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ORIGINAL

No. 65740-2-1

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

PUGET SOUND ELECTRICAL WORKERS  
HEALTH TRUST AND VACATION PLAN; PUGET SOUND  
ELECTRICAL WORKERS PENSION TRUST; IBEW LOCAL 46  
RETIREMENT ANNUITY TRUST; IBEW LOCAL 46  
APPRENTICESHIP AND TRAINING TRUST;  
AND PUGET SOUND ELECTRICAL JOINT  
LABOR COOPERATION TRUST,

Respondents,

v.

McKENZIE ROTHWELL BARLOW & KORPI, P.S.;  
SMITH McKENZIE ROTHWELL & BARLOW, P.S.,

Appellants,

and

MICHAEL H. KORPI; A. BRUCE McKENZIE;  
DAVID S. BARLOW; AND CATHERINE A. ROTHWELL,

Defendants.

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## A. INTRODUCTION

The brief submitted to this Court by the respondent Taft-Hartley Trusts (“Trusts”) in response to the opening brief of McKenzie Rothwell Barlow & Korpi, P.S. (“the firm”) is long on the jury-type argument and short on legal analysis. The Trusts fail to adequately address the duty owed them by the firm in light of preemption of state law collection remedies by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (“ERISA”).

Similarly, they fail to adequately address causation in a professional negligence action, making the erroneous assertion that the firm provided “no evidence” of negligence on the part of its successor when that firm failed to take steps to pursue collection actions on the Trusts’ behalf based on that successor’s erroneous understanding of Washington law.

Finally, the Trusts offer less than two pages of analysis in their brief to the trial court’s damages decisions in which it permitted them to recover highly speculative amounts of damages as well as damages for the legal fees of attorney Sanford Levy for an audit that was nothing more than preemptive retention of a trial expert.

## B. ISSUES PRESENTED FOR REVIEW

The Trusts offer four pages of a Counterstatement of Issues (more attention than they devoted to the damages issue, for example) that is nothing but a regurgitation of their argument. Br. of Resp'ts at 1-5. They do not perceive how issues relating to Assignments of Error should be articulated. *See, e.g.*, RAP Form 6. This Court should consider the issues as articulated by the firm. Br. of Appellants at 4-6.

## C. STATEMENT OF THE CASE

The Trusts' statement of the case does not provide the Court a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5); RAP 10.3(b). Instead, often without citations to the record, the Trusts offer an argumentative, and highly selective, version of what transpired below. Generally, the Trusts' recitation of the facts ignores the factual discussion in the firm's Statement of the Case and Argument sections of its brief. Several points about the Trusts' discussion of the facts, however, bear emphasis.

The Trusts largely do not take issue with the core facts presented in the firm's opening brief. The firm made extensive reports on the status of claims to the Trusts. Exs. 11, 38-70, 109-34. The firm utilized auditors' reports on contractor delinquencies to "harden" the claims it pursued on the Trusts' behalf. Exs. 135, 140, 158-63, 166-68, 171-72. Levy

acknowledged the value of qualification of the lien amount. RPV:45, 70. The firm filed, and then renewed, claims against delinquent contractors when it was economic to do so. Exs. 180-237. The firm reported to the Trusts that federal preemption of state remedies by ERISA was a reality that would impact collection efforts. Ex. 101.

The principal focus of the Trusts' brief is Michael Korpi's January 2005 letter, Ex. 1, which they allege justified retention of attorney Levy for an "audit." See Br. of Resp'ts at 5-9. The Trusts then recount Levy's "audit" report with respect to various delinquent contractors. The Trusts' emphasis on Korpi's letter is a diversion.

With respect to *Trans World Electric*, the firm failed to renew liens, as the firm admitted. Ex. 1. See generally, Br. of Appellants at 13. However, the firm reported to the Trusts that the claims as to other contractors, which were in different stages of collection, were progressing appropriately. Ex. 12.

With respect to *Fox Electric*, the firm filed liens and initiated an action. The Trusts take issue with the statement made in the firm's opening brief that nothing prevented the firm's successor from accepting Fox's \$281,000 settlement proposal. Br. of Resp'ts at 11. However, the Trusts neglect to advise the Court that they discharged the firm in December 2004. RPIV:63-64. Robert Bohrer of the successor firm met

with James Fox in January 2005. Ex. 107; CP 1141-42. There is *no testimony* in the record that Fox would not have settled for \$281,000 at that time, had Bohrer recommended the settlement to the Trusts. Indeed, Exhibit 107, Fox's declaration (attached in the Appendix) is not to the contrary.

With respect to *Pacific Electric*, the Trusts ignore the alter ego lawsuit the firm filed and the problem created by the Trusts' insistence that any funds collected be applied first to the earliest outstanding delinquencies of the contractor. Exs. 14, 32-37.

As to *Atkinson Bell/Lunde*, the Trusts ignore the firm's efforts to obtain restitution from the principals of that firm who had been indicted. Ex. 243; RPIV:160-61; RPV:63-64.

#### D. ARGUMENT

##### (1) Standard of Review

The Trusts recite the standard of review for trial court decisions here, br. of resp'ts at 18-19, but their discussion does not differ significantly from the firm's, except with regard to conclusions of law that are findings in disguise. Br. of Appellants at 17.

The Trusts themselves state quite correctly that "[a] conclusion of law is a conclusion of law wherever it appears, even if it is erroneously labeled a finding of fact." Br. of Resp'ts at 19. They apparently concede

that findings 13, 15, 18, 22, 25, 26, 28, 29, 30 and 31 are conclusions of law because those conclusions address the standard of care, ordinarily a question of law; the Trusts do not dispute the firm's contention in its brief at 17 that those findings are conclusions of law in disguise.

The Trusts, however, take issue with the firm's citation of *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) for the unremarkable proposition that duty or standard of care in a negligence case is a question of law. But the basis for the Trusts' apparent disagreement with the firm on the standard of care is unclear. The Trusts quote *Sheikh* wherein our Supreme Court stated: "Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo." *Id.* Obviously, the firm agrees with that proposition. But the Trusts fail to appreciate the relationship of duty and the standard of care. Duty is based on the standard of care owed by a defendant to a plaintiff. That standard of care may arise from statute or common law principles. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.2d 1214 (2009). The two concepts are inextricably intertwined and *both* are questions of law for the court.

If the Trusts are seriously contending that standard of care is a fact question, they are wrong. Instead, the Trusts seem to *concede* that duty and standard of care are, in fact, questions of law reviewed de novo

because they offer no real analysis of this question, and instead they segue to a contention that the firm asserted breach of duty was a question of law. Br. of Resp'ts at 20. This is flatly *untrue*. Nowhere in the firm's opening brief is such an argument advanced. *See* Br. of Appellants at 20.

The duty and standard of care owed by the firm to the Trusts is a question of law that should be reviewed *de novo* even if it appears improperly in a finding of fact.

(2) Requisite Elements of a Professional Negligence Claim Against the Firm

The Trusts devote a significant portion of their brief (br. of resp'ts at 20-25) essentially repeating the discussion by the firm of the elements of a professional negligence claim in Washington. Br. of Appellants at 17-19. The Trusts apparently do not disagree with the firm's discussion of the law set forth there.

They do not take issue with the proposition that an attorney is not held to a standard of perfect judgment, but only to one of good faith and due diligence in the client's representation. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675, *review denied*, 108 Wn.2d 1008 (1987).

They *concede* that they bore the burden of proving causation, a "case within a case," under *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985). Br. of Resp'ts at 23-24.

They further *concede* that on damages, they claim they bore the burden of proving the collectability of the underlying claims or debts owed to them in accordance with *Tilly v. John Doe*, 49 Wn. App. 727, 746 P.2d 323 (1987), *review denied*, 110 Wn.2d 1022 (1988). Br. of Resp'ts at 24.

The major difference between the parties is the Trusts' extensive discussion of a breach of fiduciary duty by the firm. Br. of Resp'ts at 21-23. To be clear, the *sole* instance of an alleged breach of fiduciary duty by the firm related to Michael Korpi's tardy report of an error in pursuing collection against Trans World. The firm did not appeal from findings of fact number 17 or 21 on that issue. Apart from that isolated breach of fiduciary duty to the Trusts that is not even an issue on appeal (which the Trusts have repeatedly referenced in their brief for its jury argument value – br. of resp'ts at 6, 7, 8, 16, 17, 22, 23, 25, 26, 37), fiduciary duty is not relevant to the issues on review.

(3) The Trial Court Erred in Setting the Standard of Care for ERISA Collection Work

The Trusts attempt to soft pedal the enormous problems presented for Washington collection lawyers by case law applying ERISA preemption to state collection remedies. Those problems are set forth in detail in the firm's opening brief. Br. of Appellants at 20-29.

The Trusts do not dispute the firm's articulation of the key issues in the trial court's decision in its brief at 20. The trial court determined, notwithstanding decisions by our Supreme Court aggressively applying ERISA preemption to the collection remedies of RCW 39.08 and RCW 60.28, that the firm should have immediately filed collection lawsuits even where the employer was cooperating in making payments, and that lien foreclosure lawsuits should have been filed despite ERISA's preemption of the state lien statutes.

In fact, ERISA preempted the major tools available to collection lawyers to compel recalcitrant employers to meet their financial obligations to the Trusts.

The Trusts *concede* that the firm generally filed liens against employers who failed to pay; the firm usually filed such liens and used auditors' reports to quantify the amounts due from the employers. RPIV:42-46, 222-23; RPV:69-73. The Trusts complain that the firm should have quantified the amounts due more rapidly by contacting union representatives and others, br. of resp'ts at 27, but the firm believed that its lien claims were on more solid footing, particularly in federal court, with auditor testimony. RPIV:42-46, 222-23; RPV:69-73. This was a judgment call on litigation, a matter of tactics, and not malpractice. *Halvorsen*, 46 Wn. App. at 717.

Notwithstanding the Trusts' disavowal of Levy's testimony that the standard of care required ERISA collection attorneys to file lien foreclosure suits despite the risk that they were frivolous, br. of resp'ts at 25, that is *precisely* what Levy argued was required. Levy testified that to meet the standard of care, collection counsel *must* file a lien foreclosure action, even though our Supreme Court *twice* held such actions to be preempted. RPII:149. Such lawyers had to display powers of foresight, nowhere required by law, that the law would change by "reading the tea leaves." RPV:56-57. Indeed, when the successor firm actually filed a lien foreclosure action in state court, the court awarded CR 11 sanctions against the Trusts' successor law firm because the state action was preempted by ERISA. Exs. 143-57; RPII:190-92. The trial court seemingly adopted Levy's theory of the standard of care in stating that the firm was not sufficiently "diligent" in filing lien foreclosure actions. CP 1332-33 (CL 4). But it is not malpractice to accept the ERISA preemption decisions of our Supreme Court as a correct interpretation of the law. *Hansen v. Wightman*, 14 Wn. App. 78, 100-01, 538 P.2d 1238 (1975).

On the basis of Levy's testimony, the trial court established an erroneous standard of care that mandated the filing of frivolous liens or lien foreclosure actions by ERISA collection attorneys like the firm. That is *not* the standard of care for attorneys. Indeed, in light of controlling

Supreme Court precedent on ERISA preemption, the firm would have risked a ruling that it and/or the Trusts violated CR 11 or RCW 4.84.185 in filing an action preempted by ERISA. RPC 3.1 (“A lawyer shall not bring ... a proceeding, or assert ... an issue there, unless there is a basis in law and fact for doing so that is not frivolous...”). The firm did not breach the standard of care by not filing facially invalid liens or frivolous lien foreclosure lawsuits preempted by ERISA.

Similarly, contrary to the trial court’s finding number 13 (CP 1324), the firm did not breach the standard of care by choosing not to file suits against employers like Pacific Electric, Atkinson Bell, and Baird-Weber that were cooperating in making payments. RPIV:200, 206-07. That was a proper tactic for obtaining recovery, even though Levy might disagree. Again, tactical disagreements are not malpractice. *Halvorsen*, 46 Wn. App. at 717.

Finally, a particularly strange twist to the standard of care is found in the trial court’s determination that an ERISA collection lawyer must invariably recover 85% of all delinquent contractor contributions. CP 1330 (FF 31). The Trusts try to justify this absolute standard, br. of resp’ts at 27-30, but their justification rings hollow.

Setting the standard of care at an 85% collection rate (or 90% according to Levy – RPII:61-62) disregards the actual nature of the

collection cases themselves. To use this number would require a court to look beyond the fact that a collection case might be factually or legally weak, or that the defendant employer had no resources or was actually seeking bankruptcy protection. The problem of all state lien statutes being preempted by ERISA certainly could not be considered, according to the Trusts.<sup>1</sup>

To put the exclamation point on just how screwy the Trusts' percentage argument is, a lawyer would be guilty of malpractice if he or she did not recover 85% of the delinquent contributions of an employer who claimed the protection of bankruptcy and creditors received only a fraction of their claims. In this case, according to the trial court, the firm was guilty of malpractice because it did not recommend to the Trusts a 50% settlement with Fox Electric. CP 1328-29 (FF 30). Yet, at the same time, the firm would be guilty of malpractice because it did not recover 85% from Fox, according to Levy and the trial court. The trial court's elaboration of the standard of care makes virtually no sense.

(4) The Trial Court Erred in Addressing Causation and the Successor Firm's Failure to Timely Commence Foreclosure Actions

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<sup>1</sup> The firm indicated to the Trusts *in 1990* that it recovered 95-100% of delinquencies when it was seeking to work for them. Ex. 5. Of course, that level of recovery predated the ERISA preemption decisions that removed the core collection tools for ERISA collection attorneys.

The Trusts claim that the trial court did not err in its treatment of causation, their burden to prove the “case within a case.” Br. of Resp’ts at 30-36. They are wrong. The Trusts bore the burden of establishing that the amounts now claimed as damages from the inflated sums in the Levy expert report were collectible and they failed to meet that burden.

The Trusts claim that in order for the firm to contend that its successor firm was negligent in failing to pursue various delinquent employers, the firm had to proffer expert testimony to support that position, citing conclusions of law numbers 2 and 6, and *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993). The Trusts’ citation of conclusion of law number 2 and *Adcox* does not help them. This is *not* an argument about allocation of fault under RCW 4.22.070, but rather an argument on causation. *Nowhere* does *Adcox* state that an expert is a prerequisite to such a claim.

In *Adcox*, our Supreme Court was confronted with a case in which a defendant belatedly sought to raise the issue of allocation of fault to another defendant under RCW 4.22.070(1). That defendant not only did not present any expert testimony, it presented *no testimony at all* on the other defendant’s fault. 123 Wn.2d at 25. The defendant did not make an offer of proof at trial. *Id.* at 26. It finally made an offer of proof five weeks post-trial. *Id.* at 28.

Contrary to the Trusts' assertion and the trial court's conclusion of law number 2, *Adcox* does not hold that expert testimony is required to prove that the acts of successor counsel in a legal malpractice case constitute the superseding cause of a plaintiff's harm. Indeed, the holding is far narrower: a defendant seeking to allocate fault to another entity must produce evidence of that person's fault.

In this case, the firm presented ample testimony to the trial court upon which this Court could conclude that the trial court erred by not finding the firm's successor to be the superseding cause of the Trusts' alleged harm. Moreover, the core issues confronting the trial court were legal in nature. Those questions were:

- Was the successor firm in error in believing that a foreclosure action under RCW 60.28 could not be filed where the firm had renewed the lien notices?
- Was the successor firm in error in believing that claims against the contractors' bonds under RCW 39.08 were somehow time-barred when a six-year statute of limitations applied?

Even if the Trusts and the trial court were somehow correct that expert testimony is necessary to establish superseding causation in this case, conclusion of law number 2 notes that such expert testimony is unnecessary if the negligence is "obvious." CP 1332 (CL 2). The failure of the successor firm to file actions under RCW 60.28 or RCW 39.08 to

collect on contractors' bonds because it misunderstood the applicable statute of limitations is just about as "obvious" an error as is possible.

Conclusion of law number 6 stands for the unremarkable proposition that a plaintiff bears the burden of proving causation and a lawyer's negligence need not be the sole proximate cause of a plaintiff's loss. But the trial court, like the Trusts, confused the argument on superseding causation with an argument on damage reduction, CP 1334 (CL 12), that the firm did not make. The firm argued this issue as one of causation below. CP 581-82.

The failure of a party to act can be a superseding cause so as to defeat liability on the part of a defendant. For example, our Supreme Court in *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999) so held in a case in which a child was killed by an intoxicated probationer whose probation officer failed to properly supervise him. The probation officer reported the probationer's violation of the terms of his probation to a court, but the court declined to revoke his probation. The Court stated:

. . . in light of the information before the district court judge at that hearing and his decision not to revoke probation, as a matter of law proximate causation is lacking. The judge knew that Miche had violated the court-imposed condition of his probation by driving while his license was suspended. He knew that Miche had an alcohol problem but attended meetings somewhat sporadically. He knew that Miche was scheduled to attend intensive alcohol treatment within 3 days, and thus knew that Miche was not

then in such treatment and that Miche needed such treatment. Nevertheless, despite Miche's violation of his probation conditions, the obvious severity of his alcohol problem, and the fact that Miche knowingly drove after his license had been suspended, the judge did not revoke probation. The accident occurred only 2 days later, one day before Miche's scheduled treatment was to begin.

As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.

*Id.* at 531-32. *See also, Petcu v. State*, 121 Wn. App. 36, 86 P.3d 1234, *review denied*, 152 Wn.2d 1033 (2004) (court order in dependency action broke causal chain as to alleged negligent investigation by DSHS of parent allegedly abusing his children).

In the specific context of legal malpractice, this Court held in *Lockhart v. Greive*, 66 Wn. App. 735, 834 P.2d 64 (1992), that a successor attorney's failure to timely commence a lawsuit broke the causal chain as to a claim for legal malpractice due to counsel's failure to initiate a lawsuit within the limitation period. There, Lockhart was injured in a motorcycle accident and retained Murphy to represent him. Murphy decided to withdraw from the representation. Lockhart then retained Greive. When Greive filed suit, the court found the suit was time-barred. Lockhart then sued Murphy and Greive for malpractice. This Court upheld dismissal of Murphy because causation could not be established. Murphy turned the case over to Greive with ample time to timely commence a lawsuit.

This case is no different than *Lockhart*. If the successor firm could have collected from delinquent employers, but chose not to do so based on an erroneous belief regarding the applicable statute of limitations or the scope of its authority, causation as to the firm *cannot be established here*. Nor can causation be established where, as in the case of Pacific Electric, a viable alter-ego lawsuit was pending against Pacific Electric's successor firm at the time the file was transferred to the successor law firm, but that firm chose not to pursue the claim. RPII:176; RPIV:226-27.

As recounted in the firm's opening brief at 30-35, the successor firm could have filed a lien foreclosure action against the employers' retainage funds under RCW 60.28, had it taken the step of renewing the lien notices. *Shope Enterprises v. Kent School Dist.*, 41 Wn. App. 128, 132, 702 P.2d 499 (1985). *See also, Rachow v. Philbrick & Nicholson, Inc.*, 148 Wash. 214, 217, 268 Pac. 876 (1928) (four-month period for lien foreclosure action ran from latest of lien claim notices, not first). The successor firm chose not to do so, a fact that the Trusts do not deny in their brief. This failure permitted the four-month limitation period for such lien claims under RCW 60.28.030 to expire.

Further, it is unambiguous after *Industrial Coatings Co. v. Fidelity & Deposit Co. of Maryland*, 117 Wn.2d 511, 817 P.2d 393 (1991) that a six-year statute of limitations applies to claims against a contractor's bond.

Both Levy and Robert Bohrer of the successor firm labored under the mistaken belief that if a joint RCW 39.08/60.28 notice was filed against delinquent employers, the shorter statute of limitations of RCW 60.28.030 applies. Br. of Appellants at 32. Such a belief is completely undercut by *Industrial Coatings*. *No Washington case* supports Levy or Bohrer's position, as even Levy admitted. RPII:152-55.

The Trusts cite *no case* holding that the shorter statutory period applies to RCW 39.08 claims after *Industrial Coatings*. Br. of Resp'ts at 32-34. Instead, they make the odd argument that because ERISA collection attorneys "universally" file joint RCW 39.08/60.28 claim notices, that somehow justifies the successor firm's decision, based on a flat-out misreading of *Industrial Coatings*, to forego filing actions to collect on the contractors' bonds of delinquent employers under RCW 39.08.

The only real legal argument by the Trusts is found, ironically, in their Counterstatement of the Case. Br. of Resp'ts at 14-15. In absence of any *authority*, the Trusts refer to the testimony of Oregon lawyer Charles Colett regarding the *practice* of attorneys to file joint RCW 39.08/60.28 notices of claim. The Trusts seemingly want to argue that creditors cannot renew the liens, contrary to this Court's holding in *Shope*. Br. of Resp'ts at 15. The Trusts also seem to argue that there is an absolute time

deadline to a claim against the retainage fund under RCW 60.28. The Trusts cite *no authority* for any such deadline. They cannot point to anything in the language of RCW 60.28 creating such a deadline.

RCW 60.28.011(2) requires that the lien notice for any lien against the retainage fund must be filed within 45 days “of completion of the contract work” and must be filed in the manner prescribed by RCW 39.08.030.

Under RCW 60.28.030, the lien foreclosure action must be filed within four months of the lien filing. The failure to timely file causes the lien to cease to exist. *Shope*, 41 Wn. App. at 131, 133; *Airefco, Inc. v. Yelm Comm. Schools No. 2*, 52 Wn. App. 230, 233-34, 758 P.2d 996, *review denied*, 111 Wn.2d 1029 (1988). As noted in both *Shope* and *Airefco*, however, the lien may be renewed so as to avoid the running of the four-month limitation period. *Shope*, 41 Wn. App. at 132; *Airefco*, 52 Wn. App. at 234. In *Airefco*, the lien claimant allowed the four-month time period on the initial lien notice to expire and the filing of subsequent lien notices did not revive the lien claim. 52 Wn. App. at 234.

Even if the Trusts were correct about a deadline on a RCW 60.28 action, that argument essentially missed the point. The successor firm had

*six years* to pursue claims under RCW 39.08.<sup>2</sup> The Trusts had claims against the bonds of delinquent employers under RCW 39.08. The successor firm negligently recommended to the Trusts to forego such claims. This broke the causal chain. Nothing in *Inland-Ryerson Construction Products Co., Inc. v. Brazier Construction Co., Inc.*, 7 Wn. App. 558, 500 P.2d 1015 (1972) justified this blatant error on the successor firm's part. In that case, the court held that where a party made claims against the retainage fund and the contractor's bond and then proceeded to release the RCW 60.28 claim against the retainage fund in exchange for a partial payment and a promise from the delinquent employer of full payment later, the surety on the bond was prejudiced by such actions when the employer reneged on its promises and a suit under RCW 39.08 was initiated. The surety was released. Here, no such release of RCW 60.28 claims occurred. Moreover, as noted above, it is important to note that if the failure to pursue claims under RCW 60.28 could be construed as prejudice to the contractor bond sureties, *the successor firm specifically chose not to renew the claim notices, thereby relinquishing the RCW 60.28 claims against the contractors' retainages.*

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<sup>2</sup> The trial court erroneously concluded that the standard of care *mandated* that a single notice of claim and a single foreclosure action for RCW 39.08/RCW 60.28 liens be filed. CP 1334 (CL 11). *Nothing* in statute or case law states that such actions cannot be filed separately.

Finally, the Trusts appear to misunderstand the firm's *causation* argument pertaining to Fox Electric. Br. of Resp'ts at 35-36. The Trusts instead laud the successor firm for obtaining a settlement and focus on the firm's recommendation to them regarding the proposed 50% settlement proffered by Fox in September 2004.

The Trusts utterly ignore the fact that they *discharged* the firm in December 2004. Bohrer assumed responsibility for the Fox file and met with James Fox in January 2005. Ex. 107. *Nothing prevented Bohrer from recommending to the Trusts at that time that they accept the 50% offer.* The offer was still available. The successor firm's failure to recommend the 50% Fox offer broke the causal chain as to any alleged negligence on the firm's part. *See* Br. of Appellants at 35-40.

(5) The Trial Court Erred in Making Its Damages Determinations

The Trusts offer little response to the firm's argument on the trial court's damages decision, thereby conceding the points set forth in the firm's brief. Br. of Resp'ts at 36-37; Br. of Appellants at 40-49.

First, the trial court's damages award was based on speculation and conjecture. The Trusts have no answer to that problem other than to recite, yet again, their perception of Mr. Korpi's failings. There must be

*some* basis upon which damages are set. Neither the Trusts nor the trial court have articulated a rational basis for the damages award.

Second, perhaps emblematic of the trial court's *laissez faire* attitude toward damages is the Fox Electric award. Again, the Trusts have no answer to the obvious problem of the trial court condoning what amounts to a double recovery. The firm's alleged "malpractice" was in not recommending acceptance by the Trusts of Fox's 50%, or \$281,000 settlement offer. Acceptance of that offer would have resulted in the Trusts *walking away* from any other delinquent contractor contributions Fox owed to them. Nevertheless, the trial court awarded the Trusts \$281,000 *and* 85% of the remainder of the alleged delinquencies.<sup>3</sup> This is nothing more than a double recovery. The maximum harm from the firm's alleged malpractice was \$281,000.

Finally, on the Levy "audit" fees, the Trusts state that none "of the sum awarded was for consulting or testifying in the malpractice case . . ." Br. of Resp'ts at 37. Such a statement fails the straight-face test.<sup>4</sup> The Trusts hired Levy to perform an "audit," an activity that was plainly the

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<sup>3</sup> The successor firm negotiated a settlement with Fox that has resulted in \$255,000 in payments and an agreement to pay \$2,000 per month until the sum of \$673,500 is realized. Ex. 20; RPIII:117. It was not until the firm's motion for reconsideration that the trial court gave the firm any credit for future payments.

<sup>4</sup> Levy was hardly an impartial witness to begin with. A former firm employee, he left the firm under less than cordial circumstances. Ex. 179.

precursor to the present lawsuit. They had a malpractice claim in mind when they fired the firm; Levy was going to be their expert witness on damages. This was documented in Levy's own "audit report." Ex. 107. That report contains an email string wherein Levy is asked to help with numbers for a demand letter to be sent to the firm (SL 0320-21). More blatant yet, the Levy report contains a specific section labeled "Legal Mal Issues" (SL 0319) that contains a memorandum entitled "Overview of Major Problems" (SL 0322-25) that appears to be an inventory of issues for an expert's testimony. The report even contains a document discussing expert testimony in a legal malpractice case (SL 0327) and a memorandum on legal malpractice law (SL 0328-31). This "audit" was plainly a forensic document.

The trial court should have apportioned Levy's outrageously large "audit" fee between real audit activities and his obvious forensic activities. The court should not have allowed recovery of expert fees in the guise of an "audit" used to set up the firm for this lawsuit.

#### E. CONCLUSION

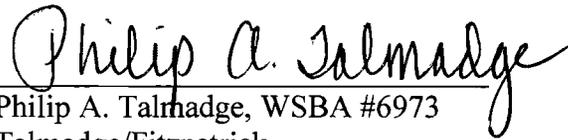
Nothing offered in the brief of respondents should dissuade this Court from reversing the trial court's judgment where the trial court erred in handling the duty owed to the Trusts by the firm by misstating the

standard of care, and by improperly addressed causation and damages in a professional negligence case.

This Court should reverse the trial court's judgment and remand the case to the trial court for a new trial. Costs on appeal should be awarded to the firm.

DATED this ~~29th~~ day of April, 2011.

Respectfully submitted,



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