Supreme Court No. 97395-4
Court of Appeals No. 74512-3-I

IN THE WASHINGTON SUPREME COURT

SANDRA FERGUSON, ET AL.,
Petitioner/Appellant/Plaintif,

v.

BRIAN J. WAID, ET AL.
Respondent/Appellee/Defendent.

Petition of Court of Appeals Decision

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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A. Ferguson did not "abandon" her claim of Economic Duress. Ferguson raised this issue in her appellate brief when she recited the undisputed facts of Waid's acts, errors, and omissions as Ferguson's attorney in the underlying matter. This goes to the heart of Ferguson's malpractice and CPA claims which will be tried before a jury. 4

B. Waid refers to the District Court's Findings of Fact and Conclusions of Law. The findings and conclusions are irrelevant and resulted from Waid's witness, Kathleen Nelson's perjury. The perjury is an uncontroverted fact. 5

C. Contrary to Waid's assertion, Ferguson has established grounds for review. The April 15, 2019 opinion conflicts with Division I holding in *Ferguson v. Teller*, conflicts with this Court's opinion in *Ross v. Scannell*, and conflicts with Division I's own decisions in *Suleiman v. Cantino* and *Wilson v. Henkle*. The opinion also conflicts with Division 2's decision in *Aiken, St. Louis & Siljeg, P.S. v. Linth.* Division 2 continues to follow *Ross v. Scannell*. 5

D. Contrary to Waid's assertion, the trial court did not prevent Waid from adjudicating his fee-claim after remand in *Ferguson v. Teller*. 7

E. Ferguson's Petition for Review is not frivolous. 8

F. Appendix

(1) COA Opinion in appeal from Ferguson v. Waid, 14-2-29265-1 SEA, dated 4/15/2019, No. 74512-3-I (Unpublished)
(2) Order denying reconsideration, No. 74512-3-I
(3) RCW 60.40 Attorney Lien Statute
(4) RCW 19.86 Consumer Protection Act

(5) General Rule of Appellate Procedure 14 (re: unpublished opinions now can be cited as persuasive).
(6) Ferguson v. Teller, published, No. 69220-8-I (lined with No. 68329-2-I)
(7) Ferguson v. Teller, unpublished, No. 68329-2-I (linked with 69220-8-I)

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Petitioner's Reply to Part II of Respondent's "Rejoinder Re: Decision Below.

In its April 15, 2019 opinion, Division I reversed the trial court's order dismissing Waid's counterclaim to fees because it finds that Waid is not barred by the doctrine of res judicata from litigating his claim for attorney's fees multiple times. First, in his client's case (*Ferguson v. Teller*), by filing his lien-notice and invoking summary adjudication, successfully appealing the trial court's order invalidating his lien, then re-litigating his fee-claim in this case, where he is the defendant and the same former client against whom he filed his lien, is suing him for malpractice and false and deceptive business practices in violation of the Consumer Protection Act. Division I's reasons that the strict-construction rule enunciated by this Court in *Ross v. Scannell*, 97 W.2d 598, 647 P.2d 1004 (1982) is no longer binding on the lower courts (i.e., "[T]he attorney lien statute must be strictly followed and not judicially expanded…"). Division I reasons that strict construction of the attorney-lien statute is no longer binding because the legislature intended to overrule or correct the Court's decision in Ross when it enacted the 2004 amendments to RCW 60.40.010 **"significantly changed the statute"** to grant **"super priority"**

powers to the attorney's charging lien.[1] Thus, Division I concludes that its prior attorney-lien decisions in *Suleiman v. Cantino*, 35 Wn.App. 602, 656 P.2d 1122 (1983) and *Wilson v. Henkle*, 45 Wn.App. 162, 724 P.2d 1069 (1986)—two pre-amendment attorney lien cases it decided in compliance with *Ross*—are no longer good law. Petitioner asks this Court to grant this petition for review and decide whether Division I has correctly interpreted Legislature's purpose behind the 2004 amendments to the attorney-lien statute. This is a matter of the utmost importance to members of the legal profession, their clients, the general public, and the lower courts which need guidance as to the proper rule for interpretation of the amended attorney-lien statute. The question for this Court to decide os whether the strict-construction rule enunciated in *Ross v. Scannell* is still binding on the lower courts. S*ee, Respondent's Answer To Petition for Review ("Resp.'s Answer"), at p. 2 (quoting Ferguson v. Waid, 2019 WL 1644134 *8 (Div. 1, April 15, 2019) (Unpublished)*).

<u>Reply to Part IV of Waid's Answer</u>: Waid's statements of fact are disputed. The disputes of fact will be resolved by a jury.

[1] This view of the purpose and effect of the 2004 amendments to RCW § 60.40.010 first appears as pure dicta in *Smith v. Moran, Windes & Wong, PLLC,* 145 Wash.App. 459, 469 (¶¶ 24, 26-27), 187 P.3d 275, 281 (Div. 1, 2008). This dicta planted the seed that would fully flower in *Ferguson v. Teller*, 178 Wn.App. 622, 632 (Ferguson's and Teller's earnings from the Endres case, deposited and held in the court registry of the Teller case by Waid, constituted "proceeds received in the action" and therefore, were properly subject to Waid's lien filed and extensively litigated in *Ferguson v. Teller*, 11-2-19221-1 SEA.

In Part IV ("Statement of the Case") Waid contains Waid's version of the facts he will try to present to the jury in *Ferguson v. Waid, 15-2-28797-5 SEA*. *See Waid's Answer, pp. *** For almost four years, Waid has delayed the trial of Ferguson's malpractice and CPA claims against him, while he has appealed the trial court's adverse rulings. On April 15, 2019, Division I resolved Waid's appeal.[2] Ferguson is finally able to proceed to trial with her claims. CP ** Therefore, a jury will consider the evidence presented by the parties and will decide whether Waid committed malpractice, or not.[3] Also, the jury will decide whether Waid engaged in unfair or false and deceptive business practices in violation of Washington's Consumer Protection Act (CPA) while representing Ferguson in the underlying matter (i.e., the *Endres* and *Teller* cases).[4]

Petitioner's Reply to Part V of Answer: Respondent's Arguments.

[2] Waid appealed from several orders of the trial court in Ferguson v. Waid, 14-2-29265-1 SEA. Waid requested and obtained an order of involuntary dismissal of Ferguson's case without prejudice pursuant to CR 41, Ferguson re-filed and a new case schedule was issued under a new cause number, Ferguson v. Waid, 15-2-28797-5 SEA. Waid sought and obtained a stay of the 2015 action while he pursued his appeal. Ferguson will be proceeding to trial under the 2015 cause number.

[3] Ferguson's expert witness, Peter Jarvis, will testify at trial to assist the jury in understanding the evidence of malpractice. See, Declaration of Peter Jarvis. CP**. See also, Declaration of Richard Kilpatrick, Ferguson's former expert witness and a fact witness to the facts and circumstances surrounding Waid's contested withdrawal from *Ferguson v. Teller* on February 10, 2012. At trial, Kilpatrick will testify in his capacity as a fact witness. CP **

[4] The trial will proceed under a different cause number, *Ferguson v. Waid, 15-2-28797-5 SEA.*

A. Ferguson did not "abandon" her claim of Economic Duress. Ferguson raised this issue in her appellate brief when she recited the undisputed facts of Waid's acts, errors, and omissions as Ferguson's attorney in the underlying matter. This goes to the heart of Ferguson's malpractice and CPA claims which will be tried before a jury.

See, Ferguson's appellate brief.[5] In fact, it is an undisputed fact on the record that Ferguson *did* object to Waid's fees as soon as she retained an attorney to replace Waid (i.e., John Muenster). Muenster promptly entered into a stipulation and order with opposing counsel to obtain the release of Ferguson's undisputed funds from the court registry. However, by this time, Ferguson's clear title to $265,000 was clouded by Teller's pending CR 11 motion for sanctions of $102,000 (captioned as "Motion to Disburse" this money to Teller from Ferguson's previously undisputed $265,000 being held in the registry). Ferguson's $265,000 was also attached by Waid's lien-notice asserting his right to $78,350.85 in unpaid fees. Therefore, approximately $85,000 was immediately disbursed to Ferguson. Then, Muenster filed a motion to invalidate Waid's lien and to set it aside. The trial court granted that motion and held that Waid's lien was invalid. *See Resp.'s Answer, pp. 10-11.*

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B. Waid refers to the District Court's Findings of Fact and Conclusions of Law. The findings and conclusions are irrelevant and resulted from Waid's witness, Kathleen Nelson's perjury. The perjury is an uncontroverted fact.

Ferguson waived trial and did not present witnesses or evidence at the trial. Therefore, the District Court's findings and conclusions are based on Waid's testimony and the perjured testimony of his only witness, Kathleen Nelson. Ferguson appealed the District Court's pretrial rulings on pure issues of law. The Ninth Circuit denied Waid's motion to summarily dismiss Ferguson's appeal. The Ninth Circuit recently notified the parties that it is considering hearing oral argument from the parties. The perjury of Kathleen Nelson during the trial is uncontroverted. See, Appendix (Rains letters).

C. **Contrary to Waid's assertion, Ferguson has established grounds for review. The April 15, 2019 opinion conflicts with Division I holding in *Ferguson v. Teller*[6], conflicts with this Court's opinion in *Ross v. Scannell*[7], and conflicts with Division I's own decisions in *Suleiman v. Cantino*[8] and *Wilson v. Henkle*[9]. The opinion also conflicts with Division 2's decision**

[6] *Ferguson v. Teller*, 178 Wn.App. 622, 316 P.3d 509 (Div.1, 2013).
[7] *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982).
[8] *Suleiman v. Cantino,* 33 Wn.App. 602, 656 P.2d 1122 (Div.1, 1983).
[9] *Wilson v. Henkle,* 45 Wn.App. 162, 724 P.2d 1069 (Div. 1, 1986).

in *Aiken, St. Louis & Siljeg, P.S. v. Linth.*[10] Division 2 continues to follow *Ross v. Scannell*.

See opinions cited above. Furthermore, Division I's April 15, 2019 opinion conflicts with its December 30, 2012 opinion, involving the same parties and the same subject matter. Therefore, Division I's opinion at issue here, violates the law of the case doctrine. In 2013, Division I held that the trial court's order invalidating Waid's lien had the effect of a final judgment and therefore, Waid had the right to appeal that decision. *See Ferguson v. Teller*, at 628-30. In its April 15, 2019 opinion, as Waid points out, the court held to the contrary, concluding that "the record makes clear that no court ever issued a final judgment" regarding Waid's fee-claim against Ferguson. *See, Resp.'s Answer, p. 2 (citing Ferguson v. Waid, 2019 WL 1644134 *8 (Division I, April 15, 2019) (unpublished)).*

In 2012, Ferguson appealed from the trial court's final judgment in *Ferguson v. Teller*, based on fraud she alleges Waid,

[10] *Aiken, St. Louis & Siljeg, P.S. v. Linth*, 195 Wash.App. 10, 380 P.3d 565, 571 (Div. 2, 2016) (holding nowhere in the legislative history is there any suggestion that the right to seek enforcement of an attorney's lien "equates to the right to control the underlying litigation to satisfy the attorney's interest [in fees]".

her own attorney, perpetrated on her and her former clients (the Endres plaintiffs). Division I affirmed the trial court's summary judgment order in favor of Teller in an unpublished opinion.[11] The court refused to consider Ferguson's evidence of fraud on appeal, because the evidence was not before the trial court at summary judgment. Instead, the evidence was submitted to the trial court after summary judgment when Ferguson filed a pro se motion for reconsideration. *See Appendix hereto (Ferguson v. Teller (unpublished opinion)).*

D. Contrary to Waid's assertion, the trial court did <u>not</u> prevent Waid from adjudicating his fee-claim after remand in *Ferguson v. Teller*.

After Division I held that Waid's fee claim was <u>not</u> moot because there was $290,000 remaining in the court registry and that the trial court erred when it invalidated Waid's lien because the proceeds from the *Endres* case which were earned by Ferguson and Teller long before Waid was retained, constituted "proceeds received in the [*Ferguson v. Teller*] action". Therefore, Division I remanded Waid's fee-claim for summary adjudication by the trial court. But, Waid declined to pursue

[11] See Appendix.

summary adjudication and in the absence of any affirmative steps by Waid to pursue his fee-claim to a final judgment, the $290,000 in the registry was disbursed to Teller. In Division I's April 15, 2019 opinion, the appellate court holds that Waid is allowed to re-litigate his fee-claim in this case because *Ross v. Scannell* was legislatively overruled by the 2004 amendments to the attorney-lien statute. Division I's April 2019 opinion erroneously states that it is "understandable" that Waid failed to pursue summary adjudication after remand. *April 15, 2019 Op., p. 15 (footnote 12).* And, Waid states that he could not have adjudicated his fee-claim because it was "moot". *Resp.'s Answer, p. 2.* Neither statement is accurate. The record is clear: Waid's fee-claim was remanded in December 2013. Ferguson filed a motion for discretionary review which the Washington Supreme Court denied in July 2014, and the $290,000 in the court registry was disbursed to Teller two months later, in September 2014. Therefore, it is clear that Waid had ample opportunity to finish the litigation he started in Ferguson v. Waid by filing his lien for attorney's fees which attached to the funds in the registry.

E. Ferguson's Petition for Review is not frivolous**.**

It is in the public interest for the Court to grant this petition and decide whether *Ross v. Scannell* is binding on the lower courts, or whether the 2004 amendments to the attorney-lien statute were intended to overrule, supersede, or correct this Court's holding in *Ross*.

DATED this 30th day of July, 2019.

s/Sandra L. Ferguson
Sandra L. Ferguson, Pro se
Petitioner

THE FERGUSON FIRM

July 30, 2019 - 4:48 PM

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