

69220-8

69220-8

No. 69220-8-I

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

THE FERGUSON FIRM, PLLC,

Respondent,

vs.

TELLER & ASSOCIATES, PLLC,

Other Party,

and

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

Appellant Attorney Lien Claimant.

AMENDED BRIEF OF APPELLANT ATTORNEY LIEN CLAIMANT
BRIAN J. WAID D/B/A LAW OFFICE OF BRIAN J. WAID

Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661

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

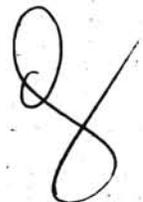


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR.....	2
(1) <u>Assignments of Error</u>	2
(2) <u>Issues Pertaining to Assignments of Error</u>	3
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	12
E. ARGUMENT	14
(1) <u>Statutory Interpretation and Standard of Review</u>	14
(2) <u>A Separate Lawsuit Is Not Required to Adjudicate an Attorney’s Lien</u>	15
(3) <u>The Trial Court Erred by Invalidating Waid’s Attorney Lien</u>	16
(a) <u>Waid has a valid lien on the fee dispute and its proceeds under RCW 60.40.010(1)(d)</u>	16
(b) <u>Waid has a valid lien to the extent of the value of his services under RCW 60.40.010(1)(e)</u>	20
(4) <u>This Court Should Consider and Resolve the Amount of Waid’s Lien</u>	23
F. CONCLUSION.....	24
Appendix	

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Banzeruk v. Estate of Howitz, 132 Wn. App. 942,
135 P.3d 512 (2006), *review denied*,
159 Wn.2d 1016, 157 P.3d 403 (2007).....17

Cannon v. Dep't of Licensing, 147 Wn.2d 41, 50 P.3d 627 (2002).....14

City of Spokane v. Dep't of Revenue, 145 Wn.2d 445,
38 P.3d 1010 (2002).....21

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1,
43 P.3d 4 (2002).....14

Fruitland Irr. Co. v. Thayer, 93 Wash. 338, 160 P. 1048 (1916)17

Gustafson v. City of Seattle, 87 Wn. App. 298,
941 P.2d 701 (1997).....16

Hossack v. Graham, 20 Wash. 184, 55 P. 36 (1898).....17

Jones v. Int'l Land Corp., 51 Wn. App. 737,
755 P.2d 184 (1988)..... 20-21

King County v. Seawest Inv. Assoc., LLC, 141 Wn. App. 304,
170 P.3d 53, *review denied*, 163 Wn.2d 1054,
187 P.3d 752 (2007).....15

Krein v. Nordstrom, 80 Wn. App. 306, 908 P.2d 889 (1995).....15

Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003)14

Ross v. Scannell, 97 Wn.2d 598, 647 P.2d 1004 (1982).....15, 20

Samuel's Furn., Inc. v. Dep't of Ecology, 147 Wn.2d 440,
54 P.3d 1194, 63 P.3d 764 (2002)21

Smith v. Moran, Windes & Wong, PLLC,
145 Wn. App. 459, 187 P.3d 275 (2008).....17, 19, 23

State v. J.M., 144 Wn.2d 472, 8 P.3d 720 (2001)14

State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001)14

State v. Neher, 112 Wn.2d 347, 771 P.2d 330 (1989)14

State v. Stribling, 164 Wn. App. 867, 267 P.3d 403 (2011)19

Suleiman v. Cantino, 33 Wn. App. 602, 656 P.2d 1122 (1983)19, 20

The Ferguson Firm, PLLC v. Teller & Assoc., PLLC,
Court of Appeals Cause No. 68329-21

Wilson v. Henkle, 45 Wn. App. 162, 724 P.2d 1069 (1986).....2, 19, 20

Other Cases

Bank of Washington v. Nock, 76 U.S. 373, 19 L.Ed. 717 (1869)17

Statutes

RCW 60.04.02115
RCW 60.24.03315
RCW 60.40.010..... 20
RCW 60.40.010(1).....15, 16
RCW 60.40.010(1)(c)20
RCW 60.40.010(1)(d)12, 16, 17, 22
RCW 60.40.010(1)(e)12, 13, 22
RCW 60.40.010(5).....17, 19
RCW 60.40.010(d).....2, 12
RCW 60.40.010(e).....2, 13, 20
RCW 60.44.01015

Rules and Regulations

CR 3(a).....17
RAP 10.3(g)2
RAP 12.8.....22
RPC 1.6..... 8
RPC 1.9..... 8

Other Authorities

Black’s Law Dictionary (9th ed. 2009).....21

A. INTRODUCTION

The underlying case involves a dispute over the division of a contingent fee (“fee dispute”) recovered by The Ferguson Firm, PLLC (“Ferguson”) and Teller & Associates, PLLC (“Teller”) arising out of their joint representation of several clients in an unrelated matter (“other matter”). Brian J. Waid d/b/a Law Office of Brian J. Waid (“Waid”) represented Ferguson in an effort to protect its share of the fund. After the trial court permitted Waid to withdraw from his representation of Ferguson for good cause, he filed an attorney’s lien to secure payment of his unpaid fees from Ferguson’s share of the fund. Ferguson moved to set aside the lien.

This appeal arises out of the trial court’s decision to grant Ferguson’s motion and invalidate Waid’s lien.¹ The lien is valid and superior to any other liens; thus, the trial court erred by invalidating it. This Court should reverse, reinstate the lien, require the trial court to order Ferguson to restore the funds that it withdrew from the court registry, and determine the amount of fees to which Waid is entitled. Alternatively, the Court should reverse, reinstate Waid’s lien, and remand for further proceedings in the trial court.

¹ This appeal is linked for consideration with Ferguson’s appeal in *The Ferguson Firm, PLLC v. Teller & Assoc., PLLC*, Court of Appeals Cause No. 68329-2.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error²

1. The trial court erred by finding that “[t]he \$530,107.58 in attorneys’ fees do not represent ‘proceeds’ received by Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW 60.40.010(d). The funds were earned by Teller and Ferguson well before Mr. Waid was retained.”

2. The trial court erred by finding that “[t]he funds that are currently in dispute were not obtained by a ‘judgment’ on behalf of Ferguson against Teller. RCW 60.40.010(e). *Wilson v. Henkle*, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson was entitled to half of the attorneys’ fees that were generated in the Underlying Matter. Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.”

3. The trial court erred by entering an order on July 30, 2012 setting aside Waid’s attorney lien and ordering the disbursement of funds from the court registry to Ferguson.

² Waid cannot provide a separate assignment of error for each finding of fact that he contends was improperly made with reference to the number as RAP 10.3(g) requires because the trial court did not number the findings in the order setting aside his attorney’s lien. Copies of the challenged orders are in the Appendix.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err by invalidating a statutory attorney's lien where the lien automatically arose by operation of law upon an action and its proceeds when the attorney initiated the action on his client's behalf and the client recovered funds at the conclusion of that action as a result of the services that the attorney performed? (Assignments of Error Nos. 1, 3)

2. Did the trial court err by invalidating a statutory attorney's lien where the lien applies to a final judgment determining the entitlement of the attorney's client and a third-party to disputed fees earned in another matter and the judgment is one from which the client independently appeals? (Assignments of Error Nos. 2-3)

C. STATEMENT OF THE CASE

Sandra Ferguson is an attorney and the principal of Ferguson. CP 116. Ferguson began representing the clients in the other matter in August 2009 pursuant to a flat fee/contingency agreement. CP 4, 116, 448-54. The clients were unable to advance the majority of their litigation costs. CP 4. With the clients' knowledge and consent, Ferguson approached several law firms seeking co-counsel who could advance the substantial litigation costs and share the workload. CP 4.

Teller was one of seven firms that Ferguson approached as potential co-counsel.³ CP 4.

In October 2010, Ferguson attempted to mediate the clients' dispute. CP 5. When mediation failed, Ferguson and the clients expected to take the matter to trial. CP 5.

In November 2010, Ferguson and Teller agreed to jointly represent the clients in the other matter with the clients' consent and knowledge. CP 4, 7. Teller agreed to advance all litigation costs. CP 20.

During the joint representation, the WSBA Disciplinary Board suspended Sandra for three months based on misconduct she committed in an unrelated action.⁴ CP 2-3, 8, 20. Ferguson withdrew from representing the clients when Sandra began serving her suspension in February 2011.⁵ CP 2, 8, 21.

During Ferguson's absence, Teller negotiated a settlement for the clients and the other matter settled in April 2011. CP 8. When Ferguson and Teller disagreed about the division of the contingent fee shortly

³ Stephen Teller is an attorney and principal at Teller. CP 3. Sandra and Stephen had known one another for approximately ten years and had successfully worked together in the past. CP 3.

⁴ Teller was aware of Sandra's impending suspension from the practice of law when it negotiated the co-counsel agreement in the other matter. CP 5, 20, 117.

⁵ Sandra was readmitted to practice in May 2011. CP 21.

thereafter, Ferguson served, but did not file, a notice of attorney's claim of lien. CP 8, 20, 66.

On May 4, 2011, Ferguson retained Waid to represent it in the fee dispute with Teller. CP 8, 66, 118. Their written agreement defines the scope of Waid's representation as follows:

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 agreement further provides that Waid "shall" have a lien against any proceeds recovered by, or on behalf of, Ferguson in connection with the claims arising out of the fee dispute with Teller, including pursuant to RCW 60.40.010 *et seq.* CP 210-11. Under the agreement, Waid invoiced Ferguson each month for the services that he provided. CP 161, 210, 217-42. Ferguson never questioned a single charge and never disputed Waid's fees. CP 161, 166.

Waid successfully defended Teller's two attempts to summarily adjudicate the fee dispute. CP 68, 69-70, 103-05, 119, 169-70, 248-77. In those petitions, Teller argued alternative awards: Ferguson should recover no more than 50% of the disputed fees; Ferguson should recover less than 50% of the fees based on *quantum meruit*; and Ferguson should

recover no fees at all. CP 71. By defeating Teller's petitions, Waid protected Ferguson's *quantum meruit* theory and its entitlement to at least 50% of the disputed fees. CP 159, 170. During the fee dispute litigation, the trial court suggested that the two law firms file a separate action to resolve their claims. CP 163.

On May 27, 2011, Ferguson sued Teller to resolve the fee dispute. CP 1-12, 46. They eventually agreed to deposit the amount of the disputed fees into the court registry. CP 66, 72, 118, 120, 172. Although Teller counterclaimed, *again alleging that Ferguson was entitled to either no fees or less than 50% of the disputed fees*, the trial court dismissed Teller's counterclaims on Ferguson's motion. CP 13-18, 76, 170, 175, 444.

After unsuccessfully moving to dismiss Ferguson's complaint under CR 12(c), Teller filed a motion for summary judgment seeking a declaratory judgment that: (1) an express fee agreement existed between Teller and Ferguson; and (2) that Ferguson's *quantum meruit* claim be dismissed. CP 19, 174-75. At oral argument, the trial court ruled that Teller had established as a matter of law that an express contract existed between Teller and Ferguson to divide the attorney fee award equally. CP 19. But the court reserved ruling on the issue of whether Ferguson's suspension from the practice of law was a condition subsequent

rendering the agreement unenforceable, permitting fees to be awarded on the basis of *quantum meruit*. CP 19-20. On January 30, 2012, the trial court granted summary judgment to Teller, dismissed Ferguson's *quantum meruit* claim, and ordered the disputed funds to be divided equally. CP 19-25, 123, 177. The court denied Ferguson's request for reconsideration. CP 199.

On February 9, 2012, Teller filed a motion for, among other things, the disbursement of funds, which required Ferguson to respond by 12 noon on February 15, 2012. CP 27, 29, 45. By then, Ferguson had retained replacement counsel and instructed Waid that it preferred its replacement counsel to prepare the opposition, provided that replacement counsel could have an additional three weeks to review the record and to prepare the response. CP 33, 58, 187.

On the morning of February 10, 2012, Ferguson threatened Waid with a legal malpractice claim. CP 32, 57, 187-88. Waid promptly advised Ferguson of the potential conflict of interest, both verbally and electronically, and informed it that he was required to immediately withdraw. CP 33, 44, 57, 58-59, 188. He then filed his withdrawal and moved for permission to immediately withdraw and to continue the hearing on Teller's motion as Ferguson had instructed so that its replacement counsel could prepare the opposition. CP 26-36, 188-89.

The trial court conducted a telephone conference call to address Waid's motion on February 13, 2012. CP 184, 361-63. Moments *before* the conference began, Ferguson instructed Waid by email that it wanted a continuance to obtain new counsel. CP 60, 190. *During* the conference, Ferguson again reiterated to Waid by email that it wanted its new replacement counsel (now an entirely different firm than its first replacement counsel) to file the opposition to Teller's motion, provided that Waid obtained a 30 day extension of time. CP 59-61, 190. Waid communicated Ferguson's instructions to the trial court. CP 59, 61, 190-91. That court granted Ferguson's request for an additional 30 days and authorized Waid's immediate withdrawal. CP 361.

Ferguson requested reconsideration of that order on February 15, 2012 when its second replacement counsel declined to proceed on its behalf.⁶ CP 37-51, 60. Among other assertions, it claimed that it had always wanted Waid to prepare the opposition to Teller's motion. CP 46, 50. Waid responded in writing to the extent permitted by RPC 1.6 and RPC 1.9 and requested an *in camera* hearing to further address Ferguson's allegations. CP 56-61.

⁶ Although Ferguson's motion was noted as a motion opposing Waid's withdrawal, it was functionally a motion for reconsideration. CP 37-43.

The trial court conducted a second hearing on February 16, 2012 to consider Ferguson's motion. CP 184-201. During the hearing, the trial court instructed Waid to produce the emails between him and Ferguson concerning Ferguson's instructions. CP 157, 197. The court reviewed those emails *in camera* and concluded that Waid had followed Ferguson's instructions precisely. CP 157, 195, 197. The court re-affirmed its prior order authorizing Waid to withdraw immediately for cause. CP 155, 199.

Waid filed an attorney's lien seeking to recover \$78,350.85 in fees and costs that he incurred representing Ferguson in the fee dispute with Teller and in the instant action.⁷ CP 131-33. Ferguson never disputed any of Waid's fees or charges. CP 143, 166. Ferguson made only two payments to Waid during his representation. CP 165.

Teller eventually sought disbursement of its 50% share of the disputed fees, interest, attorney fees, and costs. CP 358. On February 16, 2012, the trial court entered an order of partial disbursement. CP 62-63. The trial court determined that Ferguson had not established any basis to prevent Teller from receiving its 50% share of the fees in dispute and ordered \$265,053.79 disbursed to Teller. CP 62. It then ordered that \$101,000.74 remain in the court registry until

⁷ Waid filed notice of his lien with the clerk of the court and the appropriate entry was made in the execution docket. CP 166-67.

further notice because the issues relating to interest and sanctions/attorney fees as to Ferguson's 50% share had not yet been resolved. CP 62. It also ordered that \$78,350.85 remain in the court registry until further court order to protect Waid's lien. CP 63. Finally, the court ordered that the remaining portion of Ferguson's 50% share or \$85,702.20, be disbursed to it. CP 63. Later that same day, Ferguson filed an emergency motion in this Court to stay the order of partial disbursement. CP 358. The Court of Appeals Commissioner granted a temporary stay and directed the parties to provide additional briefing on the issue. CP 358.

On February 21, 2012, Ferguson appealed the trial court's summary judgment order and the other orders granted in favor of Teller. CP 358. It moved the trial court for a supersedeas bond to stay the partial disbursement to Teller. CP 373.

On March 22, 2012, this Court's Commissioner issued a ruling extending the temporary stay an additional 14 days and informing Ferguson that it was required to post a bond, cash, or alternate security approved by the trial court to stay enforcement of the order of disbursement. CP 357-59.

Ferguson and Teller entered into a stipulation and agreed order to resolve the supersedeas issue, which the trial court entered on

April 12, 2012. CP 72, 372-79. The parties agreed that \$290,905.53 of the amount on deposit in the court registry would serve as Ferguson's supersedeas bond pending the outcome of its appeal and/or upon further order of the trial court. CP 373, 376. The parties also agreed: (1) that 10% of the funds on deposit would be immediately disbursed Teller; (2) that \$78,350.85, representing Waid's attorney lien, would remain in the registry pending further order of the trial court; and (3) that the remaining \$107,840.44 on deposit would be immediately disbursed to Ferguson. CP 374, 377.

Ferguson moved on July 11, 2012 to have the trial court summarily set aside Waid's attorney lien. CP 106-25, 326-32. Waid responded and also moved to strike inadmissible portions of Sandra's supporting declaration. CP 142-81, 320-26. The trial court granted Waid's motion to strike. CP 336-38.

On July 30, 2012, the trial court granted the motion to set aside Waid's lien and directed the clerk of the court to disburse to Ferguson the sum of \$78,350.85 held in the court registry, together with all interest accrued on that amount. CP 341-43. Waid filed his notice of appeal from that order on August 9, 2012. CP 339-44.

On August 22, 2012, Waid filed a motion to stay disbursement to Ferguson of the funds in the court registry representing his attorney's lien

and for approval of a supersedeas bond. CP 345-50. Unbeknownst to him, Ferguson had withdrawn the funds representing his attorney's lien from the court registry on August 3, 2012, a scant four days after the trial court entered its order. CP 386-87, 393, 401. The trial court denied Waid's motion on August 30, 2012. CP 419-21. The next day, he filed an amended notice of appeal to include the order denying his request for a stay and for approval of a supersedeas bond. CP 413-22.

D. SUMMARY OF ARGUMENT

An attorney always has the option of suing a client to recover unpaid legal fees. An attorney may also choose to assert a lien to ensure the payment of outstanding fees. RCW 60.40.010(1) provides an attorney with an automatically enforceable lien for his or her compensation on the client's papers, on money in the hands of the adverse party, on an action and its proceeds, and on a judgment. An attorney who files a lien is not required to initiate a separate lawsuit to adjudicate the lien.

The trial court erred by invalidating Waid's attorney lien because the lien is valid under RCW 60.40.010(1)(d) and (e).

Waid has a valid lien on the fee dispute and its proceeds under RCW 60.40.010(d). The plain words of the statute state that an attorney's lien arises by operation of law upon an action and its proceeds. Here, Waid's lien arose the moment he filed the lawsuit to recover funds on

Ferguson's behalf; it automatically attached to the action and any proceeds that Ferguson recovered. Ferguson received 50% of the disputed fees as a result of the services that Waid performed. Those funds are "proceeds" within the meaning of the statute because they represent the monetary sum that Ferguson received at the conclusion of its lawsuit against Teller. Those proceeds are properly subject to Waid's attorney lien.

Waid also has a valid lien to the extent of the value of his services under RCW 60.40.010(1)(e). By its plain terms, this subsection applies to a "judgment." Whether Ferguson recovered 90% or 50% of the disputed fees is irrelevant. The trial court determined the entitlement of Ferguson and Teller to the disputed fees and entered an order from which Ferguson's appeal arises. Waid's lien therefore properly attached to the trial court's final "judgment" as between Ferguson and Teller.

This Court should consider and resolve the amount of Waid's attorney lien as a matter of judicial economy where the evidence before the Court is undisputed. Ferguson never questioned Waid's charges and never disputed his fees.

This Court should reverse, reinstate Waid's lien and require the trial court to order Ferguson to restore the funds that it withdrew from the court registry. Alternatively, the Court should reverse, reinstate Waid's lien, and remand for further proceedings in the trial court.

E. ARGUMENT

(1) Statutory Interpretation and Standard of Review

The Court's fundamental objective in reading a statute is to ascertain and carry out the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then the Court must give effect to that plain meaning. *Id.* Under the plain meaning rule, the statute's meaning is derived from all that the Legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. *Id.* at 11-12. But if the statute is ambiguous, the Court may look to outside sources to determine legislative intent. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56-57, 50 P.3d 627 (2002). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Id.* at 56. The Court should not adopt an interpretation that renders any portion meaningless. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Strained meanings and absurd results should be avoided. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). The meaning of a statute is a question of law that the Court reviews de novo. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

(2) A Separate Lawsuit Is Not Required to Adjudicate an Attorney's Lien

An attorney may sue a client for unpaid fees. *Ross v. Scannell*, 97 Wn.2d 598, 605, 647 P.2d 1004 (1982). But like many other professionals, an attorney may also choose to assert a lien to ensure payment of outstanding fees without initiating a lawsuit to recover those fees. *See, e.g.*, RCW 60.04.021 (contractor's lien on the improvement to real property); RCW 60.24.033 (lien on real property for labor or services on timber and lumber); RCW 60.44.010 (medical service providers' lien on a patient's recovery from a tortfeasor). RCW 60.40.010(1) provides an attorney with an automatically enforceable lien for his or her compensation on the client's papers, on money in the attorney's hands belonging to the client, on money in the hands of the adverse party, on an action and its proceeds, and on a judgment to the extent of the value of any services performed by the attorney in the action.

The attorney lien statute protects both the client and the attorney. *Krein v. Nordstrom*, 80 Wn. App. 306, 309, 908 P.2d 889 (1995). But it does not require the attorney to initiate a separate lawsuit to adjudicate the lien. *King County v. Seawest Inv. Assoc., LLC*, 141 Wn. App. 304, 314-16, 170 P.3d 53, *review denied*, 163 Wn.2d 1054, 187 P.3d 752 (2007) (where the attorney lien statute does not establish any procedure for

enforcing the lien, the trial court is left with broad discretion to craft an appropriate equitable remedy).

A party seeking to invalidate an attorney's lien bears the burden of producing evidence to justify the motion. *Gustafson v. City of Seattle*, 87 Wn. App. 298, 304, 941 P.2d 701 (1997).

(3) The Trial Court Erred by Invalidating Waid's Attorney Lien

The trial court invalidated Waid's attorney lien on Ferguson's motion, finding that the disputed fees in the other matter were not "proceeds" received by Ferguson based on services Waid performed and that the funds Ferguson received at the conclusion of the fee dispute were not obtained by a "judgment" against Teller. CP 416-17. The trial court erred by invalidating the lien.

(a) Waid has a valid lien on the fee dispute and its proceeds under RCW 60.40.010(1)(d)

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.)

In addition, the written fee agreement between Ferguson and Waid expressly provides that Waid has a lien against any proceeds recovered by, or on behalf of, Ferguson in connection with the fee dispute.⁸ CP 201-11. But the Court need not address whether Waid has a contractual lien or whether Ferguson has any obligation under such a lien to reverse the trial court's decision in this case. As this Court has already stated:

The plain words of section 1(d) of the statute state that an attorney's lien for compensation, whether express or implied, arises by operation of law '**[u]pon an action . . . and its proceeds after the commencement**' of the action.

Smith v. Moran, Windes & Wong, PLLC, 145 Wn. App. 459, 466, 187 P.3d 275 (2008) (emphasis in original) (quoting RCW 60.40.010(1)(d)).

The Court further explained:

Subsection (5) states, "For the purposes of this section, '**proceeds**' means any monetary sum received in the action."

Id. (emphasis in original) (quoting RCW 60.40.010(5)).

An action is "commenced" upon service of the summons and complaint or by filing a complaint. CR 3(a); *Banzeruk v. Estate of Howitz*, 132 Wn. App. 942, 945, 135 P.3d 512 (2006), *review denied*, 159 Wn.2d 1016, 157 P.3d 403 (2007).

⁸ It has long been established that liens may arise by contract. *See, e.g., Bank of Washington v. Nock*, 76 U.S. 373, 19 L.Ed. 717 (1869); *Fruitland Irr. Co. v. Thayer*, 93 Wash. 338, 160 P. 1048 (1916); *Hossack v. Graham*, 20 Wash. 184, 55 P. 36 (1898).

Applying the plain words of the statute to the undisputed facts of this case, an attorney's lien for compensation in favor of Waid arose by operation of law upon the fee dispute and its proceeds. Waid's lien arose when he filed the lawsuit to recover funds on Ferguson's behalf on May 27, 2011. It automatically attached to the action and any monetary sum that Ferguson received in the action. Waid's lien was therefore valid and the trial court erred by setting it aside.

Waid anticipates that Ferguson will continue to argue as it did below that the trial court properly invalidated his attorney's lien because he did not obtain proceeds for Ferguson in the other matter or in the fee dispute with Teller. *See, e.g.*, CP 108, 113, 327-25. Ferguson is mistaken. First, both Ferguson and the trial court conflate the clients' recovery in the other matter with Ferguson's recovery of its share of the disputed fees in the action against Teller. Second, Ferguson and the trial court ignore the fact that Waid's job in representing Ferguson was twofold. He was not just attempting to recover fees for Ferguson under a *quantum meruit* theory. He was also attempting to *protect* Ferguson's share of the disputed fees from Teller's repeated attempt to limit those fees to less than 50% or none at all. CP 167-80. Third, Waid sued Teller on Ferguson's behalf to recover a portion of the fees generated in the other matter. The trial court awarded Ferguson 50% (approximately \$265,000) of the

disputed fees. Those funds are “proceeds” as defined by RCW 60.40.010(5) because they represent the monetary sum that Ferguson received at the conclusion of the action against Teller, which resulted from Waid’s efforts on Ferguson’s behalf.⁹ Accordingly, those proceeds are properly subject to Waid’s attorney lien.¹⁰ *Id.*

Waid also expects Ferguson to rely on *Wilson v. Henkle*, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986) and *Suleiman v. Cantino*, 33 Wn. App. 602, 604, 656 P.2d 1122 (1983) to argue that his lien was properly invalidated. CP 113, 327. Ferguson’s reliance on these cases is misplaced. First, both Ferguson and the trial court fail to recognize that *Wilson* and *Suleiman* interpreted the *pre-2004* version of the attorney’s lien statute. As this Court is aware, the 2004 amendments significantly changed the statute. *Smith*, 145 Wn. App. at 469. Ferguson and the trial court mistakenly carried over to the current statute interpretations that were based on the former rather than the current statute, with no attention paid to the differences in language. *State v. Stribling*, 164 Wn. App. 867, 878, 267 P.3d 403 (2011) (noting defendant’s argument, and State’s

⁹ Once proceeds come into the hands of the client, such as through distribution from the registry of the court, the term “proceeds” is limited to identifiable cash proceeds. RCW 60.40.010(5).

¹⁰ If Ferguson successfully appeals the trial court order equally dividing the disputed fees between it and Teller, then Waid’s attorney lien should be reinstated and attach to any additional proceeds that Ferguson recovers on remand.

concession, were misplaced where they relied on the wrong version of the statute). Second, *Wilson* and *Suleiman* both involved a judgment *against* the client, rather than a judgment in the client's favor. This Court held in both cases that the pre-amendment attorney lien statute authorized a lien against a judgment in the client's favor, but not a judgment against the client in favor of the adverse party. *Wilson*, 45 Wn. App. at 170; *Suleiman*, 33 Wn. App. at 606-07. *Wilson* and *Suleiman* are factually distinct and do not address the situation in this case; accordingly, they are not controlling.

(b) Waid has a valid lien to the extent of the value of his services under RCW 60.40.010(1)(e)

RCW 60.40.010(1)(e) further provides that an attorney has a lien for his or her compensation:

Upon a judgment to the extent of the value of any services performed by the attorney in the action[.]

(Emphasis added.)

By its clear terms, this subsection limits the attorney's lien to fees earned for services that the attorney performed in the action in which the judgment is entered. *Ross*, 97 Wn.2d at 604 (construing the essentially identical provision in former RCW 60.40.010). An attorney may effectively file a lien on a judgment even before a judgment for the client is entered. RCW 60.40.010(1)(c); *Jones v. Int'l Land Corp.*, 51 Wn. App.

737, 740, 755 P.2d 184 (1988). But the statute does not define the term “judgment.”

Ferguson argued, and the trial court apparently agreed, that the funds it recovered in the fee dispute with Teller were not obtained by a “judgment” against Teller because Ferguson recovered only 50% of the total fees in dispute rather than the 90% that it wanted. Ferguson and the trial court interpret the term “judgment” too narrowly for purposes of the attorney’s lien statute.

By its plain terms, the subsection applies to, but does not define, a “judgment.” When an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning with the industry, this Court may turn to the technical, rather than general purpose, dictionary to resolve the word’s definition. *See City of Spokane v. Dep’t of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002). Thus, this Court may consider Black’s Law Dictionary definition, which defines “judgment” as: “A court’s final determination of the rights and obligations of the parties in a case. • The term *judgment* includes an equitable decree and any order from which an appeal lies.” Black’s Law Dictionary (9th ed. 2009). *See also, Samuel’s Furn., Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002) (noting a judgment is considered final on appeal if it

concludes the action by resolving the plaintiff's entitlement to the requested relief).

This definition supports the conclusion that Waid's lien properly attached to the order determining the rights of Ferguson and Teller to the disputed fees. Whether Ferguson agrees with the amount that the trial court awarded is irrelevant. Ferguson unquestionably received a portion of the disputed funds based on the services that Waid provided. More to the point, Ferguson itself appealed that order as a final judgment *before* the trial court ruled on the motion to invalidate Waid's lien.

Waid's attorney lien was proper as a matter of law under RCW 60.40.010(1)(d) and (e), and automatically attached to the funds that Ferguson received at the conclusion of its fee dispute with Teller. The trial court erred by invalidating it. This Court should reverse, reinstate Waid's lien, and order the trial court to require Ferguson to restore the funds that it withdrew from the court registry pursuant to RAP 12.8.¹¹

¹¹ 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.

(4) This Court Should Consider and Resolve the Amount of Waid's Lien

Ferguson and Waid had an hourly fee agreement that required Waid to invoice Ferguson on a monthly basis for the services that he provided. CP 161, 210, 217-42. He did so. Ferguson never questioned a single charge and never disputed his fees. CP 161, 166. It simply stopped paying for Waid's services. When Ferguson moved to invalidate Waid's lien, Waid presented *undisputed* evidence to the trial court to support both the validity and the amount of the lien. Where this Court has the same *undisputed* evidence before it, it should consider and resolve on appeal the amount of fees to which he is entitled in the interest of judicial economy.

The trial court here did not rule on arguments about the amount of Waid's attorney lien in light of its decision to invalidate the lien. *Smith*, 145 Wn. App. at 472. Unlike the situation in *Smith*, however, Waid addressed the amount of his lien in his opposition to Ferguson's motion and provided documentation to support it. Ferguson did not challenge any of those fees or charges; instead, it generally objected to the lien. Ferguson and Waid had ample time to prepare for the hearing on the motion to invalidate the lien and had ample opportunity to present evidence to support their arguments. Ferguson was given an opportunity to contest the amount of Waid's lien, but ultimately chose not to do so.

Accordingly, the Court should resolve the amount of fees to which Waid is entitled under his lien based on the undisputed evidence before it in the interest of judicial economy. Alternatively, it should direct the trial court to consider and resolve the matter on remand. *Id.*

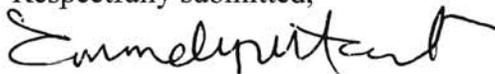
F. CONCLUSION

Ferguson bore the burden of producing evidence to justify its motion to invalidate Waid's attorney lien. It failed to meet that burden. Waid's lien was valid and attached automatically to the funds that Ferguson received at the conclusion of its fee dispute with Teller.

The Court should reverse the trial court order invalidating Waid's attorney lien, require the trial court to order Ferguson to restore the funds disbursed from the court registry, and set the amount of fees to which Waid is entitled. Alternatively, the Court should reverse, reinstate Waid's lien, and remand for further proceedings in the trial court. Costs on appeal should be awarded to Waid.

DATED this 26th day of November, 2012.

Respectfully submitted,



Emmelyn Hart, WSBA #28820

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Attorneys for Appellant

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC.,

Plaintiff,

vs.

TELLER & ASSOCIATES, PLLC.,

Defendant.

NO. 11-2-19221-1 SEA

ORDER GRANTING THE
FERGUSON FIRM'S MOTION TO
SET ASIDE WAID ATTORNEY'S
LIEN, AND ORDERING
DISBURSEMENT OF FUNDS

[CLERK'S ACTION REQUIRED]

This matter came on for hearing without oral argument on The Ferguson Firm, PLLC's Motion to Set Aside Waid "Attorney's Lien" and For Disbursement of Funds to The Ferguson Firm, PLLC. Based on the evidence and Pleadings of Record, the Court finds:

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 296-9490

1 On behalf of several clients, Plaintiff Ferguson and Defendant Teller reached a
2 settlement agreement in an Underlying Matter on April 28, 2011. Due to a dispute
3 concerning the apportionment of the resulting \$530,107.58 in attorneys' fees between
4 Ferguson and Teller, the entire sum was deposited into the Court's Registry. On May 4,
5 2011, Ms. Ferguson retained Brian Waid to represent her in her fee dispute with Mr.
6 Teller over how to divide the fees. On May 27, 2011, Ms. Ferguson filed a Complaint
7 seeking Declaratory Judgment that there was no enforceable contract with Mr. Teller
8 and arguing that the Court should divide the fees based on a theory of *quantum meruit*.
9 To Ms. Ferguson this meant 90% to her and 10% to Teller. Teller argued the existence
10 of an express contract to divide the fees 50:50. On January 30, 2012, this Court rejected
11 Ferguson's argument, found the existence of a contract and ordered the fees divided
12 50:50. This order is currently on appeal.

13
14
15 On February 13, 2012, Mr. Waid withdrew as Ms. Ferguson's attorney. The
16 following day he filed a lien for his attorney's fees in the amount of \$78,350.85.
17 Ms. Ferguson now seeks to set aside Mr. Waid's lien for attorney's fees on the grounds
18 that the lien is invalid under RCW 60.40.010(c), (d), and (e).
19

20 The funds are currently in the Court's registry, not in the "hands of an adverse
21 party." RCW 60.40.010(c). This subsection does not apply.

22 The \$530,107.58 in attorneys' fees do not represent "proceeds" received by
23 Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW
24 60.40.010(d). The funds were earned by Teller and Ferguson well before Mr. Waid was
25

1 retained.

2 The funds that are currently in dispute were not obtained by a "judgment" on behalf
3 of Ferguson against Teller. RCW 60.40.010(e). *Wilson v Henkle*, 45 WnApp. 162, 170,
4 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson
5 was entitled to half of the attorneys' fees that were generated in the Underlying Matter.
6 Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.

7
8 THEREFORE, IT IS ORDERED that the Motion to Set Aside Waid "Attorney's
9 Lien" and For Disbursement of Funds to The Ferguson Firm, PLLC. is GRANTED,
10 and;

11 It is further Ordered that the Clerk of Court is authorized and directed to
12 disburse to the Ferguson Firm, the sum of \$78,350.85, held in the Court Registry in this
13 matter, together with all interest accrued on that amount.

14 DATED this 30th day of July, 2012.

15

16

17

JUDGE MARIANE C. SPEARMAN

18

19

20

21

22

23

24

25

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 296-9490

King County Superior Court
Judicial Electronic Signature Page

Case Number: 11-2-19221-1
Case Title: FERGUSON FIRM VS TELLER & ASSOCIATES

Document Title: ORDER

Signed by Judge: Mariane Spearman
Date: 7/30/2012 2:32:12 PM



Judge Mariane Spearman

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 43C39890476C001CDC4C9815BD2359E397D46AD1

Certificate effective date: 1/11/2011 8:36:01 AM

Certificate expiry date: 1/10/2013 8:36:01 AM

Certificate Issued by: CN=Washington State CA B1, OU=State of Washington
CA, O=State of Washington PKI, C=US

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC,
Plaintiff,
v.
TELLER & ASSOCIATES, PLLC
Defendant.

NO 11-2-19221-1 SEA

ORDER DENYING MOTION TO
STAY DISBURSEMENT OF
FUNDS IN THE COURT
REGISTRY PENDING APPEAL

THIS MATTER came before the Court on Attorney Brian Waid's Motion to Stay Disbursement of Funds in the Court Registry Pending Appeal. Sub. #160. The plaintiff, The Ferguson Firm, PLLC, was represented by its attorney, John R. Muenster. The defendant, Teller & Associates, PLLC, was represented by its attorney, Kelby Fletcher. Attorney Brian Waid was represented by his attorney, Emmelyn Hart.

This Court has considered the records and files herein, including all papers filed for and against the motion. Being fully advised, the Court finds as follows:

ORDER DENYING WAID MOTION TO
STAY DISBURSEMENT OF FUNDS IN
THE COURT REGISTRY PENDING
APPEAL [PROPOSED] - 1

MUENSTER & KOENIG
JOHN R. MUENSTER, INC., P.S.
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 467-7500
FAX: (206) 855-1027

1 (1) This Court has previously granted the Motion to Set Aside
2 Waid "Attorney's Lien" and For Disbursement of Funds to The Ferguson Firm.
3
4 Order, Sub. # 150.

5 (2) Pursuant to this Court's Order, the sum of \$78,350.85 was
6
7 disbursed by the Clerk of the Court to The Ferguson Firm, PLLC, on or about
8
9 August 3, 2012.

10 (3) Attorney Brian Waid's Motion to Stay Disbursement of Funds
11
12 in the Court Registry Pending Appeal, Sub. #160, filed August 22, 2012, is moot.
13
14 Accordingly,

15 IT IS HEREBY ORDERED that Attorney Brian Waid's Motion to
16
17 Stay Disbursement of Funds in the Court Registry Pending Appeal is DENIED.

18
19 DATED this 30th day of August, 2012.

20
21
22
23
24
25
26
27
28
e-filed

Hon. Mariane C. Spearman
Judge of the Superior Court

Presented by:
MUNSTER AND KOENIG

By: S/ John R. Muenster
John R. Muenster
Attorney at Law
WSBA No. 6237

ORDER DENYING WAID MOTION TO
STAY DISBURSEMENT OF FUNDS IN
THE COURT REGISTRY PENDING
APPEAL [PROPOSED] - 2

MUNSTER & KOENIG
JOHN R. MUNSTER, INC., P.S.
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 467-7500
FAX: (206) 855-1027

King County Superior Court
Judicial Electronic Signature Page

Case Number: 11-2-19221-1
Case Title: FERGUSON FIRM VS TELLER & ASSOCIATES

Document Title: ORDER

Signed by Judge: Mariane Spearman
Date: 8/30/2012 3:47:36 PM



Judge Mariane Spearman

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 43C39890476C001CDC4C9815BD2359E397D46AD1

Certificate effective date: 1/11/2011 8:36:01 AM

Certificate expiry date: 1/10/2013 8:36:01 AM

Certificate Issued by: CN=Washington State CA B1, OU=State of Washington
CA, O=State of Washington PKI, C=US

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the following document: Cover letter to Richard D. Johnson and the Amended Brief of Appellant Attorney Lien Claimant Waid d/b/a Law Office of Brian J. Waid in Court of Appeals Cause No. 69220-8-I to the following:

John Muenster
Muenster & Koenig
14940 Sunrise Drive NE
Bainbridge Island, WA 98110

Kelby Fletcher
Stokes Lawrence
1420 5th Avenue, Suite 3000
Seattle, WA 98101-2393

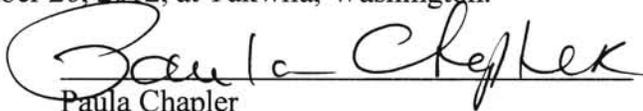
Brian Waid [x] Sent by email only
4847 California Avenue SW, Suite 100
Seattle, WA 98116

Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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: November 26, 2012, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick