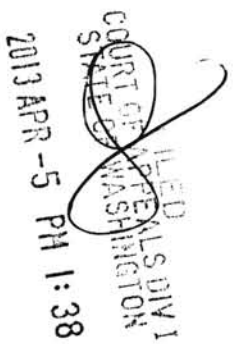
NO. 68329-2-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE



THE FERGUSON FIRM, PLLC,

Plaintiff-Appellant,

v.

TELLER & ASSOCIATES, PLLC,

Defendant-Respondent.

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT

The Honorable Mariane Spearman, Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF (FOURTH AMENDED)

JOHN R. MUENSTER
Attorney at Law
WSBA No. 6237
Attorney for Plaintiff-Appellant
14940 Sunrise Drive N.E.
Bainbridge Island, WA 98110
Telephone: 206-467-7500

Table of Contents

Table of Authorities

Cases

Rules

I. ***INTRODUCTION***

This appeal arises from an attorney-fee dispute between two law firms: The Ferguson Firm, PLLC, Plaintiff/Appellant (Ferguson) and Teller & Associates, PLLC Defendant/Respondent (Teller). Sandra Ferguson and Stephen Teller are attorneys and principals of the eponymous law firms. The subject of this fee dispute case is a contingent-fee of $530,107.00 which resulted from the settlement of an employment discrimination lawsuit ("the SEBS case") brought by four named plaintiffs ("the SEBS group") against their corporate employer ("ABC Corp."). The question or controversy presented is how the contingent-fee is to be lawfully divided between the two law firms.

In August 2009, Ferguson entered into written "Flat Fee/Contingency Fee" retainer agreements with the four women who would become the named plaintiffs in the SEBS case. Ferguson developed and litigated the SEBS group's claims over a 4-year period.

Ferguson filed the SEBS group's lawsuit in February 2010 in the wake of the successful resolution of a co-worker's lawsuit. Teller was associated on the case 9 months later—November 22, 2010—because he

stated his law firm's commitment to advance 100% of the litigation costs (including the costs of at least three specific experts).

After Teller was retained and appeared on the SEBS case, Ferguson continued to carry the workload. Ferguson substantially performed under the written fee agreements she entered into with her four clients, when she procured a 6-figure settlement offer; then a 7-figure settlement offer, during two mediations on October 28, 2010 and February 2, 2011.

On February 3, 2011, a disciplinary proceeding (unrelated to the SEBS case) ended with Ferguson's 90-day suspension from the practice of law. Ferguson's clients and Teller knew of this possibility prior to November 2010 when Teller was retained; but the possibility of Ferguson's suspension was not the reason Teller was retained. When Teller committed to advance litigation costs as a condition of appearing on the case, Teller and Ferguson's clients were all aware that Ferguson had arranged for another attorney (not Teller) to handle the litigation in the event a suspension was imposed; that is unless she had secured co-counsel to finance the case by that time.

Ferguson promptly withdrew after she received the suspension notice. According to the plan which was already in place, it was

understood that Ferguson was going to observe her 90-day suspension and return to the SEBS case as lead counsel on or around May 3, 2011. The attorneys' joint representation would resume, and Teller would begin to advance the expenses for the work of three expert witnesses (statistician, economist, industry expert) needed to prepare the case for trial. But this is not what occurred.

On April 28, 2011, just 4 (court) days before the end of Ferguson's suspension, a settlement agreement was executed which ended the SEBS litigation. Ferguson's clients received $250,000.00 more than the amount rejected on February 2, 2011, one day before Ferguson withdrew. Teller inserted into the final agreement a confidentiality clause which subjected his clients to legal and financial liability if they ever discussed the settlement with their former attorney "Sandra L. Ferguson."

In this fee-dispute case, Ferguson asserts that it is contractually entitled—pursuant to its retainer agreements with the SEBS plaintiffs—to one-third of the settlement offer procured on February 2, 2011. Ferguson also claims it is entitled to a quantum meruit portion (90%) of $82,500.00, which is the one-third contingent-fee on the additional $250,000.00 offered and accepted by the SEBS group after Ferguson withdrew. According to Ferguson, the fee of $82,500.00 must be divided based on

the principle of *quantum meruit* and Ferguson earned 90% of the fee based on the value of legal services rendered by it.

Teller alleges, on the other hand, that an enforceable contract exists between Teller and Ferguson and requires the two firms to divide the fee from the entire underlying settlement, non-proportionally (i.e., on a 50-50 basis). Teller claims that a "Contingency Fee Representation Agreement" which he drafted—but neither attorney signed—is an enforceable "contract" against Ferguson and supersedes Ferguson's fully executed written agreements with the clients. Thus, Teller claims it is contractually due 50% of the total fee, without regard to the quantum meruit rule or the relative value of legal services rendered by the Teller firm.

Ferguson's lawsuit to recover a proportional fee was dismissed on Teller's motion for summary judgment. The trial court concluded that Teller's retainer agreement was an "express contract" and required Ferguson to divide the fee with Teller on a non-proportional 50-50 basis. Ferguson timely filed this appeal.

II. ***ASSIGNMENTS OF ERROR***

1. The trial court erred as a matter of law when it granted Teller's CR 12(b)(6) Motion for Judgment on the Pleadings and dismissed Ferguson's breach of contract claim.

2. The trial court erred as a matter of law when it granted Teller's CR 12(b)(6) Motion for Judgment on the Pleadings and dismissed Ferguson's negligent misrepresentation claim.

3. The trial court erred when it granted Teller's Motion for Summary Judgment and denied Ferguson's cross-motion for summary judgment, concluding that Teller had "established as a matter of law the existence of an express contract between the parties to divide attorney fees 50/50."

4. The trial court erred when it concluded, as a matter of law, that Teller's draft retainer agreement complied with RPC 1.5(e).

5. The trial court erred when it denied Ferguson's Motion for Reconsideration.

6. The trial court erred when it resolved a genuine dispute of material fact by finding that "Ferguson presented the (retainer) agreement to her clients for signature on November 18, 2010 and they signed it."

7. The trial court erred when it resolved a genuine dispute of material fact by finding that "Ferguson enlisted the assistance of Teller to jointly represent the clients...because she needed an attorney to provide her clients with legal representation during her suspension."

8. The trial court erred when it resolved a genuine dispute of material fact by finding that "Ferguson had the opportunity to include this condition [Teller's payment for the costs of three expert witnesses] in the [retainer] Agreement. She did not do so."

9. The trial court erred when it resolved a genuine dispute of material fact by concluding that "Ferguson is bound by the terms of the [Contingency Fee Representation] Agreement. Teller lived up to his end of the bargain when he advanced costs and represented the clients while Ferguson was suspended."

III. ***ISSUES PERTAINING TO ASSIGNMENTS OF ERROR***

1. Did the trial court fail to apply the correct legal standard when it granted Teller's motion for summary judgment and dismissed Ferguson's quantum meruit claim? (Assignment of Error No. 3, 5, 6, 7, 8, 9)

2. Were there genuine issues of material fact on the question of whether the two attorneys intended for Teller's draft retainer agreement, signed by three of the clients, but not by the attorneys, to serve as their co-counsel agreement? (Assignments of Error No. 3, 5, 6, 7, 8, 9)

3. Did the trial court fail to draw all reasonable inferences as to disputed material facts in favor of Ferguson, the non-moving party, as

the legal standard on summary judgment requires? (Assignment of Error No. 3, 5, 6,7, 8, 9)

4. Did the trial court overlook Ferguson's evidence that Teller's retainer agreement, prepared for the clients to retain him as Ferguson's co-counsel, was not intended to serve as the final expression of the terms and conditions of the law firms' *co-counsel* agreement? (Assignment of Error No. 3, 5, 6, 7, 8, 9)

5. Does Teller, as the party asserting the existence of a contract, have the burden of proof on that question and did the trial court err by shifting that burden to Ferguson when it dismissed Ferguson's *quantum meruit* claim on summary judgment? (Assignments of Error No. 3, 5, 6, 7, 8, 9)

6. Must this Court conclude, as a matter of law, that Ferguson "substantially" performed under the Flat Fee/Contingency Fee Agreements she had with each of the clients and, therefore, remand this case to the trial court to order disbursement of Ferguson's one-third contingent-fee on the settlement offer made on February 2, 2011; and to determine the appropriate quantum meruit share each firm receives of $82,500.00 (the one-third contingent-fee based on $250,000.00 offered by

ABC Corp. and accepted by the SEBS plaintiffs, *after* Ferguson withdrew from the SEBS case)? (Assignment of Error No. 3)

7. Did the trial court err when it implicitly concluded, in Teller's favor, that the parties assigned no specific or definite meaning to the term "costs" during their negotiations since this was a dispute of a genuine issue of material fact? (Assignments of Error No. 3, 5, 9)

8. Did the trial court improperly resolve a genuine issue of material fact when it concluded that Teller substantially performed under the Teller Retainer Agreement since this question depends on a genuine dispute of material fact as to the terms of the agreement? (Assignments of Error No. 3, 5, 8, 9)

9. If the term "the bulk of costs" had no intended meaning to the parties, was Teller's promise to advance "the bulk" of the litigation costs illusory, as a matter of law, thus, rendering Ferguson's promise to share fees non-proportionally (50/50) unenforceable? (Assignments of Error No. 3, 4, 5, 9)

10. Did the trial court err, as a matter of law, when it implicitly found that Teller's retainer agreement was a fully-integrated contract between the two law firms since this resolved a genuine dispute of material fact? (Assignments of Error No. 3, 5, 8, 9)

11. Does the Teller retainer agreement comply with RPC 1.5(e)'s requirement of a formal writing and assumption by the attorneys of joint responsibility for the representation? (Assignments of Error No. 4, 5)

12. Does the enforcement of a non-proportionate fee-splitting agreement, under the facts of this case, contravene the public policy that generally prohibits non-proportional fee-sharing agreements between law firms in order to promote the public policy of safeguarding the primacy of the fiduciary duty owed by attorneys to their clients, above all other interests and duties? (Assignments of Error No. 4, 5)

13. Are Ferguson and Teller required to share fees in proportion to the work each attorney performed because there was no formal writing and no joint responsibility for the representation, and thus, the requirements of RPC 1.5 (e)(2) are not satisfied? (Assignment of Error Nos. 4,5,6)

14. If the trial court's finding stands and the Teller retainer agreement is deemed an "express contract" which is enforceable, doesn't Paragraph 6 of the Teller retainer agreement, by its express terms, allow Ferguson to choose a *quantum meruit* payment? (Assignments of Error No. 3, 4, 9)

15. Did the trial court err, as a matter of law, when it granted Teller's CR 12(b)(6) Motion for Judgment on the Pleadings and dismissed Ferguson's breach of contract and negligent misrepresentation claims based on Brian Waid's erroneous statements about the legal effect of the Washington Supreme Court's opinion in *Mazon v. Krafchick*? (Assignments of Error No. 1,2)

16. Does the law require reversal of the trial court's decision to grant, in part, Teller's 12(b)(6) Motion for Judgment on the Pleadings because the dismissal was based on an error of law? (Assignments of Error No. 1, 2)

17. Did the erroneous, improper, and unauthorized concession of Ferguson's breach of contract claim by her attorney, Brian Waid, constitute a valid waiver of that claim, even though Ferguson did not authorize Waid to make this concession? (Assignments of Error No. 1, 2)

18. Did the trial court commit error in dismissing Ferguson's negligent misrepresentation claim even though Ferguson's attorney, Waid, did not concede that claim and it did not meet the standard for dismissal under CR 12? (Assignment of Error No. 2)

IV. ***STATEMENT OF THE CASE***

In April 2007, Ferguson was retained by the SEBS group's co-worker, "JK". She identified the four SEBS women as similarly situated female managers who had been subject to similar discrimination by the ABC Corp. CP 309-10. JK's lawsuit was filed in May 2008. CP 145. The four SEBS women retained Ferguson to represent them to pursue their own discrimination claims against the ABC Corp. CP 309-15.

In August 2009, Ferguson entered into a "Flat Fee/Contingency Fee Agreement" with each of the four women who would become the named plaintiffs in the SEBS case. (App. C; CP 108-114)

In December 2009, JK's lawsuit settled, shortly before trial. CP 82; CP 145, 310, 314. Ferguson's work and achievements in JK's case served equally to advance the SEBS group's claims. CP 310-315; CP 82; CP 145-54.1

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1 Examples are: (1) after contentious discovery litigation, the trial court adopted JK's view of the geographic scope and type of discovery relevant to JK's claims, and ordered ABC Corp. to produce comparator data and other information for the five-state division in which all five of Ferguson's clients were employed, CP 147-48; (2) Ferguson prevailed on JK's motion for imposition of terms in the amount of $9,562.44 after the ABC Corp. failed to comply with the court's order compelling discovery production, CP 147; (3) Ferguson successfully defended against ABC Corp.'s motion to disqualify her from continuing to represent JK *and* the SEBS group, CP 146-47; (4) Ferguson obtained a declaratory ruling which held that hundreds of other Store Managers in the 5-state "division" in which all five of her "Store Manager" clients were employed, were not "speaking

In February 2010, Ferguson agreed to file the lawsuit to preserve her clients' claims. CP 83; CP 316-322. Ferguson and her clients also agreed that Ferguson would present their case to prospective co-counsel in order to obtain the financing to proceed. The clients agreed to cooperate with Ferguson's efforts because it was understood, from the outset of the representation, that Ferguson's firm was not committing to finance the litigation and the SEBs group did not have consensus to finance their own lawsuit. It was understood that, going forward, Ferguson's Flat Fee/Contingency Fee Agreement–executed in August 2009–remained in effect. (App. C). CP 154-55. CP 316-321; 231.

An extensive record of evidence existed to support the SEBS group's claims, due to Ferguson's prior litigation for JK. Additional work by experts would be required, however, to establish the full extent of the disparate impact and resulting damages. CP 153-54; CP 312-13; CP 144-

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agents" and, therefore, Ferguson could contact them ex parte, a ruling that meant Ferguson, on behalf of JK *and* the SEBS group, could interview other potential witnesses (store managers) without formally deposing all of them. CP 146-49; (5) Ferguson noted and took 9 depositions during JK's case, all of which were equally relevant to the SEBS group's claims in the second lawsuit. CP 148; and (6) Ferguson defended each of the SEBS women's depositions during JK's case, during which each woman was questioned extensively, on the record, about her own claims. CP 152.

54. Those Ferguson approached as prospective co-counsel (with the exception of Teller) performed extensive due diligence and investigations, reviewing the record and asking detailed questions about evidence of liability and damages. CP 319-20. As experienced employment lawyers, they understood that this litigation would be expensive due to the need for expert witnesses to establish the disparate impact claims. (App. A1, A2, A3); CP 154-55; CP 342-49; CP 307; CP 304-08; CP 317-18; CP 322.

At the end of August 2010, Ferguson and Teller began to discuss Teller's possible association. CP 322. Other interested firms were considering the case at that time. CP 162. When Ferguson first approached Teller, it was understood that Ferguson was proposing a co-counsel agreement pursuant to which Teller's firm would have to advance 100% of the litigation costs. Teller moved forward on this basis and later tried to shift the discussions to a cost-sharing agreement; a proposal Ferguson ultimately rejected. CP 316-320. (App. B3)

On September 2, 2010, the ABC Corp. proposed mediation. CP 322-23. Teller sent Ferguson an e-mail in which he seemed to assume that he had already been selected to serve as Ferguson's co-counsel. (B 8); CP 267-69. Teller made it known that he wanted to attend the mediation and receive 50% of the attorney-fee if the case settled. Ferguson rejected

Teller's proposal. Teller then stated that he would "consider" taking 1/3 of the attorney-fee if the case settled at mediation. Ferguson rejected that proposal as well. Id. Ferguson explained to Teller that she was securing co-counsel for the purpose of proceeding with additional litigation. If a settlement resulted from the mediation, however, the association they were contemplating would not be necessary. (App. B 8); CP 266-69. Ferguson offered, instead, to pay Teller at an hourly rate if he would start working on the case immediately (behind the scenes), to educate himself about the case for the future litigation, if mediation did not result in settlement. (App. B8). Teller rejected this offer to work on an hourly basis. (B8); CP 266-67. The attorneys parted ways with no agreement. CP 203; CP 244.

Once the parties agreed to the mediator, the mediation date was set for October 28, 2010. During the ensuing two-months, Ferguson continued to actively litigate the case while preparing mediation materials. Ferguson completed the substantive work that needed to be done. CP 323-26.

The first mediation in the SEBS case took place on October 28, 2011. CP 84. The mediation concluded without a settlement when Ferguson's clients rejected a six-figure offer. CP 372-73.

Ferguson resumed contact with Teller and three other law firms to

obtain financing. CP 327; (App. B3) After the October 28, 2010 mediation, however, Ferguson made it clear to Teller that she had no intention of associating with his firm unless he was committed to advancing 100% of the litigation costs. (App. B3) CP 285. Teller indicated he would meet Ferguson's non-negotiable condition to advance 100% of the litigation costs. Three specific experts (economist, statistician, and industry expert) were discussed. CP 366.

Now that Teller was going to have to advance 100% of the substantial litigation costs, he wanted to share fees non-proportionally. CP 316-22. CP 320-21. Teller took the lead in drafting the attorney-client fee agreement which entitled "Contingency Fee Representation Agreement" which he hoped would replace Ferguson's four separate, but identical "Flat Fee/Contingency Fee Agreements" with the SEBS clients. At this point, Ferguson and Teller had reached a clear understanding that Teller would carry 100% of the litigation costs (including the experts) and that, but for his agreement to do so, he would not be retained as Ferguson's co-counsel. (App. B 3; CP 285) Therefore, when Ferguson received Teller's draft fee agreement, she was surprised to see that it omitted any mention of his firm's promise, to the clients, to assume sole responsibility for the litigation costs. (App. D; CP 1126-28); CP 329-31.

Ferguson immediately called Teller and insisted that the draft retainer agreement be revised to memorialize the Teller firm's sole responsibility for advancing litigation costs, and defining costs to include, at the very least, the commitment to pay for the three experts they had discussed. Id. Teller agreed to revise his draft retainer agreement but, in fact, he never did. Instead, Teller emailed Ferguson later that day and attached a second draft which he purported to have "updated" in accordance with their "prior discussion". (App. B4; CP 187). In fact, it continued to omit the same material terms (i.e. Teller's sole obligation to advance the costs of the three experts). Contrary to his e-mail message, Teller had not, in fact, cured the problem with his first draft. CP 329-31.

On November 18, 2010, Teller presented his draft retainer agreement to Ferguson's clients even though Ferguson had not approved it. CP 371. This fact is a disputed material fact which the trial court improperly resolved in Teller's favor on summary judgment. But there is *no dispute* that Ferguson never signed Teller's retainer agreement, and neither did Teller. CP 367-69. Ferguson never even saw the signed retainer agreement–signed by three of her four original clients–until after the fee dispute with Teller arose and her attorney, Brian Waid, asked Teller to produce the agreements, with signatures, if they existed. CP 338.

On November 22, 2010, Teller filed a notice of appearance in the SEBS case. Ferguson continued to carry the entire workload. CP 331-33. Ferguson had assumed Teller's good faith and allowed him to appear before a written co-counsel contract was fully negotiated. CP 309-40. (App. B3; CP 285)

In December 2010, although three clients had by now signed Teller's retainer agreement, the attorneys did not act as if there was a binding co-counsel contract. On the contrary, Teller made repeated statements to the effect that he might withdraw from the SEBS case because he was finding himself "too busy" with other matters (App. B5; CP 254). CP 332-34

On December 8, 2010 (6:44 AM), Ferguson e-mailed Teller and demanded that he either immediately confirm his intention to remain on the case, or be clear about his intention to withdraw. Ferguson stated, in pertinent part:

> "**Are you in the case for the duration, or not? Do you intend to withdraw if this case does not settle in the near future?** Because you said something yesterday, about your other case not settling and you are looking for things to cut out...etc...*which led me to have great concern that you were referring to withdrawing as co-counsel in this case. I need to know now if that is the case. Or did I misunderstand again? Your immediate response will be*

> *greatly appreciated. Maybe then, I can get a good night's sleep again.*"

CP 1146 [Emphasis added].

On December 10, 2010, Teller responded to Ferguson by e-mail as follows:

> "I do not intend to withdraw. I am cutting other cases and other work, but not this case." CP 1146.

This e-mail exchange between the two attorneys took place *after* the clients had signed Teller's draft retainer agreement. Yet, neither Ferguson, nor Teller, seemed to believe there was an enforceable contract which *required* Teller to remain on the case, and to finance the case.

After Teller appeared, he deceived his co-counsel and his clients in order to bring about a second mediation. CP 309-40. Teller called Ferguson and informed her that the parties were returning to mediation. Ferguson was surprised her clients had authorized Teller's settlement proposal, but did not suspect the truth (i.e., that Teller had not obtained prior approval from the clients to make the lower offer). CP 333-35.

As the date of the second mediation approached, Ferguson spoke with the SEBS group's spokesperson, "E". As a result, it became clear to Ferguson that Teller had unilaterally made the proposal to the ABC Corp., and had not obtained the clients' authorization. CP 328-29; 333-35; 372.

Ferguson's possible suspension was *not* the purpose of associating Teller on the SEBS case. Before Teller agreed to *finance* the SEBS case, he knew Ferguson had arranged for another attorney, Shawn Newman, to assume responsibility for the case if the 90-day suspension was imposed before securing permanent co-counsel to finance the case. In other words, Teller knew that, but for his commitment to finance the case, he would not be permitted to appear. (App. B 1, B 2, B5; CP 351, 289, 195.).

In addition, Teller knew that Ferguson always intended to negotiate all essential terms of their future co-counsel contract and reduce those terms to writing signed by the attorneys (separate and distinct from the attorney-client fee agreement). On September 4, 2010, Ferguson wrote to Teller: "I hope there are no hard feelings about what I am now proposing. ***But I guess that is the purpose of negotiations and discussions prior to signing an agreement.***" (App. B1; CP 351) (Emphasis added). On September 7, 2010, Ferguson wrote to Teller: "If the mediation does not result in settlement, assuming you are still willing to proceed with me, we would enter into a new fee agreement with [the clients] ***and with each other.***" (App. B1; CP 289) (Emphasis added).

Teller also knew of Ferguson's intention based on their prior course of dealings. There were separate written agreements between the

law firms, in two of their prior three associations. CP 133-45. In a third (most recent) association, Teller agreed to take the case to trial, was retained by the client, formally appeared, and then changed his mind and notified Ferguson of his intention to withdraw. In this past aborted association, there was not yet a written agreement in place when Teller changed his mind about taking the case forward. Although Ferguson was frustrated by Teller's failure to follow through on his verbal commitment, the attorneys amicably agreed that Teller would wait to formally withdraw until it would not harm the clients' interests. There was no understanding, or allegation by Ferguson, that Teller was contractually *required* to remain on the case because of his statements and actions. Id.

The SEBS group's second mediation proceeded on February 2, 2011 after Teller made the settlement proposal without his clients' prior approval. CP 387; 327-34. The SEBS group rejected a 7-figure settlement offer. For the second time, the clients decided

to proceed with the litigation which they expected Teller to finance. CP 372-73.

On February 3, 2011—the day after the second mediation—Ferguson received notice of her suspension, effective immediately. Ferguson notified Teller and her clients, and promptly withdrew. They

planned for Ferguson's return to the case as lead counsel, on or around May 3, 2011. CP 80-91; 129-64; 309-40

On February 18, 2011, Ferguson left the SEBS clients' file at her office for Teller pursuant to her prior arrangement with Teller. On March 22, 2011, after returning from a planned vacation, Ferguson delivered the clients' file to Teller's office because he had failed to pick it up as they had arranged. CP 388; CP 163.

Teller refused to provide Ferguson with status updates on the SEBS case. CP 382-83. In April 2011, Ferguson suspected that the case was on the verge of settlement and advised Teller of her intention to file a Notice of Lien for Attorneys' Fees. CP 338; 487-501. On April 27, 2011, Ferguson served a Notice of Lien for Attorneys' Fees on Teller and the ABC Corp. CP 383-84. Ferguson's lien notice asserted a right to a *proportional* share of the attorney-fee (90%). Teller subsequently served his own lien notice, asserting his claim that he was entitled to a *non-proportional* 50% of the total fee. CP 384-85.

The final settlement agreement in the SEBS case was executed on April 28, 2011. CP 80-91; CP 95-128; CP 328, 337-38. The settlement generated a contingency fee of $530,107.00. CP 124. The written agreement contained a confidentiality provision, with a liquidated

damages clause, which stated that if any of the SEBS women ever discussed the settlement with their former attorney "Sandra L. Ferguson", they would be in breach and liable for damages to the ABC Corp. (App. E; CP 358).

On May 27, 2011, Ferguson filed a lawsuit against Teller, alleging various contractual-related causes of action. CP 80-91; CP 389. The entire amount of fees from the SEBS case, including Ferguson's funds, was deposited in the Court Registry. CP 92-94; 471-77; 489-96; 541-43.

When this fee dispute arose, $265,000.00 was not in dispute. Ferguson had a right to possession of its undisputed share of the attorney-fee ($265,000.00), even under Teller's theory that a 50-50 contract existed. Ferguson's attorney, Brian Waid, failed to seek disbursement of those funds ($265,000.00). CP 487-528. Most of Ferguson's funds were finally released from the Court Registry after Ferguson retained a new attorney, John Muenster. CP 471-86.

On October 28, 2011, the trial court heard Teller's CR 12 motion to dismiss Ferguson's case. CP 4; 814-829. Brian Waid dismissed his own client's breach of contract claim without Sandra Ferguson's consent. RP 10/28/2011. CP 390, 392. As a result, the trial court granted Teller's CR 12 motion, dismissing Ferguson's breach of contract *and* negligent

misrepresentation claims. The trial court's ruling was based on Waid's erroneous concession of law, not on the standard for dismissal under CR 12. (App. F1, F2, F3); RP 10/28/2011. CP 5-6; RP 10/28/11 at 23, 32-33, 38-39.

On January 30, 2012, the court entered its written summary judgment order. (App. G; CP 39-44) The court's order held that Teller's unsigned retainer agreement (signed by three of Ferguson's former clients, but *not* by either of the attorneys) was an "express contract" between the attorneys and was enforceable, thus, Ferguson was required to divide the fee with Teller on a 50/50 basis. (App. G; CP 39-45) The trial court also ruled that Teller's unsigned retainer agreement complied with the formal writing required by RPC 1.5(e), and that the joint responsibility under RPC 1.5(e) was satisfied even after Ferguson withdrew and the clients could not seek her legal advice. Id.; CP 42. As a result of the trial court's rulings, Ferguson's entire case was dismissed on summary judgment. Id.

On February 13, 2012, Waid filed a Notice of Intent to Withdraw. CP 839-46. One day later, on February 14, 2012, Waid filed a Notice of Lien for Attorneys' Fees.2 CP 123,131-133.

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2 Waid's fee-lien was later set aside as invalid. He then filed an untimely motion for supersedeas after the court's order had been executed

The trial court denied Ferguson's Motion for Reconsideration, (CP 857-58), granted Teller's Motion for Prejudgment Interest, denied Teller's Motion for Attorneys' Fees (sanctions); and signed Teller's proposed order for partial disbursement of funds. CP 448-449; RP 2/16/12 at 17.

Ferguson timely filed a Notice of Appeal of the trial court's rulings in Teller's favor and sought a stay of the judgment. This Court granted Ferguson's motion for a temporary stay. CP 74-76. Meanwhile, John Muenster appeared on Ferguson's behalf. An agreed order was entered allocating a portion of Ferguson's funds in the court registry as a supersedeas bond pending appeal. There is currently approximately $290,000.00 in the court registry, including the judgment in favor of Teller, the award of prejudgment interest to Teller, and Ferguson's cash supersedeas bond. CP 49-50; 448-50; 451-53; 463-70; 471-86.

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and funds disbursed to Ferguson. The trial court denied Waid's motion because it was moot. Waid appeals the order setting aside the lien. He also appeals the order denying supersedeas. Waid's appeals have been linked, but not consolidated, with this appeal. See No. 69220-8-I.

V. *ARGUMENT*

A. It Was Legal Error to Dismiss Ferguson's Breach of Contract and Negligent Misrepresentation Claims on the Pleadings Even Though Ferguson's Own Attorney Caused the Error.

On October 28, 2011, the trial court heard oral argument on Teller's CR 12(b)(6) Motion. Ferguson's causes of action for "breach of contract" and "negligent misrepresentation" were dismissed. The trial court's ruling was not based on the legal standards for dismissal under CR 12. Instead, the dismissal occurred because Ferguson's own attorney, Brian Waid, erroneously conceded that his clients' breach of contract claim was legally baseless. (App. F1, F2, F3); (RP 10/28/2011). Waid opined that because of the Washington Supreme Court's opinion in *Mazon v. Krafchick,* 158 Wn.2d 440, 144 P.3d 1168 (2006), Ferguson's breach of contract claim could not succeed as a matter of law. App F2; RP 10/28/2011. Waid's concession was a clear error of law. CP 839-46. Waid's faulty legal analysis was, as a matter of logic, extended to Ferguson's negligent misrepresentation claim and both causes of action were dismissed on the pleadings. The court's order thus granted in part, and denied in part, Teller's Motion for Judgment on the Pleadings. (App. F1, F2, F3); (RP 10/28/2011).

1. *No Valid Waiver by Ferguson*

Mr. Waid's improper and legally erroneous comments on October 28, 2011 do not constitute a valid waiver by Ferguson. First, Ferguson did not authorize Waid's statements. Secondly, Waid's erroneous concessions of law were made in the context of his undisclosed conflict of interest involving his former client, Reba Weiss. CP 394-410. Mr. Waid's conduct violated RPC 1.7(a)(2), (b)(3), and (4).

2. *CR 12(b) Standard for Dismissal Was Not Met.*

On a CR 12(b) motion to dismiss, the court must presume the non-moving parties alleged facts are true and may consider hypothetical facts not included in the record. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). "CR 12(b)(6) motions should be granted `sparingly and with care' and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Id., (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). Whether dismissal under CR 12(b)(6) is appropriate is a question of law that is reviewed *de novo* by this Court. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). This Court should, according to the CR 12(b)(6) standard, reverse the dismissal of Ferguson's breach of contract and negligent

misrepresentation and remand to the trial court.

3. *Mazon v. Krafchick Is Not A Bar to Ferguson's Claims.*

Waid "argued" that his own client's claims could not succeed under *Mazon v. Krafchik,* 158 Wn.2d 440, 144 P.3d 1168 (2006). This is clearly an error of law. *Mazon* is quite easily distinguished—factually and legally—from the Ferguson vs. Teller fee dispute. The Supreme Court held that Mazon could not sue his co-counsel for the loss of a *prospective fee*.

The *Mazon* Court reasoned that to acknowledge the legal duty of co-counsel to preserve a prospective fee for his/her co-counsel, could potentially erode the important public policy of the attorney's undivided fiduciary duty to the client. Id., at 1172. In this fee-dispute case, however, Ferguson does not seek to recover a prospective fee. Ferguson filed its lawsuit against Teller to recover its lawful share of an actual *earned* fee.

Unlike *Mazon*, the attorneys' fees here resulted from the *successful* prosecution of the SEBS group's claims. Ferguson and Teller dispute the existence and/or the material terms of a co-counsel contract providing for the lawful division of the *actual* fee. Teller alleges that a contract was formed and requires Ferguson to share the attorney-fee with him in a

manner disproportionate to the legal services Teller provided. Ferguson denies a co-counsel contract was formed and asserts that, even if a contract was formed, Teller did not perform; therefore, Ferguson is excused from sharing fees with Teller on a non-proportional basis.

Ferguson simply asks for a determination on the legal questions: (1) Was a contract formed for the non-proportional division of the attorney-fee? (2) If so, is the contract enforceable? *Mazon* does not bar the resolution of these issues and does not require dismissal of Ferguson's breach of contract and negligent misrepresentation claims.

In *Hoglund v. Meeks*, 139 Wash. App. 854, 170 P.3d 37 (2007), the Court of Appeals expressly held that *Mazon* is only a bar to the recovery of co-counsel's lawsuit to recover *prospective* fees; not actual fees. *Hoglund*'s facts are strikingly similar to the facts in this case.

B. Teller Had The Legal Burden to Establish The Formation of A Co-Counsel Contract.

The trial court erred by concluding, on summary judgment, that Teller's retainer agreement was an "express contract" and by resolving issues of material fact as to the questions of contract-formation and contract terms in favor of Teller. As the party asserting the existence of an enforceable fee-sharing contract, it is Teller's burden to establish each

element of a contract. *Weiss v. Lonnquist*, 153 Wash.App. 502, 224 P.3d 787, 792(2009) (citing *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wash.App., 743, 765, 162 P.3d 1153 (2007)). In its summary judgment ruling, the trial court improperly shifted Teller's burden to Ferguson, requiring Ferguson to prove the negative (i.e., that no contract existed). (App. G; CP 39).

Washington follows the objective manifestation test for contracts. *Hoglund*, at 46 (citing *Wilson Court Ltd P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998). For an agreement to be enforceable, the parties must assent to sufficiently definite terms. *Jacob's Meadow Owner's Ass'n*, at 765 162 P.3d 1153 (2007). Mutual assent generally takes the form of an offer and an acceptance. *Id.* "'In determining the mutual intention of contracting parties, the mutual assent of the parties must be gleaned from their outward manifestations.'" *Id.*(internal quotation omitted).

A contract may be oral, written, or implied in fact with its existence depending on some act or conduct of the party sought to be charged. *Weiss*, at 792 (citing *Hoglund v. Meeks*). The finder of fact may deduce mutual assent to an agreement from the circumstances surrounding a transaction, inferring the existence of a contract based on a course of

dealings between the parties or a common understanding within a particular commercial setting. Id.

It is undisputed that Ferguson never signed the alleged "contract" prepared by Teller. Moreover, in e-mails to Teller, Ferguson repeatedly expressed her intention to enter into a *future* written co-counsel agreement, separate and distinct from any fee agreement between the attorneys and the clients (App. B 1, B2 and H). CP133-44. Teller received Ferguson's e-mails and never stated any contrary intention. In addition, there is evidence of Ferguson and Teller's prior course of dealings which supports Ferguson's assertion that the two attorneys intended to negotiate and execute a separate written co-counsel agreement, as was their custom and habit on prior associations. (App. B 1, B2, H).

The attorneys never agreed upon definite material terms of their intended co-counsel agreement. Teller stated his intention to advance "the bulk of the costs advanced during the litigation". (App. B4) Ferguson stated her firm's intention to agree, as part of their future contract, to divide the fees equally based on Teller's agreement (also to be contained in the future contract) to advance 100% of the "litigation costs." The attorneys' statements of future intent do not constitute offer and acceptance. There were too many uncertainties; too few details or

specifics to make this agreement enforceable. If the attorneys intended to have a binding contract, they would have put it in writing.

Agreements to negotiate a contract in the future—such as Ferguson and Teller made—are not enforceable in Washington. See *Keystone Land Development Co. v. Xerox Corp.*, 152 Wash.2d 171 (2004). "A statement of . . .an intention to do a thing is not a promise to do it." *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1980) (quoting *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 957, 421 P.2d 674 (1966). An agreement to negotiate a contract in the future is nothing more than negotiations. *Nimmer,* at 556, (citing *Johnson v. Star Iron & Steel Co.*, 9 Wn.App. 202, 206, 511 P.2d 1370 (1973)).

By making repeated references to a future written agreement, Ferguson, in effect, stated her intention not to be bound until the two attorneys had a formal written agreement. (App. B1, B2, H) See *Keystone Land & Development Co.*, at 950 (citing *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) ("holding 'reference to a binding sales agreement to be completed at some future date' is evidence of a present intent *not* to be bound").

"[T]he primary concern is to 'avoid trapping parties in surprise contractual obligations.'" *Keystone*, at 949 (citing *Teachers Ins. & Annuity*

Ass'n v. Tribune Co., 670 F. Supp. 491, 497 (S.D.N.Y. 1987)) The trial court's ruling finding that Teller's draft retainer agreement is an "express contract" is a "surprise" agreement which "traps" Ferguson contrary to her intention. A non-proportional fee-division may well have been in Teller's mind, when Teller sent Ferguson his draft retainer agreement on November 10, 2010, and then failed to make the revisions. In Ferguson's mind, the purpose of the retainer agreement which Teller prepared was for the clients to sign; not to form a contract between the two attorneys; but rather, to allow the clients to retain Teller as her co-counsel so he could get to work on the case. (App. B3) Even so, Ferguson insisted that Teller revise the agreement for the clients to include the material term of his promise to carry costs. He agreed, but never did it. CP 329-31.

"When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other which would make it reasonable and just, [the courts] will adopt the latter interpretation." *Id*, at 672 (quoting *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). Here, it was simply not reasonable for the trial court to find that Ferguson, alone, would resolve one case on her own, work on developing her clients' claims for 4 years and then agree to a 50-50 division of the fee, when the only consideration

was Teller's promise to carry "the bulk" of litigation costs, whether it meant $50.00 for photocopying, or $120,000.00 for expert witness fees.

C. If Teller Cannot Establish Each Element of a Contract, Ferguson is Entitled to Enforce the "Flat Fee/Contingency Fee Agreement[s]".

Ferguson had a fully-executed written "Flat Fee/Contingency Fee Agreement" with each of the SEBS clients. (App. C; 108-114) Ferguson substantially performed her obligations under those contracts when she procured a six-figure settlement offer on October 28, 2011, and then procured a seven-figure settlement offer on February 2, 2012. CP 372-73. *Taylor v. Shigaki*, 84 Wash. App. 723, 930 P.2d 340, 343 (1997) (an attorney can enforce a contingency fee agreement if he/she is fired or withdraws after "substantially" performing, even if the client rejects the offer procured by the attorney). If Teller cannot satisfy his burden to prove that a *new* contract was formed which superseded Ferguson's original fee agreements with the clients, Ferguson's agreements with the clients (providing for a one-third contingent fee) are fully enforceable.

Ferguson withdrew, for cause, after procuring a 7-figure settlement offer on February 2, 2011. In April 2011, the clients accepted a settlement offer which was $250,000.00 more; thus, one-third of $250.000.00 ($83,250.00) is subject to the *quantum meruit* rule and must be divided

between Ferguson and Teller according to the value of each firm's services to the result obtained for the clients after Ferguson withdrew. CP 388. The Court should find accordingly and reverse and remand to the trial court to determine the *quantum meruit* division.3

D. The Trial Court Failed to Apply The Proper Legal Standard on Summary Judgment and Failed to Consider Context Evidence.

Summary judgment is only appropriate when there is "no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law..." CR 56(c). All reasonable inferences are to be construed in favor of the non-moving party. *Lipscomb v. Farmers Ins. Co. of Wash.*, 142 Wash.App. 20, 27, 174 P.3d 1182 (2007). Summary judgment is only appropriate if reasonable persons could reach but one conclusion. *Venwest Yachts, Inc. v. Schweickert*, 142 Wash. App. 886, 893, 176 P.3d 577 (2008).

In this case, genuine disputes of material fact are determinative of the ultimate issues: (a) contract formation, and (b) the material terms and the meaning the parties assigned to words. The genuine disputes of

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3 Although the *quantum meruit* division of the fee is an issue for the fact-finder on remand, Ferguson has always claimed a quantum meruit fee of 90%. Teller, however, has never made an assertion about his entitlement based on quantum meruit. If the one-third fee on $250,000.00 equals $83,333., then Ferguson's share is $75,000.00 and Teller's share of the fee is $8,333.00 under the 90/10 split Ferguson asserts.

material fact were improperly resolved on summary judgment even though Ferguson's position was supported by evidence in the record below. CP 365-409.

Teller does not dispute that he promised to carry 100% of the litigation costs and pursuant to the attorneys' agreement, Ferguson was not to be responsible for any costs. Nevertheless, these terms are not set forth in the retainer agreement Teller drafted. (App. D; CP 368) Thus, even if it were not disputed that Teller's retainer agreement was intended by the parties to serve as a co-counsel contract, extrinsic evidence is admissible to determine the material terms. See *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

In *Berg*, the Washington Supreme Court adopted the rule from the Restatement (Second) of Contracts, §§ 212, 214(c)(1981). Section 212 provides:

> "(1) the interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter. (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law."
>
> *Berg*, 115 Wn.2d at 667-68 (quoting Restatement).

The *Berg* Court held that the "context rule" must be applied to the interpretation of contracts. Even where there is a fully-integrated contract (as the court impliedly found in this case), extrinsic evidence is admissible to show the entire circumstances under which the contract was formed, as an aid in ascertaining the parties' intent. (*Berg,* 115 Wn.2d at 667). Thus, the terms of the Ferguson's and Teller's alleged "contract" should not have been decided on summary judgment.

1. *The Trial Court Disregarded Ferguson's Evidence That She Rejected The Draft Retainer Agreement Teller Presented to Her Clients.*

On summary judgment, the trial court improperly weighed the evidence and made credibility determinations. For example, in the summary judgment order, the trial court states:

> "The existence of such an agreement was contested by Ferguson but this Court found that such an agreement did, in fact, exist....Ferguson presented the (retainer) Agreement to her clients for signature on November 18, 2010. Ferguson had the opportunity to include [the obligation to pay expert witness fees] in [Teller's retainer] Agreement. She did not do so."

(App. G; CP 40, 41, 43)

Ferguson disputes that she ever approved the retainer agreement Teller drafted on November 10, 2010. The evidence in support of Ferguson includes Ferguson's own statements in her declarations, and the

November 10, 2010 e-mail exchange between Teller and Ferguson. (App. B4); CP 330-31. The trial court overlooked this evidence or improperly weighed conflicting evidence on this question. This Court should reverse the trial court's summary judgment ruling and remand Ferguson's *quantum meruit* claim for a trial on its merits.

2. *The Trial Court Disregarded Ferguson's Evidence That Teller Knew She Had Another Attorney To Handle the Case In the Event of Her Suspension.*

The trial court's summary judgment order stated that,

> Ferguson "enlisted the assistance of Teller to jointly represent the clients for two reasons: first, because she needed him to advance the costs of litigation which neither she nor the clients could do and secondly, she needed an attorney to provide her clients with legal representation during her suspension."

(App. G; CP 42-43)

Ferguson showed in the trial court proceedings that the decision to retain Teller had nothing to do with the possibility that she could be suspended during the litigation. Ferguson presented evidence in her declaration testimony, and in the form of three e-mail exchanges with Teller, which established that she told Teller she had arranged for someone other than him (i.e., Shawn Newman) to cover for her if she got suspended. It was clear that Teller knew about these arrangements. Thus, Teller and Ferguson and the clients knew that Teller was only retained in

reliance on his promise to carry litigation costs so the case could proceed to trial. (App. B1, B6); CP 162-63. The trial court's resolution of this disputed material fact was improper, and the granting of summary judgment in Teller's favor must be reversed.

3. *The Trial Court Improperly Disregarded Evidence That Ferguson and Teller Intended to Negotiate a Separate Written Co-Counsel Agreement.*

Ferguson always intended to negotiate and reduce to writing the terms of her co-counsel agreement with Teller. Teller knew this was Ferguson's intention. Thus, Teller's retainer agreement was never intended to serve as the final expression of the terms of the attorneys' agreement. CP 370-71. The attorneys intended that their future written agreement would include other material terms which they discussed but never agreed upon, such as time-keeping requirements and exchange of time records, identifying who Teller intended to assign from his firm to work on the Ferguson's case, division of responsibilities and future workload, and in dividing the future workload, whether Ferguson would receive credit for work already done and if so, to what extent. CP 161-62.

On this dispute of fact, Ferguson submitted evidence to the trial court regarding Ferguson and Teller's prior course of dealings, as well as evidence of Ferguson's habit and custom with other co-counsel. CP 133-

144; CP 161-62. Ferguson had always entered into separate written co-counsel agreements with other law firms, including Teller's firm. CP 133-44. Ferguson produced e-mail documentation in which she repeatedly referenced her intention to negotiate a "separate" agreement with Teller. Teller did not disagree with this stated intention by Ferguson. (App. B-4, B1, B2, H). This evidence created a genuine dispute of material fact. The trial court improperly resolved the dispute in Teller's favor. This Court should reverse the trial court's summary judgment ruling and remand Ferguson's *quantum meruit* claim to be considered on its merits.

4. *The Trial Court Improperly Decided the Ultimate Issue When It Held That Teller Substantially Performed Under the Contract.*

In the summary judgment order, the trial court concluded:

> "Teller lived up to his end of the bargain when he advanced costs and represented the clients while Ferguson was suspended."

(App. G; CP 43)

Whether Teller "lived up to his end of the bargain" necessarily depends on the meaning the parties assigned to the term "litigation costs". Ferguson asserted the term "litigation costs" had a shared meaning based on the attorneys' discussions with each other and with Ferguson's clients. Teller knew that he was committing, at a minimum, to pay substantial

costs, possibly well into six figures, for at least three expert witnesses (economist, statistician, and industry expert). He also knew that, without stating his commitment to do so, he would not have been allowed to appear on the case. There was evidence submitted by Ferguson establishing that other prospective co-counsel who considered associating on the SEBS case knew it was going to be expensive and would require experts. (App. A 1, A 2, A3) (Beth Terrell and Jesse Wing e-mails, Declaration of Joseph Sellers). The material dispute of fact as to the meaning of "litigation costs" can only be resolved by a jury after considering Teller's draft agreement in context to interpret the meaning of the words. *Berg v. Hudesman*, supra, at 670. Therefore this Court should reverse and remand the trial court's ruling on summary judgment.

5. *Even After Teller's Alleged "Contract" Was Signed by the Clients, the Attorneys' Words and Conduct Establish That There Was No Fee-Sharing Contract.*

In early December 2010, it was very clear that *neither* Ferguson, nor Teller, believed that a binding co-counsel contract had been formed. After Ferguson's clients signed Teller's retainer agreement, Teller repeatedly stated he might withdraw from the SEBS case because he was "too busy". CP 332-34; (App. B5). The e-mails exchanged between the two attorneys on December 8th and 10th, 2010, are strong evidence that the

retainer agreement signed by the clients the previous month (November 2010) was not an enforceable co-counsel contract. Even though Teller responded to Ferguson's demand for an answer about his intentions by stating that he did not intend to withdraw, what is clear from the e-mail exchange in December 2010, is that Teller and Ferguson both believed that Teller *could* withdraw. As casually as Teller apparently assumed responsibility for financing the case (no due diligence), he seemingly contemplated leaving the case.

Teller must meet his burden of establishing the elements of a non-proportional fee-sharing contract (offer, acceptance, consideration). It is not Ferguson's burden to show the absence of the contract Teller alleges. If Teller cannot meet this burden, Ferguson's Flat Fee/Contingency Fee Agreement[s] with her former clients must be enforced. As a matter of law, those agreements entitle Ferguson to one-third of the fee from the offer her clients rejected on February 2, 2011. The balance of one-third of $250,000.00 should be divided based on quantum meruit. This Court should so declare and remand to the trial court to determine the *quantum meruit* division of the shared fee ($82,500.00).

E. This Court Should Find, As A Matter of Law, That

There Is No Enforceable Contract Which Entitles Teller to a Share of the Fee Grossly Disproportionate to His Legal Services Provided on the SEBS Case.

As discussed below, this Court should reverse the trial court's ruling on the following purely legal grounds: (1) lack of consideration; (2) failure to satisfy requirements of RPC 1.5(e)(2); and (3) enforcement of the non-proportional fee agreement in this case contravenes public policy.

1. Teller's Promise to Carry "The Bulk of Litigation Costs" Was Illusory; Therefore the Agreement is Not Enforceable Against Ferguson for Lack of Consideration.

The trial court's Order on Summary Judgment states:

> "Ferguson enlisted the assistance of Teller to advance the costs of litigation which neither she nor the clients could do....Teller lived up to his end of the bargain when he advanced costs...."

(App G; CP 43)

The courts do not give effect to interpretations that render contract obligations illusory. *Taylor v. Shigaki* (citing *Kennewick Irr. Dist. V. U.S.*, 880 F.2d 1018, 1032 (9th Cir. 1989)). The trial court's order assumes that "litigation costs" had no definite, shared meaning. If that is true, then Teller's promise to advance costs was illusory, thus, the contract fails for lack of consideration. The trial court's order implies that, whether Teller's firm paid $50.00 for photocopies or $100,000.00 for expert

witness fees, he performed under the "contract" and was entitled to 50% of the fee. In fact, as the e-mail evidence shows, the parties apparently did not even believe Teller had an obligation to remain on the case. Thus, the "contract" which Teller alleges entitles him to 50% of the fee, fails for a lack of consideration because Teller's promise to carry "the bulk" of costs so the case could proceed, was illusory. This Court should reverse the trial court's finding that a contract was formed which entitles Teller to a 50-50 fee division.

2. *Ferguson "Substantially" Performed as a Matter of Law Under Taylor v. Shigaki.*

Generally, an attorney who is discharged before full performance is not entitled to a contingency fee under a contingency fee retainer agreement, and must be paid on quantum meruit. *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920). However, Washington courts have recognized an exception where the attorney is discharged after "substantially performing" the duties owed to a client. E.g., *Barr v. Day*, 124 Wash.2d 318, 329, 879 P.2d 912 (1994); *Ramey*, 112 Wash. at 92, 191 P. 801; *Cavers v. Old Nat'l Bank & Union Trust Co.*, 166 Wash. 449, 452, 7 P.2d 23 (1932); *Ross v. Scannell*, 97 Wash.2d 598, 609, 647 P.2d 1004 (1982). And "a discharged attorney has substantially performed his or her

duties when the attorney's efforts make a settlement "practically certain" even if the settlement occurs after the client fires the attorney." *Taylor v. Shigaki*, 84 Wash.App. 723, 729, 930 P.2d 340, 343 (Div. 1, 1997); see also, *Barrett v. Freise*, 119 Wash. App. 823, 846, 82 P.3d 1179 (Div. 1 2003); *Goncharuk v. Barrong*, 132 Wash. App. 745, 749 (Div. 3 2006). This rule is intended to prevent clients, who have sole control over whether to accept or reject a settlement offer, from firing their attorneys immediately before the contingency occurs in order to avoid paying a contingency fee. *Barr*, *supra,* 124 Wash.2d at 329.

Ferguson substantially performed under the contingency fee agreements with her clients by procuring a six-figure settlement offer on October 28, 2011 and a seven-figure settlement offer on February 2, 2011. Surely, if Ferguson's *clients* cannot be unjustly enriched by firing Ferguson after she has substantially performed under her contingency fee agreement, then Ferguson's newly-retained *co-counsel* should not be unjustly enriched after substantial performance by Ferguson. As a result of the trial court's ruling, Teller has been allowed to do what the law clearly prevents Ferguson's clients from doing.

As a matter of law (*Taylor v. Shigaki*), Ferguson is entitled to one-third of the settlement offer which her clients rejected on February 2,

2012. An additional one-third of the $250,000.00 ($82,500.00) is subject to the *quantum meruit* rule and should be divided between the firms accordingly. The division, based on *quantum meruit*, should be determined by the trial court on remand.

3. *The Non-Proportional Fee Division Violates Public Policy under RPC 1.5(e) and Mazon v. Krafchick.*

Attorney fee agreements that violate the RPCs are against public policy and unenforceable. *Valley/50th Avenue, LLC v. Stewart*, 159 Wn.2d 736, 745-746, 153 P.3d 186 (2009) (citing *Belli v. Shaw*, 98 Wn.2d 569, 578, 657 P.2d 315 (1983); *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004) (citing *Simburg, Ketter, Sheppared & Purdy, LLP v. Olshan,* 97 Wn.App., 901, 909, 988 P.2d 467, 33 P.3d 742 (1999). Prior to 1985, non-proportional fee agreements between co-counsel were prohibited. Non-proportional fee agreements are now permitted, but *only if*: "(i) each lawyer assumes joint responsibility for the representation; (ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (iii) the total fee is reasonable." RPC 1.5(e)(2).

Teller's retainer agreement does not meet the requirements of RPC 1.5(e)(2) because (1) Ferguson and Teller did not sign the retainer

agreement; (2) the retainer agreement did not fully disclose to the clients, in writing, *Teller's* duty to pay 100% of their litigation costs; and (3) Ferguson's suspension ended joint responsibility until such time as Ferguson could return to the case as a practicing attorney, make decisions, give advice, and actually be responsible for the representation.

The comments to the Rules of Professional Conduct support Ferguson's position. Comment [1] states, "Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances." Teller's attempt to confiscate $265,000 for a few weeks of non-substantive work on the case is not "reasonable under the circumstances." Comment [5] provides "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." Teller had too much to gain by an immediate settlement, with no prior investment in the case and his pending commitment to advance the substantial litigation costs if it did *not* settle immediately. Comment [7] provides: "Joint responsibility for the representation entails *financial and ethical* responsibility for the representation as if the lawyers were associated in a partnership." The lack of joint responsibility in this case is particularly marked, given that Ferguson could not practice law for 90 days and even upon her return, the

confidentiality provision the SEBS women were required to sign prevented them from *ever* consulting with Ferguson, as their former attorney, about their options at the time of the rush to settlement.

This case is a textbook example of the reason for strict enforcement of the requirements set forth in RPC 1.5(e)(2). Ferguson had been developing the SEBS clients' claims for 4 years. The clients had their careers at stake. Teller's financial interests were far out of alignment with the clients' interests. If a 50-50, non-proportional fee-division were enforced, Teller would have nothing to lose and everything to gain (or so he believed) by an immediate settlement; including freedom from his commitment to make a substantial financial contribution to the case. Ferguson's interests were much more closely aligned than Teller's with the SEBS group's interests; therefore, had the SEBS plaintiffs decided to settle their claims while Ferguson was available to advise them, the joint responsibility requirement under RPC 1.5(e)(2) would have been satisfied. This would not necessarily, mean that Teller and Ferguson had an enforceable contract to share fees non-proportionally. But the enforcement of the non-proportional "contract" would not undermine the public interest.

The *Hoglund* Court found that no written agreement is required under RPC 1.5(e), provided the fee-sharing agreement between the law firms is *proportional*; thus, only *non-proportional* agreements must be in writing under RPC 1.5(e). In this case, the facts change the result. Unlike *Hoglund*, the equal division of fees between Ferguson and Teller would be *grossly disproportional* to the value of legal services rendered by each of the law firms. Thus, it is clear that the requirements of RPC 1.5(e) *must* be satisfied. There must be actual joint responsibility if a contract to share fees non-proportionally is to be enforced.

The enforcement of Teller's non-proportional fee-sharing "contract" would harm the public interest and render RPC 1.5(e)(2) toothless. Furthermore, the quantum meruit division of the one-third fee on $250,000.00 (discussed supra) is not an unjust alternative for Teller and protects the public policy and the interests of clients.

4. *Ferguson Has a Right Under Teller's "Contract" to Elect A Quantum Meruit Method of Fee-Division or Lodestar Fee.*

According to Teller's alleged "contract" (Teller's retainer agreement), Ferguson may choose an hourly, or a quantum meruit fee. Paragraph 6 of the Teller retainer agreement provides in pertinent part as follows:

DISCHARGE: If client discharges attorneys, *or if attorneys withdraw for cause* (e.g., dishonesty of client), client agrees to pay attorneys a reasonable attorney fee and any non-reimbursed costs. The attorney fee shall be, *at attorney's option*, either (a) an *hourly fee* for the attorney time expended at *$345.00 per hour for Mr. Teller or Ms. Ferguson*,. . .; (b) contingency percentage computed from the last settlement offer; or (c) a *pro-rata portion* of the contingent fee ultimately recovered *based on relative contributions* to the case by the lawyers and any *successor law firm* as determined by Washington law and the factors set out in the Rule of Professional Conduct 1.5(a). [Emphasis added]

Ferguson withdrew for cause. Teller is the "successor law firm." Therefore, if this Court affirms the trial court's rulings on summary judgment, then Teller's contract is enforceable and Ferguson is entitled to elect to take her hourly fee at the rate of $345.00 per hour or: "a pro-rata portion of the contingent fee ultimately recovered based on relative contributions to the case by the lawyers and any successor law firm as determined by Washington law and the factors set out in RPC 1.5(a)." If the Court affirms the trial court's rulings in favor of enforcing Teller's alleged "contract", this Court should remand to the trial court with instructions to enter a judgment in accordance Ferguson's election of a method for its fee calculation.

VI. ***CONCLUSION***

Ferguson respectfully requests that this Court: (1) reverse the trial court's dismissal of Ferguson's claims under CR 12(b); (2) reverse the

trial court's dismissal of Ferguson's claims on summary judgment. Alternatively, Ferguson asks this Court to rule as a matter of law: (1) the non-proportional division of fees in this case contravenes the important public policy promoted by RPC 1.5(e), and by the Supreme Court's decision in *Mazon v. Krafchick*; therefore, is not enforceable; and (2) Ferguson is entitled to its one-third fee under its contingency-fee retainer agreements with the SEBS plaintiffs. Ferguson asks the Court to remand to the trial court to determine the equitable apportionment of $82,500 (one-third of $250,000.00) between the firms based on quantum meruit.

DATED this the 4th day of April, 2013.

Respectfully submitted,

MUENSTER & KOENIG

By: S/ John R. Muenster
JOHN R. MUENSTER
Attorney at Law
Of Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 4th day of April, 2013, a true and correct copy of the foregoing document was filed with the Clerk of the Court, and served via email and first class mail on opposing counsel.

S/John R. Muenster
John R. Muenster
Muenster & Koenig