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SUPREME COURT
OF THE STATE OF WASHINGTON

BRIAN FAIR and SHIRLEY FAIR and the marital community composed
thereof,

Appellants,

v.

POWERS & THERRIEN, P.S., LESLIE ALAN POWERS and
PATRICIA POWERS, husband and wife, and KEITH THERRIEN and
MARSHA THERRIEN, husband and wife,

Respondents.

CROSS-REPLY BRIEF OF RESPONDENTS-CROSS APPELLANTS
LES POWERS, PATRICIA POWERS, KEITH THERRIEN, AND
MARSHA THERRIEN

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ORIGINAL

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A. INTRODUCTION

In his only appeal as of right from prior court orders claiming that he violated the RPCs, respondent Les Powers¹ has made his case that he did not violate RPC 1.7 or RPC 1.8(a) with respect to two legal entities' decision to do business together. The outcome of this cross-appeal has very real personal and pecuniary implications for Powers. His personal and professional status is jeopardized by these erroneous applications of the RPCs, and he seeks to have his name cleared and to preserve his rights in this and future proceedings.

Powers did not violate any ethical rule, and seeks review of his arguments by this Court, which has final and plenary authority over such determinations.

B. RESPONSE ON STATEMENT OF THE CASE²

Appellants/Cross Respondents Fair and TCG editorialize and argue extensively in their statement of the case, (Br. of Cross-Resp't at 3-9), in violation of RAP 10.3(a)(5). Powers will not do so, however, some factual clarifications are required.

¹ Once again, it is critical to note that despite being a named party in this action, there has never been any suggestion or evidence presented in this case of any ethical breach by respondent Keith Therrien. Thus, as have prior briefs, this brief refers to Powers only.

² Some of the facts recited herein are part of the record in the contract appeal, which this Court is reviewing in conjunction with this appeal. References to those clerk's papers are designated here as "CP1." References to the clerk's papers in this appeal are designated here as "CP2." Key documents are also included in the Appendix.

Fair and TCG emphasize the trial court's finding that Powers "accepted" Fair's proposition regarding investment in TCG, as evidence that the statement "LKO accepted the offer" is somehow misleading. Br. of Cross-Resp't at 4. However, they ignore the trial court's ultimate finding in this case that LKO, not Powers, was the contracting party:

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.

RP 424; *see also*, CP 2306, 2302. There is ample evidence in the record that the people who made the decision for LKO to invest in TCG were Powers' and Therrien's adult children who used their separate company, LKO, for that purpose. CP1 501, 522, 543-47, 565. Thus, any communication Powers made was on LKO's behalf, and not his own.

Fair and TCG admit that no legal documents were actually demanded or prepared, although they point out that Fair suggested it "if you wish." Br. of Cross-Resp't at 4. They also admit that the proposal Fair made and LKO accepted without comment or negotiation was for LKO to own a 50% share of TCG. Br. of Appellant at 5. They suggest that the lack of documentation, and that lack alone, caused litigation between LKO and Fair. Br. of Cross-Resp't at 5. They state that any suggestion Fair caused the litigation to commence here is "a masterfully

Nixonian use of the passive voice,”³ because LKO filed a complaint against Fair when he tried to deprive LKO of its 50% interest in TCG. *Id.*

There is no dispute here that LKO had a contract that entitled it to a 50% stake in TCG. Fair got exactly what he demanded from LKO without alteration, negotiation, or compromise. Had LKO or Fair demanded a writing, there is no evidence to suggest there would have been no subsequent alteration of the course of events. Fair’s demand to increase his own ownership share would still have caused LKO to file a complaint to protect its rights. Fair himself admitted this fact. CP2 906. Thus, the statement that “Fair caused litigation to commence” is supported by the evidence.

C. SUMMARY OF ARGUMENT

This Court should reject Fair and TCG’s suggestion that Powers has no right to raise the improper RPC violations in the context of this appeal. The challenged order was entered in this action, and Powers preserved his right to ask this Court for affirmative relief from the improper RPC findings by filing a notice of cross-appeal. This Court has

³ Setting Nixon comparisons aside, from a purely factual standpoint the sentence “Fair caused that litigation to commence” is not passive voice. “Fair” is the subject of the sentence, “caused” is an active verb, and “litigation” is the object. In the passive voice, the sentence would read, “Litigation was caused to be commenced by Fair.”

the power to provide any relief it thinks is demanded by the necessities of the case.

Powers is deeply aggrieved by the findings against him of RPC 1.7 and 1.8(a) violations. His personal, pecuniary, and business interests are greatly impacted by the court orders in question, and he is properly a party to the cross-appeal.

Powers has an alternative right to raise the RPC arguments as arguments of respondent. Fair and TCG have contended that their entire claim of malpractice rests on the very RPC findings Powers is challenging. If this Court agrees with Powers, it provides alternate grounds for dismissal of the malpractice action.

D. ARGUMENT ON CROSS-REPLY

Fair and TCG sued Powers for malpractice based upon his alleged RPC violations. Br. of Appellant at 1. Fair and TCG appealed from the trial court's summary judgment order concluding that their claimed damages – attorney fees – were not compensable under the equitable “ABC rule.” *Id.*

Powers cross-appealed. In his arguments on cross appeal, Powers challenged the findings that he violated RPC 1.7 or 1.8. Br. of Resp't/Cross-Appellant at 2-3. Powers noted he did not engage in any relevant act of “representation” under RPC 1.7. Br. of Resp't/Cross-

Appellant at 29. Powers argued that there is no evidence Powers entered into a business transaction with TCG or with Fair. Br. of Resp't/Cross-Appellant at 34. Finally, he challenged the Court of Appeals' finding an RPC 1.8 violation for the first time on appeal, arguing that the court conflated separate legal entities with individual officers, i.e., "constituents."⁴ *Id.* at 35.

Fair and TCG decline to respond to the cross-appeal, and instead question Powers' right to bring it. Br. of Cross-Resp't at 21-23. They claim that Powers is not aggrieved by the trial court's finding that he violated RPC 1.7. *Id.* They aver that because he ultimately prevailed in the malpractice action, Powers has no right to seek review of judgments in this matter that he violated ethical rules. *Id.*

(1) The Order in Question Was Entered in this Action and Was Relied Upon in the Brief of Appellants

Fair and TCG suggest that Powers is not permitted to cross-appeal from the order in question because it was entered in the contract action and not the malpractice action. *Id.* at 22. They claim that their briefing in this matter does not rely upon that ruling, or upon the Court of Appeals findings in the malpractice action, and thus Powers' arguments are not

⁴ The fallacy of conflating of constituents with organizational entities in analyzing ethical duties was explained by this Court in *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 747, 153 P.3d 186 (2007), in at RPC 1.7 comment 34, and in comments to RPC 1.13.

appropriately the subject of a cross-appeal. *Id.* They claim that Powers' intervention in the contract appeal is sufficient to protect his rights. *Id.*

The Rules of Appellate Procedure give Powers the right to cross-appeal from prior orders that prejudice him:

The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

RAP 2.4(a). Thus, if Powers has timely sought cross-appeal on the RPC issues, and/or if review of those orders is "demanded by the necessities of the case," this Court can consider his arguments.

Contrary to what Fair and TCG suggest, the trial court order Powers has challenged on cross-appeal was a partial summary judgment order entered *in this proceeding*. At the time the trial court's order was entered, this action was consolidated with the contract action, the two were one in the same, and that parties were all joined in the same action. CP2 34-45.⁵ Thus, despite later bifurcation, the order in question was a partial summary judgment ruling in this action, and is properly the subject of a cross-appeal from the malpractice action.

⁵ This order was included with the Brief of Respondent/Cross-Appellant at Appendix A.

This cross-appeal represents Powers' only appeal as of right of the RPC findings. After bifurcation, Powers was no longer a party to the contract action and thus could not challenge the order as of right in that context. Powers was able to file a brief on a limited issue in the contract action only because the Court of Appeals concluded that Powers had a sufficient interest in that appeal under the standards for intervenors. Appendix A. Fair and TCG provide no authority for the proposition that Powers' status as an intervenor in the contract action deprives Powers of his right as a party to challenge orders that aggrieve him in this case.

In fact, this case might present the quintessential example of when consideration of Powers' claims is "demanded by the necessities of the case." RAP 2.4(a). The bizarre procedural posture in which this case has finally come to this Court, particularly considering the Court of Appeals' decision to find an RPC 1.8(a) violation for the first time on appeal in a case in which Powers was not even a party, is an exceptional and rare circumstance in which Powers must be allowed to make his case.

Also, Fair and TCG's claim that their appeal does not implicate the RPC findings, and that they did not rely upon those findings in their opening brief, is disingenuous. Their arguments regarding their right to attorney fees are completely predicated on a claim of "wrongful acts" or "wrongful conduct" by Powers, a shorthand reference to the alleged RPC

violations. Br. of Appellant at 11, 13, 14, 16, 18. In fact, they state plainly in their brief that their entire claim of malpractice is predicated upon a presumption that those violations occurred: “As this court concluded in the underlying contract lawsuit, the wrongful conduct of the attorneys included not only concurrent representation of clients with differing interests, but going into business with an existing client without necessary safeguards.” Br. of Cross-Resp’t at 18. These arguments are entirely predicated on the assumption that the RPC 1.7 and 1.8 violations are a settled matter in this case.

Finally, Fair and TCG’s suggestion that Powers cannot cross-appeal the partial summary judgment order is also disingenuous considering the law of the case doctrine. The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005).

Had Powers declined to cross-appeal, and this Court ultimately reversed the trial court’s summary judgment ruling on damages, TCG and Fair would no doubt argue that RPC findings were now the law of the case, and therefore could not be challenged.

Given the procedural history of this case, the notion that Powers is precluded from cross-appealing the RPC violations is insupportable.

(2) Powers Is Aggrieved By a Finding that He Violated the Rules of Professional Conduct, Such a Finding Has Concrete Pecuniary and Personal Effects

Fair and TCG claim that Powers is not aggrieved by the findings of two courts that he violated two RPCs. Br. of Cross-Resp't at 22.

This Court defines “aggrieved party” as one whose personal rights or pecuniary interests have been affected. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003); *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944). “The word ‘aggrieved’ in a statute, it has been held, refers to a substantial grievance, a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation; and a party or persons ‘aggrieved’ has been variously defined.” *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690, 692 (1949) quoting 4 C.J.S., Appeal and Error, § 183 b (1).

Powers’ personal and pecuniary interests are directly affected by having had two courts find him in violation of two Rules of Professional Conduct. He has a substantial grievance with the findings, his personal and business interests in exonerating himself could not be more concrete. If the findings are upheld, the public record will state that Powers was

found to have violated two ethical rules. Regardless of whether those findings result in actual sanction or discipline, they will at the least hurt his ability to practice law, and at most could end his career.

These rulings have impacts beyond the confines of this litigation. In fact, this Court can take judicial notice that the trial court's finding of an RPC violation in this case has already been the subject of a referral to the Washington State Bar Association. This Court has warned that the stigma associated with that disciplinary action is "greater than that associated with most tort and contract cases." *Matter of Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988).

Also, the Court of Appeals' ruling that Powers could intervene in the contract action amounts to a finding by that court that Powers is indeed aggrieved by the RPC findings. Intervention is governed by the Rules of Civil Procedure,⁶ which state that a person may intervene as of right in a matter who claims "an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." CR 24(a). Intervention as of right should be granted

⁶ Although the Rules of Appellate Procedure apply at this stage of litigation, there is no RAP governing intervention for the first time on appeal, so they made their motion to the Court of Appeals under CR 24. *Loveless v. Yantis*, 82 Wn.2d 754, 758, 513 P.2d 1023, 1026 (1973). Washington courts allow parties to intervene on appeal. *Id.*, see also, *In re Long & Fregeau*, 158 Wn. App. 919, 925, 244 P.3d 26, 29 (2010), *reconsideration denied* (Mar. 7, 2011).

“unless the applicant's interest is adequately represented by existing parties.” *Id.* The rule provides for permissive intervention if “an applicant's claim or defense and the main action have a question of law or fact in common. ...In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” CR 24(b).

If Powers was sufficiently aggrieved by the RPC findings to justify intervention in the contract appeal, then he is certainly aggrieved by the same orders as they apply to this action, to which he is a party.

(3) Even If This Court Does not Elect to Examine Powers' RPC as a Cross-Appeal, they Are Appropriate Respondents' Arguments: This Court Can Affirm Dismissal of the Malpractice Claims Improperly Predicated on RPC Violations

Fair and TCG have argued in their opening brief that their malpractice claim rests upon allegations of RPC violations. Thus, regardless of this Court's view on whether Powers can cross-appeal, he can make the arguments as a respondent, because they represent alternate grounds to affirm dismissal of the action.

When arguments on cross-appeal present alternate grounds for the trial court order that is the subject of the main appeal, this Court can consider them. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). In that case, this Court considered

the arguments of a cross-appellant who was not actually “aggrieved” by the judgment, but whose arguments that trial court erred were an alternate basis for upholding the judgment. *Id.* This Court concluded that those arguments could be considered as arguments of a respondent:

Although considered a respondent, rather than an appellant, WNG may nevertheless assign error to trial court findings, *Burt v. Heikkala*, 44 Wash.2d 52, 54, 265 P.2d 280 (1954), and may offer additional reasons in support of the judgment, even if the trial court rejected such reasoning. *Peterson v. Hagan*, 56 Wash.2d 48, 351 P.2d 127 (1960).

Id. at 685.

Remand for trial on the malpractice action is pointless if this Court agrees with Powers that the RPCs were not violated here, because it can uphold the trial court’s dismissal on that alternate ground.⁷ Fair and TCG’s concession that their malpractice action is predicated entirely on the claimed RPC violations provides grounds for upholding dismissal of the malpractice action.

Therefore, Powers’ arguments regarding the RPC violations, even if not considered to be arguments on cross-appeal, are arguments for alternate grounds to dismiss the malpractice claim.

⁷ Powers notes that RPC violations cannot be used as evidence of malpractice, and that Fair and TCG must prove breach of a duty and cannot simply rely on the RPCs. *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646, 651 (1992). In the event that this case is remanded for further proceedings, they reserve their right to challenge any attempt to base a malpractice case solely on claims of RPC violations.

(4) As Fair and TCG Have Not Opposed Powers' RPC Arguments on the Merits, there Are No Arguments to Which to Reply

Powers argued in his opening brief on cross-appeal that the findings of RPC 1.7 and RPC 1.8 violations were erroneous.

Fair and TCG offered no arguments on the merits of Powers' arguments regarding these errors. As a result, there is nothing Powers offers by way of reply.

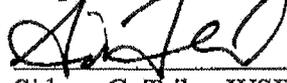
E. CONCLUSION

Whether based on the fact that Powers caused Fair and TCG no damages, or that Powers obeyed the RPCs, the trial court correctly concluded that Fair and TCG could not maintain a malpractice claim against Powers as a matter of law. This Court should uphold dismissal of the malpractice action.

This Court should also take the affirmative step of granting Powers relief from the erroneous findings that he violated the RPCs, and clearing his name.

DATED this 5th day of September, 2013.

Respectfully submitted,



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APPENDIX

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CASE # 297411
LK Operating v. The Collection Group, LLC, et al
CHELAN COUNTY SUPERIOR COURT No. 072006529

Counsel:

Pursuant to the Motion of Les and Patricia Powers and Keith and Marsha Therrien to Intervene or Submit Amicus Brief, the following notation ruling was entered:

April 9, 2012
The Motion of Les and Patricia Powers and Keith and Marsha Therrien to Intervene is granted and Powers and Therrien are allowed to file a brief.

Renee S. Townsley
Clerk

Response briefs, if any, are due within 7 days from the date of this letter, by April 18, 2012.

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:jr

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service a true and accurate copy of the Cross-Reply Brief of Respondents-Cross Appellants Les Powers, Patricia Powers, Keith Therrien, and Marsha Therrien in Supreme Court Cause No. 88846-9 to the following:

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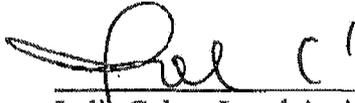
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated September 6, 2013 at Tukwila, Washington.



Ireli Colon, Legal Assistant
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OFFICE RECEPTIONIST, CLERK

To: Irelis Colon
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Dear Clerk:

Attached please find the Respondents/Cross-Appellants' Reply.

Case Name: LK Operating LLC v. The Collection Group, LLC, et al

Supreme Court Cause No.: 88846-9

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