IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUND ELECTRICAL WORKERS HEALTH TRUST AND VACATION PLAN; PUGET SOUND ELECTRICAL WORKERS PENSION TRUST; IBEW LOCAL 46 RETIREMENT ANNUITY TRUST; IBEW LOCAL 46 APPRENTICESHIP AND TRAINING TRUST; and PUGET SOUND ELECTRICAL JOINT LABOR COMPLAINT FOR PROFESSIONAL COOPERATION TRUST, Respondents, v. McKENZIE ROTHWELL BARLOW & KORPI, P.S.; SMITH McKENZIE ROTHWELL & BARLOW, P.S., Appellants, and MICHAEL H. KORPI; A. BRUCE McKENZIE; DAVID S. BARLOW; and CATHERINE A. ROTHWELL, Defendants.	)	No. 65740-2-I DIVISION ONE UNPUBLISHED FILED: January 30, 2012

Cox, J. — McKenzie Rothwell Barlow & Korpi, P.S., and its predecessor,

Smith McKenzie Rothwell & Barlow, P.S., (collectively, "the firm") appeal the judgment that imposes monetary liability on them for legal malpractice. The malpractice claims arise from the firm's representation of the Puget Sound Electrical Workers Health Trust and Vacation Plan and other trusts ("the trusts"). We hold that the trial court correctly stated and applied the proper standard of care and properly determined that the firm breached that standard of care. The trusts established that the breaches caused the damages imposed in this case. The findings on damages, including the award for the audit fee, are supported by substantial evidence. We affirm.

The International Brotherhood of Electrical Workers Local Union 46 (Local 46) has collective bargaining agreements (CBAs) with the National Electrical Workers Puget Sound Chapter. These agreements provide, among other things, that the electrical contractors who are signatories to the CBAs are required to contribute money to several pension and benefit trusts (the trusts). The amount of the contributions is based upon the hours worked by Local 46 member electricians. Contributions that are not made by the date required are delinquent and subject to interest, attorney fees, and liquidated damages.

In 1990, the trusts hired Michael Korpi to handle their collections. Korpi is a member of the firm defending this action. The court expressly found that the firm generally limited its practice "to the representation of labor-management employee benefit trust funds."

Korpi was responsible for handling many of the trusts' collection accounts,

including those for Trans World Electric, Fox Electric, Baird Weber, Atkinson Bell/Lunde, CAE, Pacific Electric, and Sun Innovations. These seven accounts are at issue in this case.

In December 2004, because of dissatisfaction with Korpi's collection efforts, the trusts referred several accounts to the Ekman Bohrer law firm. Korpi was never a member of this law firm, and it is not a defendant in this action.

In January 2005, following the referrals to Ekman Bohrer, Korpi sent a letter to two of the trustees identifying errors that he made in handling a delinquent collection account from Trans World Electric. In that letter, Korpi accepted responsibility for a $55,332.42 loss to the trusts on that account. He also acknowledged that he had known about the errors since May 2004 but failed to disclose them to the trusts.

Both as a result of Korpi's letter and because they were concerned about the status of other collection accounts assigned to Korpi, the trustees hired Sanford Levy to perform an audit of Korpi's cases. Levy is an attorney with experience in Employee Retirement Income Security Act (ERISA) trust collection work.

In his extensive audit, Levy discovered that $2,292,663.94 in delinquent contributions were uncollectable due to Korpi's actions and omissions. The trusts ultimately wrote off $1,405,993.90. It then sued the firm for legal malpractice.

After a five-day bench trial, the trial court found the firm liable for legal

malpractice on the Trans World Electric, Fox Electric, Baird Weber, Atkinson Bell/Lunde, CAE, and Pacific Electric accounts. The court determined there was legal malpractice in the handling of the Sun Innovations account, but that there was insufficient evidence to support a finding of damages caused by the malpractice. The court awarded the trusts $1,139,111.47 in damages, including the fees expended on the audit by Levy as consequential damages for the other six matters.

The firm appeals.

DUTY OF CARE

The firm argues that the trial court erred in articulating and applying the duty of care owed by the firm to the trusts in performing ERISA collection work. Specifically, it claims the court was oblivious to the serious practical implications to collection of delinquent accounts due to the state supreme court's decisions holding that ERISA preempted collections. The firm also takes issue with the trial court's use of a percentage of success as a measure of the standard of care in this case. We disagree with both claims.

In a professional negligence claim against an attorney, the plaintiff must prove four elements by a preponderance of the evidence.[1] First, that an attorney-client relationship exists that gives rise to a duty of care on the part of the attorney to the client.[2] Second, that the attorney's act or omission breached that

[1] Ang v. Martin, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).

[2] Id. at 482.

duty of care.[3] Third, that the client suffered damages.[4] And, fourth, that the attorney's breach proximately caused the client's damages.[5]

In order to breach the duty of care, an attorney must fail to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in Washington.[6] "[I]n a malpractice action, the standard of care is the particular duty owed the client under the circumstances of the representation . . . ."[7] Expert testimony is required to determine whether an attorney's duty of care was breached in a legal professional negligence action.[8]

Whether a duty exists is a question of law that is reviewed de novo.[9] A trial court's findings of fact are reviewed for substantial evidence.[10] Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the

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[3] Id.

[4] Id.

[5] Id.

[6] Geer v. Tonnon, 137 Wn. App. 838, 850-51, 155 P.3d 163 (2007) (quoting Hizey v. Carpenter, 119 Wn.2d 251, 261, 830 P.2d 646 (1992)).

[7] Barrett v. Freise, 119 Wn. App. 823, 842-43, 82 P.3d 1179 (2003).

[8] Geer, 137 Wn. App. at 851 (quoting Lynch v. Republic Publ'g Co., 40 Wn.2d 379, 389, 243 P.2d 636 (1952)).

[9] Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (citing Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

[10] Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

finding's truth.[11] Unchallenged findings of fact are verities on appeal.[12] This court reviews de novo the trial court's conclusions of law to determine if they are supported by the findings of fact.[13]

Fiduciary Duty of Care

In May 2004, Korpi became aware that the deadline to amend $55,000 in Trans World Electric lien claims had passed. He did not immediately notify the trusts. Rather, he waited until January 2005 to advise the trusts of the errors, a month after they transferred his accounts to Ekman Bohrer. In his letter to the trusts, he took responsibility for the errors and stated that he was "prepared to make the necessary arrangements for making the Trusts whole."[14]

The trial court concluded that an attorney owes the "fiduciary duties of good faith, loyalty, honesty and a strict duty of full disclosure" to his clients. The court further stated that these fiduciary duties are a "component" of the standard of care. The trial court found that Korpi's failure to disclose the errors to the trustees immediately upon discovery of them was a breach of his fiduciary duty of full disclosure and a violation of the standard of care.

The firm does not dispute any of these findings or conclusions by the trial court, which serve to support a portion of the damages award the trial court

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[11] Id. at 879.

[12] In re Marriage of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

[13] Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 562 (2002) (citing City of Seattle v. Megrey, 93 Wn. App. 391, 393, 968 P.2d 900 (1998)).

[14] Ex. 1.

made on this account. With these observations in mind, we move to consideration of the challenges the firm does make.

Duty of Diligence

The firm argues that the trial erred in concluding that Korpi had a duty to timely file lien foreclosure actions because state court foreclosure actions are preempted by federal law. Because this argument focuses too narrowly on one part of the standard of care, and the firm, by its own testimony, continued this practice without any of the consequences it now argues, we disagree.

Here, the trial court correctly stated in its Conclusion of Law 3 the general standard of care that a lawyer owes to a client:

> The standard of care is that degree of care, skill[,] diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in Washington State in the same or similar circumstances. The standard of care includes legal knowledge, skill, thoroughness, preparation, diligence and calendaring procedures reasonably necessary for the representation.[15]

The trial court refined the general statement of this standard of care in its Conclusion of Law 4. It stated that the standard is not limited to filing and foreclosing liens:

> 4. ***Diligence and persistence are extremely important in collection work and the standard of care includes more than simply filing lien notices, it also includes, contacting employers and union agents, and obtaining joint check arrangements with the general contractor.*** Delay in filing and foreclosing liens and filing suit can result in lost opportunities to collect. Attorney Sanford Levy testified that the defendants

[15] Clerk's Papers at 1332.

> followed a set of mechanized procedures but took little, if any, initiative to contact employers, general contractors, and union agents to identify and to secure all available sources of recovery, did not timely file suit and did not track public work contract acceptance dates.[16]

Levy testified that the standard of practice of attorneys, notwithstanding the federal preemption cases, was to continue to file liens. Moreover, the firm's counsel admitted that this practice continued with some degree of success in collecting delinquent accounts. The firm presented evidence that Ekman Bohrer was sanctioned once for filing a lien foreclosure action in state court.[17] But, there was neither any finding by the trial court in this case, nor any evidence in the record, that the firm suffered any adverse consequences despite its continued practice to file and foreclose liens after the state supreme court cases on preemption were decided.

We recognize, as did the trial court, that case authority limited certain collection methods after March 1994. In Puget Sound Electrical Workers Health and Welfare Trust Fund v. Merit Co.,[18] the state supreme court concluded that RCW 39.08 and RCW 60.28.010 are preempted by ERISA.[19] It held that these statutes have the effect of regulating how ERISA plans are funded because they impose liability upon general contractors who have not agreed to contribute to

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[16] Id. at 1332-33 (emphasis added).
[17] Exhibit 156.

[18] 123 Wn.2d 565, 870 P.2d 960 (1994).

[19] Id. at 573.

the plans.[20] Accordingly, the court affirmed the trial court's summary judgment dismissal of the trusts' state court collection efforts.[21] We note that the opinion makes no mention of imposing sanctions for bringing the action.

Six years later, the state supreme court reaffirmed Merit in International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.[22] Although the plaintiffs there argued that recent developments in the law undermined Merit, the supreme court disagreed and affirmed the trial court's dismissal of the state collection lawsuit.[23] Again, there is no mention in the opinion of sanctions.

The firm now argues that these cases barred reasonably prudent attorneys from filing and foreclosing liens for fear of sanctions. We note that Korpi testified that he continued to file liens, notwithstanding these federal preemption cases. He explained that he would only file RCW 39.08 and 60.28 foreclosure actions in federal court, not in state court. There was no testimony that he or any other attorney of the firm doing so suffered any adverse consequences from courts.

More importantly, the standard of care requires more than mere filing and foreclosing liens. Diligence also requires pursuit of other collection methods that

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[20] Id. at 572.

[21] Id. at 573.

[22] 142 Wn.2d 431, 13 P.3d 622 (2000).

[23] Id. at 440-43.

are specified in Conclusion of Law 4. Korpi failed to pursue these other methods. Consequently, he breached the standard of care.

The firm argues that requiring an attorney to file and foreclose liens in order to meet the standard of care is error because of federal preemption. This argument places undue emphasis on only part of the overall standard of care that the firm breached in this case.

In Washington, "[a]n attorney is not negligent when he accepts as a correct interpretation of the law a decision of the highest court of his state …."[24] Therefore, it is true that Korpi had no duty to file or foreclose liens in ***state court***. The trial court's conclusion did not limit the standard of care to filing and foreclosing liens in state court. Even if we focused narrowly on the filing and foreclosing of liens to define the standard of care, Korpi failed in this respect, as well. This is because foreclosing liens in federal court was an option since 2002.

In 2002, two years after Trig, a federal district court in Washington held that a remedy under RCW 39.08 could be enforced in federal court in Ironworkers District Council of the Pacific Northwest v. George Sollit Corp.[25] There, the federal court held that it had subject matter jurisdiction over the state law claim because there was diversity between the parties to that claim and the

[24] Hansen v. Wightman, 14 Wn. App. 78, 100-01, 538 P.2d 1238 (1975), overruled on other grounds by Bowman v. Two, 104 Wn.2d 181, 187, 704 P.2d 140 (1985).

[25] Noted at 2002 WL 31545972 (W.D. Wash.).

amount in controversy exceeded $75,000.[26] Then, relying on Ninth Circuit precedent, the district court held that the RCW 39.08 was not preempted by ERISA under federal law and denied the defendants' motion to dismiss the state law claim.[27] The court did not address the plaintiffs' RCW 60.28 claim because it was dismissed by the parties' stipulation earlier in the litigation.[28]

This option was further clarified in 2007. In 2007, a federal district court in Washington entered an order further establishing its jurisdiction over the state lien foreclosure claims in Board of Trustees of the Cement Masons & Plasterers Health and Welfare Trust v. GBC Northwest LLC.[29] It held that there was supplemental jurisdiction over such claims in an ERISA action because they arose "under the exact same set of facts surrounding the employer's failure to make the required payments to the union's trust actionable under ERISA."[30]

The trial court concluded that Korpi's failure to file or foreclose liens was at least, in part, a breach of the duty of care on four accounts—Baird Weber, Atkinson Bell/Lund, CAE, and Trans World Electric. The firm does not argue that foreclosure actions for these accounts could not have succeeded in federal court. Furthermore, the firm does not argue that Korpi was diligent in pursuing

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[26] Id. at *2.

[27] Id. at *5-6 (citing Operating Engineers Health and Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998)).

[28] Id. at *1 n.2.

[29] Noted at 2007 WL 1306545 (W.D. Wash.).

[30] Id. at *2.

other collection methods for these accounts. If he believed that he could not pursue the foreclosure of liens as a collection method, presumably he would have had an incentive to pursue other collection methods. In fact, the trial court held that Korpi "followed a set of mechanized procedures but took little, if any, initiative to contact employers, general contractors, and union agents to identify and to secure all available sources of recovery . . . ."[31] For these reasons, we reject the firm's argument that the court failed to correctly define or apply the standard of care for the legal malpractice claims in this case.

The firm also challenges the trial court's conclusion in Finding of Fact 13, arguing that the court applied a "mechanical" analysis that required commencing all lawsuits within 30 days after referral of delinquent accounts. It argues that this standard of care ignores the Washington rule deferring to an attorney's discretion on questions of litigation tactics.[32] Specifically, the firm claims that the trial court's duty imposes liability for failure to file within the time limit "regardless of whether the employer was cooperating in making payment and without an auditor report quantifying the claim . . . ."[33]

This is unpersuasive. The court did not state that the 30-day period was an inflexible requirement. Rather, the court stated that this time period was

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[31] Clerk's Papers at 1332-33 (Conclusion of Law 4).

[32] See also Halvorsen v. Ferguson, 46 Wn. App. 708, 717, 735 P.2d 675 (1986) ("In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.").

[33] Brief of Appellants at 27 (citing Clerk's Papers at 1324).

"probative as to informing the standard of care, with regard to the need to pursue delinquent contributions with prompt, diligent, expeditious and persistent collection methods and procedures."[34] Thus, we reject the firm's argument to the contrary.

Collection of 85 Percent of Outstanding Contributions

The firm argues that the trial court erred in finding that Korpi had a duty to collect 85 percent of the contributions outstanding from the Fox Electric account. We disagree.

Here, the trial court found that:

> 31. With respect to damages on the Fox matter, Plaintiffs' [sic] have presented evidence that a reasonably prudent attorney doing ERISA collection work should collect 90 per cent of the delinquent contributions. The Ekman Bohrer firm recovered close to this rate (approximately 87%) in the 4 plus years after it took over the collections and Mr. Levy testified that 90% is the standard of care. In addition, when the predecessor firm to the defendants was retained, its representative Mr. McKenzie told the trustees that the firm had collected 95 – 100% of the delinquent accounts. Based upon all of the evidence, the court finds that 85% is a reasonable collection rate to expect from a firm meeting the standard of care in ERISA trust collection work.[35]

The firm argues that the percentage methodology is "counterintuitive and unsupported under Washington law." This argument is not persuasive.

The trial court examined historic collection rates for the firm from 1985 to 1990 and for Ekman Bohrer from 2005 to 2009. It also heard expert testimony from Levy about what amount of the accounts under consideration were

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[34] Clerk's Papers at 1324 (Finding of Fact 13).
[35] Id. at 1330.

collectible during the period at issue. Based upon this data, the trial court derived a percentage and used this as a measure of the standard of care. This was a reasonable approach.

The firm argues that the historical collection rates that the trial court relied upon were incorrectly calculated. But, because the record includes substantial evidence that would persuade a rational fact finder that these percentages are correct, this argument is not persuasive.

CAUSATION

The firm next argues that the trial court erred in concluding that Korpi's actions proximately caused the trusts' damages. Specifically, the firm claims that the successor firm also had an opportunity to collect some of the delinquent accounts and did not do so. We hold that the lack of expert evidence to demonstrate the alleged breach of duty by others is fatal to this claim. Accordingly, we reject it.

Proximate cause can be divided into two elements: cause in fact and legal cause.[36] Cause in fact is the actual, "but for," cause of the injury.[37] Establishing the cause in fact is generally left to the jury because it involves determining what actually occurred.[38] Legal cause focuses on whether, as a matter of policy, the

[36] Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 609, 257 P.3d 532 (2011) (citing Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998)).

[37] Id. at 610 (quoting Schooley, 134 Wn.2d at 478).

[38] Id. (quoting Schooley, 134 Wn.2d at 478).

connection between the ultimate result and the tortfeasor's act is too remote or insubstantial to impose liability.[39]

There may be more than one proximate cause, and the concurring negligence of a third party does not necessarily break the causal chain from the original negligence to the final damages.[40] The general rule is that the concurrent negligence of a third party is not a defense if the defendant's negligence was a cause without which the injury would not have occurred.[41]

A superseding cause exists if a new, independent act breaks the chain of causation so that the original negligence is no longer a proximate cause of the injury.[42] If this occurs, the defendant is not liable for the injury.[43] The supreme court has looked to the Restatement (Second) of Torts for guidance in determining whether a third party's actions are a superseding cause.[44] Section

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[39] Id. at 611 (quoting Schooley, 134 Wn.2d at 478-79).

[40] Estate of Shinaul M. v. State Dep't of Soc. & Health Servs., 96 Wn. App. 765, 770, 980 P.2d 800 (1999) (quoting Doyle v. Nor-West Pac. Co., 23 Wn. App. 1, 6, 594 P.2d 938 (1979)).

[41] Travis v. Bohannon, 128 Wn. App. 231, 242-43, 115 P.3d 342 (2005) (citing Eskildsen v. City of Seattle, 29 Wash. 583, 586, 70 P. 64 (1902); Restatement (Second) of Torts § 439 ("If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.")).

[42] Id. at 241 (citing Riojas v. Grant County Pub. Util. Dist., 117 Wn. App. 694, 697, 72 P.3d 1093 (2003)).

[43] Id. (citing Riojas, 117 Wn. App. at 697).

[44] See Michaels, 171 Wn.2d at 613; Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 812-13, 733 P.2d 969 (1987).

449 of the Restatement states:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Whether the third party's act is a superseding cause or simply a concurring one is an issue for the trier of fact.[45]

Here, the trial court found that Korpi was the proximate cause of the trusts' injuries. It is undisputed that, but for Korpi's negligence, the trusts would not have suffered damages. Additionally, the firm does not dispute that public policy favors holding an attorney liable for failure to handle a case with diligence and failure to disclose material information to clients.

Nevertheless, the firm argues that subsequent actions by the successor firm severed the chain of causation so that Korpi was no longer the proximate cause of the trusts' damages. Essentially, it argues that the successor firm's actions were a superseding cause.

The trial court correctly stated the law that, if a defendant alleges that a subsequent lawyer was negligent as part of his defense, evidence about the standard of care must be established by expert testimony. This is consistent with case law requiring expert testimony on the standard of care in a legal malpractice case.[46] Specifically, the trial court stated that:

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[45] Travis, 128 Wn. App. at 243 (citing Eckerson v. Ford's Prairie Sch. Dist. No. 11, 3 Wn.2d 475, 483-84, 101 P.2d 345 (1940)).

[46] See Geer, 137 Wn. App. at 851; Lynch, 40 Wn.2d at 389.

> 12. The defendants did not present any expert testimony that Ekman Bohrer committed any standard of care violations that caused damage to the trusts, nor did they do so with respect to any other non party or entity so the court will not reduce the damages pursuant to RCW 4.22.070.[47]

The firm challenges this finding. It argues that both Korpi and its expert witness, Charles Colett, presented "ample" evidence that the successor firm was negligent in two ways:

> (a) at the time many of the accounts were transferred to the successor firm it had remedies it mistakenly chose not to pursue, recommending instead to the Trusts that they write off the sums, and (b) with respect to Fox specifically, the firm was terminated and bore no further responsibility regarding Fox's offer to the Trusts.[48]

The firm fails to point to a single place in the record where either Korpi or Colett testified that the successor firm breached its duty with respect to these two situations. This absence of evidence is fatal to the claim that the successor firm was a proximate or superseding cause of any of the trusts' claims.

Because of the absence of any expert testimony on this critical part of the firm's case, we will not discuss this claim any further.

DAMAGES

The firm also argues that the trial court's determination of damages was based on speculative, insubstantial evidence. We disagree.

"'Evidence of damage is sufficient if it affords a reasonable basis for

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[47] Clerk's Papers at 1334.

[48] Brief of Appellants at 30.

estimating loss and does not subject the trier of fact to mere speculation or conjecture.'"[49] Mathematical certainty is not required, and a fact finder has discretion to award damages within the range of competent evidence in the record.[50] The appellate court will not disturb an award of damages unless it is outside the range of substantial evidence in the record, shocks the conscience, or appears to have been the result of passion or prejudice.[51]

Here, the trial court entered detailed findings of fact and conclusions of law supporting its determination of damages for each account. According to his audit report, which was admitted into evidence,[52] Levy determined that the outstanding Trans World Electric contributions that could have been recovered equaled $151,324.66 and the trial court awarded $151,324.46. As we previously observed in this opinion, some $55,000 of this total was acknowledged by Korpi in his letter to his former clients that tardily informed them of his malpractice.

Levy's report also concluded that there were $77,697.95 in known public works projects on the Baird Weber account that were not liened and the trial court awarded $77,697.95 in damages. Levy testified that the total contributions outstanding on the Atkinson-Bell/Lunde account was $73,000 and that the trusts

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[49] Clayton v. Wilson, 168 Wn.2d 57, 72, 227 P.3d 278 (2010) (quoting State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)).

[50] Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc., 160 Wn. App. 728, 737, 253 P.3d 101 (2011) (citing Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990)).

[51] Id. (citing Mason, 114 Wn.2d at 850).

[52] Exhibit 107.

eventually wrote-off $124,000, which included amounts for liquidated damages, interest and fees. The trial court awarded damages of $124,659. For Pacific Electric, the trial court found that Korpi was negligent in failing to secure a promissory note with a deed of trust on real estate. Levy testified that the balance owing on the note was $178,109 and the trial court awarded that amount as damages. For CAE, the trial court found that Cochran Electric, a general contractor, gave Korpi certified payroll records indicating $110,487 in delinquent contributions, and the firm does not dispute this amount. The trial court also found that Cochran offered to pay these contributions on CAE's behalf and Korpi failed to follow up on that offer. The amount awarded as damages mirrors the amount of delinquent contributions from the certified payroll records. This evidence is substantial and supports the challenged findings.

The firm argues the damages awarded were speculative for various reasons. It asserts that Korpi did collect some funds, that his decision not to file suit was within his discretion, that Pacific Electric was not honest about its collateral, and that Cochran would not have paid the entire balance owed by CAE. These were issues of fact for the trial court, as the finder of fact, to resolve. It did so, and there is no reason for this court to overturn the decision. Reasonable minds could differ about the exact amount of damages awardable. But, as we have already stated, there is substantial evidence to support the damages findings.

Finally, the firm challenges the trial court's award of damages for the Fox

account, but this amount is also supported by substantial evidence. First, the trial court determined that Korpi was liable for the $281,586 settlement offer that he recommended the trusts reject. Additionally, it found that a reasonably prudent attorney doing ERISA collection work would have collected 85 percent of the total delinquent contributions outstanding on the Fox account. It calculated the damages related to breach of that duty to act prudently as the total delinquent contributions, minus the settlement offer rejected, multiplied by 85 percent. Therefore, the total damages included the full settlement offer, plus the remaining contributions that could have been recovered through reasonable collection efforts, minus the settlement offer later negotiated by the successor firm. This is a reasonable calculation, one within the range of the evidence at trial.

The firm argues that the award is unreasonable because, had Korpi accepted the settlement, the trusts would only have received the settlement amount and not the remaining contributions. But, the additional amount awarded represents the damages incurred from Korpi's failure to diligently pursue the lawsuit against Fox. The firm does not challenge the finding that Korpi was not diligent, therefore, this argument is not persuasive.

AUDIT FEES AS CONSEQUENTIAL DAMAGES

The firm argues that the trial court abused its discretion by awarding consequential damages to the trusts for Levy's audit fees. We disagree.

The amount of damages that will fairly compensate a plaintiff is a question

of fact for the finder of fact.[53] A trial court's findings of fact are reviewed for substantial evidence.[54]

Here, the trial court found that:

> After receiving the letter from Mr. Korpi belatedly disclosing the Trans World errors and because of the trustees concern regarding the status of several other files, the trustees felt it was their responsibility to have an audit conducted of the collection cases assigned to Mr. Korpi. The trusts hired Seattle attorney Sanford Levy to conduct the audit. Mr. Levy has significant experience in ERISA trust collection work. Mr. Levy's fees for conducting the audit were $128,000.00 and the court finds those fees to be reasonable, necessary and recoverable as consequential damages occasioned by the failure to timely disclose the errors.[55]

Steve Washburn, a trustee, testified that the trusts believed they had a fiduciary duty to conduct an audit after receiving Korpi's letter. Exhibit 71, which was admitted at trial, indicates that the audit cost $128,051.61. Levy testified that this amount did not include any expert witness consultation fees, and was purely limited to the audit charges. Based on this substantial evidence, the trial court's finding should not be disturbed on appeal.

The firm argues that the audit fee was really an expert witness fee, which is not a cost that is awardable in an attorney fee and cost award under RCW 4.84.010. This argument is unpersuasive for two reasons. First, Levy's testimony that he did not include expert witness fees in the audit fees is

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[53] Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc., 135 Wn.2d 255, 267, 956 P.2d 312 (1998).

[54] Sunnyside Valley Irr. Dist., 149 Wn.2d at 879.

[55] Clerk's Papers at 1325-26.

substantial evidence that the fee was not related to his expert witness fees. Second, the trial court found that this amount was a consequential damage caused by Korpi's breach of duty to the trust. It did not award the audit fee to the trusts as part of its attorney fee and costs award.

The firm also argues that this audit was commissioned in anticipation of litigation and therefore its cost is not properly awardable as damages. The firm points to no evidence in the record to support this contention. Therefore, it does not meet its burden to show that the trial court's finding was not supported by substantial evidence.

The firm assigned error to 29 matters and identified six issues in its opening brief. Our disposition of this case does not necessitate dealing with all of these. Accordingly, we have limited our discussion to those that are necessary to resolve the issues on appeal.

We affirm the judgments.

Cox, J.

WE CONCUR:

Leach, A.C.J.