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NO. ~~845274~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN BEHNKE and CARL BEHNKE as Trustees and on behalf of
the G.W. SKINNER CHILDREN'S TRUST and the G.W. SKINNER
TRUST NO. 2,

Petitioners,

v.

EDWARD AHRENS and TERI AHRENS, et. al.,

Respondents.

RECEIVED
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INTRODUCTION

Attorney Edward Ahrens recommended that his clients, the Trustees of the Skinner Trusts, purchase a "752" tax-savings plan from the plan's Texas promoter, the Heritage Organization. Ahrens never informed the Trustees that he designed the 752 plan and secretly licensed it to Heritage in return for a percentage of sales. Ahrens reaped millions of dollars from this business arrangement. He also failed to adequately inform the Trustees of the nature and extent of his attorney-client relationship with Heritage from the outset. The Trusts lost millions of dollars when the IRS declared Ahrens' plan an abusive tax shelter. But for Ahrens' representation, the Trustees never would have participated in this plan.

The above facts were found by the trial judge, the Honorable Michael J. Trickey. CP 6372-81 (copy attached). An advisory jury also found that Ahrens violated his fiduciary duty to the Trusts. CP 5414 (copy attached). Yet Judge Trickey awarded the Trusts only \$12,325, believing he was limited to ordering attorney fee disgorgement for Ahrens' violations of the Rules of Professional Conduct. Judge Trickey also dismissed the Trusts' CPA claim on

summary judgment because it allegedly does not apply to wealthy people. These results are neither just nor legally justified.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in granting summary judgment on the Trusts' CPA claims on the bases that the Act does not protect wealthy people or that representing clients without disclosing substantial personal business and financial interests in the subject matter of the representation is not an unfair and deceptive practice that has the potential to injure a substantial portion of the public. CP 3080-82.
2. The trial court erred as a matter of law in ruling that Ahrens' conflict of interest was waivable. CP 6378.
3. The trial court erred as a matter of law in ruling that it could grant only disgorgement of attorney fees (\$12,325) and not undisputed consequential damages (millions of dollars) even after the advisory jury concluded that Ahrens had breached his fiduciary duty of undivided loyalty and the Judge concluded that Ahrens violated RPC 1.7 by failing to adequately disclose his personal and business conflicts of interest.
4. The trial court erred in denying the Trustees' motion for additur or new trial because the advisory jury's \$6,162.25 verdict

(exactly half of the trial court's disgorgement award) was so inadequate as to unmistakably indicate passion or prejudice and because the jury omitted an entire category of damages.

5. The trial court erred in entering judgment based on the above erroneous rulings. CP 6362-65, 6700-03.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington's CPA, is the practice of attorneys representing clients without disclosing substantial business and financial interests in the subject matter of the representation an unfair and deceptive practice that has the potential to injure a substantial portion of the public?

2. Under the CPA, does "substantial portion of the public" refer to the "purchasing public," consistent with a long line of federal court FTCA rulings, but contrary to the trial court's ruling that the CPA does not protect "millionaires"?

3. Where an attorney has prior business and attorney-client relationships worth millions of dollars that are dependent on him referring other clients to his combined client and businesses associate, does the attorney have a non-waivable conflict of interest as a matter of law?

4. The trial court found as a matter of law that an attorney breached his RPC 1.7 fiduciary duty of loyalty to his clients by failing to make adequate disclosures, give adequate advice, or obtain a valid waiver of his personal financial and multi-client conflicts of interest. An advisory jury also found that the attorney breached his fiduciary duties to the clients. Where the trial court had reserved the determination of all elements of this claim to itself, was it limited to ordering disgorgement of attorney fees as the sole remedy for this breach under *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992), or *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002)?

5. Under the same facts, is the advisory jury verdict awarding the Trusts only \$6,162.25 so inadequate as to unmistakably indicate passion or prejudice, particularly where the trial court failed (despite repeated requests) to instruct the jury that the attorney breached his fiduciary duty of loyalty as a matter of law? Is this verdict also reversible because it omits approximately \$3.4 million in undisputed out-of-pocket damages that the trial court found the Trusts would not have incurred but for the attorney's conflict-ridden representation?

STATEMENT OF PROCEDURE

The Trustees of the Skinner Trusts retained the Ahrens & DeAngeli law firm ("Ahrens") in October 2001, entering a retainer agreement including a purported Waiver of Conflicts of Interest on December 13, 2001. RP 1293-94, 1572; Ex 5 (copy attached). For reasons discussed in detail below, the Judge ultimately found that Ahrens breached his fiduciary duty of undivided loyalty to the Trusts by failing to properly disclose the nature and monetary value of his relationship with the tax promoter, The Heritage Organization. CP 6369-81. An advisory jury also found that Ahrens breached his fiduciary duty to the Trusts. CP 5414.

A. The parties filed numerous motions for summary judgment, and Judge Trickey dismissed the Trusts' CPA claim, but otherwise denied the salient motions.

The Trustees filed suit on September 29, 2006. CP 3. In November 2008, Ahrens filed two motions for summary judgment, one seeking to dismiss all of the Trusts' claims, the other to limit its damages claims. CP 828-44, 848-75. On the dismissal motion, Ahrens argued (among other things) that the Trusts' Consumer Protection Act claims should be dismissed because "claims premised on tax shelters for multimillionaires lack the capacity to deceive a 'substantial portion' of the public" (*i.e.*, the "extremely

wealthy" are not a "substantial portion" of the public). CP 873-74. On the damages motion, as relevant here, Ahrens sought to dismiss the Trusts' claims for attorney fees paid to other law firms. CP 828-44. The Trusts opposed these motions. CP 879-951.

In January 2009, the Trusts filed a motion for partial summary judgment that Ahrens breached his fiduciary duty of undivided loyalty to the Trusts as a matter of law. CP 1929-63. The Trusts filed a corrected motion in early February 2009. CP 2572-2605. Ahrens opposed this motion. CP 2915-37.

After oral argument on the Trusts' fiduciary-breach motion, Ahrens filed a supplemental brief. CP 3059-60. He conceded that whether he violated the RPCs is a question of law. CP 3059. But he argued that fact issues required a trial. *Id.* at 3059-60. He also argued that damages for his violation are limited to disgorgement of the attorney fees the Trusts paid to him, \$12,325. CP 3060.

The Trusts responded that Ahrens had failed to raise any genuine issue of material fact. CP 3061-63. Before Ahrens undertook the Trusts' representation, he indisputably had an unwaivable conflict of interest due to his extensive business dealings with Heritage (*i.e.*, no disinterested lawyer would conclude that the Trusts should retain Ahrens in these circumstances). CP

3061-62 & n.1. Since the conflict was unwaivable as a matter of law, no genuine issues of material fact remained. *Id.*

In March 2009, Judge Trickey dismissed the Trusts' CPA claim, but otherwise denied Ahrens' dismissal motion. CP 3080-82. On Ahrens' damage-limitation motion (as relevant here) Judge Trickey denied the motion to preclude damages for fees paid to other firms. CP 3076-78. Judge Trickey also denied the Trusts' motion on the fiduciary duty issues, acknowledging that whether a fiduciary duty exists between an attorney and client is a question of law for the court, but finding that issues of fact precluded summary judgment. CP 3073-74. Judge Trickey found that *Eriks, supra*, which also concerns a lawyer/tax promoter/client conflict of interest, is "not precisely on point." *Id.*

B. The Trusts asked the court to find a breach of Ahrens' fiduciary duty of undivided loyalty as a matter of law, but Judge Trickey denied the repeated motions.

The parties filed roughly 1600 pages of pleadings regarding 20 motions in limine, with the Trusts filing three motions, and Ahrens filing 17. CP 3220-3530, 3542-4714. Most relevant here is Ahrens' motion to exclude reference to the RPCs concerning his breach of the fiduciary duty of undivided loyalty. CP 3610-13 (discussing *Hizey, supra*). The Trusts opposed this motion, noting

that *Hizey* does not forbid reference to RPC 1.7(b) (Conflicts of Interest) in these circumstances and that Division I allowed citations to the RPCs in *Cotton, supra*. CP 4526-27. Indeed, *Eriks, supra*, affirmed a trial court's breach of fiduciary duty finding for violations of the Code of Professional Responsibility, the predecessor to the RPCs. CP 4527. As discussed below, the trial court ultimately ruled that the RPCs could not be mentioned before the jury, reserving to itself the RPC-based fiduciary breach claim.

Trial began on October 13, 2009, lasting 15 court days over nearly a month. RP 20-2858. On November 2nd (after all the relevant testimony was in) the Trusts again asked Judge Trickey to rule that Ahrens had an unwaivable conflict of interest as a matter of law, and to so instruct the jury. CP 5297-99. At this point in the trial, the undisputed evidence included (a) Ahrens' overlapping attorney-client relationships with the Trusts and Heritage (starting in 2001, as discussed above); (b) Ahrens' stipulation in Ex 207 (copy attached) that his Nevada company, FWP Technologies, Inc., received \$4,763,000 from Heritage between April 1999 and October 2005; and (c) Ahrens' FWP receiving these "royalties" from Heritage (Ex 34; RP 836-40). This undisputed evidence established an unwaivable conflict of interest as a matter of law.

CP 5297-98. The Trusts also submitted proposed jury instructions on this issue, and a proposed Special Verdict form. CP 5302-08 (copies attached).

In the alternative, the Trusts asked Judge Trickey to rule that Ahrens' disclosures to the Trustees in his engagement letter (Ex 5) were inadequate as a matter of law, and to so instruct the jury. CP 5298. Ahrens' letter told the Trusts nothing about his long-standing and lucrative business relationship with Heritage. Ex 5. While his letter mentioned representing Heritage, it said nothing about how his conflict of interest could be harmful to the Trusts. *Id.* On the contrary, Ahrens said that if the Trustees had any questions about "why we are requesting that you expressly waive the conflict in writing, please do not hesitate to contact me." *Id.*

C. After the case went to the jury, the Trusts again asked Judge Trickey to rule on the fiduciary breach issue, and he reserved all aspects of the issue to the court.

Trial testimony concluded on November 4 (RP 2853) and the closing arguments (not transcribed) occurred over two days. The jury instructions did not include anything regarding the RPC-based breach of fiduciary duty issue, which the trial court had, to some degree, reserved. CP 7075-7102.

During jury deliberations, the Trusts' counsel sent Judge Trickey a letter on November 10, suggesting that he now hear expert testimony and decide the RPC-based breach of fiduciary duty issues. CP 5411-12. If the Judge found such a breach, he could then hold the jury when it returned, instruct them on this issue, and send them back to determine damages for this breach. *Id.* In the alternative, the Trusts offered to stipulate that the court decide duty, breach, causation and damages on this issue. *Id.* Ahrens objected in a November 12 letter. CP 5420-22.

Also on November 12, the jury returned its verdict. CP 5413-16. Prior to taking the verdict, Judge Trickey announced his ruling that he would decide all issues related to the RPC-based fiduciary breach after releasing the jury (RP 2898):

I did receive a letter from Mr. Pence on the 10th, part of it addresses what happens to the jury now.

The second paragraph says "we assume that you will not dismiss the jury and hold the jury under the Court's jurisdiction after the jury reaches its verdict."

It would not be my practice to do that. It would be my practice to discharge the jury. And then I have heard the testimony and I have a record of the testimony. I would receive further briefing on the remaining legal issue and make a decision independent – not independent – but I would make my own decision on that aspect of the case.

Neither party objected to Judge Trickey's practice (*id.*):

I don't know if you wanted to argue that point before I bring the jury out. Either side?

MR. SULKIN [for Ahrens]: No, your Honor.

MR. PENCE [for the Trusts]: No, your Honor, that is entirely agreeable.

On November 13, the Trusts' counsel confirmed by letter that Judge Trickey had reserved "all elements of Plaintiffs' RPC-based fiduciary duty claim." CP 5417; *see also* CP 6373 (Finding 7).

D. Both the Judge and the advisory jury found that Ahrens breached his fiduciary duties, but neither awarded the Trusts their undisputed out-of-pocket damages.

As relevant here, the jury found that Ahrens breached his fiduciary duty and proximately caused the Trusts' damages. CP 5414. But it awarded only "Fees paid to Ahrens & DeAngeli" of \$6,162.25. *Id.* This is 50% of the actual fees paid. The jury also found that Ahrens breached his standard of care, but again awarded precisely the same amount of damages. CP 5415. The jury also determined that the Trusts were contributorily negligent, causing 47% of their own damages. CP 5416.

The Trusts moved the Court to decide the RPC-based breach of fiduciary duty issue. CP 5516-22. Both parties provided declarations to supplement their respective experts' trial testimony,

Peter Jarvis for the Trusts, CP 5492-5515, and David Boerner for Ahrens, CP 5772-77. Jarvis' opinion is summarized at CP 5497:

- a. The Heritage-Ahrens-Trusts conflicts were not waivable, primarily though not exclusively because of the importance of Heritage to Ahrens.
- b. Even if the conflicts were waivable, Ahrens never obtained effective consent because his disclosures were materially incomplete and misleading.
- c. Ahrens also failed to obtain effective consent because his attempt to limit the scope of his representation of the Trusts was ineffective.

Boerner's opinions are more difficult to summarize, but essentially deny that Ahrens breached any fiduciary duties or did anything else wrong, notwithstanding the jury's verdict. CP 5772-77.

After considering numerous additional pleadings and declarations and hearing argument, the trial court entered RPC Findings and Conclusions on March 8, 2010 (CP 6353-60), amending them to include an attachment listing the pleadings it considered on March 10, 2010 (CP 6369-81, attached). Judge Trickey's Findings confirm the procedure set forth above regarding the RPC-based fiduciary duty issue. CP 6373-74. Judge Trickey concluded that Ahrens breached his RPC-based fiduciary duties as a matter of law, but ruled that he could award only disgorgement of the attorney fees the Trusts paid to Ahrens, \$12,325. CP 6377-79.

STATEMENT OF THE CASE

Judge Trickey also found the facts relevant to this appeal. CP 6374-77. They are set forth below, in a slightly different order, together with citations to the record supporting each fact.

A. Beginning in 1997, Attorney Ahrens (acting through his Nevada corporation, FWP) established a business relationship with Heritage, a tax-savings plan promoter in Texas, from which Ahrens made millions of dollars.

“Commencing in 1997 and continuing during his representation of Plaintiffs, defendant Edward Ahrens had a business relationship with The Heritage Organization (“Heritage”), a promoter of tax saving strategies located in Dallas, Texas.” CP 6374 (FF 9).¹ “Acting through his corporation, FWP Technologies, Inc., Ahrens designed and sold or licensed tax reduction strategies to Heritage, which Heritage promoted and sold.” *Id.*² “Heritage in turn often referred its customers to Ahrens to perform the legal services required to implement the strategies.” *Id.*³ “FWP was a Nevada corporation that Mr. Ahrens operated out of his law office without offices or employees.” *Id.*⁴

¹ RP 1340, 1585, 2426-27; Ex 34.

² RP 475, 1345, 1361-62, 1417, 1553-54, 1585, 1776-77, 2483.

³ RP 840, 1724.

⁴ RP 1342, 1554.

"Ahrens used two variations of a capital gains tax reduction strategy known as '752' or 'Son of Boss' transactions, which Ahrens licensed through FWP to Heritage in return for a share of the purchase money Heritage received from customers who purchased the plan." CP 6374 (FF 10).⁵ "Before Ahrens undertook plaintiffs' representation, Heritage made 752 licensing fees payments to FWP totaling \$3,720,000." *Id.*⁶ "After Ahrens undertook plaintiffs' representation, Heritage made 752 licensing fees payments to FWP totaling \$1,043,000." *Id.*

"Mr. Ahrens testified and the Court finds that Mr. Ahrens knew that whether or not Heritage paid him the 752 licensing payments was entirely dependent upon the goodwill and discretion of Heritage's owner,⁷ and he considered being on the owner's good side an important factor in whether he would be paid." CP 6376 (FF 18); RP 1789-91. "Ahrens further testified and the Court finds that Ahrens knew that one way of being on Heritage's owner's good side was for Ahrens to refer clients like Plaintiffs to Heritage." *Id.*

⁵ RP 237-38, 1361-62, 1551-53, 1556, 1774-75, 1776-77.

⁶ RP 1294, 1572; Ex 207.

⁷ CP 6376 (FF 18); RP 1362, 1776, 1789.

B. At the same time, Ahrens formed and conducted an active attorney-client relationship with Heritage.

“Commencing in 1997 and continuing during his representation of Plaintiffs, Ahrens also had a continuous attorney-client relationship with Heritage.” CP 6374 (FF 11); RP 2427. “Ahrens and his firm performed nearly daily legal services for Heritage from 1998 through 2002.” CP 6374 (FF 11).⁸ “Ahrens flew with Heritage sales personnel around the country to market the 752 strategy to prospective buyers; developed tax avoidance strategies for Heritage; advised Heritage on individual tax strategy sales transactions; analyzed and reported to Heritage on tax developments in the courts, Congress, IRS, Justice Department, and tax literature; provided Heritage strategic business advice; investigated and reported to Heritage on its competitor's tax strategies; and performed numerous other services billed to Heritage as legal services.” CP 6374-75 (FF 11).⁹

⁸ RP 814-15 (Jarvis' opinion relied on Ex 217, Ahrens' billings to Heritage, an Exhibit not offered or admitted at trial).

⁹ CP 2045-50, 2052-53, 2075-82, 2084-85, 2115, 2120-28, 2164-75, 3763-66, 4213; RP 1341-42, 1381-82, 2427, 2482-84; Ex 31, 147, 184, 191, 196, 228, 375.

C. In October 2001, the Trustees hired Ahrens to evaluate a tax-savings proposal, which Ahrens found unsuitable.

"In 2001, on the advice of financial advisors, the trustees of Plaintiff Trusts considered selling a substantial portion of the Trusts' concentrated holdings in two low-basis stocks to diversify the Trusts' investments." CP 6375 (FF 12).¹⁰ "The Trusts received a proposal from a national accounting firm for a strategy by which the Trusts might reduce the large capital gain taxes anticipated from selling the low basis stocks." *Id.*¹¹

"On October 23, 2001, on the advice of a financial advisor, the Trusts retained Ahrens to evaluate the accounting firm's proposal." CP 6375 (FF 13).¹² "Ahrens holds himself out as a specialist in such tax matters." *Id.*¹³ "The attorney-client relationship between the Trusts and Ahrens and his law firm commenced on October 23, 2001." *Id.*¹⁴

"Ahrens advised the Trusts co-trustees Carl and John Behnke that the accounting firm proposal was not suitable." CP

¹⁰ RP 229-30, 232-33.

¹¹ RP 233-34.

¹² RP 1293-94, 1572.

¹³ RP 234-35, 1274-75, 1282-83, 1836; see Ex 132.

¹⁴ RP 1294, 1572.

6375 (FF 14).¹⁵ “The co-trustees asked Ahrens for legal advice regarding other potential tax-savings alternatives.” *Id.*¹⁶

D. Ahrens instead recommended a Heritage strategy – for which the Trusts ultimately paid millions of dollars – yet Ahrens never disclosed either his business relationship with Heritage or that he personally developed the Heritage strategy he was recommending.

“Ahrens recommended one of the Heritage 752 strategy variations that Ahrens had licensed to Heritage.” CP 6375 (FF 15).¹⁷ “Ahrens arranged two meetings in Seattle in November 2001 between himself, the Trusts’ four co-trustees, and Heritage sales representatives, during which the co-trustees executed the Heritage 752 sales contract and decided to participate in the Heritage 752 strategy.” *Id.*¹⁸ “The Trusts ultimately paid \$1,762,906 to Heritage and became obligated on approximately \$3 million of promissory notes to Heritage.” *Id.*¹⁹

“Ahrens admits and the Court finds that Ahrens never disclosed to the trustees that he was in business with Heritage; that he had designed and licensed to Heritage the 752 strategy that he

¹⁵ RP 236.

¹⁶ RP 1298.

¹⁷ RP 237, 1584; Ex 202, p. 9.

¹⁸ RP 115-17, 239-40, 272-73; Ex 8.

¹⁹ RP 274-76, 353; Ex 93, 230.

referred to the Trusts; that Heritage had paid a lot of money in 752 licensing payments in the past; or that Heritage may pay him a lot of money in 752 licensing payments in the future.”²⁰

“Ahrens’ engagement letter sent to and signed by each co-trustee states that Ahrens’ law firm would act as the Trusts’ tax planning legal counsel to the best of its ability and extend its duty of loyalty to both Trusts.” CP 6376 (FF 19); Ex 5. “Ahrens’ letter states his firm would represent the Trusts in the 752 planning project with Heritage along with the law firm that was retained to prepare transactional documents and tax opinion letters, and would review ‘the documents, planning designs and legal opinions in order to implement this planning.’” *Id.* “Ahrens’ engagement letter also states ‘we will work jointly with Heritage in preparing, presenting and implementing the planning project.’” *Id.*

“Ahrens’ engagement letter’s sole disclosure regarding the continuous attorney-client relationship between Ahrens and Heritage states only: “we have previously represented and continue to represent The Heritage Organization.” CP 6377 (FF 20); Ex 5.

²⁰ CP 6376 (FF 16); CP 1804-05, 2227-40, 2270-71; RP 1557-58, 1584; 1574-75; 1725, 1727, 1774-76; Ex 202, p.10, Ex 207, Ex 442.

"The letter does not limit Ahrens' promised scope of representation or responsibilities to the Trusts on account of Ahrens' attorney-client relationship between Heritage and Ahrens or advise the trustees of any risks or implications of his dual legal representation of Heritage and the Trusts, or of the business and financial relationship between Heritage and Ahrens." *Id.*

"At trial Ahrens testified that, contrary to the written engagement letter, he orally informed the trustees that he would not represent the Trusts in any matters adverse to Heritage because he also represented Heritage." CP 6377 (FF 21).²¹ "Ahrens also testified he was instructed by one of the trustees to limit the services Ahrens had promised in the engagement letter to perform." *Id.*²² "The Court finds that this testimony is not credible and that Ahrens was not authorized to limit the scope of the representation he agreed to provide." *Id.*²³

²¹ RP 1531-34, 1576; Ex 5.

²² RP 1332-33, 1529-30; Ex 5.

²³ RP 140, 291, 526, 635.

E. But for Ahrens' recommendation, the Trustees would never have participated in the Heritage strategy, which the IRS ultimately deemed an "abusive tax shelter."

"The Trusts' trustees had no prior knowledge of Heritage or of any 752 tax strategy." CP 6376 (FF 17).²⁴ "But for Ahrens' representation of the Trusts, the Trusts would not have participated in the Heritage 752 strategy." *Id.*²⁵

"The Trusts' 752 transaction was subsequently declared an abusive tax shelter by the IRS, and all tax benefits were disallowed." CP 6377 (FF 22).²⁶ [End of Findings].

This transaction cost the Trusts millions of dollars. RP 1187-88; Ex 230. The trusts' undisputed out-of-pocket damages include (1) \$1,762,905.70 paid to Heritage; (2) \$650,011.26 in penalties (and interest on the penalties) paid to the IRS; (3) \$175,000 in professional fees and expenses to do the transaction; and (4) \$796,660.56 paid for defending against the IRS and in responding to the Heritage bankruptcy. *Id.*

²⁴ RP 239, 1584.

²⁵ RP 350, 358.

²⁶ Ex 382 (Trusts/IRS Closing Agreement showing Ahrens' 752 Plan was covered by Notice 2000-44; CP 492 (Notice 2000-44)).

ARGUMENT

- A. The trial court erred as a matter of law in dismissing the Trusts' CPA claim because that Act protects all Washington citizens – even the wealthy – and because anyone could be misled by Ahrens' deceptive acts.**

The trial court erred as a matter of law in granting summary judgment dismissing the Trusts' CPA claim, for two principal reasons. First, the trial court's ruling that the Act does not protect "millionaires" flies in the face of the central purposes of the CPA and is fundamentally unjust. Second, representing clients without disclosing substantial personal business and financial interests in the subject matter of the representation is an unfair and deceptive practice that has the potential to injure a substantial portion of the public. The Court should reverse and remand for trial on this claim.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Its purpose is to "protect the public and foster fair and honest competition." RCW 19.86.920; *accord Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976). The CPA is "liberally construed that its beneficial purposes may be served." *Id.*

A CPA violation requires proof that a defendant's act or practice (1) is unfair or deceptive, (2) occurs in the conduct of trade

or commerce, (3) affects the public interest, and (4) causes (5) injury to the plaintiff in his or her business or property. **Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.**, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Ahrens' motion for summary judgment on this issue consists of two paragraphs covering roughly a page. CP 873-74. He put at issue only the first and third elements: whether his acts could deceive a substantial portion of the public (unfair or deceptive) and affected the public interest. *Id.*

Whether Ahrens' now-proven acts were unfair or deceptive is a question of law. See, e.g., **Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.**, 162 Wn.2d 59, 75, 170 P.3d 10 (2007). To establish this element, the evidence must show that his acts "had the *capacity* to deceive a substantial portion of the public." **Hangman Ridge**, 105 Wn.2d at 785. The purpose of this rule is to deter deceptive conduct before it occurs. *Id.*

On the third element, the Trusts must show not only that Ahrens' practices affected them, but also that they have the potential to affect the public interest. **Indoor Billboard**, 162 Wn.2d at 74 (citing **Hangman Ridge**, 105 Wn.2d at 788, **Lightfoot v. MacDonald**, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976)).

Ahrens' argument that the CPA does not apply to the wealthy relied exclusively on two Washington Federal District Court cases, one unpublished (*Malone v. Clark Nuber, P.S.*, 2008 LEXIS 48461 (W. D. Wa. Jan. 23, 2008)), quoting the second, *Swartz v. KPMG L.L.P.*, 401 F. Supp. 2d 1146 (W. D. Wa. 2004), *affirmed in part*, 476 F.3d 756 (9th Cir. 2007). Both cases involved multiple claims against tax-shelter promoters, including CPA claims. Those trial courts ruled that neither plaintiff proved the CPA's unfair-or-deceptive-act element because the small number of consumers seeking large capital gains tax savings is not "a substantial portion of the public." *Swartz*, 401 F. Supp. 2d at 1154.

With great respect for these two courts, even wealthy people must receive the full protection of Washington law. The CPA specifically states that "**Any person** who is injured in his or her business or property by a [CPA] violation" may bring a civil action to recover actual damages. RCW 19.86.090 (emphasis added). This directive is to be liberally construed. RCW 19.86.920. These two courts plainly did not liberally construe this directive.

Indeed, their two rulings are directly contrary to other Washington decisions applying the CPA to protect very wealthy corporations and individuals. See, e.g., *First State Ins. Co. v*

Kemper Nat'l Ins. Co., 94 Wn. App. 602, 971 P.2d 952 (excess liability carrier had a CPA claim against a primary insurer); *Wash. State Physicians Ins. Exch. & Ass'n Corp. v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993) (insurance company had CPA claim against a drug company for claims loss); *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 759 P.2d 418 (1988) (thoroughbred racehorse owner had a CPA claim against seller). No other Washington court has held that the wealthy are undeserving of CPA protection.

These two District Court decisions are unsound and harmful. On whether the acts had the capacity to deceive a substantial portion of the public, the relevant "public" is **the purchasing public**. *Haner v Quincy Farm Chemicals*, 97 Wn.2d 753, 759, 649 P.2d 828 (1982) ("unfair or deceptive does not require that intent be shown if the action has a capacity to deceive a substantial portion of the purchasing public"); see also *Short*, 103 Wn.2d at 70 (quoting *Fisher*, 15 Wn. App. at 748 (1976) ("a tendency or capacity to deceive a substantial portion of the purchasing public"); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258 (2005) (same); *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) (same)).

Federal precedents addressing similar federal laws must guide our courts. RCW 19.86.920; accord *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 39, 50, 554 P.2d 349 (1976). Like the CPA, under the Federal Trade Commission Act, if “defendant’s actions possessed a . . . capacity to mislead, an unfair or deceptive act is proved.” *Testo*, 16 Wn. App. at 51 (citing *Vacu-Matic Carburetor Co. v. Federal Trade Comm’n*, 157 F.2d 711 (7th Cir. 1946)). In *Vacu-Matic*, the question was whether acts had the capacity to “deceive a substantial portion of the purchasing public . . .” 157 F.2d at 713. The “purchasing public” is that portion of the public who purchase a particular thing. See, e.g., *Kerran v. Federal Trade Comm’n*, 265 F.2d 246, 248 (10th Cir. 1959):

. . . a **substantial portion of the public who purchase lubricating oil** prefer new and unused oil . . . the failure of petitioners to disclose that their oil is made from previously used oil has a . . . capacity to . . . deceive a **substantial portion of the purchasing public** . . . and . . . such failure has a . . . capacity to cause such members of the public to purchase petitioners’ oil as a result of the erroneous and mistaken belief so engendered.

In short, it does not matter how many or few millionaires there are. They are the relevant purchasing public for Ahrens’ services. The trial court erred in ruling that wealthy people are barred from seeking relief under the CPA.

Ahrens also argued under *Malone* and *Swartz* that wealthy plaintiffs cannot prove that the unfair act or practice affected the public interest (e.g., *Swartz*, at 1154):

The tribulations of multimillionaires are not the focus of the legislative intent behind the CPA; as a (very small) group, the extremely wealthy are neither unsophisticated nor easily subject to chicanery.

But here, the Judge specifically found that in soliciting the Trusts' business, Ahrens failed to disclose that he had a long-standing business relationship that had already netted him millions of dollars from the very organization to whom he referred the Trusts. He failed to disclose that he stood to make millions more in the future from that business relationship through his secret Nevada corporation, FWP. Contrary to every lawyer's core legal and ethical duties, he failed to disclose that he actually developed the tax-savings plan, a plan the IRS ultimately found abusive.

Simply put, any person – no matter how wealthy, sophisticated, or brilliant – could easily be deceived by a lawyer who fails to disclose conflicts of interest like these. In any event, the CPA unambiguously says that "Any person" may bring a claim, so the District Courts should not have "interpreted" the Legislature's "intent" at all. See, e.g., *Indoor Billboard*, 162 Wn.2d at 71 (courts

do not interpret unambiguous statutory language). The District Courts erred in “interpreting” away those citizens’ rights due to wealth. This Court should reject those decisions and hold that the CPA protects all Washington citizens, regardless of wealth.

Similarly, the CPA applies to both “consumer transactions” and to “private disputes.” *Hangman Ridge*, 105 Wn.2d at 789-91. *Hangman Ridge* says attorney-client relationships exemplify essentially private disputes. *Id.* In these circumstances, courts look to the following non-exclusive factors (*id.* at 790-91) to determine whether the act affects the public interest:

- (1) Were the alleged acts committed in the course of defendant’s business?
- (2) Did defendant advertise to the public in general?
- (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?
- (4) Did plaintiff and defendant occupy unequal bargaining positions?

Courts inquire whether the act has the potential to deceive other clients in similar circumstances. *Hangman Ridge*, 105 Wn.2d at 790 (“it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest”).

Here, Ahrens plainly committed his non-disclosures in the course of his business. Ahrens actively solicited the Trusts to do

business with Heritage after telling the Trustees that another company was unsuitable. CP 6375 (FF 15). While it is possible to believe that the Trustees and Ahrens occupied equal bargaining positions in a general sense, when one side holds special expertise – particularly a lawyer in an arcane field like tax law – and fails to disclose gross conflicts of interest, the other side is plainly at a disadvantage, no matter how sophisticated. Many other clients could be deceived the same way. Ahrens’ secret arrangement to receive “royalties” from Heritage was certainly the sort of material information anyone would like to have, much less a client.

In both *Eriks* and *Cotton*, our courts ruled that a CPA claim against a lawyer who violated his fiduciary duty of undivided loyalty should go forward to trial. *Eriks*, 118 Wn.2d at 465; *Cotton*, 111 Wn. App. at 272-75. *Eriks* is fundamentally on all fours, involving a lawyer who represented both the tax promoter and the investors without disclosing the significance of the conflict to the investors. 118 Wn.2d at 455. The Trusts were entitled to a trial on this issue.

In sum, the trial court erred in ruling both that wealthy people are not entitled to CPA protections and that Ahrens’ egregious non-disclosures were unlikely to injure others in the same way. This Court should reverse and remand for trial on this issue.

B. Ahrens' conflict of interest was unwaivable, so the Court should reverse and remand for a proper determination of damages.

The trial court ruled (and the advisory jury found) that Ahrens breached his fiduciary duty of undivided loyalty to the Trusts due to his blatant conflicts of interest. CP 5414, 6378. It nonetheless ruled that "the conflict between [Ahrens'] responsibilities as [the Trusts'] lawyer and [his] personal financial and business dealings with Heritage" "was waivable because of the business experience and sophistication of . . . two . . . co-trustees." CP 6378. As with the CPA claim, the trial court overstated the importance of the Trustees' circumstances, misplacing its focus on the Trustees rather than Ahrens. This Court should reverse, hold that his conflicts were unwaivable, and remand for a proper determination of damages.

"RPC 1.7(b) allows for a lawyer to represent a client when a potential conflict of interest exists only if the lawyer 'reasonably believes the representation will not be adversely affected.'" *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 867, 64 P.3d 1226 (2003). If a conflicted lawyer reasonably so believes, then he may seek the client's agreement to waive the conflict. *Id.* But whether the conflicted lawyer's belief is reasonable "is

measured by whether 'a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.'" *Id.* If a disinterested lawyer would advise against it, then the conflicted lawyer "cannot properly ask for such agreement or provide representation on the basis of the client's consent." *Id.* In other words, such a conflict is not waivable. *Cf., In re Cellcyte Genetic Corp. Sec. Litig.*, 2008 U.S. Dist. LEXIS 94761 (W.D. Wa. 2008) (addressing non-waivable conflicts).

As a matter of law, Ahrens' conflict was unwaivable. A disinterested lawyer would never advise the Trustees to retain a lawyer to steer them to a tax plan promoter, where the lawyer (a) had represented the promoter for years and still did, and (b) had an ongoing business relationship with the promoter, much less where (c) the lawyer had developed and reaped huge secret profits from the very plan in question. Had Ahrens fully disclosed the millions of dollars he had secretly received from Heritage and those he would secretly receive in the future, a disinterested lawyer would advise the Trusts to seek disinterested advice. Since a disinterested lawyer would always advise against this engagement, Ahrens' conflict of interest was unwaivable as a matter of law.

The consequence of this obvious conclusion is that the trial court should have ruled on summary judgment that the Trusts could not waive the conflict as a matter of law. Had it done so, then it could have instructed the jury that Ahrens breached his fiduciary duty of undivided loyalty to the trusts from the outset of the representation as a matter of law, instead of waiting until after the jury was released. Since – as the trial court found – the Trusts would not have gone to Heritage but for Ahrens’ advice, the millions of dollars in damages they suffered by taking Ahrens’ (and Heritage’s) advice flowed directly from his breach of fiduciary duty. The trial court should have instructed the jury to award all of the damages proximately caused by Ahrens’ breach, as the Trusts repeatedly requested. *See, e.g.*, CP 4803-04.

This Court should reverse and remand for a proper determination of damages.

C. Trial courts should have broad authority to award actual damages proximately caused by a breach of the fiduciary duty of undivided loyalty.

Rather than putting the damages issue to the jury, the trial court reserved “all elements of this fiduciary breach claim” to itself, “liability, causation and damages,” and released the jury. CP 6373. Yet the trial court later ruled that “no civil remedy, legal or equitable

exists for breach of a lawyer's fiduciary duty of undivided loyalty based on violation of the RPC conflict of interest rules other than disgorgement of fees." CP 6378-79. It so ruled because, "if there was a broader remedy than disgorgement available in these circumstances, the Supreme Court in *Eriks v. Denver*, *supra*, and the court of appeals in *Cotton v. Kronenberg*, *supra*, would have made that clear." *Id.* These cases do not support these rulings. And these rulings deprived the Trusts of their right to have their damages properly determined by the finder of fact.

In *Eriks*, a tax promoter hired an attorney to represent both the promoter of and the investors in a tax-shelter plan. 118 Wn.2d at 453. The attorney failed to explain to the investors that they might later have claims against the promoters. *Id.* at 455. After things went badly with the IRS, the investors sued the attorney for his breach of the fiduciary duty of undivided loyalty by undertaking the representation while under a conflict of interest. *Id.* This Court upheld the trial court's ruling that the attorney violated the Code of Professional Conduct's prohibition against conflicts of interest as a matter of law. *Id.* at 460.

The Court addressed only disgorgement of fees for this violation. *Id.* at 462. Malpractice and negligence issues were

reserved for a second phase of trial. *Id.* This Court ruled that the trial court properly ordered disgorgement because that is “within the inherent power of the trial court to fashion judgments” (*Id.* at 463):

The trial court found that Denver violated the CPR and breached his fiduciary duty to his clients. Disgorgement of fees is a reasonable way to “discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type.” *In re Eastern Sugar Antitrust Litig.*, 697 F.2d 524, 533 (3rd Cir. 1982). Such an order is within the inherent power of the trial court to fashion judgments. *Allen v. American Land Research*, 95 Wn.2d 841, 852, 631 P.2d 930 (1981).

In *Cotton* too, the court addressed only disgorgement of attorney fees for the attorney’s breach of fiduciary duty. 111 Wn.2d at 275. *Cotton* notes that disgorgement in these circumstances is a “well recognized” principle and well within the trial court’s broad discretion. *Id.* But *Cotton* never addresses whether a trial court may award actual damages in this situation.

Thus, neither *Eriks* nor *Cotton* addressed whether a court may award actual damages proximately caused by an attorney’s breach of his fiduciary duty of undivided loyalty by violating the prohibition against conflicts of interest in RPC 1.7. This Court should address this issue of first impression and reaffirm what it suggested in *Eriks*: the trial court has broad discretion to fashion appropriate remedies for this sort of breach. See, e.g., *Allen*, 95

Wn.2d at 852 (“The court has wide discretion in determining the measure of damages”) (citing ***Edwards Contracting Co. v. Port of Tacoma***, 83 Wn.2d 7, 514 P.2d 1381 (1973)).

It is black letter law that judges sitting in equity have broad discretion, may fashion broad remedies, and should do substantial justice to the parties and put an end to the litigation. See, e.g., ***Hough v. Stockbridge***, 150 Wn.2d 234, 236, 76 P.3d 216 (2003); ***Esmieu v. Hsieh***, 92 Wn.2d 530, 535, 598 P.2d 1369 (1979); ***Senn v. Northwest Underwriters, Inc.***, 74 Wn. App. 408, 875 P.2d 637 (1994); ***Carpenter v. Folkerts***, 29 Wn. App. 73, 78, 627 P.2d 559 (1981). And where, as here, a fiduciary breaches his duty of undivided loyalty, he is not permitted to profit from his wrong. See, e.g., ***Wormhoudt Lumber Co. of Ottumwa v. Cloy***, 219 N.W.2d 543, 545-46 (1974) (agent who took kickbacks required to account for and turn over all profits, regardless of whether the principal suffered any actual loss); ***Avianca, Inc. v. Corriea***, 1993 U.S. Dist. Lexis 20954 at *11 (D.D.C. 1993) (“[t]here are many potential remedies for a breach of fiduciary duty, including restitution, rescission, disgorgement of profits, and constructive trusts”); ***Rosebud Sioux Tribe v. Strain***, 432 N.W.2d 259 (S.D. 1988) (attorney required to disgorge kickbacks).

Like the Judge, the jury in this case – whose verdict on this equitable issue was merely advisory (CR 39(a)(1)) – found a breach of fiduciary duty. But the jury was never instructed (a) that Ahrens breached his fiduciary duty of loyalty as a matter of law from the outset of the representation (*i.e.*, the conflicts precluded him from undertaking the representation), or (b) that damages therefore must accrue from the outset of the representation. Since the trial court – by agreement of the parties – reserved this issue to itself, it was not limited as to the remedies it could fashion.

The trial court also ruled that this Court's recent decision in ***Shoemake v. Ferrer***, 168 Wn.2d 193, 225 P.3d 990 (2010) would not support a broader remedy. CP 6379. Yet ***Shoemake*** notes that where, as here, a breach of fiduciary duty is proved, the fundamental principle of tort law – “to make the injured party as whole as possible through pecuniary compensation” – requires that a plaintiff receive “that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act.” 168 Wn.2d at 198. This Court went further, noting our legal system's “particular interest” in awarding tort damages to deter lawyers from breaching their ethical duties (*id.* 203):

[S]uch damages also frequently include a deterrence component that should not be confused with a punitive award. See, e.g., **Savage v. State**, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995) (recognizing that tort law is concerned in part with deterring negligent acts); **Davis v. Baugh Indus. Contractors, Inc.**, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007) (same). Our legal system has a particular interest in deterring lawyers from breaching their ethical duties to their clients.

Of course, **Shomake** is a legal malpractice case, not a claim based on the RPCs like in **Eriks** and **Cotton**. Those two cases and **Hizey**, *supra*, establish a regime under which the RPCs (a) may evidence a breach of a lawyer's standard of conduct, (b) may not be mentioned to a jury, and (c) may be violated as a matter of law. Here, an experienced jurist struggled with these rules, denying a motion for summary judgment that Ahrens breached his fiduciary duty as a matter of law; then reserving this entire issue to itself (including causation and damages); then ruling that Ahrens breached his fiduciary duty of loyalty as a matter of law (albeit after the jury had been released); and yet in the end deciding that it could not award the damages flowing from his breach.

The bifurcated system this Court began in **Hizey** has resulted (in this case and likely others) in great confusion and complexity in dealing with both liability and damages issues. **Hizey** leaves **Eriks** untouched, as **Cotton** also recognized. **Hizey**, 119

Wn.2d at 264. And Judge Trickey made every effort to comply with both directives – the jury may not hear about the RPCs, but the Judge may decide RPC violations as a matter of law.

Had Judge Trickey not believed that **Hizey** precluded him from granting complete relief for Ahrens' breach, he could have (and should have) awarded, at a minimum, the Trusts' undisputed out-of-pocket expenses incurred while dealing with the consequences of Ahrens' fiduciary breach, \$3.4 million. See Ex 230. The ultimate result in this case arising from the **Hizey** confusion is that the Trusts were left with two clear determinations that attorney Ahrens breached his fiduciary duties, and yet with no remotely adequate damages award.

Ultimately, **Hizey** is based on a false premise because the RPCs "do establish standards of conduct by lawyers," so "a lawyer's violation of [an RPC] may be evidence of breach of the applicable standard of conduct." RPC Scope, ¶ 20. Furthermore, the RPCs regarding conflicts of interest provide minimum standards of conduct, so as a matter of law and logic, a breach of the conflict-of-interest RPCs must also be a breach the common law standard of conduct for fiduciaries. The standard of conduct does not vary between the RPCs and the common law in this instance. In light of

our courts' broad equitable powers to remedy fiduciary breaches, damages should not vary either.

This Court should reject the unjust result in this case – and the *Hizey* confusion – and hold instead that where, as here, the trial court determines that an attorney has breached his fiduciary duty of undivided loyalty as a matter of law, it has broad discretion to fashion appropriate remedies, including awarding actual damages proximately caused by the fiduciary breach, or instructing the jury to do so. This Court should reverse and remand for trial on damages.

D. The advisory jury's verdict plainly evinces prejudice against the wealthy.

Throughout the record in this case runs a constant and troubling theme: the wealthy are less deserving of protection in our courts. This theme is manifest, from the trial court's CPA ruling (wealthy people are not "Any person" entitled to bring a claim) to its unwaivable conflict ruling (wealthy people know so much that they cannot be deceived by a lawyer who withholds material information) to the advisory jury's award of only half the fees the Trusts paid Ahrens for his breach of fiduciary duty. While the wealthy should never receive special treatment in our courts, neither should they be denied justice. Over many years, the members of this family

have contributed more than most of us to the well being of our State. CP 2301-02. They deserve and are entitled to equal treatment under our laws.

Determining the amount of damages is within the jury's province, and courts are generally reluctant to interfere with a jury's damages award. **Locke v. City of Seattle**, 162 Wn.2d 474, 486, 172 P.3d 705 (2007) (quoting **Palmer v. Jensen**, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)). Under RCW 4.76.030, however, *additur* is permitted where (1) the trial court finds that a new trial would be appropriate because the damages are "so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice," and (2) the adversely affected party consents to an increase in the verdict as an alternative to a new trial. **Green v. McAllister**, 103 Wn. App 452, 462, 14 P.3d P.2d 795 (2000).

Alternatively, the court may leave the jury's liability verdict intact, but order a new trial solely on damages when the damages are so inadequate as to unmistakably indicate that they were the result of passion or prejudice. CR 59(a)(5); **Green**, 103. Wn. App at 462. Similarly, a court may order a new trial on some or all of these issues if (1) there is no evidence or reasonable inference

from the evidence to justify the verdict (CR 59(a)(7)), or (2) substantial justice has not been done (CR 59(a)(9)).

The advisory jury awarded the Trusts \$6,162.25, half of Ahrens' total attorney fees (\$12,325). This damages award is difficult to explain. The jury found the Trusts 47% contributorily negligent, but awarded none of the Trusts' \$3.4 million in undisputed out-of-pocket damages. The jury's award is not 47% of Ahrens fees, but almost exactly 50%. Rejecting the jury's advice, the trial judge awarded the Trusts all of Ahrens' fees. Yet no one awarded the Trusts its damages arising from Ahrens breach: the jury was not instructed on the breach, and the trial judge felt he was precluded by precedent from awarding more. This was a legal error, and this Court should remand with instructions to award all damages proximately caused by Ahrens' breach.

A court may also award a new trial when, as here, the jury omits an entire category of damages, the existence of which is obvious. For example, in *Palmer v. Jensen*, the plaintiff proved both special damages and general damages at trial. The plaintiff argued after trial that although the jury had awarded her special damages, it had failed to award her general damages.

Because the verdict form employed in *Palmer v. Jensen* did not permit the jury to find special damages separately from general damages, the court first had to determine whether the jury had in fact failed to award general damages. 132 Wn.2d at 198-201. Reviewing the record, the Court determined that the jury had awarded only special damages. Plaintiff had been treated for pain and suffering and physical therapy for more than a year, and defendants did not dispute these damages. The Court thus held the jury's omission of general damages contrary to the evidence and reversed. *Palmer*, 132 Wn.2d at 203.

Similarly, two plaintiffs presented evidence of both special (economic) and general (non-economic) damages in *Fahndrich v. Williams*, 147 Wn. App. 302, 194 P.3d 1005 (2008). Unlike in *Palmer*, this verdict form provided separate spaces for the jury to award economic and non-economic damages. The jury awarded one plaintiff \$22,500 as special damages, and another plaintiff \$2,500 as special damages. The jury did not award any general damages for either plaintiff.

On appeal, the defendant argued that the circumstances of the accident itself "could bear on the credibility of Fahndrich's complaints of pain and discomfort" or "presumably had something

relevant to [add] about the significance of the impacts that could bear on the issues of causation and damages.” *Fahndrich*, 147 Wn.App. at 307-08. The Court of Appeals rejected this argument, however, finding that the special damages award meant that the plaintiffs suffered more than “minimal” damages. The Court of Appeals held that plaintiff was entitled to a new trial on damages because the jury could not have “found that the accident caused injuries but believed the plaintiff suffered no pain.” *Id.* at 309 (quoting *Ma’ele v. Arrington*, 111 Wn. App. 557, 562, 45 P.3d 557 (2002)).

In this case, the jury found that Ahrens was 53% responsible for the Trusts’ entry into the Heritage 752 Strategy. Yet their award omits an entire category damages arising from this injury: millions of dollars in undisputed out-of-pocket expenses. As in *Fahndrich*, the verdict is unsupportable because the jury found that Ahrens proximately caused injury to the Trusts, but that the Trusts suffered no out-of-pocket damages. Under *Palmer* and *Fahndrich*, the Trusts are entitled to *additur* or a new trial. Since the Trusts’ uncontested out-of-pocket damages amounted to \$3,426,580, the trial court plainly erred in denying relief.

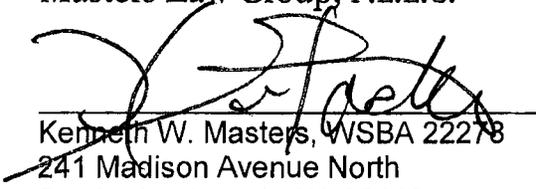
In sum, once Ahrens' blatant and egregious breach of fiduciary duty was recognized, no reasonable juror could properly reach the bizarre conclusion that he caused only a few thousand dollars in damages. Judge Trickely refused to consider the actual damages Ahrens caused. Since no one ever considered these damages, the Trusts were deprived of their fundamental constitutional right to have some fact-finder assess damages for this breach. See, e.g., CONST. ART. I § 21; **Sofie v. Fibreboard Corp.**, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). The trial court should have granted the damages, granted an *additur*, or granted a new trial solely on damages. This Court should reverse and remand for a proper determination of damages.

CONCLUSION

This Court should reverse and remand for a proper determination of the Trusts' CPA claim and damages.

DATED this ^{15th}~~14th~~ day of February, 2011.

Masters Law Group, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
Attorneys for Petitioners

CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed and/or emailed, a copy of the foregoing **BRIEF OF PETITIONERS** postage prepaid, via U.S. mail on the 18th day of February 2011, to the following counsel of record at the following addresses:

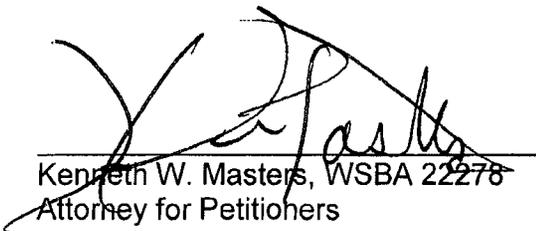
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Kenneth W. Masters, WSBA 22278
Attorney for Petitioners

Plaintiffs' Proposed Jury Instruction No. ____

NO. ____

DEFENDANT AHRENS' CONFLICT WAS UNWAIVABLE

The Court instructs you that the conflicts that existed between the interests of the Plaintiff Skinner Family Trusts, on the one hand, and Defendant Ahrens' responsibility to Heritage or a third person, or to his own personal interests, on the other hand, could not be waived by Plaintiffs, regardless of any disclosures that Ahrens gave the Skinner Trust trustees, if any, and regardless of whatever consent the Skinner Trust trustees gave Ahrens, if any. You shall accept the foregoing as proven facts during your deliberations, and when answering all questions in the Jury Verdict Form.

Plaintiffs' Proposed Jury Instruction No. ____

NO. ____

DEFENDANT AHRENS BREACHED FIDUCIARY DUTY OF LOYALTY

The Court instructs you that Defendant Ahrens breached his fiduciary duties of loyalty and disclosure to Plaintiffs. You shall accept the foregoing as proven fact during your deliberations, and when answering all questions in the Jury Verdict Form.

SPECIAL VERDICT FORM

QUESTION A: *Would a disinterested lawyer, knowing all the circumstances regarding Defendant Ahrens' business, financial and attorney-client relationships and expectations regarding Heritage, if any, advise the trustees that the Skinner Trusts not be represented by Ahrens with respect to the Heritage 752 strategy?*

ANSWER: [] Yes [] No

INSTRUCTION: If you answered "no" to Question A, proceed to the next question. If you answered "yes", the Presiding Juror should sign this Special Verdict Form and notify the Bailiff.

QUESTION B: *Did Ahrens reasonably believe that his legal representation of the Skinner Trusts would not be adversely affected by his responsibilities as Heritage's lawyer; or by his personal financial interests; or by his relationship with Gary Kornman?*

ANSWER: [] Yes [] No

INSTRUCTION: If you answered "yes" to Question B, proceed to the next question. If you answered "no," then skip to Question E.

QUESTION C: *Did Ahrens fully disclose to the trustees of the Skinner Trusts the material facts regarding his legal representation of Heritage; his personal financial interests; and his relationship with Gary Kornman?*

ANSWER: [] Yes [] No

INSTRUCTION: If you answered "yes" to Question C, proceed to the next question. If you answered "no," then skip to Question E.

QUESTION D: After Ahrens' consultation and full disclosure regarding these facts, did the trustees of the Skinner Trusts consent in writing to be represented by Ahrens under these circumstances?

ANSWER: Yes No

QUESTION E: Did Ahrens legally represent both the Skinner Trusts and Heritage in the 752 transaction?

ANSWER: Yes No

INSTRUCTION: If you answered "yes" to Question E, proceed to the next question. If you answered "no," then skip to Question G.

QUESTION F: Did Ahrens explain to the Skinner Trusts' trustees the implications of his common representation of the Trusts and Heritage, and the advantages and risks involved?

ANSWER: Yes No

QUESTION G: Did Ahrens knowingly acquire a financial interest adverse to the Skinner Trusts in the 752 transaction?

ANSWER: Yes No

INSTRUCTION: If you answered "yes" to Question G, proceed to the next question. If you answered "no," the Presiding Juror should sign this Special Verdict Form and notify the Bailiff.

QUESTION H: Was the transaction and the terms on which Ahrens acquired the financial interest (1) fair and reasonable to the Trusts, and (2) fully disclosed and

transmitted in writing to the Skinner Trusts trusteeS in a manner that could be reasonably understood by the trustees?

ANSWER: Yes No

INSTRUCTION: If you answered "yes" to Question H, proceed to Question I. If you answered "no," the Presiding Juror should sign this Special Verdict Form and notify the Bailiff.

QUESTION I: Were the Skinner Trusts' trustees given a reasonable opportunity to seek the advice of independent counsel regarding Ahrens' acquisition of a financial interest, and did the Trusts consent to Ahrens' financial acquisition.

ANSWER: Yes No

INSTRUCTION: On completion, the Presiding Juror should sign this verdict form and notify the bailiff.

DATE: _____ SIGNATURE: _____

Presiding Juror

FILED
KING COUNTY, WASHINGTON

NOV 12 2009

SUPERIOR COURT CLERK
BY LEANNE SYMONDS

DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOHN BEHNKE and CARL BEHNKE as
Trustees and on behalf of the G.W.
SKINNER CHILDREN'S TRUST and
the G.W. SKINNER TRUST NO. 2.

Plaintiffs,

v.

EDWARD AHRENS and TERI
AHRENS, husband and wife,

Defendants.

CAUSE NO. 06-2-31638-0SEA

SPECIAL VERDICT FORM

We, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: Were there one or more intentional misrepresentations or material concealments by Defendants that was a proximate cause of the Plaintiffs' damages?

ANSWER: Yes No

INSTRUCTION: If you answer "Yes" to Question 1, please proceed to the next question. If you answer "No," please skip to Question 3.

QUESTION 2: What do you find to be the amount of damages caused Plaintiffs by Defendant's misrepresentation(s) and/or concealment(s)?

- a. Fees paid to Heritage **ANSWER:** \$ _____
- b. Fees paid to Lewis Rice **ANSWER:** \$ _____
- c. Fees paid to Ahrens & DeAngeli **ANSWER:** \$ _____
- d. Fees paid to Preston Gates **ANSWER:** \$ _____
- e. Fees paid to Haynes & Boone **ANSWER:** \$ _____
- f. Additional capital gains tax **ANSWER:** \$ _____
- g. Tax Penalty **ANSWER:** \$ _____

QUESTION 3: Did Defendants breach a fiduciary duty owed to Plaintiffs that was a proximate cause of Plaintiffs' damages?

ANSWER: Yes No

INSTRUCTION: If you answer "Yes" to Question 3, please proceed to the next question. If you answer "no," please skip to Question 5.

QUESTION 4: What do you find to be the amount of damages proximately caused by Defendants' breach of fiduciary duty?

- a. Fees paid to Heritage **ANSWER:** \$ ~~_____~~ ^{DM} _____ ϕ
- b. Fees paid to Lewis Rice **ANSWER:** \$ _____ ϕ
- c. Fees paid to Ahrens & DeAngeli **ANSWER:** \$ 6,162.25
- d. Fees paid to Preston Gates **ANSWER:** \$ _____ ϕ

- e. Fees paid to Haynes & Boone ANSWER: \$ _____ 0
- f. Additional capital gains tax ANSWER: \$ _____ 0
- g. Tax Penalty ANSWER: \$ _____ 0

QUESTION 5: Did Defendants breach the standard of care (were Defendants negligent or commit legal malpractice) in one or more ways that proximately caused Plaintiffs' damages?

ANSWER: [] Yes [] No

INSTRUCTION: If you answered "Yes" to Question 5, please proceed to the next question. If you answer "No," the Presiding Juror should sign this verdict form and notify the bailiff.

QUESTION 6: What do you find to be the amount of damages caused Plaintiffs by Defendants' breach of the standard of care (negligence or legal malpractice)?

Do not consider the issue of contributory negligence, if any, in your answer; this issue is addressed below.

- a. Fees paid to Heritage ANSWER: \$ _____ 0
- b. Fees paid to Lewis Rice ANSWER: \$ _____ 0
- c. Fees paid to Ahrens & DeAngeli ANSWER: \$ 6,162.25
- d. Fees paid to Preston Gates ANSWER: \$ _____ 0
- e. Fees paid to Haynes & Boone ANSWER: \$ _____ 0
- f. Additional capital gains tax ANSWER: \$ _____ 0
- g. Tax Penalty ANSWER: \$ _____ 0

QUESTION 7: Was there negligence by Plaintiffs that was a proximate cause of Plaintiffs' own damages?

ANSWER: [] Yes [] No

INSTRUCTION: If you answer Question 7 "Yes," please proceed to the next question. If you answer "No, the Presiding Juror should sign this verdict form and notify the bailiff. "

Question 8: Assume that 100% represents the total combined negligence that proximately caused the Plaintiffs' damages. What percentage of this 100% is attributable to the breach of the standard of care (professional malpractice or negligence) of the Defendants, and what percentage of this 100% is attributable to Plaintiffs' negligence?

ANSWER:

Defendants	<u>53</u> %
Plaintiffs	<u>47</u> %

INSTRUCTION: On completion, the Presiding Juror should sign this verdict form and notify the bailiff.

DATE: 11/12/09 SIGNATURE: 
Presiding Juror

FILED

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Honorable Michael J. Hickey
SUPERIOR COURT CLERK
Noted for Presentation: February 12, 2010
Without Oral Argument
CASE NUMBER: 06-2-31638-0 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JOHN BEHNKE and CARL BEHNKE as
Trustees and on behalf of the G.W. SKINNER
CHILDREN'S TRUST and the G.W. SKINNER
TRUST NO. 2,

Plaintiffs,

v.

EDWARD AHRENS and TERI AHRENS, et al.,

Defendants.

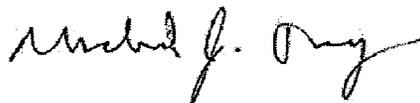
NO. 06-2-31638-0 SEA

AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
PLAINTIFFS' RPC-BASED FIDUCIARY
BREACH CLAIM

When the Court electronically filed the Findings of Fact and Conclusions of Law on Plaintiffs' RPC-Based Fiduciary Breach Claim on March 8, 2010, the court did not properly attach Exhibit A which lists the parties pleadings submitted on this contested claim.

The Court now files the Amended Findings of Fact and Conclusions of Law on Plaintiffs' RPC-Based Fiduciary Breach Claim, which has the original Findings and Conclusions and Exhibit attached and incorporated by reference.

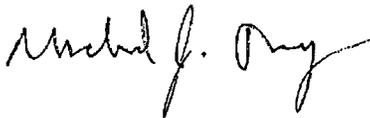
Dated: March 15, 2010.

A handwritten signature in black ink, appearing to read "Michael J. Trickey". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Judge Michael J. Trickey

King County Superior Court
Judicial Electronic Signature Page

Case Number: 06-2-31638-0
Case Title: BEHNKE ET AL VS AHRENS & DEANGELI ET AL
Document Title: ORDER AMENDED FFCL RE: FIDUCIARY BREACH
Signed by Judge: Michael Trickey
Date: 3/15/2010 1:39:13 PM



Judge Michael Trickey

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 2133E79A9850E1598A1E92F483D25F1489FE3B1B
Certificate effective date: 2/9/2010 12:37:03 PM
Certificate expiry date: 3/20/2012 1:37:03 PM
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington
CA, O=State of Washington PKI, C=US

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JOHN BEHNKE and CARL BEHNKE as
Trustees and on behalf of the G.W.
SKINNER CHILDREN'S TRUST and the
G.W. SKINNER TRUST NO. 2,

Plaintiffs,

v.

EDWARD AHRENS and TERI AHRENS,

Defendants.

No. 06-2-31638-0SEA

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON PLAINTIFFS' RPC-BASED
FIDUCIARY BREACH CLAIM

Having received the evidence at trial and reviewed the parties' papers (which are itemized at Attachment A) submitted in support and opposition to Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach Claim, the Court incorporates its oral ruling of December 29, 2009 and makes the following FINDINGS OF FACT:

1. Plaintiffs are the G.W. Skinner Children's Trust and the G.W. Skinner Trust No. 2 ("Skinner Family Trusts," "Trusts" or "plaintiffs"). During the period in question, the trustees of the Skinner Family Trusts were Sally Behnke, Carl Behnke, John Behnke and the Union Bank of California.
2. Defendant is Edward Ahrens ("Ahrens"), an attorney admitted by the Washington Supreme Court to practice law in the State of Washington and subject to the provisions of the Rules of Professional Conduct promulgated by the Washington Supreme Court.

3. Plaintiffs allege that defendant breached his fiduciary duty of undivided loyalty to plaintiffs by, among other things, violating the conflict of interest provisions of then-applicable Rule of Professional Conduct (“RPC”) Rule 1.7(b).

4. A claim of breach of fiduciary duty of undivided loyalty based on a violation of the RPCs conflict of interest provisions is a question of law for the Court. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 269, 44 P.3d 878 (2002). Accordingly, the Court took this issue from the jury and reserved the issues of Plaintiffs’ RPC-based fiduciary breach claim to the Court.

5. Plaintiffs’ claims of intentional misrepresentation and omission, common law fiduciary breach and legal negligence were tried to a jury from October 12 to November 6, 2009.

6. After the close of evidence to the jury and before the jury returned its verdict, Plaintiffs proposed alternatives to the Court for deciding causation and damages on Plaintiffs’ RPC-based fiduciary breach claim, should the Court conclude defendant breached his fiduciary duty to Plaintiffs by violating RPC 1.7(b). Plaintiffs proposed that the jury not be discharged and any disputed issue of causation or damages be referred to the jury (without reference to the RPCs in compliance with *Hizey v. Carpenter*, 119 Wash.2d 251, 830 P.2d 646 (1992)). Alternatively, Plaintiffs proposed that the parties agree that the Court decide all issues of liability, causation and damages.

7. In open court on November 12, 2009, the Court ruled and counsel for Plaintiffs and Defendant agreed that the Court would decide all elements of this fiduciary breach claim and that the jury would be released after rendering its verdict. Thereafter, the jury returned its verdict and was discharged.

8. Thereafter, the Court received and considered the parties' papers in support and opposition to Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach Claim, which are detailed at Attachment A hereto, including expert opinion declarations by the parties' professional responsibility experts on the RPC-based fiduciary duty issue. On December 29, 2009, the Court heard argument of counsel and rendered its oral opinion.

9. Commencing in 1997 and continuing during his representation of Plaintiffs, defendant Edward Ahrens had a business relationship with The Heritage Organization ("Heritage"), a promoter of tax saving strategies located in Dallas, Texas. Acting through his corporation, FWP Technologies, Inc., Ahrens designed and sold or licensed tax reduction strategies to Heritage, which Heritage promoted and sold. Heritage in turn often referred its customers to Ahrens to perform the legal services required to implement the strategies. FWP was a Nevada corporation that Mr. Ahrens operated out of his law office without offices or employees.

10. Ahrens used two variations of a capital gains tax reduction strategy known as "752" or "Son of Boss" transactions, which Ahrens licensed through FWP to Heritage in return for a share of the purchase money Heritage received from customers who purchased the plan. Before Ahrens undertook plaintiffs' representation, Heritage made 752 licensing fees payments to FWP totaling \$3,720,000. After Ahrens undertook plaintiffs' representation, Heritage made 752 licensing fees payments to FWP totaling \$1,043,000.

11. Commencing in 1997 and continuing during his representation of Plaintiffs, Ahrens also had a continuous attorney-client relationship with Heritage. Ahrens and his firm performed nearly daily legal services for Heritage from 1998 through 2002. Ahrens flew with Heritage sales personnel around the country to market the 752 strategy to prospective buyers; developed tax

avoidance strategies for Heritage; advised Heritage on individual tax strategy sales transactions; analyzed and reported to Heritage on tax developments in the courts, Congress, IRS, Justice Department, and tax literature; provided Heritage strategic business advice; investigated and reported to Heritage on its competitor's tax strategies; and performed numerous other services billed to Heritage as legal services.

12. In 2001, on the advice of financial advisors, the trustees of Plaintiff Trusts considered selling a substantial portion of the Trusts' concentrated holdings in two low-basis stocks to diversify the Trusts' investments. The Trusts received a proposal from a national accounting firm for a strategy by which the Trusts might reduce the large capital gain taxes anticipated from selling the low basis stocks.

13. On October 23, 2001, on the advice of a financial advisor, the Trusts retained Ahrens to evaluate the accounting firm's proposal. Ahrens holds himself out as a specialist in such tax matters. The attorney-client relationship between the Trusts and Ahrens and his law firm commenced on October 23, 2001.

14. Ahrens advised the Trusts co-trustees Carl and John Behnke that the accounting firm proposal was not suitable. The co-trustees asked Ahrens for legal advice regarding other potential tax-savings alternatives.

15. Ahrens recommended one of the Heritage 752 strategy variations that Ahrens had licensed to Heritage. Ahrens arranged two meetings in Seattle in November 2001 between himself, the Trusts' four co-trustees, and Heritage sales representatives, during which the co-trustees executed the Heritage 752 sales contract and decided to participate in the Heritage 752 strategy. The Trusts

ultimately paid \$1,762,906 to Heritage and became obligated on approximately \$3 million of promissory notes to Heritage.

16. Ahrens admits and the Court finds that Ahrens never disclosed to the trustees that he was in business with Heritage; that he had designed and licensed to Heritage the 752 strategy that he referred to the Trusts; that Heritage had paid a lot of money in 752 licensing payments in the past; or that Heritage may pay him a lot of money in 752 licensing payments in the future.

17. The Trusts' trustees had no prior knowledge of Heritage or of any 752 tax strategy. But for Ahrens' representation of the Trusts, the Trusts would not have participated in the Heritage 752 strategy.

18. Mr. Ahrens testified and the Court finds that Mr. Ahrens knew that whether or not Heritage paid him the 752 licensing payments was entirely dependent upon the goodwill and discretion of Heritage's owner, and he considered being on the owner's good side an important factor in whether he would be paid. Ahrens further testified and the Court finds that Ahrens knew that one way of being on Heritage's owner's good side was for Ahrens to refer clients like Plaintiffs to Heritage.

19. Ahrens' engagement letter sent to and signed by each co-trustee states that Ahrens' law firm would act as the Trusts' tax planning legal counsel to the best of its ability and extend its duty of loyalty to both Trusts. Ahrens' letter states his firm would represent the Trusts in the 752 planning project with Heritage along with the law firm that was retained to prepare transactional documents and tax opinion letters, and would review "the documents, planning designs and legal opinions in order to implement this planning." Ahrens' engagement letter also states "we will work jointly with Heritage in preparing, presenting and implementing the planning project."

20. Ahrens' engagement letter's sole disclosure regarding the continuous attorney-client relationship between Ahrens and Heritage states only: "we have previously represented and continue to represent The Heritage Organization." The letter does not limit Ahrens' promised scope of representation or responsibilities to the Trusts on account of Ahrens' attorney-client relationship between Heritage and Ahrens or advise the trustees of any risks or implications of his dual legal representation of Heritage and the Trusts, or of the business and financial relationship between Heritage and Ahrens.

21. At trial Ahrens testified that, contrary to the written engagement letter, he orally informed the trustees that he would not represent the Trusts in any matters adverse to Heritage because he also represented Heritage. Ahrens also testified he was instructed by one of the trustees to limit the services Ahrens had promised in the engagement letter to perform. The Court finds that this testimony is not credible and that Ahrens was not authorized to limit the scope of the representation he agreed to provide.

22. The Trusts' 752 transaction was subsequently declared an abusive tax shelter by the IRS, and all tax benefits were disallowed.

Based on the foregoing Findings of Fact and applicable law, the Court makes the following CONCLUSIONS OF LAW:

1. Defendant and Plaintiffs consented pursuant to CR 39(a)(1)(A) to the Court deciding all elements of plaintiffs' breach of fiduciary duty claim based upon defendant's alleged violation of Rule of Professional Conduct 1.7(b). This matter is appropriately before the Court.

2. The version of RPC 1.7(b) in force at all material times provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

3. Defendant breached his fiduciary duty of undivided loyalty to Plaintiffs by violating RPC 1.7(b). Defendant was prohibited by RPC 1.7(b) from undertaking Plaintiffs' representation because it was apparent Plaintiffs' representation may be materially limited by Defendant's personal financial dealings with Heritage and Defendant's attorney-client relationship with Heritage and because Defendant did not fully disclose to Plaintiffs the material facts of his personal business and attorney-client relationships with Heritage and obtain Plaintiffs' written consent.

4. Plaintiffs contend that the conflict between Defendant's responsibilities as Plaintiffs' lawyer and Defendant's personal financial and business dealings with Heritage constituted a nonwaivable conflict of interest. The Court concludes this conflict was waivable because of the business experience and sophistication of John and Carl Behnke, two of the Plaintiff Trusts' co-trustees.

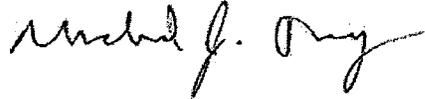
5. Plaintiffs contend that the Court has authority to award Plaintiffs their actual damages proximately caused by Plaintiffs' participation in the Heritage 752 plan licensed by Ahrens because, but for Defendant's representation of Plaintiffs in violation of RPC 1.7(b), Plaintiffs would not have participated in the Heritage plan or incurred any of the losses resulting from their participation. Plaintiffs also contend that an award of actual damages is within Court discretion conferred by the equitable nature of a breach of fiduciary duty claim. The Court rejects these contentions because the Court concludes that no civil remedy, legal or equitable exists for breach of a lawyer's fiduciary duty

of undivided loyalty based on violation of the RPC conflict of interest rules other than disgorgement of fees. The Court concludes that if there was a broader remedy than disgorgement available in these circumstances, the Supreme Court in *Eriks v. Denver, supra*, and the court of appeals in *Cotton v. Kronenberg, supra*, would have made that clear.

6. The scope of the remedy of disgorgement of fees does not include those fees paid by Heritage to Defendant Ahrens. The court concludes that the recent Washington state Supreme Court decision of Shoemake v. Ferrer, No. 81812-6, filed on February 4, 2010, does not support the Plaintiffs' suggested expansion of the disgorgement of fees remedy.

7. Plaintiffs are awarded disgorgement of the attorney's fees that Plaintiffs paid to Defendant in the amount of \$12,325, plus prejudgment interest.

DATED this 8th day of March, 2010.



Judge Michael J. Trickey

Presented by:

LAW OFFICE OF CHRISTOPHER PENCE PLLC

s/ Christopher C. Pence
Christopher C. Pence, WSBA No. 7726

CHICOINE & HALLETT, P.S.

s/ Darrell D. Hallett
Darrell D. Hallett, WSBA No. 00562

King County Superior Court
Judicial Electronic Signature Page

Case Number: . 06-2-31638-0
Case Title: . . BEHNKE ET AL VS AHRENS & DEANGELI ET AL
Document Title: . OTHER FFCL RE: RPC FIDUCIARY BREACH
Signed by Judge: Michael Trickey
Date: 3/8/2010 8:30:00 AM

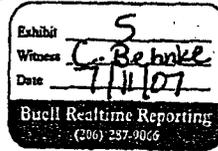


Judge Michael Trickey

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 2133E79A9850E1598A1E92F483D25F1489FE3B1B
Certificate effective date: 2/9/2010 12:37:03 PM
Certificate expiry date: 3/20/2012 1:37:03 PM
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington
CA, O=State of Washington PKI, C=US

EXHIBIT A

1. Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach Claim (dated 12.4.09);
2. Expert Affidavit of Peter R. Jarvis Re: Washington RPCs (12.4.09);
3. Declaration of Jon Fogle in Support of Plaintiffs' Post-Trial Motions (12.4.09);
4. Memorandum of Procedural History and Authority of Plaintiffs' RPC-Based Fiduciary Breach Claim (12.7.09);
5. Supplemental Declaration of Christopher Pence Re: Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach (12.7.09);
6. Supplemental Memorandum Summarizing Facts in Support of Judgment on Plaintiffs' RPC-Based Fiduciary Breach Claim (12.7.09);
7. Defendants' Opposition to Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach Claim (12.18.09);
8. Declaration of David Boerner in Opposition to Plaintiffs' Motion to Enter Judgment on RPC-Based Fiduciary Breach Claim (12.11.09);
9. Declaration of Malaika M. Eaton In Support Of Defendants' Opposition to Plaintiffs' Motion to Enter Judgment On RPC-Based Fiduciary Breach Claim (12.18.09);
10. Plaintiff's Reply to Defendant's Response to Enter Judgment on RPC-Based Fiduciary Breach Claim (12.23.09);
11. Declaration of Christopher Pence in Support of Plaintiffs' Reply to Defendant's Response To Enter Judgment on RPC-Based Fiduciary Breach Claim (12.23.09);
12. Supplemental Declaration of Christopher Pence In Support of Plaintiffs' Reply to Defendant's Response To Enter Judgment on RPC-Based Fiduciary Breach Claim (12.28.09);
13. Findings of Fact and Conclusions of Law on Plaintiffs' RPC-Based Fiduciary Breach Claim;
14. Plaintiffs' Memorandum In Support of Its Supplemental Findings of Fact and Conclusions of Law;
15. Plaintiffs' Supplemental Conclusions of Law;
16. Defendants' Response and supporting documents (if any); and
17. Plaintiffs' Reply and supporting documents (if any).



5351

Ahrens & DeAngeli, p.l.l.c.

Attorneys at Law

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 Suite 1701
 101 South Capitol Boulevard
 PO: Box 6561
 Boise, Idaho 83707-6561
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 Facsimile: (208) 395-0002

December 13, 2001

Carl G. Behnke
 John S. Behnke
 Robert J. Adamonis
 Co-Trustees of Skinner Trust No. 2
 520 Pike Street, Suite 2620
 Seattle, WA 98101-4001

Sally Behnke
 John S. Behnke
 Carl G. Behnke
 Co-Trustees of Gilbert W. Skinner
 Testamentary Trust
 520 Pike Street, Suite 2620
 Seattle, WA 98101-4001

Re: Engagement Terms

Dear Sally, John, Carl and Bob:

Thank you for selecting AHRENS & DeANGELI, pllc, as legal counsel for your estate and tax planning. We value you as a client and look forward to providing legal services for you. It is important, therefore, that you understand our relationship with you as your lawyers.

Scope of Work. We will represent you in regard to the planning project that you are intending to do with The Heritage Organization and the law firm of Lewis, Rice & Fingetsh, L.C. Our work will include review of the documents, planning designs and legal opinions in order to implement this planning. Our engagement will also include any additional work to which we mutually consent or which is reasonably encompassed within its terms.

We will at all times act on your behalf to the best of our ability. Any expressions on our part concerning the outcome of your legal matters are expressions of opinion based upon our best professional judgment. They are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on our interpretation of the law at the time they are expressed.

Identification of Clients. We will represent and be engaged by all of the co-trustees of both the Skinner Trust No. 2 and the Gilbert W. Skinner Testamentary Trust. Our duties of loyalty and confidentiality extend to both trusts.

Service Providers. E. Ed Ahrens, will be the principal attorney representing you from our firm. You are free to request a change of principal attorney at any time, however. I may also work

December 13, 2001

Page 2

with other attorneys in our firm in order to ensure that we provide the highest quality services to you. We are happy to respond to all inquiries concerning attorneys and legal assistants who work on your matters.

Fees. The fees for our services are based on our hourly rates. My hourly rate is \$290; the rates for other attorneys in our firm range from \$150-250.

Our rates and fees are determined under guidelines set out in the Rules of Professional Conduct adopted by the Washington State Supreme Court. These guidelines include:

- The time and effort required, the novelty and complexity of the issues presented, and the skill required to perform the legal services promptly;
- The fees customarily charged in the community for similar services, and the value of the services to you;
- The amount of money or value of property involved and the results obtained;
- Time constraints requiring substantial disruption of our other business imposed by you as our client, (such as emergency or time-critical legal service);
- The nature and longevity of our professional relationship with you;
- The experience, reputation and expertise of the lawyers performing the services;
- The extent to which office procedures and systems have produced a high quality product efficiently;

Typically, the time and effort required are weighed most heavily in fee determinations. We will keep accurate records of the time we devote to your work, including conferences (both in-person and over the telephone); negotiations, factual and legal research and analysis, document preparation and revision, travel on your behalf, and other related matters. We record our time in units of tenths of an hour.

Your Right to Arbitrate. If you disagree with the amount of our fee, please take up the question with me or with the firm's managing partner, Dawn DeAngeli. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute which is not readily resolved, you have the right to request arbitration under supervision of the Washington State Bar Association, and we agree to participate fully in that process.

December 13, 2001

Page 3

Our Relationship with The Heritage Organization, L.L.C. We are bound by our ethical duty as lawyers to disclose to you that we have previously represented and continue to represent The Heritage Organization, L.L.C. ("Heritage"). On this project we will work jointly with Heritage in preparing, presenting and implementing the planning project for you. You have requested that Heritage reimburse you or provide a credit to you for one-half or some other agreed upon portion of the fees that we incur in this engagement. We understand that Heritage has agreed to this request. Since this relationship and your fee arrangement creates a potential conflict of interest regarding our obligations to both you and Heritage, we ask that you acknowledge this conflict and expressly waive the conflict in writing by signing the attachment to this letter. If at any point during our representation you change your mind and wish to be represented by separate counsel, please let us know as soon as possible. If you have any questions about this conflict or why we are requesting that you expressly waive the conflict in writing, please do not hesitate to contact me. Any confidential information obtained from you will not be shared with Heritage without your direction.

Joint Representation We will represent both the Skinner Trust No. 2 and the Gilbert W. Skinner Testamentary Trust. While it is not uncommon for lawyers to represent two parties with common interests, especially in the estate planning setting, the possibility still exists for a conflict of interest between the Skinner Trust No. 2 and the Gilbert W. Skinner Testamentary Trust during the course of our engagement. By signing the attached conflict waiver, you are expressly waiving this conflict. Any confidential information about either trust gained during the course of our engagement will, to the extent necessary, be shared with the trustees of the other trust.

Joint Investment Relationship In the course of the envisioned planning project, a corporation will likely contribute monies into an entity into which you will also contribute monies and other assets and that entity will make certain investments. The capital stock of the aforementioned corporation is owned by Edward D. Ahrens and related persons or trusts. We ask that you acknowledge this conflict and expressly waive the conflict in writing by signing the attachment to this letter.

I look forward to working with you on this project. Please contact me with any questions.

Very truly yours,

AHRENS & DeANGELI PLLC

Edward D. Ahrens

EDA:spj

December 13, 2001

Page 4

ACCEPTANCE OF ENGAGEMENT TERMS

We have read and understand the Engagement Terms outlined in this letter. By our signatures below, we hereby accept the foregoing Engagement Terms and authorize Edward D. Ahrens and Ahrens & DeAngeli, PLLC, to commence work under the conditions outlined above.

Skinner Trust No. 2, N/T/A dated December 9, 1941

Gilbert W. Skinner Testamentary Trust

By: Carl G. Behnke
Carl G. Behnke, Co-Trustee

By: Sally Behnke
Sally Behnke, Co-Trustee

By: John S. Behnke
John S. Behnke, Co-Trustee

By: John S. Behnke
John S. Behnke, Co-Trustee

By: Robert J. Adamonis
Union Bank of California, Co-Trustee
By: Robert J. Adamonis, Vice President

By: Carl G. Behnke
Carl G. Behnke, Co-Trustee

December 13, 2001

Page 5

WAIVER OF CONFLICTS OF INTEREST

We have read and understand the Conflicts of Interest outlined in this letter. By our signatures below, we hereby acknowledge the aforementioned conflicts of interest and we knowingly waive both such conflicts of interest.

Dated: _____

Skinner Trust No. 2, U/T/A dated December 9, 1941. Gilbert W. Skinner Testamentary Trust

By: Carl G. Behnke
Carl G. Behnke, Co-Trustee

By: Sally Behnke
Sally Behnke, Co-Trustee

By: John S. Behnke
John S. Behnke, Co-Trustee

By: John S. Behnke
John S. Behnke, Co-Trustee

By: Robert J. Adamonis
Union Bank of California, Co-Trustee.
By: Robert J. Adamonis, Vice President

By: Carl G. Behnke
Carl G. Behnke, Co-Trustee

The Honorable Michael J. Trickey

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

JOHN BEHNKE and CARL BEHNKE as
Trustees and on behalf of the G.W. SKINNER
CHILDREN'S TRUST and the G.W.
SKINNER TRUST NO. 2,

Plaintiffs,

v.

EDWARD AHRENS and TERI AHRENS,
husband and wife; et al.

Defendants.

No. 06-2-31638-0SEA

STIPULATION RE: PAYMENTS
RECEIVED BY FWP TECHNOLOGIES,
INC.

STIPULATION

The above-captioned parties, by and through their undersigned counsel of record,
stipulate that the attached Schedule A accurately reflects payments received by Defendant,
FWP Technologies, Inc. ("FWP"), for the period January 1, 1997 through October 6, 2005.
Specifically, FWP received the following payments from the Heritage Organization for
section 752 transactions:

- 1. April 23, 1999 \$400,000
- 2. February 1, 2000 \$1,320,000
- 3. February 21, 2001 \$1,000,000
- 4. July 12, 2001 \$1,000,000
- 5. December 20, 2001 \$300,000

STIPULATION RE: PAYMENTS
RECEIVED BY FWP- 1

PLF EXHIBIT 514 FOR ID.
RANDY D. GARRETT, CSR
DATE 4-10-09
WITNESS McCaffery
PAGE 1 OF 3

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6. December 31, 2001 \$425,000

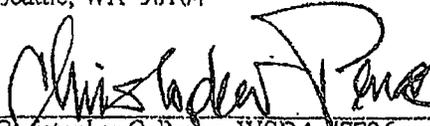
7. November 8, 2002 \$318,000

Total \$4,763,000

DATE: 4.8.09

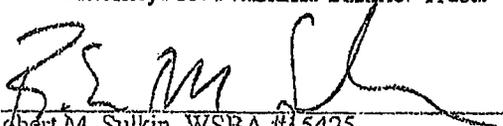

Darrell D. Hallett, WSBA #562
John M. Colvin, WSBA #20930
Cori E. Flanders, WSBA # 34893
Chicoine & Hallett PS
719 Second Avenue, Suite 425
Seattle, WA 98104

DATE: 4.8.09


Christopher C. Pence, WSBA #7726
Morrow Kidman Tinker & Pence PLLC
400 Winslow Way E, Suite 230
Bainbridge Island, WA 98110

Attorneys for Plaintiffs Skinner Trusts

DATE: 4.8.09


Robert M. Sulkin, WSBA #15425
Gregory J. Hollon, WSBA #26311
McNaul Ebel Nawrot & Helgren PLLC
600 University Street, Suite 2700
Seattle, WA 98101
Attorneys for Defendants Ahrens,
DeAngeli and FWP Technologies

STIPULATION RE: PAYMENTS
RECEIVED BY FWP-2

514-2

FWP Technologies, Inc.
Transacción Detail By Account
January 1, 1997 through October 6, 2005

100805

Type	Date	Num	Name	Memo	Paid Amount
Licensing Income					
Invoice	4/23/1998	8	The Heritage Organization, L.L.C.	Proprietary estate planning techniques	400,000.00
Invoice	7/12/2001	11	THO - Ath Gary	Consulting services for the year 2000.	1,320,000.00
Invoice	2/21/2001	11	The Heritage Organization, L.L.C.	Consulting Services	1,000,000.00
Invoice	7/12/2001	14	The Heritage Organization, L.L.C.	Tax Research and Consulting Fees.	1,000,000.00
Invoice	12/20/2001	16	The Heritage Organization, L.L.C.	Consulting Services	300,000.00
Invoice	12/31/2001	16	The Heritage Organization, L.L.C.	Consulting Services	425,000.00
Invoice	11/02/2002	16	The Heritage Organization, L.L.C.	Consulting Services	318,000.00
Total Licensing Income					
TOTAL					

REDACTED

L&P 00165

ADDENDUM

Schedule A

514-3

EXHIBIT 207

RCW 4.76.030

Increase or reduction of verdict as alternative to new trial.

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

[1971 c 81 § 19; 1933 c 138 § 2; RRS § 399-1.]

RCW 19.86.020

**Unfair competition, practices, declared
unlawful.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

RCW 19.86.090

Civil action for damages — Treble damages authorized — Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

RCW 19.86.920

Purpose — Interpretation — Liberal construction — Saving — 1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

Washington State Supreme Court
Court Case No: 84527-I
February 18, 2011
Page 2 of 2

CERTIFICATE OF SERVICE

I certify that I caused to be mailed and/or emailed a copy of the foregoing letter on the 18th day of February 2011 to the following counsel of record at the following addresses:

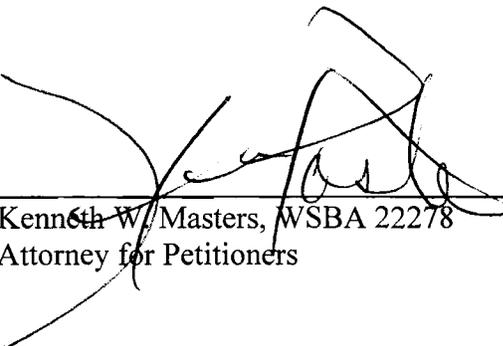
Attorneys for Petitioners

Christopher C. Pence
Law Office of
Christopher Pence, PLLC
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chris@pencelaw.com

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Kenneth W. Masters, WSBA 22278
Attorney for Petitioners