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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 253988-III

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

CHERYL FORBES,

Respondent/Cross-Appellant,

v.

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

Defendants,

and

MARY SCHULTZ,
Appellant/Cross-Respondent

PETITION FOR REVIEW

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TABLE OF CONTENTS

| | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. IDENTITY OF PETITIONER..... | 1 |
| II. COURT OF APPEALS DECISION..... | 1 |
| III. ISSUES PRESENTED FOR REVIEW | 1 |
| IV. STATEMENT OF THE CASE..... | 2 |
| V. ARGUMENT..... | 6 |
| 1. This Petition Involves Issues of Substantial Public Interest that Should be Determined by the Supreme Court. | 6 |
| 2. The Court of Appeals' Decision Upholding the Award of Prejudgment Interest Conflicts with a Decision of the Supreme Court and Another Decision of the Court of Appeals. | 11 |
| 3. The Decision of the Court of Appeals Mistakenly Determined (via speculation) that the Amount of the Settlement was \$655,000 more than Actually Received by the Client – Unjustly Awarding Ms. Schultz an Additional \$262,000 in Fees. | 15 |
| VI. CONCLUSION..... | 20 |
| VII. APPENDIX..... | A-1 |

TABLE OF AUTHORITIES

Cases

| | |
|----------------------------------------------------------------------------------------------------------|------------------|
| <u>Cosmopolitan Eng. Group v. Ondeo Degremont, Inc.</u> , 128 Wn. App. 885, 117 P.3d 1147 (2005)..... | 15 |
| <u>Crest Inc. v. Costco Wholesale Corp.</u> , 128 Wn. App. 760, 115 P.3d 349 (2005)..... | 12, 14 |
| <u>Eriks v. Denver</u> , 118 Wn.2d 451, 824 P.2d 1207 (1992)..... | 7, 8 |
| <u>Fisher Props, Inc. v. Arden-Mayfair, Inc.</u> , 115 Wn.2d 364, 798 P.2d 799 (1990)..... | 19 |
| <u>Flint v. Hart</u> , 82 Wn. App. 209, 917 P.2d 590 (1996) | 14 |
| <u>Holmes v. Loveless</u> , 122 Wn. App. 470, 94 P.3d 338 (2004) | 6 |
| <u>Johnson v. Washington State Dept. of Health</u> , 133 Wn. App. 403, 36 P.3d 760 (2006)..... | 18 |
| <u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632 (1998)..... | 11, 12, 14 |
| <u>Merrick v. Peterson</u> , 25 Wn. App. 248, 606 P.2d 700 (1980) | 7 |
| <u>Ross v. Scannell</u> , 97 Wn.2d 598, 647 P.2d 1004 (1982) | 7, 9, 10, 11, 14 |
| <u>Simburg v. Olshan</u> , 109 Wn. App. 436, 988 P.2d 467 (1999)..... | 7, 8, 10 |
| <u>Sunnyside Valley Irrigation Dist. v. Dickie</u> , 149 Wn.2d 873, 73 P.3d 369 (2003)..... | 18 |
| <u>Taylor v. Shigaki</u> , 84 Wn. App. 723, 930 P.2d 340 (1997)..... | 15 |
| <u>Wilson v. Henkle</u> , 45 Wn. App. 162, 724 P.2d 1069 (1986)..... | 13, 14 |
| <u>Woods v. City Nat'l Bank</u> , 312 U.S. 262 (1941)..... | 8 |

Statutes

| | |
|---------------------|----|
| RCW 36.48.090 | 13 |
| RCW 4.24.005 | 14 |

Rules

| | |
|----------------------------------------|---|
| Rules of Professional Conduct 1.5..... | 9 |
|----------------------------------------|---|

I. IDENTITY OF PETITIONER

Petitioner, Cheryl Forbes, asks this Court to accept review of the Court of Appeals decision terminating review as designated in Section II of this Petition.

II. COURT OF APPEALS DECISION

Ms. Forbes requests that this Court review the Division III Court of Appeals published decision in *Forbes v. American Building Maintenance Company West, et al.*, filed on January 8, 2009, affirming, in part, the trial court's decision. Ms. Forbes filed a Motion for Reconsideration to correct an error made by the Court of Appeals. On February 24, 2009, the Court of Appeals denied Ms. Forbes' Motion for Reconsideration. A copy of the Court of Appeals' decision and Order Denying Motion for Reconsideration are attached in the Appendix at pages A-1 through A-35.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in finding that the trial court considered egregious ethical misconduct of the client's attorney when the trial court stated its belief that ethical misconduct was irrelevant to the determination of a reasonable fee payable to the attorney.
2. Whether the Court of Appeals erred in affirming the award of pre-judgment interest on the amount of attorneys' fees and costs payable to Mary Schultz where ABM placed the entire disputed amount of

\$3,572,754.33, claimed via Ms. Schultz' attorney lien directly into the Court Registry, thereby prohibiting Ms. Forbes from using or controlling those funds until released by order of the Washington State Supreme Court.

3. Whether the Court of Appeals erred in "finding" that Ms. Forbes settled her underlying suit for \$5.65 million where the Court of Appeals' "finding" was: (a) contrary to the trial court's uncontested finding that the settlement was for a total of \$5 million (which the Court of Appeals fails to even mention or address), (b) against the substantial evidence that Ms. Forbes, in fact, settled her lawsuit for a total of \$5 million, and (c) based upon speculation that the settlement "apparently" included interest.

IV. STATEMENT OF THE CASE

Over the course of representing Ms. Forbes in her lawsuit against ABM, Ms. Schultz' ethical conduct was described by Professor John Strait as the most egregious and outrageous conduct of an attorney towards a client witnessed in his entire career of reviewing thousands of ethics complaints against attorneys. (CP 862-84.) In fact, the egregious nature of Ms. Schultz' conduct caused Professor Strait to remark:

I have never seen a combination of exploitative contractual relationships plus over-reaching in enforcement such as the instant case.

(CP 883). This evidence was not disputed by Ms. Schultz at trial.

During the course of representation on the underlying case, there were no less than 6 fee arrangements between Ms. Forbes and Ms. Schultz, each of which provided Ms. Schultz with a greater fee and were demanded by Ms. Schultz under threats of abandoning the client's case. (CP 911, 916-17, 949-52, 960-65, 967-73, 2006.) The circumstances surrounding the execution of these fee agreements, as well as their substantive provisions, violated numerous provisions of Washington's Rules of Professional Conduct and rendered the agreements unenforceable. (CP 866-84.) In fact, by the count of Professor John Strait, Ms. Schultz' conduct violated some 35 provisions of the RPC. Id.

Even after the jury verdict was entered against ABM in this case, Ms. Schultz continued to threaten Ms. Forbes with patent untruths regarding the amount of her contingency fee she was going to take from Ms. Forbes. (CP 918.) For instance, in an effort to coerce Ms. Forbes into re-negotiating the fee agreement post trial, Ms. Schultz' knowingly and falsely told Ms. Forbes their retainer agreement provided for a fee of **88%**. (CP 918, 974, 919, 979-80.) It was not until Ms. Schultz conditioned settlement of the underlying claim with another increase in Ms. Schultz' compensation that Ms. Forbes terminated her. (CP 927.)

Specifically, in late July 2005, while ABM's Petition for Review was pending before this Court, ABM made a \$5 million settlement offer to

Ms. Forbes. (CP 927.) ABM indicated it wanted a response to its offer by August 2, 2005, as its Board of Directors was set to meet that day. (CP 2025). Upon receiving ABM's settlement offer, Ms. Schultz told Ms. Forbes her fee was a 44% contingency, **plus** all of the court-awarded prevailing party attorney fees (approx. \$800,000 over and above the contingency fee), **plus** interest, **plus** costs, **plus** interest on the costs, **plus** appellate fees, which totaled over 70% of the settlement offer. (CP 1038, 1043.) While Ms. Forbes disagreed with Schultz' position on the fee calculation, she did not believe it was the time for fee negotiations in advance of formalizing a settlement with ABM. (CP 927.) As such, Ms. Forbes instructed Ms. Schultz to submit a counter offer to ABM for \$5.8 million. (CP 1042.) Ms. Forbes also stated:

I also want to note that I disagree with your interpretation of our fee agreement and how the settlement money is to be split as you outlined in your previous e-mails, as well as this one.

It will be good to get this behind me, and I am sure you as well. Please e-mail me a copy of the counter offer when you mail/fax it to them.

(CP 1042.) In response to Ms. Forbes' directive, Mary Schultz responded:

Per our contract, my fees are already earned at **44% of the judgment** I received for you, **plus** prevailing party fees, **plus** fees on appeal. You may agree to compromise the claim, but I am not prepared to compromise an already earned fee under the conditions of dispute with you. The investment I have made on your behalf is substantial.

The contract also **gives me the authority to settle or compromise the claims**, 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. 2) Given your comment below, until and unless we reach some written agreement on distribution, I will require the earned 44% on the entire amount, plus prevailing party fees, from any settlement that is submitted.

You may email me your proposal as to the fee split and percentage from any proposed counter, and **if we reach an agreement**, I will put it in writing, you can sign, and we can send a counter.

(CP 1043.) (emphasis added).

When Ms. Forbes learned on August 1, 2005, that Ms. Schultz was refusing to send the counter offer to ABM, and instead threatening to cut Ms. Forbes out of the settlement negotiations under demand of fees based upon an unenforceable judgment amount (which was more than the settlement offer), Ms. Forbes had no choice but to terminate the attorney-client relationship. In so doing, Ms. Forbes stated, via e-mail:

I instructed you to submit a counter proposal to ABM last Friday, July 29. In your responsive e-mail to me below, you refused to do so without me meeting your conditions regarding the attorneys fees. You did not submit the counter offer as requested. I am invoking my right per my contract to terminate you as my attorney. This is effective immediately.

* * *

Your refusal to carry out my directions to you and tying [sic] your fee to whether I accept ABM's offer has put me in a very compromising position. I'm going to accept ABM's settlement offer. I'm afraid if I don't act now, all might be lost because of

your actions. I can no longer stand for you to put your interests above mine.

(CP 1047.). Thereafter, Ms. Forbes accepted ABM's initial \$5 million settlement offer. (CP 930, 1048.)

Ms. Forbes and ABM agreed to fully resolve and settle all claims and causes of actions between them, including all claims in the lawsuit, under the terms of a written Settlement Agreement providing for the payment of \$5 million. (A-36-39; CP 1947.) On September 16, 2005, ABM deposited \$3,572,754.33 (the exact amount of the attorney lien filed by Schultz) directly into the Registry of the Spokane County Superior Court. (CP 499.) Ms. Forbes never had possession of the disputed funds. Ms. Forbes' portion of the funds held in the Registry of the Court remained there until they were released by order of this Court on November 21, 2006.

V. **ARGUMENT**

1. **This Petition Involves Issues of Substantial Public Interest that Should be Determined by the Supreme Court.**

The relationship between attorney and client is the foundation upon which the legal profession is built. The relationship is fiduciary in nature and advancement of the client's interests and protection from overreaching goes hand in hand. As stated by Holmes v. Loveless, 122 Wn. App. 470, 478, 94 P.3d 338 (2004), the obligations of the attorney to

the client transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client.

As a result of the unique relationship between attorney and client, Washington has long recognized the trial court possesses considerable discretion to disregard a fee agreement and limit attorneys' fees to a reasonable amount. Merrick v. Peterson, 25 Wn. App. 248, 256, 606 P.2d 700 (1980). While widely recognized, however, there was little guidance as to how attorney misconduct affects that determination until the Washington Supreme Court's decision in Ross v. Scannell, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982).

In Ross, this Court held that professional misconduct may be grounds for denying attorney's fees. As a result, the Ross court directed that – at a minimum – the trial court must consider the charges of ethical misconduct in determining the amount of fees due from client to attorney. Id. at 610 (“we instruct the trial court to consider the charges of unethical conduct . . . in determining the amount of fees due Ross”). Following the Court's decision in Ross, however, there was a lack of specific direction in how courts must “consider” the charges of unethical conduct. Two subsequent cases provide that direction: Eriks v. Denver, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992), and Simburg v. Olshan, 109 Wn. App. 436, 445, 988 P.2d 467 (1999).

In Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992), the Supreme Court ruled that “disgorgement of fees is a reasonable way to ‘discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.’” Id at 462. In so holding, the Court found:

A fiduciary . . . may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well . . . *Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries ‘at a level higher than that trodden by the crowd.’*

Eriks, 118 Wn.2d at 462 (*quoting Woods v. City Nat’l Bank*, 312 U.S. 262, 268-69 (1941) (emphasis added)). Thus, the Supreme Court outlined the standard for evaluating attorney misconduct as requiring “strict adherence” to the rules of professional conduct. Absent strict adherence to the rules, a court is entitled to disgorge fees. See id.

In Simburg v. Olshan, 109 Wn. App. 436, 445, 988 P.2d 467 (1999), Division I of the Court of Appeals concluded that to determine what impact attorney misconduct has on a claim for attorney’s fees, “the finder of fact **must** determine whether there was . . . an RPC violation in this case.” 109 Wn. App. at 446 (emphasis added). Thus, Simburg makes clear that when faced with charges of ethical misconduct, a court must make a finding as to whether the RPCs were violated.

Ignoring this settled authority, the trial court failed to examine any attorney misconduct as it related to the reasonable fee payable to Mary Schultz. Instead, the court focused exclusively on the RPC 1.5 factors. (CP 1809, RP 239-40). On this issue, the trial court stated:

It's my belief and probably will be my ruling when I finish up on this, that the narrow issue before me is the reasonableness of the fee and the things that go into the reasonableness, and I will learn to pronounce that word before long, of the fee are those isolated factors and collateral and related factors that go to those that are outlined in 1.5. That's the nut of what we are doing.

(RP 239-40.) The trial court went on to state:

I do not . . . believe that the conduct goes to the reasonableness of the fees, but it may go to the reasonableness of the termination. Don't know. Have to wait and see. It won't go to quantum meruit in light of -- well, I am going to factor that in. The things I factor in on the reasonableness issues are the 1.5.

(RP 240.) After this initial statement by the trial court, the trial court issued its 17 page Order, which makes no mention of the declaration of Professor Strait or his opinions concerning the 35 ethical violations and fails to reference any of the RPCs violated by Ms. Schultz, or the presence or absence of any ethical violation. (CP 1797-1813.) In fact, the only RPC cited in the entire Order is RPC 1.5, relating to the reasonableness of attorneys fees. (CP 1809.) The trial court's refusal to consider the charges of ethical misconduct was contrary to the Supreme Court's pronouncement in Ross v. Scannell and should have been reversed.

The Court of Appeals glossed over the trial court's mistaken opinion regarding the interplay of ethics in a fee dispute. While the Court of Appeals did note that the "trial court did not specifically mention that Ms. Schultz appeared to condition the submission of a settlement counteroffer on the parties' agreement to the fee distribution[,]" it seems to conclude that the trial court was allowed to, in its discretion, ignore violations of the RPC. (A-21.) The Court of Appeals' decision is incorrect. While the trial court has the discretion to determine the impact of a lawyer's misconduct on the reasonable fee, it has no discretion to simply ignore whether or not a violation of the RPCs occurred. As stated by Simburg, 109 Wn. App. at 446, "the finder of fact *must* determine whether there was ... an RPC violation in this case." (emphasis added).

Given the trial court's mistaken belief that attorney misconduct does not impact the reasonableness of the fees, and the trial court's Order (which only mentions RPC 1.5), it is evident the trial court failed to consider the uncontroverted charges of ethical misconduct by Mary Schultz, which is consistent with the trial court's only comment on the issue. (See RP 239-240.) Having failed to find the presence or absence of a violation of the RPCs, the decision of the Court of Appeals is in conflict with the mandate issued by the Supreme Court in Ross v. Scannell and Division I's decision in Simburg v. Olshan and presents an issue of

substantial public interest to be resolved by the Supreme Court. As such, this Court should accept review of this matter, reverse the Court of Appeals and remand the case to the trial court with specific direction, per Ross v. Scannell, to consider the charges of ethical misconduct and breaches of fiduciary duty in determining the amount of reasonable attorneys' fees.

2. **The Court of Appeals' Decision Upholding the Award of Prejudgment Interest Conflicts with a Decision of the Supreme Court and Another Decision of the Court of Appeals.**

The Court of Appeals affirmed the award of \$226,893.35 in pre-judgment interest on the contingency fee percentage ultimately found payable to Mary Schultz. (A-29, A-30.) The Court of Appeals decision on this issue was contrary to this Court's decision in Mahler v. Szucs, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (finding an abuse of discretion where prejudgment interest was awarded against a party that did not retain the use value of the money).

There are two requirements for an award of prejudgment interest under Washington law: (1) the amount claimed is liquidated or determinable with precision and without reliance on opinion or discretion; and (2) a party retains the use value of the money belonging to another. See Mahler, 135 Wn.2d at 429. Here, neither prerequisite is satisfied.

First, as enunciated by this Court, “[t]he touchstone for an award of prejudgment interest is that a party must have the ‘use value’ of the money improperly.” Mahler, 135 Wn.2d at 429. Effectively, therefore, “an award of prejudgment interest compels a party that *wrongfully holds* money to disgorge the benefit.” Id. at 430 (emphasis added). Thus, it is the *retention* of the “use value” of the money by the party to be charged that triggers the right to prejudgment interest. Id. A party does not retain the “use value” of funds when disputed amounts are held in the registry of the court pending resolution. This proposition was confirmed in Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 775, 115 P.3d 349 (2005).

In Crest, Division I expressly found that a party can prevent the imposition of pre-judgment interest by depositing the amount owed into the registry of the court. Id. at 775-76. By so doing, the Crest court found that prejudgment interest is tolled on the amount deposited with the court. Id. at 776. Therefore, when a party deposits the entire amount claimed by the adverse party into the registry of the court, an award of prejudgment interest is not applicable. See id.

Ms. Forbes did not retain the “use value” of the money. In fact, Ms. Forbes never had possession of any of the disputed funds whatsoever. (A-36-38.) Instead, per Ms. Schultz’ demands, ABM deposited the full amount of her claimed lien into the registry of the court pending resolution

by the trial court. (CP 487-89, 499.) Once the money was deposited into the registry of the court, the trial court became the custodian of the funds with the duty and sole authority to distribute those funds. See Wilson v. Henkle, 45 Wn. App. 162, 169, 724 P.2d 1069 (1986). Ms. Forbes retained no authority or control over the money. In fact, until Division Three of the Court of Appeals and the Washington Supreme Court allowed the release of the funds from the court registry, they remained untouched by Ms. Forbes. Nonetheless, the Court of Appeals wrongly reasons that because the Court Registry required Ms. Forbes to provide them her Social Security number, she retained the use value of the funds. (A-29.) The Court of Appeals' rationale is in conflict with the required procedures put in place by the Clerk of the Superior Court for establishing interest-bearing accounts. Funds deposited into the registry of the court do not automatically accrue interest. See RCW 36.48.090. In order for funds to accrue interest, RCW 36.48.090 establishes that "a litigant in the matter" may file a written request that the funds held in trust be invested. Nothing about this request gives the party making the request control over the money. See id.; 45 Wn. App. at 169.

At all times, the court clerk retained custody and absolute control over the funds pending an order of this Court distributing those funds. Wilson, 45 Wn. App. at 169. In fact, all funds deposited into the court

registry by ABM on September 16, 2005, remained there until the trial court ordered their disbursal, which ultimately was reviewed by this Court.¹ (CP 499-500) Thus, Ms. Forbes did not have the “use,” control, or benefit of any of the funds held in the registry of the court. Instead, the funds were under absolute control of the trial court and could not be removed without the authority of the trial court. Id. As such, an award of prejudgment interest was improper. See Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 776, 115 P.3d 349 (2005) (finding that prejudgment interest is tolled on the amount deposited with the court). Thus, the Court of Appeals decision in this matter conflicts with the Supreme Court’s decision in Mahler and Division I’s decision in Crest.

Second, the determination of a reasonable attorney fee is an unliquidated claim. Flint v. Hart, 82 Wn. App. 209, 226, 917 P.2d 590 (1996). In determining the amount of fees payable to Ms. Schultz, the trial court was required to exercise its discretion in light of the charges of ethical misconduct. See Ross v. Scannell. Ms. Forbes urged the trial court to disregard the fee agreement in its entirety and award appropriate fees

¹ As this Court will remember, Ms. Schultz challenged the release of the funds from the Court Registry and attempted to block Ms. Forbes access to those funds. It was not until the Washington Supreme Court denied review and lifted the temporary stay that any funds were released from the Court Registry to Ms. Forbes. (See 11/21/06 Washington Supreme Court Ruling).

under quantum meruit. (RP 29-30). Ms. Forbes expressly motioned the court to exercise its discretion in setting the fee under RCW 4.24.005, which calls for the court's exercise of discretion. (CP 501); see Taylor v. Shigaki, 84 Wn. App. 723, 732, 930 P.2d 340 (1997). The trial court was required to determine what fees were "reasonable" in its discretion. Therefore, it was an unliquidated amount for which prejudgment interest is improper. See Cosmopolitan Eng. Group v. Ondeo Degremont, Inc., 128 Wn. App. 885, 895, 117 P.3d 1147 (2005) (finding claims unliquidated where "the sum's precise amount 'must in the last analysis depend upon the opinion or *discretion of the judge or jury.*'").

3. **The Decision of the Court of Appeals Mistakenly Determined (via speculation) that the Amount of the Settlement was \$655,000 more than Actually Received by the Client – Unjustly Awarding Ms. Schultz an Additional \$262,000 in Fees.**

Ms. Forbes received a total of \$5 million in settlement from ABM. The Court of Appeals found that Ms. Schultz was entitled to "40 percent of [the] 'amount reached in settlement.'" (A-16.) The Court went on to wrongly conclude that "Ms. Forbes provides no evidence that the amount she reached in settlement with ABM was anything other than the \$5,655,176.70 listed in the satisfaction of judgment." (A-16-17.) This

was clear error that should be corrected by this Court.² The amount of the settlement was an uncontroverted issue and finding of the trial court, which was adequately supported by the evidence. (CP 1810.) The evidence disputes the Court of Appeals' mistaken conclusion that Ms. Forbes provided "no evidence" of the settlement amount.

First, Ms. Forbes' Statement of the Case in her opening brief (Brief of Respondent/Cross-Appellant) refers to the fact that she settled her lawsuit for \$5,000,000. (See Forbes Brief at 25, 39, 69 ("Ms. Forbes accepted ABM's \$5 million settlement offer as a final resolution of all the claims she had against ABM. (CP 930, 1048).").

Second, evidence relied upon in Ms. Forbes' opening brief references her letter to ABM accepting its \$5 million settlement offer: "Please be advised that I accept your settlement offer of \$5 million for final resolution of all claim matters between us." (CP 1048.) ABM's confirmation of this acceptance is also in the record on appeal and confirms the settlement amount as \$5,000,000. (Schultz Trial Exh. I-289.)

Third, Ms. Forbes testified at trial that she only received \$5,000,000 in settlement. The pertinent testimony is as follows:

² The amount listed in the satisfaction is merely a reference to the amount of the judgment entered by the trial court, not the amount of the settlement. CP 382-391 (adding up the amounts from Judgment Summary A, B, and C produce the amount utilized in the Satisfaction).

Q. What's the total amount of your settlement with ABM?
A. Five million.

(RP 364.) This testimony was in the record on appeal and more than adequately supports the trial court's finding that Ms. Forbes received \$5 million from ABM in settlement of her lawsuit. This testimony was unchallenged by Ms. Schultz at trial. In fact, Ms. Schultz testified: "It doesn't matter to me what she received. I'm not challenging or not challenging it. **It is not an issue here.**" (RP 703.)

Lastly, a copy of the Settlement Agreement and Release in the record on appeal confirms the amount reached in settlement. The agreement provides, in part: "ABM will pay a total of \$5,000,00 (Five-million dollars) (the "Settlement Amount")." (CP 1947.) Specifically, the Settlement Agreement provides, in part: "ABM will pay a total of \$5,000,00 (Five-million dollars) (the "Settlement Amount")." (CP 1947; A-36-39). Indeed, the copy of the Settlement Agreement unambiguously provides: "The Settlement Amount described above constitutes the sole compensation to Forbes, and thus includes any and all cost and attorneys' fees that she might otherwise seek from ABM." (A-38.)

Taken together, the evidence in Ms. Forbes' opening brief and the record on appeal more than adequately supports the trial court's factual finding that the ABM suit was settled for \$5 million. This evidence also

shows that the Court of Appeals was in error in concluding that “Ms. Forbes provides *no evidence* that the amount she reached in settlement with ABM was anything other than the \$5,655,176.70 listed in the satisfaction of judgment.” (A-16, 17.) Therefore, this Court should accept review and reverse the Court of Appeals’ “finding” that Ms. Forbes settled her case for \$5.65 million. Failure to do so would result in a manifest injustice by requiring Ms. Forbes to pay hundreds of thousands of dollars as a contingency percentage on funds she never received. Alternatively, this Court could accept review and remand this issue to the Court of Appeals for further consideration, as requested pursuant to Ms. Forbes’ Motion for Reconsideration that was summarily denied by the Court of Appeals.

In addition, the Court of Appeals applied the incorrect standard of review to the trial court’s determination that the amount of the settlement “apparently” included interest and amounted to \$5.65 million, as opposed to the \$5 million actually received.

Under established Supreme Court precedent, findings of fact are reviewed for substantial evidence. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). And, the Court of Appeals will not substitute its judgment for that of the trial court when reviewing findings. See id. As such, “review is deferential, requiring the

appellate court to view the evidence and its reasonable inferences in the light most favorable to the prevailing party in the highest forum that exercised factfinding authority.” Johnson v. Washington State Dept. of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006); see also Fisher Props, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (finding the court presumes that the trial court’s findings are adequately supported by the evidence).

Here, the trial court found “[a] settlement of \$5,000,000 resolved the case[.]” (CP 1810-11.) This finding was supported by ample evidence, such as Ms. Forbes’ testimony, confirming letters with ABM, and the actual settlement agreement itself. Without any reference to the trial court’s finding, however, the Court of Appeals incorrectly concluded that Ms. Forbes settled her case for \$5.65 million. The Court of Appeals improperly substituted its judgment for the trial court and reversed an uncontroverted finding that was supported by an abundance of unrefuted evidence.

The Court of Appeals improperly speculated that the amount referenced in the Satisfaction of Judgment included interest received by Ms. Forbes. (See A-16 (“Apparently the satisfaction of judgment amount includes interest[.]”). The Satisfaction of Judgment was just one document in a settlement package required by ABM that was filed with

the trial court, which also included a signed Order vacating the Judgment (A-37; CP 503-04). If the Court of Appeals was unclear on this issue, it should have remanded the determination of the amount received by Ms. Forbes to the trial court for further proceedings. By speculating that the amount received by Ms. Forbes was \$5.65 million (which is erroneous), the Court of Appeals subjected Ms. Forbes to liability without redress that infringes upon notions of fundamental fairness and due process. Therefore, this Court should accept review and correct the Court of Appeals error as to the amount of the settlement.

VI. CONCLUSION

For the reasons stated herein, this Court should accept review of the Court of Appeals decision terminating review, reverse the Court of Appeals determinations on consideration of the charges of ethical misconduct and pre-judgment interest and correct the Court of Appeals mistaken conclusion as to the settlement amount received by Ms. Forbes.

RESPECTFULLY SUBMITTED this 26th day of March, 2009.

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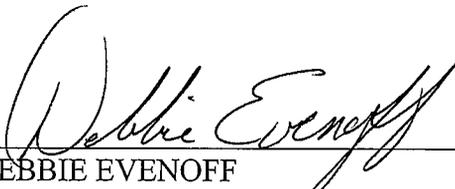
Attorneys for Petitioner Cheryl Forbes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of March, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

| | | |
|------------------------|-------------------------------------|----------------|
| Ms. Mary E. Schultz | <input type="checkbox"/> | U.S. Mail |
| Mary Schultz Law, P.S. | <input checked="" type="checkbox"/> | Hand Delivered |
| Davenport Tower | <input type="checkbox"/> | Overnight Mail |
| Penthouse Suite 2250 | <input type="checkbox"/> | Telecopy (FAX) |
| 111 South Post | | |
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|----------------------------------|---|--------------------------|
| CHERYL FORBES, |) | No. 25398-8-III |
| |) | |
| Respondent and |) | |
| Cross-Appellant, |) | Division Three |
| |) | |
| COLLEEN MYERS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | PUBLISHED OPINION |
| |) | |
| AMERICAN BUILDING |) | |
| MAINTENANCE COMPANY WEST; |) | |
| ABM JANITORIAL SERVICES; |) | |
| ABM INDUSTRIES INC., |) | |
| |) | |
| Defendants, |) | |
| |) | |
| MARY SCHULTZ, |) | |
| |) | |
| Appellant. |) | |

KULIK, A.C.J.—Spokane attorney Mary Schultz represented Cheryl Forbes in an employment discrimination suit against ABM Industries Inc. and American Building Maintenance Company West (collectively “ABM”). Ms. Schultz and Ms. Forbes entered into an attorney fee contingency agreement that promised Ms. Schultz 40 percent of amounts reached in settlement or 44 percent of any judgment after a trial on the merits.

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

Ms. Forbes won a jury verdict and the judgment was affirmed on appeal to this court.

Forbes v. ABM Indus., Inc., noted at 127 Wn. App. 1003, 2005 WL 914836.

While ABM's petition for review was pending, Ms. Forbes fired Ms. Schultz and settled with ABM for less than the trial judgment. Ms. Schultz then demanded 44 percent of the trial judgment, plus statutory prevailing party fees and costs. The trial court awarded Ms. Schultz 40 percent of the settlement amount plus appellate fees, posttrial fees, and costs. The court ordered Ms. Forbes to pay prejudgment interest of 12 percent from the date of settlement on the contingent fees.

Ms. Schultz appeals, contending she is entitled to 44 percent of the original judgment because her services under the contract were completed when judgment was entered after trial. She also argues that she is entitled to the statutory prevailing party fees awarded in the trial judgment. In her cross-appeal, Ms. Forbes contends (1) the trial court erred by refusing to consider ethical misconduct and breaches of fiduciary duty when setting a reasonable fee; (2) the final contingency fee agreement was unenforceable for lack of consideration; and (3) the trial court incorrectly computed the fee and interest.

We agree with the trial court that the contract was ambiguous on the application of the contingency fees. Reading the contract against its drafter, we further agree that Ms. Schultz is entitled to only the settlement contingency (40 percent) applied to the amount

received in settlement. But we also conclude that the amount actually received in settlement was the amount stated in the satisfaction of judgment. Accordingly, we modify the trial court's order and award Ms. Schultz 40 percent of the amount stated in the satisfaction of judgment, plus the additional fees and costs determined by the trial court. We affirm the judgment as modified.

FACTS

Ms. Forbes sued ABM in 1999 for sex discrimination, creating a hostile work environment, and retaliation. Her action and that of another former ABM employee were joined for trial. *Forbes*, 2005 WL 914836, at *1. Because they were dissatisfied with the performance of their first attorney, the plaintiffs contacted Ms. Schultz in 2000. At that time, discovery was nearly done and the trial was scheduled to begin six months later. Little had been done to develop a theory of recovery for Ms. Forbes.

After the original attorney withdrew in December 2000, the plaintiffs asked Ms. Schultz to represent them. The parties' initial contract in January 2001 stated that Ms. Schultz would investigate the viability of the claims at an hourly rate. She agreed to take the case in February, but only if the clients would pay a hybrid contingency fee that included one-third of any amount reached in settlement or 40 percent of any judgment after trial, plus \$100 per hour (to be deducted from any contingency fee earned) and

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

statutory prevailing party fees. The clients would pay all costs as they were incurred.

This agreement was signed on February 26, 2001. An amended version of this agreement was signed on May 17, 2001. That same day, Ms. Forbes and Ms. Schultz signed a similar fee agreement for a different employment discrimination suit against another employer.

Ms. Schultz and her clients discussed litigation expenses at various times from September 2001 through May 2002 when Ms. Forbes and the other plaintiff were delinquent in their payments of costs and hourly fees. As a result, the parties met on May 24, 2002, and agreed that Ms. Schultz would pay costs as they arose while the clients would remain responsible for—and make their best efforts to assist with—cost payments. Additionally, Ms. Schultz agreed to waive past defaults on the hourly fee. In return, Ms. Schultz would receive an increase in the contingency fee and would buy life insurance on her clients to secure the cash outlays. This new contract was sent to the plaintiffs in July 2002 and was edited by Ms. Schultz at their request in October and November 2002. It was executed on November 5, 2002.

Ms. Schultz obtained a continuance of the trial date, joined for trial American Building Maintenance Company West's parent corporation, ABM Industries Inc., wrestled with intricate and difficult discovery regarding ABM, and successfully defended

against ABM's motion to sever. She was also pursuing Ms. Forbes's separate action against another employer.

The six-week ABM trial resulted in a verdict for Ms. Forbes of \$4 million. The other plaintiff was not successful and is not involved in this appeal. Posttrial, Ms. Schultz defended against ABM's motion to vacate and motion for a new trial, and successfully pursued prejudgment interest (\$270,890) and taxable consequences recovery (\$759,893) for Ms. Forbes. The trial court awarded Ms. Schultz \$504,737 in statutory attorney fees under RCW 49.60.030(2) and \$84,378 in costs through September 23, 2003. Ms. Schultz also obtained a favorable settlement for Ms. Forbes in the separate action involving a different employer.

After trial, Ms. Forbes could not find employment, so Ms. Schultz hired her as office manager at Ms. Schultz's law firm. Citing stress and related health problems, Ms. Forbes resigned in mid-March 2005.

When ABM filed an appeal in February 2004, Ms. Schultz initially exercised her option under the contract not to undertake the appeal. Ms. Schultz arranged for Ms. Forbes to hire appellate counsel, who agreed to do the appeal for 1 percent of the verdict plus prevailing party fees. Appellate counsel withdrew just before the respondent's/cross-appellant's brief was due and Ms. Schultz rewrote the brief, timely filed it, and argued the

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

case on appeal. This court affirmed and awarded Ms. Schultz additional attorney fees incurred after trial as well as attorney fees and costs on appeal. *Forbes*, 2005 WL 914836, at *16.

After the appeal, the judgment was worth close to \$7 million. ABM then filed a petition for review at the Washington Supreme Court. *Forbes v. ABM Indus., Inc.*, No. 77154-5 (Wash. June 3, 2005).

In the months following the judgment and after it was affirmed on appeal, Ms. Schultz and Ms. Forbes could not agree on attorney fees or costs. Ms. Forbes understood the contract to state that the 44 percent judgment contingency covered fees on appeal, while Ms. Schultz argued that she was entitled to an additional two percent of the judgment: one percent to her and one percent to appellate counsel for his involvement. They also disagreed on whether the 44 percent contingency or the 40 percent contingency would apply if the case settled. Ms. Schultz began to suspect that Ms. Forbes was receiving advice from another attorney on the fee agreement and settlement. In fact, Ms. Forbes was in contact with attorneys at the Spokane law firm of Lukins & Annis during those months, especially in July and August 2005.

On July 26, 2005, ABM sent Ms. Schultz a settlement offer of \$5 million with a request to reply, if possible, by August 2, 2005, when the board of directors would meet.

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

The offer noted that, with taxes and an attorney contingency fee of 40 percent, Ms. Forbes would actually recover more with a settlement of \$5 million than she would with a judgment that was now worth—according to ABM—around \$6.2 million. Ms. Schultz responded to the offer by having an accountant assess the taxable interest and sending that information to Ms. Forbes. She also showed Ms. Forbes the benefits of counter-offering \$6 million.

On the morning of Friday, July 29, 2005, Ms. Forbes e-mailed Ms. Schultz and directed her to reject the \$5 million offer and to counter with \$5.8 million. Ms. Forbes continued, “I also want to note that I disagree with your interpretation of our fee agreement and how the settlement money is to be split as you outlined in your previous e-mails.” Forbes Ex. 74. Ms. Schultz responded later that morning with language that suggested she would not submit the counter offer until she and Ms. Forbes reached an agreement on distribution of the settlement:

Cheryl,

Surprising comments.

Per our contract, my fees are already earned at 44% of the judgment I received for you, plus all prevailing party fees, plus fees on appeal. You may agree to compromise the claim, but I am not prepared to compromise an already earned fee under conditions of dispute with you. The investment I have made here on your behalf is substantial.

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

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

am trying to work with you on it. 2) Given your comment [in the previous e-mail], until and unless we reach some written agreement on distribution, I will require the earned 44% of the entire amount, plus prevailing party fees, from any settlement that is submitted.

You may e[-]mail me your proposal as to the fee split and percentage from any proposed counter, and if we reach agreement, I will put it in writing, you can sign, and we can send a counter.

I will refrain from forwarding any more financial assessment information or correspondence, as it appears you are addressing your own interests independently, and I will do the same.

Forbes Ex. 74.

The following Monday, August 1, 2005, Ms. Forbes sent an e-mail to Ms. Schultz firing her:

I instructed you to submit a counter proposal to ABM last Friday, July 29. In your responsive e-mail to me[,] you refused to do so without me meeting your conditions regarding the attorney fees. You did not submit the counter offer as requested. I am invoking my right per my contract to terminate you as my attorney. This is effective immediately.

You no longer are my attorney, nor do you represent me in this matter at this juncture. Please have no communication to ABM or anyone else on my behalf.

I'm further afraid that you have put ABM's \$5 million settlement offer in jeopardy. You know that ABM wanted my answer to their offer before their Board meeting tomorrow. Your refusal to carry out my directions to you and tying [sic] your fee to whether I accept ABM's offer has put me in a very compromising position. I'm going to accept ABM's settlement offer. I'm afraid if I don't act now, all might be lost because of your actions. I can no longer stand for you to put your interests above mine.

Forbes Ex. 76. In her faxed acceptance of the settlement offer that same day, Ms. Forbes

advised ABM that Ms. Schultz was no longer her attorney and instructed ABM to direct all communication to her new attorneys at Lukins & Annis.

Ms. Schultz filed a notice of lien on August 2, 2005, for \$2,213,545 (the 44 percent contingency fee after the trial judgment), \$589,115 (prevailing party fees and costs), \$92,958 plus interest (posttrial and appellate fees and costs), and interest on all the above. She filed an amended notice of lien two weeks later for a total of \$3,572,754 plus 12 percent interest from August 2, 2005. Ms. Schultz then filed a motion to intervene and an intervenor's motion to enforce the fee agreement.

On September 16, 2005, Ms. Forbes filed a satisfaction of judgment for \$5,655,177 and a stipulated motion to vacate the judgment due to the settlement.¹ She filed a motion for determination of the reasonableness of attorney fees and costs on September 23, 2005. In October 2005, Ms. Schultz filed a motion for an award of fees pursuant to the Court of Appeals' decision.

The parties' motions were heard by the trial court in a week-long hearing in March 2006. In findings of fact and conclusions of law entered in May 2006, the trial court found that Ms. Schultz took on a "factually and legally difficult and risky"² case and

¹ The order vacating the judgment was entered on September 30, 2005.

² Clerk's Papers (CP) at 1740.

“provided exemplary service and professional expertise . . . at great risk.”³ The court also found, however, that Ms. Schultz did not have the right to state that she could make the final decision on a settlement. With regard to Ms. Forbes, the trial court found that she “engaged in suspicious conduct after the trial, up to and including and beyond the time of settlement, as evidenced by her contact with attorneys at Lukins & Annis.” Clerk’s Papers (CP) at 1749. Finding that both parties were experienced businesspeople, the trial court concluded that “[e]ach used [her] considerable talents, during this unfortunate and contentious time, in inappropriate ways.” CP at 1750. In fact, the trial court suggested that Ms. Forbes deliberately fired her attorney to maximize her share of the generous verdict. Finally, the trial court found that “[w]hat is somewhat unusual is the history in this case of the complete breakdown and self-dealing on the part of the client, and the attorney failing to professionally respond.” CP at 1751.

The trial court concluded that the judgment was never enforceable or executed because the case was settled and the 44 percent contingency on a judgment was not applicable. Accordingly, the trial court concluded that the contractual provision for 40 percent of the settlement applied. The court also stated that this amount was fair and reasonable, as were the additional appellate fees (minus the lodestar factor) of \$61,162

³ CP at 1749.

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

and the posttrial fees of \$35,377, less amounts previously paid or reduced by a small claims court decision. Finally, the trial court awarded Ms. Schultz statutory attorney fees and costs.

In amended findings of fact, conclusions of law, and an order filed on July 3, 2006, the trial court removed the award of statutory attorney fees and costs, but added prejudgment interest of 12 percent on the awarded contingency fee from the date of the settlement. Ms. Schultz filed a notice of appeal to this court on August 1, 2006, and Ms. Forbes filed a notice of appeal (now designated the cross-appeal) the next day.

ANALYSIS

CONTINGENCY FEE FOR SETTLEMENT AFTER JUDGMENT

Ms. Schultz contends she is entitled to 44 percent of the trial judgment plus the statutory prevailing party attorney fees awarded in the judgment. She argues that she had fully performed under the contract when the judgment was entered after trial. The trial court concluded, however, that the trial judgment was not executed and was not enforceable. Accordingly, the trial court concluded that the provision in the contract referencing 44 percent of “any judgment after a trial on the merits” did not apply. CP at 556.

The meaning of a contract provision is a mixed question of law and fact, with the intent of the parties controlling. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). We determine this intent by viewing the contract as a whole, its objective, the conduct of the parties, and the reasonableness of the parties' interpretations. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). Extrinsic evidence may be considered whether or not the contract terms are ambiguous. *Id.* at 669.

"[R]esolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts." *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). When, as here, the trial court has weighed the evidence, we review the findings of fact for substantial evidence and then determine whether the findings support the conclusions of law and judgment. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991); *Bloor v. Fritz*, 143 Wn. App. 718, 730, 180 P.3d 805 (2008). We presume the trial court's findings are adequately supported by the evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Additionally, this court defers to the trial court's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence as well as the credibility of the witnesses. *Boeing Co. v. Heidi*, 147 Wn.2d 78,

87, 51 P.3d 793 (2002).

In this case, the trial court concluded that the contingency fee provision in the attorney fee contract did not specifically cover settlement after trial and entry of the judgment. The court also concluded that there were ambiguities and errors in the fee agreement. The relevant sections of this provision support these conclusions:

5. Contingency Fee: The Attorney's fees shall be a sum equal to 40% percent 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 party to the action, less payments made by the Client pursuant to the Hourly Rate provision in Paragraph 6.

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 reached on each matter if settled independently. . . . Conclusion of the case shall be deemed to include settlement, judgment after suit, arbitration award, appeal award, or termination by Client. The Client understands that she has the right to request the Court to reduce the Attorney's fee in this matter if she believes the fee to be excessive.

CP at 556.

Ms. Schultz contends the contract is not ambiguous because the settlement contingency clearly relates only to settlement before a judgment is entered. She does not show, however, where the contract otherwise provides for the specific circumstances of this case.

As stated in the quoted provision above, attorney fees are due at the conclusion of the case, and conclusion of the case includes settlement or judgment after suit. The conclusion of the case here was by settlement, not by judgment after trial. Consequently, the right to attorney fees did not arise under the contract until the case concluded with the settlement. And the only provision in the contract related to settlement set the fees at that time as 40 percent of the amounts reached in settlement.

The attorney fee agreement is ambiguous on the applicable contingency when, after a successful trial and appeal, the client settles. Generally, an ambiguity in a contract is resolved against the drafter. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Ms. Schultz not only drafted this contract, but she amended it on more than one occasion in the course of the parties' relationship. If she had intended to provide herself a specific contingency for settlement after a trial on the merits and judgment, she could have drafted appropriate language clearly indicating that the parties agreed to that contingency. Under the actual terms of the contract, however, the evidence supports the trial court's conclusion that the settlement contingency controls.

At issue in *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997), however, was whether an attorney, who had substantially performed under a contingency agreement and was then fired before the client settled, was entitled to the contingency fee for

settlement, or merely an hourly fee.

The parties in *Taylor* had a provision in the attorney fee contract providing an hourly fee for services rendered if the client discharged the attorney. Usually an attorney who is discharged before full performance under a contingency fee agreement is not entitled to the contingency fee. *Id.* at 728. Ms. Forbes and Ms. Schultz agreed to an hourly fee with similar language. Ms. Schultz was fired just before Ms. Forbes accepted the settlement offer. But *Taylor* noted that Washington courts recognize an exception when the attorney is discharged after substantially performing his or her duties. “This exception prevents clients from firing their attorneys immediately before the contingency occurs to avoid paying a contingency fee.” *Id.* at 728-29.

But here, there is no dispute that Ms. Schultz had substantially performed her duties when she was fired. She was entitled to a contingency fee under the contract. *See id.* at 730. However, *Taylor* does not support her assertion that she was entitled to the judgment contingency rather than the settlement contingency.

Ms. Schultz also contends the trial court erred by refusing to award her the civil rights prevailing party fees awarded in the trial judgment. The fee agreement states that in addition to the contingency fee, Ms. Schultz is entitled to direct payment of any prevailing party attorney fees and costs awarded in a civil rights action.

In its first findings of fact, conclusions of law, and order in the current action for attorney fees, the trial court awarded statutory fees and costs along with the contingency fee. After Ms. Forbes's motion for reconsideration, however, the trial court removed the award of statutory fees and costs from the amended findings and conclusions.

Ms. Schultz characterizes the statutory fees in this action as the same statutory prevailing party fees awarded by the trial court in the original judgment. She is incorrect. The trial court here awarded her statutory fees for being the prevailing party in the attorney fee controversy, not for her work in the original civil rights claim. As stated in the trial judge's letter to the parties: "I believe that I was in error awarding statutory attorney fees and costs." CP at 2413. As discussed above, the original judgment was vacated after settlement. Consequently, Ms. Schultz's award of statutory prevailing party fees in the judgment was also vacated. The trial court did not err by failing to award her those separate fees.

Ms. Schultz also notes that the satisfaction of judgment shows that Ms. Forbes received a total of \$5,655,176.70, yet Ms. Schultz was awarded a percentage of only \$5 million. Apparently the satisfaction of judgment amount includes interest ("together with interest"). CP at 497. The amended contract states that the contingency fee is equal to 40 percent of "amount reached in settlement." CP at 556. Ms. Forbes provides no evidence

that the amount she reached in settlement with ABM was anything other than the \$5,655,176.70 listed in the satisfaction of judgment. Consequently, Ms. Schultz is entitled to 40 percent of \$5,655,176.70 minus amounts previously paid, plus the appellate and posttrial fees and interest as awarded by the court in its July 2006 amended order. The trial court's order is so modified.

EFFECT OF ATTORNEY AND CLIENT MISCONDUCT ON ATTORNEY FEES

Ms. Forbes raises several issues on cross-appeal. She first contends the trial court erred by failing to consider Ms. Schultz's ethical misconduct and breaches of fiduciary duty by determining the reasonableness of the attorney fees. Ms. Forbes also challenges the trial court's conclusion that she breached the attorney fee contract.

At the outset, we address Ms. Schultz's motion to strike portions of Ms. Forbes's reply brief. Ms. Schultz contends pages 4 through 36 of the respondent's reply brief should be stricken because Ms. Forbes assigns error to findings by the trial court that were unchallenged in the respondent's opening brief. These findings address Ms. Forbes's "suspicious conduct"⁴ with Lukins & Annis, her "certainly unwarranted"⁵ firing of Ms. Schultz, and that "some would say she deliberately fired Mary Schultz to

⁴ CP at 1807.

⁵ CP at 1808.

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

maximize [her] share of the generous verdict.”⁶ The motion to strike was referred to this panel in a June 9, 2008 commissioner’s ruling.

RAP 10.3(g) requires an appellant or cross-appellant to assign error to specific findings of fact, with reference to each finding by number. This court will review only a specific assignment of error or an error clearly disclosed in an associated issue.

RAP 10.3(g). And errors raised for the first time in a reply brief are generally too late. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Ms. Forbes did not assign error to all of the specific findings of fact related above. She assigned error only to the trial court’s conclusions of law that each party breached the contract and that Ms. Forbes was not justified in firing Ms. Schultz. In her discussion of the assignments of error, however, she did challenge the trial court’s interpretation of the evidence that Ms. Forbes’s contact with Lukins & Annis was suspicious.

This court will, in appropriate cases, waive technical violations of RAP 10.3(g) when the opening brief makes the nature of the challenge clear. *Harris v. Urell*, 133 Wn. App. 130, 137, 135 P.3d 530 (2006), *review denied*, 160 Wn.2d 1012 (2007). Moreover, technical violations of the rules will not bar review when justice is to be served.

Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979). Although Ms.

⁶ CP at 1809.

Forbes's argument in the opening brief focuses on the ethical misconduct of Ms. Schultz, she also asserts that her own conduct did not constitute breach of the attorney fee agreement. Because the nature of the challenge is clear, we waive Ms. Forbes's technical violations of RAP 10.3(g) and deny Ms. Schultz's motion to strike. We, therefore, review the entirety of Ms. Forbes's contention that the trial court abused its discretion by determining the reasonableness of the attorney fees.

Contracts for attorney fees are continually reviewed for reasonableness throughout the relationship of the client and attorney. *Holmes v. Loveless*, 122 Wn. App. 470, 473, 94 P.3d 338 (2004). The factors set forth in RPC 1.5(a) are properly used by the trial court as a guideline for determining whether the fee agreement is reasonable. *See, e.g., Allard v. First Interstate Bank*, 112 Wn.2d 145, 149-50, 768 P.2d 998, 773 P.2d 420 (1989). These factors, which were considered by the trial court in its conclusions of law, include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services[;]
- (4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

CP at 1810. A fee agreement that violates the RPC is against public policy and unenforceable. *Holmes*, 122 Wn. App. at 475. Moreover, professional misconduct may justify denying or disgorging fees. *Id.*

Ms. Forbes contends the trial court failed to examine any evidence of attorney misconduct and instead focused entirely on the factors of RPC 1.5(a). The findings and conclusions prove the contrary. Certainly the trial court carefully considered the factors of RPC 1.5, as evidenced in its findings that Ms. Forbes's case was "uncertain in theory, facts and law"⁷ at the outset; that Ms. Schultz was "concerned that the amount of money, time and effort in costs could bankrupt a law firm like hers"⁸; that the material elements of the fee agreement were "reasonably and fairly disclosed" to Ms. Forbes and she was "not under undue influence"⁹; that Ms. Schultz "provided exemplary service and

⁷ CP at 1798.

⁸ CP at 1799.

⁹ CP at 1801.

professional expertise and that she did so at great risk”¹⁰; that a 40 percent contingency fee for similarly difficult and risky litigation was customary in this locale (erroneously designated a conclusion of law); and that Ms. Schultz is “a skilled and tenacious litigator,” although she “can be very contentious.”¹¹

Additionally, however, the trial court considered conduct by Ms. Schultz that “did not rise to the level of her litigation skills or professional mandate.” CP at 1808. This conduct included wrongfully stating that she could make the final decision to settle without her client’s involvement¹²; engaging in a “contentious and adversarial”¹³ settlement discussion with Ms. Forbes, and failing “to provide the responsible, professional and dignified role that is demanded of attorneys.” CP at 1808. The trial court did not specifically mention that Ms. Schultz appeared to condition the submission of a settlement counteroffer on the parties’ agreement to the fee distribution. But it noted that Ms. Schultz’s “positions” in the e-mail that contained the condition were not justified. CP at 1808.

¹⁰ CP at 1807.

¹¹ CP at 1808.

¹² An attorney does not have authority to compromise and settle a client’s rights without special authority from the client to do so. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980); *Grossman v. Will*, 10 Wn. App. 141, 149, 516 P.2d 1063 (1973).

¹³ CP at 1807.

The trial court concluded that the November 2002 amended contract between the parties was fairly reached, understood by both parties, and was reasonable under the factors of RPC 1.5(a). The evidence supports the findings of fact relied upon by the trial court to reach this conclusion.

The remaining question is whether professional misconduct justified denying fees to Ms. Schultz. Although the trial court found that Ms. Schultz's conduct breached the terms of the fee agreement by failing to comply with the high standards required of attorneys, the court did not conclude that this conduct was egregious enough to require departure from the attorney fee agreement. The trial court tempered its disapproval with recognition that Ms. Schultz's understandable sense of betrayal and the tensions between the parties by the time the appeal was over "successfully tempted Ms. Schultz to take or convey inappropriate positions." CP at 1808.

Ms. Forbes cites several cases where misconduct of an attorney justified denial of fees. For instance, in *Eriks v. Denver*, 118 Wn.2d 451, 462-63, 824 P.2d 1207 (1992), an attorney who represented both promoters and investors was deemed to be in breach of his fiduciary duty to the investors. Citing the trial court's inherent power to fashion judgments, the court affirmed the trial court's decision to deny fees as a reasonable way to discipline the breach of professional responsibility and to deter future misconduct. *Id.*

at 463. This principle was also expressed in *Ross v. Scannell* which stated that “[w]hen an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy, the client may have a complete defense to the attorney’s action for fees.” *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982) (quoting *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967)).

Ms. Forbes claimed Ms. Schultz’s ethical misconduct included (1) successive increases to the contingency fee percentage under threats of withdrawal, (2) a claim to 88 percent of the recovery, (3) an attempt to acquire all of the rights to the settlement, and (4) refusal to submit her client’s settlement request. Ms. Schultz rebutted these claims with evidence that (1) the parties agreed to the fee increases due to Ms. Forbes’s inability to stay current on the costs and hourly fee, (2) she merely pointed out to Ms. Forbes that one—obviously ridiculous—interpretation of the contract was that it awarded her 88 percent of the recovery if she brought a successful appeal, and (3) she never refused to submit a counteroffer.

Ultimately, the trial court has the discretion to decide what impact, if any, a lawyer’s misconduct will have on a claim for attorney fees. *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991). And this court must defer to the trial court’s decisions regarding conflicting evidence. *Weyerhaeuser v. Tacoma-Pierce County Health Dep’t*,

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

123 Wn. App. 59, 65, 96 P.3d 460 (2004). The trial court found that both parties breached the agreement by self-dealing and unethical practices. It also found, however, that Ms. Schultz provided her client “exemplary service.” CP at 1807. The trial court’s decision is supported by the evidence and does not constitute an abuse of the court’s discretion. Ms. Schultz’s misconduct did not justify voiding the contract and denying her fees.

CONSIDERATION FOR THE AMENDED CONTRACT

Ms. Forbes next contends the November 2002 amended contract was unenforceable because it was executed without consideration. The trial court did not make a specific conclusion regarding this issue.

Modification of a contract by a subsequent agreement requires a meeting of the minds and consideration separate from that of the original contract. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007). Consideration is a bargained for act or forbearance, such as a new promise or exchange. *Id.* at 572. Generally the renegotiation of an attorney’s fee after establishment of the attorney-client relationship requires particular attention and scrutiny. *Ward v. Richards & Rossano, Inc.*, 51 Wn. App. 423, 428, 754 P.2d 120 (1988) (citing *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1983)). When renegotiation results in higher fees, the court may refuse to

No. 25398-8-III
Forbes v. Am. Bldg. Maint.

enforce the amended contract unless it is supported by new consideration. *Perez*, 98 Wn.2d at 841.

In *Perez*, the attorney renegotiated his fee upward at the time of settlement based on contingencies that the court later decided were illusory. *Id.* For instance, the attorney claimed that he needed to renegotiate the fee upward because he had to assume several new, additional risks justifying the increased fee. The court noted, however, that by the time of the settlement, all of these additional risks had been dealt with and were nonexistent. *Id.* at 841-42.

Here, the record shows that the final fee agreement between the parties—the November 2002 amended contract—was renegotiated before trial, not during settlement discussions. The trial court found that Ms. Schultz became increasingly concerned that her investment of resources into the case would bankrupt her practice. When Ms. Forbes was unable to keep up with costs and the hourly fee as agreed to in the hybrid attorney fee contract, the agreement was renegotiated to provide that Ms. Schultz would advance all costs, discontinue the hourly fee, and waive past defaults on the hourly fee. In return, the parties agreed that Ms. Schultz would receive a higher contingency percentage if she prevailed on Ms. Forbes's behalf. Ms. Schultz would also buy life insurance on her clients to secure the costs. The trial court found that Ms. Forbes, a successful business

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

woman with litigation experience, discussed these amendments with Ms. Schultz and negotiated changes over several months before signing.

Although the trial court did not specifically conclude that the November 2002 amended contract was supported by valid consideration, its findings show that the parties negotiated with recognition that new circumstances required a new agreement. By signing the amended contract, Ms. Forbes was no longer in default on costs and the hourly fee, and Ms. Schultz was protected with a higher potential recovery. Valuable consideration was exchanged. The renegotiated November 2002 contract was, thus, enforceable. *Pappas*, 98 Wn.2d at 841-42; *Dragt*, 139 Wn. App. at 571-72.

COMPUTATION OF THE FEE

Ms. Forbes challenges the trial court's award of prejudgment interest and computation of the fees and costs. She contends prejudgment interest is not warranted and the calculations of fees and costs are not supported by the evidence.

I. Prejudgment interest. Prejudgment interest is allowed in civil litigation when a party to the litigation retains funds that rightfully belong to another and the amount of the funds is liquidated, meaning that the amount can be calculated with precision and without reliance on opinion or discretion. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005) (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

632 (1998)). Such interest is also awardable when a claim is unliquidated but is determinable by computation with reference to a fixed standard in a contract. *Hadley v. Maxwell*, 120 Wn. App. 137, 141-42, 84 P.3d 286 (2004) (quoting *Lakes v. von der Mahden*, 117 Wn. App. 212, 217, 70 P.3d 154 (2003)). The policy supporting prejudgment interest arises from the view that one who has had the use of money owed to another should in justice make compensation for its wrongful detention. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 54 (1935)). We review an award of prejudgment interest for abuse of discretion. *Crest*, 128 Wn. App. at 775 (quoting *Curtis v. Sec. Bank of Wash.*, 69 Wn. App. 12, 20, 847 P.2d 507 (1993)).

The trial court awarded Ms. Schultz prejudgment interest of 12 percent on the contingency fee from the date of settlement, minus sums previously paid under the hybrid agreement, and on the remaining costs due in the judgment summary. Ms. Forbes contends Ms. Schultz is not entitled to prejudgment interest because the amount and entitlement to attorney fees was in dispute from the time of settlement. She also asserts that she did not retain the use of the funds because she deposited a portion of her recovery under the settlement in the court registry pending the resolution of this suit.

The fact that a defendant believes he or she does not owe the plaintiff any money

No. 25398-8-III
Forbes v. Am. Bldg. Maint.

does not make a claim unliquidated. *Hadley*, 120 Wn. App. at 143-44 (quoting *Colonial Imports v. Carlton N.W., Inc.*, 83 Wn. App. 229, 247, 921 P.2d 575 (1996)). And “a liquidated claim remains so even if the defendant is partially successful in reducing his or her share of liability.” *Id.* at 144.

The claim here was for attorney fees under an attorney fee agreement. The amount of the claim could be calculated with precision under the terms of the contract. Although both parties disagreed on which terms of the contract applied to the claim of fees—and ultimately disagreed with the terms applied by the trial court—the claim was liquidated because it could be calculated without reliance on opinion or discretion. *See Crest*, 128 Wn. App. at 775. Even if Ms. Forbes had been successful in convincing the trial court to reduce the amount of fees based on Ms. Schultz’s professional misconduct, the claim for fees remained liquidated. *See Hadley*, 120 Wn. App. at 144.

Ms. Forbes cites *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 687-88, 15 P.3d 115 (2000) for the rule that an award of attorney fees is the type of discretionary claim that does not warrant prejudgment interest. But she takes this language out of context. The attorney fees in *Weyerhaeuser* were awarded to the prevailing party at trial and were not computed from the terms of a contract. Fees to the prevailing party in a lawsuit are reviewed for abuse of discretion. *Boeing*, 147 Wn.2d at

90. Accordingly, attorney fees to the prevailing party in a lawsuit generally do not qualify for prejudgment interest. *Weyerhaeuser*, 142 Wn.2d at 687-88. The award here, on the other hand, was calculated according to the terms of the contract and was, therefore, liquidated.

Although prejudgment interest on a liquidated claim ordinarily is a matter of right, a trial court has discretion to disallow that interest when justice requires it. *Colonial Imports*, 83 Wn. App. at 245. Additionally, the interest may be tolled if the defendant tendered the amount due to the plaintiff and the plaintiff refused to accept it. *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988). By placing the amount due in the registry of the court, the defendant may also toll the interest. *Crest*, 128 Wn. App. at 775-76; *Richter*, 50 Wn. App. at 785. The record here shows that Ms. Forbes placed almost \$3.6 million in the court registry in September 2005 as a response to Ms. Schultz's amended notice of lien. Later that month, she directed the Spokane County Clerk to invest the funds in an interest-bearing account for her benefit and with her social security number on the account for tax purposes. She cannot say that she gave up all use of the funds by placing it in the court registry. And clearly Ms. Schultz was deprived of the use of the funds.

Under the circumstances of this case, prejudgment interest was justified because

No. 25398-8-III

Forbes v. Am. Bldg. Maint.

the claim was liquidated and Ms. Forbes retained funds that rightfully belonged to Ms. Schultz under the fee contract. The trial court did not abuse its discretion in awarding Ms. Schultz prejudgment interest.

II. Calculation of attorney fees and costs. Ms. Forbes assigns error to the trial court's calculation of the fees and costs. She challenges the evidence presented by Ms. Schultz and cites her own evidence of amounts already paid toward the fees and costs. The trial court considered the evidence from both parties. We must defer to its resolution of the conflicting testimony when the record contains sufficient evidence to support its findings. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 377-78, 113 P.3d 463 (2005). The designation of fees and costs due and the amount to be deducted from those fees and costs is supported by Ms. Schultz's evidence. This evidence is sufficient to support the trial court's decision.

ATTORNEY FEES ON APPEAL

Ms. Schultz did not request attorney fees in her appellant's brief. In the respondent's/cross-appellant's brief, Ms. Forbes included a section that states in its entirety: "Pursuant to RAP 18.1, Ms. Forbes requests that this Court award her attorneys' fees for prosecuting this appeal based upon equitable considerations. [*Rogerson*] *Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d [131 (1999)]." Resp't's

Br. at 74. This statement adequately complies with RAP 18.1(b), which requires the party to devote a section of its opening brief to the request for fees or expenses. Ms. Schultz in her response to the cross-appeal then argues that she should be reimbursed for her fees and costs under *Rogerson Hiller*. Her request does not comply with RAP 18.1(b) because she did not raise the issue in her opening brief.

In her reply to the appellant's brief, Ms. Forbes explains her equitable argument for attorney fees. She contends that she should be awarded attorney fees and costs based on Ms. Schultz's breaches of fiduciary duty, citing *Allard v. First Interstate Bank*, 112 Wn.2d 145, 151-52, 768 P.2d 998, 773 P.2d 420 (1989). Ms. Forbes claims that Ms. Schultz brought this litigation in bad faith. She argues that Ms. Schultz's prelitigation misconduct necessitated termination and required a reasonableness challenge to the requested fees. She also contends Ms. Schultz engaged in procedural bad faith by threatening future litigation, withholding client funds, bringing frivolous motions and then withdrawing them, and threatening to sue Lukins & Annis for tortious interference.

This court may award attorney fees on appeal only if authorized by contract, statute, or a recognized ground in equity. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (quoting *Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 815, 638 P.2d 1220 (1982)). Neither the contract

nor a statute authorizes an award here. The equitable ground of bad faith may justify attorney fees. *Rogerson Hiller*, 96 Wn. App. at 927 (quoting *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267 & n.6, 961 P.2d 343 (1998)).

The three types of bad faith recognized as warranting attorney fees include prelitigation misconduct, procedural bad faith, and substantive bad faith. *Id.* Prelitigation misconduct refers to obstinate conduct in bad faith that wastes private and judicial resources. *Id.* at 927-28. Procedural misconduct includes vexatious conduct during litigation and is unrelated to the merits of the case. *Id.* at 928. Substantive bad faith occurs when a party intentionally brings a frivolous claim, counterclaim, or defense for the purpose of harassment. *Id.* at 929.

Ms. Schultz did not engage in obstinate prelitigation conduct that wasted resources. She also did not engage in unusually vexatious conduct during litigation. Ms. Forbes seems to argue that Ms. Schultz is guilty of substantive bad faith for bringing a frivolous claim or defense. But Ms. Schultz's issues on appeal had merit; she did not engage in bad faith litigation. *See Pearsall-Stipek*, 136 Wn.2d at 267. Accordingly, we deny attorney fees on appeal.

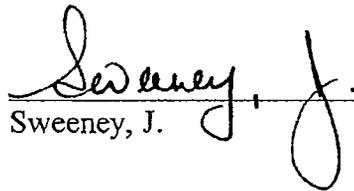
No. 25398-8-III
Forbes v. Am. Bldg. Maint.

In conclusion, we affirm the judgment as modified and award Ms. Schultz 40 percent of \$5,655,176.70.

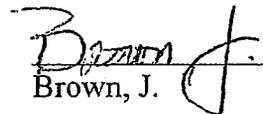


Kulik, A.C.J.

WE CONCUR:



Sweeney, J.



Brown, J.

FILED

FEB 24 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF
WASHINGTON**

CHERYL FORBES,

**Respondent and
Cross-Appellant,**

COLLEEN MYERS,

Plaintiff,

v.

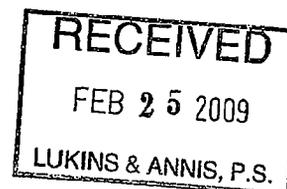
**AMERICAN BUILDING
MAINTENANCE COMPANY WEST;
ABM JANITORIAL SERVICES;
ABM INDUSTRIES INC.,**

Defendants,

MARY SCHULTZ,

Appellant.

No. 25398-8-III



**ORDER DENYING
MOTION FOR
RECONSIDERATION**

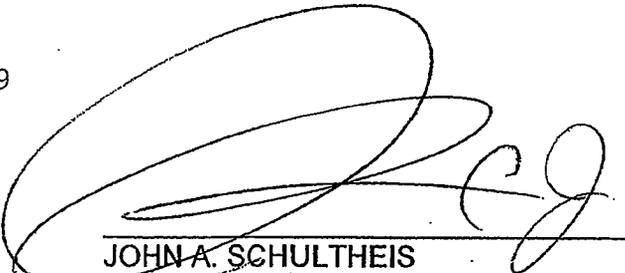
The court has considered Cheryl Forbes's motion for reconsideration and the response thereto, and is of the opinion the motion should be denied. Therefore,

No. 25398-8-III
Forbes v. Am. Bldg. Maint.

IT IS ORDERED the motion for reconsideration of this court's decision of
January 8, 2009, is hereby denied.

DATED: February 24, 2009

FOR THE COURT:



JOHN A. SCHULTHEIS
CHIEF JUDGE

SETTLEMENT AGREEMENT AND RELEASE

Cheryl L. Forbes ("Forbes"), American Building Maintenance Co.-West and ABM Industries Incorporated ("the Parties") enter into the following Settlement Agreement and Release ("Agreement"):

I. RECITALS

A. Forbes was employed by American Building Maintenance Co.-West ("ABMCo.") as a Branch Manager until her employment terminated in February of 1999.

B. In September 1999, Forbes filed a complaint against ABMCo. in Spokane County Superior Court (Case No 99-2-05753-2). In her complaint, Forbes alleged gender discrimination, in violation of the Washington Law Against Discrimination, RCW 49.60 et seq. Later, Forbes amended her complaint to add ABM Industries Incorporated as a defendant. Both ABMCo. and ABM Industries Incorporated (collectively "ABM"), denied her allegations, and thus denied that its actions with respect to Forbes were in any way unlawful. The case was tried to a jury who returned a verdict for Forbes. ABM appealed the resulting judgment to the Washington Court of Appeal. (Docket number 22656-5-III) The appeal was denied in a decision dated April 21, 2005. ABM has filed a petition for review by the Washington Supreme Court, (Case number 77154-5) and the parties await a decision on that petition (all proceedings described above hereinafter called "the Action").

C. The Parties now desire to settle their disputes and any claims stemming from Forbes's employment by ABM or the ensuing litigation.

II. AGREEMENTS

In consideration of the mutual covenants and promises contained herein, the Parties agree as follows:

A. ABM will pay a total of \$5,000,000 (Five-million dollars) (the "Settlement Amount"). \$4,254,476 of the settlement amount will be designated as emotional distress due to physical sickness. ABM is not in a position to make a technical tax determination as to whether Forbes' injuries qualify for exclusion under I.R.C. Sec. 104(a), but ABM does not dispute characterization of non-wage amounts received by Forbes under their agreement as emotional distress damages due to physical sickness. Payment shall be made as follows:

1. \$3,572,754.33, the amount specified in the August 16, 2005, Amended Notice of Lien filed by Forbes' former attorney Mary Schultz, shall be deposited into the registry of the Spokane Superior Court in an interest bearing money market fund. If it is determined by the Court that Mary Schultz or Mary Schultz & Associates is entitled to any portion of these funds, ABM shall issue a Form 1099 to Ms. Schultz and/or Mary Schultz & Associates reflecting said amounts.
2. \$35,613.33 to Talmadge Law Group. ABM shall issue a Form 1099 to the Talmadge Law Group to reflect this payment.

3. \$1,188,861.24 directly to Forbes by wire transfer to the trust account of her current attorneys, Lukins & Annis, with \$745,524 of this amount designated as wages. \$202,771.10 will be withheld by ABM for payment of federal income taxes, Social Security and Medicare taxes and will be reported on a Form W-2. Payment shall be made within three business days of receipt of the following signed documents, which shall be filed contemporaneously with payment:

1. Stipulated Motion For Vacation of Judgment;
2. Satisfaction of Judgment;
3. Release of Talmadge Lien;
4. Affidavit and Indemnity Agreement for Cancellation of Letter of Credit;
5. Stipulated Motion for Dismissal of Review.

B. Forbes assumes responsibility for the payment of any and all taxes and applicable withholding obligations and shall hold harmless ABM against any and all claims, lawsuits, liabilities, taxes, interest, penalties and expenses, including but not limited to, reasonable attorneys' fees and litigation expenses, resulting from any liability or claim of liability for the payment or withholding of amounts assessed due to any federal, state or local governments or agencies in payment of any obligation resulting from the payment of the Settlement Amount to Forbes. The foregoing in no way limits ABM's obligation to pay the employer's share of any FICA, FUTA and Medicare taxes for which it is responsible as an employer on behalf of Forbes. Forbes agrees that ABM has not made and that she has not relied upon any representations about the taxability of any portion of the Settlement Amount paid pursuant to this Agreement.

C. Forbes assumes responsibility for the payment of any fees, costs, or litigation expenses incurred or claimed on her behalf by any and all former or current attorneys, experts or accountants, including any such claims arising from assignment of the judgment or any claim of lien.

D. The Parties will cause the Action to be dismissed with prejudice and without costs to either Party by executing and filing the Satisfaction of Judgment, the Stipulated Motion for Vacation of Judgment, and the Stipulated Motion for Dismissal of Review.

E. Forbes agrees not to apply for employment with, nor accept an offer of employment from, ABM or any of its parents, affiliated entities or subsidiaries.

F. Forbes hereby releases and forever discharges ABM and its parent corporations, affiliates, subsidiaries, successors, assignees, and their respective partners, agents, officers, directors, employees, associates, attorneys, insurers, and representatives, and former partners, agents, officers, directors, employees, associates, attorneys, insurers, and representatives, and ABM hereby releases and forever discharges Forbes (collectively "Released Parties"), from any and all claims, demands, liabilities, and causes of action of every kind, whether known or unknown, stemming from or in any way related to Forbes's employment by, and termination

from employment with, ABM, including, but not limited to, any and all claims which are, or may be based upon or connected in any manner with any of the matters referred to or encompassed in any of the pleadings, records, or other papers filed in the Action. This release specifically covers, but is not limited to, any whistleblower complaints; physical or mental disability claims under local, state, or federal law; any claims of discrimination based on race, color, national origin, sex, marital status, veteran status, or age (including claims under the federal Age Discrimination in Employment Act); any tort claims; any claims under state or federal law governing the payment of wages; and any claims under any express or implied contract. This release is intended to be all encompassing and includes any and all claims and causes of action that either Party may have against any of the Released Parties that arose on or before the date on which this Agreement is signed.

G. Neither this Agreement, nor the payment made hereunder to Forbes, shall in any way be construed as an admission by ABM that it has acted wrongfully with respect to Forbes or any other person.

H. The parties represent that other than the Action, they have no pending complaints, charges, lawsuits, or claims against the Released Parties with any government agency or any court.

I. The Settlement Amount described above constitutes the sole compensation to Forbes, and thus includes any and all costs and attorneys' fees that she might otherwise seek from ABM.

J. The Parties agree not to make any statements or take any actions to disparage, place in a negative light, or impair the reputation, goodwill, or commercial interest of the other party. Forbes acknowledges that during her employment with ABM she received or became aware of proprietary trade secrets and other confidential information not in the public domain ("Proprietary Information") including but not limited to specific customer data such as: (a) the identity of ABM's customers, former customers and sales prospects, (b) the nature, extent, frequency, methodology, cost, price and profit associated with its services and products purchased from ABM, (c) any particular needs or preferences regarding its service or supply requirements, (d) the names, office hours, telephone numbers and street addresses of its purchasing agents or other buyers, (e) its billing procedures, (f) its credit limits and payment practices. Forbes agrees that such Proprietary Information has unique value to ABM, is not generally known or readily available to ABM's competitors, and could only be developed by others after investing significant time and money. ABM would not have made such Proprietary Information available to Forbes unless ABM was assured that all such Proprietary Information would be held in trust and confidence by Forbes. Therefore, Forbes covenants to hold all such Proprietary Information and any documents containing or reflecting the same in the strictest confidence, and Forbes will not disclose, divulge or reveal to any person, or use for any purpose any Proprietary Information, whether contained in the Forbes's memory or embodied in writing or other physical form.

K. Each Party has had a full and complete opportunity to review this Agreement. Forbes has been represented by independent counsel from Lukins & Annis who have reviewed this Agreement and negotiated its terms on her behalf. Accordingly, the Parties agree that the

common law principles of construing ambiguities against the drafter shall have no application to this Agreement.

L. This Agreement is intended to be a full and final resolution of this matter and sets forth the entire agreement between the Parties. Should it become necessary to enforce the terms of this Agreement, the Parties agree that any such action shall be brought in the state of Washington. In any such action, the substantially prevailing party shall be entitled to receive reasonable attorneys' fees and costs.

Clyde J. Forbes
CLYDE J. FORBES

9-14-05
DATE

ABM INDUSTRIES INCORPORATED

By: Linda A. Humes
George Sandby, Executive Vice-President
LINDA HUMES, SENIOR

9/15/05
DATE

AMERICAN BUILDING MAINTENANCE CO.-WEST

By: Jack Smith
Jack Smith, Senior Vice-President

9/19/05
DATE