

J3645-1

J3645-1
78353-5

No. 53645-1-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SAYED ZIA EHSANI, a single man, Appellant,
GUITTY ZAMANI, a single woman, Respondent/Cross Appellant,
v.
THE MCCULLOUGH FAMILY PARTNERSHIP, et al, Respondents.

BRIEF OF RESPONDENT DAVID CULLEN

Christopher I. Brain, WSBA #5054
Coreen Ferencz, WSBA #30314
Attorneys for Respondent David Cullen
Tousley Brain Stephens PLLC
700 Fifth Avenue, Suite 5600
Seattle, WA 98104
(206) 682-5600

ORIGINAL

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2004 SEP 20 PM 4:19

TABLE OF CONTENTS

I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT6

 1. Ms. Zamani has already received the relief for which she prays, because she has a judgment against Mr.Ehsani for the full amount of reimbursement she requested6

 2. Ms. Zamani released all claims against the McCulloughs’ agents, and thus is barred from seeking restitution against Mr. Cullen.....7

 3. The trial court properly denied Mr. Ehsani’s motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because he is not a party to the case and because the court lacked personal jurisdiction over him9

 4. The trial court properly denied Mr. Ehsani’s motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because Mr. Cullen did not have a judgment in his favor, rendering Mason inapplicable10

 5. The trial court properly denied Mr. Ehsani’s motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because neither RAP 12.8 nor the equitable principles of restitution call for such an award, and because the funds were paid to others, and both Mr. Ehsani and Ms. Zamani have unclean hands13

 6. Attorney fees and costs should be awarded to Mr. McCullough as the prevailing party on appeal21

V. CONCLUSION.....21

TABLE OF AUTHORITIES

STATE CASES

<i>Bort v. Parker</i> , 110 Wn. App. 561, 42 P.3d 980 (2002)	17
<i>Brader v. Minute Muffler Installation, Ltd.</i> , 81 Wn. App. 532, 914 P.2d 1220 (1996)	16
<i>Cox v. Cox</i> , Mass.App.Ct. 864, 780 N.E. 2d 951 (2002).....	17, 18, 19, 20
<i>Escude v. King County Public Hosp. Dist. No. 2</i> , 117 Wn. App. 183, 69 P.3d 895 (2003).....	7
<i>Fradkin v. Northshore Utility Dist.</i> , 96 Wn. App. 118, 977 P.2d 1265 (1999).....	8
<i>In re Marriage of Mason</i> , 48 Wn. App. 688, 740 P.2d 356 (1987).....	10, 11, 12
<i>In re Marriage of Stern</i> , 68 Wn. App. 922, 846 P.2d 1387 (1993)	13
<i>In re McKean</i> , 148 Wn.2d 849, 64 P.2d 1226 (2003).....	14
<i>Malvo v. Anderson</i> , 76 Wn.2d 1, 454 P.2d 828 (1969).....	12
<i>Nationwide Mutual Fire Ins. Co. v. Watson</i> , 120 Wn.2d 178, 840 P.2d 851 (1992)	8
<i>Ruddach v. Don Johnston Ford, Inc.</i> , 97 Wn.2d 277, 644 P.2d 671 (1982).....	17
<i>Sac Downtown Ltd. Partnership v. Kahn</i> , 123 Wn.2d 197, 867 P.2d 605 (1994).....	13, 14
<i>State v. A.N.W. Seed Corp.</i> , 116 Wash.2d 39, 802 P.2d 1353 (1991).....	14
<i>State v. Superior Court of King County</i> , 63 Wn. 96, 114 P. 905 (1911).....	9
<i>Town Concrete Pipe of Washington, Inc. v. Redford</i> , 43 Wn. App. 493, 717 P.2d 1384 (1986)	17

STATE STATUTES

RCW 26.09.140 (2004)	10, 11
Massachusetts General Laws, Chapter 208: Section 38	18

SECONDARY AUTHORITIES

Restatement of Restitution § 74, comment h (1937).....	11, 19
Restatement of Restitution § 1 (1937)	19
Restatement Third of Restitution and Unjust Enrichment § 18 (Tentative Draft No. 1 2001)	19
5 Am. Jur. <i>Attorneys at Law</i> § 147	19

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Ms. Zamani has already received the relief for which she prays, because she has a judgment against Mr. Ehsani for the full amount of reimbursement she requested.

2. Whether Ms. Zamani released all claims against the McCulloughs' agents, and thus is barred from seeking restitution against Mr. Cullen.

3. Whether the court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, when Mr. Cullen is not a party to this case and the court has no personal jurisdiction over him.

4. Whether the court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, when neither Ms. Zamani nor Mr. Ehsani paid any funds to Mr. Cullen, and Mr. Cullen had no judgment in his favor.

5. Whether the court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, when equitable principles of restitution do not call for such an award because the funds were paid to others, and because both Mr. Ehsani and Ms. Zamani have unclean hands.

6. Whether attorney fees and costs should be awarded to Mr. Cullen as the prevailing litigant on appeal.

II. STATEMENT OF THE CASE

This appeal is the culmination of seven years of litigation. Mr. Ehsani and Ms. Zamani owned the Residence Suites Hotel in Bellevue, Washington, and sold it to The McCullough Family Partnership, David E. McCullough and Chong R. McCullough, Edward McCullough, and The McCullough Group, Inc. (the “McCulloughs”) in 1992. CP 3. In conjunction with the sale, the McCulloughs executed a deed of trust and promissory note that secured the property in favor of Mr. Eshani and Ms. Zamani. *Id.*

At the time of sale, Mr. Ehsani and Ms. Zamani were married. *Id.* Two years later, in 1994, their marriage was dissolved. *Id.* In the dissolution proceeding, Mr. Ehsani was awarded 38.95% of the outstanding principle and interest on the note, and Ms. Zamani was awarded the remaining 61.05%. CP 3.

In 1995, the McCulloughs fell into arrears on their payments on the note. *Id.* Mr. Ehsani brought suit for judicial foreclosure of the note and deed of trust two years later, in 1997, and joined Ms. Zamani as a plaintiff. CP 4. Mr. Ehsani made a claim for a deficiency judgment for the amount of indebtedness owed, if any, after sale of the property. *Id.*

The hotel sold prior to trial, and the net profits of the sale were set aside in a hold-back account with First American Title Company pending adjudication of the rights of the parties at trial. CP 181.

Prior to trial, Ms. Zamani settled with the McCulloughs, and executed a release of all claims in favor of the McCulloughs and their

agents. CP 275:14-21; CP276-86. The release provided, in pertinent part, as follows:

...Zamani and McCulloughs do hereby release one-another, their parent or subsidiary corporations, affiliates, directors, officers, management personnel, insurers, and sureties, agents, employees, predecessors or successors, and assigns, jointly and severally, from all claims, counterclaims, damages, actions, causes of action, or suits of any kind or nature, arising now or in the future or related in any way to the transaction by which the McCulloughs purchased the Hotel, the 9/1/92 Installment Note and Deed of Trust, McCulloughs' operation of the Hotel to June 13, 1996, and Zamani's operation of the Hotel on and after June 13, 1996.

...McCulloughs understand and acknowledge that Zia Ehsani intends to pursue a claim for deficiency against them under his 38.95 share of the Note and Deed of Trust. Zamani does not hereby assume any responsibility or obligation to indemnify, defend or hold harmless the McCulloughs against Ehsani's claim for deficiency against McCulloughs or any other claim asserted by Ehsani against McCulloughs. **Such matters are to [be] resolved solely between McCulloughs and Ehsani with no involvement, obligation, or liability by or upon Zamani.**

CP 279, ¶¶ 7, 9 (emphasis added).

The foreclosure action proceeded to trial on Mr. Ehsani's claims. CP 4. At trial, the court denied Mr. Ehsani's request for a deficiency judgment, based on its finding that Mr. Ehsani had a duty to mitigate damages, but failed to do so, and unreasonably refused sale offers on the hotel. CP 4. Mr. Ehsani has admitted that the trial court found his behavior to be "obstructive, contentious, and downright wrongheaded," CP 17:10-11, and noted that Mr. Ehsani went through eight different attorneys during the pendency of the foreclosure action. CP 270:18-20. As a result of Mr. Ehsani's failure to mitigate damages and because of his intransigent behavior and unclean hands, the trial court determined that the

McCulloughs were the prevailing party, and thus entered a judgment for attorney fees and costs in their favor, against Mr. Ehsani *only*, of \$97,459.00 under the requisite provision in the note. CP 6; CP 139:14-23; CP 308.

Mr. Eshani did not post a supersedeas bond to stay enforcement of the judgment. Once the trial on the foreclosure action concluded, Ms. Zamani received a disbursement of \$122,100.00 from the hold-back fund, which represented her 61.05% share of the hold-back fund. CP 38:1-2; 141:10-14. The monies remaining in the fund, which represented Mr. Ehsani's share of the hold-back fund, amounted to \$77,900.00. This amount was disbursed to the McCulloughs in partial satisfaction of the judgment for fees against Mr. Ehsani. CP 353-54. The funds were deposited into the trust account of their attorney, David Cullen, and were subsequently disbursed at the McCulloughs' instruction, CP 172:2-7, to the McCulloughs, to the McCullough's accountant, to a legal messenger service, to the Court of Appeals, and to Mr. Cullen for his fees. CP 261:12-23. No escrow agreement, terms, conditions or restrictions on transfer were imposed on the disbursement of funds to the attorney's trust account. CP 316: 1-8.

Both Mr. Ehsani and Ms. Zamani appealed. *Ehsani v. The McCullough Family Partnership*, 113 Wn. App. 1046, 2002 WL 31106405 (Wash.App. Div. 1 2002).¹ Mr. Ehsani argued on appeal that

¹ This case is not cited as authority, which is prohibited by RAP 10.4(h), but is rather cited only in explanation and support of the procedural history of this case.

his claim for a deficiency judgment should not have been denied, and the Court of Appeals agreed. CP 6. The award of attorney fees to the McCulloughs was thus reversed, and the Court of Appeals ordered that fees were to be awarded to Mr. Ehsani on remand. CP 9. On her cross-appeal, Ms. Zamani argued that she was entitled to reimbursement from Mr. Ehsani for funds that she expended to operate the hotel after the McCulloughs' default and prior to the sale of the hotel. CP 6. The Court of Appeals held that she was entitled to reimbursement for funds expended for taxes and for payments on the McCulloughs' bank loan to keep the property out of foreclosure. CP 10. Consequently, the case was remanded to the trial court. CP 11.

On remand, Mr. Ehsani filed a motion for restitution. CP 158-60. However, all of the McCulloughs, except the McCullough Group, Inc., filed for bankruptcy, which precluded Mr. Ehsani from requesting restitution from them and from demanding an award of attorney fees against them. CP 256:15-257:6. Thus, instead of requesting relief against the McCulloughs, Mr. Ehsani requested that the attorney for the McCulloughs, David Cullen, restore the funds that were disbursed to his trust account from the hold-back fund in partial satisfaction of the trial court's initial order awarding the McCulloughs their attorney fees. *Id.*; CP 160.

At a hearing on Mr. Ehsani's motion, the trial court requested that Ms. Zamani file a proposal for reimbursement from Mr. Ehsani to her as

ordered by the Court of Appeals, CP 203, which she did, and requested reimbursement in the amount of \$32,377.20. CP 205-07, 287-90.

The trial court denied Mr. Ehsani's request for restitution of the funds disbursed to Mr. Cullen's trust account, CP 301:17-20, and granted Ms. Zamani reimbursement as follows:

...[I]t is ORDERED that Zamani shall have a judgment *against Ehsani* for \$32,377.20 from his 38.95% share of the holdback.

CP 302:8-9 (emphasis added).

Mr. Ehsani and Ms. Zamani both appealed. Mr. Ehsani's appeal has been dismissed for failure to file his brief, and only the appeal of Ms. Zamani remains.

Despite the fact that Ms. Zamani has a judgment against Mr. Ehsani for the full amount of the reimbursement she requested, and despite her full release of the McCulloughs' agents under the settlement agreement, she nonetheless argues on appeal that she should receive restitution against Mr. Cullen for \$32,377.20 of the \$77,900.00 disbursed to his trust account from the hold-back fund.

IV. ARGUMENT

1. **Ms. Zamani has already received the relief for which she prays, because she has a judgment against Mr. Ehsani for the full amount of reimbursement she requested.**

The trial court granted to Ms. Zamani the precise relief she demanded. Despite the fact that the trial court ordered a judgment in her favor against Mr. Ehsani for the full amount of reimbursement she requested, Ms. Zamani never sought entry of a judgment against Mr.

Ehsani, and has never made any effort to collect against him. Instead, she is apparently arguing that Mr. Cullen should restore Mr. Ehsani's share of the hold-back fund so that she can collect against those funds. It is unclear why Ms. Zamani is proceeding in this fashion, because there is no evidence that Mr. Ehsani is insolvent or that any other obstacles to collection exist.

Simply put, Ms. Zamani is not entitled to appeal because she has already won at the trial court level. She has not assigned error to the portion of the trial court's order granting a judgment in her favor against Mr. Ehsani, rather than Mr. Cullen, has not presented any argument in support of the position that judgment should be entered against Mr. Cullen instead, and made no such argument at the trial court level. Thus, the court should not consider any such argument on appeal. *See Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 (FN 4), 69 P.3d 895 (2003) (holding, "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.") Accordingly, the trial court's order should be affirmed.

2. Ms. Zamani released all claims against the McCulloughs' agents, and thus is barred from seeking restitution against Mr. Cullen.

Ms. Zamani released all claims against the McCulloughs' agents, and further promised that she would maintain "no involvement" in Mr. Ehsani's claims against the McCulloughs. CP 279, ¶¶7, 9. Ms. Zamani's

appeal, and her argument at the trial court level, directly violates the release agreement.

Ms. Zamani essentially requests that reimbursement of Mr. Ehsani's funds be ordered against Mr. Cullen (who is the agent of the McCulloughs), so that she can then collect against them. This request violates her agreement to release all claims against the McCulloughs agents, as well as her agreement to remain uninvolved in the dispute between the McCulloughs and Mr. Ehsani. She provides no legal basis for her implicit request that the court disregard the release, and in fact has made no argument, either at the trial court level or on appeal, that the release is voidable or inapplicable.

“A release is a contract and its construction is governed by contract principles subject to judicial interpretation in the light of the language used.” *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). Washington courts generally uphold the validity of releases. *Id.* A release of “all claims” is generally held to be binding upon a plaintiff who later discovers the damage caused by an injury is greater than was originally contemplated. *Fradkin v. Northshore Utility Dist.*, 96 Wn. App. 118, 128, 977 P.2d 1265 (1999).

In this case, Ms. Zamani entered into a broad release of all claims, present and future, against the McCulloughs and their agents, arising out of the note and deed of trust on the hotel. CP 279, ¶7. Ms. Zamani now claims restitution against Mr. Cullen—the McCulloughs' agent—in the foreclosure litigation, in direct violation of the unambiguous contract

terms. Additionally, Ms. Zamani explicitly agreed to maintain no involvement in the claims between Mr. Ehsani and the McCulloughs. CP 279, ¶9. Despite this agreement, she has injecting herself directly into the controversy between Mr. Ehsani and the McCulloughs regarding the disbursement of Mr. Ehsani's share of the hold-back fund, and has even continued the litigation after Mr. Ehsani's appeal was dismissed.

3. **The trial court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because he is not a party to the case and because the court lacked personal jurisdiction over him.**

Because Mr. Cullen is not a party to this case, the court has no personal jurisdiction over him, and thus cannot require him to pay to Ms. Zamani any fees he received from the McCulloughs. Accordingly, the trial court properly denied Mr. Ehsani's motion for restitution.

Personal jurisdiction is acquired only "by the service of the applicable statutory process, or by the voluntary appearance of the party whose rights are sought to be adjudicated." *State v. Superior Court of King County*, 63 Wn. 96, 100, 114 P. 905 (1911). In *State v. Superior Court*, the plaintiff brought an action to cancel a deed, and named the recipients of the deed as defendants. Plaintiff attempted to settle the case with the defendants, and executed a settlement agreement, to which several realtors were also parties. When a dispute arose under the settlement agreement, the trial court adjudicated the right of the realtors under the settlement agreement, even though they were not parties to the plaintiff's suit. On appeal, the court held that personal jurisdiction over

the realtors was lacking, even though the realtors were parties to the settlement agreement.

Similarly, Mr. Cullen is not a party to the litigation between Mr. Ehsani, Ms. Zamani, and the McCulloughs. Because he is not a party to the litigation, the court lacks personal jurisdiction over him and cannot adjudicate his rights. Thus, the denial of Mr. Ehsani's motion for restitution against Mr. Cullen was proper.

4. **The trial court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because Mr. Cullen did not have a judgment in his favor, rendering *Mason* inapplicable.**

The judgment for attorney fees entered in this case was in favor of the McCulloughs, not Mr. Cullen, and the funds received were disbursed to individuals other than Mr. Cullen. As a result, the court's decision in *In re Marriage of Mason*, 48 Wn. App. 688, 740 P.2d 356 (1987), is inapposite and does not provide a legal basis for requiring Mr. Cullen to disgorge the monies deposited into his trust account.

Ms. Zamani heavily relies on *In re Marriage of Mason* to support her argument on appeal. However, the *Mason* case contained a crucial difference from the case at issue here: in *Mason*, the attorney "was a judgment creditor in his own right pursuant to the trial court's order RCW 26.09.140 and he was paid directly by Joseph Mason, the judgment debtor." *Id.* at 693. RCW 26.09.140 is a marital dissolution statute which provides as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name.

RCW 26.09.140 (2004) (emphasis added). Under the court's order awarding the attorney in *Mason* his fees pursuant to RCW 26.09.140, the attorney was a judgment creditor, with an independent right to secure payment on the obligation. Mr. Cullen, however, was not a judgment creditor in his own right, and was not paid by Mr. Ehsani, and did not receive payment of the entire judgment amount. This pivotal deviation from the circumstances at issue in *Mason* precludes any requirement that Mr. Cullen provide restitution of the funds paid into his trust account.

Furthermore, in declining to apply Restatement of Restitution § 74, comment h (1937) and the cases to which comment h cites, the *Mason* court held, "In none of these cases was the attorney paid directly pursuant to a judgment requiring the opposing party to pay the attorney fees and naming the attorney as a judgment creditor in his own right." *Id.* at 692. This crucial distinction mirrors the difference between the circumstances at issue in *Mason* and those at issue here.

In clearly defining and heavily relying upon the unique facts before it, the *Mason* court limited its holding to only those situations in which the attorney “was paid directly pursuant to a judgment requiring the opposing party to pay the attorney fees and naming the attorney as a judgment creditor in his own right.” *Id.* at 692. As such, *Mason* has no applicability to the issues presented in the instant case.

It is also important to note that Mr. Cullen was not bound by any escrow agreement, terms, conditions or restrictions imposed on him or the McCulloughs in conjunction with disbursement of \$77,900.00 from the hold-back account for the McCulloughs. Without such condition or restriction, Mr. Cullen was under no duty to retain these funds pending appeal, especially in light of the fact that the funds were disbursed according to the McCulloughs’ instructions. CP 172: 2-7.

Finally, Ms. Zamani could have protected herself completely from this possible outcome. RAP 8.1 specifically provides a mechanism for a judgment debtor to protect himself or herself during the appeal process from collection of such a judgment by posting a supersedeas bond. *See Malvo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828 (1969).

Here, Ms. Zamani did not post a supersedeas bond and simply allowed the \$77,900.00 to be deposited into Mr. Cullen’s trust account. Having slept on her rights, she cannot now claim entitlement to restitution from Mr. Cullen.

5. **The trial court properly denied Mr. Ehsani's motion to require Mr. Cullen to restore the monies disbursed from the hold-back fund to his trust account, because neither RAP 12.8 nor the equitable principles of restitution call for such an award, and because the funds were paid to others, and both Mr. Ehsani and Ms. Zamani have unclean hands.**

Restitution under RAP 12.8 is an equitable remedy, to which no party is entitled as a matter of right. *See* RAP 12.8; *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 867 P.2d 605 (1994); *In re Marriage of Stern*, 68 Wn. App. 922, 846 P.2d 1387 (1993). The trial court's determination of the appropriateness of restitution is subject to an abuse of discretion standard of review on appeal. *Id.* at 205. Ms. Zamani has failed to identify any abuse of discretion by the trial court and has not made any argument to suggest that the equities of the case require restitution; accordingly, the trial court's order denying Mr. Ehsani's motion should be affirmed.

A similar issue was presented in *Sac Downtown*, a foreclosure action in which the defendants claimed a right to restitution under RAP 12.8 for damages for their loss of the use of the property during the period the foreclosure sale was litigated. RAP 12.8 provides as follows:

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired

by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

RAP 12.8 (2004).

In analyzing whether restitution was appropriate under RAP 12.8, the Washington Supreme Court has held that such restitution is not a matter of right:

[R]estitution is an equitable remedy. On equitable matters, a court has broad discretion, which will be disturbed on appeal only if the trial court abused its discretion. We cannot conclude that the trial court abused its discretion here in arriving at its conclusion concerning the equities.

Id. at 205. Other courts have similarly recognized that whether restitution is appropriate under RAP 12.8 turns on the equities of the case, and have explained, “This rule is based upon common law principles of restitution that allow a person who has conferred a benefit on another to recoup that benefit to avoid unjust enrichment.” *State v. A.N.W. Seed Corp.*, 116 Wash.2d 39, 802 P.2d 1353 (1991).

Similarly, in the case at issue here, the trial court weighed the equities of the case in reaching its decision. Prior to issuing its order, the court reviewed Mr. Cullen’s accounting records which reflected the fact that Mr. Cullen had not received the \$77,900.00 disbursed from the hold-back fund. CP 301; CP 261. In fact, the monies were paid into his trust account, thus rendering them the property of his clients, the McCulloughs. *See* RPC 1.14; *In re McKean*, 148 Wn.2d 849, 64 P.2d 1226 (2003). These funds were then tendered from Mr. Cullen’s trust account at the direction of the McCulloughs to a number of individuals, including the

McCulloughs, the McCulloughs' accountant, a legal messenger service, and the Court of Appeals. CP 261; CP 301. Only a portion of these funds were retained by Mr. Cullen. CP 261. The fact that Mr. Cullen has not retained the monies weighs heavily in favor of denying restitution.

Perhaps the most critical fact weighing in favor of denying Ms. Zamani's demand for restitution is the fact that the monies disbursed from the hold-back fund to Mr. Cullen's trust account *did not belong to her*, and Ms. Zamani already has a judgment against Mr. Ehsani for the full amount of reimbursement she requested. CP 302:6-7. Ms. Zamani offers no explanation why she has chosen to collect against Mr. Cullen, when the appropriate remedy is collection against Mr. Ehsani, who is the undisputed judgment debtor. *Id.* Ms. Zamani is essentially requesting restitution of funds to Mr. Ehsani, so that she can collect on her judgment against him. There is no evidence that Mr. Ehsani is insolvent or that it would be impracticable or impossible to collect against him.

Additionally, the trial court considered the fact that David McCullough had told Mr. Ehsani several times—and in fact rendered testimony at trial—to the effect that he could not pay a substantial deficiency judgment, and that he would be forced to declare bankruptcy if one was awarded. CP 266. Despite this knowledge, neither Mr. Ehsani nor Ms. Zamani chose to employ the supersedeas procedures authorized by RAP 8.1, and Mr. McCullough filed bankruptcy. There is no evidence in the records that Ms. Zamani has filed a claim in the bankruptcy proceeding to recover the amount for which she claims restitution.

Finally, the court was familiar with and considered the conduct of the parties throughout the course of litigation, and found in its order on remand:

Plaintiff Ehsani submitted invoices and billing statements from various counsel representing him before, during, and after trial in this matter. The statements were not supported by analysis or briefing and are not differentiated in any way by Plaintiff. Defendant objected to the aggregate amount claimed[,] noting that both the failed deal negotiations, the litigation and especially the trial were protracted in large part due to Plaintiff Ehsani's intransigence and insistence on re-hashing the history of his marriage and dissolution from Plaintiff Zamani. The court agrees with this assessment as it did at the time of trial...

CP 301:5-13. Moreover, the court found that neither Mr. Ehsani nor Ms. Zamani had "clean hands" with regard to the foreclosure action against the McCulloughs. CP 6. Based on these facts, the trial court properly decided that requiring Mr. Cullen to reimburse the funds dispensed from the hold-back account to the McCulloughs, an unidentified portion of which was disbursed to Mr. Cullen, would be inequitable and unfair, and thus properly denied Mr. Ehsani's motion under RAP 12.8.

Indeed, the trial court's decision harmonizes with the purpose behind the remedy of restitution, which is "to prevent unjust enrichment to either party." *Brader v. Minute Muffler Installation, Ltd.*, 81 Wn. App. 532, 537, 914 P.2d 1220 (1996). Unjust enrichment is defined as follows:

A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity. Enrichment alone will not trigger the doctrine; the enrichment must be unjust both under the circumstances and as between the two parties to the transaction.

Bort v. Parker, 110 Wn. App. 561, 580, 42 P.3d 980 (2002) (internal citations and quotations omitted). Furthermore, “[t]he mere fact of benefit alone is not enough. Liability only attaches where the circumstances of the benefit would make it unjust to retain it.” *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493, 499, 717 P.2d 1384 (1986).

Mr. Cullen has not unfairly profited at Ms. Zamani’s expense. In fact, he received only a portion of the funds disbursed to the McCulloughs, and there is no evidence to the effect that the amount paid to Mr. Cullen even approached the \$32,377.20 for which Ms. Zamani requests restitution. Although Ms. Zamani now objects to the trial court’s *in camera* review and consideration of Mr. Cullen’s accounting records, she made no such objection to the trial court, and thus failed to preserve this issue for appeal. *See*, RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”); *see also, e.g., Ruddach v. Don Johnston Ford, Inc.*, 97 Wn.2d 277, 281, 644 P.2d 671 (1982) (holding, “issues not raised in the trial court will not be considered for the first time on appeal.”). Thus, she cannot now claim that the trial court’s consideration of this evidence is error.

Under circumstances similar to those at issue in the present case, restitution has been denied by courts in other jurisdictions. For example, in *Cox v. Cox*, 56 Mass.App.Ct. 864, 780 N.E. 2d 951 (2002), the Massachusetts Court of Appeals denied a request for restitution of attorney

fees paid to a party in a marital dissolution proceeding after reversal of the award on a prior appeal. In *Cox*, the wife was successful at trial, and her attorney was awarded his fees pursuant to a Massachusetts statute that allows the court to order an award for fees directly to a party's attorney in divorce cases.² The husband successfully appealed, and the case was remanded "for the purpose of acting upon any application of the [husband] to restore the parties to the status quo ante, consistent with this opinion." *Id* at 867. The husband made such a motion and the wife filed for bankruptcy. At the subsequent hearing a new trial judge issued an order compelling the wife's trial attorney to repay the amounts he was awarded by the court after the previous trial.

The Massachusetts Court of Appeals reversed. In so doing, it reviewed cases from a number of jurisdictions, and conducted a detailed analysis of the applicable principles of restitution. In support of its conclusion, the *Cox* court noted that a number of jurisdictions have adopted the rule that "[A]n attorney acting in good faith is not required to restore monies paid to the attorney in satisfaction of a valid debt incurred

² That statute provides as follows: "In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder, to a party, they may be awarded to his or her counsel, or may be apportioned between them." Massachusetts General Laws Chapter 208: Section 38 (emphasis added).

for legal services rendered, which monies were received from the opposing party pursuant to a court order.” *Id.* at 877.³

The court also adopted section 1 of the Restatement of Restitution (1937), which provides:

Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party. ... The fact that a person has benefited from another is not of itself sufficient to require the other to make restitution therefore. ... Restitution is appropriate only if the circumstances of its receipt or retention are such that as between the two persons it is unjust for [her] to retain it.

Id. at 872-873 (internal citations omitted; emphasis added). In situations in which restitution is sought from third parties, the Appeals Court noted that both Restatement of Restitution §74 (1937) and Restatement Third of Restitution and Unjust Enrichment § 18 (Tentative Draft No. 1 2001) are in accord that third parties are to be treated quite differently from parties to the case after a judgment has been reversed. *Id.* at 876.

Reconciling the cases and the principles from the restatements, the court in *Cox* identified the operative dichotomy as follows: bona fide creditors of the judgment creditor are not liable in restitution; real parties

³ See also 5 Am. Jur. *Attorneys at Law* § 147, which states as follows:

The general rule is that even though the attorney retains as payment for his services, or for some other debt owing by his client, under an agreement with the latter, part of all of the proceeds of a judgment recovered by the client which is subsequently reversed, he is not obliged to make restitution to the judgment debtor provided he acted in good faith in prosecuting the action in which the judgment was recovered. But if the judgment was void, or if the attorney knew it was recovered by fraud or he otherwise did not act in good faith in retaining the money, he is liable to make restitution.

in interest, such as attorneys compensated under a contingent fee arrangement, are liable in restitution. The Appeals Court then went on to apply this principle, and concluded as follows:

The attorney is not liable in restitution to the judgment debtor unless the judgment debtor, on remand, proves either the payment did not discharge an unconditional, bona fide obligation the client had to the attorney or that, although the payment did discharge such an obligation, other circumstances exist that make the attorney's retention of the payment unjust. The foregoing principle applies at least when, as here, the attorney receives payment directly from an opposing party pursuant to a court order.

Id. at 879 (emphasis added). Notably, in the case at bar, the threshold requirement that the attorney receives payment directly from the opposing party pursuant to a court order was not even met.

In the instant case, Mr. Cullens' trust account records, fee agreement, and other documents submitted to the court *in camera* indicated that disbursements were made to individuals in addition to Mr. Cullen. All parties paid with funds from Mr. Cullen's trust account received these funds for services rendered—i.e., for unconditional, bona fide obligations—and thus were bona fide creditors of defendants rather than real parties in interest. Therefore, based on the applicable principles of restitution, as carefully delineated in *Cox*, plaintiff would not be entitled to an order of restitution against these individuals. Consequently, restitution was properly denied.

6. Attorney fees and costs should be awarded to Mr. McCullough as the prevailing party on appeal.

Costs to the prevailing party are permitted on appeal under RAP 14.2, which provides, in pertinent part, as follows:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

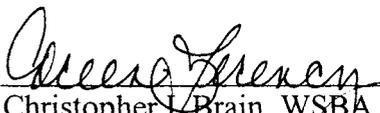
RAP 14.2 (2004). Although Mr. Cullen is not a party to this case, he is no less entitled to recover his costs on appeal if he prevails. As a prevailing litigant who was unwittingly and improperly dragged into this litigation, equity demands that he receive the same benefit as a prevailing party under RAP 14.2. Ms. Zamani should not be permitted to hale non-parties into court with impunity by hiding behind a rigid definition of "party" under RAP 14.2 to escape paying costs.

V. CONCLUSION

Therefore, for the reasons set forth above, the court should affirm the trial court's order denying Mr. Ehsani's motion for restitution.

RESPECTFULLY SUBMITTED this 20th day of September 2004.

TOUSLEY BRAIN STEPHENS PLLC

By: 
Christopher J. Brain, WSBA #5054
Coreen R. Ferencz, WSBA #30314
Counsel for Appellants

CERTIFICATE OF SERVICE

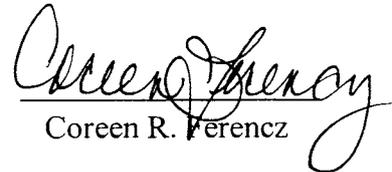
I hereby certify that I have this 20th day of September, 2004,
caused to be served a true and correct copy of the following upon
the persons indicated below:

Brief of Respondent David Cullen

Helmut Kah Attorney at Law 13901 NE 175 th Street Ste. K Woodinville, WA 98072-8548	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivered via Messenger Service <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Facsimile
Sayed Zia Ehsani P.O. Box 22802 Seattle, WA 98122	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivered via Messenger Service <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Facsimile

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 20th day of September, 2004, at Seattle,
Washington.


Coreen R. Ferencz

FILED
COUNTY OF KING
STATE OF WASHINGTON
2004 SEP 20 PM 4:19

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SAYED ZIA EHSANI, a single man, Appellant,
GUITTY ZAMANI, a single woman, Respondent/Cross Appellant,

v.

THE MCCULLOUGH FAMILY PARTNERSHIP, et al, Respondents.

INDEX OF OUT OF STATE AUTHORITIES

Christopher I. Brain, WSBA #5054
Coreen Ferencz, WSBA #30314
Attorneys for Respondent David Cullen
Tousley Brain Stephens PLLC
700 Fifth Avenue, Suite 5600
Seattle, WA 98104
(206) 682-5600

ORIGINAL

OUT-OF-STATE AUTHORITIES

CASES

- A. *Cox v. Cox*,
Mass.App.Ct. 864, 780 N.E. 2d 951 (2002).....17, 18, 19, 20

STATUTES

- B. Massachusetts General Laws, Chapter 208: Section 3818

Index A

West Reporter Image (PDF)

56 Mass.App.Ct. 864, 780 N.E.2d 951

Appeals Court of Massachusetts,
Essex.
Nancy L. COX & another [FN1]

FN1. Edward Mahlowitz, intervener.

v.

Richard E. COX.
No. 99-P-1509.
Argued Oct. 9, 2001.
Decided Dec. 31, 2002.

Former husband brought motion to restore parties to status quo ante after original judgment of divorce was reinstated, and attorney of former wife successfully moved to stay and vacate order insofar as it concerned him. The Probate and Family Court Department, Essex Division, John C. Stevens, III, J., joined attorney as party plaintiff, and ordered him to repay \$31,075 previously awarded for counsel fees. Attorney appealed. The Appeals Court, Lenk, J., held that: (1) Probate Court had jurisdiction to order attorney to make repayment to former husband, and (2) attorney was not liable in restitution to former husband upon reversal of judgment unless former husband, on remand, proved either that payment did not discharge unconditional, bona fide obligation client had to attorney or that, although payment did discharge such obligation, other circumstances existed that made attorney's retention of payment unjust. Vacated and remanded.

West Headnotes

[1] [KeyCite Notes](#)



106 Courts

106V Courts of Probate Jurisdiction

106k200.5 k. Equitable Powers in General. Most Cited Cases

134 Divorce KeyCite Notes



134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k287 k. Determination and Disposition of Questions. Most Cited Cases

On remand from appellate decision ruling a nullity vacation of divorce judgment on former wife's motion as to division of marital property, Probate Court had jurisdiction to order former wife's attorney to repay to former husband counsel fees, which he had been ordered to pay on vacation of judgment, in order to restore the status quo; although Probate Court was court of limited jurisdiction, it had general equity powers. M.G.L.A. c. 215, § 6.

[2] [KeyCite Notes](#)



106 Courts

106V Courts of Probate Jurisdiction

106k198 k. Nature and Scope of Jurisdiction in General. Most Cited Cases

A probate court possesses inherent powers apart from statutory authorization; these powers are broad and flexible, and extend to actions necessary to afford any relief in best interests of a person under their jurisdiction. M.G.L.A. c. 215, § 6.

[3] KeyCite Notes



106 Courts

106V Courts of Probate Jurisdiction106k198 k. Nature and Scope of Jurisdiction in General. Most Cited Cases

A probate court has power to correct what has been wrongfully done, such as ordering a restitution of monies obtained under the court's statutory authority after a decision has been overturned. M.G.L.A. c. 215, § 6.

[4] KeyCite Notes



45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k26 k. Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

Attorney, who received proceeds of judgment favoring attorney's client in divorce proceeding, was not liable in restitution to former husband of attorney's client, for counsel fees that former husband had paid to attorney, upon reversal of judgment unless former husband, on remand, proved either that payment did not discharge unconditional, bona fide obligation client had to attorney or that, although payment did discharge such obligation, other circumstances existed that made attorney's retention of payment unjust.

[5] KeyCite Notes



205H Implied and Constructive Contracts

205HI Nature and Grounds of Obligation205HI(A) In General205Hk2 Constructive or Quasi Contracts205Hk4 k. Restitution. Most Cited Cases

Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another is required to repay the injured party.

[6] KeyCite Notes



205H Implied and Constructive Contracts

205HI Nature and Grounds of Obligation205HI(A) In General205Hk2 Constructive or Quasi Contracts205Hk4 k. Restitution. Most Cited Cases

Restitution is appropriate only if circumstances of its receipt or retention are such that, as between two persons, it is unjust for one to retain it.

[7] KeyCite Notes



45 Attorney and Client

45IV Compensation

45k142 Contracts for Compensation45k144 k. Construction and Operation. Most Cited Cases

A lawyer who has a fee for legal services rendered arrangement is entitled to payment of the fee irrespective of

client's ultimate success and any unpaid counsel fees remain client's debt obligation.

****952 *864** Edward M. Mahlowitz, Belmont (John L. Mason, Jr., with him), pro se.

Lisa Stern Taylor for the defendant.

Present: LENK, COWIN, & McHUGH, JJ.

LENK, J.

Reduced to essentials, the issue before us is whether a Probate Court judge erred in determining that the appellee Richard Cox is entitled to repayment from Edward Mahlowitz, his former wife's lawyer, of counsel fees that Cox had paid to Mr. Mahlowitz pursuant to a judgment that was subsequently reversed on appeal.

865** I. *Factual and procedural background.* We distill and summarize such of the somewhat convoluted facts of record as *953** are relevant to the issue on appeal. The plaintiff is Nancy Cox (wife), [FN2] the former wife of the defendant-appellee Richard Cox (husband). The wife retained Attorney Edward Mahlowitz--the true appellant here [FN3]--to represent her following the entry of a divorce judgment that was predicated upon a settlement agreement as to which she apparently later had second thoughts. Mr. Mahlowitz thereafter successfully moved on the wife's behalf to vacate the judgment as to the division of marital property, and following trial, a new judgment that was more favorable to the wife in that regard entered. In connection with these and related matters, [FN4] as well as certain contempt proceedings against the husband, Mr. Mahlowitz requested, again on the wife's behalf, the award of his counsel fees and costs. The judge ordered, as part of the amended judgment on further division of the marital assets, that the husband pay to Mr. Mahlowitz, as attorney for the wife, presumably pursuant to G.L. c. 208, § 38, and G.L. c. 215, § 34A, [FN5] approximately \$30,000 in counsel fees, a sum that was less than half of the fee ***866** requested. [FN6] Thereafter, Mr. Mahlowitz again sought fees and costs specifically in connection with his prosecution of a second ****954** complaint for contempt and was awarded \$1,075.00, presumably pursuant to G.L. c. 215, § 34A, as requested, and again less than half of the amount sought. The husband ultimately paid Mr. Mahlowitz the fees awarded.

FN2. Though listed on the Appeals Court docket sheet as a party, the wife did not file a brief in this appeal.

FN3. Mr. Mahlowitz, listed on the Appeals Court docket sheet as an intervener-appellant, was belatedly added as a plaintiff to the proceedings by the motion judge, sua sponte, when hearing the husband's postappeal

restitution request.

FN4. Pursuant to his complaint for modification, the husband's alimony obligation was reduced by half. See note 6, *infra*.

FN5. General Laws c. 208, § 38, as appearing in St.1933, c. 288, states:

"In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them."

General Laws c. 215, § 34A, fourth par., inserted by St.1982, c. 282, effective October 6, 1982, reads as follows:

"In entering a judgment of contempt for failure to comply with an order or judgment for monetary

payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on monetary arrears, all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt. The contempt judgment so entered shall

include reasonable attorney's fees and expenses unless the probate judge enters specific findings that such attorney's fee and expenses shall not be paid by the defendant."

FN6. Following the vacation of the judgment, the judge consolidated for hearing the wife's complaints for division of marital assets and contempt and the parties' respective complaints for modification as to alimony. The judgment as to the division of assets contained the counsel fee award while the judgment as to the husband's contempt neither specifically discussed nor awarded fees. At the time the judgments entered, the court had before it Mr. Mahlowitz's motion, as amended, for counsel fees, based upon his representation of the wife in all of the aforesaid proceedings. In awarding counsel fees, the judge cited *Brash v. Brash*, 407 Mass. 101, 106, 551 N.E.2d 523 (1990), and *Grubert v. Grubert*, 20 Mass.App.Ct. 811, 819-820, 483 N.E.2d 100 (1985), and stated: "As a result of the defendant's fraudulent conduct and continuous obstructive behavior to discovery, the unraveling of the defendant's financial affairs was extremely difficult and therefore required considerable expense and effort by the attorney for the plaintiff. Hence the court has granted plaintiff's counsel the sum of \$30,000 as a contribution towards plaintiff's counsel fees." The judge's stated

rationale suggests that the fees were largely awarded pursuant to G.L. c. 208, § 38, but the matter is not free from doubt.

The husband appealed both from the order vacating the judgment of divorce and from the subsequent judgment further dividing the marital assets. The wife retained new counsel to handle the appeal, who apparently elected not to appeal on her behalf from any portion of the judgments adverse to the wife. A panel of this court, in an unpublished memorandum and order issued pursuant to rule 1:28, *Cox v. Cox*, 44 Mass.App.Ct. 1118, 694 N.E.2d 52 (1998) (our memorandum and order), determined that it was error for the Probate Court judge to have allowed the wife's motion to vacate the judgment, stating:

"It follows that the section 34 hearing, the amended judgment ... that resulted from the hearing, and all orders arising out of the allowance of the motion to vacate and the entry of amended judgment were nullities.

"The allowance of the plaintiff's motion to vacate the divorce judgment is vacated, and the original judgment of ***867** divorce is reinstated. The case is remanded to the Probate Court for the purpose of acting upon any application of the defendant to restore the parties to the status quo ante, consistent with this opinion."

In short order thereafter, the husband moved to "restore the parties to status quo ante," the Probate Court judge whose orders had been reversed on appeal abruptly recused himself sua sponte and without explanation, and the wife filed for bankruptcy. Despite the suggestion of bankruptcy and motion to continue filed on the wife's behalf, a different Probate Court judge (the motion judge) acted on the husband's motion and ordered the wife to take certain actions to restore the husband to his former position. As the husband requested, in addition to nullifying certain qualified domestic relations orders concerning pension benefits, the motion judge ordered the wife to pay the husband the \$127,120 previously awarded her, plus interest, and to pay the husband \$47,301.43 in counsel fees incurred in connection with the trial and appeal. As particularly relevant here, the order of the motion judge also stated that:

"Nancy L. Cox, and her attorney, Edward Mahlowitz, are hereby ordered to pay to the defendant, Richard E. Cox, the amount of ... \$31,075 together with interest at the rate of ... 12% per annum from May 31, 1996 to date of payment, within ... 30 days of this Court's order."

This order as to Mr. Mahlowitz entered despite the fact that he had not been served with the husband's "Motion to Restore Parties to Status Quo Ante Pursuant to Appeals Court Decision" and did not participate in the hearing, just as he had not participated in the appeal. In the motion judge's written rationale for the order, he notes--presumably on the basis of inferences he drew from our memorandum and order--that the equities favored the husband since the wife and Mr. Mahlowitz had been "less than candid with the Court" in bringing the motion pursuant to Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974), which was "without substance," "a meritless proceeding," and prosecuted in "bad faith."

***868** Mr. Mahlowitz, upon being notified of the judge's order, successfully moved to stay and vacate the order insofar as it concerned him. Sua sponte, however, the judge joined Mr. Mahlowitz as a party plaintiff and, following

an April 1, 1999, ****955** limited evidentiary hearing, [FN7] ordered him to repay the \$31,075. The judge observed that:

FN7. The scope of the hearing was expressly limited by the motion judge to determining "(a) whether the husband paid fees to Attorney, and, if so, how much; (b) whether the payment included interest and, if so, how much; (c) whether any amount was repaid; (d) whether Attorney shall be ordered to repay the award, all or in part; (e) if so, whether interest is applicable; and (f) if so, the rate and amount of interest."

"[I]t was he who initiated the [r]ule 60(b) proceeding ... which the Appeals Court found to be without merit. Further, Attorney Mahlowitz was notified by counsel for the husband of the appeal. He knew or should have known that if the appeal were successful, all orders made by the judge including those for attorney's fees, were in jeopardy.

"Inasmuch as the judgment ... is a nullity, it follows that the order to pay legal fees to Attorney Mahlowitz pursuant to that nullified judgment is, in and of itself, a nullity. Only by repayment of the \$31,075 can the husband (a party) be restored to the *status quo ante* [sic] contemplated by the Appeals Court decision....

"Inasmuch as Attorney Mahlowitz did not receive any interest on any amounts paid to him and there has been no finding of unethical or improper conduct on Attorney Mahlowitz's part (other than the statement in the Appeals Court decision that the allegations in the [r]ule 60(b) motion were "at the very least, inexplicable") in my discretion, I believe it would be inequitable to award interest retroactively."

Mr. Mahlowitz complied with the order and paid the husband, then timely filed this appeal in which the wife did not participate.

II. *Discussion*. On appeal, Mr. Mahlowitz challenges on numerous grounds the order requiring him to repay counsel fees. He contends, variously, that the Probate Court was without ***869** subject matter jurisdiction to make such an order, that the motion judge erred in joining him as a party plaintiff, that the husband did not raise or preserve the counsel fee issue on appeal or give Mr. Mahlowitz timely notice that he was asserting such a claim against him, that the motion judge misinterpreted the scope and effect of this court's memorandum and order, and that his constitutional rights were violated.

In addressing this plethora of claims, we are struck by the fact that neither the husband nor Mr. Mahlowitz denominated the remedy that the husband sought by its proper name--restitution--and that they did not bring either to our attention or to the attention of the motion judge any pertinent cases or authorities on the subject. The resulting misdirection may account for the somewhat scattershot nature of many of the issues raised on appeal, the bulk of which can be disposed of with dispatch. This same misdirection, however, also necessitates a remand to permit consideration anew of the question whether the husband is entitled to a remedy in restitution against Mr. Mahlowitz, this time on the basis of relevant factors that we later outline.

[1]  [2]  [3]  *Subject matter jurisdiction*. There is no merit in Mr. Mahlowitz's contention that the Probate Court was without jurisdiction to order him to make repayment. While the Probate Court is a court of limited jurisdiction, it has general equity powers. See G.L. c. 215, § 6; Young v. Department of Pub. Welfare, 416 Mass. 629, 624 N.E.2d 110 (1993). "Our Probate Court ... [possesses] inherent powers apart from statutory authorization. ****956** These powers are broad and flexible, and extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction." Matter of Moe, 385 Mass. 555, 561, 432 N.E.2d 712 (1982). The court accordingly has the power to correct what has been wrongfully done, such as ordering a restitution of monies obtained under the court's statutory authority after the decision has been overturned. See, e.g., Keller v. O'Brien, 425 Mass. 774, 683 N.E.2d 1026 (1997) (Keller II); Heron v. Heron, 428 Mass. 537, 703 N.E.2d 712 (1998). See also United States v. Morgan, 307 U.S. 183, 197, 59 S.Ct. 795, 83 L.Ed. 1211 (1939) (courts have inherent authority to order restitution).

Joinder. The motion judge sua sponte joined Mr. Mahlowitz as a party plaintiff, citing ***870** Edinburg v. Edinburg, 22 Mass.App.Ct. 192, 492 N.E.2d 1159 (1986), and Mass.R.Dom.Rel.P. 19(a). The sua sponte aspect of the joinder is beyond dispute under the rule. However, insofar as the husband maintained in his motion papers that the wife was jointly and severally liable for the counsel fee awarded, Mr. Mahlowitz was not technically a necessary party for joinder purposes. See Mongeau v. Boutelle, 10 Mass.App.Ct. 246, 253, 407 N.E.2d 352 (1980). Nonetheless, we think the point without consequence here since the husband had an independent cause of action in restitution against Mr. Mahlowitz which he could have asserted in the same court.

Preservation/notice of counsel fee claim. Despite Mr. Mahlowitz's contention that the husband failed to challenge the fee award on appeal, the record is clear that the husband appealed from both the order vacating the judgment of divorce and the subsequent amended judgment on further division of the marital assets. The appeal from the order vacating the judgment of divorce itself placed the orders subsequent to it in jeopardy. Further, because the

counsel award was one of four orders listed on the amended judgment, its propriety was without question among the matters challenged on appeal. [FN8]

FN8. The circumstances here being *sui generis*, we note that an appeal taken from an award of counsel fees should ordinarily be explicitly stated.

That, of course, is not to say that Mr. Mahlowitz was fairly on notice that the issue had been raised or that, were the fee award tipped on appeal, his retention of it would be put at risk. When the husband was ordered to pay Mr. Mahlowitz \$30,000 for counsel fees owed by the wife to Mr. Mahlowitz, it was in this sense the wife's debt that the husband paid. That the wife might be required to repay that amount to the husband as a consequence of reversal on appeal does not of itself necessarily suggest that Mr. Mahlowitz was equally at risk. Mr. Mahlowitz was not a named party to that appeal, does not appear to have been served with the appellate briefs, and represented neither the wife nor himself in connection with the appeal. In our memorandum and order, the panel did not address Mr. Mahlowitz's status or liability and, when the husband brought his motion seeking to restore the parties to status quo ante, he did not serve it upon Mr. Mahlowitz. Presumably because of this, the motion judge vacated his initial order requiring Mr. Mahlowitz ***871** to repay the counsel fees and thereafter conducted a limited evidentiary hearing in which Mr. Mahlowitz participated, thereby rectifying, albeit belatedly, the deficiency in notice as to the restitution proceedings.

The memorandum and order pursuant to rule 1:28: its scope and effect. That the motion judge joined Mr. Mahlowitz as a party in connection with the husband's motion does not mean that Mr. Mahlowitz ****957** was thereby transformed into a party ab initio. When the panel of this court remanded the matter for consideration of any application the husband might make to "restore the parties" to the status quo ante, the panel was referring to the parties to the action then before the court, viz., the husband and the wife. Moreover, our memorandum and order to "restore the parties" was not issued in a legal vacuum but rather within the context of well-established equitable remedies. Otherwise put, our memorandum and order contemplated the application of the remedy of restitution, not the mechanical imposition of a foreordained result. The wife has not challenged the orders entered against her, and we proceed on the assumption that the husband was entitled to the equitable relief that he sought from her. [FN9]

FN9. While the equities of the husband's case for restitution against the wife may well have weighed strongly in his favor, involving as it did

the original parties to the underlying proceedings, the result as to the wife was nonetheless not an inevitability. See *Keller II, supra*; *Heron v. Heron, supra*. The fact that the wife had filed for bankruptcy protection might well have affected the equities of the situation as between the two parties; indeed, the bankruptcy filing could have raised some concern as to whether the requested restitution might result in the wife becoming a ward of the public. See *Heron v. Heron, 428 Mass. at 542 n. 4, 703 N.E.2d 712*. Because the matter is not raised by any party on appeal, we also prescind from any consideration of the propriety of adjudicating the husband's motion in the face of the wife's docketed suggestion of bankruptcy absent any indication that relief from the presumed automatic stay of proceedings had first been obtained.

We have reviewed with care the transcript of the motion hearing in which Mr. Mahlowitz participated, as well as the motion judge's findings, memorandum and resulting order that required Mr. Mahlowitz to repay the fee. We are persuaded that the motion judge mistakenly construed our memorandum and order as an edict requiring him to do whatever was necessary to put the husband in the position he had been in before the ***872** original judgment of divorce was vacated at the wife's behest. This view of the matter had the result of hobbling Mr. Mahlowitz in his efforts to raise defenses recognized as legitimate in restitution cases. Given this, we conclude that the order at issue cannot stand and that a new hearing, governed by the law of restitution, is necessary to determine whether Mr. Mahlowitz should repay the counsel fees he had been awarded. [FN10]

FN10. Given our disposition of this matter, we do not address the constitutional issue that Mr. Mahlowitz asserts.

[4]  III. *Restitution*. We are unaware of any Massachusetts appellate authority addressing precisely the issue here, i.e., whether a party's former attorney, who was himself neither a named party nor a participant in an appeal, may be ordered to restore a fee awarded him as part of a judgment that has been reversed. Before turning to the Restatement of Restitution (1937) and cases from other states that more nearly address this situation, we look to two recent Massachusetts cases that offer some guidance. See *Keller II*, 425 Mass. 774, 683 N.E.2d 1026; *Heron v. Heron*, 428 Mass. 537, 703 N.E.2d 712.

[5]  [6]  *Massachusetts decisions*. In *Keller II*, the Supreme Judicial Court faced the question of whether and to what extent a former spouse can be ordered to reimburse an ex-spouse for alimony paid under an erroneous judgment. After the husband prevailed [FN11] in his effort to terminate ****958** his alimony obligations following his ex-wife's remarriage, he sought a refund of the monies that he had paid to her after the filing of his initial complaint. The Probate Court judge declined to order the repayment. On appeal, the Supreme Judicial Court affirmed, after first discussing the applicable doctrine of restitution.

FN11. In *Keller v. O'Brien*, 420 Mass. 820, 821, 652 N.E.2d 589 (1995) (*Keller I*), the court vacated the Probate Court's dismissal of the husband's complaint for modification, holding for the first time that remarriage, in the absence of an agreement to the contrary, is a prima facie change of circumstances that terminates alimony obligations absent proof of some extraordinary circumstances. The Probate Court's "erroneous judgment" reversed in *Keller I* was technically not an order to pay alimony but the dismissal of the husband's complaint seeking to terminate or modify the pre-existing order requiring the payment of alimony.

"Restitution is an equitable remedy by which a person who has been unjustly enriched at the expense of another ***873** is required to repay the injured party. *Salamon v. Terra*, 394 Mass. 857, 859, 477 N.E.2d 1029 (1985), quoting *Restatement of Restitution § 1 (1937)*. *Jones v. Swift*, 300 Mass. 177, 185, 15 N.E.2d 274 (1938). The fact that a person has benefitted from another 'is not of itself sufficient to require the other to make restitution therefor.' *Restatement of Restitution, supra* at § 1 comment c. Restitution is appropriate 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [her] to retain it.' *Id.* See *National Shawmut Bank v. Fidelity Mut. Life Ins. Co.*, 318 Mass. 142, 146, 61 N.E.2d 18 (1945)." (footnote omitted). *Keller II, supra* at 778, 683 N.E.2d 1026. The issue before the court, then, was whether, as between the two former spouses, it was unjust for the wife to retain the payments she received after remarriage. *Ibid.* Decisional law was of little aid in this regard since no Massachusetts case was on point, [FN12] and no other jurisdiction had ordered a refund in similar circumstances.

FN12. Restitution had only been awarded in Massachusetts in cases "where a party has been unjustly enriched because of the breach of some duty, a violation of trust, bad faith, or fraud." *Keller II, supra* at 779, 683 N.E.2d 1026.

Turning to the equities of the situation, the court determined that restitution would be unfair because the wife had no reason to anticipate, as matter of fact or law, that she would be asked to reimburse her husband for alimony received after her remarriage, and a retroactive application of the new rule would be substantially inequitable to the wife. The court declined to order restitution solely on the grounds that the trial court's denial of the modification complaint was eventually reversed.

"While we have not done so, some courts have ordered restitution where a judgment has been reversed after a party has been ordered by a court to make payment to another, and the judgment has been paid. See *Restatement of Restitution § 74 (1937)* ('[a] person who has conferred a benefit upon another in compliance with a judgment ... is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable ...')." (Emphasis supplied.) *Keller II, supra* at 781, 683 N.E.2d 1026.

Prospectively, however, the court stated: ***874** "If a complaint for modification is brought and a probate judge refuses to terminate the alimony obligation, the decision may be appealed. Absent a request for, and the allowance of, a stay of that judgment, the payor spouse must continue to pay alimony pending the appellate court's decision. But if it is later determined that the probate judge erred, the payments will not operate as ****959** a waiver of any timely claim for a refund of the alimony, and restitution may be ordered dating from the judgment of the Probate Court. Our rule is now clear, and

we do not anticipate that any hardship will be imposed by restitution in those circumstances. Where hardship is claimed, perhaps by reason of some intervening, unanticipated event during the appellate process, probate judges are in the best position to resolve those claims."

Keller II, supra at 785, 683 N.E.2d 1026.

In *Heron v. Heron*, 428 Mass. at 542, 703 N.E.2d 712, the court touched upon restitutionary principles after it vacated a judgment of the Probate Court that had modified an out-of-State alimony award and division of marital assets, holding that full faith and credit required Massachusetts to honor the res judicata effect of the out-of-State divorce decree, i.e., the plaintiff's claim was barred here because it would have been barred if brought there. The court remanded the case to the Probate Court for entry of an order staying the payment of alimony to the plaintiff and for a determination, after hearing, "whether equity requires that the plaintiff make restitution of all or part of the alimony paid to her." *Id.* In doing so, the Supreme Judicial Court stated that the Probate Court should take into account "whether restitution would so impoverish [the wife] as to make her a ward of the public." *Id.* at 542 n. 4, 703 N.E.2d 712. The court also vacated the award of counsel fees, but without discussion of restitution, and the opinion is silent both as to whom the fee award was to be paid (the wife or her lawyer) and as to whether the award had been stayed pending appeal.

The Restatement of Restitution. As noted above, *Keller II* cited with approval the Restatement of Restitution § 1 (1937) (Restatement), emphasizing that unjust enrichment is the key predicate to recovery when a judgment has been reversed on ***875** appeal. The view of the Restatement, set out in § 74, follows directly from this, i.e., § 74 does not require restitution automatically upon reversal. This is largely consonant with the position later taken in the Restatement (Third) of Restitution and Unjust Enrichment § 18 (Tentative Draft No. 1, 2001) (Restatement [Third]), "Judgment Subsequently Reversed or Avoided: A transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution to the extent necessary to avoid unjust enrichment." [FN13]

FN13. As is further noted in this regard in the Restatement (Third) § 18 comment e: "Some courts assert an equitable discretion to grant or withhold restitution upon the reversal or avoidance of a judgment, while others declare that restitution is available to the judgment debtor as a matter of right. The conflict on this point is more apparent than real. The claim of the judgment debtor is valid only to the extent of any unjust enrichment, as described in this Comment."

What this suggests, then, is that a party seeking restitution from another party after a judgment has been reversed on appeal may satisfy its initial burden of establishing unjust enrichment by showing that the order compelling payment was ultimately reversed. The burden shifts to the payee party to show why it should not be compelled to repay, whether by virtue of change of position, undue hardship or other limited affirmative defenses, [FN14] thereby ****960** demonstrating that it would not be unjust for the payee party to retain the amount paid.

FN14. Where the judgment was reversed on appeal because of a newly promulgated rule, it is also relevant whether retroactive application of the new rule would be consistent with equity. See *Keller II, supra* at 782, 683 N.E.2d 1026. However, the Reporter of the Restatement (Third) § 18 comment g observed:

"Rather than enter the thicket of 'prospective application,' it is easier to consider that *Keller v. O'Brien* recognized an affirmative defense of change of position on the part of the former wife. The majority opinion emphasized the 'devastating financial impact' on the defendant of a restitutionary liability that it characterized as 'wholly unexpected' and virtually unforeseeable, notwithstanding the pendency of the appeal on the issue of the former husband's liability."

Neither *Keller II* nor *Heron v. Heron* contemplates any but ***876** the "relatively straightforward" [FN15] situation where restitution is demanded by one party from another party. Neither addresses the situation where, as here, restitution is demanded by one party from the other party's lawyer, i.e., a third party. In determining whether a third party in retention of an award that has been overturned has been unjustly enriched, we look to the Restatement and to decisions in other jurisdictions that have considered the question.

FN15. See Restatement (Third) § 18 comment a ("Where the issue in restitution is still between the original parties to the underlying proceedings, the remedy for a successful restitution claim is relatively

straightforward. In some circumstances, however, the remedy in restitution will turn on the availability of relief against third parties").

The Restatement and other jurisdictions as to third parties. Both the Restatement § 74, and the Restatement (Third) § 18, view third parties in quite a different light than they do parties to the judgment that was reversed. Whereas the initially prevailing party generally (albeit not automatically) will be liable in restitution to repay the other party upon reversal of the judgment pursuant to which payment was made, a nonparty creditor of the initially prevailing party who in good faith received a portion of the judgment proceeds generally will not be required to repay. See Restatement § 74 comments h, k; Restatement (Third) § 18. A nonparty may be liable, however, where the nonparty is effectively a party to the action, such as where an attorney retains portions of the judgment under a contingent fee arrangement.

Comment h to Restatement § 74, entitled "Restitution from attorney or agent of judgment creditor," states in relevant part:

"An attorney or other agent of the judgment creditor who receives payment from the judgment debtor ... is not liable if the judgment was valid before reversal and if he had no knowledge of any fraud used in securing it. Under the same conditions he is under no duty to repay money which he received on account of the judgment creditor and which he retains as payment for services or for a debt *877 owed by the judgment creditor to him ... since he received the money as a bona fide purchaser." [FN16]

FN16. Illustration 20 under this comment states:

"A obtains a valid judgment against B for \$3,000. B pays the amount of the judgment to C, A's attorney. At A's direction C expends \$1,000 to satisfy A's creditors and retains \$2,000 as compensation for his services in this suit and in previous ones. Upon reversal of the judgment, B is not entitled to restitution from C."

Cases from other jurisdictions taking essentially this view have held that an attorney acting in good faith is not required to restore monies paid to the attorney in satisfaction of a valid debt incurred for legal services rendered, which monies were received from the opposing party pursuant to a judgment that is subsequently reversed. See *Wall v. Johnson*, 80 So.2d 362 (Fla.1955); *Martin v. Lenahan*, 658 So.2d 119 (Fla.Ct.App.1995); **961 *Lowenstein v. Reikes*, 258 N.Y. 444, 180 N.E. 113 (1932); *Munitz v. Munitz*, 132 N.Y.S.2d 644 (1954); *Herkert v. Stauber*, 127 Wis.2d 87, 378 N.W.2d 704 (1985). See also *Abrahami v. U.P.C. Constr. Co., Inc.*, 248 A.D.2d 272, 670 N.Y.S.2d 457 (1998) (where investors won fraud suit at trial but lost on appeal, investors' lawyers were required to make restitution of that portion of funds representing a contingent fee retained in connection with the matter but not for disbursements retained or made to third parties for client debts); 7 Am.Jur.2d Attorney at Law § 252 (1997).

Comment k to Restatement § 74, entitled "Restitution against other parties," articulates an exception to the rule exempting third parties from a repayment obligation where the third party is the real party in interest:

"After the reversal of a judgment any person who, although not a party to the action, was a real party in interest and who received payment in whole or in part as the beneficial owner or as one of several owners, is under a duty to restore the amount received by him." [FN17]

FN17. The relevant illustrations to comment k are:

"27. A obtains a judgment against B for \$2,000. B pays the \$2,000 to A who pays it to C, for whom A is trustee with respect to the subject matter of the action. Upon reversal of the judgment, B is entitled to restitution from C."

"28. A, an administrator, obtains a judgment against B for \$3,000. B pays A the amount of the judgment which A distributes among the next of kin of the deceased. The judgment is reversed. B is entitled to restitution of the amount received by each of the next of kin."

See also illustration 25 to comment j:

"25. A obtains a judgment against B. Execution is levied upon B's land and at the execution sale it is purchased by A. A transfers title of the land to C who pays value, although knowing that an appeal is pending. The judgment is reversed. B is not entitled to restitution from C."

Those courts that have required the attorney to make restitution ***878** after the judgment is reversed, whether in reliance on comment k or otherwise, typically involve circumstances where the attorney's right to and scope of compensation is contingent upon the client's ultimate success (e.g., a contingency fee arrangement), but some also take into consideration whether the attorney had clear notice regarding the consequences of the appeal (e.g., payment of the monies under explicit protest or a rule codifying a duty to restore). See *Mohamed v. Kerr*, 91 F.3d 1124 (8th Cir.1996); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149 (Colo.App.1994); *Excel Corp. v. Jimenez*, 269 Kan. 291, 7 P.3d 1118 (2000); *Champion Intl. Corp. v. McChesney*, 239 Mont. 287, 779 P.2d 527 (1989); *Abrahami, supra*; *Transamerica Ins. Group v. Adams*, 62 Or.App. 419, 661 P.2d 937 (1983). See also *Waggoner v. Glacier Colony of Hutterites*, 131 Mont. 525, 312 P.2d 117 (1957); *Bruns v. Mattocks*, 6 N.J.Super. 174, 70 A.2d 780 (1950); *Pincus v. Pincus*, 211 A.D. 128, 206 N.Y.S. 599 (1924); *Baker v. Baker*, 17 A.D.2d 924, 233 N.Y.S.2d 741 (1962); *In re Marriage of Mason*, 48 Wash.App. 688, 740 P.2d 356 (1987). Notably, many of the foregoing cases also involve the active participation of the attorney in the appeal and related proceedings. [FN18]

FN18. In the case of *In re Marriage of Mason, supra (Mason)*, which has certain factual similarities to the case at bar, the wife's attorney in a divorce action was ordered to return a fee award, even though he neither represented the spouse on appeal nor was appended formally as a party to the action. See *Baker v. Baker, supra* (ordering restitution from spouse's former attorney). The *Mason* court thought comment k more apt than comment h given its view that, under its rules of appellate

procedure, a party is entitled to restitution as a matter of right against persons who received a benefit from an order that was reversed. *Id.* at 691-692 & n. 1, 740 P.2d 356. We do not think *Mason* apposite, however, because there is no such analog in our rules. See *Keller II*, 425 Mass. at 781, 683 N.E.2d 1026 ("While we have not done so, some courts have ordered restitution where a judgment has been reversed after a party has been ordered by a court to make payment to another, and the judgment has been paid") (emphasis added). We note, too, that the *Mason* court was apparently unaware of decisional law such as *Wall v. Johnson, supra*, and *Munitz v. Munitz, supra*, and relied instead upon cases that factually are quite distinguishable. See *Bruns v. Mattocks, supra* (fee paid under protest); *Transamerica Ins. Group v. Adams, supra* (contingency fee arrangement).



****962 [7]** ***879** While not all of the cited cases reaching the same result can easily be reconciled, we think it is sensible to sort third parties, as the Restatement § 74 does, into two categories: bona fide creditors of the judgment creditor (not liable in restitution) and real parties in interest (liable in restitution). We also think it sensible, when the third party is an attorney, that the nature of the fee arrangement should be a chief consideration in determining the category into which the third party falls. As stated in the Restatement (Third) § 18 comment g:

"[A] lawyer who receives a share of a judgment pursuant to a contingent-fee [*sic*] arrangement does not take the money as a bona fide creditor of the judgment creditor, notwithstanding that the lawyer takes the money in good faith. Between lawyer and client, in such circumstances, the lawyer assumes the risk of nonrecovery: this makes the lawyer, not the client's creditor, but the assignee *pro tanto* [*sic*] of the client's judgment."

See *Mohamed v. Kerr*, 91 F.3d at 1126. Otherwise put, a lawyer who has a fee for legal services rendered arrangement is entitled to payment of the fee irrespective of the client's ultimate success and any unpaid counsel fees remain the client's debt obligation.

We are in accord with the Restatement position that a bona fide creditor who in good faith receives payment from the proceeds of a judgment favoring his debtor is not liable in restitution to the person or entity whose payment satisfied the judgment when the judgment is reversed. Because the bona fide creditor is entitled to payment regardless of the judgment's validity, that creditor is not unjustly enriched by retention of the payment after the judgment's reversal.

Applying that principle to payments an attorney receives from the proceeds of a judgment favoring the attorney's client, we conclude that the attorney is not liable in restitution to the judgment debtor upon reversal of the judgment unless the judgment ***880** debtor, on remand, proves either that the payment did not discharge an unconditional, bona fide obligation the client had to the attorney or that, although the payment did discharge such an obligation, other circumstances exist that make the attorney's retention of the payment unjust. [FN19] The foregoing principle applies at least when, as here, the attorney receives the payment directly from an opposing party pursuant to a court order. [FN20]

FN19. See note 12, *infra*.

FN20. Different considerations may well apply when the attorney receives the payment from his or her own client but the client pays out of the proceeds of a judgment subsequently vacated.

IV. *Application*. In applying on remand the principle just described, several considerations will merit attention. [FN21] The ****963** first such consideration is the nature of the fee arrangement between the wife and Mr. Mahlowitz, and the impact that the husband's payment to Mr. Mahlowitz had on any bona fide debt existing pursuant to the lawyer-client arrangement at the time of payment. In that regard, we recognize that Mass.R.Prof.C. 1.5(d)(1), as amended, 432 Mass. 1301 (2000), prohibits contingent fees in divorce cases and that Mr. Mahlowitz submitted hourly time records in support of his motions for an award of counsel fees. If the husband cannot make a satisfactory evidentiary showing that his payment to Mr. Mahlowitz performed some function other than the unconditional discharge of a debt for hourly legal services rendered to the wife, then Mr. Mahlowitz is to that extent a bona fide creditor.

FN21. It bears repeating that the wife has already been found liable in restitution to the husband for, inter alia, the legal fees he paid on her behalf to Mr. Mahlowitz. To the extent that the husband shows that he has been unable to recover from her the full amount of payment made for legal fees, he may seek payment from Mr. Mahlowitz, the relevant third party.

The second consideration has to do with Mr. Mahlowitz's conduct of the litigation that generated the aforesaid debt for legal fees. Although the motion judge indicated the absence of any unethical or improper conduct on Mr. Mahlowitz's part, he nonetheless alluded to a statement in our memorandum and order characterizing the allegations in the rule 60(b) motion Mr. Mahlowitz filed on the wife's behalf as, "at the very least, inexplicable." Allowance of that motion, of course, generated a significant portion of the litigation in connection with which the ***881** fees were awarded. It may be that the circumstances surrounding Mr. Mahlowitz's filing of the motion will bear on whether, satisfaction of his client's unconditional obligation notwithstanding, it would be inequitable, at least as between Mr. Mahlowitz and the husband, to allow Mr. Mahlowitz to retain the amount the husband paid to Mr. Mahlowitz for attorney's fees. [FN22]

FN22. Questions surrounding the equity of Mr. Mahlowitz's retention of the fee paid by the husband cannot be resolved solely by examining our memorandum and order pursuant to rule 1:28, the appellate briefs, or the concessions made on appeal by successor counsel to the wife. It seems largely undisputed that Mr. Mahlowitz did not participate in the wife's appellate strategy and had no role either in determining to forswear a cross appeal or in shaping the arguments to make or forego in briefs and at oral argument. The question of whether Mr. Mahlowitz had a good faith, nonfrivolous basis for initially bringing and then maintaining the postjudgment proceedings should be squarely confronted upon remand on the basis of such broader relevant evidence as may be proffered by the husband and Mr. Mahlowitz.

Should the judge on remand determine that Mr. Mahlowitz's conduct of the litigation was such that equity would require him to restore to the husband some portion of the husband's payment for legal fees, the matter would not be at an end; a further consideration would then come into play. Any such repayment to the husband would be

subject to the wife's right to show, and, thus, to Mr. Mahlowitz's right to show on her behalf, that her retention of the benefits of the husband's payment to Mr. Mahlowitz does not constitute unjust enrichment. See Restatement § 74. It appears, for example, that a portion of the payment was designed to cover the wife's attorney's fees resulting from the husband's contumacious conduct. See *Hennessey v. Sarkis*, 54 Mass.App.Ct. 152, 156-157, 764 N.E.2d 873 (2002). As noted earlier, another portion of the fee may have been awarded under G.L. c. 208, § 38, a statute that is not predominantly success driven but is instead designed to level the playing field and allow both sides access to capable legal representation in divorce litigation. See Kindregan & Inker, Family Law and Practice § 6.1 (1996); *Nelon v. Nelon*, 329 Mass. 643, 110 N.E.2d 119 (1953); *Kelley v. Kelley*, 374 Mass. 826, 827, 374 N.E.2d 580 (1978); *Brash v. Brash*, 407 Mass. 101, 107, 551 N.E.2d 523 (1990); ****964** *Peterson v. Peterson*, 30 Mass.App.Ct. 932, 934, 568 N.E.2d 649 (1991). See also G.L. c. 208, § 17. Repayment of portions of the fee awarded under either theory would appear not to be necessary in order to avoid the wife's unjust enrichment and, if ***882** so, Mr. Mahlowitz's retention of such portions of the fee award would likewise not be inequitable. [FN23]

FN23. Analysis and fact-finding in this difficult area would be aided immeasurably if the judge had described the basis for the fee award and the considerations underlying it at the time he made the award itself.

V. *Conclusion*. We do not suggest that the aforesaid considerations on remand are necessarily exhaustive. There may well be other pertinent factors suggested in the cases that the judge may consider in determining whether Mr. Mahlowitz will be unjustly enriched if permitted to retain the court-awarded fees. The order requiring Mr. Mahlowitz to repay the husband \$31,075 [FN24] is vacated and the matter is remanded for further proceedings not inconsistent with this opinion.

FN24. That Mr. Mahlowitz has complied with the motion judge's order and repaid the fee to the husband during the pendency of this appeal (which fee the husband had paid before to Mr. Mahlowitz during the pendency of the first appeal) adds an interesting wrinkle. Because a domestic relations fee award is not automatically stayed pending appeal, however, it is a wrinkle likely to be peculiar to divorce situations. Compare Mass.R.Civ.P. 62 with Mass.R.Dom.Rel.P. 62 and *Brash v. Brash*,

supra at 106, 551 N.E.2d 523. Assuming without deciding that, on remand, the judge will order the husband to repay any monies to Mr. Mahlowitz, the husband's liability in restitution, as a party to the proceedings, is straightforward. See *supra* at 875-876, 780 N.E.2d at 959-960. Of course, the husband may in that eventuality assert such affirmative defenses as are available to him. See *Keller II*.

So ordered.

Mass.App.Ct., 2002.

Cox v. Cox

56 Mass.App.Ct. 864, 780 N.E.2d 951

END OF DOCUMENT

West Reporter Image (PDF)

Copr. (C) 2004 West. No Claim to Orig. U.S. Govt. Works.

Index B

GENERAL LAWS OF MASSACHUSETTS

PART . REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III. DOMESTIC RELATIONS

CHAPTER 208. DIVORCE

GENERAL PROVISIONS

Chapter 208: Section 38 Costs

Section 38. In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

Return to:

**** [Next Section](#) ** [Previous Section](#) ** [Chapter Table of Contents](#) ** [Legislative Home Page](#)**