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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY *W*
DEPUTY

No. 40301-3-II

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

JAMES and DEBRA PRUITT
Appellants,

v.

PIERCE COUNTY,
Respondent.

APPELLANTS PRUITTS' REPLY BRIEF

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ORIGINAL

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I. ANALYSIS

A. THE COURT ERRED IN GRANTING SUMMARY JUDGEMENT ON ISSUE OF FRAUD

1. Standard of Review Requires Reversal.

The Court erred by granting Respondents' Summary Judgment Motion based on its finding that Appellant's attorney committed fraud.

When reviewing a summary judgment order, the appellate court makes the same inquiries as a trial court. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006).

The court considers all the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

The Court considers all legal questions de novo. *Cowlitz Stud Co.*, 157 Wn.2d at 573.

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party shows that he or she is "entitled to a judgment as a matter of law." CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co.*, 164 Wn.2d at 552.

"The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law." Consequently, "[t]he nonmoving party avoids summary judgment when it 'set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" *Ranger Ins. Co.*, 164 Wn.2d at 552 (alteration in original) (quoting *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986)).

Any doubts as to the existence of factual disputes must be resolved against the moving party, here, the County. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990).

2. County Failed to Establish by Undisputed Facts or as a Matter of Law that Fraud Occurred.

To prove Fraud, the County should have been required to establish each the following nine elements by clear, cogent, and convincing and undisputed evidence, which they did not:

- (1) Appellants' counsel made a representation of an existing fact;
- (2) the factual representation was material;
- (3) it was false;
- (4) Appellants' counsel knew it was false;
- (5) Appellants' counsel intended that the County act on the false representation;
- (6) The County was ignorant of the falsity of the representation;
- (7) The County relied on the false representation;

- (8) The County had a right to rely on this representation; and
- (9) The County suffered damages due to its reliance on the false representation.

Stiley v. Block, 130 Wn.2d 486, 504-505, 925 P.2d 194 (1996); *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

Failure to establish just **one** of the nine elements of fraud renders summary judgment inappropriate. *Id.* The County established **none** of the elements of fraud sufficient to prevail against Summary Judgment standards. The Court erred in so finding.

3. Facts don't show Fraud.

The County concedes the basic facts, where parties created and exchanged multiple version of a settlement agreement, where the County's attorney had the opportunity to review all drafts, but only selectively reviewed or in some cases, failed to review some drafts at all. CP 434-35, 574, 590.

Date	Version	Offered By	Release clause	Changes admitted?	Read by County attorney?
2/12/08	1st	Appellant's counsel ¹	mutual	n/a	YES
3/3/2008 MONDAY	2nd	Appellant's counsel	mutual	Yes, filled in some "blank spots" ²	NO
3/4/2008 TUESDAY	3rd	Appellants' counsel	Unilateral	Yes, "there were a number of provisions that were not	NO

¹ CP 537, 559-63

² CP 543

				relevant so they have been omitted” ³	
3/6/2008 THURSDAY	4 th	Respondents’ Counsel	mutual	?	
3/12/2008 WEDNESDAY	5 th	Appellants’ Counsel	Unilateral	Yes: “I made some modifications to your proposed settlement Agreement. I hope there is not an issue with my modifications; I don’t think they change the substance of the document.” ⁴	??
3/13/2008 THURSDAY	6 th	Appellants counsel	Unilateral	Yes, admittedly CP 713-14	??

It is further undisputed that each time Appellant’s then counsel made revisions, she called them out to opposing counsel the County’s attorney. Each time changes were made, Appellant’s counsel **admitted** changes were made: *filled in* “blank spots” CP 543, *omitted* “a number of provision that were not relevant” CP569, “I **made modifications** to your proposed Settlement Agreement. I hope there is not an issue with **my modifications**”. CP 581.

The County’s timeline correctly describes the timeline of when the first three versions were provided to the County’s attorney (Version 1- February 12, 2008; Version 2 March 3, 2008, Version 3 March 4, 2008) but then *curiously* describes that *after* Version 3, Guernsey “in the meantime,

³ CP569

⁴ CP 581 emphasis added

took a hard copy of McMahan's first version to her home to work on over the weekend" (County brief at 10), and "Guernsey emailed her draft to McMahan on March 6, 2008" County brief at 11.

However, March 4, 2008 the date Version 3 was created and sent to Guernsey is a Monday, and thereafter Guernsey sent her Version 4 on March 6, 2008 (CP 574), which is a Thursday. So there was no intervening weekend as the County claims. In sum, the County offers no explanation as to why Respondent County's attorney fails to review Version 2, and dismissively the County states that she apparently simply chose not to review Version 3, CP 434-5. CP 224-299; CP 228.

Then, as to why Respondent's counsel failed to review the release language of Version 5 and 6, even in light of the announced changes, the explanation is, "I relied on the mutual release language that [McMahan] had in **first** draft and the draft I sent **on the 6th** [Version 4]," CP 439, (one week earlier).

Finally it is undisputed that the last version, reviewed on the last day of negotiation March 13, 2009, included the unilateral release language, and that that version was reviewed extensively by the parties on the day it was signed, including that the County's attorney made multiple revisions to it on her own computer throughout the day of negotiation. CP 224-299; CP 228.

The parties held an extended negotiation session to finalize the Agreement. Id. The negotiations took place at the County offices. Four generations of the draft Agreement were successfully worked on. Handwritten revisions were made. **None of the four drafts worked on by the parties on March 13, 2009 included a mutual release.** Id. The County's attorney imputed the changes to each successive document.

Under these circumstances, it was error for the Court to find that no disputed facts existed as to the following critical criteria necessary to support a finding of fraud on Summary Judgment:

- (1) That McMahan made a "factual assertion"
- (2) the "factual" representation was material;
- (3) it was false;
- (4) Appellants' counsel knew it was false;
- (6) The County was ignorant of the falsity of the representation;
- (7) &(8)The County relied and had a right to rely on the false representation;

B. THE COURT ERRED BY GRANTING RESPONDENTS' SUMMARY JUDGEMENT WHERE DISPUTED FACTS EXIST

The Court erred in granting Summary Judgment because the County failed to prove fraudulent misrepresentation by material facts that are undisputed.

(1) (2) (3) (4) Appellants' counsel did NOT make a representation of an existing fact, that was either material or false.

The County failed to establish that Appellant's counsel made a "representation of an existing fact". More than just a cornerstone, the entirety of the County's argument that an attorney committed fraud is this: **"I have made some modifications to your proposed settlement agreement. I hope there is not an issue with my modifications; I don't think they changed the substance of the document."**

In this statement, the attorney **not once but twice** calls out affirmatively that **modifications were made** to the agreement. The attorney offers her *opinion* the changes are not substantive, but clearly the invitation is made for the opposing counsel to review and comment on the modifications, i.e.,: "I hope there is not an issue with my modifications". The statements flatly do not rise to a representation of an existing fact, that was either material or false, nor sufficient to support a finding of fraud.

Each element of fraud must be established by "clear, cogent and convincing evidence." *Sigman v. Stevens-Norton, Inc.*, 70 Wash.2d 915, 920, 425 P.2d 891 (1967).

Evidence of misrepresentation, which does not rise to level of a "material existing fact" is not "clear, cogent and convincing evidence" of fraud. *Stiley v. Block*, 130 Wash.2d 486, 925 P.2d 194 Wash., 1996.

The first essential element of proving fraud is that the statement must be a representation of an existing fact, and test to apply in determining whether representation pertains to an existing fact, or instead is a *mere expression of opinion*. *Shook v. Scott*, 353 P.2d 431, Wash., 1960. See also *Webster v. L. Romano Engineering Corp.*, 34 P.2d 428, Wash 1943, “The representation must relate to an existing fact.” (cited 34 times for this issue), and see also *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 P. 738, 742, See, also, *Stewart v. Larkin*, 74 Wash. 681, 134 P. 186, L. R. A. 1916B, 1069.

The County fails this “first essential step” to prove fraud, as there can be no clearer expression of *opinion* that “I don’t think...”. CP 581. Lacking a (1) representation which (2) relates to an existing fact, that is (3) false, and (4) not mere opinion, the County failed to establish the first essential element of fraud and Summary Judgment must be reversed.

(5) Appellants’ counsel DID NOT intend that the County act on the any representation;

In further defeat of a finding of fraud, Appellant’s counsel invited independent review of the modifications: “I **hope** there is not an issue with my modifications” CP 581. At most Appellants’ counsel offered an opinion during the negotiations on the status of then-current draft version: (“I *don’t*

think they change..”) Id. At the very least, the facts are disputed on this point, which does not support Summary Judgment.

Respondent’s counsel, as the typist and co-drafter of the four progressive versions of the settlement agreement on March 13th, should have known that the unilateral release language had been removed. The four versions of the proposed settlement agreements were read and revised by all parties attending the March 13th meeting. Respondent’s counsel knew that the unilateral release had been placed into the document by Appellate’ Counsel on March 12th because she is presumed to have read the document (Paragraph 17 of the Settlement Agreement) and she agreed to it on the 13th by her acceptance of the language which *she did not change despite having the opportunity to so do.*

Section 17 of the Settlement Agreement includes a paragraph entitled “Opportunity for Legal Advice” which reads as follows:

“Each party acknowledges that the execution of this Agreement is done after an opportunity to consult with friends, attorneys, or other advisors, and with the full understanding and appreciation of those acts and ramifications and that the signing of this document is free from any coercion. Jacqueline McMahan of the Law Offices of J. McMahan on behalf of the Pruitts has drafted this Agreement. Pierce County (PALS) was represented by Deputy Prosecuting Attorney, Jill Guernsey.”

The County failed to show that there was falsity on the part of the Appellant’s attorney; and the signed Settlement Agreement confirms that

each party had an opportunity to consult with others and that the signing was free from coercion.

(8) The County had NO right to rely on any representation;

According to the Restatement, parties with the same experience (here, the two opposing legal counsels) are not entitled to rely on one another's opinions: The recipient of a fraudulent misrepresentation solely of the *maker's opinion* is **not** justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker:

- (a) purports to have special knowledge of the matter that the recipient does not have, or
- b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
- (c) has successfully endeavored to secure the confidence of the recipient, or
- d) has some other special reason to expect that the recipient will rely on his opinion.

Restatement (Second) of Torts sec. 542 (emphasis added). Reliance is not justified if both parties have approximately equal competence to form a reliable opinion on the subject matter. *Restatement (Second) of Torts* sec.542, Comment d. The representee is deemed to be competent to form an independent opinion regarding a transaction if the transaction relates to something of common experience and to an ordinary commodity.

Restatement (Second) of Torts sec. 542 cmt. d. *Stiley v. Block*, 130 Wn.2d 486, 504-505, 925 P.2d 194 (1996).

Here, there are no facts in the record to show that Appellants' counsel had special expertise, or that any special reason existed such that the County's attorney was entitled to rely on opposing counsel's opinion as to the effect of the *called out* modifications. In absence of these facts, it is presumed that each counsel for the opposing parties were each competent to form an independent opinion regarding the transaction. *Id.*

Absent a showing by the County that it was entitled to rely on Appellant's counsel's opinion of the modifications, this last element of fraud, like all other elements, fails. The Court erred in its finding of fraud.

C. THE COURT ERRED BY REFORMING CONTRACT WHERE REFORMATION IS BARRED DUE TO DEFENDANT'S NEGLIGENCE

Appellants' attorney committed no fraud upon which reformation could properly be made. Further, reformation is barred on the independent basis of negligence.

As held in *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash.562, 177 P.810, 812, "We have always held that a party whose rights rest upon a written instrument which is *plain and unambiguous, and who has read or had the opportunity to read* the instrument cannot claim to have

been misled concerning its contents or to be ignorant of what is provided therein.”

The Washington Courts have issued numerous consistent rulings, including *Yakima Cy. (W. Vly.) Fire Protec. Dist. 12 v. Yakima*, 122 Wash.2d 371, 858 P.2d 245 (1993); *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 745 P.2d 37 (1987); and *National Bank of Wash. v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973), standing for the proposition that **“a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.”** *Skagit State Bank*, 109 Wash.2d at 381, 745 P.2d 37 (quoting *Equity Investors*, 81 Wash.2d at 912, 506 P.2d 20).

Only in limited circumstance will negligence be overlooked in favor of reformation. Those limited circumstances do not exist in the present case.

Comment *b* to § 157 of the Restatement explains:

The exceptional rule stated in the present Section with regard to (allowing) reformation **has no application to the common case in which the term in question was not the subject of prior negotiations. It only affects cases that come within the scope of § 155, under which there must have been an agreement that preceded the writing.** In such a case, a party's negligence in failing to read the writing does not preclude reformation if the writing does not correctly express the prior agreement....

Comment *b*, *Restatement (Second) of Contracts § 157*. Here, there was no such “prior negotiations” or “prior agreement” that precede the parties

Settlement Agreement, that would forgive negligence. Instead, *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 P. 955, 958. is controlling in this case.

* * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other **29 people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.'

Throughout the negotiation process the County was represented by legal counsel. Each time changes were made, the fact of the changes was called out, and review invited. Respondent's counsel simply chose not to review or was negligent in so doing. That negligence negates reformation. The Court erred.

D. THE COURT ERRED WHEN IT DENIED APPELLANTS' MOTION TO CONTINUE THE TRIAL TO OBTAIN NEW COUNSEL AFTER COURT WAS AWARE THAT CURRENT LEGAL COUNSEL HAD ETHICAL CONFLICT IN CONTINUED REPRESENTATION

1. Motion To Continue was Proper.

PCLR 40(g)(2)(B) provides that "If a motion to change the trial date is made after the Deadline to Adjust Trial Date, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice". Here, the substantial

injustice sought to be prevented was the detriment to the client's interest based on the conflict of interest. The dictates of RPC 1.7,⁵ which address conflicts of interest, must be strictly followed. *Tank v. State Farm Fire & Casualty Co.* (1986) 105 Wash.2d 381, 715 P.2d 1133. The clients (Pruitts) were present in the court room at the time the Motion was presented, and fully supportive of the Motion to continue.⁶ RP 28-29.

2. Trial Court Erred in Failing to Make Inquiry Once Issue of Conflict Was Raised

The county in its response falsely claims that the sole authorities offered by Appellants in support of a Trial Court's duty upon a showing of conflict of interest are criminal cases. Respondent brief at 34. Respondent County overlooks *Stiley v. Block*, 130 Wash.2d 486, 502, 925 P.2d 194 (1996) and *Mickens v. Taylor*, 535 U.S. 162, at 172 n. 5, 122 S.Ct. 1237; 2002.

Nor is a Trial Court's duty to inquire whether a conflict exists limited to criminal cases as the county argues. See *Johnson v. Continental Cas. Co.* 57 Wash.App. 359, 788 P.2d 598, Wash.App, 1990, (Trial Court's

⁵ Washington's Rule of Professional Conduct (*RPC*) 1.7(b), "[a] lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests" unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after consultation and full disclosure of the material facts. "

⁶ The Trial Court correctly observed the Pruitts were present and supportive, RP 28-29, but incorrectly concluded that they "come in with unclean hands"

consideration of RPC 1.7 in determining specific criteria to be met by the defense counsel hired by the insurer).

The Court has broad discretion to interpret and apply the local rule addressing standards of professional conduct for attorneys. *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000, W.D.Wash.,2007, (applying Washington RPC 1.7).

Determining the existence of an attorney-client relationship is a fact-based inquiry. See *Bohn v. Cody*, 119 Wash.2d 357, 363, 832 P.2d 71 (1992). Determining whether an attorney/client relationship exists necessarily involves questions of fact. *Bohn v. Cody*, 119 Wash.2d 357, 832 P.2d 71, Wash.,1992, quoting 48 *Am.Jur. Proof of Facts 2d, Existence of Attorney-Client Relationship* 525 (1987); 1 R. Mallen**75 & J. Smith, *Legal Malpractice* § 11.2 n. 12 (3d ed. 1989).

The existence of the relationship “turns largely on the client's subjective belief that it exists.’ The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions.” *Bohn v. Cody*, 119 Wash.2d 357, 363, 832 P.2d 71 (1992). (quoting *In re McGlothlen*, 99 Wash.2d 515, 522, 663 P.2d 1330 (1983)).

Last, Respondents also unsuccessfully attempts to minimize the Court's holding in the cited, civil case of *Halvorsen v. Halvorsen*, 3 Wash.App. 827, 479 P.2d 161, Wash.App. 1970. County brief at 35.

Appellants in this case properly and timely raised the issue of a conflict of interest with their former counsel to the Trial Court, prior to entry of the Orders which decimated their case. The Court had a duty to inquire further, but did not. When the facts underlying the alleged attorney-client relationship are disputed, the fact-finder in both a civil or criminal setting, is to make the determination after weighing the evidence and the credibility of the witnesses. *Stiley v. Block*, 130 Wash.2d 486, 502, 925 P.2d 194 (1996). Here, the trial court did not, which was error.

When an attorney client conflict of interest is challenged in court, the matter is a fact question to be determined by looking to the reasonableness of the activity, under the whole circumstances of the case. *Halvorsen v. Halvorsen*, 3 Wash App. 827, 479 P.2d. 161, 1970.

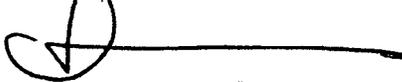
A trial court commits reversible error if it knows or reasonably should know of a particular conflict of interest into which it fails to inquire. *In re Richardson*, 100 Wash.2d at 677, 675 P.2d 209. This Court should grant this appeal, in order for the trial court to undertake the appropriate inquiry.

II. CONCLUSION AND RELIEF

This appeal should be granted. The grant of Summary Judgment to Respondent should be reversed because the County failed to show by undisputed evidence that any fraud was committed, as to any of the nine essential criteria. Even if a misstatement was made, which did not occur, the Court erred in reforming the Contract due to the County's negligence. Finally, on remand the trial Court should be directed to undertake the proper fact finding inquiry to address Appellants' concern of a conflict of interest.

DATED: October 18, 2010.

GOODSTEIN LAW GROUP PLLC

A handwritten signature in black ink, appearing to be 'Carolyn A. Lake', written over a horizontal line.

Carolyn A. Lake WSBA #13980
Attorneys for Appellants Pruitt

FILED
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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
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JAMES and DEBRA PRUITT,

Appellants,

v.

PIERCE COUNTY a municipal corporation
operating in the State of Washington, PLANNING
LAND SERVICES, a division of Pierce County;
DAVID RISVOLD, individually and on behalf of
the marital community composed thereof

Respondents.

NO. 40301-3-II

GR 17 DECLARATION

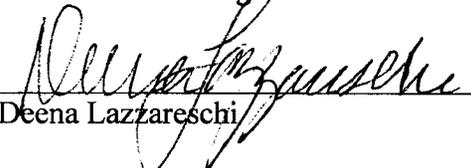
1. I, Deena Lazzareschi, make this declaration based on personal knowledge. I have
examined APPELLANTS PRUITTS' REPLY BRIEF

2. The faxed pleading is legible, and consists of 21 pages.

3. The facsimile signature on the pleading of Carolyn A. Lake is a true and correct copy of
her original signature.

I declare under the laws of perjury for the State of Washington that the foregoing
statement is true and correct.

Signed this 19 day of October 2010 at Tacoma Washington.



Deena Lazzareschi