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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to consider the evidence of ethical misconduct and breaches of fiduciary duty in determining the reasonable fee payable to Mary Schultz.
2. The trial court erred in finding that Ms. Forbes' termination of Mary Schultz was not justified or in breach of the fee agreement.
3. The trial court erred by enforcing the fee agreement in spite of Mary Schultz' breach and because of the lack of new consideration to support the modifications to the fee agreement.
4. The trial court erred in awarding Mary Schultz more than her hourly rate under the fee agreement.
5. The trial court erred in awarding pre-judgment interest on the amount of attorneys' fees and costs payable to Mary Schultz.
6. The trial court erred in calculating the amount payable under its Amended Order.

II. ISSUES REGARDING ASSIGNMENTS OF ERROR

1. Whether a court must consider evidence of ethical misconduct and breaches of fiduciary duty in determining the reasonableness of attorneys' fees.

2. Whether a modification of a contingency fee agreement is unenforceable without new consideration.
3. Whether a client has an absolute right to terminate her attorney.
4. Whether Mary Schultz' termination was justified where she increased her contingency fee percentage, elevated her own interests above those of her client, and breached the fiduciary duties owed to her client.
5. Whether the award of pre-judgment interest was proper in this case where the determination of reasonable attorneys' fees is discretionary and where Ms. Forbes did not have use of the funds because they were held in the Court Registry pending the Court's determination of what constituted a reasonable fee.
6. Whether the Judgment should have credited Ms. Forbes for amounts she previously paid to Mary Schultz and for costs not actually incurred by Mary Schultz.

III. STATEMENT OF THE CASE

A. Factual Background¹

1. Ms. Forbes' initial contact with Mary Schultz.

¹ In order to expedite the hearing on the reasonableness of the attorneys' fees payable to Mary Schultz, the parties stipulated to allow all of the declarations into the hearing as evidence, with the same force and effect as live testimony. Verbatim Report of Proceeding "RP". (RP 417-18).

Cheryl Forbes was a co-plaintiff with Colleen Myers in the underlying employment discrimination lawsuit against ABM. (Clerk's Papers "CP" at 910). In October 2000, Colleen Myers and Ms. Forbes became dissatisfied with the progression of their case and began looking for a new attorney to represent them in the ABM lawsuit. (CP 910). In October 2000, both Ms. Myers and Ms. Forbes jointly met with Mary Schultz and explained their case. (CP 910-11). Initially, Mary Schultz said that she could not take their case because trial was scheduled so soon. However, Mary Schultz empathized with their situation. (CP 911). Because she believed they had been "screwed over" by their attorney, Steve Crumb, she said she would take their case if they fired Mr. Crumb and obtained a trial continuance. (CP 911).

2. Ms. Forbes enters into first fee agreement.

In December 2000, Ms. Forbes and Ms. Myers fired Steve Crumb. (CP 911). They then informed Mary Schultz that they had fired their attorney and asked her to take their case. (CP 911). Instead of taking their case, as she had previously told them she would, Mary Schultz stated she wanted to make sure they had a case before she agreed to take it. (CP 911). Both Colleen Myers and Ms. Forbes became panicked as they were now without an attorney. (CP 911). At that point, Mary Schultz agreed to review their claims for a flat fee of \$2,500.00 each to determine if she

wanted to take the case. (CP 911). Mary Schultz then provided them with a fee agreement. (CP 911). On January 18, 2001, Colleen Myers and Ms. Forbes entered into this agreement. (CP 911).

3. Mary Schultz asks Ms. Forbes to enter into second fee agreement.

In February 2001, after being charged thousands more than the agreed-upon flat fee, Mary Schultz arranged a conference call to discuss the status of Ms. Forbes' case. (CP 911). Mary Schultz indicated that she had reviewed enough to determine that there was a case and she wanted to take it. (CP 911). However, Mary Schultz stated that she wanted to take the case on a "hybrid" basis – that is, a partial hourly/contingent basis. (CP 911). Mary Schultz stated that she would take a 1/3 contingency PLUS Ms. Forbes would pay \$100.00 per hour, which would be credited back if she prevailed at trial. (CP 911). Thus, the hourly component acted as security. Ms. Forbes was told that it would cost between \$15,000.00 and \$30,000.00 to try the case. (CP 911-12). Thereafter, Ms. Forbes agreed to retain Mary Schultz' services as she had enough money to cover what she understood to be the maximum projected fee of \$30,000.00. (CP 912). Had Mary Schultz not promised that the most she would incur for her case was \$30,000.00, Ms. Forbes would not have entered into the hybrid hourly/contingent contract. (CP 912).

On February 26, 2001, Ms. Myers and Ms. Forbes went into the law offices of Mary Schultz and Associates to sign the hybrid fee agreement. (CP 912). Both Ms. Myers and Ms. Forbes were taken into a conference room and left alone to sign the contract. No one went over the contract with them or explained any of its provisions before, during, or after its execution. (CP 912).

4. Mary Schultz asks Ms. Forbes to enter into a third fee agreement.

In May 2001, Ms. Forbes was told to sign another new contract to correct some ambiguities Mary Schultz had recently discovered in the February 26, 2001 contract. (CP 912). As instructed, both Ms. Forbes and Ms. Myers signed the third fee agreement on May 17, 2001. (CP 912, 952). Under this agreement (“May 2001 Contract”), Ms. Forbes agreed to pay Mary Schultz an hourly rate plus a contingency fee of 33% if the case settled or 40% after trial and/or appeal. (CP 948-49). On top of this hourly fee and contingency, the May 2001 Contract provided Mary Schultz with the right to also recover any prevailing party attorney fees awarded by the court, reduced by any fees previously paid by Ms. Forbes. (CP 949). The May 2001 Contract does not specify whether the costs were to be billed and paid immediately or if they were to be billed and paid at the conclusion of the case, like the contingency fee. (CP 949-50). The May

2001 Contract also provided that if Mary Schultz elected to handle any appeal, she would be paid the 40% contingency set forth in the agreement. (CP 951).

5. Ms. Forbes' emotional condition.

In August 2001, Mary Schultz was notified that Ms. Forbes was experiencing an "acute crisis" and that her psychiatrist suggested she be hospitalized. (CP 2003-04). This information was conveyed to Mary Schultz by Donna Beatty, an associate attorney in her office. (CP 2004). Ms. Beatty stated that "it will be miraculous if she manages to weather this[.]" (CP 2004). Mary Schultz responded to the concerns raised by her associate in an e-mail sent 35 minutes later: "How is [our investigator expert] doing? Any word?" (CP 2003). As can be seen, Mary Schultz completely disregarded her client's emotional condition. It was against this backdrop that Mary Schultz proceeded to operate in dealing with her evolving fee relationship with Ms. Forbes.

6. Ms. Forbes enters into a fourth fee agreement, modifying the fee agreement to a straight contingency.

On September 11, 2001, a deposition was scheduled to take place at the law offices of Allen & McLane, P.C. (CP 912). However, due to the events of September 11th, Mary Schultz received word that Mr. McLane would like to reschedule the deposition set for that day. (CP 912-13). Mary Schultz quickly agreed to this request. (CP 913). Immediately

thereafter, Mary Schultz told Ms. Myers and Ms. Forbes that because the case was progressing so well and because it was costing more money than she had told them it would, she was going to continue to pursue the case on a straight contingency from that point forward; that is, without the hourly component. (CP 913, 2042).

Mary Schultz told them that neither would have to pay anymore costs or fees from that point forward with the sole exception of a certain investigator's fees. (CP 913, 954, 2042). There was never any discussion concerning changing any of the other terms or conditions of the original hourly/contingent contract, including the contingency fee percentage. (CP 913). It was Ms. Forbes' and co-plaintiff Colleen Myers' understanding that the contingency fee percentage would remain the same as the original hourly/contingent contract (i.e. 33.3%). (CP 913, 2042). Thus, the Fourth Fee Agreement between Mary Schultz and Ms. Forbes was orally entered into on September 11, 2001.

That same day, Mary Schultz informed her office staff that she was switching the case to a straight contingency. In so doing, Mary Schultz sent an email to her office, which provided: "As a result of the **complete wastefulness** on this case to date, I agreed as of this am to do this case on a straight contingency, that is, all attorney time from here on will be billed at 0." (CP 2006; see also CP 1977).

Nearly 9 months later, on approximately May 24, 2002, Ms. Forbes and Ms. Myers met with Mary Schultz to discuss the status of their case. (CP 914). During this meeting, Mary Schultz brought up the fact that costs were not being paid and that because she was now fronting the fees and costs she would be taking a higher percentage of any recovery as a contingency fee. (CP 914). This was the first time an increased contingency was discussed. (CP 1980).

Ms. Forbes told Mary Schultz that an increased contingency fee was unreasonable and pointed out that this was not the agreement reached on September 11, 2001. (CP 914). Mary Schultz refused to listen. She not only remained entrenched in her position that an increased contingency was required, she also raised the need to buy a life insurance policy on Ms. Forbes' life, naming Mary Schultz as a beneficiary due to her investment in Ms. Forbes' case. (CP 914). Indeed, Mary Schultz proposed charging the costs of the insurance to Ms. Forbes as a cost of the litigation. (CP 914, 963). Mary Schultz stated that she needed this life insurance policy because if Ms. Forbes died before trial, she would lose her investment. (CP 914). Ultimately, it was determined that Mary Schultz did not have an insurable interest in Ms. Forbes' life and the insurer refused to issue the policy. (CP 915).

7. Mary Schultz asks Ms. Forbes to enter into a fifth fee agreement.

On July 22, 2002, Mary Schultz sent Ms. Myers and Ms. Forbes a letter enclosing another proposed amended fee contract. (CP 915).

Notably, while the cover letter to this latest fee agreement reveals the life insurance issue, the possibility that Ms. Myers and Ms. Forbes' claims may be segregated, and confirms Mary Schultz will advance "all fees," it makes no mention of any increase in the contingency fee rate. (CP 959).

On or about July 26, 2002, Ms. Myers and Ms. Forbes went into Mary Schultz' office to review this new contract. (CP 915). They were taken to a conference room with the contract and were told to review and sign it. (CP 915). No one from Mary Schultz' office was present while they reviewed this contract, no one advised them concerning the effect of any provision in this new contract, and no one advised them to seek independent counsel to review this new contract. (CP 915).

While in Mary Schultz' office, Ms. Forbes told Sue Carter, Mary Schultz' former office manager, that she had some problems with the new contract and wanted to discuss them with Mary Schultz. (CP 915). Ms. Carter e-mailed Mary Schultz, advising her that Ms. Forbes and Ms. Myers were in the office "reviewing the contract and [are] not ready to sign them. There are concerns they have on certain parts of the contract

and will discuss with you.” (CP 966). About 50 minutes later, Mary Schultz sent a reply e-mail, directing Amy Rimov to respond to the questions. (CP 966).

Thereafter, Amy Rimov came in and talked to Ms. Forbes and Ms. Myers. (CP 916). However, Amy Rimov did not explain any of the provisions of the agreement with them, but rather just listened to their complaints about the increase in contingency fee percentage, etc. (CP 916). Ms. Rimov told them that she did not have authority to respond to any of their concerns. (CP 916). Neither Ms. Forbes nor Ms. Myers signed the proposed fifth amended fee agreement. (See CP 965).

8. Mary Schultz asks Ms. Forbes to sign a sixth fee agreement.

Ms. Forbes did not hear anything more about signing a new fee contract until October 2002, several months later, at which time Mary Schultz advised her that it was imperative that she sign a new fee contract. (CP 916). At this time, both Ms. Forbes and Ms. Myers were proceeding under the belief that the May 2001 Contract was in effect, as orally modified on September 11, 2001.

In late October 2002, Maureen Roberts, Mary Schultz’ former office manager, began calling Ms. Myers and Ms. Forbes to come in and sign the new contract. (CP 916). As she did not agree with Mary Schultz’

changes, Ms. Forbes avoided going to Mary Schultz' office. (CP 916). Eventually, Ms. Roberts called insisting that both Ms. Forbes and Ms. Myers come in and sign the new contract, stating that if they refused, all work on the case would stop. (CP 916). Trial was imminent.

On November 4, 2002, Ms. Forbes reluctantly agreed to go into Mary Schultz' office. (CP 916). When she arrived at Mary Schultz' office, she was presented with yet another new, revised contract to sign. (CP 916). This was the sixth fee agreement proposed to Ms. Forbes. This sixth agreement was virtually identical to the fifth agreement Ms. Forbes and Ms. Myers did not execute. (Cf. CP 960-65 and CP 967-73). Ms. Forbes was taken to a conference room and left alone without anyone from Mary Schultz' office to explain or go over the new contract with her. (CP 916, 2047-48). Moreover, no one from Mary Schultz' office ever informed Ms. Forbes or even suggested that she should seek independent advice before signing this new fee contract. (CP 916-17). As Ms. Forbes sat and reviewed this contract by herself, she felt particularly helpless and confused. (CP 917). After she had reviewed the new contract by herself, Ms. Forbes told Maureen Roberts that she was not happy with the new contract, including the increase in the contingency fee percentage. (CP 917, 2048). Ms. Roberts stated that she would discuss Ms. Forbes' concerns with Mary Schultz and get back to her. (CP 917). A few minutes

later, Maureen Roberts came back into the conference room and stated that according to Mary Schultz, the contract was “non-negotiable.” (CP 917, 2048). Due to the fact that their trial date was fast approaching and the discovery cut-off had already passed, Ms. Forbes felt as though Mary Schultz was not giving her any choice but to sign the new contract. (CP 917). Mary Schultz had already threatened to withdraw. (CP 917). It is worth noting that Ms. Forbes was still taking psychological medications and becoming more anxious and depressed as the trial date neared. (CP 917). As a result of these issues, Ms. Forbes reluctantly signed the new contract and left the office. (CP 917).

This sixth fee agreement, dated November 4, 2002 (“November 2002 Contract”), increased the contingency fee to 40% if the case was settled or 44% of a judgment after trial and/or appeal. (See CP 968). The November 2002 Contract purported to allow Mary Schultz to recover, in addition to the contingent fee, any prevailing party attorney fees awarded by the court, reduced by any costs previously paid by Ms. Forbes. (CP 969). This agreement also allowed Mary Schultz to take a \$3 million life insurance out on Ms. Forbes and the costs of said policy “are chargeable to the clients as costs of this proceeding” and were to be considered “accrued costs for which reimbursement if (sic) required.” (CP 970-71). Finally, like the May 2001 Contract, the November 2002 Contract provided Ms.

Forbes with the right to discharge Mary Schultz, but if she did, she would be required to pay Mary Schultz' full hourly rate (\$250.00) for all hours worked on the case. (CP 971).

9. After trial, Mary Schultz claims a right to receive 88% of any proceeds from the lawsuit.

On May 19, 2003, the jury returned a verdict in favor of Ms. Forbes and awarded her \$4,000,000.00. (CP 372-74). After the verdict, Forbes and ABM filed numerous post-trial motions and ABM ultimately appealed the verdict obtained at trial to the Court of Appeals. (CP 366-71).

After ABM filed its Notice of Appeal, Mary Schultz told Ms. Forbes that if she elected to pursue the appeal, she had a right to 44% of the amount recovered at trial **AND** 44% of any judgment after trial, for a **total of 88%** of the total recovery. (CP 918, 974). However, instead of making Ms. Forbes pay the 88% she claimed the contract provided, Mary Schultz suggested they fund the appeal on an hourly (pay as you go) basis or, if Ms. Forbes had to defer payment until after the appeal, then she would do the appeal by taking an increase in the amount of the contingency fee. (CP 974). Mary Schultz also said that they would have to "renegotiate" their contract after the appeal (i.e., in the event the matter was appealed to the Supreme Court). (CP 974). Ms. Forbes disagreed

with Mary Schultz' interpretation of the fee agreement, which contained an appeal provision. (See CP 918-19 and 972).

Because of the contentious nature of the dispute, and Mary Schultz' argument that she was actually entitled to 88% of her client's recovery, Ms. Forbes decided to hire another attorney to review the November 2002 Contract. (CP 918). Ms. Forbes engaged Bruce Blohowiak, a local attorney, to review the contract. (CP 918). Mr. Blohowiak told Ms. Forbes that she was not obligated to pay Mary Schultz more money for doing the appeal. (CP 918). Mr. Blohowiak advised Ms. Forbes that while she need not agree to pay Mary Schultz any more money for doing the appeal, she could – in the spirit of compromise – offer to split the cost of hiring associate counsel to help with the appeal. (CP 919). Ms. Forbes conveyed this compromise to Mary Schultz via e-mail on March 1, 2004. (CP 977-78).

In response to Ms. Forbes' offer of compromise, Mary Schultz responded with a threatening email telling Ms. Forbes that she was misreading the November 2002 Contract and that her interpretation was “unethical” and required her to work for free. (CP 919). Mary Schultz again stated her belief that the November 2002 Contract entitled her to recover **88% of the total recovery** (44% from trial AND 44% after appeal). (CP 919, 979-80). Mary Schultz interpreted her contract as

giving her the option of pursuing the appeal and obligating the client to accept whatever terms she demanded. (CP 982).

Despite the fact that the November 2002 Contract set her maximum contingent fee at 44%, Mary Schultz demanded that Ms. Forbes agree to pay her an additional percentage for the appeal, plus prevailing party attorneys' fees. (See CP 982). Notably, Mary Schultz went as far as advising Ms. Forbes in this e-mail that if Mary Schultz elected to pursue the appeal, Ms. Forbes would be "required to agree to the terms of this contract as the new contract." (CP 980) (emphasis added).

Things began to become even more hostile between Mary Schultz and Ms. Forbes, as they both held their ground. (CP 921). It is worth noting that Ms. Forbes was employed by Mary Schultz as an office manager during this time period. At one point, Mary Schultz called Ms. Forbes into her office and threatened that if Ms. Forbes did not agree to her request for more money, she would need to get an attorney to defend herself. (CP 919). Much to Mary Schultz' surprise, Ms. Forbes had Joe Delay, a local attorney, review the November 2002 Contract. (CP 919). Mr. Delay advised Ms. Forbes that the agreement did not obligate her to pay Mary Schultz any more for doing the appeal and that if Mary Schultz elected to handle the appeal, the contract set her fee. (CP 919). Mr. Delay also told Ms. Forbes that the November 2002 Contract

was ambiguous and, therefore, it would be construed against Mary Schultz, the person who drafted the contract. (CP 919). Mr. Delay stated that Ms. Forbes could work out a deal with Mary Schultz if she wanted to keep the peace. However, his advice was to sit tight, allow the appeal to go forward, and then deal with any remaining fee dispute issues after the appeal was finished. (CP 920). He told Ms. Forbes that she could submit a fee dispute to the Washington State Bar Association and have the dispute arbitrated. (CP 920). Ultimately, Ms. Forbes offered to take her dispute over fees to the Bar Association, but Mary Schultz refused. (CP 920).

As the fee dispute between Mary Schultz and Ms. Forbes got more intense, it was obvious to everyone in the office that there was a huge problem. (CP 921). In the Spring of 2004, Shannon Deonier, an attorney at Mary Schultz & Associates, P.S., reviewed the November 2002 Contract at the request of Ms. Forbes. (CP 921). According to Ms. Forbes, Deonier stated that it was her opinion that it was unethical to recover both the court-awarded fees and the contingency fee. (See CP 921). In addition, Ms. Forbes testified that Ms. Deonier stated that the 44% contingency fee was excessive and unenforceable and became mortified upon learning the Ms. Forbes was forced to sign the agreement under threat of withdrawal. (CP 921). In order to protect herself against Mary

Schultz' overreaching, Ms. Forbes began copying certain documents from her files. (CP 922).²

10. Mary Schultz has Ms. Forbes enter into appeal contract with Talmadge Law Group.

In the Spring of 2004, Mary Schultz provided Ms. Forbes with an appellate contract with the Talmadge Law Group to perform work on Ms. Forbes' appeal. (CP 922). This constituted the seventh attorney fee contract Mary Schultz presented to Ms. Forbes. The Talmadge contract stated that Ms. Forbes was to pay 1% of the recovery to Talmadge as part of his fee for doing the appeal. (CP 922-23). Up to that point, Ms. Forbes had never completely resolved her dispute with Mary Schultz and did not agree to the 1% fee. (See CP 923).

Several days later, on May 17, 2004, Mary Schultz sent Ms. Forbes an email, advising that the appeal brief was due in 30 days and "problems" were arising because the contract was not signed. (CP 1005). As it appeared that the fee dispute was impacting the appeal, Ms. Forbes acquiesced to the pressure to enter into the Seventh Fee Agreement, which provided that Mary Schultz would receive her hourly rate on appeal and the Talmadge Law Group would receive a 1% contingency, which was to

² Deonier, who is no longer employed by Mary Schultz, filed a declaration on the eve of trial contradicting Ms. Forbes' account.

come out of Ms. Forbes' share of the judgment. (CP 1005). Mary Schultz negotiated the contract with the Talmadge Law Group without Ms. Forbes' involvement. (See CP 1015, 1019, RP 205). Indeed, the fact that Ms. Forbes paid any portion of the fees to Talmadge is contrary to the fee agreement between Mary Schultz and Ms. Forbes (See CP 970 ("The attorney may, at her own expense, employ associate counsel[.]")).

From the outset of the appeal, however, Mary Schultz and Mr. Talmadge had problems working together. (See CP 1007-17). As the appeal drug on, the relationship between the Talmadge Law Group and Mary Schultz continued to deteriorate. (CP 923-24). As a result of these and other problems, the Talmadge Law Group withdrew from representing Ms. Forbes in the appeal, but not before they finished their appeal brief and sent it to Mary Schultz. (CP 924). Thereafter, the Talmadge Law Group filed a lien in the above-referenced action which upset Mary Schultz, as she felt it was airing her dirty laundry. (CP 924). In a letter dated September 1, 2004, to Mr. Talmadge, Mary Schultz accused the former Washington Supreme Court Justice of "utterly inept performance" and accused him of ethical violations. (CP 1013-14). Mary Schultz then threatened to turn Mr. Talmadge into the State Bar Association if he did not withdraw his lien and if the Bar would not act, Mary Schultz threatened to sue him civilly. (CP 1014). While she

apparently never sent it, Mary Schultz drafted a bar complaint against Phil Talmadge relating to his lien. (See CP 1015-17).

11. Disputes between Mary Schultz and Ms. Forbes extend throughout entire appeal process.

After their dispute over the fees erupted, Mary Schultz began trying to convince Ms. Forbes to sign an assignment of her claim. (CP 922, 925). Ms. Forbes had no idea what this assignment was or why it was even necessary. (CP 922). Ms. Forbes was told that Mary Schultz wanted the assignment so that Ms. Forbes could not get her hands on the money when it came in from ABM so she avoided providing the assignment. (CP 922).

However, on April 29, 2005, after the Court of Appeals affirmed the trial court results, Mary Schultz sent Ms. Forbes an email explaining why she believed the assignment was absolutely necessary. (CP 926, 1028). Mary Schultz stated that without the assignment, ABM could delay sending the funds and that the only way to protect their interests was to make sure that these funds were controlled and governed by professional ethical restraints. (CP 1028). According to Mary Schultz, one way was by assignment, the other was by lien. (CP 1028). Mary Schultz went on to explain that Ms. Forbes had given her an assignment via the November 2002 Contract, but she did not feel she could disclose the terms

of that contract because it would be contrary to the percentage fee represented to the trial court and used to calculate the taxable consequences. (CP 1028). Mary Schultz explained that if this information was disclosed it would substantially impair Ms. Forbes' financial interest. (CP 1028). As this reflects, Mary Schultz was deliberately withholding information from the trial court. As a result of Mary Schultz' "explanation," Ms. Forbes signed the assignment without really understanding what was going on. (CP 926).

12. ABM offers to settle the lawsuit for \$5 Million.

On July 26, 2005, ABM submitted a \$5 million settlement offer to Ms. Forbes. (CP 927). In this offer, ABM expressed a desire to present a settlement to its board of directors when they next met on August 2, 2005. (CP 2025).

Mary Schultz sent Ms. Forbes an email attaching the settlement offer the same day. (See CP 1038). In that email, Mary Schultz stated that any settlement with ABM would need to return the full award of prevailing party fees to her office, plus interest, before calculating the contingency fee she was to recover under the November 2002 Contract. (CP 1038). Notably, the November 2002 Contract did not reference paying interest. (See CP 967-73)

Mary Schultz also stated that the full amount of costs were due as well, not simply the recovered costs which, according to Mary Schultz, continued to incur interest at 12% notwithstanding any reduced interest rate on the judgment. (CP 927, 1038). While Ms. Forbes continued to disagree with this approach, she did not immediately respond to Mary Schultz' terms, but rather hoped to address the fee and cost issues after the settlement. (CP 927).

In fact, Ms. Forbes was talking to various attorneys, including attorneys at Lukins & Annis, P.S., about a potential fee dispute and began to seek legal counsel regarding her relationship with Mary Schultz. (CP 918-21). Ms. Forbes was understandably concerned about her relationship with Mary Schultz and had every right to consult with an independent attorney. Notwithstanding Mary Schultz' attempts to vilify Ms. Forbes as the mastermind of a multi-year conspiracy to deprive her of her earned fee, Ms. Forbes had no intention of terminating Ms. Schultz. (RP 202, 357-58). It was not Ms. Forbes, but rather Mary Schultz' shocking response to her request to submit a counteroffer that compelled her termination. (RP 358, 360).

On July 28, 2005, Ms. Forbes sent Mary Schultz an email seeking her advice on a potential counteroffer of another \$500,000.00. (CP 927, 1040). Mary Schultz responded by stating she thought they should

counter at \$6 million or ask that ABM pay \$5 million, plus fees, so that the contingency fee percentage would operate on the \$5 million. (CP 927, 1040). Ms. Forbes thought that Mary Schultz was making the entire settlement about her own financial interests and disregarding Ms. Forbes' interest. (CP 927-28). Later that day, Mary Schultz sent Ms. Forbes another email explaining why they should counteroffer at \$6 million. (CP 1041).

13. Mary Schultz holds the ABM settlement hostage.

On July 29, 2005, Ms. Forbes sent Mary Schultz an email instructing her to submit a \$5.8 million counteroffer, essentially splitting the difference between Ms. Forbes' suggested \$5.5 million counter and Mary Schultz' suggested \$6 million. (CP 928, 1042; see also CP 1040-41). Ms. Forbes directed Mary Schultz to submit the counteroffer that day, as she wanted to get the settlement before ABM's board by August 2, 2005, as requested. (CP 1042). Due to the fact that Mary Schultz continued to email Ms. Forbes concerning her interpretation of the fee split, Ms. Forbes also noted her disagreement with Mary Schultz' interpretation of the November 2002 Contract on how the settlement funds were to be divided. (CP 1042). Ms. Forbes testified that she wanted to prevent Mary Schultz from effectuating any settlement which would negate her ability to later challenge the fees payable to Mary Schultz. (CP 928). Moreover,

Ms. Forbes did not want Mary Schultz to argue that Ms. Forbes had waived her right to challenge those fees by not responding to her proposed interpretations in the previous emails. (CP 928).

That same day, Mary Schultz replied to Ms. Forbes' directive by stating, in pertinent part:

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

The contract also gives me the authority to settle or compromise the claims, so long as I submit the compromise to you. Two things result. 1) Even though I am not required to obtain your agreement on the counter, I am trying to work with you on it. 2) Given your comment below, until and unless we reach some written agreement on distribution, I will require the earned 44% on the entire amount, plus prevailing party fees, from any settlement that is submitted.

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

(CP 1043) (emphasis added). After receiving this e-mail response from Mary Schultz, Ms. Forbes felt as though Mary Schultz was threatening her and about to settle the case without her permission and on less than advantageous terms for Ms. Forbes via her stated authority. (CP 929). It

appeared to Ms. Forbes that Mary Schultz was solely interested in protecting her own interests. (CP 927-28, 929).

14. Ms. Forbes terminates the attorney-client relationship with Mary Schultz and accepts ABM's settlement offer.

On August 1, 2005, Ms. Forbes discovered that Mary Schultz failed to convey her counteroffer as instructed. (CP 929). Ms. Forbes was shocked. (CP 929). Ms. Forbes felt as though Mary Schultz was holding the entire settlement proceeds hostage until such time as Ms. Forbes agreed to her proposed fee split. Ms. Forbes realized there was no option but to terminate Mary Schultz before she caused any further harm. (CP 929). Contrary to Mary Schultz' representations, Ms. Forbes never testified that she terminated Mary Schultz to maximize her recovery or to only pay Mary Schultz' hourly rate. See (RP 201).

Indeed, Ms. Forbes was afraid that Mary Schultz' refusal to submit her counteroffer placed ABM's \$5 million settlement offer in jeopardy. (CP 929). Ms. Forbes was not aware of any evidence to contradict this belief and any suggestion or finding to the contrary is against the substantial weight of the evidence. ABM had wanted an answer to its offer before its board meeting on August 2, 2005, and Mary Schultz' refusal to carry out Ms. Forbes' directions put her in a very compromising position. (CP 930). Now without an attorney to advise her on the ABM

settlement, Ms. Forbes felt as if she had no choice but to accept ABM's settlement offer. (CP 930). Ms. Forbes simply could not allow Mary Schultz to put her financial interests above her own any longer. (CP 930).

On August 1, 2005, Ms. Forbes sent Mary Schultz an email terminating the attorney-client relationship effective immediately. (CP 929, 1047). Ms. Forbes also instructed Mary Schultz that she no longer represented her and that she was not authorized to have any more communication with ABM or anyone else on her behalf. (CP 929, 1047). Later that same day, Ms. Forbes accepted ABM's \$5 million settlement offer as a final resolution of all the claims she had against ABM. (CP 930, 1048). Ms. Forbes directed ABM to send all further communications to her new attorneys, Lukins & Annis. (CP 1048).

On August 2, 2005, Mary Schultz filed a Notice of Lien in the amount of \$2,895,617.00. (CP 458-61). On August 16, 2005, Mary Schultz filed an Amended Notice of Lien in the amount of \$3,572,754.33, roughly 72% of Ms. Forbes' settlement. In connection with the lien, Mary Schultz demanded that ALL proceeds from the ABM settlement needed to be placed into the court registry and filed a motion seeking to direct the deposit of the entire \$5 million settlement into the registry of the court. (See CP 489). Mary Schultz' demand to deposit all settlement proceeds

into the court registry was repeated on numerous occasions. Ultimately, Mary 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 Mary Schultz' claimed lien interest into the registry of the court. (See CP 1931).

B. Procedural Background

On March 20, 2006 through March 29, 2006, the trial court held a hearing to determine the reasonableness of the attorneys' fees and costs payable to Mary Schultz. (See CP 1739). On May 18, 2006, the trial court issued Findings of Fact, Conclusions of Law and Order. (CP 1739-54). Both Ms. Forbes and Mary Schultz filed for reconsideration of the trial court's May 2006 Order. (CP 1778, 1814). On July 3, 2006, the trial court issued an Amended Findings of Fact, Conclusions of Law and Order ("Amended Order"). (CP 1797-1813). On September 1, 2006, the trial court issued a Judgment on Intervenor's Fees (CP 1914-18).

On August 1, 2006, Mary Schultz filed a Notice of Appeal regarding the trial court's Amended Order. (CP 1820). On August 2, 2006, Ms. Forbes filed a Notice of Appeal, cross-appealing the trial court's Amended Order. (CP 1840). Both parties amended their Notices of Appeal. (CP 1862-1890). On September 6, 2003, Ms. Forbes amended her Notice of Appeal to request review of the Judgment entered by the

trial court on September 1, 2006. (CP 1862-63). Mary Schultz also amended her Notice of Appeal to include the trial court's Judgment. (CP 1923).

IV. SUMMARY OF ARGUMENT

A. Irrespective of her Contract, Mary Schultz is Allowed Only a Reasonable Fee.

Given the sanctity of the attorney-client relationship, an attorney acts as a fiduciary when dealing with her clients. This fiduciary relationship imposes upon the attorney the highest duty known to law. Based in part on this duty, extensive rules of conduct govern virtually every aspect of attorney-client relationships, including those dealing with fees and costs. Pursuant to Washington's Rules of Professional Conduct ("RPC"), irrespective of an attorney's private contractual rights, a fee can never be more than what a court deems "reasonable." RPC 1.5. The fiduciary duties and RPCs also govern the fee agreements themselves, providing strict rules for the entry and modification of such agreements, as well as strict limitations as to their substance. These duties and rules of conduct are required to be addressed in any fee analysis.

B. The Fee Dispute Arose from Mary Schultz' Over-Reaching, not any Deficiency in the Courtroom.

This fee dispute arises not based on the quality of Mary Schultz' representation, but on the over-reaching that occurred during her attorney-

client relationship with Ms. Forbes. While Mary Schultz was undoubtedly instrumental in obtaining a significant recovery for Ms. Forbes at trial, she viewed the case and the resulting judgment as something which she owned, failing to recognize that the claim and judgment belonged to Ms. Forbes. The fact that Mary Schultz believed Ms. Forbes' lawsuit was hers was most tellingly reflected by Mary Schultz' reference to the lawsuit as "my retirement case." (RP 779).

C. **Mary Schultz' Over-Reaching Reflected in Numerous Unethical Fee Agreements.**

As discussed below, evidence of Mary Schultz' over-reaching is found in the numerous fee agreements she had Ms. Forbes execute, each of which provided Mary Schultz with a successively greater economic stake in the outcome of Ms. Forbes' case.

The circumstances surrounding execution of these fee agreements, as well as their various substantive provisions, violate numerous sections of the RPCs, and Mary Schultz violated her fiduciary duty in pressuring Ms. Forbes into executing these agreements. Highlighting this is Mary Schultz' own "technical" interpretation of her November 2002 fee agreement, which she claims provides her with the right to 88% of Ms. Forbes' judgment after appeal of the trial verdict. (CP 2019). On top of this, Mary Schultz claimed the right to ALL prevailing party attorney fees

awarded by the trial court to Ms. Forbes, despite the fact that the ABM lawsuit settled and there were now no prevailing party fees. (CP 1038). Apparently, while Mary Schultz believes this to be technically what she is entitled to under her contract with Ms. Forbes, she now claims 44% of the judgment, as opposed to 44% of the settlement amount, plus prevailing party fees at trial, plus prevailing party fees for time spent by Ms. Forbes' prior counsel, plus post-trial prevailing party fees, plus prevailing party fees for her appeal work, plus costs, plus interest at 12%. (CP 1049). Based on this untenable position, Mary Schultz sought over \$3.5 million of the \$5 million settlement obtained from ABM (a 72% contingency fee), despite the fact that her fees based on her hourly rates would be approximately \$500,000.00. (CP 464-67). Mary Schultz' over-reaching was also reflected in her insistence that Ms. Forbes completely assign all rights and interest in her claim to Mary Schultz. (CP 1033-35).

D. Mary Schultz' Attempt to Increase Her Contingency After the Fact from 33/40% to 40/44% Fails for Lack of Consideration.

After the fee agreements were modified on several occasions, Mary Schultz attempted to further modify the agreements in November 2002 to increase her contingency fee from 33% of any settlement to 40% and from 40% after appeal to 44%. (CP 948, 968). As new, independent

consideration was not given for this new fee agreement, it fails for lack of consideration.

E. Mary Schultz' Over-Reaching Manifested in the Refusal to Abide by Ms. Forbes' Settlement Instructions.

Ultimately, Mary Schultz' distorted view of Ms. Forbes' rights in her own lawsuit prompted Mary Schultz to ignore Ms. Forbes' directive to submit a counter settlement offer to ABM until an agreement was first reached on their fee dispute. (CP 1043). In effect, Mary Schultz used the pending settlement offer as leverage to resolve her fee dispute with Ms. Forbes. In response to Ms. Forbes' express instruction to send a counter offer to ABM, Mary Schultz replied as follows: "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). This was improper.

F. The Trial Court Failed to Strictly Construe the Contingency Fee Agreement and Invoke the Hourly Rate Provision.

In the alternative, assuming the applicability of the November 2002 contingency fee agreement, and disregarding Mary Schultz' unethical conduct, Mary Schultz was only entitled to her hourly rate, as that is what her agreement provides. (CP 971). At paragraph 14 of the November 2002 contingency fee agreement, which Mary Schultz drafted, Mary Schultz agreed that Ms. Forbes had the right to discharge her and

that if this occurred, Mary Schultz would be entitled to her full hourly rate for all time incurred. (CP 971). Mary Schultz refused to submit a counter offer to ABM until Ms. Forbes agreed to resolve their fee dispute. (CP 1043). This was a breach of her obligations to her client and mandated her termination.

Professor John Strait examined the fee agreements and related communications between Mary Schultz and Ms. Forbes. For 30 years, Professor Strait has been a Professor of Law at Seattle University and has consulted, counseled, and represented attorneys on issues involving compliance with the Rules of Professional Conduct. (CP 862-63). Professor Strait observed no less than 35 violations of the conduct described in the RPCs, as well as numerous instances where Mary Schultz breached her fiduciary duty to Ms. Forbes. (CP 865-84). Indeed, Professor Strait stated:

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

(CP 883).

In light of Mary Schultz' conduct, and in accordance with established legal precedent, the trial court was required to carefully scrutinize Mary Schultz' right to fees in light of the relevant RPCs and fiduciary duty standards. Indeed, to settle her case, Ms. Forbes was

compelled to discharge Mary Schultz. Thus, under paragraph 14 of the fee agreement, Mary Schultz is only entitled to her hourly rate. (CP 971).

What is more, the trial court should have assessed to what extent Mary Schultz' hourly fees should be reduced based on her misconduct.

V. STANDARD OF REVIEW

In Washington, "the determination of attorney fees is a matter left to the discretion of the trial judge." Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 574, 829 P.2d 196, rev. granted, 120 Wn.2d 1011 (1992). As such, courts review an award of attorneys' fees under an abuse of discretion standard. American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 82 Wn. App. 646, 669, 920 P.2d 192 (1996); Boeing Co. v. Heidy, 147 Wn.2d 78, 90, 51 P.3d 793 (2002).

Discretion is abused when it results in a decision that is manifestly unreasonable, or is exercised based on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision based on a misapplication of law rests on untenable grounds. In re Marriage of Bralley, 70 Wn. App. 646, 651, 855 P.2d 1174 (1993). In addition, review of assignments of error related to findings of fact and conclusions of law is limited to determining whether substantial evidence supports the findings and, if so, whether the findings support the

conclusions of law. Willener v. Sweeting, 107 Wash. 2d 388, 393, 730 P.2d 45 (1986).

VI. LEGAL ARGUMENT

A. The Trial Court Erroneously Failed to Consider the Charges of Ethical Misconduct and Breaches of Fiduciary Duty in Determining the Amount of Attorneys' Fees Payable to Mary Schultz.

The trial court failed to consider the impact of Mary Schultz' ethical violations in setting the amount of attorneys' fees payable by her client, Ms. Forbes. Instead, the trial court focused exclusively on the factors expressly listed in RPC 1.5. (CP 1809-10 at ¶ 83); (RP 239-40). In so doing, the trial court ignored the impermissible conflicts of interest and breaches of fiduciary duty that permeated Mary Schultz' representation of Ms. Forbes. The trial court's failure to consider the ethical violations was based upon untenable legal grounds and resulted in an abuse of discretion.

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

In holding that professional misconduct may be grounds for denying attorney's fees, the Ross court directed that – at a minimum – the trial court **must** consider the charges of ethical misconduct in determining the amount of fees due from client to attorney. Id. at 610 (“we instruct the trial court to consider the charges of unethical conduct . . . in determining the amount of fees due Ross”). Since the Court's decision in Ross, numerous courts have followed suit and affirmed the principle that breaches of ethical duties may result in denial or disgorgement of fees. See e.g., Simburg v. Olshan, 109 Wn. App. 436, 445, 988 P.2d 467 (1999), and Eriks v. Denver, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992).

In Simburg, the Court of Appeals reaffirmed the same directive: to determine what impact attorney misconduct has on a claim for attorney's fees, “the finder of fact **must** determine whether there was . . . an RPC violation in this case.” Simburg, 109 Wn. App. at 446 (emphasis added). In Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992), the Supreme Court again affirmed the “general principle that a breach of ethical duties may result in denial or disgorgement of fees.” Id. at 462. In affirming the disgorgement of fees due to the attorney's violation of ethics rules, the Eriks court ruled that “disgorgement of fees is a reasonable way to ‘discipline specific breaches of professional responsibility, and to deter

future misconduct of a similar type.” Id. at 46. In so holding, the Court found:

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

Eriks, 118 Wn.2d at 462 (quoting Woods v. City Nat’l Bank, 312 U.S. 262, 268-69) (emphasis added).

Following the lead of the U.S. Supreme Court, the Washington Supreme Court has made clear that a trial court’s authority to consider an attorney’s ethical misconduct rests in the inherent power of the court. Eriks, 118 Wn.2d at 463 (“Such an order [disgorging fees due to the attorney’s ethical misconduct] is within the inherent power of the trial court to fashion judgments.”).

Critically, in Danzig v. Danzig, 79 Wn. App. 612, 620, 904 P.2d 312, rev. den., 129 Wn.2d 1011 (1996), Division Three of the Court of Appeals addressed the authority of the trial court in light of the fact that “responsibility for the administration of lawyer discipline lies exclusively with the supreme court.” In so doing, the Danzig court explicitly held that the Supreme Court’s exclusive authority over lawyer discipline “does not mean, however, that our lower courts are without authority over attorneys

who appear before them.” Id. As such, Division Three of the Court of Appeals went on to make clear: “A superior court’s power includes ordering disgorgement of an attorney’s fee when the attorney has breached his or her ethical duties in the proceeding before the court.” Id. What is more, the Danzig court noted that considering breaches of ethical duties is entirely appropriate in connection with fashioning remedies, hearings on fee issues before the court, and policing attorney conduct. See id.

In Holmes v. Loveless, 122 Wn. App. 470, 94 P.3d 338 (2004), the court – after concluding that the RPC’s are applicable to determine the enforceability of a fee agreement – held that the court’s inherent power to consider ethical violations in determining a reasonable fee stems from the fact that a fee agreement between an attorney and client is not an ordinary business transaction. Id. at 478. The obligations of the attorney to the client transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client. Id.

Rejecting this authority, the trial court failed to examine any attorney misconduct, but instead focused exclusively on the RPC 1.5 factors. (RP 239-40). This was reversible error. The factors listed in RPC 1.5(a) are not an exhaustive list of the factors to be considered in determining a reasonable fee. See WSBA Informal Opinion 978 (1986) (finding that RPC 1.5(a) “does not purport to be an exhaustive list”);

Kimball v. PUD No. 1, 64 Wn.2d 252, 257, 391 P.2d 205 (1964) (factors are strong, but not controlling guides in ascertaining the reasonableness of an attorney's fee); Absher Const. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 917 P.2d 1086 (1995) (the court may use the factors identified in RPC 1.5, but "[t]here are additional concerns which may also be relevant" to determine a reasonable fee).

As established under Washington case law, a trial court is not bound solely to the factors listed in RPC 1.5 for determining the reasonableness of attorneys' fees. In addition, the trial court was required to consider the charges of ethical misconduct in determining the amount of reasonable fees payable to Mary Schultz. Having failed to look past RPC 1.5 and examine the charges of ethical misconduct, such as Mary Schultz' successive increases to the contingency fee percentage under threats of withdrawal, claim to 88% of the recovery, attempt to acquire all of the rights to the settlement, or refusal to submit to her client's settlement request, the trial court's decision was contrary to law and amounts to an abuse of discretion.

Indeed, the facts at issue here are more egregious than any published decision in the United States. As Professor Strait found, Mary Schultz' conduct resulted in no less than 35 violations of the RPCs as well as numerous breaches of fiduciary duty. (CP 865-84). To name of a few,

Mary Schultz' numerous modifications to the fee agreements violated her fiduciary duty to her client, created an impermissible conflict of interest, and resulted in a violation of Washington's Consumer Protection Act. (CP 865-67). Likewise, Mary Schultz' attempt to acquire Ms. Forbes' cause of action through an assignment and her refusal to submit her client's counteroffer unless and until Ms. Forbes agreed to resolve their fee dispute was in violation of her ethical obligations owed to Ms. Forbes. (CP 866). These breaches should have impacted the trial court's analysis of the attorneys' fees payable to Mary Schultz.

In addition to other general provisions of the RPCs, the trial court failed to consider the application of RPC 1.8 to the numerous fee agreements between Mary Schultz and Ms. Forbes. While an initial contingency fee agreement entered into between a lawyer and client is not a business transaction subject to RPC 1.8 (because there is not an existing attorney-client relationship), any modification after the commencement of the attorney-client relationship is subject to particular attention and scrutiny under RPC 1.8. In fact, pursuant to established Washington case law, "[o]nce the attorney-client relationship is established, any modification of the fee agreement becomes subject to the fiduciary obligations and the well-established presumptions." Perez v. Pappas, 98 Wn.2d 835, 841, 659 P.2d 475 (1983). One of the well-established

presumptions is that any such modification is “prima facie fraudulent.” See In Re McGlothlen, 99 Wn.2d 515, 524, 663 P.2d 1330 (1983). One reason for this rigid restriction is that lawyers have a special obligation to avoid exploitation of their existing fiduciary relationship. See Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 754 P.2d 120 (1988). The trial court failed to appreciate these presumptions.

The harm resulting from Mary Schultz’ refusal to submit to her client’s directive is undeniable. Indeed, Ms. Forbes felt compelled to terminate her attorney and accept ABM’s opening offer of \$5,000,000.00, when she had instructed Mary Schultz to counter at \$5.8 million. As such, this Court should remand this case to the trial court with specific direction, per Ross v. Scannell, to consider the charges of ethical misconduct and breaches of fiduciary duty in determining the amount of reasonable attorneys’ fees payable to Mary Schultz.

B. The Contingency Fee Agreement Relied Upon by the Trial Court Was Unenforceable for Lack of Consideration.

In determining the amount of attorneys’ fees payable to Mary Schultz, the trial court utilized the November 2002 fee agreement. (See CP 1810-11 at ¶¶ 88, 90, 96, 97). However, Mary Schultz failed to present evidence that the November 2002 fee agreement, as modified, was

supported by new consideration. Therefore, as explained below, the November 2002 fee agreement was unenforceable.

In Ward, 51 Wn. App. 423, the court addressed the issue of whether and to what extent subsequent modifications to an original attorney fee contract are enforceable. In addressing the applicable standard of review, the court commented that review of an attorney's fee agreement renegotiated after the attorney-client relationship was established "requires particular attention and scrutiny." Id. at 428. Significantly, the court held that:

Such a modification is considered to be void or voidable until the attorney establishes that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated.

Ward, 51 Wn. App. at 428 (quoting Kennedy v. Clausing, 74 Wn.2d 43, 491, 445 P.2d 637 (1968)).

Pursuant to settled Washington law, "if renegotiation after commencement of the attorney-client relationship results in greater compensation for the attorney than that under the initial agreement, courts may refuse to enforce the renegotiated fee unless it is supported by new consideration." Cotton v. Kronenberg, 111 Wn. App. 258, 272, 44 P.3d 878 (2002). In Boardman v. Dorsett, 38 Wn. App. 338, 341, 685 P.2d 615, rev. den., 103 Wn.2d 1006 (1984), the court found that "a subsequent

agreement modifying an existing contract must be supported by new consideration independent of the consideration involved in the original agreement.” Put simply, “[i]ndependent, additional, consideration is required for the valid formation of a modification or subsequent agreement.” Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004). “Independent consideration involves new promises or obligations previously not required of the parties.” Id. Moreover, “a modification or subsequent agreement is not supported by consideration if one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract.” Rosellini v. Banchemo, 83 Wn.2d 268, 273, 517 P.2d 955 (1974).

In Rufolo v. Rossiello, 912 F. Supp. 344 (N.D. Ill. 1995), the court addressed a factually similar situation. The Rufolo court was confronted with multiple modifications of an attorney’s contingency fee agreement. The attorney and client originally entered into a contingency fee contract which provided the attorney with 33 1/3 % of any amounts received. Id. at 348. After entry of judgment, but before appeal, the attorney and client entered into a second contingency fee agreement, which provided the attorney with 40% of any recovery. Id. After appeal and remand, the attorney and client entered into a third contingency fee agreement which provided the attorney with 50% of any amounts recovered. Id. at 348-49.

The attorney sought to enforce the third contingency fee agreement claiming that it superseded and replaced the previous two agreements. Id. at 349.

In analyzing the issues, the Rufolo court applied the same careful scrutiny and presumptions as Washington courts. See id. As a result of this careful scrutiny, and noting the need for consideration to support any modifications, the Rufolo court found that the attorney failed to carry his burden to support the modifications to the contingency fee agreement. Accordingly, the Rufolo court refused to enforce the modified contingency fee agreement. Id. at 351.

Here, the successively modified fee agreements between Mary Schultz and Ms. Forbes increased the level of Mary Schultz' compensation. As such, the rule articulated by the court in Cotton requires Mary Schultz to prove new consideration for each of the new fee contracts. Mary Schultz failed to establish independent, additional, consideration. Because the modified fee agreements between Mary Schultz and Ms. Forbes were not supported by new consideration, they should not be enforced.

C. **The Trial Court Erred in Awarding Mary Schultz Pre-Judgment Interest.**

The trial court awarded Mary Schultz \$226,893.35 in pre-judgment interest on the contingency fee percentage ultimately found payable. (CP 1813 at ¶ 103, CP 1914-18). This was error. What is more, it was inequitable. The trial court awarded Mary Schultz pre-judgment interest at a rate of 12% when the money being held in the Registry of the Court was only earning around 3%.

The trial court's award of prejudgment interest on the fee it found owed to Mary Schultz was contrary to established case law and amounts to an abuse of discretion. See Mahler v. Szucs, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (finding an abuse of discretion where prejudgment interest was awarded against a party that did not retain the use value of the money).

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

1. The amount of attorneys' fees payable to Mary Schultz was unliquidated, rendering an award of prejudgment interest improper.

As a general matter, the determination of a reasonable attorney fee is an unliquidated claim. Flint v. Hart, 82 Wn. App. 209, 226, 917 P.2d 590 (1996). In fact, the Washington Supreme Court has held that “an award of attorneys’ fees is precisely the type of discretionary claims where we have rejected the right to prejudgment interest.” Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 687-88, 15 P.3d 115 (2000). As such, a court abuses its discretion when it awards pre-judgment interest on an award of attorneys’ fees. Id.

Here, the reasonable amount of attorneys’ fees was not determinable without reliance upon opinion or discretion. As discussed in detail above, the trial court was required to exercise its discretion in determining the amount of fees and costs payable to Mary 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). That is, whether Mary Schultz’ alleged ethical misconduct had any effect on the fee awarded, the trial court was required to utilize its discretion in setting the “reasonable” fee.

What is more, while Mary Schultz argued for 44% of the judgment amount, Ms. Forbes urged the trial court to disregard the fee agreement

and award appropriate fees under quantum meruit. (RP 29-30). Thus, the trial court was required, irrespective of how it ultimately calculated the fees, to determine what fees were “reasonable” by exercising its discretion.

As manifest by its Amended Order, the trial court utilized its discretion in determining the amount of reasonable fees payable to Mary Schultz – albeit poorly. 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. See Cosmopolitan Eng. Group v. Ondeo Degremont, Inc., 128 Wn. App. 885, 895. 117 P.3d 1147 (2005) (finding claims unliquidated where “the sum's precise amount ‘*must in the last analysis depend upon the opinion or discretion of the judge or jury.*’”). (emphasis in original).

2. Forbes did not retain the “use value” of the claimed fees, but rather deposited the full amount of Mary Schultz’ claimed interest into the registry of the court.

According to the Washington Supreme Court, “[t]he touchstone for an award of prejudgment interest is that a party must have the ‘use value’ of the money improperly.” Mahler, 135 Wn.2d at 429. Effectively, therefore, “an award of prejudgment interest compels a party that *wrongfully holds* money to disgorge the benefit.” Id. at 430 (emphasis added). Thus, it is the *retention* of the “use value” of the money by the party to be charged that triggers the right to prejudgment interest. Id.

A party does not retain the “use value” funds when disputed amounts are held in the registry of the court pending resolution.³ This proposition was confirmed in Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 775, 115 P.3d 349 (2005). In Crest, the court expressly found that a party can prevent the imposition of pre-judgment interest by depositing the amount owed into the registry of the court. Id. at 775-76. By so doing, the Crest court found that prejudgment interest is tolled on the amount deposited with the court. Id. at 776. Therefore, when a party deposits the entire amount claimed by the adverse party into the registry of the court, an award of prejudgment interest is not applicable. See id.

³ 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 (Wn. App. Div. I, 2001), is directly on point. However, pursuant to RAP 10.4, Ms. Forbes is not permitted to rely on this case as authority.

Here, Ms. Forbes did not retain the “use value” of the money. Instead, Ms. Forbes and ABM deposited the full amount of Mary Schultz’ claimed lien into the registry of the court pending resolution by the trial court. 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. Ms. Forbes retained no authority or control over the money. In fact, until Division Three of the Court of Appeals and the Washington Supreme Court allowed the release of the funds deposited into the court registry, they remained untouched by Ms. Forbes, together with all accrued interest.

Critically, however, the money was actually deposited into the registry as a result of Mary Schultz’ demands. (See CP 489). Mary Schultz cannot now claim that the act of depositing her claimed lien amount into the registry of the court, which she herself demanded, was not warranted or appropriate. Allowing Mary Schultz to demand the money be deposited into the registry of the court – thereby depriving Ms. Forbes the right to use that money during the pendency of the fee dispute – and then forcing Ms. Forbes to pay prejudgment interest for the “use” of this money, is inequitable, contrary to law and a manifest abuse of discretion. As such, Ms. Forbes is entitled to restitution in the amount of all pre-

judgment interest paid to Mary Schultz under the trial court's Order. See Ehsani v. McCullough Family P'ship, 160 Wn.2d 586, 159 P.3d 407 (2007); RAP 12.8.

D. The Trial Court Erred in Finding that Ms. Forbes Breached the Fee Agreement by Termination of the Attorney-Client Relationship and Failing to Find Justification for the Termination.

The trial court found that Ms. Forbes breached the contract by terminating the attorney-client relationship and settling her lawsuit with ABM. (See CP 1811, ¶¶ 92, 93). However, this is an erroneous pronouncement of the law and should be overturned by the Court of Appeals.

As stated in Kimball v. PUD No.1, 64 Wn.2d 252, 257, 391 P.2d 205 (1964):

A client may, at any time, either for good or fancied cause, or out of whim or caprice, or wantonly and without cause whatever, discharge his attorney and terminate the attorney-client relationship.

This rule "is thought necessary for the protection of the client in particular and the public in general." Id. Thus, "[t]he discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause." Wright v. Johanson, 132 Wash. 682,

692, 233 P. 16 (1925). Accordingly, Ms. Forbes' decision to terminate Mary Schultz was not a breach of contract and should not have impacted the trial court's analysis

Notwithstanding the recognition that Mary Schultz breached the terms of the fee agreement and failed to act in accord with her professional mandate, the trial court found that Ms. Forbes' firing of Mary Schultz was not justified. (CP 1811 at ¶¶ 92, 93). The trial court's failure to recognize Ms. Forbes' justifiable termination of the attorney-client relationship was contrary to the substantial evidence. Indeed, Ms. Forbes was so distraught over Mary Schultz' actions that she felt compelled to seek out legal counsel.

Contrary to Mary Schultz' vigorous effort to vilify Ms. Forbes, Ms. Forbes was the victim here. Over the course of their attorney-client relationship, the evidence offered at trial established that Mary Schultz repeatedly and continually abused her role as Ms. Forbes' attorney in violation of her fiduciary and ethical duties. See CP 911-30, 2041-43); see also Perez v. Pappas, 98 Wn.2d 835, 841, 659 P.2d 475 (1983) ("an attorney must continually be aware that the attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the high duty to the client").

While it is correct that Ms. Forbes long ago realized she would likely be embroiled in a fee dispute with Mary Schultz, who was viewing Ms. Forbes' case as her own "retirement case," she had every hope and desire of concluding the ABM lawsuit with Mary Schultz as her attorney and then pursue appropriate avenues to resolve her fee dispute after the ABM case was resolved. (CP 927). Ms. Forbes' desire to have Mary Schultz complete the ABM lawsuit was thwarted not by anything Ms. Forbes did, but rather a deliberate and calculated stance taken by Mary Schultz in claiming exclusive ownership of Ms. Forbes' lawsuit with the right to settle without Ms. Forbes' approval. (CP 1043). As the evidence established, it was Mary Schultz' shocking response to Ms. Forbes' request to send a counteroffer on July 29, 2005, that compelled Mary Schultz' termination. (RP 357-58). Specifically, on July 29, 2005, Ms. Forbes emailed Mary Schultz the following, directing Mary Schultz to counteroffer at \$5.8 million:

OK, please inform ABM that I reject their offer, but I am submitting a counter offer of \$5.8 million. [. . .]
Please send this counteroffer today. I also want to note that I disagree with your interpretation of our fee agreement and how the settlement money is to be split as you outlined in your previous e-mails, as well as this one.

(CP 1042). The client's directive was simple. It requested Mary Schultz to submit a counter offer at a figure that is about \$200,000.00 less than the

\$6 million counter offer Mary Schultz had been discussing with Ms. Forbes the previous day. (See CP 1040, 1041). Mary Schultz could have responded to this directive in a number of ways. However, the approach Mary Schultz selected placed her own interests above her client's and mandated her termination.

In response to Ms. Forbes' directive to submit the \$5.8 million counteroffer, Mary Schultz replied by stating that she alone had full authority to settle the client's case without the client's approval and until they reached a written agreement on the distribution of the settlement proceeds, she was going to refrain from submitting the client's counteroffer. (CP 1043). Indeed, Mary Schultz held Ms. Forbes' settlement hostage and stated:

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

(CP 1043) (emphasis added).

In a 1994 Formal Bar opinion, the WSBA indicated that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." The WSBA recognized that "abide" means "to await submissively; accept *without question or objection* . . . to submit to." (emphasis added). Thus, the Bar held that "RPC 1.2(a) requires the lawyer to accept without question a client's decision to accept or reject a

settlement offer.” WSBA Formal Opinion 191 (1994). As can be seen, Mary Schultz’ approach was diametrically opposed to her ethical and fiduciary obligations.

In contrast to the myriad choices presented to Mary Schultz, Ms. Forbes testified that in light of Mary Schultz’ email on July 29, 2005, she had no choice but to immediately terminate Mary Schultz to prevent Mary Schultz from unilaterally settling Ms. Forbes’ lawsuit with ABM. (CP 929). While this was not Ms. Forbes’ desire, she felt compelled to do so. (CP 929).

Ms. Forbes further explained the necessity in terminating Mary Schultz after receiving the July 29, 2005 email by stating that she felt as if she had no choice but to terminate Mary Schultz for fear that she would effectuate a settlement without her approval that was harmful to Ms. Forbes’ interests and benefited Mary Schultz. (CP 929-30).

Had Mary Schultz simply complied with her client’s instruction to submit a counteroffer, or if she had at least responded to Ms. Forbes’ settlement directive with the type of questions she now claims she had, Ms. Forbes would not have terminated her. (RP 358, 937-38). Instead, Mary Schultz chose an entirely different approach, one that caused Ms. Forbes grave concerns about Mary Schultz’ motivation and interests in this matter and one that resulted in her termination. (RP 202, 357).

Mary Schultz' conduct violated her fiduciary duties and the attorney-fee contract with Ms. Forbes. (CP 1857 at ¶ 92). Her conduct was also in bad faith. See Badgett v. Sec. State Bank, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). As such, her termination was more than justified. In light of this compelling evidence, the trial court's determination that Ms. Forbes' termination of the attorney-client relationship was not justified is not supported by substantial evidence and should be reversed.

E. The Trial Court Miscalculated the Amount Payable to Mary Schultz Under its Amended Order.

1. The trial court miscalculated the amount of attorneys' fees payable to Mary Schultz.

The trial court's Amended Order provides, in part:

Cheryl Forbes is ordered to pay 40% of the settlement amount of \$5,000,000 as a fair and reasonable attorney fee to Mary Schultz, **minus amounts previously paid** pursuant to the hybrid Fee Agreement. Additionally, appellant fees (minus the lodestar factor) of \$61,161.60, and post trial fees of \$35,376.73 are fair and reasonable and shall be paid to Mary Schultz.

(CP 1812 at ¶ 101). Thus, pursuant to the trial court's Order, Ms. Forbes was required to pay Mary Schultz \$2,096,538.33 in attorneys' fees *less* amounts previously paid. (See CP 2066). Ms. Forbes previously paid Mary Schultz a total of \$43,324.44 in attorneys' fees. (CP 2066). Additionally, pursuant to her work contract with Mary Schultz & Associates, Ms. Forbes paid \$500.00 per month towards the legal fees charged by Mary Schultz. (CP 2067). Ms. Forbes made these payments

for a total of fifteen months while she was employed at Mary Schultz & Associates which equals \$7,500.00. (CP 2067). Therefore, Ms. Forbes was ordered to pay Mary Schultz a total of \$2,045,713.89 in reasonable attorneys' fees as awarded by the Court. However, Mary Schultz proposed a judgment, which the trial court entered, that awarded her \$2,060,922.50 in attorneys' fees. (See CP 1915-17).⁴ This was error and Ms. Forbes is entitled to restitution in the amount of \$15,208.61 plus interest for overpayment of attorneys' fees. See RAP 12.8.

2. The trial court miscalculated the amount of costs payable to Mary Schultz.

In addition to the award of reasonable attorneys' fees, the trial court's Amended Order also provides that,

Cheryl Forbes is ordered to **reimburse** Mary Schultz for all costs incurred, as calculated and referenced in the Judgment Summary, **less amounts that were not ultimately incurred and less amounts that have been previously paid, or reduced by a small claims court decision.** Additionally, **subsequent incurred costs, supported by invoice, shall be reimbursed,** including those relating to the appeal and settlement.

(CP 1859 at ¶ 102). The total amount of costs calculated and referenced in the Judgment Summary equals \$84,377.88. (CP 1915, 2063-64).

Additionally, Mary Schultz has asserted the right to recover costs on appeal in the amount of \$2,473.00 and an accounting fee related to

⁴ The trial court also erroneously awarded Mary Schultz pre-judgment interest, which is addressed in Section VI.C.

settlement calculations in the amount of \$975.00. (CP 2081). Thus, in accordance with the trial court's Amended Order, Ms. Forbes was obligated to pay Mary Schultz \$87,825.88 in costs *less* amounts not ultimately incurred, previously paid, reduced, or not supported by invoice. (CP 2081). As with a request for fees, Mary Schultz bears the burden of proof as to those costs actually incurred. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993); see also Pearl v. Greenlee, 76 Wn. App. 338, 407, 887 P.2d 405 (1994) (finding that person claiming benefit of statutory lien carries burden of proving right to claimed amount).

Here, Ms. Forbes paid Mary 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). 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 Mary Schultz and should have been deducted from the total amount owed. Ms. Forbes is also entitled to deduct \$1,900.04 representing the difference between the amount billed to the trial court and awarded in the Judgment Summary as a cost and the amount actually paid by Mary Schultz. (CP 2064).

In addition, the total amount of costs should be further reduced by Westlaw charges in the amount of \$9,841.31, which were never incurred

by Mary Shultz. (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). For instance, Mary Schultz submitted \$10,958.32 in Westlaw charges to the Court as costs, yet only \$1,117.01 in Westlaw charges were actually incurred and paid by Mary Schultz. See (Cf. CP 2071-72 and 2073-2077). These Westlaw records illustrate that Mary Schultz was provided Westlaw service based on a “Defined Subscriber” agreement; that is, a flat fee. (See CP 319-20). Despite unambiguous language on the Westlaw records stating that **“SUBSCRIBER AGREES NOT TO . . . REPRESENT THE CHARGES AS ACTUAL WESTLAW CHARGES,”** Mary Schultz computed Westlaw charges pursuant to some unidentified per minute formula. (CP 319-20). Thus, \$9,841.31 in Westlaw charges were not actually incurred and should be reduced from the total costs payable to Mary Schultz.

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 Mary Schultz. (CP 2083). Neither of these charges are supported by documentation reflecting that Mary Schultz incurred the identified charges on behalf of Ms. Forbes. Pursuant to the trial court’s Amended Order, Ms. Forbes should have only paid

Mary Schultz a total of \$52,754.08 in costs.⁵ (See CP 2083). However, the judgment entered by the trial court awarded Mary 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 Mary Schultz plus an award of interest on this amount.⁶ See Ehsani, 160 Wn.2d at 587-88.

F. Mary Schultz' Appeal is Without Merit.

1. The trial court correctly found the November 2002 contingency fee contract to be ambiguous and construed it against the drafter, Mary Schultz.

Mary Schultz' claims that the settlement between ABM and Ms. Forbes rendered the agreement ambiguous. However, Mary Schultz misconstrues the trial court's Amended Order. The trial court found that "[t]here are ambiguities and errors in the November 2002 Fee Agreement." (CP 1811 at ¶ 96). In particular, the trial court found that "[t]he clause regarding Contingent Fees in the November 2002 Fee Agreement is ambiguous regarding how it would apply in cases with this specific fact pattern[.]" (CP 1811 at ¶ 97). Therefore, as the trial court explained, it was not the settlement that caused the ambiguity, but rather

⁵ 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.

⁶ Ms. Forbes is also entitled to recover restitution equal to all of the pre-judgment interest paid to Mary Schultz. See Section VI.C.

the absence of language in the fee agreement as applied to this scenario that highlighted the already present ambiguity in the fee agreement.

The provision at issue provides:

The Attorney's fees shall be a sum equal to 40% percent (sic) of any . . . amounts reached in settlement and-or arbitration, and forty (44%) (sic) percent of any judgment after a trial on the merits and/or appeal by any party to the action[.]

(CP 1801 at ¶ 28). The trial court correctly reasoned that the allocation of the settlement proceeds under this provision was ambiguous. As such, the Trial court properly construed that ambiguity against Mary Schultz as the attorney/drafter of the Agreement, consistent with Ms. Forbes' interpretation. See Ward, 51 Wn. App. at 430 (finding any ambiguities in the contract should be resolved against the attorney drafter); (RP 408-09).

Additionally, Mary Schultz seems to claim that the trial court erred by not awarding her 44% of the non-final judgments. However, Mary Schultz' argument is misplaced.

To obtain recovery sought by Mary Schultz, however, there had to be a final, executable, judgment. As the trial court found that there was never an enforceable judgment entered in this case, the provision of the fee agreement tying Mary Schultz' compensation to a "judgment" was inapplicable. (CP 1811 at ¶ 95). The trial court then examined the portion of the fee Agreement addressing settlements. The Agreement provides:

“The Attorney’s fees shall be a sum equal to 40% percent (sic) of any . . . amounts reached in settlement.” (CP 1801). A settlement resolved the case. (CP 1810 at ¶ 88). Therefore, the trial court’s decision to award Mary Schultz 40% of the amount Ms. Forbes received in settlement, was supportable under the plain and express language of the November 2002 Contract. (CP 1810). As the drafter of the Agreement, and as the attorney, Mary Schultz was in the position to suggest a higher contingent fee in the event of a post-trial or post-appeal settlement. She did not do so and must live with the ambiguity she created. (See CP 1001-02).

Likewise, Mary Schultz’ argument that her client “affirmed” the contingency fee percentage is misplaced. Ms. Forbes was put in a position where she was forced to negotiate with her attorney and was suggesting that Mary Schultz was being greedy, demanding more than she could ever claim as the top percentage under the fee agreement long before any settlement was being contemplated.

2. The trial court correctly determined that Mary Schultz breached the fee agreement with Ms. Forbes.

Mary Schultz claims that the trial court’s failure to conclude that she fully performed under the November 2002 Contract led to the obviously erroneous ruling that she breached the contract. Putting aside

the logical inconsistency in this assertion, Mary Schultz fails to recognize her duties to her client as extending past trial.

As stated in Farwell v. Colman, 35 Wash. 308, 314, 77 P. 379 (1904), “[t]he principal and ultimate object of a lawsuit is for the benefit of the client, and it is the client’s interests that must be considered by the attorney throughout” so that the attorney’s personal interests do not interfere with the full performance of his duties. However, when an attorney fails to act in accordance with the duties for which the attorney was retained, a client is justified in settling a matter on her own accord in “any manner which she considered advantageous to her interests.” See id. at 315.

Here, Mary Schultz’ decision to refuse to convey Ms. Forbes’ counteroffer allowed her personal interests (i.e. recovery of her fees) to interfere with the obligations and duties to the client. For this reason alone, Ms. Forbes was fully justified in settling the lawsuit in accordance with what she thought was reasonable. See Colman, 35 Wash. at 315.

In addition, Mary Schultz failed to perform her obligations under the November 2002 Contract. In Ward, 51 Wn. App. at 430, the court expressed the general rule that,

In the absence of an express provision to the contrary, services rendered by the attorney in prosecuting or defending an appeal from a judgment in the case for which he was employed are held to

be covered by a contingent fee contract, and **the attorney is not entitled to any additional compensation for such services.**

The Ward court went on to explain:

The rationale for the rule is that a client retaining an attorney on a contingent fee basis normally expects the fee to cover all services necessary to render a judgment final, . . . and that any ambiguities in the contract should be resolved against the attorney.

Id. at 430. Here, the November 2002 Contract provided that if Mary Schultz decided to do the appeal it would be under the same terms and conditions as stated in the agreement. (CP 972). As admitted by her own expert, Roger Felice, Mary Schultz' obligation to pursue the appeal under the November 2002 Contract was, at best, ambiguous. (See RP 984-85).

Since Mary Schultz was obligated to pursue Ms. Forbes' case through appeal without demanding more compensation, she breached the contingency fee agreement with Ms. Forbes by demanding an additional fee for the appeal. Moore v. Fellner, 325 P.2d 857, 863-64 (Cal. 1958). Moreover, even a "threat to withdraw from representation of the client unless an additional fee is paid is considered strong evidence of the extortion paradigm at work." *Anderson & Steele, Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, *Geo J. Legal Ethics* 811 (1991).

In Dagny Management Corp. v. Oppenheim & Meltzer, 199 A.D.2d 711, 712 (1993), the court addressed whether a law firm's interference with a client's right to settle its claim was under the guise of protecting the client's interest or in an effort to protect its contingency fee. Id. Under either scenario, however, the court concluded that "the firm's interference with the client's right to settle constitutes misconduct sufficient to rise to a level warranting discharge for cause and forfeiture of its fee." Id. at 713.

Mary Schultz' July 29, 2005, email also illustrates that she was refusing to submit a counteroffer unless they "reach agreement" on the terms of her compensation. In Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So.2d 947 (1983), the court addressed a surprisingly analogous situation. In Searcy, the plaintiff was offered a \$19.9 million dollar settlement of a \$26 million dollar judgment. Id. at 948. Instead of concentrating on effecting this settlement, the attorney pressured his client into signing a new fee agreement. Ultimately, the attorney claimed that the client could (1) acknowledge that the higher contingency fee applied to the recovery; (2) sign a new contract; or (3) get another lawyer. Id. at 949. The trial court concluded that the attorneys' conduct amounted to a material breach of the entire contract and ordered forfeiture of any fees due to the attorney. Id. at 949-50. As discussed in

detail above, while the trial court correctly found Mary Schultz to be in breach of the Agreement, it failed to properly address the amount of fees payable as a result of her breach. The trial court should have awarded Ms. Schultz her fees pursuant to the hourly termination provision in the fee agreement.

3. Mary Schultz is only entitled to a “reasonable” fee, as determined by the court. The trial court’s exercise of its discretionary function does not result in a Constitutional violation.

Mary Schultz argues that this Court lacks the discretionary authority to determine the amount of reasonable fees owed by a client. Indeed, Mary Schultz claims that the trial court’s exercise of discretionary authority and oversight over attorney fee agreements violates her constitutional rights. This issue was not raised at the trial court level. Nonetheless, Mary Schultz could not be more mistaken and her position ignores the fiduciary nature of the attorney-client relationship.

It is beyond legitimate dispute that a client is only obligated to pay an attorney a “reasonable fee” for the services rendered. Kimball v. PUD No.1, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). The determination of a reasonable fee, however, is reserved for the trial court. Commercial Credit Corp. v. Wollgast, 11 Wn. App. 117, 126, 521 P.2d 1191 (1974); RCW 4.24.005. Indeed, the court must independently determine what represents

a reasonable attorneys' fee payable by a client. Nordstrom, Inc. v. Tambourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

In Holmes v. Loveless, 122 Wn. App. 470, 478, 94 P.3d 338 (2004), the Washington Court of Appeals found:

A fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationship and prohibit the lawyer from taking advantage of the client. Thus, in fixing and collecting fees the profession must remember that it is 'a branch of the administration of justice and not a mere money getting trade.'

Id. at 478 (emphasis added). Moreover, as stated in Holmes, "it is appropriate to hold attorneys to a standard of continued adherence to the rules prohibiting excessive fees." Id. Thus, "[t]he unique relationship between attorney and client prevents the agreement between them from being considered as an ordinary contract because doing so would ignore the special fiduciary relationship." Olsen and Brown v. City of Englewood, 889 P.2d 673, 676 (Colo. 1995); Perez v. Pappas, 98 Wn.2d 835, 659 P.2d 475 (1983) (accord). As such, a court interpreting a contract between an attorney and client is required to analyze it in accordance with the lawyer's fiduciary obligations. Perez, 98 Wn.2d at 840 (finding that "an attorney must continually be aware that the attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client.").

The trial court properly concluded that any contingency amount should be computed from a settlement amount, not the non-final judgment against ABM. This was in accord with the opinion of Roger Felice, Mary Schultz' expert, who opined during trial that it would be **“inherently unfair”** to compute a contingent fee from anything other than the amount the client actually recovers. (RP 1010-11). Indeed, computing the contingent fee based on the non-existent judgment would have yielded a 72% contingent fee, which only Mary Schultz claims is reasonable. As established, Mary Schultz' argument rests upon faulty premises unsupported by Washington law.

What is more, while Ms. Forbes disagrees that the trial court's decision is subject to constitutional scrutiny, the mandate to award only a reasonable fee is “reasonable and necessary” to serve the legitimate public purpose of protecting clients from attorney overreaching. See Pierce Cty. v. State, 159 Wn.2d 16, 28, 148 P.3d 1002 (2006).

4. Mary Schultz' Fee is based upon the amount recovered, not the unenforceable judgment amount.

Mary Schultz claims that her claim for attorneys' fees could not be affected by settlement. Mary Schultz' position finds no support in law or policy and deserves short shrift.

An attorney is not entitled to a contingency fee until there has been a recovery. Stageberg v. Stageberg, 695 N.W.2d 609, 616 (Minn. App. 2005); McRea v. Warehime, 49 Wash. 194, 197, 94 P. 924 (1908) (finding a contingency fee does not allow attorney any vested rights). In accord with this principle, a client can always settle a case at any time without the attorney's consent. Id. And, "a stipulation in a contingency fee agreement requiring the consent of the attorney as a prerequisite to settlement is void as against public policy because it stifles settlement and removes control over the cause from the client." Krippner v. Matz, 287 N.W. 19, 24 (1939) at 24.

In so settling, however, "it is immaterial that the attorney is by agreement to receive a part of the sum which may be recovered." McRea, 49 Wash. at 197. "[T]he amount of the settlement must be taken as a basis from which to compute the attorneys' fees. And this seems to be the only practical rule to apply if we are to hold, as has been heretofore held, that the client's right to settle his cause of upon such terms as to him seems best is absolute." Krippner v. Matz, 287 N.W. 19, 24 (1939); see generally Annon., 3 A.L.R. 472 (1919) (noting that the weight of authority holds that in contingency fee cases the amount of the settlement is the amount from which the percentage fee shall be calculated); Annon., 40 A.L.R. 1529 (1926) (affirming and affirming the validity of the rule that

percentage fees are derived from settlement amounts rather than judgment amounts awarded but not received).

While Mary Schultz now concedes that a client has the absolute right to settle its dispute, she asserts a right to recover the full amount of an unenforceable judgment amount based upon the client's exercise of that right. Such an argument is not practical or appropriate given the client's absolute right to settle her own dispute. (Accord CP 1807 at ¶ 72 (finding client's right to settle dispute is primary)).

Mary Schultz spends considerable time analyzing out-of-jurisdiction bad faith decisions, many of which are 100-years old. See Desaman v. Butler Brothers, 136 N.W. 747, 750 (Minn. 1912) (requiring presence of fraud to deprive attorney of all fees before the court would conceivably allow an attorney to stand in the way of a settlement). Moreover, the cases relied upon by Mary Schultz require, at a minimum, that the attorneys' interest, if any, be ignored entirely. This simply did not happen here. Instead, Ms. Forbes and ABM agreed to place the entire lien amount claimed by Mary Schultz into the Registry of the Court. Thus, the established facts at issue here are not in accord with the case law relied upon by Mary Schultz.

Irrespective, the trial court did not find bad faith and no bad faith is present, at least with respect to Ms. Forbes. Ms. Forbes never testified

that she discharged Mary Schultz so as to void the entire contingency and only pay her an hourly rate. (RP 201). Ms. Forbes explained that her decision to terminate Mary Schultz was based upon the fear that Mary Schultz was only acting to protect her own interest in the fee and would cut her out of the decision-making process. (RP 355-58).

As confirmed by the court in Stephens v. Metropolitan Street Railway Co., 138 S.W. 904, 908 (1911), the fact that a “settlement is made by the client without the advice or consent of the attorney, of itself, will not support an inference that the client acted in bad faith towards his attorney.” While Mary Schultz now concedes this right, she fails to understand the necessary corollary that a client’s decision to settle impacts the amount recoverable by an attorney retained under a contingency fee agreement.

At the time the settlement was made, Ms. Forbes was confronted with the uncertainty of the petition for review before the court, and hence confronted with the possibility of losing her case in its entirety. Therefore, since the matter was on appeal, “the client’s right to compromise [remained] paramount.” Stephens, 138 S.W. at 908.

Moreover, Mary Schultz’ own expert, Roger Felice, testified that it would be “inherently unfair” to force a client to pay any amount other than that recovered in settlement. (RP 1010-1011). Mary Schultz’ expert

explained: “[u]ltimately if there is a judgment entered for 100 and it settles for 75, the contingency should be based upon the 75, on the amount of the settlement. (RP 1011).

As the trial court correctly found “[a] settlement of \$5,000,000 resolved the case” and as a result of the request for Supreme Court review, the judgment was “**not enforceable.**” (CP 1810-11 at ¶¶ 95, 87). Thus, there is no conceivable basis to award Mary Schultz attorneys’ fees based upon a non-existent judgment that was never executable.

Likewise, Mary Schultz’ argument that the judgments were recovered because Ms. Forbes and ABM filed a Satisfaction of Judgment is absurd and not in accord with the facts. A \$5,000,000 settlement resolved the dispute between ABM and Ms. Forbes. (CP 1810). The satisfaction was a procedural formality to take the judgment off of the public records and to provide notice that the all disputes between ABM and Ms. Forbes were resolved. Because Mary Schultz wanted to argue that her “reasonable” fees should be calculated based upon the unenforceable judgments entered against ABM, Ms. Forbes stipulated to allow Ms. Schultz to argue such an entitlement. (See CP 503-04).

5. The trial court correctly concluded that Mary Schultz is not entitled to recover prevailing party fees in addition to her contingency fee percentage.

Mary Shultz is not entitled to recover the prevailing party fees awarded to Ms. Forbes. The attorneys fees awarded to Ms. Forbes under RCW 49.60 were part of her damages and tied to the judgment. As the court noted, the “**judgment included attorney fees.**” (CP 1811 at ¶ 95). Thus, the trial court concluded that the judgment, including the award of prevailing party fees to Ms. Forbes under RCW 49.60, was unenforceable and not applicable due to the fact that a settlement had resolved the underlying dispute.

Furthermore, awarding Mary Schultz the prevailing party fees awarded to Ms. Forbes in addition to her full contingency fee percentage would have been an unreasonable fee. Courts addressing this precise issue have been unambiguous in their distain for such an occurrence. In Venegas v. Skaggs, 867 F.2d 527, 534 (9th Cir. 1989), aff’d, 495 U.S. 82 (1990), the Ninth Circuit concluded that “plaintiff’s attorneys are not entitled to *both* the statutory award and the full amount of the contingency fee.” Numerous other courts considering this issue have come to the same conclusion as the Venegas court. See State ex rel. Okla Bar Ass’n v. Weeks, 969 P.2d 347, 352 (Okla. 1998), cert. den., 525 U.S. 1042 (1998) (finding dual recovery of court-awarded attorneys’ fee and full contingency amount to constitute an “unwarranted windfall . . . which constitutes an unreasonable fee[.]”); Cambridge Trust Co. v. Hanify &

King Prof. Corp., 430 Mass 472, 721 N.E.2d 1, 7 (1999) (finding dual recovery of court-awarded fees and contingency fee to be per se unreasonable). Therefore, based upon precedent from around the country, the trial court was correct in its refusal to award Mary Schultz the prevailing party fees awarded to Ms. Forbes under RCW 49.60 in addition to her full contingency fee of 40% of the settlement, and post trial and appeal fees. (CP 1810-11 at ¶¶ 95, 87).

6. Washington's lien statute does not support Mary Schultz's ability to recover fees based upon an unenforceable judgment.

Washington's lien statute "is in derogation of the common law and therefore must be strictly construed." Ross v. Scannell, 97 Wn.2d 598, 605 647 P.2d 1004 (1982). As such, the attorney lien statute cannot be judicially expanded. Id. While Mary Schultz believes the attorneys' lien statute confirms an entitlement, the Ross court explained that the attorney lien statute is "designed to be a tool in the collection of fees." Id. at 604.

Moreover, citing RCW 60.40.010(4), Mary Schultz claims that her lien on the judgment is not affected by any settlement between the parties until the lien is satisfied in full. However, Mary Schultz fails to recognize that RCW 60.40.010(4) does not apply to a judgment lien but only to liens created upon a party's cause of action. See RCW 60.40.010(4) ("The lien created by subsection 1(d) of this section [upon an action] is not affected

by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.”).

Nonetheless, while an attorney’s lien is subject to the client’s right to settle, it is not affected or released by the client’s settlement. Instead, the attorney’s lien follows the proceeds of the settlement. See RCW 60.40.010(5) (defining proceeds as the “monetary sum received in the action.”). As such, when a client “exercises his right to settle his lawsuit, the amount of the attorney’s lien, where the fee is on a percentage basis, is determined by the sum **actually received by the client in settlement.**”

Franklin v. Local Finance Co., 136 S.W.2d 112, 116 (1940) (emphasis added). Of course, “[w]here the client exercises that right, the attorney’s lien is not defeated thereby, but attaches to the proceeds of the settlement.”

Id.

What is more, a statutory lien can only be effective “from the time of filing notice of such lien or claim with the clerk of the court.” RCW 60.40.010. Here, it is undisputed that Mary Schultz filed her Notice of Lien on August 2, 2005 – **after** Ms. Forbes had accepted ABM’s offer of settlement. (CP 458, 1048). Therefore, Mary Schultz’ lien only attaches to the proceeds from the settlement between ABM and Ms. Forbes, not a hypothetical and unrecoverable judgment amount. See McRea, 49 Wash.

194 (finding client has right to settle without attorney's consent where attorney has not yet asserted a lien).

Embracing Mary Schultz' position that an attorney's lien must be paid in full regardless of the amount of recovery would enable an attorney to recover a judgment on behalf of a client, file a lien based upon the judgment amount, and then enable the attorney to recover the full amount of his or her contingency fee based upon judgment amounts notwithstanding the possibility that the defendant may not be able to pay the entire judgment amount or files bankruptcy. Thus, a contingent fee client could be exposed to a substantial fee obligation, even if her attorney never collected one dollar from the defendant or if the judgment was reversed on appeal. Such a result is in direct contravention of the nature of a contingency fee, which is based upon the amount ultimately recovered by the client and the statute itself. See Matz, 287 N.W. at 24. Indeed, this is the exact type of scenario that Mary Shultz' own expert witness considers to be "inherently unfair." (See RP 1011).

More importantly, Mary Schultz was never deprived of her lien. The purpose of the attorney's lien statute is to enable the attorney to "rest secure that he would obtain his reasonable fee." Krein v. Nordstrom, 80 Wn. App. 306, 309, 908 P.2d 889 (1995) (*quoting State ex rel. Robinson v. Gilliam*, 94 Wash. 243, 245, 161 P. 1194 (1917)). Mary Schultz' lien

secured her right to receive a “reasonable fee.” Mary Schultz’ lien became fully satisfied by the payment of the amount of attorneys’ fees and compensation determined due and owing by the trial court. Washington’s lien statute does not allow an attorney to recover fees in excess of what is determined to be a reasonable attorneys’ fee, and Mary Schultz’ argument to the contrary should be rejected.

G. The Court of Appeals Should Reimburse Ms. Forbes for her Attorneys’ Fees and Costs Expended in this Appeal.

Pursuant to RAP 18.1, Ms. Forbes requests that this Court award her attorneys’ fees for prosecuting this appeal based upon equitable considerations. Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 927, 982 P.2d 1313, rev. den., 140 Wn.2d 1010 (2000).

VII. CONCLUSION

This Court should reverse the trial court’s award of prejudgment interest to Mary Schultz, award Ms. Forbes restitution equal to the amount of prejudgment interest paid to Mary 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 the trial court with the express request that the trial court consider the charges of ethical misconduct in determining the fees payable to Mary Schultz.

In addition, this Court should find that Ms. Forbes' termination of the attorney/client relationship was not in breach, but rather substantially justified. As such, this Court should 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 Mary Schultz' ethical misconduct. Lastly, Mary Schultz' appeal and assignments of error should be rejected.

RESPECTFULLY SUBMITTED this 3rd day of October, 2007.

LUKINS & ANNIS, P.S.

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2007, I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENT/CROSS-APPELLANT on the following persons in the manner indicated:

Ms. Mary E. Schultz
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ELECTRONICALLY
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DATED this 3rd of October, 2007, at Spokane, Washington.



PENNY LAMB