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STATE OF WASHINGTON
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Supreme Court No. 96437-8

Court of Appeals No. 765426

SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH P. PADGETT,

Petitioner,

v.

THE LAW FIRM OF KALLIS & ASSOCIATES, P.C., and THE LAW OFFICE OF BUSTAMANTE & GAGLIASSO, P.C.,

Respondents.

Appeal from the Superior Court for King County, Honorable Beth Andrus, Presiding

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PETITION FOR REVIEW

Joseph Padgett
35538 SE 41st St.
Fall City, WA 98024
(425) 891-5055

Petitioner
In propria persona

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JOSEPH PADGETT hereby petitions for review of the decision of the Court of Appeals in the case of The Law Firm of Kallis & Associates, P.C., and The Law Office of Bustamante & Gagliasso, P.C., v. Joseph P. Padgett. He avers that:

CITATION TO COURT OF APPEALS DECISION

This petition for review concerns the decision of the Court of Appeals in Case No. 76542-6-1. (Apdx. 1-11.) The decision was filed on August 13, 2018. Petitioner timely moved for reconsideration of that decision. The motion for reconsideration was denied by an order dated September 21, 2018. (Apdx. 12.)

ISSUES PRESENTED FOR REVIEW

1. The proper procedure by which to compel the deposition of a party to a California lawsuit who is a resident of Washington is to serve a notice of deposition issued from the California court. It is, therefore, improper to compel such a deposition by a deposition subpoena from a Washington court under the Uniform Interstate Deposition and Discovery Act [RCW §§ 5.51.010 et seq.]. As a result, a Washington trial court may not assume jurisdiction over a dispute concerning the deposition of a Washington resident in a

California case where that Washington resident is a party to the California case.

2. A Washington trial court may not assume jurisdiction over a dispute arising from a notice of deposition issued to a party to a lawsuit by a California court even if the deposition sought is to be had in Washington and the deponent is a resident of Washington. It is the California court which issued the deposition notice which has jurisdiction of such disputes.

3. The appeal was not frivolous. Quite to the contrary, as will be demonstrated herein, the appeal raised issues of substantial public interest and of jurisdiction, and it was supported by evidence and argument over which, at a minimum, reasonable minds might differ. Furthermore, there is no evidence of any improper motive.

STATEMENT OF THE CASE

I

Procedural Note 1

Respondent The Law Firm of Kallis & Associates, P.C., which is a corporation represented by its principal M. Jeff Kallis, WBN 27855, filed for relief under the bankruptcy laws on or about August 8, 2018. The only significant

debt listed in the petition is the debt owed to Mr. Padgett.

Respondent Law Office of Bustamante & Gagliasso, P.C., is also a corporation. It purports to appear in pro se or alternatively, by Mr. Kallis.

Mr. Padgett objects to the pro se appearance of Bustamante & Gagliasso, P.C. As a matter of law, a corporation may appear only through counsel. (Lloyd Enters., Inc. v. Longview Plumbing & Heating Co., 91 Wn.App. 697, 701 (1998).) Furthermore, Mr. Padgett objects to any purported representation of them by Mr. Kallis, who is his former lawyer in a related matter. Mr. Padgett has not waived, and does not, and will not, waive, Mr. Kallis' conflict of interest.

II

Procedural Note 2

Respondents, The Law Firm of Kallis & Associates, P.C., and the Law Office of Bustamante & Gagliasso, P.C., (hereinafter "Kallis et al.",) sued Mr. Padgett in California in the Superior Court for Santa Clara County, Action No. 16CV298149. (CP 1-2 and 247:19-23.)

Kallis et al. are lawyers. They sued Mr.

Padgett for legal fees allegedly owed for work they performed on his behalf. (Ibid.) They alleged seven legal theories of relief in their complaint, including breach of an attorney-client fee contract and quantum meruit. Mr. Padgett cross-complained for a declaratory judgment that the fee contract was void.

On June 6, 2018, the Santa Clara County Superior Court GRANTED Mr. Padgett's motion for summary judgment. (Apdx. 27-43.) The motion was granted both as to the complaint of Kallis et al. and also as to Mr. Padgett's cross-complaint. The order holds in pertinent part, that the attorney-client fee contract is void and the claim for quantum merit is time-barred. (Ibid.; see also, CP 247:24-248:21 [King County Superior Court advised the case was in a death spiral].)

The order granting summary judgment is included in the appendix hereto as a relevant matter of which the court may take judicial notice. (ER 201(d).)

III

While the Kallis v. Padgett lawsuit was pending in the California Superior Court, Kallis et al. sought to compel Mr. Padgett's testimony at

a deposition. Mr. Padgett is, and at all relevant times was, a resident of Washington. California law provides the procedure and process by which to compel the deposition testimony of an out-of-state party. Specifically, California Code of Civil Procedure § 2026.010(b) provides in pertinent part that:

> If a deponent is a party to the action ... the service of a deposition notice is effective to compel that deponent to attend and to testify.

(Apdx. 13.)

For the sake of contrast, California Code of Civil Procedure § 2026.010(c) addresses the problem of compelling the deposition testimony of an out-of-state witness who is NOT a party to the lawsuit. It provides in pertinent part that:

> If the deponent is not a party to the action ... a party serving the deposition notice under this section shall use any process and procedures required and available under the laws of the state ... where the deposition is to be taken to compel the deponent to attend and to testify.

(Apdx. 13.)

The undisputed fact is that Kallis et al. failed to follow the approved procedure to compel Mr. Padgett's deposition testimony. Instead of

serving Mr. Padgett with a deposition notice drawn in conformance with California law under the authority of California law, they obtained a subpoena from the clerk of the King County Superior Court. (CP 199.) This subpoena was obtained under Uniform Interstate Depositions and Discovery Act [RCW §§ 5.51.010 et seq.].

This subpoena procedure, however, is expressly reserved for assisting a foreign court with non-party discovery. It provides, at RCW § 5.51.020, in pertinent part that:

> (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.
>
> (2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(Apdx. 19.) N.B. A subpoena is not required to compel an out-of-state party to testify; only a notice of deposition is required.

Further, it is undisputed that Kallis et al. failed to give notice of the proposed deposition to Mr. Padgett's lawyer, (CP 260:27-261:5,) who had entered his appearance in the California case

two weeks before the subpoena was issued. (CP 293-295.) It is undisputed that Mr. Padgett's lawyer timely and properly objected to the King County deposition subpoena. (CP 297.) It is undisputed that the deposition was then canceled, when Kallis et al. unilaterally rescheduled it by a deposition notice issued from the California Superior Court for a later date. (CP 299-301.)

Neither this second date, nor a third date, in December 2016, were secured by a subpoena from the King County Superior Court. (Ibid; and see, also, CP 141-143.) It is noteworthy that Kallis et al. did create a counterfeit "subpoena" for the third date, (CP 209-210,) and that Mr. Kallis executed it. (CP 209.) However, it is undisputed that the subpoena was not executed by the clerk of the court, who is the only authorized person to execute such subpoenas. (RCW § 5.51.020(2) [Apdx 19].)

In any event, it is undisputed that Kallis et al. did not serve the counterfeit subpoena document in the manner in which subpoenas must be served. (CP 210.) As such, it is no more than an artifact of history, it having no legal effect whatsoever.

It is undisputed that Mr. Padgett appeared to testify on December 27, 2016, as required by the deposition notice for the third date. (CP 259:25-260:2.) It is also undisputed that no one associated with Kallis et al. appeared. (Ibid.) Further, Kallis et al. subsequently admitted that they had failed to make arrangements for a court reporter, (CP 32:1-3,) and also failed even to put the deposition on the calendar at the court reporter's office. (CP 260:1-2.)

Kallis et al. then set a fourth date for the deposition. (CP 308.) It is undisputed, however, that they failed to comply with applicable California notice laws. (C.C.P. §§ 2025.270(a) [CP 288] and 1013(a) [CP 290].) Moreover, it is undisputed that Kallis et al. canceled this date, (CP 169,) when Mr. Padgett properly objected to it. (CP 167.) Finally, it is undisputed that Kallis et al. notified the King County Superior Court that the fourth date was not an issue in their motion. (CP 326:27-327:2.)

When the parties could not settle the dispute which arose from the failure, and apparent inability, of Kallis et al. to follow the law in setting and taking a deposition, Kallis et al.

addressed various grievances to the King County Superior Court. (CP 11-246.) They brought their motion under the Uniform Interstate Depositions and Discovery Act [RCW §§ 5.51.010 et seq.] and CR 37. (CP 19:7-20:5.)

Mr. Padgett argued that the matter should have been addressed to the California Superior Court. The Uniform Interstate Depositions and Discovery Act did not apply to the circumstances of the dispute. (CP 249:2-250:6.) Further, service of notice of the deposition set by the subpoena from the King County Superior Court did not conform to law. (CP 250:7-252:13.) In addition, Mr. Padgett argued that all dates after the first date had been set by notice of deposition, and not by subpoena, and that, therefore, were not within the jurisdiction of the King County Superior Court. (CP 252:14-254:13.)

The King Count Superior Court assumed jurisdiction over the dispute, and ordered Mr. Padgett to appear for a deposition and to pay monetary sanctions in an unspecified amount. (CP 373-375.) Mr. Padgett timely moved for reconsideration, (CP 376-388,) and when reconsideration was denied, (CP 399-400,) timely

appealed. (CP 395.)

The Court of Appeals affirmed the decision of the King County Superior Court, (Apdx. 1-11,) and denied Mr. Padgett's timely motion for reconsideration of the decision. (Apdx. 12.)

This petition for review follows.

ARGUMENTS AND AUTHORITIES

I

THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

The Uniform Interstate Deposition and Discovery Act [RCW §§ 5.51.010 et seq.] by its own terms, is intended to assist litigants in obtaining evidence from out-of-state non-party witnesses who are outside the reach of a trial court's processes. The act substantially streamlines the procedure which had existed before its adoption, and which still exists in the states which have not adopted the act, if any.

However, there is no need to access the rights under the act, and to involve a foreign court and its resources, to obtain discovery from an out-of-state party. Once a trial court has jurisdiction over such a party – typically through the service of a summons, it then is vested with

the full authority of the law with respect to that party. Indeed, it is fair to argue that it is an abuse of process to drag an out-of-state party through the processes of some other court, once a trial court has obtained jurisdiction.

California law, quoted above, makes clear that the deposition of an out-of-state party is compelled by a notice of deposition. (C.C.P. § 2026.010(b)1; see also, CR 30(b)(1) [same rule in Washington].) In addition, the law reserves for the trial court tremendous power to enforce a party's right of discovery, (C.C.P. § 2025.450 [Apdx 20-21],) including a full panoply of sanctions. (Ibid.) In contrast, a local court which becomes involved in the discovery process of a foreign action through the Uniform Interstate Deposition and Discovery Act has no power whatsoever with respect to the control and management of the underlying case.

The Court of Appeals answered this textual argument with a non-sequitur:

> Nothing in the plain language of the UIDDA or the California Code of Civil Procedure states that a party can never be compelled to attend a deposition through issuance of a subpoena.

(Apdx. 6.) This rationale, obviously, defies a

fundamental rule of statutory interpretation – to wit: "Expressio unius est exclusio alterius." (See, e.g., Wash. Natural Gas Co. v. Pub. Utils. Dist. No. 1, 77 Wn.2d 94, 98 (1969).) Here the law of both states, California and Washington, sets out the process by which to secure the deposition testimony of out-state witnesses, both parties and non-parties. Those processes are different for parties than for non-parties. It is simply unreasonable to conclude that the respective legislatures intended litigants (and the courts) to ignore the expressed procedures in favor of some other procedures.

The Uniform Interstate Deposition and Discovery Act is a national model statute, and appears to have been adopted by most, if not all, states. The undersigned, however, has found not one published decision which provides an interpretation of any its provisions. This could be due to the fact that the act is a relatively new law; and it could be due to the fact that the act's provisions are fairly clear. In any event, this is a case of first impression with national implications. As a result, it meets the standard for review.

II

THIS CASE PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION

It is undisputed that only one of the deposition dates was secured by a Washington state subpoena. This date is the first date of October 13, 2016. (CP 4.)

It is undisputed that Kallis et al. failed to give proper notice of this deposition to Mr. Padgett's counsel of record, who timely and properly objected to the deposition date. (CP 297.) It is undisputed that Kallis et al. then canceled that deposition date. (CP 299-301.)

It is further undisputed that all subsequent deposition dates were set by deposition notice issued out of the California Superior Court. (CP 299-301, 141-143, and 308-310.)

Nevertheless, the King County Superior Court assumed jurisdiction not only over the first date, which suffered from defective notice, and which Kallis et al. had canceled, but also the subsequent dates which were all secured by process issued from the California Superior Court. (CP 373-374.) This was a Constitutional error.

Article IV, Section 6, of the Washington

Constitution provides in pertinent part that:

> The Superior Court shall also have original jurisdiction in all cases and of all proceeding in which jurisdiction shall have been vested exclusively in some other court.

Even assuming that the King County Superior Court had the authority to assume jurisdiction over the original subpoena and to enter some order other than that the process employed was improper, the King County Superior Court had no authority to assume jurisdiction over the discovery processes of the California Superior Court. California law makes clear that disputes arising out of deposition notices are to be addressed to the California court from which the notices were issued. (C.C.P. § 2025.450 [Apdx. 20-21].)

Moreover, as a matter of comity, the King County Superior Court ought to have left the parties to address their concerns over the deposition dates to the discretion of the California Superior Court. This case illustrates exactly why such decorum exists and is generally respected. The principle is to avoid the multiplicity of suits, and to prevent vexatious litigation, conflicting judgments, confusion, and unseemly controversy between litigants and the

courts.

The King County Superior Court overstepped its jurisdictional bounds. As a result, this case meets the standard for review.

III

THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT

The Court of Appeals casually states that "Padgett's appeal raises no debatable issue upon which reasonable minds might differ and is devoid of merit." Thereupon, the Court of Appeals held that Mr. Padgett's appeal was "frivolous", and casually imposed sanctions under RAP 18.9(a).

In entering this order, the Court of Appeals failed to follow the guidelines set out by the Supreme Court or the decisions of other Courts of Appeals. For example, the Court of Appeals relied on Reid v. Dalton, 124 Wn.App. 113, 128 (2004) for its decision. However, the appellant in that case brought a case which was barred by the statute of limitations to a court which had no power to grant the relief he requested. Further, he admitted that he knew that he had no standing and that his action was barred. Nevertheless he proceeded with

his case, even after being asked to dismiss it.

This case has none of those types of characteristics. Mr. Padgett raised two primary issues in the Court of Appeals, which are the same two raised by this petition. First, the plain language of California law and the Uniform Interstate Depositions and Discovery Act read together, and read separately, suggest, and even compel, the conclusion that it was improper for Kallis et al. to obtain a subpoena to compel Mr. Padgett's deposition. Thus, Mr. Padgett did nothing more than exercise his right to judicial review over a serious, disputed point of law.

Second, it is undisputed that deposition dates set subsequent to the first, which had been set by the improper subpoena, were all set by a notice of deposition issued from the California Superior Court. As a result, the King County Superior Court could not assume jurisdiction over any dispute arising therefrom. Any such dispute was under the jurisdiction of the California Superior Court from which the deposition notices issued. Furthermore, comity would have recommended the King County Superior Court not interfere in discovery disputes arising in cases

pending in other states. Thus, when Mr. Padgett sought review of the adverse decision, he did nothing more than present a serious issue to the appellate court, as was his right.

The appeal was presented conscientiously, respectfully, and in conformance with the rules of appellate procedure. Moreover, there was no effort whatsoever to delay any proceeding or any other improper motive. In fact, the deposition proceeded pursuant to the order of the King County Superior Court, even though it is obvious that it was Kallis et al. who had employed vexatious and bad faith tactics in pursuit of a frivolous case, as the summary judgment evidences. (Apdx. 27-43.)

This court has held that an appeal is frivolous only "if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." (Green River Comm'ty College Dist. 10 v. Higher Educ. Personnel Bd., 107 Wn.2d 427, 442-43 (1986).) All doubts as to whether an appeal is frivolous, however, must be resolved in favor of the appellant. (Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241 (2005).) Further, where an appeal presents a

debatable issue as to the interpretation of a statute, the appeal is not frivolous. (Fay v. Northwest Airlines, 115 Wn.2d 194, 200-201 (1990).)

That an appeal does not result in a reversal is not enough to deem it "frivolous". Nor is it enough that the appellant is unpopular or that the issues he raises are unpopular. Some bad or improper intent is required, lest the courts inadvertently chill the rights of litigants to review of mistaken decisions. This much is clear from precedent. As a result, without identifying one manner in which Mr. Padgett's appeal was improper, the Court of Appeals failed to follow prior decisions of this court. As such, this case meets the standard for review.

CONCLUSION

For the foregoing reasons, this court should grant review of the lower court proceedings, order briefing on the legal issues, and after hearing the merits of the matter, reverse the decisions of the Court of Appeals and the King County Superior

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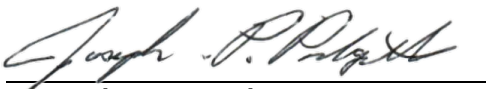
Court.

Dated: October 22, 2018

Respectfully submitted,



Joseph P. Padgett
In propria persona

Proof of Service

I, Linda Parker, certify under penalty of perjury that:

I am over the age of eighteen and not a party to this case. My address is 35538 SE 41st Street, Fall City WA 98024. I served the following:

Petition for Review,

by depositing true copies in a mail box regularly maintained by the United States Postal Service, in Fall City, WA, on October 22, 2018, sealed in envelopes, with first class postage prepaid, addressed as follows:

Hon. Beth Andrus
Judge of the Superior Court
516 3rd Ave., Room E-609
Seattle, WA 98104,

Bustamante & Gagliasso, P.C.
333 W. San Carlos St., Suite 600
San Jose, CA 95110, and

Attorney for Bankruptcy Estate of
Kallis & Associates, P.C.:

Rory C. Livesey
Attorney at Law
600 Stewart St., Suite 1908
Seattle, WA 98101.

Linda Parker

Appendix

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

THE LAW FIRM OF KALLIS & ASSOCIATES, P.C. and THE LAW OFFICE OF BUSTAMANTE & GAGLIASSO, P.C., Respondents, v. JOSEPH P. PADGETT, Appellant.	No. 76542-6-I UNPUBLISHED OPINION FILED: August 13, 2018

VERELLEN, J. — Joseph Padgett, a King County resident and party to a California lawsuit, argues that the King County Superior Court could not compel him to attend his local deposition or award sanctions for his failure to attend. But the Washington Uniform Interstate Depositions and Discovery Act, ch. 51.51 RCW (UIDDA), allows the superior court to issue a subpoena to compel a Washington resident's deposition in a foreign lawsuit. We affirm the trial court's order compelling Padgett's attendance at his deposition and awarding sanctions against him. Additionally, because this appeal is frivolous, we award the respondents reasonable attorney fees in an amount to be determined by the superior court on remand.

FACTS

The Law Firm of Kallis & Associates P.C. and Bustamante & Gagliasso P.C. (the law firms) sued Padgett for unpaid attorney fees in Santa Clara County, California.[1] Hugo Torbet represented Padgett in that lawsuit.

On September 12, 2016, consistent with the UIDDA, the law firms submitted a deposition subpoena to King County Superior Court. The clerk of the court signed the subpoena, and it was served upon Padgett at his residence in Fall City, Washington on September 21, 2016. The subpoena gave Padgett notice that he was commanded to appear at a deposition in Seattle on October 13, 2016.

On October 5, 2016, Torbet e-mailed Steven Berki, an attorney for Bustamante & Gagliasso P.C., stating that the notice of the deposition was defective because it was not served upon him. Torbet also indicated he could not attend on the date scheduled and asked Berki for alternative dates. Torbet later declared that he and Padgett would not "appear for the defectively noticed deposition."[2] Neither Torbet nor Padgett sought a protective order or an order to quash or modify the subpoena in the Washington or California courts.

Complying with Torbet's request that he be served and hoping to find a date that would work for all parties, Berki then sent Torbet a notice of deposition for October 20, 2016 in Seattle. Torbet responded that the date of the deposition was

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[1] At oral argument, Padgett informed this court that the Santa Clara County lawsuit was dismissed in June 2018.

[2] Clerk's Papers (CP) at 69.

"basically okay"[3] but insisted Berki comply with the UIDDA and serve Padgett with a "local" subpoena because the notice of deposition by itself was insufficient.[4] Berki objected to this request and informed Torbet that the deposition would occur as originally scheduled for October 13. Again, neither Torbet nor Padgett sought a protective order or an order to quash or modify the subpoena or notice in Washington or California.

On October 13, 2016, Jeffrey Kallis of The Law Firm of Kallis & Associates, P.C., appeared at the deposition. Padgett and Torbet did not attend. On October 20, 2016, Berki attended the deposition for Padgett. Again, neither Torbet nor Padgett appeared.

On December 5, 2016, Kallis and Berki sent Padgett and Torbet another deposition notice that compelled Padgett's attendance at a deposition on December 27, 2016, apparently in response to Torbet's request that it would be easier for him to attend at the beginning of the week between Christmas and New Year's Day. Neither Padgett nor Torbet responded to Kallis's numerous attempts to confirm Padgett's attendance. On December 19, in an attempt to meet and confer, Kallis asked Torbet to confirm Padgett's attendance. Torbet sent several unresponsive emails that evaded the issue of attendance.

On December 26, Kallis advised Torbet that he had cancelled the deposition. Torbet threatened that the law firms would waive their right to depose

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[3] CP at 70.

[4] Torbet referred to the UIDDA as the "uniform discovery compact, or whatever it is called." CP at 73.

Padgett if they did not attend the deposition as scheduled. Because the original location was not available, the law firms scrambled to secure a new time and location for a December 27 deposition. The law firms sent numerous e-mails to Torbet about the new time and location. Torbet and Padgett arrived at the original deposition location but refused to accept any information regarding the new location and time of the deposition. Kallis and Berki appeared at the deposition at the new location, a 10-minute walk from the prior location. Neither Padgett nor Torbet attended. Two days later, Torbet sent Kallis and Berki a letter demanding $4,000 for their failure to appear at the December 27 deposition.

On January 4, 2017, the law firms served Padgett with another subpoena for a deposition on January 13, 2017. Torbet was again unresponsive. After further unsuccessful attempts to meet and confer, the law firms suspended the deposition and filed a motion to show cause to compel Padgett to attend his deposition, and for sanctions.

The trial court granted the motion and awarded sanctions to the law firms. Padgett filed a pro se motion for reconsideration and for sanctions. The motion was denied. Padgett appeals.

ANALYSIS

Personal Jurisdiction and the UIDDA

Padgett argues that the trial court could not compel his deposition or award sanctions against him because it did not have personal jurisdiction over him. Because Padgett was personally served with a subpoena in compliance with the

UIDDA and waived any personal jurisdiction defense by failing to seek relief from the court, we disagree.

A trial court's assertion of personal jurisdiction is a question of law that we review de novo.[5] A defense of lack of personal jurisdiction is waived if not timely asserted.[6]

Washington adopted the UIDDA to govern the process and procedures to compel a deponent residing in Washington to attend a deposition for an out-of-state case.[7] A party to the out-of-state lawsuit must request issuance of a subpoena under the UIDDA by submitting "a foreign subpoena to a clerk of the court in the county in which discovery is sought" and the clerk "shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed."[8] Once a subpoena is issued, Washington has personal jurisdiction over the deponent, and any subsequent application to the court for a protective order or to quash or modify a subpoena must comply with Washington's rules and statutes.[9]

Here, as soon as the law firms served Padgett with the subpoena issued by the King County Superior Court Clerk, the court obtained personal jurisdiction over him. Additionally, Padgett did not move any court in Washington or California for a

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[5] Failla v. FixtureOne Corp., 181 Wn.2d 642, 649, 336 P.3d 1112 (2014).

[6] CR 12(h)(1).

[7] Ch. 5.51 RCW.

[8] RCW 5.51.020(1)-(2).

[9] RCW 5.51.050. "Superior court civil rules (CR) 26 through 37 apply to subpoenas issued under RCW 5.51.020." RCW 5.51.040.

protective order or an order to quash or modify the subpoena under CR 26(c). Therefore, he waived any argument that the superior court lacked personal jurisdiction.

To the extent that Padgett suggests that the UIDDA limits the subject matter jurisdiction of the superior court, he is mistaken. Superior courts obtain their broad subject matter jurisdiction from the Washington State Constitution, not from any statutory authority.[10] Therefore, we look to the Constitution, not the statute, to determine whether the trial court has subject matter jurisdiction over this type of controversy. A matter filed under the UIDDA is squarely within the broad subject matter jurisdiction of the Washington courts.

Despite Torbet's previous insistence that the law firms serve Padgett with a subpoena in compliance with the UIDDA, Padgett now argues that the UIDDA is only applicable to nonparties and cannot be used to issue a subpoena against a party. Nothing in the plain language of the UIDDA or the California Code of Civil Procedure states that a party can never be compelled to attend a deposition through issuance of a subpoena.[11] And, at oral argument, Padgett acknowledged

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[10] See Ralph v. State Dep't of Nat. Res., 182 Wn.2d 242, 252, 343 P.3d 342 (2014) (article IV, section 6 gives the superior courts "universal original jurisdiction") (quoting Moore v. Perrot, 2 Wash. 1, 4, 25 P. 906 (1891)).

[11] The California Code of Civil Procedure allows "[a]ny party [to] obtain discovery by taking an oral deposition . . . in another state of the United States." CCP § 2026.010(a). The requirements for doing so vary depending on whether the deponent is a party or nonparty to the lawsuit. If the deponent is a party, "the service of a deposition notice is *effective* to compel that deponent to attend and to testify." CCP § 2026.010(b) (emphasis added). If the deponent is a nonparty, "a party serving a deposition notice . . . *shall* use any process and procedures

that the court can issue a subpoena to a party in California.[12] But more importantly, he waived any concern with the adequacy of the Washington UIDDA subpoena because he did not seek a protective order or move to quash the subpoena in California or Washington. Padgett cannot assert inconsistent requirements for the process necessary to compel his attendance at his deposition and, even when those requirements are met, simply refuse to attend without pursuing relief from the superior court.

In conclusion, King County Superior Court had personal jurisdiction, subject matter jurisdiction, and authority under the UIDDA to issue a subpoena for Padgett's deposition and to award sanctions for his failure to attend.

Findings of Fact

Padgett argues that the trial court's findings of fact that he "repeatedly failed to appear for a deposition" and that his claims of procedural defects were "unfounded" are not supported by substantial evidence.[13] We disagree.

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required and available under the laws of the state . . . where the deposition is to be taken." CCP § 2026.010(c) (emphasis added).

[12] CCP § 1985(a) provides, "The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness." Nothing in this language limits a subpoena's use to nonparties. Furthermore, CCP § 1985(c) states that "[a]n attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein." Again, nothing in the statute limits the use of a subpoena to nonparties.

[13] CP at 373-74.

We review findings of fact to determine whether they are supported by substantial evidence.[14] Substantial evidence exists when there is evidence sufficient to persuade a rational, fair-minded person that the finding is true.[15] Unchallenged findings of fact are verities on appeal.[16] "[T]he appellant has the burden of showing that a finding of fact is not supported by substantial evidence."[17]

Here, in its order granting motion compelling attendance at deposition and for sanctions, the trial court included the following findings of fact:

> (1) Defendant Joseph P. Padgett is a party to a lawsuit brought by Plaintiffs in Santa Clara Superior Court; (2) Padgett is now represented by counsel, Hugo Torbet, in that lawsuit; (3) Mr. Torbet claimed that the initial notice of deposition served on Padgett was defective but agreed to produce Padgett for a deposition; (4) Plaintiff sought to cure the defect by serving Mr. Torbet with a revised notice of deposition; (5) Padgett and Mr. Torbet have taken inconsistent positions regarding what process was necessary to compel Padgett's attendance at a deposition; (6) Padgett and his counsel have repeatedly failed to appear for a deposition, making unfounded claims of procedural defects in the issuance of a deposition subpoena or the service of a deposition notice; and (7) Padgett's actions have led Plaintiff to incur needless legal fees.
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> The Court further finds that Defendant was properly notified of his depositions as required by Washington Rules of Civil Procedure and per the Uniform Interstate Discovery and Deposition Act.[18]

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[14] Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

[15] Id. at 555-56.

[16] Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

[17] Pham v. Corbett, 187 Wn. App. 816, 825, 351 P.3d 214 (2015).

[18] CP at 373-74.

Padgett assigns error only to finding (6), that he repeatedly failed to appear for a deposition and that he made unfounded claims of procedural defects.[19] All other findings are verities on appeal.[20] Those include the facts that Torbet agreed to produce Padgett for a deposition, and that he made inconsistent claims of the process required to compel Padgett's attendance.

There is substantial evidence in the record that Padgett did not attend the depositions on October 13 or 20, and that on December 27, he appeared at the prior location set for the deposition but refused to appear at the updated location a 10-minute walk away. Furthermore, Padgett elected to disregard the subpoenas and deposition notices without seeking relief from the court through a protective order or a motion to quash under CR 26(c). Therefore, the trial court's finding that he repeatedly failed to appear for a deposition and that his claims of procedural defects were unfounded was supported by substantial evidence.

The trial court was well within its discretion to award sanctions to the law firms for Padgett's failure to appear at his deposition, and it did not abuse its discretion by denying his motion for reconsideration. His failure to attend, combined with his inconsistent positions as to the process required to compel his attendance, his choice to ignore the change of location for the December deposition, and his refusal to meet and confer to schedule the deposition all speak

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[19] A party is required to make "[a] separate assignment of error for each finding of fact [the] party contends was improperly made . . . with reference to the finding by number." RAP 10.3(8)(g).

[20] See Robel, 148 Wn.2d at 42 (unchallenged findings are verities on appeal).

to a level of gamesmanship that is inconsistent with the duty to cooperate in discovery matters.[21] The trial court ordered Padgett to pay "reasonable attorney fees and costs associated" with the motion to compel, but the amount of sanctions has not yet been determined. For this reason, we remand for a determination of those reasonable fees and costs.

Padgett's Request for Discovery Sanctions and Attorney Fees

Padgett argues that, both at the trial court and on appeal, he is entitled to sanctions and attorney fees under CR 37(a)(4). Sanctions under this rule are only allowed to a deponent who successfully defends against a motion to compel.[22] Because Padgett did not successfully defend against the law firms' motion to compel, he is not entitled to attorney fees on appeal. The trial court did not abuse its discretion in declining to award him sanctions below.

The Law Firms' Request for Attorney Fees on Appeal

The law firms request attorney fees because this appeal is frivolous. RAP 18.9(a) permits this court to award attorney fees when the appellant files a frivolous appeal.[23] "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which

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[21] See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (recognizing "[t]he concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials.").

[22] CR 37(a)(4) states: "*If the motion is denied*, the court shall . . . require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees." (Emphasis added.)

[23] Reid v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004).

reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal."[24] Here, Padgett's appeal raises no debatable issues upon which reasonable minds might differ and is devoid of merit. Because Padgett's appeal is frivolous, we award the law firms their reasonable attorney fees on appeal. We direct the trial court to determine on remand the amount of reasonable fees on appeal.[25]

We affirm and remand for a determination of the amount of reasonable attorney fees and costs, including fees on appeal, to be awarded to the law firms.

WE CONCUR:

[24] Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

[25] See RAP 18.1(i) ("The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.").

FILED
9/21/2018
Court of Appeals
Division I
State of Washington

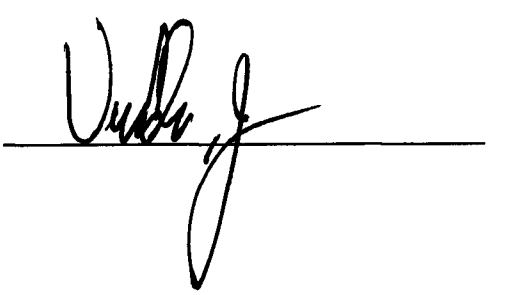
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE LAW FIRM OF KALLIS & ASSOCIATES, P.C. and THE LAW OFFICE OF BUSTAMANTE & GAGLIASSO, P.C.,	)	No. 76542-6-I
Respondents,	)	
v.	)	
JOSEPH P. PADGETT,	)	ORDER DENYING MOTION FOR RECONSIDERATION
Appellant.	)	

Appellant Joseph Padgett filed a motion for reconsideration of this court's August 13, 2018 opinion. Following consideration of the motion, the panel has determined it should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



STATE OF CALIFORNIA
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State of California

CODE OF CIVIL PROCEDURE

Section 2026.010

2026.010. (a) Any party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in another state of the United States, or in a territory or an insular possession subject to its jurisdiction. Except as modified in this section, the procedures for taking oral depositions in California set forth in Chapter 9 (commencing with Section 2025.010) apply to an oral deposition taken in another state of the United States, or in a territory or an insular possession subject to its jurisdiction.

(b) If a deponent is a party to the action or an officer, director, managing agent, or employee of a party, the service of the deposition notice is effective to compel that deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, testing, or sampling. The deposition notice shall specify a place in the state, territory, or insular possession of the United States that is within 75 miles of the residence or a business office of a deponent.

(c) If the deponent is not a party to the action or an officer, director, managing agent, or employee of a party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, testing, sampling, and any related activity.

(d) A deposition taken under this section shall be conducted in either of the following ways:

(1) Under the supervision of a person who is authorized to administer oaths by the laws of the United States or those of the place where the examination is to be held, and who is not otherwise disqualified under Section 2025.320 and subdivisions (b) to (f), inclusive, of Section 2025.340.

(2) Before a person appointed by the court.

(e) An appointment under subdivision (d) is effective to authorize that person to administer oaths and to take testimony.

(f) On request, the clerk of the court shall issue a commission authorizing the deposition in another state or place. The commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and electronically stored information and answer questions. The commission shall be issued by the clerk to any party in any action pending in its venue without a noticed motion or court order.

The commission may contain terms that are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application.

(Amended by Stats. 2012, Ch. 72, Sec. 27. (SB 1574) Effective January 1, 2013.)

CR 30
DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required:

(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

(2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Video Tape Recording.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice:

(A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period; and

(B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subsection (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under section (c), any changes made by the witness, the witness's signature identifying the deposition as the witness's own or the statement of the officer that is required if the witness does not sign, as provided in section (e), and the certification of the officer required by section (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 34 shall apply to the request, including the time established by rule 34(b) for the party to respond to the request.

(6) A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which the deponent will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to the matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer the propounded questions.

(8) Videotaping of depositions.

(A) Any party may videotape the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically

states that the deposition will be recorded on videotape. Failure to so state shall preclude the use of videotape equipment at the deposition, absent agreement of the parties or court order.

(B) No party may videotape a deposition within 120 days of the later of the date of filing or service of the lawsuit, absent agreement of the parties or court order.

(C) On motion of a party made prior to the deposition, the court shall order that a videotape deposition be postponed or begun subject to being continued, on such terms as are just, if the court finds that the deposition is to be taken before the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

(D) Unless otherwise stipulated to by the parties, the expense of videotaping shall be borne by the noting party and shall not be taxed as costs. Any party, at that party's expense, may obtain a copy of the videotape.

(E) A stenographic record of the deposition shall be made simultaneously with the videotape at the expense of the noting party.

(F) The area to be used for videotaping testimony shall be suitable in size, have adequate lighting and be reasonably quiet. The physical arrangements shall be fair to all parties. The deposition shall begin by a statement on the record of:

(a) the operators name, address and telephone number,

(b) the name and address of the operators employer,

(c) the date, time and place of the deposition,

(d) the caption of the case,

(e) the name of the deponent, and

(f) the name of the party giving notice of the deposition. The officer before whom the deposition is taken shall be identified and swear the deponent on camera. At the conclusion of the deposition, it shall be stated on the record that the d eposition is concluded. When more than one tape is used, the operator shall announce on camera the end of each tape and the beginning of the next tape.

(G) Absent agreement of the parties or court order, if all or any part of the videotape will be offered at trial, the party offering it must order the stenographic record to be fully transcribed at that party's expense. A party intending to offer a videotaped recording of a deposition in evidence shall notify all parties in writing of that intent and the parts of the deposition to be offered within sufficient time for a stenographic transcript to be prepared, and for objections to be made and ruled on before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the tape. The court shall permit further designations of testimony and objections as fairness may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the videotape be made, or that the person playing the tape at trial suppress the objectionable portions of the tape. In no event, however, shall the original videotape be affected by any editing process.

(H) After the deposition has been taken, the operator of the videotape equipment shall attach to the videotape a certificate that the recording is a correct and complete record of the testimony by the deponent. Unless otherwise agreed by the parties on the record, the operator shall retain custody of the original videotape. The custodian shall store it under conditions that will protect it against loss or destruction or tampering, and shall preserve as far as practicable the quality of the tape and the technical integrity of the testimony and images it contains. The custodian of the original videotape shall retain custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the tape be preserved for a longer period.

(I) The use of videotaped depositions shall be subject to rule 32.

(c) Examination and Cross Examination; Record of Examination; Oath; Objections. Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A judge of the superior court, or a special master if one is appointed pursuant to rule 53.3, may make telephone rulings on objections made during depositions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion To Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the

officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though signed unless on a motion to suppress under rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Service by Officer; Exhibits; Copies; Notice.

(1) The officer shall certify on the deposition transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. The officer shall then secure the transcript in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly serve it on the person who ordered the transcript, unless the court orders otherwise. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that:

(A) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; and

(B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition transcript and filed with the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition transcript to any party or the deponent.

(3) The officer serving or filing the deposition transcript shall give prompt notice of such action to all parties and file such notice with the clerk of the court.

(g) Failure To Attend or To Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by such party and such other party's attorney in attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in per son or by attorney because such party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by such other party and such other party's attorney in attending, including reasonable attorney fees.

(h) Conduct of Depositions. The following shall govern deposition practice:

(1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.

(3) Instructions Not To Answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30 (d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

(4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.

(5) Private Consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

(6) Courtroom Standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

[Originally effective July 1, 1967; amended effective July 1, 1972; April 2, 1979; September 1, 1985; September 1, 1988; September 1, 1989; September 1, 1993; September 1, 2005; April 20, 2015.]

RCW 5.51.010

Definitions.

In this chapter:

(1) "Foreign jurisdiction" means a state other than Washington state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(a) Attend and give testimony at a deposition;

(b) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(c) Permit inspection of premises under the control of the person.

[2012 c 95 § 2.]

RCW 5.51.020

Issuance of subpoena.

(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this chapter does not constitute an appearance in the courts of Washington state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena under subsection (2) of this section must:

(a) Incorporate the terms used in the foreign subpoena; and

(b) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

[2012 c 95 § 3.]

STATE OF CALIFORNIA
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State of California

CODE OF CIVIL PROCEDURE

Section 2025.450

2025.450. (a) If, after service of a deposition notice, a party to the action or an officer, director, managing agent, or employee of a party, or a person designated by an organization that is a party under Section 2025.230, without having served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, or to produce for inspection any document, electronically stored information, or tangible thing described in the deposition notice, the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

(b) A motion under subdivision (a) shall comply with both of the following:

(1) The motion shall set forth specific facts showing good cause justifying the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

(2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040, or, when the deponent fails to attend the deposition and produce the documents, electronically stored information, or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance.

(c) In a motion under subdivision (a) relating to the production of electronically stored information, the party or party-affiliated deponent objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(d) If the party or party-affiliated deponent from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of the undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(g) (1) If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(2) On motion of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of that party and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(h) If that party or party-affiliated deponent then fails to obey an order compelling attendance, testimony, and production, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010) against that party deponent or against the party with whom the deponent is affiliated. In lieu of, or in addition to, this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against that deponent or against the party with whom that party deponent is affiliated, and in favor of any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to that order.

(i) (1) Notwithstanding subdivisions (g) and (h), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

(Amended by Stats. 2012, Ch. 72, Sec. 24. (SB 1574) Effective January 1, 2013.)

CR 37
FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before the proponent applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure To Comply With Order.

(1) Sanctions by Court in County Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring the party to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or her or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure To Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(1) the request was held objectionable pursuant to rule 36(a); or

(2) the admission sought was of no substantial importance; or

(3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine; or

(4) there was other good reason for the failure to admit.

(d) Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails;

(1) to appear before the officer who is to take his or her deposition, after being served with a proper notice; or

(2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories; or

(3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) Failure To Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or such party's attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

[Adopted effective July 1, 1967; amended effective July 1, 1972; September 1, 1985; September 1, 1992; September 1, 1993; April 28, 2015.]

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Attorney for Joseph Padgett

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 6/13/2018 9:46 AM
Reviewed By: L. Wang
Case #16CV298149
Envelope: 1617517**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR SANTA CLARA COUNTY - UNLIMITED CIVIL JURISDICTION

THE LAW FIRM OF KALLIS & ASSOCIATES, P.C., et al., Plaintiffs, v. JOSEPH P. PADGETT, et al., Defendants.	No. 16CV298149 NOTICE OF ENTRY OF ORDER

TO PLAINTIFFS:

PLEASE TAKE NOTICE that on June 6, 2018, the court entered an order GRANTING defendant Joseph P. Padgett's motion for summary judgment, both as to your first amended complaint and as to his first amended cross-complaint. A copy of the order is attached hereto as Exhibit A.

Dated: June 13, 2018

Hugo Torbet
Attorney for Defendant

Proof of Service

I certify under penalty of perjury that:

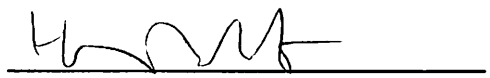
I am over the age of eighteen and not a party to this lawsuit. My business address is 3223 Webster St., San Francisco, CA 94123. I served the following:

Notice of Entry of Order,

by depositing true copies in a mailbox regularly maintained by the United States Postal Service, in San Francisco, CA, on June 13, sealed in envelopes, with postage prepaid, addressed as follows:

M. Jeffery Kallis
Attorney at Law
321 High School Rd., Suite D
Bainbridge Island, WA 98110, and

Robert Bustamante
Bustamante & Gagliasso
2150 Trade Zone Blvd., Suite 204
San Jose, CA 95131.



Hugo Torbet

Exhibit A

FILED
JUN 06 2018
Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
Robert Gutierrez

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

THE LAW FIRM OF KALLIS & ASSOCIATES, P.C., et al., Plaintiffs, vs. JOSEPH P. PADGETT, Defendant,	Case No. 16-CV-298149 ORDER RE: MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

The motion by defendant and cross-complainant Joseph P. Padgett ("Defendant") for summary judgment or, alternatively, summary adjudication came on for hearing before the Honorable James L. Stoelker on June 5, 2018, at 9:00 a.m. in Department 13. The matter having been submitted, the Court finds and orders as follows:

Factual and Procedural Background

This action arises out of the alleged non-payment of legal fees and costs incurred in connection with the prosecution of a federal civil rights lawsuit.

In September 2008, Defendant and his wife, Darla Padgett, (collectively, "the Padgetts") retained plaintiffs and cross-defendants The Law Firm of Kallis & Associates, P.C. ("K&A") and

Bustamante & Gagliasso, P.C. ("B&G") (collectively, "Plaintiffs") as their counsel in connection with a lawsuit filed against the City of Monte Sereno and members of the City Council, alleging violations of their civil rights. (First Amended Complaint ("FAC"), ¶¶ 22-23.) The Padgetts executed a written fee agreement ("Fee Agreement") with Plaintiffs, stating that Plaintiffs would provide legal services in connection with the federal civil rights lawsuit in exchange for payment of attorney fees and costs. (*Id.*, at ¶¶ 34-37, 39, 44, 48-49, 51, 53.) The Fee Agreement provided that the case would be handled as a modified contingency fee case. (*Id.*, at ¶¶ 35, 37, 39, 48-49, 51, 53, 55.) If the case went to trial, Plaintiffs would get twenty percent of the award plus their hourly attorney fees. (*Ibid.*) If the case settled, Plaintiffs would receive the greater of a set percentage of the total settlement or their hourly fee. (*Ibid.*) Plaintiffs would be entitled to one-third of any punitive damages award. (*Ibid.*) If the Padgetts fired Plaintiffs, they would pay Plaintiffs' hourly fees within ten business days of the date of termination and Plaintiffs would have a contractual lien for the reasonable value of their services. (*Ibid.*) The Fee Agreement also provided that the Padgetts would provide a retainer deposit in the amount of $144,000. (*Ibid.*) The Padgetts were also obligated to make timely payments for costs incurred by Plaintiffs in connection with the case. (*Ibid.*)

During the course of their representation of the Padgetts, Plaintiffs put on a three-week trial in federal district court. (FAC, ¶ 24.) At trial, Defendant prevailed on one cause of action; his wife did not prevail on any of her claims. (*Ibid.*) Subsequently, post-trial motions were filed and argued, and three appeals were filed. (*Id.*, at ¶ 25.) Plaintiffs represented the Padgetts in the appeals. (*Ibid.*)

Following the appeals, the Ninth Circuit Court of Appeals remanded the case to the district court for recalculation of the attorney fee award. (FAC, ¶ 26.) Prior to the submission of renewed motions for fees, Defendant asked the district court to relieve Plaintiffs as his counsel of record. (*Id.*, at ¶ 27.) The court subsequently relieved Plaintiffs as Defendant's counsel on October 11, 2013. (*Ibid.*)

Shortly after Defendant requested that Plaintiffs be removed as his counsel of record, Plaintiffs issued a written demand to Defendant for payment of their contract fees. (FAC, ¶ 40.)

The district court instructed Plaintiffs to file a motion for attorney fees for their work on the case and Defendant to file a motion for attorney fees for the work performed by his prior attorneys, McManus Faulkner. (*Id.*, at ¶ 28.) Defendant did not file a motion as instructed by the district court. (*Id.*, at ¶ 29.) The court ruled that "the reasonable lodestar amount of attorney fees and costs" for the worked performed on the case was $1,682,345.14 plus interest and the reasonable value of the services rendered was $1,682,345.14. (*Id.*, at ¶¶ 30-31.) However, the district court "ultimately awarded fees and costs of $520,586.28 due to limited success." (*Id.*, at ¶ 32.) Defendant "appealed that ruling to the Ninth Circuit Court of Appeals, but did not appeal the fee amount." (*Id.*, at ¶ 33.)

Plaintiffs allege that Defendant breached the Fee Agreement by failing to make any payments towards the $101,028 in costs incurred in connection with the lawsuit; failing to pay their hourly fees within ten business days of the date of their termination; refusing to pay any fees; refusing "to allow ... [them] to collect the respective attorneys' fees set by the District Court"; refusing to recognize their lien; refusing "to pay ... [them] the amount awarded by the Court or fees owed"; and failing to pay them one-third of the $10,000 punitive damages award. (FAC, ¶¶ 38, 40-42, 46, 48, 50, 52-55.)

Plaintiffs further allege, in the alternative, that if "there is no written contract" they should be awarded fees based on "the equitable principals [*sic*] of quantum meruit, unjust enrichment, and promissory estoppel." (FAC, ¶ 1.)

Based on the foregoing allegations, on July 26, 2016, Plaintiffs filed a complaint against Defendant. Approximately two months later, Plaintiffs filed the operative FAC against Defendant, alleging causes of action for: (1) breach of contract; (2) restitution; (3) quantum meruit; (4) promissory estoppel; (5) account stated; and (6) declaratory relief.

Defendant subsequently demurred to the FAC. On January 18, 2017, the Court issued its order on Defendant's demurrer, sustaining the demurrer without leave to amend as to the fourth cause of action for promissory estoppel and overruling the demurrer in all other respects.

A few weeks later, Defendant filed an amended answer to the FAC, generally denying the allegations of the FAC and alleging various affirmative defenses. As is relevant here, the

amended answer alleges that the Fee Agreement is unenforceable and void and Plaintiffs' second and third causes of action are time-barred by the statute of limitations.

Thereafter, on February 10, 2017, Defendant filed the operative first amended cross-complaint ("FAXC") against Plaintiffs, alleging a single cause of action for declaratory relief. In the FAXC, Defendant alleges that there is an actual controversy relating to the legal rights and duties of the parties under the Fee Agreement. (FAXC, ¶¶ 4-5.) Defendant alleges that the Fee Agreement is unenforceable because: (1) it does not comply with Business and Professions Code section 6147, subdivision (a) and it has been voided; and (2) "an undisclosed conflict of interest pervaded the attorney-client relationship between" him and Plaintiffs. (*Id.* at ¶ 6.) Defendant further alleges that paragraph 9 of the Fee Agreement "is ineffective to create a lien" because Plaintiffs "did not comply with Rule of Professional Conduct 3-300[ ] and because it is part of a contract which itself is not enforceable." (*Id.* at ¶¶ 7-8.) In light of the foregoing, Defendant seeks a declaration that the Fee Agreement is void and no lien was created by the Fee Agreement. (*Id.* at Prayer for Relief, ¶ 1.)

In November 2017, Defendant filed the instant motion for summary judgment or, alternatively, summary adjudication. The motion was originally set for hearing on February 8, 2018, but later continued to June 5, 2018.

On February 26, 2018, K&A filed a request for dismissal, without prejudice, of "[a]ll causes of action other than Quantium [*sic*] Meruit and injunctive relief" from the complaint. On the same day, the court clerk entered the dismissal as requested.

Subsequently, on May 16, 2018, B&G filed a request for dismissal, without prejudice, of "Counts 1; 4; 5; and 6 of the Complaint only." On the same day, the court clerk entered the dismissal as requested.

A few days later, on May 22, 2018, Plaintiffs filed papers in opposition to the pending motion for summary judgment or, alternatively, summary adjudication.

Discussion

Pursuant to Code of Civil Procedure section 437c, Defendant moves for summary judgment of the FAC and the FAXC. In the alternative, Defendant moves for summary adjudication of the first, second, third, fifth, and sixth causes of action of the FAC.[1]

I. Effect of Dismissals

As a preliminary matter, the Court considers the effect of Plaintiffs' dismissals on the instant motion. As indicated above, after the filing of the instant motion, Plaintiffs dismissed various claims from the FAC. Specifically, on February 26, 2018, K&A filed a request for dismissal, without prejudice, of "[a]ll causes of action other than Quantium [*sic*] Meruit and injunctive relief" from the complaint. On the same day, the court clerk entered the dismissal as requested. Thereafter, on May 16, 2018, B&G filed a request for dismissal, without prejudice, of "Counts 1; 4; 5; and 6 of the Complaint only." On the same day, the court clerk entered the dismissal as requested.

In their opposition papers, Plaintiffs acknowledge the filing of the dismissals and assert that, as a result of the filings, they dismissed all causes of action other than their claims for quantum meruit and declaratory relief. (Opp'n., p. 9:12-15.)

Plaintiffs are mistaken. First, in the February 26, 2018 dismissal, K&A dismissed "[a]ll causes of action other than Quantium [*sic*] Meruit and injunctive relief" from the FAC. Notably, the FAC does not allege a claim for injunctive relief. Thus, K&A dismissed all of its claims against Defendant except its third cause of action for quantum meruit. Second, in the May 16, 2018 dismissal, B&G dismissed "Counts 1; 4; 5; and 6" of the FAC. Thus, B&G dismissed all of its claims against Defendant except its second cause of action for restitution and third cause of action for quantum meruit.

In light of the foregoing, the Court finds that the motion for summary adjudication of the first, second, fifth, and sixth causes of action as alleged by K&A is MOOT. Additionally, the

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[1] Defendant also states that he moves for summary adjudication of the declaratory relief claim alleged in the FAXC. (Ntc. Mtn., pp. 2:7-3:4.) However, the only claim alleged in the FAXC is the claim for declaratory relief. As Defendant's motion, if successful, would dispose of the FAXC in its entirety, the motion directed at the FAXC is properly construed only as a motion for summary judgment. (See *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954 [summary judgment is appropriate if it disposes of the entire lawsuit].)

Court finds that the motion for summary adjudication of the first, fifth, and sixth causes of action as alleged by B&G is MOOT.

II. Requests for Judicial Notice

A. Defendant's Request

Defendant asks the Court to take judicial notice of: the original complaint; the FAC; the amended answer to the FAC; and the FAXC.

These documents are generally proper subjects of judicial notice as they are court records relevant to issues raised by the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 (*Lockyer*) ["There is … a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue."]; *People v. Woodell* (1998) 17 Cal.4th 969B, 455 (*Woodell*) ["Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached-in the documents such as orders, statements of decision, and judgments-but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.'"].)

Accordingly, Defendant's request for judicial notice is GRANTED as to the existence of the subject court records.

B. Plaintiffs' Request

Plaintiffs ask the Court to take judicial notice of: the docket in the underlying federal civil rights action; orders and judgments entered in the underlying federal civil rights action; Business and Professions Code section 6147, subdivision (b); Code of Civil Procedure section 339; and "[a]ll documents Defendant requested judicial [n]otice of." (Opp'n. RJN, p. 2:1-6.)

As an initial matter, the court docket in the underlying federal civil rights case is a proper subject of judicial notice under Evidence Code section 452, subdivision (d). (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 960 [taking judicial notice of superior court docket].)

Next, the documents filed in the underlying federal civil rights case are generally proper subjects of judicial notice as they are court records relevant to issues raised by the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Lockyer, supra,* 24 Cal.4th at p. 422, fn. 2 ["There is … a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue."]; *Woodell, supra,* 17 Cal.4th at p. 455 ["Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached-in the documents such as orders, statements of decision, and judgments-but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.'"].)

Business and Professions Code section 6147, subdivision (b) and Code of Civil Procedure section 339 are also proper subjects of judicial notice under Evidence Code sections 451, subdivision (a) and 452, subdivision (a). (See Evid. Code, §§ 451, subd. (a) [courts must take judicial notice of the decisional, constitutional, and public statutory law of California and the United States] and 452, subd. (a) [courts may take judicial notice of the decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state].)

Finally, as previously articulated, the pleadings filed in this action are generally proper subjects of judicial notice. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Lockyer, supra,* 24 Cal.4th at p. 422, fn. 2 ["There is … a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue."]; *Woodell, supra,* 17 Cal.4th at p. 455 ["Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached-in the documents such as orders, statements of decision, and judgments-but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.'"].)

Accordingly, Plaintiffs' request for judicial notice is GRANTED as to the court docket in the underlying federal civil rights case, the existence of the documents filed in the underlying federal civil rights case (and the truth of the results reached in orders and judgments), Business and Professions Code section 6147, subdivision (b) and Code of Civil Procedure section 339, and the existence of the court records filed in this action.

III. Legal Standard on Motions for Summary Judgment or Adjudication

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Super. Ct.* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a).) "Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' " (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272, internal citations omitted.)

Where a plaintiff moves for summary judgment, the plaintiff bears the initial burden of showing that there is no defense to a cause of action by proving each element of the cause of action entitling the plaintiff to judgment. (Code Civ. Proc., § 437, subd. (p)(1); *Paramount Petroleum Corporation v. Super. Ct.* (2014) 227 Cal.App.4th 226, 241.) If the plaintiff makes

such a showing, the burden then shifts to the defendant to show that a triable issue of one or more material facts exists as to a cause of action or a defense thereto. (*Ibid.*)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).) ... Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464 (*Hartline*).)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny summary judgment on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Super. Ct.* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Super. Ct.* (1977) 70 Cal.App.3d 656, 660.) As summary judgment "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing summary judgment and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-18.)

IV. Substantive Merits of the Motion

Following Plaintiffs' dismissals, the matters that remain before the Court are: Defendant's the motion for summary judgment of the FAXC; Defendant's motion for summary judgment of the FAC, which now consists of the second cause of action, only as alleged by B&G, and the third cause of action; and Defendant's alternative motion for summary adjudication of the second cause of action, only as alleged by B&G, and the third cause of action.

A. Motion as to the FAXC

Defendant argues that he is entitled to summary judgment of the FAXC because there is no defense to his cause of action for declaratory relief, which seeks a declaration that the Fee Agreement is void and no lien was created by the Fee Agreement. (FAXC, Prayer for Relief, ¶ 1.) Defendant contends that the Fee Agreement is void and unenforceable because it does not

comply with Business and Professions Code section 6147, subdivision (a) and he elected to void the Fee Agreement on January 24, 2017. Defendant further asserts that no lien was created by the Fee Agreement because the Fee Agreement—the only basis for the lien—is void.

In support of his arguments, Defendant proffers a copy of the Fee Agreement, a January 24, 2017 letter voiding the Fee Agreement, and Plaintiffs' responses to requests for admission.

Defendant's arguments are well-taken. Business and Professions Code section 6147 states, in relevant part:

> (a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:
>
> ...
>
> (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.
>
> ...
>
> (b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(Bus. & Prof. Code, § 6147.)

"Where ... a client exercises his right to void a contingency fee agreement, section 6147 does not permit the trier of fact to consider the contingent nature of the fee arrangement in determining a reasonable fee. If the contingency fee agreement is void, there is no contingency fee arrangement. 'A void contract is no contract at all; it binds no one and is a mere nullity. [Citation.] Consequently, such a contract cannot be enforced. [Citation.]' [Citation.]" (*Fergus v. Songer* (2007) 150 Cal.App.4th 552, 573.) It therefore follows that if a client decides to void a contingency fee agreement, then the lien within that agreement would be voided with it. (See

Hartford Life & Acc. Ins. Co. v. White (N.D. Cal., June 25, 2010, No. C09-05668) 2010 WL 2573926, at *4.)

Here, it is undisputed that the Fee Agreement was handled as a modified contingency fee case. (FAC, ¶¶ 35-36; D's Undisputed Material Fact ("UMF"), Issue 1, Nos. 1-2 and Issue 2, No. 2.) In other words, the Fee Agreement was a hybrid agreement whereby Defendant was charged both contingent and hourly fees. (FAC, ¶¶ 35-36, 39.) The requirements of Business and Professions Code section 6147 apply to hybrid agreements. (*Arnall v. Super. Ct.* (2010) 190 Cal.App.4th 360, 371.) Thus, that statute applies to the parties' Fee Agreement. Furthermore, as Defendant persuasively argues, Plaintiffs did not comply with Business & Professions Code section 6147 because the Fee Agreement does not include the requisite language that "the fee is not set by law but is negotiable between attorney and client." (Padgett Dec., Ex. A; D's UMF, Issue 1, No. 3 and Issue 2, No. 3.) The undisputed evidence further demonstrates that Defendant elected to void the Fee Agreement on January 24, 2017, and Plaintiffs admitted that the Fee Agreement is void and unenforceable. (Padgett Dec., Ex. B; Torbet Dec., Exs. L-s and M-2; D's UMF, Issue 1, Nos. 4-5 and Issue 2, Nos. 4-5.)

This evidence sufficiently establishes that the Fee Agreement is now void as well as any lien that the Fee Agreement purported to create.

In opposition, Plaintiffs explicitly concede that the Fee Agreement is void as of January 24, 2017 (Opp'n., p. 5:21-23), and they do not oppose the motion to the extent it seeks summary judgment of the FAXC. Therefore, Plaintiffs do not raise a triable issue of material fact as to the FAXC.

Accordingly, Defendant's motion for summary judgment of the FAXC is GRANTED.

B. Motion as to the FAC

Following Plaintiffs' dismissals, the FAC as alleged by K&A consists only of the third cause of action for quantum meruit, and the FAC as alleged by B&G consists only of the second and third causes of action for restitution and quantum meruit, respectively.

In the second cause of action for restitution, B&G alleges that the court in the underlying federal civil rights action awarded Defendant a judgment for attorney fees that was intended for

its benefit and "was for the provision of [its] legal services to [Defendant]." (FAC, ¶¶ 61-62.) Defendant allegedly sought court approval that the fees were his property, not B&G's property "despite the agreement to the contrary." (*Id.* at ¶¶ 63 and 65.) B&G further alleges by keeping the judgment, Defendant denied it the benefit of the money. (*Id.* at ¶ 64.)

In the third cause of action for quantum meruit, Plaintiffs allege that they performed legal services for Defendant, at his request, in the underlying federal civil rights case from September 9, 2008 and October 11, 2013. (FAC, ¶¶ 66-69.) The reasonable value of the legal services provided by Plaintiffs "was determined by the District Court to be $1,682,345.14." (*Id.* at ¶ 70.) In addition, Plaintiffs "expended $101,028 in expenses that [Defendant] is responsible for and has not paid for these costs." (*Id.* at ¶ 71.) The court in the underlying federal civil rights case allegedly "awarded $100,000 in costs that [Defendant] owes to Plaintiffs." (*Ibid.*) Lastly, Plaintiffs allege that Defendant has not paid for any of the services rendered to him. (*Id.* at ¶ 72.)

As an initial matter, Defendant contends the second cause of action for "restitution by unjust enrichment" is not legally cognizable because unjust enrichment is not a cause of action; unjust enrichment is a general principle synonymous with restitution; the right to restitution is quasi-contractual and may be brought as an action for the reasonable value of services, i.e., a claim for quantum meruit; Plaintiffs are suing for the reasonable value of their services; and a claim for restitution cannot be stated when a separate claim for quantum meruit is also alleged.

Defendant's argument is not well-taken. Although there "is no cause of action in California for unjust enrichment" (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793), unjust enrichment is synonymous with restitution (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1314) and courts will overlook the label of a cause of action to determine whether a claim warranting restitution has been stated (*McBride v. Houghton* (2004) 123 Cal.App.4th 379, 387-88). Moreover, Defendant concedes that the second cause of action states a claim for restitution of the reasonable value of Plaintiffs' services. Finally, Defendant is not entitled to summary adjudication of the claim simply because it may be duplicative of the third cause of action for quantum meruit. A defendant is only entitled to summary adjudication of a claim if the defendant shows that one or more of its elements

cannot be established or that there is a complete defense. (See Code Civ. Proc., § 437c, subd. (f); *Hartline, supra,* 132 Cal.App.4th at p. 464 ["Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' "].) The fact that the second cause of action may be duplicative of the third cause of action does not show that one or more of its elements cannot be established or that there is a complete defense to the claim.[2]

Next, Defendant argues that the second and third causes of action are time-barred by the applicable statute of limitations. Defendant contends that the two-year statute of limitations provided by Code of Civil Procedure section 339 governs both claims. He asserts that the statute of limitations accrued on October 11, 2013, when the federal court in the underlying civil rights action formally relieved Plaintiffs of their representation of him. Defendant cites *Cullinan v. McColgan* (1927) 87 Cal.App. 684 and *E.O.C. Ord, Inc. v. Kovakovich* (1988) 200 Cal.App.3d 1194 to support his contention that a cause of action for quantum meruit accrues on the date the lawyer's services are terminated or the date on which the lawyer's services are completed, if later than the date of termination. Defendant also states that he terminated Plaintiffs on July 28, 2013, and Plaintiffs did not perform any work on his behalf after they were terminated. Defendant concludes that this action is time-barred because this lawsuit was filed on July 26, 2016, more than two years after October 11, 2013.

In opposition, Plaintiffs agree that the facts before the Court are undisputed and the two-year statute of limitations provided by Code of Civil Procedure section 339 applies. However, they contend that the statute of limitations accrued either on January 24, 2017, when the Fee Agreement was voided by Defendant, or it has yet to accrue because the contingency—Defendant's receipt of recovery from the underlying judgment—has not occurred. Plaintiffs assert that their claim for quantum meruit was not ripe until Defendant voided the Fee Agreement. They point out that a claim for quantum meruit cannot be brought while the parties have an actual contract covering compensation and Business and Professions Code section 6147,

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[2] The case relied upon by Defendant to support his contention to the contrary—*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 (*Jogani*)—is not persuasive. *Jogani* neither provides that a claim for restitution based on unjust enrichment should be summarily adjudicated because it is duplicative of another claim nor addresses the legal standard on summary judgment/adjudication.

subdivision (b) states that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall *thereupon* be entitled to collect a reasonable fee." (Bus. & Prof. Code, § 6147, subd. (b), italics added.) Plaintiffs also assert that *Chambers v. Kay* (2002) 29 Cal.4th 142 (*Chambers*) and *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453 (*Huskinson*) "state that the statute of limitations on a quantum meruit claim for attorneys' fees arising from an unenforceable fee agreement accrues when the client receives recovery from the underlying judgment." (Opp'n., p. 16:4-8.)

On the issue of accrual of the statute of limitations, the recent case of *Leighton v. Forster* (2017) 8 Cal.App.5th 467 (*Leighton*) is instructive. In *Leighton*, the Court of Appeal held that an attorney fee contract violated Business and Professions Code section 6148, subdivision (a) because there was no written fee contract. (*Leighton, supra,* 8 Cal.App.5th at p. 486.) The court further held that the contract was void because the client exercised her option to void an attorney fee agreement under section Business and Professions Code 6148, subdivision (c). (*Id.* at p. 487.) That subdivision states that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, *upon the agreement being voided*, be entitled to collect a reasonable fee." (Bus. & Prof. Code, § 6148, subd. (c), italics added.)

The Court of Appeal also held that the attorney's quantum meruit claim was time-barred by the two-year statute of limitations set forth in Code of Civil Procedure section 339. (*Leighton, supra,* 8 Cal.App.5th at p. 490.) Explaining its holding, the court opined, "[w]here the claim of quantum meruit is based upon services performed under a contract that was void or voidable, the limitations period commences to run on either the date the last payment was made toward the attorney fees, or the last date that the attorney performed services in the case. [Citation.]" (*Ibid.*) The Court of Appeal further explained:

> In the present case, appellant filed her complaint against Rochelle in June 2012, three years 10 months after she formally terminated her limited scope representation of the Forsters. By that time, a cause of action to recover the reasonable value of appellant's services from Rochelle pursuant to a common

count for quantum meruit or by virtue of any other obligation not founded in a writing was barred by the two-year statute of limitations governing such claims. [Citation.]

(*Ibid.*)

The statute at issue here, Business and Professions Code section 6147, subdivision (b), is virtually identical to the statute at issue in *Leighton,* Business and Professions Code section 6148, subdivision (c). Both statutes provide that a failure to comply with any provision of the respective sections renders the agreement voidable at the option of the plaintiff and, upon the agreement being voided, the attorney is entitled to collect a reasonable fee. (Bus. & Prof. Code, §§ 6147, subd. (b) ["Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall *thereupon* be entitled to collect a reasonable fee."] and 6148, subd. (c) ["Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, *upon the agreement being voided*, be entitled to collect a reasonable fee."], italics added.) It follows that the Court of Appeal's holding in *Leighton*—that where a claim to recover the reasonable value of services is based upon services performed under a contract that was void or voidable, the limitations period commences to run on either the date the last payment was made toward the attorney fees or the last date that the attorney performed services in the case—applies in this case as well.

The cases cited by Plaintiffs do not compel a different conclusion. *Chambers* and *Huskinson* in no way stand for the proposition "that the statute of limitations on a quantum meruit claim for attorneys' fees arising from an unenforceable fee agreement accrues when the client receives recovery from the underlying judgment." (Opp'n., p. 16:4-8.) In fact, the issue of accrual of the statute of limitations was not an issue before the California Supreme Court in either case. In *Chambers*, the court expressly states,

> The Court of Appeal also reversed the trial court's ruling that the two-year statute of limitations (Code Civ. Proc., § 339) bars the quantum meruit claim. To the extent Kay argues in his brief that the Court of Appeal decided that issue

> incorrectly, or contends that Chambers has no right to recover the reasonable costs of services rendered, even under a quantum meruit theory, because of the absence of written client consent to the agreed fee division, he has forfeited the issues by failing to petition for their review.

(*Chambers, supra,* 29 Cal.4th at p. 162.) Thus, the court had no occasion to address the accrual of the statute of limitations. In *Huskinson*, the court simply makes no reference whatsoever to the statute of limitations. Consequently, these cases do not undermine *Leighton.*

At oral argument, plaintiff emphasized that the accrual date could not have occurred until January 8, 2018, the date on which the Ninth Circuit decision vacated the prior award of attorney fees by the District Court. In essence, plaintiffs claim that the applicable statute of limitations accrual date under *Leighton* was tolled because of the pending appeal. However, "acting with due caution against the possibility of a negative outcome to the attorneys" plaintiffs filed this action on July 26, 2016 with the understanding that the applicable statute of limitations was four years. Plaintiffs provide no authority for their proposition that the appeal tolled the statute. More importantly, plaintiffs do not adequately explain why the last element necessary for the cause of action did not occur on July 28, 2013, the date that the services of the firms were terminated. Likewise, plaintiffs do not provide justification for reasonable reliance that the District Court had awarded fees directly to the firm rather than to Padgett. Therefore, the vacation of the award was irrelevant to the recovery of fees by the firm and did not impact the previously accrued cause of action based on quantum meruit.

When the accrual rule set forth in *Leighton* is applied to the facts of this case, it is readily apparent that Plaintiffs' remaining claims are time-barred by the applicable statute of limitations. The undisputed facts establish that Plaintiffs were formally terminated and did not perform any services for Defendant after October 11, 2013. (D's UMF, Issue 3, Nos. 1-5.) Additionally, this lawsuit was filed on July 26, 2016, more than two years after the last date that Plaintiffs performed services for Defendant. (D's UMF, Issue 3, Nos. 6-7.) Consequently, Defendant meets his initial burden to demonstrate that the second and third causes of action are time-barred by the statute of limitations.

As Plaintiffs concede that the material facts relevant to this issue are undisputed, they fail to raise a triable issue of material fact.

Accordingly, Defendant's motion for summary judgment of the FAC is GRANTED.

June 1, 2018

James L. Stoelker
Judge of the Superior Court

JOSEPH PADGETT - FILING PRO SE

October 22, 2018 - 2:03 PM

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