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

CHERYL FORBES and COLLEEN MYERS,

Respondent/Cross-Appellant,

v.

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

Defendants,

and

MARY SCHULTZ,
Appellant/Cross-Respondent

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

BRYCE J. WILCOX
WSBA# 21728
MICHAEL D. FRANKLIN
WSBA #34213

Attorneys for Respondent-Cross
Appellant Cheryl Forbes

LUKINS & ANNIS, P.S.
717 W Sprague Ave., Suite 1600
Spokane, WA 99201-0466
Telephone: (509) 455-9555
Facsimile No.: (509) 747-2323

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I. SUMMARY OF REPLY

Contingency fee agreements are necessary and serve laudable societal goals. Indeed, numerous legal scholars and well-respected judges have commented that without contingency fee agreements, many individuals would be unable to pursue meritorious claims to redress wrongs committed against them. Indeed, Ms. Forbes may have been unable to pursue her claims were it not for the availability of a contingent-fee contract.

Notwithstanding their benefits, contingency fee agreements also present an inherent potential conflict between an attorney and a client, as the attorney possesses a direct pecuniary interest in her client's case. To protect against this, Washington lawyers are subject to ethical and fiduciary restraints, which serve to ensure that the interests of the client are advanced in the litigation, not the interests of the attorney. This case presents a situation where the attorney advanced her own pecuniary interests over those of her client, and this appeal centers on the trial court's failure to consider Ms. Schultz' numerous ethical and fiduciary violations in determining what would be a reasonable fee for her services.

Foundational to the trial court's error was its acceptance of Ms. Schultz' argument that because this is not a disciplinary proceeding, the charges of ethical misconduct and ethical violations are irrelevant.

However, Washington Supreme Court precedence is clear that a trial court *must* consider such issues when assessing the reasonableness of attorneys' fees. The trial court's refusal to engage in this process was reversible error. Considering the numerous ethical violations and breaches of fiduciary duty, the trial court should have disgorged Ms. Schultz' fee or determined the appropriate fee using *quantum meruit*.

The trial court also committed reversible error when it loosely concluded that Ms. Forbes was not justified in terminating Ms. Schultz. This "finding" is particularly important, because the written contingent fee agreement drafted by Ms. Schultz provided that she be paid her hourly rate if discharged. Under Washington law, Ms. Forbes had the absolute right to fire Ms. Schultz, which she justifiably did because of Ms. Schultz' conduct. As the trial court's finding that the termination was not justified finds no support with the evidence, the hourly provision of the fee agreement was triggered. Alternatively, even if the termination was not justified in the trial court's mind, it made no finding of bad faith. This is significant because irrespective of whether the termination was justified, the hourly fee provision applied unless Ms. Schultz proved she was fired in "bad faith." As the trial court only determined that the termination was not justified, and made no findings of bad faith, it erred in not enforcing the hourly fee provision in the contract.

The trial court also erred in applying pre-judgment interest to Ms. Schultz' earned fee. Such is only appropriately awarded if no discretion is needed to determine the amount due *and* it is found that Ms. Forbes retained the "use value" of the funds during trial. As the trial court did, or at least should have, exercised discretion in determining Ms. Schultz' fee, it was unliquidated and not subject to pre-judgment interest.

Further, as Ms. Forbes tendered the entire fee claimed owed by Ms. Schultz into the Court Registry, she did not have use of the funds, a fact that provides an independent basis for the denial of pre-judgment interest.

As discussed in Ms. Forbes' previous appeal brief, Ms. Schultz presented, and Ms. Forbes executed, several written fee agreements. Each of these agreements were drafted by Ms. Schultz and most, if not all, provided incrementally increasing financial benefits for Ms. Schultz. In particular, because the November 2002 agreement with the highest contingent fee provisions was not supported by new, valid consideration, it is unenforceable. The trial court's conclusion to the contrary was in error.

Finally, even using its flawed analytical approach and erroneous factual findings, the trial court erred in calculating the fees and costs owed to Ms. Schultz. This resulted in a judgment being entered in favor of Ms. Schultz that was approximately \$48,380 more that it should have been.

II. RESPONSE TO “FACTS” RAISED BY MS. SCHULTZ

Ms. Schultz’ counter-statement of the case asserts a array of irrelevant facts and misstatements of the record. Without a page limit on this reply brief, Ms. Forbes would refute each and every “factual” assertion made by Ms. Schultz with accurate citations to the record. However, in light of the page limitations, Ms. Forbes will only correct the record for facts relevant to this dispute.

A. **Ms. Forbes Challenges Many of the Trial Court’s Factual Findings**

Ms. Schultz asserts that Ms. Forbes assigns error to only one finding of fact. Ms. Schultz is mistaken.

Here, the trial court made a total of 66 express findings of fact. (See CP 1798-1806 at ¶ 1-66.) These are not challenged. After these findings, however, the trial court make certain deductions from the findings: “The court deduces the following from the preceding Findings of Fact[.]” (CP 1806). The trial court thereafter made several observations in paragraphs 67-81 of the Amended Order, many of which Ms. Forbes objects to. (See CP 1807-09.)

Specifically, Ms. Forbes is challenging paragraphs 73, 77, and 78 as being unsupported (and unsupportable) by the evidence. See paragraph 73 (“Ms. Forbes . . . engaged in *suspicious conduct* . . . as

evidenced by her contact with attorneys at Lukins & Annis.”) (finding that Ms. Forbes was using Lukins & Annis in “*suspicious ways*.”); paragraph 77 (“Firing Ms. Schultz was *possibly* calculated and certainly unwarranted”); and paragraph 78 (“*[S]ome would say* [Ms. Forbes] deliberately fired Ms. Schultz to maximize [her] share of the generous verdict.”). Phrases such as “possibly calculated,” or “some would say” are speculative observations and not findings of fact made by the preponderance of the evidence. As such they must be disregarded.

To the extent this Court considers these “deductions” made from the factual findings to be findings of fact, Ms. Forbes challenges them as not being supported by substantial evidence. For instance, the trial court’s comment that Ms. Forbes engaged in suspicious conduct as evidenced by her contact with attorneys at Lukins & Annis lacks evidentiary support and is pure speculation. The *only evidence* of communication between Lukins & Annis and Ms. Forbes related to a one-page privilege log identifying the parties present, the type of contact, the date of the contact, and the length of communication. (Exhibit I-307; RP 23) The substance of the communications between Ms. Forbes and Lukins & Annis was privileged, so neither party offered evidence about what was discussed during these meetings. As nothing could be deduced solely from the fact Ms. Forbes had discussions with another attorney, she objected to

evidence relating to the fact of these communications (See RP 66-67).

Nonetheless, the evidence was admitted over these pre-trial objections and used at trial to infer improper conduct. It was entirely unwarranted for the trial court to speculate something “suspicious” occurred merely because contact was made between Ms. Forbes and a Lukins & Annis attorney.

Notably, Ms. Forbes offered to conditionally waive the attorney-client privilege leading up to the date of Ms. Schultz’ termination in order to rebut the conspiracy theory.¹ However, Ms. Schultz, through her counsel, refused to stipulate to a conditional waiver of the attorney-client privilege. Because Ms. Forbes did not want to risk a general waiver of all attorney-client communications, she could not explain what was discussed with Lukins & Annis attorneys before she fired Ms. Schultz. Suffice it to say, Ms. Schultz’ refusal to allow Ms. Forbes to conditionally waive the privilege for communications with Lukins & Annis before she was terminated, while preserving the privilege for post-termination communications, shows Ms. Schultz was not interested in the truth about Ms. Forbes’ contact with Lukins & Annis, but wanted to engage in “cloak and dagger” speculation about a scheme to deprive her of her “earned”

¹ Ms. Forbes requested the verbatim report of proceedings from this pre-trial hearing, but the court reporter moved out of state and failed to provide the requested proceedings. Nonetheless, Ms. Schultz cannot deny that this occurred as stated herein.

fee. The fact that the trial court appears to have accepted this theory, at least in part, amounts to reversible error.

Additionally, the trial court's comment that firing Ms. Schultz was "possibly calculated" and certainly unwarranted is not a finding.² It is theoretical observation and, as such, it was reversible error for the trial court to base its conclusions on it. If this Court determines that these speculative comments are findings, they are challenged on appeal. As discussed at length in Ms. Forbes' opening brief, Ms. Schultz was fired because she elevated her interests over her client's. Consequently, it was reversible error for the trial court to conclude that the termination was unwarranted.

The trial court also stated that while the facts never did clearly establish Lukins & Annis was involved in any specific unethical conduct, Ms. Forbes was using the firm in suspicious ways. Again, other than evidence that Ms. Forbes spoke to Lukins & Annis attorneys prior to terminating Ms. Schultz, which is not disputed, there was no evidence that Ms. Forbes' contact was improper. The inference apparently drawn by the trial court was wholly speculative and merely an endorsement of the

² What makes these comments additionally perplexing is that they are inconsistent with the trial court's holding that Ms. Schultz' email to Ms. Forbes on Friday, July 29, 2005, was not justified. (See CP 1808 at ¶ 73).

argument made by Ms. Schultz throughout trial with no evidentiary support.

In addition to the specific challenges cited above, Ms. Forbes is challenging all facts relating to her assignments of error. As recognized by commentators, it is sufficient to make general challenges to issues or decisions, which bring all findings relating to that issue before the court. See 2A Wash. Prac., Rules Practice RAP 5.3 (6th ed.).

B. No one Explained the November 2002 Fee Agreement to Ms. Forbes.

Ms. Schultz claims that the trial court rejected the contention that no one explained the contract provisions to Ms. Forbes before, during, or after its execution. However, Ms. Schultz fails to indicate that her citations to the record reflect the second contract entered into between the parties in February 2001, not the November 2002 contract, which is the subject of this appeal. This type of misdirection is exactly what Ms. Schultz did at the trial court level.

C. Ms. Schultz Repeatedly Sought an 88% Contingent Fee.

Ms. Schultz' claim that Ms. Forbes is misrepresenting the record regarding her claimed entitlement to 88% of Ms. Forbes' recovery is less than credible. This Court should take notice that Ms. Schultz claimed an entitlement to 88% of the recovery on multiple occasions. (See CP 974, 982).

On January 2, 2004, Ms. Schultz sent Ms. Forbes an e-mail “explaining” the operation of the contingency fee percentage following ABM’s appeal. Ms. Schultz stated:

Technically, it could be read to claim ANOTHER 44%, i.e., 44% at trial, and 44% again after appeal . . . plus costs. In other words, the trial contract gives me 44% of all judgments after trial. See par. 5.

Then, if an appeal is undertaken, if I agree to do it, it would be for *another* 44% of what is left. Which would leave you with a rockin 12%.

I think not.

What we need to do is figure out how to fund this. I had indicated before that we could fund it as a paid hourly; but it would have to be a pay as we go contract. If I do a deferred payment, then it has to be as a contingency. We could thus also do an increase in the total contingency after appeal. Remember, there are also stages of an appeal, so this is a stage by stage proceeding.

Let me know what you think. . .

(CP 974) (emphasis in original.) Later, as the dispute between Ms. Schultz and Ms. Forbes continued to escalate, Ms. Schultz sent Ms. Forbes another email.³ This time Ms. Schultz was less diplomatic. On March 1, 2004, Ms. Schultz sent Ms. Forbes another e-mail which stated:

[R]ead consistently, I am owed 44% of what I get after trial, any appeal is a new contract per the above, if I choose to do it, and if I do, it is done on the same terms

³ It is important to remember that this dispute arose while Ms. Forbes underlying case was on appeal to this Court.

as the initial. Thus, within the “and/or” portion of the contract, which does in fact break it out into those two stages – trial and appeal – I am doing both, the AND applies. It is thus read as follows: attorneys’ fees shall be a sum equal to . . . “44% of a judgment after trial on the merits (now owed)” AND 44% after an appeal.

The new contract must be read to apply a 44% amount to both phases independently, as the contract makes it clear that both phases are in fact independent.

(CP 982) (emphasis in original.)

After reviewing Ms. Schultz’ own “interpretation” of the contingency fee agreement, there can be little dispute that Ms. Schultz was attempting to use her claimed right to recover 88% as leverage to negotiate a new contract with her client. (See CP 982). This was improper.

D. Ms. Schultz’ Retirement Case.

Ms. Schultz unconvincingly attempts to distance herself from her boast that this was her “retirement case.” While Ms. Schultz attempts to distance herself from such comments by calling it “tongue and cheek,” the email containing this assertion speaks for itself: “I want Chris. This is my retirement case.” (RP 779) Ms. Schultz’ e-mail makes no reference to being a joke or a tongue and cheek comment. It simply states: “This is my retirement case.” (Exhibit F-14). This position is consistent with the numerous modifications to the fee agreements between Ms. Schultz and Ms. Forbes which increased the amount of compensation payable to Ms.

Schultz and, as a result, decreased the amount of compensation Ms. Forbes would receive upon a successful resolution of her discrimination claims. There should be little doubt that Ms. Schultz thought of this case as her “retirement case.”

E. Ms. Schultz’ Experts Did Not Support Her Stacking Theory.

Ms. Schultz claims that Richard Eymann and Roger Felice both opined that her requested fee with stacked prevailing party fees, costs, and appeal fees was reasonable. See Schultz Resp. at 7. This is inaccurate.⁴

Mr. Eymann, who failed to testify at trial, noted that Ms. Schultz hourly rate of \$200-\$250 per hour was reasonable. (CP 847). He further stated that payment of \$250 per hour was a reasonable hourly rate to pay in the event of Ms. Schultz’ discharge. (CP 850, n. 3) (“When an attorney contracts with a client on a contingency fee basis, it is incumbent upon the attorney and client to place a value on the work done on an hourly basis should the client elect at some point to dismiss the attorney.”).

⁴ Ms. Schultz claims that Ms. Forbes did not challenge Ms. Schultz’ ability to recover prevailing party fees awarded to Ms. Forbes after the ABM trial on top of her contingency fee percentage until her reconsideration motion. Schultz Resp. at 14. Ms. Schultz is wrong. Ms. Forbes argued against the award of “stacked” fees pre-trial, and at trial. (CP 2454-55, 2507; RP 295-96, 1099). On reconsideration, Ms. Forbes argued against the trial court’s award of statutory fees and costs to Ms. Schultz as a prevailing party in the fee dispute under RCW 4.84.010, which the trial court reconsidered. See CP 2413 (letter ruling explaining no prevailing party in fee dispute).

Mr. Eymann goes on to state (contrary to Ms. Schultz' assertion) that adding prevailing party fees awarded to a discrimination plaintiff to a contingency fee percentage is *not* the "standard arrangement." (CP 854). Mr. Eymann explains that the prevailing arrangement where fees might be awarded statutorily:

[I]s treatment of the primary verdict amount plus any subsequent court-awarded fees as a total amount (aka "total recovery"), which amount is then multiplied by the contingent fee percentage (i.e., 44%) to arrive at the division of said total recovery as between client and attorney.

(CP 854, n. 4). Significantly, Mr. Eymann states that, in his opinion, such a stacking approach would not be unreasonable if the total recovery came to about 50% of the total recovery. Here, by contrast, Ms. Schultz is demanding approximately 72% of Ms. Forbes \$5,000,000 settlement.⁵ Besides Ms. Schultz, no one testified that 72% was a reasonable contingent fee percentage.

Likewise, Mr. Felice, another expert retained by Ms. Schultz, did not testify that stacking Ms. Forbes' award of prevailing party fees from the ABM trial, on top of her contingency fee, on top of her appeal fee

⁵ Ms. Schultz' claim that she is only requesting about 50% of the recovery, or as she states: "barely" in excess of the upper range of what the WSBA considers appropriate, is the product of incorrect mathematics. Ms. Schultz is requesting more than \$3.58 million dollars from a \$5 million dollar settlement. This equals roughly 72 percent of the settlement amount.

resulted in a reasonable fee. (See CP 836). Rather, Mr. Felice testified that, in his opinion, a fee at or near 50% of the recovery is reasonable.⁶ (CP 836). Significantly, in direct contrast to the position advanced by Ms. Schultz at trial and on appeal, Mr. Felice also testified that the contingency fee percentage must operate on the amount recovered by the client, as opposed to a judgment amount. (RP 1010-11). Any other method of computation would be “inherently unfair” to the client. (RP 1010-11).

F. Other Factual Anomalies.

While Ms. Forbes could spend considerable time refuting Ms. Schultz many other misstatements of the record, they are not specifically germane to this appeal. Therefore, in the interests of brevity, only brief mention is made of some additional misstatements:

- The fact that Ms. Schultz has accused former justice Phil Talmadge of ethical violations is not relevant except to

⁶ Mr. Felice’s declaration contains a number of propositions that have been flatly contradicted by established Washington precedent. For instance, Mr. Felice claims that a court should only void an attorney’s modification to a fee agreement in extreme circumstances. This pronouncement is contrary to the court’s decision in Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 754 P.2d 120 (1988).

Likewise, Mr. Felice’s belief that a court cannot determine the reasonableness of attorney’s fees under a contingency fee contract utilizing “hindsight” is expressly rejected by Holmes v. Loveless, 122 Wn. App. 470, 477, 94 P.3d 338 (2004) (“[T]he time frame for evaluating the reasonableness of a fee is **not** restricted to the time of entry into the agreement.”) (emphasis added).

provide some background context on how Ms. Schultz deals with conflict.

- Ms. Schultz takes issue with Ms. Forbes' assertion that she paid thousands more than Ms. Schultz quoted under the investigative contract. It is worth noting that Ms. Schultz fails to cite her own contract, which states that \$2,500 was "to cover all attorney fees and services generated during the pre-retention inquiry of Plaintiff's matter for trial." (CP 564). Likewise, the trial court's finding that it was an hourly contract does not change the fact that Ms. Forbes was told it would only cost her and Colleen Myers \$2,500 apiece.
- Ms. Schultz claims that the statements attributed to attorney Joe Delay and Bruce Blohowiak were hearsay, is completely immaterial, as Ms. Schultz never objected to this at the time of the trial and went undisputed.

III. REPLY ARGUMENT

A. **The Trial Court Erred in Not Considering Ms. Schultz' Ethical Misconduct and Breaches of Fiduciary Duty in Determining a Reasonable Fee.**

It is widely recognized that a trial court must consider charges of ethical conduct in determining the amount of fees due from a client to her attorney. Ross v. Scannell, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982); Simburg v. Olshan, 109 Wn. App. 436, 445-46, 988 P.2d 467 (1999) ("[t]he finder of fact must determine whether there was . . . an RPC violation in this case"); Eriks v. Denver, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) (reaffirming the "general principle that a breach of ethical duties may result in denial of disgorgement of fees").

Here, a leading Washington scholar on legal ethics opined that Ms. Schultz' conduct resulted in 35 violations of the RPCs, as well as numerous breaches of fiduciary duty. (CP 865-84). To name just a few, Ms. Schultz' numerous modifications to the fee agreements and attempts to collect an unreasonable fee violated her fiduciary duty to Ms. Forbes, created an impermissible conflict of interest, and resulted in violation of Washington's CPA. (See generally, CP 865-67; 870-884, 2192-94).

Despite Ms. Forbes' heavy reliance on Ms. Schultz' ethical violations in this fee dispute case, the trial court failed to consider or even mention any RPC provision, with the sole exception of RPC 1.5.⁷ (See CP 1797-1813). The reason is clear: the trial court accepted Ms. Schultz' argument that ethical violations, breaches of fiduciary duties, and CPA violations were irrelevant in a fee dispute matter. This was clear error.

Ms. Schultz' primary response to this appeal issue is that the trial court considered, and then rejected, the ethical violations raised. Not only does the plain text of the trial court's Order belie this assertion, the trial court's pre-trial and trial comments on the issue show it accepted Ms. Schultz' position that ethical issues were irrelevant. The following

⁷ While the trial court did find that Cheryl Forbes was not under undue influence or coercion in connection with executing the November 2002 contract, this finding related to the contractual concept of capacity to contract, as opposed to ethical considerations.

illustrates that the trial court did not consider the charges of ethical misconduct as required under Ross v. Scannell and its progeny.

At a pre-trial hearing, the trial court indicated its strong inclination not to consider charges of ethical misconduct. During trial, Ms. Schultz' attorney vigorously and continually argued that RPC 1.5 was the *only* RPC at issue and that all other RPCs were irrelevant to the proceedings, even going as far as objecting to Ms. Forbes' opening argument when the ethical issues were raised. (RP 47).

Likewise, the trial court stated:

I am going to make one other comment absent a ruling, **I think it is important for you to know my thoughts** on the concerns that have been raised referencing quantum meruit and what is and what is not issues in determining that whether or not – **whether or not attorney conduct or misconduct are or allegations of misconduct are a relevant considerations and factors when the issue is solely the reasonableness of the fee.** And I recognize the DRs and I recognize the RPCs and I recognize case law before and after.

It is 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) (emphasis added).

The trial court went on to state that it might consider the Declaration of Professor Strait as it may be collateral to the issues in the case regarding termination of the attorney-client relationship. (RP 240). The court further provided that **“I do not, by saying that, however, believe that the conduct goes to the reasonableness of the fees, but it may go to the reasonableness of termination. Don’t know. Have to wait and see. It won’t go to quantum meruit in light of – well, I’m going to factor that in. The things I factor in on the reasonableness issues are the 1.5.”** (RP 240) (emphasis added). This made it clear that Professor Strait’s declaration would not be considered regarding ethical violations, a reality confirmed by the fact that the trial court failed to even mention Professor Strait in its 17-page Order. (See generally CP 1797-1813).

The trial court’s Order evidences that it failed to consider the charges of ethical misconduct, but rather followed the request of Ms. Schultz and her counsel to not consider such charges as they were beyond the jurisdiction of the court:

- The trial court’s order makes no citation to the lengthy declaration of Professor Strait: no criticism, no admonishment, no support, no discussion, no analysis, and no notation concerning the declaration.
- The trial court’s Order fails to cite any of the cases concerning the requirement to consider the RPCs,

- There is no finding that there was not a violation of any cited RPC, or that there was an RPC violation. The only reference in the entire Order to the RPCs is RPC 1.5. (CP 1809 at ¶ 83).
- The trial court awarded pre-judgment interest, which is incompatible with a discretionary determination or a weighing of the ethical considerations at issue.

That the many ethical issues alleged by Cheryl Forbes were completely ignored by the trial court in its ruling further reflects the trial court's erroneous holding that ethical issues were not germane to this dispute. (See RP 240). For instance, Ms. Schultz' former office manager, who Ms. Schultz considered to be extremely truthful, testified about a particularly troubling ethical violation:

In compiling the cost and fee bill, **Mary Schultz instructed me to, among other things, increase the hourly rates of certain timekeepers on the Cost Bill we were preparing to submit to the Court.** For instance, Mary Schultz instructed me to increase Ms. Tina Rehm's billing rate from her actual hourly rate that was actually billed to Ms. Forbes to a higher hourly rate. Similarly, Mary Schultz had me increase Becky Gilbreth's and Sue Carter's hourly rates in the submittal to the Court from their normal rates that were actually billed to Ms. Forbes to higher hourly rates. In the Cost Bill submitted to the Court, Mary Schultz also had me change her rate to \$250 per hour for all of her time, despite the fact that she only actually charged Ms. Forbes \$200 per hour at the beginning of the Forbes matter. Mary Schultz also had me increase Francesca D'Angelo billing rate from her actual and normal hourly rate of \$150 per hour as it appeared on the firm's computer system and on Ms. Forbes' monthly bill to \$175 per hour. What is more, Mary Schultz instructed me to change certain items billed as "no charge" to actual billings for submittal to the Court.

(CP 2047) (emphasis added). Ms. Duffy also testified that no one explained the November 2002 contract with Ms. Forbes and when Ms. Forbes had questions regarding the November 2002 contract she was told that there was no negotiation and she had to sign the document. (CP 2048; CP 917). This testimony was uncontroverted at trial, yet was never mentioned by the trial court in its ruling.

Likewise, Colleen Myers, Ms. Forbes co-Plaintiff in the underlying trial, testified that Ms. Schultz attempted to influence her testimony in this matter. In particular, Ms. Myers testified concerning a conversation with Ms. Schultz:

Ms. Schultz told me that the three of us (Cheryl, Mary, and me) were in the ABM lawsuit together and that there was no reason why we should not all share in the verdict. In fact, Ms. Schultz told me that after Cheryl Forbes received the verdict from ABM, she called Cheryl Forbes and told her that she should give me some since I did not prevail on my claims against ABM, which she claimed Cheryl Forbes flatly refused. **Mary Schultz also said that she would make it worth my while if I agreed to help her in this dispute with Cheryl Forbes.** I interpreted Ms. Schultz's comments to mean that she was willing to pay me money in connection with testimony that supported her side of the story.

(CP 2059). This testimony went undisputed by Ms. Schultz.

In addition, the findings cited by Ms. Schultz to support her belief that the court considered the charges of ethical misconduct are overstated:

- Finding 10 deals with a February 2001 contract, not any ethical issue.

- Finding 19 deals with a conversation between Ms. Schultz, Cheryl Forbes, and Colleen Myers.
- Finding 20 deals, again, with another conversation between Ms. Schultz, Cheryl Forbes, and Colleen Myers.
- Finding 25 deals with the fact that Ms. Forbes worked as a branch manager for ABM.
- Finding 27 deals with Cheryl Forbes' capacity to contract. This finding conspicuously ignores Maureen Roberts in rebuttal testimony about circumstances of the November 2002 fee agreement.
- Finding 37 addresses the fact that Cheryl Forbes was an office manager for Ms. Schultz and assisted in compiling the fee petition submitted to the trial court in the underlying lawsuit.
- Finding 44 deals with an unrelated case and Cheryl Forbes' quitting Ms. Schultz' office.
- Finding 51 references various contacts between Lukins & Annis attorneys and Cheryl Forbes.
- Finding 60 indicates that Ms. Schultz sent Cheryl Forbes an email.
- Finding 61 indicates that Cheryl Forbes did not tell Ms. Schultz that she was in contact with Lukins & Annis.

The remaining "findings" relied upon by Ms. Schultz are the deductions and musings discussed above. As this reveals, the findings cited by Ms. Schultz in support of her claim that the trial considered and rejected the ethical issues do not support her argument.

What is more, Ms. Schultz' attempts to distinguish Ross v. Scannell, Eriks v. Denver, and Cotton v. Kronenberg, 111 Wn. App. 258, 272, 44 P.3d 878 (2002), are not persuasive. Ms. Schultz does not offer any meaningful distinction between these cases and the situation at issue here. The holdings from these courts required the trial court to consider the ethical considerations. The cases themselves are not factually dispositive of anything. Therefore, attempting to distinguish them on their facts is unpersuasive and should be rejected by this Court.

In the absence of any express findings on the issue of Ms. Schultz' ethical misconduct justice is not being served. If this court assumes the trial court considered and rejected the charges of ethical misconduct in the absence of any express findings on the issue, Ms. Forbes will be denied an opportunity to have those issues addressed as they relate to her obligation to pay Ms. Schultz a reasonable fee. Conversely, if the trial court did consider, and reject, the charges of ethical misconduct, it could simply state so on remand. Accordingly, this matter should be remanded with instructions to the trial court to consider the ethical and fiduciary violations alleged by Ms. Forbes, and that if they are found to exist, Ms. Schultz' fee would either be disgorged or set under the doctrine of *quantum meruit*.

B. Ms. Forbes Did Not Breach the Contingent Fee Agreements.

At trial, Ms. Forbes made an alternative argument relating to fee computation. If *quantum meruit* was not the proper method for computing Ms. Schultz' fee, it should be computed on an hourly basis under the express terms of the fee agreement drafted by Ms. Schultz. The trial court apparently rejected this argument because it found that both Ms. Forbes and Ms. Schultz breached the fee agreement. (CP 1811). This too was error.

The trial court's Amended Order does not indicate or explain how Ms. Forbes breached the November 2002 fee agreement. Instead, the trial court merely concludes: "[e]ach party breached terms of the contract." (CP 1811 at ¶92). This "finding" appears under the trial court's "conclusions of law," and is in close proximity to the trial court's other conclusion of law indicating that "Cheryl Forbes' firing of Ms. Schultz was not justified." (CP 1811 at ¶93).

In support of her claim of breach, Ms. Schultz indicates that Ms. Forbes was found to be delinquent in costs and fees under the **original** contract. See Schultz Resp. at 48. Ms. Schultz' argument is misplaced. The original contract to which Ms. Schultz refers was replaced by numerous subsequent fee agreements. Therefore, any alleged breach of

the original contract would not be relevant to the determination of whether or not Ms. Forbes breached the November 2002 fee agreement. As its stands, there was no evidence that this agreement was ever breached.

C. Ms. Forbes' Termination of Ms. Schultz was Justified.

The trial court's comment that Ms. Forbes' termination of the attorney-client relationship with Ms. Schultz was unwarranted or unjustified is not supported by substantial evidence. In fact, this finding, if that is in fact what it was, is contrary to substantial evidence and inconsistent with other comments by the trial court. (See CP 1807 at ¶ 72 ("Mary Schultz did not have the right . . . to take or convey that the client's authority . . . to make the final decision was primary."); CP 1808 at ¶ 73 ("Ms. Schultz' position as evidenced by her email dated Friday, July 29, 2005, at 11:10 a.m., to Cheryl Forbes . . . was not justified"), (Ms. Schultz took or conveyed "inappropriate positions"); and CP 1808 at ¶ 77 ("Ms. Schultz's conduct did not rise to the level of her . . . professional mandate.").

In light of these observations, the e-mail demands made by Ms. Schultz, and the many other factors cited in Ms. Forbes' opening appeal brief, any finding that Ms. Forbes' termination of Ms. Schultz was unjustified or unwarranted is contrary to the substantial evidence and should be reversed without further proceedings. Jaramillo v. Morris, 50

Wn. App. 822, 833, 750 P.2d 1301 (1988); In re Dependency of A.S., 101 Wn. App. 60, 72, 6 P.3d 11 (2000).

D. As There Was No Evidence That Ms. Schultz' Termination Was in Bad Faith, Ms. Schultz is ONLY Entitled To Her Hourly Fee, Even if Her Termination Was Unjustified.

Significantly, the trial court made no finding of fact of bad faith or lack of good faith necessary to invoke the rule announced in Taylor v. Shigaki, 84 Wn. App. 732, 930 P.2d 340 (1997). As discussed, the hourly fee provision in Taylor was not applied because the court found that the client did not act in good faith when he fired his attorney, but did so deliberately to increase his compensation. Without this finding, the client in Taylor would have had the right to rely on the contract terms allowing the payment of his attorney's hourly rate in the event of termination.

Here, like in Taylor, the attorney-drafted fee agreement had a provision protecting the attorney in the event he or she was discharged by the client:

If the Client elects to abandon the claim or discharge the Attorney, the Client agrees to pay the Attorney at the rate of Two Hundred Fifty Dollars (\$250.00) per hour for all hours the Attorney has served the Client in this litigation up to the time the abandonment or discharge is communicated to the Attorney.

(CP 971 at ¶ 14). However, unlike Taylor, the trial court here did not find that Ms. Forbes acted in bad faith when she fired Ms. Schultz. See

Anderson v. Anderson, 46 Wn.2d 766, 776 (2001) (finding that the party alleging bad faith bears the burden of proof on that issue). Indeed, Ms. Schultz was discharged for her refusal to submit a counter-offer, which as the trial court noted was unjustified and improper. See CP 1807-08 at ¶¶ 72, 73, 77.

Ms. Forbes received a \$5 million settlement offer from ABM and discussed the prospect of submitting a counteroffer with her attorney. (See CP 927). Ms. Forbes questioned whether a counteroffer of \$5.5 million would be advisable. Ms. Schultz responded with a suggestion to counter at \$6 million. (CP 1040, 1041). As a result, Ms. Forbes informed Ms. Schultz that she would like to counter at \$5.8 million, essentially splitting the difference between her suggestion of \$5.5 million and Ms. Schultz' \$6 million counter. (CP 1042). Ms. Forbes also noted her disagreement with Ms. Shultz' suggestion that she could recover 44%, plus all the costs incurred (including costs for another plaintiff, Colleen Myers), plus all the prevailing party fees (awarded to Ms. Forbes as the victim of discrimination under RCW 49.60), plus interest at 12% from the date of the judgment. (CP 1042; but cf. RP 840-41 (Schultz' admission at trial)).

In response, Ms. Schultz went on the offensive and lashed out at her client by stating, in pertinent part: "The contract also gives me the authority to settle or compromise the claims, so long as I submit the

compromise to you.” (CP 1043). Ms. Schultz concluded her e-mail to Ms. Forbes by stating: “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). Thus, not only was Ms. Schultz claiming the right and authority to unilaterally settle or compromise Ms. Forbes case, she was refusing to submit the proposed counteroffer to ABM unless and until she reached an agreement on the fee split with Ms. Forbes. (See CP 1043). As can be seen, Ms. Forbes did not act in bad faith by terminating Ms. Schultz – it was mandated by Ms. Schultz’s conduct. As no bad faith was found, Taylor is inapplicable.

For these reasons, Ms. Schultz should be forced to live with the contract as she drafted and this Court should strictly construe the November 2002 contingency fee agreement, awarding Ms. Schultz her hourly fee. Ms. Schultz drafted the contract to protect herself. Now that a strict construction of her agreement favors her client, Ms. Schultz is trying to say that her contract should not be interpreted in accordance with the way it was drafted.

E. Ms. Schultz Failed to Adequately Dispute the Lack of Consideration for the November 2002 Contract.

It is well-settled that modifications to a fee agreement implicate RPC 1.8 and must be supported by new, independent consideration in order to be enforceable. See Cotton v. Kronenberg, 111 Wn. App. 258, 272, 44 P.3d 878 (2002). The trial court neither found new consideration nor addressed the requirements of RPC 1.8.

Ms. Schultz claims that the trial court found new consideration which is identified in finding 20 of the trial court's Amended Order. However, finding number 20 does not deal with the new, independent consideration required for modifications to a fee agreement. See Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004). As the Labriola court explained, "independent consideration involves new promises or obligations previously not required of the parties." Id.

Finding of fact 20 indicates that there was a general agreement concerning an increase in the contingency percentage if Ms. Schultz prevailed at trial. All of the other issues addressed in finding 20 are either inconsequential to a new agreement (i.e., submitting themselves to an examination so that Ms. Schultz could obtain life insurance) or relate to matters that Ms. Schultz already obligated herself to do such as waiving the hourly component of her fee contract. See CP 2006, 1977.

Contrary to Ms. Schultz' assertion, Ms. Forbes was never in default of her contractual obligations prior to September 11, 2001. (See RP 787-791). On September 11, 2001, Ms. Schultz unequivocally stated in an email to her office staff "as a result of the complete wastefulness on this case to date, I have agreed as of this a.m., to do this case on a straight contingency, that is, all attorney time from here on will be billed at 0."⁸ (CP 913, 953). Consistent with this agreement, both Cheryl Forbes and Colleen Myers testified that because the case was going well Ms. Schultz agreed to do the case on a straight contingency and without any additional payments for fees or cost, with the sole exception of one investigator's bill that was outstanding. (CP 912-13, 2042).

Conversely, Ms. Schultz' position is contrary to the unrebutted testimony and her own e-mails. In further example, Ms. Schultz maintains that she never agreed to defer payment of costs prior to the execution of the November 2002 fee agreement. However, Ms. Schultz' belief is directly contrary to the position she took as expressly stated in communications with her office staff. In an e-mail dated April 18, 2002, Ms. Schultz explained: "I told them I was advancing travel costs and hotels, etc. but they are still paying for depo costs." (Exhibit I-76). This e-

⁸ Ms. Schultz also admitted that there was no discussion of increasing the contingency fee percentage as a result of the Sept 11, 2001 agreement. (CP 1977).

mail shows, at a minimum, that Ms. Schultz had agreed prior to November 2002 to advance costs.

Ms. Schultz' argument that Ms. Forbes was not even trying to pay costs is consistent with the agreement that they didn't have to pay costs any more. To think that Ms. Schultz would allow Ms. Forbes to travel to watch depositions in the case and loan money to a co-plaintiff, all the while being in "substantial default" is simply not credible.

Ms. Schultz' reliance on R.W. Grainger & Sons, Inc. v. J & S Insulation, Inc., 61 Mass. App. Ct. 92, 103-04, 807 N.E. 2d 211 (Mass. 2004), is not factually analogous and does not change clear Washington law on the issue that provides:

[A] modification or subsequent agreement is not supported by consideration if one party is to perform additional obligation while the other party is simply to perform that which he promised in the original contract.

Rossellini v. Banchemo, 83 Wn.2d 268, 273, 517 P.2d 955 (1974).

Ms. Schultz also attempts to distinguish Rufolo v. Rossiello, 912 F. Supp. 344 (N.D. Ill. 1995) claiming that Rufolo is not factually similar because the contracts were executed following trial and no new consideration was given by the attorney for prosecuting the appeal. This is exactly what happened in this situation. While there was no new obligation assumed by Ms. Schultz to support the November 2002 fee

agreement, she demanded new increased consideration to prosecute the appeal, even though the original fee contract spelled out how she was to be paid in the event of an appeal. (See CP 972). Thus, Ms. Schultz fails to establish any new, independent consideration necessary to modify her contingency agreement with Ms. Forbes.

F. The Court Erred in Awarding Pre-Judgment Interest to Ms. Schultz.

Ms. Schultz cites an incomplete standard for awarding pre-judgment interest. The standard, as announced by Washington Supreme Court, identifies two requirements for an award of pre-judgment interest:

- (1) the amount of the claim 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.

Mahler v. Szucs, 135 Wn.2d 398, 429, 957 P.2d 632 (1998). If either prerequisite is not satisfied, an award of prejudgment interest is improper.

See id.⁹

1. The Attorney Fee Issues Presented an Unliquidated Claim.

Ms. Schultz' reliance on Taylor v. Shigaki, 84 Wn. App. 723, is misplaced. First, Taylor only addresses the first prong of the prejudgment

⁹ Ms. Schultz' citation to Aker Verdal v. Neil F. Lampson, Inc., 65 Wn. App. 177, 189, 828 P.2d 60 (1992), only addresses the first part of the test: liquidated vs. unliquidated.

interest analysis: whether a claim is liquidated. See id. at 731. Second, Taylor does not stand for the broad proposition that an attorney is entitled to prejudgment interest when awarded fees pursuant to a contingency fee agreement. The holding in Taylor is intentionally narrow and limited to its facts.

In Taylor, the attorney was discharged by the client in bad faith and filed a lien to recover his attorney's fees. Id. at 731. The client responded to the lien by seeking a determination of reasonable attorney fees owed under RCW 4.24.005, "which normally calls for the exercise of the court's discretion in determining the reasonableness of fees." Id. at 732. However, instead of requesting that the court exercise its discretion in determining the amount of fees owed, the parties disputed "which of two contractual payment clauses to apply[.]" both of which could be computed by the court **without exercising any discretion.** Id. ("[N]either of the parties' claims called for the exercise of the court's discretion."). As a result, the Taylor court found the amount to be liquidated. Id.

Here, unlike Taylor, Ms. Forbes requested, *inter alia*, that the trial court exercise its discretion in determining the amount of fees and costs payable to Ms. Schultz in light of the charges of ethical misconduct. See Cotton v. Kronenberg, 111 Wn. App. 258, 275, 44 P.3d 878, rev. den., 148 Wn.2d 1011 (2003) (finding that effect of professional misconduct in the

context of determining the reasonableness of attorneys fees is within the discretion of the court). While Ms. Schultz argued for 44% of the unenforceable judgment amount, plus fees on appeal, plus costs, plus interest, plus the statutory fees awarded to Ms. Forbes in the ABM trial, Ms. Forbes urged the trial court to disregard the fee agreement and award appropriate fees under *quantum meruit*. (RP 28-32). Thus, the trial court was required, irrespective of how it ultimately calculated the fees, to determine what fees were “reasonable” by exercising its discretion.

Furthermore, the trial court based its conclusion that 40% of the settlement amount was a fair and reasonable attorney fee “considering the facts and circumstances of this case.” (CP 1812 at ¶ 98; see also CP 1811 at ¶ 90 (stating Court’s opinion that 40% of the settlement is customarily charged in this locality for similar cases)). Thus, the trial court’s decision as to the precise award of fees and costs depended upon the opinion or discretion of the judge as to whether a larger or smaller amount should be allowed. Therefore, it was an unliquidated amount for which prejudgment interest is improper.

2. Ms. Forbes Never had “Use” of Ms. Schultz’ Fee.

Ms. Schultz’ discussion of Mahler and Richter v. Trimmerger, 50 Wn. App. 780, 750 P.2d 1279 (1988), miss the mark on the “use value” component of the test for awarding prejudgment interest. In Mahler, the

court determined that the client had the “use value” of the funds because the funds were in her attorneys’ trust account and, therefore, she had constructive possession of the funds. Mahler, 135 Wn.2d at 430. As the Mahler court held, the ultimate “touchstone for an award of prejudgment interest is that a party must have the ‘use value’ of the money improperly.” Id. at 429. As explained in Mahler, “an award of prejudgment interest compels a party that wrongfully holds money to **disgorge the benefit.**” Mahler, 135 Wn.2d at 430 (emphasis added). Thus, absent retention of the “use value” of the money rightly belonging to another, prejudgment interest is not warranted and constitutes an abuse of discretion. Id. at 429

Here, the funds were held in the Court Registry and completely controlled by the court. (CP 499-500). Ms. Forbes was not in possession of the funds and could not access the funds without a court order.¹⁰ What is more, Ms. Schultz misrepresents the circumstances surrounding the deposit of the funds into the Court Registry.

¹⁰ While the court’s decision in Sussman, Shank, Wapnick, Caplan and Stiles, LLP v. Henderson, No. 4555-9-I, 2001 Wn. App. LEXIS 9 at *19 (Wash. Ct. App., Div. I, 2001), is unpublished, Ms. Schultz discussion of that case is wrong. In Sussman, the court found the liable party “did not retain the use value of the settlement reward. Rather, the court clerk held the money in an interest-bearing account while the parties litigated issues concerning the attorney fee liens.” Id.

First, there was nothing conditional about the placement of the funds into the Court Registry. The entire amount of Ms. Schultz' claimed lien was deposited into the Court Registry. (Cf. CP 499 and CP 467). Second, Ms. Schultz demanded that the funds be placed into the Court Registry. (CP 489). In fact, Ms. Schultz was so adamant that ALL proceeds from the ABM settlement be placed into the Court Registry that she filed a Motion seeking to direct the deposit of the entire \$5 million settlement into the registry of the court. (See CP 487-489). Ms. Schultz' demand to deposit all settlement proceeds into the court registry was repeated on numerous occasions.

Ultimately, however, Ms. Schultz withdrew her Motion directing the money be placed into the registry of the Court as moot after Ms. Forbes and ABM deposited the entire amount of Ms. Schultz' claimed lien interest into the registry of the court. (See CP 1932). 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); see also RCW 4.44.480; RCW 4.44.500.

Funds deposited into the registry of the court do not automatically accrue interest for the benefit of the litigants. 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. However, nothing about this request gives the party making the request control over the money. See id. Nonetheless, the fact that Ms. Schultz – a litigant in this matter – did not request the funds to be invested or otherwise object to Ms. Forbes’ request is significant and amounts to a waiver of her right to complain about the investment mechanism utilized by the Court Registry.

The funds were never *removed* from the registry and were never in Ms. Forbes’ possession, constructive or otherwise. 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 together with all accrued interest until the trial court ordered their disbursal.¹¹ (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 the control of the trial court and could not be removed without the authority of the trial court. Id.

¹¹ 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).

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).

Similarly, Ms. Schultz' argument that the court considered the ethics of the situation and exercised its discretion accordingly is inconsistent with an award of pre-judgment interest. Critically, if the trial court considered the charges of ethical misconduct and, in its discretion, decided not to adjust the fee as a result, pre-judgment interest would be improper as it would not have been a sum determinable without reliance on opinion or discretion. Ms. Schultz cannot have it both ways. She cannot argue that the trial court, in its discretion, chose not to disgorge or reduce her claimed fees based upon the charges of ethical misconduct and also that the trial court's decision was made without exercising any discretion. In short, Ms. Schultz' position is inconsistent and should be rejected.

G. Ms. Schultz Fails to Point to Sufficient Evidence to Support the Trial Court's Calculation of the Judgment Amount.

Ms. Schultz claims that substantial evidence supports the trial court's calculation of the offsets ordered, but fails to provide any evidence to rebut the calculations challenged by Ms. Forbes. Instead, Ms. Schultz

engages in misdirection to confuse the issues before the court. However, the resolution of this particular error requires the application of simple arithmetic to the trial court's Amended Order.

1. The trial court miscalculated the fees payable to Ms. Schultz.

Ms. Forbes was ordered to pay Ms. Schultz 40% of the settlement amount of \$5,000,000 (or \$2,096,538.33) in attorneys' fees *less* amounts previously paid. (See CP 2066, 2078; CP 1812 at ¶ 101).

According to Ms. Schultz' own accounting records, Ms. Forbes previously paid Ms. Schultz a total of \$43,324.44 in attorneys' fees. (CP 2066). Additionally, pursuant to her work contract with Ms. Schultz & Associates, Ms. Forbes paid \$500 per month towards the legal fees charged by Ms. Schultz, via payroll reductions. (CP 2067). Ms. Forbes was employed as Mary Schultz & Associates' office manager for a total of fifteen months. (CP 2067). Ms. Forbes paid Ms. Schultz a total of \$7,500.00 through reduction in her wages. (CP 2067). Therefore, after deducting amounts previously paid by Ms. Forbes, was ordered to pay Ms. Schultz a total of \$2,045,713.89 in reasonable attorneys' fees as awarded by the trial court.

However, Ms. Schultz' proposed judgment, which the trial court entered, awarded Ms. Schultz \$2,060,922.50 in attorneys' fees. (See CP

1915-17). Simply accepting Ms. Schultz' proposed judgment and not accounting for the payments made by Ms. Forbes (as ordered) was error. Therefore, Ms. Forbes is entitled to restitution in the amount of \$15,208.61 plus 12% interest for overpayment of attorneys' fees. RAP 12.8.

Other than generally referencing her self-serving declaration and stating her belief that Ms. Forbes should not be allowed to offset her "wage claim" against the fees payable under the trial court's Order, Ms. Schultz does not provide any evidence to contradict Ms. Forbes calculation of the amounts payable. Rather, Ms. Schultz incorrectly claims that Ms. Forbes is making a claim for a credit of \$37,649 because of the Ms. Schultz admission that all of the time incurred prior to September 11, 2001, was a complete waste. While it is true that Ms. Schultz stated that all of the time spent by her office prior to September 11, 2001 was a complete waste, Ms. Forbes is NOT requesting a credit in connection with this appeal.¹²

Because Ms. Schultz failed to provide any evidence to justify the trial court's award of \$2,060,922.50 in attorneys' fees as opposed to the

¹² Ms. Forbes testified at trial that she should receive a credit in the amount of all the fees and costs paid to Ms. Schultz prior to September 11, 2001. However, Ms. Forbes has not assigned error to the trial court's failure to deduct that amount.

\$2,045,713.89 calculated by Ms. Forbes, this Court should order Ms. Schultz' to reimburse Ms. Forbes the difference between these calculations (\$15,208.61), plus 12% interest as restitution. RAP 12.8.

2. The trial court miscalculated the costs payable to Ms. Schultz.

Under the trial court's Order, Ms. Forbes was obligated to reimburse Ms. Schultz for all costs "incurred, as calculated and referenced in the Judgment, less amounts that were not ultimately incurred and less amounts that have been previously paid, or reduced by a small claims court decision." (CP 1813 at ¶ 102).

It is undisputed that the total amount of costs calculated and referenced in the Judgment equals \$84,377.88. (CP 1915, 2063-64; see also Schultz' Resp. at 54). While acknowledging this was the amount awarded by the trial court before any deductions, Ms. Schultz mistakenly claims that Ms. Forbes was responsible for \$102,584.88 and she graciously compromised Ms. Forbes' obligation. See Schultz Resp. at 54. Ms. Schultz' position is pure fantasy and completely irrelevant to the issue at hand.

The trial court only allowed Ms. Schultz to recover approximately \$84,000 in costs from ABM because Ms. Forbes co-plaintiff, Colleen Myers, did not prevail on her claims. In essence, the trial court reduced

the allegedly incurred costs from \$102,000 to roughly \$84,000. In making its award of costs to Ms. Schultz in connection with Ms. Forbes' fee dispute, the trial court began with the assumption that Ms. Forbes should reimburse Ms. Schultz for the roughly \$84,000 awarded after the ABM trial *less* any amounts not actually incurred, previously paid or reduced via small claims decision. (CP 1813 at ¶ 102). Thus, Ms. Schultz' "gracious" gesture is completely irrelevant to the calculations at issue.

In addition, Ms. Schultz asserted the right to recover costs on appeal in the amount of \$2,473.00 and an accounting fee related to settlement calculations in the amount of \$975.00. (CP 2081). These amounts were awarded by the trial court and are to be added to any costs payable to Ms. Schultz. (CP 1813 at ¶ 102). Thus, in accordance with the trial court's Amended Order, Ms. Forbes was obligated to pay Ms. Schultz \$87,825.88 in costs (\$84,377.88 + \$2,473 + 975), *less* amounts not ultimately incurred, previously paid, reduced, or not supported by invoice. (CP 2081). As with her request for fees, Ms. Schultz failed to carry her burden of proof that these costs were actually incurred. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

It is undisputed that Ms. Forbes is entitled to deduct \$1,900.04 representing the difference between the amount billed to the trial court and

awarded in the Judgment as a cost and the amount actually paid by Ms. Schultz.¹³ (CP 2064; see also Schultz Resp. at 53).

In addition, Ms. Schultz' own accounting records establish that Ms. Forbes paid Ms. Schultz \$7,842.00 in costs directly from her trust account and \$8,118.90 in costs directly to investigators and experts. (CP 2081-82, 2088-89). Thus, Ms. Forbes paid a total of \$15,960.90 in costs that were itemized and included in the Judgment Summary. (CP 2081-82). These costs were not incurred by Ms. Schultz and should have been deducted from the total amount owed under the trial court's Order.

The total amount of costs should be further reduced by Westlaw charges in the amount of \$9,841.31, which were not incurred by Ms. Schultz. (CP 2065). The Westlaw charges sought by Ms. Schultz are far in excess of those Westlaw charges that were actually billed to Ms. Forbes when they were allegedly incurred. (CP 2065; see, also CP 2092). Ms. Schultz submitted \$10,958.32 in Westlaw charges to the trial court as costs, yet only \$1,117.01 in Westlaw charges were actually incurred and paid by Ms. Schultz. (Cf. CP 2071-72 and 2092-96). Ms. Schultz failed to carry her burden of proof on these charges and fails to substantiate the

¹³ Ms. Schultz presented the full amount of this billing to the trial court for reimbursement notwithstanding the fact that she never paid the bill, which was later compromised by a small claims court decision.

trial court's award in connection with the instant fee dispute with Ms. Forbes.¹⁴

Further, the Westlaw records illustrate that Ms. Schultz was provided Westlaw service based on a "Defined Subscriber" agreement; that is, a flat fee and were "NOT ACTUAL WESTLAW RATES." (See CP 319-20; see also CP 278, 280, 281, 282, 284-86). Despite unambiguous language on the Westlaw records stating that Ms. Schultz "AGREES NOT TO . . . REPRESENT THE CHARGES AS ACTUAL WESTLAW CHARGES," Ms. Schultz computed Westlaw charges pursuant to some unidentified per minute formula. (CP 286, 319-20). Thus, \$9,841.31 in Westlaw charges were NOT actually incurred and should be reduced from the total costs payable to Ms. Schultz under the trial court's Order.

What is more, \$651.15 in appeal costs and \$6,718.40 in American Express charges have not been "supported by invoice" and should be reduced from the total costs payable to Ms. Schultz. (CP 2083). Neither of these charges are supported by documentation reflecting that Ms. Schultz ultimately incurred the identified charges on behalf of Ms. Forbes.

¹⁴ The fact that Ms. Forbes was hired by Ms. Schultz & Associates and helped prepare the cost bill for submission to the court following the ABM trial is irrelevant to the determination as to what amounts she previously paid or whether Ms. Schultz actually incurred the stated charges.

Therefore, pursuant to the trial court's Amended Order, Ms. Forbes should have only paid Ms. Schultz a total of \$52,754.08 in costs.¹⁵ (See CP 2083). However, the judgment entered by the trial court awarded Ms. Schultz \$85,925.84 in costs. (CP 1915-17). Therefore, Ms. Forbes is entitled to restitution in the amount of \$33,171.76 for overpayment of costs to Ms. Schultz, plus an award of 12% interest on this amount. RAP 12.8.

H. This Court Should Award Ms. Forbes her Attorneys' Fees and Costs in Prosecuting this Appeal.

It is completely within the court's inherent powers to award attorneys' fee on equitable grounds. In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 267 n.6, 961 P.2d 343 (1998). The court is "at liberty to set the boundaries of the exercise of that power." Weiss v. Bruno, 83 Wn.2d 911, 914, 523 P.2d 915 (1974). A court may award attorneys' fees upon the finding of a breach of fiduciary duty. Allard v. First Interstate Bank, N.A., 112 Wn.2d 145, 151-52, 768 P.2d 998 (1989). Such an award is proper to make a party whole. Id. Ms. Forbes, an unfortunate victim of discrimination at the hands of her former employer, has expended a

¹⁵ After making the proper deductions for costs previously paid by Ms. Forbes (\$15,960.90), Westlaw charges not ultimately incurred (\$9,841.31) and costs not supported by invoice (\$7,369.55), the trial court should have awarded Ms. Schultz a total of \$52,754.08 in costs.

substantial sum in litigating this fee dispute and the ethical misconduct of her former attorney, Ms. Schultz. This Court should order Ms. Schultz to reimburse Ms. Forbes for those fees.

The Washington Supreme Court has already found that “bad faith litigation can warrant the equitable award of attorney fees.” Id. The court has recognized at least three types of bad faith warranting attorneys’ fees: (1) pre-litigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 927, 982 P.2d 131 (1999), rev. den., 140 Wn.2d 1010 (2000).

According to the Hiller Corp. court, “[p]relitigation misconduct refers to ‘obdurate or obstinate conduct that necessitates legal action’ to enforce a clearly valid claim or right.” Id. at 927. Accordingly, an “award of attorney’s fees for pre-litigation misconduct can be compared to a ‘remedial fine’ imposed by a court for civil contempt” in that the party acting in bad faith is wasting private and judicial resources.” Id. at 928. Here, Ms. Schultz’ conduct not only necessitated her termination, but required the institution of a reasonableness challenge to her requested fees. Ms. Schultz laid the groundwork for this dispute by exerting undue influence in negotiating an increasing contingency fee arrangement under threats of withdrawal, and claiming a right to 88% of her client’s recovery. Ms. Schultz compounded the necessity of this dispute by thereafter

refusing to submit a counteroffer in settlement, as directed by Ms. Forbes, and conditioning any counteroffer on resolving the fee dispute with Ms. Forbes. Ms. Schultz' pre-litigation conduct is the very definition of unyielding and obstinate behavior and justifies this Court's exercise of its inherent equitable powers.

Not only does Ms. Schultz' pre-litigation conduct justify an award of attorneys' fees, her procedural bad faith throughout the course of this dispute compels such an award. As explained by the Hiller Corp. court, "[p]rocedural bad faith is unrelated to the merits of the case and refers to 'vexatious conduct during the course of litigation.'" Id. at 928. "The purpose of this type of award is 'to protect the efficient and orderly administration of the legal process.'" Id. Division One of the Court of Appeals has already recognized that this type of bad faith could support the award of attorney's fees. State v. S.H., 95 Wn. App. 741, 977 P.2d 621 (1999), opinion substituted at, 102 Wn. App. 468, 8 P.3d 1058 (2000). In State v. S.H., the court held that "a trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. A party may demonstrate bad faith by, inter alia, delaying or disrupting litigation." Id. at 475. The court's inherent power to make such an award is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and

expeditious disposition of cases.” Id. (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)).

Throughout the resolution of this dispute, Ms. Schultz has threatened her client with baseless allegations of future litigation for challenging the reasonableness of her attorneys’ fees, wrongfully withheld client funds, brought frivolous motions to needlessly increase the cost of litigation for Ms. Forbes only to withdraw them, and even threatened Ms. Forbes’ current attorneys, Lukins & Annis, P.S. for tortious interference and asserted that Lukins & Annis was negligent for settling Ms. Forbes’ dispute with ABM, when Ms. Schultz knew or should have know that Lukins & Annis did not settle the dispute.¹⁶ (CP 929). Therefore, an equitable award of attorneys’ fees is not only appropriate to protect clients, such as Ms. Forbes, but to protect “the integrity of the court” and discourage future abuses by Ms. Schultz. S.H., 102 Wn. App. at 475.

IV. CONCLUSION

This Court should reverse the trial court’s award of prejudgment interest to Ms. Schultz, award Ms. Forbes restitution equal to the amount of prejudgment interest paid to Ms. Schultz, award Ms. Forbes additional restitution for the amounts paid on the Judgment that were not found payable under the trial court’s Amended Order, and remand this case to

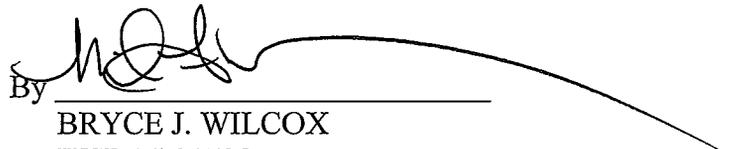
¹⁶ (See CP 1959-1964).

the trial court with the express directive that it consider the charges of ethical misconduct in determining the fees payable to Ms. Schultz.

This Court should also find that Ms. Forbes' termination of the attorney/client relationship was not in breach, but rather substantially justified. As such, this Court should alternatively instruct the trial court to determine the award of reasonable fees under the hourly rate provision of the fee agreement or under a *quantum meruit* analysis in light of Ms. Schultz' ethical misconduct. Lastly, Ms. Schultz' appeal and assignments of error should be rejected and Ms. Forbes should be awarded her attorney fees for prosecuting and defending these appeals.

RESPECTFULLY SUBMITTED this 30th day of January, 2008.

LUKINS & ANNIS, P.S.

By 

BRYCE J. WILCOX

WSBA# 21728

MICHAEL D. FRANKLIN

WSBA #34213

Attorneys for Respondent-Cross
Appellant Cheryl Forbes

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2008, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT on the following persons in the manner indicated:

Ms. Mary E. Schultz
Schultz & Associates
810 Lincoln Building
818 W Riverside Ave
Spokane, WA 99201

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DATED this 30th of January, 2008, at Spokane, Washington.



PENNY LAMB