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

LEVIN & STEIN,	)	No. 62334-6-I
	)	
Appellants,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
MEADOW VALLEY CONDOMINIUM OWNERS ASSOCIATION,	)	
	)	
Respondents.	)	FILED: July 26, 2010
	)	

Schindler, J. — The Meadow Valley Condominium Owners Association (the Association) retained the law firm of Levin & Stein (L&S) to sue the condominium developer for construction defect damages. Relying on the advice of L&S, the Association entered into a covenant judgment settlement agreement with the developer and the general contractor. The developer and general contractor stipulated to entry of a $7.2 million judgment and agreed to assign coverage and bad faith claims against the insurance carriers. In exchange, the Association agreed not to execute on the judgment. Following a reasonableness hearing on the terms of the settlement

agreement, the trial court concluded that $4.8 million in construction defect damages was reasonable but that $1.6 million instead of $2.4 million in attorney fees was reasonable. Thereafter, the developer and general contractor stipulated to entry of a $6.4 million judgment in favor of the Association.

After the Association terminated L&S, the law firm filed an attorney fee lien of $1,632,000 against the Association. The Association challenged the amount of fees, alleging L&S breached its fiduciary duty. Following a five-week trial, the court determined that L&S was entitled to fees in quantum meruit of $996,300 but deducted $400,000 based on finding L&S breached its fiduciary duty to the Association. The court also ruled that the Association was entitled to an attorney fee award of $492,075 as the prevailing party and entered a judgment of $104,275 in favor of L&S. On appeal, L&S contends the doctrine of judicial estoppel precluded the Association from challenging the reasonableness of the attorney fees in the lien foreclosure action. In the alternative, L&S claims the trial court erred in rejecting the law firm's request for a multiplier, the court abused its discretion in only awarding $10,000 in fees for work performed after entry of the covenant judgment settlement agreement, and the court erred in concluding that the Association was entitled to an award of attorney fees as the prevailing party. We conclude the trial court did not abuse its discretion in ruling that the doctrine of judicial estoppel did not bar the Association from contesting the reasonableness of attorney fees in the lien foreclosure action based on breach of fiduciary duty. We also conclude the court did not abuse its discretion in refusing to

grant the request for a multiplier and in determining the amount of attorney fees in quantum meruit. But we remand on the question of whether the Association is entitled to an award of attorney fees.

FACTS

Meadow Valley, LLC (MV) was the developer of a 78-unit condominium, the Meadow Valley Condominiums. Herbert Construction, Inc. (HCI) was the general contractor. Construction was completed in 2000.

On July 29, 2003, the Meadow Valley Condominium Owners Association retained L&S to pursue construction defect claims against MV, and entered into a written contingency fee agreement.

A number of construction defects were discovered during the initial investigation by an architectural and an engineering firm. The Association's undisputed litigation objective was to recover the amount necessary to repair the construction defects and resulting damage.

L&S primarily relies on the strategy of entering into an ER 408 agreement with the defendants to resolve construction defect cases through mediation. The trial court findings state:

> L&S contended that the ER 408 facilitates the free exchange of information and opinion by the technical construction experts from both sides, who negotiate an agreed joint repair scope between them. The joint repair scope is then priced by three independent contractors, the lowest estimate representing the settlement negotiation ceiling for mediation. The intent of the ER 408 agreement is to limit discovery and its attendant expenses, and encourage the parties to agree on the nature of the problems and the cost of

remediation, leading to an agreed settlement by both sides.

The court also found that L&S resolves the vast majority of construction defect cases through mediation.

> While the L&S firm holds itself out as experienced and successful CD attorneys, that experience is largely limited to case resolution by mediation, not trial. L&S lawyers testified that as of the time they took the [the Association] case, Stein had tried the only plaintiff's CD case to judgment in the eight-year history of the Seattle office. Levin never once tried a CD plaintiff's case to judgment in any locale. In the history of the entire firm, including all of its branch offices, only two plaintiff's CD cases were tried to judgment. Both Levin and Stein admitted at trial that their CD cases almost always settle, in part due to the strict liability for defects, and in part because of the prevailing party attorney's fee provision in the Condominium statute, RCW 64.34.445. Levin testified that L&S had never handled a CD case that did not produce some amount of recovery.

In September 2003, the Association sued MV for breach of contract and violation of the WCA. St. Paul Fire and Marine Insurance Company (St. Paul) agreed to defend MV under a reservation of rights. MV sued the general contractor HCI for breach of contract and indemnification. Admiral Insurance Company (Admiral) agreed to represent HCI under a reservation of rights.

L&S assigned associate John Siegel as the lead attorney in the Association's case against the developer. Aside from the initial construction defect investigation, L&S did very little work on the case until May 2004.

In early May 2004, Siegel circulated a draft ER 408 agreement to defense counsel. On May 17, Richard Levin and Siegel met with the Association to provide a status report of the litigation. Levin later admitted that at the time, the attorneys at L&S

did not have "any idea how much actual insurance coverage existed for the Plaintiff's claims." Nonetheless, it is uncontested that Levin told the Association at the May 17 meeting that there was $9 million in insurance coverage to pay for construction defect repairs and damages.

Without the authorization of the Association, on June 7, Siegel entered into an ER 408 agreement with the defense and agreed to dismiss certain named individual defendants. Later that same day, Siegel met with the Association to obtain authorization to enter into the ER 408 agreement. However, Siegel did not disclose the fact that he had already done so. The Association did not authorize Siegel to enter into an ER 408 agreement.

In a June 11 e-mail to the Association, Levin admitted "that Siegel had signed the ER 408 without authorization," but Levin said that it was necessary in order to prepare for the mediation scheduled in September 2004. The Association directed L&S to remove Siegel from the case and withdraw from the ER 408 agreement. L&S removed Siegel from the case. Levin later persuaded the Association to authorize L&S to enter into the ER 408 agreement. But neither Levin nor any other L&S attorney explained "the prospective risks of the ER 408 process [to the Association] and never fully advised [the Association] of the ways in which the agreement might develop into a disadvantage."

On June 29, Levin met with the Association to discuss the value of the case. According to the board members, Levin told the Association the value of the case was between $2.5 and $3 million. The parties also discussed renegotiating the terms of the

fee agreement.

On July 15, the Association and L&S entered into an Amended Fee Agreement (AFA). L&S agreed to advance all costs and agreed that the contingency fee percentage would be based on the amount of the recovery minus costs.

The first mediation was scheduled for October 29. On October 25, Levin sent a letter to the mediator demanding $5.113 million in damages, including approximately $3.9 million for the cost of repair and $2.5 million in attorney fees, for a total of $7.648 million. Based on the ER 408 agreement, the letter sets forth three estimates for the entire "'joint repair scope,'" with an average cost of repair of $3,906,754. The letter states "[s]o, in essence, the estimators have already set a ceiling of $4,048,149.08 and floor of $2,160,873.00 for mediation purposes for the contractor's cost for the 'joint repair scope.'" Levin told the Association that the demand was unrealistic because of the relative lack of physical damage. As a result, Levin also told the Association that the available insurance may not cover all repairs.

On October 27, two days before the mediation, Levin met with the defense attorneys to discuss and coordinate the "'mediation strategy.'" Levin admitted that the attorneys discussed "dollar amounts of coverage to be paid." L&S did not inform the Association about the meeting. At the mediation on October 29, none of the defendants or their insurance companies made an offer to settle.

Without the prior consent of the Association, Levin retained construction litigation and insurance attorney Richard Beal after the first mediation, to conduct an analysis of

the available insurance coverage. Based on the discovery of additional construction defects in early 2005, the Association's construction expert estimated that the cost of repair was $4.35 million.

After analyzing available insurance coverage, Beal told Levin there was insufficient coverage to pay the cost of repair. According to Beal, Levin then focused on "a settlement strategy that would resolve the whole case." Beal told Levin that because there was no evidence of liability for bad faith on the part of the insurance carriers, he did not believe that entering into a covenant judgment settlement agreement was an appropriate strategy. The trial court found:

> [B]ecause [the Association] would be trading its right to trial against the defendants, in exchange for a covenant judgment. Beal said that inasmuch as policy limits were too low to fund all of [the Association's] repairs, recovering enough to make all repairs depended on whether the bad faith case was strong enough to prevail on that basis, which would break through the policy limits ceiling. [The Association's] ultimate success in collecting a covenant judgment therefore rested on the record made by the defendants that they had been harmed by their carriers' bad faith violations of the enhanced obligations in Tank. Beal testified that he saw no evidence in the [Association's] case.

While Levin also did not believe St. Paul or Admiral were liable for bad faith, Levin took steps before the second mediation on January 4, 2005, to "lay the groundwork for trial against the defendants that would result in a bad faith claim against the insurance carriers."

After the second unsuccessful mediation in January, L&S filed a motion for partial summary judgment asserting that as a matter of law, a number of the alleged construction defects violated the Washington Condominium Act (WCA), chapter 64.34

RCW. The court granted the Association's motion for partial summary judgment.

A third mediation was scheduled for April 5. About two months before the third mediation, Levin "discussed the concept of a covenant settlement with defense counsel, Weigel and Jager, and St. Paul's coverage counsel, Andersen. . . ." Neither Levin nor any other L&S attorney discussed entering into a covenant judgment settlement agreement with the Association before the third mediation.

On February 10, Levin sent an e-mail to the mediator stating, "the settlement value of the case would be plus/minus $4 million *if* the insurance was adequate." However, Levin said that because he did not believe there was coverage "to reach a settlement between $3 million and $4 million, the individual LLC members would have to pay some substantial sums over the $2 million in potential insurance coverage." There is no dispute that Levin did not provide a copy of the February 10 e-mail to the Association.

Right before the third mediation, St. Paul and Admiral filed a declaratory judgment action in federal district court asserting no duty to defend or indemnify. L&S retained the law firm of Stafford Frey Cooper (SFC) to represent the Association in the coverage litigation.[1]

In the days leading up to the April 5 mediation, Levin sent the Association three memos, urging the Association to accept any offer of at least $3 million. After the defendants made no counteroffer to the Association's settlement demand at the April 5

[1] Under the terms of the AFA, L&S paid SFC on an hourly basis.

mediation, the mediator suggested the Association enter into a covenant judgment settlement agreement with MV and HCI. Without the consent of their insurers, MV and HCI agreed to entry of a stipulated judgment of $7.2 million and agreed to assign to the Association their coverage and bad faith claims against St. Paul and Admiral. L&S recommended the Association agree to the covenant judgment settlement agreement. The Association entered into a covenant to not execute on the stipulated judgment and agreed to dismiss the claims against MV and HCI in exchange for assignment of coverage and bad faith claims.

L&S filed a motion for a reasonableness hearing of the settlement agreement. The motion allocated $4.8 of the stipulated $7.2 million judgment for construction defect damages and $2.4 million for attorney fees and costs. St. Paul and Admiral intervened and contested the measure of damages and the amount of attorney fees.[2]

Following the reasonableness hearing on the settlement agreement, the court entered findings of fact and conclusions of law. The court concluded that the $4.8 million allocated for construction defect damages was a reasonable settlement of the Association's claims against MV and HCI, but rejected the amount of $2.4 million in attorney fees as unreasonable. The court found that attorney fees of $1.6 million in favor of the Association as part of the settlement agreement would be reasonable. The $1.6 million attorney fee determination was based on a lodestar of $1.1 million, which

[2] St. Paul and Admiral argued that the $2.4 million attorney fee award represented approximately 50 per cent of the $4.8 million damage award. The insurers noted that 33 per cent of the damages award amounted to only $1.6 million and argued that the Association should not be entitled to recover $800,000 more than the amount agreed to under the AFA.

was calculated by multiplying 4,000 hours by a "blended" hourly rate of $275 plus an upward adjustment or multiplier of $500,000 to account for the contingent nature of the case and the remedial nature of the WCA.[3] The findings state in pertinent part:

> In determining the reasonableness of a settlement agreement under RCW 4.22.060, the trial court is required to make an objective determination of reasonableness by weighing the nine factors identified in Chausse v. Maryland Casualty Co., et al., 60 Wn. App. 504, 803 P.2d 1339 (1991), and Glover v. Tacoma General Hospital, et al, 98 Wn.2d 708, 658 P.2d 1230 (1983). Applying the Chausee and Glover factors to the facts of this case, this Court concluded that $4.8 million is a reasonable sum of settlement of the Association's damage claims.
> . . .
> The Court concludes that this is an appropriate case for an award of attorneys' fees in favor of the Association. Such an award will promote the legislative purpose for enacting the fee provision, to encourage meritorious private enforcement actions. Moreover, the Association's action was a legitimate effort to enforce the WCA's consumer protection provisions.
> . . .
> Applying the lodstar method as directed by Bowers v. Transamerica Title Ins. Co., supra, and taking into consideration the factors enumerated in Allard v. First Interstate Bank of Washington, supra, and these Findings of Fact, the Court concludes that attorneys' fees of $2.4 million as part of this settlement is unreasonable, but attorneys' fees of $1.6 million would be reasonable. In that regard, in serving the legislative purpose of RCW 64.34.100 to make the aggrieved party whole, the test is not to rely solely upon the terms of the aggrieved party's private contingent fee agreement, but to determine that the fee awarded under RCW 64.34.555, as a whole, is reasonable. See Allard, at 148, 150-151.[4]

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[3] L&S advocated using a blended rate that averages the hourly rates of the junior and senior attorneys who worked on the case.

[4] The court concluded:

> Under RCW 4.22.060, Chausse v. Maryland Casualty Co., et al., 60 Wn. App. 504, 803 P.2d 1339 (1991), and Glover v. Tacoma General Hospital, et al., 98 Wn.2d 708; 658 P.2d 1230 (1983), the total settlement of $7.2 million is unreasonable, but $6.4 million divided between $4.8 million for damages and $1.6 million for attorneys' fees, is reasonable.

Following the court's decision, MV and HCI agreed to entry of a stipulated judgment of $6.4 million in favor of the Association.

St. Paul and Admiral appealed the trial court's decision. In Meadow Valley Owners Ass'n v. St. Paul Fire and Marine Ins., 137 Wn. App. 810, 156 P.3d 240 (2007), we affirmed.

On February 24, 2006, the Association terminated L&S. On February 26, L&S filed an attorney fee lien of $1,632,000 against the Association. The Association retained SFC.

SFC filed counterclaims in the federal court coverage litigation on behalf of the Association against St. Paul and Admiral for bad faith and violation of the Consumer Protection Act, chapter 19.86 RCW. On cross motions for summary judgment, the insurers and the Association disputed the nature and scope of coverage under the insurance policies.[5] The federal court ruled that as a matter of law, the $1.6 million in attorney fees agreed to as a part of the covenant judgment settlement agreement between the Association and MV was covered as "costs taxed" under a "supplemental payments" provision in the St. Paul's insurance policy.[6]

The jury awarded the Association $322,000 for property damages covered under

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[5] Prior to the decision on summary judgment, Admiral settled with the Association for $2.2 million.

[6] See, St. Paul Fire and Marine Ins. Co. v. Hebert Const., Inc., 450 F. Supp. 2d 1214, 1235 (W.D. Wa. 2006). However, in a later decision of this court, Polygon NW. v. Am. Nat'l Fire Ins., 143 Wn. App. 753, 189 P.3d 777 (2008), we made clear coverage was not available and that the federal court misapplied Washington law in ruling in the Association's favor. Polygon, 143 Wn. App. at 789-90.

the St. Paul policy but rejected the Association's bad faith and CPA claims.[7] The federal court awarded the Association $322,000 in property damages, costs taxed of $1.6 million, $372,000 in prejudgment interest and approximately $395,000 in attorney fees.[8] St. Paul agreed to pay the judgment on the condition that L&S release its lien against St. Paul. L&S agreed to release the lien but only if the amount the Association held in trust was increased from $1.6 million to $2.123 million.[9]

After entry of the judgment in federal court, L&S filed a motion to foreclose on the attorney fee lien against the Association. L&S asked the court to award it $1.6 million in attorney fees, outstanding costs of approximately $86,000, and fees incurred by L&S after the settlement agreement. L&S also requested an award of attorney fees and costs as the prevailing party under the terms of the AFA.

In response, the Association filed a petition for relief under RCW 4.24.005[10] and

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[7] The jury also awarded $1.8 million in damages under a separate St. Paul policy, but the court subsequently ruled that as a matter of law, there was no coverage for construction defects under that policy.

[8] See, Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn. 2d 37, 53, 811 P.2d 673 (1991). The settlement with Admiral together with the verdict against St. Paul totaled $4.9 million. SFC also settled with another potential party defendant for $500,000. The trial court found that SFC achieved a total recovery of $5.7 million.

[9] The increase to $2.123 million was based on outstanding costs owed, hours expended by L&S following the reasonableness hearing, and the application of a multiplier to those hours. The Association disputed the reasonableness of the hours and application of a multiplier. But it is undisputed that the Association later paid the costs owed to L&S.

[10] RCW 4.24.005 provides:

> Any party charged with the payment of attorney's fees in any tort action may petition the court not later than forty-five days of receipt of a final billing or accounting for a determination of the reasonableness of that party's attorneys' fees. The court shall make such a determination and shall take into consideration the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

asked the court to determine the amount of reasonable attorney fees owed to L&S for legal services. The Association also asked the court to determine the amount that L&S should forfeit based on the claim that the law firm committed numerous breaches of its fiduciary duty. The Association also requested an award of attorney fees under the AFA as the prevailing party.

The five-week trial began on September 24, 2007. The trial court identified the primary issues as:

> (1) What is the reasonable value of the services provided by L&S to [the Association] on a *quantum meruit* basis? (2) Did L&S breach any of their fiduciary duties to [the Association], and, if so, should L&S forfeit any of their fees?

Over 1000 exhibits were admitted into evidence, including the pleadings from the reasonableness hearing and the federal court litigation.

In an 80-page decision, the trial court entered extensive findings of fact and conclusions of law.[11] The court ruled that the Association carried its burden of proving L&S committed numerous breaches of fiduciary duty in violation of the Rules of

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(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent;
(9) Whether the fixed or contingent fee agreement was in writing and whether the client was aware of his or her right to petition the court under this section;
(10) The terms of the fee agreement.

[11] The court entered 223 findings of fact.

Professional Conduct (RPC). The court expressly rejected the testimony of the L&S attorneys as not credible.

> The Court finds that the L&S attorneys, Mr. Levin, Mr. Stein, Mr. Sudweeks, and Mr. Siegel were not credible—their testimony being evasive, exaggerated, or frequently following a shifting course that sequentially contradicted both themselves and each other. The Court finds that Mr. Levin's testimony was colored by obvious anger, deep acrimony, wounded pride, and a significant financial expectation in the outcome, all of which prompted emotional testimony. Levin's testimony expressed his misguided view that L&S acted ethically throughout their representation of [the Association] and are entitled to a fee Levin calculates at more than $2 million. The court finds that the credible trial evidence refutes Levin's view convincingly.

Starting with the lodestar amount of $1.1 million from the reasonableness hearing, the court deducted approximately $103,000 and approved "a lodestar of $996,350 as representing the reasonable value of the L&S services in this case." However, based on its finding L&S breached its fiduciary duty to the Association, the court ruled that the law firm should forfeit $400,000 of the $996,350 fee award.

> Numerous acts and omissions have made clear to the Court that L&S throughout this case possessed an ambivalence towards its ethical obligations to its client which is grossly unbecoming a law firm. The Court notes that it has found ethical violations by former and 3 current firm members who actively participated in the case. The Court finds that the unprofessional and unethical behavior exhibited in this case was highly improper and deserving of the sanction imposed. The Court determines that the appropriate sanction should be forfeiture of $400,000 in previously approved fees due under *quantum meruit*.

In determining the amount of attorney fees L&S should receive in quantum meruit, the court rejected the law firm's request for a multiplier. The court awarded the Association reasonable fees of $492,075 as the prevailing party under the AFA, and

extinguished L&S's attorney fee lien and entered a final judgment of $104,275 in favor of L&S. L&S appeal entry of the final judgment.

ANALYSIS

Judicial Estoppel

L&S contends the doctrine of judicial estoppel precludes the Association from challenging the reasonableness of the $1.6 million fee award because (1) the court in the reasonableness hearing determined that an award of attorney fees in the amount of $1.6 million as part of the settlement agreement with the Association was reasonable, and (2) the Association argued in the federal court litigation that the $1.6 million in attorney fees was covered as "costs taxed" under the supplemental payments insurance provision of the St. Paul policy.[12]

The equitable doctrine of judicial estoppel prevents a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position in another court proceeding. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

We review the trial court's application of judicial estoppel for abuse of discretion. Miller v. Campbell, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). Where a decision of the trial court is a matter of discretion, it will not be disturbed except on a clear showing that

[12] L&S also argues that collateral estoppel bars the Association's challenge to the reasonableness of the fees. However, below, L&S relied solely on the doctrine of judicial estoppel. Because this argument was not raised below, we decline to address the argument. RAP 2.5(a); Brower v. Ackerley, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997) ("appellate court may refuse to review any claim of error which was not raised in the trial court.")

the decision was manifestly unreasonable and exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The court focuses on three core factors when deciding whether to apply the doctrine of judicial estoppel:

> (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Miller, 164 Wn.2d at 539 (internal quotation marks omitted) (quoting Arkison, 160 Wn.2d at 538-39).

The determination that the amount of $1.6 million in attorney fees as part of a covenant judgment settlement agreement was reasonable is not inconsistent with the Association's later challenge to the amount it owed the law firm.

In Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 738, 49 P.3d 887 (2002), the Washington Supreme Court agreed with our approach in Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 803 P.2d 1339 (1991), to apply the factors in Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 717, 658 P.2d 1230 (1983) to determine the reasonableness of a stipulated judgment and covenant not to execute.[13] The purpose of

[13] In Glover, 98 Wn. 2d at 717, the court adopted the following factors:

> "[T]he releasing party's damages; the merits of the releasing party's liability theory; the merits of the released party's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to

a reasonableness hearing for a covenant judgment settlement agreement between the insured developer and general contractor and the Association, is to establish the presumptive measure of damages in a later bad faith action against the insurer. See Besel, 146 Wn.2d at 738. According to established case law, the court determines the reasonableness of a settlement "at the time the parties enter into it." Brewer v. Fibreboard Corp., 127 Wn.2d 512, 541, 901 P.2d 297 (1995); Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 38, 935 P.2d 684 (1997).

Here, in exchange for the agreement to assign the bad faith and coverage claims against the insurance carriers, the Association agreed not to execute on a stipulated judgment of $7.2 million against MV and HC and to dismiss the claims against MV and HCI. In the reasonableness hearing on the settlement, the court ruled that an award of $1.6 million rather than $2.4 million was reasonable as part of a covenant judgment settlement agreement between the Association and MV and HCI.

The reasonableness hearing determination to establish the presumptive measure of damages in a bad faith action against the insurers is not inconsistent with the Association later challenging the amount of fees owed to its attorneys based on claims of breach of fiduciary duty that were unknown at the time. Seeking to establish the measure of damages in a covenant judgment settlement agreement and the amount of attorney fees the Association was entitled to recover in the litigation against the insurers

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pay; any evidence of bad faith, collusion, or fraud, the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released."

of MV and HCI does not preclude a client from contesting the amount owed to their attorneys based on alleged breaches of fiduciary duty.

The Association's challenge in the lien foreclosure action to the amount of reasonable attorney fees owed L&S, is also not inconsistent with the Association's position in the federal court insurance coverage litigation. In the federal court litigation, the Association argued that as a matter of law, it was entitled to attorney fees of $1.6 million under the supplemental payments provision of the St. Paul insurance policy as part of the covenant judgment settlement agreement with MV.

In sum, neither the reasonableness hearing determination nor the Association's position in the coverage action prevents the Association from later challenging the amount of attorney fees L&S was entitled to receive in quantum meruit on the ground that the law firm breached its fiduciary duty to the Association. This is so, especially where, as here, the Association was unaware of either the nature or the extent of the breaches of fiduciary duty at the time of the reasonableness hearing or the federal court insurance coverage litigation. The trial court did not abuse its discretion in refusing to apply the doctrine of judicial estoppel to preclude the Association from challenging the amount of attorney fees the law firm was entitled to receive in quantum meruit based on alleged breaches of the fiduciary duty.

Attorney Fee Award to L&S

In the alternative, L&S argues that the trial court abused its discretion in determining the reasonable amount of attorney fees it was entitled to recover in

quantum meruit.

We review a trial court's findings of fact and conclusions of law following a bench trial to determine whether substantial evidence supports the findings of fact, and in turn, whether the findings of fact support the conclusions of law. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan Cty., 141 Wn.2d 169, 176, 4 P.3d 123 (2000). This court will not substitute its judgment for that of the trial court. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). We must defer to the trial court's decisions regarding conflicting evidence. Weyerhaeuser v. Tacoma-Pierce Cty. Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

Where a law firm is discharged before fully performing under a contingency fee agreement, the court determines the reasonable amount of attorney fees owed to the law firm in quantum meruit, "meaning 'as much as he [or she] deserve[s],' to prevent unjust enrichment." Taylor v. Shigaki, 84 Wn. App. 723, 728, 930 P.2d 340 (1997) (quoting Black's Law Dictionary 1408 (4th ed 1968)).

Washington courts calculate fees by using the lodestar amount which is arrived at by first "multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended." Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993) (quoting Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990) (Fetzer I)). After calculating the lodestar, the court may adjust the amount to reflect other

factors. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 598, 675 P.2d 193 (1983).

Failure to Award a Multiplier

L&S contends the trial court erred in ruling that it did not have the authority to award a multiplier.

While courts generally "presume that the lodestar represents a reasonable fee, occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 542, 151 P.3d 976 (2007). The purpose of an upward adjustment of the lodestar is to account for the contingent nature of the agreement and is based on an assessment of the likelihood of success at the outset of litigation. Bowers, 100 Wn.2d at 598. "This is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion." Bowers, 100 Wn.2d at 598. An important consideration is the need to compensate for the "'possibility . . . that the litigation would be unsuccessful and that no fee would be obtained.'" Bowers, 100 Wn.2d at 599 (quoting Copeland v. Marshall, 641 F.2d 880, 893 (D.C.Cir.1980)).[14]

Here, the court ruled that it did not have the authority to award a multiplier in making a quantum meruit determination of the reasonable amount of attorney fees L&S was entitled to fees for legal services. However, the court also ruled that even if it had

[14] Adjusting the lodestar upward in order to reflect the quality of the work is not at issue here. "This is an extremely limited basis for adjustment, because in virtually every case the quality of work will be reflected in the reasonable hourly rate." Bowers, 100 Wn.2d at 599. Fetzer, 122 Wn.2d at 150.

the authority to award a multiplier, it would decline to do so because a multiplier was not warranted in this case.[15]

The court concluded that a multiplier was not warranted because it would amount to a recovery beyond what L&S would have received if L&S had not been terminated and had fully performed.

> Furthermore, the Court concludes that a multiplier on these facts would be particularly inappropriate and contrary to law and reason, where to do so would be to award a significantly larger fee to L&S than the firm would have been entitled to, had the firm never been terminated and had it fully or substantially performed its contingency.

The court also found that the lodestar adequately compensated L&S for the degree of risk and pointed to the testimony of the L&S attorneys that construction defect cases "almost always settle," due to strict liability for defects and fee-shifting under the WCA. The court also cited Levin's testimony that L&S "usually does much better than hourly time."

Thus, even if the court erred in ruling that it did not have the authority to award a multiplier in determining fees in quantum meruit, the record supports the court's finding that it would not have awarded a multiplier. Consequently, the court did not abuse its discretion in declining to adjust the lodestar upward to account for the contingency nature and the likelihood of success in this case. See Fetzer, 122 Wn.2d at 150; Bowers, 100 Wn.2d at 598.

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[15] L&S had the burden at trial to establish that it was entitled to a multiplier. See Bowers, 100 Wn. 2d at 598.

Reduction of Fees for Breach of Fiduciary Duty

L&S also contends the trial court erred in reducing the lodestar amount based on the findings that L&S breached its fiduciary duty to the Association. L&S claims that its conduct was not egregious enough to warrant reduction of the fee. L&S also maintains that the court erred in a number of instances in finding a breach of fiduciary duty.

If an attorney engages in conduct that is a breach the fiduciary duty to the client, the trial court has the inherent authority to require the attorney to forfeit or disgorge fees. Shoemake v. Ferrer, 168 Wn.2d 193, 202, 225 P.3d 990 (2009); Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992). After finding breach of fiduciary duty based on professional misconduct, the question of what remedy is appropriate is within the trial court's discretion. Eriks, 118 Wn.2d at 463.

L&S primarily argues that the court erred in finding certain provisions in the AFA violated the Rules of Professional Conduct, and in finding L&S breached its fiduciary duty by failing to insist that the Association obtain independent counsel when renegotiating the AFA. L&S also challenges the court's findings that it violated a fiduciary duty based on alleged misrepresentations during the 2005 reasonableness hearing, filing an inflated attorney fee lien, and failing to adequately investigate insurance coverage in preparing the case.[16]

But the findings that L&S challenges do not implicate the court's largely

[16] L&S also asserts that the court erred in finding that L&S attorney Siegel violated RPC 2.1 by signing the ER 408 agreement without the Association's authorization. But the court did not find that Siegel's execution of the agreement was misconduct. Instead, the court found that Siegel's lack of candor violated RPC 2.1.

undisputed core findings that L&S withheld information and pursued a strategy that undermined the Association's objective of recovering the amount necessary to repair the construction defects and resulting damages. Therefore, even if we disregard the challenged findings, the remaining breach of fiduciary duty findings are supported by substantial evidence and those findings, in turn, support the trial court's decision to reduce the amount of attorney fees.

The crux of the findings that L&S breached its fiduciary duty was the court's determination that L&S disregarded the Association's undisputed litigation objective. The court found that in pursuing its own goal of achieving a settlement, L&S engaged in conduct that breached its fiduciary duty to the Association.

> L&S flagrantly disregarded its client's goals of the representation entirely, and placed its own goals and agenda ahead of that of its client, right from the beginning and right up to the point when the firm was terminated. During the course of the representation, [the Association] was placed in the position of not being able to trust their lawyers to honor their basic goals in the case. In the Court's Findings of Fact, the Court outlined the numerous ways in which L&S not only ignored, but undercut its client's goals of fully funding of all repairs identified by Charter Construction, including covert contacts, settlement discussions with defendants' attorneys, inappropriate conduct with the mediator undercutting the client's goals of the representation and in failing to properly advise the client on the true amount of available insurance, including coverage for attorney's fees, the risks of a trial, and in completely failing to advise the client about a covenant settlement while discussing it with everyone else in the case. In disregarding the goals of the representation and in fact, in pushing its lower recovery agenda in a stealth fashion, L&S has seriously breached fiduciary duties to [the Association].
>
> In addition to the above, given the Court's finding that the entire efforts of L&S in the case from start to finish was aimed at forcing a settlement of $2.5 to $3 million, that would never have met the client's goals of the representation, was knowing and intentional, the Court determines that L&S has additionally breached its fiduciary

duties to its client [the Association].

The finding that L&S pursued a settlement strategy which contravened the Association's goals is further supported by the finding that entering into the ER 408 agreement had significant drawbacks for the Association by foreclosing additional investigation of defects, and that in the absence of that strategy, the damages awarded in the federal coverage case may have been higher.

L&S fails to persuasively refute these critical findings. L&S asserts that the law firm adequately communicated with the Association, pointing to the voluminous communication in the record between the Association's litigation representative and the firm's attorneys regarding the details of the case. However, L&S does not address the court's findings that support the numerous instances where L&S admittedly withheld or concealed material and relevant information from the Association.

L&S also argues that it did not unduly pressure the Association to settle the case, suggesting that the court's findings were solely based on the e-mails that Levin prepared prior to the third mediation advocating that the Association accept an offer of $3 million to settle. But the court's findings were not based only on these e-mails. Rather, the court viewed the e-mails in the context of the law firm's conduct in aggressively seeking a settlement that was contrary to the Association's goal to obtain $4.35 million to repair the construction defects.

> Gillman and the Board read Levin's four e[-]mails as very aggressive pressure to settle for $3 million, when L&S knew the cost of repairs was $4.35 million and the mediation settlement demand was $8.57 million. The Court finds that L&S imposed unrelenting pressure on [the Association] to settle for $3 million,

> less than was necessary. The Court finds that [the Association] would have been left with approximately $1.6 million, after payment of costs and L&S's contingent fee, to fund $4.35 million in repairs, a shortfall of about $2.75 million, had the Board adopted Levin's $3 million recommendation.
>
> There is substantial evidence to credit [the Association] claim that L&S were continually pressuring [the Association] to accept a settlement in the $3 million range. In the initial meeting with the Board, the Court finds that Levin told the Board that the value of the claim was between $2.5 million and $3 million. In his deposition, Levin testified that as of the second (January) mediation, 'In my opinion at that time that one could make a persuasive argument that three million dollars was enough.' Levin told Beal that he thought the case was worth $3 million dollars [sic]. In his February 10, 2005 letter to Soelling, Levin informed the mediator that the settlement value of the case was $4 million 'plus or minus,' if the insurance coverage issues could be resolved. In his letter to the defense counsel of February 14, 2005, where Levin accuses them of conflicts of interest, he predicts a $3 to $4 million jury verdict. Gillman testified that Sudweeks told her that the case was worth $3 million, even as he discouraged her from refining repair cost estimates. SFC attorney, Ken Hobbs, testified Sudweeks twice told him the case should settle at $3 million. The Court finds this testimony highly credible, and finds it coalesces well with other evidence. Accordingly, the Court finds that L&S persistently pressured [the Association] to settle the case in the $3 million range.[17]

In a similar vein, L&S contends the court abused its discretion in awarding only $10,000 in fees for the work L&S performed after the Association entered into the covenant judgment settlement agreement. L&S billed approximately 1,000 hours before the law firm was terminated in February 2006. The court concluded that of the hours billed, 700 hours were related to the reasonableness hearing. The court determined that the appropriate number of hours should be approximately 800. But after taking into account the "persistent,

[17] Internal citations to exhibits in the record omitted.

egregious violations of fiduciary duties," the court only awarded L&S $10,000. Because the breach of fiduciary duty findings are supported by substantial evidence, the court did not abuse its discretion in reducing the attorney fee award.[18]

Award of Attorney Fees to the Association as the Prevailing Party

L&S contends the trial court abused its discretion in awarding attorney fees to the Association as the prevailing party under the AFA. As explained, the court awarded $996,350 in quantum meruit fees to L&S and deducted $400,000 for breaches of ethical duties to arrive at a net judgment of $596,350 in favor of L&S before deducting the amount of fees awarded to the Association as the prevailing party.

The trial court ruled that the Association was entitled to an award of attorney fees "under the attorney's fee clause in the Amended Fee Agreement, Exhibit 104" and on equitable grounds based on breach of fiduciary duty. The Association concedes the trial court did not have the authority to award fees on equitable grounds but argues that it is the "substantially prevailing party."

Under Washington law, the parties each bear the legal expenses incurred unless attorney fees are authorized by a statute, a contract, or a recognized equitable exception. In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). The AFA provides for the recovery of attorney fees "[i]f either party to this Agreement must initiate litigation to enforce the terms of the Agreement, the prevailing

[18] L&S cites no authority to support its position that the court was required to more fully explain its decision. See Eriks, 118 Wn.2d at 463 (citing the trial court's inherent power to fashion judgments, affirming the trial court's decision to deny all fees as a reasonable way to discipline breach of professional responsibility and deter future misconduct).

party shall be entitled to reasonable attorney fees and costs incurred."[19]

There is no dispute that even if the AFA is void, the court has the authority to award fees under the prevailing party attorney fee provision in the AFA. Park v. Ross Edwards, Inc., 41 Wn. App. 833, 839, 706 P.2d 1097 (1985); see also, Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).[20] However, L&S contends the trial court erred in concluding the Association was the prevailing party because L&S obtained an affirmative judgment in its favor.

Whether a party is a "prevailing party" is a mixed question of law and fact that this court reviews under an error of law standard. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). The question as to which party is the substantially prevailing party is often subjective and difficult to assess. Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1993), overruled on other grounds by, Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 490-92, 200 P.3d 683 (2009). As a general rule, the prevailing party is one who receives an affirmative judgment in its favor. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). But if neither party wholly prevails, the determination of who is the substantially prevailing party depends on the extent of the relief accorded. Transpac Dev., Inc. v. Oh, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006); Marine Enter., Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 772, 750

[19] Below and on appeal, both parties cite and rely on RCW 4.84.330. RCW 4.84.330 applies only to a contract with a unilateral attorney fee provision. Kaintz v. PLG. Inc., 147 Wn. App. 782, 786, 197 P.3d 710 (2008). Here, the AFA contains a bilateral attorney fee provision.

[20] L&S acknowledged in the opening brief the applicability of the attorney fee provision in the AFA. There is no merit to the argument, belatedly raised in its reply brief that the fee provision does not apply.

P.2d 1290, (1988). In Marassi, we concluded that where multiple and distinct claims were at issue, the trial court should take a "proportionality approach." Marassi, 71 Wn. App. at 917. If both parties prevail on major issues, both parties bear their own costs and fees. Phillips Bldg. Co., Inc. v. An, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996).

Here, the court only summarily concluded that the Association was the prevailing party "by any measure of how that might be determined." Because the court erred in relying on equitable grounds in deciding the Association was the prevailing party and the court did not engage in any analysis of which party was the substantially prevailing party, we remand.[21]

CONCLUSION

We affirm the trial court in all respects except as to the award of attorney fees to the Association as the prevailing party. On remand, the court shall determine whether either party is entitled to fees as the substantially prevailing party or whether both parties should bear their own fees and costs. If the trial court awards fees, the court should also

determine reasonable attorney fees on appeal. See Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d (1989) ("A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal").

[21] We reject the law firm's request to remand the case to a different judge. The cases L&S cites address inappropriate ex parte contact. State v. Roman, 34 Wn. App. 567, 569, 662 P.2d 4061 (1983); Sherman v. State, 128 Wn.2d 164, 204-06, 905 P.2d 355 (1996); L&S does not point to any evidence of inappropriate ex parte contact.

WE CONCUR: