97395-4

No. 74512-3-I

IN THE WASHINGTON SUPREME COURT

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC,

Appellant/Cross-Respondent,

v.

LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID

Respondent/Cross-Appellant.

Amended RESPONDENT'S PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS FOR DIVISION ONE

Sandra L. Ferguson
Respondent, Pro Se
600 First Avenue
Pioneer Building
Seattle, WA 98104

A. Identity of Parties

Carolyn L. Ferguson, Petitioner, respectfully asks this court to accept review of the decision of the Court of Appeals terminating review, designated in Part B of this motion.

B. Court of Appeals Decisions (Parts V and VI)

The trial court granted Ferguson's motion for summary judgment and dismissed Waid's counterclaim based on the doctrine of res judicata. CP 2075-2077. The trial court found that "in prior proceedings, Mr. Waid had the opportunity to fully litigate his claim for alleged fees from Plaintiff." CP 2076:13-16. And, the trial court "decline[d] to address the other bases raised by [Ferguson's dispositive motion]". Waid appealed and the Court of Appeals, Division I, reversed the trial court's decision granting summary judgment to Ferguson, finding that the doctrine of res judicata was not applicable even though in the Ferguson v. Teller case, Waid filed his Notice of Lien for Attorney's Fees of $78,350.85 and extensively litigated his lien-claim, obtaining remand and the right to litigate his priority right to $290,000 in the court registry.

The trial court dismissed Waid's motion for summary judgment on his account stated theory on the basis that Ferguson's professional negligence claim disputed the basis for and reasonableness of attorney fees and costs allegedly earned by Waid, the parties necessarily disputed genuine issues of fact material to Waid's account stated counterclaim. The Court of Appeals, Division I, reversed the trial court's decision and held that there is no genuine issue of material fact that Ferguson owes Waid $50,000 because prior to January 2012, Waid sent Ferguson bills while he kept her $265,000 in the court registry against her will and during that time, she did not expressly object to his bills, therefore, she assented.

C. Issues Presented for Review

Did the Court of Appeals err when it considered Waid's appeal of the trial court's denial of summary judgment on his account stated claim?

Does the doctrine of res judicata preclude an attorney from filing a lien for attorney's fees in his client's case, extensively litigating the validity of his lien, then when his client sues him for malpractice and Consumer Protection Act claims, bringing his fee claim against as counterclaims in that action?

Can granting summary judgment in favor of an attorney on an account stated theory be proper where the client alleges that the attorney engaged in unfair or false and deceptive acts or practices in order to charge, bill, or collect fees, or to continue to retain the client? Can the question of assent be decided on a summary judgment where there are genuine disputes of material facts as to the malpractice and CPA claims?

D. Statement of the Case

Ferguson seeks discretionary review of the Court of Appeals decision reversing the trial court's finding that res judicata precludes Waid from litigating his claim for attorney's fees in this case because he already litigated his fee-claim in Ferguson v. Teller, 11-2-19221-5 SEA. Ferguson also seeks discretionary

review of the Court of Appeals decision reversing the trial court's denial of Waid's motion for summary judgment and remanding for entry of judgment against Ferguson for $50,000 based on account stated. The date the Court of Appeals decision was entered or filed is: April 15, 2019. Petitioner filed a timely Motion for Reconsideration, which was denied on May 7, 2019.

Ferguson consulted Waid on April 5, 2011 because she suspected that her former co-counsel, Stephen Teller, was defrauding her former clients (the Endres plaintiffs) and her, so that he could receive a windfall profit without advancing the costs for three experts' work, as he promised the clients he would do. Waid advised Ferguson to file a Notice of Lien for Attorney's Fees in Endres v. Safeway, 10-2-06166-5 SEA--which she did. On May 4, 2011, Ferguson and Waid executed a contract for legal services. On May 10, 2011, Waid filed a Limited Notice of Appearance in Endres v. Safeway ("the Endres case"). Waid's conduct after that, gave rise to this lawsuit against Waid (Ferguson v. Waid, 14-2-29265-1 SEA). Waid sought dismissal of the lawsuit without prejudice on December 1, 2015 and his request was granted. Ferguson re-filed her malpractice and CPA claims against Waid the same day and a new case schedule was issued under a new cause number (i.e., Ferguson v. Waid 15-2-28797-5 SEA). Waid filed this appeal from the first-filed action. Waid requested and obtained a stay of the second-filed action pending resolution of his appeal. The Court of Appeals issued an opinion on April 15, 2019. As a result of that opinion, Ferguson is free to continue to trial with her claims against Waid for malpractice and CPA violations. However, Ferguson is hereby seeking discretionary review of the Court of Appeals decisions reversing the trial court's order granting Ferguson's motion for summary judgment of Waid's counterclaims for fees based on res judicata and reversing the trial court's order denying Waid's motion for summary judgment on his account stated claim for $50,000 because there are genuine disputes of fact that must be resolved, therefore, summary judgment on Waid's account stated claim would not be proper.

E. Argument Why Review Should Be Granted

Court of Appeals Decision is Inconsistent with this Court's Decisions on res judicata..

The Court of Appeals decision is inconsistent with its holding in Karlberg v. Otten and and Ensley v. Pitcher, which both state that the relitigation of a claim "that [was] litigated, or could have been litigated, in a prior action" are barred. Karlberg v. Otten, 167 Wn. App. 522, 535, 280 P.3d 1123 (2012); Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009). As a result, the Court of Appeals decision in this matter is inconsistent with at least two of its prior opinions on the same issue and furthermore, it appears that the decision in this case provides a special exception for attorneys to the doctrine of res judicata by allowing them to bring claims in two separate lawsuits, one for its lien and another for an account stated claim or breach of contract claim.

The Appellate Decision That Res Judicata Doctrine Does Not Preclude Respondent's Claim for Fees In This Case Conflicts with this Court's Decisions in Marino Property Co. v. Port Comm'rs of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982).

The Appellate Decision That Res Judicata Doctrine Does not Preclude Respondent's Claim for Fees In This Case Conflicts with Division One's Decision in Bunch v. Nationwide Mut. Ins. Co., 180 Wash. App. 37, 43-44, 321 P.3d 266 (2014).

Account Stated, Assent, Duress

RAO 13.4(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the

Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

The Court of Appeals imputed Ferguson's assent from her payments to Waid which occurred prior to January 2012. However, Ferguson argues that the record shows that payments she made were made under duress because she was without possession and control of her own money ($265,000) which her attorney caused to be deposited and withheld from her during the entire time he represented her in the Endres v. Safeway and Ferguson v. Teller cases. Just as the period after January 2012 is subject to a dispute of material fact as to whether Ferguson objected to Waid's invoices within a reasonable period of time, so is there a dispute of material fact as to the period of time prior to January 2012, since Ferguson alleges she was under economic duress and coercion. Therefore, the Court of Appeals should not have placed itself in the role of factfinder with regard to any period of time during which Ferguson alleges she was deceived by her attorney or subject to duress for lack of possession of her $265,000.

Given the totality of the circumstances in this case, Ferguson's payments to Waid prior to January 2012, are not a sufficient manifestation of assent by Ferguson. Ferguson made relatively small payments to

Waid from money that was never even in her possession, but was disbursed to Waid. This is not sufficient, under the circumstances, to show assent to Waid's bills through January 2012.

Any manifestation of asset is negated by evidence of economic duress. Ferguson's complaint contains allegations of Waid's unfair or false and deceptive acts or practices and ethical violations. Ferguson has consistently alleged that she was under duress because Waid failed to act on her behalf to obtain possession and control of her $265,000 at the time sher to title to this property was not disputed by Teller (i.e., from April 28, 2011 to August 7, 2011 and from November 2, 2011 to February 9, 2012 when Teller file his Motion for CR 11 Sanctions which clouded Ferguson's clear title to the $265,000 in the registry.

"Duress...means

Any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or

Any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement."

Undue influence is defined as follows:

Where one party is under the domination of another, or by virtue of the relation between them, is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.

Pleuss v. Seattle, 504 P.2d 1191, 8 Wn.App. 133, 137-38 (Div. I, 1972) (citing Restatement of Contracts 492 (1932).

A dispute of fact exists as to whether Ferguson objected within a reasonable period of time. This dispute applies to the entire period of time, before and after January 2012, and to the entire sum of Waid's bills due to the alleged fraud or deception alleged by Ferguson.

Ferguson did object to Waid's fees as soon as she retained replacement counsel, John Muenster.

"How long a time is unreasonable is a question of fact to be answered in light of all the circumstances." See, p. 18, of Court of Appeals opinmion, citing Restatement (Second) of Contracts 282, cmt. B (1981).

The effect of the Court of Appeals Decision is to ____.

"The threshold requirement of res judicata is a final judgment on the merits in the prior suit. Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and 'the quality of the persons for or against whom the claim is made.'" Hisle v. Todd Pacific Shipyards Corp., 93 P.3d 108 (2004)(citing Rains v. State, 100 Wash.2d 660, 663, 674 P.2d 165 (1983)). "The general doctrine is that the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising

reasonable diligence, might have brought forward at the time.'" Id. (citing Schoeman v. N.Y. Life Ins. Co., 106 Wash.2d 855, 859, 726 P.2d 1 (1986)(quoting Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966, 38 P. 137 (1894). But, res judicata does not bar claims arising out of different causes of action, and is not intended "to deny the litigant his or her day in court." Id. at 860, 726 P.2d 1.

"Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, Civil Procedure § 35.32, at 475 (1st ed.2003) (hereafter Tegland, Civil Procedure). It is distinguished from claim preclusion 'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.'" Christensen v. Grant County Hosp. Dist., 96 P.3d 957 (2004)(quoting Rains v. State, 100 Wash.2d 660, 665, 674 P.2d 165 (1983).

"Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. Shoemaker v. City of Bremerton, 109 Wash.2d 504, 507, 745 P.2d 858. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wash.2d 255, 264-65, 956 P.2d 312 (1998). For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." Christensen v. Grant County Hosp. Dist., 96 P.3d 957 (2004)(quoting Reninger v. Dept. of Corr., 134 Wash.2d at 449, 951 P.2d 782; State v. Williams, 132 Wash.2d 248, 254, 937 P.2d 1052 (1997).

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant review of the decision of the court below.

DATED this 8th day of July, 2019.

/s/Sandra Ferguson
Sandra L. Ferguson, Pro se
Petitioner

APPENDIX TO PETITION

(1) COA Opinion in appeal from Ferguson v. Waid, 14-2-29265-1 SEA, dated 4/15/2019, No. 74512-3-I (Unpublished)

(2) Order denying reconsideration, No. 74512-3-I

(3) RCW 60.40 Attorney Lien Statute

(4) RCW 19.86 Consumer Protection Act

(5) Ferguson v. Teller, published, No. 69220-8-I (lined with No. 68329-2-I)

(6) Ferguson v. Teller, unpublished, No. 68329-2-I (linked with 69220-8-I)

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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June 7, 2019

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CASE #: 74512-3-I
Sandra L. Ferguson, App/Cross-Res. v. Law Office of Brian J. Waid, Res/Cross-App.
King County No. 14-2-29265-1 SEA

Counsel:

Enclosed please find a copy of the Granting Motion for Extension of Time to File Motion for Reconsideration and Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. Judith Ramseyer
Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC, Appellant/Cross-Respondent, v. LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community, Respondents/Cross-Appellants.	DIVISION ONE No. 74512-3-I ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION FOR RECONSIDERATION

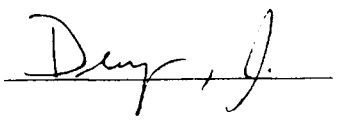
The appellant has filed a motion for an extension of time to file her motion for reconsideration to May 7, 2019. A majority of the panel having determined that it should be granted; now, therefore, it is hereby

ORDERED that the motion for extension of time to file motion for reconsideration to May 7, 2019 be, and the same is, hereby granted.

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



FILED
4/15/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC, Appellant/Cross-Respondent, v. LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community, Respondents/Cross-Appellants.	DIVISION ONE No. 74512-3-I UNPUBLISHED OPINION FILED: April 15, 2019

DWYER, J. — Sandra Ferguson and the Ferguson Firm, PLLC (collectively Ferguson) hired Brian J. Waid, d/b/a/ Law Office of Brian J. Waid, to represent her in a fee dispute with her former co-counsel Stephen Teller. However, Waid withdrew as Ferguson's attorney prior to the resolution of the dispute. Subsequently, Ferguson brought a lawsuit against Waid, the Law Office of Brian J. Waid, and Jane Doe Waid (collectively Waid) alleging several causes of action, including legal negligence and violations of the Consumer Protection Act (CPA), chapter 19.86 RCW. In response, Waid denied Ferguson's allegations and brought counterclaims seeking recompense for unpaid attorney fees. Ultimately, the trial court dismissed Waid's counterclaims with prejudice and dismissed Ferguson's claims without prejudice.

Waid now appeals seeking reversal of four of the trial court's orders: (1) the dismissal of Ferguson's claims without prejudice (asserting that the dismissal

should have been with prejudice); (2) the dismissal of his counterclaims with prejudice on the ground that they were barred by res judicata; (3) the order denying Waid's motion for summary judgment in his favor on his counterclaims; and (4) the order denying summary judgment dismissal of Ferguson's CPA claim. We affirm the trial court's dismissal of Ferguson's claims without prejudice, decline to review the trial court's order denying summary judgment dismissal of Ferguson's CPA claim, reverse the dismissal of Waid's counterclaims, and order that Waid be granted partial summary judgment on his account stated counterclaim.

I[1]

In May 2011, Ferguson hired Waid to represent her in a fee dispute with her former co-counsel, Teller, pursuant to a written hourly fee agreement. The fees disputed by Ferguson and Teller, totaling $530,107.58, were placed into the superior court registry during the litigation. Ferguson Firm, PLLC v. Teller & Assocs., PLLC, 178 Wn. App. 622, 626, 316 P.3d 509 (2013). Waid provided legal services to Ferguson, and detailed these services in monthly invoices issued to Ferguson. Ferguson did not object to any of the invoices and made partial payments on the invoices throughout the period of Waid's representation.

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[1] While not pertinent to our discussion of the issues presented, we note that the parties filed numerous additional motions in this appeal, some of which we resolve herein. First, Ferguson filed several motions to supplement the record on appeal with additional information contained in several appendices to her briefing. She also seeks to add additional testimony and further requests that we take judicial notice of certain facts. Because none of the additional information is material to the resolution of the issues on appeal, her motions to supplement the record are hereby denied. We consider the record as it was before the trial court.

Second, Waid filed a statement of additional authorities and Ferguson filed a subsequent motion to strike the statement of additional authorities. Because Waid does not, in his statement of additional authorities, cite to authority setting forth principles of law material to the resolution of the issues presented on appeal, we grant the motion to strike.

However, in February 2012, Waid withdrew as counsel for Ferguson. At that time, Ferguson had yet to pay all outstanding amounts invoiced for Waid's legal services. Hence, Waid filed a $78,350.85 lien for unpaid attorney fees in Ferguson's case against Teller. Ferguson, 178 Wn. App. at 627.

Subsequently, the trial court ordered a partial disbursement of the funds in the court registry, determining that Ferguson and Teller were each entitled to half of the funds. Ferguson, 178 Wn. App. at 627. However, the court ordered that $78,350.85 of Ferguson's share could not be disbursed until Waid's lien claim was resolved. Ferguson, 178 Wn. App. at 627.

Ferguson then successfully moved to vacate Waid's lien. The trial court held that the funds on deposit in the court registry did not constitute "proceeds" as defined by the attorney fees lien statute, RCW 60.40.010, and were therefore not subject to Waid's lien. In rendering its decision, the trial court did not rule on the merits of Waid's claim for the amount of fees due to him. Shortly thereafter, Ferguson withdrew the funds previously set aside.

Several weeks later, Waid moved to stay the disbursement of funds to Ferguson. The trial court ruled that the issue was moot because Ferguson had already withdrawn the funds. Waid then appealed from the order vacating his lien. Ferguson, 178 Wn. App. at 628.

We reversed the trial court's decision that the funds in the court registry did not constitute "proceeds" to which Waid's lien could attach. Ferguson, 178 Wn. App. at 631-32. Recognizing that Ferguson had already removed the disputed funds from the court registry, we nonetheless concluded that his claim

was not moot because sufficient funds then remained in the court registry to satisfy Waid's lien claim. Ferguson, 178 Wn. App. at 630 n.4. We did not rule on the merits of Waid's lien claim but, rather, remanded the matter "for a determination of what amount, if any, of the funds remaining in the court registry are rightfully Waid's." Ferguson, 178 Wn. App. at 633.

In short order, Teller successfully moved for disbursement to him of all funds remaining in the court registry. Because this left nothing to satisfy Waid's lien claim, Waid requested that the trial court order Ferguson to return the funds previously disbursed to her so that Waid's lien claim could be resolved. The trial court denied the motion.[2] As a result, Waid declined to pursue resolution of his lien claim.

Thereafter, Ferguson filed a legal malpractice action against Waid, alleging negligence, breach of contract, breach of fiduciary duty, fraud, conversion, infliction of emotional distress, and violation of the CPA. Waid denied the claims and filed account stated and breach of contract counterclaims, seeking payment of his outstanding invoices.

Waid and Ferguson both filed motions seeking summary judgment. While the trial court made several rulings on summary judgment, those pertinent to this appeal are (1) its ruling denying Waid's motion for dismissal of Ferguson's CPA claim based on there being genuine disputes as to material facts, (2) its ruling dismissing Waid's counterclaims on the basis that they were barred by the

[2] The trial court denied Waid's motion because "[t]he Court of Appeals remanded this case with instructions for this court to determine 'what amount, if any, of the funds remaining in the court registry are rightfully Waid's.'"

doctrine of res judicata, and (3) its ruling denying Waid's motion for summary judgment in his favor on his counterclaims.

These rulings left the following claims for trial: professional negligence and the CPA claim. However, during pretrial proceedings Ferguson missed numerous deadlines set by the trial court and generally failed to participate in any joint pretrial efforts. Instead, Ferguson sought, but was denied, a continuance of the trial.

On the scheduled day of trial, Ferguson arrived late and her attorney did not appear in court, instead sending a letter again seeking a continuance of the trial. The trial judge managed to get Ferguson's attorney on the telephone, and the parties proceeded to argue their positions on proceeding with trial. Ferguson asserted that she was not prepared for trial and needed a continuance both to finish preparations and to pare down the issues and evidence to be presented. Waid asserted that Ferguson was entirely at fault for her lack of preparation, that she had not complied with any of the trial court's orders regarding pretrial matters and scheduling, and that a continuance would result in prejudice to Waid. Waid asserted that "the choice is to proceed today, which we've all known about, or dismiss the case."

However, the trial judge was unavailable to oversee a continued trial, as requested by Ferguson. The judge thus considered several alternative options for proceeding with the case, including attempting to locate a different judge who could try the case, asking Waid if he would waive his right to a jury trial, shortening the trial, or proceeding with the trial as scheduled. The trial court

concluded that Ferguson was responsible for her failure to be prepared for trial, that Ferguson had violated numerous court orders, and that there was no practicable alternative but to dismiss the case without prejudice.

After the trial judge orally announced her decision to dismiss Ferguson's remaining claims without prejudice, Waid requested that the judge "address the terms and conditions, if Ms. Ferguson decides to refile, as far as payment of defense costs."[3] The trial judge declined to address the payment of defense costs in the event of refiling. Waid asked no further questions during the hearing regarding the judge's ruling.

Instead, 10 days later, Waid moved for reconsideration of the order dismissing the case, seeking dismissal with prejudice as opposed to dismissal without prejudice. Waid now appeals from the denial of this motion and from the order dismissing the case without prejudice, as well as from the dismissal, with prejudice, of his counterclaims on summary judgment and the denial of his motions for summary judgment on Ferguson's CPA claim and on his account stated and breach of contract counterclaims.

II

As a preliminary matter, Ferguson asserts that Waid cannot appeal from the denial of his motion for reconsideration because the order denying reconsideration is void. This is so, Ferguson asserts, because the trial court lost

[3] This request makes clear that, at that time, Waid understood that dismissal without prejudice had been ordered.

jurisdiction over the matter following its order dismissing Ferguson's claims without prejudice.[4] We disagree.[5]

Ferguson relies solely on Cork Insulation Sales Co. v. Torgeson, 54 Wn. App. 702, 775 P.2d 970 (1989), a Division Three case, to assert that the trial court had no jurisdiction over the case subsequent to its order dismissing the case and that, therefore, its subsequent order denying Waid's motion for reconsideration is void. However, Cork is inapposite. That opinion addresses a voluntary dismissal, not an involuntary dismissal. See Cork, 54 Wn. App. at 707 ("[H]aving taken a voluntary dismissal, [Cork] has waived the jurisdiction of both the trial and appellate courts with respect to the merits of its claim."). Ferguson cites no authority to support the notion that this rule should apply to involuntary dismissals.

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[4] The claim is in reality that the superior court lost the authority to act. The two components of jurisdiction—personal and subject matter—were always present. As a general jurisdiction court, the superior court had jurisdiction over the subject matter involved. Similarly, the superior court had, at all times, jurisdiction over the persons involved.

[5] Although Ferguson does not address any other issues regarding Waid's right to appeal from the trial court's order of dismissal, we note that if Waid's only claim of error on appeal was that the trial court should have dismissed the claims against him with prejudice as opposed to without prejudice, we would first need to determine if Waid was aggrieved by the dismissal without prejudice because "[o]nly an aggrieved party may seek review by the appellate court." RAP 3.1. "While RAP 3.1 does not itself define the term 'aggrieved,' Washington courts have long held that '[f]or a party to be aggrieved, the decision must adversely affect that party's property or pecuniary rights, or a personal right, or impose on a party a burden or obligation.'" Randy Reynolds & Assocs. v. Harmon, No. 95575-1, slip op. at 4-5 (Wash. Mar. 28, 2019) http://www.courts.wa.gov/opinions/pdf/955751.pdf (citing In re Parentage of X.T.L., No. 31335-2-III, slip op. at 17 (Wash. Ct. App. Aug. 19, 2014) (unpublished) http://www.courts.wa.gov/opinions/pdf/313352.unpub.pdf; State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605 (2003) (stating that an aggrieved party is "one whose personal right or pecuniary interests have been affected"); Sheets v. Benevolent & Protective Order of Keglers, 34 Wn.2d 851, 855, 210 P.2d 690 (1949)).

A different analysis, however, controls the appealability of Waid's appeal from the order dismissing without prejudice. This order was the final order entered by the trial court and finally resolved all claims. Prior to entry of this order Waid was unable to appeal from the interlocutory order dismissing his counterclaims. RAP 2.2(a)(1), (3). Waid was clearly aggrieved by the dismissal of his counterclaims. Thus, it is clear that—in this instance—the appeal from the order dismissing without prejudice is properly taken.

Even had Ferguson argued to extend Cork's holding to involuntary dismissals, we would decline to do so. Subsequent cases have limited, rather than extended, Cork's holding. For example, in Condon v. Condon, 177 Wn.2d 150, 157-61, 298 P.3d 86 (2013), our Supreme Court noted that Cork's holding is limited and concluded that even a voluntary dismissal did not relieve a court of the authority to enforce a settlement agreement. Similarly, in Hawk v. Branjes, 97 Wn. App. 776, 782-83, 986 P.2d 841 (1999), we concluded that a court retains authority following a voluntary dismissal to determine an award of attorney fees pursuant to a statutory provision or contractual agreement.

The trial court's order denying Waid's motion for reconsideration is not void. Waid's appeal is proper.

III

A

Waid first asserts that the trial court abused its discretion by dismissing Ferguson's claims without prejudice instead of with prejudice. Waid did not properly preserve this claim of error for appeal. His request for relief that prompted the trial court's ruling was for the trial court to dismiss Ferguson's case. He did not request a dismissal with prejudice at that time, nor did he contemporaneously object to the judge's ruling. His request for a dismissal with prejudice was first made in his motion to reconsider—far too late to preserve the claim of error.

"It is a principle of long standing that a trial attorney who does not request a remedy forfeits the claim that the trial judge should have imposed that remedy."

State v. Giles, 196 Wn. App. 745, 769-70, 385 P.3d 204 (2016). If a party receives the remedy it requested from the trial court, that party may not subsequently claim such a determination to have been made in error. See Giles, 196 Wn. App. at 769; accord State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); State v. Swan, 114 Wn.2d 613, 661-64, 790 P.2d 610 (1990).

Herein, Waid seeks review of the order dismissing Ferguson's claims without prejudice. However, because Waid merely requested a dismissal, and did not specifically request a dismissal with prejudice, he has waived his claim of error. See Giles, 196 Wn. App. at 769-70. The record indicates that Waid had several opportunities to clarify that he was seeking a dismissal with prejudice prior to the trial court's ruling, but never requested anything other than the dismissal of Ferguson's claims. Even when Ferguson's counsel asked the trial court whether the dismissal would be with or without prejudice, Waid never asserted that he was entitled to, or that he even sought, a dismissal with prejudice. When the trial court orally announced its decision to dismiss Ferguson's claims without prejudice, Waid did not assert any objections to the ruling.[6] Waid asked for, and received, a dismissal. Thus, he forfeited any claim that dismissal without prejudice was improper.

[6] Instead, Waid waited over a week to file a subsequent motion for reconsideration, in which he, for the first time, asserted that dismissal with prejudice was the only proper remedy. This was too little, too late. The trial court, with both parties present on the scheduled day of trial, explicitly considered lesser sanctions, such as an abbreviated trial or converting the jury trial to a bench trial, and concluded that dismissal without prejudice was the appropriate remedy. The circumstances surrounding that consideration were not reproducible more than a week after the initial ruling. Waid's motion for reconsideration was not brought at a time when the trial court had the same array of choices available to it. Had Waid contemporaneously made clear that his motion was *not* for a dismissal without prejudice, the trial judge may have chosen a remedy other than dismissal. We can never know the answer to this question, which illustrates why contemporaneous objections are necessary to avoid forfeiting a claim of error.

B

Even had Waid properly requested a dismissal with prejudice, and objected to the trial court's order of a dismissal without prejudice, it is nevertheless so that the trial court did not err in reaching its decision.

We review an order of dismissal for an abuse of discretion. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A trial court has broad "discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases." Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (citing Wagner v. McDonald, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973)). The trial court's discretionary authority to dismiss a case has also been codified in RCW 4.56.120 and in CR 41. Pursuant to RCW 4.56.120, an "action in the superior court may be dismissed by the court and a judgment of nonsuit rendered in the following cases: . . . . (7) Upon its own motion, for disobedience of the plaintiff to an order of the court concerning the proceedings in the action." Similarly, CR 41(b) states, in pertinent part, that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her."

"[I]t is the general policy of Washington courts not to resort to dismissal lightly." Woodhead, 78 Wn. App. at 129-30 (citing Anderson v. Mohundro, 24

Wn. App. 569, 575, 604 P.2d 181 (1979)). "Where, however, a court has found that a party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice and has prejudiced the other side by doing so, dismissal has been upheld as justified." Woodhead, 78 Wn. App. at 130 (citing Anderson, 24 Wn. App. at 575). Dismissal pursuant to CR 41(b) is "an appropriate remedy where the record indicates that '(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.'" Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 129, 89 P.3d 242 (2004) (alteration in original) (quoting Rivers, 145 Wn.2d at 686).

The record herein is clear: the trial court properly performed the required analysis as set forth by case law and did not abuse its discretion.[7] See Will, 121 Wn. App. at 129. The trial court noted that Ferguson had repeatedly missed deadlines, failed to provide information to opposing counsel, and was to blame for her lack of preparedness for trial. The trial court also considered numerous alternative options to a dismissal, including finding a different judge to take over the proceedings, shortening the trial, converting the jury trial to a bench trial, or

[7] Waid cites to no case in which an appellate court reversed a trial court order dismissing a case without prejudice on the basis that a dismissal with prejudice was required. Instead he cites to Apostolis v. City of Seattle, 101 Wn. App. 300, 3 P.3d 198 (2000), and Woodhead, 78 Wn. App. 125, which simply affirm the dismissal with prejudice of the cases there at issue. The absence of authority in support of Waid's position is notable.

simply proceeding with the trial as planned.[8] The trial court's analysis was far from manifestly unreasonable or untenable.[9] Dismissing Ferguson's claims without prejudice was not an abuse of discretion.

IV

Waid next contends that the trial court erred when it denied his motion seeking dismissal of Ferguson's CPA claim. Ferguson responds by asserting that Waid may not appeal from the denial of a summary judgment motion. We decline to review the merits of Waid's assignment of error because he seeks an advisory opinion and because the order denying Waid's motion for summary judgment is not reviewable.

It is a longstanding rule that, generally, courts "do not give advisory opinions." Hutchinson v. Port of Benton, 62 Wn.2d 451, 456, 383 P.2d 500 (1963).

Moreover, "a denial of summary judgment based on a trial court's determination of the presence of material, disputed facts" is not a decision determining an action. Johnson v. Rothstein, 52 Wn. App. 303, 305-06, 759 P.2d 471 (1988). Therefore, "denial of a motion for summary judgment is ordinarily not reviewable."[10] City of Redmond v. Hartford Accident & Indem. Ins. Co., 88

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[8] Waid contends that Ferguson's behavior was so egregious that only dismissal with prejudice was a just remedy. The trial court plainly did not view the case this way. We say this because the trial court searched extensively for other remedies, short of dismissal, notwithstanding Ferguson's misbehavior.

[9] On the scheduled day of trial, Waid's counsel at one point suggested proceeding with the trial as planned, as an alternative to dismissal. This suggestion sharply contradicts Waid's contention on appeal that the only reasonable course was to dismiss Ferguson's claims with prejudice.

[10] The proper procedure to preserve a claim of error following a denial of a request for summary judgment is to bring a "motion challenging the sufficiency of the evidence during trial or by a posttrial motion." Johnson, 52 Wn. App. at 308. When a trial court denies summary

Wn. App. 1, 6 n.2, 943 P.2d 665 (1997) (citing Zimny v. Lovric, 59 Wn. App. 737, 739, 801 P.2d 259 (1990)).

Herein, Waid seeks review of an order denying dismissal on summary judgment of Ferguson's CPA claim. However, that CPA claim is no longer a part of this case because it was dismissed. Therefore, any ruling we would make on this issue would be advisory because it would not effect a claim present in this lawsuit. For this reason, we decline to review this assignment of error.

Furthermore, the denial of summary judgment on Ferguson's CPA claim is not reviewable. The trial court explicitly found that there were genuine disputes of material fact. Because "the trial court found there were disputed issues of fact, this assignment of error is unreviewable." Canfield v. Clark, 196 Wn. App. 191, 194, 385 P.3d 156 (2016).

For both reasons, Waid does not show an entitlement to appellate relief.

V

Waid next contends that the trial court erred by concluding that his counterclaims of an account stated and breach of contract were barred by the doctrine of res judicata. This is so, he asserts, because there was no final judgment as to the merits of the lien he asserted in the prior litigation, and thus there was no final judgment on the issue of his entitlement to attorney fees. In response, Ferguson asserts that Waid declined to enforce his lien and that he has therefore waived his right to bring any claims relating to his right to attorney

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judgment due to factual disputes, any review on appeal must follow a trial on the merits and any claim of error must be based on the evidence adduced at trial. Caulfield v. Kitsap County, 108 Wn. App. 242, 249 n.1, 29 P.3d 738 (2001).

fees arising from the underlying matter.

Res judicata is an equitable court-created doctrine. Karlberg v. Otten, 167 Wn. App. 522, 535, 280 P.3d 1123 (2012) (citing Corbin v. Madison, 12 Wn. App. 318, 323, 529 P.2d 1145 (1974)). The doctrine bars relitigation of claims "that were litigated, or could have been litigated, in a prior action." Karlberg, 167 Wn. App. at 535 (citing Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009)). However, the "threshold requirement of res judicata is a final judgment on the merits in the prior suit." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Washington courts apply the doctrine of res judicata only "where a prior final judgment is identical to the challenged action in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 836, 125 P.3d 202 (2005) (quoting Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995)).

The trial court summarily dismissed Waid's account stated and breach of contract claims seeking recompense for unpaid attorney fees because "it is clear that the defendant's lien for attorney fees in the underlying Ferguson vs. Teller matter was litigated[,]" and "Mr. Waid didn't pursue his lien or his claim for attorney fees, even though it clearly had been a point of contention and an issue that was litigated in that matter." However, the record does not support the trial court's reasoning. Instead, it shows that Waid's entitlement to attorney fees was not litigated and that there was never any final judgment on the question.

Our decision in Ferguson resolved only one issue regarding the validity of

Waid's lien claim: whether Waid's lien could properly attach to any of the funds placed in the court registry pending resolution of the fee dispute between Ferguson and Teller. 178 Wn. App. at 631-32. We concluded that Waid's lien was valid. Ferguson, 178 Wn. App. at 631-32. However, the money in the registry that had once been set aside to potentially satisfy Waid's lien had already been disbursed.[11] Ferguson, 178 Wn. App. at 628. Recognizing that, at the time of our decision, other funds remained in the court registry from which Waid's lien could potentially be satisfied, we remanded the matter for a determination of the proper amount, if any, of those funds remaining in the registry to which Waid's lien attached. Ferguson, 178 Wn. App. at 633. We did not rule on the merits of Waid's lien claim.

On remand, the trial court also did not rule on the merits of Waid's lien claim. Waid declined to litigate the merits of his lien because his lien claim had been rendered moot. Ferguson asserts that Waid's failure to litigate the merits of his lien claim resulted in his waiver of any subsequent claim of right to attorney fees from the underlying matter. However, the record shows that Waid's decision not to litigate his lien claim was due to the disbursement of all remaining funds in the court registry to Teller.[12] Once there were no funds remaining to which

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[11] In Ferguson, we explained that Waid had missed his window of opportunity to stay the disbursement of funds in the registry when he failed to move to stay the disbursement within the time period required by CR 62. Ferguson, 178 Wn. App. at 630 n.4.

[12] Almost a full year passed between the filing of our decision in Ferguson (December 2013) and Teller receiving the disbursement of all funds remaining in the court registry (September 2014). However, Waid's failure to litigate his lien claim during this time is understandable, as Ferguson had petitioned the Supreme Court for review of our decision. Review was denied in July 2014. Ferguson Firm, PLLC v. Teller & Assocs., PLLC, 180 Wn.2d 1025, 328 P.3d 903 (2014). Upon learning of Teller's receipt of the remaining funds in the registry, Waid filed a motion requesting that the trial court order Ferguson to return the funds

Waid's lien could attach, the lien claim was moot.[13] See Ferguson, 178 Wn. App. at 630 n.4 ("[T]he question of whether Waid's lien is valid is not moot because money remains in the court registry to which Waid's lien could attach.").

Accordingly, the record makes clear that no court ever issued a final judgment on the question of whether Waid was actually entitled to attorney fees as alleged in his lien claim, nor could any court have done so because the claim was moot. Therefore, res judicata does not apply to bar Waid's subsequent account stated and breach of contract claims seeking payment of attorney fees arising out of the Ferguson litigation.[14] The trial court erred by ruling otherwise.

VI

Waid next contends that the trial court erred by denying his motion for summary judgment on his account stated counterclaim. Waid specifically asserts that the trial court erred when it concluded that, because Ferguson's professional negligence claims disputed the basis for and reasonableness of attorney fees and costs allegedly earned by Waid, the parties necessarily disputed genuine issues of fact material to Waid's account stated counterclaim. We agree.

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previously disbursed to her. When this motion was denied there was no point in pursuing the merits of the lien claim. There was no money in the court registry to which the lien could attach.

[13] It is for this reason that we also reject Ferguson's assertion that Waid waived his claim to attorney fees and failed to mitigate his damages when he failed to litigate his lien claim in Ferguson. Ferguson strenuously asserts that it is unfair for Waid to be able to claim that he is owed attorney fees after failing to litigate his attorney fees lien, but the lien only entitled Waid to recover fees from "proceeds" Ferguson obtained during the litigation. Ferguson, 178 Wn. App. at 631-32; RCW 60.40.010. Once the remaining funds in the court registry were disbursed to Teller, there were no remaining "proceeds" to which Waid's lien could apply. Our prior decision had restricted the issue on remand to determining the portion of funds remaining in the registry, if any, to which Waid's lien attached. There was nothing Waid could have done to obtain fees via his lien after all of the remaining funds had been disbursed.

[14] Lost in the furor is a simple notion. Nothing in the lien statute requires an attorney who seeks payment for services rendered to file a lien. Had Waid never filed a lien he would still have the ability to sue Ferguson to recover his unpaid fees.

On the record before us undisputed facts show that Waid established an account stated as to his invoices sent through January 2012. Therefore, the trial court should have granted Waid partial summary judgment on his account stated claim.

A denial of summary judgment is generally not reviewable on appeal. City of Redmond, 88 Wn. App. at 6 n.2. However, courts may review a denial of summary judgment if there are no disputed questions of fact and "the decision on summary judgment turned solely on a substantive issue of law." Univ. Vill. Ltd. Partners v. King County, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001).

An account stated is "'a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor.'" Sunnyside Valley Irrig. Dist. v. Roza Irrig. Dist., 124 Wn.2d 312, 315, 877 P.2d 1283 (1994) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 282(1) (1981)). "[O]nce an account stated is established, it becomes a new contract." Parrot Mech., Inc. v. Rude, 118 Wn. App. 859, 865, 78 P.3d 1026 (2003).

"To establish an account stated, an invoice must set forth the state of the account between the parties and the balance owed." Parrot Mech., 118 Wn. App. at 865. Whether the invoice is actually a true statement of work performed is immaterial to an account stated claim. Parrot Mech., 118 Wn. App. at 866-67. Instead,

> "[t]o impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to another does not show an account stated. *There must be some form of assent* to the account, that is, *a definite*

> *acknowledgment of an indebtedness in a certain sum.* . . . True, *assent may be implied* from the circumstances and acts of the parties, *but it must appear in some form.*"

Sunnyside, 124 Wn.2d at 315-16 (second alteration in original) (quoting Shaw v. Lobe, 58 Wash. 219, 221, 108 P. 450 (1910)).

"The notion that an account stated can only be premised on an express mutual agreement to settle the account by payment of a stated sum misapprehends one of the functions of the doctrine, to permit the court to impute agreement to a party *in the absence* of explicit agreement about that sum." Sunnyside, 124 Wn.2d at 317-18 (citing RESTATEMENT (SECOND) OF CONTRACTS § 282(2) (1981)). Assent to the account stated may therefore be implied from the failure to object within a reasonable amount of time. Parrot Mech., 118 Wn. App. at 865. "How long a time is unreasonable is a question of fact to be answered in the light of all the circumstances." RESTATEMENT (SECOND) OF CONTRACTS § 282 cmt. b (1981). Additionally, "payment, together with a failure to objectively manifest either protest or an intent to negotiate the sum at some future time, does establish an account stated." Sunnyside, 124 Wn.2d at 316 n.1 (citing Nw. Motors, Ltd. v. James, 118 Wn.2d 294, 302-03, 822 P.2d 280 (1992)).

Herein, the trial court denied Waid's motion for summary judgment on his account stated counterclaim, explaining that

> [t]he basis for and reasonableness of attorney fees and costs allegedly earned by Defendant while representing Plaintiff in underlying litigation are at the heart of Plaintiff's allegations of professional negligence in the instant cause of action. Genuine issues of material fact preclude the entry of summary judgment on Defendant's counterclaims for attorney fees and costs earned during that representation.

However, the basis and reasonableness of the attorney fees Waid seeks to recover through his account stated counterclaim are not material to whether Waid has a valid account stated claim. See Parrot Mech., 118 Wn. App. at 867 ("Parrot was not required to prove that the invoices were a true statement of the work done. . . . Disputed facts on this question . . . are not material."). Thus, the trial court's explanation establishes that it denied summary judgment based on its erroneous belief that whether Waid performed the work to earn the attorney fees claimed to be due was material to his account stated counterclaim.[15] Instead, the trial court should have considered solely whether the undisputed facts established that Waid presented written invoices to Ferguson setting forth the state of the account between Waid and Ferguson and whether Ferguson assented to the account as presented in such invoices.

The record supports Waid's contention that the undisputed facts establish that he provided written invoices to Ferguson setting forth the state of her account and that Ferguson assented to some of those invoices through her failure to object to them and through her partial payments made in response to certain of them.[16] Ferguson admitted that Waid presented her with written

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[15] The trial court also relied upon this explanation to justify denial of Waid's summary judgment request as to his breach of contract counterclaim. Waid also contends that such denial was erroneous. However, unlike with the account stated claim, whether Waid actually performed the work pursuant to his contract with Ferguson is material to whether Ferguson owes Waid damages for a breach of that contract. If Waid did not fulfill all of his obligations pursuant to his contract with Ferguson, then he may not be entitled to his claimed fees as damages. Because the trial court concluded that there were genuine issues of material fact regarding whether Waid performed his obligations pursuant to the contract, we decline to review the denial of Waid's motion for summary judgment on his breach of contract claim. See Canfield, 196 Wn. App. at 194 (because "the trial court found there were disputed issues of fact, [the] assignment of error [to the denial of summary judgment] is unreviewable").

[16] In her briefing, Ferguson contends only that res judicata bars Waid's account stated counterclaim. She presents no argument regarding the merits of Waid's account stated claim and

invoices setting forth a statement of her account. Ferguson also admitted that she did not contemporaneously object to any of the fees or expenses stated in Waid's invoices. Furthermore, the record shows that Ferguson made contemporaneous payments on certain of Waid's invoices, the latest of which was in January 2012, only a month prior to the termination of Waid's representation of Ferguson in the litigation against Teller. Thus, the record is clear: Ferguson's "failure to objectively manifest either protest or an intent to negotiate the sum at some future time," Sunnyside, 124 Wn.2d at 316 n.1 (citing Nw. Motors, 118 Wn.2d at 302-03), when she made payments on Waid's invoices established an account stated as to Waid's invoices up through the date of those payments.

However, Ferguson did not make any payments subsequent to her partial payment in January 2012. The record before us is insufficient to determine as a matter of law that Ferguson assented to the invoices she received from Waid subsequent to her January 2012 payment. While assent may be implied from the failure to object after a reasonable period of time, Waid does not point to undisputed facts in the record to establish that which constitutes a reasonable period of time under the circumstances. We would thus be placing ourselves in the role of fact finder were we to determine if the delay between when Ferguson received the invoices following her final payment and when she first objected to them was reasonable. We decline to do so.

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does not dispute that she received and assented to Waid's written invoices through her failure to object to them and her partial payment of certain of them.

Therefore, because the trial court's order denying summary judgment was based solely on an error of law and the undisputed facts show that Waid established an account stated, we conclude that the trial court erred. On remand, the trial court must grant Waid partial summary judgment as to his account stated established at the time of Ferguson's January 2012 payment. The trial court then must determine whether Ferguson ever assented to Waid's subsequent invoices.[17]

Affirmed in part. Reversed in part and remanded.

WE CONCUR:

[17] Because we order that the trial court grant only partial summary judgment on Waid's counterclaim, we cannot order an award of prejudgment or postjudgment interest in Waid's favor. Upon the trial court's determination as to the entirety of Waid's account stated counterclaim, the trial court should determine the amount of interest, if any, to be awarded.

316 P.3d 509 (2013)

The FERGUSON FIRM, PLLC, Respondent,
v.
TELLER & ASSOCIATES, PLLC, Defendant, and
Brian J. Waid, d/b/a Law Office of Brian J. Waid, Appellant Attorney Lien Claimant.

Nos. 69220-8-I, 68329-2-I.

Court of Appeals of Washington, Division 1.

December 30, 2013.

510 *510 John Rolfing Muenster, Muenster & Koenig, Bainbridge Island, WA, for Respondent.

Kelby Dahmer Fletcher, Stokes Lawrence, Seattle, WA, for Other Parties.

DWYER, J.

¶ 1 The Ferguson Firm, PLLC (Ferguson), sued Teller & Associates, PLLC (Teller), over a fee dispute.[1] Brian J. Waid d/b/a Law Office of Brian J. Waid (Waid) represented Ferguson throughout much of the dispute, but eventually withdrew because of a conflict with the firm's principal, Sandra Ferguson. Soon after withdrawing, Waid filed an attorney's lien in the amount of $78,350.85 for legal services provided to Ferguson. Thereafter, Ferguson moved for a summary dismissal of Waid's lien, which the trial court granted. The court also directed the clerk to disburse to Ferguson the sum of $78,350.85 held in the court registry, together with accrued interest. Waid then filed a notice of appeal from that order and — more than three weeks after the order was entered — filed a motion to stay the disbursement to Ferguson of the funds in the court registry and for approval of a supersedeas bond. The trial court denied Waid's motion, holding that — because the funds had already been disbursed — the motion was moot. Although Waid's motion was moot when the trial court considered it, money remains in the court registry to which Waid's lien could attach.[2] Thus, the issue of the propriety of the trial court's ruling on the validity of Waid's lien is not moot. Because the trial court erroneously ruled that the money in the court registry was not "proceeds" of Ferguson's action against Teller, we reverse the trial court's order invalidating Waid's lien and remand to the trial court for further proceedings.

I

¶ 2 Sandra Ferguson is the principal of The Ferguson Firm, PLLC. Her firm began representing a group of clients in an employment discrimination case (hereinafter underlying matter) in August 2009. The clients agreed to a contingency fee arrangement but were unable to advance litigation

costs and so, with their consent, Ferguson approached multiple law firms, seeking a co-counsel willing to advance litigation costs and able to represent the clients in the event that she was suspended from practicing law by the Supreme Court. Stephen Teller's firm, Teller & Associates, PLLC, was one of the firms that Ferguson approached. After negotiating with Ferguson, Teller agreed to jointly represent the clients and to advance all litigation costs. While Teller and Ferguson were jointly representing the clients, Ferguson was, in fact, suspended from practicing law for 90 days and subsequently withdrew from the case. *See In re Disciplinary Proceeding Against Ferguson,* 170 Wash.2d 916, 246 P.3d 1236 (2011). During the period of Ferguson's suspension, the clients — represented solely by Teller — accepted a settlement offer.

¶ 3 Subsequently, Ferguson and Teller disputed the manner in which the contingent fee resulting from the settlement should be divided, and Ferguson served a notice of lien for attorney fees on Teller. On May 4, 2011, Ferguson hired Waid to represent her in the fee dispute with Teller.
511 The fee agreement *511 between Ferguson and Waid 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."* Waid invoiced Ferguson each month for services provided with no objection from Ferguson.

¶ 4 On May 27, 2011, Ferguson, seeking 90 percent of the contingent fee, sued Teller to resolve the fee dispute. Both parties agreed to deposit the full amount of the contingent fee — $530,107.58 — into the superior court registry. On January 30, 2012, the superior court granted Teller's motion for summary judgment, dismissing all of Ferguson's claims and ordering that the disputed funds be divided equally between Ferguson and Teller.

¶ 5 On February 9, Teller filed a motion seeking the disbursement of the funds, which required that Ferguson's response be filed by noon on February 15. However, Ferguson had retained a new attorney to replace Waid and wanted the new attorney to prepare the opposition papers, so long as an additional three weeks was granted to prepare the response. On February 10, Ferguson threatened to bring a legal malpractice claim against Waid. Waid then informed Ferguson that he was required to withdraw from representation. Waid filed a notice of withdrawal, moved for permission to withdraw immediately, and moved to continue the hearing on Teller's motion pursuant to Ferguson's instructions. The court granted Ferguson's request for an additional 30 days and authorized Waid's immediate withdrawal.

¶ 6 On February 14, Waid filed an attorney's lien in the amount of $78,350.85. On February 16, the trial court entered an order of partial disbursement in which it determined that Teller was entitled to receive his 50 percent share, but ordered that $101,000.74 of Ferguson's share would remain in the court registry until further notice because issues relating to the calculation of fees, costs, and interest had not yet been resolved. The trial court also ordered that an additional $78,350.85 would remain in the registry until further court order in order to protect Waid's lien. Lastly, it ordered that the remaining portion of Ferguson's 50 percent share — $85,702.20 — be disbursed to her. Ferguson, on the same day, filed an emergency motion in this court to stay the order of partial disbursement. Our commissioner granted a temporary stay and directed the parties to provide additional briefing on the issue.

¶ 7 On February 21, Ferguson appealed from the trial court's summary judgment order and the related orders granted in favor of Teller. She additionally moved the trial court to set a supersedeas bond amount in order to stay the partial disbursement to Teller. On March 22, our commissioner issued a ruling extending the temporary stay an additional 14 days and informing Ferguson that she was required to post a bond,

cash, or alternate security approved by the trial court in order to stay enforcement of the order. Ferguson and Teller then 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 the appeal. They also agreed that $78,350.85, representing the amount of Waid's lien, would remain in the registry pending further order of the trial court.[3]

¶ 8 Thereafter, on July 12, Ferguson moved to have the trial court summarily set aside Waid's attorney's lien. On July 30, the trial court granted the motion and directed the clerk to disburse to Ferguson the sum of $78,350.85 held in the court registry, together with accrued interest. The order stated, in pertinent part, as follows:

> The $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.
>
> The 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 Wash. App. 162, 170, 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson
> 512 was entitled to half *512 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.

Waid filed a notice of appeal from that order.

¶ 9 On August 22, Waid filed a motion to stay disbursement to Ferguson of the funds in the court registry representing Waid's attorney's lien and for approval of a supersedeas bond. However, Ferguson had previously withdrawn the funds. The trial court denied Waid's motion in an order issued on August 30, ruling that the motion was moot. The next day, Waid filed an amended notice of appeal to include the August 30 order.

II

¶ 10 Ferguson contends that Waid may not appeal from the July 30 order. This is so, Ferguson reasons, because the order does not constitute a "final judgment" and because here there was no "action" pertaining to Waid. We disagree.

¶ 11 A party may appeal as of right "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). Furthermore, pursuant to RAP 3.1, a party must be "aggrieved" to be permitted to seek review. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *Cooper v. City of Tacoma*, 47 Wash.App. 315, 316, 734 P.2d 541 (1987).

¶ 12 The July 30 order meets the criteria of RAP 2.2(a)(3). It is a written decision that affects Waid's substantial right to monetary relief and determined the action with respect to Waid's attorney's lien. Moreover, it is immaterial that Waid was not a named party to the fee dispute between Ferguson and Teller.

In rare cases, a person who is not formally a party to a case may have standing to appeal a trial court's order because the order directly impacts that person's legally protected interests. Thus, in the case of *In re Guardianship of Lasky,* 54 Wash. App. 841, 848-50, 776 P.2d 695 (1989), we held that an attorney was an "aggrieved party" for purposes of appealing from an order imposing sanctions against him but was not an "aggrieved party" for purposes of appealing from an order removing him as the legal guardian of an incompetent adult. *See also State v. G.A.H.,* 133 Wash. App. 567, 575-76, 137 P.3d 66 (2006) (Department of Social and Health Services could appeal, even though not a named party, because juvenile court ruling ordered department to assume responsibility for minor's welfare); *Breda v. B.P.O. Elks Lake City 1800 SO-620,* 120 Wash.App. 351, 353, 90 P.3d 1079 (2004) (sanctioned attorney became "aggrieved party" for purposes of appealing sanctions imposed directly against him); *Splash Design, Inc. v. Lee,* 104 Wash.App. 38, 44, 14 P.3d 879 (2000) (same).

Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wash.App. 753, 768-69, 189 P.3d 777 (2008); *accord Mestrovac v. Dep't of Labor & Indus.,* 142 Wash.App. 693, 704, 176 P.3d 536 (2008) ("`Aggrieved' has been defined to mean "`a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation.'" (quoting *G.A.H.,* 133 Wash.App. at 574, 137 P.3d 66 (quoting *State v. A.M.R.,* 147 Wash.2d 91, 95, 51 P.3d 790 (2002)))), *aff'd on other grounds sub nom. Kustura v. Dep't of Labor & Indus.,* 169 Wash.2d 81, 233 P.3d 853 (2010)). Waid has standing to appeal and the July 30 order is appealable.

¶ 13 Ferguson also contends that Waid may not appeal from the August 30 order. Again, we disagree. Appeal is authorized by RAP 2.2(a)(3).

¶ 14 A party may appeal as of right "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). Here, the August 30 order was a written decision that affected Waid's right to assert an attorney's lien. It also, in effect, determined the action by declaring moot Waid's motion to stay disbursement. The trial court's
513 determination that his motion was moot meant that Waid had no alternative recourse in this action by which Waid could *513 seek to obtain the disbursed funds. Accordingly, the August 30 order is appealable as a matter of right pursuant to RAP 2.2(a)(3).[4]

III

¶ 15 Waid contends that the trial court erred in invalidating his lien. This is so, he reasons, because the money that Ferguson received from working on the underlying matter constitutes "proceeds" pursuant to the applicable statute. We agree.

¶ 16 "The interpretation and meaning of a statute is a question of law subject to de novo review." *Bennett v. Seattle Mental Health,* 166 Wash.App. 477, 483, 269 P.3d 1079, *review denied,* 174 Wash.2d 1009, 281 P.3d 686 (2012). "The goal of statutory interpretation is to discern and carry out legislative intent." *Bennett,* 166 Wash.App. at 483, 269 P.3d 1079. "Absent ambiguity, a statute's meaning is derived from the language of the statute and we must give effect to that plain meaning as an expression of legislative intent." *Bennett,* 166 Wash.App. at 484, 269 P.3d 1079.

¶ 17 An attorney may sue a client for unpaid fees, but an attorney also has the option of asserting a lien to ensure payment without resorting to a lawsuit to recover those fees. *See* RCW 60.40.010(1). Once an attorney's lien attaches to an action, that lien "is superior to all other liens" and "is

not affected by settlement of the parties until the lien is satisfied in full." *Smith v. Moran, Windes & Wong, PLLC*, 145 Wash.App. 459, 466-67, 187 P.3d 275 (2008). RCW 60.40.010 provides, in pertinent part, as follows:

> (1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:
>
> . . .
>
> (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, or if the services were rendered under a special agreement, for the sum due under such agreement; and
>
> (e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.
>
> (5) For the purposes of this section, *"proceeds" means any monetary sum received in the action.*

(Emphasis added.)

¶ 18 The attorney's lien statute provides that an attorney has a lien "upon an action ... and its proceeds," which means "any monetary sum received in the action." RCW 60.40.010(1)(d), (5). Here, Waid's lien arose when Waid filed suit on behalf of Ferguson. Furthermore, Ferguson received a monetary sum in the action — 50 percent of the $530,107.58 contingent fee generated by the clients' decision to settle the underlying matter. The plain language of the statute establishes that "any monetary sum received in the action" constitutes "proceeds." Ferguson received a monetary sum and, therefore, received "proceeds" to which the lien attaches.

514 ¶ 19 Nevertheless, Ferguson contends that Waid's lien is invalid because he failed to *514 obtain a judgment in her favor in the underlying matter. In support of this contention, Ferguson cites to two cases in which we held that a former version of RCW 60.40.010[5] did not authorize a lien when the attorneys failed to obtain a monetary judgment in favor of their clients. *See Wilson v. Henkle*, 45 Wash.App. 162, 170, 724 P.2d 1069 (1986); *see also Suleiman v. Cantino*, 33 Wash.App. 602, 606-07, 656 P.2d 1122 (1983). Neither case guides our analysis. The previous version of the statute, in effect when *Wilson* and *Suleiman* were decided, required attorneys to obtain a monetary judgment in favor of their clients. Now, however, the amended statute requires only that Ferguson obtained "proceeds" in the action. "Proceeds" are defined as "any monetary sum received in the action." Ferguson received a monetary sum in the action and, therefore, received "proceeds." Thus, the trial court erred by invalidating Waid's lien.

¶ 20 Although the trial court correctly denied Waid's motion to stay the disbursement of the funds as moot, the question of whether Waid's lien is valid is not moot. Here, the trial court erred in determining that Waid's lien was invalid. Accordingly, we reverse the trial court's July 30 order

invalidating Waid's lien and remand for a determination of what amount, if any, of the funds remaining in the court registry are rightfully Waid's.

¶ 21 Reversed and remanded.

We concur: VERELLEN and SCHINDLER, JJ.

[1] Sandra Ferguson and Stephen Teller are principals of their eponymous law firms. The firms, not the individuals, were parties to the case in which Waid represented Ferguson. Nevertheless, our opinion will use last names and gendered pronouns when referring to the firms, as well as to the individuals.

[2] This was confirmed by counsel for the parties at oral argument in this court.

[3] Waid was not a party to this agreement.

[4] Although the August 30 order is appealable, the trial court did not err when it held that Waid's motion to stay was moot. CR 62 provides, in pertinent part, "Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment." CR 62(a). Judgment on the validity of Waid's attorney's lien was entered on July 30, yet he waited until August 22 to bring a motion to stay enforcement of the order. Pursuant to CR 62, Waid had no reason to expect that the funds would still be in the registry of the court 22 days after entry of the disbursement order. Unsurprisingly, the funds had, in fact, been disbursed in the interim. Thus, the trial court did not err by denying his motion as moot. However, not-withstanding the fact that Waid's motion to stay disbursement was moot at the time that it was considered by the trial court, the question of whether Waid's lien is valid is not moot because money remains in the court registry to which Waid's lien could attach.

[5] RCW 60.40.010 was amended in 2004. Laws of 2004, ch. 73, § 2 (effective June 10, 2004).

RCW 19.86.010

Definitions.

As used in this chapter:

(1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.

(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.

(3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

[1961 c 216 § 1.]

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

NOTES:

Hearing instrument dispensing, advertising, etc.—Application: RCW 18.35.180.

RCW 19.86.023

Violation of RCW 15.86.030 constitutes violation of RCW 19.86.020.

Any violation of RCW 15.86.030 shall also constitute a violation under RCW 19.86.020.

[1985 c 247 § 7.]

RCW 19.86.030

Contracts, combinations, conspiracies in restraint of trade declared unlawful.

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[1961 c 216 § 3.]

NOTES:

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.

RCW 19.86.040

Monopolies and attempted monopolies declared unlawful.

It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce.

[1961 c 216 § 4.]

RCW 19.86.050

Transactions and agreements not to use or deal in commodities or services of competitor declared unlawful when lessens competition.

It shall be unlawful for any person to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[1961 c 216 § 5.]

RCW 19.86.060

Acquisition of corporate stock by another corporation to lessen competition declared unlawful—Exceptions—Judicial order to divest.

It shall be unlawful for any corporation to acquire, directly or indirectly, the whole or any part of the stock or assets of another corporation where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

In addition to any other remedy provided by this chapter, the superior court may order any corporation to divest itself of the stock or assets held contrary to this section, in the manner and within the time fixed by said order.

[1961 c 216 § 6.]

RCW 19.86.070

Labor not an article of commerce—Chapter not to affect mutual, nonprofit organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in this chapter shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.

[1961 c 216 § 7.]

NOTES:

Labor regulations: Title 49 RCW.

RCW 19.86.080

Attorney general may restrain prohibited acts—Costs—Restoration of property.

(1) The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

[**2007 c 66 § 1; 1970 ex.s. c 26 § 1; 1961 c 216 § 8.**]

NOTES:

Effective date—2007 c 66: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2007]." [**2007 c 66 § 3.**]

RCW 19.86.085

Establishment of investigation unit—Receipt and use of criminal history information.

There is established a unit within the office of the attorney general for the purpose of detection, investigation, and prosecution of any act prohibited or declared to be unlawful under this chapter. The attorney general will employ supervisory, legal, and investigative personnel for the program, who must be qualified by training and experience. The attorney general is authorized to receive criminal history record information that includes nonconviction data for any purpose associated with the investigation of any person doing any act herein prohibited or declared to be unlawful under this chapter. Dissemination or use of nonconviction data for purposes other than that authorized in this section is prohibited.

[2008 c 74 § 7.]

NOTES:

Finding—2008 c 74: See note following RCW 51.04.024.

RCW 19.86.090

Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

NOTES:

Application—2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date—2007 c 66: See note following RCW 19.86.080.

Intent—1987 c 202: See note following RCW 2.04.190.

Short title—Purposes—1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

RCW 19.86.093

Civil action—Unfair or deceptive act or practice—Claim elements.

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

(1) Violates a statute that incorporates this chapter;

(2) Violates a statute that contains a specific legislative declaration of public interest impact; or

(3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

[2009 c 371 § 2.]

NOTES:

Application—2009 c 371: See note following RCW 19.86.090.

RCW 19.86.095

Request for injunctive relief—Appellate proceeding—Service on the attorney general.

In any proceeding in which there is a request for injunctive relief under RCW 19.86.090, the attorney general shall be served with a copy of the initial pleading alleging a violation of this chapter. In any appellate proceeding in which an issue is presented concerning a provision of this chapter, the attorney general shall, within the time provided for filing the brief with the appellate court, be served with a copy of the brief of the party presenting such issue.

[1983 c 288 § 5.]

NOTES:

Short title—Purposes—1983 c 288: See note following RCW 19.86.090.

RCW 19.86.100

Assurance of discontinuance of prohibited act—Approval of court—Not considered admission.

In the enforcement of this chapter, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of this chapter, from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the superior court of the county in which the alleged violator resides or has his or her principal place of business, or in Thurston county.

Such assurance of discontinuance shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of this chapter.

[**2011 c 336 § 556; 1970 ex.s. c 26 § 3; 1961 c 216 § 10.**]

RCW 19.86.115

Materials from a federal agency or other state's attorney general.

Whenever the attorney general receives documents or other material from:

(1) A federal agency, pursuant to its subpoena or Hart-Scott-Rodino authority; or

(2) Another state's attorney general, pursuant to that state's presuit investigative subpoena powers,

the documents or materials are subject to the same restrictions as and may be used for all the purposes set forth in RCW 19.86.110.

[1993 c 125 § 2.]

RCW 19.86.120

Limitation of actions—Tolling.

Any action to enforce a claim for damages under RCW **19.86.090** shall be forever barred unless commenced within four years after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW **19.86.020**, **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW **19.86.090**, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW **19.86.090** which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.

[**1970 ex.s. c 26 § 5; 1961 c 216 § 12.**]

NOTES:

*Action to enforce claim for civil damages under chapter **19.86** RCW must be commenced within six years. Unfair motor vehicles business practices act: RCW **46.70.220**.*

*Limitation of actions: Chapter **4.16** RCW.*

RCW 19.86.130

Final judgment to restrain is prima facie evidence in civil action—Exceptions.

A final judgment or decree rendered in any action brought under RCW **19.86.080** by the state of Washington to the effect that a defendant has violated RCW **19.86.020**, **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060** shall be prima facie evidence against such defendant in any action brought by any party against such defendant under RCW **19.86.090** as to all matters which said judgment or decree would be an estoppel as between the parties thereto: PROVIDED, That this section shall not apply to consent judgments or decrees where the court makes no finding of illegality.

[**1970 ex.s. c 26 § 6; 1961 c 216 § 13.**]

RCW 19.86.140

Civil penalties.

Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.

Every person, other than a corporation, who violates RCW **19.86.030** or **19.86.040** shall pay a civil penalty of not more than one hundred thousand dollars. Every corporation which violates RCW **19.86.030** or **19.86.040** shall pay a civil penalty of not more than five hundred thousand dollars.

Every person who violates RCW **19.86.020** shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation: PROVIDED, That nothing in this paragraph shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints or distributes, advertising in good faith without knowledge of its false, deceptive or misleading character.

For the purpose of this section the superior court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.

With respect to violations of RCW **19.86.030** and **19.86.040**, the attorney general, acting in the name of the state, may seek recovery of such penalties in a civil action.

[**1983 c 288 § 2; 1970 ex.s. c 26 § 7; 1961 c 216 § 14.**]

NOTES:

Short title—Purposes—1983 c 288: See note following RCW **19.86.090**.

RCW 19.86.145

Penalties—Animals used in biomedical research.

Any violation of RCW 9.08.070 through 9.08.078 or 16.52.220 constitutes an unfair or deceptive practice in violation of this chapter. The relief available under this chapter for violations of RCW 9.08.070 through 9.08.078 or 16.52.220 by a research institution shall be limited to only monetary penalties in an amount not to exceed two thousand five hundred dollars.

[2003 c 53 § 150; 1989 c 359 § 4.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

RCW 19.86.150

Dissolution, forfeiture of corporate franchise for violations.

Upon petition by the attorney general, the court may, in its discretion, order the dissolution, or suspension or forfeiture of franchise, of any corporation which shall violate RCW **19.86.030** or **19.86.040** or the terms of any injunction issued as in this chapter provided.

[**1961 c 216 § 15.**]

RCW 19.86.160

Personal service of process outside state.

Personal service of any process in an action under this chapter may be made upon any person outside the state if such person has engaged in conduct in violation of this chapter which has had the impact in this state which this chapter reprehends. Such persons shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of RCW **4.28.180** and **4.28.185**.

[**1961 c 216 § 16.**]

RCW 19.86.170

Exempted actions or transactions—Stipulated penalties and remedies are exclusive.

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW **19.86.020** and all sections of chapter 216, Laws of 1961 and chapter **19.86** RCW which provide for the implementation and enforcement of RCW **19.86.020** except that nothing required or permitted to be done pursuant to Title **48** RCW shall be construed to be a violation of RCW **19.86.020**: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title **18** RCW shall not be construed to be a violation of chapter **19.86** RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW **9A.20.010**(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

[**1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.**]

NOTES:

*Radio communications: RCW **80.04.530**.*

*Telecommunications: RCW **80.36.360**.*

RCW 60.40.010

Lien created—Enforcement—Definition—Exception.

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(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, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

(3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW **62A.9A-315**(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW **62A.9A-327** or a transferee under RCW **62A.9A-332**.

(6) Child support liens are exempt from this section.

[**2004 c 73 § 2;** Code 1881 § 3286; **1863 p 406 § 12;** RRS § 136.]

NOTES:

Purpose—Intent—Application—2004 c 73: "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double

taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW **60.40.010**(4), the statute is intended to apply retroactively." [**2004 c 73 § 1.**]

RCW 60.40.020

Proceedings to compel delivery of money or papers.

When an attorney refuses to deliver over money or papers, to a person from or for whom he or she has received them in the course of professional employment, whether in an action or not, he or she may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he or she should not be punished for a contempt.

[**2012 c 117 § 152;** Code 1881 § 3287; **1863 p 406 § 13;** RRS § 137.]

RCW 60.40.030

Procedure when lien is claimed.

If, however, the attorney claim a lien, upon the money or papers, under the provisions of *this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

[Code 1881 § 3288; **1863 p 406 § 14;** RRS § 138.]

NOTES:

***Reviser's note:** "this chapter" appeared in section 3288, chapter 250 of the Code of 1881, the lien sections of which are codified as chapter **60.40** RCW.

RCW 60.40.010

Lien created—Enforcement—Definition—Exception.

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(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, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

(3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW **62A.9A-315**(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW **62A.9A-327** or a transferee under RCW **62A.9A-332**.

(6) Child support liens are exempt from this section.

[**2004 c 73 § 2;** Code 1881 § 3286; **1863 p 406 § 12;** RRS § 136.]

NOTES:

Purpose—Intent—Application—2004 c 73: "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double

taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW **60.40.010**(4), the statute is intended to apply retroactively." [**2004 c 73 § 1.**]

RCW 60.40.020

Proceedings to compel delivery of money or papers.

When an attorney refuses to deliver over money or papers, to a person from or for whom he or she has received them in the course of professional employment, whether in an action or not, he or she may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he or she should not be punished for a contempt.

[**2012 c 117 § 152;** Code 1881 § 3287; **1863 p 406 § 13;** RRS § 137.]

RCW 60.40.030

Procedure when lien is claimed.

If, however, the attorney claim a lien, upon the money or papers, under the provisions of *this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

[Code 1881 § 3288; **1863 p 406 § 14;** RRS § 138.]

NOTES:

***Reviser's note:** "this chapter" appeared in section 3288, chapter 250 of the Code of 1881, the lien sections of which are codified as chapter **60.40** RCW.

THE FERGUSON FIRM, PLLC, Appellant,

v.

TELLER & ASSOCIATES, PLLC Respondent.

No. 68329-2-I, Linked with No. 69220-8-I.

Court of Appeals of Washington, Division One.

Filed: December 30, 2013.

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UNPUBLISHED OPINION

DWYER, J.

Sandra Ferguson, the principal of The Ferguson Firm, PLLC, spent substantial time and effort developing an employment discrimination case without the assistance of co-counsel. However, by early 2010, she found herself in need of a firm willing to advance litigation costs and—in the event that she was suspended from the practice of law—take responsibility for the case. She approached Stephen Teller, principal of Teller & Associates, PLLC,[1] and the two eventually agreed to work together on the case. Although the two discussed acceptable fee splitting arrangements, they dispute what agreement, if any, was ultimately reached. Subsequently, the Supreme Court suspended Ferguson from practicing law for 90 days. During the period of her suspension, and while Teller was solely representing the clients, a settlement agreement was reached. Thereafter, Ferguson filed an attorney's lien and filed a lawsuit against Teller, claiming that Ferguson was entitled to a substantial percentage of the contingent fee, not the 50 percent amount that Teller claimed Ferguson was entitled to pursuant to their contract.

The trial court granted in part Teller's motion for judgment on the pleadings and, subsequently, granted Teller's motion for summary judgment, dismissing the case. Because no genuine issues of material fact exist as to whether a valid contract existed between the parties, we affirm the trial court's grant of summary judgment in favor of Teller. We also affirm the trial court's denial of Teller's motion for sanctions, but we do so without prejudice.

I

On August 24, 2009, Ferguson entered into a fee agreement with four women (hereinafter the clients) who eventually became the named plaintiffs in a lawsuit against the ABC Corporation[2] (hereinafter the underlying matter). The clients were female managers who alleged that they had been subject to similar discrimination by the ABC Corporation. Ferguson's fee agreement with the clients provided for a hybrid one-third contingency fee and a flat fee. The agreement did not obligate Ferguson to file a lawsuit or to litigate the case; instead, Ferguson agreed to attempt to negotiate a settlement. Nevertheless, in order to preserve their claims, Ferguson ultimately did file suit on behalf of the clients in February of 2010.

During this time, Ferguson was defending herself against suspension by the Supreme Court. By June 2010, both Ferguson and the clients were aware that she could be suspended at any time thereafter. In part because of the possibility of suspension, Ferguson devoted substantial time to locating competent co-counsel. However, she also wanted to locate a co-counsel willing to advance litigation costs because she was unwilling to advance costs and her clients were either unwilling or unable to pay their own costs. Ferguson approached a number of firms, including Teller's.

In early September 2010, Ferguson and Teller discussed various fee sharing arrangements but did not reach an agreement. With a mediation session imminent, Ferguson e-mailed 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." Subsequently, Teller e-mailed Ferguson, "Be sure to let the clients know that I've not taken on any role yet. I think it's a good case and I'd like to be involved if we can work out a fee agreement." In late October, a mediation took place in the underlying matter. However, the mediation concluded without a settlement. One day later, Ferguson again sought Teller's assistance as co-counsel. Ferguson stated that she had reconsidered fee splitting arrangements that the two had discussed previously and determined that her firm "need[ed] to associate with a firm who can advance the costs." Teller agreed, at that point, to advance costs, and evidently Ferguson and Teller discussed a fee splitting arrangement because Teller e-mailed Ferguson on November 10, 2010, stating that, "Our proposed fee split is incorporated into the [attached] retainer for [the clients'] signatures." Teller's proposed fee agreement set forth, in pertinent part, "Teller & Associates, PLLC, and The Ferguson Firm PLLC, have between them agreed to a 50/50 split of fees, and each firm assumes joint responsibility for the representation." On the same day that Teller sent Ferguson the proposed fee agreement, Ferguson e-mailed the clients stating, "At this point, Steve has agreed to take joint responsibility for your case. His firm and mine will represent you going forward."

On November 18, 2010, Ferguson and Teller met with the clients and provided them with paper copies of the fee agreements; three of the four clients accepted the agreement and one chose not to pursue her claim. On November 22, Teller filed his notice of appearance. Shortly thereafter, Ferguson and Teller exchanged e-mail messages in which Ferguson questioned Teller's commitment to the case:

> Are you in this 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.

Teller assured Ferguson that he was committed to the case. Subsequently, Teller began working on the case, including expending over $9,000 in costs.

Thereafter, on February 2, 2011, a second mediation was held. This session also failed to result in a settlement. The next day, Ferguson was suspended from practicing law for 90 days. See In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 246 P.3d 1236 (2011). Ferguson withdrew from representing the clients and Teller successfully moved for a nine month continuance of the trial date. In late April 2011, while Ferguson was still suspended, the clients entered into a settlement agreement with the ABC Corporation. The settlement resulted in an earned contingency fee of $530,107.58.

On April 11, 2011, Ferguson e-mailed Teller saying that she was "somewhat confused whether *the contract between us* governs the fees I am paid . . . while lam suspended, or whether my fees for work on the case must be based on quantum meruit." (Emphasis added.) Ferguson added that "because the clients have no `dog in the fight' one way or the other, *the agreement between you and I* would stand and would govern the fee I am paid." (Emphasis added.) On April 15, Ferguson e-mailed Teller saying, "Just so you know, apart from the ethics issue, I may decided [sic] to take the position that I have not obtained the benefit of the bargain we made when we *agreed to the 50/50 arrangement.* I have not yet decided." (Emphasis added.) On April 20th, Ferguson e-mailed Teller, "I am entitled to fees based on quantum meruit. I am not sure I need to repudiate *the 50/50 joint representation agreement we had . . . ."* (Emphasis added.) Ferguson went on to say, "We *entered into our 50/50 joint representation agreement* contemplating the possibility of my suspension" and "I *agreed to that fee split* ONLY because you agreed to advance costs and be equally responsible for the workload . . . ." (Emphasis added.) On April 25, Ferguson e-mailed Teller, "I *agreed that you would receive 50% of the fees* BECAUSE you agreed to take the case forward with me and to advance costs. *That was the reason for our contract."* (Emphasis added.)

Thereafter, on April 27, Ferguson filed an attorney's lien asserting that, under a theory of quantum meruit, Ferguson was entitled to 90 percent of the contingent fee earned as a result of the settlement. On May 27, Ferguson filed a lawsuit against Teller. Ferguson asserted four causes of action: (1) a declaratory judgment as to whether a fee agreement existed, (2) a declaratory judgment as to whether quantum meruit was appropriate, (3) breach of contract, and (4) negligent misrepresentation. By stipulation, the amount of the contingent fee was deposited into the King County Superior Court registry on July 18, 2011.

Teller subsequently moved for judgment on the pleadings pursuant to CR 12(c). During the hearing on this motion, Ferguson's counsel, Brian Waid, conceded Ferguson's breach of contract claim. There is no indication that Ferguson, who was present at the hearing, objected to this concession. Thereafter, the trial court granted Teller's CR 12(c) motion, but only with respect to Ferguson's breach of contract and negligent misrepresentation claims. In a subsequent letter to the parties, the trial judge wrote, "Mr. Waid did state that Plaintiff was withdrawing her claim for breach of contract based on the authority cited in Defendant's CR 12(c) motion, specifically Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). The court dismissed the claim of negligent misrepresentation based on that same authority."

Thereafter, Teller moved for summary judgment, seeking a declaratory judgment that "(1) an express fee agreement existed between Defendant Teller and Plaintiff Ferguson and (2) Ferguson's claim for compensation in *quantum meruit* must be dismissed." Ferguson filed a cross-motion for

summary judgment. At oral argument, the trial court ruled that Teller had "established as a matter of law the existence of an express contract between the parties to divide attorney fees 50/50." Three days later, the trial court granted summary judgment in favor of Teller with respect to the "issue of whether Ferguson's suspension from the practice of law was a condition subsequent that rendered their agreement unenforceable so that attorney fees should be divided on a *quantum meruit* basis." Ferguson moved for reconsideration,[3] which the trial court denied on February 16, 2012.

On February 9, 2012, Teller moved for an award of fees and costs pursuant to CR 11 and RCW 4.84.185. The trial court denied Teller's motion, and Teller timely appealed.

On February 15, Ferguson's attorney, Waid, filed a notice of intent to withdraw. He also filed a declaration and attachments, wherein he documented the circumstances of his withdrawal, including allegations that Ferguson had deceived the court. Waid was replaced by Ferguson's current counsel. Ferguson timely appealed the trial court's rulings in Teller's favor.

II

As a preliminary matter, we refuse to consider Ferguson's declaration in support of her motion for reconsideration. Her declaration contained new evidence, which implicated new theories of the case, neither presented to nor considered by the trial court prior to its ruling on summary judgment.

"On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. A litigant may not make arguments on a motion for reconsideration that are "based on new legal theories with new and different citations to the record." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox, 130 Wn. App. at 241.

Ferguson contends that she provided additional evidence after summary judgment because she was not yet aware of Waid's asserted conflict of interest, and of an alleged scheme to interfere with her attorney-client relationship. Regardless of whether Ferguson's allegations in the declaration are true, they have no bearing on the trial court's summary judgment order, which addressed whether Ferguson and Teller had formed a contract. Accordingly, our review is circumscribed to the evidence called to the attention of the trial court prior to the entry of its order on summary judgment.

III

Ferguson contends that the trial court erred by dismissing the breach of contract and negligent misrepresentation claims. This is so, Ferguson asserts, because the trial court's ruling was not based on the legal standards for dismissal under CR 12(c) but, instead, on Waid's erroneous concession that the breach of contract claim was legally baseless. This claim is unavailing.

"We review de novo a trial court's order for judgment on the pleadings." Pasado's Safe Haven v. State, 162 Wn. App. 746, 752, 259 P.3d 280 (2011). "Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity." Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). "The `sins of the lawyer' are visited upon the client." Rivers, 145 Wn.2d at 679 (quoting Taylor v. Hl., 484 U.S. 400, 433, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (Brennan J., dissenting)).

Ferguson's attorney, Waid, conceded the breach of contract claim on the record:

> We did allege breach of contract, and I have my client's authorization to do this. I will — I will concede the defendant's argument that under Mazon vs. Krafchick — and I've lectured about that case before — that under Mazon vs. Krafchick we cannot prove a breach of contract. I think that's also significant to the 12(b)(6) motion that Your Honor will consider that's noted on Tuesday.

Subsequently, the trial court granted in part Teller's motion for judgment on the pleadings with respect to Ferguson's breach of contract and negligent misrepresentation claims, dismissing them both. Nevertheless, Ferguson now asserts that Waid's concession was a clear error of law, claims that Waid's concessions violated the rules of professional conduct, and proceeds to address the merits of the legal position that Waid declined to take.

Ferguson authorized Waid's concession by allowing him to appear as her representative and by refusing to contest his concession in the trial court. Waid's concession is binding upon Ferguson, regardless of whether Waid's legal analysis was flawed.[4] Accordingly, Ferguson's arguments regarding the merits of the legal position Waid declined to take are unavailing. In the trial court, Waid did not take a legal position on the breach of contract claim, but instead conceded that the claim was not viable. By doing so, he waived the opportunity for Ferguson to argue the merits both in the trial court and on appeal. The trial court properly dismissed the breach of contract claim.

The trial court also properly dismissed Ferguson's negligent misrepresentation claim in light of Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). Mazon stands for the proposition that co-counsel may not sue each other to recover lost or reduced prospective fees. Mazon, 158 Wn.2d at 448. The gravamen of Ferguson's claim is that Teller misrepresented his intention to prepare for trial and advance costs and, instead, focused his efforts on effectuating a settlement. From this, Ferguson asserts that she is entitled to all damages proximately caused by Teller's misrepresentation. In effect, Ferguson asks for the difference between what she earned by virtue of the clients settling and what she could have earned had the case been taken to trial, with a better result being achieved. What Ferguson seeks to recover is lost prospective fees, which Mazon prohibits. Accordingly, the trial court did not err.

IV

Ferguson next contends that the trial court erred by granting summary judgment in favor of Teller on the issue of whether Ferguson and Teller contracted to evenly split the contingency fee. This is so, she reasons, because the trial court resolved genuine issues of material fact in favor of Teller. We disagree.

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). On a summary judgment motion, the trial court must review all evidence in the light most favorable to the nonmoving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 350, 588 P.2d 1346 (1979). The motion should be granted when a reasonable person could reach only one conclusion. Lamon, 91 Wn.2d at 350.

"Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

Ferguson asserts five reasons for why the trial court improperly granted summary judgment on the issue of contract formation: (1) the trial court disregarded evidence that Ferguson rejected the draft retainer agreement that Teller presented to the clients; (2) the trial court disregarded evidence that Teller knew that Ferguson had another attorney to handle the case in the event of her suspension; (3) the trial court disregarded evidence that Ferguson and Teller intended to negotiate a separate written co-counsel agreement; (4) the trial court decided the ultimate issue when it held that Teller substantially performed; and (5) Ferguson's and Teller's words and conduct establish that there was no feesharing contract. Each of these assertions will be addressed in turn.

First, Ferguson's present assertion that she ultimately rejected the retainer agreement Teller presented to the clients does not establish trial court error. Ferguson repeatedly confirmed the existence of a contract in a series of e-mail exchanges[5] and presents no evidence of objective manifestations indicating otherwise.

Second, Ferguson's assertion that Teller knew that Ferguson had another attorney to handle the case if she was suspended also does not establish trial court error. The e-mail Ferguson cites in support of this claim actually refutes her position: *"Prior* to *mediation,* however, I think I need my own attorney, Shawn Newman, to be my back-up should I get suspended." (Emphasis added.) This e-mail was sent several months before the fee agreement at issue was executed, and Ferguson's statement explicitly addresses the relevant time period as being "prior to mediation." Ferguson's objective manifestations following mediation indicate that circumstances changed when the case failed to settle; indeed, Ferguson's e-mail messages to Teller admitting that they had a contract belie the suggestion that evidence of this earlier e-mail created a genuine issue of material fact.

Third, no trial court error is apparent from Ferguson's assertion that she intended, and that Teller understood, that they would enter into a written cocounsel agreement separate from the contract with the clients. Ferguson e-mailed 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 them and with each other." This language, coupled with Ferguson's assertion that she has employed separate co-counsel agreements in the past,[6] does suggest that Ferguson, at one time, contemplated entering into a separate cocounsel agreement. However, the numerous e-mail messages sent by Ferguson following the presentation of Teller's retainer agreement to her and to the clients, wherein she acknowledges the existence of a contract, could lead a reasonable person to only one conclusion—that the retainer agreement drafted by Teller constituted a contract between the attorneys.

Fourth, the trial court did not improperly decide the ultimate issue of whether Teller lived up to his end of the bargain. This is so because Ferguson provided no evidence that Teller failed to advance litigation costs or was unwilling to advance costs in an amount equal to that which Ferguson had contemplated. The parties did not specify that Teller had to pay a certain amount of costs in order to perform pursuant to the contract. Moreover, there is no evidence that the parties ever intended to make substantial performance under the contract contingent upon paying a certain amount of money other than simply "litigation costs." The case settled before Teller had advanced the amount of money Ferguson had, perhaps, contemplated. However, Teller did advance costs and represented the clients, leading to the clients' decision to settle. The contract did not require more.

Fifth and finally, the parties' words and conduct after the fee agreement was signed by the clients did not establish the absence of a contract. Ferguson asserts that Teller's response to Ferguson's e-mail sent on December 8, 2010, wherein she asked whether Teller was planning to withdraw, shows that both parties thought that he could withdraw without breaching a contract. This e-mail exchange does not accomplish what Ferguson wants it to—Teller merely says he does not plan to withdraw. Furthermore, the numerous e-mail messages referring explicitly to the existence of a contract establish that the parties understood that they had an agreement. This e-mail exchange is not inconsistent with the parties' objective manifestations indicating that a contract was formed.

Ultimately, the objective manifestations of the parties reveal that both intended to contract for a 50/50 fee splitting arrangement. Accordingly, the trial court did not err when it held that there was a contract to that effect, and it did not improperly resolve genuine issues of material fact when it ruled in favor of Teller.

V

Ferguson next contends that the trial court erred by granting summary judgment in favor of Teller on the issue of whether the contract was enforceable against Ferguson as a matter of law. This is so, she asserts, because Teller failed to provide consideration for the fee agreement, because Ferguson "substantially performed," and because the agreement violated public policy pursuant to RPC 1.5(e). We disagree.

Ferguson first contends that Teller failed to provide consideration for the fee agreement. This is so, she reasons, because the amount of costs that Teller advanced was miniscule when compared to the amount that Ferguson anticipated he would advance. Ferguson's contention lacks merit.

"Consideration is a bargained-for exchange of promises." Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Determining whether consideration supports a contract is a question of law. Hanks v. Grace, 167 Wn. App. 542, 548, 273 P.3d 1029, review denied, 175 Wn.2d 1017 (2012). "Courts generally do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test" which "`is concerned not with comparative value but with that which will support a promise." Labriola, 152 Wn.2d at 834 (quoting Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 314, 430 P.2d 591 (1967)). We will "not relieve a party of a bad bargain . . . unless the consideration is so inadequate as to constitute constructive fraud." Emberson v. Hartley, 52 Wn. App. 597, 601, 762 P.2d 364 (1988).

Ferguson fails to perceive the distinction between adequacy and sufficiency of consideration. Adequacy deals with the comparative value of the exchanged acts or promises, whereas sufficiency deals with that which will support a promise. We will not invalidate a contract for insufficient consideration merely because the parties exchanged acts or promises that differed in comparative value. So long as the consideration exchanged will support the promise, the consideration is sufficient. Nevertheless, Ferguson argues, in effect, that we should invalidate the contract because Teller paid very little yet profited considerably when the clients decided to settle. Implicit in her position is that Teller did not give comparative value for what he received, or, stated differently, that Teller did not give adequate consideration. However, the consideration provided by Teller does not suggest constructive fraud and, absent evidence to the contrary, we find no need to inquire into adequacy. Ferguson and her clients determined that they needed someone to finance the litigation and, to that end, contracted with Teller to advance costs. The fact that Teller received a good deal when the clients chose to settle does not mean that the consideration he provided was inadequate.

Ferguson next contends that she "substantially performed" and should, therefore, receive one-third of the second settlement offer that the clients rejected. The basis for her claim is that she procured two sizeable settlement offers, ultimately rejected by the clients, prior to the case being settled. Her contention lacks merit.

"It has long been the rule in this state that where the compensation of an attorney is to be paid contingently, and the attorney is discharged prior to the occurrence of the contingency, the measure of the fee is not the contingent fee agreed upon but reasonable compensation for the services actually rendered." Barr v. Day, 124 Wn.2d 318, 329, 879 P.2d 912 (1994). The "substantial performance" exception to the general rule that clients may fire their attorneys at any time with or without cause is meant to protect attorneys from their clients. Barr, 124 Wn.2d at 329.

Ferguson's contention is unavailing because she was not fired by her clients—she was forced to withdraw due to her suspension by the Washington State Supreme Court. The "substantial performance" exception is designed to protect attorneys from clients, not attorneys from other attorneys. More specifically, the exception protects attorneys from clients, with whom lies the authority to accept or reject a settlement offer,[7] who would seek to unjustly enrich themselves by firing their attorney immediately prior to accepting a settlement offer. Because Teller could not accept or reject a settlement offer without the clients' authorization, there is no reason to extend this exception to protect Ferguson from Teller. Accordingly, Ferguson may not avail herself of the "substantial performance" exception.

Ferguson finally contends that the fee division violates public policy as expressed by RPC 1.5(e). This is so, she avers, 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 advance litigation costs; and (3) Ferguson's suspension ended joint responsibility. Her contention lacks merit.

"Attorney fee agreements that violate the RPCs are against public policy and unenforceable." Vallev/50th Ave., LLC v. Stewart, 159 Wn.2d 736, 743, 153 P.3d 186 (2007). RPC 1.5(e) allows for nonproportional fee agreements between attorneys, subject to some restrictions:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) (i) the division is in proportion to the services provided by each lawyer or 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).

Ferguson first contends that both she and Teller were required to sign the fee agreement. Neither RPC 1.5(e) nor Comment 7[8] to the rule includes such a requirement, and Ferguson has failed to provide a compelling reason why this court should read into the rule such a requirement.

Ferguson next contends that the retainer agreement did not fully disclose Teller's duty to advance litigation costs. Neither RPC 1.5(e) nor Comment 5[9] to the rule includes such a requirement. Ferguson asserts that the contract violated the rule because Teller had a strong incentive to settle the case; however, her assertion disregards the fact that the clients have the ultimate authority to authorize a settlement. RPC 1.2(a). Neither the letter nor the spirit of RPC 1.5(e) required the attorneys to disclose to the clients that Teller would pay for all litigation costs.

Ferguson finally contends that her suspension ended her joint responsibility with Teller. WSBA Advisory Opinion 1522 states, "The Committee was of the unanimous opinion that `joint responsibility' as used in RPC 1.5(e)(2) refers to legal liability to see that the client's work is competently performed." The term "legal responsibility" does not involve the practice of law. See Elane v. St. Bernard Hosp., 284 Ill. App. 3d 865, 872, 672 N.E.2d 820 (1996) (a former lawyer who became a judge sought enforcement of a fee agreement even though she could no longer practice law). There appears to be no meaningful distinction between "legal liability" and "legal responsibility" in this context. Therefore, the fact that Ferguson was suspended from practicing law did not mean that she no longer had "legal liability" with respect to the clients in the underlying matter. Accordingly, the fee does not, as Ferguson asserts, violate public policy as expressed by RPC 1.5(e).

VI

Ferguson next contends that she is entitled to choose between a quantum meruit method of fee division or a lodestar fee calculation. This is so, she reasons, because her fee agreement with Teller permits her to elect between these methods of fee calculation. We disagree.

The contract provision invoked by Ferguson reads, in pertinent part, as follows:

> 6. 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 nonreimbursed 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 prorata 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).

Ferguson is incorrect because this provision, by its terms, applies if *attorneys* withdraw for cause. Only Ferguson withdrew. Accordingly, Teller is not, as Ferguson claims, the "successor law firm." A successor law firm would be a firm that would take over the case after both Ferguson and Teller withdrew for cause. Because only Ferguson withdrew, she may not avail herself of this contract provision.

VII

Teller contends that we should sanction Ferguson for the manner in which she has conducted this appeal and that we should reverse the trial court's order denying sanctions and remand in light of newly discovered evidence. We decline to sanction Ferguson for her conduct of this appeal. Further, we affirm the trial court's denial of Teller's request for sanctions. However, we affirm the trial court's order without prejudice. In rendering our decision, we do not intend for the law of the case doctrine to preclude Teller, if he chooses to do so, from presenting new evidence to the trial court in support of a new request for sanctions.

Affirmed.

Schindler, J., and Verellen, J., concurs.

[1] Sandra Ferguson and Stephen Teller are principals of their eponymous law firms. The firms, not the individuals, are parties to this case. Nevertheless, our opinion will use last names and gendered pronouns when referring to the parties, as well as to the individuals.

[2] ABC Corporation is a pseudonym used by the parties, presumably to protect the identity of the corporation.

[3] Ferguson failed to include her motion for reconsideration in our Clerk's Papers.

[4] Even if Waid's concession violated the Rules of Professional Conduct, which we do not assume, such a violation would not form the basis for an appellate challenge to Waid's trial court legal strategy. See Hizey v. Carpenter, 119 Wn.2d 251, 261-62, 830 P.2d 646 (1992) (explaining that the Rules of Professional Conduct are not statutes promulgated by the legislature and are not intended as a basis for civil liability).

[5] See supra pp. 5-6.

[6] rguson stated that she has used separate co-counsel agreements both with Teller and with other attorneys.

[7] "A lawyer shall abide by a client's decision whether to settle a matter." RPC 1.2(a).

[8] "[T]he client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing."

[9] "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."

THE FERGUSON FIRM

August 01, 2019 - 11:21 AM

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