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Court of Appeals Cause No. 69220-8-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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THE FERGUSON FIRM, PLLC,

Petitioner,

vs.

TELLER & ASSOCIATES, PLLC,

Other Party,

and

BRIAN J. WAID, d/b/a LAW OFFICE OF BRIAN J. WAID,

Respondent.

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ANSWER OF RESPONDENT  
BRIAN J. WAID D/B/A LAW OFFICE OF BRIAN J. WAID  
TO PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

The Ferguson Firm, PLLC (“Ferguson”) and Teller & Associates, PLLC (“Teller”)<sup>1</sup> have been embroiled in a lengthy battle over the division of a contingent fee they earned years ago while jointly representing several clients in an unrelated matter. Ferguson retained Brian J. Waid, d/b/a Law Office of Brian J. Waid, to represent it in the fee dispute with Teller. After the trial court permitted Waid to withdraw from representing Ferguson for good cause, Waid filed an attorney’s lien to secure payment of his outstanding fees.

The trial court dismissed Waid’s lien, directed the clerk of the court to disburse to Ferguson funds held in the court registry in the amount of Waid’s lien, and denied Waid’s motion to stay that disbursement. Waid appealed. The Court of Appeals, Division I, reversed the order invalidating Waid’s lien and remanded for a determination of what amount, if any, of the funds still held in the court registry are rightfully his. *Ferguson Firm, PLLC v. Teller & Associates, PLLC*, 178 Wn. App. 622, 316 P.3d 509 (2013).

Ferguson petitions for review, but spends the bulk of its petition revisiting the arguments it made in the Court of Appeals rather than

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<sup>1</sup> Sandra Ferguson and Stephen Teller are principals of their eponymous law firms. They will be referred to by their first names when required to distinguish them from their law firms. No disrespect is intended.

addressing the requirements necessary to secure this Court's review. Its attempt to concoct an argument that satisfies any of the requirements of RAP 13.4(b) justifying review falls far short. In the end, Ferguson offers little real analysis to support the proposition that the Court of Appeals incorrectly decided the question posed here. This Court should deny review.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Waid acknowledges the issues Ferguson presents for review, but believes they are more appropriately formulated as follows:

(1) Should this Court deny discretionary review of a decision by the Court of Appeals to reverse a trial court order invalidating an attorney's lien filed to secure payment of unpaid legal fees where the petitioner fails to identify an issue of substantial public interest meriting such review by this Court?

(2) Should this Court deny discretionary review of a decision by the Court of Appeals to reverse a trial court order invalidating an attorney's lien filed to secure payment of unpaid legal fees where the petitioner fails to identify any conflict between decisions of this Court or another Court of Appeals considering the attorney lien statute at issue?

III. COUNTERSTATEMENT OF THE CASE

The Court of Appeals' decision provides the proper factual overview of this case, which Waid incorporates by reference. He

offers the following additional facts to offset Ferguson's misleading factual contentions.

Ferguson deceptively states "Teller argued the existence of an express contract to divide the fees 50:50." Pet. at 5. Teller actually argued alternative theories: Ferguson should recover no more than 50% of the disputed fee; Ferguson should recover less than 50% of the fee based on *quantum meruit*, or Ferguson should recover nothing. CP 71. At no time did Ferguson and Teller agree on the amount of fees to which the other was entitled.

Ferguson complains that Waid failed to obtain a disbursement of the fees earned at the conclusion of the other matter or a judgment in its favor during his representation. Pet. at 4. Ferguson again fails to recognize that the trial court struck paragraphs 17, 35, and 36 from the declaration upon which it now relies for those "facts." CP 336-38. More to the point, Ferguson did not have an undisputed right to a specific amount of the disputed fees unless and until it acknowledged that a valid and enforceable contract existed with Teller. It consistently refused to do so. CP 177.

Ferguson studiously avoids mentioning the reason Waid withdrew from representing it in the fee dispute. Pet. at 5. The trial court permitted Waid to immediately withdraw from representing

Ferguson after Ferguson threatened him with a legal malpractice claim. CP 32, 57, 187-88, 361. The court later affirmed its decision to permit Waid to withdraw for good cause when it denied Ferguson's motion to reconsider that issue. CP 155, 199. Ferguson did not appeal either order. They are now final.

Unsurprisingly, Ferguson neglects to mention two dispositive facts. First, Ferguson's written fee agreement with Waid clearly defined the scope of his representation:

CLIENT hereby retains ATTORNEY to provide legal services to CLIENT on an hourly fee basis *relative to claims for a fee division dispute with Attorney Stephen Teller, arising out of or relating to CLIENT's and Mr. Teller's representation of clients in the [other matter].*

CP 210 (emphasis added). The "action" for which Ferguson retained Waid was the fee dispute with Teller, without regard to the forum in which that dispute would be resolved. Second, and more importantly, the agreement between Ferguson and Waid specifically stated:

ATTORNEY *shall have a lien* against any proceeds recovered by, or on behalf of, CLIENT in connection with the claims arising out of the matter described in this Agreement, including pursuant to RCW 60.40.010, *et seq.*

CP 210-11 (emphasis added). Sandra is an experienced attorney and is familiar with fee agreements and billing practices. CP 161. She had two days to review Waid's proposed fee agreement before she



signed it. CP 161. By signing the agreement, Sandra agreed that a lien to recover unpaid legal fees would be appropriate and that it would attach to any proceeds Waid recovered in the fee dispute with Teller.

This Court should rely on the facts as the Court of Appeals and Waid have objectively presented them, rather than on the self-serving summary that Ferguson presents in its petition.

#### IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court's review of an intermediate appellate court's decision terminating review is discretionary. RAP 13.3. This Court will grant a petition for review only if the decision of the Court of Appeals is in conflict with a decision from this Court or with another decision of the Court of Appeals or if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1)(2), (4).

Ferguson pays scant attention to the criteria of RAP 13.4(b). Its attempt to create a conflict where none exists is unavailing. Far from being in conflict with prior decisions addressing the attorney lien statute, the Court of Appeals' opinion is consistent with them. Nor can Ferguson claim this case represents an issue of substantial public interest that should be determined by this Court. This is a fact-specific

case inapplicable to the general citizenry of Washington. Ferguson's tortured interpretation of RCW 60.40.010 does not merit review.

A. The Court of Appeals' decision does not threaten the public interest

Ferguson first asserts, with little analysis, that a substantial public interest will be served if this Court accepts review because the Court of Appeals' decision to reinstate his lien conflicts with the "common sense meaning of RAP 2.2(a)(3)" and "no authoritative decision of this Court appears to address or decide the issue presented here." Pet. at 8, 12. Ferguson is mistaken. The Court of Appeals' decision does not implicate a substantial public interest meriting further review under RAP 13.4(b)(4).

The criteria generally considered to determine if an issue is of substantial public interest "are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Rather than address these factors, however, Ferguson squanders its time duplicating the arguments raised in its motion to dismiss Waid's appeal and in its briefing on the merits. Pet. at 7-11. The Court of Appeals properly rejected those arguments.

Ferguson argues the Court of Appeals should have dismissed Waid's appeal because the order invalidating his lien was not appealable as of right. Pet. at 7-8. *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008), *review denied*, 165 Wn.2d 1032 (2009) is dispositive. In *Smith*, a law firm asserted a \$750,000 attorney's lien against settlement proceeds recovered in the client's underlying legal malpractice case against another law firm. The client's creditors moved to invalidate the lien and the trial court dismissed it. The law firm *appealed* the order invalidating the lien. *Id.* at 463. *But see State v. Superior Court for King County*, 89 Wash. 342, 344-45, 154 P. 603 (1916) (holding order overruling motion to strike attorney's lien on the ground that motion was made at improper time, but which did not pass on validity of lien or right of attorneys to file it, was not appealable where order did not affect a substantial right). The Court of Appeals reversed the order dismissing the lien and remanded the case to determine what amount, if any, the law firm was entitled to assert.

Here, the order setting aside Waid's attorney lien was a final order that entitled him to immediate review under RAP 2.2(a)(1) because it disposed of all the issues in the case between he and

Ferguson.<sup>2</sup> Furthermore, the lien had “super priority” over all other liens and attached automatically. *Smith*, 145 Wn. App. at 467 (citing RCW 60.40.010(3)). The order also terminated the action and entitled Waid to immediate review under RAP 2.2(a)(3) because it set aside the lien he filed to protect his financial interests. The order had a financial impact sufficiently fundamental to warrant immediate review. *Id.* at 463.

Ferguson next argues Waid’s appeal should have been dismissed because he was not a party to the lawsuit between it and Teller. Pet. at 9. Ferguson fundamentally misunderstands who qualifies under RAP 3.1<sup>3</sup> as an aggrieved party entitled to appeal. Even though Waid and Ferguson were not directly adverse to one another in the instant action, Waid had standing to challenge the trial court’s decisions because they directly and substantially impacted his pecuniary, proprietary, and personal rights. *State ex rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944) (noting an “aggrieved party” is one whose personal rights or pecuniary interests have been affected). *See also, Breda v. B.P.O. Elks Lake City 1800*

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<sup>2</sup> But even if Waid mischaracterized his notice and the orders from which he appealed were non-appealable as of right, the Court of Appeals could treat his notice of appeal as a notice for discretionary review and permit review. RAP 5.1(c).

<sup>3</sup> RAP 3.1 states: “Only an aggrieved party may seek review by the appellate court.”

*SO-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (noting sanctioned attorney, rather than clients, was the “aggrieved party” for purposes of appealing sanctions imposed directly against him).

Here, Waid qualified as an aggrieved party under RAP 3.1. He represented Ferguson in its lawsuit against Teller and incurred substantial attorney fees and costs to do so. When Ferguson failed to pay him pursuant to the terms of their written contract, he filed an attorney's lien as the contract between them permitted. Despite the language in the contract permitting the lien, the trial court dismissed it.

Ferguson next argues the Court of Appeals should have dismissed Waid's appeal of the trial court order denying his motion for stay and approval of a supersedeas bond because it had already withdrawn the funds representing his attorney's lien from the court registry. Pet. at 11-12. Waid's appeal from that order was not moot. Based on Ferguson's statements to the court during oral argument and its own calculations, funds remain on deposit in the court registry. Furthermore, Ferguson could have recovered additional money from Teller to which Waid's lien would have attached had Ferguson

prevailed in its appeal against Teller. Finally, the trial court can order re-deposit of the withdrawn funds on remand. RAP 12.8.<sup>4</sup>

Ferguson's pleas for review under RAP 13.4(b)(4) should fall on deaf ears. The Court of Appeals' decision does not involve an issue of substantial public interest. Review is not warranted on that basis.

B. The Court of Appeals' decision does not conflict with other appellate decisions addressing the attorney lien statute

Ferguson also claims review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision is allegedly inconsistent with decisions of this Court and with decisions of another Court of Appeals. Pet. at 13-19. Ferguson fails to identify those decisions; regardless, it manufactures a conflict where none exists. The Court of Appeals' decision is consistent with well-established precedent addressing the attorney lien statute.

Ferguson first argues the Court of Appeals erred by failing to dismiss Waid's appeal because he did not challenge the disbursement of the disputed funds from the court registry. Pet. at 13-14. Ferguson

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<sup>4</sup> RAP 12.8 states, in pertinent part:

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.

seems to suggest that an aggrieved party cannot appeal from an adverse judgment if he or she opts to pay the judgment during the appeal rather than to supersede it. The court rules are not so restrictive. *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 27 P.3d 1233 (2001). *See also, In re Sims Estate*, 39 Wn.2d 288, 297, 235 P.2d 204 (1951) (holding that an appellant is not obligated to supersede a judgment or a decree appealed from). Waid was not required to move to stay the trial court's disbursement order or to appeal the subsequent order denying the requested stay to preserve his right to challenge the underlying order invalidating his attorney's lien. RAP 2.2(a)(1). The cases upon which Ferguson relies to suggest otherwise are inapposite. Pet. at 13-14.

Finally, Ferguson contends the Court of Appeals erred by reinstating Waid's lien under RCW 60.40.010(1)(d)<sup>5</sup> because it did not receive any "proceeds" through services he performed on its behalf to which the lien could attach. Pet. at 14-19. The Court of Appeals

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<sup>5</sup> RCW 60.40.010(1) provides in pertinent part that an attorney has a lien for his or her compensation:

(d) *Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action[.]*

(Emphasis added.)

appropriately reinstated Waid's attorney lien because "proceeds" means "any monetary sum received in the action." RCW 60.40.010(5).

Here, Ferguson received a monetary sum when the action Waid commenced against Teller concluded and the trial court disbursed a portion of the disputed funds then held in the court registry. Ferguson received those funds because of the services that Waid performed in the action he brought against Teller, including successfully defending Teller's efforts to limit Ferguson's recovery, CP 68-70, 103-05, 119, 169-70, 248-77, and dismissing Teller's counterclaim. CP 13-18, 76, 170, 175, 444. Ferguson thus received "proceeds" in an action commenced by Waid to which Waid's lien properly attached. *See generally, Price v. Chambers*, 148 Wash. 170, 172, 268 P. 143, 144 (1928) (noting that funds secured were originally held in relation to another case).

As Ferguson grudgingly admits, *Wilson v. Henkle*, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986) interpreted the pre-2004 version of the attorney's lien statute. Pet. at 19 n.9. But it fails to recognize the 2004 amendments significantly changed the statute. *Smith*, 145 Wn. App. at 469 n.13. Ferguson's arguments are thus unavailing. *State v. Stribling*, 164 Wn. App. 867, 878, 267 P.3d 403 (2011) (noting



defendant's argument, and State's concession, were misplaced where they relied on the wrong version of the statute). Although this Court held in *Ross v. Scanell*, 97 Wn.2d 598,604-05,647 P.2d 1004 (1982) that an attorney's lien, as a statutory creation, is in derogation of the common law and must be strictly construed, that is no longer the case. When the Legislature amended the attorney lien statute in 2004, it unambiguously stated:

The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. *Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases* so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. *This statute should be liberally construed to effectuate its purpose.*

Laws of 2004, ch.73, § 2 (emphasis added); *see also*, S.B. Rep. 6270, 58th Leg., Reg. Sess. (Wash. 2004); Final Bill Report on ESSB 6270, 58th Leg., Reg. Sess. (Wash. 2004) (discussing these policies).

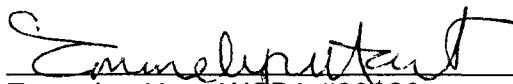
Despite Ferguson's best efforts to create a conflict justifying further review under RAP 13.4(b)(1) and (2), none exists. The Court of Appeals' analyzed the controlling decisions addressing attorney liens and issued an opinion consistent with those decisions. Accordingly, the Court should deny Ferguson's petition for review.

V. CONCLUSION

Ferguson fails to offer any basis under RAP 13.4(b) for review by this Court. Accordingly, this Court should deny the petition for review.

DATED this 23<sup>rd</sup> day of April, 2014.

Respectfully submitted,



Emmelyn Hart, WSBA #28820

Attorneys for Respondent Attorney Lien Claimant  
Brian J. Waid d/b/a Law Office of Brian J. Waid

**DECLARATION OF SERVICE**

I, Vicki Milbrad, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

1. I am a litigation secretary with the law firm of Lewis Brisbois Bisgaard & Smith LLP.

2. On April 23, 2014, I caused to be delivered a copy of the foregoing document as shown below:

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\_\_\_\_\_  
Vicki Milbrad

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Please find attached for filing the Answer of Respondent Brian J. Waid d/b/a Law Office of Brian J. Waid to Petition for Review.

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