

**FILED**

DEC 22 2011

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON  
NO. 297411-III

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LK OPERATING, LLC, a Washington limited liability company,

Appellant,

vs.

THE COLLECTION GROUP, LLC, a Washington limited  
liability company; and BRIAN FAIR and SHIRLEY FAIR,  
husband and wife, and their marital community composed thereof,

Respondents.

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REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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JAMES A. PERKINS, WSBA #13330  
Larson Berg & Perkins PLLC  
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## I. INTRODUCTION

On appeal from a summary judgment order, the court must accept as true, all disputed facts most favorable to the non-moving party, and must accept as true, all reasonable inferences from the facts, both admitted and disputed, most favorable to the non-moving party. *Scott Galvanizing, Inc. v. Northwest Enviro. Svcs., Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Tanner Elec. Co-op v. Puget Sound Power & Light*, 128 Wn.2d 656, 911 P.2d 1301 (1996).

The rule is the same for the benefited party when a trial court judgment is challenged. Specifically, when the correctness of a court judgment is challenged, the appellate court identically accepts as true, all record evidence most favorable to the successful party, and all fact inferences most favorable to that party. *Arthurs v. National Postal Transport Ass'n*, 49 Wn.2d 570, 304 P.2d 685 (1956); *Ford v. United Broth. of Carpenters and Joiners*, 50 Wn.2d 832, 315 P.2d 299 (1957).

Here, LK Operating, LLC (LKO) was the non-moving party for summary judgment purposes and it was later the prevailing party for trial judgment purposes.

It follows that applying settled Washington law, all disputed facts most favorable to LKO must be accepted as true, and any evidence contesting LKO's favorable facts, either for motion or trial purposes, whether presented by The Collection Group, LLC (TCG) or by Brian or Shirley Fair (Fair), must either be ignored or deemed to be untrue. Notwithstanding these clear and longstanding legal rules, TCG and Fair now improperly ask this court to accept as true certain disputed evidence and inferences disfavorable to LKO. The court should refuse this invitation.

## II. REPLY ON STATEMENT OF FACTS

In September 2004, TCG through its agent Fair spoke to Les Powers (Powers) about Powers and/or Keith Therrien (Therrien) possibly participating in a new business venture. Powers and Therrien both rejected Fair's proposal, choosing not to become involved. (CP 1113). When Fair, a second time by email dated October 27, 2004, and by follow-up telephone call, asked Powers and/or Therrien to reconsider investing, (CP 196; 1113; RP 284) Powers and Therrien again declined to invest, but told Fair their adult children had a company (LKO) with available funds, which might be interested. (CP 125-126, 1113).

Accordingly, as of October 2004, Fair knew Powers and Therrien had personally declined the business offer, but that a company owned by their children (LKO) might accept it.

After personally declining the business proposal, Powers did review and make changes to a draft "Unifund" agreement. Powers testified however, he reviewed this contract solely on LKO's potential behalf. (CP 849, 1114, 1411). Powers' testimony was undisputed since Fair testified he did not know for whom Powers did this "Unifund" work. (CP 954-955). It must therefore be accepted as true that Powers "Unifund" work was not done for either Fair or TCG.

Subsequently, between February 1, 2005 and February 8, 2005, Fair and Powers spoke by telephone. Powers testified he told Fair LKO had decided to accept the terms of Fair's October 2004 business proposal. (CP 1114). Accordingly, as of February 8, 2005, Fair knew LKO (not Powers or Therrien) would be the contracting/investing party. On February 8, 2005, Fair sent an email to Powers for the first time, identifying that the other contracting party would be TCG. (CP 1115).

After being told LKO would invest the capital and provide the free legal services which TCG wanted, on February 8, 2005, Fair emailed Diane Sires (Sires) a legal assistant for Powers & Therrien, asking for a first investment check in the amount of one-half the cost of the first debt

portfolio TCG had just purchased. (CP 1119). Fair admits he knew this first check came from LKO. (CP 197). The court later found as true Sires' testimony that beginning in February 2005 (and on many later occasions) Sires discussed with Fair that LKO, not Powers and Therrien, had contracted with TCG. (RP 417-418, 422). It must accordingly be accepted as true that TCG's contract proposal, upon the terms communicated by Fair as TCG's manager, was accepted by LKO and the contracting parties were identified and agreed to, prior to Powers performing any legal work for TCG.

Despite TCG's persistent false assertion that Powers or Therrien, rather than LKO, contracted with TCG, the trial court specifically found against TCG on that issue:

And the court, obviously, has concluded that LKO did meet its burden of proof to show it was the contracting party, as well as the investor, as an alternative basis for the court's decision to provide it its money. [Emphasis added.]

RP 424, ln. 6-9; *See also*, CP 2306, 2302.

The court's filed Conclusions of Law also say:

- D. LKO is a Washington limited liability company. It exists and operates as an independent legal entity.
- E. LKO was not formed for the purpose of becoming involved with TCG's debt collection business.
- F. LKO is not the "alter ego" of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence. [Emphasis added.]

CP 2307.

The trial court's Finding of Fact 47 also shows that the court ultimately concluded LKO, not Powers or Therrien, contracted with TCG.

47. On April 21, 2007, Fair sent a letter to Powers and Therrien proposing to formalize the ownership agreement. Fair's proposal reduced the ownership of the entity chosen by Les Powers from the 50 percent confirmed by Fair's email of February 23, 2006. Plaintiff's Trial Exhibit 30. [Emphasis added.]

Furthermore, evidence introduced for both summary judgment and trial purposes supports the court's conclusion that LKO had contracted and that LKO was not the "alter ego" of Powers and Therrien. Specifically, LKO was formed long prior to Fair presenting any business proposal (CP 844, 965, 969) and it is undisputed that Powers and Therrien never had any ownership interest in 1) any child's trust, 2) any trust owned corporation, or 3) LKO. (CP 498, 501, 845, 965; RP 100-101).

LKO also had its own capital and other business investments prior to ever becoming involved with TCG. (CP 844, 969).<sup>1</sup> The persons who actually made the decision to invest in TCG were Powers' and Therrien's

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<sup>1</sup> Although a management company owned by Powers and Therrien named Powers & Therrien Enterprises (PTE) provided management services for LKO, it is undisputed the two lawyers had sufficient funds and owned companies which independently had the resources to otherwise invest in TCG, had either Powers or Therrien wanted to personally do so. (RP 365). Because neither they nor their owned companies wanted to contract with TCG however, they did not do so.

adult children, who used their separate company LKO for that purpose. (CP 501, 522, 543-547, 565).

Importantly, TCG/Fair in their brief, make a number of claims that are either irrelevant or directly contradicted by the record, including:

1. **In early-February 2005, Powers had told Fair in a phone call that he was interested [in the deal].** (Resp. Brief p. 9). This is incorrect. During the first week of February, Powers told Fair LKO had accepted the proposal to contract/invest. (CP 1114).

2. **On February 18, 2005, still not having received any funds, but believing that Powers was again interested in participating in the deal...** (Resp. Brief p. 9). This is incorrect. On February 8, Fair/TCG knew that LKO, not Powers, would be the contracting party. (CP 1114).

3. **When TCG received the first check issued by LKO, “Fair did not know what LK Operating, LLC was... Given the name LK Operating, he assumed it was from an account owned by Powers and Therrien and that Les and Keith (LK) had decided to participate...”** (Resp. Brief p. 10). This is incorrect. As of February 21, Fair knew that LKO was the contracting entity (CP 1114), Fair also knew that Powers and Therrien personally had previously declined to invest on two prior occasions. (CP 1113, 125-126; RP 28). The trial court also

found as true that beginning in February 2004, Sires had repeatedly told Fair LKO was the contracting entity, but Fair had simply “ignored this information.” (RP 417-418, 422; CP 498, 499, 2304; RP 193-194).

**4. In an April 21, 2007 letter, Fair told Powers and Therrien that it was necessary to get an agreement among the parties finalized and proposed that the parties jointly own TCG.** (Resp. Brief p. 12). This is incorrect, to the extent it suggests an agreement for a 50 percent/50 percent TCG ownership did not already exist between LKO and TCG, (the court found one did exist, CP 2306, 2302; RP 424) or suggests that Fair’s letter was not an illegal attempt to change existing TCG ownership terms in breach of party agreements. (CP 2306, ¶47).

**5. Powers and Therrien rejected this proposal and insisted they were entitled to a 50 percent ownership in TCG.** (Resp. Brief, p. 12). This is incorrect. Powers and Therrien have always maintained that LKO, not themselves personally, had a 50 percent ownership interest in TCG. (CP 374; CP 1-10; CP 2306 ¶47).

**6. A 50 percent LKO ownership in TCG would mean “that Fair and his wife would essentially receive nothing for their two years of sweat equity.”** (Resp. Brief pp. 12-13). This is incorrect. As a consequence of LKO investing the money which TCG asked for and arranging for the free legal services TCG asked for, in about two years

TCG went from having no assets, to a company Fair claimed was worth approximately \$1.5 million. (CP 276, 1026). Owning \$750,000 in new equity is not getting “essentially nothing.”

**7. This was a case of “bait and switch.”** (Resp. Brief p. 18). This is incorrect. Fair knew before receiving any money from LKO that LKO was the contracting party. (CP 1114). The court also found as fact that Sires told Fair LKO was the investor, but that he “ignored this information” because he did not care who the TCG investor was, so long as the desired funds and legal services were provided. (CP 2304-2305).

**8. It is undisputed that as Fair was entering the collection business, he was looking for one or more attorneys who could bring to the venture legal expertise that is necessary to run a debt collection business. That is why he sought out attorneys, not “investors” to join in the business.** (Resp. Brief pp. 18-19). This is incorrect. The court disbelieved this disputed testimony and instead concluded that Fair did not care who the investor was so long as TCG received the desired funds and legal services requested. (CP 2204, 2205).

**9. Powers and Therrien... for their own purposes... slipped LKO into the transaction.** (Resp. Brief p. 19). This is incorrect. Fair specifically knew LKO would be the investor, not Powers and Therrien. Also, the persons who actually decided to contract were the

adult children owners of LKO, not Powers and Therrien. (CP 501, 522, 543-547, 565).

**10. Fair denies ever having heard of LKO until the lawsuit was filed.** (Resp. Brief p. 19). This is irrelevant. The court also disbelieved Fair's testimony about this. (RP 417-418, 422). Accordingly, Fair's rejected testimony is irrelevant for appeal purposes.

**11. Fair did not know what LK Operating, LLC was, but inferred from the initials "LK" that the checks were from an entity owned by Powers and Therrien.** (Resp. Brief p. 20). This is incorrect. As cited above, because all record testimony favoring LKO must be accepted as true, it must be concluded that TCG did know LKO was the contracting party prior to receiving LKO's checks. (CP 1114).

**12. TCG/Fair claim the reason for LKO's formation and the facts about how it is owned or configured are purportedly relevant.** (Resp. Brief p. 30-32). This is incorrect. The trial court concluded as a matter of law that LKO was not the "alter ego" of Powers or Therrien. It also ruled there was no basis to pierce the corporate veil of LKO's independent existence. (CP 2307). At trial, TCG itself conceded there was no basis for piercing the corporate veil so as to assert that LKO's contracting with TCG could be found to be Powers or Therrien contracting with TCG. (RP 17-18, RP 171-173). The court at trial

conclusion, also dispositively held that LKO had met its burden of proof to show it was the contracting party, as well as the investor, as an alternative basis for the court's decision to issue judgment in its favor. (RP 424). It follows that nothing about how LKO is structured is even minimally relevant to appeal issues.

**13. The contention that appellant LKO is an innocent third party is a fantasy.** (Resp. Brief p. 33). This is incorrect. The trial court specifically found LKO was a third party, independent of Powers and Therrien. (RP 424). The trial court also specifically found as fact that LKO had committed no fraud or misrepresentation when contracting with TCG (CP 1982) and no breach of duty, breach of contract, or any other improper act by LKO has ever been claimed or shown. TCG/Fair have not challenged these findings on appeal.

**14. TCG/Fair claim the trial court allegedly found that Powers was the contracting party.** (Resp. Brief p. 34). This is incorrect. At trial conclusion, the court specifically held that LKO, not Powers, was the contracting party. (RP 424; CP 2306 ¶47). Because LKO always communicated through Powers, its agent, however, TCG/Fair now misrepresent the facts to falsely claim that Powers' actions were instead being undertaken by him personally and not for LKO. Reading the filed Findings and Conclusions in this manner would directly conflict with the

Judgment issued in LKO's favor and directly conflict with the trial court's bench decision findings.

**15. These findings that Powers was the contracting party mean that Powers went into business with TCG.** (Resp. Brief p. 34). This is incorrect. As noted above, the trial court found exactly the opposite. LKO, not Powers, was the contracting party. (RP 424).

**16. ... these findings are inconsistent with, and irrelevant in light of, the trial court's determination that the original agreement was between Powers and TCG.** (Resp. Brief p. 42). This is incorrect. As noted, the trial court expressly found LKO was the contracting party, not Powers. (RP 424).

### III. ARGUMENT

A. *There was no "bait and switch"*.

Considering as true all facts most favorable to LKO, TCG/Fair knew TCG was contracting with LKO when Powers told TCG's agent Fair that their children's company would be the contracting party. (CP 1114). Fair also knew the investment checks later sent all came from LKO. (CP 197; 502-505, RP 852-853). The trial court further accepted as true that Sires, beginning in February 2005, frequently discussed with Fair that

LKO, and not Powers or Therrien, was the contracting party. (CP 498-499, 2304; RP 193-194).

Contrary to Fair's assertion that TCG did not want to contract with a party who was not a lawyer, the trial court disbelieved Fair and instead found as fact, that so long as TCG received the cash and free legal services it requested, Fair both personally and as manager of TCG, did not care who contracted with TCG. (CP 2303; RP 417-418). It is also undisputed the court found as fact that after contracting:

Les Powers made sure at all times that performance of the terms of the proposal, including investing \$52,000 from LKO to TCG, and Powers & Therrien, P.S. providing legal services to TCG was accomplished.  
CP 2308.

There was accordingly no "bait and switch" by anyone. Rather, from 2004 to 2007, TCG got in full, exactly what it contracted for. Indeed, it is exceedingly strange and misleading for TCG to be persistently claiming it suffered a detriment by reason of the LKO/TCG contract, when the proven facts are that because LKO fully performed its contract obligations, TCG flourished to the point where by April 2007, Fair valued the company's worth at approximately \$1.5 million. (CP 276, 1026). Precisely how do these proven facts show TCG was harmed? This absurd claim has never been explained.

Fair and his wife do imply the unpaid hours they spent were somehow “unfair,” but it was Fair, not LKO, who proposed this contract term:

C. My contribution will include no charge for finding this debt, and negotiations with debtor and debt seller (unless you prefer to do this), and keeping you informed.  
[Emphasis added.]

CP 216.

Fair also ignores that concurrent with their performing work, LKO arranged for TCG to receive untold hours of free legal services as part of LKO’s contribution. Clearly, post-contracting, neither TCG nor Fair considered this no-fee contribution of continuing legal services to be prejudicial. Equally, TCG ignores that it was TCG who sought to breach the contract, not LKO.

Specifically, the court found as fact that the original agreement was for each investor to be a 50 percent owner. (CP 2303 ¶17). The trial court next found as fact, that in April 2007, Fair acting for TCG sought to change the deal (*i.e.* breach the parties’ agreement) in order to increase Fair’s ownership percentage beyond the agreed 50 percent, and give Fair’s mother a TCG ownership percentage as well. (CP 2306 ¶47). What the record accordingly shows is that LKO’s only “harmful act” was to refuse to agree that TCG could breach the parties’ contract and change the deal.

Dispositively, the trial court ruled when approving the rescission remedy, that LKO had not engaged in any fraud or misrepresentation when contracting with TCG. (CP 1982). Abundant evidence supported that conclusion and accordingly, this too must be accepted as true on appeal. In short, if Fair had not been motivated by greed as a consequence of TCG's success, and if Fair had not sought to breach the TCG-LKO contract terms to benefit himself, , there would have been no lawsuit and neither Fair nor TCG would have incurred a penny of costs in the litigation.

Had TCG complied with contract terms, it would have recognized LKO's one-half interest in TCG's estimated net worth of \$1.5 million. (CP 276, 1026). Fair however, wanted LKO's share for himself. Accordingly, to try and escape this contractual responsibility, in 2007 Fair suddenly claimed that TCG had not contracted with LKO, and instead, it was Powers who had contracted. Based on this false claim, Fair then argued the application of one or more RPCs should allow TCG to escape its contract obligation to Fair's sole benefit. Most astonishingly, it was also claimed that LKO's providing all the investment money and free legal services which TCG had asked for and which TCG had solicited LKO to provide, was purportedly a "plot" formulated by Powers to disadvantage TCG. That claim is facially nonsensical. TCG had no interest in who its

members were. It was only interested in whether it received the cash investment and services that it bargained for. (CP 2204-2205).

*B. The trial court erred as a matter of law in holding that Powers violated RPC 1.7.*

The fact assertions made by TCG at trial, as raised again in this appeal, are fabrications. Ultimately, the trial court correctly concluded that LKO (not Powers) was the contracting party. It correctly ruled LKO was not the alter ego of Powers or Therrien and that LKO had not acted to defraud TCG/Fair by simply accepting the contract terms which TCG had proposed. Unfortunately, instead of then enforcing LKO's legitimate contract rights, the trial court erred by finding that a disputed RPC 1.7 violation by Powers had occurred, which as a "first impression issue" it then found did give TCG contract rescission rights. It is these errors which LKO's appeal now seeks to remedy.

All parties admit that whether an attorney's conduct violates a relevant RPC is a question of law. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). Accordingly, an "abuse of discretion" standard does not apply. *State v. Hunsaker*, 74 Wn. App. 38, 42, 873 P.2d 540 (1994). Instead, this Court reviews the issue *de novo*. *Id.*

As to this issue, the trial court, TCG and Fair all err by failing to recognize that RPC 1.7 has both a relationship and transactional (*i.e.*

representation) component, both of which must exist before a violation can be found.

Ignoring that two necessary tests must be met for a violation to exist, but focusing on the relationship test, TCG and Fair assert that since Powers had an attorney/client relationship with Fair personally in 2004, and since Powers had an attorney/client relationship with LKO concurrently in 2004, this alone means that Powers violated RPC 1.7 with respect to TCG.

This is incorrect for a number of reasons. First there is no finding that separate party TCG was a Powers' client prior to February 2005 when LKO first accepted TCG's offer. Precisely because no evidence established that TCG had been a Powers' client before February 2005, the court specifically ruled for motion purposes that TCG was not a Powers' client prior to the LKO/TCG agreement being formed. (CP 1979).

Because the only common matter involving LKO and TCG was the investment made by LKO in TCG, and that matter did not involve Fair, and since Fair stipulated that his only involvement was his acting in a representative capacity as manager of TCG, how then did Powers violate RPC 1.7 in connection with any matter involving Fair?

In summary, if TCG was not a Powers' client prior to the LKO-TCG contract, and if there was no common matter between Fair and LKO

(which there was not) then it necessarily follows there was no concurrent representation of two clients involving the LKO/TCG contract, a necessary predicate for there to be any RPC 1.7 rule violation.

That Powers may have been Fair's attorney individually in the prior unrelated BF Trading matter, is entirely irrelevant for RPC 1.7 purposes, because Fair individually was not contracting with LKO. The distinction is important, because it makes the facts of this case here completely different than those in Comment 7 to RPC 1.7. Specifically, Comment 7 addresses the different circumstance where a lawyer does concurrently represent both contracting parties, but is representing one of them on another matter.

Critically, as later clarified by RPC 1.13, and by Comment 34 to current RPC 1.7, as a matter of law, a corporate entity is legally considered to be separate from its owners and representatives for purposes of identifying both the client and the matter for RPC application purposes and it makes no difference whether the company is "closely held or not."<sup>2</sup>

TCG and Fair ignore this legal rule to instead persistently and wrongly claim that LKO and Powers are interchangeable for rule purposes and that TCG and Fair are also legally interchangeable for all RPC rule

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<sup>2</sup> The comment in fact makes clear that a lawyer can sue a corporate client's subsidiary company and this will not violate RPC 1.7 because owners and entities are legally distinct.

purposes. They are not. Indeed, virtually all of TCG and Fair's appeal arguments are wholly dependent upon this effort to conflate the various parties, in order to mislead the court about rule application.

Turning to the second rule component, not only was TCG not a Powers' client at the time of contract formation, Powers also did not as a lawyer, "represent" either LKO or TCG with regard to the subject contract.

As noted in appellant's opening brief, in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), the Supreme Court has held that a legal "representation" exists only when an attorney's advice or assistance is sought and received on legal matters. *Bohn, Id.*, 363. The undisputed facts here establish that no one asked Powers to do any legal work or provide any legal advice with regard to the subject contract proposal. Similarly, there was never any "negotiation" between LKO and TCG about contract terms as TCG falsely asserts.

The true facts are that Fair for TCG, independently developed those contract terms which as TCG's manager, Fair deemed reasonable. Fair then presented those terms through an October 27, 2004 email solicitation and follow-up phone call to Powers (CP 196, 1113; RP 284). Eventually in the first week of February 2005, LKO's owners (not Powers or Therrien) made the decision to invest by simply accepting TCG's

proposed terms without any negotiations (CP 501, 522, 543-547, 565). Powers, acting for LKO's corporate manager PTE, then told Fair that LKO was accepting the offer. (CP 1114). Since TCG did not object to LKO being the investor/contracting party, LKO next proceeded to pay TCG all sums it later requested and it later supplied TCG with all the free legal services asked for. (CP 502, 505; RP 852-853).

What these proven facts establish is that Powers was never asked to provide any legal "representation" pertaining to the formation of the LKO-TCG contract by anyone. No legal advice was sought by either LKO or TCG, and no documents were scrivined nor were they required since Washington limited liability companies need not have written member/operating agreements. *See e.g., Noble v. A & R Envtl. Services, LLC*, 140 Wn. App. 29, 31, 164 P.3d 519, 520 (2007) (noting statutory rules for distribution of LLC assets in absence of written agreement).

Ignoring these record facts, TCG now wants to rewrite history by making false conclusory statements about how the parties' agreement was allegedly reached. For example, TCG asserts that Powers was supposedly motivated to "saddle Fair with a partner he had never met" and that "this effort by Powers was directly adverse to Fair's interest" (Resp. Brief p. 22) although the basis for these false conclusory assertions is not explained.

What the court instead found as true was that Fair did not care who contracted with TCG, so long as TCG received the cash and free legal services it requested. (CP 2303; RP 417-418). Those services later provided by Powers were legal services in connection with third parties unrelated to TCG and LKO, or Fair and LKO. TCG also does not explain how LKO's giving TCG everything it asked for by way of money and free legal services was conduct "directly adverse to Fair's interest," or even why it frames the issue as "Fair's" interest, and not the interests of TCG. As previously noted, TCG went from no assets to a \$1.5 million company in large part because of LKO's contributions.

TCG also falsely claims that "Powers could not ethically represent LKO in a negotiation with Fair, when Fair was still a client in the BF Trading matter." (Resp. Brief p. 24). Neither assertion is true, and the assertion misstates facts. First, it is undisputed that the negotiation was between LKO and TCG, not LKO and Fair. Second, it is a proven fact there was no contract "negotiation" between LKO and TCG. TCG simply stated its terms, and LKO accepted them as offered. Powers accordingly did not "negotiate" the contract for anyone. It follows that once all the false conclusory assertions are ignored and the proven facts properly analyzed, it becomes readily evident that no RPC 1.7 violation by Powers ever occurred.

Finally, TCG asserts that *Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004) is relevant authority. That too is incorrect. *Egger* is factually distinguishable, because the lawyer in *Egger* was asked by a party to actually provide legal services relating to the disputed transaction. Also, the representation in *Egger* involved both a common relationship and a common transaction. Further, in *Egger*, the lawyer represented both the lender and the ultimate recipient of the money. Here, Powers was not asked to give legal advice about the at-issue contract proposal and he had no attorney/client relationship with TCG. Further, Fair never personally received any of the invested money nor free legal services which LKO later gave to TCG. For these multiple reasons *Egger* is factually distinguishable and it does not support the conclusion an RPC 1.7 violation occurred.

*C. The civil remedy of rescission cannot be based upon an RPC violation.*

Not surprisingly, TCG fails to address *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) which contradicts the trial court's decision to rescind a valid contract between two otherwise innocent parties.

Contrary to TCG's claim, (Resp. Brief p. 28) the relevant ruling in *Hizey* has nothing to do with the type of civil remedy which the defendant

sought for an RPC 1.7 violation. Rather, the relevant *Hizey* ruling is that while the RPCs might give rise to a disciplinary remedy, they do not give rise to a private civil remedy. That is precisely what the trial court incorrectly ruled here: that the civil remedy of rescission could rest solely upon an RPC violation.

Obviously, if an RPC violation cannot support a private civil remedy, then it matters not whether the civil remedy sought is for damages or rescission. Neither form of civil relief is awardable.

The Court of Appeals in *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1259 (1992) identically confirmed that an RPC violation does not support a private civil remedy, yet again the TCG/Fair brief does not address the *Harrington* decision at all.

Turning to the New Mexico case of *C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (1982), that case is inapplicable and factually distinguishable for a host of reasons. First, rescission was granted by the court in large part because one contracting party was found to owe fiduciary duties to the other which were breached. Here, LKO owed no fiduciary duties to TCG and Judge Small specifically found LKO had engaged in no fraud or misrepresentation when entering into the disputed LKO/TCG contract. (CP 1982). In addition, the lawyer in *Hefner* did provide actual legal services by scrivening the parties' disputed contract

documents at both parties' request. Here, Powers provided no legal services to either party with regard to the subject contract and was not asked to do so.

TCG asserts that the trial court found the facts of the present case to be more egregious than those in *Hefner* because in *Hefner*, allegedly neither client had any relationship with the attorney. (Resp. Brief p. 26). Although the trial court did say this, those are not the *Hefner* case facts. The court in *Hefner* instead specifically found the following:

The attorney that represented Hefner in connection with the sale was also retained counsel for plaintiff; there is no dispute that the attorney represented both parties to the contract. There was also no dispute that the attorney was a specialist in oil and gas law. [Emphasis added.]

*Hefner* at 596.

Finally, the *Hefner* court did not grant rescission because of an RPC violation. It instead approved rescission based upon what it found was a breach of common law fiduciary duties owed by both the seller and the lawyer to the plaintiff. Accordingly, *Hefner* stands for a very different proposition than that for which the trial court sought to use it. (*i.e.* that an RPC violation alone can support a private party rescission remedy).

TCG also wrongly claims other decisions purportedly hold that if an attorney breaches RPC duties, that alone can support a rescission remedy. That is not what the cited cases hold however. In *Friedlander v.*

*Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972), rescission was awarded because the court found one contracting party (the husband) breached his fiduciary duty to provide his wife with a full disclosure of all material facts about the property being addressed by the parties' prenuptial agreement. Accordingly, it was the husband's common law duty breach, not the lawyer's RPC rule breach, which was the basis for rescission. *Bartlett v. Bartlett*, 84 A.D.2d 800, 444 N.Y.S.2d 157 (N.Y.A.D.2 Dept. 1981) is factually the same. It follows that no case cited by TCG conflicts with the *Hizey* and *Harrington* rule that an RPC violation alone cannot support a private civil remedy.

*D. LKO is an "innocent party." No act undertaken by LKO supports contract rescission.*

It is undisputed fact that LKO is a separate company owned substantively and exclusively by the adult children of Mr. Powers and Mr. Therrien. (CP 502, 1756; RP 360). Pre-trial, TCG conceded that LKO was not the alter ego of Powers and Therrien (RP 17-18). Also at trial conclusion, the court found as fact and ruled as a matter of law, that LKO was not the "alter ego" of either Powers or Therrien. (CP 2307).

Dispositively, the trial court's conclusions that LKO was not the "alter ego" of Powers or Therrien and that LKO did not engage in any fraud or misrepresentation, are both well supported by the record.

Furthermore, they are verities on appeal, because TCG has not challenged those findings. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002); *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Because of the now indisputable fact that LKO is its own entity and not Powers alter ego, as a matter of law, all of TCG and Fair's reply and cross-appeal arguments necessarily fail, and therefore remand for an appropriate contract breach trial is required.

*E. TCG's cross-appeal is without merit. There was no contract with Powers and Therrien and no RPC 1.8 violation.*

TCG claims that even if its RPC 1.7 arguments are unpersuasive, this Court can still affirm on an independent ground. (*i.e.* a purported violation of RPC 1.8(a)). To support this appeal claim, TCG again wrongly avers that the contracting parties were TCG and Powers, not TCG and LKO. (Resp. Brief p. 34). TCG then claims that since LKO is merely an alter ego of Powers, that therefore Powers violated RPC 1.8 by going into business with a client. *Id.* at 35.

RPC 1.8(a) provides in relevant part: "(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a

client....”<sup>3</sup> Under the plain language of this rule however, it only applies if the business transaction is between the lawyer and a current client.<sup>4</sup>

Therefore, to prevail on its RPC 1.8 claim, TCG must convince this Court that Powers, not LKO, was the party to the LKO-TCG contract. (Resp. Brief p. 34). To do so, TCG mischaracterizes isolated conclusions of law to falsely claim that Powers, not LKO, was the contracting party. *Id.* The trial court however found that LKO and TCG were the contracting parties, not Fair and Powers or TCG and Powers.

Furthermore, whenever findings as approved by the court are not totally clear, by law any oral statements made by the court when rendering its bench decision, can then be used by the appellate court to interpret the filed findings. *State v. Bynum*, 76 Wn. App. 262, 266, 848 P.2d 10 (1994); *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157, *rev. denied*, 108 Wn.2d 1029 (1987), and so long as the written findings do not directly conflict with the oral rulings, oral rulings can be used to resolve any issues on appeal. *Id.*

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<sup>3</sup> The remainder of subsection (a) details the steps a lawyer can take to avoid running afoul of the general rule by entering into a business relationship with a client. RPC 1.8(a).

<sup>4</sup> A review of the comments to RPC 1.8 and case law both inside and outside Washington reveals little in the way of guidance regarding how to determine whether a particular business transaction was in fact between a lawyer and a client. Therefore, the plain language of the rule is the only guide.

Applying this settled legal rule, the trial court dispositively made clear that it found LKO to be the contracting party when making its oral ruling:

And the court, obviously, has concluded that LKO did meet its burden of proof to show it was the contracting party, as well as the investor, as an alternative basis for the court's decision to provide it its money. [Emphasis added.]

RP 424. This oral ruling does not conflict with the court's later written findings, which find LKO, not Powers to be the contracting party and which give LKO its judgment.

The incorrect interpretation of the court's findings now urged by TCG would in contrast, directly conflict with both the court's bench statements and with Finding of Fact paragraph 47 which states:

On April 21, 2007, Fair sent a letter to Powers and Therrien proposing to formalize the ownership agreement. Fair's proposal reduced the ownership of the entity chosen by Les Powers from the 50 percent confirmed by Fair's email of February 23, 2006. (Plaintiff's trial exhibit 30). [Emphasis added.]

CP 2306.

It also conflicts with Conclusion of Law "M" which states:

Les Powers accepted the business offer by having LKO provide the sum of \$17,000 to TCG, which occurred beginning February 21, 2005, and by having Powers & Therrien, P.S. provide the legal services to TCG as requested in Fair's October 27, 2004 email. [Emphasis added.]

CP 2308.

It also conflicts with Conclusion of Law “N” which states in pertinent part:

The court finds that the statement on the bottom of this fax “Les, this gives you guys one-half ownership in the company. You can formalize however you wish...” provided Les Powers and Keith Therrien the option to name the investor of their choosing. [Emphasis added.]

CP 2308.

Accurately read, the findings and conclusions as a whole reveal Powers to be simply LKO’s agent, not the contracting party. It was also proven at trial that Powers provably had no ownership in LKO. In fact, the trial court specifically found that the *sole* trustees and beneficiaries of LKO were the five adult children of Les Powers and Keith Therrien. (CP 2302). Powers & Therrien Enterprises, Inc. was also only the manager for, not owner of, LKO. *Id.* The trial court also ultimately found that LKO, not Powers, was the sole investor of funds in TCG. CP 2308.

Similarly at trial, after weighing the evidence, the court specifically said it found as fact that TCG did not care who the actual contracting party was. (CP 2303; RP 417-418). The trial court further concluded that Sires had told TCG that LKO was the investor (RP 417-418, 422). It was also proven that TCG knew the checks sent were LKO checks and that TCG had no objection to receiving the LKO investment

checks LKO (CP 197) so long as the money and legal services desired were provided to TCG in the manner requested. (RP 417-418, 422).

Pre-trial, TCG also made clear to the court they were claiming LKO was not the contracting party and therefore was purportedly not the real party in interest. (RP 8, 15). The trial court agreed that if this factually contested issue was resolved in TCG's favor then LKO would not get a judgment. (RP 15). At trial conclusion however, the court issued LKO a judgment, because it found that LKO had sustained its burden of proof to show it was a separate "real party in interest" contracting party.

#### IV. CONCLUSION

In summary, contrary to TCG's appeal assertions, the LKO-TCG transaction was never one between a lawyer and a current client. The contracting parties were instead always LKO and TCG. Because after weighing all evidence the court found LKO, not Powers and/or Therrien, was the contracting party, there simply is and was no RPC 1.8 violation as now wrongly asserted by TCG/Fair's cross-appeal. Because abundant evidence supports the trial court's resolution of the fact dispute in LKO's favor, as a matter of law, there is no basis for TCG/Fair's cross-appeal and it must accordingly be denied.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2011.

LARSON BERG & PERKINS PLLC

A handwritten signature in black ink, appearing to read "J. Perkins", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2011, I caused to be served by forwarding via Federal Express Standard Overnight service, a true and correct copy of the Reply Brief of Appellant/Cross-Respondent to:

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