Supreme Court No. 90144-9

No. 68329-2

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

THE FERGUSON FIRM, PLLC,
Appellant,

v.

TELLER & ASSOCIATES, PLLC,
Respondent,

OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

The unpublished decision of the Court of Appeals applied settled law to determine on summary judgment that Ferguson, Teller[1] and their clients formed a contingent fee contract, compliant with RPC 1.5(e), in which Ferguson and Teller would evenly divide any potential fee. Before that dismissal, on Teller's motion for judgment on the pleadings, Ferguson's lawyer, with her consent, agreed to dismiss a claim for breach of contract, and the trial court properly dismissed a claim for negligent misrepresentation. Ferguson never raised objections to the dismissal of these claims until this appeal.

In late 2010 Ferguson needed help with a case. The trial judge in the Underlying Matter[2] had entered multiple orders, including awards of sanctions, against her; neither she nor her clients would advance costs and she was facing suspension from the practice of law.

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[1] Sandra Ferguson and Stephen Teller are the owners of the law firms bearing their names. Reference will be made to them individually and by personal pronouns.

[2] Various protective orders and confidentiality agreements were entered into with the defendant and the plaintiffs in the Underlying Matter. The Defendant in that matter is referred to as "ABC Corp." for confidentiality purposes.

Ferguson's writings admit the existence of the contract. Her clients signed the contract. Her claim of lien in this case was predicated upon the existence of the very fee agreement she now disputes.

The Clerk's Papers do not include Ferguson's opposition to Teller's motions for CR 12(c) judgment on the pleadings and summary judgment or her motion for reconsideration of summary judgment. Review is impossible because the Court does not know what arguments or evidence were advanced by Ferguson in the trial court.[3]

The Court of Appeals properly remanded to the trial court to reconsider awarding Teller sanctions for Ferguson's lawsuit based on her admissions to Teller and to her lawyer, Brian Waid, that a contract with Teller existed - the very fact she disputed in this litigation. Indeed, she admitted that the simple contract had no other material terms, eliminating the "we merely agreed to agree" claim she now relies upon.

[3] The decision of the Court of Appeals properly noted the absence of the motion for reconsideration. Slip op. at 7, fn.3. Teller's briefing in the Court of Appeals noted the absence of Ferguson's opposition to summary judgment. See, Brief of Respondent/Cross-Appellant at 18.

II. STATEMENT OF THE CASE.

A. Ferguson Needed Help With An Employment Discrimination Case.

Ferguson began representing four clients by way of hybrid one-third contingency/ flat fee agreements which excluded litigation from the engagement. CP 1052-1058.

At all relevant times, Ferguson was also subject to disciplinary action for misrepresentation which led to a 90 day suspension. See ***In re Disciplinary Proceeding Against Ferguson***, 170 Wn.2d 916, 246 P.3d 1236 (2011). Ferguson and her clients knew she could be suspended. CP 276-277; CP 1070. She needed co-counsel to advance costs because she and her clients were unable or unwilling to do so. CP 83 (Complaint at ¶3.6); CP 241.

The Underlying Defendant moved to compel discovery and Ferguson failed to respond. CP 1070. There were multiple orders against her including sanctions. CP 1083-1094. By late 2010 Ferguson had not propounded any discovery despite a trial date of July 18, 2011. CP 1079.

When she explained her situation to Teller in September, 2010, she wrote: "I know I have the bar thing hanging over my head . . . . 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, no other firm was 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.

When Ferguson first approached Teller about helping with the case, each was aware of her likely suspension. CP 276. Ferguson proposed a fee for Teller based on hourly compensation or a proportionate contingent fee. Teller rejected both proposals. CP 1070-1071. Teller wrote, "[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 tried to settle without Teller in a mediation in October 2010. CP 1071.

B. Teller Accepts Joint Responsibility, Ferguson Accepts "50/50"

After the failed mediation Ferguson again sought Teller as co-counsel. CP 1071. They agreed that Teller would advance costs and they would equally divide any potential fee. The 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, and each firm assumes joint responsibility for the representation." CP 1111-1112. Ferguson sent 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, equal fee division and the value that Teller brought to the case. Three of the four clients accepted the agreement; one withdrew from the case. CP 1071-1072 and CP 1123-1128 (signed fee agreements). The new agreement provided for a 40% contingent fee in the event of a settlement. *Id.*

The fee agreement required the lawyers to be jointly responsible for the underlying clients' case. "Joint responsibility" as used in RPC 1.5(e)(2) is defined in WSBA Advisory Opinion 1522 (1993) as "legal liability to see that the client's work is competently performed." CP 1166. Comment 7 to RPC 1.5 indicates "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."[4] Teller thus assumed the risk that his firm would have to litigate the case without Ferguson due to her probable suspension; joint liability for malpractice in a case in which there were already multiple discovery orders entered

[4] Ferguson was re-admitted to practice by the time the settlement was effected in July, 2011. CP 92-94. She never sought to re-appear in the Underlying Matter from the time of her readmission in early May.

against Ferguson; the responsibility for advancing all client costs and the risk of no fee, due to its contingent nature.

C. Teller Performed His Part Of The Bargain.

Teller filed his Notice of Appearance "in this matter as co-counsel on behalf of the Plaintiffs" on November 22, 2010. CP 1072, 1130.

Teller performed under the fee agreement. Over the next five months, he and his staff, working with Ferguson until her suspension, got the case back on track. He took on the overdue discovery and got that problem solved, freeing up Ferguson's time to propound discovery for Plaintiff. After Ferguson was suspended, he and his staff reviewed deposition transcripts; obtained 60,000 pages of discovery and engaged in a CR 37 process for obtaining more documents. CP 296-304.

Teller also advanced $9,000 in costs so that the case could go forward. CP 1072. There is no evidence that Teller was unable or unwilling to pay further client costs as the case developed.

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

Another mediation was held on February 2, 2011. This, too, failed. Ms. Ferguson was suspended by the Supreme Court the next day. CP 1072. In addition to pushing hard for discovery responses pursuant to

CR 37, Teller successfully moved for a nine month continuance of the trial date based on the lack of discovery accomplished 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 during Ferguson's suspension. At the insistence of ABC Corp. confidentiality of the settlement was required. Teller's clients instructed Ferguson (who was then no longer their lawyer and never sought to re-appear) "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."). Teller was not required to advance additional client costs because of the settlement. Ferguson was re-admitted to practice when the settlement was paid. CP 92-94.

D. Ferguson Repeatedly Affirmed The Material Terms of Agreement.

The Court of Appeals decision accurately recounts some of the e-mails from Ferguson acknowledging the fee agreement she had with her clients and with Teller. Slip Op. at 5. For example, she wrote on

April 25, "I agreed that you would receive 50% of the fee BECAUSE you agreed to take the case forward with me and to advance costs. That was the reason for our contract." CP 1142. She wrote nothing up to the time of this litigation which contends that the equal fee agreement was incompletely formed between her, Teller and the clients.

E. Ferguson's Lien Was Based On The Fee Agreement With Teller.

Ferguson's lien was made on April 27, 2011. It relied on the fee agreement with Teller and her clients and was for 90% of the 40% contingent fee - the very agreement which provided for an equal division of a fee with Teller. CP 1062.

In Ferguson's lawsuit 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.[5] CP 80-91.

Teller moved to dismiss the Complaint in a CR 12(c) motion for judgment on the pleadings. The trial court granted the motion with respect to the negligent misrepresentation claim, CP 5-6, and Ferguson agreed to

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[5] The negligent misrepresentation claim was based on the notion that Teller deceived Ferguson about taking the case to trial and allegedly focused on settlement instead. Complaint, ¶ 7.1, CP 90. That claim ignores the right of the clients to decide whether to go forward with trial or not.

dismiss the breach of contract claim. *Id.* and CP 830-31 (letter from trial judge). 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) (emphasis supplied). Ferguson was in court when her attorney spoke and did not seek reconsideration after the Order was entered.

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

F. After She Lost, Ferguson Attacked Her Lawyer, to Whom She had Earlier Admitted the "50/50" Agreement with Teller.

Ferguson became dissatisfied with her lawyer, Brian Waid. CP 863. Waid filed a declaration to counter allegations about him made by Ferguson in court filings. CP 859-1023.

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 direct contradiction to the position she took in her lawsuit,

she admitted to her attorney her contracts with Teller.[6] 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.

The same message confirms that Teller "improve[d] the offer" made by the defendant in the Underlying Matter. CP 950. The same series of e-mails expresses Ferguson's willingness to nevertheless "take her chances" on Summary Judgment because she would rather that Teller spend money on lawyer fees. CP 1009.

III. ARGUMENT

A. The Record Created in This Case Does Not Allow For Review of Ferguson's Claims.

Ferguson has not placed into the record her oppositions to Teller's CR 12(c) and CR 56 motions, nor has she placed in the record her motion for reconsideration of the trial court grant of summary judgment. This failure to create a record cannot be overlooked. ***In Re Marriage of Ochsner***, 47 Wn. App. 520, 529, 736 P.2d 292, *rvw. denied*, 108 Wn.2d 1027 (1987). This Court cannot determine how Ferguson opposed the two dispositive motions by Teller. On this basis alone, review must be denied.

[6] Ferguson waived the attorney-client privilege with her attacks on her lawyer. RPC 1.6(b)(5). While she objected to this evidence in a motion in the Court of Appeals, she is not seeking review of that in this Court.

("On review of an order granting . . . summary judgment the appellate court will consider only . . . issues called to the attention of the trial court." RAP 9.12).

B. The Ferguson/Teller/Client Fee Agreement Governs The Fee Earned By The Lawyers.

RPC 1.5(e)(1) allows lawyers to earn a contingent fee that is non-proportional to their services if the lawyers agree to joint responsibility for the representation, the clients agree in writing to the arrangement and the total fee is reasonable.

It was on the basis of the 40% contingency found in the November, 2011 agreement between Ferguson, Teller and their clients that Ferguson later claimed a lien on settlement proceeds. Ferguson admitted the existence of the agreement. The clients agreed to it and signed it. That the lawyers may not have signed it is irrelevant[7] as is the notion that a separate 'co-counsel' agreement was necessary - a contention for which no authority is provided. The terms of Teller's engagement - advancing costs and assuming joint responsibility - were agreed to by the clients and,

[7] Ferguson's claim at p. 9 of her Petition that the lawyers, as offerors, had to sign the fee agreement is simply wrong. There is no such requirement in RPC 1.5 or in Washington law. See, *e.g.*, RCW 19.36.010, the party "to be charged" must sign to comply with statute of frauds. Here, the clients were to be charged a portion of their recovery for attorneys' fees. In any event, there was full performance by all parties to the contract and that nullifies this claim. *See*, RESTATEMENT, SECOND, OF CONTRACTS, § 145 (1981).

where necessary, by the lawyers. Again, it was Ferguson who supplied the agreement to her clients for signature, encouraged an independent counsel review, and then when the dispute arose, relied upon it for her lien.

Ferguson's contentions at pp. 6-8 of her Petition would require a court to ignore the necessity of obtaining client agreement to the unequal fee division sought by Ferguson which is required by RPC 1.5(e)(1)(ii). The clients are not parties to this litigation and there is no evidence that they agree to Ferguson's claim for an unequal fee division. What is in evidence is that the clients in the Underlying Matter specifically agreed to an equal fee division regardless of the proportion of services provided by their lawyers, and that they were satisfied with the settlement without the need to risk substantial additional client costs.

The substantial performance doctrine of ***Taylor v. Shigaki,*** 84 Wn. App. 723, 930 P.2d 340, *rvw. denied*, 123 Wn.2d 1009 (1997), is inapplicable here. The ***Taylor*** doctrine deals with whether an attorney earns a contingent fee after a client fires her. RPC 1.5(e) specifically allows a contingent fee to be earned in disproportion to the services provided by the lawyers.

There is no requirement in RPC 1.5(e)(1) that the fee agreement disclose Teller's obligation to pay costs in the litigation. This argument

was not presented either to the trial court or to the Court of Appeals. In any event, Teller performed.

RPC 1.5(e)(1) does require "joint responsibility for the representation" as a whole including "financial and ethical responsibility." *Id.* at cmt. 7. Here, Teller and Ferguson were, by their fee agreement with their clients, jointly and severally liable for the malpractice of either lawyer. During the time Ferguson was not suspended from the practice of law, she was certainly responsible for complying with the Rules of Professional Conduct. She earned the non-proportional fee for her efforts while she was admitted.

C. Ferguson's Waiver, Through Her Counsel, Of Certain Claims Should Not Be Reviewed.

Ferguson was present in the trial court when Brian Waid, her lawyer, agreed to dismissal of her claim for breach of contract. There is nothing in the Report of Proceedings or the Clerk's Papers which indicates contemporaneous objection to this dismissal. Nor is there any indication that timely reconsideration of the dismissal was sought. Mr. Waid's conduct complied with CR 2A and Ferguson is bound by it. The Supreme Court authority cited by the Court of Appeals, ***Rivers v. Washington State Conference of Mason Contractors,*** 145 Wn.2d 674, 679, 41 P.3d 1175

(2002), is more recent than that cited by Ferguson, ***Graves v. P.J. Taggares Co.***, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980).[8]

In any event, Ferguson's assertion about the trial court's and her counsel's improper reading of ***Mazon v. Krafchick***, 158 Wn.2d 440, 144 P.3d 1168 (2006), fails scrutiny.

Ferguson's claims for negligent misrepresentation and breach of contract against Teller were based on prospective fees, *i.e.*, her idea of what the fees might have been had the clients chosen to go to trial rather than settle their case.

In ***Hoglund v. Meeks***, 139 Wn. App. 854, 170 P.3d 37 (2007), attorney Hoglund brought an action to assert a right to a greater share of a contingent fee above a base agreed to with his then co-counsel, Willingham. Attorney Meeks, who replaced Hoglund as counsel, was aware of Hoglund's agreement with Willingham. Meeks accepted the benefit of the agreement between Willingham and Hoglund, and remained silent without objecting to Hoglund's belief that Hoglund was entitled to a portion of the underlying litigation recovery. *Id.* at 873. The trial court found Meeks had demonstrated acceptance of Hoglund and Willingham's fee-sharing contract.

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[8] Even under the ***Graves*** case, *supra*, Mr. Waid's dismissal of a claim was binding on Ferguson. With Ferguson in court, he represented that he had authority to dismiss a claim. Ferguson did not protest at that time.

Meeks argued it violated public policy for Hoglund to retain an interest in the contingent fee when he had withdrawn from the litigation, and relied on ***Mazon*** for this position. *Id.* at 874. The court determined ***Mazon*** did not support Meeks' argument. Here, Ferguson's argument appears to forget the fundamental factual basis of her own legal claims. Ferguson's claims were inescapably based on the *ex post facto* expression of her hopes for prospective fees at the time she agreed to split those fees with Teller 50/50. Her Complaint, CP 88-89, alleges that Teller negligently represented his intentions about litigating the underlying case to trial, and that he then breached the contract between them by settling the case rather than continuing to litigate it with Ferguson once her suspension was lifted. Thus, these claims are based on Ferguson's aspiration of what a verdict - prospective fees - might yield in terms of a contingent fee, as the Court of Appeals aptly summarized.

Ferguson cannot escape the fact that the clients, as was their right, chose to settle. The lawyers had to abide by that decision. RPC 1.2(a). ***Mazon*** prohibits an attorney from a claim to recover lost prospective fees. The Court of Appeals' decision in this case is consistent with ***Hoglund*** and ***Mazon***. Ferguson's negligent misrepresentation and breach of contract claims were based on her notion of prospective fees; claims clearly prohibited as a matter of settled law.

D. No Material Facts Are Disputed.

It was Ferguson who tendered to her clients the proposed fee agreement prepared by Teller. That Ferguson may have had other counsel prepared to mind her cases during her suspension is irrelevant as to whether she and Teller and their clients formed a contingent fee agreement. The e-mail evidence demonstrates that between Teller and Ferguson, Teller agreed to advance client costs. There can be no doubt that Teller fully performed: He advanced client costs as needed up through the time the clients chose to settle.[9] CP 1110, 1072.

E. There Was Consideration.

The writings exchanged by Ferguson and Teller, and Ferguson and her lawyer, uniformly and without a doubt demonstrate that a contract between them and their clients was formed. Ferguson's Petition at pp.16-17 contends that Teller was obligated to advance additional costs for three expert witnesses before the "50/50" fee split could take effect. However, it was not necessary to do so because the clients chose to settle and avoid being potentially liable for reimbursing Teller for those advances. And no

[9] The clients would have assumed liability for greater costs had they not chosen to settle. And they would have incurred the risk of further litigation and, if successful, a larger contingent fee (45%) if the case proceeded to trial. CP 1071-72; 1123-1128. By settling when they did, it is reasonable to assume the clients determined they could each safely move on with their lives with less risk. They may have netted a greater amount of money in settlement from what might have been a larger gross recovery at trial.

such term is referenced in any of Ferguson's writings—even her private e-mails to her lawyer do not claim the term "advance costs" actually meant "advance costs above a threshold number, or for specific experts, even if the clients want to settle before risking those costs."

Teller was plainly obligated to advance the bulk of client costs. He did so. That the clients made a choice requiring fewer advances is irrelevant. It was the fact of Teller's obligation, not the amount of it, that constituted the consideration. Teller delivered on all of his obligations.

IV. CONCLUSION.

Teller, Ferguson and their clients formed an appropriate fee agreement which complied with RPC 1.5(e). Ferguson's own writings confirm the existence of that contract. She created a record on appeal which does not allow for review. Regardless, the facts in the record support the orders of the trial judge.

The Court of Appeals properly affirmed the trial court.

Review should be denied and Teller should be allowed to submit a supplemental application for costs.

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CERTIFICATE OF SERVICE

I certify under penalty or perjury under the law of Washington that on April 16, 2014, I caused a copy of the foregoing to be sent by e-mail and first class U.S. Mail to all counsel of record, postage prepaid and addressed as follows:

Counsel for Sandra Ferguson

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Signed at Seattle, Washington on April 16, 2014.

Kelby D. Fletcher

OFFICE RECEPTIONIST, CLERK

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From: Sarah Armon [mailto:sarah.armon@stokeslaw.com]
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To: OFFICE RECEPTIONIST, CLERK
Subject: Division I cause number: 68329-2

Good afternoon.

Please see the attached Opposition to Petition for Review relating to cause number 68329-2 from the Court of Appeals Division 1.

Thank you.

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