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No. 68329-2

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

THE FERGUSON FIRM, PLLC,
Appellant,

v.

TELLER & ASSOCIATES, PLLC,
Respondent.

Brief of Respondent/Cross-Appellant

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I. INTRODUCTION

The issues in this case were decided by the trial court in dispositive motions and a motion for sanctions made by Respondent Teller.

The parties represented three plaintiffs in a lawsuit against ABC Corporation (the "Underlying Matter").[1] They did so under an express contingency fee agreement which they offered to their clients in November, 2010, in which any fee would be divided evenly. The clients accepted the fee agreement, which complied with RPC 1.5(e)(1). In contemporaneous e-mails between Mr. Teller and Ms. Ferguson,[2] they agreed upon the fee division (also set out in the contingent fee agreement) and that Teller would pay costs. The clients in the Underlying Matter are not involved in this Appeal or otherwise in the dispute.

At the time of the decision to associate, Ferguson was 1) facing suspension from practice; 2) neither she nor her clients could pay litigation costs, and 3) her failure to respond to discovery in the Underlying Matter had been repeatedly sanctioned. She needed the help of an experienced employment litigator, and chose to split the fee with Teller rather than lose

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[1] The Underlying Defendant required that the terms of settlement of the case it and the identity of the parties be maintained in confidence.

[2] Sandra Ferguson, Esq. is the principal of Appellant and Stephen Teller, Esq. is the principal of the Respondent. In this brief, they will be referred to as "Ferguson" or "Teller" and by use of personal pronouns.

it all. Teller's work saved Ferguson's fee, resolved the case, and served the clients effectively.

Ferguson was suspended for 90 days on February 3, 2011, and withdrew from representation. Teller performed his obligations under the agreement both before and after the suspension: he litigated the case effectively, and paid all costs incurred following his association. Ultimately ABC Corporation agreed to settle for substantially more than it offered before Ferguson was suspended.

Until she sued, Ferguson never claimed there were other terms left to negotiate. Her emails refer to "our contract" and a "50/50" agreement. In April, 2011, while the case was settling, she claimed she could choose between *quantum meruit* or the contract fee. Shortly thereafter Ferguson filed a lien which claims 90% of the 40% contingent fee that was established in her contract with Teller and her former clients.[3]

Ferguson's Complaint sought a declaratory judgment whether a contract existed; determination of fees based on *quantum meruit*; and a claim of breach of contract because Teller engaged in settlement rather than litigation and a claim that Teller negligently misrepresented his intentions.

[3] Her prior agreement with the clients did not contemplate litigation and was a 33.33% contingency fee plus a flat fee of $1,000.

The trial Court dismissed Ferguson's negligent misrepresentation claim on a CR 12(c) motion and Ferguson voluntarily dismissed her claim of breach of contract. On Teller's motion for summary judgment, the trial court dismissed Ferguson's claim for *quantum meruit* compensation and determined that a contract for an even division of fees existed.

Ferguson then accused her original lawyer of misconduct. In his defense under RPC 1.6(b)(5) he made statements accusing her of deception and disclosing her admissions of the existence of the contracts with Teller. These admissions, along with those in the summary judgment record, establish that she is now estopped by RPC 3.3 from denying formation of the contract. Further, Ferguson and her counsel are barred by the same rule from claiming the contracts were not formed.

These admissions also inform the Court as to Ferguson's improper motivations for litigation and require sanctions under CR 11, RCW 4.84.185 and RAP 18.9. Teller sought sanctions in the trial court and they were denied, but that court was not aware of the later disclosed admissions to Ferguson's lawyer. Teller cross-appealed. Ferguson has intentionally delayed this appeal and filed multiple briefs, causing Teller to incur substantial fees.

II. RESTATEMENT OF ISSUES AND ASSIGNMENT OF ERROR ON CROSS APPEAL

A. Restatement of The Issues.

1. Do the documents prepared by the parties and Ferguson's admissions establish objective manifestation of contracts for an equal division of a contingent fee with Teller assuming costs?

2. Did Ferguson's attorney have apparent authority to agree to dismissal of the breach of contract claim and was that done, in any event, pursuant to CR 2A?

3. May a claim for negligent misrepresentation in the formation of a co-counsel agreement be maintained where the clients choose to settle and where the lawyer accused of misrepresentation performed as originally represented?

4. With an express contract, can Ferguson claim *quantum meruit* or that Teller was unjustly enriched?

5. Did the parties' express contract with their clients conform to the requirements of RPC 1.5(e)?

6. Because of Ferguson's conduct in this appeal, involving multiple filings of an opening brief and continued delay, are sanctions against Ferguson in this Court appropriate?

B. Assignment of Error On Teller's Cross Appeal

1. Did the trial court err in denying sanctions to Teller?

a. Because of Ferguson's manifold admissions to Teller and also to her former counsel, discovered only after appeal was taken, is remand to the trial court appropriate to determine whether Teller is entitled to sanctions?

b. Was Ferguson's position below so devoid of merit that sanctions were appropriate given her admissions such as, "I agreed that you would receive 50% of the fees BECAUSE you agreed to take the case forward with me and to advance costs. That was the reason for our contract."?

III. STATEMENT OF THE CASE.

A. Ferguson Struggled to Represent Plaintiffs And Sought Co-Counsel.

Ferguson began representing four clients in the Underlying Matter on August 24, 2009, by way of fee agreements which expressly excluded litigation. Ferguson committed only to negotiate satisfactory settlements. CP 1052-1058. Her fee was a hybrid one-third contingency and a flat fee. She was then litigating a similar case against the same defendant and eventually settled it. CP 231-232.[4] Despite the express exclusion of litigation under her "1/3rd plus $1,000" fee contract, Ferguson filed suit in the Underlying Matter in February 2010. CP 1079. There is no admissible evidence that she did so with the advance consent of her clients.

At the same time Ferguson was defending herself against suspension by the Supreme Court for "misrepresentation and deceit." *See **In re Disciplinary Proceeding Against Ferguson,*** 170 Wn.2d 916, 246 P.3d 1236 (2011). After argument in that Court in June 2010, she and her clients knew she could be suspended at any time. CP 276-277; CP 1070.

[4] The corrected version of Ferguson's declaration opposing summary judgment, referred to by the trial court in its order granting the motion (CP 40), is found in two places in the Clerk's Papers: CP 216-303 and CP 665-752. This version contains redactions required by the Underlying Defendant. Unredacted versions of the declaration are found at CP 129-215 and CP 578-664. This brief will refer to the version found at CP 216-303. Ferguson's other declarations are not part of the record for purposes of the summary judgment order and cannot be considered with respect to its review. See, RAP 9.12 and pp. 21-22, *infra.*

She also needed co-counsel to fund the litigation, because she and her clients were unable or unwilling to do so. CP 83 (Complaint at ¶3.6); CP 241.

Ferguson "invested a substantial amount of . . . time" shopping the case around to locate co-counsel. CP 242; Complaint at ¶ 3.6, CP 83. Before associating Teller, she struggled to represent the underlying plaintiffs diligently.

For example, ABC Corporation moved to compel discovery on several occasions and Ferguson failed to respond. CP 1070. The trial judge entered multiple orders against her and imposed sanctions. CP 1083-1094. Further orders of this nature could have led to dismissal of the case. *See, e.g.*, ***Rivers v. Wash. State Conference of Mason Contractors,*** 145 Wn.2d 674, 41 P.3d 1175 (2002). By fall of 2010 Ferguson had not propounded discovery in the Underlying Matter despite a trial date of July 18, 2011. CP 1079.

In short, Ferguson needed capable co-counsel willing to advance costs and able to litigate the case alone during her probable suspension. CP 81-82, Complaint at ¶¶ 3.0, 3.5 and 3.7.[5] Ferguson approached nine different law firms, including Teller "in an attempt to obtain financing for

[5] Teller's Motion for summary Judgment specifically referenced the Complaint. CP 1024-1046.

the case because [her] four clients, as a group, were unwilling or unable to pay their own litigation costs." CP 242.[6] When she explained the situation to Teller in September, 2010, she wrote: "I know I have the bar thing hanging over my head. But I guess that I will have to pay for that if the day comes that I am suspended. As I said, in that case, I am willing to share the case as partners." CP 266-267. By then, Ferguson and Teller had been professional colleagues for about 10 years. CP 82, Complaint ¶3.2, CP 1070.

Other than Teller, none of the firms were willing to associate. CP 84 (Complaint ¶3.9), CP 242. She wrote, "I offered this opportunity to others who would not take it due to the cost issue and the clients' unwillingness to contribute financially to their own case." CP 1144.

Teller's due diligence included talking to Ferguson about the evidence in the Underlying Matter, meeting with the clients, and reviewing documents related to the Underlying Case. CP 83.

B. Teller and Ferguson Agreed to a 50/50 Fee Division, And The Clients Agreed.

In late summer 2010, when Ferguson approached Teller about helping with the case, each was aware of her likely suspension. CP 276.

[6] Ferguson's brief states that she had another attorney available who could have managed the case during her suspension. That lawyer does not appear to be one of the "experienced employment lawyers" to whom she shopped the case. Fourth Amended Brief of Appellant at 13.

Ferguson proposed a fee for Teller based on hourly compensation or a contingent fee in proportion to his work. Teller rejected both proposals. CP 1070-1071.[7] No agreement was reached. Teller wrote Ferguson "[b]e sure to let the clients know that I've not taken on any role yet. I think it's a good case and I'd like to be involved if we can work out a fee agreement." CP 1104. Ferguson unsuccessfully tried to settle without Teller in a mediation in late October 2010. CP 1071.

After the failed mediation Ferguson again sought Teller's assistance as co-counsel. CP 1071. Teller and Ferguson came to an agreement under which Teller would advance costs and they would divide any potential fee equally. On November 10, 2010, Teller wrote to Ferguson, "Our proposed fee split is incorporated into the [attached] retainer for [clients'] signatures. In addition, we discussed that I will carry the bulk of the costs advanced during the litigation." CP 1110. This new fee agreement stated, in part, "Teller & Associates, PLLC, and The Ferguson Firm PLLC, have between them agreed to a 50/50 split of fees,

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[7] On September 2, 2010, Ferguson did propose a "50/50 fee-sharing arrangement . . . ." if pending settlement discussions were not fruitful. CP 1108. This, Ferguson stated, "is pretty favorable to you." *Id.* Teller replied on September 4, 2010, "it takes a lot of mental energy for me to get up to speed and carry the emotional burden and stress of fitting in a new matter into my pre-existing workload, and my input and support may be very valuable . . . ." CP 1107. There was no discussion in this exchange of a new fee agreement with the clients or how to comply with RPC 1.5(e).

and each firm assumes joint responsibility for the representation." CP 1111-1112. Ferguson then forwarded the new fee agreement to her clients with a copy to Teller. In this e-mail, Ferguson wrote, "[a]t this point, Steve has agreed to take joint responsibility for your case. His firm and mine will represent you going forward." CP 1120.

Ferguson and Teller met with the clients on November 18, 2010, and discussed with them the new fee agreement, the fee division and the value that Teller brought to the case. They provided the clients with paper copies of the fee agreements. Three of the four clients accepted the agreement; one withdrew from the case. CP 1071-1072 and CP 1123-1128 (fee agreements with signatures redacted). This new fee agreement provided for a forty percent contingent fee in the event of a settlement.

After the remaining three clients signed the new fee agreement Ferguson and Teller provided them with a 'multi-representation letter' CP 1114-1117, 1121. This stated, in part, "Sandra Ferguson and I mentioned this letter to you when we met . . . .[W]e need to obtain your consent to representation in light of the potential conflicts of interest between you." CP 1114.

The fee agreement required the parties to be jointly responsible for the underlying clients' case. "Joint responsibility" as used in RPC 1.5(e)(2) is defined in Wash. State Bar Ass'n Advisory Opinion 1522:

Division of Fees Between Lawyers in Different Firms (1993) as, "legal liability to see that the client's work is competently performed." CP 1166. In agreeing to joint responsibility, Teller assumed significant risk that his firm would have to litigate the case without Ferguson, due to her pending suspension. In addition, he assumed joint liability for malpractice in a case in which there were already multiple discovery orders entered against Ferguson. Teller also bore the risk of no fee, due to its contingent nature and he bore responsibility for costs.

On November 22, 2010, Teller filed his Notice of Appearance in the Underlying Matter. CP 1072, 1130. It stated Teller was appearing "in this matter as co-counsel on behalf of the Plaintiffs." It went on to state that papers and pleadings should be served on Teller "in addition to service on existing counsel, who is not withdrawing." *Id.*

Ferguson was "all for settling this case, early, if that is possible. As we discussed yesterday. [December 7, 2010]." CP 1073, 1146.

C. Teller Performed Under the Agreement.

Teller performed under the fee agreement. Teller and his staff reviewed deposition transcripts; obtained 60,000 pages of discovery from the defendant in the Underlying Matter; engaged in a CR 37 process for obtaining more discovery, CP 296-304, while simultaneously pursuing settlement negotiations. Teller also paid $9,000 in costs, as he agreed to

do. CP 1072. There is no evidence that Teller was unable or unwilling to pay further costs for experts or otherwise.

A further mediation was held on February 2, 2011 attended by the clients, Ferguson and Teller. This, too, was unsuccessful. The next day, Ferguson was suspended by the Supreme Court. CP 1072. Ferguson withdrew from representation. CP 251. Teller successfully moved for a nine month continuance of the trial date. CP 1072. This was because of the discovery left undone by Ferguson and the volume of documents produced by ABC Corporation. CP 1072, 1132-1133 (copy of order granting continuance). The continuance would also allow Ferguson to participate in the case after her suspension. The clients chose to settle while Ferguson was suspended. There is no evidence that this was other than voluntary decisions by each of the clients. Because of the requirements of the Older Worker Benefit Protection Act, the clients had 21 days to consider the settlement document and seven days within which to rescind their approval of it. CP 101 (¶ 3.23 of Answer). Due to confidentiality of the settlement, Teller's clients instructed Ferguson (who was then suspended and no longer their lawyer) "to maintain the confidentiality of all terms of our settlement . . . .and to take no further action to interfere with our voluntary choices to resolve this matter." CP 122.

The settlement they obtained was substantially greater than what was previously offered. CP 950 (admission by Ferguson that Teller "improve[d] the offer."). Because of the settlement Teller was not required to advance additional costs.

D. Ferguson Decides To Renege.

Until settlement of the Underlying Matter, Ferguson never wrote or said that she believed it was necessary to have a separate express contract between the lawyers in addition to the fee division agreement between the lawyers and their clients. CP 1072. Rather, in her e-mails with Teller she admitted she had a contract with him and with the clients to divide any fee evenly.

On April 11, 2011, Ferguson wrote that she was "somewhat confused <u>whether the contract between us</u> governs the fees I am paid . . . .while I am suspended, or whether my fees for work on the case must be based on quantum meruit." CP 1137 (Emphasis added). She added that "because the clients have no "dog in the fight" one way or the other, <u>the agreement between you and I would stand</u> and would govern the fee I am paid." *Id.* (Emphasis added).

On April 15, 2011, Ferguson wrote, "[j]ust so you know, apart from the ethics issue, I may decided [sic] to take the position that I have not obtained the benefit of the bargain we made when we agreed to the

50/50 arrangement. I have not yet decided." CP 1139. In an e-mail to Teller from Ferguson on April 18 she wrote, "I brought you on board to litigate it with me and to advance costs, which you agreed to do." CP 1144.

Ferguson wrote Teller on April 20th , CP 1140, " . . . .I am entitled to fees based on quantum meruit. I am not sure I need to repudiate the 50/50 joint representation agreement we had . . . ." In that same message, she also wrote, "[w]e entered into our 50/50 joint representation agreement contemplating the possibility of my suspension" and "I was willing to share fees with you on an equal basis had we actually litigated the case together." Most telling, she continued: "[a]nd I agreed to that fee split ONLY because you agreed to advance costs and be equally responsible for the workload . . . ."[8]

An April 25, 2011 e-mail from Ferguson to Teller stated, "I agreed that you would receive 50% of the fees BECAUSE you agreed to take the case forward with me and to advance costs. That was the reason for our contract." CP 1142.

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[8] Of course, they had litigated the case together for nearly three months before the suspension, and Teller litigated it alone for nearly three months after.

Ferguson's claim of a lien was made on April 27, 2011. Her lien was based on the forty percent contingent fee agreement - the very agreement which provided for an equal division of a fee. CP 1062.

E. Proceedings In The Trial Court.

Ferguson filed suit against Teller on May 27, 2011. CP 80-91. She asserted claims for: a declaratory judgment whether a fee agreement existed; a declaratory judgment whether *quantum meruit* was appropriate; that Teller breached the fee agreement and negligent misrepresentation.[9]

By stipulation, the Underlying Defendant deposited the contingent fee into the registry of King County Superior Court on July 18, 2011. CP 92-94. By then, Ferguson's suspension was over.

Teller moved to dismiss the Complaint in a motion for judgment on the pleadings, CR 12(c). The trial court granted the motion with respect to the negligent misrepresentation claim. CP 5-6. Ferguson agreed to dismiss the breach of contract claim. *Id.* and see, CP 830-831 (letter from trial judge: "[D]uring oral argument Mr. Waid did state that [Ferguson] was withdrawing her claim for breach of contract based on the

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[9] The latter two claims were based on allegations that Teller "understood he needed to commit to take the Underlying Matter to trial." Complaint, at ¶ 3.18, CP 86 and "TELLER had no intention of performing any agreement to associate with FERGUSON in the Underlying Matter, and instead intended to settle the matter as soon as TELLER had sole control of the litigation." Complaint at ¶ 3.26, CP 87.

authority cited in [Teller's] CR12(c) motion . . . ."). At the hearing, counsel for Ferguson acted pursuant to CR 2A in open court and stated, "We did allege breach of contract, and I have my client's authorization to do this. I will . . . concede defendant's argument . . . we cannot prove a breach of contract." RP 23 (10/28/2011). Ferguson did not seek reconsideration of the order or her counsel's agreement to dismiss.[10]

Teller moved for summary judgment based on Teller's declaration and attachments, CP 1069-1147 and his lawyer's declaration, CP 1048-1068. Ferguson opposed the motion with her declaration[11] and that of her counsel, Brian Waid. Ms. Ferguson's declaration mostly contained inadmissible evidence and Teller objected to specific portions of her declaration. CP 1148-1152.[12] The trial judge did not rule on the objections. RP 5-6 (1/27/12), CP 39-45 (order granting summary judgment to Teller). Ferguson did not object to any of Teller's evidence and her opposition to the motion is not in the Clerk's Papers.

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[10] The transcript reflects that Ferguson was present. RP 4 (10/28/2011).

[11] Apparently, Ferguson submitted a draft of her declaration which was over 300 pages in length. Her lawyer wrote an e-mail to her "My God, Sandra—327 pages! You can't be serious. The judge will throw us out on our ear. I don't even know where to begin." CP 1004 (Exhibit 20 to Declaration of Brian J. Waid.)

[12] The objections were to all or parts of ¶ ¶ 16, 18-51, 53, 59-60, 62, 64 and 68 of her declaration.

Judge Spearman granted Teller's motion for summary judgment on January 30, 2012, in a lengthy order. CP 39-45. Ferguson moved for reconsideration. Only her declaration in support of that motion is in the Clerk's Papers. CP 309-364.[13] The motion was denied on February 12, 2012, without requiring a response by Teller. KC LCR 59(b).

On February 9, 2012, Teller moved for fees under a number of theories including CR 11 and to disburse funds from the court's registry. CP 1167-1179. The trial court denied the motion for sanctions in its order dated April 12, 2012. CP 448-450. Teller timely appealed. CP 1180-1188.

In the meantime, Ferguson became dissatisfied with her lawyer, Brian Waid, for not obtaining from the court registry her "entitlement" to half the fee.[14] CP 863. Mr. Waid clarified, "Ferguson *never* had an undisputed right to a specific amount of fee *unless* Ferguson acknowledged that a valid and enforceable contract existed with Teller . .." CP 881 (Emphases in original).

This resulted in several hearings by phone and in court. Mr. Waid filed declarations to counter allegations about him made by Ferguson. On

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[13] The same declaration also appears at CP 758-813.

[14] Ferguson has argued that she was entitled to immediate disbursement of half the fee, although she denied the existence of a contract with Teller.

July 12, 2012, Mr. Waid filed his declaration and attachments found at CP 859-1023. He documented the circumstances of his withdrawal, which was approved by the trial court, and Ferguson's opposition to it. He wrote, "Ferguson's responses to the [trial] Court's questions were, therefore, for the express purpose of and with the intent to deceive the Court . . . ." CP 861:15-18. He also stated, "Ms Ferguson previously lied to this Court." CP 860.

Attached to Mr. Waid's declaration are e-mails from Ferguson which substantiate that she was not conducting her litigation with Teller in good faith. In stark distinction with the position she took in her opposition to Teller's motion for summary judgment and in this appeal, she admitted to her attorney her contracts with Teller. On May 2, 2011, Ferguson wrote her lawyer,

> [B]oth Teller and I are representing clients under new fee agreement with Teller and I jointly responsible for representation. He and I also have a 50/50 agreement between ourselves regarding the 40% attorney fees contingency share under the contract with the clients." (Emphases supplied).

The same message confirms that Teller "improve[d] the offer" made by the defendant in the Underlying Matter. CP 950.

Another email, this one from Mr. Waid to Ferguson on January 13, 2012, reports on a telephone consultation with noted legal ethics expert Prof. David Boerner:

> Had my telephone conference w/Prof. Boerner this morning. He will not be of any help. He concludes they're [Teller] right that there is no need for an express writing signed by both clients and lawyers. He concludes that the only real question here at this point is whether they can prove the existence of a contract based on other writings-or whether you and Teller merely had an agreement to agree.

CP 999-1000. Teller maintained all along that Ferguson's writings proved the material terms had been agreed to: Teller would pay costs, accept joint responsibility, and litigate the case with Ferguson and in her absence, and any fee would be divided evenly.

F. Ferguson's Conduct of This Appeal.

Ferguson has consistently failed to perfect this appeal. She filed five versions of her opening brief. The first three were vastly over-length, ranging from 67 to 117 pages. The fourth version was filed more than a month after the first. Yet, a different version of that fourth brief was filed several days later.[15] In all, 391 pages of briefing were filed in five briefs, some with appendices of over 150 pages.

Ferguson did not include in Clerk's Papers her opposition to the motion for summary judgment or her motion for reconsideration.

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[15] A letter from counsel stated that the "Fourth Amended Opening Brief" differed only from the fourth iteration in its cover sheet. However, a red-line comparison shows that virtually every page of this latest version is different. *See,* Exhibit 'A' to Teller's Motion for Sanctions of April 12, 2013.

The issues pertaining to the failures to perfect and the costs incurred by Teller's counsel having to review successive versions of Ferguson's opening brief are set out in motions made to the Commissioner on February 21 and 28, March 19 and April 12, 2013. By a notation ruling dated April 24, 2013, the Commissioner referred the motions to the panel hearing the case on the merits. Those motions are incorporated into this brief.

IV. ARGUMENT.

A. Summary of Argument.

Ferguson's opening brief is flawed. It cites to matters which were not before the trial judge in the motion for summary judgment. The claim that her lawyer should not have agreed to dismiss a claim that Teller breached a contingency fee contract with Ferguson is not supported by authority and her lawyer acted pursuant to CR 2A in open court with Ferguson present.

The evidence in the motion for summary judgment clearly established that Ferguson and Teller formed a contingent fee contract with their clients and in that agreement, any potential fee was to be divided evenly. Ferguson's claim that no contract was established is contradicted by her admissions confirming the contract. Ferguson simply does not

understand the law in this area, and mistakenly believed that she could choose between *quantum meruit* and the contract.

The trial court should have granted sanctions to Teller. The underlying action lacked merit and sanctions were appropriate.

In addition, there is new evidence, provided by Ferguson's lawyer, which should be considered on remand by the trial court. Ferguson's admissions to Brian Waid show that she understood she had a fee agreement with her clients and Teller and that this fee agreement required an even division of any contingent fee in the Underlying Matter. The conduct of this appeal demonstrates that the litigation process was used for purposes of spite or delay and that Ferguson knew it lacked merit.[16]

1. Appellant's Brief Does Not Comply With RAP 9.12.

Ferguson appeals from a summary judgment in favor of Teller as well as from her voluntary dismissal of a claim for breach of contract and the trial court dismissal of a claim for negligent misrepresentation.

The trial court's order granting summary judgment, CP 39-45, recites the submissions on which it relied at CP 40. On Ferguson's side, they consist of her lawyer's declaration, CP 16-37, and her declaration,

[16] *See also* CP 1009 ("I'll take my chances at summary judgment and pay you my money instead of Teller. Either way I lose. But I would rather pay you than Teller. All money I pay to Teller is available for my legal fees, as far as I am concerned.")

CP 216-303. (*See* n.4, *supra*, regarding various places in the Clerk's Papers where this same declaration appears).

Fully half of the citations in Ferguson's Statement of the Case are to Ferguson's declarations in support of reconsideration, CP 309-364, and in opposition to Teller's motion for sanctions. These cannot be part of a *de novo* appellate review of a summary judgment. The trial court's denial of the motion for reconsideration, CP 857-858, is reviewed in this Court for abuse of discretion. ***Wilcox v. Lexington Eye Inst.,*** 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

RAP 9.12 requires review of summary judgment orders "only [on] evidence and issues called to the attention of the trial court." The trial court order, as in this case, "shall designate the documents and other evidence called to [its] attention . . . ." *Id. See*, ***Green v. Normandy Park***, 137 Wn. App. 665, 679-80, 151 P.3d 1038 (2007).[17] Rule 9.12 also states that "other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order." That has not occurred here, nor could it.

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[17] This defect in perfection of the appeal is one of many. Previously, Ferguson filed four other versions of this brief. Three of the four were vastly over-length. In addition, some of those versions had inadequate citations to the record. Commissioner Neel entered a notation ruling on March 4, 2013 which stated, in part, that "[t]he panel of judges that considers the appeal on the merits will be in a better position to determine if [Ferguson's] brief is inadequate to address certain issues."

Here, there is no reason why evidence included in Ferguson's declaration filed with a motion for reconsideration could not have been put forward in the opposition to Teller's motion for summary judgment. The evidence in both matters came from the same declarant. There was no later-discovered evidence, for example.

Ferguson also did not designate her motion for reconsideration as part of the Clerk's Papers. In this Court, Ferguson did not refer to any provision of CR 59 which might allow for reconsideration nor did it refer to any authority for the proposition that denial of the motion was erroneous. There was no abuse of discretion by the trial court when it denied Ferguson's motion for reconsideration.

The record created by Ferguson for review of the summary judgment and denial of reconsideration does not allow for review. For those reasons alone, Ferguson's appeal fails.

2. Ferguson Cannot Claim Ineffective Assistance of Counsel.

a. The Record Does Not Show That This Claim Was Made Below.

Ferguson claims that her former lawyer improperly agreed to dismiss a breach of contract claim against Teller at the time Teller made

his motion for dismissal under CR 12(c). Brief at 25-28.[18] There is nothing to indicate that Ferguson objected to the dismissal of this claim or that she did not consent to it. Ferguson did not move for reconsideration. RAP 2.5(a) precludes consideration of this argument. *See, also*, ***Lindblad v. The Boeing Co.***, 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

b. Counsel for Ferguson Had Authority To Dismiss The Breach of Contract Claim.

The transcript of the hearing on Teller's motion under CR 12(c) shows that counsel for Ferguson affirmatively represented that he had authority to dismiss the breach of contract claim. The transcript also shows Ferguson was present when he made that statement.

CR 2A provides that "[n]o agreement or consent between parties or attorneys in respect to the proceedings in a cause . . . .will be regarded by the court unless the same shall have been made and assented to in open court on the record . . . ." No objection was made by Ferguson to her lawyer's statement made in open court and reported. *See, e.g.,* ***Cook v. Vennigerholz,*** 44 Wn.2d 612, 615, 269 P.2d 824 (1954).

c. An Attorney's Conduct Binds The Client.

Ferguson does not cite any authority for her claim that her lawyer's acts on her behalf are not binding. Instead, Ferguson presents legal

[18] The breach of contract claim was based on the contingent fee agreement with Teller and the clients in the Underlying Matter. Complaint at ¶ VI, CP 88-89.

authority about the merits of the claim of breach of contract. This omission is fatal to this claim. *See, e.g.*, ***Rivers v. Wash. State Conference of Mason Contractors***, 145 Wn.2d at 679: "Absent fraud, the actions of any attorney authorized to appear for a client are binding on the client at law and in equity."

3. Teller, Ferguson And Their Clients Formed Contracts.

a. There is Undisputed Objective Manifestations of Formation of Contracts Between Teller and Ferguson and Between The Lawyers And Their Clients.

The essence of formation of a contract is offer and acceptance. ***Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima***, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Ferguson's admissions and the writings of the parties conclusively demonstrate that she formed contracts with Teller and with Teller and her clients. Her written communications with Teller before and after the contract was formed confirm there were no further terms to negotiate and that they agreed to an even division of a fee. This establishes as a matter of law the objective manifestation test used in Washington for establishing an enforceable contract. ***Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.***, 134 Wn.2d 692, 699-700, 952 P.2d 590 (1998).

Ferguson's later e-mails to her lawyer estop her from claiming in this Court that a contract did not exist. Those e-mails were not part of the

summary judgment record in the trial court. But they do serve to confirm — because they are consistent with — what she previously wrote and which were part of the summary judgment record. In that respect, they constitute additional evidence of why sanctions are appropriate: Ferguson admitted, in the sanctity of the attorney-client privilege, what she denied in the trial court and in this appeal.[19]

These facts are undisputed and objectively verifiable:

1. Ferguson needed assistance in the Underlying Matter;
2. Teller rejected a fee based on a contingent/hourly basis;
3. The lawyers expressly agreed to divide a fee equally with Teller to assume the costs;
4. The lawyers tendered to their clients a contingent fee agreement which clearly stated they would divide the fee equally and provide joint representation;
5. The clients accepted the fee agreement;
6. Ferguson wrote her clients, "Steve has agreed to take ongoing responsibility for your case. His firm and mine will represent you going forward . . . ..";

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[19] Because Ferguson is accusing her lawyer of misconduct he is allowed to disclose client confidences. RPC 1.6(b)(5).

7. Teller performed — he engaged in litigation and advanced costs incurred through settlement;

8. Ferguson was suspended;

9. The clients chose to settle on more favorable terms while Ferguson was suspended;

10. Ferguson thereafter wrote to Teller about "our contract"; "we agreed to the 50/50 arrangement"; that he "agreed" to advance costs; and,

11. Ferguson wrote her lawyer about the "new fee agreement" with the clients and that "[Teller] and I also have a 50/50 agreement between ourselves . . . ."

Therefore, it was not necessary for Teller and Ferguson to sign the fee agreement with their clients nor was it necessary that a separate contract exist between them with signatures on it.[20] Rather, "mutual intention may be deduced from circumstances." 25 David K. DeWolf, et al., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE, § 2.11 (2d ed. 2007). These circumstances establish that Ferguson brought Teller into the Underlying Matter, introduced him to her clients, introduced their joint fee agreement to her clients and between Teller and Ferguson, agreed

[20] Ferguson's consulting expert, Prof. David Boerner, advised her lawyer that this was so. *See* p. 18, *supra*.

that Teller would advance costs. She did so to save herself — and her clients — from losing the case because of her inability to focus as a lawyer before, and during, her suspension. Teller performed each of his obligations.

Ferguson would violate RPC 3.4(a)(1),(4) if she testified that these contracts did not exist. Further, any counsel representing her would run afoul of the same rules.

B. There Was Consideration.

Ferguson argues that Teller's promise to advance "the bulk" of litigation costs was illusory. In fact, he advanced all costs after his Notice of Appearance. The term "the bulk" of costs is a sufficiently definite term to allow enforcement of a contract. ***Keystone Land & Dev. Co. v. Xerox Corp.,*** 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). And, in this case, Teller's performed: He paid costs after his appearance in the case.

Ferguson seems to argue that because litigation costs could be quite extensive there is a question of fact as to what amount of costs Teller committed to undertake. Brief at 40. But there is no evidence that Teller was either unable or unwilling to advance all costs necessary to take the case through trial. And, it was for the clients to decide whether to go so far as trial. RPC 1.2(a). "A lawyer shall abide by a client's decision whether to settle a matter." That additional experts might have to be

retained at great cost is, for these reasons, speculative. The clients chose to settle before those costs had to be incurred.

C. Neither Substantial Performance Nor Unjust Enrichment Are Doctrines Available to Ferguson.

At pages 43-45 of her Brief, Ferguson argues that she "substantially performed" and that therefore entitles her to *quantum meruit* because Teller is unjustly enriched.

Ferguson formed an express contract with Teller. Therefore, *quantum meruit* is unavailable to her. ***Young v. Young***, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008). That Ferguson worked on the Underlying Matter and an earlier, similar case, is not relevant. She expressly agreed to an even division of fees she knew, or should have known, would require disproportionate work by Teller, in a case she knew should settle. (*E.g.*, Ferguson wrote, before her suspension that she was "all for settling this case, early, if that is possible. As we discussed yesterday. [December 7, 2010]." CP 1073, 1146.) She obtained from Teller an obligation to be jointly responsible for litigating the case, assuming liability for it and advancing costs.[21]

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[21] Any suggestion that Teller received a windfall is contradicted by the work he put into the case, CP 1072-1073, coupled with the risks he assumed. He did not assume, however, the risk of this costly and time consuming collateral litigation.

Likewise, unjust enrichment is not a remedy she may obtain where there is an express contract. That doctrine is applicable only in the absence of a contractual relationship. 164 Wn.2d at 484.

That Ferguson's former clients chose to settle when and how they did should not be a factor. However, their decision to settle seems most troublesome to Ferguson. Her Complaint, CP 88-89, relates allegations that suggest Teller was entitled to a fee only if he tried the case. This position seems to be the focus of her litigation and squarely conflicts with the absolute right of a client to settle. RPC 1.2(a).

D. The Fee Agreement Complied With RPC 1.5(e).

1. A Non-Proportionate Fee Agreement Does Not Have To Be Signed By The Lawyers.

RPC 1.5(e)(1)(ii) states that a fee agreement which provides for a division of fees disproportionate to the services provided by a lawyer requires that the "client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing . . . ." RPC 1.5(c)(1) requires a contingent fee agreement to be "in a writing signed by the client." A fee agreement under RPC 1.5(e)(1)(ii) is a species of contingent fee. There is nothing in the Rules requiring that the offering lawyers sign the agreement.

2. There Is No Requirement To Disclose How The Lawyers Will Apportion Costs Between Them.

It is clear that neither Ferguson nor her clients would advance costs. That is a reason why Teller was brought into the case. Regardless, there is nothing in RPC 1.5 which requires the lawyers to inform the clients that Teller was obligated to pay costs. Rather, RPC 1.5(e)(1)(ii) is quite specific: The agreement must disclose "the share [of any fee] each lawyer will receive." RPC 1.5(c)(2), generally dealing with contingent fees, mentions costs only in the context of whether they are deducted "before or after the contingent fee is calculated."

3. Ferguson's Suspension Did Not End Her Joint Responsibility.

a. Ferguson retained malpractice liability.

While Ferguson could not practice law during her suspension, she remained jointly responsible for professional liability before, during and after her suspension.

Elane v. St. Bernard Hosp., 284 Ill. App. 3d 865, 672 N.E.2d 820 (1996), involved an action by a former lawyer who became a judge against another lawyer with whom she had fee-division agreements. The sitting judge sought enforcement of the fee agreements even though she could no longer practice law. Illinois RPC 1.5(g)(2) required the lawyers to

maintain "legal responsibility" for the matter. (The Washington rule, RPC 1.5(e)(1)(i), states "joint responsibility").

The Court in ***Elane*** approved advisory opinions of a judicial ethics committee that "legal responsibility consists solely of potential financial responsibility for any malpractice action against the recipient of the referral." 284 Ill. App. 3d at 872. Therefore, the term "legal responsibility" did not involve the practice of law. *Id. See also*, WSBA Advisory Opinion 1522, CP 1166: "'joint responsibility' as used in RPC 1.5(e)(2) refers to legal liability to see that the client's work is competently performed."

b. Ferguson Was Able to Practice When The Fee Was Paid.

Ferguson was suspended for 90 days on February 3, 2011. Her suspension ended on May 6, 2011. The Underlying Matter settled on April 28, 2011, and, under federal law, the earliest effective date of the settlement was May 6, 2011. RP 14 (1/27/2012). The contingent fee was deposited into the trial court registry on July 18, 2011, p.9, *supra*.

c. Ferguson Cannot Maintain A Claim of Negligent Misrepresentation.

The trial court dismissed Ferguson's claim of Negligent Misrepresentation on Teller's CR 12(c) motion.

The Complaint alleged that Ferguson "expected that FERGUSON and TELLER would continue to litigate the matter together . . . .[and that] FERGUSON and TELLER would resume joint control after Ferguson's suspension concluded . . . ." CP 85 at ¶ 3.11. And, instead of "sharing in the workload for trial, TELLER instead focused on settlement negotiation." *Id.* at ¶ 3.14. From this, Ferguson "sustained damages . . . ." CP 90 at ¶ 7.5. However, the only damages she could sustain would be the difference between a contingent fee she anticipated and the amount of the fee paid after settlement.

Notably, none of the clients in the Underlying Matter disputed either the settlement or the fees. Rather, the clients exercised their right to control the litigation and to settle. RPC 1.2(a) requires Ferguson to "abide by a client's decision whether to settle a matter."

The Supreme Court observed in ***Mazon v. Krafchick***, 158 Wn.2d 440, 449, 144 P.3d 1168 (2006) that "[d]iscretionary, tactical decisions, such as whether to advise clients to settle or risk proceeding to trial . . . ." create potential conflicts between co-counsel and clients. However, the interest of the client is paramount, "even if that means not completing the case and forgoing a potential contingency fee." *Id.*

Ferguson's brief at p.27 is disingenuous. It asserts that she does not seek to recover a prospective fee on this claim. Rather, "to recover its

lawful share of an actual *earned* fee." (Emphasis in original). This presupposes that *quantum meruit* is available. That is not possible. *See* p. 29, *supra*, and p. 34, *infra*.

Until the clients decided to settle, Teller performed. He engaged in discovery, he litigated, he continued the trial date which would allow Ferguson to participate fully in the case if it did not settle. Teller also advanced all costs through the time of the settlement.

The negligent misrepresentation claim was properly dismissed based on the allegations in the Complaint.

4. Ferguson Does Not Have The Right To Elect Between The Contract Fee And *Quantum Meruit*.

a. This Issue Was Not Asserted In The Trial Court.

There is nothing in the record to indicate that Ferguson brought this argument about election between half the contingent fee and a proportionate fee, found at pp. 45-49 of the opening brief, to the attention of the trial court. *See*, RAP 2.5 ("appellate court may refuse to review any claim of error which was not raised in the trial court"); ***State v. Scott***, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)("appellate courts will not" entertain issues not raised in the trial court) *but see*, ***State v. Ford***, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)(appellate court has discretion under RAP 2.5).

b. Ferguson Should Not Benefit From Her Misconduct.

Ferguson claims that she withdrew from the Underlying Matter "for cause" — her suspension — and that she may therefore elect under the fee contract with her clients to receive a "pro-rata portion of the contingent fee . . . ."

There is no dispute that the clients, Teller and Ferguson were aware that Ferguson could be suspended. This apprehension was material to the formation of the contracts.

Ferguson is now attempting to put herself in a position where she believes she might profit from her professional misconduct, *i.e.,* her unclean hands. This would be inequitable. ***Malo v. Anderson***, 62 Wn.2d 813, 817, 384 P.2d 867 (1963).

c. The Contract Language Is Inapplicable To Withdrawal By Only One of Jointly Responsible Attorneys.

The contract itself states that this proportional remedy for a fee is available if the attorneys are discharged "or if attorneys withdraw for cause (*e.g.,* dishonesty of client) . . . ." This requires that both Teller and Ferguson be fired by their clients or that they both withdraw for "cause." This provision cited by Ferguson is inapplicable if only one attorney decided to withdraw. That makes perfect sense in a fee agreement governed by RPC 1.5(e)(1): Each lawyer is jointly responsible for the

case. The withdrawing attorney would still be responsible for the malpractice of the other and both attorneys would have to acknowledge that 'cause' exists to withdraw. Thus, a "successor law firm" would not be Teller. It would instead be a lawyer who replaced <u>both</u> Teller and Ferguson and that lawyer or law firm would have to share her or its fee with Teller and Ferguson on a proportionate basis.

5. Teller's Cross-Appeal.

Teller sought sanctions in the trial court. He seeks them in this Court under RAP 18.9 and RAP 18.1.

a. Newly Discovered Evidence Warrants Remand To The Trial Court.

Teller sought sanctions against Ferguson in the trial court under CR 11, and RCW 4.84.185. The trial court denied the motion in an order dated April 3, 2012, more than two months after granting summary judgment to Teller. CP 448-450. Teller timely appealed from that order.

On appeal, the trial court decision regarding sanctions is reviewed for abuse of discretion. ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

Here, the trial court did not have before it the later disclosed evidence of Ferguson's admissions to her lawyer. This was filed on July 23, 2012, three months after the trial court denied Teller's motions for sanctions. CP 859.

Until the time Ferguson engaged in a dispute with her former lawyer, her communications with him were confidential. RPC 1.6. Therefore, they could not be timely discovered in the litigation between Teller and Ferguson. These admissions are, therefore, newly discovered evidence warranting reconsideration under CR 59(a)(4) or relief from the order denying sanctions, CR 60(b)(3).

Ferguson admitted to her lawyer on May 2, 2012, that there was a fee agreement with her clients and that she and Teller agreed he would pay costs, CP 950:

> By the time of the second mediation [in the Underlying Matter] on February 2nd, both Teller and I are representing clients under new fee agreement with Teller and I jointly responsible for representation. He and I also have a 50/50 agreement between ourselves regarding the 40% attorney fees contingency share under the contract with the clients.[22]

In the trial court she denied these contracts, putting Teller to the expense and burden of proving what she admitted to him and to her

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[22] This message to her lawyer asserted that Teller "did not share the workload with me and he did not advance costs." CP 950. This theme appears in the Complaint where Ferguson alleged that Teller "intended to settle the matter as soon as [he] had sole control of the litigation." This, of course, fails completely to take into account that Teller could not settle the matter. Only the clients could do that. RPC 1.2. Because of that, Teller did not have to advance costs beyond the $9,000 he did advance. Ferguson knew the case could - and should - settle as she acknowledged to Teller on December 8, 2010. See, p. 10, *supra*. This was a month after Teller appeared in the Underlying Matter and, more than four months before it did settle.

lawyer. *See, e.g.*, Complaint at CP 88, ¶ 4.0: "[Ferguson] is entitled to a determination concerning the validity of the fee-splitting agreement alleged by [Teller] . . . ."; CP 86, ¶ 3.1: "Although FERGUSON and TELLER engaged in discussions about the merits of a fee-splitting agreement between them, no such agreement was ever finalized."

The trial court should consider Ferguson's admissions to her lawyer along with the evidence already in the record. Because Ferguson knew before she filed suit that she had contracts with Teller and with Teller and her clients, her lawsuit was not "well grounded in fact" and is, therefore, subject to CR 11 sanctions. ***West v. Wash. Ass'n of County Officials,*** 162 Wn. App. 120, 135, 252 P.3d 406 (2011).

Remand to the trial court on the issue of sanctions is appropriate. Alternatively, this Court may make that determination. RAP 12.2.

b. Sanctions Are Appropriate In This Court.

Ferguson filed her Notice of Appeal from the Summary Judgment on February 21, 2012. CP 54-55. She had transcripts of the various hearings on Teller's Dispositive Motions even before the Notice of Appeal was filed but they were not filed with this Court until September, 2012. *See,* Motion To Designate Filed Transcripts As The Report of Proceedings, filed September 25.

Ferguson delayed perfection of this Appeal and, in doing so, impaired the *supersedeas* which was stipulated and calculated according to an eighteen month appellate process. *See* CP 463-469 at fn.2.

Finally, and without explanation or "compelling reasons," Ferguson filed three versions of her opening brief in excess of page limits set out at RAP 10.4(b). These three briefs range from 67 to 117 pages in length. Teller had to review each one in the event one was accepted for filing. A fourth version was filed within the page limits. Yet, a "Fourth Amended" brief was filed, ostensibly only with a corrected cover page. Yet, a red-line comparison between the Fourth Amended brief and the earlier, page limit-compliant brief, shows there are changes to virtually every page of the former. See Teller's motion for sanctions, filed April 12, 2013.

Teller made motions in this Court for various forms of relief including sanctions. The Commissioner deferred to the panel of judges assigned to this case.

Rather than taking up space in this brief, Teller incorporates the legal authority and facts recited in his earlier motions. Ferguson has placed undue burdens on Teller as well as this Court by delay, filing multiple briefs, referring to matters not in the record and not providing a

record of what she did in the trial court to oppose Teller's motion for summary judgment.

> Our rules of appellate procedure are designed to promote the considered adjudication of legal issues raised by the parties. They are not designed to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants.

Rich v. Starczewski, 29 Wn. App. 244, 250, 628 P.2d 831 (1981). Sanctions are appropriate under RAP 18.9(a) and RAP 10.7. Additional *supersedeas* should be required in order to secure Teller's allocation of the fees in the trial court registry.

Conclusion

Ferguson formed contracts with Teller and with Teller and her clients. Teller performed under both of them. Ferguson obtained a substantial fee and is using this lawsuit to gain more than what her bargain allows.

Ferguson's many admissions demonstrate the baselessness of her lawsuit. Her conduct in this Court demonstrates that appeal was taken for improper purposes — delay and causing Teller to incur expense. Teller's fees and compensatory damages should be awarded in this Court pursuant to RAP 18.1 and RAP 18.9.

The decisions of the trial court on the merits of Ferguson's claims must be affirmed. The matter should be remanded to the trial court only

with regard to reconsideration of Teller's claim for sanctions. Alternatively, this Court may make that determination.

By:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 3rd day of May, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondent/Cross-Appellant," to be delivered via email and US mail to the following counsel of record:

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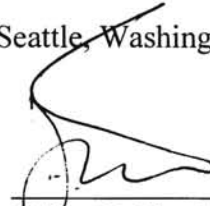
Dated this 3rd day of May, 2013, at Seattle, Washington.



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