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Supreme Court No. 97395-4
Court of Appeals No. 74512-3-I

IN THE WASHINGTON SUPREME COURT

SANDRA FERGUSON, ET AL.,
Petitioner/Appellant/Plaintiff,

v.

BRIAN J. WAID, ET AL.
Respondent/Appellee/Defendant.

Petition of Court of Appeals Decision

**PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO
PETITION FOR REVIEW**

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**Petitioner’s Reply to Part II of Respondent’s Answer: “Rejoinder
Re: Decision Below”.**

In its April 15, 2019 opinion, Division I holds that Waid is *not* barred by the doctrine of res judicata from litigating his attorney’s fee claim multiple times—first in his client’s case and later, in this case. *See April 15, 2019 Unpublished Opinion of the Court of Appeals in 74512-3-I, at 13-16*. Also, Division I granted summary judgment to Waid for \$50,000 in fees based on its finding that Ferguson’s assent to the charges on Waid’s invoices is established as a matter of law and therefore, Waid prevails on his account stated claim because Ferguson received Waid’s invoices from May 2011 to January 2012 and did not contemporaneously object, but waited to object until she had secured a different attorney (John Muenster) to represent her in the underlying matter. *Id. at 16-21*.

On April 5, 2011, Ferguson consulted Waid because she was concerned that her co-counsel, Stephen Teller, might be injuring their clients while she was unable to protect them. **CP 352, 355**. On May 4, 2011, Ferguson and Waid executed a contract for legal services pursuant to which Waid promised to represent Ferguson in *Endres v. Safeway*, 10-2-06166-4 SEA. Ferguson promised to pay Waid’s law firm at the hourly rates charged for his time and his associate’s time on the matter. And,

Waid promised to investigate Teller's suspected fraud on Ferguson and the *Endres* women. **CP 283**. Waid filed a Limited Notice of Appearance in the *Endres* case. **CP 286-287**. After that, Waid never filed his client's lien-notice which he had helped Ferguson to prepare and which he knew had been served on Safeway and Teller. **CP 1015, 2648**. Waid took no action to enforce Ferguson's rights as the priority lienholder. Instead, Waid filed a separate lawsuit in his client's name (i.e., *Ferguson v. Teller*, 11-2-19221-1 SEA). Then, Waid took the lead in drafting a Stipulation and Order which provided for the deposit of the proceeds from the "2011 case" (i.e., the *Endres* settlement funds) to be deposited into the court registry of the *Teller* case. **CP 213**. After five months of active litigation, Waid disavowed the claims pled against Teller, advising the trial court that the claims never had any merit to begin with because of a Supreme Court case which had been published for five years before *Ferguson v. Teller* was filed. **CP 116**. Ferguson alleged in 2012 when she appealed from the adverse judgment in *Ferguson v. Teller*, that Waid did not obtain her informed consent before conceding that her claims were meritless. **CP 113-121**. She makes the same allegation in this lawsuit. **CP 1-26**. Furthermore, Ferguson alleged that the Supreme Court opinion Waid cited

as the basis for disavowing her claims against Teller was inapposite.¹ In February 2012, Waid abruptly withdrew on a false pretext over Ferguson’s objections, leaving Ferguson without legal representation with a response to Teller’s CR 11 motion seeking sanctions of \$102,000 against Ferguson (not Waid, the attorney who filed the pleadings and then disavowed the claims he pled). Ferguson’s response was due in a few days.² Four days later, Waid filed his lien for attorney’s fees and attached \$78,350.85 of the funds he had caused to be deposited into the court registry. **CP 1396-1398.** Waid sought summary adjudication in *Ferguson v. Teller* for the fees he claimed to be owed for his failed representation of Ferguson in *Endres v. Safeway*, 10-2-06166-4 SEA and *Ferguson v. Teller* (collectively, “the underlying matter”). **CP 1407-1409.** Ferguson moved to invalidate Waid’s lien. The trial court granted Ferguson’s motion, finding that Waid’s lien was “invalid under RCW 60.40.010(c),(d), and (e) because [t]he funds are currently in the Court’s registry, not in the “hands of an adverse party. RCW 60.40.010(c).” And, held that “[t]he \$530,107.58 in attorney’s fees do not represent ‘proceeds’ received by Ferguson after arbitration or mediation due to services performed by Waid...because [t]he funds were earned by Teller and Ferguson well

¹ Dick Kilpatrick, one of Ferguson’s expert witnesses, agrees. **CP 1789-1800** (Kilpatrick Decl.).

² See *Appellee’s Response Brief*, p. 18, included in Appendix hereto.

before Mr. Waid was retained.” *See Order Granting The Ferguson Firm’s Motion to Set Aside Waid Attorney’s Lien And Ordering Disbursement of Funds. CP 1388:18-25, 1389:1.*

Waid appealed the trial court’s order invalidating his lien. The Court of Appeals held that “the trial court erred by invalidating Waid’s lien”. It reasoned that although “**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... the amended statute requires only that Ferguson obtained “proceeds’ in the action.”**

Ferguson v. Teller, 178 Wn.App. 622, 632 (2012) (emphasis added).

Division I found that the money in the registry was Ferguson’s earnings “generated by [her] clients’ decision to settle [the *Endres* case]” and also, that Waid caused the proceeds from the *Endres* settlement to be deposited by Safeway into the court registry of the *Ferguson v. Teller* case where Waid (as opposed to his client) was the priority lienholder. *Id.* at 631.

Division I knew that Waid’s conduct of the underlying matter deprived Ferguson of possession and control of her own undisputed funds (\$265,000) throughout Waid’s entire representation.³ Nevertheless,

³ Ferguson’s money was in the hands of Safeway (the “adverse party”) from May 28, 2011 to August 8, 2011 and on August 9, 2011, was deposited into the court registry by Safeway. Teller filed counterclaims on August 7, 2011, claiming that he might be entitled to less than 50% under his contract theory of the case. Before Teller brought this

Division I held that the Legislature intended to strengthen the attorney's lien when it enacted the 2004 amendments to the attorney-lien statute. Thus, Waid could use an attorney's lien to attach his client's personal property even though he had not obtained a judgment in Ferguson's favor, nor a settlement. Division I held that the funds earned by *Ferguson* upon settlement of the *Endres v. Safeway* case constituted "proceeds received in the [Ferguson v. Teller] action" under RCW 60.40.010(1)(d) and (5). *Ferguson v. Teller*, at 631. As a preliminary matter, Division I held that Waid had the right to appeal the trial court's order invalidating the lien because it had the effect of a final judgment. *Id.* at 628-630. Division I rejected Ferguson's argument that the validity of the lien was a moot issue because the portion of the funds in the registry *that belonged to Ferguson* had already been disbursed from the registry and therefore, there were no funds in the registry to which Waid's lien could attach. The Court of Appeals rejected this argument too. It held that the validity of Waid's lien was not a moot issue because **"money remains in the court registry to**

meritless counterclaim, which would later be dismissed with prejudice, he was conceding that Ferguson was entitled to 50% of the fee under the "contract" he claimed required a 50-50 division of the contingent fee he had charged the Endres plaintiffs. On November 2, 2011, the trial court dismissed Teller's counterclaim with prejudice. **CP 1021, 1029.** Waid continued to represent Ferguson until February 10, 2012. In all that time, Waid did not move to disburse Ferguson's \$265,000 from the court registry. On February 14, 2012, after abruptly withdrawing over Ferguson's objections, Waid filed his Notice of Lien Claim For Attorney's Fees of \$78,350.85 which attached to the money in the court registry. **CP 1396-1398.**

which Waid’s lien could attach.” *Id.* at 625, 630 fn. 4. This referred to \$290,000 in the court registry at the time, which the Court knew would otherwise be disbursed to Teller; *not* Ferguson. The Court of Appeals held that Waid’s lien arose by operation of law at the time he filed the *Ferguson v. Teller* lawsuit and “[o]nce 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’”. Thus, the Court of Appeals remanded the matter to the trial court **“for a determination of what amount, if any, of the funds remaining in the court registry are rightfully Waid’s.”** *Id.* At 632. After remand, Waid refused to adjudicate his fee-claim. He did not oppose Teller’s motion to disburse the remaining \$290,000 to Teller. Therefore, the \$290,000 was disbursed to Teller. **CP 2023-2024.**

On October 2014, Ferguson filed this lawsuit against Waid for malpractice, breach of fiduciary duty, and Consumer Protection Act violations. **CP 1-26.** Waid countersued for his alleged fees (\$78,350.85 plus interest) he still claims to be owed for the failed representation of Ferguson in the *Endres v. Safeway* and *Ferguson v. Teller* cases. **CP 27-46.** On June 19, 2015, the trial court (Judith Ramseyer, J.) denied Waid’s motion for summary judgment as to Ferguson’s malpractice and CPA

claims because genuine disputes of material fact warrant a trial. **CP 2472-2473**. On November 13, 2015, the trial court granted Ferguson’s motion for summary judgment, finding that the “counterclaim is barred by res judicata...” because “Mr. Waid had the opportunity to fully litigate his claim for alleged fees from Plaintiff” during *Ferguson v. Teller*. **CP2075-2077**. On November 30, 2015, after one year of active litigation, the trial court granted Waid’s request for the involuntary dismissal of Ferguson’s case *without prejudice*. **CP 2403-2455 (RP 11/30/15)**. The order was entered December 1, 2015. **CP 2130-2131**. Ferguson re-filed her malpractice and CPA claims. **CP 2170-2196**. The court clerk issued a new case schedule under a new cause number (*Ferguson v. Teller, 15-2-28797-5 SEA*). Waid moved for reconsideration and dismissal with prejudice. **CP 2143-2159**. Reconsideration was granted, Ferguson filed a response, and Waid’s motion was denied. **CP 2464-2465**. Waid moved for entry of judgment, Ferguson objected, the trial court entered judgment, concluding that there was “no just reason for delay”. **CP 2466-2467**. Waid appealed several rulings made by the trial court in the the 2014 action. **CP 2468-2470**. *See also April 15, 2019 Op., pp. 1-2*. Waid sought a stay of the 2015 action until his appeal was resolved, which was granted. On April 15, 2019, the Court of Appeals resolved Waid’s appeal. Division I’s opinion holds that Waid is not barred by the doctrine of res

judicata from re-litigating his fee-claim in this case, although he already litigated the same fee claim against the same client, in *Ferguson v. Teller*. Division I reaches this result by deciding that the 2004 amendments to the attorney-lien statute were meant to overrule or correct the strict-construction rule enunciated in *Ross v. Scannell*, 97 W.2d 598, 647 P.2d 1004 (1982), therefore, *Ross* is no longer binding on the lower courts (*Ross* held, “The attorney lien statute must be strictly followed and not judicially expanded...”). Division I reasons that this is because the 2004 amendments to RCW 60.40.010 “**significantly changed the statute**” to grant “**super priority**” powers to the attorney’s charging lien.⁴ Division I declared that its pre-amendment attorney-lien decisions, *Suleiman v. Cantino*, 35 Wn.App. 602, 656 P.2d 1122 (1983) and *Wilson v. Henkle*, 45 Wn.App. 162, 724 P.2d 1069 (1986), which were decided in compliance with *Ross*—are no longer good law. Thus, Division I holds that because of

⁴ Division I’s view of the purpose and effect of the 2004 amendments first appears as dicta in *Smith v. Moran, Windes & Wong, PLLC*, 145 Wash.App. 459, 469 (¶¶ 24, 26-27), 187 P.3d 275, 281 (Div. 1, 2008). This dicta planted the seed that would fully flower in *Ferguson v. Teller*, 178 Wn.App. 622, 632 (held that Ferguson’s and Teller’s earnings from the *Endres* case, deposited and held in the court registry by Waid, were “proceeds received in the action” under 60.40.010(1)(d) and (5), therefore, the money could be lawfully attached by Waid’s lien filed in *Ferguson v. Teller*, 11-2-19221-1 SEA, although Waid did not obtain a favorable judgment or a settlement on behalf of his client. After Division I’s opinion in *Ferguson v. Teller*, the attorney-lien statute (as amended in 2004) was interpreted even more broadly by Division I’s April 15, 2019 opinion, which held that the attorney’s lien provides an *additional* opportunity for attorneys to litigate a fee claim against a client, rather than providing an *alternative* to the filing of a lawsuit against the client for the fees he is allegedly owed.

the 2004 amendments to the attorney-lien statute, it is no longer bound to follow *Ross v. Scannell*. See *April 15, 2019 Opinion (unpublished)*.

Division I's opinion also grants summary judgment to Waid on his account stated claim on the basis that Ferguson's failure to contemporaneously object to the charges contained in Waid's invoices between May 2011 and February 2012, constitute "assent" as a matter of law, even though Ferguson alleges in this lawsuit that Waid engaged in false and deceptive acts or practices which placed her under duress and prevented her from discharging Waid and retaining replacement counsel after she began to distrust Waid. **CP 362, 373, 392, 662, 757, 759, 949-950, 959-960, 2656, 2677-2689, 1070, 1030-1031. 3285-3328.**

Ferguson asks this Court to grant this petition for review in order to decide whether the lower courts are still bound to follow the strict-construction rule for charging liens that this Court enunciated in *Ross v. Scannell*, regardless of the 2004 amendments to RCW § 60.40.010. Waid asks the Court to deny this petition and not resolve the conflict between the Supreme Court, Division I, and the other two divisions of the Court of Appeals that continue to follow *Ross*. The criteria for granting review is met. See RAP 13.4(b)(1),(2). Ferguson's petition for review "involves an issue of substantial public interest that should be determined by the

Supreme Court.” RAP 13.4(b)(4). Therefore, this Court should grant Ferguson’s petition and resolve the conflict.

Reply to Part IV of Waid’s Answer: Waid’s statements of fact are disputed. The disputes of fact will be resolved by a jury.

In Part IV (“Statement of the Case”) Waid provides his version of the disputed material facts in *Ferguson v. Waid*, 15-2-28797-5 SEA. (*See Resp.’s Answer*, pp. 3-10.) For almost four years now, Waid has delayed the trial of Ferguson’s malpractice and CPA claims, while he appeals the trial court’s adverse rulings in *Ferguson v. Waid*, 14-2-29265. On April 15, 2019, Division I resolved Waid’s appeal.⁵ Ferguson is finally free to proceed to trial with her claims. *See April 15, 2019 Op.*, pp. 10-13 (denying Waid’s request to reverse the trial court’s orders denying summary judgment dismissal of Ferguson’s CPA claim and affirming the trial court’s rulings). Therefore, a jury will consider the evidence and decide if Waid is liable for malpractice.⁶ Also, the jury will decide

⁵ Waid appealed from several orders of the trial court in *Ferguson v. Waid*, 14-2-29265-1 SEA. Waid requested and obtained an order of involuntary dismissal of Ferguson’s case without prejudice pursuant to CR 41, Ferguson re-filed and a new case schedule was issued under a new cause number, *Ferguson v. Waid*, 15-2-28797-5 SEA. Waid sought and obtained a stay of the 2015 action while he pursued his appeal. Ferguson will be proceeding to trial under the 2015 cause number.

⁶ Ferguson’s expert witness, Peter Jarvis, will testify at trial, to assist the jury in understanding the evidence of malpractice. *See*, Declaration of Peter Jarvis. **CP 2233**. Richard Kilpatrick was Ferguson’s expert witness at Waid’s motion for summary judgment was denied. *See* Kilpatrick Declaration. **CP 1789-1800**. However, Kilpatrick was also a fact witness because Ferguson tried to hire him when Waid abandoned her on

whether Waid is liable for violating Washington’s Consumer Protection Act (CPA).

Petitioner’s Reply to Part V of Answer: Respondent’s Arguments.

A. Contrary to Waid’s assertion, Ferguson did *not* “abandon” her claim of Economic Duress. Ferguson raised this issue in her appellate brief filed in the Court of Appeals. The brief discusses Waid’s acts, errors, and omissions as Ferguson’s attorney in the underlying matter and his false and deceptive acts or practices which injured Ferguson and at least one other client, Angela Oppe. This goes to the heart of the malpractice and CPA claims which will be tried before a jury.

See Resp. ’s Answer, pp. 10-11 (Waid argues that Ferguson waived duress or coercion as defense to account stated claim).

Whether Ferguson “assented” to Waid’s charges in the invoices she received from May 2011 to February 2012 is a question for the trier of fact. Furthermore, Ferguson filed Appellee’s Response Brief which argues that—as Ferguson’s attorney in the *Endres v. Safeway* and *Ferguson v. Teller* cases—Waid engaged in unfair or false and deceptive business practices in violation of the Consumer Protection Act (RCW §19.86), and that his unfair or deceptive acts, errors, and omissions in the underlying matter (especially, depriving Ferguson of possession and control of her own \$265,000 over the course of the

February 10, 2012, while an important motion was pending. See Kilpatrick emails. CP 2677-2689.

entire representation) placed Ferguson under economic duress and prevented her from discharging Waid and retaining a different attorney. While her money was in the registry, her car was repossessed, she lost her health insurance, she fell behind on her mortgage payments and was forced to borrow to meet personal and business expenses. **CP 949-950**. *See also Appellee's Response Brief in 74512-3-I.*⁷ Although Ferguson made no payments as the unpaid fees Waid claimed steadily mounted to \$78,350.85, Waid showed little concern. **CP 290-315**. This was because Waid knew that *no less* than \$265,000 of the funds he had caused to be deposited into the court registry belonged to Ferguson. **CP 3285-3328**. Furthermore, it is clear from the record that Ferguson *did* object to Waid's fees and his deceptive conduct as soon as she retained a different attorney (i.e., John Muenster). The first thing Muenster after he appeared, was approach Teller's attorney about disbursing Ferguson's undisputed funds from the court registry. The two attorneys signed and filed a stipulated order providing for the disbursement of all undisputed funds from the registry. However, by this time, Ferguson's clear title to \$265,000 of the funds in the court registry was clouded by Teller's

⁷ The Appellee's Response Brief is part of Petitioner's Appendix submitted herewith.

pending CR 11 motion for sanctions filed on February 9, 2012.⁸ Also, Ferguson's title was clouded by Waid's Notice of Lien Claim For \$78,350.00 filed on February 14, 2012. **CP 1396-1398**. Therefore, only about \$85,000 was immediately disbursed to Ferguson because of Muenster's efforts on her behalf. Next, Muenster filed a motion to declare Waid's lien invalid and have it set aside so the funds attached by Waid's lien (\$78,350.85) could be disbursed to Ferguson. The trial court granted Ferguson's motion. **CP 1387-1390**. The money was disbursed to Ferguson in due course. Waid filed a Waid appealed. *See Ferguson v. Teller*, 178 Wn.App. 622, 316 P.3d 509 (2013).

B. Waid is engaged in fraud on this Court when he cites the U.S. District Court's findings and conclusions in his defamation lawsuit in support of his arguments for denying this petition. The District Court's findings and conclusions are irrelevant to this Petition for Review. And, Waid knows that the findings and conclusions of the District Court were obtained by the perjury of his only witness, Kathleen Nelson (the insurance defense attorney in this litigation). Nelson's perjury is an uncontroverted fact.

Kathleen Nelson's perjury is uncontroverted. *See Appendix (Emily Rains' letters and exhibits thereto)*.⁹ Furthermore, Waid fails to inform

⁸ The CR 11 motion filed by Teller was captioned as "Motion to Disburse" \$102,000 of Ferguson's \$265,000 from the court registry.

⁹ Ferguson filed a motion for the Court of Appeals to take judicial notice of these documents regarding the perjury at the federal trial because improperly Waid submitted the Findings and Conclusions to the Court as "Additional Authority". However, the court

this Court that Ferguson waived trial and did not present evidence during the bench trial. Therefore, the findings and conclusions are the product of a bench trial in which only Waid and his attorney, Kathleen Nelson, testified. Waid fails to inform this Court that Ferguson appealed the District Court's pre-trial rulings denying her motions for summary judgment dismissal of Waid's defamation case to the Ninth Circuit Court of Appeals. The Ninth Circuit denied Waid's motion for summary affirmance of the District Court's decisions "because the arguments raised in the opening brief are sufficiently substantial to warrant further consideration by a merits panel."¹⁰ On July 24, 2019, the Ninth Circuit notified the parties that Ferguson's appeal is being considered for oral argument.¹¹

C. Contrary to Waid's assertion, Ferguson has established grounds for review. Division I's April 15, 2019 opinion conflicts with Division I's holding in *Ferguson v. Teller*¹², conflicts with this Court's opinion in *Ross v. Scannell*¹³, and conflicts with Division I's decisions in two other attorney-lien cases, *Suleiman v. Cantino*¹⁴ and *Wilson v. Henkle*¹⁵. The opinion of Division I in this case conflicts with Division 2's

denied the motion the facts evidenced by the documents were not necessary to its decision. *See April 15, 2019 Unpublished Opinion No. 74512-3, p. 2, ¶1.*

¹⁰ See Appendix hereto.

¹¹ See Appendix hereto.

¹² *Ferguson v. Teller*, 178 Wn.App. 622, 316 P.3d 509 (Div.1, 2013).

¹³ *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982).

¹⁴ *Suleiman v. Cantino*, 33 Wn.App. 602, 656 P.2d 1122 (Div.1, 1983).

¹⁵ *Wilson v. Henkle*, 45 Wn.App. 162, 724 P.2d 1069 (Div. 1, 1986).

decision in *Aiken, St. Louis & Siljeg, P.S. v. Linth*.¹⁶ Division 2 continues to follow *Ross v. Scannell*.

See the opinions cited above. Division I's April 15, 2019 opinion conflicts with its December 30, 2012 opinion. Therefore, Division I's opinion of April 15, 2019 violates the law of the case doctrine. In 2013, Division I held that the trial court's order invalidating Waid's lien had the effect of a final judgment. Therefore, Waid had the right to appeal that decision. *Ferguson v. Teller*, at 628-30. In its April 15, 2019 opinion (as Waid points out) reached the contrary conclusion, concluding that "the record makes clear that no court ever issued a final judgment" regarding Waid's fee-claim against Ferguson. *See, Resp.'s Answer, p. 2 (citing Ferguson v. Waid, 2019 WL 1644134 *8 (Division I, April 15, 2019) (unpublished))*.

Ferguson, not just Waid, appealed in 2012. Ferguson appealed from the trial court's final judgment in *Ferguson v. Teller*, based on fraud she alleges her own attorney, Waid, perpetrated on her and her former clients (the *Endres* plaintiffs). Division I affirmed the trial court's summary judgment order in favor of Teller in an unpublished opinion.¹⁷

¹⁶ *Aiken, St. Louis & Siljeg, P.S. v. Linth*, 195 Wash.App. 10, 380 P.3d 565, 571 (Div. 2, 2016) (holding nowhere in the legislative history is there any suggestion that the right to seek enforcement of an attorney's lien "equates to the right to control the underlying litigation to satisfy the attorney's interest [in fees]").

¹⁷ Appendix (unpublished opinion of Court of Appeals in *Ferguson v. Teller*, Nos. 69220-8-I, linked with 68329-2-I).

The court refused to consider Ferguson’s evidence of fraud on appeal, because the evidence was not before the trial court when it granted summary judgment for Teller, but was submitted to the trial court after summary judgment, when Ferguson filed a pro se motion for reconsideration. *See Appendix hereto (Ferguson v. Teller (unpublished opinion))*.

D. Contrary to Waid’s assertion, the trial court did *not* prevent Waid from adjudicating his fee-claim after remand in *Ferguson v. Teller*.

Division I remanded Waid’s fee-claim for summary adjudication by the trial court. Waid took no affirmative steps to resolve his fee claim and did not object to, or oppose Teller’s motion to disburse the \$290,000 in the court registry to Teller. In its April 15, 2019 opinion, the Court of Appeals holds that Waid is allowed to re-litigate his fee-claim in this case because *Ross v. Scannell* was legislatively overruled by the 2004 amendments to the attorney-lien statute. Division I inexplicably states that it is “understandable” that Waid failed to pursue summary adjudication after remand. *April 15, 2019 Op.*, p. 15 (footnote 12). And, Waid states that he could not have adjudicated his fee-claim because it was “moot”. *Resp.’s Answer*, p. 2. Neither statement is accurate. The record is clear: Waid’s fee-claim was remanded in December 2013. Ferguson filed a motion for

discretionary review which the Washington Supreme Court denied in July 2014. In September 14, 2014, the \$290,000 in the court registry was disbursed to Teller. This was almost one year after the Court of Appeals decided that Waid's lien was valid and remanded to the trial court to decide what fees, if any, Waid was entitled to receive. The disbursement of the \$290,000 from the court registry to Teller happened two months after Ferguson's motion for discretionary review was denied by the Supreme Court. Therefore, Waid had ample opportunity to fully adjudicate his fee-claim before the money was disbursed to Teller. He did nothing.

E. Contrary to Waid's assertion, Ferguson's Petition for Review is not frivolous.

This petition for review is not frivolous. On the contrary, this "petition involves an issue of substantial public interest that should be determined by the Supreme Court." RCW 13.4(b)(4). There is no basis for this Court to sanction Ferguson. Instead, the Court should grant this petition and decide whether *Ross v. Scannell* is still binding on the lower courts, or whether Division I has correctly decided that the 2004 amendments to the attorney-lien statute were intended by the Washington Legislature to overrule, supersede, or correct this Court's holding in *Ross v. Scannell*.

DATED this 31st day of July, 2019.

s/Sandra L. Ferguson

Sandra L. Ferguson, Pro se
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2019, I caused a copy of the foregoing Petitioner's Corrected Reply to Respondent's Answer to Petition for Review to be delivered to Petitioners and Respondents, through their attorneys on the following in the manner indicated below:

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FILED
SUPREME COURT
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BY SUSAN L. CARLSON
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DOCUMENT # 1

Email from Kathleen Nelson to Emily Rains dated May 29, 2019

Ferguson v Waid

Nelson, Kathleen [Kathleen.Nelson@lewisbrisbois.com]

Sent: 5/29/2019 10:25 AM

To: "Emily Rains (mail@emilyrains.com)" <mail@emilyrains.com>

Cc: "'Brian J. Waid' (bjwaid@waidlawoffice.com)" <bjwaid@waidlawoffice.com>, "Demaree Macklin, Sarah" <Sarah.Macklin@lewisbrisbois.com>

I am in receipt of your "Motion for an Order Awarding Attorney's Fees Pursuant to RAP 18.9" filed in Div 1, COA on May 28, 2019. This motion improperly seeks fees against my lawfirm and me. You are well aware that Mr. Waid filed the Statement of Additional Authorities in his capacity as a pro se attorney prosecuting his account stated claim. This was NOT filed on behalf of Brian Waid, defendant. I am not his attorney in the prosecution of his fee claim, and I have no authority to withdraw anything he files in that action. You and Ms. Ferguson have always blurred the lines as to whether Ms. Ferguson is pro se, whether she is represented or what the case may be. There have been numerous filings by her in the action when you are acting as her counsel. However, this is improper and we clearly delineate our roles on this side.

I write to request that you withdraw your request for sanctions against Lewis Brisbois and me. If not, I will be forced to respond to this frivolous motion against my firm and me and I will not hesitate to request fees for responding. You know this is improper as is noted in your motion itself. Please withdraw the motion no later than COB tomorrow. Thanks, Kathleen



Kathleen A. Nelson
Partner
Kathleen.Nelson@lewisbrisbois.com

T: 206.876.2965 F: 206.436.2030

1111 Third Avenue, Suite 2700, Seattle, WA 98101 | LewisBrisbois.com

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FERGUSON 002

DOCUMENT # 2

Copy of Documents Declaration by Emily Rains in Support of Ferguson's Motion
to Strike Waid Statement of Additional Authority dated February 26, 2019

DOCUMENTS DECLARATION OF EMILY SHARP RAINS

I, Emily Rains, hereby certify that the following documents submitted herewith are true and correct copies of the originals and are from my law firm's records and files concerning this matter.

(1) My four letters to Brian Waid and Kathleen Nelson dated February 1, 2019, February 5, 2019, and February 11, 2019, Kathleen Nelson's email to Emily Rains dated February 22, 2019, and my letter in response to Ms. Nelson's email, also dated February 22, 2019, and the five foregoing documents are attached hereto as Exhibit A.

(2) The three-page excerpt of Sandra Ferguson's Pretrial Conference Memorandum Waiving Trial (Dkt. #158) in Brian Waid's defamation case, and attached hereto as Exhibit B.

(3) My declaration, signed and dated November 14, 2018, with supporting Exhibits A—D (Dkt. #173), is a true and complete copy of the document that was admitted into the record as A-77 during Waid's defamation trial (see p. 30 of transcript of Kathleen Nelson's testimony, EX. E hereto), and my Declaration signed and dated November 18, 2018 (Dkt. #184), filed after the defamation trial to correct factual errors which I found in the District

Court's Findings of Fact and Conclusions of Law, and the two foregoing documents are attached hereto as Exhibit C.

(4) An email string between me and Kathleen Nelson dated February 19, 2019 and February 20, 2019 and my follow-up letter to Ms. Nelson, dated February 20, 2019, Letter from Kathleen Nelson to Emily Rains, dated November 16, 2019, attached hereto as Exhibit D.

(5) The transcript of Kathleen Nelson's testimony during the defamation trial re: our alleged phone calls in November of 2015, which Ms. Nelson testified took place after my letters to her, written on November 15, 2015 and November 16, 2015, but before November 30, 2015, attached hereto as Exhibit E.

(6) The redacted phone records of Emily Rains for November 2015, Letter of Kathleen Nelson to Emily Rains, dated November 16, 2015, Email from Kathleen Nelson to Emily Rains dated November 16, 2015, Transmittal e-mail from Emily Rains to Kathleen Nelson dated November 16, 2015, and the foregoing documents are attached hereto as Exhibit F.

I swear under penalty of perjury that the foregoing statement is true and correct the best of my knowledge, information and belief.

DATED and signed on February 25, 2019, at Salt Lake City, Utah.

By: *s/Emily Sharp Rains*
Emily Sharp Rains

EXHIBIT A

Letter from Emily Rains to Brian Waid, February 1, 2019

Letter from Emily Rains to Brian Waid, February 5, 2019

Letter from Emily Rains to Kathleen Nelson, February 11, 2019

Email string from Kathleen Nelson to Emily Rains, February 22, 2019

Letter from Emily Rains to Kathleen Nelson, February 22, 2019

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 1, 2019

SENT VIA EMAIL

BRIAN WAID
Waid Law Office, PLLC
5400 California Ave S.W.
Suite D
Seattle, Washington 98136

RE: January 25, 2019 Filing by Brian Waid in Case No. 74512-3-I

Dear Monsieur Brian Waid,

I am writing to ask you to withdraw the document and related attachment that you filed with the Court of Appeals Division I in Case No. 74512-3-I, captioned: *Appellant's Rap 10.8 Statement of Additional Authority Re: Merits and Respondents' Motion to Take Judicial Notice* on January 25, 2019.

If you choose not to comply with this request, I will prepare and file a motion to strike the document and attachment. In addition, I will seek attorney's fees for the time incurred to prepare, file, and defend the motion.

First, I will point out that contrary to the caption for your filing, neither the document nor the related attachment (i.e., the Findings of Fact and Conclusions of Law entered in U.S. District Court Case No. 2:17-cv-01685 RSM) qualify as a "statement of additional authorities" as defined by RAP 10.8 or related caselaw. *See, O'NIELL v. City of Shoreline*, 332 P.3d 1099 (2014). In fact, the document you have filed contains no additional authorities and no explanation for the filing (as required by the Rule).

Second, I will assert that you have improperly filed the Findings of Fact and Conclusions of Law in an attempt to prejudice my client, Ms. Ferguson, on appeal. As you know, but have failed to disclose to the Court of Appeals in your recent filing, the federal Court did not have the opportunity to consider Ms. Ferguson's claims against you which are pending in the state court. Nor did the federal Court hear or review witness' testimony and evidence related to Ms. Ferguson's claims against you in the state court (e.g., the testimony of Kany Levine, Randy Baker, Angela Oppe, Sarah Atwood, Dick Kilpatrick, Peter Jarvis).

Ferguson
February 1, 2019
Page 2

Your filing was **improper and misleading** and will likely prove **vexatious** to the Court if I have to file a motion to strike it. **See, *Brewer v. Fibreboard Corp.*, 901 P.2d 297 (1995).** Therefore, I ask you to promptly and voluntarily withdraw it.

If you do not withdraw the document and related attachment by Tuesday, February 5, 2019, I will prepare and file the Motion to Strike.

Respectfully,

/s/Emily Sharp Rains
Emily Sharp Rains

Cc: Kathleen Nelson via email

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 5, 2019

SENT VIA EMAIL

BRIAN WAID
Waid Law Office, PLLC
5400 California Ave S.W.
Suite D
Seattle, Washington 98136

RE: Response to Brian Waid email dated Friday, February 1, 2019
Case No. 74512-3-I

Dear Monsieur Brian Waid,

I am writing this letter in response to the email I received from you on Friday, February 1, 2019. (See, attached email) As you are aware, I did not participate in the briefing related to your appeal, nor did I prepare the Appellee's Statement of Additional Authorities or Motion to Take Judicial Notice, filed with Division I. As an act of good faith, I have returned to the record and reviewed the documents mentioned in your email. Namely, Ms. Ferguson's Statement of Additional Authorities, filed on August 28, 2018, and her Motion to Take Judicial Notice, filed on September 4, 2018. I have also reviewed the Table of Authorities contained in your opening brief and in Ms. Ferguson's response brief, as well as the authorities listed in your reply brief.

(1) Ms. Ferguson's Statement of Additional Authorities

You have cited *O'Neill v. City of Shoreline*, 332 P.3d 1099 (2014) in support of your position that Ms. Ferguson's filing of the Statement of Additional Authorities is improper. But *O'Neill* is easily distinguished from the facts of this case. Unlike the O'Neills, Ms. Ferguson prepared and filed a list of authorities which were largely omitted from all prior briefing. Of the 25 cases listed in Ms. Ferguson's Statement of Additional Authorities, only two of those cases appear in your briefing. Moreover, the cases listed in Ms. Ferguson's Statement of Additional Authorities have the capacity to be helpful to the Court's analysis and decision regarding the issues raised by your appeal. In fact, some of the cases she has provided to the Court appear to be dispositive (in Ms. Ferguson's favor).

After reading *O'Neill*, it is clear to me why the Court was vexed with the O'Neills. The Court did not need to be informed about cases that it was already aware of, so the Statement of Additional Authorities filed by the O'Neills was superfluous and nothing more than a waste of

Ferguson
February 5, 2019
Page 2

the Court's time. By contrast and as previously noted, all the cases but two which are provided in Ms. Ferguson's Statement of Additional Authorities, are not found elsewhere in the parties' appellate briefing. Furthermore, the cases added by Ms. Ferguson's filing are relevant, thus, the additional authorities are not a waste of the Court's time and attention.

In contrast to Ms. Ferguson's proper Statement of Additional Authorities, the document and attachment you filed on January 25, 2019 is not proper. First, neither your document or the related attachment provide relevant legal authorities. Second, your filing is nothing more than legerdemain by you to supplement your original briefing and create improper bias against Ms. Ferguson.

Also, it is incumbent upon me, as an officer of the court, to point out that it is improper for you to ask us to withdraw Ms. Ferguson's Statement of Additional Authorities as *quid pro quo* for a withdrawal of your improperly-filed document. To strike such a bargain with you would be to deprive the Court of relevant authority which could (and should) aid it in making the correct decision in this case.¹ Therefore, I cannot in good conscience advise Ms. Ferguson to withdraw her Statement of Additional Authorities because doing so would be improper. Nothing less than candor toward the tribunal is required of us, and I would be violating my duty to the Court if I agreed to your bargain.

(2) Ms. Ferguson's Motion to Take Judicial Notice

Your objections to Ms. Ferguson's Motion to Take Judicial Notice lack merit. First, Ms. Ferguson's Motion to Take Judicial Notice does not contain any references to RAP 10.8. Instead, Ms. Ferguson *expressly* seeks relief pursuant to ER 201(b) and RAP 9.11.

You have provided no valid basis for the withdrawal you seek. Therefore, the Motion to Take Judicial Notice stands.

(3) The Federal Case—Ms. Ferguson's Pending Appeal in the Ninth Circuit.

Contrary to the statements contained in your email, the federal lawsuit between you and Ms. Ferguson did not include her state claims against you e.g. breach of fiduciary duty, consumer protection act violations, and malpractice. Judge Martinez did not provide Ms. Ferguson an opportunity to present evidence or witnesses in relationship to her malpractice and CPA claims against you because the case before Judge Martinez did not include these claims against you. I remind you that there is ample physical evidence in support of this fact.

¹ See, Comment [4] to RPC 3.3(a)(3) requiring candor toward the tribunal which states in relevant part "Legal argument is a discussion seeking to determine legal premises properly applicable to the case" before the Court.

Ferguson
February 5, 2019
Page 3

In November 2017, Ms. Ferguson filed the federal case against you based on 42 U.S.C. §1983, after you filed frivolous bar grievances against her and continuously wrote to State Bar Officials, urging them to act on your behalf to disbar Ms. Ferguson before her case against you for malpractice and CPA violations could proceed to trial in state court. You repeatedly stated, without any supporting evidence whatsoever, that Ms. Ferguson is “mentally ill” and should be disbarred to spare you from a trial. According to your website, you are learned in the area of ethics. This means, prior to filing your bar grievances, you would know that it is improper to file a bar complaint as a litigation tactic.

Moreover, I disagree that Ms. Ferguson has had two opportunities to present her claims against you at trial. In 2015, the only opportunity she had to present her claims, the Court denied her 3-day continuance so I could be present to represent her. I only wish that Ms. Ferguson would have been able to represent herself and tell the jury her story. Declining to go trial without her attorney was not unreasonable and though the Court was frustrated because of her own calendar limitations, it was also very clear that she was not willing to dismiss Ms. Ferguson’s claims against you with prejudice, despite your numerous requests.

Though, you have been quick to claim that Ms. Ferguson has avoided going to trial, I remind you that it is you who vigorously fought for this appeal, just as Ms. Nelson said you would. If Ms. Ferguson’s case is remanded, I expect there to be a trial, unless the two of you can finally agree to some settlement.

Leaving aside (for purposes of this letter) predictions about the outcome of the pending appeal, your filing of the federal court’s findings and conclusions was improper because (1) it does not contain a single authority as defined by RAP 10.8 and related caselaw; (2) nor does it comply with the other requirements of RAP 10.8; and (3) it does not assist the Court in reaching a decision on the questions presented in your appeal. Filing this document will only mislead the Court because you did not disclose the context or circumstances which led to the federal case or the related outcome. I do not think such conduct can be construed as candor with the tribunal.

Ferguson
February 5, 2019
Page 4

In light of the time it took to research and respond to your email, I am extending the withdrawal deadline until Wednesday, February 6, 2019 (5:00 p.m.), after which time I will prepare and file the Motion to Strike.

Respectfully,

/s/Emily Sharp Rains
Emily Sharp Rains

Cc: Kathleen Nelson via email

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 11, 2019

SENT VIA EMAIL

KATHLEEN NELSON
Lewis, Brisbois, Bisgaard, & Smith LLP
1111 3RD Avenue
Suite 2700
Seattle, Washington 98101

RE: Motion to Strike; Settlement Offer
(the portions of this letter related to settlement are intended to be covered ER 408)

Dear Kathleen Nelson,

I am writing as a follow-up to today's telephone call. The primary purpose of our call was to discuss the improper Statement of Authorities filed by your client, Mr. Waid, in relationship to claims that you are responsible for litigating. During our discussion, you explained that you did not condone any such filing, but that you could not do anything to stop Mr. Waid from continuing with his filing because, as a pro se litigant, he has a right to file any documents he chooses in relationship to the claims he filed pro se. As I explained during our call, Mr. Waid's January 25, 2019 filing was not related to his pro se claim but is instead related to the claims that you are responsible for litigating.

Contrary to the position Mr. Waid takes in his Wednesday, February 5, 2019 email to me (copied to you), Judge Martinez's findings of fact and conclusions of law for the federal case between the parties does not constitute an authority as defined by RAP 10.8 and related caselaw. *See, Brewer v. Fiberboard Corp.*, 901 P.2d 297 (1995). The Washington Supreme Court makes it crystal clear that an order and final judgment from a federal case are more in the nature of supplementation of the record and not additional authorities as defined by RAP 10.8.

Despite Mr. Waid's unwillingness to voluntarily withdraw his improper statement of authorities, since this filing is in relationship to the claims that you are litigating, I thought I should give you an opportunity to work with your client to withdraw the improper filing before I file my motion and ask for attorney's fees. Please let me know if you and your client plan to voluntarily withdraw Mr. Waid's documents filed on January 25, 2019 by no later than Wednesday, February 15, 2019, 5pm.

Ferguson
February 11, 2019
Page 2

This offer expires on Friday, February 15, 2019, 5pm. If you would like to discuss this offer, please contact me at 206-778-1330.

Sincerely,

/s/Emily Sharp Rains
Emily Sharp Rains

From: [Emily Sharp Rains](#)
To: [Sandra Ferguson](#)
Subject: FWD: RE: [EXT] Motion to Strike & Request for Last 4 Digits of Cell Number
Date: Friday, February 22, 2019 6:22:48 PM
Attachments: [LB-Logo_7c9c5bd0-0a1e-47b8-a3b1-a4b5cdfed8fa.png](#)
[Letter Kathleen Nelson 20190222-f.pdf](#)

----- Original Message -----

Subject: RE: [EXT] Motion to Strike & Request for Last 4 Digits of Cell Number
From: "Emily Sharp Rains" <mail@emilyrains.com>
Date: 2/22/19 6:21 pm
To: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>
Cc: "jmkk1613@aol.com" <jmkk1613@aol.com>

Dear Ms. Nelson,

Please see the attached letter. This is the only copy of this letter that is forthcoming.

Kindly,

Emily Rains

----- Original Message -----

Subject: RE: [EXT] Motion to Strike & Request for Last 4 Digits of Cell Number
From: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>
Date: 2/22/19 2:19 pm
To: "Emily Sharp Rains" <mail@emilyrains.com>
Cc: "jmkk1613@aol.com" <jmkk1613@aol.com>

Dear Emily Rains:

I am in receipt of this completely inappropriate letter and your baseless demand that I send you my cell phone number--improper because this has nothing to do with the Ferguson v. Waid matter. It has to do with (I believe) the Federal Court matter. Hard to tell. However, you are not attorney of record in that action, are you?

I frankly consider this a threat. If I have to respond to anything whatsoever pertaining to this baseless and improper request, I will seek sanctions for every minute of time that I put into responding to your demands.

Kindly,

Kathleen Nelson



Kathleen A. Nelson
Partner
Kathleen.Nelson@lewisbrisbois.com
T: 206.876.2965 F: 206.436.2030

1111 Third Avenue, Suite 2700, Seattle, WA 98101 | LewisBrisbois.com

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From: Emily Sharp Rains [<mailto:mail@emilyrains.com>]
Sent: Wednesday, February 20, 2019 1:04 PM
To: Nelson, Kathleen
Subject: [EXT] Motion to Strike & Request for Last 4 Digits of Cell Number

External Email

Dear Ms. Nelson,

Please see the attached letter. This is the only copy of the letter you will receive.

Kindly,

Emily Rains

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILIE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 22, 2019

SENT VIA EMAIL

KATHLEEN NELSON
Lewis, Brisbois, Bisgaard, & Smith LLP
1111 3RD Avenue
Suite 2700
Seattle, Washington 98101

RE: Response to Ms. Nelson's February 22, 2019 Email

Dear Kathleen Nelson,

I did not intend for my February 20, 2019 letter to be a threat. My apologies if it came across that way.

Mr. Waid's filing is improper under RAP 10.8. I have asked both you and Mr. Waid to voluntarily withdraw this document three times, but you have both refused. I am concerned because not only is the document Mr. Waid filed on January 25, 2019 improper pursuant to RAP 10.8 and related caselaw, but it may also contain errors, at least one (possibly two) which pertains to your testimony that has the potential to unfairly prejudice Ms. Ferguson.

I am not sure why you would be unwilling to share information that could clear up any misunderstanding about the phone calls that you testified about in the federal case. Especially since, according to your testimony, I would be in possession of your telephone number because you used it to call me. You have the ability to clear up this issue and avoid making public any negative inferences that could arise because of an error. All you have to do is provide me the last four digits of your cell phone number or offer me a log of your own. If you provide me the last four digits of your cellphone, we can resolve this matter in minutes.

As for your threats against me to seek sanctions, Mr. Waid's January 25, 2019 filing coupled with your refusal to withdraw an improperly filed document that contains error(s) that have the potential to prejudice Ms. Ferguson is what makes the accuracy of your testimony relevant to this motion. Threatening me with sanctions is not going to deter me from doing my job as Ms. Ferguson's counsel.

If you see another solution to the dilemma Ms. Ferguson is facing as a result of Mr. Waid's filing, then I am open to solutions. My motion is done. However, as an act of good faith, I am willing to defer my filing until Monday at 12pm. I only ask that you provide me the last four digits of your cell number and identify the number you called me at before the deadline. A phone log would be helpful. Consider this my fourth and final request.

Sincerely,

/s/Emily Sharp Rains
Emily Sharp Rains

EXHIBIT B

Excerpt, pp. 1-3 of Ferguson's Pretrial Conference
Memorandum Waiving Trial

Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN J. WAID,
Counter-Plaintiff,

v.
SANDRA L. FERGUSON,
Counter-Defendant.

No. 2:17-cv-01685-RSM

COUNTER-DEFENDANT’S
PRETRIAL CONFERENCE
MEMORANDUM WAIVING
TRIAL

Pretrial conference: November 7,
2018 at 1:30 pm

COMES NOW the counter-defendant, Sandra Ferguson, by and through her attorney, John R. Muenster, and provides the Court with the following pretrial conference memorandum waiving trial.

I. Waiver of jury trial and waiver of trial.

Undersigned counsel has received and reviewed the court’s order on the

COUNTER-DEFENDANT’S PRETRIAL
CONFERENCE MEMORANDUM
WAIVING TRIAL-1

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMKK1613@AOL.COM

1 parties' motions in limine. Dkt. #157. Undersigned counsel is of opinion that
2 the rulings contained therein, considered separately or in conjunction with the
3 Court's previous rulings on the summary judgment motions in this matter (Dkt.
4 Nos. 85, 94, and 150, hereinafter "Court's rulings"), are tantamount to a
5 directed verdict as to the defamation counterclaim. Undersigned counsel is also
6 of opinion that the Court's rulings are tantamount to summary judgment in
7 favor of Mr. Waid as to the civil harassment counterclaim.

8 The Court's rulings in Dkt. #157 are discussed in Section II below.

9 Trials impact the Court's resources as well as the resources of the parties.
10 Resources should be conserved if feasible. In the local rules, the Court
11 encourages the parties at the pretrial conference to propose ways to shorten and
12 simplify the litigation. See LCR 16(1)(2).¹ We do so here.

13 Because of the Court's rulings, and without waiving any objection to the
14 Court's rulings, Ms. Ferguson takes the following actions:

15 (1) Ms. Ferguson hereby waives her right to a jury trial on the defamation
16 counterclaim. We request that the jury call for this case be cancelled.

17 (2) Ms. Ferguson waives her right to call witnesses and introduce evidence
18 in a non-jury trial on the two counterclaims.

19
20
21 ¹ LCR 16(1)(2) provides in pertinent part:

22 At the final pretrial conference, the court may consider and take action with respect
23 to:

24 . . .

25 (2) Any matters which may be presented relative to parties, process, pleading or
26 proof, with a view to simplifying the issues and bringing about a just, speedy and
27 inexpensive determination of the case; . . .

28 COUNTER-DEFENDANT'S PRETRIAL
CONFERENCE MEMORANDUM
WAIVING TRIAL-2

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMCK1613@AOL.COM

1 (3) Ms. Ferguson consents to a determination of liability on the two
2 counterclaims by the Court based on the documents record in this case to date.

3 (4) Ms. Ferguson consents to the Court deciding what damages, if any,
4 should be awarded on the counterclaims in this matter.

5 (5) Ms. Ferguson reserves her right to appeal all rulings in this case to the
6 Ninth Circuit Court of Appeals.

7 Ms. Ferguson makes these waivers and consents to conserve resources, to
8 expedite resolution of the disputed liability and damages issues in the trial
9 court, and to preserve all issues she has presented in this case for appeal.
10

11
12 **II. Discussion of rulings of the Court resulting in Counter-Defendant's**
13 **waiver of trial.**

14 **A. The civil harassment counterclaim.**

15 Ms. Ferguson moved to exclude evidence relating to the civil harassment
16 counterclaim and for dismissal of the counterclaim due to lack of subject matter
17 jurisdiction. Dkt. #149, page 2, lines 1-26; p. 3, lines 1-17; and page 3, lines 1-
18 21. The Court denied the motion. Dkt. #157, page 1, lines 25-28; page 2, lines
19 1-9.
20

21 We recognize the Court's decision. Nonetheless, we believe that there is
22 no precedent, authority or subject matter jurisdiction for Mr. Waid's "civil
23 harassment" counterclaim. Due to the Court's contrary ruling, no further relief
24 appears available to Ms. Ferguson at the trial court level. We have made our
25 record. We seek to preserve our challenges to this counterclaim for appeal.
26

27 COUNTER-DEFENDANT'S PRETRIAL
28 CONFERENCE MEMORANDUM
WAIVING TRIAL-3

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMKK1613@AOL.COM

EXHIBIT C

Declaration of Emily Rains signed and dated November 14, 2018 and supporting Exhibits A—D (Dkt # 173, Trial Exhibit A-77)

Declaration of Emily Rains signed and dated November 18, 2018 (Dkt. #184)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SANDRA L. FERGUSON,

Plaintiff,

v.

BRIAN J. WAID, JANE DOE
WAID and the marital community
thereof,

Defendants.

NO. 2:17-CV-01685-RSM

DECLARATION OF EMILY
RAINS RE SETTLEMENT
DISCUSSIONS WITH
KATHLEEN NELSON

DECLARATION OF EMILY RAINS

I, EMILY RAINS, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I represented the defendant-in-counterclaim, Sandra Ferguson (“Ferguson”), in case no. 14-2-29265-1 SEA.
2. On November 14, 2015, I spoke with Kathleen Nelson (“Nelson”) by telephone to discuss settlement between Ms. Ferguson and Brian

DECLARATION OF EMILY RAINS
RE SETTLEMENT DISCUSSIONS
WITH KATHLEEN NELSON - 1

MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

1 Waid (“Waid”). Ms. Nelson asked me to put Ms. Ferguson’s offer in
2 writing and send it to her, which I did. *See Exhibit A: Settlement*
3 *Offer date November 15, 2015. This is the only telephone call*
4 *between Ms. Nelson and I regarding settlement between Ms.*
5 *Ferguson and Mr. Waid.*

- 6 3. Mr. Waid rejected the November 15, 2015 settlement offer and
7 instead offered Ms. Ferguson \$200,000.
- 8 4. On November 16, 2015, I responded, in writing, to Mr. Waid’s
9 counter-offer of \$200,000 and offered \$350,000. *See Exhibit B:*
10 *Settlement Offer date November 16, 2015.*
- 11 5. On November 18, 2015, Ms. Nelson finally responded to the
12 settlement offer, and informed me that the \$200,000 was Mr. Waid’s
13 “last ditch effort” to get the case settled before proceeding to trial.
14 *See Exhibit C: Email String between Rains and Nelson Re: Counter-*
15 *Offer by Ferguson.*
- 16 6. According to Ms. Nelson, after the deposition of Peter Jarvis was
17 taken, Mr. Waid was no longer interested in settling with Ms.
18 Ferguson.
- 19 7. On December 29, 2015, I contacted Ms. Nelson to again try and settle
20 the case. At this point, Ms. Ferguson’s case had been dismissed
21 without prejudice by the court pursuant CR 41 and Mr. Waid had filed
22 a motion for reconsideration to have Ms. Ferguson’s case dismissed
23 with prejudice. While waiting for the court’s decision on Mr. Waid’s
24 motion for reconsideration, I sent another letter for settlement. *See*
25

26
27
28 DECLARATION OF EMILY RAINS
RE SETTLEMENT DISCUSSIONS
WITH KATHLEEN NELSON - 2

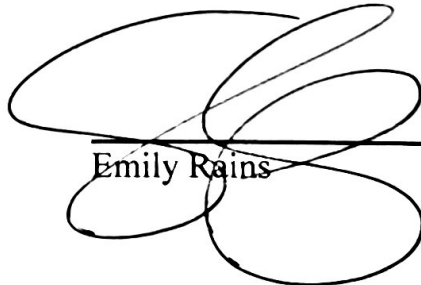
MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

FERGUSON 025

*Exhibit D: Email String between Rains and Nelson Re: Counter-Offer
by Ferguson.*

8. Mr. Waid rejected Ms. Ferguson's settlement offer.
9. The court denied Mr. Waid's motion for reconsideration.
10. Since December 29, 2015, I have sent Ms. Nelson a few emails to encourage settlement, but each email has been met with silence.
11. If called to testify, I will testify to the forgoing facts.
12. My sister has an aggressive form of breast cancer. She has a PETSCAN today, November 14, 2018, at 10am Mountain Time. I will be with her during her PETSCAN procedure. I am available to testify by phone, but I am not available during my sister's PETSCAN procedure.

DATED and signed on November 14, 2018 at Salt Lake City, Utah.


Emily Rains

DECLARATION OF EMILY RAINS
RE SETTLEMENT DISCUSSIONS
WITH KATHLEEN NELSON - 3

MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

EXHIBIT A
SETTLEMENT OFFER DATE NOVEMBER 15, 2015

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

3213 W. WHEELER STREET, #367
SEATTLE, WASHINGTON 98199
TELEPHONE: 206.283.5593
MOBILE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

November 15, 2015

Kathleen Nelson
Lewis, Brisbois, Bisgaard & Smith, LLP
2101 Fourth Avenue, Suite 700
Seattle, WA 98121

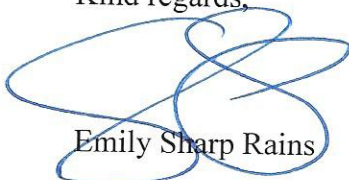
Re: *Ferguson v. Waid, et al---ER 408 Settlement Demand*

Dear Ms. Nelson:

Thank you for taking the time to speak with me on Saturday, November 14, 2015 by telephone. Per our conversation, I am writing you this letter to memorialize the settlement demand by Sandra Ferguson. Sandra Ferguson offers to settle this case for a total sum of \$500,000. This is a firm and final offer to settle the matter between the parties.

This settlement demand expires Monday, November 16, 2015 at 6:00pm. I realize the timeframe for your client to consider this settlement demand is short, but since Plaintiffs' demand is firm and final and the trial date is quickly advancing, Plaintiffs' desire to spend their time preparing for trial without the distraction of settlement discussions.

Kind regards,



Emily Sharp Rains

Cc: Sandra L. Ferguson

Encls.

FERGUSON 028

EXHIBIT B
SETTLEMENT OFFER DATE NOVEMBER 16, 2015

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

3213 W. WHEELER STREET, #367
SEATTLE, WASHINGTON 98199
TELEPHONE: 206.283.5593
MOBILE: 206.778.1330
FACSIMILIE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

November 16, 2015

Kathleen Nelson
Lewis, Brisbois, Bisgaard & Smith, LLP
2101 Fourth Avenue, Suite 700
Seattle, WA 98121

Re: *Ferguson v. Waid, et al---*ER 408 Settlement Demand

Dear Ms. Nelson:

I received your letter dated November 16, 2015 in which your decline Sandra Ferguson's settlement demand of \$500,000 and instead counter her demand by offering her \$200,000 to settle her dispute with Mr. Waid. After careful consideration, Ms. Ferguson declines Mr. Waid's counter-offer and instead makes a final settlement demand in the amount of \$350,000. This final settlement includes the additional settlement provisions requested by Mr. Waid for non-disparagement.

Kind regards,

/s/Emily Sharp Rains
Emily Sharp Rains

Cc: Sandra L. Ferguson

Encls.

FERGUSON 030

EXHIBIT C
EMAIL STRING BETWEEN RAINS AND NELSON RE:
COUNTER-OFFER BY FERGUSON

Re: Response

Nelson, Kathleen [Kathleen.Nelson@lewisbrisbois.com]

Sent: 11/18/2015 5:58 AM

To: "Emily Rains" <mail@emilyrains.com>

Received. I will of course pass this on but I am certain it will be full steam ahead particularly after the Jarvis deposition. Focusing on trial prep and witnesses at this point for a Nov. 30 trial date. The 200 was the last ditch offer.

Sent from my iPhone



LewisBrisbois.com

Kathleen A. Nelson
Partner
Kathleen.Nelson@lewisbrisbois.com

1111 Third Avenue, Suite 2700
Seattle, WA 98101

T: 206.876.2965 F: 206.436.2030



PLEASE NOTE OUR NEW ADDRESS AS OF NOVEMBER 9, 2015:

1111 Third Avenue, Suite 2700
Seattle, WA 98101

Representing clients from coast to coast. View our nationwide locations.

This e-mail may contain or attach privileged, confidential or protected information intended only for the use of the intended recipient. If you are not the intended recipient, any review or use of it is strictly prohibited. If you have received this e-mail in error, you are required to notify the sender, then delete this email and any attachment from your computer and any of your electronic devices where the message is stored.

On Nov 17, 2015, at 10:16 PM, Emily Rains <mail@emilyrains.com> wrote:

See attached letter. It was sent last night.

Emily

Sent from my T-Mobile 4G LTE Device

----- Original message -----

From: mail@emilyrains.com

Date: 11/16/2015 11:12 PM (GMT-07:00)

To: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>

Subject: Response

Hi Kathleen,

See attached letter.

Emily

<ER 408 Settlement Letter 201511162308.pdf>

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EXHIBIT D
SETTLEMENT OFFER DATE DECEMBER 29, 2015

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

3213 W. WHEELER STREET, #367
SEATTLE, WASHINGTON 98199
TELEPHONE: 206.283.5593
MOBILE: 206.778.1330
FACSIMILIE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

December 29, 2015

Lewis Brisbois Bisgaard & Smith LLP
1111 Third Avenue
Suite 2700
Seattle, Washington 98101

Attn: Kathleen Nelson

Re: Ferguson Settlement Demand

Covered by ER 408

Dear Kathleen Nelson,

I am writing this letter in response to your email dated December 29, 2015. Prior to my email to you yesterday, I spent a considerable amount of time conferring with my client regarding this case and my belief that she should allow me to revive our prior settlement discussions. I think we can both agree that our clients will never agree about anything, especially this case. I recognize that the parties' personal feelings toward one another have made settlement discussions very difficult, up to this point. However, I see an opportunity for success, or I would not be writing this letter.

As I see it, based on the past behaviors of both clients, yours and mine, this case is likely to continue indefinitely with no relief to either party for a very long time. That would be unfortunate for both parties. Though, the settlement negotiations just prior to the November 30th trial date went off track, I believe there may still be an opportunity for a compromise which could resolve this case, but now is the time.

Ferguson has authorized me to offer an opening settlement demand in the amount \$481,093.92, which is the amount of her economic damages. If your client agrees to settle this matter before Judge Ramseyer makes a decision on the motion for reconsideration, Ferguson is willing to discount the settlement amount to \$366,765.00. The discounted amount represents the cost that will be incurred by my client to go to trial in her subsequently filed lawsuit. I do understand that reasonable minds may differ and you may have a different perspective regarding what a reasonable settlement looks like. To that end, I ask that you help me to understand your client's position so that we can attempt to settle this matter for our clients.

Lastly, I want to address a couple of comments made by you in your email. I do recall you raising the statute of limitations as a potential bar to my client's new case, the last time we spoke. Though, you seemed quite adamant that the statute of limitation has expired on my client's negligence claim, my research resulted in a different conclusion. Of course, reasonable minds may differ. If you think, I am overlooking authoritative information that might lead me to make a different conclusion then please send it to me so I can understand your position and have a discussion with my client about the merits of your position. That being said, however, the decision regarding the statute of limitations is not going to be made by either one of us or our clients, so there is risk to both parties if they

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

do not settle their dispute now. Despite, the looming debate over the statute of limitations issue as to the negligence claim, there is no such issue with regard to the Consumer Protection Act claim which has a 4-year statute of limitations.

If, Judge Ramseyer dismisses Ferguson's case with prejudice, that decision will only lead to further litigation. The case law seems pretty clear here, so it is not likely that the Court will grant the motion for reconsideration and dismiss with prejudice, but again neither you, me or our clients will be making the decision so there is risk to both clients if they do not voluntarily settle their dispute now.

Please understand, when all is said and done, regardless of the many decisions by the Courts and later a jury, my view is that the risk that my client will not recover anything from your client is rather low. Even if the Consumer Protection Act claim is the only claim that survives, my client is likely to recover her economic damages, litigation costs and attorney's fees, the sum of which will far exceed the policy limits. With her economic damages alone, close to the policy limits, any amounts in excess of the policy limits will have to be recovered from your client personally. I will not address the merits of my client's claims in this letter since I have already done an extensive analysis of her claims in the trial brief.

Finally, I wanted to mention that I intend to take a CR 30(b)(6) deposition of the insurer in Ferguson's new case for the purpose of determining how Ferguson's attorneys' fees and costs, for the Consumer Protection Act and the malpractice claims which we expect to recover, will be paid and by whom, and to make sure that the information we have about Waid's insurance coverage is accurate.

In conclusion, I believe there is much to be gained for both parties, by making our best effort to settle this dispute now, and this is true regardless of how the motion for reconsideration is decided by the Court. A settlement now will bring both clients long awaited relief and will end, once and for all, this very contentious dispute.

To reiterate the settlement demand, Ferguson agrees to settle this dispute for \$366,756.00 if the matter is settled before Judge Ramseyer rules on your client's motion for reconsideration, or \$481,093.92, after Judge Ramseyer decides the motion for reconsideration.

Kind regards,

Emily Sharp Rains

Cc: Sandra Ferguson by email

Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN J. WAID,
Counter-Plaintiff,
v.
SANDRA L. FERGUSON,
Counter-Defendant.

No. 2:17-cv-01685-RSM
POST TRIAL DECLARATION OF
EMILY RAINS

I, Emily Rains, declare under penalty of perjury under the laws of the United States that the following is true and correct. I am filing this declaration to correct factual errors, within my personal knowledge, contained in the Findings of Fact and Conclusions of Law entered by the Court on November 19, 2018, Document #179. This memorandum is offered to correct the following erroneous findings of fact.

POST TRIAL DECLARATION OF
EMILY RAINS -1

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMKK1613@AOL.COM

1 Paragraph 37 erroneously states: “The Sunday night before the trial date of
2 November 30, 2015, Ms. Ferguson’s attorney Emily Rains communicated to Mr.
3 Waid’s attorney, Kathleen Nelson, via the phone, that settlement would no
4 longer be possible because the dispute was no longer about money, it was about
5 ‘dragging [Mr. Waid’s] name through the mud.’”

6 Correction: I have never stated to Ms. Nelson that my client was not
7 interested in settling her case against Mr. Waid. Nor have I ever communicated
8 to Ms. Nelson any words to the effect that my client’s case “was no longer about
9 money, it was about ‘dragging [Mr. Waid’s] name through the mud.’” The Court
10 admitted my declaration and exhibits as part of the trial record. The conversation
11 described in paragraph 38 of the findings of fact and conclusions of law did not
12 occur.

13 My testimony on this point is consistent with the physical evidence
14 submitted in support of my declaration (i.e., written settlement offers I sent to
15 Ms. Nelson and an email string between Ms. Nelson and I). The documents
16 admitted at trial in support of my sworn declaration were contemporaneous with
17 the settlement discussions that Ms. Nelson testified about at trial. The
18 documents speak for themselves.

19 Paragraph 38 erroneously states: “Ms. Ferguson’s remaining claims were
20 dismissed without prejudice on November 30, 2015...because Ms. Ferguson’s
21 counsel, Emily Rains, did not show up for trial and Ms. Ferguson herself
22 appeared late, indicating that she was not prepared for trial.”

23 Correction: When I entered my notice of appearance in September 2015, I
24 made it clear to the trial court, Mr. Waid, Ms. Nelson and Ms. Ferguson that I
25

26
27 POST TRIAL DECLARATION OF
28 EMILY RAINS -2

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMCK1613@AOL.COM

1 would need a continuance to try Ms. Ferguson's case due to existing scheduling
2 conflicts, time needed to review the extensive record, resolve discovery abuse,
3 replace Mr. Kilpatrick who would not be able to testify at trial due to medical
4 issues, and prepare for trial. The record reflects that I diligently attempted to
5 secure a continuance, so Ms. Ferguson would not have to go to trial without an
6 attorney. Even though there were no prior continuances in the case, the trial
7 court denied my requests. Though, I was not scheduled to try the case, I worked
8 tirelessly with the little time I had to come up to speed on the case, resolve issues,
9 and prepare for trial before the November 30, 2015 trial date. I also managed to
10 adjust my schedule so that I would only need a 3-day continuance to try the case.
11

12 On November 30, 2015, I appeared by telephone, even though I was not
13 obligated to do so, in hopes of securing, at minimum, a 3-day continuance.
14 Unfortunately, the trial court had her own calendar challenges and Ms. Nelson
15 and Mr. Waid were unwilling to cooperate in any way that would result in the
16 parties going to trial 3-days later, so the court dismissed Ms. Ferguson's
17 remaining claims without prejudice. It is notable that trial court refused, not
18 once, but twice, Mr. Waid's requests to have Ms. Ferguson's claims dismissed
19 with prejudice. Therefore, it is not accurate to state that Ms. Ferguson's
20 remaining claims were dismissed because I did not appear for trial. I was not
21 expected to appear for trial.
22

23 DATED this the 28th day of November, 2018

24 Respectfully submitted,
25 EMILY RAINS

26
27 POST TRIAL DECLARATION OF
28 EMILY RAINS -3

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMCK1613@AOL.COM

FERGUSON 039

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By: /s/Emily Rains
Attorney at Law
WSBA No. 35686
mail@emilyrains.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on or about the 28th day of November, 2018, a true and correct copy of the foregoing document was filed with the Clerk of the Court via ECF and served via ECF on opposing counsel.

/s/ John R. Muenster
Muenster & Koenig

POST TRIAL DECLARATION OF
EMILY RAINS -4

MUENSTER & KOENIG
IN MEMORIAM:
KIM KOENIG (1956-2018)
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WA 98110
TEL: (206) 501-9565
EMAIL: JMCK1613@AOL.COM

EXHIBIT D

Email string to and from Emily Rains and Kathleen Nelson,
dated February 19, 2019 and February 20, 2019

Letter from Emily Rains to Kathleen Nelson dated February 20,
2019

From: [Emily Sharp Rains](#)
To: [Sandra Ferguson](#)
Subject: FWD: Re: [EXT] Quick Question
Date: Wednesday, February 20, 2019 9:52:28 AM

----- Original Message -----

Subject: Re: [EXT] Quick Question
From: "Emily Rains" <mail@emilyrains.com>
Date: 2/20/19 6:27 am
To: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>

Kathleen,

I dont need the entire number. Just provide me the last four digits of your cell phone number. This will avoid the additional attorney's fees associated with having to do a manual search. In the alternative, you and your client can withdraw the federal court's findings of fact and conclusions of law.

Kindly,

Emily

----- Original message -----

From: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>
Date: 2/19/19 7:20 PM (GMT-07:00)
To: Emily Sharp Rains <mail@emilyrains.com>
Subject: Re: [EXT] Quick Question

I don't give it out

Sent from my iPhone

On Feb 19, 2019, at 5:38 PM, Emily Sharp Rains <mail@emilyrains.com> wrote:

Kathleen,

I dont need to discuss anything with you . I am reviewing my phone records in light of your recent testimony in Mr. Waid's federal case. Please send me this information. I do not intend to use your cell phone for any other purpose and will only contact you on your office telephone regarding this litigation.

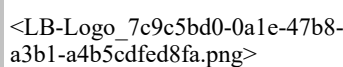
Kindly,

Emily Rains

----- Original Message -----

Subject: RE: [EXT] Quick Question
From: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>
Date: 2/19/19 3:14 pm
To: "Emily Sharp Rains" <mail@emilyrains.com>

No--- I don't give that out. You can catch me on the office phone, or if you want to talk, you can email me and we can set up a time. I am almost always on email and available. Why are you asking for my cell, not judging, but just curious?

 **Kathleen A. Nelson**
Partner
Kathleen.Nelson@lewisbrisbois.com

T: 206.876.2965 F: 206.436.2030

1111 Third Avenue, Suite 2700, Seattle, WA 98101 | LewisBrisbois.com

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From: Emily Sharp Rains [<mailto:mail@emilyrains.com>]
Sent: Tuesday, February 19, 2019 3:09 PM
To: Nelson, Kathleen
Subject: [EXT] Quick Question

External Email

Kathleen,

Can you please send me your cell phone number?

Thank you,

Emily

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 20, 2019

SENT VIA EMAIL

KATHLEEN NELSON
Lewis, Brisbois, Bisgaard, & Smith LLP
1111 3RD Avenue
Suite 2700
Seattle, Washington 98101

RE: Motion to Strike

Dear Kathleen Nelson,

I am writing as a follow-up to today's email related to my request for the last four digits of your cell phone number. Since, our last email, I have thoroughly reviewed my telephone records and there are no calls between you and I after November 15, 2015 through November 29, 2015. In light of the significant inferences that can be drawn from the absence of your telephone number in my records in conjunction with your testimony in the federal case, I want to provide you the opportunity to come forward with evidence of the phone calls that you testified about before this matter advances any further. I just want to give you the benefit of the doubt and make sure that I have not overlooked something. Please respond with your records by Thursday, February 21, 2019. After that date, I will proceed with further action.

Sincerely,

/s/Emily Sharp Rains
Emily Sharp Rains

EXHIBIT D

Email string to and from Emily Rains and Kathleen Nelson,
dated February 19, 2019 and February 20, 2019

Letter from Emily Rains to Kathleen Nelson dated February 20,
2019

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SANDRA L. FERGUSON,)	C17-01685-RSM
)	
Plaintiff and)	SEATTLE, WASHINGTON
Counter-Defendant,)	
)	November 13, 2018
v.)	
)	Trial Testimony of
BRIAN J. WAID AND THE MARITAL)	Kathleen Nelson
COMMUNITY,)	
)	
Defendants and)	
Counter-Plaintiffs.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff and	John R. Muenster
Counter-Defendant:	Muenster & Koenig
	14940 Sunrise Drive NE
	Bainbridge Island, WA 98110

For the Defendants	Jeffery E. Bilanko
and	Susan K. Kaplan
Counter-Plaintiffs:	Carroll Biddle & Bilanko
	801 2nd Avenue
	Suite 800
	Seattle, WA 98104

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EXAMINATION INDEX

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	REDIRECT EXAMINATION BY MR. BILANKO	28

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1 THE COURT: And you may seated. Thank you.

2 All right. Counsel, we were going to interrupt the testimony
3 of Mr. Waid here to take on the other witness.

4 Do you have your witness ready?

5 MR. BILANKO: We do, Your Honor. We would like to call
6 Kathleen Nelson.

7 THE COURT: Good afternoon. If I could have you step up
8 here in front of my clerk, raise your right hand and be sworn.

9 KATHLEEN NELSON,
10 having been sworn under oath, testified as follows:

11 THE CLERK: Please have a seat.

12 There's water here if you need it.

13 MS. NELSON: Thank you.

14 THE CLERK: That is Mr. Waid's.

15 MS. NELSON: Okay.

16 THE CLERK: Would you please state your name for the
17 record and spell it for our court reporter?

18 MS. NELSON: Yes. My name is Kathleen Nelson.

19 K-a-t-h-l-e-e-n, Nelson --

20 MR. MUENSTER: Excuse me, Ms. Nelson. Could you pull
21 the microphone towards you? Because my hearing is not as good as
22 it was a couple of years ago, if you can --

23 MS. NELSON: Certainly.

24 Is that better?

25 MR. MUENSTER: -- project, that would be great.

1 MS. NELSON: Okay.

2 MR. MUENSTER: Thank you.

3 MS. NELSON: Nelson, N-e-l-s-o-n.

4 THE CLERK: Thank you.

5 THE COURT: Ms. Nelson, just a couple things to keep in
6 mind as you testify. Number one, keep your voice up so everybody
7 can hear you, and, obviously, counsel. Number two, don't speak
8 over counsel's question. Wait until it's complete before you
9 begin your response. Otherwise, our court reporter can't take it
10 down. And, obviously, if you don't understand a question being
11 asked, just say so; we will try to get them to rephrase it
12 hopefully in a way that makes more sense, all right?

13 MS. NELSON: Yes, Your Honor.

14 THE COURT: You may inquire.

15 MR. BILANKO: Thank you.

16 DIRECT EXAMINATION

17 BY MR. BILANKO:

18 Q Good afternoon, Ms. Nelson.

19 A Good afternoon.

20 Q Thank you for appearing today in court. I just have a few
21 questions for you.

22 Do you know Brian Waid?

23 A I do.

24 Q Okay. Do you know Sandra Ferguson?

25 A I do.

1 Q Can you tell me how it is that you know Brian Waid?

2 A I represent Brian Waid in the Ferguson versus Waid action.

3 Q And that action, you are talking about the 2015 -- the
4 lawsuit in King County that was filed in 2015?

5 A I believe it was filed in 2014, because trial was in 2015.

6 Q Okay. And so we have heard testimony this morning that there
7 were two lawsuits. There was a lawsuit filed in 2014 that had a
8 trial date of November 30th of 2015, and then we heard testimony
9 that there was a separate lawsuit filed the very next day after
10 the first lawsuit was dismissed.

11 Did you represent Mr. Waid in both lawsuits?

12 A In both lawsuits, yes.

13 Q Okay. And do you know Emily Rains?

14 A I do.

15 Q And how is it that you know Emily Rains?

16 A She is Sandra Ferguson's attorney -- is or was, I don't know
17 at this point -- in those actions.

18 Q Okay. So she was Ms. Ferguson's attorney at least for some
19 portion of the 2014 lawsuit?

20 A Correct. Yes.

21 Q Was she Ms. Ferguson's attorney who was supposed to appear
22 for trial on November 30th of 2015?

23 A Yes.

24 Q Do you know what the current lawsuit between Mr. Waid and
25 Ms. Ferguson is about, the one you're here testifying about

1 today?

2 A Very little. I believe Sandra Ferguson's claims have been
3 dismissed, so Mr. Waid's counterclaims are the only ones
4 surviving, and it's a defamation action.

5 Q Okay. Yes, Mr. Waid has a claim for defamation and for civil
6 harassment.

7 What I wanted to ask you about today, during the course of
8 your representation of Mr. Waid, did Emily Rains ever make any
9 statements to you about the purpose of Ms. Ferguson's lawsuits
10 against Mr. Waid?

11 A Yes.

12 MR. MUENSTER: Your Honor, I'm going to -- she's
13 probably going to say yes, but I'll note my objection, on hearsay
14 grounds, to her testifying about Ms. Rains' comment.

15 THE COURT: Why isn't it hearsay, Mr. Bilanko?

16 MS. KAPLAN: She's Ms. Ferguson's representative, so
17 it's a statement by an admission party -- statement against --
18 sorry. It's a statement by a party opponent, so it's not hearsay
19 under Rule 801.

20 MR. MUENSTER: Well, I don't think a foundation has been
21 laid for that finding, Your Honor, so I would respectfully object
22 on hearsay grounds.

23 THE COURT: All right. And, again, in a bench trial, I
24 think we can be probably a little more lenient. It can or cannot
25 be hearsay depending exactly on the rest of her comments. So I

1 will overrule the objection and let her answer the question.

2 MR. BILANKO: Sure. Thank you, Your Honor.

3 Q (By Mr. Bilanko:) So the question was, "Did Ms. Rains ever
4 make any statements about the purpose of her lawsuit?" and you
5 answered "Yes."

6 Can you tell me what statements she made to you about the
7 purpose of the lawsuit in King County?

8 MR. MUENSTER: Objection. Hearsay. Lack of foundation.

9 THE COURT: Overruled.

10 A There was one statement in particular where she said -- it
11 was sort of last-minute settlement negotiations right before
12 trial. So it was within the week before trial. I can't remember
13 if it was right before Thanksgiving break or the Sunday night
14 before the Monday trial, which was after Thanksgiving. We were
15 on the phone at night, as parties normally do, talking about "Can
16 we settle this?" and I gave a number that was part of the
17 negotiations, and she came back with a number that was way higher
18 than where she was before, and she said, "This is no longer" --
19 or "This is not about money. This is about dragging Brian's name
20 through the mud."

21 Q And was anyone else present when you made that phone call?

22 MR. MUENSTER: Let me renew my objection. Move to
23 strike the testimony, Your Honor.

24 THE COURT: Overruled.

25 Q Was this conversation on the telephone, or were you in

1 person?

2 A It was on the telephone.

3 Q Okay. Did anyone else hear that statement, other than you?

4 A Not on my end. I'm not sure who was on Emily Rains' end.

5 Q And you were -- the following, I guess, day, the first day of
6 trial, November 30th, were you in the courtroom when -- well,
7 strike that.

8 When the judge issued the order of involuntary nonsuit, do
9 you recall Ms. Ferguson making any statement to Brian Waid?

10 A Yes.

11 Q Okay. Can you tell me what that was?

12 A She made several statements after that involuntary nonsuit.
13 She kind of had a few --

14 MR. MUENSTER: Your Honor, I'm going to object. If this
15 is something that's on the record -- I think we have the hearing
16 marked as an exhibit, and it's unclear what time we're talking
17 about or when this alleged contact occurred. So I object to lack
18 of foundation.

19 THE COURT: All right.

20 Could we get a little more foundation, Mr. Bilanko?

21 MR. BILANKO: Sure.

22 Q So after the order had been entered and the case was
23 dismissed, as you were leaving the courtroom, did Ms. Ferguson
24 make any statements to Mr. Waid that would not have been on the
25 record?

1 A I don't know if it was on the record or not actually --

2 Q Okay.

3 A -- because I was at counsel table packing up my stuff. And
4 she -- I remember she had gathered all of her belongings and she
5 kind of stormed out, and as she was storming out, she said
6 something to the effect of, "This is not the end of it, Brian" or
7 "You haven't seen the end of me" or something like that.

8 Q Okay. Do you have any reason to believe that Emily Rains was
9 not speaking on behalf of Ms. Ferguson when you had your
10 conversation with her prior to trial?

11 MR. MUENSTER: Objection to the form of the question.

12 A No.

13 MR. MUENSTER: It's kind of asking a negative. I object
14 to the form of the question. He should be bringing out why --
15 what her factual basis is for claiming that Emily Rains was
16 speaking for Sandra Ferguson in this telephone conversation.

17 THE COURT: If I could have you rephrase, counsel.

18 MR. BILANKO: Sure.

19 Q You said that you were having discussions with Emily Rains
20 about settling the lawsuit. You meant the lawsuit between
21 Ms. Ferguson and Mr. Waid, correct?

22 A Correct.

23 Q And so can you tell us why it is you believed that Emily
24 Rains was speaking on behalf of Sandra Ferguson in that phone
25 call?

1 A Because she was the one talking to me about the settlement
2 negotiations.

3 Q And she was counsel of record for Sandra Ferguson at the
4 time?

5 A She was counsel of record.

6 Q Would you have any other reason to speak with Ms. Rains?

7 A No reason whatsoever.

8 Q Thank you.

9 MR. BILANKO: I don't have any other questions.

10 THE WITNESS: Thank you.

11 THE COURT: Any cross-examination?

12 MR. MUENSTER: Yes, Your Honor. Thank you.

13 CROSS-EXAMINATION

14 BY MR. MUENSTER:

15 Q Good afternoon, Ms. Nelson.

16 A Good afternoon, Mr. Muenster.

17 Q Just to fill in the background, we have met before, because
18 during the summer of 2015, I was representing Sandra Ferguson,
19 along with Everett attorney Mark Olson, right?

20 A Well, I know that Mr. Olson represented her at one time and
21 you represented her at one time. And, yes, we have met before.
22 I don't know the time frame.

23 Q Okay. During that time frame, I took Mr. Waid's deposition
24 in the summer of 2015. Does that ring a bell for you?

25 A I know you took his deposition. I'm not sure exactly when it

1 was.

2 MS. KAPLAN: Objection. Beyond the scope of the direct.

3 THE COURT: Ms. Kaplan, this is Mr. Bilanko's witness.

4 MS. KAPLAN: Okay.

5 THE COURT: So he's the one that has to make the
6 objections.

7 MS. KAPLAN: Okay. Sorry.

8 MR. BILANKO: Your Honor, we would object. This is
9 beyond the scope of the direct examination.

10 THE COURT: Well, I think he's just trying to set a
11 background here.

12 MR. MUENSTER: Exactly.

13 THE COURT: All right. The next question.

14 MR. MUENSTER: Exactly.

15 Q (By Mr. Muenster:) Ms. Rains came on the case representing
16 Ms. Ferguson in September of 2017; is that right?

17 A I don't -- I can't tell you when the date was, but she was
18 after you, I believe.

19 Q Okay. Well, she came -- she started representing
20 Ms. Ferguson in 2017, at some point before there was this hearing
21 in the courtroom that you have testified about on direct, right?

22 A 2015. You are saying --

23 Q 2015. Excuse me.

24 A So she represented Ms. Ferguson after you. So that sounds
25 about right. And she represented her up through the first day of

1 trial.

2 Q Okay. All right. Now, with regard to the comment that you
3 have testified about, is that memorialized in a writing by you
4 someplace?

5 A No. I wouldn't have put it in a writing.

6 Q Okay. So the comment -- your testimony is that the comment
7 was made to you in 2015 and you didn't write it down anyplace?

8 A I was standing at the bottom of the elevator, on my way to my
9 car, before trial.

10 Q So did you not write it down?

11 A No, I didn't write it down.

12 Q Okay. Now, to provide the Court with a little background,
13 there was a mediation -- well, let me back up a second.

14 You're representing Mr. Waid because he's insured by the
15 Travelers Insurance Company?

16 MR. BILANKO: Your Honor, I would object. That's
17 irrelevant.

18 THE COURT: And how is it relevant, counsel?

19 MR. MUENSTER: Because the mediation was held with
20 Travelers, and I have a letter that I want to show the witness
21 that's written by the Travelers agent about the mediation that
22 I'm about to ask her about.

23 THE COURT: All right. I will let you go ahead and show
24 her the letter, if it will help in terms of her recollection.

25 Q Let me ask you this: Do you recall having a mediation in

1 Sandra Ferguson's case?

2 A Yes.

3 Q Was it attended by somebody from Travelers?

4 A Yes.

5 Q It occurred in -- strike that.

6 There were settlement discussions in the summer of 2015, and
7 at that -- and do you recall that in the summer of 2015 Mr. Olson
8 and I made a policy-limit settlement offer to you and your client
9 of \$500,000?

10 MR. BILANKO: Your Honor, we would object that the
11 settlement discussions are privileged and not admissible in this
12 case.

13 MR. MUENSTER: Well, they wouldn't normally be, but
14 the --

15 THE COURT: I understand. I understand, counsel.
16 It will be overruled.

17 MR. MUENSTER: Thank you.

18 A I don't necessarily remember that. If you have something in
19 writing that I can look at?

20 Q Sure.

21 A I recall that Mr. Olson was at the mediation.

22 Q Yep. That's right.

23 MR. MUENSTER: Okay. I have given this -- a copy of
24 this to counsel already, Your Honor.

25 Q So do you happen to recall -- this is a letter, an e-mail

1 letter, from the Travelers adjuster maybe, Thomas Asher.

2 A Yes.

3 Q And he cc's you and Mr. Waid, and he recounts that -- it's
4 addressed to me and Mr. Olson, and he recounts that in July of
5 2015, we made a policy-limits demand of \$500,000.

6 Does that refresh your recollection?

7 A Yes.

8 Q Okay. All right.

9 MR. BILANKO: John, can we have a copy of this? We
10 didn't get a copy.

11 MR. MUENSTER: I thought I gave you a copy already.

12 Oh, the Travelers ... Okay. I'm sorry. There you go. It's
13 all yours. Keep it.

14 Q And it's true, is it not, that Travelers rejected that offer,
15 and at least insofar as this letter indicates, I don't think --
16 well, here, let me --

17 MR. MUENSTER: May I approach the witness so she can see
18 this?

19 THE COURT: She can see it on the screen up there.

20 MR. MUENSTER: Oh, okay.

21 A It's moving around.

22 Q Yeah, I know.

23 A I'm not looking at anything, actually.

24 Q Okay. There you go.

25 A Thank you.

1 Q My question is, did Travelers make a counteroffer to our
2 policy-limits offer?

3 A Yes.

4 Q And what was that?

5 A I don't know at the time.

6 What's the date of that letter?

7 Q The letter is July 12th. Here is the second page. In the
8 middle of the paragraph, it says, "Travelers sought to
9 negotiate" -- "sought to negotiate the mediation in good faith,
10 making an initial offer of \$10,000, with the understanding that
11 further settlement discussions would continue during the course
12 of the mediation."

13 Does that refresh your recollection that you guys offered
14 \$10,000?

15 A It doesn't necessarily refresh my recollection. I do
16 remember the mediation. I don't remember the increments that we
17 talked about. I remember it was in front of Teresa Wakeen. I
18 remember it didn't settle.

19 Q Okay. It didn't settle.

20 Now, in November of 2015, at the end of that month, that's
21 when we had the hearing in which the case is dismissed by Judge
22 Ramseyer, where Ms. Rains does not appear and Ms. Ferguson is not
23 ready to go forward with trial, correct?

24 A Correct. It was a jury trial.

25 Q Right.

1 And prior to that time, had Ms. Rains contacted you and
2 extended a settlement offer to you?

3 A Yes.

4 Q Okay.

5 A Yes.

6 Q And I'm not going to make this a memory test. I'm going to
7 show a letter to you dated November 15th, 2015, which would be
8 about two weeks before the trial date. Can you take a look at
9 that letter and tell me if you recognize it?

10 MR. MUENSTER: And for the record, these documents that
11 I'm running through I have provided to Mr. Waid's counsel this
12 morning. I told them I had them and wanted to ask this witness
13 about them, for impeachment purposes.

14 MR. BILANKO: Your Honor, we would object as to the
15 relevance of this document and that it's hearsay.

16 MR. MUENSTER: Well, the relevance, quite frankly, is
17 the portrayal of the statement "This is not about money; it's
18 dragging Brian's name through the mud." That, in my view, is
19 contradicted directly by these documents that -- the settlement
20 offers back and forth that were going between the parties, which
21 would appear to conflict with the uncorroborated, unrecorded
22 statement that Ms. Nelson has testified to.

23 THE COURT: All right. I will let you ask her.

24 MR. MUENSTER: Thank you.

25 A There's more than these letters. We were talking over the

1 phone back and forth about numbers.

2 Q Okay.

3 A That was the context of that remark. It had nothing to do
4 with these letters.

5 Q Well, I appreciate your views on the relevancy, but let me
6 just get some facts from you now as a witness, okay?

7 A Sure. Okay.

8 Q Good.

9 So Ms. Rains made an offer -- again renewed the offer of
10 \$500,000 to you in the letter dated November 15th, right?

11 A It appears that way by her letter, yes.

12 Q Okay. Do you have an independent recollection of that offer
13 at all?

14 A I do not.

15 Q Okay. Did you make a counteroffer?

16 A Yes.

17 Q Okay. When did you make a counteroffer?

18 A I don't know.

19 Q Okay. Was it in 2015?

20 A Yes.

21 Q Was it in November of 2015?

22 A Yes.

23 Q Okay. What was the amount on the counteroffer?

24 A I don't remember. It was a series of negotiations going back
25 and forth.

1 Are you asking about my last -- my last number?

2 Q Well, you wrote a letter, which has the last number, and
3 that -- yeah. What was the last number you gave them?

4 A If you have the letter and you can show it to me, that would
5 be helpful.

6 Q You know, I couldn't find your letter last night. But let me
7 show you another letter and maybe that will refresh your
8 recollection.

9 I want to show you a letter written the next day by
10 Ms. Rains, November 16th. Take a look at that letter and tell me
11 if you recognize it.

12 A Okay. Yes.

13 Q So is that letter correct, that you countered with \$200,000?

14 A I'm not sure if this is a direct counter to the letter that I
15 just saw. But that sounds about right. There was also another
16 figure that went back and forth.

17 Q All right. And the figure that went back and forth, was that
18 in the phone conversation that you're talking about?

19 A Yes. That's how I typically ...

20 Q And this was a figure that -- was this the same phone
21 conversation where Ms. Rains made the statement you testified to,
22 or a different conversation?

23 A I'm not sure because -- and I will tell you why -- when I am
24 going to trial, I'm trying to do last-minute settlement
25 negotiations. So it could be two, three, four, five

1 conversations. And I'm saying that because I have to go back and
2 ask for money and all that. So I ...

3 Q Okay. Well, would it be fair to say that in the week prior
4 to the trial date, you and Ms. Rains were having telephone
5 conversations with a view to try to reach settlement, correct?

6 A That was my view, to try to reach settlement.

7 Q Okay. And it sounds like the two of you were exchanging
8 offers?

9 A Yes.

10 Q And I'm just talking about the last week before the trial
11 date.

12 Now, could you pinpoint for us in time when this statement
13 about "It's not about the money" was made?

14 A Yes.

15 Q When was that made?

16 A The trial was on November 30th, which was the Monday after
17 Thanksgiving.

18 Q Right.

19 A So this conversation either happened right before the
20 Thanksgiving holiday -- and I know this because I was out of town
21 for Thanksgiving, with no cell phone reception -- it was either
22 the Wednesday before, but I think it might have even been the
23 Sunday before the Monday trial, because I did come into my office
24 on Sunday of that weekend to prepare for trial. I think this
25 phone call was as I was leaving my office the evening of November

1 29th.

2 Q Okay. So when we leave off with the letters on November
3 16th, Ms. Ferguson has offered half a million dollars; you have
4 countered, as indicated in the letter, at some point with
5 \$200,000; Ms. Rains counters back in this letter with 350-. And
6 that's where things are as of November 16th; is that right?

7 A That sounds right.

8 Q Okay. Assuming for the purposes of this question that you
9 exchanged -- or that you made an offer or you gave a number the
10 night before the trial, what was the number that you gave
11 Ms. Rains the night before the trial?

12 A I believe -- I don't remember. I have been trying to think
13 about it. I believe it was 240-.

14 Q 240-?

15 A Something like that.

16 Q And did Ms. Rains give you a number back in the same
17 conversation?

18 A She did.

19 Q And what was her number?

20 A Like \$1.2 million.

21 Q Did you say \$1.2 million?

22 A Something like \$1.2 million. It was over a million dollars.

23 Q Okay. You were at 240-. Okay.

24 So if your testimony is accurate then, she had jumped from
25 350- on November 16th to 1.2 million the eve of the trial?

1 A She did.

2 Q Okay.

3 A Or the days before Thanksgiving break.

4 Q Okay. All right.

5 Now, did you accept that 1.2 million offer, Ms. Nelson?

6 A No. That was the -- that sent a message to me.

7 Q Okay. Were there any other offers? Was there a counteroffer
8 made by your client in response to the \$1.2 million offer?

9 A There was no reason to make a counteroffer --

10 Q Okay.

11 A -- at that time based on --

12 Q And did Ms. Rains write to you about settlement in December
13 of 2015?

14 A I don't know. If you have a letter, that would help.

15 Q You bet. We're going to get to that next.

16 I want to show you the first page of this letter, which is
17 dated December 29, 2015.

18 MR. MUENSTER: And, again, Your Honor, I have given
19 counsel this morning a copy of this letter.

20 Q And it's written to you, and it goes on for -- there's a
21 second page. It looks like it's a two-page letter.

22 MR. BILANKO: Your Honor, we would object to this
23 exhibit as hearsay.

24 THE COURT: Overruled.

25 MR. MUENSTER: Thank you, Your Honor.

1 Q So does this -- do you remember receiving this letter? Maybe
2 you don't. Is this -- I can show you the second page. Take your
3 time and read through it if you -- it rings a bell.

4 A I recall the concept of this letter. I don't recall this
5 letter in particular.

6 Q Okay. Can you tell me if there -- were there any other
7 written exchanges of offers made after the case was dismissed on
8 November 30th?

9 A Offers from our end?

10 Q Either end, other than this letter.

11 A I don't know.

12 Q All right.

13 And to set the context that's discussed in this letter, your
14 side disagreed with the dismissal-without-prejudice order that
15 was entered by Judge Ramseyer, so you filed a motion to
16 reconsider, correct?

17 A Correct.

18 Q Okay. And Judge Ramseyer denied that motion, denied your
19 motion to reconsider on or about December 31st of 2015, correct?

20 A I don't know the date, but I know that we've --

21 Q I will represent to you -- I have seen the order -- it was on
22 the last day -- it was on New Year's Eve, 2015.

23 A Okay.

24 Q Okay.

25 And after that order was entered, Mr. Waid appealed. You

1 mentioned this morning he's got an appeal going in the Court of
2 Appeals. Is that one of the things that he appealed?

3 A Yes.

4 Q Okay. Are you representing Mr. Waid on the appeal in the
5 Court of Appeals?

6 A I represent him as a defendant. Any counterclaim he has is
7 his own.

8 Q Okay.

9 A He's attorney of record.

10 Q All right. And he's appealed the dismissal without
11 prejudice, right?

12 A Yes.

13 Q Okay. And you represent him on that, correct?

14 A Yes.

15 Q Okay. So are you representing him in the Court of Appeals on
16 that appeal?

17 A Yes.

18 Q Okay. Does he have any other issues in the Court of Appeals
19 that -- he mentioned he had three issues. What were the other --
20 do you know what the other two issues are?

21 Well, let me help you. Did Mr. -- during this, I call it the
22 2014 case --

23 A Okay.

24 Q -- Ferguson versus Waid, during that case, did Mr. Waid file
25 a counterclaim?

1 A Yes.

2 Q And while I was representing Ms. Ferguson, did I move to
3 dismiss that counter -- or I moved for summary judgment or
4 dismissal of that counterclaim, right?

5 A Somebody did. I don't remember if it was you or Mr. Olson,
6 okay?

7 Q And the judge granted the motion to dismiss. So Mr. Waid's
8 counterclaim was dismissed, correct?

9 A Correct.

10 Q And is that one of the things that Mr. Waid has up on appeal
11 now in the Court of Appeals?

12 A Yes.

13 Q All right. And is there a third issue that he's got up in
14 the Court of Appeals that you're representing him on?

15 A (No audible response.)

16 Q You don't know. Okay.

17 He said three issues this morning on his direct, so I'm
18 just --

19 A There are lots of briefs and lots of filings and lots of
20 actions going on, so if you can help me out. I know that -- as I
21 sit here right now, I don't know right now.

22 Q Okay. Let me ask you this: After Ms. Rains gave you the
23 1.2 million number, was there any counteroffer made by your side,
24 before she wrote you the December 29th letter, that you recall?

25 A No.

1 Q Okay. All right.

2 And then in this December 29th letter, when we look to the
3 end of it, addressed to you, here Ms. Rains talks about the
4 wisdom of settlement and so forth. And then the last
5 paragraph -- could you take a look at that for me? -- she made an
6 offer of \$366,000 and 756 -- excuse me, \$366,756, if you settle
7 with them before Judge Ramseyer denied -- or ruled on the motion
8 to reconsider, and then a larger number afterwards, right?

9 A Okay. That's what it says, yes.

10 Q Okay. Did you make any response to that offer?

11 And by "response," I mean, you called her up and said, "Okay,
12 we counteroffer this," or you said, "No. We're going to -- you
13 have to pound sand; we're not going to make a counteroffer"?

14 A Well, I didn't say that. But the case was dismissed, so I
15 don't believe I responded to this --

16 Q Okay.

17 A -- with a settlement offer.

18 Q Okay. All right.

19 A Because I had already done that before --

20 Q Uh-huh. Okay. All right.

21 A -- and she rejected it.

22 Q So, in summary, at least from these documents and your
23 testimony, we've got the -- the policy limits were offered twice,
24 once in the summer with Travelers and then again by Ms. Rains in
25 her November 15th letter; you counter with \$200,000 in writing

1 and possibly 240- the night before; Ms. Rains had countered your
2 200- with 350-; and then at the end of December, she sends you a
3 letter offering 366,756, and in the alternative, 481-, if you
4 settled it after Judge Ramseyer ruled on your motion to
5 reconsider. Is that a fair summary of what it was about?

6 A I don't think so.

7 Q Okay. Tell me what's not fair about it.

8 A There were several settlement discussions going on.

9 Q Okay.

10 A And we were within the range of settlement. This is my
11 thought process.

12 Q Right.

13 A We're going to trial. This case can settle.

14 Q Uh-huh.

15 A She was at three-something, or whatever she was at, and I was
16 up to 240-.

17 Q Okay.

18 A She responded to the 240- with \$1.2 million and the statement
19 that I told you about. That, to me, closed the door.

20 Q All right.

21 A We went to trial.

22 Q Okay. So she had offered you -- I think we saw in the
23 November 16th letter she had countered your 200- with 350-?

24 A Correct.

25 Q And then you on the phone are talking to her about -- you

1 give the number of 240-, and she comes back with the -- and
2 that's when she comes back with the 1.2 million?

3 A Yes.

4 Q Okay. And then no dialogue about settlement until the end of
5 December?

6 A I doubt it.

7 Q Okay. All right.

8 MR. MUENSTER: Give me a moment, Your Honor. I think
9 I'm complete.

10 Oh, a couple of questions.

11 Q You have your appeal -- Mr. Waid has his appeal on -- I think
12 he -- I'm pretty sure he said three issues in the Court of
13 Appeals. And that's awaiting oral argument?

14 A Yes.

15 Q And the other case that Sandra Ferguson filed, which I call
16 the 2015 Ferguson versus Waid case -- which is filed the same day
17 as the dismissal, I guess -- that case is under a stay order?

18 A Yes.

19 Q The case has been stayed?

20 A Yes.

21 Q And it's stayed pending what?

22 A The appeal, the outcome of the appeal.

23 Q Okay. Thank you, Ms. Nelson.

24 MR. MUENSTER: Thank you, Your Honor. No further
25 questions.

1 THE COURT: Mr. Bilanko, any redirect for Ms. Nelson?

2 MR. BILANKO: Yes, Your Honor. Just a few questions.

3 REDIRECT EXAMINATION

4 BY MR. BILANKO:

5 Q Ms. Nelson, you detailed the kind of back-and-forth with the
6 settlement discussions, where you had come to 240- and they were
7 at 350- and went to 1.2 million, and you said that sent you a
8 message. I think that was your statement.

9 What message did that send to you?

10 A She wasn't interested in discussing settlement.

11 Q So she wasn't interested in money?

12 A Correct. Because she made that statement afterwards. I
13 thought the case would settle.

14 Q Right.

15 Mr. Muenster showed you this December 29th letter. This is
16 dated almost, I guess, 29 days after the case was dismissed, the
17 2014 case, correct?

18 A Yes.

19 Q And was the 2015 lawsuit, the one that was filed the very
20 next day after the 2014 lawsuit was dismissed, was the 2015
21 lawsuit stayed by this point?

22 A I don't know, but I doubt it.

23 Q And why is it that you doubt it?

24 A Because I don't think anything had -- I don't think we had
25 even answered it by this point.

1 Q Oh. You mean filed an answer to the 2015 complaint?

2 A Correct.

3 Q Okay.

4 A I could be wrong.

5 Q How was the -- was the 2015 case stayed as a result of a
6 motion filed by you?

7 A I believe so.

8 Q Okay. And the motion was based on the fact that appeals were
9 being taken from the 2014 lawsuit?

10 A Correct.

11 Q Okay. So that they were effectively the same lawsuit?

12 A Parallel actions.

13 Q Thank you.

14 MR. BILANKO: No further questions.

15 MR. MUENSTER: Your Honor, with the -- excuse me. With
16 the Court's permission, I would like to have marked and move the
17 admission of the December 29th, 2015 letter, which contains what
18 appears to be the final offer from Ms. Ferguson to Ms. Nelson. I
19 covered it with her in the cross-examination, but I would like to
20 move its admission so that we have it in the record.

21 THE COURT: Any other objection, counsel?

22 MR. BILANKO: We would object to it as hearsay and the
23 fact that it's not signed as well. I don't think -- it's not
24 authenticated.

25 THE COURT: And, again, that will be overruled.

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Madam Clerk, do we have a number for it?

MR. MUENSTER: Thank you, Your Honor.

THE CLERK: Would this be a counter-defendant's exhibit?

THE COURT: Yes.

MR. MUENSTER: This could be A, the next --

THE CLERK: Yes. Correct.

Exhibit A-77.

MR. MUENSTER: Exhibit A-77. Thank you.

THE CLERK: Exhibit A-77.

THE COURT: All right. Then that will be admitted.

(Exhibit No. A-77 admitted.)

MR. BILANKO: I'm sorry, John. What is it?

THE CLERK: Exhibit A-77.

MR. MUENSTER: Counsel, you have your copy of that,
right?

MR. BILANKO: Yes.

MR. MUENSTER: Thank you, Your Honor.

THE COURT: Anything else?

MR. MUENSTER: No further questions.

THE COURT: Ms. Nelson, thank you.

MS. NELSON: Thank you.

THE COURT: You may step down.

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C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

/s/ Nickoline Drury

Nickoline Drury

EXHIBIT F

Letter from Kathleen Nelson dated 11/16/2015 re: settlement offer

Email from Kathleen Nelson to Emily Rains dated November 16, 2015
coordinating telephone discussions re: settlement

Transmittal Email from Emily Rains to Kathleen Nelson, dated November 16,
2015, re: Ferguson's counteroffer

Telephone Records of Emily Rains for November 2015

RE: Ferguson v. Waid

mail@emilyrains.com [mailto:mail@emilyrains.com]

Sent: 11/16/2015 5:41 PM

To: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>

Email string between Nelson and Rains coordinating the discussion of Nelson's November 16, 2015 settlement offer

206-778-1330.

From: Nelson, Kathleen
Sent: Monday, November 16, 2015 6:26 PM
To: 'mail@emilyrains.com'
Subject: RE: Ferguson v. Waid

Headed out call me at around 7 am or give me your cell # and I will call from the car

From: mail@emilyrains.com [mailto:mail@emilyrains.com]
Sent: Monday, November 16, 2015 5:24 PM
To: Nelson, Kathleen
Subject: RE: Ferguson v. Waid

Hi Kathleen,

Do you have time to chat about your letter.

Emily

From: Nelson, Kathleen
Sent: Monday, November 16, 2015 4:57 PM
To: Emily Rains (mail@emilyrains.com)
Cc: 'Sandra Ferguson'
Subject: Ferguson v. Waid

Emily: Please see attached letter.

[Kathleen A. Nelson](#)
Partner
Kathleen.Nelson@lewisbrisbois.com
1111 Third Avenue, Suite 2700
Seattle, WA 98101
T: 206.876.2965 F: 206.436.2030

PLEASE NOTE OUR NEW ADDRESS AS OF NOVEMBER 9, 2015:
1111 Third Avenue, Suite 2700
Seattle, WA 98101

FERGUSON 079

[Representing clients from coast to coast. View our nationwide locations.](#)

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Response

mail@emilyrains.com [mail@emilyrains.com]

Sent: 11/16/2015 10:12 PM

To: "Nelson, Kathleen" <Kathleen.Nelson@lewisbrisbois.com>

Email transmitting counteroffer to Nelson from Rains after November 16, 2015 call between the two attorneys which occurred at 6:51pm - see Exhibit F: Rains call records

Hi Kathleen,

See attached letter.

Emily

Attachments: [ER 408 Settlement Letter 201511162308.pdf](#)

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**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

1111 Third Avenue, Suite 2700
Seattle, Washington 98101
Telephone: 206.436.2020
Fax: 206.436.2030
www.lewisbrisbois.com

KATHLEEN A. NELSON
DIRECT DIAL: 206.876.2965
KATHLEEN.NELSON@LEWISBRISBOIS.COM

November 16, 2015

File No.
50027-3397

Emily Sharp Rains
3213 W. Wheeler Street, No. 367
Seattle, WA 98199
Email: mail@emilyrains.com

ER 408: PRIVILEGED AND CONFIDENTIAL

Re: Ferguson v Waid

Dear Emily:

We are in receipt of your November 15, 2015 settlement demand. That demand is respectfully rejected. We are willing to extend our firm, non-negotiable settlement offer, which expires at 10:00 pm tonight, given that the out of town deposition of your expert is tomorrow. We are willing to offer \$200,000 to fully settle this matter. As part of this settlement, Mr. Waid will forgo any appeal of the court's November 13, 2015 ruling on his summary judgment motion on the counterclaim. He has assured me that if this matter goes to trial, he will appeal that ruling. Such settlement would be conditioned on strict confidentiality and non-disparagement provisions and would act as a full and final release of the entire matter.

This settlement offer will remain open until 10:00 pm tonight. After that time, it will expire, and no further offer will be extended, as we are fully prepared to try this matter on November 30. We are mindful of the COA decision that denied discretionary review and know that the case is set to go on November 30, 2015. Please respond to this settlement offer via email or by cell. Thank you.

Very truly yours,



Kathleen A. Nelson of
LEWIS BRISBOIS BISGAARD & SMITH LLP

KAN:irm

cc: Brian J. Waid

ALBUQUERQUE • ATLANTA • BOSTON • CHARLESTON • CHICAGO • DALLAS • DENVER • FORT LAUDERDALE • HOUSTON • INDIAN WELLS

LAFAYETTE • LAS VEGAS • LOS ANGELES • MADISON COUNTY • NEW ORLEANS • NEW YORK • NEWARK • ORANGE COUNTY • PHILADELPHIA • PHOENIX

PORTLAND • PROVIDENCE • SACRAMENTO • SAN BERNARDINO • SAN DIEGO • SAN FRANCISCO • SEATTLE • TAMPA • TEMECULA • TUCSON • WICHITA

4843-5311-8763.1

FERGUSON 082

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located.

Date and time	Number	Description	Type	Min	Amount
11/12/15, 11:22 AM	all	Incoming	-	6	-
11/12/15, 11:30 AM	1335	Incoming	-	2	-
11/12/15, 11:48 AM	:033	Incoming	-	1	-
11/12/15, 12:00 PM	3188	to SEATTLE/WA	-	6	-
11/12/15, 12:32 PM	8797	Incoming	-	21	-
11/12/15, 12:51 PM	7722	to KIRKLAND/WA	(B)	2	-
11/12/15, 12:53 PM	4055	to BELLEVUE/WA	-	2	-
11/12/15, 12:57 PM	5877	to PORTLAND/OR	-	1	-
11/12/15, 1:27 PM	:8000	Incoming	-	1	-
11/13/15, 4:01 PM	-1201	to PT ANGELES/WA	-	3	-
11/13/15, 4:04 PM	-1129	to PT ANGELES/WA	-	1	-
11/13/15, 4:05 PM	:2042	to WOODSIDE/CA	-	1	-
11/13/15, 11:44 PM	-4474	to SEATTLE SR/WA	(F)	5	-
11/14/15, 1:40 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/14/15, 1:40 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/14/15, 1:57 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 11:51 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 1:43 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 2:01 PM	-4474	Incoming	(F)	1	-
11/15/15, 2:03 PM	22	1-800 #	-	4	-
11/15/15, 2:08 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 3:04 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 3:37 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 3:46 PM	-4474	Incoming	(F)	2	-
11/15/15, 4:02 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 5:51 PM	all	Incoming	-	3	-
11/15/15, 6:21 PM	-4474	to SEATTLE SR/WA	(F)	4	-
11/15/15, 7:25 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/15/15, 7:27 PM	-5696	to SEATTLE/WA	-	9	-
11/15/15, 7:35 PM	-5696	to SEATTLE/WA	-	3	-
11/15/15, 7:49 PM	-5696	to SEATTLE/WA	-	6	-
11/15/15, 8:40 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 12:00 AM	-4474	to SEATTLE SR/WA	(F)	1	-
11/16/15, 1:28 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 1:52 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 2:10 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 2:17 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 4:08 PM	-0900	to SEATTLE/WA	-	18	-
11/16/15, 4:39 PM	-1604	to SEATTLE SR/WA	-	1	-
11/16/15, 4:44 PM	-2042	to WOODSIDE/CA	-	2	-
11/16/15, 4:45 PM	-4335	Incoming	(A)	3	-
11/16/15, 4:53 PM	-3898	to SALT LAKE/UT	-	1	-
11/16/15, 4:53 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 4:55 PM	-3898	to SALT LAKE/UT	-	11	-
11/16/15, 5:07 PM	-5696	to SEATTLE/WA	-	18	-
11/16/15, 6:23 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/16/15, 6:51 PM	(206) 354-4120	Incoming	-	31	-
11/16/15, 6:58 PM	-722	to KIRKLAND/WA	(B)	1	-
11/16/15, 7:21 PM	(206) 354-4120	to SEATTLE SR/WA	-	1	-
11/16/15, 7:23 PM	-5696	to SEATTLE/WA	-	27	-
11/16/15, 8:33 PM	-5696	Incoming	-	7	-
11/16/15, 9:03 PM	-5696	Incoming	-	2	-
11/16/15, 10:22 PM	-5696	to SEATTLE/WA	-	32	-
11/17/15, 7:12 AM	32	1-888 #	-	15	-
11/17/15, 7:27 AM	32	1-888 #	-	14	-
11/17/15, 7:44 AM	-2042	to WOODSIDE/CA	-	48	-
11/17/15, 10:10 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/17/15, 12:36 PM	-7722	to KIRKLAND/WA	(B)	2	-
11/17/15, 1:10 PM	-7722	to KIRKLAND/WA	(B)	2	-
11/17/15, 7:55 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/18/15, 8:34 AM	-5696	to SEATTLE/WA	-	13	-
11/18/15, 2:51 PM	-7722	to KIRKLAND/WA	(B)	2	-
11/18/15, 3:47 PM	-7722	to KIRKLAND/WA	(B)	4	-
11/18/15, 5:01 PM	-8467	to PORTLAND/OR	-	24	-
11/18/15, 5:31 PM	-9495	to BREMERTON/WA	-	25	-
11/18/15, 5:56 PM	-5696	to SEATTLE/WA	-	21	-
11/18/15, 6:17 PM	-5696	to SEATTLE/WA	-	6	-

Highlighted text is
Ms. Nelson's
telephone number
from calls that
occurred on
11/16/15.

Type (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail
(H) Free Calls (I) Intl Disc. Call (J) Intl Disc. Call to Mobile (K) WPS Call (M) AnyMobile (R) Roaming (T) T-Mobile Number
(V) myFaves Call (W) Wi-Fi Call (X) T-Mobile @Home Call (Y) Subscription (Z) One-time Purchase

Statement for

Account number

Bill close date

Nov 24 2015

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located

Date and time	Number	Description	Type	Min	Amount
11/18/15 7:27 PM	7722	to KIRKLAND/WA	(B)	1	-
11/19/15 8:56 AM	5696	to SALT LAKE/UT	-	1	-
11/19/15 11:58 AM	7722	to KIRKLAND/WA	(B)	1	-
11/19/15 2:54 PM	7201	Incoming	-	2	-
11/19/15 4:43 PM	7722	to KIRKLAND/WA	(B)	1	-
11/19/15 5:01 PM	5696	to SEATTLE/WA	-	1	-
11/19/15 5:02 PM	5696	to SEATTLE/WA	-	1	-
11/19/15 5:03 PM	5696	to SEATTLE/WA	-	1	-
11/19/15 5:04 PM	5696	Incoming	-	9	-
11/19/15 5:13 PM	5696	to SEATTLE/WA	(A)	12	-
11/19/15 5:25 PM	2042	to WOODSIDE/CA	-	1	-
11/19/15 5:31 PM	2240	to REDWOOD CY/CA	-	1	-
11/19/15 5:35 PM	4474	to SEATTLE SR/WA	(F)	1	-
11/19/15 5:36 PM	2042	Incoming	-	10	-
11/19/15 5:40 PM	7722	to KIRKLAND/WA	(B)	1	-
11/19/15 5:46 PM	2042	to WOODSIDE/CA	-	1	-
11/19/15 5:47 PM	2042	to WOODSIDE/CA	-	1	-
11/19/15 5:47 PM	2042	to WOODSIDE/CA	(A)	16	-
11/19/15 6:19 PM	4777	to SALT LAKE/UT	(F)	12	-
11/19/15 7:15 PM	7722	to KIRKLAND/WA	(B)	1	-
11/19/15 7:46 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 8:19 AM	4776	to MINNEAPOLIS/MN	-	2	-
11/20/15 8:24 AM	3041	to FISHERS/IN	-	2	-
11/20/15 9:21 AM	2042	to WOODSIDE/CA	-	1	-
11/20/15 9:21 AM	2240	to REDWOOD CY/CA	-	7	-
11/20/15 9:47 AM	5696	to SEATTLE/WA	-	8	-
11/20/15 10:13 AM	5696	Incoming	-	1	-
11/20/15 10:13 AM	5696	Incoming	-	1	-
11/20/15 10:22 AM	5696	Incoming	-	3	-
11/20/15 10:32 AM	5696	Incoming	-	2	-
11/20/15 10:34 AM	5696	to SEATTLE/WA	-	13	-
11/20/15 11:02 AM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 11:15 AM	5696	to SEATTLE/WA	-	5	-
11/20/15 11:39 AM	3073	to DOVER/DE	-	1	-
11/20/15 11:44 AM	3073	to DOVER/DE	-	1	-
11/20/15 11:44 AM	3073	to DOVER/DE	-	1	-
11/20/15 11:45 AM	3073	to DOVER/DE	-	2	-
11/20/15 11:52 AM	5696	Incoming	-	9	-
11/20/15 12:09 PM	5696	Incoming	-	1	-
11/20/15 12:13 PM	5696	Incoming	-	1	-
11/20/15 12:16 PM	5696	Incoming	-	1	-
11/20/15 12:55 PM	5696	to SEATTLE/WA	-	40	-
11/20/15 1:37 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 1:42 PM	2500	to HAMPTONBYS/NY	-	3	-
11/20/15 1:47 PM	3012	Incoming	-	5	-
11/20/15 2:04 PM	7684	Incoming	-	32	-
11/20/15 2:36 PM	1-877 #	Incoming	-	11	-
11/20/15 2:40 PM	0722	Incoming	(A)	1	-
11/20/15 2:42 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 2:46 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 2:57 PM	0020	to PINE RIDGE/SD	-	7	-
11/20/15 3:04 PM	0020	to PINE RIDGE/SD	-	27	-
11/20/15 3:31 PM	5696	to SEATTLE/WA	-	29	-
11/20/15 4:01 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 4:06 PM	9495	to BREMERTON/WA	-	36	-
11/20/15 4:22 PM	7722	to KIRKLAND/WA	(B)	1	-
11/20/15 4:42 PM	5696	to SEATTLE/WA	-	3	-
11/20/15 4:45 PM	5696	Incoming	-	1	-
11/20/15 4:45 PM	1201	to PT ANGELES/WA	-	1	-
11/20/15 4:59 PM	5696	Incoming	-	1	-
11/20/15 5:00 PM	5696	to SEATTLE/WA	-	17	-
11/20/15 5:07 PM	1201	Incoming	(A)	2	-
11/20/15 5:17 PM	5696	Incoming	-	8	-
11/20/15 5:38 PM	0722	to PT ANGELES/WA	-	4	-
11/20/15 5:42 PM	1201	to PT ANGELES/WA	-	2	-
11/20/15 6:23 PM	7777	to SALT LAKE/UT	(F)	2	-
11/20/15 10:03 PM	7722	to KIRKLAND/WA	(B)	1	-

Page A29 of A51

Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail
(H) Free Calls (I) Intl Disc Call (J) Intl Disc Call to Mobile (K) WPS Call (M) AnyMobile (R) Roaming (T) T-Mobile Number
(V) myFaves Call (W) Wi-Fi Call (X) T-Mobile @Home Call (Y) Subscription (Z) One-time Purchase

FERGUSON 084

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located

Date and time	Number	Description	Type	Min	Amount
11/21/15, 7:51 AM	2240	Incoming	-	28	-
11/21/15, 9:29 AM	6164	to SALT LK E/UT	-	1	-
11/21/15, 9:30 AM	6438	to SALT LK E/UT	-	8	-
11/21/15, 9:55 AM		1-800 #	-	2	-
11/21/15, 10:23 AM	4040	to SALT LAKE/UT	(F)	28	-
11/21/15, 12:44 PM	1976	Incoming	(F)	2	-
11/21/15, 12:46 PM	7722	to KIRKLAND/WA	(B)	1	-
11/21/15, 1:30 PM	7722	to KIRKLAND/WA	(B)	1	-
11/21/15, 2:55 PM	7722	to KIRKLAND/WA	(B)	1	-
11/21/15, 2:56 PM	4617	to PORTLAND/OR	-	1	-
11/21/15, 2:56 PM	7722	to KIRKLAND/WA	(B)	1	-
11/21/15, 3:19 PM	4617	to PORTLAND/OR	-	59	-
11/21/15, 4:24 PM	2240	to REDWOOD CY/CA	-	1	-
11/21/15, 4:24 PM	2240	to REDWOOD CY/CA	-	1	-
11/21/15, 4:36 PM	2023	Incoming	-	60	-
11/21/15, 5:36 PM	5696	to SEATTLE/WA	-	1	-
11/21/15, 5:43 PM	5696	to SEATTLE/WA	-	1	-
11/21/15, 6:06 PM	5696	Incoming	-	150	-
11/21/15, 7:43 PM	7722	Incoming	(A)	1	-
11/21/15, 8:38 PM	5696	Incoming	-	11	-
11/21/15, 8:48 PM	7722	to KIRKLAND/WA	(B)	1	-
11/22/15, 8:54 AM	4040	Incoming	(F)	1	-
11/22/15, 9:29 AM	5696	Incoming	-	28	-
11/22/15, 9:58 AM	2240	to REDWOOD CY/CA	-	1	-
11/22/15, 10:13 AM	2240	Incoming	-	9	-
11/22/15, 10:32 AM	5696	to SEATTLE/WA	-	1	-
11/22/15, 10:33 AM	5696	Incoming	-	13	-
11/22/15, 3:37 PM	5696	Incoming	-	3	-
11/22/15, 4:02 PM	5696	Incoming	-	45	-
11/22/15, 4:48 PM	7722	to KIRKLAND/WA	(B)	1	-
11/22/15, 5:34 PM	5696	to SEATTLE/WA	-	6	-
11/22/15, 5:43 PM	5696	to SEATTLE/WA	-	12	-
11/22/15, 6:44 PM	5696	to SEATTLE/WA	-	12	-
11/22/15, 8:21 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 8:51 AM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 9:15 AM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 12:16 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 1:21 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 2:25 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 3:28 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:16 PM	3340	to WASHINGTON/DC	-	2	-
11/23/15, 5:19 PM	3200	to PORTLAND/OR	-	2	-
11/23/15, 5:23 PM	2042	to WOODSIDE/CA	-	1	-
11/23/15, 5:25 PM	5696	to SEATTLE/WA	-	1	-
11/23/15, 5:26 PM	4474	to SEATTLE SR/WA	(F)	1	-
11/23/15, 5:26 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:27 PM	5696	to SEATTLE/WA	-	23	-
11/23/15, 5:27 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:28 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:29 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:34 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:40 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 5:50 PM	4474	to SEATTLE SR/WA	(F)	1	-
11/23/15, 5:52 PM	4474	to SEATTLE SR/WA	(F)	1	-
11/23/15, 5:52 PM	3200	Incoming	(A)	6	-
11/23/15, 5:57 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 6:01 PM	2042	to WOODSIDE/CA	-	16	-
11/23/15, 6:05 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 6:18 PM	5877	to PORTLAND/OR	-	9	-
11/23/15, 6:19 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 6:25 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 6:27 PM	5696	Incoming	-	2	-
11/23/15, 6:31 PM	5696	to SEATTLE/WA	-	10	-
11/23/15, 6:41 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 6:41 PM	4601	to BAINBDG IS/WA	-	118	-
11/23/15, 7:43 PM	7722	to KIRKLAND/WA	(B)	1	-
11/23/15, 8:39 PM	5696	to SEATTLE/WA	-	1	-

Highlighted section is the dates during which Ms. Nelson alleges that she called Ms. Rains. Notice Ms. Nelson number is absent for the call logs.

Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls (I) Intl Disc Call (J) Intl Disc Call to Mobile (K) WPS Call (M) AnyMobile (R) Roaming (T) T-Mobile Number (V) myFaves Call (W) Wi-Fi Call (X) T-Mobile @Home Call (Y) Subscription (Z) One-time Purchase

Statement for

Account number

Bill close date
Nov 24, 2015

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located.

Date and time	Number	Description	Type	Min	Amount
11/23/15, 8:46 PM	-5696	to SEATTLE/WA	-	23	-
11/24/15, 9:48 AM	-5696	to SEATTLE/WA	-	1	-
11/24/15, 9:49 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 9:50 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 9:51 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 11:51 AM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 1:31 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 3:20 PM	-8244	Incoming	-	1	-
11/24/15, 3:38 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/24/15, 8:30 PM	-5696	Incoming	-	74	-
Total:				4,381	\$0.00

Highlighted section is the dates during which Ms. Nelson alleges that she called Ms. Rains. Notice Ms. Nelson number is absent for the call logs.

Text

The date and time correspo

a (PST/PDT).

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located

Date and time	Number	Description	Type	Min	Amount
11/13/15, 11 10 PM	4474	to SEATTLE SR/WA	(F)	1	-
11/13/15, 11 13 PM	4474	to SEATTLE SR/WA	(F)	30	-
11/14/15, 8 45 AM	4474	to SEATTLE SR/WA	(F)	1	-
11/14/15, 8 50 AM	4474	Incoming	(F)	26	-
11/14/15, 12 20 PM	8500	to SEATTLE/WA	-	17	-
11/14/15, 12 47 PM	(206) 346-4120	to SEATTLE/WA	-	1	-
11/14/15, 1 43 PM	(206) 344-4120	to SEATTLE SR/WA	-	20	-
11/14/15, 3 50 PM	12240	Incoming	-	14	-
11/14/15, 4 04 PM	2240	Incoming	-	7	-
11/15/15, 12 51 AM	5696	to SEATTLE/WA	-	1	-
11/25/15, 8 53 AM	8460	Incoming	-	7	-
11/25/15, 9 04 AM	5844	Incoming	-	13	-
11/25/15, 9 48 AM	5696	to SEATTLE/WA	-	1	-
11/25/15, 9 49 AM	5696	Incoming	-	76	-
11/25/15, 10 08 AM	1201	Incoming	(A)	2	-
11/25/15, 11 05 AM	3005	to SEATTLE/WA	-	3	-
11/25/15, 11 09 AM	5033	to BAINBDG IS/WA	-	143	-
11/25/15, 11 53 AM	7722	to KIRKLAND/WA	(B)	1	-
11/25/15, 12 00 PM	7722	to KIRKLAND/WA	(B)	1	-
11/25/15, 1 14 PM	7722	to KIRKLAND/WA	(B)	1	-
11/25/15, 1 33 PM	5033	to BAINBDG IS/WA	-	6	-
11/25/15, 1 39 PM	4335	to BELLEVUE/WA	-	6	-
11/25/15, 1 49 PM	2042	to WOODSIDE/CA	-	1	-
11/25/15, 1 58 PM	1188	to SEATTLE/WA	-	2	-
11/25/15, 2 30 PM	1590	to SEATTLE/WA	-	23	-
11/25/15, 3 02 PM	5696	to SEATTLE/WA	-	39	-
11/25/15, 3 03 PM	7722	to KIRKLAND/WA	(B)	1	-
11/25/15, 3 40 PM	1188	Incoming	(A)	4	-
11/25/15, 3 44 PM	5696	to SEATTLE/WA	-	1	-
11/25/15, 3 46 PM	5696	Incoming	-	32	-
11/25/15, 3 53 PM	2240	Incoming	(A)	15	-
11/25/15, 4 07 PM	7722	to KIRKLAND/WA	(B)	1	-
11/25/15, 4 18 PM	5696	Incoming	-	3	-
11/25/15, 4 22 PM	4474	Incoming	(F)	2	-
11/25/15, 4 26 PM	5696	Incoming	-	21	-
11/25/15, 4 46 PM	1188	Incoming	(A)	3	-
11/25/15, 5 39 PM	5696	to SEATTLE/WA	-	1	-
11/25/15, 5 45 PM	5696	Incoming	-	22	-
11/25/15, 6 07 PM	5696	to SEATTLE/WA	-	65	-
11/25/15, 7 19 PM	5696	to SEATTLE/WA	-	77	-
11/25/15, 10 15 PM	5696	to SEATTLE/WA	-	6	-
11/25/15, 10 31 PM	5696	Incoming	-	6	-
11/26/15, 9 35 AM	5696	to SEATTLE/WA	-	14	-
11/26/15, 9 48 AM	5696	to SEATTLE/WA	-	183	-
11/26/15, 12 58 PM	5696	to SEATTLE/WA	-	11	-
11/26/15, 1 17 PM	5696	to SEATTLE/WA	-	44	-
11/26/15, 1 41 PM	7722	to KIRKLAND/WA	(B)	1	-
11/26/15, 2 01 PM	5696	Incoming	-	1	-
11/26/15, 2 25 PM	5696	to SEATTLE/WA	-	1	-
11/26/15, 2 26 PM	5696	to SEATTLE/WA	-	4	-
11/26/15, 2 49 PM	5696	to SEATTLE/WA	-	3	-
11/26/15, 2 55 PM	5696	to SEATTLE/WA	-	6	-
11/26/15, 3 12 PM	5696	to SEATTLE/WA	-	6	-
11/26/15, 3 29 PM	4777	to SALT LAKE/UT	(F)	1	-
11/26/15, 3 30 PM	4777	to SALT LAKE/UT	(F)	1	-
11/26/15, 3 30 PM	4777	to SALT LAKE/UT	(F)	1	-
11/26/15, 4 11 PM	7722	to KIRKLAND/WA	(B)	1	-
11/26/15, 4 27 PM	7722	to KIRKLAND/WA	(B)	1	-
11/26/15, 5 30 PM	7722	to KIRKLAND/WA	(B)	1	-
11/27/15, 10 00 AM	7722	to KIRKLAND/WA	(B)	1	-
11/27/15, 11 29 AM	7722	to KIRKLAND/WA	(B)	1	-
11/27/15, 1 55 PM	5696	to SEATTLE/WA	-	5	-
11/27/15, 1 59 PM	9207	Incoming	(A)	13	-
11/27/15, 2 11 PM	5696	to SEATTLE/WA	-	10	-
11/27/15, 2 51 PM	5696	to SEATTLE/WA	-	1	-
11/27/15, 3 02 PM	5696	Incoming	-	1	-
11/27/15, 3 21 PM	5696	to SEATTLE/WA	-	145	-

Ms. Nelson's telephone call on 11/14/15

Highlighted section is the dates during which Ms. Nelson alleges that she called Ms. Rains. Notice Ms. Nelson number is absent for the call logs.

Continued... (206) 778-1330

Talk

The date and time corresponds to the local time where the mobile was located

Date and time	Number	Description	Type	Min	Amount
11/27/15, 5:46 PM	-5696	to SEATTLE/WA	-	4	-
11/27/15, 5:56 PM	-5696	to SEATTLE/WA	-	2	-
11/27/15, 6:27 PM	-5696	to SEATTLE/WA	-	1	-
11/27/15, 6:38 PM	-5696	to SEATTLE/WA	-	1	-
11/27/15, 7:09 PM	-5696	to SEATTLE/WA	-	54	-
11/27/15, 8:08 PM	-5696	Incoming	-	4	-
11/27/15, 8:16 PM	-4174	to SEATTLE SR/WA	(F)	1	-
11/27/15, 10:02 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/28/15, 11:15 AM	-5696	Incoming	-	41	-
11/28/15, 12:18 PM	-5696	Incoming	-	1	-
11/28/15, 12:35 PM	-5696	Incoming	-	2	-
11/28/15, 12:37 PM	-5696	Incoming	-	1	-
11/28/15, 4:02 PM	-8467	to PORTLAND/OR	-	1	-
11/28/15, 4:17 PM	-5271	Incoming	-	27	-
11/28/15, 5:15 PM	-8467	to PORTLAND/OR	-	1	-
11/28/15, 6:11 PM	-5696	Incoming	-	16	-
11/28/15, 7:43 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/28/15, 7:47 PM	-5696	to SEATTLE/WA	-	20	-
11/28/15, 10:16 PM	-5696	to SEATTLE/WA	-	1	-
11/28/15, 10:17 PM	-5696	Incoming	-	12	-
11/29/15, 9:54 AM	-4777	Incoming	(F)	2	-
11/29/15, 10:13 AM	-5696	Incoming	-	46	-
11/29/15, 11:07 AM	-8467	to PORTLAND/OR	-	10	-
11/29/15, 11:16 AM	-2023	Incoming	-	28	-
11/29/15, 12:50 PM	-5696	Incoming	-	14	-
11/29/15, 2:03 PM	-5837	Incoming	-	2	-
11/29/15, 2:08 PM	-5696	to SEATTLE/WA	-	29	-
11/29/15, 2:47 PM	-5271	to SEATTLE/WA	-	9	-
11/29/15, 3:01 PM	-5696	Incoming	-	1	-
11/29/15, 3:01 PM	-5271	to SEATTLE/WA	-	9	-
11/29/15, 3:11 PM	-5696	to SEATTLE/WA	-	3	-
11/29/15, 4:36 PM	-5696	to SEATTLE/WA	-	9	-
11/29/15, 4:50 PM	-5696	to SEATTLE/WA	-	3	-
11/29/15, 5:00 PM	-5696	Incoming	-	13	-
11/29/15, 5:45 PM	-5696	to SEATTLE/WA	-	3	-
11/29/15, 7:13 PM	-5696	to SEATTLE/WA	-	19	-
11/29/15, 9:08 PM	-5696	to SEATTLE/WA	-	2	-
11/29/15, 9:12 PM	-5696	Incoming	-	1	-
11/29/15, 9:18 PM	-5696	to SEATTLE/WA	-	36	-
11/29/15, 10:03 PM	-5696	to SEATTLE/WA	-	17	-
11/29/15, 10:47 PM	-5696	Incoming	-	6	-
11/29/15, 11:02 PM	-7722	to KIRKLAND/WA	(B)	1	-
11/29/15, 11:12 PM	-5696	to SEATTLE/WA	-	3	-
11/29/15, 11:17 PM	-5696	to SEATTLE/WA	-	3	-
11/30/15, 7:44 AM	-5696	Incoming	-	3	-
11/30/15, 8:29 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 9:04 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 9:19 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 9:24 AM	-5696	to SEATTLE/WA	-	7	-
11/30/15, 9:31 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 9:38 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 9:55 AM	-5696	Incoming	-	5	-
11/30/15, 10:00 AM	-5696	to KIRKLAND/WA	(B)	4	-
11/30/15, 10:00 AM	-5696	to SEATTLE/WA	-	1	-
11/30/15, 10:11 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 11:51 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 11:55 AM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 12:23 PM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 1:11 PM	-5696	to KIRKLAND/WA	(B)	1	-
11/30/15, 5:39 PM	-5696	to SEATTLE/WA	-	1	-
11/30/15, 5:40 PM	-5696	to SEATTLE/WA	-	1	-
11/30/15, 5:41 PM	-5696	to WOODSIDE/CA	-	31	-
11/30/15, 6:30 PM	-5696	to SEATTLE/WA	-	1	-
11/30/15, 6:51 PM	-5696	to SEATTLE/WA	-	1	-
12/01/15, 9:12 AM	-5696	to SEATTLE/WA	-	1	-
12/01/15, 9:12 AM	-5696	to WOODSIDE/CA	-	1	-
12/01/15, 9:13 AM	-5696	to WOODSIDE/CA	-	1	-

Highlighted section is the dates during which Ms. Nelson alleges that she called Ms. Rains. Notice Ms. Nelson number is absent for the call logs.

Type: (A) Call Waiting (B) Call Forward (C) Conference Call (E) Data/Fax (F) Mobile2Mobile (G) Voicemail (H) Free Calls (I) Intl Disc. Call (J) Intl Disc. Call to Mobile (K) WPS Call (M) AnyMobile (R) Roaming (T) T-Mobile Number (V) myFares Call (W) Wi-Fi Call (X) T-Mobile @Home Call (Y) Subscription (Z) One-time Purchase

DOCUMENT #3

Excerpts from Waid's 9th Circuit Appeal # 18-36043

on the internet. ER 87-88, 89-90. The injunction thus properly targeted the conduct the trial court deemed to constitute harassment, and leaves Ferguson otherwise free to express herself, so long as she refrains from harassing Waid in the future. See, e.g., *Littleton, supra* at 7.

Ferguson's critique of the trial court injunction consists of her concern that a former client of Waid might contact her for representation. Op. Br., p. 48. The likelihood of that happening seems extraordinarily improbable, considering that Ferguson markets herself as an employment attorney, while Waid represents clients on issues of legal malpractice and professional responsibility. Nevertheless, the injunction only prevents Ferguson from *initiating* contact with Waid's clients and former clients.

Ferguson also expressed concern that her "civil case against Waid is headed toward trial" and wonders whether the injunction would preclude her from calling others of Waid's clients as witnesses in **Ferguson-II**. *Id.* Ferguson's optimism about **Ferguson-II** is at best premature and, more realistically, unwarranted because the trial court Findings of Fact in this case (which Ferguson has not challenged) will collaterally estop her on remand of **Ferguson-I**. Moreover, all of Ferguson's causes of action in **Ferguson-II** are barred by either *res judicata* or the 3-year Washington statute of limitations, with the exception of her Consumer

Protection Act cause of action which is now quite obviously baseless due to the collateral estoppel effect of the trial court Findings of Fact. Nevertheless, *if* that problem should ever actually arise, Ferguson—an attorney—can readily ask the trial court for appropriate relief. And finally, the federal courts have ample authority to limit the ability of vexatious litigants like Ferguson from filing frivolous lawsuits. *E.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007)(re: vexatious litigant orders).

Here, Ferguson’s harassment consisted of filing successive, frivolous lawsuits, threatening Waid (both directly and indirectly through her attorney), harassing his former clients, and posting false and defamatory information on the internet. Ferguson has thus failed to demonstrate any basis for modifying the injunction; nevertheless, if the Court were to modify the injunction, it should only do so in a manner designed to protect Waid from continuing harassment by Ferguson.

VII. CONCLUSION

Appellee thus asks the Court to affirm the trial court in all respects, and award him reasonable attorney fees pursuant to 42 U.S.C.A. §1988 and/or RCW 4.24.510 and all taxable costs of this appeal.

VIII. REBUTTAL STATEMENT OF RELATED CASES

This appeal is related to Ferguson’s previous appeal in *Caruso/Ferguson v. Washington State Bar Association*, 9th Cir. Case no. 17-35410.

DATED: May 28, 2019.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
Attorney for Appellees and
Pro Se Appellees

CERTIFICATE OF SERVICE

This document was filed via CM/ECF and will be automatically served on all registered participants. Additional copies served by mail: None

DATE: May 28, 2019.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
Brian J. Waid
WSBA No. 26038

DOCUMENT #4

February 20, 2019 Letter to Nelson

FROM THE DESK OF
EMILY SHARP RAINS, ESQ PLLC
LL.M. OF TAXATION

4760 SOUTH HIGHLAND DRIVE, #402
SALT LAKE CITY, UTAH 84117
TELEPHONE: 206.778.1330
FACSIMILE: 206.260.3114
E-MAIL: MAIL@EMILYRAINS.COM

February 20, 2019

SENT VIA EMAIL

KATHLEEN NELSON
Lewis, Brisbois, Bisgaard, & Smith LLP
1111 3RD Avenue
Suite 2700
Seattle, Washington 98101

RE: Motion to Strike

Dear Kathleen Nelson,

I am writing as a follow-up to today's email related to my request for the last four digits of your cell phone number. Since, our last email, I have thoroughly reviewed my telephone records and there are no calls between you and I after November 15, 2015 through November 29, 2015. In light of the significant inferences that can be drawn from the absence of your telephone number in my records in conjunction with your testimony in the federal case, I want to provide you the opportunity to come forward with evidence of the phone calls that you testified about before this matter advances any further. I just want to give you the benefit of the doubt and make sure that I have not overlooked something. Please respond with your records by Thursday, February 21, 2019. After that date, I will proceed with further action.

Sincerely,

/s/Emily Sharp Rains
Emily Sharp Rains

NO. 74512-3-I

COURT OF APPEALS: DIVISION I
OF THE STATE OF WASHINGTON

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC

Appellant/Cross-Respondent

Vs.

LAW OFFICE OF BRIAN J. WAID,
BRIAN J. WAID and JANE DOE WAID,
And their marital community,

Respondent/Cross-Appellants.

RESPONSE BRIEF OF SANDRA L. FERGUSON

Sandra L. Ferguson, Pro Se
600 First Avenue
Seattle, WA 98104
(206)624-5696
sandra@slfergusonlaw.com

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1.

I. INTRODUCTION

The parties to this appeal were before this Court in 2013.¹ Sandra Ferguson and The Ferguson Firm, PLLC (“Ferguson”) appealed from a judgment of the trial court in favor of the defendants Stephen Teller and Teller & Associates (“Teller”). Ferguson v. Teller, 2013 WL 6865540 (Wash. App. Div. I). Ferguson sought reversal and remand on the basis that her own attorney (the Defendant herein), had an undisclosed conflict of interest and dismissed her legal claims during a hearing on Teller’s dispositive motion under CR 12(c), without her informed consent. Defendant’s sudden disavowal of the claims he pled occurred 5 months into the lawsuit, was based on an error of law, and resulted in his client (not him) being sued for \$102,000 in attorneys’ fees and costs by the adverse party, Teller. At the time of Teller’s CR 11 motion for “disbursement”, Ferguson’s \$265,000 was being held in the court registry against her will and unlawfully, due to Defendant’s negligence and/or false and deceptive business practices. This Court affirmed the trial court’s rulings for Teller in an unpublished opinion. *Id.* CP 113-121. Citing RAP 9.12, the Court “refuse[d] to consider Ferguson’s declaration in support of her motion for reconsideration filed after summary judgment,

¹Linked appeals 683292-I and 69220-8-I from Ferguson, et al. v. Teller, et.al. 11-1-19221-1 SEA.

because it contained “new evidence, which implicated new theories of the case, neither presented to or considered by the trial court prior to its ruling on summary judgment”. Ferguson v. Teller, at 7. The Court further held that “[r]egardless 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, [this Court’s] review [was] circumscribed to the evidence called to the attention of the trial court prior to the entry of its order on summary judgment.” Id., at 8. This Court concluded that “[a]bsent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity [and] ‘[t]he sins of the lawyer are visited upon the client.’” Id., at 9. In retrospect, Ferguson’s 2013 appeal was a misguided attempt to mitigate the damages caused by her own attorney. At the time of her appeal, Ferguson did not know all the material facts relevant to Waid’s malpractice, or the true nature of his conflict of interest and false and deceptive acts and practices. Now, Ferguson understands that it was Waid’s failure to file and enforce her lien in Endres case and his filing of a meritless case against Teller, not the concession of those claims, which were the “sins visited upon [her as Waid’s] client.”

In 2013, Waid appealed a decision of the trial court in Teller which declared invalid his lien for attorney’s fees of \$78,350.85 which he

claimed to be owed for the failed representation of Ferguson in the co-counsel dispute (i.e., the Endres and Teller cases). This Court reversed the trial court's order, finding (inter alia) that Waid's lien was valid as a matter of law, and "superior to all other liens" because it arose by operation of law on the date Waid filed the Teller case in Ferguson's name. The Ferguson Firm, PLLC v. Teller & Assoc., 178 Wn. App. 723, 877 P. 3d 509 (2013).² This Court denied Waid's request that it award him the fees he claimed to be owed. Instead, the fee-claim was remanded to the trial court to adjudicate what fees, *if any*, Waid was entitled to receive from the \$290,000 in the court registry (allocated by Ferguson and Teller as a supersedeas bond). Waid did not enforce his lien or adjudicate his fee-claim after remand to the trial court. As a result, the entire sum in the court registry was disbursed to Teller. CP 2023-2024.

A. Office of the Attorney General Accepts and Processes Ferguson's CPA Complaint Against Waid for False and Deceptive Billing and Collection Practices.

In February 2014, Ferguson filed a consumer complaint against Waid under the CPA, for depositing and leaving her uncontested \$265,000 in the court registry for the purpose of fraudulently retaining her as a client, and for the purpose of charging and billing and attempting to

² CP 123-129.

collect fees for worthless legal services. By letter dated April 9, 2014, Ferguson received notice of the Office of Attorney General's determination that her complaint was within its enforcement powers under the Consumer Protection Act, RCW §19.86 ("CPA"). Accordingly, the complaint was processed and the Consumer Protection Division of the Attorney General's Office offered its mediation services to the parties. Waid refused mediation. *See, Appendix, Part A.*³

B. Ferguson v. Waid, 14-2-29254-1 SEA.

In October 2014, Ferguson filed this lawsuit against Waid, alleging (inter alia) malpractice and Consumer Protection Act ("CPA") violations committed by Waid as her attorney during the co-counsel dispute with Teller (i.e., during the Endres and Teller cases). CP 1-26.

1. Summary of Ferguson's CPA Claim.

The gravamen of Ferguson's CPA claim is twofold: (1) Waid's website falsely advertises to the public that he has expertise in the areas of legal malpractice, legal ethics, co-counsel relationships, and fee disputes when in fact, he does not possess such expertise; (2) Waid engages in a false and deceptive business practice of filing entirely meritless lawsuits so that he can fraudulently charge, bill, and collect fees from his clients for

³ Pursuant to RAP 10.3(8), Ferguson hereby requests permission to include the proposed Appendix A-001-018 (AGO File # 44427)

worthless legal services. Waid has engaged in this same false and deceptive billing and collection practice with at least one other client—Angela Oppe.

2. Waid’s Malpractice in Endres Case.

Waid committed the following acts, errors and omissions in the Endres case which injured his client. First, Waid failed to inform Ferguson that she was the priority lienor, or to explain to her that she had the right to have her priority lien adjudicated and resolved before any of the proceeds from Endres were disbursed. Second, Waid failed to file Ferguson’s lien-notice in the Endres Court where it had legal effect. Third, Waid caused 60% of the proceeds from the Endres case to be distributed to the Endres plaintiffs in derogation of his own client’s priority lien rights. Fourth, Waid caused the Endres case to be dismissed without filing or enforcing his client’s priority lien which arose by operation of law on the date she filed the Endres case and was “superior to all other liens”. Ferguson v. Teller, 316 P.3d 509, 513. If the statements on Waid’s website were true, Waid would have known that Ferguson had a priority lien, and that summary adjudication was Ferguson’s right, and that summary adjudication was in Ferguson’s best interest. Or, he would have conducted the research to learn that he did not know, as he promises on the website. Waid charged Ferguson more than \$17,650.00 in the

month of May 2011, for *opposing* summary adjudication. CP 290-291. Waid failed to inform Ferguson that she was the priority lienholder, or to inform her of the rights that this status conferred. Waid failed to file Ferguson's lien-notice and Waid waived Ferguson's rights as the priority lienholder when he caused 60% of the proceeds to be disbursed to the Endres plaintiffs, then caused the Endres case to be dismissed, although Ferguson's fee-lien was not resolved and her concerns about her former clients had not been addressed or resolved.

3. Waid's Filing of Sham Teller Lawsuit.

The Teller lawsuit (as pled) had no legitimate purpose. It was a complete sham. Waid pled the wrong claims. Waid failed to plead the correct claims. CP 2229, 2230. Waid advised Ferguson to file a separate lawsuit against Teller. Ferguson deferred to her attorney's supposed expertise. Waid drafted the Complaint without any input from Ferguson. However, Ferguson was given the opportunity to review the draft Complaint before it was filed. She asked Waid why he had not pled a claim for fraud. She communicated to Waid that she was "committed" to pursuing a fraud claim against Teller. CP 352. Waid promised to amend the complaint if discovery supported the claim. Ferguson and Waid discussed the need to depose the Endres plaintiffs and to depose Teller. Waid never took the depositions of these witnesses. CP 2230. Upon

filing the Complaint on May 27, 2011, Waid acquired the position of priority lienholder by operation of law. This gave him priority lien rights to any proceeds resulting from the Teller case. Then, Waid drafted and signed a Stipulated Order which caused the remaining proceeds from the Endres case (\$530,107) to be deposited into the court registry of the sham Teller case. The total sum to be deposited included \$265,000 which Teller could not dispute belonged to Ferguson under his own contract theory which he claimed entitled him to a disproportionate fee. When the entire remaining proceeds from the Endres case were deposited into the court registry of the Teller case, Waid acquired an unlawful security interest. Waid never took steps to release his own client's \$265,000 from the court registry. This gave him an ever-increasing proprietary interest which was adverse to his client in the underlying matter.

4. Waid's Breach of Confidentiality and Collusion.

Waid allowed himself to be used by Teller's agents. Starting June 1, 2011, Waid allowed his former client, Reba Weiss, to meddle in Ferguson's matter. Starting June 14, 2011, Waid allowed his former boss, Bob Gould, to meddle in Ferguson's matter. Waid breached client confidentiality by discussing his client's case with these two attorneys without her consent. CP 870, CP 1237, CP 293. Weiss and Gould were acting informally as agents for Teller. CP 1170-1171.

5. Waid's Unauthorized Concession of Claims.

On October 28, 2011, Waid disavowed all but one of the claims he pled. This occurred during a hearing on Teller's motion for judgment on the pleadings under CR 12(c). Waid represented to the trial court that his client's breach of contract claim was meritless under the law of Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). He advised the court that he was "very familiar" with the opinion, having "lectured" on it. CP 116. He failed to obtain his client's informed consent before disavowing her claims. The Mazon opinion had been published for 5 years before Waid pled the breach of contract claim against Teller. Mazon was in fact, inapposite. Waid's erroneous concession after 5 months of litigation got his client sued for \$102,000 by Teller, clouding her clear title to the \$265,000 in the court registry. One meritless claim remained which the trial court would soon dismiss. Waid took this opportunity to charge and bill more fees for more worthless legal services. Waid recommended taking the deposition of his former client, Reba Weiss, who was not a material witness. Weiss committed perjury. CP 1212-1267. Ferguson proved Weiss' perjury. Ferguson was upset by the perjury and wanted Waid to act to protect her reputation. Waid refused. CP 1168-1195. Weiss joined Teller's firm on February 8, 2012. The next day, February 9, 2012, Teller filed the Motion for CR 11 Sanctions (styled as a "Motion

to Disburse”) against Ferguson’s \$265,000 which was unlawfully being held in the court registry. The next day, Waid withdrew on a false pretext. Three days later, he misled the trial court in order to obtain a post facto order permitting his withdrawal. The next day, Waid filed his lien-notice asserting a claim to \$78,350.00 for his worthless legal services. The lien, as well as Teller’s CR 11 motion, clouded Ferguson’s clear title to the \$265,000 in the court registry.

6. Testimony of Expert Witnesses.

According to the testimony of the expert witness, Peter Jarvis”

“Instead of providing competent and diligent representation to his client and communicating in a timely and appropriate manner with her, *Mr. Waid would appear to have failed to meet his obligations under the Standards, if not also the Rules, by a wide margin and at virtually every turn.*” CP 2233. [Emphasis added.]

According to the testimony of the expert witness, Dick Kilpatrick:

“Mr. Waid failed to work on and obtain the uncontested fee amount for his client across the whole claim...*I have seen no explanation from Mr. Waid that in my opinion excuses his leaving uncontested amounts in the court registry...*” [Emphasis added.] CP 1794.⁴

⁴ Declaration of Richard B. (Dick) Kilpatrick. CP 1789-1800. Mr. Kilpatrick was also a fact witness regarding the events of February 10, 2012. Mr. Kilpatrick’s knowledge of these events supports Ferguson’s testimony that Waid abandoned her before he obtained the trial court’s order permitting him to withdraw. In e-mails from Kilpatrick to Waid that day, he told Waid that he was acting unethically CP 2677-2689. See also, Kilpatrick Decl., CP 1789-1800..

B. Oppe v. Atwood, et al., 15-2-27236-5 SEA.

Waid has engaged in the same false and deceptive business practice with other clients, besides Ferguson. The record shows that Waid pursued a sham lawsuit in Angela Oppe's name, then conceded her claims without her informed consent after charging, billing and collecting substantial fees for worthless legal services. Waid was retained by Ms. Oppe in June 2010 after Ms. Oppe and her Maryland attorney, Spencer Hecht, contacted Waid because of his law firm website, advertising Waid's extensive "legal malpractice" background. CP 1036-1043. Waid was contacted by Hecht's office within a month or two after the meritless legal malpractice lawsuit was filed in Angela's name against the Washington attorney, Sarah Atwood. CP 827, CP 800-808. CP 810-812. CP 829-831. Waid was retained by Ms. Oppe because of his malpractice expertise. CP 1036-1041. Waid and Hecht litigated Oppe's meritless malpractice case against Atwood for months, charging, billing and collecting fees for worthless legal services. CP 814-818. Then, at the first of two summary judgment hearings, the attorneys conceded all but one of the meritless claims, without Ms. Oppe's knowledge or consent, leaving one meritless claim for the trial court to dismiss at the second summary judgment hearing (the better to bill more hours and disguise their fraud). CP 824:6-7. Neither Waid, nor Hecht, ever informed their own client, Ms.

Oppe, that they had conceded her claims at the first summary judgment hearing. CP 1036-1043. Instead, the two attorneys continued to charge, bill and collect *more* attorneys' fees from Ms. Oppe for a second round of briefing and a second summary judgment hearing regarding the one remaining claim of "outrage", which the trial court (predictably) dismissed. CP 1036-1043. Then, they recommended to Ms. Oppe that she pay them to pursue a meritless appeal, for which they charged, billed and collected *more* fees.⁵ Oppe authorized the appeal based on her belief that if successful, the appeal could result in the reinstatement of all of her legal claims.⁶

C. Ferguson v. Waid, 14-2-29265-1 SEA.

On October 24, 2014, Ferguson filed this lawsuit against Waid for (inter alia) malpractice and CPA violations. CP 1-26. Waid filed counterclaims seeking a judgment for the fees and interest he claimed to be owed for worthless legal services rendered in Endres and Teller. CP 27-46. On June 19, 2015, the trial court denied in part, and granted in part, Waid's Motion for Summary Judgment. The court held that genuine disputes of material fact precluded summary judgment dismissal of

⁵ Appendix Part B (Opinion Declaration of Peter R. Jarvis in Oppe v. Waid).

⁶ Waid and Hecht charged, billed and collected more than **\$320,000** from Ms. Oppe. Pursuant to RAP 10.3(8), Ferguson seeks permission to file as Part B of the Appendix to this Brief.

Ferguson's malpractice and CPA claims. CP 2472-2473 (Order), CP 1833-1890 (RP 6/19/2015). On November 13, 2015, the trial court granted Ferguson's motion to dismiss Waid's counterclaims, concluding that Waid was barred from pursuing his claims under the doctrine of res judicata. CP 2075-2077. On November 30, 2015 (after one year of active litigation), Ferguson appeared in court for the first day of trial. RP 11/30/15 (CP 2403-2455). She advised the trial court (as she had been doing for two months) that her attorney could not be present because of the trial court's orders denying requests for a change of the trial date. Ms. Ferguson informed the trial court that she could not proceed to trial without her attorney, citing the medical documentation she had already submitted to the court. CP 2134. Ferguson's attorney, Ms. Rains, appeared by telephone from Utah where she is a college professor. Ms. Rains renewed her prior requests for a short continuance to resolve her longstanding scheduling conflict. A recess was called. But, when the hearing reconvened, the phone connection with Ms. Rains was lost. At this point, Defendant stated he was ready for trial. Defense Counsel asked the trial court to dismiss Ferguson's case under CR 41(b), citing Rivers v. Washington State Conference of Mason Contractors, 41 P.3d 1175 (2002). CP 2449-2455. Ms. Ferguson opposed Waid's oral motion for involuntary dismissal. She asked to proceed to trial with the CPA claim,

which would take fewer days to try, which would give her attorney time to be here for the trial. CP 2453. The court announced that it was granting Defendant's request and would be dismissing the case *without prejudice*. CP 2449. Waid and his attorneys openly rejoiced in the courtroom when the decision to dismiss was announced. CP 2220. The Order of Involuntary Non-Suit Dismissal Without Prejudice was entered on December 1, 2015. CP 2130-2131. Ferguson re-filed her case that same day, as she had the right to do. CP 2170-2196.⁷ Next, Waid moved for reconsideration and dismissal with prejudice. CP 2143-2159. The trial court required Ferguson to file a response. After considering the evidence a second time, the trial court again denied Waid's motion for dismissal with prejudice, concluding that Ferguson's missing of pre-trial deadlines and inability to proceed to trial on November 30, 2015, did not warrant the ultimate sanction. CP 2464-2465. Next, Waid sought entry of judgment. Ferguson objected. The trial court entered judgment, concluding (without written findings supporting the conclusion), that there was "no just reason

⁷ Ferguson v. Waid, 15-2-28797-4 SEA. Upon re-filing, the court clerk issued a new case schedule under this new cause number. Ferguson agreed to reassign or transfer the case to the original trial court judge. After the transfer, Waid's filed a motion for a stay of the proceedings under the new cause number, and moved for entry of judgment in the 2014 action. The trial court imposed a stay on the 2015 action and judgment was entered on December 31, 2015 for the 2014 action.

for delay”. CP 2466-2467. Defendants’ joint cross-appeal was filed on January 12, 2016.. CP 2468-2470. This appeal followed.

This Court should not review or reverse the trial court’s order denying Waid’s motion for dismissal with prejudice. Ferguson was unable to proceed to trial without her attorney due to her documented medical condition. Ferguson’s failure to meet pre-trial deadlines was not intentional or willful. Ferguson was represented by Emily Rains, whom the trial court has acknowledged “worked her butt off...to try and come up to speed on this case.” CP 2403-2455 (46:23-25, 47:1-6). Ferguson had to overcome many obstacles not of her own making to pursue her claims against Waid. Ferguson’s first challenge was to find an experienced malpractice attorney willing to consider her case against Waid on the merits. This proved to be an impossible task because Waid is member of the small plaintiffs’ bar in this field. In October 2014, Ferguson filed this lawsuit pro se to preserve her malpractice claim. Thereafter, she actively litigated the case while continuing to search for counsel. In February, she retained Mark Olson. Then, Olson advised her that he did not want to serve as the trial attorney. CP 2520-2521. Ferguson retained John Muenster as the trial attorney. Olson stayed on in an advisory capacity. In August 2015, Muenster (who had represented Ferguson in post-judgment proceedings in Teller) became a necessary witness due to Waid’s

deposition testimony. CP 3285-3328, CP 1485-1488, CP 3225-3229. Ferguson promptly secured Ms. Rains as replacement counsel. Ms. Rains moved for a 180-continuance because she was new to the case, there was discovery abuse, and she needed to find a new expert witness. Ms. Rains worked diligently to get up to speed and made astonishing progress in a short period of time, finding a new expert witness (CP 1784-1788), and preparing and filing a Motion to Compel to address Defendant's discovery abuse (CP 3448-3647), while at the same time, reviewing the extensive record from the two underlying cases, Endres and Teller. (RP 10/16/2015). 1472-1479, CP 3412-3433, CP 2740-2787, CP 2805-2806, CP 2796-2797, CP 2801-2804.

D. Erroneous Facts in 2013 Opinions of Court of Appeals.

There are three erroneous statements of fact in the Court's published and unpublished opinions from 2013. They are material to this appeal. First, the Court erroneously stated that Ferguson "filed" an attorney's lien on April 27, 2011.⁸ This is not accurate. Ferguson did not file a lien, she served a lien. CP 1015, CP 2648. On May 10, 2011, Waid appeared as Ferguson's attorney in the Endres case. CP 286-287. Due to Waid's negligence, Ferguson's lien was never filed. CP 2648. Secondly, the Court's unpublished opinion erroneously states that "there is no

⁸ Unpublished Op. (No. 68329-I, 12/30/13), pp. 1, 6.

indication that Ferguson objected to [Waid's] concession [of her legal claims during Teller] on October 28, 2011.”⁹ CP 117. This is not accurate. The record shows that on October 27, 2011, Ms. Ferguson e-mailed the Defendant, requesting a meeting that same day to discuss her case. Defendant declined to meet with Ms. Ferguson, stating that such a meeting would be “premature”, until after the trial court ruled on Teller’s CR 12(c) motion. CP 1021-1022. The hearing was set for oral argument the next day; Plaintiff’s briefing had already been filed, opposing Teller’s motion entirely. CP 1021. The day after telling his client there was no reason to meet and nothing to discuss, Waid conceded two of Ms. Ferguson’s claims, averring that under the law of Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006), her breach of contract claim lacked merit as a matter of law. CP 1022. Mazon was inapposite. See, Hoglund v. Meeks, 139 Wash.App. 859, 170 P.3d 37 (2007) (court distinguishes from Mazon based on facts). See also, Kilpatrick Opinion Decl. (Mazon inapposite to Ferguson’s dispute with Teller), CP 1060-1061. Waid represented to the court and to those present (including his own client), that he was “very familiar” with the law of Mazon, having “lectured” on it. CP 116. Waid’s erroneous concession (5 months into the

⁹ Id., at 6.

litigation) caused the trial court to grant Teller's CR 12(c) motion as to two legal claims. It also caused Teller to sue Ferguson (not Waid) for \$102,000 in CR 11 sanctions. CP 607. After he conceded her claims, Waid tried to deceive his client and the trial court by repeatedly stating in his court filings that the court first dismissed one of Ms. Ferguson's claims based on Mazon, which caused him to then concede the other claim. CP 544-545. The true chronology of events was the reverse. CP 1021-1022, CP 116. Given these circumstances, Ferguson was understandably caught by surprise when, on October 28, 2011, Waid suddenly told her that her claims were meritless and could not succeed under Mazon v. Krafchick—a Supreme Court opinion which had been the law of Washington for 5 years. The Court's finding that Ferguson did not voice her objection in the middle of the hearing does not prove that she gave her informed consent to Waid's action—not under these facts. In any event, this appears not to have been a fact material to the Court's decision to deny Ferguson's appeal in 2013. The Court held that "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 (in her motion for reconsideration) and on appeal. This Court held that the trial court properly dismissed the breach of contract claim." Although Waid's deceptive concession was not

material to the conclusion this Court reached in Ferguson’s 2013 appeal, it is material to Ferguson’s’ allegation in this case that Waid engaged in false and deceptive “bait-and-switch” practices with her and this, in turn, supports her CPA claim. Third, the Court’s opinion states (as if it were undisputed) a fact which was hotly disputed in 2013 and remains hotly disputed today. The Court’s published opinion erroneously states that when Waid was trying to withdraw from Teller, “Ferguson had retained a new attorney to replace Waid...” This is not accurate.¹⁰ Ferguson did not have replacement counsel, although Waid told the trial court she did. In addition, this Court ‘s opinion erroneously states: “On February 10, Ferguson threatened to bring a legal malpractice claim against Waid.” This is a disputed factual issue. However, the evidentiary record in this case shows that Waid lied when he claimed that Ferguson threatened to sue him during a three-way telephone conference on February 10, 2012. Ferguson has consistently denied making any such threat. The appellate attorney, Randy Baker, who was present at the telephone conference where Waid claims the threat was made, has testified that no such threat was made. CP 1044-1047. The attorney, Dick Kilpatrick, is a fact witness to the events of February 10, 2012, and his testimony and e-mails support

¹⁰ See, Kilpatrick-Waid e-mails dated 2/10/2012. CP 2677-2689. See also, Ferguson-Waid e-mails on 2/13/12 during telephonic hearing. CP 2691-2694. See also, Declaration of Dick Kilpatrick, *CP 1051-1062

Ferguson's position¹¹ The evidence shows that Waid withdrew on a false pretext on February 10, 2012, without proper notice, and lied to the court and everyone else about the reason for his action. The evidence shows that Waid had already withdrawn on February 13, 2013 when he procured the trial court's *post facto* order permitting him to withdraw. Waid misled the trial court in order to obtain that post facto order.¹² CP 1029, CP 1044-1049. Then, on February 14, 2012, Waid filed his Lien for Attorneys' Fees which attached Ferguson's uncontested \$265,000, unlawfully in the court registry due to Waid's negligence and fraud. CP 1396-1398.

Appellant ("Defendant" or "Waid") seeks review of the following three orders of the trial court: **(1)** the order denying Defendant's motion for summary judgment dismissal of Plaintiff's Consumer Protection Act ("CPA") claim, entered June 19, 2015; **(2)** the order granting summary judgment dismissal of Defendant's counterclaims, entered November 13, 2015; **(3)** the order denying Defendant's request for dismissal with prejudice (instead of without prejudice), entered on December 31, 2015. See Appellant's Joint Brief, 2-4, 16-36.

Ferguson v. Teller and Waid, 316 P.3d 509, 511 (2013).¹¹ See, Kilpatrick-Waid e-mails dated 2/10/2012. CP 2677-2689.

This Court should not consider Waid's appeal. First, because the entry of judgment on December 31, 2015, is void. The trial court no longer had jurisdiction to act in the case after December 1, 2015, the date Ferguson's case was involuntarily dismissed without prejudice under CR 41(b). Secondly, the trial court's order denying Defendant's motion to dismiss the case with prejudice is a void order, because the trial court lacked jurisdiction to act on Waid's motion for reconsideration filed on December 15, 2015. A void order is not appealable. Third, the Court should not consider Waid's appeal from the trial court's order denying his motion for summary judgment dismissal of the CPA claim, entered June 19, 2015. A trial court's order denying a party's motion for summary judgment is generally not an appealable order. There is no final judgment from which to appeal. Furthermore, the trial court reviewed the evidence on June 19, 2015, and then reviewed the evidence *again* after Waid's post-dismissal motion for reconsideration was filed on December 15, 2015. Both times, the trial court denied Waid's dispositive motions.

Ferguson had an absolute right to *voluntarily* dismiss her own case under CR 41(a). Had she done so, she would have been entitled to re-file and proceed with her CPA claim. Ferguson did in fact re-file the CPA claim on December 1, 2015, the date of the order granting Waid's motion for involuntary dismissal under CR 41(b). As a result, Ferguson's CPA

and malpractice claims are stayed in the trial court under a new cause number.¹³ There is no question that the 4-year statute of limitations period had not expired on the CPA claim as of December 1, 2015.¹⁴

E. The Consumer Protection Act Claim.

The CPA claim is based on Ferguson's allegation that Waid committed malpractice during the Endres case because he lacks the experience or skills advertised on his law firm's website. Waid also violated the CPA when he filed a sham case in Ferguson's name (i.e., the Teller case), acquired an unlawful security interest by depositing Ferguson's \$265,000 into the court registry of the sham case, then conceded that the claims he pled after litigating for 5 months and charging and billing his client for worthless legal services, then filed a Notice of Lien for Attorneys' Fees of \$78,350.85 to collect by foreclosing on Ferguson's \$265,000, being unlawfully held in the court registry.

Waid engaged in similar false and deceptive billing practices when he represented Angela Oppe. Waid pursued a meritless legal malpractice case against the attorney, Sarah Atwood, then after months of charging, billing and collecting for his worthless legal services, conceded that the claims were meritless to begin with, and dismissed them without his

¹³ Ferguson, et al v. Waid, et al, 15-2-28797-5 SEA.

¹⁴ Ferguson's CPA claim, re-filed on December 1, 2015, is stayed in the trial court below, under Cause No. 15-2-28797-4 SEA.

client's knowledge or consent, then continued to charge, bill, and collect fees from Opp for a second summary judgment brief and hearing, then charged, billed and collected more fees for a meritless appeal.

F. Collusion to Exclude Endres Plaintiffs From Summary Adjudication.

Teller sought to avoid summary adjudication in the Endres case because the clients would have testified that Teller coerced or deceived them in order to settle their case with Safeway before Ferguson returned.

Ferguson alleges that Waid acted in collusion with Teller and his agents, Gould and Weiss (his former boss and his former client, respectively) to ensure that Ferguson and her former clients would not have the right to be heard in summary adjudication. Waid waived Ferguson's rights as the priority lienholder without Ferguson's informed consent in order to accomplish Teller's goal.

RESTATEMENT OF ASSIGNMENTS OF ERROR

G. Restatement of Waid's Assignments of Error Re: Ferguson's Claims.

1. The trial court committed legal error by granting Defendant's motion for involuntary dismissal on November 30, 2015, because Defendant failed to provide the 10 days' notice mandated by CR 41(b)(1)..
2. The trial court lacked jurisdiction to act after it dismissed the case on December 1, 2015 without prejudice.

3. The trial court lacked jurisdiction to enter judgment on December 31, 2015 and the judgment is void.

H. Issues Pertaining to Restated Assignments of Error Re: Ferguson's Claims.

1. Did the trial court lose jurisdiction over this case on December 1, 2015 when the case was dismissed without prejudice pursuant to CR 41(b)(1)? [Assignments 2, 3]

2. Is the trial court's order granting Defendant's motion for reconsideration and denying Defendant's request for dismissal with prejudice void for lack of jurisdiction and therefore not an appealable order? [Assignment 2,3]

3. Should the Court vacate or reverse the trial court's order granting Defendant's motion for involuntary dismissal because Ferguson did not receive the mandatory 10 days' notice required under CR 41(b)(1)? [Assignment 1]

4. Should the Court deny Defendant's request for de novo review of the trial court's order entered June 19, 2015, because there is no final judgment and the decision to deny summary judgment is not appealable? [Assignment 2, 3]

5. If the Court engages in de novo review of the June 19, 2015 order, should the trial court be affirmed because the record establishes genuine disputes of material fact as to each element of the CPA claim? [Waid's Assignments of Error 1]

6. Should the Court affirm the trial court's order dismissing Waid's counterclaims with prejudice based on the doctrine of res judicata, waiver, estoppel, or failure to mitigate?

II. STATEMENT OF THE CASE

A. Waid Law Firm Website.

1. Waid Falsely Advertises Expertise Re: Co-Counsel Relationships, Fee-Disputes, Legal Ethics, Legal Malpractice.

In April 2011, Sandra Ferguson knew almost nothing about the laws governing fee disputes, co-counsel relationships, or lien law, when she found herself in a dispute with her co-counsel, Teller. On his website, Waid falsely claims to possess this knowledge, background and experience. Ferguson retained Waid because of these false claims. For example, here is the statement that appears on the first page:

“Waid Law Office offers you 37 years of experience in civil litigation and appeals, including substantial experience representing clients in legal malpractice claims and attorney fee disputes.” [CP 2631]

Also, the website promises that Waid is an attorney who **“conduct[s] extensive research”**. CP 2637. As Ferguson's attorney, and as Opppe's attorney, Waid pled claims and months later, conceded the claims he pled as meritless. Waid harmed both women by failing to

conduct research. Also, the website advertises: “**EXPERIENCED ADVICE ON VARIOUS MALPRACTICE AND LEGAL ETHICS ISSUES**”, and promises that Waid is an attorney who “**work[s] to provide detailed and informative support.**” CP 2644. Waid is described on the website as an attorney who works to bring about “**swift resolutions to restore your faith in the justice system.**” CP 2638. Then, there is the apparently false or misleading statement that Waid has “**demonstrated experience in fraud-related litigation**”. Waid states on the website: “**I have helped clients to find resolutions to even the most complicated and challenging legal concerns.**” On one page, Waid gives the false impression that he is a learned professional by providing a list of his “**Seminar Materials**”, including the titles of several articles Waid has authored on Legal Ethics. CP 2634, 2640, 2643. Then, there is another page of “**Published Works**” which includes an article by Waid entitled: “*The Perils of the Co-Counsel Relationship and How to Reduce Them*” and another one entitled: “*Telling the Truth When Things Go Wrong.*”) CP 2632.

2. Waid’s Malpractice—Waiver of His Client’s Priority Lien Rights During Endres Case: May 10, 2011-June 29, 2011.

On April 5, 2011, Ferguson was confronting a crisis in her co-counsel relationship with the attorney, Stephen Teller. She called Waid.

Her decision to retain Waid was based on the information on Waid's website, listing several areas of expertise which Ferguson believed made Waid well-qualified to advise and represent her. The first day they spoke, Ferguson expressed to Waid the following goals:

(1) protecting her attorney's fees earned over the past several years developing and litigating the Endres plaintiff's claims; CP 352.¹⁵

(2) protecting herself from liability for harm that might result to her former clients from Teller's negligence and unethical conduct at a time when she was suspended and therefore, had no ability to control Teller's actions; CP 352, 355.¹⁶

(3) protecting the interests of her former clients—to whom she remained loyal—from harm due to Teller's negligence and possible fraud or deception. CP 283-284¹⁷

Ferguson had represented Endres plaintiffs for several years.

Teller had recently been permitted to appear as her co-counsel in the Endres case based on his promise to advance 100% of the litigation costs for the work of at least three specific experts. In the "Keltner" case, Ms.

¹⁵ 5/18/2011 e-mail from Ferguson to Waid informing him of her commitment to pursuing evidence to prove fraud by Teller.

¹⁶ 6/24/2011 email from Ferguson to Waid informing Waid that she wants to "talk to the plaintiffs, my former clients" and will not mediate until Safeway or Teller answer their questions.

¹⁷ See esp., CP 283. The "Hourly Fee Agreement: Limited Engagement", signed and dated May 4, 2011, provides that "ATTORNEY" will conduct "investigation of [Teller's] potential Consumer Protection Act violation as may be discovered in connection with those particular issues". This refers to the concerns Ferguson raised with Waid early on, regarding Teller's possible deception and coercion of clients and her questions and concerns about her n exposure to liability due to her co-counsel's unethical conduct.

Keltner paid her own litigation costs. These costs were substantial and included paying for the work of an expert statistician and an expert economist. The Keltner case settled in December 2009, and the experts' work stopped. CP 708-709, CP 953-955. Ferguson served the Endres Complaint on Safeway in early 2010. CP 709. After that, she filed and litigated the Endres case for 9 months, which resulted in an offer to mediate by the defendant, Safeway. Ferguson prepared extensive mediation materials and represented her clients at mediation. Her work procured a settlement offer of \$1,125,000. Her clients did not accept the offer. Instead, they chose to move forward with the case. But unlike Ms. Keltner, the Endres plaintiffs could not pay the litigation costs in order to continue the work of the experts. Teller was hired only because he promised to advance these costs. CP 1013-1035.

Once Teller was permitted to appear in the case, he balked whenever Ferguson tried to assign him substantive work necessary to advance the litigation. Teller focused his time and effort trying to renew settlement discussions and to resuscitate the mediation that concluded prior to his entry into the case. This was not within the scope of work for which he had been retained. Teller's activities to revive the mediation were not authorized by Ferguson, or by Teller's new clients. Thus,

tension developed. The clients view was that Teller's unilateral actions were unwelcome and problematic. In fact, Teller's unauthorized offer to Safeway caused one of the four Endres plaintiffs (Linda Boyd) to retain her own counsel and withdraw from the Endres case. CP 1017.(fn. 2). The three remaining plaintiffs did attend a second day of settlement discussions. Teller did not prepare mediation materials, and there had been no new developments in the case since the mediation which preceded Teller's involvement in the case. The Endres plaintiffs rejected the offer made that day and reiterated their decision to move forward with the case, with the knowledge that Teller's firm was committed to advancing the costs of doing so. The client's decision took place on February 2, 2011. CP 1071-1105. One day later (February 3, 2011), Ferguson received notice that her appeal of a disciplinary suspension to the Washington Supreme Court had ended with the Court affirming her 90-day suspension. She withdrew, as Teller and the clients knew she would, to observe the 90-day suspension. Ferguson and her clients expected her to return to the case on or around May 3, 2011. But, in early April, Ferguson had begun to suspect that the clients were about to, or already may have, entered into a settlement agreement. When she asked Teller to confirm or deny that a settlement had occurred or was imminent, Teller refused to update her on the status of the Endres case, claiming that he could not share any

information with her because she was a suspended attorney. He further stated that even if the case were about to settle, he might be prohibited from sharing *any* part of the resultant contingent-fee with Ferguson, due to her status as a suspended attorney. CP 171-172, CP 182.

When Ferguson contacted Waid on April 5, 2011, she expressed to him that she was concerned about protecting her own fees—to be sure. But she also expressed her concern about protecting her former clients and herself, from Teller’s negligence and unethical conduct. Teller had failed to retrieve the Keltner and Endres files from Ferguson’s office during her suspension, as the attorneys had agreed. Teller required his clients to sign a settlement agreement with Safeway which had a so-called “confidentiality” provision subjecting them to a lawsuit and liability for substantial damages if they *ever* discussed the settlement with their “former attorney, Sandra L. Ferguson”. CP 1033. Thus, Ferguson was seeking advice from Waid to protect her former clients from harm, and how to protect herself from exposure to legal liability for her co-counsel’s negligence and unethical conduct in the Endres case. It was discussed and agreed that Waid would need to interview Ferguson’s former clients, or depose them, and that he would need to depose Teller. CP 743. On July 1, 2011, Waid wrote a letter to the Endres plaintiffs asking them to contact

him, but he received no response. After that, Waid never acted to communicate directly with the Endres plaintiffs or to depose them. CP 1267.

Waid's advice to Ferguson on April 5, 2011 was to waste no time, but to file and serve a Notice of Lien for Attorneys' Fees asserting her claim to fees earned in the Endres case. Ferguson had never needed to use an attorney-fee lien to collect fees. She was not familiar with the use of liens or the enforcement process under the Washington Attorney Lien Statute, RCW § 60.40. Waid was preparing to leave town on April 5, 2011. Therefore, she would have to get the lien filed and served. Waid sent Ferguson some recommended language for purposes of drafting, filing and serving her own lien-notice. After that, Waid was unavailable for about two weeks. On April 26, 2011, Ferguson served her lien-notice on all parties-in-interest. CP 2569. CP 956. The lien-notice stated Ferguson's claim to 90% of the attorney's contingent-fee from the proceeds of the Endres case, and expressly conceded Teller's right to 10% of the total contingent-fee. Although Ferguson served the lien-notice on Teller and Safeway, she did not file it, because as soon as Teller was served, he began making threats. Teller claimed that if Ferguson filed the lien, this act of filing would harm her former clients' interest in achieving

the settlement they wanted. Ferguson was uncertain about whether she had the right to protect her fees if it might harm her clients, as Teller claimed. Therefore, she decided to wait for Waid to return so she could consult with him again, rather than immediately file the lien. CP 171-172.

On May 4, 2011, Ferguson and Waid met at The Waid Law Office. They executed a contract for legal services drafted by the attorney, Waid. CP 283-284. In relevant part, the contract provided as follows:

“CLIENT hereby retains attorney to provide services to CLIENT on an hourly basis relative to claims for a fee division dispute with Attorney Stephen Teller, arising out of or relating to CLIENT’s and Mr. Teller’s fee for representation of clients in the matter entitled *Endres et al v, Safeway* (the Underlying Matter).

ATTORNEY’s role will be limited to such issues relative to the fee agreements and account(s) between CLIENT and Mr. Stephen Teller, *and investigation of his potential Consumer Protection Act violation* as may be discovered in connection with those particular issues.” {CP 283}

[emphasis added]¹⁸ On May 5, 2011, the day after the meeting, Waid sent his new client one of his articles, entitled “*The Perils of the Co-Counsel Relationship*” WSBA Bar News (May 2010). CP 159:7-11. This article is listed on one of his website pages. CP 2632.

¹⁸ The reference to the Consumer Protection Act violation is evidence of Waid’s knowledge of Ferguson’s suspicions and concerns which were expressed to him at the outset of the representation (i.e., that Teller had a conflict of interest and was unethically pressuring the clients to settle quickly, before she returned to the case.

Suddenly, Teller filed a Petition for Summary Adjudication in the Endres Court. The “Petition” was filed under seal, noted on the 6-day calendar, without proper notice to Ferguson. Waid opposed the petition (CP 178) and due to the procedural defects, the Endres Court dismissed Teller’s petition without prejudice. CP 190-193. Teller promptly re-filed it, calling it a Motion for Summary Adjudication. Waid sought a continuance until July 13, 2011. CP 203-204. Meanwhile, Teller retained experienced counsel, Kelby Fletcher, who never appeared in the Endres case. With Teller’s motion for summary adjudication in abeyance, Waid caused his client to mediate in a state of complete ignorance of her rights as the priority lien-holder. CP 593. Ferguson wanted Waid to condition mediation on receiving Teller’s Answer to the Complaint, but Waid disregarded Ferguson’s concerns. Ferguson wanted to talk to her clients, but Waid disregarded this concern. CP 355. Ferguson believed Teller was defrauding both her and her clients and wanted this claim included in the pleadings, but Waid disregarded her concern about pleading the fraud claim. CP 738-739. Before, during and after the mediation which took place on July 13, 2011, Waid failed to advise his client of her priority lien rights. Ferguson and Waid learned during mediation that Teller had charged the clients a 40% contingent-fee (\$530,107.00), and that the total proceeds from the settlement of the Endres case were \$1,375,000.

Ferguson had no control over the fee Teller charged the clients from the proceeds. Ferguson continued to tell Waid that she wanted to hear directly from her clients to confirm they had knowingly and voluntarily entered into the settlement with Safeway. But, Waid failed in all respects to address Ferguson's concerns or to take actions to achieve Ferguson's goals.

It appears that despite the representations made on his website, Waid knew no more than his client did about the lien statute, Ferguson's priority lien rights, or the enforcement mechanisms available to him to achieve his client's goals. Clearly, Waid did not conduct the "extensive research" he promised, to cure himself of his ignorance on these subjects.

On May 6, 2011, Waid (erroneously) informs Teller that summary adjudication is *not* a procedure available to the parties. Waid's e-mail to Teller opining on the subject states in relevant part, as follows:

RCW 60.40. et seq. provides the means for attorneys and *clients* to resolve their fee disputes through summary proceedings in certain limited instances; however, *the statute does not authorize such proceedings relative to a dispute strictly between the attorneys.* CP 178. (Emphasis added).

Waid's characterization of the "dispute" as a dispute about fees, "**strictly between the attorneys**" was not accurate. Waid had not been

listening to his client. This matter was not simply a “fee dispute” between the two attorneys, which is how Waid proceeded with it (which played into Teller’s hands to keep his clients isolated). To address Ferguson’s concerns, the Endres plaintiffs needed to be part of the lien-enforcement process and the proceedings which would fully and finally decide the final disposition of the entire \$1,375,000 proceeds. The right to invoke summary adjudication for this purpose belonged to his client as the priority lienholder, and this should have been the objective Waid pursued. An experienced attorney with the background, knowledge and expertise Waid claims to have regarding co-counsel relationships, would have taken this approach, and would not have caused 60% of the proceeds to be disbursed to the Endres plaintiffs before his client’s lien-claim was resolved. Summary adjudication should have been *pursued*; not *opposed* by Waid.

On May 10, 2011, Waid filed a Limited Notice of Appearance in the Endres case. CP 286-288. Although Waid had a copy of Ferguson’s Lien for Attorneys’ Fees and knew that it had been served on Teller and Safeway, he did not file Ferguson’s lien with the court. Teller refused to disclose information to Waid regarding the status of the Endres case (i.e., whether a final settlement has been signed and if so, the amount and

location of the proceeds). For the next few months, Waid would continue to beseech Teller (or Safeway's attorney, Steve Winterbauer) to enlighten him and his client on these matters. But, what he did not do (for some reason) is file his client's lien-notice, which would have given him and his client a *right* to this information. CP 171-173, CP 199. In an e-mail Waid sent to Teller on May 10, 2011, Waid advocates *dismissing* the Endres case, although his client's lien-notice has not been filed, and none of her concerns have been addressed. Waid writes:

“We can fight over the fees later without the presence of defense counsel if and when the settlement gets completed.” [CP 182]

In fact, the settlement was “completed” on April 27, 2011 (i.e., one day after Ferguson served her lien-notice on Teller and Safeway). Again, on May 16, 2011, Waid writes an e-mail to Teller which shows him pushing for *dismissal* of the Endres case, before he has filed his client's priority-lien or addressed her concerns. CP 188. On May 23, 2011, Waid still has not filed his client's lien, but he writes to Teller complaining that he and Ferguson are being **“kept completely in the dark on the status of disbursement of settlement funds”**. In this e-mail, Waid requests *Teller's “unconditional consent”* to communicate directly with Safeway's counsel of record, Steve Winterbauer, who is holding the proceeds. CP 199. The invoice Ferguson receives from Waid in early June

shows that Ferguson owes Waid \$17,650.00 for his time *opposing* summary adjudication. CP 290-291. Summary adjudication was in Ferguson's best interest. Waid should not have been opposing it.

On June 21, 2011, Waid continues in vain to try and obtain information about the amount and location of the proceeds. Waid writes to Kelby Fletcher: **“Can you confirm that the [Endres] case has concluded?”** CP 210. He also writes: **“Can you let us know the whereabouts of the fund(s) and whether there is a way to get it deposited and earning interest?”** Fletcher responds: **“The money is with Mr. Winterbauer...”** CP 154. Critically, on June 21, Kelby Fletcher writes: **“We need to learn in which matter you propose to deposit the fees.”** CP 215. Waid's response appears below:

“As per my earlier e-mails, *The 2011 Case*. Safeway would thus be out of the matter once and for all. I've begun drafting a stipulation to that effect.” [Emphasis added] [CP 213]

On July 1, 2011, Waid has still not filed his client's lien-notice. Waid notes this fact, stating: **“Ms. Ferguson did *not* file her lien into the court record, although I think *Mr. Teller* may have filed it as an exhibit to one of his declarations.”** CP 2648. [Emphasis added]

On July 13, 2011, Waid writes that he is “taking the lead” in drafting a stipulation which provides for the deposit of money into the court registry of the Teller case. CP 2646-2648.

On July 21, 2011, Waid is again asking Winterbauer about the location of the money because although a stipulation and order was entered 8 days ago, the \$530,107 of remaining proceeds from the Endres case, have not been deposited into the court registry. CP 217-218. Meanwhile, Ferguson continues to ask Waid how he intends to communicate directly with her former clients. On June 24, 2011, Ferguson writes:

“I also want to talk to the plaintiffs, my former clients. ...What should we do? I think this should be a condition of going to mediation i.e., that they actually respond (one way or the other) to our requests for information. I am not willing to mediate with all these questions hanging in the balance. We need them to respond to us.” [Emphasis added.] [CP 355]

On July 29, 2011, after mediation, Waid writes about the elusive proceeds:

“Dear Sandra: Followed up with Winterbauer. He’s got a litany of excuses...He reports that he should get the funds deposited, finally, around next Thursday. Just wanted you to know I’ve kept after that.” [CP 778], [CP 392]

Ferguson's response: **“Thanks for letting me know. But something is not right about it all.”** CP 392. Waid's reply: **“I agree, but *there's not a lot that you or I can do about it other than keep after him. bjw*”** CP 778. [Emphasis added] Ferguson did not know then, but she knows now, that there was something Waid could have done about it. He could have filed her lien-notice. Waid never explained to his client her rights as the priority lienor. He never sought to enforce those rights on her behalf. Instead, Waid caused 60% of the proceeds from the settlement of the Endres case to be disbursed to the Endres plaintiffs in May or June, thereby waiving his client's rights as the priority lienor, without her informed consent. Then, Waid caused the Endres case to be dismissed without any resolution of any of Ferguson's three main concerns. CP 178, CP 188, CP 146-162, CP 190-193, CP 199, CP 203-204, CP 206-207, CP 210, CP 213, CP 215, CP 214, CP 217-218.

The money was not deposited by Safeway into the Court Registry of the Teller case until August 5, 2011. CP 2650. The timing was suspicious because the stipulation for the deposit had been filed on July 13, 2011. CP 2646-2648. The actual deposit, when finally made on August 5, 2011, occurred within a day or two after Teller asserted a new, meritless counterclaim that he was possibly entitled to *more than 50%* of

the contingent-fee which he had charged his clients (i.e., \$530,107 or 40% of the proceeds). This frivolous counterclaim provided the flimsiest pretext for Waid to continue to deprive Ferguson of her property now in the registry (\$265,000).

3. Waid's False and Deceptive Acts and Business Practices Representing Ferguson in the Teller (Sham) Case: May 27, 2011 to February 10, 2012.

The Teller case was filed by Waid on May 27, 2011, while Teller's second motion for summary adjudication remained pending in Endres. Ferguson deferred to her attorney's supposed expertise when he recommended the filing of the separate lawsuit. Waid pled the wrong claims in the Complaint filed on May 27, 2011. Waid failed to plead the correct claims. CP 2225-2233. Ferguson was not involved in the drafting, but when she received the completed draft document from Waid, she reviewed it and asked why Waid was not alleging "fraud" against Teller. CP 352. Waid promised Ferguson that he would amend the complaint to include a fraud claim if future discovery warranted a fraud claim. But Waid never deposed the Endres plaintiffs or Teller, or anyone with relevant knowledge. Waid directed payments from the proceeds of Endres to be distributed to the three Endres plaintiffs in derogation of his client's priority lien rights. After that, \$530,107 in proceeds remained in the hands of the adverse party (Safeway). Although his client had clear title

(or could have had clear title) to \$265,000 of these remaining proceeds, Waid prepared and signed a stipulated order for the remaining proceeds of \$530,107.00 to be deposited by Safeway into the court registry of the Teller case. CP 2646-2648. On the date the sham Teller case was filed, Waid acquired a priority lien to any proceeds resulting from the Teller case. Ferguson v. Teller, 178 Wn.App. 723, 877 P.3d 509 (2013). On the date the \$530,107 was deposited into the court registry of Teller, Waid acquired an unlawful security interest in his client’s \$265,000 earned in the Endres case, and a proprietary interest in his client’s property, adverse to her interests in the underlying matter.¹⁹

Waid failed to depose material witnesses during Endres, but deposed his former client, Reba Weiss. Waid suggested taking Weiss’ deposition to prove defamation by Teller. CP 1213-1246. Then, refused to represent Ferguson in pursuit of a defamation claim when the discovery indicated that defamation was in fact, taking place and that Waid’s former client, Weiss, was involved. This pattern of conduct by Waid is the basis for Ferguson’s use of the term “bait-and-switch”. CP 2696-2698. During

¹⁹ See, Appendix, Part D.—Aronson, Rob, The Law of Lawyering in Washington, 7-1-77(RPC 1.8(a) and 1.8(i) addresses a lawyer’s conflict between his own financial interest and the interests of his client.) See also, In re Shepard, 169 Wn.2d 697, 239 P.3d 1066 (2010), In re Haley, 156 Wn.2d 324, 339-40, 126 P.3d 1262 (2006); Valley/50th Avenue, LLC v. Steward, 159 Wn.2d 736, 748 n.7, 153 P.3d 186 (2007).

Waid's deposition of his former client, Weiss, she gave false testimony. CP 1318-19, CP 1256-66, CP 1321-32. Ferguson proved the perjury. Then, she wanted Waid to act to protect her reputation, including sending a Cease and Desist Letter. Waid refused. CP 932, CP 35. After the deposition, Weiss sent a letter to Waid admonishing him about his duty of loyalty to *her*, as a former client, and she copied Waid's former boss, Gould, on this letter. CP 1251. From this letter, it is clear that Weiss and Gould were aware that a conflict of interest existed for Waid, and that they were aware that Waid was trying to conceal the conflict of interest from his client. Ms. Ferguson suspected collusion for many reasons and finally, she asked Waid to disclose to her, the substance of his communications with Weiss. CP 2655. Waid did not respond to this written request. Under these facts, Waid continues to falsely assert, as a matter of law, that "no such conflict existed." CP 35, CP 841-42, CP 1833-1890 (*1844:18-25,1845-46, 1857:5-18).

To summarize: Waid does not possess the expertise he claims. Waid committed malpractice during the Endres case, concealed it from his client, and filed and pursued a totally meritless (sham) case against Teller solely for his own pecuniary gain.

(a) **Oppe v. Atwood.** Waid has pursued sham cases before. Specifically, he pursued the frivolous malpractice case against the attorney, Sarah Atwood, in Oppe's name. See Part I.,(*infa*).

(b) **Carole LaRoche.** Waid was retained by Ms. LaRoche because of the content of Waid's website. Waid filed a legal malpractice case in LaRoche's name, litigated it for months, conceded it was meritless, filed a Notice of Lien Claim for Attorneys' Fees for \$48,000 to collect for worthless legal services. LaRoche sued Waid and filed a bar complaint against him. CP 3088-3105. Waid engaged in discovery abuse in the trial court below, to conceal the information about LaRoche from Ferguson. CP 484-486, CP 1710-1746. CP 1751-1760.

(c) **Debbie Scharer, Lucy Endres, Linda Boyd, Sarah Atwood.** These women were also injured by Waid's false and deceptive business practices. They were denied notice and an opportunity to be heard in summary adjudication, but Teller was assisted by Waid.

(d) **November 2, 2011—February 2, 2011.** On November 2, 2011, Teller's frivolous counterclaim to more than 50% of the contingent-fee of \$530,107, was dismissed with prejudice. CP 1021, 1029. Even then, Waid did not move to disburse Ferguson's uncontested \$265,000 from the court registry. Throughout the representation, Ferguson

continually asked Waid about her \$265,000 and when she would have it. Waid failed to give clear, cogent, or consistent answers. CP 759, CP 757, CP 662, CP 362, CP 373, CP 392, CP 949-950, CP 959-960, CP 2656, CP 2677-2689. Waid's unlawful security interest (Ferguson's \$265,000 in the registry) prevented Ferguson from firing Waid and hiring another attorney (i.e., a competitor). The record shows that Ferguson did try to hire other attorneys. Harish Bharti was one, but she had insufficient funds. CP 1070. On February 10, 2012, she tried to hire Dick Kilpatrick. CP 1030-1031. Kilpatrick told her in no uncertain terms that her money should not still be in the registry, and that she needed to advise the court of the situation. CP 2677-2689. Tellingly, though Waid's monthly statements eventually reflected an unpaid balance of \$78,350.88, Waid showed little concern. CP 290-315. This was because Waid knew that Ferguson had clear title to a substantial portion of the \$530,107.00 in the registry. . (See, Waid's Dep. Tr. CP 3285-3328). While Ferguson's \$265,000 was in the adverse party's hands and in the court registry due to Waid's negligence or fraud, Ferguson's car was repossessed, she lost her health insurance, she fell behind on her mortgage payments, and was forced to borrow to meet expenses. CP 949-950.

III. ARGUMENT

1. The Trial Court Lacked Jurisdiction After December 1, 2015.

The trial court lost jurisdiction over this case on December 1, 2015, when the court entered the order of involuntary (non-suit) dismissal without prejudice. Thus, the trial court's entry of judgment on December 31, 2015 is void. "Entry of a judgment after the order of dismissal [under CR 41] exceeds the jurisdiction of the court." Cork Insulation Sales Co. v. Torgeson, 54 Wn. App. 702 (1989). Similarly, the trial court's order denying Waid's motion for reconsideration and dismissal with prejudice occurred after the involuntary non-suit order under CR 41(b). Waid cannot appeal this void order.

2. Defendant Failed to Provide 10 Days' Notice to Non-Moving Party.

The 10-Days' notice requirement is mandatory under CR 41(b)(1).

Therefore, the trial court lacked discretion to grant Waid's motion for involuntary dismissal under CR 41(b).

3. This Court Should Decline to Engage in De Novo Review of the Trial Court's Summary Judgment Ruling.

As discussed (par. 1), the trial court lacked jurisdiction to enter judgment on December 31, 2015. Thus, there is no right of appeal. RAP 2.2(a)(3) provides that "[a] party may appeal as of right any 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.” A trial court’s decision to *deny* summary judgment is generally not an appealable order, and discretionary review of such orders is not ordinarily granted. DGHI, Enterprises v. Pacific Cities, Inc., 137 Wash. 2d 933, 977 P.2d 1231 (1999); Seafirst Center Ltd. Partnership v. Kargianis, Austin & Erickson, 73 Wash. App. 471, 866 P.2d 60 (Div. 1 1994), decision aff’d, 127 Wash. 2d 355, 898 P.2d 299 (1995) (denials of summary judgment are rarely appealable, particularly when factual issues are involved).

4. Plaintiff’s Consumer Protection Act Claim Should Not Be Dismissed—Genuine Disputes of Material Fact Preclude Summary Judgment..

The trial court has twice held that Ferguson has satisfied the plaintiff’s burden of production as to each element of the CPA claim. If this Court engages in de novo review, the facts and evidence must be considered in the light most favorable to Ferguson as the non-moving party. Indoor Billboard Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wash.2d 59, 70, 170 P.3d 10 (2007). Ferguson must produce evidence sufficient to show that genuine disputes of material fact exist as to each of the following five elements to a Consumer Protection Act claim: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) affecting the public interest, (4) injury to a person’s business or property,

and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 784-85, 719 P.2d 531 (1986).

Element No. 1. An act or practice is deceptive if it has the capacity to deceive a substantial portion of the public. Panag v. Farmers Ins. Co. of Wash., 166 Wash.2d 27, 47, 204 P.3d 885 (2009). The purpose of the capacity-to-deceive test is to deter deceptive conduct before it occurs. Dwyer v. J.I. Kilslan, Morg. Corp., 103, Wash. App. 542, 547, 13 P.3d 240 (2000), review denied, 143 Wash.2d 1024, 29 P.3d 717 (2001). Neither intent to deceive nor actual deception is required. Dwyer, 103 Wash. App. at 547, 13 P.3d 240.

Ferguson alleges that Waid engages in false advertising and that he engages in unfair billing and collection practices by filing sham cases in his clients' names. Ferguson's CPA claim is not "directed at the competence and strategies employed by a professional". See Combined Brief of Appellants Waid, p. 29. In Wright v Jeckle, 104 Wn. App. 478, 16 P.3d 1268 (2001), cited by Waid, the Court found the CPA claim valid because the doctor's selling of diet drugs was deemed entrepreneurial. In this case, Waid is a lawyer who files meritless cases for profit. This is analogous to a doctor who performs unnecessary surgeries on patients solely for profit. Filing and pursuing sham cases is a false and deceptive

billing and collection practice of Waid. It is an entrepreneurial aspect of Waid's law practice. A reasonable jury could conclude that Waid's habit of conceding claims with no excuse for filing them in the first place is a deceptive act for profit, not an error in professional judgment, as Waid tries to argue.

Element 2: Waid's false advertising on the internet and his filing of sham cases occurs in trade or commerce. Ms. Ferguson, Ms. Oppe, and Ms. LaRoche, have testified to retaining Waid because of the content of the website. Oppe and LaRoche lived in other states when they came across Waid's website advertisement.

Element No. 3. A plaintiff may establish that an alleged unfair or deceptive act or practice is injurious to the public interest because it... (3)(a) Injured other persons; (3)(b) had the capacity to injure other persons, or (3) (c) has the capacity to injure other persons. RCW § 19.86.093. See, Rush v. Blackburn, 190 Wash.App. 945, 967-68, 361 P.3d 217 (2015). The facts of Oppe's case show that she was injured in the same fashion as Ferguson, and this changes a factual pattern from a private dispute to one that affects the public interest. Hangman Ridge, 105 Wn.2d at 7. Therefore, Plaintiff satisfies subpart (3)(a)-(c). The courts consider other factors as to the public interest showing, such as: (1) Were

the alleged acts committed in the course of the defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? Hangman Ridge, 105 Wash.2d at 790-91, 719 P.2d 531. The answers to the foregoing questions is yes. The website shows Waid solicited each of these clients with his website. A fiduciary relationship is, by definition, an unequal bargaining position. In Ferguson's case, Waid gained additional coercive power by depositing and holding his client's \$265,000 in the court registry. The similarity of Waid's conduct as Ferguson's attorney and Oppe's attorney indicates that Waid's deception of Ferguson was part of a predatory *pattern*, not an aberration (or one-off). A reasonable jury could find that Waid's deceptive acts or practices have the potential for repetition and are injurious to the public interest.

Elements 4 &5. "A plaintiff must establish that, but for the defendant's unfair, false or deceptive act or practice, the plaintiff would not have suffered an injury." Indoor Billboard, 162 Wash.2d at 84, 170 P.3d 10. The injury requirement may be satisfied even if the expenses caused by a consumer protection act violation are minimal. Panag, 166 Wash.2d at 57. Here, Waid held himself out to the public as possessing expertise he did not possess. The injuries to Ferguson were caused (inter alia) by Waid's

lack of expertise and failure to conduct research. Waid's malpractice in the Endres case injured Ferguson in her business and property (including her reputation, loss of health insurance, loss of the home she owned since 2001, her car was repossessed. See *infra*).

5. The Trial Court's Dismissal of Waid's Counterclaims Was Correct as a Matter of Law.

The trial court dismissed Waid's counterclaims with prejudice based on the doctrine of res judicata. CP 2075-2077. Waid is also barred from pursuing these claims based on failure to mitigate, waiver, or estoppel. CP 1372-1383 and CP 1385-1414.

The doctrine of res judicata rests upon the foundation that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.

Marino Property Co. v. Port Comm'rs of Seattle, 97 Wn.2d 307, 312, 644

P.2d 1181 (1982) (internal citation omitted). See also, Bunch v.

Nationwide Mut. Ins. Co., 180 Wash. App. 37, 43-44; 321 P.3d 266

(2014) (internal citations and footnotes omitted). Waid chose to litigate

the fees issue in the Teller case. This Court held that he had a priority-lien

and remanded the matter to the trial court to determine what fees, if any,

Waid was entitled to receive from the \$290,000 in the court registry.

After remand, Waid chose not to enforce his priority lien and the \$290,000 was released to the next lienholder, Teller. A party can waive a remedy by failing to take some action to seek a remedy within a reasonable time. See, e.g., Otis Hous. Ass'n v. Ha ["OHA"], 165 Wn.2d 582, 587-588, 201 P.3d 309 (2009) (citing cases). Waid failed to make reasonable efforts to mitigate his damages while there was \$290,000 in the court registry in Teller. Ferguson would be prejudiced if Waid is allowed to pursue his fee-claim after refusing to adjudicate while there was \$290,000 in the court registry.

“The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts. [Citations omitted]. The injured party’s duty is to “use such means as are reasonable under the circumstances to avoid or minimize the damages.”

Cobb v. Snohomish County, 86 Wash. App. 223, 230, 935 P.2d 1384 (1997), quoting in part, Young v. Whidbey Island Bd. Of Realtors, 96 Wn.2d 729, 732, 638 P.2d 1235 (1982).²⁰

IV. CONCLUSION

Plaintiff’s case should be remanded to the trial court for further proceedings.

²⁰ In both cases, the appellate court affirmed rulings by the trial court that the plaintiff had failed to mitigate damages.

V. APPENDIX

Part A-The Attorney General's Office File.No. 444272.

Part B-Decl. of Peter R. Jarvis from Oppe v. Waid, 15-2-27236-5 SEA.

Part C-Aronson, Rob, The Law of Lawyering, Ch. 7, Conflicts of Interest.

Part D-Chapter 60.40, RCW

Part E-RPC 1.7, RPC 1.8, RPC 1.9, RPC 1.16.

DATED this 28th day of June, 2018.

/s/Sandra L. Ferguson_____

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CERTIFICATE OF SERVICE

I certify that on this 26th day of June, 2018, I caused a true and correct copy of this Response Brief to be served on the following in the manner indicated below.

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/s/Sandra L. Ferguson
Sandra L. Ferguson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SANDRA L. FERGUSON, Esquire,

Plaintiff-counter-
defendant-Appellant,

v.

BRIAN J WAID, and the marital community
thereof,

Defendant-counter-claimant-
Appellee.

No. 18-36043

D.C. No. 2:17-cv-01685-RSM
Western District of Washington,
Seattle

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellee's motion for summary affirmance (Docket Entry No. 76) is denied because the arguments raised in the opening brief are sufficiently substantial to warrant further consideration by a merits panel. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

From: ca9_ecfnoticing@ca9.uscourts.gov
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Subject: 18-36043 Sandra Ferguson v. Brian Waid "NOTICE -- Case being considered for Oral Argument"
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United States Court of Appeals for the Ninth Circuit

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Case Name: Sandra Ferguson v. Brian Waid

Case Number: [18-36043](#)

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Please review the Seattle sitting dates for November 2019 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file [Form 32](#) **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's [instructions](#) carefully.

When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date.

If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document:** File Correspondence to Court; **Subject:** request for mediation). [11375299] (KS)

Notice will be electronically mailed to:

Sandra L. Ferguson
Eugene Volokh
Mr. Brian J Waid, Attorney

THE FERGUSON FIRM

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Comments:

Please accept this corrected Reply to Respondent's Answer to Petition. This document is intended to replace Reply filed July 30, 2019.

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