try to urge the client’s new counsel, Michael Hines, to protect the client’s interests in the settlement she was effecting. RP 940-941. Moreover, the client herself did not take the message as a breach. Forbes testified that this July 29<sup>th</sup> email message did not cause her to discharge Schultz. Instead, it was not until the following

Monday, after Forbes had met with Lukins and Annis attorneys four separate times following the email, that she decided that the her reason for discharging Schultz would be that Schultz had “not conveyed her settlement offer.” *RP 98, lns. 4-9; CP 1805, finding 51.*

In sum, while unacceptable in a professional sense, no breach or repudiation of a contract occurs because a statement is made which erroneously purports to follow the contract, when no action is ever taken on the statement, and where instead, all other statements and all actions were contrary to any breach.

It was error for the trial court to conclude that the attorney had breached a fully performed contingency agreement.

## V. CONCLUSION

The trial court erred in applying the settlement contingency of a fully performed contingency fee agreement against a post judgment settlement effected unilaterally by the client. So long as those judgments remained existent, the client had no ability to diminish the attorney’s equitable interest in the value of the services performed through judgment, i.e. the trial contingency against the judgments obtained at trial, by accepting a settlement of those judgments. This court should reverse and remand for entry of a judgment in favor of the Intervenor for the value of

the trial contingency earned against the judgment values. This court should also reverse and remand to ensure that the prevailing party fee compensation provision agreed upon as compensation for a fully performed contract be properly awarded to the attorney. Finally, this court should reverse the court's conclusion that a breach occurred by this attorney after this contingency contract was fully performed.

DATED this 13 day of Aug., 2007.

Respectfully Submitted,

MARY SCHULTZ & ASSOCIATES, P.S.

  
Mary Schultz, WSBA #14198  
Intervening Party/Appellant/Cross Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on the 13<sup>th</sup> day of August, 2007, she served a copy of the Opening Brief of Appellant to the persons hereinafter named at the place of address stated below which is the last known address via hand delivery.

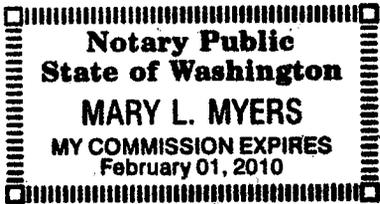
ATTORNEYS FOR RESPONDENT/CROSS APPELLANT:

Mr. Bryce Wilcox  
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Washington Trust Bank Building, #1600  
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Spokane, WA 99201

  
TINA REHM

SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day of August, 2007.

  
NOTARY PUBLIC in and for the State of Washington, residing in Spokane.  
Commission Expires: 2-1-2010



**APPENDIX**

**RCW 60.40.010. Lien created--Enforcement--Definition--Exception**

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

.....

(d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

.....

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2) . The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

.....

## CREDIT(S)

[2004 c 73 § 2, eff. June 10, 2004; Code 1881 § 3286; 1863 p 406 § 12; RRS § 136.]

## HISTORICAL AND STATUTORY NOTES

**Purpose--Intent--Application--2004 c 73:** "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW 60.40.010(4), the statute is intended to apply retroactively." [2004 c 73 § 1.]

### 2004 Legislation

Laws 2004, ch. 73, § 2 rewrote the section, which formerly read:

"An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided: (1) Upon the papers of his client, which have come into his possession in the course of his professional employment; (2) upon money in his hands belonging to his client; (3) upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party; (4) upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice."

Source:

Laws 1863, p. 406, § 12.