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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 253988-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

APPELLANT'S REPLY BRIEF and RESPONSE TO COUNTER APPEAL

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I. REPLY

A. Reply Summary.

This appeal offers a simple premise. An attorney providing services to a client under a contingent fee contract is entitled to be compensated in accord with the specific contingency performance rendered to the client. In other words, if a client gets a trial, a client pays for a trial.

Here, a Plaintiff obligated herself to pay her attorney a trial contingency compensation if the attorney successfully completed her trial. The attorney did so. The client is obligated to pay for the trial she received. Her obligation remains, regardless of what the client and any new lawyer chose to do with the judgments obtained for them. No ambiguities arise under this principle which would render contractual obligations illusory. The rationale of *Taylor v. Shigaki*, 84 Wn. App. 730, 732, 930 P.2d 340 (1997) mandates this outcome.

Respondent's offered precedent supports and re-emphasizes this equity and this law.

B. Argument.

1. **Accepting “ambiguity” in a client’s payment obligation, after full trial performance is given the client, renders the trial contingency illusory.**

Because the word “pretrial” was not included before the word “settlement” in her contract’s contingency paragraph, Respondent Forbes argues that an ambiguity existed in her payment obligation to her lawyer for a fully completed trial on her behalf. She argues that this alleged ambiguity is properly used to reduce her payment obligation, because she settled the case post judgment. *Response Brief at pages 57-59*. But claimed ambiguities may not render contractual obligations illusory. In *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000), the court held that a clause is only ambiguous when, on its face, it is fairly susceptible to two different interpretations, *both of which are reasonable. Id., emphasis added*. In *Taylor v. Shigaki*, 84 Wn. App. at 730, the court held that any reading of a contingency fee agreement which renders contract obligations illusory is not a reasonable interpretation.

Taylor v. Shigaki is directly on point. It stands for the proposition that a client owes [his] lawyer the contingency relative to the specific

performance received by the client from the lawyer, whatever the client chooses to do with the result of that performance. In *Taylor*, a contingent fee agreement contained a provision whereby, if the client were to discharge the attorney, the client would pay the attorney an hourly rate. *Taylor*, 84 Wn. App. at 725-726. The client and attorney came into conflict, and the client fired the attorney. The client accepted settlement, and claimed he was obligated to pay only an hourly rate, as opposed to a contingency, because of the firing. The contract became arguably “ambiguous” as to the situation. But the Appellate court rejected such an ambiguity. *Id.* at 730.

“Contracts need not recite every legal doctrine to avoid ambiguity.” *Id.* at 730. Moreover, a trial court is specifically directed to refrain from giving effect to interpretations that render contract obligations illusory. *Id.* (citing *Kennewick Irrigation District v. U.S.*, 880 F.2d 1018, 1032 (9th Cir., 1989)). “Such a result cannot be sanctioned.” *Id.* at 730.

Notwithstanding that the *Taylor* contract allowed the client to pay his attorney hourly if the client discharged the attorney, the court affirmed payment to the attorney consistent with the settlement contingency of the contract, as the attorney had “substantially performed” representation through that specific contracted task for the client. *Id.* In other words, the

lawyer's substantial performance of the task obligated the client to pay the compensation connected with that specific performance rendered, or the obligation to pay would be illusory. It could, as here, be unilaterally avoided by the client's actions post-performance. This principle controls here.

Intervenor Schultz, as a Plaintiff's attorney, performed a trial for (then Plaintiff) Forbes. Forbes is obligated to pay the trial contingency fee for the trial she received. It was error for the court to construe an "ambiguity" in this contract which renders Forbes's contractual obligation for her trial illusory.

- i). The Attorney Lien Statute is a guideline for interpretation.

Forbes argues that Washington's lien statute does not support her lawyer's ability to be paid her trial contingency because of "unenforceable" judgments. *See Response Brief, p. 71.* She misses the point. Intervenor Schultz's reference to the lien statute is solely to point out that part of a court's analysis of whether an ambiguity exists in a contract must involve interpreting the contractual provisions at issue in a manner consistent with statutory laws. *See Paradise Orchards General Partnership v. Fearing*, 122 Wn. App. 507, 518-519, 94 P.3d 372 (2004),

and pp. 27-29 of Appellant's Brief. RCW 60.40.010(1)(e)'s lien provisions are consistent with the argument that the value of the services rendered is determined on entry of judgment. The statute provides that a post judgment settlement by the client does not affect a lien interest. *RCW 60.40.010 (4)*. The "extent of the value of any services performed by the attorney in the action" is secured. *RCW 60.40.010(1)(d)*. This language is consistent with the theory here, whether or not any lien was ever filed.

As noted by even ethics Professor David Boerner, the obligation owed by Forbes is set at the time of entry of judgments, and the fee owed by the client is liquidated. *See Boerner, CP 1130, Ins. 20-22*.

Forbes argues that it is a "necessary corollary" that a client's decision to settle impacts the amount recoverable by an attorney under a contingent fee agreement. *See Response Brief, p. 68*. A pretrial settlement certainly impacts the amount recoverable by the attorney, as the attorney's fee would be based upon the amount for which the client settled. The same premise is not true after a fully performed trial to judgment, when the fee is liquidated at a certain value against the judgments.

Forbes cites no authority supporting her position that a post-trial settlement by a client reduces a liquidated fee.

2. The Attorney did not contract to represent a client on this case for whatever fee the trial court ultimately determined was reasonable; and the Client did not obligate herself to pay an unspecified fee to be determined by a court in the future. Both parties agreed in advance to the reasonable fee to be paid for specific performance in the Client's case.

Forbes argues that Schultz is entitled only to a “reasonable fee as determined by the court.” *Response Brief at page 63*. Forbes confuses the trial court’s authority to ensure that a contracted fee is reasonable, with the unsupported theory that the trial court gets to make up its own reasonable fee after full performance is rendered under a contract.

In *Venegas v. Mitchell*, 495 U.S. 82, 90,110 S.Ct. 1679 (1990) the United States Supreme Court noted the distinction between what a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement, verses the “reasonable attorney’s fees” ruling of the court as to what a defendant must pay. *Id.* at 90 (holding that the statutory fee section of 42 U.S.C. 1988 “does not interfere with the enforceability of a contingent fee contract.”)

Certainly a lawyer is entitled to only a reasonable contractual fee. *Response Brief at p. 63-65, and see Appellant's Brief at p. 45* (citing RPC 1.5). And as certainly, a trial court may determine if that fee as contracted is reasonable. *Id.* But here, all evidence supported the proposition that the fee negotiated between Schultz and Forbes was reasonable. Experts Richard Eymann and Roger Felice both noted that the total fee owed by Forbes, with both statutory fees and the contingency combined, and including Schultz's hourly fees for doing the appeal, was reasonable. All components combined totaled right around 50% of the value of all judgments entered. *CP 854, lns. 15-22 (Eymann); CP 836, lns. 1-13 (Felice); RP 976-977 (Felice testimony); RP 627, lns. 12-18 (Schultz testimony that total owing under the contract, including appeal fees, was \$3,582,687.20 of judgment valued at \$7,069,550, citing CP 520, lns. 7-11).* All evidence supports that this contract was reasonable.¹ No contrary finding was made. As a result, the trial court's role was to enforce that agreement to ensure that the client properly paid for the services she received.

¹ Professor David Boerner attested that Schultz should be compensated consistent with the contract terms. And Forbes's expert, Professor John Strait, did not attest that the contract and its compensation terms were improper or unreasonable. *See Boerner at 1131; and see Declaration of John Strait, CP 862, et seq. (nowhere attesting that a contract which provided for a 44% contingent fee, plus prevailing party fees was unreasonable per se or outside appropriate guidelines).* Strait opined only that an 88% contingent fee contract would be per se "unreasonable." *CP 877, lns. 19-24.*

As noted in the opening brief of Appellant, and by *Willmington v. J.I. Case Co.*, 793 F.2d 909 (C.A. 8 (IOWA) 1986), provided via Forbes's response (see below at § 4), a court's restructuring of the attorney's contractual arrangement with a client would constitute unwarranted interference in a private contract between a plaintiff and her counsel. *Willmington*, 793 F.2d at 923.

Forbes next writes that “[i]ndeed, Mary Schultz claims that the trial court’s exercise of discretionary authority and oversight of attorney fee agreements violates her constitutional rights.” *Response Brief at p. 63*. This grossly misrepresents the argument. Intervenor Schultz agrees that a trial court has discretion and authority over the policing of contingent fee agreements. *See Appellant’s Brief at p. 45* (citing *RPC 1.5*). But, she argues, upon the trial court’s having determined that a fee agreement is reasonable, if a trial court then reworks the compensation terms of a fully performed contract to its own liking, such action would implicate constitutional prohibitions. *Appellant’s Brief at pp. 43-46*.

3. The claim that an earned fee can be unilaterally reduced by a client's post judgment actions, i.e. settlement, is unsupported by precedent.

Forbes asserts that a trial court may relieve her of her contractual obligation to pay for a trial she received because of what she unilaterally did with the verdicts obtained for her. She argues that because she settled her case post performance for \$2 million dollars less than the value of the judgments obtained for her, through another lawyer, then she has lessened her obligation to her trial counsel in the process. *See Response Brief at p. 65, para. 4.* There is no support for such a proposition. Such unilateral authority over the outcome of an earned fee would allow the client to unilaterally avoid the trial fee and render the client's contracted obligation illusory. *Taylor*, 84 Wn. App. at 730. Forbes remains obligated to pay the contingency applicable to the performance she received from her lawyer. Thus, as with any cost, Forbes needed to take those existing obligations into account in her settlement.

Forbes claims certain precedent as support for her proposition that a lawyer's contingency must be relegated to a part of the "settlement" recovered. The precedent she offers says no such thing. All precedent

offered simply enforces the contractual terms between the lawyer and client.

Forbes submits the case of *Franklin v. Local Finance Co.*, 233 Mo. App. 973, 136 S.W.2d 112 (1940). She argues that it stands for the proposition that the contract percentage that should be used in a settlement is determined by the sum actually received by the client in settlement. *See Response Brief at p. 72.* But the contract language agreed upon between the Plaintiff and his lawyer in *Franklin* said exactly that. In *Franklin*, Plaintiff was obligated to pay his lawyer “fifty percent of whatever amount was obtained in ‘settlement of said claim either by suit or compromise.’” *Id.* at 113. The case did not involve a higher percentage if the attorney took the case to trial for his client. The court enforced the language of the contract.

Forbes cites *McRae v. Weyerheim*, 49 Wn. 194 at 194, 94 P. 924 (1908). She claims it supports her proposition that the attorney’s lien would attach only to the proceeds from settlement, not to a hypothetical and unrecoverable judgment amount. Again, the contract language in *McRae* provided for that result. The fee that the attorney earned for his services was “a part of the judgment that the Plaintiff might thereafter

recover.” See *McRae* at 195. The court enforced the language of the contract.

And Forbes cites *Krippner v. Matz*, 205 Minn. 497, 287 N.W. 19 (1939), for the alleged proposition that a contingency fee is based upon the amount ultimately recovered by the client. Again, in *Krippner*, the contract language provided for this result. The attorney was to receive twenty-five per cent of “any sums *received in settlement* of said claim” (*emphasis in original*) in a pretrial settlement, and thirty-three and one-third per cent (33 1/3%) of any sums “*recovered in this action, or received in settlement of any verdict recovered in the action.*” *Id.* at 499 (*emphasis in original*). The court enforced the language of the contract.

This representation involved a high risk case for the attorney taken on at a high risk time. *CP 1824, Finding 7; 1825, Findings 8, 9.* Forbes and Schultz agreed to the following contractual language for the fee:

“The Attorney’s fee shall be a sum equal to.....(44%) of any judgments after a trial on the merits.....” and;

“7. Recovery of fees: “Additionally, in an action for a violation of civil rights...., and in the event prevailing party attorney fees...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 contingency at para. 5).”

CP 569-570, paras. 5, 7 (original hybrid contingency contract of February 26, 2001); CP 556-57, paras. 5, 7 (amended contract of November 2, 2004) (emphasis added).

By this language, Forbes promised to pay Schultz a fee valued at 44% of judgments Schultz obtained for Forbes. This language does not obligate Forbes to pay a fee based only on “judgments recovered” or only on “post judgment settlement.” As even Professor David Boerner attested, upon entry of Forbes’s judgments after trial, “... the exact amount of fees owed pursuant to their contract (was) capable of calculation.” *CP 1130, lns. 20-22.* Forbes herself understood this. *CP 1382, lns. 9-15, citing Ex. I-282, also located at CP 745.*

The language is fair. If the judgments had been reversed, neither fee would be owed, as there would no longer be “judgments.” But so long as those judgments remained viable, Forbes was bound to pay the fee. As a result, this contractual language served to protect the attorney/client relationship from precisely what occurred here, i.e., the attempted post judgment manipulation by the client of her payment obligation which damaged all parties concerned.²

² Schultz discussed her understanding of the balance that would occur between parties acting in good faith. *RP 843-845.* But neither Forbes nor her new counsel involved Schultz in any discussion about how the fee might be addressed or compromised in settlement, notwithstanding Schultz’s offer to do so. *CP 551, para. 312; and see,*

Forbes's claim that her payment obligation to Schultz can only be based on her post judgment action is thus without support. As noted in *Taylor v. Shigaki*, "Holding clients to the obligations they have undertaken is not punishment." 84 Wn. App. at 730. The judgments Schultz obtained for Forbes remained standing and viable at the time of Forbes's settlement. The agreed upon trial compensation obligation Forbes agreed to pay Schultz under the fee agreement remained owed at the time she settled the case. Forbes needed to consider that debt owed in selecting her settlement figure. The law of contracts, and the holding in *Taylor v. Shigaki*, mandate this result.

4. **A contract providing for a contingent fee and statutory fees is not "per se unreasonable;" such contracts are properly negotiated between private parties to secure contingent representation in difficult cases.**

Forbes argues that the trial court "correctly concluded that Mary Schultz is not entitled to recover prevailing party fees in addition to her

Intervenor's 302, 303(unreturned efforts to communicate with the client). The client could also always ask for relief under the contract itself, which provides for relief if the client believes the attorney's fee to be "excessive." *CP 570, para. 5.* But Forbes never invoked this provision, nor made such an argument. Instead, Forbes argued that Schultz should be paid hourly, or that all of Schultz's fees should be "disgorged" because Schultz was allegedly a "bad actor" operating on a "vulnerable" client. She also offered no expert on her behalf to attest that a contract which required both a contingent fee and a prevailing party fee component was unreasonable or excessive. *See Boerner at 1131, Strait at CP 862 et seq.*

contingency fee percentage.” *See Response Brief at pp. 69-71.* The trial court concluded no such thing. Initially, the trial court awarded the statutory fees and costs. *CP 1754, para. 104, and see CP 557, para. 7 language, citing “statutory fees and costs;” see CP 373, Judgment Summary C and CP 1760, para. D, identifying such for judgment.* It then removed this compensation component, without comment, after Forbes requested reconsideration. *CP 1778-1779; CP 1786-1787; then see CP 1812-1813.* No “conclusion” as to why this was done was ever made.

Because no justification was provided by the trial court as to its rationale for ignoring this statutory fee compensation obligation, Forbes now attempts to claim that a contract with both a contingent fee and a statutory fee component is “unreasonable per se.” Forbes never took this position at trial. She first raised it on a reconsideration motion after trial.³ Civil Rule 59 does not permit a plaintiff to suddenly propose a new theory of the case in a reconsideration motion. *JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999).

³ Following trial, Forbes raised the issue of a “per se unreasonableness” in a July 24, 2006 response to a reconsideration motion brought by Schultz. *CP 2120, 2132, Ins. 1-15; Reply filed by Schultz on July 31, 2006, CP 2167, Ins. 18-26.* The court denied the Intervenor’s motion for reconsideration, and likewise denied Forbes’ Motion for Reconsideration of Additional Issues. *See Order on Reconsideration filed Aug. 18, 2006, CP 2178-2179.*

Moreover, even if such a “per se unreasonable” argument is to be considered, it is specious. In *Venegas v. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679 (1990), the United States Supreme Court held the exact reverse of what Forbes argues here. The *Venegas* court held that a client and attorney may properly negotiate eligibility for the statutory fees compensation component, in addition to the contingency provision of a representation contract. *Id.* at 82, 88. Nothing in the federal law regulates “what plaintiffs may or may not promise to pay their attorneys if they lose or win.” *Id.* at 86-87. No limitations exist on what civil rights Plaintiffs may be free to negotiate with their attorneys in order to obtain that counsel. *Id.*

Thus, in order to present this specious argument, Forbes offers a misread footnote from the earlier Ninth Circuit holding of *Venegas v. Skaggs*, 867 F.2d 527, 534, n. 7 (9th Cir., 1989). But in the footnote, the *Venegas* court was only commenting on the contract language used in that case. Specifically, the contingent fee agreement in *Venegas* required the attorney to deduct the statutory fee recovery from the 40% entitlement to result in the fee owed. *Id.* at 529. Thus, as the court accurately stated in its footnote 7, “[t]he plaintiff’s attorneys are not entitled to both the statutory award and the full amount of the contingent fee.” *Venegas*, 867

F.2d at 534, n. 7. The court's comment is no more than a statement of fact. Respondent's effort at elevation of that comment to a "per se unreasonableness" rule is patently frivolous.

Forbes then offers *Cambridge Trust Co. v. Hanify & King Professional Corp.*, 430 Mass. 472, 721 N.E.2d 1 (1999). She claims that the *Cambridge* court found "dual recovery of court awarded fees and contingency fee to be per se unreasonable." The holding of the case is directly contrary to her claim.

In *Cambridge Trust Co.*, the client argued that a contingency clause in addition to statutory fees rendered a fee agreement unenforceable. *Cambridge*, 430 Mass. at 473. The *Cambridge* court rejected the argument. It held: "We can find no authority that makes it per se unreasonable for an attorney and client to agree that the attorney is to be paid a percentage of a total award....as well as court-awarded attorney's fees." *Id.* at 478. The court enforced the contract, finding a contract with both components enforceable. *Id.* at 475-476, 478.

The confusion arises, again, from Forbes misreading a footnote. In its footnote 9, the *Cambridge* court noted that other courts have differed in their approach, and implying that in the right case, *Cambridge* would as well differ: "Courts have held, however, that a dual recovery of both the

court-awarded attorney's fee and the contingent amount owing under the contract is an 'unwarranted windfall ... which constitutes an unreasonable attorney fee in violation of (the applicable rule of professional conduct)....' We agree with this result." *Cambridge Trust Co. v. Hanify*, 430 Mass. at 480, n. 9. But the footnote cites several cases which must be read to illuminate what the *Cambridge* court meant by this. On so doing, the "unwarranted windfall" principle becomes clear.

The phrase, "unwarranted windfall" applies to situations where the two referenced fee components will be awarded to the client's lawyer, but where the contract was silent as to one – the statutory fees. *Id.* at 478-479.

In *Wilmington v. J.I. Case Co.*, 793 F.2d at 922, cited in the *Cambridge* footnote, the contingency fee agreement between the Plaintiff and counsel was silent as to the statutory fees. The Defendant thus asserted that Plaintiff's counsel would end up with a "windfall" of both the statutory fees and the contingency under the fee agreement. *Wilmington*, 793 F.2d at 922. But the *Wilmington* court required the Defendant to pay the statutory fees. *Id.* at 923. It noted that limiting private party attorney compensation would be an unwarranted interference with a private contract. *Id.* It reaffirmed Eleventh Circuit holdings confirming that a contingent fee contract "represents the client's and the attorney's notions of

a reasonable fee.” *Id.* at 923, *cites omitted*. But because the contract was silent as to how the statutory fees should be treated, it offset the fee award against the contingency for the client as against the attorney. *Id.* at 923.

Consistently, the *Cambridge* court held as follows: “We conclude, however, that where a contingent fee agreement is ambiguous or silent as to how attorney’s fees are to be treated, the contingent percentage must be calculated on the total amount minus the court-awarded fees, with the attorney awarded the greater of the two amounts.” *Cambridge*, 430 Mass. at 478-479. The *Cambridge* court also reaffirmed that the allocation of statutory fees to the lawyer in addition to a contingency is a matter of negotiation between the lawyer and client. “[S]tatutory awards of fees can co-exist with private fee arrangements...[a]nd just as we have recognized that...it is the party’s entitlement to receive the fees in the appropriate case, so have we recognized that it is the party’s right to...negotiate that eligibility.” *Id.* at 476 (quoting *Venegas v. Mitchell*, 495 U.S. at 88.)

The rationale behind the “unwarranted windfall” result is thus revealed as the court’s frowning on compensation paid to the attorney that was neither discussed nor predicted. The phrase applies to prevent “unfair surprise” to a plaintiff who believes the attorney will look to certain fees as a sole source of compensation. *Cambridge*, 430 Mass. at 481.

But here, Schultz's contractual fee was based on a negotiated statutory fee provision, as well as a contingency, both of which appear in Forbes's contracts from the outset of the contingent fee representation. *CP 569-70, paras. 5 & 7; CP 556-57, paras. 5 & 7*. The language is clear that all statutory fees "awarded" are to be paid to the attorney in addition to the contingency. *See CP 556 at para. 7*.

The *Cambridge* court also cites *Int'l Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (C.A. Minn., 1980), in its footnote 9. In this holding, however, the Minnesota court's inquiry was not addressing fee components, but whether the fee agreement as combined resulted in an excessive fee. The attorneys had already tripled their compensation by operation of statute alone, as this was an anti trust case, which allowed for treble damages. *Int'l Travel Arrangers*, 623 F.2d at 1278. No "per se unreasonable" ruling exists in the case.

In *State ex. rel. Oklahoma Bar Assoc. v. Weeks*, 969 P.2d 347, 352 (1998) (*cert. denied* 525 U.S. 1042 (1998)), also cited in the *Cambridge* footnote, the court cites *Venegas v. Mitchell* in also approving the co-existence of both statutory fees and contingent fees in a private contract. 969 P.2d. at 354. The problem in *Oklahoma Bar Association* was that the attorney applied the combined provisions unfairly in achieving a pretrial

settlement result. To wit, the attorney negotiated \$23,417.68 as his statutory attorney fee, then settled the case in a manner which gave him another \$20,000 for his 40% contingency amount. The lawyer's recovery was \$43,417, while the client's recovery was \$30,000. *Id.* at 350. This uneven result did not arise from the client's attempted self dealing on a settlement, as occurred here with a liquidated fee. It arose from the lawyer negotiating a better result for himself than for his client prior to settlement. No such scenario is present here. As evidenced in this case, Schultz's total fee, with appellate fees included, barely exceeded the upper range of a usual contingent fee arrangement as discussed by the WSBA, in spite of the circumstances Schultz took on in this case.⁴

In sum, Schultz was not claiming statutory fees from a contract silent as to such compensation, nor was there evidence or opinion that the combined fee using both components was excessive as against the judgments obtained.

No precedent exists which renders the fee agreement used here "per se unreasonable."

⁴ *Venegas v. Skaggs*, 867 F.2d at 534 n. 7, cited in the *Cambridge* footnote, is discussed above. The contract itself required deductions of one fee from the other, and it was thus improper to award both.

5. The record does not support that the Attorney breached the contingency fee agreement.

Forbes argues that Schultz breached the fee agreement by “failing to act in accordance with the duties for which the attorney was retained.” *See Response Brief at p. 60.* The conclusion is not supported by the trial court’s findings, or the record. The trial court concluded that Schultz’s representation of Forbes was exemplary. *CP 1833, Finding 72.* Schultz obtained multimillion dollar judgments for Forbes at trial, successfully represented Forbes on appeal and paid Forbes’s costs while Forbes remained in default throughout. Throughout the week following the receipt of the settlement offer, Schultz hired an accountant to protect and guide Forbes in making the appropriate counteroffer to ABM. *CP 1831, Findings 54, 55.* This evidence and the court’s findings do not support any breach of fiduciary duty to Forbes.

Forbes argues that Schultz “refused to convey Ms. Forbes’s counteroffer” as a breach of contract. This demonstrates confusion as to the role of an attorney in a settlement process. A lawyer must abide by a client’s decision as to *whether to settle* a matter. *Rules of Professional Conduct (hereafter, “RPC”) 1.2 (a)(emphasis added).* A lawyer is also charged with abiding by a client’s decisions concerning “the objectives of

representation.” *RPC 1.2 (a)*. Here, Forbes’s objective was to settle the case for the best sum available to her. Schultz was assisting Forbes throughout the week following the settlement offer with effecting that very objective. *CP 1831, Findings 53-57*.

The lawyer must also “consult with the client as to the means by which (the client’s objectives) are to be pursued.” *RPC 1.2*. Schultz was doing so. *CP 1831, Findings 53-57*.

But a lawyer must also provide competent representation to a client. *RPC 1.1(b)*. A lawyer must exercise independent professional judgment and render candid advice. *RPC 2.1*. And a lawyer is required to explain a matter to a client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *RPC 1.4*. Schultz was attempting to do all of this. Schultz described in detail the dilemma caused by the method of Forbes’s proposed counteroffer by email, and the reasons why her email demand could not be forwarded as demanded at that time. *RP 664-680*. There is no support for the proposition that when a client says “counteroffer now with this number” preceded by no discussion between the lawyer and client which might allow the lawyer to conform that the client knows what she is doing, that a lawyer must immediately get on the phone and convey that offer.

And Schultz never refused to convey her client's agreement to settle. The trial court made no such finding. Nor did Schultz even refuse to forward a legitimate counteroffer made by her client, as Schultz was not aware of whether or not Forbes was making her request voluntarily, with full knowledge of the ramifications of her choices, or whether she was being improperly influenced by someone else. *RP 671-672*. The trial court concluded that Forbes's firing of Schultz for this "refusal to send a counteroffer" claim was "certainly unwarranted," and was "not justified." *CP 1834, Finding 77; CP 1837, Finding 93*.

Forbes then claims that Schultz breached the fee agreement because, e.g., "Roger Felice believed that Schultz's obligation to pursue the appeal under the November 2002 contract was at best ambiguous." *See Response Brief at p. 61, citing RP 984-985*. This is misrepresentation of the record. First, the contract is clear that no such obligation existed. *CP 560, para. 16*. Second, at "RP 984-985," Felice agrees that the contract does not require Appellate representation. He references some "additional language" he feels is unclear, but does not explain, nor was he asked to explain. *RP 983, lns. 17-18; RP 984, lns. 24-25 and 989 lns. 15-16*.⁵

⁵ The ambiguity was in the payment terms if the appeal was undertaken by the attorney. *See CP 560, para. 16; CP 974 and CP 1383, lns. 4-24(a phrase requiring an increased contingency if the appeal was undertaken was mistakenly omitted).*

Forbes then claims that Schultz breached the contingency fee agreement by “demanding an additional fee” for the appeal because “Schultz was obligated to pursue the case through appeal without more compensation.” *See Brief at p. 61.* Schultz was not obligated to pursue the appeal. *CP 560, para. 16.* And in addition to there being no obligation on Schultz’s part to perform the appeal, Forbes was also substantially in default by the time of the appeal, with over \$100,000 of costs outstanding and owed to Schultz by that time. *CP 735-742.* (Schultz had invested over \$700,000 of time and costs total. *CP 544.*) As Schultz attested, she was financially exhausted. *CP 545, para. 16-18.*

Finally, the only compensation Schultz ultimately claimed on appeal was the statutory fee award already contracted for, per paragraph 7 of the fee agreement. *CP 761, para. 29.* Those additional fees were to be awarded by the Appellate court. *Forbes v. ABM Industries, Inc.*, 127 Wn. App. 1003, 2005 WL 914836 at p. 15 (2005).

Forbes cites *Dagny Management Corp. v. Oppenheim and Neltzer*, 199 A.D.2d 711, 712 (1993) for the proposition that “interference with a client’s right to settle its claim” may rise to a level warranting discharge for cause. *See Response Brief at p. 62.* Schultz did not interfere with

Forbes's right to settle her claim. Forbes settled her claim through other counsel after firing Schultz by email.

Forbes cites *Searcy, Denny, Scarola, Barnhart, and Shipley, P.A. v. Scheller*, 629 So.2d 947 (1983), which is completely inapplicable to this case. In *Searcy*, upon an offer of settlement, the attorney pressured the client into signing a new fee agreement. There are no such facts before this court.

While the trial court did chastise Schultz for her July 29, 2005 11:10 email, *CP 1831, Finding 59*, Forbes herself testified that she believed Schultz was "bluffing." *RP 359, lns. 15-18*.

In sum, Forbes fails to identify any breach by Schultz of any aspect of her fee agreement with Forbes. It was error for the trial court to have concluded that Schultz breached the fee agreement by sending an e-mail Forbes herself knew would not be acted on.

C. Reply Summary.

Intervenor's appeal should be granted. This Appellate court should remand this matter to the trial court to require that Respondent Forbes pay the obligation she contracted to pay her attorney for that attorney's full performance of a successful trial for Forbes, resulting in judgments. Judgment should be entered in favor of Schultz for the remaining sums

owed by this client, including the statutory fees awarded on Jan. 21, 2004, and the additional 4% of the verdicts entered. *CP 372-373*.

II. RESPONSE TO COUNTERAPPEAL

1. Counter Statement of the Case.

Counter Appellant Forbes's statement of the case is a self serving version of events rejected by the trial court in unchallenged findings. It misrepresents the evidence, injects hearsay, and engages in melodrama as to the predictable processes of a representation with a client continuing in default. It should be rejected here as well.

Unchallenged findings of the trial court are treated by the appellate court as verities on appeal. *Fuller v. Employment Security Department of the State of Washington*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988); *State v. Gentry*, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995). Forbes assigns error to only one fact finding of the trial court. The challenged fact is the total amount of fees and costs owed, where Forbes claims error of \$15,208.61, and approximately \$27,000 of costs respectively. See *Counter Appellant Brief, Assignments of Error, p. 1, Assignments 1-6, and pp. 54-55*. All other Findings of Fact entered by the court in its July 3, 2006 order are thus verities on appeal. *CP 1797-1813*.

Forbes's statement contains numerous examples of assertions contrary to unchallenged facts. Examples are as follows: Forbes asserts that Schultz charged Forbes "thousands more than the agreed upon flat fee" in an investigative contract. *See Response/Counter Appeal Brief, (hereafter "Response Brief") at p. 4.* The trial court rejected this claim. The investigative contract was a purely hourly contract, plus costs. *CP 1798, Finding 4; and see, CP 562, title, and para. 2, CP 565, para. 6 (the original hourly contract itself).*

Forbes asserts that she was taken into a conference room and left alone to sign the contract. She states that no one went over the contract with her or explained provisions before, during, or after its execution. *See Response Brief at p. 5.* The court found otherwise. *CP 1799, Finding 10.*

Forbes asserts claimed confusion and emotional vulnerability on her own behalf, along with coercion and undue influence by Schultz in Forbes agreeing to representation contracts. *Response Brief, generally throughout.* The trial court found otherwise. *CP 1801, Findings 25, 27, 75.* Forbes's own testimony was contrary to her assertion. When Forbes signed a corrected version of the February 2001 contract, which had minor changes in it, she did so without even looking at it. *RP 137, lns. 12-14.* She testified that she trusted Schultz. *RP 138, lns. 19-20; RP 139, lns. 14-*

21. Forbes's testimony otherwise generally consisted of transparently fabricated confusion over plain contract terms. *See RP 124-127.*

Forbes claims that ABM had wanted an answer to its opening settlement offer before its board meeting on August 2, 2005. *See Response Brief at p. 24, citing CP 930, para. 24, (where Forbes wrote that Schultz's "refusal to carry out Forbes's directions" placed her in a very compromising position)* The trial court found only that a response was requested by a certain date if "possible." *CP 1805, Finding 53.* In fact, Forbes's claimed dilemma occurred only because Forbes and her new undiscovered counsel misread the settlement letter from ABM, and refused to communicate with Schultz to clarify what ABM's language was intended to mean, creating their own confusion. *See generally, RP 664-650.*

Forbes's statement of the case is also based primarily on her own self serving declarations. But her version of events was meticulously and exhaustively contradicted by a declaration from her attorney, which included pages of documentary support. *CP 1333-1397.* Forbes's version of events also contradicts numerous declarations of numerous individuals who were involved with Forbes during the relevant period. *CP 1132-1250; 1283-1131.*

The trial court found that Forbes's version of events was not credible, by making fact findings rejecting her allegations. *CP 1798-1809*.

Forbes also asserts "facts" which are a standard part of a representation process with a client continuing in default as some sort of melodrama, as if the acts were somehow improper. As an example, she presents appropriate advice from Schultz to Forbes to seek outside representation to assist Forbes with the appeal fee dispute as somehow trying to leverage Forbes. *Response Brief at p. 15*. She states ominously "This constituted the seventh attorney fee contract Mary Schultz presented to Ms. Forbes." *Response Brief at p. 17*. This count would necessarily include not only drafts of the amended agreement signifying the negotiation process between the attorney and client, but contracts on another matter which Schultz successfully completed for Forbes as well. (The Senske case).⁶

Finally, Forbes simply misrepresents the record. Examples are as follows:

Forbes misrepresents that Schultz claimed entitlement to "88%" of the judgments after such were entered. *See Response Brief, pp. 13-14*,

⁶ Only four contracts were executed—the Jan. 18, 2001 hourly investigative agreement, *CP 562-568*, the Feb. 15, 2001 initial hybrid contingency contract, *CP 569-573*, a May 17, 2001 contract which contained no substantive changes, *CP 574-578*, and the amended contingency agreement due to Forbes's default. *CP 555-56*; and see trial court findings at *CP 1798, para. 4, CP 1799, paras. 12 and 13, and CP 1802, para. 29*.

citing CP 918, 974. Her support for this claimed evidence is an email which states the exact reverse. *CP 974; CP 1386, para. 237.*⁷

Forbes claims that Schultz viewed Forbes's case as Schultz's "retirement case." *See Response Brief at p. 50.* And indeed, Forbes's support for this assertion is an interoffice email taken from her counsel's office, where Schultz wrote: "This is my retirement case." *Ex. F-14; and see RP 779, lns. 17-19.* But the e-mail statement is asserted out of context. Reference to the text of the email shows that Schultz wants a trusted investigator to assist with developing the case. In other words, Schultz hadn't even started the investigative process yet, and had no idea of the case's merit. *See RP 1019, lns. 1-4, referencing Ex. F-14; CP 1347-48, para. 51-52.* Schultz attributed the "retirement case" phrase to an attorney friend, who used it to describe a case and client of his own that "ended up basically taking over the next 10 years of his life." *RP 1019, lns. 5-9; CP 1348, lns. 7-10.* It was a "tongue in cheek comment." *RP 1019, lns. 1-2; CP 1348, ln. 8.* Forbes's demeanor in the office was

⁷ In explaining that the strict contract language did not support Forbes's claim that Schultz had to do Forbes's appeal (either) for free while Forbes was in continuing breach, Schultz wrote that, e.g. common sense has to be used in interpreting contract clauses. Otherwise, she notes, a technical reading of the provision could result in an 88% fee, which was clearly not intended: "I think not." *CP 974.*

already being noted. *See. e.g., Declaration of Becky Gilbreth, CP 1166, paras. 6 and 7; Declaration of Mary Holcomb, CP 1215-1217.*

Forbes generally offers confusion regarding the compensation terms of the operative November 2002 contingency fee contract. But post-judgment, Forbes cited those very terms of the contract and ratified their applicability, in the effort to get Schultz to do more work for her on appeal, explaining to Schultz that Schultz was entitled to 44% of Forbes's verdict, plus some \$600,000 of prevailing party fees. *Ex. 125, RP 187, 185.* Her very intent, she stated, was to hold Schultz to the terms of the November 2002 contingency fee contract. *RP 188, lns. 6-10; RP 103-104; RP 407, lns. 4-9.* It was "strictly business." *RP 188.*

Forbes implies that the appeal brief filed for Forbes was the one finished by the Talmadge Law Group. *See Response Brief at p. 18.* But Forbes acknowledged that the brief Talmadge had sent was not the brief that was filed. *RP 322, lns. 8-9, 18-20.*

Forbes states that Schultz "wrote a letter" to Attorney Phil Talmadge accusing Philip Talmadge of poor performance and ethical violations. *Response Brief at p. 18; CP 1013-1014.* Yet sentences later,

she acknowledges that this letter was never mailed. *Response Brief at page 18.*⁸

Forbes states that Talmadge's lien "upset Mary Schultz, as she felt it was airing her dirty laundry." (citing *CP 924*). The lien was filed "commencing at 12% interest, effective immediately." *RP 653, lns. 1-6*. In fact, Talmadge's lien would run against Forbes's portion of the judgments. *RP 653, lns. 8-20*.

Forbes offers claimed comments of others, nearly all of which were universally disputed by those to whom she attributed the comments.⁹ Forbes claimed statements of other attorneys from whom she sought advice, e.g. Bruce Blohowiak and Joseph Delay. This hearsay was unsupported by any declaration from either. *Response Brief at pp. 14 and 15*.

⁸ The "Talmadge letter," turned out to be a dictation by Schultz of a "...kind of venting, free-flow letters...I do these notes and I throw them transcribed back there, and then I take some time to settle down, to cool down, and then I go back and write the letter...." *RP 654, lns. 17-24. RP 655, lns. 3-6*. Talmadge had withdrawn from representation of Forbes on appeal on the date his brief was due for Forbes in Appellate Court, the due date of the response, after a second continuance had been granted to him by the Appellate Court to file the brief. *CP 1009-1012* is a letter sent from Schultz to Talmadge providing some insight into the dynamic from the outset.

⁹ See *Response Brief at p. 16 representing Forbes's claims as to Shannon Deonier, and see contra Declaration at CP 1132; see Declaration of Aukerman 1445; Declaration of Rehm, CP 1311; Declaration of Johnson, CP 1183; Declaration of Rimov, CP 1231; Declaration of Holcomb, CP 1212; Declaration of Gilbreth, CP 1165*.

The statement of the case provided by Forbes was properly rejected by the trial court in its findings. It is contrary to unchallenged trial court findings. It should be rejected here as well.

2. Argument

- a. “Strict construction” may not be used to produce an illusory result. A court may not properly pretend that a trial was never performed by the attorney.

Forbes argues in her appeal that the court was required to strictly construe the fee agreement against Schultz, and thus award Schultz only an hourly fee for a fully performed trial provided her under contingency agreement, because Forbes fired Schultz as she simultaneously accepted a settlement offer. *See Counter Appeal Brief at p. 30.* As noted above at section B(1), this position has already been rejected in *Taylor v. Shigaki*, 84 Wn. App. 732, 930 P.2d 340 (1997). A client’s obligation is to pay for the specific services rendered to her, not what the client does with the result achieved. *Id.*

- b. Forbes's allegation of ethical misconduct/breaches of fiduciary duty by her attorney were considered, and rejected, by the trial court.

Forbes argues that the trial court failed to consider charges of ethical misconduct and alleged breaches of fiduciary duty on Schultz's behalf. *See Brief at p. 33.* Her position is without merit.

The trial court affirmatively admitted all expert declarations relative to both fee reasonableness and alleged attorney misconduct.¹⁰ It considered all aspects of argument.¹¹ *Id.* It directly addressed Forbes's claims of undue influence and coercion in its findings, making findings contrary to all of her claimed violations. *See e.g., CP 1797, et. seq., Findings 10, 19, 20, 25, 27, 37 (Forbes herself assisting in compiling the cost bills and receipts to present such to the trial court for an award of fees), 44, 51, 60, 61, 73, 75, 77, 78, and 81.* The trial court focused its ethical concerns, not on Schultz, but on Lukins and Annis lawyers' involvement in this situation. *See CP 1807, para. 73.* It found that

¹⁰ This included both the declaration of John Strait (*see CP 862 et seq.*) and the declaration of David Boerner. *CP 1128 et seq.* As to reasonableness of the fee, it included the Declaration of Roger Felice, *CP 828 et seq.*, and the Affidavit of Richard Eymann, *CP 845 et seq.; RP 226, ln. 21-RP 228(court's discussion regarding admission), RP 238, lns. 7-10; RP 239.*

¹¹ While noting that attorney misconduct seemed to have little relevance to a determination as to whether a contracted fee was reasonable, *RP 240, lns. 17-23*, it felt that such claims might be relevant as to other issues raised in the case, such as quantum meruit arguments and the termination agreement. *Id.*

Forbes's conduct was "arguably calculated to stiff her attorney." *CP 1809, Finding 78*. It found that Forbes's firing of Schultz was "clearly unwarranted" and "not justified." *CP 1808, Finding 77; CP 1811, para. 93*. All of these findings confirm the trial court's assessment of the lack of merit of Forbes's array of ethical charges.

Ethics Professor Boerner had reviewed the depositions of both parties, the pleadings, and declarations from both sides.¹² Boerner stated that nothing was present in the evidence or the allegations made by Forbes that would justify less than an award of fees consistent with the contract terms. *CP 1131, lns. 5-10*. Professor Boerner opined that, even if the court were to find justification for the termination of an attorney, which Boerner was not addressing, Schultz had fully performed under the written fee agreement before Forbes elected to terminate the relationship. *CP 1131, lns. 5-10*. "Quantum meruit" had no applicability in that situation.

¹² Forbes's expert John Strait had not reviewed any declarations or testimony from Schultz or her affiants. Strait reviewed only evidence from Forbes, Myers, and Duffy. *CP 864*. Strait's declaration evidences no awareness that Forbes was in breach of her cost obligations throughout the trial representation, or that this breach is what caused the need to renegotiate the contract. *See e.g. CP 870, Introduction at paras. 1 and 2*. Strait focuses his greatest objection to Schultz allegedly "claiming entitlement to an 88% contingent fee"--a frivolous assertion by Forbes. *CP 877, lns. 19-21; CP 871, lns. 1-1; CP 884, lns. 10-13*. Strait accepted that Schultz was "refusing to respond to ABM's offer," *CP 875, ln. 3*, yet he had no information from Schultz as to why Forbes's counter could not properly have been forwarded to ABM, nor any understanding that no response was necessary in the timeframe claimed by Forbes. Strait failed to understand the process involved in the preparation of a fee bill, *See e.g. CP 868, para. 3*, and was unaware that, e.g. Forbes herself had prepared the cost bill for the court, including charges for which she wanted her former employer ABM to reimburse her. *CP 876, lns. 14-21*.

CP 1130, lns. 17-22. The trial court accepted that quantum meruit did not apply, as it deliberated its construction and application of the contract terms. *CP 1810, paras. 88, 89, 96, 97, 98, 99.* It also affirmatively found that the termination of Schultz was not justified. *CP 1811, para. 93.* The conclusion is consistent with existing law.

In cases where attorney misconduct impacted fees, the attorney did not give full performance. The fees were not earned as contracted. In *Ross v. Scannell*, 97 Wn.2d 598, 608, 647 P.2d 1004 (1982), cited by Forbes, the attorney did not substantially complete performance of the contract, among other misdeeds. *Id.* at 609-610. In *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), the attorney violated conflict of interest rules with joint representation, which materially impacted the attorney's ability to adequately represent both client. *Id.* at 462. The undisclosed conflict resulted in a breach of fiduciary duty to both clients. *Id.* at 458-459. In *Cotton v. Kronenberg*, 111 Wn. App. 258, 263, 44 P.3d 878 (Div. I, 2002), the lawyer never took the case to trial.

The facts before this court are in no way similar to any of the referenced precedent. Here, Schultz fully performed, and produced an exceptional result for Forbes. Forbes was obligated to properly pay for that specific performance rendered.

c. The November 2004 contract was based upon consideration.

Forbes claims that the November 2, 2004 contract is unenforceable for lack of consideration. *See Brief at p. 39*. Consideration is defined as “[S]omething such as an act, forbearance, or a return promise” bargained for and received by a promisor from a promisee. *Bullseye Distributing LLC v. State Gambling Commission*, 127 Wn. App. 231, 241, 110 P.3d 1162 (2005) (citing *Black’s Law Dictionary*). But Forbes fails to challenge trial court finding 20, which identified and found the specific consideration provided for the amended contract. *CP 1800, para. 20*. Her contention is without merit.

Forbes cites *Rufolo for Use of Rossiello v. Midwest Marine Contractor, Inc.*, 912 F.Supp. 344 (N.D.Ill.,1995). She claims that *Rufolo* is factually similar. *Response Brief at p. 41-42*. The case is not factually or legally similar. In *Rufolo*, new contracts were executed following trial, for appeal purposes. But new consideration was not given by the attorney for appeal performance in *Rufolo*, because the original representation contract did not limit the attorney’s representation to trial. *Rufolo*, at 350, *versus here at CP 572, para. 16 (original contract)*. This case does not involve a post-judgment contract modification, as did

Rufolo. Moreover, the client in *Rufolo* was not in substantial default of their contractual obligations heading into the appeal, as here. The case before this court is readily distinguishable.

Here, Forbes was in continuing and substantial breach of her original 2001 contingency contract at the time of modification. The trial court found that Forbes was responsible for paying costs “as the costs were incurred.” *CP 1798, Finding 7*. Schultz stated: “...On the costs, they weren’t just in arrears. The problem was, they weren’t even trying.” *CP 1338, Ins. 15-17*.¹³ By April, 2002, Forbes was delinquent over \$40,000, including earlier defaulted fees prior to September 11, 2001. *CP 1362, para. 118; RP 688, Ins. 9-14*. The trial court identified the default in its discussion of consideration. *CP 1800, Finding 20(a)(b)*.

R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 61 Mass.App.Ct. 92, 103-104, 807 N.E.2d 211 (Mass.2004) is on point here. In *Granger*, a court found “no merit” in the argument that no consideration existed for an amended agreement which increased the attorney’s compensation, and that the lawyer was entitled to dispute its “obligation” to continue representing the client, in view of a history of

¹³ Forbes was traveling to Seattle to watch depositions which Schultz was taking and paying for on Forbes’s behalf. *CP 1361, para. 116*. She loaned money to Co-Plaintiff Colleen Myers to start a gift shop. *RP 200*.

payment problems. The *Granger* court found that the attorney's willingness to remain in the case, and its discount of current bills, constituted any necessary consideration for an amended "bonus" agreement. The same applies here.

Schultz's agreement to waive defaults, remain in the case, and advance costs and fees moving forward, constitutes consideration as a matter of law.

- d. Prejudgment interest was properly awarded, as Forbes wrongfully withheld all funds due without tender.

Forbes argued that the court erred in awarding prejudgment interest upon the amounts owed Schultz. *See Response Brief at p. 43 through 45.* The court's ruling was correct.

- i) The standard of review as to awards of prejudgment interest is abuse of discretion.

The standard of review to be applied to trial court determinations of prejudgment interest is one of abuse of discretion. *See Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 487-488, 910 P.2d 486 (1996) (citing *Curtis v. Security Bank*, 69 Wn. App. 12, 20, 847 P.2d 507, review denied, 121 Wn.2d 1031, 856 P.2d 383 (1993)).

The trial court was well within its discretion to award interest here.

- ii) A contingency fee agreement results in a liquidated debt owing from a plaintiff client to their lawyer.

Interest is allowed as damages for a party's withholding of amounts due after such becomes due and payable. *Gheen v. Construction Equipment Co.*, 49 Wn.2d 140, 144, 298 P.2d 852 (1956). A trial court may award prejudgment interest: (1) when an amount claimed is "liquidated" or (2) when the amount of an "unliquidated" claim is for an amount due upon a specific contract for the payment of money, and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion. *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 189, 828 P.2d 610 (1992). A "liquidated" claim is "one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." 65 Wn. App. at 189, (citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968)). Under both scenarios, prejudgment interest was proper here.

The contingent contract used here sets the value of Forbes's obligation to Schultz as 44% of the judgments, plus prevailing party fees.

CP 556, 557, paras. 5 and 7. Upon entry of judgment, the amount owed was liquidated. *Id.*; and see *Boerner, CP 1130, para. 5.*

Forbes claims that the inherent right of the trial court to determine if the contracted fees are the reasonable under a contingent fee agreement renders contingency amounts unliquidated. *Response Brief at p. 44.* But her cited authority does not deal with fees owed pursuant to a contingency fee contract. See *Flint v. Hart*, 82 Wn. App. 209, 226, 917 P.2d 590 (1996) (prejudgment interest not awarded on a damage claim by client on a property sale transaction due to the attorney's negligence); and *Weyerhauser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d at 687-688 (Where fees were awarded on an equitable basis, and where no argument existed that the attorneys' fees were liquidated and thus properly the subject of prejudgment interest).

Forbes's theory has already been rejected in *Taylor v. Shigaki*, 84 Wn. App., *supra* at 732. In *Taylor*, a contingent fee agreement provided for two contractual payment clauses—hourly or contingency. But “[b]oth clauses provide an amount that can be computed without exercising discretion.” *Taylor*, 84 Wn. App. at 732. In *Taylor*, the trial court selected the contingency clause it deemed applicable, and awarded prejudgment interest on the sum. This was proper. *Id.* Forbes then claims

that self serving efforts to disgorge Schultz's fees by claiming ethical violations renders her obligation to pay Schultz unliquidated. *Response brief at 44* (citing *Cotton v. Kronenberg*, 111 Wn. App. 258 (2003)). But the *Cotton* case does not address prejudgment interest on a contract claim. And *Taylor v. Shigaki* precludes this result. Claiming nothing is owed, for whatever reason, has never been an excuse for refusing payment under a contract. 84 Wn. App. at 732 (citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968)) (*italics omitted*) (quoting *Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899)).

The court properly awarded prejudgment interest.

iii) Forbes reverses the "use value" equitable exception to prejudgment interest.

Forbes argues that she should not be assessed pre-judgment interest, as equitably, Forbes herself did not have the "use value" of the fees. She reverses the law. The question is not whether Forbes had use of the funds, but whether the party entitled to those funds, i.e. Schultz, was deprived of their use. Prejudgment interest awards rest on the principle that a defendant retaining money which ought to be paid to the plaintiff should pay interest on the money, because the plaintiff loses the "use value" of the money. *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. at

488 (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)); and see *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279, 1282 (1988).

Mahler v Szucs, 135 Wn.2d 398, 430, 957 P.2d 632 (1998) also illuminates the point. In *Mahler*, the Appellate Court held that a party who was owed money had “use value” of funds when the party’s own lawyer held the contested funds in the client’s trust account pending an outcome. The client “could have” invested those funds in her lawyer’s trust account as she saw fit. Thus, as the party owed the funds, Mahler had use value of funds, and was not entitled to prejudgment interest.

Conversely in this case, Schultz, the party owed funds, had no use value of the funds. And Forbes, the party who owed Schultz the funds, invested the funds herself. Immediately after ABM required that the contested funds be deposited in the registry, *RP 692, ln. 5-11*, Forbes unilaterally directed the court clerk to issue a check transferring all the contested registry funds to Forbes’ selected bank, where Forbes thereupon invested the funds into a money market fund under Forbes’s name and her social security number, for her benefit, with her own personal banker, in a selected investment mechanism of her choice, at her chosen rate of interest. *Declaration of Schultz as to Registry Funds, filed June 9, 2006*,

CP 2105-06 and 2108-2109. Schultz had no access to or use value of the funds owed her.

Forbes likewise reverses the holding of *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 774-775, 115 P.3d 349 (2005). In *Crest Inc.*, the party who withheld funds from another who was owed the funds stipulated to the fact that money was owed, but also placed conditions on the release of funds to the party owed those funds. The *Crest, Inc.* court held that any conditional tender did not constitute the tender required to stop the running of interest, as it did not give the party owed the funds the use value of those funds. *Id.* at 775. Prejudgment interest was proper. Per *Crest Inc.*, prejudgment interest is a make-whole remedy grounded in the “sense of justice in the business community ... that he who retains money which he ought to pay to another should be charged interest on it.” *Id.* at 775.

Forbes claims that because the owed fees went into the registry, she is protected from being assessed a penalty for her withholding of funds owed. But such “registry protection” is given only to those who tender proceeds into the registry *as amounts offered to the person owed funds*. Illustrative is *Richter v. Trimberger*, 50 Wn. App. 780, 782, 750 P.2d 1279 (1988).

In *Richter*, the Trimbergers offered Richter \$12,000 – an amount that was agreed to be owed. Richter refused the amount offered. The Trimbergers then deposited the funds they had offered Richter into the registry of the court. The court ultimately ruled that Richter was entitled to the exact amount of the \$12,000 offered into the registry. *Id. at 782*. Richter received the funds from the registry, then requested prejudgment interest. The court denied interest, holding that Richter had access to the money at all times, as it had been offered to him, and placed in the registry for his receipt. *Id. at 785*. He simply refused to accept the money. After appellant filed his claim, respondents again tendered the judgment amount into the registry of the court and appellant again refused to accept the funds. *Richter*, 50 Wn. App. at 785. Thus, because Richter had access to the amount due, i.e., he had “use value,” he was not entitled to prejudgment interest.

Here, Forbes did not use the registry as a depository for funds tendered to Schultz as owing. When Forbes recovered \$5 million dollars from her verdicts, she took \$1.5 million for herself. She threatened Schultz that if Schultz did not accept an hourly fee for her work, and release both Forbes and Lukins and Annis from all claims, they would move to “disgorge” Schultz’s fees. *CP 552, para. 137*. A tender which

stops the running of interest must be unconditional. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. at 775; and see *Jones v. Best*, 134 Wn.2d 232, 242-243, 950 P.2d 1 (1998). Forbes's "tender" of an hourly fee was not unconditional.

Forbes then removed all the liened funds to her own trust account, and invested the funds herself. The funds remained in that account under Forbes's name, without ever being released to Schultz or placed in any account to which Schultz had access at any time, until the trial court ordered such released. *CP 2099*.¹⁴

In promoting a position contrary to this published law, Forbes cites *Sussman, Shank, Wapnick, Caplan & Stiles, LLP v. Henderson, WL 89061 (Div. I, 1999)*, claiming it is "directly on point." *Response brief at p. 46, n. 3*. First, the decision is unpublished. Her citation to this authority is in violation of RAP 10.4(h). Moreover, it is not on point. The attorney in *Sussman* did not complete the representation, withdrawing before trial. There were no judgments, and no contractual formula on those judgments. Nothing ever became liquidated.

¹⁴ At one point, at the urging of the trial court, Forbes agreed in writing to release certain funds, but only subject to a court order, the wording of which she insisted upon controlling. See *Reply Re: Order allowing withdrawal of funds filed March 7, 2006, CP 2101, 2105 generally, and CP 2102, lns. 15-20, 2103*. That order was never entered, and Forbes never ultimately tendered any funds out of the bank account in her name, or moved any funds into Schultz's access, as in *Richter, supra*. The process went nowhere.

Prejudgment interest was well within the court's discretion, and entirely proper.

- e. Forbes breached the fee contract. Separate and apart from the breach, her termination of her Attorney was also unjustified.

Forbes argues that the trial court erred in "finding" that "Forbes breached the contract by terminating of the attorney/client relationship and settling her lawsuit with ABM." *See Response Brief at p. 48, citing CP 1811, Conclusion 92-93.* The assertion is without merit.

First, Respondent recognizes that the finding of breach is actually a conclusion of law. *See Response Brief at p. 48, stating "...[This] is an erroneous pronouncement of the law, and should be overturned..."* But second, the court's conclusion is misrepresented. The trial court did not conclude that Cheryl Forbes breached the fee agreement "by terminating Schultz and settling her lawsuit with ABM as represented." *See Forbes' Brief at p. 48.* The court concluded only that "Each party breached the terms of the contract." *CP 1811, Finding 92.* The evidence was uncontroverted that Forbes was in continuing breach of both the original and the amended contingency fee agreements. *See CP 570, para. 8; CP 1798 Finding 7, CP 556 (in bold), CP 557, para 8 (and insert in bold).*

The trial court found that Forbes was delinquent in costs and fees under the original contract. *CP 1800, Findings 19, 20 (a) and (b)*. These findings are unchallenged, and a verity on appeal. There is no error in the trial court's Conclusion 92 that Forbes breached the terms of the fee agreement.

The trial court then made a second separate and independent conclusion: "Cheryl Forbes's firing of Mary Schultz was not justified." *CP 1811, at para. 93*. A client may, at any time, for any reason, wantonly and without cause whatsoever, discharge an attorney. *See e.g. Respondent's Brief at p. 48 (citing Kimball v. P.U.D. No. 1, 64 Wn.2d 252, 257, 391 P.2d 205 (1964))*. But here, the court is not concluding that Forbes's discharge was not allowed. Its conclusion is that the discharge was not justified. These are two different concepts.

An act that is "unjustified" is defined as an act "a : not demonstrably correct or judicious: unwarranted in the light of surrounding circumstances." *Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002; <http://unabridged.merriam-webster.com> (13 Dec. 2007)*. The conclusion is supported by trial court findings. The trial court found that Schultz performed in exemplary fashion for Forbes. *CP 1807, para. 72*. It entered unchallenged findings

regarding Forbes's questionable motives in the discharge act. *CP 1807, Finding 73, 77*. It found that the actions taken by Forbes were calculated, harmful to her personally, "plain bad judgment" (and) arguably calculated to *stiff* her attorney..." *Id., Finding 73. (emphasis in original)*. It found that she was engaged in self-dealing. *CP 1809, Finding 81*. And it found that "some would say she deliberately fired Mary Schultz to maximize Cheryl Forbes's share of the generous verdict." *CP 1809, Finding 78*.

And indeed, the court made a finding that the discharge was "certainly unwarranted." *CP 1808, para. 77*. "Unwarranted" is defined, in part, as something that is "unjustified." *Webster's Third New International Dictionary, Unabridged. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (13 Dec. 2007)*. The unchallenged findings leading to Finding 77 support this finding as well. In this case, the court's finding and its conclusion has a myriad of applications to the issues presented. As an example, both relate to a provision of the contract which might have allowed Forbes to discharge Schultz and thereby affect Schultz's right in the proceeds Forbes collected. *See CP 560, para. 15*. In the fee contract, the parties agreed that the "unwarranted" discharge of Schultz would not affect nor destroy Schultz's right, interest and lien in the said claim or proceeds." *Id.* The court's

finding that the discharge was “clearly unwarranted” prevented the discharge from affecting Schultz’s interest in the proceeds. *CP 1808, Finding 77.*

And in so finding and concluding, the trial court thus rejected both Forbes’s claim that Schultz’s fees should be disgorged or reduced by Forbes’s professed reasons for discharge, and it rejected Forbes’s claims of unethical conduct. In other words, the trial court found that Forbes’s professed reasons for the discharge were lacking credibility.

The evidence supporting this determination was substantial. In part, Forbes engaged in plain perjury as to her actions.¹⁵ In *Taylor*, the court also noted that the circumstances of the events leading to the

¹⁵ Forbes testified at her deposition that she had not met either Bryce Wilcox or Michael Hines prior to Friday, July 29th. *RP 99, Ins. 24–100, In. 7.* This was patently false. *RP 100, Ins. 8-11, referencing Ex. I-307.* As soon as the verdict was affirmed on appeal in April 2004, Forbes contacted Lukins and Annis. *Ex 307, RP 56, Ins. 8-24.* Forbes testified that she had no attorney she felt was representing her interests on August 1 when she fired Schultz, and believed she therefore had to terminate Schultz. *RP 89, In. 5.* But when Forbes received the Settlement offer from ABM through Schultz on July 27, 2005, she sent it to Lukins and Annis. *RP 66-67.* Forbes received Schultz’s emails to her with financial information and breaking down various financial scenarios, and called Lukins and Annis. *RP 61, Ins. 1-8.* Forbes engaged in four different phone calls with Lukins and Annis on July 28, 2005. *RP 105, referencing Ex. I-302.* It was ultimately revealed that Forbes also spent two hours with three lawyers at Lukins and Annis the morning she fired Schultz and accepted settlement. *RP 71, Ins. 5-24.* In her 12:53 p.m. email to ABM on Aug. 31, accepting ABM’s offer, she notified ABM of her new lawyers at Lukins and Annis, Mike Hines and Bryce Wilcox. *RP 89, referencing Ex. I-285; also see at CP 1944.*

Forbes attempted to cover her and her lawyer’s presentation of this false information to the court by stating “I had not yet signed a contract.” *RP 91; RP 89, Ins. 6-9. RP 91, In. 9.* (Forbes then decided that Lukins and Annis became her lawyers at the time she sent the email to ABM accepting the offer. *RP 92, Ins. 3-16.* The purpose for third party lawyers was to “help (Forbes) with the fee dispute.” *RP 93, Ins. 17-24.*

discharge supported a finding that the client had already determined to discharge the lawyer after he was informed of the settlement offer. *Taylor*, 84 Wn. App. at 731. The court noted that the client's purpose in contacting a third party lawyer was to deprive the lawyer of the contingency fee. *Id.* Here, the evidence was transparent. Forbes began preparing for this same end substantially earlier, without notice to Schultz, while Schultz continued working for her.¹⁶

As to the alleged "deadline" to accept ABM's opening offer, this was illusory. Forbes never spoke to Schultz about whether this Aug. 2nd Board of Director's meeting was any form of a deadline. *RP 88, ln. 11-24.* The offer letter from ABM had no deadline in it. *CP 1938-39; and see RP 87, lns. 1-5, RP 88, lns. 3-7.* The letter actually discussed how the

¹⁶ A year before she discharged Schultz, Forbes attested that she "knew I had grounds for a fee dispute," and began using her position in Schultz's office to copy documents from files and from the office for that dispute. *RP 147, lns. 7-25; RP 148, lns. 21-23.* Co-employee Kristie Auckerman confirmed Forbes's motives. *CP 1447.* Because Schultz had been so successful for Forbes, Forbes decided it was unfair that Schultz should receive so much money on her claims. *Id.* And substantial evidence existed of Forbes's stated desire and her active efforts to harm Schultz in Schultz's own office, while employed there. *See Opening Brief "Statement of the Case," and see e.g. CP 1154,1224-1225, CP 1232-1237, CP 1283-1292, CP 1311-1324, CP 1445, et seq., CP 1132 et seq.*

Forbes concealed her intentions from Schultz to obtain more services from Schultz on appeal. At no time in the 4 and a half years of representation prior to ABM's settlement offer did Forbes tell Schultz that she intended to dispute Schultz's fee provisions. *RP 101-102.* The first time Forbes ever told Schultz she had an issue with Schultz's trial fee provisions was in her July 29, 2005 email. *RP 149, lns. 19-150, lns. 1-13.*

attorney mailing the offer was to be on vacation between July 27th and Aug. 8th. *CP 1939*.¹⁷

In sum, the trial court's conclusion that Schultz's firing was "unjustified" was amply supported by unchallenged findings, and the findings by substantial evidence in the record.

f. The trial court did not miscalculate fees or costs owing.

Forbes assigns error to the trial courts order of fees and costs, claiming that the fees she owed Schultz should be reduced by \$15,208.61, and that the cost bill should be reduced by \$15,960.90, plus \$1,900.04, plus \$9,841.31. *Response Brief at p. 54, 55.*

The appellate court determines whether substantial evidence supports challenged findings of fact, and whether the findings support the conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Amounts due are findings of fact. *See generally Agee v. Smith*, 7 Wn. 471, 472, 35 P. 370

¹⁷ Forbes also testified that the July 29th email from Schultz was not a basis for discharge – Schultz was "maybe bluffing." *RP 359, lns. 15-18*. Forbes decided to fire Schultz on Monday, August 1, 2005, when Forbes allegedly discovered that Schultz had not sent her counteroffer. *RP 359, lns. 12-13; RP 405- 406, lns. 18-15, citing Ex. 75*. Forbes's "counteroffer" could not be sent under the circumstances. *RP 664-680*.

(1893). Thus, the standard of review on amounts owed is whether substantial evidence supports the amount found due by the court.

Substantial evidence supports the amounts found due by the trial court. On May 25, 2005, Schultz accounted for the fee and cost requirements. *CP 1759-1777, Schultz's Declaration of Accounting; CP 1859, para. 102 (court's order)*. In the declaration, Schultz included in her calculations all cost refunds to which Forbes was entitled. Under Forbes's initial hourly investigative contract, no "refund" was available to Forbes, as Forbes tries to claim here. *CP 1760, lns. 1-8*. In the same declaration, Schultz credited Forbes the "\$1,900.04" she seeks here. *CP 1760, lns. 20*. As to the Westlaw charges and the American Express charges, these charges were earlier submitted to the trial court following the Forbes v. ABM verdicts being entered. *CP 740-742*. Defendant duly objected to certain costs and required verification, and Schultz both accepted certain adjustments and provided verification of all others in the form of receipts accepted by the court. *CP 151-344*. The costs to Defendant were reduced by 17% total, based upon Myers's failing to obtain a verdict in her claim. *CP 777, paras. 9-14; 21-24*. Westlaw charges were incurred. *See examples at CP 278, 280-282, 284-286, 320, and see CP 1803, para. 37 (where the court found that Forbes herself*

prepared the invoices for the fee petition, and assisted in compiling the cost bills and receipts to present to the trial court). Those costs were verified and accepted in the award against the Defendant. *CP 777, para. 22.*

Substantial evidence thus supports the court's fee and cost calculations. The trial court did not err in rejecting Forbes's claimed cost and fee reductions.

But more importantly, Forbes was directly responsible for reimbursing Schultz for any and all costs advanced by Schultz on Forbes's behalf, regardless of whether or not the Defendant had to pay such. *CP 557, para. 8.* While the total costs advanced by Schultz for which Forbes was responsible were \$102,584.88, Schultz requested only that Forbes pay the statutory cost provision of the contract. *CP 557, para. 7; CP 755, lns. 23-24; and see CP 735-742, CP 775, judgment summary C.* That award was only \$84,377.88. *CP 775, and 755.* Schultz thus compromised the full cost reimbursement required from Forbes. Instead of appreciating the gesture, Forbes started her cost dispute by using the compromise amount, then deducting amounts from there. *RP 190.* The contract doesn't allow Forbes to deduct costs from what statutory fees were awarded. *CP 557, para. 7.*

Moreover, many of Forbes's claims for credit were nonsensical. Forbes made claims, e.g., such as her presenting an e-mail from Schultz to her office staff, which described Schultz's frustration with how Forbes's behavior was impacting the progress of the case and its cost. *See CP 2006, Ex. I-58, RP 375, lns. 25-37; RP 403, lns. 9-10; see Response Brief at p. 7.* Forbes claimed she should receive a credit of \$37,649 against her attorney fees as a result, i.e., all of the fees incurred from the inception of the representation in January 2001 through September 11, 2001. *RP 375, ln. 25 through 376, lns. 1-17.* Forbes argued, e.g., that she was entitled to employment wages from Schultz in this fee dispute. *See Response Brief at p. 53-54.* There is no support in the law for any offset against a contingent fee owed for a wage claim.

In sum, not only did substantial evidence support use, but Forbes's presentation lacked credibility or merit.

g. The argument for sanctions.

Forbes argues that she should be reimbursed for her attorney fees and costs expended in this appeal. *See Response Brief at p. 74* (citing *Heller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 1313, review denied, 140 Wn.2d 1010 (2000)). Her precedent supports application against Forbes.

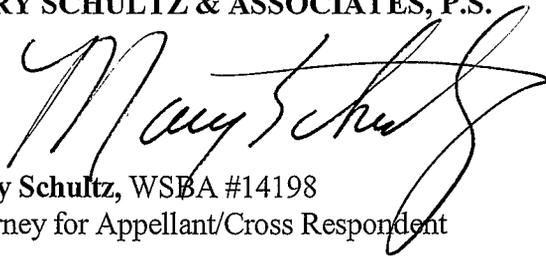
In her counter appeal, Forbes assigns no error to fact findings of the court other than calculation errors. She offers a statement of the case contrary to unchallenged findings, misrepresents evidence, raises issues on appeal that were not raised at trial, and misrepresents case holdings. She cites an unpublished case as support for her position, asserts “general rules” from cases which are specific to the contract language involved, misstates appeal issues, and makes wage claims to this court. She disputes amounts for costs she herself placed into her own cost bill, which were awarded. Fee awards under *Heller Corp. v. Port of Port Angeles* should be considered in this “counter appeal.”

h. Conclusion/Counter Appeal.

For the reasons stated herein, Forbes’s counter appeal should be denied.

DATED this 17 day of Dec., 2007.

MARY SCHULTZ & ASSOCIATES, P.S.



Mary Schultz, WSBA #14198
Attorney for Appellant/Cross Respondent

CERTIFICATE OF SERVICE

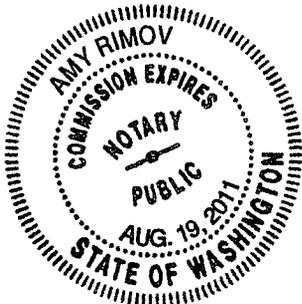
The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on the 17th day of Dec., 2007, she served a copy of the Appellant's Reply Brief and Response to Counter Appeal to the person hereinafter named at the place of address stated below which is the last known address via regular U.S. mail.

ATTORNEYS FOR RESPONDENT/CROSS APPELLANT:

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Tina Rehm
TINA REHM

SUBSCRIBED AND SWORN to before me this 17th day of Dec, 2007.



Amy Rimov
NOTARY PUBLIC in and for the State of Washington, residing in Spokane.
Commission Expires: 8/19/11