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No. 68339-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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**STACEY DEFOOR,**

Appellant,

v.

**RAFEL LAW GROUP PLLC,**

Respondent

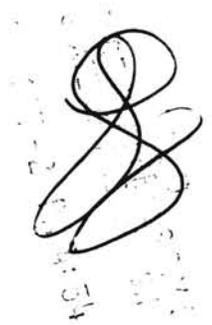
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Appeal From the Superior Court for King County  
The Honorable Mary Yu

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**BRIEF OF RESPONDENT RAFEL LAW GROUP PLLC**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Rafel Law Group PLLC (“RLG” or “Rafel”) vigorously and successfully prosecuted Stacey Defoor’s (“Defoor”) meretricious relationship claims against Terry Defoor (“Terry”). After a 19 day trial, Rafel obtained a Judgment in Defoor’s favor of over \$5.4M. When informed of the result, the mediator, Rosselle Pekelis, wrote, “WOW. You really worked this up.” CP 2748. Rafel called it a “decisive victory for our client.” CP 2755. Ms. Defoor was “quite happy with the result.” CP 2754. The result far exceeded all prior settlement offers. CP 2757.

When Terry appealed, Davis Wright Tremaine (“DWT”) represented Defoor. Defoor did not appeal the property distribution and on remand told the court that “the court’s property division was fair” and “equitabl[e].” CP 2802. Family law expert witness Kyle Johnson termed RLG’s work excellent (CP 2765); expert witness Jeff Tilden called it an excellent result (CP 990). Unfortunately, the economy went into a deep recession, the real estate market tanked, and Terry and his two companies filed for bankruptcy. As a result, while Defoor received valuable property, including a \$1.65M SeaTac debt-free commercial property, two homes, a condo, three Porsches, a \$100K boat, jewelry and other personal property, she has not collected on her \$2.2+ million cash judgment in three years.

When years passed with no payment from Defoor, RLG filed suit.

Months later, DWT agreed to represent Defoor against Rafel on a contingent fee basis and filed counterclaims. On summary judgment, the court dismissed Defoor's counterclaims and granted judgment in Rafel's favor. While riddled with hyperbole and mischaracterization in an effort to smear Rafel Law Group and its principal, Anthony "Tony" Rafel, Appellant's Brief fails to identify any genuine disputed issue of material fact or incorrect application of law by the trial court.

The Re-Engagement Agreement is valid and enforceable. It is undisputed that Defoor was not a current client of Rafel when Defoor signed the Re-Engagement Agreement in mid-February of 2008. Rafel had previously withdrawn pursuant to Court Order effective January 10, 2008. RPC 1.8(a), a Rule which by its own terms is applicable to "Current Clients," did not apply. Every Washington case cited by Defoor on this issue involved business transactions with an existing current client. Continuing to limit RPC 1.8(a) to "Current Clients" does not create a *caveat emptor* standard as Defoor would like the Court to fear. RPC 1.5 applies to fee agreements with new clients and requires that they be fair and reasonable, and all attorneys become subject to RPCs and applicable standards of care when representation commences. Rule 1.8(a) has been in place for decades. Yet there is no applicable case law or other authority applying RPC 1.8(a) to prospective representations in Washington and no

evidence that its application as now written and applied to current clients and not new clients has led to abuse.

But even if RPC 1.8(a) applied, there was no violation. Experts John Strait and Jeffery Tilden opined that the terms of the Re-Engagement Agreement were fair and reasonable. That testimony stands un-rebutted. The voluminous record shows that Rafel advised Defoor in writing to seek independent counsel. And she did just that. Defoor was advised by James Clark and Ginger Edwards who reviewed the terms of the proposed Agreement and informed Defoor of the very matters she now asserts were not disclosed.

Defoor ignored the Oseran firm's advice and signed the Re-Engagement Agreement in Florida, thousands of miles away from Rafel before two witnesses and a notary public. In it, she acknowledged under oath that she had an opportunity to engage independent counsel, that she understood its terms, and that it was her free and voluntary act without coercion or duress of any kind. However, Defoor did not tell Rafel at the time – as she later admitted at her deposition and as reflected in contemporaneous emails by Defoor to Oseran and others – that she never intended to comply with the terms of the agreement. Instead, all along she secretly planned to sue Rafel. At her deposition, she admitted that her Acknowledgments in the Agreement were “Totally false.” Defoor's

fraudulent inducement to obtain Rafel's services and her acceptance of thousands of hours of its services estops Defoor from now rescinding or voiding the Re-Engagement Agreement.

Defoor's Counterclaim for malpractice was also properly rejected. Tellingly, Defoor devotes only three pages of her Brief to this claim. First, even if she had a basis and requisite expert testimony to show that Rafel acted negligently (and she has neither), Defoor cannot meet her burden of proving that any greater award against Terry would have been collectable.

Second, Defoor cannot establish that she was damaged by any alleged actions or omissions by Rafel. Such claims would require Defoor to establish by expert testimony that the trial court would have awarded her a larger judgment if some action required of Rafel had been completed, and that if Defoor had received a larger judgment, she would have been able to collect it. She has no such expert testimony. Even with discovery in the bankruptcies and supplemental proceedings, Defoor and DWT have not located any hidden asset that was not presented to the trial court in formulating its judgment. Even if they could, Rafel obtained for Defoor an award of 50% of any allegedly undiscovered assets.

Third, Defoor has not proffered expert testimony to support her allegations of malpractice, as required by Washington law. Here,

Defoor's only standard of care expert, Ted Billbe, has provided but one bald opinion that Rafel "did not do a proper job of tracking assets." Yet Mr. Billbe conceded that he could not identify a single asset that was not presented to the court and had no opinion on whether Defoor had been damaged or whether any damages were collectible. Mr. Billbe also has conceded that it is a "judgment call" for the trial attorney as to whether to value assets at the time of separation or trial.

Fourth, any claim by Defoor that she would have obtained a greater damage award had Rafel presented the evidence of Terry's post-separation expenditures in a different way is speculative and is not supported by any expert testimony.

Defoor's breach of fiduciary duty claim also fails as a matter of law. There was nothing improper about Rafel's filing of notices of liens that arose by operation of law and that identified fees and costs which were reasonable per the un-rebutted testimony of Jeffery Tilden. Nor is there anything improper, or even unusual, for Rafel to have included a risk premium in his contingent fee rates. Rafel's rates were no greater than those charged Defoor by DWT, and there is no basis for Defoor's false assertion that Rafel requested "admittedly unreasonable charges" in the liens or otherwise. Indeed, the lien notices filed by Rafel preceding the Re-Engagement Agreement and fees identified for Matter 1 fees in the Re-

Engagement Agreement were understated, given an inadvertent failure to include the time of RLG attorney Duncan Manville. Defoor also cannot establish any damages. She has no expert testimony that a different lawyer trying the case in a different way would have resulted in a higher, collectable award, and she failed to submit the required medical evidence of emotional distress damages if such damages are even allowed for breach of fiduciary duty in this context.

The Judgment for the fees earned and costs incurred by Rafel is supported by the un-rebutted testimony of Tilden who confirmed, among other things, that the hourly rates and total fees and costs were more than reasonable and in fact were low. The total fees and costs awarded to Rafel were very close to those charged by Terry's lawyers even though Defoor had the burden of proof and Terry had all the evidence. And the trial court correctly found the fees and costs due under quantum meruit are the same as under the Re-Engagement Agreement.

Finally, Defoor continues to rely in her Brief upon unqualified opinions, legal argument and conclusions contained in Defoor's Supplemental Declaration that were properly stricken. Defoor is not an attorney, accountant, or real estate appraiser and her opinions on all of these subjects were not and are not admissible. All of the trial court's rulings should be affirmed in their entirety.

## II. STATEMENT OF THE CASE<sup>1</sup>

### A. Rafel's Withdrawal Pursuant to Court Order

After Defoor fired her first lawyers, Rafel initially represented Defoor pursuant to a Contingent Fee Agreement.<sup>2</sup> When Defoor, among other things, questioned Rafel's right to fees in the event of a settlement, Rafel moved to withdraw. Rafel's withdrawal was expressly authorized by the court, after a lengthy in camera hearing where Defoor was heard, and after the court's consultation with the mediator, Honorable Rosselle Pekelis. CP 3471 and 3493-95. Judge Downing expressly found "good cause" and that such withdrawal could be done "without material adverse effect on Defoor." CP 3494. Defoor did not appeal that order and does not dispute that Rafel's withdrawal became effective January 10, 2008. Defoor, therefore, was not Rafel's client when the Re-Engagement Agreement was subsequently signed more than a month later. CP 4078-4080 (testifying that she was "pro se" and "representing myself") (Defoor Dep. at 145 and Vol. II at 16, 50 and 52).

### B. The Re-Engagement Agreement

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<sup>1</sup> Rafel disputes Appellant's Statement of Issues but has not submitted a counter-statement because of page limits and refers to its Summary of Argument and Argument.

<sup>2</sup> Rafel's principal Anthony Rafel is a Martindale Hubbell AV-rated trial lawyer with over 30 years' experience, a Washington Law & Politics peer-elected Super Lawyer for the past twelve years, one of WA CEO Magazine's "Top Lawyers in WA" in 2008, and was President of the Federal Bar Association. These and his many other achievements are highlighted in the record at CP 1004-05.

Following Rafel's withdrawal, Defoor subsequently requested that Rafel represent her at trial. Because of Defoor's prior statements that she did not believe she should be required to pay Rafel pursuant to the parties' contingent fee agreement, Rafel indicated that he would represent her again, but only if she acknowledged the amount of fees and costs due for the work completed prior to withdrawal, agreed to pay his fees on an hourly basis going forward, and memorialized such obligation with a promissory note. Rafel orally and in writing urged Defoor to seek independent counsel about this proposed arrangement. *See* CP 3472-73; CP 146.

An agreement was reached and memorialized in the Re-Engagement Agreement and Promissory Note ("Re-Engagement Agreement"). Contrary to Defoor's claim (rejected by the trial court and not pursued by Defoor in this appeal) that these agreements should fail for undue influence, coercion and duress, Defoor signed them in Florida on February 14, 2008, thousands of miles away from Rafel, before witnesses and a notary public. Defoor expressly acknowledged in bold text in the Re-Engagement Agreement (at CP 435):

9. Free and Voluntary Act. **Defoor hereby certifies that she is of sound mind and has fully read the agreement, that she understands it, that she has been given the opportunity to consult with independent legal counsel of her choosing and has either so consulted or waived her**

**right to consult, and that she has executed this Agreement and the accompanying promissory note as her free and voluntary act and deed, without coercion, duress or undue influence of any kind.**

**C. Defoor Sought and Obtained Independent Counsel**

During the period between Rafael's withdrawal and entry of the Re-Engagement Agreement, Defoor received legal advice from her first lawyers at Oseran. Mr. Clark reviewed the proposed re-engagement terms and repeatedly advised Defoor not to enter the Re-Engagement Agreement. *See* CP 4265-66, 4268, Raskin Dec. Exs. 17 and 18. On February 5, Defoor emailed Clark the proposed terms, including that she would have to sign a promissory note, acknowledging her obligations for past fees plus interest and for work from this point forward:

1) You would have to sign a promissory note, in a form satisfactory to me, acknowledging your obligation to us for fees of \$505,000 and costs of \$270,000. The note would have to be approved in writing by Jim Clark or another attorney independently representing you,.... The note will bear interest from and after January 10, 2008 at our standard rate of one percent per month until paid.

2) Our work from this point forward would be charged to you on an hourly basis and be treated as "additional advances" under the promissory note. ....

CP 4270, Raskin Dec. Ex. 19. Clark responded the very next day:

"Stacey, you have an option, the best option is to file bankruptcy as I have outlined before. I do not recommend that you accept the terms in Tony's email." CP 4274, Raskin Dec. Ex. 20. Clark also referred Defoor to a

bankruptcy lawyer, with whom she then communicated. CP 4268, Raskin Dec. Ex. 18. And, in an email to Mr. Rafel on February 12, 2008, Defoor informed Rafel that she had been “strongly advised” by Jim Clark not to enter into the Re-Engagement Agreement, and that “All other parties in the case feel the same way.” CP 4276, Raskin Dec. Ex. 21.

Defoor ignored Clark’s advice and re-engaged Rafel pursuant to the terms of the proposed Re-Engagement Agreement. Defoor confirmed at her deposition that Mr. Rafel recommended that she confer with independent counsel, that she obtained independent counsel and was advised not to enter into the Agreement. CP 4060-4061, Defoor Dep. Vol. I at 162-63. The indisputable evidence (discussed in detail *infra* p. 24-26) also shows that Defoor’s attorneys at Oseran advised Defoor of the same matters she now claims were not disclosed, including that after withdrawal Rafel’s recovery would be in quantum meruit.

**D. Defoor’s Fraud in the Inducement**

At her deposition, Defoor admitted that when she entered into the Re-Engagement, she never intended to comply with it. Rather, she secretly intended later to sue Rafel over legal fees but did not tell Rafel this because she knew that Rafel would not have agreed to represent her. *See* CP 4069-4071, Defoor Dep. at 190 and 187 (Q. Why didn’t you tell Rafel anything about this? ... A. “I wouldn’t make it to trial”); (Q. Did

you ever tell him or not? ... A. "Of course not"). The testimony at issue came during a series of questions about three emails from late January 2008 (after withdrawal but before re-engagement) that Defoor sent to counsel for Mr. Defoor and to attorney James Clark, with whom she was then consulting. They were marked as Exhibits 48, 49 and 50 to the Defoor deposition. *See* CP 4288, 4290, 4292, Raskin Dec. Exs. 24-26. *See* CP 4067-4068, Defoor Dep. Vol. I at 186:18-187:22; CP 4069-4070, *id.* at 188:16-189:3; CP 4070-4071, *id.* at 189:19-190:26.

Defoor also testified that when she signed the Re-Engagement Agreement and under oath acknowledgments at ¶ 9 therein, she was "lying." CP 4065. She stated that her acknowledgement in order to obtain Rafel's services was "Totally false." *See* CP 4065-4066, Dep. at 173-174; *see also* CP 4062-4064, Defoor Dep. Vol. I at 168-170. Defoor's videotaped testimony about her prior under oath acknowledgments was submitted on DVD to the Court below and is part of the record on this appeal that Rafel asks the Court to review. Video Clips (Sub. No. 220A).

**E. Expert Testimony Regarding Re-Engagement Agreement and Fees and Costs**

Ethics expert Professor John Strait testified that RPC 1.8(a) did not apply to the negotiation and execution of the Re-Engagement Agreement because Defoor was not a client at the time. But even if RPC 1.8(a) had applied, Strait found compliance because the terms of the Agreement were

clear and Defoor was advised to seek independent counsel. CP 4115-4120, Strait Dep. at 95-100. Strait also opined that the terms of the Agreement were fair and reasonable, provided that the hourly rates and amounts to be billed are fair and reasonable (which he was not asked to opine on and for which Tilden provided an un-rebutted opinion, CP 990-992). Strait confirmed that “the granting of the lien ... is not uncommon” and noted “Davis Wright sought security for its representation.” CP 4121, Strait Dep. at 102.<sup>3</sup>

Defoor’s expert, Mark Fucile, likewise conceded that lawyers “can generally bargain at arm’s length before an attorney-client relationship is formed.” CP 4129, Fucile Dep. at 77. Mr. Fucile did not dispute that Defoor was no longer a client of Rafel, once the withdrawal was effective, and he was unable to identify any Washington case law that RPC 1.8 applies to a new engagement. *See* CP 4125-4127, Dep. at 32, 38 and 39.

## **F. The Nineteen-Day Trial**

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<sup>3</sup> Contrary to any suggestion by Defoor or DWT that it was improper for Rafel to obtain a lien against assets recovered in litigation, DWT itself demanded and obtained from Defoor 20 months after its representation commenced, a deed of trust for the Sea-Tac Property, even though Defoor had already awarded Rafel a lien against this asset. CP 938-941. Notably, Defoor did not obtain independent counsel before entering that fee agreement with DWT, which modified her existing relationship with DWT, and there is no evidence, aside from DWT’s fee agreement, that DWT advised Defoor in writing about the terms of its security interest. CP 4072, Defoor Dep., Vol. I at 194. DWT is now seeking in separate litigation filed by it against Rafel to obtain priority over Rafel’s contractual lien which the trial court rendered judgment on in favor of Rafel, so that DWT can collect its own \$1.1M fees from Defoor ahead of Rafel. CP 4038-4042; CP 3992-3994.

Rafel represented Defoor at a 19-day trial in March of 2008. Twenty-five witnesses gave testimony and hundreds of trial exhibits were admitted. *See* CP 3707-3709, Rafel Dec. ¶¶ 3-8. A forensic CPA and certified fraud examiner with over 25 years of experience (Paul Sutphen of RGL Forensics) was engaged by Rafel to review, evaluate and testify regarding financial information obtained through discovery. Rafel also engaged an expert real estate appraiser and an expert development engineer who testified at trial. Mr. Sutphen presented the parties' assets and liabilities in the form of a balance sheet with detailed supporting schedules and extensive back up documentation. The balance sheet and supporting schedules were thorough, identifying bank accounts, real properties, boats, cars and other assets at the time of separation in October 2006. *See* CP 3708, 3715-3716, 3718-3753, Rafel Dec. ¶¶ 4-6 and Exs. 1-2. Additionally, the Court received extensive testimony from Mr. Sutphen and other witnesses regarding post-separation cash proceeds received by GWC from pending projects with Camwest known as Federal Way and Fairwood and post-separation cash expenditures by Terry. CP 3708-3709, 3755, 3757, Rafel Dec. ¶¶ 7-8 and Exs. 3-4.

**G. All Community Assets Were Brought to the Court's Attention**

All community assets were identified at trial. Defoor and DWT have pursued additional discovery in connection with bankruptcy and

supplemental proceedings against Terry. Yet Defoor has not discovered any asset that was not presented to the trial court. *See* CP 4095-4096, Billbe Dep. at 62 and 65.

Defoor now seeks to manufacture an issue out of one UBS account containing \$950,000 that was not identified by Terry at his deposition or in his interrogatory responses and not identified by UBS in response to a subpoena. But the funds in that undisclosed UBS account were indisputably the same Camwest Federal Way assignment proceeds that were identified at trial in testimony and admitted Trial Exhibits. Rafel identified at trial \$1,050,000 in Camwest proceeds that were deposited into one UBS account. \$950,000 of those funds was subsequently transferred by Terry to another, undisclosed UBS account. *See* CP 3709-3710, 3754-67; Rafel Dec. ¶¶ 7 and 9 and Exs. 3 and 5. The entire asset was thus identified and considered by the trial court.

Mr. Billbe could not identify any asset that was not brought to the court's attention and could not dispute that the funds in the undisclosed UBS account were the very same Camwest proceeds identified in testimony and trial exhibits. *See* CP 4095, Billbe Dep. at 62 (testifying that the Camwest sale proceeds in the undisclosed UBS account were talked about); CP 4096, Dep. at 65 (Q. "Is there any other specific asset that you think existed that wasn't brought to the court's attention? A. If

your question is brought to the court's attention, I would have to say no.”).

**H. The Draft Findings of Fact and Property Award**

Following trial and receipt of the court's draft findings, Rafel submitted to the court redlined findings and redlined property award expressly requesting that the court award Stacey 50% of the Camwest \$1,050,000 proceeds. Specifically, in paragraph 61 describing “Cash,” Rafel proposed: “Besides the approximately \$3,000,000 that the parties had at time of separation, GWC received the additional sum of \$1,050,000 from Camwest in October 2007 (exhibit 925) ...” Rafel's draft property award likewise specifically requested that Defoor be allocated \$525,000 of those proceeds. *See* CP 3710, 3839-3866, Rafel Dec. ¶¶ 12 and Ex. 12.

**I. The Judgment and Findings of Fact**

The Findings of Fact and Judgment issued were very favorable to Defoor. The Court found for example: “The parties intended that all of the assets they acquired be jointly owned.” CP 3887, FOF at p. 7, ¶ 24. The Judgment awarded Defoor the following, valued as indicated by the court (real estate values are net of debt, as determined by the Court):

Cash	\$2,223,368
Sea-Tac Property	\$1,625,000
Duvall residence and contents	\$759,000
Marco Island, FL second home	\$420,000
Naples FL condominium	\$105,000
Letourneaux property	\$35,000
Two lots in Branson, MO	\$29,230
Formula Boat	\$100,000

2003 Porsche Cayenne	\$45,000
2004 Porsche Cayenne	\$65,000
2002 Porsche Boxter	\$30,000
Jewelry	<u>\$46,400</u>
<b>Total</b>	<b>\$5,482,998</b>

CP 3868-3877. In addition, the Court awarded Defoor a substantial interest in contract rights that had been her number one priority going into trial, and which she testified at trial was the “golden egg.” CP 4262, Defoor Dep. at 53. The Court also awarded her 50% of any undisclosed assets. CP 3873-3874, Judgment p. 6, ¶ 13.

While the Court did not specifically incorporate Rafel’s proposed redline that Defoor be awarded half of the Camwest \$1,050,000 proceeds, the Court clearly recognized in FOF Paragraphs 42(a) and 42(b) that this “assignment fee of \$1,050,000” had been paid to and received by GWC. CP 3893-3894. Notably, notwithstanding that Defoor was found to be a 50% owner of GWC, the Court saddled Terry with all of GWC’s liabilities, including a \$1.6M bank debt. *See* CP 3876, Judgment, p. 9 ¶ 23; *see also* CP 4183-4184, Additional Findings of Fact.

**J. The Court Deemed Property to Be Sufficient Security Pending Appeal and Enjoined Terry From Dissipating Assets**

Terry moved for a stay pending appeal. Rafel opposed and requested a cash bond. The Court exercised its discretion to allow property valued at \$3.15M to be posted for the \$2.23M cash award. Rafel moved for reconsideration. *See* CP 3711, 3927-3955, Rafel Dec. ¶ 14 and

Ex. 14. Notwithstanding Rafel’s argument that the property could lose value in the economic downturn, the court deemed \$3.15M of real property to be sufficient security for the \$2.2M cash award. The court’s Judgment, however – adopting language requested by Rafel – enjoined Terry “from directly or indirectly transferring, encumbering or secreting any assets awarded to the other party herein.” CP 3877, Judgment ¶ 26.

**K. DWT’s Subsequent Representation of Defoor and Terry’s Bankruptcies**

Less than one month later, DWT appeared for Stacey Defoor. On appeal, DWT did not argue that the trial court had erred in failing to award assets to Defoor or that there were missing assets. In fact, Defoor’s Brief asserted on pages ii and 31 that “The Trial Court Properly Exercised its Discretion in Distributing the Parties’ Assets and Liabilities.” CP 4335, 4371. Defoor repeated this assertion on remand (CP 2802) and never moved on remand for an additional award under the 50% provision.

Further, when DWT appeared for Defoor, it did not seek to lift the stay of enforcement of the money judgment or take other action to ensure that Terry did not dissipate any assets awarded to Stacey. It was not until nearly a year later that DWT filed a motion for additional security due to Terry’s delinquency on property taxes. *See* CP 4151-62. Terry and GWC and GWCA thereafter filed for bankruptcy protection. CP 4165-69.

In the three years since the Court issued its Judgment, Defoor has

not recovered any of her cash award against Terry. When summary judgment was heard, the bankruptcy proceedings were nearly complete and Defoor stated under oath she would ultimately recover only \$450,000 of the \$2.2M cash award. CP 4057-4058, Dep. Vol. I at 111 and 115.

### III. ARGUMENT

#### A. **The Trial Court Properly Found That The Re-Engagement Agreement Was Valid and Enforceable According to Its Terms**

##### 1. **RPC 1.8 (a) Is Not Applicable**

RPC 1.8(a) provides rules applicable to “Current Clients.” It is titled: “Rule 1.8 Conflict of Interest: Current Clients: Specific Rules.” For current clients, it prohibits a lawyer from entering a business transaction with a client or knowingly acquiring a security interest adverse to the client, unless its three subsections are satisfied. RPC 1.8(a).

This rule does not apply here because Defoor was indisputably not a current client of Rafel Law Group at the time the Re-Engagement was entered. Defoor testified that she was “representing herself” at the time. CP 4078. Even Defoor’s ethics expert conceded that Rafel was no longer representing Defoor after the Court’s withdrawal order became effective. *See* CP 4125-4127, Fucile Dep. at pp. 32, 38 and 39. And Mr. Fucile, like Professor Strait, acknowledged that lawyers “can generally bargain at arm’s length before an attorney-client relationship is formed.” CP 4129, Fucile Dep. at 77; *see also* CP 4115-16, Strait Dep. at 95-96.

Unable to dispute that she was not a current client when the Re-Engagement Agreement was entered, Defoor argues that RPC 1.8(a) applies because the Re-Engagement Agreement was entered into “concurrently with” Rafel’s re-engagement. Defoor fails to explain how this characterization changes the relevant facts or law. Before Defoor signed the Re-Engagement Agreement, she was not a client of Rafel and was, by her own admission, “representing herself” (although the record shows that she was advised by the Oseran firm). After she signed the Re-Engagement Agreement, she became a Rafel client pursuant to its terms. Describing that as “concurrent” does not change the fact that the Re-Engagement Agreement was a fee agreement signed prior to the new representation; Defoor was not a current client of Rafel at that time.

Describing the Re-Engagement Agreement as “concurrent” with Rafel’s re-engagement also is misleading, since the Agreement itself provided that Rafel’s representation would not commence until after her execution and delivery of the Agreement and the filing of a notice of appearance in the litigation. Re-Engagement Agreement ¶ 2 (CP 433).

Defoor relies primarily on *Cotton v. Kronenberg* and *Holmes v. Loveless*. Both involved agreements entered with existing current clients. First, *Cotton v. Kronenberg*, 111 Wn. App. 258 (2002), involved the re-negotiation of a fee agreement in a rape case while the client was already

being represented under an initial fee agreement. The record showed that the client, Cotton, “signed a [hourly] fee agreement on March 6, 1996,” and a statutory warranty deed to his “Dessert Aire property.” *Id.* at 262. Three days later, on March 9, Cotton signed a new agreement setting forth “terms for a nonrefundable fee for defense against the rape charges,” and “provide[d] for the transfer of the Desert Aire property and the mobile home to Kronenberg in full satisfaction of all fees earned in the case.” *Id.* at 263. Kronenberg was subsequently removed from the case after he paid off and purchased a “one-way ticket” for a witness, but “denied Cotton’s request for a refund.” *Id.* at 263.

The Court’s “focus” in *Cotton* was on a renegotiated agreement made while the attorney was already representing an existing client. The Court explained that: “The March 9 agreement [not the initial March 6 agreement] sets forth the terms and conditions by which Cotton conveyed to Kronenberg the Desert Aire realty and mobile home situated thereon. This transaction was the main focus of the trial court’s ruling that Kronenberg had breached his fiduciary duty to his client.” *Id.* at 263. The Court also “note[d] that our Supreme Court has held that any modification of a fee arrangement after an attorney-client relationship has been established is subject to ‘particular attention and scrutiny.’” *Id.* at 272 & n.34 (emphasis added).

*Holmes v. Loveless*, 122 Wn. App. 470 (2004), likewise involved an attorney who was already representing the client at the time the alleged business transaction occurred (providing services to a joint venture in return for “five percent of any cash distributions produced by the joint venture”). *See Holmes* at 473 (noting that “In 1970, Holmes and his law firm began providing legal services to C.E. Loveless, a real estate developer,” prior to the 1972 fee agreement and 1986 addendum being challenged in that case).

*Valley/50<sup>th</sup> Ave LLC v. Stewart*, 159 Wn.2d 736 (2007), like *Cotton* and *Holmes*, involved attorneys entering agreements with their current client. The Court found that an agreement between a law firm and its current client regarding unpaid fees was a business transaction falling within RPC 1.8(a). Defoor’s expert agreed that the *Valley* case concerned a business transaction with a current client and was “different” from the Re-Engagement Agreement “in the sense that she [Defoor] was at that point not a current client.” CP 4126-4127, Fucile Dep. at 38 and 39.<sup>4</sup>

Nor do the out-of-state cases cited by Defoor alter this analysis. *In re Richmond’s Case*, 153 N.H. 729 (2006) also involved an agreement

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<sup>4</sup> Mr. Fucile’s own publication (available on his web site) points out that *Valley* raises issues for an attorney “along the way” of his representation, in contrast to “at the beginning” of the representation. *See Fucile*, “Ethical Issue in the Lifecycle of the Business Entity” (June 22, 2010).

with a current client. The lawyer started representation in March of 2000. The client agreement challenged in that case (unlimited discretion to liquidate client's securities to pay fees) was signed over a year later on May 3, 2001.<sup>5</sup>

## **2. Rafel Complied With RPC 1.8(a)**

Although RPC 1.8(a) did not apply, Rafel also established below that the Re-Engagement Agreement met its three-part test. First, the terms are fair and reasonable and were fully disclosed in a manner that could be understood by Defoor. RCP 1.8(a)(1). In un-rebutted testimony, Tilden and Strait have opined that the terms were fair and reasonable. *See* CP 4121, Strait Dep. at 102. Mr. Tilden's Declaration establishes, for example:

- "The RLG hourly rates charged in this case are all reasonable. ... In fact, under the circumstances, his hourly rate is quite low.
- "It makes perfect sense that a lawyer handling a case on an hourly basis will charge a higher-than-normal rate, when the client cannot pay during the engagement and the lawyer's ultimate compensation is dependent on winning the case and collection."

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<sup>5</sup> *Fletcher v. Davis*, 33 Cal. 4<sup>th</sup> 61 (2004), involved a different California rule that contains no reference to "Current Clients" and concerned a lien against the subject matter of the litigation under California rules that the court explained are different than most other states (including Washington). *Walton v. Clark & Washington, P.C.*, 454 B.R. 537, 545-46 (Bankr. M.D. Fla. 2011) involved a postdated check scheme that violated bankruptcy automatic stay and discharge injunctions, and "the acceptance and deposit of postdated checks" by the attorney created a conflict of interest.

- “[F]ees in the amount of \$505,000 are reasonable, low in fact” for Matter #1. Fees for Matter #2, the principal amount of which total \$425,000 “are very reasonable.”
- “The amounts charged here [for costs] are well within the reasonable range . . . .”
- “The End Result in This Case Was Excellent.”

Tilden Dec. ¶ 10 (CP 990-992). This testimony is not rebutted. The terms of the agreement were clearly transmitted to Defoor in emails preceding the re-engagement (which Defoor in turn transmitted to her independent counsel, James Clark) and in the Re-Engagement Agreement itself. *See* CP 4265-4266, 4270-4272, 4278-4283, Raskin Dec. Exs. 17, 19 and 22. Defoor acknowledged in the Re-Engagement Agreement (¶ 9) that she understood those terms and she did not argue otherwise in the trial court.

Second, Defoor was advised in writing of the desirability of seeking and was given a reasonable opportunity to seek the advice of independent counsel. RPC 1.8(a)(2). CP 3472-3473. Defoor acknowledged this too in the Re-Engagement Agreement and at her deposition, and the evidence shows that she in fact was advised by Jim Clark and Ginger Edwards. *See* CP 4265-4283, Raskin Dec. Exs. 17-22; CP 4060 (Defoor Dep. at p. 162).

Third, Defoor gave informed consent. RPC 1.8(a). Rafel proposed terms in an email on February 5, 2008, which Defoor forwarded to her counsel at Oseran that same day. CP 4270-4272, Raskin Dec. Ex. 19.

Defoor was advised by her independent counsel not to accept the terms in Rafel's email. CP 4274, Raskin Dec. Ex. 20. Defoor declined her counsel's advice and signed the Agreement under oath.

**3. Defoor Was Advised of the Matters She Claims Rafel Did Not Disclose**

**i. Defoor Was Advised of *Ausler* and that Rafel Was Entitled to Quantum Meruit**

On February 16, 2011, Ginger Edwards sent Defoor a letter by fax (*see* CP 4278-4283, Raskin Dec. Ex. 22) "reiterat[ing]" advice she had previously given to Defoor. Defoor's attorneys specifically advised that under the contingency agreement, no fee would be payable if there was no recovery: "The contingency agreement with Tony states that 'if there is no recovery on your behalf, no fee will be payable to Rafel Manville PLLC.'" Defoor's attorneys specifically advised her of the *Ausler* case that Defoor now seeks to rely upon and that, under *Ausler* (which had been provided to Defoor more than a month before, on January 4, the date that the Court heard Rafel's Motion for Withdrawal), any recovery by Rafel would be in quantum meruit. And they advised her that the \$505,000 figure was "based on Tony's hourly rates," which she expressed "serious doubts" Rafel could collect under quantum meruit. Edwards concluded: "I wanted to reiterate our discussions and if what we discussed had not been clear, to make sure you understood the above **advice**. The attorneys

at Oseran Hahn believe that it is still not too late for you to file bankruptcy, as well as object to Tony's actions ...." See CP 4280, 4283 (emphasis added).<sup>6</sup>

Defoor understood very well what she was giving up and that Rafel was requiring new terms as a condition for his re-engagement, terms that he would not otherwise be entitled to under the contingent fee agreement or in quantum meruit. Defoor cannot avoid the Re-Engagement Agreement on the basis that RLG did not repeat what her independent counsel had already told her. See RPC 1.8, Cmt 4.

**ii. Defoor Was Advised that the Re-Engagement Agreement Converted Her Contingent Fee Claim into An Hourly Fee Plus 1% Interest**

Defoor's argument that Rafel "failed to disclose that he had no legal basis to claim interest at 1% per month on an unliquidated fee claim" is no different from her claim that Rafel did not inform her that his claim would be quantum meruit if the Re-Engagement Agreement was not entered. Defoor understood that her initial fee agreement with Rafel was contingent. An email from Defoor to Terry's counsel, which Defoor forwarded to Jim Clark, remarked: "Line one of our contract clearly states if there is no recovery by his firm I am only responsible for the associated

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<sup>6</sup> Rafel disputes the advice given by Edwards in this letter, which is hearsay and not corroborated by Defoor's experts in this case. The letter is being presented solely to show that Defoor was advised by independent counsel regarding these issues.

costs such as appraisers, court reporters, accountants, etc. Tony knows this and this is why he is attempting to negotiate an agreement on what his firm is due.” CP 4292. The Re-Engagement Agreement and the proposed terms provided by Rafel which Defoor shared with her counsel at Oseran also specified that Rafel would be entitled to interest. CP 434; CP 4270. Defoor’s email to Clark after receiving the proposed terms queried: “Maybe it’s just me, but it seems his fees just continue to escalate. 1% a month interest on \$750,000 starting last month? Do I have a choice?” CP 4274. Clark, as noted, advised Defoor not to accept the terms. *Id.* Rafel likewise informed her that she was “completely free” to decline his proposed terms. CP 828. Defoor thus understood the interest term being proposed and consulted with Clark about it before deciding to enter into the agreement.

**iii. Defoor Was Advised of the Fees and Costs Incurred in the Prior Engagement**

Defoor seeks to argue that the Re-Engagement Agreement should be voided because she was not provided with itemized billing for the first (contingent) engagement. Notably, there is no evidence that Defoor ever asked for such records.

Rafel had the burden to establish that the amount charged for fees and costs was reasonable, and it met that burden. *See* CP 990. But absent a request from Defoor (which never came), RLG had no obligation to

provide itemized billing to her. *See* CP 4329-4330, Tilden Dep. at 37-38; CP 2365. Defoor relies upon *Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 97 Wn. App. 901 (1999). In that hourly-fee case, an attorney alleged that it entered into an “accord” with its client resolving an overdue bill. The bill was reduced by nearly \$24,000 and the client provided a promissory note, but it turned out that the law firm had increased its rates for one of the attorneys during the representation. The Court explained that in addition to the three requirements to prove an accord and satisfaction, “when a fiduciary claims accord and satisfaction with a principal, there is a fourth requirement: Evidence of an express agreement made upon full revelation.” *Id.* at 906. Because the law firm had not provided bills showing the attorney rates, there was not a full revelation. *Id.* at 909.

Here, Rafel does not claim accord and satisfaction. Rafel seeks simply to enforce the terms of the Re-Engagement Agreement and promissory note. The Re-Engagement Agreement – and Defoor’s agreement therein to pay for prior fees and costs at hourly rates rather than on a contingent fee basis – was a condition for Rafel agreeing to represent Defoor again and to take her case to trial. Unlike in *Simburg* where the attorney claimed that he had resolved a past-due debt and, therefore, that the reasonableness of fees and costs could not be challenged, the Re-

Engagement Agreement and promissory note were entered to induce Rafel to provide services and cost advances going forward.

*Perez v. Pappas*, 98 Wn.2d 835 (1983), also is inapplicable, as noted by Professor Strait. CP 959. *Pappas* involved the re-negotiation of a fee agreement with a current client. The attorney obtained a favorable structured settlement but failed to advise the client of the value of the settlement. *Id.* at 838. Thereafter, the client agreed that the attorney would take \$350,000 and pay all fees due the client's former lawyers who worked on the case, "rather than the 35% of recovery originally agreed upon as a fee." "[C]lose scrutiny reveal[ed] that all the contingencies cited by respondent as justification for renegotiating his fee upward were essentially non-existent," and the claimed basis for the fee being "renegotiated upward" was "illusory."

Defoor cannot identify any such misrepresentation or failure by Rafel to account. Rafel specifically informed Defoor of the \$505,000 fees and \$270,000 costs incurred and advanced on her behalf in the first representation, which amounts were based on contemporaneous records, and are supported as reasonable, and in fact low, by the un-rebutted testimony of Jeffrey Tilden. *See* CP 4270, Raskin Dec. Ex. 19; CP 433, Re-Engagement Agreement, Recital C; CP 998-99.

4. **Defoor's Fraud and Unclean Hands Estop Defoor**

Defoor's admitted fraud and unclean hands also estop Defoor from avoiding her obligations under the Agreement. The unclean hands doctrine "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). Equitable estoppel requires three elements: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *See Bd. of Regents of the Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 551 (1987). A party, for example, "will be estopped by its silence, coupled with knowledge of another's detrimental acts in reliance on that silence." *Id.* at 553. Additionally, "[e]quitable estoppel precludes a party from simultaneously enjoying the benefits of a contract while avoiding the obligations imposed by that contract." *Univera, Inc. v. Terhune*, 2009 U.S. Dist. LEXIS 111660 at \*7 (W.D. Wash. Nov. 18, 2009) (citing *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9<sup>th</sup> Cir. 2009)).

After accepting all of his services, Defoor asks the Court to void the very contract that she fraudulently induced Rafael to enter. Defoor

admitted at her deposition that she lied under oath in her acknowledgement in the Agreement and that her representations therein were “Totally false,” that she did not intend to honor the agreement when she signed it, that she secretly planned instead to sue Rafel later in court, and that she did not tell Rafel the truth because he would not have accepted representation otherwise. See *infra* p. 10-11; Video Clips (Sub. No. 220A); CP 4065-4066. Defoor’s deception designed to induce Rafel to enter the Re-Engagement Agreement prevents her now from using equity to avoid her obligations under that Agreement.

**5. Any Unenforceable Provision May be Severed**

Defoor claims that two provisions of the Re-Engagement Agreement constitute business transactions subject to RPC 1.8(a): (i) the lien against any non-litigation assets held by Defoor; and (ii) the conversion of the Matter 1 contingent fee from quantum meruit to an hourly sum. Br. at 27-31. She thus concedes that RPC 1.8(a) does not apply to any of the other provisions in the Re-Engagement Agreement, including the lien’s application to assets Rafel recovered for her through the litigation. CP 2563; Br. at 31. Defoor nonetheless asks the Court to void the entire Re-Engagement Agreement. To the extent the Court determines that either of the two challenged provisions should not be enforced, the Court may sever it and enforce the rest. *See Adler v. Fred*

*Lind Manner*, 153 Wn.2d 331 (2004) (substantively unconscionable provision may be severed).<sup>7</sup> There is no non-severability provision in the Agreement, and Defoor did not intend for these provisions to be non-severable; rather, she never intended to fulfill her obligations at all. Further, while it is true that Rafel required all contractual provisions to be agreed upon before entering into the contract, the same can be said for all contracts. What is important is that Rafel fulfilled his obligation to represent Defoor at trial – the foundation of the parties’ agreement – and the allegedly objectionable provisions are readily severable.

The ABA opinion cited by Defoor makes clear that the grant of a contractual security interest in the subject matter of the litigation in which the lawyer represents the client does not trigger 1.8(a). Here, Defoor has not identified any assets that Rafel has ever asserted a lien against or claimed a security interest in other than property awarded to her in the litigation. There are none. To the extent the lien language of the contract provision suggests a broader effect to reach non-litigation assets, that lien has never been asserted by RLG and the language extending the lien to

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<sup>7</sup> See also Restatement (Second) of Contracts § 208 (1981) (unconscionable term may be severed); *id.*, § 184 (term may be severed if not essential part of agreed exchange); *Viles & Beckman v. LaGarde*, 2006 U.S. Dist LEXIS 62659 (M.D. Fla. Sept. 1, 2006) (contract provision violating Florida RPCs would be severable under established rule that “bilateral contract is severable where the illegal portion of the contract does not go to its essence” and “there still remain valid legal promises on one side which are wholly supported by valid legal promises on the other”).

assets beyond those recovered in the litigation is readily severable from the language providing a lien against recovered assets.<sup>8</sup>

**B. This Court Should Affirm the Dismissal of Defoor’s Malpractice Counterclaim**

**1. Defoor’s Two Malpractice Arguments Ignore The Evidentiary Record**

Defoor’s Brief asserts two arguments in support of her malpractice claim. First, she points to a bald expert opinion that Rafel did not do some unspecified job of tracking assets. Her expert admitted, however, that there were no assets that were not, in fact, brought to the court’s attention. CP 4095-4096, Billbe Dep. at 62 and 65. Mr. Billbe also conceded that it was a judgment call for litigation counsel as to whether to value the assets as of the date of separation or at the time of trial.<sup>9</sup> CP 2799. In short, Mr. Billbe could not back up his conclusory assertion that Rafel did not do a proper job tracking assets with any specifics and did not proffer any

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<sup>8</sup> Defoor’s counsel, DWT, asks that the Court throw the baby out with the bathwater and strike the entire lien provision because DWT would like to obtain priority – under a lien it obtained 20 months after its representation of Defoor began – for its \$1.1M fees (incurred after Rafel’s work was completed) against a SeaTac property recovered by Rafel for Defoor. *See* CP 3981-3996; CP 3974-3980.

<sup>9</sup> Ms. Defoor’s Supplemental Declaration called it a “strategy” decision by Rafel to do a balance sheet valuation as of the date of separation. CP 1650. And on appeal, Defoor previously admitted valuation as of the separation date was appropriate. CP 2807. Such judgment calls and strategy decisions cannot form the basis for a legal malpractice claim, even if alleged to be in error. *See Halvorsen v. Ferguson*, 46 Wn. App. 708, 717 (1986) (“In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice”); Mallen & Smith, Legal Malpractice (2011 Ed.) § 19.14 at 1273-74 (“courts have acknowledged the need for an advocate’s immunity from liability for judgmental errors”).

opinion as to how some hypothetical different job of “tracking” would have affected the court’s findings. His opinion is criticism of style, not substance, and does not raise an issue of material fact as to negligence.<sup>10</sup>

Unable to dispute that all significant assets were brought to the trial court’s attention, Defoor next argues that “Terry disposed of *substantial* assets after the dissolution that were never tracked by RLG or its expert.” Brief at 40 (emphasis in original). Defoor goes on to identify various proceeds and payments obtained by Terry post-separation, including from the sale of a Kirkland home, payments from Camwest, the sale of a boat and the sale of a Costa Rica condo. This argument was soundly rejected by the trial court because Rafel repeatedly did bring Terry’s post-separation cash expenditures to the Court’s attention through testimony and trial exhibits. CP 3708-3709, 3755-3773, Rafel Dec. ¶¶ 7-8 and Exs. 3-7; CP 3881-3905 (FOF). For example, Trial Exhibit No. 728 identified over \$8M in cash received after separation, including the Camwest proceeds, boats and Costa Rica Condo, and other trial exhibits identified the Fairwood proceeds. CP 2651. And during closing

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<sup>10</sup> Rafel’s standard of care expert, Kyle Johnson, testified that Rafel “did an excellent job of representing Stacey Defoor, that he has more than met the standard of care expected of a lawyer in this state.” CP 4135-4136, 4139-4140, Johnson Dep. at 33, 44, 74 and 96. Mr. Johnson’s testimony confirms that “there isn’t anything to indicate in the record that there’s missing assets,” and that, if there was, “there’s a provision in the final judgment that any unidentified assets are split 50/50” (a provision that Rafel was “lucky” to get in a meretricious relationship case). CP 4137-4138, 4141-4148, Johnson Dep. at 45-46, 125-26, 133-34, 147-50.

argument, Rafel requested that Defoor be awarded \$4.3M in cash and handed up a proposed distribution of assets (approved in advance by Defoor). CP 2637, 2641-42.

Indeed, Rafel and its expert brought to the Court's attention and the Court expressly considered the expenditure by Terry of an even greater amount of funds post-separation. The following chart (CP 2708 - submitted by Rafel below) identified the assets which Defoor claimed were "disposed of" by Terry and their alleged values, and then identified a greater amount of funds which the court was made aware had been spent by Terry during the same period. As seen, the disposed of assets identified by Defoor total \$4,232,257, but Rafel made the court aware of post-separation expenditures by Terry totaling \$4,430,463.

**"\$5M [SIC] NOT TRACED" 10/06 – 10/07**

**Stacey Defoor Supplemental Declaration, p. 5**

\$ 1,700,000 State and Kirkland	January 2007
\$ 1,050,000 Camwest payment	October 2007
\$ 225,000 Camwest Fairwood payment	March 2007
\$ 157,257 Boat sale	December 2006
\$ 1,100,000 Costa Rica Condo sale	2007
<u>\$ 4,232,257</u>	

v.

**NOTHING IS "MISSING"**

\$ 1,620,000	+ Sea-Tac property purchase	July 13, 2007
	(F of F 49, p. 18)	

\$ 720,000	C. Cards (F of F 31, p. 10)	\$60,000 per month x 12 months
\$ 423,391.53	Stokes fees and costs	Corr Declaration, Ex. U
\$ 255,000	+ Furnishings (Kirkland) (F of F 53, p. 11)	Since January 2007
\$ 699,732	Kirkland Equity (F of F 53, p. 11)	January 2007
\$ 182,040	Motor Home (F of F 31, p. 10)	April 2007
\$ 122,300	Porsche (F of F 59, p. 20)	October 16, 2006
\$ 408,000 =	\$387,000 Court award to Stacey + \$21,000 she took from US Bank (F of F 34, p. 11)	October 2006 – October 2007
<u>\$ 4,430,463.53</u>		

Thus, while Stacey Defoor now claims Terry Defoor had “liquidated assets and received as their proceeds over \$5 million” between October 2006 and October 2007 (Br. at 40), he spent all of that, if not more, on assets RLG and its expert found and brought to the court’s attention. Indeed, in Defoor’s appeal brief against Terry, Defoor argued with citation to Trial Exhibits and Findings of Fact that Terry had received “post separation income of at least \$5,300,000 in cash derived from GWC assets,” and that there was “\$8,576,480 in joint cash received and documented through trial.” CP 4359 (emphasis added). Defoor ignores these telling admissions.

**2. Defoor Cannot Meet Her Burden to Show Collectibility**

Even if Defoor could otherwise meet her burden of proof, her claim fails as a matter of law because Defoor cannot establish that she

would be able to collect one additional dollar of an additional judgment, had a greater cash award been issued. Terry and GWC and GWCA went bankrupt, and Defoor conceded that she will only recover approximately \$450,000 of the \$2.23M cash judgment award, due to the depressed value of the real property assets that were posted to secure the money judgment. CP 4057-4058, Defoor Dep. at 111, 115. Defoor's admission negates any claim that she would have been able to recover from Terry any higher judgment and eliminates her claim as a matter of law.

The "collectability of the underlying judgment is a component of damages in a legal malpractice action." *Matson v. Weidenkopf*, 101 Wn. App. 472, 484 (2000). "To ensure that damage awards accurately reflect actual losses and avoid windfalls, the burden is on the plaintiff to show that damages are collectible." *Kim v. O'Sullivan*, 133 Wn. App. 557, 564 (2006); *see also Lavigne v. Chase, Haskell*, 112 Wn. App. 677, 687 (2002); *Tilly v. Doe*, 49 Wn. App. 727, 731-32 (1987) (requiring client to prove collectability is "consistent with the rule that the measure of recovery in attorney malpractice actions is the amount of loss *actually sustained as a proximate result* of the conduct of the attorney") (burden of proving collectability on client "since collectability is essentially an

extension of proximate cause analysis”).<sup>11</sup> Defoor cannot prove collectability and all of her claims for damages, therefore, fail as a matter of law.

**3. Defoor Cannot Establish Any Failure by Rafel to Discover or Present Community-Like Assets or Resulting Damages**

Defoor’s counterclaims also fail as a matter of law because she cannot establish that that she was damaged by any action or omissions of Rafel. To do so, she would have to show that, but for Rafel’s alleged wrongdoing, she would have obtained an additional judgment award.<sup>12</sup>

**i. Defoor Was Awarded 50% of any Undisclosed Assets**

Defoor and her counsel DWT have had years of further discovery in connection with the bankruptcies and supplemental proceedings, including depositions. CP 2781. Tellingly, they have not found any hidden assets that should have been recovered by Rafel.<sup>13</sup>

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<sup>11</sup> See also, e.g., *Floro v. Lawton*, 187 Cal. App. 2d 657, 670-71 (Cal. Ct. App. 1960) (plaintiff did not show defendant in underlying case able to pay a money judgment, had lawyer not erred); *Whiteaker v. State*, 382 N.W.2d 112, 115 (Iowa 1986) (failure to prove any potential judgment collectible); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983).

<sup>12</sup> Proximate cause has two elements: “but for” cause and legal causation. *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859 (2006). In a malpractice action, the former client must demonstrate that “but for” the attorney’s negligence she would have obtained a better result. *Id.*

<sup>13</sup> Defoor also was offered an opportunity to conduct a forensic audit post-trial to trace any alleged “missing” assets, which she declined. CP 2711 and 2784. Stokes Lawrence – the largest unsecured creditor in the bankruptcy, and a party with an interest in being paid – has written post-trial there are no missing assets. CP 2750. Likewise, Ed Rich,

Defoor also cannot claim to be damaged by any alleged failure of Rafel to discover the UBS account or any concealed asset because Rafel obtained for her an express award of 50% of any undisclosed assets. CP 3873-3874, Judgment, ¶ 13. Defoor has never sought to enforce this provision against any asset.

**ii. Defoor Cannot Identify Any Assets That Should Have Been Recovered by Rafel**

Moreover, Rafel bears no fault for Terry's alleged fraud. First, Terry failed to disclose the \$950,000 account in response to discovery requests. *See* CP 3709, 3775-3860, Rafel Dec. ¶ 9 and Ex. 8. And he did not identify the account in his trial testimony. CP 220-21, Leishman Dec. at ¶ 6 ("In the trial transcript and appeal briefing, Terry also represented that the community-like funds were limited to the UBS account that was before Judge Inveen."); *id.* (declaring that Stacey intends to pursue on remand her share of assets that were "undisclosed" by Terry at trial). Second, Rafel obtained a commission and issued a broad subpoena to UBS in Montana, but UBS failed to disclose the account. *See* CP 3709, 3802-3809, Rafel Dec. Exs. 9 and 10. Defoor's own counsel represented to the trial court that, "During discovery conducted by Mr. Rafel, UBS denied

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Terry Defoor's longtime accountant, has reviewed Terry Defoor's books thoroughly and stated under oath to the Bankruptcy Court that there are no secreted assets. CP 2711 and 2793.

that Terry and his companies had any additional accounts with the bank.” CP 220, Leishman Dec. ¶ 6. Third, Rafel engaged a CPA with 25 years of experience in forensic accounting and a certified fraud examiner who reviewed over 15 boxes of documents obtained from Terry, Terry’s companies and through dozens of document subpoenas, in an effort to identify assets controlled by Terry. CP 3708. There is simply no basis to find that Rafel was negligent in pursuing discovery regarding the UBS accounts. Nor is there any expert testimony on this point.

**iii. The Money in the Hidden UBS Account Was Presented to the Court**

The so-called hidden UBS account also cannot support a negligence claim because the funds in the account were presented to the Court. At trial, the Court was advised that GWC had received \$1,050,000 from Camwest for a Federal Way project in October of 2007, one-month before the discovery cutoff. *See* Eric Campbell Testimony 3/13/08 at p. 43-45 (CP 3708-3709, 3760-3761, Rafel Dec. ¶ 7 and Ex. 5). The wire transfer from Camwest to GWC for this amount also was put in evidence by Rafel. CP 3755, 3757 (Rafel Dec. Exs. 3-4). \$950,000 of this money was moved by Terry Defoor to what the parties now know was a second undisclosed UBS account. CP 3709. Thus, the funds in the hidden UBS account, which Defoor claims to be a “glaring example” of what Rafel allegedly did not identify at trial (Br. at 12), were the very same funds as

the Camwest wire transfer that was identified by Rafel and put into evidence.

Based on this evidence, Rafel argued on Defoor's behalf that the \$1,050,000 received in October 2007 was community property and was over and above the amounts in bank accounts as of October 2006. Rafel also argued directly that Defoor should receive 50% of it. *See supra* p. 15. The record is therefore crystal clear that: (1) Rafel presented evidence of GWC's receipt of the \$1,050,000; (2) Rafel showed that the \$1,050,000 was in addition to amounts the parties had in the bank at time of separation; and (3) Rafel asked that half of the \$1,050,000 be awarded. Defoor simply cannot identify any community assets that were not presented to the Court, as conceded by her own expert.

**4. Defoor Has Failed To Support Her Claims With Evidence and Expert Testimony**

A malpractice claim must be supported by expert testimony that the attorney's conduct fell below the applicable standard of care, unless the negligence charged is within the common knowledge of lay persons. *Walker v. Bangs*, 92 Wn.2d 854, 858 (1979) (expert testimony on standard of care necessary in case involving alleged negligence in trial tactics and procedure); *Geer v. Tonnon*, 137 Wn. App. 838, 850 (2007); *Carlson v. Morton*, 745 P.2d 1133, 1137-38 (Mont. 1987). Here, Defoor's standard of care expert has provided only one single vague opinion regarding

tracking assets, which does not support any negligence claim because Rafel is not responsible for Terry's concealment or UBS's failure to disclose that account, the Camwest proceeds in that account were presented to the Court, and the Court awarded Defoor 50% of any undisclosed assets. And Defoor also has not provided any expert testimony to prove causation, damages or collectability. Billbe conceded that he had "no idea" regarding Stacey's alleged damages or whether any would be collectable:

Q. How much has Ms. Defoor been damaged by the failure to trace?

A. Oh, I have no idea. I wasn't asked to look at that.

Q. ... [D]o you have any opinion as to the collectibility of any such damages.

A. No.

CP 4097-4099, Billbe Dep. at 66-67; *id.* at 68 ("I really don't profess to have any knowledge of collections").

**5. Defoor's Damages Are Speculative and Not Supported by Expert Testimony**

Defoor's claimed economic damages are entirely speculative. She has no evidence or expert testimony showing that but for Rafel's alleged negligence or alleged breach of fiduciary duty she would have been awarded a bigger judgment, and had that occurred, she would have collected anything more. Her claim fails as a result. *See Geer v. Tonnon*, 137 Wn. App. 838, 850 (2007) ("Geer also failed to provide expert

testimony or other evidence to demonstrate that such a breach of Tonnon's duty of care was the cause in fact of Geer's claimed damages.

Specifically, Geer introduced no evidence to show ... that she would have obtained a favorable judgment at trial in the absence of the error"); *Estep v. Hamilton*, 148 Wn. App. 246, 257 (2008) (summary judgment appropriate where client "merely speculate[d]" as to outcome absent alleged attorney negligence, and provided "no evidence she would have prevailed"); *Powell v. Assoc. Counsel for the Accused*, 146 Wn. App. 242, 249-50 (2008) (affirming summary judgment); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 865 (2006) (client's speculation as to what he would have done had attorney advised him differently insufficient); *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761-62 (2001) (expert's opinion that case would have settled for more absent attorney's alleged negligence was "speculative and conclusory"); *Halvorsen v. Ferguson*, 46 Wn. App. 708, 722 (1986) ("[m]ere conjecture" by client's experts as to what the result would have been).<sup>14</sup>

C. **Defoor's Breach of Fiduciary Duty Claim Fails As a Matter of Law**

Defoor argues that "[s]ubstantial evidence" establishes that Rafel's

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<sup>14</sup> Further, any claim by Defoor that Rafel or the Court ignored assets or post-separation expenditures is negated by the imposition upon Terry of a \$1.6 million loan liability and by allowing Stacey to keep funds that she received pre-judgment (collectively totaling hundreds of thousands of dollars and deemed an offset to Terry's post-separation expenditures) without a corresponding award to Terry. *See* CP 4209-4210; CP 4183-84. CP 3902, FOF 65; FOF 31.

“excessive” attorney’s lien claims breached his fiduciary duty, and harmed Defoor by preventing her from engaging other attorneys to represent her at trial. Defoor’s Brief, however, is devoid of any evidence that Rafel’s lien notices identified excessive amounts, that Defoor sought to retain other counsel other than possibly James Clark whom she previously fired, that such other counsel would have obtained a better result, or that Defoor was otherwise damaged by any alleged breach of fiduciary duty. Defoor did not rebut Tilden’s or Strait’s testimony that there was nothing improper in the lien notices or the fees and costs identified therein. *See supra*, p. 12 and 23. Defoor conceded that she did not seek to engage another attorney to represent her at trial. CP 4065, Defoor Dep. at 173. Finally, Rafel did represent her at trial. Any assertion that a different attorney would have obtained a better result is purely speculative and again not supported by expert testimony and fails for the same reasons as the malpractice claim. *See Bennett v. Jones, Waldo, Holdbrook & McDonough*, 70 P.3d 17, 27 & n.6 (Utah 2003) (breach of fiduciary duty and professional negligence “both fall under rubric of legal malpractice,” and “our analysis is the same”).

Next, Defoor argues that \$505,000 for fees for Matter 1 was excessive because Rafel ultimately deducted time entries totaling \$7,966 from his request for Judgment. First, there is no explanation or evidence

as to how the inclusion of the \$7,966 – less than 1.6% – was in any way a material, let alone, intentional overstatement that could render it a breach of fiduciary duty. Second, even with the \$7,966, the \$505,000 figure contained in lien notices understated the fees incurred because that figure did not include over \$17,000 billed by RLG attorney Duncan Manville that was inadvertently omitted by RLG when the \$505,000 calculation was completed. CP 999. Third, Jeffrey Tilden has opined (un-rebutted) that \$505,000 was not only reasonable, but low in his estimation. CP 992.

Defoor also argues that it was improper for Rafel to assert a lien for costs for which he had been billed and was admittedly obligated but had not yet fully paid. She is mistaken. Such alleged non-disclosure is not material. Defoor was liable for the expert fees under the original contingent fee agreement and applicable law, whether or not Rafel asserted a lien. *See* CP 664. In the almost 100 year-old *Gust v. Judd* case, the Court found that the attorney could not file the lien for unpaid costs because the attorney was only secondarily liable. Here, in contrast, the experts obviously considered Rafel Law Group to be primarily liable and directed their invoices to Rafel and their testimony confirmed this.<sup>15</sup>

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<sup>15</sup> CP 1011-1405 (attaching expert invoices); *see also* CP 2382-2383 (John Kilpatrick testimony 3/6/08 at p. 68 (Q. Who are you engaged by? A. Mr. Rafel.); CP 2386, Sutphen Dep. at 42 (Q. And the Rafel Law Group and Mr. Rafel were your clients for this engagement, not Ms. Defoor? A. That's correct.)).

Further, the recent amendments to the attorney's lien statute providing attorneys with a lien in the subject matter of the litigation and ethics rules requiring that clients reimburse costs advanced by their counsel raise substantial questions as to any remaining viability of *Judd* to current practice. The bottom line is that Rafel actually paid a total of \$274,250.28 in costs for Defoor (*see* CP 2860 and CP 1000), which is more than the cost amount stated in the lien notices.

Defoor's claim for emotional distress damages also fails. If emotional distress damages are available for an attorney malpractice claim (an issue that should be resolved against Defoor), then the standard for negligent infliction of emotional distress should apply because malpractice is negligence-based. For negligent infliction of emotional distress, a plaintiff's emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *See Hegel v. McMahon*, 136 Wn.2d 122, 135 (1998); *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 548-49 (1994) (plaintiff "had not seen a psychologist, psychiatrist, or social worker and had not taken any medication for emotional distress").

Defoor testified that she was not on any medication, had not seen a doctor since 2006, and had not seen any psychiatrist, mental health counselor, or therapist. CP 4086, Defoor Dep. Vol. I at 58; CP 4077, Defoor Dep. Vol. II at p. 9; CP 612. Defoor also has not proffered any of

the required medical expert testimony. She therefore cannot establish that any actionable wrong by Rafel proximately caused any emotional distress, or support such a claim without a showing of objective symptoms, much less has she proven through medical evidence that she has a diagnosable emotional disorder.

*Nord v. Shoreline Sav. Ass'n*, cited by Defoor, expressly “did not reach” whether breach of fiduciary duty may “give rise to compensable emotional distress damages.” *Id.* at 805. Further, reference by the Court in that case to standards for intentional tort cases is not helpful, as Defoor proffers no authority that breach of fiduciary duty in this context is an intentional tort, rather than a breach of duty like malpractice. *See Steinmetz v. Cooper*, 2011 Bankr. LEXIS 3830 (D.S.C. March 18, 2011) (explaining “majority rule” that “Plaintiffs cannot recover damages for emotional distress in a legal malpractice action,” or for “a fiduciary breach that was not an intentional tort”).

Moreover, given Defoor’s long history of pre-existing health problems (she claims that Terry poisoned her and otherwise has an extensive history of pre-existing health problems causing her stress and anxiety; *see* RP at 51-53 and PowerPoint Slides (Sub No. 220A)), causation is not readily observable and expert medical testimony – completely lacking here – is required. *Berger v. Sonnenland*, 144 Wn.2d

91, 111 (2001).

**D. Defoor Failed to Submit Competent Evidence Rebutting Tilden's Testimony that Fees and Costs Were Reasonable**

Tilden's testimony in support of Rafel's fees and costs and billing rates<sup>16</sup> and practices stands completely un-rebutted. CP 990-993.<sup>17</sup> Defoor argues that there are disputed factual issues regarding the reasonableness of the fees and costs incurred in connection with her representation and awarded as part of the Judgment, but has offered no competent expert evidence rebutting Tilden's testimony. *See Geer v. Tonnon*, 137 Wn. App. 838, 850 (2007) (summary dismissal of attorney malpractice claim for lack of expert testimony); *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill.App.3d 359, 367 (2011) (value of legal services requires expert testimony); *In Re L.L.*, 2010 WL 2403579 (Tex.Ct.App. 2010) (expert testimony necessary); *Morris Law Office, P.C. v. Tatum*, 388 F. Supp.2d 689 (W.D. Va. 2005) (lay opinion on expert's fees excluded).

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<sup>16</sup> Tilden testified that there was nothing improper or unusual about charging a risk premium for contingent fee matters. Defoor's false assertion in bolded language that "RLG has never actually charged or collected those rates with any non-contingent fee client other than Defoor" (Br. at 45) makes no sense because Rafel's recovery was effectively contingent on Defoor's recovery and ignores Mr. Rafel's testimony that "[t]here have been many" other clients for whom Rafel has performed services for the rate charged Defoor. CP 2985.

<sup>17</sup> The total fees awarded to Rafel of \$902,978.22 were very close to the \$860,054.50 in fees billed by Terry's lawyers, even though Stacey bore the burden of proof and Terry had all of the records. CP 978. DWT has already billed Defoor over \$1.1M. CP 3993-3994. There is no expert testimony or other basis for comparison of Rafel's work or bills to Oseran's whom Defoor fired and criticized as being "overwhelmed." CP 983; CP 3475-3476.

Defoor's argument regarding Rafel's inadvertent inclusion in his billing records for Matter 1 of over \$1,000 for 2.4 hours spent drafting the re-engagement agreement ignores that Rafel inadvertently failed to include in his billing records and therefore understated his fee request by almost \$18,000 worth of time incurred by Duncan Manville. CP 999.

Defoor's claim that she did not benefit from Rafel's work ignores the trial court's award to her of over \$5.4M in personal and real property and cash, and Defoor's actual receipt of numerous items of real and personal property that she has sold. CP 3868-74. Rafel is not responsible for the subsequent decline in the real estate market, or for Terry's bankruptcy. Notably, the trial court expressly found that "the same reasonable fee amounts are properly payable whether the basis for recovery is the Re-Engagement Agreement or quantum meruit."<sup>18</sup> CP 2859.

**E. The Court's Evidentiary Rulings Should be Affirmed**

Defoor has failed to specifically explain anywhere in her brief how the trial court erred by striking portions of Defoor's supplemental declaration, or how such alleged error changes the outcome. Defoor never graduated from college and except for some part-time work at Nordstrom

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<sup>18</sup> Defoor's counterclaims against Rafel are not relevant to Rafel's fee recovery; if Defoor prevailed on such claims, they would have been set off.

and boarding horses years ago, she had not worked in more than ten years. Yet her Supplemental Declaration (which she continues to repeatedly cite in her Appeal Brief) is replete with accounting opinions, legal malpractice opinions, real estate opinions and even opinions on what Judge Inveen would have done had different information been presented. She opines and concludes, for example: “Rafel failed to obtain analysis tracking post-dissolution disposition of community assets” (Dec. ¶ 27); “Immediate impact of expert’s failure to analyze disposition of assets after separation” (Dec. ¶ 28); “At trial, Judge Inveen calculated the money judgment in my favor based on ...” (Dec. ¶ 30); “The rate for his newly admitted associate Cynthia Jones was similarly inflated” (Dec. ¶ 13). These are self-serving legal arguments and incompetent expert opinions placed in an affidavit, not admissible facts. *See, e.g., Space Needle v. Kamla*, 105 Wn. App. 123, 130 (2001); *Roger Crane & Assoc. v. Felice*, 74 Wn. App. 769, 778-79 (1994); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 26 (1993); CR 56(e). For the reasons set forth in great detail in Rafel’s briefing below (*see* CP 2544-2558 and 2832-38), such expert opinions, naked legal argument and impermissible conclusions throughout her declaration are not admissible and no substitute for proper expert opinions. *See also* RP at 4-9.

**F. The Court Should Affirm the Award of Fees and Costs and Prejudgment Interest**

The Court should affirm the trial court's award to Rafel of prejudgment interest and its fees and costs. The Re-Engagement Agreement expressly provided for payment of interest fees and costs, and interest also may be awarded pursuant to RCW 19.52.010 where a claim is liquidated. CP 434 and 436; RCW 4.84.330; *CKP, Inc. v. GRS Construction*, 63 Wn. App. 601 (1991).

**IV. CONCLUSION**

For the foregoing reasons, Defoor's appeal is without merit, and the Judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of October, 2012.

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondent Rafel Law Group PLLC herein.
2. On September 24, 2012, I caused the document to which this certificate is attached, BRIEF OF RESPONDENT RAFEL LAW GROUP PLLC, to be filed with the Clerk of the Washington State Court of Appeals, Division I, and served upon counsel of record in the manner indicated below:

Roger Leishman  
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STATE OF WASHINGTON  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of September, 2012, at Seattle,  
Washington.



\_\_\_\_\_  
Craig H. Nim

No. 68339-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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**STACEY DEFOOR,**

Appellant,

v.

**RAFEL LAW GROUP PLLC,**

Respondent

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Appeal From the Superior Court for King County  
The Honorable Mary Yu

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**APPENDIX OF NON-WASHINGTON AUTHORITIES**

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2012 OCT -2 PM 4:54

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

Respondent Rafel Law Group PLLC. hereby submits copies of the following non-Washington State cases in support of its Response Brief:

1. *Bennett v. Jones, Waldo, Holdbrook & McDonough*, 70 P.3d 17 (Utah 2003);
2. *Carlson v. Morton*, 745 P.2d 1133 (Mont. 1987);
3. *Floro v. Lawton*, 187 Cal. App. 2d 657 (Cal. Ct. App. 1960);
4. *In Re L.L.*, 2010 WL 2403579 (Tex.Ct.App. 2010);
5. *Jackson v. Urban Coolidge*, 516 S.W.2d 948 (Tex. Ct. App. 1974);
6. *Morris Law Office, P.C. v. Tatum*, 388 F. Supp.2d 689 (W.D. Va. 2005);
7. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9<sup>th</sup> Cir. 2009);
8. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 65 S. Ct. 993 (1945);
9. *Steinmetz v. Cooper*, 2011 Bankr. LEXIS 3830 (D.S.C. March 18, 2011);
10. *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27 (S.D. 1983)
11. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill.App.3d 359 (2011);
12. *Univera, Inc. v. Terhune*, 2009 U.S. Dist. LEXIS 111660 (W.D. Wash. Nov. 18, 2009);
13. *Viles & Beckman v. LaGarde*, 2006 U.S. Dist LEXIS 62659 (M.D. Fla. Sept. 1, 2006);
14. *Whiteaker v. State*, 382 N.W.2d 112 (Iowa 1986).

DATED this 2<sup>nd</sup> day of October, 2012.

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP



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**CERTIFICATE OF SERVICE**

The undersigned hereby declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for record for Respondent/Defendant Rafel Law Group herein.

On October 2, 2012, I caused a true and correct copy of the foregoing document to be: 1) filed in the Washington State Court of Appeals, Division I; and 2) duly served via Legal Messenger on the following parties:

Roger Leishman  
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**Attorney for Respondent**  
*Via Email and First Class Mail*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: October 2, 2012, at Seattle, Washington.

  
\_\_\_\_\_  
Craig H. Nim

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CLERK OF COURT  
STATE OF WASHINGTON





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As of: Oct 01, 2012

David D. Bennett, Plaintiff and Appellant, v. Jones, Waldo, Holbrook & McDonough; Christopher L. Burton; Sidney G. Baucom; James S. Lowry; Post, Kirby, Noonan & Sweet; and Michael L. Kirby, Defendants and Appellees.

No. 20010296

SUPREME COURT OF UTAH

2003 UT 9; 70 P.3d 17; 470 Utah Adv. Rep. 19; 2003 Utah LEXIS 17

April 1, 2003, Filed

**SUBSEQUENT HISTORY:** Released for Publication June 5, 2003. As Corrected August 1, 2003. [\*\*\*1] Rehearing denied by *Bennett v. Jones*, 2003 Utah LEXIS 67 (Utah, May 20, 2003)

**PRIOR HISTORY:** Third District, Salt Lake. The Honorable Tyrone Medley. *Bennett v. Gen-Probe, Inc.*, 87 F.3d 1317, 1996 U.S. App. LEXIS 31386 (9th Cir. Cal., 1996)

**DISPOSITION:** Affirmed.

**COUNSEL:** James N. Barber, Daniel G. Moquin, Franklin Reed Bennett, Salt Lake City, for plaintiff.

R. Brent Stephens, Maralyn M. Reger, Salt Lake City, for Jones Waldo defendants.

James S. Jardine, Rick B. Hoggard, Arthur B. Berger, Salt Lake City, for Post Kirby defendants.

**JUDGES:** Chief Justice Durham, Associate Chief Justice Durrant, Judge Greenwood, and Judge Orme concur in Justice Russon's opinion. Having disqualified himself, Justice Wilkins does not participate herein, and Justice Howe did not participate herein; Court of Appeals Judges Pamela T. Greenwood and Gregory K. Orme sat.

**OPINION BY:** RUSSON

**OPINION**

[\*\*21] *RUSSON, Justice:*

[\*P1] This case involves an action brought by David D. Bennett ("Bennett") against the law firms of Jones, Waldo, Holbrook & McDonough ("Jones Waldo") and Post, Kirby, Noonan & Sweet ("Post Kirby") and several of the law firms' partners alleging legal malpractice through breach of fiduciary duty, breach of contract, abuse of process through wrongful institution of civil proceedings, intentional infliction [\*\*\*2] of emotional distress, and deceit or collusion in violation of *section 78-51-31 of the Utah Code*. The action arises from the law firms' representation of Bennett in a federal securities class action lawsuit against Gen-Probe, Inc. ("Gen-Probe"), of which Bennett was a minority shareholder.

[\*P2] Bennett appeals (1) the trial court's grant of Jones Waldo, Christopher L. Burton, Sidney G. Baucom ("Baucom"), and James S. Lowrie's ("Lowrie") (collectively, "Jones Waldo defendants") motion to dismiss Bennett's fourth amended complaint for failure to state a claim upon which relief can be granted, pursuant to *rule 12(b)(6) of the Utah Rules of Civil Procedure*, and (2) the trial court's grant of Post Kirby and Michael L. Kirby's ("Kirby") (collectively, "Post Kirby defendants") motion to dismiss Bennett's fourth amended complaint for lack of personal jurisdiction, pursuant to *rule 12(b)(2) of the Utah Rules of Civil Procedure*.

## BACKGROUND AND PROCEDURAL HISTORY

### I. UTAH GEN-PROBE LITIGATION

[\*P3] On December 5, 1989, Bennett sued Gen-Probe and its officers and directors in United States District Court for the District of Utah ("Utah Gen-Probe litigation"), seeking to enjoin [\*\*\*3] the purchase of Gen-Probe by a Japanese company because the proposed purchase price was allegedly inadequate. Bennett also asserted derivative claims on behalf of Gen-Probe against its officers and directors, and damage claims on behalf of a proposed class of the minority shareholders of Gen-Probe.

[\*P4] On April 18, 1990, Bennett and Jones Waldo entered into a retainer agreement in which Jones Waldo agreed to act as lead counsel in the Utah Gen-Probe litigation. The retainer agreement provided, among other things, that "with the exception of decisions regarding settlement, [Jones Waldo] shall have the authority to make all decisions relating to the prosecution of [the] Lawsuit in its absolute discretion" and that "Clients<sup>1</sup> agree that [Jones Waldo] may, at its sole discretion, retain associate counsel to assist in the prosecution of Client's Causes of [\*\*22] Action provided associate counsel is retained at [Jones Waldo's] sole expense." Furthermore, under the retainer agreement, the clients committed "to fully cooperate with [Jones Waldo] in the prosecution of the lawsuit" and acknowledged that "[Jones Waldo's] agreement to represent Clients is contingent upon Client's [\*\*\*4] active and continuous cooperation throughout the Lawsuit."

1 Under the retainer agreement, "Clients" referred to Bennett, James W. Bennett, Lorraine J. Engstrom, Bud Mahas Construction Company, Harold Sandbeck, Arden Lubeck, and Franklin Reed Bennett, all signatories to the agreement.

### II. CALIFORNIA GEN-PROBE LITIGATION

[\*P5] On August 24, 1990, the Utah Gen-Probe litigation was transferred from Utah to the United States District Court for the Southern District of California ("California federal district court"), where Gen-Probe was headquartered ("California Gen-Probe litigation"). As a result, Jones Waldo was required to retain local California counsel. On October 24, 1990, Post Kirby became co-counsel and local counsel with Jones Waldo on the California Gen-Probe litigation. However, Post Kirby never signed or became a party to the retainer agreement between Bennett and Jones Waldo.

[\*P6] Specifically, Post Kirby was hired by Jones Waldo as co-counsel in a joint representation with Jones

Waldo [\*\*\*5] of a class in the California Gen-Probe litigation. In a letter dated October 24, 1990, addressed to Jones Waldo, Post Kirby described the "proposed arrangement for representation" of Bennett's class action, stating:

[Jones Waldo] will continue to act as lead counsel for the plaintiffs, and [Post Kirby] will become co-counsel of record for the plaintiffs. [Post Kirby] will have considerably greater responsibility than merely acting as local counsel, but [Jones Waldo] will continue to have the ultimate decision making authority, after consultation with [Post Kirby], on any substantive or tactical decisions.

[\*P7] On December 18, 1991, two of the named plaintiffs in the California Gen-Probe litigation authorized Jones Waldo to settle the class action suit. Bennett openly opposed the proposed settlement, claiming that Jones Waldo and Post Kirby had failed to fully investigate the claims and that the amount of the settlement offer was inadequate.

[\*P8] On August 13, 1992, Bennett opted out of the proposed settlement. As a result, Jones Waldo informed Bennett by letter on August 17, 1992, that Bennett's decision to opt out of the class action settlement terminated [\*\*\*6] Jones Waldo's representation of Bennett.

[\*P9] On August 26, 1992, the California federal magistrate court held a "Good Faith Settlement Hearing" at which the court approved the proposed settlement as fair, found that the class had been adequately and competently represented by counsel, and subsequently entered a final judgment and order of dismissal with prejudice the next day. Despite having opted out of the settlement, Bennett attended the hearing and was allowed to present his objections on the record. Bennett acknowledged that because he had decided to opt out of the settlement he had no standing to challenge the settlement in that forum and that he had no right to appeal the court's approval of the settlement.

### III. BAR ORDER LITIGATION

[\*P10] In early to mid-1994, Jones Waldo learned that Bennett intended to sue Jones Waldo on behalf of the entire class for alleged legal malpractice because he thought the settlement was unfair and improper. Suspecting that Bennett's claims of malpractice were nothing more than a collateral attack on the fairness and adequacy of the class action settlement, Jones Waldo requested that Post Kirby obtain a court order ("bar order") from [\*\*\*7] the California federal district court prohibiting litigation collaterally attacking the finality of the class action settlement.<sup>2</sup>

2 In its final order, the California federal magistrate court specifically retained jurisdiction to issue bar orders in order to protect the class action settlement.

[\*P11] On July 5, 1994, the California federal district court issued a temporary bar order that was made permanent on October 3, 1994, after a hearing on the issue on September 6, 1994. Bennett was served in Utah with a copy of the temporary bar order which [\*\*23] permitted him to oppose any permanent bar order in California. Bennett was present and represented by counsel at the September 6 hearing.

[\*P12] The bar order restrained Bennett from "initiating or maintaining any lawsuit against [Jones Waldo] . . . or any other class counsel which in any way involves" the "sufficiency or fairness of the class action settlement," the "competency of class counsel and counsel's legal services on behalf of the class," the [\*\*\*8] "award of fees and costs to class counsel," and the "award of additional compensation to any of the named Plaintiffs" in the class action. The bar order expressly did not "bar or restrain David D. Bennett from pursuing solely his own individual claims as a former Gen-Probe shareholder, except to the extent such claims have been previously adjudicated by this court."

[\*P13] Bennett appealed the bar order to the Ninth Circuit Court of Appeals. While that appeal was pending, Bennett filed the instant action in Utah district court against Jones Waldo (but not against Post Kirby) on December 30, 1994.<sup>3</sup> Soon thereafter, on January 20, 1995, Bennett filed an amended complaint.

3 In addition, prior to filing his complaint in Utah district court, on February 1, 1993, Bennett filed a complaint with the Utah State Bar alleging unprofessional conduct by Jones Waldo in the prosecution of the Utah and California Gen-Probe litigations. This complaint was investigated by the Utah State Bar, and on June 1, 1994, the Utah State Bar summarily dismissed Bennett's complaint, concluding that "[Bennett's] complaint is unsupported by fact and does not raise the possibility of unprofessional conduct."

[\*\*\*9] [\*P14] When Bennett filed his amended complaint, Jones Waldo, represented by Post Kirby, moved the California federal district court to hold Bennett in contempt of the bar order. At a hearing on the contempt motion on May 1, 1995, the California federal district court, after reviewing Bennett's complaint and the amended complaint filed in Utah district court, ordered Bennett to redact all of the allegations relating to the class action settlement and the competency of class counsel's representation of the class. Bennett agreed to

file a second amended complaint, which he did on August 1, 1995.

[\*P15] In response to Bennett's second amended complaint, Jones Waldo again asked Post Kirby to move the California federal district court to hold Bennett in contempt of the bar order because the allegations in the second amended complaint continued to focus impermissibly on the adequacy and fairness of the class action settlement and class counsel's representation of the class, essentially collaterally attacking the finality of the class action settlement. The California federal district court held a hearing on the second contempt motion on January 11, 1996. At this hearing, the [\*\*\*10] California federal district court held Bennett in contempt of the bar order. The court fined Bennett and once again ordered him to amend his complaint to eliminate claims concerning the class action settlement and the competency of class counsel. Bennett appealed this contempt citation to the Ninth Circuit Court of Appeals. On February 9, 1996, Bennett filed in Utah district court his third amended complaint, omitting under protest the offending allegations.

[\*P16] On June 14, 1996, the Ninth Circuit Court of Appeals affirmed the original issuance of the bar order. In doing so, the Ninth Circuit "narrowly construed" the bar order so that the "Utah court may examine the adequacy of the class settlement, but only insofar as that settlement sheds light on [Jones Waldo's] representation of Bennett." On June 19, 1997, the Ninth Circuit reversed the contempt citation pursuant to the narrow construction of the bar order.

#### IV. UTAH LEGAL MALPRACTICE LITIGATION

[\*P17] At the same time Jones Waldo and Post Kirby were pursuing the bar order and the contempt sanctions before the California federal district court and the Ninth Circuit, Bennett's case before the Utah district court [\*\*\*11] remained pending. In response to the filing of Bennett's original complaint and various amended complaints, Jones Waldo moved to dismiss Bennett's action and stay the briefing of that motion in light of and in deference to the California federal district court's issuance [\*\*24] of the bar order and resolution of the contempt motions and interpretation of the relevant rulings by the California federal courts. The motion to stay was not an overall stay of the proceedings but rather a stay of the briefing of the motion to dismiss. Bennett was allowed to file amended complaints even though the stay on briefing was in effect. The stay on briefing was issued on April 26, 1995. On July 6, 1998, the trial court officially lifted that stay.

[\*P18] On July 7, 1998, Bennett filed his fourth amended complaint, naming Post Kirby and Kirby, indi-

vidually, and Jones Waldo attorneys Baucom and Lowrie, individually, as defendants for the first time.

[\*P19] In response to Bennett's fourth amended complaint, on September 4, 1998, the Jones Waldo defendants moved to dismiss the fourth amended complaint for failure to state a claim under *Utah Rule of Civil Procedure 12(b)(6)* and pursuant to the [\*\*\*12] doctrine of collateral estoppel/issue preclusion.<sup>4</sup> On November 25, 1998, the Post Kirby defendants moved to dismiss the fourth amended complaint for lack of personal jurisdiction under *Utah Rule of Civil Procedure 12(b)(2)*. Both motions were fully briefed by both sides. The trial court heard oral argument on both motions on August 30 and October 25, 1999.

4 The Jones Waldo defendants also argued that the new claims against Baucom and Lowrie were precluded by the statute of limitations because those defendants were not named as defendants until the fourth amended complaint was filed.

[\*P20] On January 7, 2000, the trial court granted the Post Kirby defendants' motion to dismiss for lack of personal jurisdiction and instructed them to prepare a conforming order. The minute entry granting the motion explained that Post Kirby's motion was "granted based upon *all* of the analytical points and authorities set forth in Post Kirby's memorandum in support and in reply." The Post Kirby defendants submitted a [\*\*\*13] proposed order on January 14, 2000, and Bennett filed an objection to the minute entry and the proposed order on January 28, 2000. On February 7, 2000, the Post Kirby defendants filed their response to Bennett's objections accompanied by another copy of the proposed order. The trial court signed the proposed order on February 11, 2000. On February 16, 2000, Bennett filed a reply to the Post Kirby defendants' response. The following day, the Post Kirby defendants filed a notice to submit.

[\*P21] On February 28, 2000, apparently having forgotten that it signed the order previously, the trial court once again signed the Post Kirby defendants' proposed order. However, the trial court failed to give notice to the parties that it had signed the proposed order and entered judgment. It was not until May 9, 2000, that the Post Kirby defendants learned of the entry of judgment. Upon discovering the entry of judgment, the Post Kirby defendants served Bennett with a notice of entry of judgment on the following day.

[\*P22] On May 26, 2000, Bennett filed a *rule 60 motion* to vacate the February 28 order and judgment and to decide its *rule 59 motion*. Bennett apparently effectively made [\*\*\*14] a *rule 59 motion* as part of his objections and response to the Post Kirby defendants' proposed order.

[\*P23] On June 9, 2000, Bennett filed a notice of appeal from the February 28 order. However, realizing that the judgment was not final due to the pendency of the *rules 60* and *59 motions*, Bennett moved to remand and vacate the briefing schedule, which was granted by this court on October 25, 2000.

[\*P24] On October 2, 2000, the trial court heard oral argument on Bennett's May 26 *rules 60* and *59 motions*. On October 6, 2000, the trial court denied Bennett's *rule 60 motion*. On February 21, 2001, the trial court heard oral argument on all outstanding motions and issues. The trial court signed an order denying Bennett's outstanding *rule 59 motion* on February 28, 2001.

[\*P25] At the same time the trial court was addressing the Post Kirby defendants' motion to dismiss, it was also considering the Jones Waldo defendants' dispositive motions. On February 11, 2000, the trial court granted the Jones Waldo defendants' *rule 12(b)(6)* motion to dismiss. In the minute entry granting the motion, the trial court explained that [\*\*\*25] "after further review of all memoranda and all controlling [\*\*\*15] authorities cited by counsel . . . Jones Waldo's motion . . . is granted based upon *all* of the analytical points and authorities set forth in Jones Waldo's memorandum in support, reply and oral argument." The trial court failed to give notice to the parties of this entry, and an order of dismissal was not submitted and signed until October 6, 2000.

[\*P26] Eventually, Bennett appealed the trial court's grant of the Jones Waldo defendants' motion to dismiss. However, on February 23, 2001, this court dismissed Bennett's appeal because of the apparent pendency of Bennett's *rule 59 motion* as to the trial court's entry of judgment in favor of the Post Kirby defendants. Once the trial court issued an order denying Bennett's *rule 59 motion* and any other outstanding motions on February 28, 2001, the case was finally ripe for appeal.

[\*P27] On appeal, Bennett argues that the trial court erred in granting the Jones Waldo defendants' and the Post Kirby defendants' respective motions to dismiss the fourth amended complaint. As to the Jones Waldo defendants' motion to dismiss, Bennett argues that (1) dismissal of the fourth amended complaint was improper because the complaint sufficiently [\*\*\*16] pled the four causes of action therein, (2) the trial court erred when it dismissed the fourth amended complaint on res judicata or collateral estoppel grounds "without an evidentiary hearing thereon and without entering findings of fact and conclusions of law" when it did so, (3) the trial court erred when it dismissed Bennett's claims even though he had opted out of the underlying class action suit, (4) the trial court erred when it dismissed Bennett's claims against Baucom and Lowrie as barred by the statute of

limitations, and in doing so, failed to enter findings of fact and conclusions of law in support of its dismissal on that ground, and (5) the trial court erred in dismissing the fourth amended complaint against the Post Kirby defendants for lack of personal jurisdiction.

[\*P28] The Jones Waldo defendants respond that the trial court did not err in dismissing the fourth amended complaint because (1) it did not state any claims upon which relief could be granted, (2) the fourth amended complaint is essentially an improper collateral attack on the class action settlement and is barred by the doctrine of issue preclusion, and (3) the claims against Baucom and Lowrie are [\*\*\*17] barred by the statute of limitations. Furthermore, the Jones Waldo defendants maintain that the trial court adequately supported its ruling with a brief written statement explaining the grounds for its decision.

[\*P29] The Post Kirby defendants argue that Bennett's appeal of the grant of their motion to dismiss for lack of personal jurisdiction was not timely. In the alternative, the Post Kirby defendants argue that the trial court was correct in dismissing the fourth amended complaint as to the Post Kirby defendants for lack of personal jurisdiction because the Post Kirby defendants did not have sufficient minimum contacts with the state of Utah required by due process of law to justify the trial court's exercising personal jurisdiction over them.

## STANDARD OF REVIEW

[\*P30] "Under rule 12 of the Utah Rules of Civil Procedure, a motion to dismiss is proper 'only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim.'" *Clark v. Deloitte & Touche LLP*, 2001 UT 90, P 14, 34 P.3d 209 (quoting *Prows v. State*, 822 P.2d 764, 766 (Utah 1991)). [\*\*\*18] Therefore, we will affirm the trial court's dismissal "only if it is apparent that as a matter of law, the plaintiffs could not recover under the facts alleged." *Id.* (quotation omitted). "Because we consider only the legal sufficiency of the complaint, we grant the trial court's ruling no deference and review it for correctness." *Educators Mut. Ins. Ass'n v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1030 (Utah 1995).

## ANALYSIS

### I. BREACH OF CONTRACT

[\*P31] Bennett's first cause of action in the fourth amended complaint is for breach of [\*\*\*26] contract. In the proceedings below, the trial court granted the Jones Waldo defendants' motion to dismiss the contract claim on the ground that the complaint failed to adequately

plead damages from the alleged breach of contract. Bennett argues on appeal that the cause of action for breach of contract was adequately pled and that he was in fact damaged by the Jones Waldo defendants' breach of the retainer agreement.

[\*P32] "An action for breach of a promise is governed by rules of contract rather than rules of legal malpractice." 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8.5, at 590 (4th [\*\*\*19] ed. 1996) [hereinafter *Legal Malpractice*]. To properly state a cause of action for breach of contract in the context of legal representation and an attorney-client relationship, a plaintiff must plead "(1) [existence of] a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the express promise by the defendant; and (4) damages to the plaintiff resulting from the breach." *Id.*

[\*P33] According to the allegations in the fourth amended complaint, Bennett and the Jones Waldo defendants entered into a contract upon execution of the retainer agreement on April 18, 1990. In addition, Bennett alleges several instances throughout the course of the Jones Waldo defendants' legal representation of him in the Utah and California Gen-Probe litigations in which the Jones Waldo defendants breached specific provisions of the retainer agreement. Bennett also specifically alleges that, as of August 13, 1992, he elected to "opt out" of the proposed class action settlement. As a result of this election, he received from the Jones Waldo defendants a letter indicating that because of Bennett's decision to opt out of the class action settlement, the attorney-client [\*\*\*20] relationship between the Jones Waldo defendants and Bennett was terminated as of the date Bennett opted out.

[\*P34] According to the facts pled in Bennett's complaint, the retainer agreement in this case was in effect from April 18, 1990, to August 13, 1992. By opting out of the class action settlement, Bennett effectively terminated the class counsel's legal representation of him in the matter. See *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 354, 44 Tex. Sup. Ct. J. 621 (Tex. 2001). The termination of the legal representation was confirmed by the Jones Waldo defendants in a letter to Bennett dated August 17, 1992. For the purpose of evaluating whether the fourth amended complaint states a cause of action for breach of contract, we confine our review of the facts pled in the complaint to the period in which a valid and enforceable contract was in existence. Any facts pled related to the period after the termination of the retainer agreement--that is, any facts related to the bar order litigation--cannot support a cause of action for breach of contract because no valid and enforceable contract existed at that time, an essential element in a cause of action for breach of contract.

[\*\*\*21] [\*P35] Even if we were to assume that all of the facts alleged during the existence of the contract were true, Bennett has failed to state a claim for breach of contract because he has failed to adequately plead valid damages associated with the alleged breaches of contract. Bennett alleges that he was damaged by the Jones Waldo defendants' dismissal of certain named defendants in the California Gen-Probe litigation and the dismissal of derivative claims. Moreover, Bennett alleges that "by being forced to opt out, [he] was ousted from the very lawsuit he had initiated and forced to give up his proprietary interest in the case and his share of the recovery effected therein."

[\*P36] Despite his allegations to the contrary, Bennett was not damaged in the way alleged in the fourth amended complaint by the Jones Waldo defendants' purported breaches of the retainer agreement. The damages alleged by Bennett are premised on a faulty legal assertion, which when corrected demonstrates that as a matter of law Bennett was not damaged by the Jones Waldo defendants' alleged breaches of the retainer agreement.

[\*P37] By opting out of the class action settlement, Bennett preserved [\*\*\*22] his legal claims and position totally. *See, e.g., Thompson v. Edward D. Jones & Co., 992 F.2d 187, 191 (8th Cir. 1993); see also Fed. R. Civ. P. 23(c) advisory committee's notes. Under [\*\*27] federal rule 23, which governs class action lawsuits, and the case law interpreting that rule, Bennett was not "forced to give up his proprietary interest" in the lawsuit or any potential claim or potential recovery from his individual claims by opting out of the proposed settlement. The opt out rule associated with class action suits found in rule 23(c) of the Federal Rules of Civil Procedure "is intended to protect the individual[']s[] interest in pursuing [his] own litigation rather than participating in a class action." *Gottlieb v. Q.T. Wiles, 11 F.3d 1004, 1009 (10th Cir. 1993), overruled on other grounds sub nom. Devlin v. Scardelletti, 536 U.S. 1, 153 L. Ed. 2d 27, 122 S. Ct. 2005 (2002); 7B Charles Alan Wright et al., Federal Practice & Procedure: Civil § 1787, at 211 (2d ed. 1996) ("The opt-out procedure in the amended rule preserves the right of a potential class member who feels that his interests are in conflict with or [\*\*\*23] antagonistic to the other class members to bring his own action, and at the same time, assures that differences of opinion within the class will not necessitate a dismissal of the action itself.")*.*

[\*P38] By opting out, Bennett preserved his individual claims and was free to bring those claims in another lawsuit, a notion explicitly acknowledged in the bar order issued after Bennett opted out of the class action settlement. In other words, Bennett's decision to opt out placed him in the same legal position with the same legal

claims that he would have been in had his relationship with the Jones Waldo defendants never existed. This being the case, even if we accept as true all of the relevant facts pled in the fourth amended complaint, Bennett cannot as a matter of law recover under a cause of action for breach of contract because he cannot as a matter of law show he was damaged by the Jones Waldo defendants' alleged breaches.<sup>5</sup>

5 In addition, Jones Waldo was working with Bennett on a contingency fee basis. Bennett paid nothing to Jones Waldo and therefore was not damaged even to the extent of paying for work from which he did not benefit.

[\*\*\*24] [\*P39] Therefore, the trial court did not err in dismissing the first cause of action for breach of contract.

## II. LEGAL MALPRACTICE/BREACH OF FIDUCIARY DUTY

[\*P40] Bennett's second cause of action in the fourth amended complaint is for legal malpractice through breach of fiduciary duty. Similar to its rationale with regard to its dismissal of the first cause of action, the trial court granted the Jones Waldo defendants' motion to dismiss the legal malpractice claim on the ground that the complaint did not adequately plead damages to Bennett from the alleged legal malpractice. Bennett argues on appeal that the cause of action for legal malpractice was adequately pled and that he was in fact damaged by the Jones Waldo defendants' legal malpractice.

[\*P41] "In a legal malpractice action, a plaintiff must plead and prove (i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; [ ] (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages." *Harline v. Barker, 912 P.2d 433, 439 (Utah 1996) (citing Williams v. Barber, 765 P.2d 887, 889 (Utah 1988))*; [\*\*\*25] *see also Legal Malpractice § 18.12, at 550-51.*

6 In this case, Bennett appears to make claims for breach of fiduciary duty and professional negligence, both of which fall under the broader rubric of legal malpractice. Regardless of whether we classify the cause of action as one for professional negligence or breach of fiduciary duty or both, the result of our analysis is the same. "Most rules applicable to negligence actions also apply to actions for breach of fiduciary duty." *Restatement (Third) of the Law Governing Lawyers § 49 cmt. c, at 348-49 (rev. ed. 2000)*. This is particularly true where, as here, our analysis focuses on the damages element which is common to both a

claim for breach of fiduciary duty and professional negligence.

[\*P42] Bennett's claim for legal malpractice suffers from the same deficiency as his breach of contract claim, that is, an inability to show damage from any breach of duty.

[\*P43] As an initial matter, our review of the well pled facts associated with the legal [\*\*\*26] malpractice claim must be confined to those facts and events that fall within the period in [\*\*28] which an attorney-client relationship existed. That period is the same one explained previously, that is, the period from the execution of the retainer agreement to the moment when Bennett exercised his right to opt out of the class action settlement. As previously discussed, *see supra* P 34, Bennett's decision to opt out effectively terminated the Jones Waldo defendants' representation of him. Therefore, only the facts alleged related to the Jones Waldo defendants' representation of Bennett during the Utah and California Gen-Probe litigations are relevant to whether the complaint states a claim for legal malpractice. Any other facts or allegations regarding the Jones Waldo defendants' conduct after the termination of the legal representation of Bennett cannot form the basis of a cause of action for legal malpractice, because the existence of an attorney-client relationship is an indispensable element of a cause of action for legal malpractice. *See Harline, 912 P.2d at 439.*

[\*P44] The damages claimed by Bennett arising out of the Jones Waldo defendants' alleged breaches [\*\*\*27] of duty owed to Bennett during the Utah and California Gen-Probe litigations are no different than the damages pled in connection with the cause of action for breach of contract. Consequently, the second cause of action for legal malpractice is deficient for the same reason that the first cause of action is deficient. Bennett simply cannot plead and has not pled that he was damaged as a result of the Jones Waldo defendants' alleged breaches of duty because by opting out of the class action settlement, he preserved his legal position and his individual causes of action. Bennett's failure to pursue those individual causes of action in connection with the Gen-Probe transaction is not attributable to any conduct by the Jones Waldo defendants and not related to any prior alleged breach of duty by them. Even if we assume all of the allegations in the fourth amended complaint to be true, Bennett cannot show as a matter of law that he was damaged, that is, placed in a worse position as a result of the Jones Waldo defendants' alleged conduct, because his opting out of the class action settlement placed him in the same position he would have been in prior to the instigation of the original Utah [\*\*\*28] and California Gen-Probe litigations. "Lack of any damages and direct causation is fatal to [any] malpractice claim."

*Kinniburgh v. Garrity, 244 Mont. 350, 798 P.2d 102, 105 (Mont. 1990).*

[\*P45] Therefore, the trial court did not err in dismissing the second cause of action for legal malpractice for failure to state a claim on which relief could be granted.

### III. ABUSE OF PROCESS

[\*P46] Bennett's third cause of action in the fourth amended complaint is for the tort of abuse of process. In granting the Jones Waldo defendants' motion to dismiss this claim, the trial court agreed with and accepted the Jones Waldo defendants' arguments that Bennett failed to state a proper claim for abuse of process. The trial court's dismissal of the abuse of process claims was proper.

[\*P47] A plaintiff may state a cause of action for abuse of process against a person "who uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed." *Gilbert v. Ince, 1999 UT 65, P 17, 981 P.2d 841* (quoting *Restatement (Second) of Torts § 682*, at 474 (1977)); *see also Crease v. Pleasant Grove City, 30 Utah 2d 451, 455, 519 P.2d 888, 890 (1974); [\*\*\*29] Kool v. Lee, 43 Utah 394, 403-04, 134 P. 906, 909 (1913); Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1571 (D. Utah 1995); 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 6.22 cmt. d, at 465 (4th ed. 1996)* ("A cause of action for abuse of process requires pleading and proof of two elements: (1) the use of legal process primarily to accomplish a purpose not within the scope of the proceeding for which it was designed; and (2) malice." (footnotes omitted)) [hereinafter *Legal Malpractice*]; *Restatement (Second) of Torts § 682 cmt. b*, at 475 (1977) ("For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended."); *Restatement (Third) of the Law Governing Lawyers § 57 cmt. d*, at 432 (rev. ed. 2000) ("A damaged party may recover for abuse of process from one "who uses a legal process, [\*\*29] whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed.").

[\*P48] "The essence of [a cause of action for abuse of process] is a perversion of the process to accomplish some improper purpose . . ." *Crease, 30 Utah 2d at 455, 519 P.2d at 890. [\*\*\*30]* "If [a legal process] is used for its proper and intended purpose, the mere fact that it has some other collateral effect does not constitute abuse of process." *Id. at 455, 519 P.2d at 890.*

[\*P49] Moreover, "there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant."

*Restatement (Second) of Torts* § 682 cmt. b, at 475; see also *Keller*, 896 F. Supp. at 1572 ("It is recognized that 'even a pure spite motive is not sufficient [to state a claim for abuse of process] where process is used only to accomplish the result for which it was created.'" (citation omitted) (alteration in original)); *Legal Malpractice* § 6.22, at 472-73 (discussing generally motive and malice aspects of abuse of process).

[\*P50] In this case, even when the facts alleged in the fourth amended complaint are accepted as true, Bennett has failed to state a cause of action for abuse of process. Bennett does not allege anywhere in the fourth amended complaint that the legal process of seeking a bar order or contempt sanctions [\*\*\*31] from the California federal district court was used by the Jones Waldo defendants for any purpose other than the one for which it was designed or intended.

[\*P51] According to the allegations of the fourth amended complaint, the Jones Waldo defendants acquired a draft copy of a complaint Bennett was considering filing in Utah court. It was only after receipt and review of this document that the Jones Waldo defendants initiated the legal process of obtaining a bar order from the California federal district court. The Jones Waldo defendants initiated the bar order litigation to protect the class action settlement from a potential lawsuit from Bennett that they perceived to be a collateral attack on the class action settlement.

[\*P52] The purpose and design of the legal mechanism of a bar order is to protect class action settlements from collateral attack, thus insuring their long-term viability and stability and final resolution of class actions. There is no claim in the fourth amended complaint that the Jones Waldo defendants used the bar order litigation or the subsequent contempt sanction requests for any purpose other than the one for which they were intended. Bennett [\*\*\*32] even alleges in the fourth amended complaint that the Jones Waldo defendants' single purpose for pursuing the bar order and contempt sanctions was to deter him from filing his legal action, a valid purpose for and use of those legal processes and mechanisms especially in light of the Jones Waldo defendants' perception that Bennett's legal action was a collateral attack on the class action settlement.

[\*P53] The fact that certain consequences flowed from the bar order litigation or that the bar order litigation had some collateral negative effect on Bennett such as the expenditure of time and resources in defending the bar order litigation or emotional strain or reputational damage as a result of the bar order litigation is not sufficient to state a cause of action for abuse of process. See *Crease*, 30 Utah 2d at 455, 519 P.2d at 890.

[\*P54] At best, Bennett's fourth amended complaint alleges facts that the Jones Waldo defendants pursued the bar order litigation with a spiteful or hateful motive and that they initiated the legal process to protect their legal fees earned in the class action settlement. Even if these allegations are accepted as true, such [\*\*\*33] motivations are insufficient to state a claim for abuse of process where the legal process was used "for the purpose for which it [was] intended." *Restatement (Second) of Torts* § 682 cmt. b, at 475.

[\*P55] In this case, the Jones Waldo defendants used the bar order litigation to protect the class action settlement from a perceived collateral attack from Bennett's Utah lawsuit, precisely the purpose for which the legal process or mechanism of a bar order is intended. Moreover, the Jones Waldo defendants' [\*\*\*30] request of the California federal district court to hold Bennett in contempt of the bar order was made to enforce the bar order, precisely the purpose for which the legal process or mechanism of judicial sanction is intended.

[\*P56] Because Bennett failed to allege that the Jones Waldo defendants used a legal process against him primarily to accomplish a purpose for which it was not designed and failed to plead any facts that would support such an inference, the fourth amended complaint fails to state a cause of action for abuse of process and the trial court was correct in dismissing Bennett's cause of action for abuse of process.

#### IV. INTENTIONAL INFLICTION OF EMOTIONAL [\*\*\*34] DISTRESS

[\*P57] Bennett's third cause of action in the fourth amended complaint also purports to state a claim for the tort of intentional infliction of emotional distress. In granting the Jones Waldo defendants' motion to dismiss this claim, the trial court agreed with and accepted the Jones Waldo defendants' arguments that Bennett failed to state a proper claim for intentional infliction of emotional distress, specifically that Bennett had failed to plead facts indicating that the Jones Waldo defendants' conduct was extreme, outrageous, and intolerable to the level of offending generally accepted standards of decency and morality. On appeal, the Jones Waldo defendants renew their arguments accepted by the trial court. Bennett argues that the facts pled in the fourth amended complaint are sufficient to state a claim for intentional infliction of emotional distress.

[\*P58] In order to state a claim for intentional infliction of emotional distress, a plaintiff must plead facts that demonstrate that the defendant

"intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would

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[\*\*\*35] have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."

*Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, P 25, 21 P.3d 198 (quoting *Jackson v. Brown*, 904 P.2d 685, 687-88 (Utah 1995) (quoting *Samms v. Eccles*, 11 Utah 2d 289, 293, 358 P.2d 344 (1961))); see also *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, P 37, 56 P.3d 524; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, P 108, 65 P.3d 1134.

[\*P59] In addition, this court has cautioned:

"Due to the highly subjective and volatile nature of emotional distress and the variability of its causations, the courts have historically been wary of dangers in opening the door to recovery therefor. This is partly because such claims may easily be fabricated: or as sometimes stated, are easy to assert and hard to defend against."

*Franco*, 2001 UT 25 at P 25 (quoting *Samms*, 11 Utah 2d at 291, 358 P.2d at 345).

[\*P60] Therefore, [\*\*\*36] "the sufficiency of [Bennett's] pleadings 'must be determined by the facts pleaded rather than the conclusions stated.'" *Id.* at P 26 (quoting *Ellefsen v. Roberts*, 526 P.2d 912, 915 (Utah 1974)).

[\*P61] The facts alleged in Bennett's complaint can be divided into two categories: those facts related to the California litigation and those facts related to the bar order litigation.

[\*P62] In the first category, Bennett has pled the following operative facts:<sup>7</sup>

"Jones Waldo and Post Kirby defendants initiated and pursued a misleading scheme to settle the Gen-Probe case . . . ."

The Jones Waldo and Post Kirby defendants opposed Bennett's opinions about settlement and never honored [\*\*31] named plaintiff Frank Bennett's request for a professional evaluation of the class action claims.

"Defendants Kirby and Burton threatened David Bennett on December 3, 1991 that he should not be 'difficult' about settling the case quickly . . . ."

"In retaliation for David Bennett's position against early settlement, James Peters of defendant law firm Jones Waldo angrily threatened plaintiff David Bennett that he would not thereafter be allowed to continue as liaison client [\*\*\*37] to attend an upcoming December 18, 1991 conference in California."

"The defendants Jones Waldo, its lawyers and agents wrongly pressured David Bennett . . . to acquiesce in the lawyers' interest in immediate settlement. Defendant lawyers threatened David Bennett . . . that [he] should not communicate with [other named plaintiffs] except through counsel."

7 In his reply brief on appeal, Bennett included a chart entitled "SUMMARY CHART OF EACH CAUSE OF ACTION UNDER UTAH LAW AND THE CORRELATIVE PARAGRAPHS IN DAVID BENNETT'S COMPLAINT," which purports to "present detailed particulars in support of claims pleaded in plaintiff's fourth amended complaint." The operative facts set forth in this opinion were drawn from the fourth amended complaint.

The Jones Waldo and Post Kirby defendants denied Bennett access to a copy of a hearing transcript for almost six months.

"Jones Waldo conceived and began carrying out a scheme and artifice to impose the settlement on their clients by creating fear that if the case were [\*\*\*38] lost, David Bennett . . . could be required to pay hundreds of thousands of dollars in out-of-pocket costs."

"Defendant Baucom and other Jones Waldo lawyers pressured David Bennett . . . to testify under oath that they had personally assumed an obligation to pay assessed costs, thus shielding the lawyers from that obligation."

"The aforesaid strategy of the Jones Waldo Defendants was conceived with the intent, and actually did convince David Bennett that despite the contrary provisions in the Retainer Agreement, he may be held personally liable to pay costs which might be assessed in the case."

"Defendant Baucom warned Plaintiff David Bennett at a May 27, 1992 meeting that if he, David, sent a letter criticizing the lawyers or the settlement to the Court or to anyone else that the Jones Waldo law firm would 'declare war' on him (as they did)."

"The defendant lawyers continued pressure and harassment which subjected David Bennett to extreme emotional distress."

"Baucom . . . maliciously threatened that if the class were not certified as a result of [Bennett's] objections, Bennett would be personally sued, 'probably by someone in California.'"

All of the acts that allegedly constituted [\*\*\*39] legal malpractice were outrageous conduct committed for the purpose of inflicting extreme emotional distress.

[\*P63] Bennett's complaint alleges no action by the Jones Waldo defendants that can be "considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." *Id.* (quotations omitted); *see also Tappen v. Ager*, 599 F.2d 376, 382 (10th Cir. 1979) (affirming dismissal for failure to state a claim in cause of action for intentional infliction of emotional distress where alleged conduct involved filing of lawsuit that was allegedly baseless and result of inadequate investigation and violation of legal duty on attorney's part); *Thornton v. Squyres*, 317 Ark. 374, 877 S.W.2d 921, 923 (Ark. 1994) ("The tort of [intentional infliction of emotional distress] is not one that can merely be substituted for a legal malpractice claim which involves inattentive, unprofessional or negligent action of an attorney."); *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 6 Cal.Rptr.2d 151, 169 (Ct. App. 1992) (affirming demurrer to claim for intentional infliction of emotional distress [\*\*\*40] because threat of or attempt to resort to legal process cannot give rise to cause of action for intentional infliction of emotional distress); *Beecy v. Pucciarelli*, 387 Mass. 589, 441 N.E.2d 1035, 1037, 1040 (Mass. 1982) (holding that claim for intentional infliction of emotional distress involving erroneous commencement and prosecution of collection action should have been dismissed for failure to state a claim because such conduct was not outrageous); *Green v. Leibowitz*, 118 A.D.2d 756, [\*\*32] 500 N.Y.S.2d 146, 148 (App. Div. 1986) (dismissing cause of action for legal malpractice and intentional infliction of emotional distress where "conduct complained of[,] intentional misrepresentations concerning the status and filing of the plaintiff's disability claim, does not rise to a level of 'extreme outrage'").

[\*P64] "To be considered outrageous, 'the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair.'" *Franco*, 2001 UT 25 at P 28 (quoting 86 C.J.S. *Torts* § 70, at 722). Conduct "'is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would [\*\*\*41] give rise to punitive damages, or because it is illegal.'" *Id.* (quoting 86 C.J.S. *Torts* § 70, at 722-23). "The liability [for intentional infliction of emotional distress] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Restatement (Second) of Torts* § 46 cmt. d (1965). Therefore, Bennett has failed to state a claim for intentional infliction of emotional distress based on the facts pled concerning the Jones Waldo defendants' alleged conduct associated with the Utah and California Gen-Probe litigations, because none of that conduct as a matter of law can be "considered outrageous and intolerable in that [it] offends against the generally accepted standards of decency and morality." *Franco*, 2001 UT 25 at P 25.

[\*P65] As to the operative facts pled in relation to the Jones Waldo defendants' conduct in connection with the bar order litigation, Bennett alleges in the fourth amended complaint that as a proximate result of the actions committed against him by [the Jones Waldo defendants], David Bennett has suffered extreme mental and emotional distress and reputational damage arising [\*\*\*42] from (1) being wrongfully issued a contempt citation; (2) anxiety concerning the damage to his personal and professional reputation and career; (3) fear of incarceration at the hands of [the California judge]; (4) fear of the financial consequences of the Bar Order and contempt proceedings; and (5) the financial pressure of being required to pay costs and attorneys [sic] fees of some \$ 225,000 in defending against and appealing the injunction and contempt citation.

This allegation essentially focuses on the initiation of the bar order litigation and the legal process employed to enforce the bar order as the "outrageous" conduct by the Jones Waldo defendants that induced the alleged severe emotional distress in Bennett. The allegation of this conduct is not sufficient to state a claim for intentional infliction of emotional distress.

[\*P66] An allegation of improper filing of a lawsuit or the use of legal process against an individual is not redressable by a cause of action for intentional infliction of emotional distress. *See Cantu*, 6 Cal.Rptr.2d at 169 ("Where . . . a party acts in good faith to pursue its own legal rights, such conduct is privileged, [\*\*\*43] even if emotional distress will result.").

[\*P67] Moreover, even if we were to assume that the Jones Waldo defendants' alleged conduct in connection with the bar order litigation, that is, their statements to the court during the judicial proceeding and the use of the legal process itself, were sufficiently outrageous, Bennett's claim for intentional infliction of emotional distress is barred by the judicial proceeding privilege. \* *See DeBry v. Godbe*, 1999 UT 111, P 25, 992 P.2d 979 (affirming dismissal of claim for intentional infliction of emotional distress because "the judicial proceeding privilege extends not only to defamation claims but to all claims arising from the same statements" (quotation omitted)); *see also Price v. Armour*, 949 P.2d 1251, 1258 (Utah 1997).

8 Even though the trial court did not rely on this reasoning in dismissing the cause of action for intentional infliction of emotional distress, we may affirm the trial court's dismissal on this alternate ground. *See Bailey v. Bayles*, 2002 UT 58, P 10, 52 P.3d 1158.

[\*\*\*44] [\*P68] Finally, with regard to the conduct pled in connection with the bar order litigation and

contempt proceedings, Bennett's claim for intentional infliction of emotional distress was properly dismissed because Bennett alleged that the Jones Waldo defendants' purportedly outrageous conduct [\*\*33] was actually committed not for the purpose of inflicting emotional distress on Bennett but instead to intimidate and deter him from instigating this action in Utah. Bennett alleges in the fourth amended complaint that "in causing [the bar order] to issue, the defendant lawyers were acting for one real purpose only: to take advance action to prevent David Bennett from prosecuting any action for damages for breach of contract, breaches of fiduciary obligation or legal malpractice against themselves and their law firms."

[\*P69] According to Bennett's own pleadings, the Jones Waldo defendants' bar order related conduct was not "intentionally engaged in . . . with the purpose of inflicting emotional distress." *Franco*, 2001 UT 25 at PP 25, 27 (quotations omitted). Therefore, the fourth amended complaint fails to state a cause of action with regard to the conduct associated [\*\*\*45] with the bar order litigation, and the trial court did not err in dismissing this cause of action.

V. DECEIT OR COLLUSION UNDER UTAH CODE ANN. § 78-51-31 [\*P70] Bennett's fourth and final cause of action in the fourth amended complaint purports to state a claim for deceit and collusion under section 78-51-31 of the Utah Code. *Utah Code Ann. § 78-51-31* (1996). Once again, the trial court accepted the Jones Waldo defendants' arguments that Bennett had failed to properly plead a cause of action for deceit and collusion in dismissing this claim. On appeal, the Jones Waldo defendants simply renew their arguments accepted by the trial court below and Bennett maintains that the fourth amended complaint pleads facts sufficient to state a claim under section 78-51-31.

[\*P71] Section 78-51-31 provides:

An attorney and counselor who is guilty of deceit or collusion, or who consents thereto, with intent to deceive a court or judge or a party to an action or proceeding is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action.

This statute was first enacted [\*\*\*46] in Utah in 1898. It has rarely been amended and merely recodified since its enactment over a century ago. The statute appears in the title and chapter of the Utah Code dealing with the regulation of attorneys. In the more than one hundred years section 78-51-31 has been in existence, neither Utah appellate court has been presented with a case requiring its interpretation. The interpretation of this statute and the definition of the elements of a cause of action under the statute is an issue of first impression.

[\*P72] Our interpretation of this section of the Utah Code is posthumous in that this section was repealed effective April 30, 2001. See S.B. 13, 54th Leg., Gen. Sess., 2001 Utah Laws 5-6. Because the conduct alleged in the fourth amended complaint occurred while the statute was still in effect, Bennett may attempt to state a cause of action under the statute because the law as it existed at the time of the events that give rise to a suit governs. See *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, n.3, 54 P.3d 1139 (citing *State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County*, 2002 UT 8, n.2, 44 P.3d 680).

[\*P73] [\*\*\*47] Section 78-51-31 does not create a separate and distinct cause of action, but rather merely provides for recovery of treble damages for a cause of action for the common law tort of deceit in a civil action. <sup>9</sup> See *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 666-67 (Ind. Ct. App. 2002); *Anderson v. Anderson*, 399 N.E.2d 391, 402-03 (Ind. Ct. App. 1979); *Love v. Anderson*, 240 Minn. 312, 61 N.W.2d 419, 422 (Minn. 1953); *Smith v. Chaffee*, 181 Minn. 322, 232 N.W. 515, 517 (Minn. 1930). A [\*\*\*34] plaintiff wishing to rely on section 78-51-31 must adequately plead a cause of action for the common law tort of deceit as the predicate claim to this damage trebling provision. *Accord Anderson*, 399 N.E.2d at 403.

9 Bennett seeks to use section 78-51-31 to treble the damages for every cause of action he pleads in the fourth amended complaint, including the causes of action for breach of contract and legal malpractice. This is incorrect. Section 78-51-31's allowance for the trebling of damages relates only to the underlying cause of action for the common law tort of deceit. If a plaintiff successfully recovers in a civil action under a cause of action for deceit, the damages assessed for that cause of action will be trebled under section 78-51-31. This provision does not permit all damages recovered for all causes of action to be trebled simply because a plaintiff successfully prosecutes a claim for deceit. See *Olson v. Fraase*, 421 N.W.2d 820, 832 (N.D. 1988) (construing similar North Dakota deceit and collusion statute).

[\*\*\*48] [\*P74] To properly state a claim for the tort of deceit, a complaint must plead the following elements of that cause of action:

1. A false representation of fact made by the defendant[.]
2. Knowledge or belief of the defendant that the representation was false (often called scienter).
3. An intention to induce the defendant to act or refrain from acting in reliance.
4. Justifiable reliance by plaintiff upon the representation in taking action or in refraining from it.
5. Damage suffered by plaintiff [as a result].

*Tenneco Oil Co. v. Joiner*, 696 F.2d 768, 773 (10th Cir. 1982) (citing William Prosser, *Law of Torts* 685).

[\*P75] In his fourth amended complaint, Bennett alleges myriad instances of purported deceit, misrepresentation, falsehoods, and lies perpetrated by the Jones Waldo defendants and the Post Kirby defendants in connection with the California Gen-Probe litigation, designed to induce or force an early and, in Bennett's opinion, inadequate class action settlement. Even if we were to assume that these facts are true, the complaint fails to state a claim because Bennett cannot possibly maintain that he justifiably relied upon those [\*\*\*49] alleged misrepresentations to his detriment. According to Bennett's complaint, the Jones Waldo and Post Kirby defendants attempted to induce Bennett to accept a premature and inadequate settlement of the class action. However, by opting out of the class action settlement, that is, by not relying at all on the Jones Waldo and Post Kirby defendants' alleged misrepresentations, Bennett preserved his legal position totally. All of his individual and derivative claims against Gen-Probe and any other defendants in the original Utah and California Gen-Probe litigations were unaffected by the class action settlement because he opted out. In other words, Bennett cannot show that he relied upon the alleged misrepresentations or that he was damaged by defendants' conduct in this case in connection with the California Gen-Probe litigation because his opting out of the class secured his position to bring his legal claims individually at a later time. Because Bennett was left in the same position after opting out of the class action settlement that he was in prior to the initiation of the Utah and California Gen-Probe litigations and defendants' alleged misrepresentations and lies, he cannot show [\*\*\*50] that he was damaged by defendants' alleged misconduct. Therefore, Bennett's fourth amended complaint fails to state a claim with regard to the facts pled in connection with defendants' alleged conduct related to the California Gen-Probe litigation and the class action settlement.

[\*P76] Bennett also alleges that the Jones Waldo and Post Kirby defendants deceived the California federal district court and the Utah district court in prosecuting the bar order litigation and subsequent contempt proceedings before the California federal district court. The fourth amended complaint also fails to state a cause of action in this regard.

[\*P77] Bennett's claim for deceit is also barred by the common law judicial proceeding privilege. See *DeBry v. Godbe*, 1999 UT 111, P 25, 992 P.2d 979; see also *Janklow v. Keller*, 90 S.D. 322, 241 N.W.2d 364, 367, 370 (S.D. 1976) (citing Restatement of Torts § 586, at 229, and holding that where complaint alleged that defendant attorneys had filed a petition and made state-

ments "with intent to injure the plaintiff and falsely mislead the courts" action for deceit was barred by absolute privilege during judicial proceedings). [\*\*\*51] "The judicial proceeding privilege extends not only to defamation claims but to 'all claims arising from the same statements.'" *DeBry*, 1999 UT 111 at P 25 (quoting *Price v. Armour*, 949 P.2d 1251, 1258 (Utah 1997)). "The whole purpose of the judicial privilege is to ensure free and open expression by all participants in judicial proceedings by alleviating any and all fear that participation will subject them to the risk of subsequent legal actions." *Price*, 949 P.2d at 1258.

[\*P78] For this reason, the trial court did not err in dismissing the fourth amended complaint's cause of action for deceit and [\*\*35] collusion based upon the facts pled in connection with the bar order litigation.<sup>10</sup>

10 Even though the trial court did not rely on this reasoning in dismissing the cause of action for deceit and collusion, we may affirm the trial court's dismissal on this alternate ground. See *Bailey v. Bayles*, 2002 UT 58, P 10, 52 P.3d 1158.

[\*P79] Therefore, [\*\*\*52] the trial court did not err when it dismissed for failure to state a claim Bennett's fourth cause of action for deceit and collusion under *section 78-51-31 of the Utah Code*.

## VI. PERSONAL JURISDICTION

[\*P80] Because we have concluded that the trial court did not err in dismissing Bennett's fourth amended complaint in its entirety for failure to state a claim for which relief may be granted against the Jones Waldo defendants, we need not delve into the question of personal jurisdiction related to the Post Kirby defendants, but instead assume without deciding that Utah may exercise personal jurisdiction over the Post Kirby defendants. Assuming jurisdiction, we affirm the trial court's dismissal of the fourth amended complaint as to the Post Kirby defendants on the alternate, yet identical, grounds upon which we affirm the dismissal of the complaint against the Jones Waldo defendants. The fourth amended complaint does not allege distinct conduct on the part of the Jones Waldo or Post Kirby defendants that would warrant a separate analysis for the two sets of defendants. Therefore, because the fourth amended complaint fails to state a claim against the Jones Waldo defendants, it [\*\*\*53] also fails to state a claim against the Post Kirby defendants.

## CONCLUSION

[\*P81] For the foregoing reasons, the trial court's dismissal of the fourth amended complaint against the

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Jones Waldo defendants and the Post Kirby defendants is affirmed.

**[\*P82]** Chief Justice Durham, Associate Chief Justice Durrant, Judge Greenwood, and Judge Orme concur in Justice Russon's opinion.

**[\*P83]** Having disqualified himself, Justice Wilkins does not participate herein, and Justice Howe did not participate herein; Court of Appeals Judges Pamela T. Greenwood and Gregory K. Orme sat.





Caution  
As of: Oct 01, 2012

**GERALD CARLSON and Precision Automotive, Inc., a Montana corporation,  
Plaintiff and Appellant, v. DOUGLAS K. MORTON, Defendant and Respondent**

No. 87-128

Supreme Court of Montana

*229 Mont. 234; 745 P.2d 1133; 1987 Mont. LEXIS 1062; 44 Mont. St. Rep. 1929*

October 6, 1987, Submitted  
November 24, 1987, Decided

**PRIOR HISTORY:** . [\*\*\*1] Appeal from the District Court of Flathead County. Eleventh Judicial District. Hon. Michael Keedy, Judge Presiding.

**DISPOSITION:** Affirmed.

**COUNSEL:** Richard DeJana argued, Kalispell, for plaintiff and appellant.

Warden, Christiansen, Johnson & Berg, Stephen Berg argued, Kalispell, for defendant and respondent.

**JUDGES:** Mr. Justice Harrison delivered the Opinion of the Court. Mr. Chief Justice Turnage and Mr. Justices Gulbrandson, Sheehy, Weber, Hunt and McDonough concur.

**OPINION BY:** HARRISON

#### OPINION

[\*234] [\*\*1134] Plaintiff appeals an order of the District Court of the Eleventh Judicial District granting a directed verdict to defendant Morton. The plaintiff had sued Morton alleging that he had been negligent in handling certain legal matters for the plaintiff and had misrepresented his interests. The attorney for the plaintiff notified the court and the defendant when the matter came on for trial January 19, 1987 that he would not be calling an expert witness, as he had stated at pretrial con-

ference. Plaintiff's attorney then made his opening [\*235] statement, at the end of which, the defendant made a motion to dismiss the case for failure to provide expert testimony. Both [\*\*\*2] sides briefed the question to the court. The court then heard arguments and entered an order under Rule 50, M.R.Civ.P., dismissing the case.

We affirm.

Morton was a loan officer and vice president of First Security Bank in Kalispell, Montana when he met Carlson in 1977. Morton, a law school graduate, has been admitted to the practice of law in Montana and did practice for several years before he returned to banking in the mid-1970s. He continued to moonlight practicing law after he joined the bank. He and Carlson built a friendship around their mutual interest in old cars. Morton had the opportunity to do some legal work concerning Carlson's property settlement and custody agreement when Carlson's marriage dissolved.

In 1981, Carlson purchased a business on which the Small Business Administration and the Bank of Columbia Falls were foreclosing. To aid in this purchase, Carlson asked Morton to incorporate the newly acquired business in the name of Precision Automotive, Inc. On December 18, 1981, the Secretary of State approved the proposed articles of incorporation and issued a certificate of incorporation. Carlson contends, however, that Morton failed to effectively complete [\*\*\*3] the corporation since he failed to file bylaws or organizational minutes for some fifteen months.

Carlson, though, operated the business as if it had been incorporated. He hired a man by the name of Jack Manning to work at Precision Automotive. Manning brought with him a pinpress that he said Carlson could use in his business. The pinpress served as security for some car repairs that Manning had not been able to pay for. On July 1, 1982, Manning approached Morton at First Security Bank about the possibility of obtaining a \$ 2,000 loan. He was told that since he had not worked for a full year in the Flathead Valley, the bank would require a guaranty. Manning suggested that his employer Carlson could serve as a guarantor. It is not clear what happened at this point. But taking into consideration the allegations most favorable to the appellant, it appears that Carlson told Morton he was reluctant to sign a guaranty. Nevertheless, the loan was made, Carlson was named as guarantor but had not signed the note, Manning got his \$ 2,000 after pledging the pinpress as security, and Manning then left the area. On July 25, 1982, after it was apparent that Manning had no intention of [\*\*\*4] repaying the loan, Morton [\*236] presented the written guaranty to Carlson for his signature as guarantor. There was some discussion as to whether Carlson should sign the guaranty. Morton encouraged him to sign and so [\*\*1135] Carlson did sign the guaranty. The guaranty note at some point was backdated to the date of the loan. Carlson had told Morton he feared that others might have an interest in the pinpress. Carlson told Morton he was thinking of removing the serial number to retard any prior lien holder's right to the pinpress. Carlson alleges that Morton encouraged him to do that. Carlson subsequently removed the serial number.

Morton completed the incorporation of Precision Automotive in March 1983 when he finished the bylaws and organizational minutes. In April 1983, the bank sued Carlson for possession of the pinpress. In an affidavit in support of the bank's claim, Morton indicated that the serial number had been removed. The District Court upheld the bank's claim to the pinpress. Carlson's business at Precision Automotive was seriously affected by the loss of the pinpress and within several months, Precision Automotive was forced out of business. Carlson [\*\*\*5] and Precision Automotive filed a cause of action on May 20, 1983 naming Morton as defendant. The complaint, as amended on October 26, 1983, alleged that Morton had violated Disciplinary Rules, 1-102(A)(4), 5-101(A), 5-104, 5-105, 5-107, 6-101 and 7-102 of the Code of Professional Responsibility. Carlson claims that the violation of these Disciplinary Rules was implied malice and as such constituted negligence on the part of the attorney.

The District Court ruled that such charges require expert testimony to delineate the degree of care expected of an attorney handling a client's affairs. The court ruled

that since reasonable minds could properly differ over the plaintiff's contentions, it would be unfair to lay jurors to force them to figure out the responsibility of an attorney in this matter without the aid of an expert witness. On appeal, Carlson urges that the Code of Professional Responsibility's Disciplinary Rules state a minimum standard of care, that, when breached, establishes malpractice. He argues that these Disciplinary Rules state the attorney's duty so succinctly that an expert witness is not required to demonstrate that Morton's actions were improper and negligent. [\*\*\*6] The question of whether expert testimony is required in a legal malpractice case is one of first impression in Montana.

The Canons of Professional Ethics and their accompanying Disciplinary Rules were adopted by this Court in 1973 (see 160 Mont. xxiii) to assure the utmost integrity in the legal profession and the [\*237] impartial administration of justice. *State ex rel. Coburn v. Bennett (1982)*, 202 Mont. 20, 32, 655 P.2d 502, 508. In 1985, this Court replaced the Canons with the Rules of Professional Conduct, Montana Supreme Court Order No. 84-303, dated June 6, 1985, but the intent of governing the conduct of attorneys remained. Carlson claims Morton engaged in fraudulent or dishonest misrepresentations in violation of DR 1-102(A)(4); used a confidence of the client to his disadvantage as prohibited by DR 4-101(B); undertook employment when his interests impaired his professional judgment as prohibited in DR 5-101; did not refuse employment even though it might possibly be adverse to his interest as a bank officer as proscribed by DR 5-104 and DR 5-105, and neglected a matter entrusted to him, in violation of DR 6-101. These disciplinary rules have counterparts in [\*\*\*7] the Model Rules of Professional Conduct adopted in 1985, which while differing in language and construction, establish the bounds of ethical conduct by lawyers and are employed for disciplinary purposes.

At issue is whether the applicable ethical rules create a duty in and of themselves so that a jury may determine a breach of a legal duty merely by determining whether the attorney abided by the rules. If the answer to that inquiry is negative, then an expert witness must testify so as to acquaint the jurors with the attorney's duty of care. It is fundamental that any attorney is required to use reasonable care or skill in handling his client's affairs. *Clinton v. Miller (1951)*, 124 Mont. 463, 483-84, 226 P.2d 487, 498. The failure to employ such skill may result in the attorney's liability for damages to his client. *Clinton*, 226 P.2d at 498. The Canons of Professional Ethics and the later Model Rules of Professional Conduct have been used exclusively [\*\*1136] in disciplinary proceedings in Montana. J. Faure and R.K. Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 Mont.L.Rev. 363, 369 (1986). When plaintiffs have

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based claims for [\*\*\*8] negligent practices of law on attorneys' duties to abide by ethical codes, courts have dismissed such cases. In *Bickel v. Mackie* (N.D. Iowa 1978), 447 F.Supp. 1376, *aff'd* (8th Cir. 1983), 590 F.2d 341, the trial court ruled that violation of the Code of Professional Ethics is not necessarily a tortious act and does not create a private cause of action. *Bickel*, 447 F.Supp. at 1383. Similarly, in *Bob Godfrey Pontiac, Inc. v. Roloff* (Or. 1981), 630 P.2d 840, a used car dealer sued two attorneys who had failed in a lawsuit against the car dealer. The car dealer alleged that the two attorneys had misled the court with false statements of fact, which he claimed [\*\*\*238] was in direct violation of the Code of Professional Conduct. However, the court ruled that a violation of the Code of Professional Conduct does not give rise to a private cause of action. *Roloff*, 630 P.2d at 849.

Such reasoning is supported by the Preamble to the Model Rules of Professional Conduct as promulgated by the American Bar Association. That preamble states in part:

"Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty [\*\*\*9] has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek an enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

It is true that this Court's order of June 6, 1985, which adopted the Model Rules of Professional Conduct, adopted expressly only the Rules; it did not mention the Preamble. It also is true that the matters complained of here occurred before we adopted the Model Rules of Professional Conduct. Nevertheless, this portion of the Preamble aptly states the thinking and rationale of those who developed a complicated scheme [\*\*\*10] by which to judge the conduct of attorneys in various and disparate matters, often at times where one ethical rule seems to contradict another.

In any professional negligence action, the plaintiff must prove that the professional owed him a duty, that the professional failed to live up to that duty, thus causing damages to the plaintiff. Negligence cannot be in-

ferred from the simple fact that a loss occurred. *Montana Deaconess Hospital v. Gratton* (1976), 169 Mont. 185, 191, 545 P.2d 670, 673, *Scott v. Robson* (1979), 182 Mont. 528, 537-38, 597 P.2d 1150, 1155, citing *Thompson v. Llewellyn* (1959), 136 Mont. 167, 169, 346 P.2d 561, 562. The field of legal malpractice is relatively unexplored, however, it is undisputed in Montana law that one charging medical malpractice must be able to support his claim that the physician departed from the prevalent standard of medical [\*\*\*239] care. *Montana Deaconess Hospital*, 545 P.2d at 672-73; *Collins v. Itoh* (1972), 160 Mont. 461, 469, 503 P.2d 36, 41. Without either expert testimony identifying the doctor's care as negligent or the defendant-doctor's own testimony clearly establishing his own conduct as negligent, the [\*\*\*11] defendant-doctor is entitled to summary judgment. Where plaintiffs failed to present expert testimony and the defendant-doctor did not identify his care as negligent, the District Court rightfully granted summary judgment since a jury of laypersons cannot determine for itself what caused an infection. *Montana Deaconess Hospital*, 545 P.2d at 673. The requirement that an expert witness is needed to establish the standard of care has been extended to dentists and orthodontists, *Llera v. Wisner* (1976), 171 Mont. 254, 262, 557 P.2d 805, 810; to manufacturers and distributors of pharmaceuticals, *Hill v. Squibb and Sons* (1979), 181 Mont. 199, 207, [\*\*\*1137] 592 P.2d 1383, 1388, to abstractors of title, *Doble v. Lincoln County Title Co.* (Mont. 1985), [215 Mont. 1,] 692 P.2d 1267, 1270, 42 St.Rep. 128, 131.

Professors Prosser and Keeton may have best summarized the rationale behind this rule:

"Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability. Most of the decided cases have dealt with surgeons [\*\*\*12] and other doctors, but the same is undoubtedly true of dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades.

". . .

"Since juries composed of laymen are normally incompetent to pass judgment on [such] questions . . . it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it . . . Where the matter is regarded as within the common knowledge of laymen, as where the surgeon saws off the wrong leg . . . it is often held that the jury may infer negligence without the aid of any expert."

229 Mont. 234, \*; 745 P.2d 1133, \*\*;  
1987 Mont. LEXIS 1062, \*\*\*; 44 Mont. St. Rep. 1929

Prosser and Keeton on *The Law of Torts*, Section 32, 5th Edition, (1984).

Carlson's argument throughout has been that expert testimony was not required because lay jurors could examine the conduct of Morton and determine that it violated the Canons of Professional Ethics. And if the jurors had any doubts, they would be referred to the [\*240] various Disciplinary Rules, which summarize the lawyer's obligations. Such contentions are lacking. First, we note that Carlson initially intended [\*\*\*13] to introduce expert testimony from a Missoula attorney. Second, Rule 702 of the Montana Rules of Evidence specifically authorizes the use of expert witnesses "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . ." Third, the evidence concerning the alleged improprieties involved in this case, while seemingly straightforward, might very easily confuse and befuddle lay jurors unacquainted with general notions of civil procedure, incorporation, and professional legal responsibility. To expect a jury to sit through hours of examination and cross-examination, without the guidance of an attorney's expert testimony and then arrive at a verdict consistent with the evidence is asking much. This is not because the average juror is not capable of understanding such matters but only because he or she has never had the occasion or desire to study such matters. The attorney's standard of care depends upon the skill and care ordinarily exercised by attorneys, a criteria that rarely falls within the common knowledge of laymen. While proof of the violation of some disciplinary rules may by itself establish negligence, such is [\*\*\*14] not the case with the rules cited by Carlson. Carlson must prove not that various disciplinary rules were breached in his opinion; rather he must demonstrate that Morton failed in his legal duty. Proof of such a breach requires expert testimony. *ABC Trans Nat'l Transp., Inc. v. Aeronautic Forwarders, Inc.* (1980), 90 Ill. App.3d 817, 46 Ill. Dec. 186, 197-98, 413 N.E.2d 1299, 1310-11; *Lenius v. King* (S.D. 1980), 294 N.W.2d 912, 914; *Hughes v. Malone* (1978), 146 Ga. App. 341, 247 S.E.2d 107, 111; Faure and Strong, *The*

*Model Rules of Professional Conduct: No Standard for Malpractice*, 47 Mont.L.Rev. at 376 (1986).

It is true that there are instances in which legal malpractice actions have been submitted for fact determination without the use of expert testimony. The theory in such cases is that the attorney's misconduct is so obvious that no reasonable juror could not comprehend the lawyer's breach of duty. These include the failure of a criminal defendant's attorney to appear in court on his client's behalf, *Bowman v. Doherty* (1984), 235 Kan. 870, 686 P.2d 112, 120; the lawyer's failure to file suit within the appropriate statute of limitations; *George v. Caton* [\*\*\*15] (Ct.App. 1979), 93 N.M. 370, 600 P.2d 822, 829; *Collins v. Greenstein* (1979), 61 Hawaii 26, 595 P.2d 275, 283; failure of the attorney to retain a first mortgage for seller on property [\*241] being conveyed [\*\*1138] despite seller's clear demand for a first mortgage; *Olfe v. Gordon* (1980), 93 Wis.2d 173, 286 N.W.2d 573, 576; attorney's interjection of client's claims as a permissive counterclaim in state court despite client's clear demand to file it as a separate claim in federal court is a question of material fact that may or may not require expert testimony, *Nemec v. Deering* (S.D. 1984), 350 N.W.2d 53, 56; the attorney's failure to insulate one client from the debts of another client, *Hill v. Okay Const.* (1977), 312 Minn. 324, 252 N.W.2d 107, 116; and the attorney's failure to notify a client he was resigning from the case thus resulting in a default judgment, *Central Cab. Co. v. Clarke* (1970), 259 Md. 542, 270 A.2d 662, 667.

We are aware of the above cases but will apply a rule similar to that for medical malpractice, where expert testimony is required, and so hold that this suit fails for the lack of expert testimony.

The District Court's order [\*\*\*16] granting a directed verdict to defendant Morton is affirmed.

MR. CHIEF JUSTICE TURNAGE and MR. JUSTICES GULBRANDSON, SHEEHY, WEBER, HUNT and McDONOUGH concur.





Caution

As of: Oct 01, 2012

VINCENT J. FLORO, Appellant, v. ROBERT P. LAWTON et al., Respondents

Civ. No. 24726

Court of Appeal of California, Second Appellate District, Division One

*187 Cal. App. 2d 657; 10 Cal. Rptr. 98; 1960 Cal. App. LEXIS 1441*

December 23, 1960

**SUBSEQUENT HISTORY:** [\*\*\*1] A Petition for a Rehearing was Denied January 13, 1961, and Appellant's Petition for a Hearing by the Supreme Court was Denied February 15, 1961.

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Los Angeles County. Julius V. Patrosso, Judge.

Action against attorneys for malpractice.

**DISPOSITION:** Affirmed. Judgment of nonsuit affirmed.

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

**(1a) (1b) (1c) Attorneys--Liability--Negligence -- Evidence.** --In an action against an attorney for his alleged negligence in handling plaintiff's prior action for false arrest or false imprisonment, it appeared that the attorney's doubts as to whether plaintiff had actually been unlawfully arrested and imprisoned and whether the attorney should urge the cause of that particular count at the trial were well-founded where the person accusing plaintiff, although she did sign a police form entitled "Citizen's Statement" and purporting to be a citizen's arrest of plaintiff, was not present at the arrest or at the police station after the arrest, made no statement to plain-

tiff about his being under arrest, and did not participate in any way in the arrest except indirectly by reason of her signing the "Citizen's Statement."

**(2) False Imprisonment--Definition.** --False imprisonment is interference with another's personal liberty in a way that is absolutely unlawful and without authority.

**(3) Malicious Prosecution--Definition.** --Malicious prosecution is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause.

**(4) False Imprisonment--Distinguished From Malicious Prosecution.** --The provocation, motive and good faith of defendant in an action for false imprisonment constitute no material element and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages, whereas malice and want of probable cause are the gist of the action for malicious prosecution, and without allegation of both, the action will fail.

**(5) Id.--Distinguished From Malicious Prosecution.** --No one can recover damages for a legal arrest and conviction; therefore, in malicious prosecution cases it becomes necessary to await final determination of the action; but the same principle does not apply to a false imprisonment action, since the form of the action is based on an illegal arrest and no matter *ex post facto* can legalize an act that was illegal at the time it was done.

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**(6) Arrest--Proceedings After Arrest.** --Where an arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay.

**(7) False Imprisonment--Imprisonment.** -- Imprisonment pursuant to a lawful arrest is not tortious.

**(8) Id. -- Persons Liable -- Persons Assisting Officer.** -- A private citizen who assists in the making of an arrest pursuant to the request or persuasion of a police officer is not liable for false imprisonment.

**(9) Attorneys--Liability -- Negligence -- Evidence.** -- In an action against attorneys for their alleged negligence in handling plaintiff's prior action for false imprisonment, a finding that defendant wife in the prior action was financially unable to respond to a money judgment was supported by evidence that a homestead was on the house she and her husband lived in and practically everything she had was heavily encumbered and by the fact that plaintiff did not produce any evidence as to her income, as to any clear assets or as to the value of any equity.

**(10) Id.--Liability.** --In an action for negligence allegedly arising in the trial of a prior action, against two attorneys, one of whom was substituted for the original attorney to try the prior case when the original attorney found he would be unable to do so because of a conflict in his calendar, if the substituted attorney who tried the case was liable, then the original attorney was also liable, since the client in the prior case, plaintiff in the action against the attorneys, consented to the substitution and the attorneys were to divide the fee, if and when it was collected, and each was responsible to the client.

**(11) Id.--Liability--Negligence--Evidence.** --In an action against two attorneys for negligence in the conduct of a lawsuit, it was not error to refuse to receive into evidence a letter written by the judge in the prior action to one of the attorneys wherein he set forth his views of the case after trial thereof and the attorney's answer thereto as evidence that the attorney had abandoned the third cause of action at the prior trial, since, even assuming that the prior judge's ruling that such cause of action had been abandoned was not proper and assuming that the letters had been received in evidence, the result would have been the same, because the judge had indicated that he was ruling in favor of the attorney's client on one matter and against him on the others and the attorney was being realistic in not engaging in a letter writing contest

with the judge but instead yielding to the judge's opinion in the cause.

**(12) False Imprisonment -- Proceedings to Enforce Liability -- Abandonment.** --A cause of action for false arrest and imprisonment was not abandoned where the trial judge, by his questions and rulings, gave every indication that he did not at that time consider the cause of action abandoned and defendants' attorney did not conduct himself as if the cause had been abandoned, and the fact that the judge later may have erroneously analyzed the evidence and concluded that the cause had been abandoned did not give plaintiff the right to complain, in a subsequent malpractice action against his attorneys, that he did not get enough money in the first place, since he did not appeal from the judgment rendered, but instead went to other attorneys, collected his judgment, and gave a full satisfaction therefor without compensating the attorneys who tried the action.

**(13) Attorneys--Liability--Negligence.** --In a malpractice action against two attorneys, it made little difference whether plaintiff sued on the contract between the parties or on the theory of negligence, since, under the contract involved, the attorneys simply impliedly contracted to exercise a degree of care, skill and knowledge that would in effect be required by the negligence standard.

**(14) Id.--Liability--Negligence.** --What constitutes negligence on the part of a lawyer in his practice has never been spelled out with any degree of accuracy or certainty and no formula has been devised that will determine just when a lawyer, after losing a case, may not be chargeable with negligence or malpractice.

**(15) Id.--Liability--Negligence--Questions of Law and Fact.** --In an action against attorneys for alleged negligence in the conduct of a lawsuit, it made no difference whether the question of negligence was one of law or of fact, since, if a question of law, the court properly disposed of the matter, if of fact and expert testimony was required, plaintiff produced no such testimony, and if of fact and expert testimony was not required, plaintiff failed in several essential respects to establish his claim.

**COUNSEL:** Lawrence J. Yanover for Appellant.

George W. Rochester, in pro. per., Crider, Tilson & Ruppe and Henry E. Kappler for Respondents.

**JUDGES:** Fourt, J. Wood, P. J., and Lillie, J., concurred.

**OPINION BY:** FOURT

## OPINION

[\*660] [\*\*99] This is an appeal from a "judgment of nonsuit" in favor of defendants in a malpractice action.

A resume of some of the facts is as follows:

Mr. and Mrs. Floro and Mr. and Mrs. Burke lived approximately across the street from each other in Whittier. Mrs. Burke claimed that Mr. Floro had attempted to molest her on Saturday afternoon, August 6, 1955. On the next day, Sunday, at about 7 p. m., the Burkes, after talking with the Floros (at which time alleged slanderous remarks allegedly were made), went to the police station and there apparently Mrs. Burke related what had occurred and she wrote out and signed a [\*\*100] [\*\*\*2] statement which set forth what had taken place in the episode of Saturday afternoon and also signed another statement which the police presented to her for signature. The latter statement was entitled "Citizen's Statement on Arrest By Citizen." It is a letter-size, capital-lettered, printed form with blank spaces provided therein to be filled in by the police. The latter statement set forth that a felony had been committed in the presence of Mrs. Burke, namely: "836-3220 PC (Attempted Rape) 242 PC (Battery)" and further set forth: "And I Hereby Make a Citizen's Arrest of (Him) (Her) for the Above Described Offense and I Hereby Direct the [\*661] Whittier Police Department to Assist Me in Taking (Him) (Her) into Custody Pursuant to My Arrest of (Him) (Her). I Will Appear at the Whittier Municipal Court on 8-7 --, 1955, at 9:00A.M. and Will at That Time Sign a (Misdemeanor) (Felony) Complaint Against

Vincent Floro for the Above Described Offense.

(Name of Suspect)

"/s/ Mrs. Helen C. Burke

(Complainant)

"or 95202

"Date Aug. 7., 1955

"Time 7:20P. M."

It is noted that Mrs. Burke was caused to promise to be in the Municipal Court at 9 a. m. [\*\*\*3] of that same day, namely Sunday, when according to the statement itself it was at the time of signing thereof 7:20 p. m. Sunday.

After Mrs. Burke signed the statements, the police, apparently in uniform, went to Floro's house at about 9 p. m. on Sunday, August 7, 1955, and placed Mr. Floro under arrest. Mr. Floro himself testified that the police came to his house and said, "You are under arrest" and told him of the code sections which were involved.

There is nothing in the record to the effect that the police told Mr. Floro that they were acting for Mrs. Burke or for anyone other than themselves in the course of their duty. Neither of the Burkes was present at the arrest nor was either of them at the jail and talked with or said anything to Floro with reference to any arrest or otherwise. Mrs. Burke testified that she had not asked the police to arrest Mr. Floro but that she had related to them what had occurred and that she wanted protection from him. Mr. Floro was taken to the jail by the police where he talked to his lawyer, Robert P. Lawton. Mr. Floro was released the next morning, that is, Monday, on a writ of habeas corpus. The petition for the writ recites that Vincent [\*\*\*4] John Floro was being "held on suspicion of 220 P.C. and 242 P.C." and that no bail had been set. The judge set bail which Mr. Floro furnished, ordered him released upon the bail and set the writ for hearing on Thursday, August 11, 1955. Mrs. Burke talked with a deputy district attorney and the police on Monday morning, August 8, 1955, and it was there and then determined that a complaint would not be filed, although the prosecutor indicated that in his opinion a conviction could be secured. Mrs. Burke apparently was not desirous of prosecuting Mr. Floro [\*662] but did want him to leave her alone and wanted protection from his activities.

Mr. Floro was in the office of his attorney, Robert P. Lawton, later on Monday, August 8, 1955, and at that time executed a contract entitled "Retainer" with Lawton. That agreement provides in part as follows:

"Retainer

"The Undersigned, hereinafter called the client, hereby Retain Robert P. Lawton Attorney-at-Law, hereinafter called the attorney to:

defend the undersigned & litigate

matters agst [sic] Mr & Mrs Bob Burke

and agrees that the attorney is empowered to perform the said services for and on behalf of the [\*\*\*5] client, and in his name, and to do all things necessary, appropriate or advisable, or which the attorney may deem necessary, appropriate or advisable, thereto whether by instituting and maintaining to completion an action or actions or other legal proceedings, or otherwise, either before or after Judgment, or Judgments.

[\*\*101] "As compensation for the services of the attorney, the client will pay the sum of 275.00 Dollars in cash and the further sum of -- Dollars payable -- and in addition thereto 33 1/3 per cent of any money or property paid, received or collected, by action, compromise or otherwise, upon or in satisfaction of any claim, or recovery made, incident to, or as a result of, the said services.

". . . .

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"Both the attorney and client will use their best efforts in furthering the purposes of this retainer and in obtaining the necessary evidence and attendance of witnesses."

It is noted that the agreement does not provide for the bringing of any particular type or character of action. Apparently, whatever was to be done was left largely to the discretion of Lawton.

An action, which will sometimes hereinafter be referred to as the previous action, [\*\*\*6] was instituted in the Superior Court in Los Angeles County by Vincent J. Floro, hereinafter referred to as Floro, against Robert M. Burke, hereinafter referred to as Burke, and Helen Burke, his wife. In Count I of that complaint, which was prepared and filed by Robert P. Lawton, hereinafter referred to as Lawton, on August 31, 1955, the plaintiff alleged that Burke had slandered him by saying [\*663] to Mrs. Floro, in the presence of others, in effect that Floro had "attempted to rape" Mrs. Burke and that as a result of such accusation Floro had been damaged. In Count II against Burke, Floro alleged that Burke had slandered him by saying substantially the same thing as alleged in Count I. In Count III which was against Burke and Mrs. Burke, Floro charged that defendants caused his arrest upon false and malicious charges of assault; that plaintiff was, at the instigation of defendants, taken into custody by police officers and forced to stay in jail overnight; that plaintiff was released on a writ of habeas corpus on a bond of \$ 2,000; that said complaint was withdrawn and dismissed and plaintiff was discharged and further prosecution of plaintiff was abandoned; that the arrest [\*\*\*7] and imprisonment were malicious to plaintiff's great damage. In Count IV against Burke and Mrs. Burke, plaintiff, by reference, adopted in most part the allegations contained in the third count and further charged that the prosecution of plaintiff was instituted maliciously and without cause and that plaintiff was damaged thereby. The plaintiff asked for \$ 100,000 from Burke and \$ 50,000 from Mrs. Burke.

An answer was filed by the Burkes and the case was set for trial for January 10, 1957. A short time before the trial date Lawton ascertained that he would not be able to present the evidence at the trial because of a conflict in his calendar and he talked with George W. Rochester, an attorney, about doing the trial work. In effect the two attorneys agreed to divide the fee or returns from the case half and half. The procedure and the situation was explained to Floro and he consented that Rochester should try the case. A substitution of attorneys was executed and filed showing Rochester and Lawton to be substituted for Lawton as the attorneys for Floro in the case.

In preparation for the trial Rochester and Floro talked over the facts of the case and Rochester stated that he [\*\*\*8] was not at all certain about being able to prove the false arrest, but that he would try. In this connection Floro testified that he (Floro) said at that time, ". . . fine . . . I leave it up to you." Nothing further was said about the matter until about the time of trial. At the counsel table, just before the trial commenced Rochester attempted to explain to Floro the difficulty in proving the false arrest or false imprisonment and according to Rochester, Floro said, "You are the lawyer. I trust in you. If that is what you think, why you do as you please." According to Floro, he (Floro) said (with reference to Rochester's [\*664] statement that he was not sure he could prove false arrest, but that he would try), "Fine. I leave it up to you."

[\*\*102] It is undisputed that Rochester caused to be put into evidence everything which was available by way of proof with reference to the entire matter and that no evidence which Floro wanted admitted was rejected. In other words, all of the facts with reference to the entire matter were before the judge.

Rochester was asked by the Judge, Wilbur C. Curtis (who died after the trial and before the start of the malpractice trial), [\*\*\*9] if he cared to make an opening statement prior to the taking of any evidence. Rochester said:

"Mr. Rochester: I don't think there is any necessity to -- the complaint states the cause of action and the facts. The two that we are pressing are the malicious prosecution and the slander. The allegation of false arrest -- as your Honor knows, I came in on this case rather late. I just got substituted in on the matter. As I read it, I think that the false arrest, if any, merges with the malicious prosecution, so we will introduce testimony to support the two causes of action, namely, slander and malicious prosecution."

The cause, after two days of trial, was argued and submitted on January 11, 1957. On January 24, 1957 the judge wrote a letter, a copy of which was sent to each of the attorneys for the respective parties wherein the judge set forth that judgment would be against Robert M. Burke, only, in the sum of \$ 1,000 and further:

". . .

"Counsel for the plaintiff is directed to prepare findings and judgment in conformity with the following, which is offered as the basis for the judgment as rendered.

"It will be remembered that counsel for the plaintiff at the commencement [\*\*\*10] of the trial announced that no evidence would be offered in support of Count

Three (false arrest), which therefore must be deemed abandoned, and the findings should so show.

" . . . .

"Count Four, charging malicious prosecution, affords no basis for recovery, for the reason that no *judicial process* was instituted. The evidence showed nothing more than a citizen's arrest made with the assistance of police officers.

"The only judicial proceeding involved was the petition for habeas corpus, initiated by the plaintiff himself, upon the ground that he was falsely imprisoned without judicial process, [\*665] resulting in his discharge upon the ground that no prosecution had been instituted.

"The necessity for the institution of judicial proceedings as the basis for a charge of malicious prosecution may be found in all of the authorities upon the subject. Reference is particularly made to the case of *Hayashida v. Kakimoto*, 132 Cal.App. 743 [23 P.2d 311]; see also 32 Cal.Jur.2d page 87."

Rochester answered the letter of the judge on January 30, 1957, and pointed out in effect that the judge was in error in part with reference to the malicious prosecution count and cited [\*\*\*11] authority therefor. He did, however, in a very practical and realistic fashion include with the letter, findings of fact and conclusions of law and a form of judgment in keeping with the directions of the judge. The findings were signed and the judgment was filed on February 6, 1957. In the findings it was set forth that ". . . no evidence was presented in support of said cause of action, counsel for plaintiff having announced at the commencement of the trial that no evidence would be offered in support of the third cause of action and by reason thereof, said cause of action is found to have been abandoned."

Finding No. VI reads as follows:

"VI

"The Court finds that in regard to the fourth cause of action against defendants, Robert M. Burke and Helen Burke, and each of them, that from the evidence, as a matter of law, there was no judicial process instituted upon [\*\*103] which a cause of action for malicious prosecution could be sustained."

After the judgment was entered there were talks between Lawton, Rochester and Floro with reference to appealing from the judgment. An offer of \$ 750 was made by Burke to settle the judgment. There was substantial evidence to the effect [\*\*\*12] that Burke was judgment proof; that all of his property was heavily encumbered and that the house he lived in was homesteaded. The attorneys indicated to Floro that the cost of an appeal would be disproportionate to what might be

expected from the results of the appeal, even if they were successful in the appeal. No appeal was taken and Floro did receive the full amount of the judgment and executed a satisfaction thereof. Floro did not pay the attorneys, Lawton or Rochester, their agreed-upon amount as provided in the written contract. Indeed, the file would seem to show that the satisfaction of the judgment was arranged for and completed by other attorneys hired by Floro without Lawton or Rochester knowing [\*666] about it until considerable time had elapsed after the satisfaction of judgment was filed in the records.

The complaint in malpractice filed December 24, 1957, by Floro against Lawton and Rochester is in three counts. The first count is against each of the attorneys and therein it is set forth that Mrs. Burke arrested Floro and caused the police to arrest him without a warrant upon a charge in writing that Floro had committed a felony; that he (Floro) was put in [\*\*\*13] jail for 13 hours; that Mrs. Burke acted unlawfully; that he suffered damages from the false arrest and imprisonment; that on August 8, 1955, he entered into a written contract with Lawton whereby he hired Lawton to prosecute and conduct an action against the Burkes for false imprisonment, slander, malicious prosecution; that Lawton undertook the employment and agreed to perform the same in a skillful manner as his attorney; that Lawton substituted Rochester with him as his attorney; that *each of said attorneys negligently failed to offer any evidence in support of the false imprisonment action* and the judge found that said cause had been abandoned; that Mrs. Burke was able to respond in damages and that he was damaged thereby in the sum of \$ 50,000. The second cause of action is against the two defendants and adopts the first five paragraphs of the first cause of action. Floro further alleged that he performed his promises of said contract; that he exercised diligence; that Mrs. Burke could have responded in damages amounting to \$ 50,000; that each of the defendants-attorneys *failed to perform the contract in that they failed to offer evidence* in support of the cause of [\*\*\*14] action for false imprisonment and that he was damaged in the amount of \$ 50,000 thereby. In the third cause of action Floro adopts the first five paragraphs of the first cause of action and paragraphs II and III of the second cause of action and then alleges that on August 8, 1955, he entered into an oral contract with Lawton to perform the exact thing which he sets forth was agreed upon in the written contract of the same date. It is not stated whether the oral contract was entered into before or after the written contract was signed.

The defendants answered and, among other things, attached as an exhibit to their answer a copy of the retainer contract which had been executed by Lawton and Floro and denied in effect that there was any agreement to file any certain action as alleged by Floro and denied

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1960 Cal. App. LEXIS 1441, \*\*\*

any negligence and denied that there was any oral contract. It is interesting to note that on at least two occasions in the early stages of [\*667] this case Floro swore under oath that he had not signed the contract which bore his signature and that the document was false and spurious and not a copy of the contract which he had made and entered into. Later, however, he apparently [\*\*\*15] became convinced that it was the contract which he had executed.

In his brief Floro states that his theory is that but for the abandonment of the cause of action for false imprisonment [\*\*104] by defendants he would have recovered a judgment against Mrs. Burke, that his action is predicated upon the negligence of defendants and their breach of their agreement to litigate the cause of action for false imprisonment.

Appellant asserts: (1) that he had a cause of action for false imprisonment against Mrs. Burke; (2) that she was financially able to respond to a money judgment; (3) that Lawton is jointly liable with Rochester; (4) that Rochester abandoned his cause of action; (5) that the court erred in sustaining an objection to a certain exhibit; (6) that but for the abandonment he would have been granted a judgment against Mrs. Burke; (7) that both lawyers are liable upon both theories, namely negligence and breach of contract; and (8) that the court erred in granting a nonsuit.

(1a) With reference to appellant's first contention it may be that he may have had in a very technical sense a claim for a false arrest or false imprisonment, but to prove the claim and to collect damages therefor [\*\*\*16] is a very different thing. (2) In *Singleton v. Perry*, 45 Cal.2d 489, 494 [289 P.2d 794] it is said:

"As stated, plaintiff's action is both for false imprisonment and for malicious prosecution. As the court says in *Neves v. Costa* (1907), 5 Cal.App. 111, 117-118 [89 P. 860], "False imprisonment is the unlawful violation of the personal liberty of another" ( *Pen. Code*, § 236), the interference with the personal liberty of the plaintiff in a way which is absolutely unlawful and without authority. (3) Malicious prosecution is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause.

(4) "The provocation, motive and good faith of the defendant in an action for false imprisonment constitute no material element in the case and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the [\*668] action for malicious prosecution. Without allegation and proof of both, the action will fail. [Citation.]

(5) "No one can recover damages for a legal arrest and conviction; therefore, [\*\*\*17] in cases of malicious prosecution it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest and no matter *ex post facto* can legalize an act which was illegal at the time it was done. . . ." (6) See also *Dragna v. White*, 45 Cal.2d 469, 473 [289 P.2d 428] where the court said:

". . . We are satisfied that the better rule is that where the arrest is lawful, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest, although it will subject the offending person to liability for so much of the imprisonment as occurs after the period of necessary or reasonable delay. (See Rest., Torts, § 136, com. d; *Atchison, T. & S.F. Ry. Co. v. Hinsdell*, 76 Kan. 74 [90 P. 800, 13 Ann.Cas. 981, 12 L.R.A. N.S. 94]; *Oxford v. Berry*, 204 Mich. 197 [170 N.W. 83]; *Stromberg v. Hansen*, 177 Minn. 307 [225 N.W. 148]; *Teel v. May Department Stores Co.*, 348 Mo. 696 [155 S.W.2d 74, 137 A.L.R. 495]; *Brown v. Meier & Frank Co.*, 160 Ore. 608 [86 P.2d 79]; see [\*\*\*18] also Bohlen and Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 Colum. L. Rev. (1928) 841, 849, 852, 858.)"

(1b) In this case it must be remembered that Mrs. Burke was not present at the arrest or at the police station after the arrest; she made no statement to Floro about his being under arrest or anything of that nature. She did not participate in anywise in the arrest unless by the Citizen's Statement she may indirectly be brought into the matter. [\*\*105] She did sign the form of the police department which was obviously designed to attempt to remove the police from any responsibility in performing their duty. Such an effort on the part of the police to detach or insulate themselves from the burdens of their office ought to be carefully scrutinized whenever the question arises as to who it was who made an arrest. Such a form was apparently used in the case of *Peterson v. Robison*, 43 Cal.2d 690 [277 P.2d 19]. In that case the court said at page 695:

"No liability can be predicated merely on defendant's reporting to the police facts concerning the damaging of his car and the city's parking meter. A private person does not become liable for false [\*\*\*19] imprisonment when in good faith he [\*669] gives information -- even mistaken information -- to the proper authorities though such information may be the principal cause of plaintiff's imprisonment. [Citations.]

"False imprisonment is defined by statute as 'the unlawful violation of the personal liberty of another.' ( *Pen. Code*, § 236.) (7) Imprisonment pursuant to a lawful arrest is not tortious. [Citation.] . . .

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"....

(8) "... A private citizen who assists in the making of an arrest pursuant to the request or persuasion of a police officer is not liable for false imprisonment. (*Mackie v. Ambassador Hotel etc. Corp.* (1932), 123 Cal.App. 215, 222 [11 P.2d 3]; see 29 A.L.R.2d 825.) It would be manifestly unfair to impose civil liability upon the private person for doing that which the law declares it a misdemeanor for him to refuse to do. (See *Pen. Code*, § 150 [misdemeanor for man over 18 to refuse officer's lawful request for aid in arrest]; see also *id.*, § 839.)"

In a note in 44 California Law Review 595 wherein the last cited case is discussed, it is said at page 602:

"It should be observed here that no California case has been found which makes a [\*\*\*20] basic distinction between the definitions of arrest and imprisonment. Dean Prosser writes that false imprisonment is 'sometimes called false arrest.' (Prosser, Torts 48 (2d ed. 1955).) But it is clear that an action for false imprisonment may be maintained without the necessity of pleading or proving an unlawful arrest. Conversely, it would seem that every unlawful arrest entails a false imprisonment. Thus, false imprisonment is a broader term than false arrest.

"Though probably not necessary to the decision of most cases, it is helpful here to distinguish the two terms. The obvious difference is one of scope: an 'arrest' is the initial taking of the person, while 'imprisonment' encompasses the whole of the period during which the person is detained. Consequently, the 'imprisonment' of a person includes his 'arrest,' but once an 'arrest' is accomplished and while the 'imprisonment' continues, his subsequent 'arrest' is by definition impossible. (This is not to say that a transfer of custody is impossible. It is only impossible for an initial taking into custody, *i.e.*, an arrest, to occur while custody is retained. See *Van Fleet v. West American Ins. Co.*, 5 Cal.App.2d [\*\*\*21] 125, 128, 42 P.2d 378, 379-380 (1935).) It is submitted that the quoted code sections, characterizing arrest as a 'taking into [\*670] custody' (*Cal. Pen. Code*, § 834, . . .) and false imprisonment as the more general 'unlawful violation of the personal liberty of another,' (*Cal. Pen. Code*, § 236, . . .) reinforce this conclusion. (See ALI Code of Criminal Procedure, § 18 (1930): 'Arrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense.' Compare Restatement, Torts, §§ 112 and 35 (1934)."

[\*\*106] In *Gogue v. MacDonald*, 35 Cal.2d 482, 487 [218 P.2d 542, 21 A.L.R.2d 639], it is said:

". . . It is also noted in Prosser on Torts at pages 74-75 (citing Salmond, Law of Torts, 8th ed. 1934, 378), that the policy in support of the prevailing rule is to ac-

cord to a person the privilege of making reasonable efforts to bring his case properly before the court; that consequently false imprisonment will not lie where he has attempted to comply with the legal requirements and fails to do so through no fault of his own; but that he is liable in malicious prosecution for misuse for an improper purpose of legal [\*\*\*22] process.

"It follows that where, as here, the defendant reports the facts to the magistrate, takes no active part in the arrest but leaves the matter to the public officials and no bad faith appears, he is not liable merely because the facts he has stated to the magistrate do not constitute a public offense." (See an analysis of the problem and the cited case in 24 So. Cal. L. Rev. 130.)

(1c) It is easily apparent that Rochester had some very well-founded doubts under the circumstances as to whether Floro had been unlawfully arrested and falsely imprisoned and whether he, Rochester, should urge the cause of that particular count in the trial. Rochester did feel, however, that Floro had been slandered and that there was a malicious prosecution by the Burkes and proceeded accordingly. Floro himself said in effect to Rochester that under the circumstances he, Rochester, should go ahead and use his own best judgment which was the only reasonable thing Floro could say because he, Floro, knew nothing of the technicalities of the law involved and Rochester was an experienced and able trial lawyer.

(9) As to whether Mrs. Burke was financially able to respond to a money judgment, the record without [\*\*\*23] question seems to indicate that she was not. She was unable to give any information of consequence about her assets, except that practically everything she had was heavily encumbered. The plaintiff provided no evidence indicating the value of any of the equity, if any, in any of her property. Admittedly, a [\*671] homestead was on the house in which the Burkes lived. The burden was upon the plaintiff to prove that Mrs. Burke was solvent; he produced no evidence as to her income or as to any clear assets, or as to value of any equity. She testified that she and Burke had to borrow money to pay off the judgment in the previous case, that they had no worldly goods which were not mortgaged and that she was worth nothing. There was no showing that Mrs. Burke had any insurance protection for such a situation. (*Hammons v. Schrunk*, 209 Ore. 127 [305 P.2d 405].)

(10) We think there is no doubt that if Rochester is liable then, under the circumstances of this case, Lawton is also liable. Respondents have cited the case of *Wildermann v. Wachtell*, 149 Misc. 623 [267 N.Y. S. 840], to the effect that where the client is informed of the necessity and reason for his attorney's [\*\*\*24] retaining another lawyer for certain purposes and the client approves

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such employment, that then the client cannot recover from the original attorney for the negligence of the associated attorney. However, see *Senneff v. Healy*, 155 Iowa 82 [135 N.W. 27]; *Hill v. Curtis*, 154 App. Div. 662 [139 N.Y. S. 428]. The attorneys in this case were to divide the fee, if and when it was collected and each was responsible to Floro. (See 47 Harv. L. Rev. 1056.)

(11) Appellant insists that the letter of the judge to the attorneys wherein he set forth his views of the case after the trial and Rochester's answer thereto should have been received into evidence as constituting an admission by Rochester that he had abandoned the third cause of action in the previous trial. We think the ruling of the trial judge was correct, but assuming that it was not proper and assuming that the [\*\*107] letters had been received into evidence, the result would have been the same. Rochester was a very practical and realistic trial lawyer. The judge had indicated by letter that he was going to award a judgment to Rochester's client for a stated sum in a stated matter and that he was ruling against [\*\*\*25] Rochester in other matters. Surely a trial lawyer is not to be charged and convicted of malpractice under the circumstances for yielding to the opinion of the judge with reference to the matters then under consideration. There were perhaps some courses which later could have been brought into play but a successful trial lawyer does not usually engage in letter-writing contests with the judge who is about to determine a cause in which he is vitally interested.

(12) Appellant now argues that but for the "abandonment" [\*672] of the third cause of action he would have been awarded a collectable judgment against Mrs. Burke. There was in fact no abandonment of the cause by Rochester. The trial judge in the previous case throughout the trial asked certain questions and made rulings which give every indication that he did not at that time consider the third cause of action abandoned. Counsel for the Burkes did not conduct himself as if the count had been abandoned. The trial judge in this case had before him all of the evidence of the previous trial and he had the right to determine that the trial judge in the previous case was wrong in his determination. (See *Pete v. Henderson* [\*\*\*26] , 124 Cal.App.2d 487, 490 [269 P.2d 78].) The fact that Judge Curtis erroneously analyzed the evidence is not the fault of Rochester and Lawton. The fourth cause of action contained all of the necessary allegations for a cause of action for false arrest or false imprisonment as well as a cause for malicious prosecution. If there was error upon the part of Judge Curtis, the lawyers could reasonably agree that there was error in at least two matters, namely, the finding that the third cause of action was abandoned and the finding that the law was against the plaintiff on the fourth cause of action, the plaintiff had the right to appeal. He did not

do so. There was no obligation on the part of Rochester and Lawton to take an appeal and in fact they should not have done so without the consent of their client and he, Floro, plainly stated that he did not want to appeal. Instead, Floro went to other attorneys and, after some maneuvering, collected the judgment in full and gave a full satisfaction therefor without compensating Rochester and Lawton for their services under the written contract. It would seem that when Floro entered the satisfaction of the judgment in the previous case, [\*\*\*27] that is, when he voluntarily accepted in full settlement the amount awarded to him by the court he then barred himself from further action in the proceeding. He accepted the amount without an appeal and thereby precluded the respondents in this case from ever in anywise correcting the erroneous judgment. He prevented the judicial ascertainment of the correctness of Judge Curtis' judgment and he should not now be heard to complain to the effect that he did not get enough money in the first place.

(13) Appellant contends that respondents are liable upon the theory of negligence as well as upon the theory of a breach of contract. It is true that a client can sue on the contract if there is one and upon the theory of negligence, and that is [\*673] exactly what the appellant did in this case. However, it makes little difference in this instance because, under the contract, the attorneys simply impliedly contracted to exercise a degree of care, skill and knowledge which would in effect be required by the negligence standard.

(14) Much has been written about what constitutes negligence upon the part of a lawyer in his practice. (See *National Savings Bank of the District of Columbia* [\*\*\*28] v. *Ward*, 100 U.S. 195 [25 L.Ed. 621].) It has, however, never been spelled out with any degree of accuracy or certainty and no formula has been devised which will determine just when a lawyer, after losing a case, may not be chargeable with negligence or malpractice.

[\*\*108] The lawyer occupies an anomalous position. He practices a profession but in doing so he carries on a business; he is an officer of the court and as such he should not attempt to evade or impede the orderly administration of justice; he is the agent of a citizen in matters of dispute between citizens or between the citizen and the state; and at the same time and in all things he must pursue the course which is consistent with recognized professional conduct.

It is stated in 69 New Jersey Law Journal 265, reprinted in Insurance Law Journal Number 279 (1946) 194, 200 in an article titled "The Lawyers Liability for Alleged Mal Practice":

"And so it appears to be the law in all jurisdictions that an attorney, as the physician and surgeon, is liable in

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a proper action for all damage resulting to a client from his negligence within the purview of his employment; that he is required to be reasonably conversant [\*\*\*29] with the well-known rules of law and practice and procedure and the provisions of the statutes in his own state. He is not holden for errors in judgment nor in cases where well-informed attorneys entertain different views concerning a proposition of law which has not been settled. He is not a guarantor of the soundness of his opinions but is liable for the lack of such skill and diligence as are exercised by members of his profession in his locale. He may be sued in tort for negligence or in assumpsit for breach of implied contract existing between counsel and client and under some circumstances may be impleaded to all intents and purposes as if he were an original defendant and even required to respond in exemplary damages in isolated instances." (See also 13 Temple L. Q. 530; 19 Brooklyn L. Rev. 243; 12 Vanderbilt L. Rev. 755; 60 W. Va. L. Rev. 225; 24 Cal. L. Rev. 39.)

[\*674] It would appear that the possibility of a malpractice action is an occupational hazard for a lawyer. Of necessity he cannot win every case and there is always the possibility of his having as a client an irascible person who tenaciously clings to the belief, in the face of all evidence to the contrary, [\*\*\*30] that his claim is robust and that the claim of his opponent is weak, and that it would be next to impossible for any lawyer to do otherwise than to secure a judgment as and for all that he has demanded.

It is admitted in this case that the lawyers did not warrant, guarantee or insure the client's cause.

(15) The problem arises whether the claimed negligence is a matter of law or a question of fact. In this case the plaintiff did not put on any expert witness to testify in the matter. In *Gambert v. Hart*, 44 Cal. 542 an attorney, among other things, failed to file and serve a proper notice of a motion for a new trial and the court said at page 552:

"... In actions of this character against attorneys, the rule is well settled that when the facts are ascertained, *the question of negligence or want of skill is a question of law for the Court*. But there is a considerable conflict in the authorities as to the degree of diligence and skill to which an attorney shall be holden and for which the law implies that he contracts with his client. In the English Courts there have been cases decided by eminent Judges, in which the rule is laid down that an attorney is liable only for [\*\*\*31] gross negligence, *crassa negligentia*, or for gross ignorance in the conduct of a cause, resulting in a damage to the client. (*Bakie v. Chandless*, 3 Camp. 17; *Purvass v. Landell*, 12 Clark and Finn. 91; *Godefroy v. Dalton*, 6 Bing. 468.) [Emphasis added.]

"The rule firmly established in this country by the weight of authority is that an attorney is bound to use ordinary skill and care in the course of his professional employment.

"In the late work of Shearman & Redfield on Negligence, section two [\*\*109] hundred and twelve, it is said: 'The true rule of liability undoubtedly is, that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.' This is the principle recognized in *Wilson v. Russ*, 20 Maine 421; *Goodman v. Walker*, 30 Ala., N.S., 482; *Cox v. Sullivan*, 7 Ga. 144, and numerous other American cases, and, we think is not only established by authority, but is founded in reason and justice."

[\*675] And, in *Gimbel v. Waldman*, 193 Misc. 758 [84 N.Y. S. 2d 888, 891] it is said:

". . . The defendant argues, therefore, and [\*\*\*32] I think, correctly too, that *no question of fact is involved but that the matter is one of pure law and that it would be improper to submit to a jury of lay persons the question whether the advice was correct*, or, if incorrect, whether in view of the state of the law on the subject the defendant was guilty of negligence. Hanna case, *supra*, 225 N.Y. page 583, 122 N.E. page 627; *Bank of China, Japan, & The Straits v. Morse*, 168 N.Y. 458, 470, 61 N.E. 774, 777, 56 L.R.A. 139, 85 Am.St.Rep. 676. [Emphasis added.]

"No attorney is bound to know all the law and he is therefore held not to be an insurer or a guarantor with respect to his judgment or advice and is not liable for every mistake that may occur in practice. 'But, as the law is not an exact science there is not attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible.' *Citizens' Loan Fund & Savings Ass'n v. Friedley*, 123 Ind. 143, 145, 23 N.E. 1075, 7 L.R.A. 669, 18 Am.St.Rep. 320. Thus the rule generally accepted is that if the law on the subject is [\*\*\*33] well and clearly defined, has existed and been published long enough to justify the belief that it was known to the profession, 'then a disregard of such rule by an attorney at law renders him accountable for the losses caused by such negligence or want of skill; negligence, if knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule.' *Goodman and Mitchell v. Walker*, 30 Ala. 482, 496, 68 Am. Dec. 134." [84 N.Y.S.2d.]

However, a review of the authorities leads us to the conclusion that if the Gambert case is the law in this state, then we hold to the minority view. (See 12 Vanderbilt L. Rev. 755.) If it is a question of fact then is the matter the subject of expert testimony? Without expert

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testimony the confusion could be great indeed in some situations (such as a matter involving trial tactics) because a jury would have no way of knowing what was proper and what was improper and would have no standard by which to compare the lawyers' actions. If experts are called in, then we have the battle of the experts or possibly the "conspiracy of silence." In any event it makes no particular difference in this case. If it was a question of law we think [\*\*\*34] the court properly disposed of the matter. [\*676] If it was a question of fact, which required expert testimony, the plaintiff produced no expert testimony. If it was a question of fact and expert testimony was not required the plaintiff failed completely in several essential respects to establish his claim.

Under the breach of contract theory the plaintiff produced no evidence to the effect that respondents violated their agreement with Floro. There was no evidence of an oral contract.

In this case a thorough reading of all of the exhibits, documents, transcripts and briefs leads us to the conclusion that neither of the respondents was guilty of negligence nor did either of the respondents breach any contract with Floro. The plaintiff did not prove that he was entitled, under the circumstances, to win the original third cause of action and that he would have won [\*\*110] it but for the defendants' negligence or breach of contract, nor did he show that Mrs. Burke was solvent. The plaintiff failed in producing the proof to establish his claim and the trial court properly granted a nonsuit as to both defendants. It is admitted that there was no chicanery here by respondents, [\*\*\*35] yet they have been injured by virtue of this action in spite of the fact that they have prevailed because, among other things, they have had to engage in the debasing spectacle of defending themselves in an unmeritorious lawsuit to their embarrassment and to the detriment of the bar generally.

The judgment is affirmed.



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Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION  
AND SIGNING OF OPINIONS.

**MEMORANDUM OPINION**

Court of Appeals of Texas,  
San Antonio.

In the Interest of L.L. and T.L., Children.

No. 04-08-00911-CV.  
June 16, 2010.

From the 150th Judicial District Court, Bexar  
County, Texas, Trial Court No. 2001-CI-14960;  
Barbara Hanson Nellerhoe, Judge Presiding.  
Jay R. Brandon, Law Office of Jay Brandon, San  
Antonio, TX, for Appellant.

Gina Acord, San Antonio, TX, for Appellee.

Sitting: CATHERINE STONE, Chief Justice,  
SANDEE BRYAN MARION, Justice, REBECCA  
SIMMONS, Justice.

**MEMORANDUM OPINION**

Opinion by CATHERINE STONE, Chief Justice.

\*1 Appellant's motion for rehearing is denied.  
This court's prior opinion and judgment dated Janu-  
ary 20, 2010 are withdrawn, and this opinion and  
judgment are substituted. We substitute this opinion  
to more fully explain the basis for our decision.

Ronald Leach challenges a series of orders in  
this appeal arising from a custody modification pro-  
ceeding. Leach contends the trial court abused its  
discretion in modifying his right to designate the  
primary residence of T.L. because: (1) the trial  
court penalized Leach for his military service; and  
(2) the modification was not in T.L.'s best interest.  
Leach further contends the trial court erred in or-  
dering him to pay attorney's fees in the absence of

evidence to support the reasonableness of the attor-  
ney's fees. Finally, Leach contends the trial court  
erred in signing an order more than thirty days after  
his notice of appeal was filed that required him to  
pay interim attorney's fees on appeal. We reverse  
the trial court's awards of attorney's fees, but affirm  
the trial court's order modifying T.L.'s conservator-  
ship.

**PROCEDURAL BACKGROUND**

Leach and Gina Acord were divorced in 2002.  
In 2007, Acord filed a petition to modify conservat-  
orship seeking to be appointed as the person with  
the right to designate the primary residence of L.L.  
and T.L. The petition alleged that the circumstances  
of the children, a conservator, or other party af-  
fected by the order to be modified had materially  
and substantially changed since the date of the or-  
der's rendition. The petition further alleged that  
Leach had voluntarily relinquished the primary care  
and possession of the children to Acord for at least  
six months.

At the time of the hearing, L.L. was seventeen  
years old and filed a Choice of Managing Conser-  
vatorship, seeking to have Leach appointed as the  
parent with the right to determine her primary resi-  
dence. T.L. was nine years old. Leach and Acord  
also had a third child, J.L., who was not a subject of  
the proceeding because she was nineteen years old.

The trial court conducted a three-day hearing  
on Acord's motion in May of 2008. At the conclu-  
sion of the hearing, the trial court appointed Leach  
as the person with the right to designate the primary  
residence of L.L., and appointed Acord as the per-  
son with the right to designate the primary resi-  
dence of T.L. The trial court denied a motion for re-  
consideration after a hearing on August 21, 2008.  
The trial court also denied a motion for new trial  
after a hearing on November 17, 2008. At the con-  
clusion of the hearing on the motion for new trial,  
the trial court verbally awarded Acord \$1,400 in at-  
torney's fees.

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On January 30, 2009, the trial court held a hearing on Leach's motion to clarify or amend the trial court's order regarding travel arrangements and child support and on Acord's motion for interim attorney's fees. The trial court granted both motions. With regard to Acord's motion, the trial court ordered Leach to pay Acord \$12,000 in interim appellate attorney's fees.

#### MODIFICATION OF CONSERVATORSHIP

\*2 A trial court may modify a conservatorship order if: (1) modification would be in the best interest of the child; and (2) the circumstances of the child, a conservator, or other person affected by the order have materially and substantially changed since the date of the rendition of the prior order. TEX. FAM.CODE ANN. § 156.101 (Vernon Supp.2009). The movant, in this case Acord, has the burden to prove these requirements by a preponderance of the evidence. *In re Z.B.P.*, 109 S.W.3d 772, 781 (Tex.App.-Fort Worth 2003, no pet.); *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex.App.-Houston [1st Dist.] 1993, writ denied).

##### A. Material and Substantial Change in Circumstances

In deciding whether a material and substantial change of circumstances has occurred, the court's determination is fact-specific and must be made according to the circumstances as they arise. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex.App.-Houston [14th Dist.] 2009, no pet.); *In re T.W.E.*, 217 S.W.3d 557, 559 (Tex.App.-San Antonio 2006, no pet.). Some of the factors a trial court can consider in evaluating whether circumstances have materially and substantially changed include the remarriage of one of the parties, repeated changes in the child's home environment, and poisoning of a child's mind by one of the parties. *In re A.L.E.*, 279 S.W.3d at 429; *In re Marriage of Chandler*, 914 S.W.2d 252, 254 (Tex.App.-Amarillo 1996, no writ). On appeal, we will not disturb a trial court's ruling on a motion to modify conservatorship unless a clear abuse of discretion is established by the complaining party. *In re J.S.P.*, 278 S.W.3d 414,

418 (Tex.App.-San Antonio 2008, no pet.).

In his second point of error, Leach asserts the trial court erred in finding that he voluntarily relinquished possession of the children when he was deployed for military service. In his third point of error, Leach contends the trial court's order stripped him of custody of T.L. because of his military service. Leach notes that recent amendments to the Texas Family Code, which are not applicable to the instant case, preclude a trial court from considering military deployment as a basis for finding voluntary relinquishment.

Although the recent statutory amendments preclude a trial court from modifying a conservatorship order based on voluntary relinquishment when the relinquishment is due to military deployment, the amended statute does not preclude a trial court from considering evidence of a parent's military deployment in determining whether circumstances have materially and substantially changed. *Compare* TEX. FAM.CODE ANN. § 156.101(b) (Vernon Supp.2009) *with* TEX. FAM.CODE ANN. § 156.105 (Vernon Supp.2009). Instead, the amended statute provides only that military deployment does not "by itself constitute a material and substantial change of circumstances. TEX. FAM.CODE ANN. § 156.105 (Vernon Supp.2009). Accordingly, even under the amended statute, military deployment and its effect on a child can be a factor that a trial court can consider; it simply cannot be the exclusive factor.

\*3 In this case, evidence was presented regarding Leach's three deployments since the 2002 divorce; however, nothing in the record suggests that the trial court placed greater emphasis on this evidence than other evidence of changes in circumstances. In this case, the trial court first heard evidence that both parents had remarried. *See In re A.L.E.*, 279 S.W.3d at 429. In addition, the record reveals that immediately after the divorce in April of 2002, J.L. and L.L. went to live with their paternal grandparents in Ohio, while T.L. continued to reside with Acord. Beginning in October of

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2002, the children resided with Leach in Kentucky; however, T.L. spent the summer of 2003 with Acord. In July of 2003, the children went to reside with their paternal grandparents in Ohio. In December of 2003, J.L. had some conflicts with her paternal grandparents. At that time, L.L. and T.L. moved to Texas to live with Acord. In April of 2004, J.L. had additional conflicts with her paternal grandparents and went to live with her paternal uncle in Ohio. From June of 2004 through the middle of October of 2004, the children resided with Leach in Kentucky. After Leach was again deployed, the children's maternal grandmother and maternal aunt moved to Kentucky to care for the children. Toward the end of November of 2004, T.L. moved to Texas to live with Acord. At the end of April of 2005, J.L. moved to Texas to live with Acord because she was refusing to go to school. In the middle of June of 2005, all of the children moved to live with Acord in Texas. In summary, the children had changed residences approximately nine times in five years. As previously noted, repeated changes in the child's home environment is a factor a trial court may consider in finding a material and substantial change in circumstances. *In re Marriage of Chandler*, 914 S.W.2d at 254. Accordingly, we conclude the trial court did not abuse its discretion in finding that a material and substantial change in circumstances had occurred since the 2002 divorce decree.

## B. Best Interest of the Child

### 1. Standard of Review

In his first point of error, Leach asserts that the modification of conservatorship was not in T.L.'s best interest. In determining issues of possession and access, the primary consideration is always the best interest of the child. *In re J.S.P.*, 278 S.W.3d at 418. Trial courts have broad discretion to determine what is in a child's best interest. *Id.* In determining the best interest of a child in the context of modification of conservatorship, a trial court may consider: (1) the child's desires; (2) the child's emotional and physical needs now and in the future; (3) any emo-

tional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking primary possession; (5) the programs available to assist these individuals to promote the child's best interest; (6) the plans for the child by those seeking primary possession; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; (9) any excuse for the acts or omissions of the parent; (10) the child's need for stability; and (11) the need to prevent constant litigation regarding conservatorship of the child. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex.2000); *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex.1976); *In re C.A.M.M.*, 243 S.W.3d 211, 221 (Tex.App.-Houston [14th Dist.] 2007, pet. denied).

\*4 Because conservatorship determinations are intensely fact driven, the trial court is in the best position to observe the witnesses and "feel" the forces, powers, and influences that cannot be discerned by merely reading the record. *In re J.S.P.*, 278 S.W.3d at 418-19. We defer to the trial court's resolution of underlying facts and to credibility determinations that may have affected its determination, and we will not substitute our judgment for the trial court's. *In re A.L.E.*, 279 S.W.3d at 427. Legal and factual insufficiency challenges are not independent grounds for asserting error in custody determinations. *Id.* at 427-28; *In re M.M.S.*, 256 S.W.3d 470, 476 (Tex.App.-Dallas 2008, no pet.). Instead, we consider whether the trial court had sufficient evidence upon which to exercise its discretion and, if so, whether it acted reasonably in the application of its discretion to those facts. *In re M.M.S.*, 256 S.W.3d at 476. An abuse of discretion does not occur if some evidence of a substantive and probative character exists to support the trial court's decision. *In re A.L.E.*, 279 S.W.3d at 428; *In re M.M.S.*, 256 S.W.3d at 476.

### 2. Discussion

The trial court decided not to interview T.L. because of his age, and T.L. was not asked to ex-

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press a desire with regard to conservatorship. As evidence that T.L. had expressed a desire to spend more time with Leach, Leach relies on testimony from Linda Fisher, who performed a court-ordered social study and recommended that Leach remain as the conservator to designate T.L.'s residence. In context, however, Fisher testified that she asked T.L. how he felt when he left Leach's house, and it was time to go back to Acord's house. T.L. responded, "Well, I feel both happy and sad, because I want to spend more time with my dad." Leach appears to discount that T.L. feels *both* happy and sad; apparently T.L. was happy to be returning to his home with Acord.

With regard to T.L.'s emotional and physical needs, T.L. had been residing with Acord since December of 2004. Prior to that date, possession of T.L. had alternated between Acord and Leach based on Leach's deployments to Iraq and Afghanistan and the need for T.L. to finish a school year where he started. Several periods of time when T.L. was not in Acord's possession, however, he also was not in Leach's possession. Instead, he was living with his paternal grandparents or his maternal grandmother and aunt. In 2006 and 2007, T.L. had resided with Leach for approximately four weeks in each year.

T.L. had attended the same montessori school for four years while residing with Acord. Although the montessori school had suggested having T.L. tested for attention deficit disorder, the school continued to work on alternative ways to keep T.L. focused and to assist him with his slow work pace. T.L.'s teacher, Maria Flores, testified that T.L. is bright, happy, but slow in producing work. Flores had been T.L.'s teacher for three years. Flores stated that she and Acord had a strong parent/teacher relationship, and the two had worked closely together on ways to motivate T.L. to improve his work pace. Flores did not have any contact with Leach prior to the fall of 2007. Flores testified that she understood that Leach had been deployed several times; however, she stated that she

often communicated with parents who are deployed through e-mail.

\*5 Leach testified regarding his analysis of T.L.'s school records and the reasons he believed that T.L. was not performing well. Leach presented a chart summarizing his analysis. In response to the reason Leach did not have the current school year on his chart, Leach responded, "considering the entourage of school members that came in here and seemed to be somewhat biased once the litigation started, it was not an honest reflection of what was going on anymore." Leach subsequently agreed, however, that his assessment of T.L.'s grades did not include several areas where the school reports showed that T.L. was exceeding expectations, including the school records showing that T.L. met all expectations for math, cultural studies, history, physical science, and geography in 2007-2008. Leach explained that his charts were focused on social behavior, learning characteristics, and attitudes. Leach also expressed a concern with T.L.'s excessive tardies; however, Acord explained that the tardies were from being at the most five minutes late when she had to drop J.L. and L.L. at another school before taking T.L. to school, which was also the school where Acord was working at the time.

In response to whether T.L. was a bright boy, Dr. Fernando J. Esparza, a clinical psychologist who performed a court-ordered evaluation of the parties and the children, responded that T.L. "was off the charts." Dr. Esparza stated that T.L.'s IQ was impressive and his verbal skills were amazing. Dr. Esparza stated that T.L. had a lot of positive exposure to learning. Dr. Esparza did not believe T.L. would be a candidate for medication if he had ADD; however, he would want the problem identified so appropriate interventions could be made. Dr. Esparza believed, however, that testing for ADD should occur several weeks after the beginning of a school year. At the time of the hearing on the motion for new trial, T.L. was on the A/B honor roll in a gifted and talented program at a public school and was undergoing testing for ADD.

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Both J.L. and L.L. believed T.L. should reside with Leach; however, there was evidence that J.L. and L.L. had a lot of animosity toward Acord's husband, Mark Davidson, with whom Acord had been living since her divorce from Leach. The animosity culminated in a confrontation in September of 2007 between J.L. and Davidson regarding a dent Davidson believed J.L. had caused in Acord's new car. At the end of the confrontation, J.L., who was nineteen-years-old, threw a mug full of orange juice at Davidson, and Davidson ordered J.L. to leave if she could not follow the rules of the house. After this confrontation, Leach's plan was to rent an apartment where J.L., who recently disclosed she was pregnant, and L.L. would live by themselves, and T.L. would go to live with Leach's wife in Maryland since Leach was still stationed in North Carolina and T.L. would be unable to live with him. When Fisher was asked about this plan, she responded, "I wasn't there at the time. I don't know the specifics of that. But of course, it's not the greatest idea." When Leach's wife was asked about the plan to move J.L. and L.L. into an apartment, she responded, "Not my decision, ma'am. It's their father's."

\*6 Accord testified that Leach adversely affected the relationship between Davidson, J.L., and L.L. by blaming Davidson for the divorce and discussing Leach's opinion of Davidson with J.L. and L.L. Leach admitted that he characterized Davidson as psychotic. Leach stated that he did not think that he had expressed his opinions about Davidson to J.L. or L.L. In response to how J.L. and L.L. developed the idea that Davidson was paranoid, Leach responded that it sounded like they were just corroborating what he had seen. J.L., who was called to testify by Leach, stated that she knew Leach had opinions about Davidson, but Leach "usually" stopped himself when expressing them. When Davidson realized his mental health would become an issue in the proceedings based on a prior hospitalization, he contacted Dr. Joann Murphey, a clinical psychologist, for an evaluation. Both Dr. Murphey and Dr. Esparza examined Davidson and concluded

that Davidson had no on-going clinical diagnosis. Dr. Murphey testified that even L.L. had reported a positive relationship between Davidson and T.L. Despite the conclusions reached by Dr. Murphey and Dr. Esparza, Fisher listed Davidson's evaluation as one of the reasons she recommended that Leach remain as the conservator to designate T.L.'s residence.

Fisher also testified that she was unaware that Leach had been arrested after assaulting three military police officers while his six-year-old stepdaughter was sitting in the vehicle he was driving. Fisher later stated that she recalled Leach telling her that he had been arrested over a mistake regarding his driver's license. In response to whether she was concerned about the incident, Fisher responded, "I mean, I guess I would be concerned if he was fighting the MPs-as she [Acord's attorney] said and there was a child in the car. But I am not aware of that incident in that context."

Questions were asked regarding Acord's failure to provide proper medical and dental care for the children. Acord testified that finances precluded her from obtaining the proper care. Acord acknowledged that the children were covered by Leach's military benefits, but stated the benefits did not cover all of the medical expenses when the children went outside the military facility as was required when L.L. needed to see a specialist regarding her ankle. Acord stated that L.L. was not originally referred to a specialist until she re-injured her ankle by wearing high heels. Because the military system did not have a podiatrist, obtaining a referral took time. In response to Acord's delay in obtaining a brace for L.L.'s ankle, Acord testified that the brace was suggested, not ordered, and she did not believe it took her a month to get the brace. Acord testified that a \$1,000 up front deposit was required for braces for L.L.'s teeth. In response to questions regarding her cancellation of numerous dental appointments, Acord explained that she had cancelled only a few, but the cancellation of one appointment automatically cancelled follow-up appointments so

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the record reflected more cancellations. In response to questions regarding an account established by Leach to which Acord had access to pay the medical expenses, Acord responded, "Ma'am I wasn't about to spend more than what we had talked about without-I was very reluctant to use that account, because anytime I use his money, he likes to point it out often how much he's helped out. And I didn't have permission at the time. It was my understanding with the Court Order and all that I was supposed to be handling at least half of those costs, and I didn't have the money."

\*7 Fisher also stated that T.L. not having playmates in the community was a basis for her recommendation; however, Flores, T.L.'s teacher, testified that T.L. had many friends, commenting that "pretty much anybody he encounters becomes a friend." Acord testified that T.L. spends a lot of time in after-school care with playmates, including his best friend. T.L. also had been enrolled in Tae Kwon Do and had made friends through that class.

#### C. Conclusion

As previously noted, the trial court is afforded wide discretion in modification proceedings because the trial court is in the best position to observe and evaluate the personalities of the parties and the credibility of the witnesses. *See In re J.S.P.*, 278 S.W.3d at 418-19; *In re A.L.E.*, 279 S.W.3d at 427. In this case, the trial court heard evidence regarding T.L.'s living arrangements since the divorce and the stable home provided by Acord. Although J.L. and L.L. described the atmosphere at Acord's home as cold, the trial court could have chosen to discount this testimony based on evidence of the animosity J.L. and L.L. had toward Davidson. Although Leach testified that Davidson was psychotic, both Dr. Murphey and Dr. Esparza testified that Davidson had no on-going clinical diagnosis. The trial court also heard evidence from which it could conclude that Leach had adversely affected J.L.'s and L.L.'s opinions of Davidson. T.L.'s teacher and Dr. Esparza testified regarding T.L.'s abilities. Although both recommended testing for ADD, T.L.

was performing at or above his grade level academically. The trial court had several bases on which to question Fisher's recommendation including her lack of knowledge of two events adversely reflecting on Leach's decisions involving children: (1) planning to place J.L. and L.L. in an apartment together alone; and (2) assaulting three MPs after being stopped while his young stepdaughter was in the car. *See McGalliard v. Kulmann*, 722 S.W.2d 694, 697 (Tex.1986) (noting trial court is free to reject expert opinion based on evidence as a whole). Moreover, the trial court was in the best position to weigh the testimony of other witnesses based on their relationships with Acord and Leach. Finally, during Leach's testimony, the trial court had to admonish him regarding his role in the proceedings. As previously noted, the trial court is in the better position to observe and evaluate the personalities of the parties, and the trial court's evaluation of the parties' personalities can also form a basis for its decision. Having reviewed the record as a whole, we hold that the trial court did not abuse its discretion in finding that modification was in T.L.'s best interest. *See MacDonald v. MacDonald*, 821 S.W.2d 458, 463 (Tex.App.-Houston [14th Dist.] 1992, no writ) ("When presented with conflicting evidence, the trier of fact has several alternatives: it may believe one witness and disbelieve others; it may resolve the inconsistencies in the testimony of any witness; and it may accept lay testimony over that of experts.")

#### ATTORNEY'S FEES

\*8 In his fourth point of error, Leach contends the trial court erred in ordering him to pay Acord attorney's fees because no evidence supports the reasonableness of the fees. The trial court's order modifying conservatorship ordered that attorney's fees would be borne by the party who incurred them. At the conclusion of the hearing on Leach's motion for new trial, the trial court verbally awarded Acord \$1,400 in attorney's fees; however, no written order was signed with regard to this award.

Any award of attorney's fees must be supported

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by evidence. *In re C.Z.B.*, 151 S.W.3d 627, 635 (Tex.App.-San Antonio 2004, no pet.). To support an award of reasonable costs, testimony should be presented regarding the number of hours spent on the case, the nature of the preparation, the complexity of the case, the experience of the attorney, and the prevailing hourly rates. *Id.* Expert testimony is required to establish the reasonableness of the fee. *Phillips v. Phillips*, 08-06-00171-CV, 2009 WL 792756, at \*9 (Tex.App.-El Paso Mar. 26, 2009, pet. denied); *Cantu v. Moore*, 90 S.W.3d 821, 826 (Tex. App. -San Antonio 2002, pet. denied). In this case, the only testimony at the hearing on the motion for new trial regarding attorney's fees was testimony by Acord regarding her attorney's hourly rate and the amount she had paid. Because no expert testimony was presented to establish the reasonableness of the attorney's fees, the trial court erred in awarding Acord attorney's fees. *See Phillips*, 2009 WL 792756, at \*9; *Cantu*, 90 S.W.3d at 826. Leach's fourth point of error is sustained.

In his fifth point of error, Leach contends the trial court erred in ordering him to pay interim attorney's fees on appeal pursuant to section 109.001 of the Texas Family Code. Section 109.001 vests a trial court with discretionary authority to render temporary orders, including temporary orders requiring the payment of reasonable attorney's fees, as necessary to protect the welfare of children during the pendency of an appeal. TEX. FAM.CODE ANN. § 109.001(a)(5) (Vernon 2008). However, section 109.001 contains an absolute deadline requiring such orders to be rendered not later than the 30th day after the date an appeal is perfected. *See id.*; *see also Love v. Bailey-Love*, 217 S.W.3d 33, 36-37 (Tex.App.-Houston [1st Dist.] 2006, no pet.); *In re Boyd*, 34 S.W.3d 708, 711 (Tex.App.-Fort Worth 2000, orig. proceeding).

In this case, Leach perfected this appeal on December 17, 2008; however, the hearing regarding the interim attorney's fees was not held until January 30, 2009, and the trial court did not sign the order until March 6, 2009. Accordingly, the trial

court's order requiring Leach to pay interim attorney's fees is void. *In re Boyd*, 34 S.W.3d at 711. Leach's fifth point of error is sustained.

#### CONCLUSION

The portions of the trial court's orders awarding Acord \$1,400 in attorney's fees and \$12,000 in interim attorney's fees on appeal are reversed. The remaining portions of the trial court's orders are affirmed.

Tex.App.-San Antonio,2010.

In re L.L.

Not Reported in S.W.3d, 2010 WL 2403579  
(Tex.App.-San Antonio)

END OF DOCUMENT





Positive  
As of: Oct 01, 2012

**John D. Jackson et ux., Appellants v. Urban, Coolidge, Pennington & Scott et al.,  
Appellees**

**No. 16,382**

**Court of Civil Appeals of Texas, First District, Houston**

*516 S.W.2d 948; 1974 Tex. App. LEXIS 2773*

**November 14, 1974**

**SUBSEQUENT HISTORY:** [\*\*1] N.R.E.

**PRIOR HISTORY:** Appeal from District Court of Harris County

**COUNSEL:** For Appellants: J. Leonard Gotsdiner, Ranseler O. Wyatt, Houston, Texas.

For Appellees: Barry N. Beck, Frank G. Jones, Houston, Texas.

**JUDGES:** Tom F. Coleman, Chief Justice.

**OPINION BY:** COLEMAN

**OPINION**

[\*948] This is a malpractice suit. At the conclusion of the plaintiffs' case, the trial court instructed a verdict for the defendant. This appeal results.

The plaintiffs employed the defendant law firm to represent them in presenting and collecting a contractual claim against the estate of P. V. Pappas. Mr. Scott discussed the claim with the plaintiffs and checked the inventory filed in the estate of Mr. Pappas. Mr. Scott formed an opinion [\*949] from his examination of the inventory that there were assets sufficient to justify the filing of the claim to protect his clients' interest. No list of claims against the estate was available to him. A claim was filed with the executrix of the estate and it was

rejected. Suit was then filed in the district court. Mr. Scott testified that he subsequently discussed the case with the attorney representing the executrix and that based on the information which [\*\*2] he got at that time he determined that the facts did not warrant pursuing the matter. He testified that he advised the plaintiffs that the suit was not worth prosecuting and that he purposely allowed the suit to be dropped from the docket for want of prosecution. The plaintiffs contend that they were never advised that their claim had no merit.

For the purposes of this opinion we will assume that plaintiffs introduced evidence on the trial of this case which would have justified a finding that their suit against Pappas would have been successful if prosecuted to a final judgment, and that they would have secured a judgment in the sum of \$10,000.00.

Where a client sues his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered the judgment. *Gibson v. Johnson*, 414 S.W. 2d 235 (Tex. Civ. App. -- Tyler 1967, writ ref. n.r.e.); *Patterson & Wallace v. Frazer*, 93 S.W. 146 (Tex. Civ. App. 1906, rev'd 100 Tex. 103, 94 S.W. 324, 1907); *Priest v. Dodsworth*, 235 Ill. 613, [\*\*3] 85 N.E. 940 (1908); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (Ct. of App. of N.Y. 1905).

There is no evidence that the Pappas estate was solvent at the date the case was filed or at any time thereafter. There is no evidence that any specific amount could have been collected from the Pappas estate had a judg-

ment been obtained. The plaintiffs failed to sustain their burden of proof, and the judgment of the trial court must be affirmed.

Affirmed.





Positive  
As of: Oct 01, 2012

**MORRIS LAW OFFICE, P.C., Plaintiff, v. JAMES EDDIE TATUM, ANN  
TATUM, and TEE ENGINEERING CO., INC., Defendants.**

**CIVIL ACTION NO. 3:03CV00035**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
VIRGINIA, CHARLOTTEVILLE DIVISION**

*388 F. Supp. 2d 689; 2005 U.S. Dist. LEXIS 9068*

**February 3, 2005, Decided**

**SUBSEQUENT HISTORY:** Affirmed by *Morris Law Office, P.C. v. Tatum, 141 Fed. Appx. 205, 2005 U.S. App. LEXIS 18221 (4th Cir. Va., 2005)*

**PRIOR HISTORY:** *Morris Law Office, P.C. v. Tatum, 388 F. Supp. 2d 689, 2004 U.S. Dist. LEXIS 28530 (W.D. Va., 2004)*

**COUNSEL:** **[\*\*1]** For Morris Law Office, P.C. A Virginia professional corporation, Plaintiff: Peter Booth Vaden, PETER VADEN, ATTORNEY AT LAW, CHARLOTTEVILLE, VA; Walton Davis Morris, Jr., CHARLOTTEVILLE, VA.

James Eddie Tatum, Defendant, Pro se, Trinidad, CO.

Ann Tatum, Defendant, Pro se, Trinidad, CO.

For Tee Engineering Co., Inc. A Kentucky Corporation, Defendant: David Brian Rubinstein, FREDERICKSBURG, VA; Joe F. Childers, LAW OFFICES OF JOE F. CHILDERS, LEXINGTON, KY.

For Morris Law Office, P.C., Consol Counter Defendant: Walton Davis Morris, Jr., CHARLOTTEVILLE, VA.

For Tee Engineering Co., Inc., Counter Claimant: David Brian Rubinstein FREDERICKSBURG, VA.

**JUDGES:** JUDGE JAMES H. MICHAEL, JR.

**OPINION BY:** JAMES H. MICHAEL, JR.

**OPINION**

**[\*691] MEMORANDUM OPINION**

JUDGE JAMES H. MICHAEL, JR.

This action involves a dispute between the plaintiff and the defendants over an alleged breach of their contract for legal services. By order dated July 10, 2003, this case was referred to the presiding United States magistrate judge for proposed findings of fact and a recommended disposition. The magistrate judge filed a report and recommendation on September 2, 2004, recommending that a portion, **[\*\*2]** specifically \$ 8,732.15, of the interpled funds under Count I of the complaint be distributed immediately to the plaintiff, Morris Law Office (MLO). By order dated September 10, 2004, this court adopted the magistrate judge's report and recommendation and ordered that the \$ 8,732.15 be distributed to the plaintiff together with a pro rata share of the accrued interest on those funds.

On November 10, 2004, the magistrate judge issued his second and final report and recommendation in regard to this case, recommending that the court: (1) grant the plaintiff's and defendant Tee Engineering's motions for summary judgment on Count I; (2) deny, in part, the

plaintiff's motion for summary judgment with respect to Count II, to the extent it seeks recovery of attorney's fees under the contract, but grant the motion to the extent that it seeks recovery of unreimbursed expenses under the contract; and (3) grant the plaintiff's motion for summary judgment with respect to Count III, for attorney's fees under the theory of quantum meruit. After a thorough examination of the applicable law, the parties' supporting memoranda, the report and recommendation, and the plaintiff's objections thereto, ' [\*\*3] [\*692] this court adopts the analysis and findings of the magistrate judge. This opinion will only address the plaintiff's objection and Tee Engineering's requests for prejudgment interest and attorney's fees.

1 The Tatums filed untimely objections to the magistrate judge's report and recommendation on December 16, 2004. MLO moved to strike those objections as untimely, and the court granted that motion for reasons explained in its January 11, 2005 order. Therefore, the court will not consider the Tatums' objections.

## I. FACTUAL BACKGROUND

The magistrate's report gives a detailed explanation of the pertinent facts in this case, so the court will only recount briefly the facts related to the issues discussed below. After the mining activities of Basin Resources, Inc. caused subsidence damage to their Colorado home, the Tatums hired an experienced attorney, Walton D. Morris, Jr. of Morris Law Office (MLO), to help them with administrative and judicial proceedings against Basin. After he had completed some legal [\*\*4] work for the Tatums on an hourly basis, the Tatums asked Morris to help them with additional administrative and possible judicial proceedings against Basin. Morris drafted a contract to govern the remainder of his representation of the Tatums. After some discussion and negotiation, the Contract was executed on January 24, 2001.

The Contract provided, among other things, that the Tatums would pay MLO a contingency fee for its work, based on a graduated schedule depending upon which stage of the proceedings money was recovered. (Para. 2.0.) It also stated that the Tatums would reimburse MLO for "all of [its] reasonable expenses incurred in connection with the work performed under this contract" within thirty days of billing. (Para. 3.0.) The contract provided, in paragraph 2.1(b), that if the Tatums terminated the contract prior to final judgment, then the Tatums would be immediately obligated to pay Morris a "partial attorney fee" of \$ 250 per hour for his services and \$ 50 per hour for paralegal assistance. This "conversion clause" also provided that "the balance of Morris' total attorney fee shall be determined in accordance with

[the contingency fee section] of this contract. [\*\*5] " Finally, paragraph 4.0 preserved the Tatums' right to terminate the contract "unilaterally at any time, for any reasons or for no reason," subject to the terms of paragraph 2.1(b). The contract provides that it shall be interpreted in accordance with Virginia law.

After the Tatums had received a settlement offer from Basin to cover the costs of the administrative proceeding, and after MLO had helped the Tatums secure a \$ 622,000 judgement in a Colorado state trial court, the Tatums discharged MLO partly because of a dispute about unpaid bills of an expert witness, Tee Engineering (Tee). Because Basin has appealed the judgment of the trial court, the litigation is not yet final. MLO brought this action against the Tatums in federal court to recover its attorney's fees and expenses, including those owed to the expert witness.

## II. THE PLAINTIFF'S OBJECTION REGARDING COUNT II

Under Count II of the complaint, the plaintiff alleges that the Tatums breached paragraph 2.1(b) of the Contract by failing to pay it "partial attorney's fees" after discharging Morris prior to final judgment in the Colorado litigation. These fees totaled \$ 151,312.50 plus prejudgment interest. The plaintiff [\*\*6] also alleges that the Tatums breached paragraph 3.0 of the Contract by refusing to reimburse MLO for nominal out-of-pocket expenses incurred during the Colorado litigation, namely \$ 1,213.44, plus prejudgment interest.

The magistrate judge found that paragraph 2.1(b), the "conversion clause," of the contract, was unenforceable under Virginia law, as articulated in *Heinzman v. Fine*, 217 Va. 958, 234 S.E.2d 282 (1977). In *Heinzman*, an attorney was terminated, without just cause, by the client in the middle of the representation, but the attorney [\*\*693] still wanted to recover his contingency fee that he negotiated in their initial contract, even though the settlement was negotiated by a successor attorney. The court held that a client's right to discharge his attorney is compromised if he is liable for a contingency fee to both his former and current attorneys; therefore, the former attorney should only be able to recover his fee in quantum meruit. *Id. at 964*. Here, the magistrate judge found that the conversion clause in MLO's contract was unenforceable because it stated that, if discharged before final judgment, the Tatums would be liable to MLO for both his hourly [\*\*7] fee and for a portion of his contingency fee. Even though MLO was not attempting to recover his contingency fee, the magistrate judge found that the clause of the contract was unenforceable under *Heinzman* and Virginia ethics rules. Therefore, MLO could not recover his hourly fee based on that section of

the contract. Instead, MLO was only entitled to recover his attorney's fees on a quantum meruit basis.

MLO does not object to the magistrate judge's conclusion that the portion of paragraph 2.1(b) which provides for an additional fee based on the contract's contingent fee calculus is unenforceable. But MLO does object to the magistrate judge's report to the extent that the report does not sever the unenforceable part of the contract from the remainder of paragraph 2.1(b). MLO argues that paragraph 2.1(b) can be enforced against the Tatums to the extent that it provides that MLO is due his hourly fee in the event of early termination. MLO states that only one sentence needs to be deleted, namely that which states: "The balance of Morris' total attorney fee shall be determined in accordance with subsection 2.0 of this contract."

The court finds, however, that this sentence in the [\*\*8] contract cannot be severed from the contractual provision which MLO seeks to enforce in Count II. "Generally, when a contract covers several subjects, some of whose provisions are valid and some void, those which are valid will be upheld if they are not so interwoven with those illegal as to make divisibility impossible." *Alston Studios, Inc. v. Lloyd*, 492 F.2d 279, 285 (4th Cir. 1974) (citing *Bristol v. Dominion National Bank*, 153 Va. 71, 149 S.E. 632 (1929)). In this case, paragraph 2.1(b) represents a single indivisible "provision" of the contract. The paragraph describes how the "partial attorney's fee" will be computed hourly, and the "balance of Morris' total attorney fee" shall be computed according to a contingency basis. These two sentences are related and interwoven, and cannot be divided or construed independently.

Moreover, simply deleting the objectionable sentence in paragraph 2.1(b) would constitute "blue penciling," which is impermissible under Virginia law. "The difference between 'blue penciling' and severing is a matter of focus. The former emphasizes deleting, and in some jurisdictions adding words in a particular clause. The latter emphasizes [\*\*9] construing independent clauses independently." *Roto-Die Co., Inc. v. Lesser*, 899 F. Supp. 1515, 1523 (W.D. Va. 1995) (refusing to interpret Virginia law as permitting blue penciling); see also *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 966 (W.D. Va. 2000) (same). In addition, because the paragraph refers to a "partial attorney's fee," which MLO concedes is the total attorney's fee to which he is entitled, the word "partial" would have to be deleted from several sentences in the paragraph in order for the clause to make sense. This is exactly the kind of "blue penciling" that is prohibited under Virginia law. The court will not rewrite this contractual provision for the parties so that it will be enforceable. [\*\*694] Therefore,

all of paragraph 2.1(b) of the Contract must be held to be void.<sup>2</sup>

2 Note that the court only finds that paragraph 2.1(b) of the contract is void, but agrees with the magistrate judge that other separate provisions in the contract are enforceable. Essentially, paragraph 2.1(b) can be severed from the remainder of the contract. Therefore, MLO is still entitled to recover its expenses under paragraph 3.0 of the contract.

[\*\*10] For the above reasons, the court OVERRULES the plaintiff's objection to the magistrate judge's report and recommendation.

### III. TEE'S REQUEST FOR PREJUDGMENT INTEREST AND ATTORNEY'S FEES

In its motion for summary judgment, Tee Engineering requests an award of \$ 19,185.00 plus prejudgment interest, as well as its costs and attorney's fees incurred in prosecuting its counterclaim.

The magistrate judge recommended that this court exercise its discretion to award prejudgment interest to run from a date selected by the court until the date of the court's judgment. The court agrees that this is an appropriate case for prejudgment interest, and finds that interest should run from the date on which Tee's final bill was due. Tee sent its final invoice to Morris on December 17, 2002. The Tatums must have received a copy of this invoice by December 24, 2002 because that is the date on which Morris filed their Bill of Costs, which included Tee's bill as an exhibit, with the Colorado Court. Under MLO's Contract, the Tatums were obligated to reimburse MLO for expenses, including for the cost of experts, within thirty days of the date on which Morris billed them. At the latest, the Tatums [\*\*11] were notified of Tee's final bill on December 24, 2002, and so payment on that bill was due on January 24, 2003. Therefore, prejudgment interest should run from January 25, 2003 to the date of this judgment. The prejudgment interest rate due to Tee is that prescribed by the laws of Virginia -- six percent. See Va. Code Ann. § 6.1-330.54 & § 8.01-382 (2004) (setting six percent interest rate); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 941 (4th Cir. 1983) (federal courts who use their discretion to award prejudgment interest in diversity cases should apply the interest rate of the forum state).

In his report, the magistrate judge recommended that Tee receive a pro rata share of the interest that has accrued on its award since its deposit with the court, however, the magistrate did not consider that awarding Tee both its pro rata interest and prejudgment interest would be duplicative. Therefore, this court finds that Tee shall

only receive prejudgment interest at a rate of six percent, but that Tee shall not also receive the pro rata share of interest that has accrued on the funds that have been held in the registry [\*\*12] of the court.

Finally, in its motion for summary judgment, Tee requests an award of costs and attorney's fees incurred in prosecuting its counterclaim. However, Tee makes no legal arguments in its motion to support this request. Therefore, the court sees no reason not to apply the American rule requiring each party to bear his own costs and attorney's fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001) (Courts usually follow the "American Rule," absent explicit statutory authority to the contrary.) Tee's request for attorney's fees and costs must be denied.

#### IV. CONCLUSION

The court has reviewed all other parts of the magistrate judge's report and recommendation and has found no clear error. Therefore, the court will adopt the report [\*\*695] and recommendation of the magistrate judge, as amended by this opinion. An appropriate order this day shall issue.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

#### FINAL ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, [\*\*13] ORDERED, AND DECREED

as follows:

1. The plaintiff's objection to the Report and Recommendation, filed November 15, 2004, shall be, and hereby is, OVERRULED.

2. The magistrate judge's Report and Recommendation, filed November 10, 2004, shall be, and it hereby is, ADOPTED.

#### Count I:

3. The plaintiffs and Tee Engineering's motions for summary judgment on Count I, shall be, and hereby are, GRANTED, to the extent that they seek distribution to Tee Engineering of \$ 19,185.00 of the interpled funds together with prejudgment interest at an annual rate of 6% from January 25, 2003 until the date of this judgment.

4. The court hereby DIRECTS the Clerk to distribute \$ 19,185.00 of the funds now held in the Court's registry to Tee Engineering, together with prejudgment interest at an annual rate of 6% from January 25, 2003 until the date of this judgment.

5. Tee Engineering's motion for summary judgment hereby is DENIED to the extent that it seeks attorney's fees and costs for prosecuting its counterclaim.

#### Count II:

6. The plaintiff's motion for summary judgment on Count II is DENIED to the extent that it seeks an award of attorney's fees owed to MLO under [\*\*14] the parties' contract, but GRANTED to the extent that it seeks unpaid expenses from the Colorado litigation under the contract.

7. The Tatums' motion for summary judgment is GRANTED with respect to the enforceability of paragraph 2.1(b) of the contract, but DENIED with respect to plaintiff's claim in Count II for reimbursement of expenses under paragraph 3.0 of the contract.

8. MLO hereby shall have and recover judgment against James Eddie Tatum and Ann Tatum, jointly and severally, for unpaid expenses under Count II, in the amount of \$ 1,213.44 plus 6% prejudgment interest to run from the date of MLO's termination of employment, February 4, 2003, <sup>1</sup> until the date of this judgment. This judgment under Count II for unpaid expenses and prejudgment interest is to be paid first out of any funds that remain in the registry of the court, <sup>2</sup> and then according to law, with the total not to exceed \$ 1,213.44 plus prejudgment interest.

1 On February 4, 2003, the Tatums filed a motion with the Colorado state court to allow Morris to withdraw as their attorney. The motion indicated that Morris "is not to represent Ann and Jim Tatum in anyway and he is released from any obligation to do any further work in this case." Exh. 87, First Declaration of Morris in Support of Plaintiff's Motion for Summary Judgment. The court considers this date MLO's date of termination.

#### [\*\*15]

2 The Clerk should first distribute from the court's registry \$ 19,185 plus prejudgment interest to Tee Engineering, and then distribute any remaining funds as specified in paragraph 8 above.

#### Count III:

9. The court hereby GRANTS the plaintiff's motion for summary judgment on Count III, for quantum meruit

relief, [\*696] and the Tatums' motion for summary judgment on this count is DENIED.

10. MLO hereby shall have and recover judgment against James Eddie Tatum and Ann Tatum, jointly and severally, in the amount of \$ 151,312.50 for unpaid attorney's fees, plus prejudgment interest at an annual rate of 6% from the date that MLO was terminated, February 4, 2003, until the date of this judgment.

11. The above-captioned civil action shall be STRICKEN from the active docket of the court.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

Date 2-3-05





Caution

As of: Oct 01, 2012

**JASVIRO MUNDI, as successor in interest to Harnam Singh Mundi, Plaintiff-Appellee, v. UNION SECURITY LIFE INSURANCE CO., Defendant-Appellant.**

No. 07-16171

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*555 F.3d 1042; 2009 U.S. App. LEXIS 2481*

December 9, 2008, Argued and Submitted, San Francisco, California  
February 11, 2009, Filed

**PRIOR HISTORY:** [\*\*1]

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV 06-1493 OWW. Oliver W. Wanger, District Judge, Presiding. *Mundi v. Union Sec. Life Ins. Co.*, 2007 U.S. Dist. LEXIS 41596 (E.D. Cal., May 29, 2007)

**COUNSEL:** Shane Reich, Fresno, California, for the plaintiff-appellee.

Kevin A. Rogers, Wells Marble & Hurst, Ridgeland, Mississippi, for the defendant-appellant.

**JUDGES:** Before: A. Wallace Tashima, William A. Fletcher, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Tashima.

**OPINION BY:** A. Wallace Tashima

**OPINION**

[\*1043] TASHIMA, Circuit Judge:

Union Security Life Insurance Company ("USLIC") appeals a decision of the district court denying its motion to compel arbitration in its dispute with Jasviro Mundi, the widow of Decedent Harnam S. Mundi. USLIC issued a life insurance policy to cover a loan taken out by Decedent. The life insurance policy did not contain an arbitration agreement; however, the loan agreement, to which USLIC was not a party, did contain an arbitration provi-

sion. The question, therefore, is whether USLIC may enforce the arbitration agreement, even though it is a nonsignatory to the agreement. We have jurisdiction pursuant to 9 U.S.C. § 16, and we affirm the district court's denial of USLIC's motion to compel arbitration.

**I.**

In May 2004, Decedent and Gurdip [\*\*2] S. Gill obtained a home equity line of credit from Wells Fargo Bank, memorialized in a document called the EquityLine Agreement. Section 25 of the EquityLine Agreement required that "any dispute between me and the Bank, regardless of when it arises or arose, will be settled using the following procedures." The arbitration provision provided as follows:

A dispute is any unresolved disagreement between the Bank and me that relates in any way to accounts, loans, services or agreements subject to this Arbitration provision. It includes any claims or controversy of any kind, which arise out of or are in any way related to these accounts, loans, services or agreements. It includes claims based on broken promises or contracts, tort (injury caused by negligent or intentional conduct), breach of fiduciary duty or other wrongful actions. It also includes statutory, common law and equitable claim [sic]. A dispute also includes any disagreement about the mean-

ing of this Arbitration Section and whether a disagreement is a "dispute" subject to binding arbitration as provided for in this Arbitration Section. No dispute may be joined in an arbitration with a dispute of any other person or arbitrated [\*\*3] on a class action basis. Furthermore, I agree that any arbitration I have with the Bank shall not be considered with any other arbitration and shall not be arbitrated on behalf of others without the consent of both me and the Bank.

[\*1044] In conjunction with the line of credit, Decedent purchased credit insurance in the amount of \$ 50,000 to cover the amount of the loan. The charges for the insurance were added to the amount of the loan each month. Wells Fargo was the creditor beneficiary of the insurance -- the insurance certificate provided that claim payments would be made to the creditor beneficiary "to pay off or reduce your debt." The certificate contained two questions in a medical application section, and it stated that the life insurance would not be paid if death resulted from a pre-existing condition. The certificate further provided that the insurance would stop on the date the loan stopped, or on the date that the borrower was in default.

Following Decedent's death, Mundi filed a claim with USLIC, asking the insurer to pay the \$ 50,000 amount that was outstanding on the line of credit. USLIC denied the claim, stating that Decedent had answered "no" to the medical questions on the [\*\*4] insurance application, even though he did have treatment for at least one of the pre-existing conditions listed on the application. USLIC explained that it would not have issued coverage if it had been aware of Decedent's complete medical history and therefore denied coverage. Decedent's death was not the result of any of these preexisting conditions.

Mundi filed a complaint in state court, alleging that she had been damaged by USLIC's refusal to pay the \$ 50,000 to Wells Fargo and that USLIC acted in bad faith by unreasonably denying the claim. She sought to recover the costs that she had incurred and sought punitive damages.

USLIC removed the action to federal court and filed a motion to compel arbitration. The district court reasoned that, even though the insurance was purchased in order to repay the loan, Mundi's claims did not in any other way involve the terms of the EquityLine Agreement. The court further reasoned that the arbitration provision excluded the arbitration of claims of third parties

and that USLIC was not an agent of Wells Fargo. The court accordingly denied the motion to compel arbitration. USLIC timely appealed.

## II.

The question we must answer is whether USLIC, a [\*\*5] nonsignatory to the arbitration agreement contained in the EquityLine Agreement, can require Mundi to arbitrate her claims against USLIC. <sup>1</sup> There is no question that the insurance certificate did not contain an arbitration provision. USLIC argues, however, that Mundi's claims are subject to the arbitration agreement because they arise from and relate to the EquityLine Agreement, and that equitable estoppel should be applied to compel arbitration.

<sup>1</sup> The denial of a motion to compel arbitration is reviewed de novo. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008).

In determining whether parties have agreed to arbitrate a dispute, we apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). [\*\*6] The presumption in favor of arbitration, however, does not apply "if contractual [\*1045] language is plain that arbitration of a particular controversy is not within the scope of the arbitration provision." *In re Tobacco Cases I*, JCCP 4041, 124 Cal. App. 4th 1095, 21 Cal. Rptr. 3d 875, 887 (Ct. App. 2004); see also *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960))); *Victoria v. Superior Court*, 40 Cal. 3d 734, 222 Cal. Rptr. 1, 710 P.2d 833, 834 (Cal. 1985) (en banc) (stating that "'the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate'" (quoting *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 133 Cal. Rptr. 775, 783 (Ct. App. 1976))); *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 70 Cal. Rptr. 3d 605, 611 (Ct. App. 2008) ("The public policy favoring arbitration does not apply to disputes the parties have not agreed to arbitrate."). "In addition, [h]owever broad may be the terms of a contract, it extends only to

those things concerning which it appears that the parties [\*\*7] intended to contract." *Victoria*, 710 P.2d at 834 (quoting *Cal. Civ. Code § 1648*) (alterations in original).

The arbitration provision here defines a dispute as a disagreement between Wells Fargo and the borrower that "relates in any way to accounts, loans, services or agreements subject to this Arbitration provision." Mundi's dispute with USLIC is not a disagreement between Wells Fargo and Decedent. Although there may be an attenuated relation between the EquityLine Agreement and the dispute between USLIC and Mundi, given that the insurance was taken out by Mundi's husband to pay off amounts owed under the EquityLine Agreement in the event of his death, this relation is irrelevant. The arbitration agreement is premised on a disagreement between Wells Fargo and the borrower. In the absence of such a disagreement, the arbitration provision does not apply. Thus, any disagreement between the borrower and a third party, such as USLIC, is simply not within the scope of the arbitration agreement, even if it is related in some attenuated way to "accounts, loans, services or agreements" subject to the arbitration provision. Moreover, there is no indication in the arbitration provision that [\*\*8] the parties intended to arbitrate or agreed to arbitrate a claim based on the insurance certificate. The face of the contract accordingly indicates that this dispute "is not within the scope of the arbitration provision." *In re Tobacco Cases*, 21 Cal. Rptr. 3d at 887.

We turn therefore to USLIC's argument that arbitration should be compelled on the basis of equitable estoppel. General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against nonsignatories. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). "Among these principles are '1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.'" *Id.* (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)).<sup>2</sup>

2 A nonsignatory also can seek to enforce an arbitration agreement as a third party beneficiary. *Comer*, 436 F.3d at 1101. USLIC, however, does not rely on third party beneficiary principles. Nor can it, because there is no evidence in the EquityLine Agreement that the signatories to the agreement intended to benefit third parties. *Id.* at 1102.

"Equitable estoppel 'precludes a party from claiming the benefits [\*\*9] of a contract while simultaneously attempting to avoid the burdens that contract imposes.'" [\*\*1046] *Id.* (quoting *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004)). We have examined two types of equitable estoppel in the arbitration context. In the first, a nonsignatory may be held to

an arbitration clause "where the nonsignatory 'knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement.'" *Id.* (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 199 (3d Cir. 2001)). Under the second, a signatory may be required to arbitrate a claim brought by a nonsignatory "because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations." *DuPont*, 269 F.3d at 201.

Neither line of cases addresses the precise situation we face. Although *DuPont* addressed the issue of a nonsignatory seeking to enforce an arbitration agreement against a signatory, in that case, it was a nonsignatory who brought claims [\*\*10] against the signatory, rather than the signatory bringing claims against a nonsignatory. *Comer* itself addressed whether a signatory to an arbitration agreement could enforce the agreement against a nonsignatory. And, in light of the general principle that only those who have agreed to arbitrate are obliged to do so, we see no basis for extending the concept of equitable estoppel of third parties in an arbitration context beyond the very narrow confines delineated in these two lines of cases.

The Second Circuit addressed a situation similar to ours in *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008), where the defendants, who were nonsignatories to an arbitration agreement, sought to compel a signatory to arbitrate its claims against the defendants on estoppel grounds. The court examined cases in which a nonsignatory was allowed to compel a signatory to arbitrate based on estoppel and reasoned that it was "essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration." *Id.* at 361. In addition to the requirement that the factual issues be intertwined, the court required "a relationship among the parties [\*\*11] of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." *Id.* at 359. Finding neither requirement met, the court affirmed the denial of the motion to stay pending arbitration. *Id.* at 359-62.

The Fourth Circuit also has addressed the situation of a nonsignatory seeking to compel a signatory to arbitrate its claims against the nonsignatory. In *American Bankers Insurance Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006), the Longs, signatories to a contract that contained an arbitration clause and that incorporated by reference a promissory note purchased by the Longs, sued American Bankers Insurance Group ("ABIG"), a

nonsignatory to the agreement containing the arbitration clause. The Fourth Circuit reversed the district court's denial of ABIG's motion to compel arbitration, reasoning that all of the Longs' claims depended on the terms of the note. *Id.* at 630. Because the note was appended to and incorporated by reference into the contract that contained the arbitration agreement, the court held that **[\*\*12]** "it would be inequitable to allow the Longs to seek recovery on their individual claims and at the same time deny that ABIG was a party to the [contract]'s arbitration clause." *Id.* at 630.

**[\*1047]** By contrast, in *Brantley v. Republic Mortgage Insurance Co.*, 424 F.3d 392 (4th Cir. 2005), the Fourth Circuit affirmed the denial of the defendant non-signatory's motion to compel the plaintiffs to arbitrate their claims against the defendant. The plaintiffs entered into an arbitration agreement with their mortgage lender, but their mortgage insurance contract, which was a separate transaction from the mortgage, did not contain an arbitration agreement. The Fourth Circuit held that equitable estoppel did not apply to compel the plaintiffs to arbitrate their Fair Credit Reporting Act claim against the mortgage insurance company because the claim did not arise out of or relate to the contract that contained the arbitration agreement. *Id.* at 396. Rather, the plaintiffs' claim was "wholly separate from any action or remedy for breach of the underlying mortgage contract that is governed by the arbitration agreement." *Id.* The court further reasoned that there were no allegations of collusion or misconduct **[\*\*13]** by the mortgage lender to require equitable estoppel, and that the defendant was not a third party beneficiary of the arbitration agreement because the contract did not mention the defendant or the mortgage insurance transaction. *Id.* at 396-97.

Mundi's claim that USLIC breached the insurance policy is not "intertwined with the contract providing for arbitration" -- the EquityLine Agreement. *Sokol*, 542 F.3d at 361; see also *Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, 1079-81 (C.D. Cal. 2007) (denying the insurer's motion to compel arbitration under equitable estoppel, reasoning that the plaintiff's claims regarding his insurance policies were not intertwined with the credit card agreements that the policies covered). Nor does her claim "arise[ ] out of" or "relate[ ] directly to" the EquityLine Agreement. *Brantley*, 424 F.3d at 396 (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)) (alterations in original). The resolution of her claim does not require the examination of any provisions of the EquityLine Agreement. The EquityLine Agreement does not mention the insurance certificate, let alone incorporate it by reference, as in *American Bankers*. **[\*\*14]** As in *Brantley*, Mundi's claim is based solely on USLIC's actions, and there are no allegations of collusion or of misconduct by Wells Fargo, the signatory to the arbitration agreement. Given these circumstances, USLIC may not compel Mundi to arbitrate her claims against it. The order of the district court denying USLIC's motion to compel arbitration is

**AFFIRMED.**<sup>3</sup>

<sup>3</sup> Because we affirm the district court's denial of USLIC's motion to compel arbitration, we need not address USLIC's challenge to the district court's finding that USLIC waived its right to seek arbitration.





Caution

As of: Oct 01, 2012

**PRECISION INSTRUMENT MANUFACTURING CO. ET AL. v. AUTOMOTIVE  
MAINTENANCE MACHINERY CO.**

No. 377

**SUPREME COURT OF THE UNITED STATES**

*324 U.S. 806; 65 S. Ct. 993; 89 L. Ed. 1381; 1945 U.S. LEXIS 2797; 65 U.S.P.Q. (BNA)  
133*

**January 31, February 1, 1945, Argued  
April 23, 1945, Decided**

**PRIOR HISTORY:** CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*CERTIORARI*, 323 U.S. 695, to review the reversal of a judgment dismissing the complaints and counterclaims in two suits for infringement of patents and breach of contracts.

**DISPOSITION:** 143 F.2d 332, reversed.

**LAWYERS' EDITION HEADNOTES:**

[\*\*\*LEdHN1]

EQUITY, §91

clean hands doctrine -- basis and scope. --

Headnote:[1]

The doctrine that he who comes into equity must come with clean hands is a self-imposed ordinance that closes the door of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant; and is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith, which presupposes a refusal on its part to be an abettor of inequity. While equity does not demand that

its suitors shall have led blameless lives as to other matters, it does require that they have acted fairly and without fraud or deceit as to the controversy in issue.

[\*\*\*LEdHN2]

EQUITY, §91

clean hands doctrine -- nature of complainant's misconduct. --

Headnote:[2]

The maxim that he who comes into equity must come with clean hands necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant; and accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character, but any wilful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim.

[\*\*\*LEdHN3]

EQUITY, §91

clean hands doctrine -- importance where public interest involved. --

Headnote:[3]

Where a suit in equity concerns the public interest as well as the private interests of the litigants, the doctrine that he who comes into equity must come with clean hands assumes a greater significance, since it not only prevents a wrongdoer from enjoying the fruits of his transgression but also averts an injury to the public.

[\*\*\*LEdHN4]

EQUITY, §91

clean hands doctrine -- complainant's conduct as warranting denial of relief. --

Headnote:[4]

One who, though not in possession of sufficient positive and conclusive evidence to establish the fact, became convinced that an application for a patent upon which the Patent Office had declared an interference with another application of which he was the owner, was perjured but failed to bring the facts in his possession to the attention of the Patent Office and instead procured an outside settlement of the interference proceedings by which he acquired the fraudulent application, turned it into a patent, and barred the other parties from ever questioning its validity, is barred by the doctrine of clean hands in equity from relief in a suit against the other parties to the settlement for alleged infringements of his patents and violation of the settlement agreement.

[\*\*\*LEdHN5]

PATENTS, §98

fraud or inequity underlying pending application -- duty of disclosure. --

Headnote:[5]

Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings, have an uncompromising duty to report to it all facts concerning possible fraud or inequity underlying the applications in issue.

**SYLLABUS**

1. In this suit for infringement of patents and breach of contracts related thereto, the District Court's findings of fact and conclusions of law sustained its judgment of dismissal on the ground of the complainant's "unclean hands," and the Circuit Court of Appeals' reversal of the judgment was erroneous. Pp. 807, 820.

2. The maxim "he who comes into equity must come with clean hands" closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. P. 814.

3. The clean-hands doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. P. 814.

4. While equity does not require that its suitors shall have led blameless lives as to other matters, it does require that they shall have acted without fraud or deceit as to the matter in issue. P. 814.

5. One's misconduct need not have been of such a nature as to be punishable as a crime or as to justify legal proceedings, in order to warrant invocation of the maxim. P. 815.

6. Where a suit in equity concerns the public interest as well as the private interests of the litigants, the clean-hands doctrine assumes greater significance; for if the equity court in such case properly applies the maxim to withhold its assistance, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. P. 815.

7. A suit to enforce patents and related contracts involves the public interest as well as interests of the adverse parties. P. 815.

8. The far-reaching social and economic consequences of a patent give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. P. 816.

9. Those who have applications pending in the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequity underlying the applications in issue. Failure in this duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. P. 818.

10. A settlement of interference proceedings which is grounded upon knowledge or reasonable belief of perjury, not revealed to the Patent Office or to any other public representative, lacks that equitable nature which entitles it to be enforced and protected in a court of equity. P. 819.

**COUNSEL:** Mr. Casper W. Ooms, with whom Mr. Will Freeman was on the brief, for petitioners.

Mr. Frank Parker Davis, with whom Mr. Albert J. Smith was on the brief, for respondent.

**JUDGES:** Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge

**OPINION BY: MURPHY****OPINION**

[\*807] [\*\*994] [\*\*\*1382] MR. JUSTICE MURPHY delivered the opinion of the Court.

The respondent, Automotive Maintenance Machinery Company, charged in two suits that the various petitioners had infringed three patents owned by it relating to torque [\*\*\*1383] wrenches. <sup>1</sup> It was further asserted that the allegedly infringing acts also breached several contracts related to the patents. In defense, the petitioners claimed 'inter alia that Automotive possessed such "unclean hands" [\*808] as to foreclose its right to enforce the patents and the contracts.

<sup>1</sup> The three patents involved are No. 2,279,792, issued on April 14, 1942, to Kenneth R. Larson; No. 2,283,888, issued on May 19, 1942, to H. W. Zimmerman; and reissue No. 22,219, issued on November 3, 1942, to H. W. Zimmerman, based on original No. 2,269,503.

The District Court, at the close of a consolidated trial on the sole issue of Automotive's alleged inequitable conduct, delivered an oral opinion holding that Automotive's hands were soiled to such an extent that all relief which it requested should be denied. This opinion was subsequently withdrawn at the request of one of the witnesses and is not a part of the record. At the same time, however, the court entered written findings of fact and conclusions of law, forming the basis for a judgment dismissing the various complaints and counterclaims "for want of equity." On appeal, the Circuit Court of Appeals reviewed the facts at length and concluded that the District Court's findings of fact were not supported by substantial evidence and that its conclusions of law were not supported by its findings. The judgment was accordingly reversed. *143 F.2d 332*. We brought the case here because of the public importance of the issues involved.

[\*\*995] The basic facts necessary to a determination of the vital issues are clear and without material dispute. In chronological order they may be summarized as follows:

In 1937 and prior thereto Automotive manufactured and sold torque wrenches developed by one of its employees, Herman W. Zimmerman. During this period Snap-On Tools Corporation was one of its customers for these wrenches. Automotive also had in its employ at this time one George B. Thomasma, who worked with Zimmerman and who was well acquainted with his ideas on torque wrenches. In November, 1937, Thomasma secretly gave information to an outsider, Kenneth R. Larson, concerning torque wrenches. Together they worked

out plans for a new wrench, although Thomasma claimed that it was entirely his own idea.

After unsuccessfully trying to interest other distributors, Larson made arrangements to supply Snap-On with [\*809] the new torque wrench. On October 1, 1938, Larson filed an application for a patent on the newly-developed wrench, which application had been assigned to Snap-On several days prior thereto. <sup>2</sup> Then in December, 1938, Larson, Thomasma and one Walter A. Carlsen organized the Precision Instrument Manufacturing Company to make the wrenches to supply Snap-On's requirements. All three received stock and were elected officers and directors of the new company. Manufacture of the wrenches began in January, 1939, and Precision succeeded in taking away from Automotive all of Snap-On's business. Thomasma continued to work for Automotive until the latter discovered his connection with Precision and discharged him in June, 1939. Thomasma's connection with Precision was also concealed from Snap-On during most of this period.

<sup>2</sup> Snap-On agreed to file the patent application for Larson, who was without funds, and took an assignment of the Larson application as security for performance of the agreement to supply wrenches.

Subsequently on October 11, 1939, the Patent Office declared an interference between certain claims in Larson's pending patent application and those in one filed by Zimmerman. Automotive was the owner of Zimmerman's application. Shortly after the interference was declared, R. E. Fidler, Automotive's attorney, wrote [\*\*\*1384] to the president of the company that the "whole situation confronting your opponents in this interference is quite messy, and I will be somewhat surprised if they fight the matter." He further wrote that if there was a contest "they surely will have a lot of explaining to do."

In August, 1940, Larson filed his preliminary statement in the Patent Office proceedings. In it he gave false dates as to the conception, disclosure, drawing, description and reduction to practice of his claimed invention. These dates were designed to antedate those in Zimmerman's [\*810] application by one to three years. Larson also claimed that he was the sole inventor of his wrench. When Fidler learned of this preliminary statement he immediately suspected that "there must be something wrong with this picture" and suggested to Automotive's president that a "very careful and thorough investigation" be made of the situation. The president agreed. Fidler then employed several investigators who made oral reports to him from time to time. According to Fidler's memoranda of these reports, Fidler learned in great detail in August and September, 1940, the part that Thomasma

played in the development of the Larson wrench and in the organization of Precision. He discovered that Thomasma claimed to have invented the wrench and that Larson "was now trying to freeze him out."

From October 24 to November 4, 1940, Larson and eight witnesses testified in the interference proceedings in support of his claims, corroborating his statements as to dates despite cross-examination. The day before this testimony ended Thomasma met with Fidler and Automotive's president and stated that he had developed Larson's wrench and that Larson's patent application was a "frame-up." Fidler then procured from Thomasma an eighty-three page statement concerning these matters, which Thomasma swore to on November 15. As the District Court found, this statement or affidavit "related in extensive detail the statements of Thomasma with respect to Larson's early work and disclosed such intimate knowledge thereof as to leave little doubt of the author's knowledge of the facts."

With these facts before him, Fidler admitted [\*\*996] that he "personally was inclined to take the position that I should do something drastic" in the form of taking the matter up with the Patent Office or the District Attorney. He resolved his problem, however, by submitting it to an outside [\*811] attorney. The latter advised him that his evidence was insufficient to establish Larson's perjury, that the Patent Office would not consider the matter until all proofs in the interference proceedings were in and that the District Attorney probably would not touch the situation while the interference proceedings were pending. Fidler followed his advice.

A few days later Fidler informed Larson's patent attorney, Harry C. Alberts, of the information disclosed in the Thomasma affidavit. Alberts admitted that "it looked very much like Larson had given false testimony" and asked that further examination of Thomasma be made in his presence. Accordingly, on November 28, Thomasma was examined orally before Alberts, Fidler and officials of Automotive and Snap-On. Thomasma repeated substantially the same story as in his affidavit. Snap-On's president said that if the story were true "the whole thing smells to the high heavens." And Alberts remarked that under the circumstances he felt he would have to withdraw as Larson's attorney.

On the same day, Alberts and Snap-On's president confronted Larson and Carlsen with the Thomasma story and demanded an explanation. Larson refused to commit himself on the truth of Thomasma's account but finally admitted that "my testimony is false and the whole case is false." Alberts then withdrew as [\*\*\*1385] their attorney,<sup>3</sup> giving them the names of three other lawyers, including M. K. Hobbs. The fact that Alberts withdrew was communicated by him to Fidler.

3 Alberts apparently never withdrew formally as Larson's attorney in the interference proceedings by filing a document to that effect in the Patent Office.

Larson and Carlsen called on Hobbs the next day, November 29. They told him they were willing to concede [\*812] priority in Zimmerman and wanted Hobbs to settle the interference proceedings.<sup>4</sup> Hobbs took the case on that basis, making no effort to inquire into the reasons for the concession since he considered that matter immaterial. Even when Fidler tried to tell him later about the perjury, Hobbs stopped him for he "didn't want to hear the conflict in testimony."

4 Both Larson and Carlsen testified that they told Hobbs of the perjury and of the predicament they were in, stating to him that they did not want to be turned over to the District Attorney. Hobbs, however, denied that they informed him of these matters. It was at the request of Hobbs that the District Court's oral opinion was withdrawn in order that, in the words of the District Court, it would not be "construed as implying that Mr. Hobbs had willfully given false testimony or had been guilty of professional misconduct." The court further said that the record demonstrated "that the witness Hobbs did not testify falsely." Assuming that Hobbs gave no false testimony, however, we do not consider that fact to be of controlling significance in this case.

Hobbs immediately undertook to settle the interference proceedings. On December 2 he proposed a settlement which included a concession of priority by Larson, but this proposal was apparently not satisfactory to all those concerned. Meanwhile Fidler presented the facts to another disinterested lawyer and asked him whether he thought there was enough evidence to bring a conspiracy suit for damages or a criminal action. The lawyer, after admitting that he did not have the slightest doubt but that Thomasma was telling the truth, replied in the negative.

On December 13, Fidler submitted a draft agreement that he had prepared. This draft contained a recital that "it has been determined by the parties hereto and their respective counsel that the party Zimmerman is the prior inventor of the subject matter involved in said Interference No. 77,565, as well as all other subject matter commonly disclosed in said Zimmerman and Larson applications." But this draft was likewise unacceptable.

[\*813] For a time, negotiations were broken off and resumption of the interference proceedings seemed imminent. One of the other attorneys for Automotive wrote a letter on December 19 to Alberts, who was still

acting as attorney for Snap-On, stating that "you must recognize that a large part of the [\*\*\*997] testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth" and that "you are holding up the issuance of the Zimmerman patent without the slightest justification." Fidler, who had approved this letter, justified these remarks on the ground that "they had told us Zimmerman was the prior inventor and we hadn't yet received a concession of priority." In reply to this letter, Alberts charged that Automotive's attorneys were using "threatening accusations" and "duress" and that they were threatening to "unloose the dogs" unless they got everything they requested in the settlement.

Suddenly on the next day, December 20, negotiations were resumed and the parties quickly entered into three contracts, the first two of which are involved in this suit. These contracts, in their relevant parts, provided as follows:

(1) Under the Automotive and Precision-Larson agreement, Larson conceded priority in Zimmerman and Larson's application was to be assigned to Automotive. Automotive agreed to license Larson and Precision to complete their unfilled orders [\*\*\*1386] from Snap-On to the extent of about 6,000 wrenches, with a royalty to be paid on the excess. Automotive released Precision, Larson and their customers from liability for any past infringement and gave Precision and Larson a general release as to all civil damages. Finally, Precision and Larson acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications.

(2) Under the Automotive and Snap-On agreement, Snap-On agreed to reassign the Larson application to Precision [\*814] and acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications. Automotive also gave Snap-On the right to sell the 6,000 wrenches then on order from Precision and released Snap-On from any past liability or damages.

(3) Under the Snap-On and Precision-Larson agreement, Snap-On reassigned to Larson and Precision whatever title Snap-On had to the Larson application. Precision agreed to manufacture and deliver to Snap-On the 6,000 wrenches then on order. Snap-On also assented to the Automotive and Precision-Larson agreement.

The Larson application was accordingly assigned to Automotive on December 20, 1940. Automotive subsequently received patents on both the Larson and Zimmerman applications after making certain changes. Then Precision began to manufacture and Snap-On began to sell a new wrench. Automotive claimed that this was an infringement of its patents and a breach of the contracts

of December 20, 1940. Thus the suit arose which is now before us.

[\*\*\*LEdHR1] [1]The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." *Bein v. Heath*, 6 How. 228, 247. Thus while "equity does not demand that its suitors shall have led blameless lives," *Loughran v. Loughran*, 292 U.S. 216, 229, as to other matters, it does require that they shall have acted fairly and [\*815] without fraud or deceit as to the controversy in issue. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245; *Johnson v. Yellow Cab Co.*, 321 U.S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399.

[\*\*\*LEdHR2] [2]This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." *Keystone Driller Co. v. General Excavator Co.*, *supra*, 245, 246. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of [\*\*\*998] conduct is sufficient cause for the invocation of the maxim by the chancellor.

[\*\*\*LEdHR3] [3]Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance [\*\*\*1387] in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488, 492-494.

[\*\*\*LEdHR4] [4]In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are "issues of great moment to the public." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,

324 U.S. 806, \*; 65 S. Ct. 993, \*\*;  
89 L. Ed. 1381, \*\*\*; 1945 U.S. LEXIS 2797

322 U.S. 238, 246. See also *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 665; *Morton Salt Co. v. Suppiger Co.*, *supra*; *United States v. Masonite Corp.*, 316 U.S. 265, 278. [\*816] A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the "Progress of Science and useful Arts." At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. And when such measurements are made, it becomes clear that the District Court's action in dismissing the complaints and counterclaims "for want of equity" was more than justified.

The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury. Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent. Yet Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the Larson application itself, turned it into a patent and barred the other parties from ever questioning its validity. Such conduct does not conform to minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and contracts.

Automotive contends that it did not have positive and conclusive knowledge of the perjury until the pleadings [\*817] in the instant proceedings were filed and until Larson admitted his perjury on pre-trial examination. It claims that prior thereto it only had Thomasma's affidavit and statements, which were uncorroborated and likely to carry little weight as against Larson and his eight witnesses. It is further pointed out that Fidler submitted what he knew of the facts to at least two independent attorneys, both of whom advised him that the evidence of perjury that he possessed was insufficient. From this it is argued, as the Circuit Court of Appeals held, that while Automotive was "morally certain that Thomasma's story was true" there was no duty to report this uncorroborated information to either the District Attorney or the Patent Office.

But Automotive's hands are not automatically cleansed by its alleged failure to possess sufficiently trustworthy evidence of perjury to warrant submission of the case to the District Attorney or to the Patent Office during the pendency of the interference [\*\*\*1388] proceedings. The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured. Yet it acted in complete disregard of that belief. Never for a moment did Automotive or its representatives doubt the existence of this fraud. Fidler suspected it soon after he knew of Larson's claims. His suspicions were confirmed by his hired investigators. Then Thomasma revealed such intimate and detailed facts concerning the [\*\*\*999] perjury as to convince all who heard him, despite certain reservations entertained by some persons concerning his trustworthiness. Moreover, Fidler was well aware that Alberts threatened to withdraw as Larson's counsel if he discovered from Larson that Thomasma's story was true and that Alberts in fact did so withdraw. The suspected perjury was further confirmed by Larson's sudden willingness to concede priority after he learned of [\*818] Thomasma's story and by the admissions by Alberts and Snap-On that Zimmerman "was the prior inventor." And the very fact that Fidler saw fit to submit his proof to outside attorneys for advice is an indication of the substantiality of his belief as to Larson's perjury. With all this evidence before it, however, Automotive pursued the following course of action:

[\*\*\*LEdHR5] [5] 1. It chose to keep secret its belief and allegedly unsubstantial proof of the facts concerning Larson's perjury. We need not speculate as to whether there was sufficient proof to present the matter to the District Attorney. But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitable conduct underlying the applications in issue. Cf. *Crites, Inc. v. Prudential Co.*, 322 U.S. 408, 415. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the "mute and helpless victims of deception and fraud."

324 U.S. 806, \*; 65 S. Ct. 993, \*\*;  
89 L. Ed. 1381, \*\*\*; 1945 U.S. LEXIS 2797

*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, *supra*, 246.

2. Instead of pursuing the interference proceedings and proving the fact that Zimmerman's claims had priority [\*819] over those asserted by Larson, Automotive chose to enter into an outside settlement with Larson, Precision and Snap-On, whereby Larson conceded priority. Outside settlements of interference proceedings are not ordinarily illegal. But where, as here, the settlement is grounded upon knowledge or reasonable belief of perjury which is not revealed to the Patent Office or to any other public representative, the settlement lacks that equitable nature which entitles it to be enforced and protected in a court of equity.

3. By the terms of the settlement, Automotive secured the perjured Larson application and exacted promises from the other parties never to question the validity of any patent that might be issued on that application. Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it without ever attempting to reveal to the Patent Office or to anyone else [\*\*\*1389] the facts it possessed concerning the application's fraudulent ancestry. Automotive thus acted to compound and accentuate the effects of Larson's perjury.

These facts all add up to the inescapable conclusion that Automotive has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of Larson and Precision may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims

infected with fraud and perjury is too great to be overridden by such a consideration. Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects. Instead, Automotive acted affirmatively to magnify and increase those effects. Such inequitable conduct impregnated Automotive's entire cause of action and justified dismissal by resort to the unclean hands doctrine. *Keystone Driller Co. v. General Excavator Co.*, *supra*.

[\*820] We conclude, therefore, that the evidence clearly supported the District Court's findings of fact and that these findings justified its conclusions of law. The court below erred in reversing its judgment.

*Reversed.*

[\*\*1000] MR. JUSTICE ROBERTS.

I think the writ should be dismissed or the judgment of the Circuit Court of Appeals affirmed. The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties. In my view it is not the function of this Court to weigh the facts for the third time in order to choose between litigants, where appraisal of the conduct of each must affect the result.

MR. JUSTICE JACKSON is of the opinion that the judgment should be affirmed, as he takes the view of the facts set forth in the opinion of the court below. 143 *F.2d* 332.





Analysis  
As of: Oct 01, 2012

**In re, Mark Steinmetz and ACC Builders, LLC, Debtor(s). Mark Steinmetz and ACC Builders, LLC, Plaintiff(s), v. Robert Cooper and The Cooper Law Firm, Defendant(s).**

**C/A No. 07-00628 & C/A No. 07-00579 (Joint Administration), Adv. Pro. No. 10-80177, Chapter 11**

**UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA**

*2011 Bankr. LEXIS 3830*

**March 18, 2011, Decided  
March 18, 2011, Filed**

**COUNSEL:** [\*1] For Mark Alan Steinmetz, aka M Steinmetz (07-00628-jw), Debtor: Debra J. Gammons, Debra J. Gammons, Attorney at Law, Daniel Island, SC; Robert H. Cooper, Greenville, SC.

For Karen McNeil Steinmetz (07-00628-jw), Joint Debtor: Robert H. Cooper, Greenville, SC.

For The Cooper Law Firm, Robert H. Cooper, The Cooper Law Firm (07-00628-jw), Defendants: William H. Jordan, Smith Moore Leatherwood, LLP, Greenville, SC.

For Jackson L. Cobb (07-00628-jw), Trustee: H. Flynn Griffin, III, Robert Frank Anderson, Columbia, SC.

For US Trustee's Office (07-00628-jw, 07-00579-jw), U.S. Trustee: John Timothy Stack, Joseph F. Buzhardt, III, Office of the United States Trustee, Columbia, SC.

For ACC Builders, LLC (07-00579-jw), Debtor: Debra J. Gammons, Debra J. Gammons, Attorney at Law, Daniel Island, SC; Robert H. Cooper, Greenville, SC.

Mark Alan Steinmetz (10-80177-jw), Debtor, Pro se, Greenville, SC.

Karen McNeil Steinmetz (10-80177-jw), Debtor, Pro se, Greenville, SC.

For Mark Alan Steinmetz, ACC Builders, LLC (10-80177-jw), Plaintiffs: Debra J. Gammons, LEAD ATTORNEY, Debra J. Gammons, Attorney at Law, Daniel Island, SC.

For Robert H. Cooper, The Cooper Law Firm, Cooper Law Firm (10-80177-jw), Defendants: [\*2] Jason D. Maertens, Smith Moore Leatherwood LLP, Greenville, SC.

For Jackson L. Cobb (10-80177-jw), Trustee: Robert Frank Anderson, Columbia, SC.

**JUDGES:** John E. Waites, UNITED STATES BANKRUPTCY JUDGE.

**OPINION BY:** John E. Waites

**OPINION**

**ORDER**

This matter comes before the Court on the Motion to Dismiss Plaintiffs' Complaint filed by Robert Cooper and

the Cooper Law Firm ("Defendants"), which seeks dismissal of this case with prejudice on the grounds that Plaintiffs failed to file an expert affidavit with the Complaint and failed to state a claim upon which relief can be granted. Mark Steinmetz and ACC Builders, LLC ("Plaintiffs") responded in opposition to the Motion to Dismiss and have filed a Motion to Amend Complaint in order to file an expert affidavit. Defendants filed an objection to the Motion to Amend. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.<sup>1</sup> This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Pursuant to *Fed. R. Civ. P.* 52, which is made applicable to this adversary proceeding by *Fed. R. Bankr. P.* 7052, the Court makes the following Findings of Fact and Conclusions of Law.

<sup>1</sup> See *Grausz v. Englander*, 321 F.3d 467 (4th Cir. 2003) ("An adversary proceeding brought [\*3] by a debtor to assert a malpractice claim against his bankruptcy lawyer is a case that falls within a bankruptcy court's core jurisdiction under 28 U.S.C. § 157)

#### **FINDINGS OF FACT**

1. On February 4, 2007, ACC Builders, LLC, filed a voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code. The petition was signed by Mark Steinmetz in his capacity as Manager and Sole Owner of ACC Builders, LLC. On February 5, 2007, Mark Steinmetz and Karen Steinmetz filed a joint voluntary petition for relief under Chapter 11 of the Bankruptcy Code.<sup>2</sup>

2 By order entered October 24, 2007, the Court authorized the joint administration and procedural consolidation of the two cases.

2. Plaintiffs employed Defendants as counsel for the Debtors-In-Possession, and the Bankruptcy Court approved Defendants' employment by order entered on March 13, 2007.

3. On June 27, 2007, Jackson L. Cobb ("Trustee") was appointed as the Chapter 11 Trustee for both cases. The cases were fully administered by the Trustee and were closed by orders entered in each case on July 9, 2008.

4. Thereafter, Mark Steinmetz ("Steinmetz") commenced a lawsuit against Defendants in the South Carolina Court of Common Pleas (the [\*4] "State Court"), alleging causes of action for negligent misrepresentation, fraud, unfair trade practices, legal malpractice, breach of fiduciary duty, intentional infliction of emotional distress, and claims for damages, based on Defendants' rep-

resentation during the course of the bankruptcy cases ("the First State Court Action").

5. On September 25, 2009, the State Court dismissed Steinmetz's complaint without prejudice based on Steinmetz's failure to file an expert affidavit contemporaneously with the filing of his complaint as required by *S.C. Code Ann.* § 15-36-100.

6. Thereafter, Steinmetz commenced a second lawsuit against Defendants in State Court ("Second State Court Action").

7. On July 6, 2010, Judge Edward W. Miller, Circuit Court Judge for the Thirteenth Judicial Circuit, dismissed the Second State Court Action, citing lack of subject matter jurisdiction due to Steinmetz's failure to obtain leave of the United States Bankruptcy Court before filing his lawsuit in State Court.

8. On August 31, 2010, Plaintiffs filed a motion seeking to reopen their bankruptcy cases and requesting leave of the Bankruptcy Court to pursue the malpractice lawsuit in state court.

9. On October 18, 2010, [\*5] the cases were transferred to the undersigned as a result of the recusal of Judge Helen E. Burris based upon the allegations set forth in the malpractice lawsuit.

10. On November 12, 2010, the Court entered an order granting Plaintiffs' motion to reopen their bankruptcy cases. However, the Court denied Plaintiffs' motion to the extent it sought leave of this Court to pursue the malpractice lawsuit in state court, finding that the Bankruptcy Court was the appropriate forum for Plaintiffs to bring such claims. The Court gave Plaintiffs 30 days to commence adversary proceedings against Defendants in the Bankruptcy Court. The Court also required the reappointment of the Chapter 11 Trustee and requested that he review any complaints filed and file a report with the Court.

11. On December 10, 2010, Plaintiffs commenced this adversary proceeding by filing a Complaint against Defendants, alleging causes of action for legal malpractice, intentional infliction of emotional distress, breach of fiduciary duty, fraud and misrepresentation, and negligence. However, Plaintiffs failed to attach an expert affidavit as required by *S.C. Code Ann.* § 15-36-100.

12. Defendants filed the subject Motion to Dismiss [\*6] Case with Prejudice on December 30, 2010.

13. On January 6, 2011, Plaintiffs filed a Motion to Amend Complaint in order to file the expert affidavit.

14. At the hearing on the Motion to Dismiss and Motion to Amend, Plaintiffs' counsel informed the Court that the failure to attach an expert affidavit was the result

of mistake. Plaintiffs' counsel did not have an expert affidavit prepared at the time of the hearing.

15. The Trustee filed a statement of position regarding this adversary proceeding on February 17, 2011, which indicated his belief that the claims contained in the Complaint are assets of the reopened Chapter 11 Estates and that any recoveries obtained in the adversary proceeding should be declared to be property of the Estates, and requested that the Court declare the Estates to be the proper parties in interest in the adversary proceeding.

16. On February 24, 2011, the Court requested the parties to submit briefs on the issues of whether the claims asserted in the adversary proceeding are property of the Estates and who is the proper party in interest to assert such claims.

## CONCLUSIONS OF LAW

### **I. Motion to Dismiss Based on Failure to Comply with S.C. Code § 15-30-100.**

Defendants [\*7] first argue that Plaintiffs' Complaint should be dismissed because Plaintiffs failed to file an expert affidavit in accordance with *S.C. Code Ann. § 15-36-100*.<sup>3</sup> This section provides, in pertinent part:

(B) ... in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina ..., the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

...  
(C)(1) ... If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim....

Plaintiffs argue that dismissal pursuant to § 15-36-100 is discretionary and that the purpose of the statute is not lost without an expert witness affidavit because [\*8]

Plaintiffs' claims are valid. This argument is not convincing. The plain language of the statute provides that "the plaintiff **must file as part of the complaint** an affidavit of an expert witness" and that "if an affidavit is not filed... the complaint **is subject to dismissal** for failure to state a claim." There is no language in the statute that indicates that the requirement to file an expert affidavit is optional. *Section 15-36-100* appears to have been enacted in order to prevent the filing of frivolous lawsuits against certain professionals in South Carolina, including attorneys. The expert witness affidavit serves to ensure that claims of professional negligence made against attorneys have some validity before filing and alerts the professional to the merits of the claim. The purpose of the statute is not served if the requirement of an expert witness affidavit is optional.

3 Further references to *S.C. Code Ann. § 15-36-100* shall be by section number only.

Courts interpreting § 15-36-100 in connection with a motion to dismiss raised by a defendant have dismissed complaints filed without an expert witness affidavit without consideration of whether the allegations of the complaints [\*9] have merit or whether there are equitable arguments weighing against dismissal. See *Rotureau v. Chaplin, No. 2:09-cv-1388-DCN, 2009 U.S. Dist. LEXIS 118618, 2009 WL 5195968, at \*6 (D.S.C. Dec. 21, 2009)* (dismissing malpractice claim without prejudice as a result of plaintiff's failure to comply with § 15-36-100 by filing an expert affidavit and finding that § 15-36-100 is not a mere "procedural" requirement and is applicable in federal court); *Eaglin v. Metts, No. 0:08-2547-TLW-PJG, 2010 U.S. Dist. LEXIS 26901, 2010 WL 1051177, at \*8 (D.S.C. Feb. 16, 2010)* (finding that a plaintiff could not proceed with a state law claim of negligence against a professional where he failed to file an expert witness affidavit with his complaint). Even if equitable arguments may be considered, the Court finds that the equities in this case weigh in favor of dismissal. This is the second time Steinmetz has failed to file an expert affidavit. His First State Court Action against Defendants was dismissed for failure to file an expert affidavit. Even at the hearing on the subject motion, which occurred more than a month after the Complaint was filed, Plaintiffs did not have expert affidavit to support their claims ready for submission to the Court.

Further, the [\*10] statute provides two specific exceptions where the affidavit may be filed separate from the complaint, and neither of those exceptions appear to be applicable in this case. First, § 15-36-100(C)(1) states that the contemporaneous filing requirement does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days

of the date of filing, where the plaintiff alleges that an expert affidavit could not be prepared due to time constraints. Plaintiffs have not argued that the statute of limitations is due to expire or that the affidavit could not be prepared due to time constraints; therefore, the Court concludes § 15-36-100(C)(1) is inapplicable.

Second, § 15-36-100(C)(2) provides that the contemporaneous filing requirement is not required to support "a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." Plaintiffs argue that some of their allegations come within the common knowledge and experience of a layperson and therefore [\*11] the affidavit is not required for those allegations. Plaintiffs' legal malpractice claim is based upon allegations that Defendants misadvised the Plaintiffs regarding decisions made during their chapter 11 bankruptcy cases and that Defendants' representation of Plaintiffs in their bankruptcy cases was inadequate, particularly with regard to the settlement of certain claims. Based on its review of the Complaint, the Court is unable to conclude that the allegations contained therein come within the common knowledge and experience of a layperson. Bankruptcy law is a highly specialized practice and the representation of a debtor in a chapter 11 case requires knowledge and experience beyond the common knowledge and experience of most lawyers, let alone laypersons. Accordingly, the Court finds that § 15-36-100(C)(2) is inapplicable.

Based on the foregoing, Defendants' Motion to Dismiss Plaintiffs' malpractice claim is granted.

## II. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)6*

Defendants further argue the remainder of the claims in the Complaint should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* because Plaintiffs have failed to set forth facts raising their right to relief beyond [\*12] the speculative level and to state a claim to relief that is plausible on its face.

*Fed. R. Civ. P. 12(b)(6)* is made applicable to this adversary proceeding pursuant to *Fed. R. Bankr. P. 7012*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A complaint is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing

*Bell Atlantic*, 550 U.S. at 556). Plausibility does not require probability, but does require something "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

## III. Intentional Infliction of Emotional Distress

In their Second Cause of Action, Plaintiffs assert that Defendants are liable for the tort of intentional infliction of emotional distress. The essence of Plaintiffs' claim is that despite Defendants' assurances of easy and quick bankruptcy relief based on Defendant Cooper's familiarity [\*13] and friendship with the bankruptcy judge formerly assigned to their cases, Defendants failed to perform in accordance with those statements. To support this claim, Plaintiffs allege, *inter alia*, that Defendants failed to inform Plaintiffs of a hearing and advised Plaintiffs to sell certain property which allegedly placed Plaintiffs in an unfavorable position with the United States Trustee. As a result of these actions, Plaintiffs allege that they suffered severe emotional distress.

Under South Carolina law, in order to recover for intentional infliction of emotional distress, a plaintiff must establish the following elements:

1. The defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct;
2. The conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
3. The action of the defendant caused plaintiff's emotional distress; and
4. The emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

*Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010).

Defendants [\*14] correctly assert that Plaintiffs cannot recover damages for emotional distress in a legal malpractice action. Plaintiffs' emotional distress claim appears to be based upon the same conduct complained of in connection with their malpractice claim against Defendants. Under South Carolina law, it is a general rule that damages for emotional injuries are not recoverable if they are a consequence of other damages caused by the attorney's negligence or a fiduciary breach that

was not an intentional tort. See *Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984). In *Caddel*, the court held that damages for mental anguish were not recoverable by a client bringing a malpractice action against her attorney, where the attorney overlooked an easement or other title encumbrance in searching public title records. *Id.* at 484. The court reasoned that "[a]ttorneys are not trained psychologists or psychiatrists; they cannot be expected to identify latent mental illness or the propensity of a client to lose control of his emotions." *Id.* Other courts have also adopted this majority rule. See *Boros v. Baxley*, 621 So.2d 240 (Ala. 1993) (holding there can be no recovery for emotional distress where [\*15] legal malpractice does not involve any affirmative wrongdoing but merely neglect of duty); *Timms v. Rosenblum*, 713 F.Supp. 948 (E.D.Va. 1989) (holding recovery for mental anguish is not permitted in legal malpractice claims absent alleged conduct rising to the level of a separate and independent tort), *aff'd*, 900 F.2d 256 (4th Cir. 1990); *Long-Russell v. Hampe*, 2002 WY 16, 39 P.3d 1015 (Wyo. 2002) (damages for emotional distress not recoverable for incorrect legal advice); *Brevon Developers, Inc., et al. v. Phillips, et al.*, No. 117155, 1993 WL 946386 (Va.Cir.Ct. Dec. 22, 1993) (legal malpractice claims are actions for a breach of contract and damages for emotional distress are not recoverable in an action for breach of contract, absent proof of physical injury or wanton or willful conduct amounting to a separate tort).

Plaintiffs failed to include allegations in the Complaint of intentional conduct on the part of Defendants, which would rise to the level of a separate and independent tort. Moreover, the conduct complained of, even if true, does not appear from the face of the Complaint to be extreme or outrageous or exceeding "all possible bounds of decency," such that it must be [\*16] regarded as "atrocious, and utterly intolerable in a civilized community." Thus, Plaintiffs fail to state a claim for intentional infliction of emotional distress that is plausible on its face. Accordingly, the Court dismisses Plaintiffs' Second Cause of Action.

#### IV. Breach of Fiduciary Duty

Plaintiffs allege in their Third Cause of Action that Defendants breached their fiduciary duty. The Court notes that "when...the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the latter should be dismissed as duplicative." *Doe v. Howe, et al.*, 367 S.C. 432, 626 S.E.2d 25, 33 n. 27 (S.C.Ct.App. 2007) (quoting *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 653 N.E.2d 915, 921, 210 Ill. Dec. 720 (1995)); see also *Cf. General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F.Supp.2d 951, 961-62 (E.D.Va. 2005) (holding that claims for breach of con-

tract and breach of fiduciary duty were "mere disguises for the plaintiffs' legal malpractice claims"); *O'Connell v. Bean*, 263 Va. 176, 556 S.E.2d 741 (Va. 2002) (finding claims for constructive fraud and breach of fiduciary duty, "though sounding in tort, [were] actions for breaches of the implied terms [\*17] of [the attorney-client] contract"); *Teague v. Isenhower*, 157 N.C. App. 333, 579 S.E.2d 600, 602 n.1 (N.C.Ct.App. 2003) ("[A] breach of fiduciary duty claim is essentially a negligence or professional malpractice claim.")

In their Complaint, Plaintiffs listed essentially identical facts in support of their breach of fiduciary duty claim as they did for their legal malpractice claim. As discussed above, the Court found that dismissal of Plaintiffs' cause of action for legal malpractice was appropriate due to Plaintiffs' failure to file an expert affidavit in compliance with § 15-36-100. To allow Plaintiffs to state a claim for breach of fiduciary duty based on the same facts would merely allow a way around the requirement of an expert affidavit under § 15-36-100. In light of above cases, the Court finds that Plaintiffs' cause of action for breach of fiduciary duty should be dismissed as duplicative of Plaintiffs' legal malpractice claim.

#### V. Fraud and Misrepresentation.

In their Fourth Cause of Action, Plaintiffs assert that Defendants are liable for fraud and misrepresentation. To prevail on a cause of action for fraud, a plaintiff must prove by clear and convincing evidence the following elements: (1) a [\*18] representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Moseley et al v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct.App. 2010). "The failure to prove any element of fraud or misrepresentation is fatal to the claim." *Schnellmann v. Roettger*, 373 S.C. 379, 645 S.E.2d 239, 241 (2007). The Court further notes that to the extent there are any allegations of fraud, those allegations must satisfy the heightened standard of *Federal Rule of Civil Procedure 9(b)* ("Rule 9(b)"), which requires a pleader to "state with particularity circumstances constituting fraud or mistake." *Fed.R.Civ.P. 9(b)*. The Fourth Circuit Court of Appeals has held that "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby" are the circumstances that must be plead with particularity. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) [\*19] (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)). By requiring a plain-

tiff to plead circumstances of fraud with particularity and not by way of general allegations, *Rule 9(b)* screens "fraud actions in which all the facts are learned through discovery after the complaint is filed." *Harrison*, 176 F.3d at 789.

Plaintiffs' fraud allegations fail to support a claim for fraud or misrepresentation under South Carolina law. Plaintiffs alleged in their Complaint that Defendants made representations that Defendant Cooper knew the bankruptcy judge and helped her get her seat on the Bench, that his familiarity and friendship would influence the court proceedings, that the bankruptcy proceeding would be easy and quick, that Defendants were experts, that Plaintiffs could sell property in order to have money during the bankruptcy case, and that Defendants could handle the contractor and subcontractor claims so Plaintiffs did not need to hire separate counsel. Except for the allegation that Plaintiffs could sell property, the allegations essentially consist of Defendants' making a promise and then failing to fulfill that promise. "A mere unfulfilled promise to [\*20] do an act in the future cannot support an action for fraud." See *Helena Chemical Co. v. Huggins*, 2008 U.S. Dist. LEXIS 92449, 2008 WL 4908463, \*7 (D.S.C. 2008); see also *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641, 643 (1978) (fraud must relate to a present or preexisting fact, and cannot be predicted on unfulfilled promises or statements as to future events), *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 404 S.E.2d 912, 917 (Ct.App. 1991). The same standard applies to Plaintiffs' claim of misrepresentation. See *Sauner v. Public Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161, 166 (2003) ("Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation."); *Koontz v. Thomas*, 333 S.C. 702, 511 S.E.2d 407, 413 (Ct.App. 1999) (stating, to be actionable as a misrepresentation, the representation must relate to a present or pre-existing fact and be false when made).

With respect to the allegation that Defendants' represented that Plaintiffs could sell property in order to have money during the case, a cause of action for fraud or misrepresentation based on this allegation has not been pled with sufficient particularity. Specifically, Plaintiff has not alleged when this [\*21] alleged representation was made or what Defendants obtained by virtue of making this representation. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (holding that the complaint must include allegations regarding the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby" in order to satisfy the particularity requirement). The timing of the representation may be critical in determining

whether this representation was false or misleading at the time it was made.

For the foregoing reasons, the Court dismisses Plaintiffs' cause of action for fraud and misrepresentation.

## VI. Negligence

Finally, Plaintiffs' Fifth Cause of Action for Negligence must also be dismissed for the same reasons set forth in regard to Plaintiff's Legal Malpractice claim. Plaintiffs' allegations relate to Defendants' actions taken in a professional capacity as attorney for Plaintiffs. Similar to Plaintiffs' Breach of Fiduciary Duty claim, the negligence claim is duplicative of Plaintiffs' legal malpractice claim. Since the essence of Plaintiffs' Fifth Cause of Action is a claim for professional [\*22] negligence against a professional licensed by the state of South Carolina, South Carolina law requires that Plaintiffs file an affidavit of an expert witness. See *S.C. Code Ann. § 15-36-100*; see also *In re Millmine, No. 3:10-1595-CMC*, 2011 U.S. Dist. LEXIS 9261, 2011 WL 317643 (D.S.C. Jan. 31, 2011) (dismissing a negligence action for failure to file an expert affidavit, finding that the negligence action was an action for medical malpractice because it arose from injuries resulting from negligent medical treatment and thus an expert affidavit was required to be filed under *S.C. Code § 15-36-100*). As no such affidavit was filed, Plaintiffs' negligence claim is dismissed.

## VII. Standing

The Trustee asserts the causes of action alleged in the Complaint are property of the estate, and therefore, the Plaintiffs do not have standing to bring such claims. In response, Plaintiffs assert that these claims belong to the Plaintiffs personally because the conduct giving rise to the claims occurred post petition and the claims did not exist as of the commencement of the cases.

When a bankruptcy case is commenced, all of the debtor's assets are transferred by operation of law into a bankruptcy estate, which is comprised of "all [\*23] legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Property of the estate includes causes of action belonging to the debtor at the time the petition is filed. *Id.*

Plaintiffs assert that these causes of action did not exist in February 2007 when they filed their voluntary petitions because the causes of action are based upon post petition conduct. The Trustee argues that the causes of action asserted by Plaintiffs are sufficiently rooted in pre-petition events to be considered property of their estates, citing *In re Strada Design Assocs., Inc.*, 326 B.R. 229 (Bankr. S.D.N.Y. 2005) (finding that malpractice claims based in part on post petition activities had sufficient roots in the debtor's pre-bankruptcy activities to

warrant inclusion in their estates) and *O'Dowd v. Trueger* (*In re O'Dowd*), 233 F.3d 197 (3d Cir. 2000) (finding that a post petition malpractice claim was property of the estate because it was traceable to pre-petition conduct and was also property of the estate under § 541(a)(7) because the estate itself suffered harm from the post petition conduct).

It appears from the Complaint that Plaintiffs' claims are based [\*24] upon both pre-petition and post petition conduct of the Defendants. As to Plaintiff Steinmetz, it is unnecessary to decide whether the post petition conduct was sufficiently related to the pre-petition conduct to be considered property of the estate because, pursuant to 11 U.S.C. § 1115, property of the estate in an individual chapter 11 case also includes, in addition to the property specified in § 541, "all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first." Under § 1115(a)(1), it appears that even a post petition malpractice claim would constitute property of the estate in Plaintiff Steinmetz's individual chapter 11 case, so long as it accrued before the case was closed, dismissed, or converted.

Section 1115(b) allows the debtor to remain in possession of all property of the estate, except where a chapter 11 trustee is appointed pursuant to 11 U.S.C. § 1104. See 11 U.S.C. § 1115(b). When a trustee is appointed in a chapter 11 case, the trustee becomes the estate's sole representative. 11 U.S.C. § 323 ("The trustee [\*25] in a case under this title is a representative of the estate."). Since Plaintiff Steinmetz's claims are property of the estate, the Trustee appears to be the party with standing to assert such claims. *In re Taub*, 439 B.R. 261, 272 (Bankr. E.D.N.Y. 2010) (stating that once a chapter 11 trustee is appointed, a debtor lacks standing to bring an adversary proceeding or otherwise assert claims on the estate's behalf).

With respect to Plaintiff ACC Builders, LLC, § 1115(a)(1) would not be applicable because it is not an individual. However, based on the allegations of the Complaint, the Court finds that the post petition conduct was sufficiently rooted in the alleged pre-petition conduct to be considered property of the estate. The post petition conduct alleged in the Complaint primarily includes actions taken by Defendants to address certain claims during Plaintiffs' bankruptcy cases, including the claims of Steele Construction, Economy Drywall, and Sareault Plumbing.<sup>4</sup> According to the Complaint, Plaintiffs came to Defendants for the purpose of seeking advice on how to handle the claims made by these creditors and how to overcome their financial hardship resulting from these claims. The [\*26] Complaint alleges that Defendants made certain representations and assurances

to Plaintiffs, prior to the filing of the bankruptcy cases, including those representations made at the initial client meeting on January 31, 2007, regarding their ability to address the claims of these creditors. The Complaint further alleges that Plaintiffs and Defendants negotiated a fee agreement where Plaintiffs would pay Defendants \$14,000 "to begin the Bankruptcy proceeding and to end the claims made by the contractor and subcontractors who worked on the apartment building." Plaintiffs allege that they retained Defendants based on such representations and assurances made pre-petition regarding their ability to address these claims. Thus, it appears that any post petition conduct on the part of Defendants to address these claims is sufficiently traceable to Defendants' pre-petition conduct, and therefore, Plaintiffs' claims based on such conduct should be considered property of the estate. Moreover, to the extent that these claims were improperly handled during the bankruptcy cases, any damage caused by the mishandling of claims would have been inflicted upon the Estates and their creditors, and the [\*27] claims based upon such conduct would be property of the estate pursuant to 11 U.S.C. § 541(a)(7). See 11 U.S.C. § 541(a)(7) (providing that property of the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case").

4 These entities are referred to in the Complaint as "the contractor and subcontractors," who worked on the apartment building constructed by ACC Builders, LLC.

Plaintiffs cite *In re Rivera v. Crosby*, 379 B.R. 728 (Bankr. N.D. Ohio 2007) in support of their argument that their claims are not property of the estate. In *Rivera*, the bankruptcy court held that a post petition legal malpractice claim against his state court personal injury attorney could have no conceivable effect on the bankruptcy estate and thus did constitute property of the estate. The *Rivera* case is distinguishable because it was a chapter 7 case and, unlike this case, it involved a malpractice claim unrelated to the bankruptcy case. Plaintiffs also cite *In re Doemling*, 127 B.R. 954 (W.D. Penn. 1991), where the bankruptcy court determined that an individual chapter 11 debtor's tort claim arising from an action that occurred five months after the bankruptcy petition was [\*28] filed was not property of the estate. Similar to *Rivera*, the *Doemling* case is distinguishable because it involved a tort claim unrelated to the bankruptcy case. Furthermore, the *Doemling* case was decided prior to the enactment of 11 U.S.C. § 1115, and no similar provision allowing post petition property of a chapter 11 debtor to be included in "property of the estate" was in effect at that time.

The Court finds that Plaintiffs' reliance on the foregoing cases is misplaced, and concludes that the claims set forth in the Complaint are property of the estate under

§ 541 and § 1115. Therefore, Plaintiffs' lack standing to bring such claims, and the present Complaint should be dismissed on this ground. The Trustee may have standing to assert such claims.

#### **CONCLUSION**

Based on the foregoing and due to Plaintiffs' repeated failures to meet essential requirements of the law, which has caused delay, prejudice, and damages to Defendants, the Motion to Dismiss is granted, Plaintiffs' Motion to Amend Complaint is denied, and the Complaint is dismissed with prejudice as to the Plaintiffs. If the Trustee wishes to take any further action regarding these or similarly based claims or other action in these [\*29] bankruptcy cases, he shall take such action within 21 days of the entry of this order, or the chapter 11 cases shall be re-closed.

**AND IT IS SO ORDERED.**

/s/ John E. Waites

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
March 18, 2011

#### **JUDGMENT**

Based on the Findings of Fact and Conclusions of Law set forth in the attached Order, the Defendants' Motion to Dismiss Plaintiffs' Complaint with Prejudice is granted, Plaintiffs' Motion to Amend Complaint is denied, and the Complaint is dismissed with prejudice as to the Plaintiffs. If the Chapter 11 Trustee wishes to take any further action regarding these or similarly based claims or other action in these bankruptcy cases, he shall take such action within 21 days of the entry of this order, or the chapter 11 cases shall be re-closed.

/s/ John E. Waites

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
March 18, 2011





Caution  
As of: Oct 01, 2012

**TAYLOR OIL COMPANY, Plaintiff and Appellant, v. L. ANTHONY WEISEN-  
SEE, Defendant and Appellee**

No. 13817

Supreme Court of South Dakota

*334 N.W.2d 27; 1983 S.D. LEXIS 328*

February 14, 1983, Considered on Briefs

May 18, 1983, Filed

**PRIOR HISTORY:** [\*\*1] APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, MINNEHAHA COUNTY, SOUTH DAKOTA. HONORABLE E. W. HERTZ, Judge.

**DISPOSITION:** We affirm the judgment of the trial court.

**COUNSEL:** David V. Vrooman, Sioux Falls, South Dakota, Attorney for Plaintiff and Appellant.

Steven L. Jorgensen, Sioux Falls, South Dakota, Attorney for Defendant and Appellee.

**JUDGES:** Morgan, Justice wrote the opinion. Wollman, Dunn and Henderson, Justices, concur. Fosheim, Chief Justice, concurs in result.

**OPINION BY:** MORGAN

**OPINION**

[\*28] This appeal arises from a legal malpractice action brought by a client, Taylor Oil Company (Oil Company), appellant, against its former attorney, Anthony Weisensee (Attorney), appellee. The trial court dismissed the Oil Company's complaint against Attorney and Oil Company appeals. We affirm.

Oil Company employed Attorney on a contingent fee basis to collect on a past due account in the sum of

\$107,300.20 from Russ Ripley (Ripley). On August 22, 1980, Attorney, acting on behalf of Oil Company, caused a summons and complaint to be served on Ripley for collection purposes. On May 29, 1981, Attorney, without the consent or knowledge of Oil Company, stipulated with Richard Braithwaite [\*\*2] (Braithwaite), an attorney for Ripley, that Interstate Services, Inc. (Interstate) could be substituted as the real party defendant in the place of Ripley. Although the deposition of Ripley taken prior to entry of the judgment did not indicate that Ripley was claiming Interstate was the real party in interest, subsequent to the deposition this information was conveyed by Ripley to Braithwaite. It was on that basis that Braithwaite approached Attorney and thereafter obtained a stipulation permitting the substitution of the parties. On August 20, 1981, a judgment was entered in favor of Oil Company against Interstate in the sum of \$107,300.20.<sup>1</sup> Attorney did not inform Oil Company of the entry of this judgment. Apparently, at the time that judgment was entered, Attorney had knowledge that Interstate was in effect judgment-proof.

1 Regarding the judgment in this connected case, note that the trial court in the present case pointed to a procedural error in the former. The trial court here concluded:

There is nothing to indicate that the circuit court had jurisdiction to enter the judgment against Interstate Services, Inc. since no Order

was ever entered by that court for the substitution of the parties, and direction given as to time for Interstate Services, Inc. to make answer to Plaintiff's complaint.

The question of the trial court's jurisdiction in the former case is not before us on this appeal.

[\*\*3] Since the judgment against Interstate was not collectible, Oil Company initiated this action against Attorney for legal malpractice. At trial, Oil Company contended that the failure of Attorney to obtain its permission and consent prior to substituting Interstate for Ripley constituted actionable negligence. The trial court agreed but, nevertheless, held that since Oil Company could not have collected damages from Ripley due to his insolvency, it would not be awarded a judgment against Attorney. Oil Company appeals, contending that it must prove only that a portion of the judgment was collectible.

In the instant case, both parties presented evidence to the court without a jury at a hearing on February 2, 1982. The court heard additional evidence at a hearing on March 19, 1982, concerning the financial status of Ripley. After determining that Oil Company did not prove that Ripley [\*29] could pay the damages, the trial court dismissed Oil Company's complaint. Regarding our standard of review, as this court stated in *Wefel v. Harold J. Westin & Associates, Inc.*, 329 N.W.2d 624, 626 (S.D. 1983):

When a court dismisses an action, the court must make findings of fact and [\*4] conclusions of law pursuant to SDCL 15-6-52(a). The court's dismissal of the action operates as an adjudication upon the merits. SDCL 15-6-41(b). Since the dismissal operates as an adjudication upon the merits, on appeal this court reviews the findings of fact under the "clearly erroneous" standard. 5 *Moore's Federal Practice* § 41.13[4] at 41-196 to 198. The conclusions of law are reviewed under the usual "in error as a matter of law."

The general measure of recovery in a legal malpractice action is "the amount of loss actually sustained as a proximate result of the conduct of the attorney." 7A C.J.S. *Attorney & Client* § 273a (1980); see *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524 (Iowa 1983); 7 *Am.Jur.2d Attorneys at Law* § 226 (1980). To

prove the "proximate result" the well-established rule of law is that:

A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, for therein lies the measure of his damages.

*McDow v. Dixon*, 138 Ga.App. 338, 339, 226 S.E.2d 145, 147 (1976). [\*5] See 7A C.J.S. *Attorney & Client* § 270 (1980).

This rule of law has been cited with approval in many jurisdictions. <sup>2</sup> Unquestionably, the trial court found Attorney was negligent in his representation of Oil Company. The trial court also found that Ripley, the defendant in the original action, was insolvent and consequently concluded that the present action fails since there would have been no damages collectible in the first action.

2 See, e.g., *Campbell v. Magana*, 184 Cal.App.2d 751, 8 Cal.Rptr. 32 (1960); *Floro v. Lawton*, 187 Cal.App.2d 657, 10 Cal.Rptr. 98 (1960); *Lawson v. Sigfrid*, 83 Colo. 116, 262 P. 1018 (1927); *Kohler v. Woollen, Brown & Hawkins*, 15 Ill.App.3d 455, 304 N.E.2d 677 (1973); *Piper v. Green*, 216 Ill.App. 590 (1920); *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814 (1895); *Glasgow v. Hall*, 24 Md.App. 525, 332 A.2d 722 (1975); *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970); *Gross v. Eannace*, 44 Misc.2d 797, 255 N.Y.S.2d 625 (1964); *Leavy v. Kramer*, 34 Misc.2d 479, 226 N.Y.S.2d 349 (1962); *Hammons v. Schrunck*, 209 Or. 127, 305 P.2d 405 (1956); *Gay & Taylor, Inc. v. American Cas. Co.*, 53 Tenn.App. 120, 381 S.W.2d 304 (1964); *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948 (Tex.Civ.App. 1974); *Staples' Exrs. v. Staples*, 85 Va. 76(8), 7 S.E. 199 (1888).

[\*\*6] The question facing this court on review is if, in the first action only a portion of the judgment is collectible, whether that portion which is collectible then becomes the measure of damages in a subsequent legal malpractice claim.

The Iowa Supreme Court recently discussed this issue in *Pickens, Barnes & Abernathy v. Heasley*, *supra*, a legal malpractice action. There, the court stated:

If the solvency of the prior defendant is known beyond question . . . a court may hold without other proof that the entire judgment would have been collectible. But if the prior defendant was an individual or other entity whose solvency is not known beyond question, the client must introduce substantial evidence from which a jury could reasonably find that a prior judgment would have been collectible in full, or could reasonably find the *portion* of the judgment which would have been collectible. In malpractice cases of this sort the client is limited in any event to the amount which could have been collectible.

328 N.W.2d at 526 (emphasis supplied). Similarly, in *McDow v. Dixon*, *supra*, the court stated that in a legal malpractice action the plaintiff client must prove [\*\*7] that a judgment in the prior case "would have been collectible in some amount." 226 S.E.2d at 147. This rule was applied in *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966) *aff'd* 385 F.2d 869 (6th Cir. 1967). In *Sitton*, where a plaintiff received an award of approximately \$162,000.00 against [\*\*30] his attorney, the appellate court reduced it to \$81,000.00 since the defendant in the underlying suit could not have satisfied the large judgment. *Sitton*, then, supports the rule that if only a portion of the original judgment is collectible, that this is sufficient to provide damages in a subsequent malpractice case.<sup>3</sup>

3 Although briefly, two treatises on legal malpractice discuss this rule. "Legal Malpractice" by R. Mullen and V. Levit (2d 1981) in discussing damages states "of course, what 'should have been' recovered requires consideration of the amount of probable award and how much of it could have been collected." *Id.* at § 303, p. 355. "Legal Malpractice" further states:

To establish the validity of the claim, the client not only has the burden of proving that he would have recovered the amount of the recovery, but also that the judgment was *collectible*. Often, this requires a client to prove that the debtor or tortfeasor was insured or was otherwise solvent. The extent of the collectability of a probable judgment is usually a question of fact.

*Id.* at § 557, p. 691 (citations omitted) (emphasis in original). This rule is also stated in general terms in "Attorney Malpractice: Law and Procedure" by D. Meiselman (1980).

[\*\*8] The extent of collectability in the original suit is a question of fact. *Titsworth v. Mondo*, 95 Misc.2d 233, 407 N.Y.S.2d 793 (1978); see Mullen & Levit, *Legal Malpractice* § 557 at 691 (2d 1981). Here, Oil Company was permitted to reopen its case in chief in order to demonstrate the financial responsibility of Ripley. The evidence admitted at this hearing consisted primarily of titles to numerous vehicles which Oil Company alleged belonged to Ripley. Generally, however, the titles to the vehicles were in the names of other corporations or relatives of Ripley. Ripley testified that he personally had outstanding indebtedness of \$750,000.00. The evidence also showed substantial judgments against Ripley. The total of these judgments entered into evidence was \$462,759.89. As the trial court found:

The record before this court is clear. Russ Ripley was, at the time of the judgment against Interstate Services, insolvent, and is insolvent to this present day, and therefore, any judgment against Russ Ripley for the plaintiff was uncollectible because of such insolvency.

Since the extent of collectability is a question of fact, *Titsworth v. Mondo*, *supra*, we must review [\*\*9] this finding under the clearly erroneous standard. SDCL 15-6-52(a). From our review of the record, including the testimony and the exhibits at this hearing, the trial court's finding that Ripley was insolvent is not clearly erroneous. This rule, requiring Oil Company prove with specificity some amount collectible, also answers Oil Company's argument that at some time in the future, before the judgment expires, Ripley *might have* acquired assets upon which they could levy. Since Oil Company failed to prove that it could have collected "any judgment" from Ripley in the original suit, Oil Company failed to prove any amount of damages in the present action.

We affirm the judgment of the trial court.

WOLLMAN, DUNN and HENDERSON, Justices, concur.

FOSHEIM, Chief Justice, concurs in result.

CONCUR BY: FOSHEIM

CONCUR

FOSHEIM, Chief Justice (concurrence in result).

The majority cites *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976), for the proposition that plaintiff must prove malpractice negligence and collectibility. The plaintiff in *McDow* alleged that defendant attorney was negligent in not filing a personal injury action on her behalf against a dance studio within the [\*\*10] statute of limitations. To prove damages (i.e. collectibility) against her attorney, the *McDow* court said plaintiff could introduce evidence of the dance studio's "worldly circumstances, financial status, assets," etc. *Id.* 226 S.E.2d at 148.

This case came to the trial court in an entirely different posture. Plaintiff Oil Company has a judgment in hand for \$107,300.20. The *only* way it can prove collectibility is by actually trying to collect the judgment by levy in execution. SDCL ch. [\*\*31] 15-18. If Ripley has property subject to levy, it is sold and the judgment is satisfied in whole or in part. The satisfaction it received in proving the attorney negligent must be its own reward. Plaintiff's attempt to collect damages in the manner here employed is inappropriate.





Positive  
As of: Oct 01, 2012

**TIMOTHY WHELAN LAW ASSOCIATES, LTD., Plaintiff and Counterdefendant-Appellee and Cross-Appellant, v. FRANK KRUPPE, JR., Defendant and Counter-plaintiff-Appellant and Cross-Appellee.**

No. 2-09-1234

**APPELLATE COURT OF ILLINOIS, SECOND DISTRICT**

*409 Ill. App. 3d 359; 947 N.E.2d 366; 2011 Ill. App. LEXIS 314; 349 Ill. Dec. 729*

**March 31, 2011, Opinion Filed**

**SUBSEQUENT HISTORY:** Released for Publication May 20, 2011.

**PRIOR HISTORY:** [\*\*\*1]

Appeal from the Circuit Court of Du Page County. No. 09-AR-182. Honorable Bruce R. Kelsey, Judge, Presiding.

**COUNSEL:** For Frank Kruppe Jr., Appellant: Ronald J. Broida, Joseph K. Nichele, Broida & Associates, Ltd., Naperville, IL.

For Timothy Whelan Law Associates, Ltd., Appellee/Cross-Appellant: George A. Thomas, Teresa L. Einarson, Thomas & Einarson, Ltd., West Chicago, IL.

**JUDGES:** JUSTICE HUDSON delivered the judgment of the court, with opinion. Justices Hutchinson and Zenoff concurred in the judgment and opinion.

**OPINION BY:** HUDSON

**OPINION**

[\*\*369] [\*360] Plaintiff, Timothy Whelan Law Associates, Ltd., filed a breach-of-contract action against defendant, Frank Kruppe, Jr., attempting to collect fees allegedly due for its representation of defendant. Following a jury trial, judgment was entered in favor of plaintiff

for \$30,339.14, and the trial court subsequently awarded plaintiff an additional \$19,660.86, for a total award of \$50,000. Defendant now appeals, raising a number of issues. First, defendant argues that a provision in the contract, which allowed plaintiff to collect attorney fees incurred in collecting earlier attorney fees, was against public policy. Second, defendant alleges error in the trial court's decision to dismiss his counterclaims for malpractice and breach of contract. Third, defendant complains of a number of evidentiary rulings by the trial court. Fourth, he contends that the jury's verdict is contrary to the manifest weight of the evidence. Plaintiff has also filed [\*\*\*2] a cross-appeal, in which it asserts that the trial court erred in determining that its authority to [\*361] enter an award in favor of plaintiff was [\*\*370] limited by supreme court and local rule to \$50,000. For the reasons that follow, we reverse and remand for a new trial. A number of issues, though not dispositive of this appeal, are likely to recur following remand, so we will address them here.

Plaintiff's representation of defendant primarily concerned shareholder litigation stemming from defendant's involvement in two corporations, Shank Screw Products, Inc., and the Cyrus Shank Company. Defendant owned 22% of the corporations, his brother Robert also owned 22%, and 56% was held by a trust. Defendant and his brother became involved in a dispute over control of the corporations. Plaintiff represented defendant with respect to this dispute. On plaintiff's advice, another attorney,

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Bill Churney, was retained to assist plaintiff with certain aspects of the case. Defendant terminated plaintiff on December 21, 2006, informing him that Churney would be taking over the case. A dispute over attorney fees owed to plaintiff developed, and this action ensued. As the issues are largely discrete, we will [\*\*\*3] discuss additional evidence as it pertains to them. We now turn to the merits of the parties' various contentions.

#### I. WHETHER THE PARTIES' FEE AGREEMENT WAS AGAINST PUBLIC POLICY

Defendant first contends that a provision in the fee agreement between him and plaintiff violated public policy. Specifically, defendant complains of the following provision: "In the even [sic] it becomes necessary to bring a collection proceeding against you for nonpayment of fees and costs, I may include reasonable attorney fees and cost [sic] in those proceedings." In this case, the jury first awarded plaintiff \$30,339.14, and the trial court then awarded plaintiff an additional \$19,660.86 based upon this provision.

Whether a provision of a contract violates public policy is a question of law subject to *de novo* review. *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1054, 878 N.E.2d 775, 316 Ill. Dec. 53 (2007). When the resolution of an issue turns upon public policy, it is not the role of a court to make policy; rather, the court must ascertain the public policy of this state with reference to the Illinois Constitution, statutes, and long-standing case law. *In re Estate of Feinberg*, 235 Ill. 2d 256, 265, 919 N.E.2d 888, 335 Ill. Dec. 863 (2009). Defendant believes he [\*\*\*4] has found such a manifestation of public policy in *Lustig v. Horn*, 315 Ill. App. 3d 319, 732 N.E.2d 613, 247 Ill. Dec. 558 (2000).

In *Lustig*, as in this case, an attorney sued his former client to recover attorney fees from an earlier representation as well as the fees and costs of the collection proceeding. The retainer agreement between the parties included the following provision: "[I]n the event of default [\*362] in payment Client will pay reasonable attorney's fees and costs incurred in collecting said amount which may be due." (Emphasis and internal quotation marks omitted.) *Lustig*, 315 Ill. App. 3d at 321. Defendant relies primarily on the following passage from *Lustig*, 315 Ill. App. 3d at 327:

"An attorney should not place himself in the position where he may be required to choose between conflicting duties or where he must reconcile conflicting interests rather than protect fully the rights of his client. [Citations.] In the instant case, paragraph 3 of the retainer agreement anticipates suit against and recovery of addi-

tional fees from a client should that client fail to pay the bill within the time required. [\*\*371] As evidenced from *Lustig's* conduct, paragraph 3 gives rise to substantial fees for vigorous prosecution of [\*\*\*5] the attorney's own client. As Horn aptly points out, this provision very well could be used to silence a client's complaint about fees, resulting from the client's fear of his attorney's retaliation for nonpayment of even unreasonable fees. Such a provision is not necessary to protect the attorney's interests; on the contrary, it merely serves to silence a client should that client protest the amount billed."

As defendant further points out, the *Lustig* court also commented that "such a provision clearly is unfair and potentially violative of the Rules of Professional Conduct barring an attorney from representing a client if such representation may be limited by the attorney's own interest." *Lustig*, 315 Ill. App. 3d at 327. While this passage, read in isolation, would seem to stand for the proposition that an attorney may never collect fees or costs when prosecuting an action for earlier fees and costs arising out of the representation of a client, a full reading of *Lustig* reveals several significant and relevant differences between it and the present case.

Notably, by the time the client in *Lustig* signed the retainer agreement, an attorney-client relationship already existed between [\*\*\*6] the parties. *Lustig*, 315 Ill. App. 3d at 322. Under such circumstances, the potential for overreaching on the part of an attorney is much greater than before the relationship commences, when the client is free to simply walk away. See *Lustig*, 315 Ill. App. 3d at 326. Because an attorney-client relationship is fiduciary (*Lustig*, 315 Ill. App. 3d at 325-26), the *Lustig* court emphasized that "[p]articular attention will be given to contracts made or changed after the relationship of attorney and client has been established" (*Lustig*, 315 Ill. App. 3d at 326). Indeed, "[a] presumption of undue influence arises when an attorney enters into a transaction with his client during the existence of the fiduciary relationship." *Lustig*, 315 Ill. App. 3d at 326. The burden is on the attorney to rebut this presumption by clear and convincing [\*363] evidence. *Lustig*, 315 Ill. App. 3d at 326 (citing *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 464-65, 448 N.E.2d 872, 69 Ill. Dec. 960 (1983)). To rebut this presumption, the *Lustig* court continued, the attorney would have to show that "(1) he made a full and fair disclosure to [his client] of all the material facts affecting the transaction and (2) the transaction was fair." [\*\*\*7] *Lustig*, 315 Ill. App. 3d

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at 327. Initially, the court noted that there was little evidence indicating that the attorney explained the implications of the provision at issue in that case to his client. *Lustig*, 315 Ill. App. 3d at 327. Subsequently, the court held that the transaction could not be deemed fair, and, in support, it set forth the paragraph upon which defendant here relies (which we set forth above).

Thus, it is abundantly clear that the matter upon which defendant relies was part of the *Lustig* court's determination that the attorney failed to rebut the presumption of undue influence that arose because he represented the client when the agreement was consummated. That is not the case here. Defendant asserts that the *Lustig* court never expressly limited its holding to the facts of that case. While true, as we read *Lustig*, it is not possible to divorce the paragraph upon which defendant relies from the discussion of undue [\*\*372] influence. Thus, we reject defendant's characterization of and reliance upon *Lustig* as establishing a *per se* rule against a fee agreement containing a provision like the one at issue in the present case. We conclude that there is no such general proscription. [\*\*\*8] Accordingly, at least to the extent that plaintiff is represented by outside counsel (see *In re Marriage of Tantiwongse*, 371 Ill. App. 3d 1161, 1164-65, 863 N.E.2d 1188, 309 Ill. Dec. 291 (2007) (holding that attorneys do not incur fees when they represent themselves)), we perceive no *per se* public policy that would void the provision in the fee agreement regarding the recovery of fees.

## II. WHETHER THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S COUNTERCLAIMS

Defendant next argues that the trial court should not have dismissed his counterclaims for failing to state a claim. See 735 ILCS 5/2-615 (West 2006). We review *de novo* a trial court's dismissal of a claim. *Westfield Insurance Co. v. Birkey's Farm Store, Inc.*, 399 Ill. App. 3d 219, 231, 924 N.E.2d 1231, 338 Ill. Dec. 705 (2010). To set forth an action for legal malpractice, a plaintiff must plead: "(1) the existence of an attorney-client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that 'but for' the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages." *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525, 648 N.E.2d 285, 207 Ill. Dec. 829 (1995). [\*\*364] Initially, we note that, [\*\*\*9] after setting forth a number of potential breaches of duty, defendant simply states that "[t]he facts are self evident" and that his allegations are "sufficient to establish a breach of duty." On appeal, however, the appellant bears the burden of supporting his contentions with citations to relevant authority. See *Ill. S. Ct. R. 341(h)(7)* (eff. May 1, 2007). The absence of such citations to au-

thority would be enough to resolve this issue against defendant. See *People v. Universal Public Transportation, Inc.*, 401 Ill. App. 3d 179, 197-98, 928 N.E.2d 85, 340 Ill. Dec. 366 (2010).

Moreover, defendant's allegations regarding proximate cause are insufficient. Defendant's allegations concern plaintiff's purported failure to adequately oppose the issuance of a temporary restraining order (TRO), which, defendant claims, allowed two employees to misappropriate funds. The TRO prevented defendant from exercising control over the two corporations, which, presumably, would have placed him in a position to prevent the alleged theft. Regarding proximate cause, defendant simply alleged that but for plaintiff's negligence the TRO would not have been issued and that defendant was forced to pay another attorney to have the TRO dissolved. [\*\*\*10] What is missing is any explanation of how plaintiff would have successfully opposed the issuance of the TRO. The mere fact that plaintiff neglected to file a response to the petition for the TRO would have caused damages to defendant only if some meritorious response was possible. See *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 221, 850 N.E.2d 183, 302 Ill. Dec. 746 (2006) ("[H]ad defendants perfected the appeal in the underlying case, the appellate court would not have reversed the judgment based on section 3-104; and, therefore, defendants' negligence in failing to perfect the appeal was not the proximate cause of plaintiff's injury."); *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 122, 502 N.E.2d 1186, 104 Ill. Dec. 526 (1986) ("In the terms chosen by the litigants herein, a legal-malpractice claim is a 'case within a case.' This is because of the damages element of the [\*\*373] action; no malpractice exists unless counsel's negligence has resulted in the loss of an underlying cause of action or the loss of a meritorious defense if the attorney was defending in the underlying suit.").

We further note that, before this court, defendant argues that "it is also clear from the Amended Counterclaim [*sic*] that [plaintiff] probably could [\*\*\*11] not have succeeded in the temporary restraining order hearing because no answer was filed." It is not enough to plead that plaintiff *could not* succeed in defending against the TRO absent an answer. The mere filing of an answer would not have guaranteed success. A cause of action for legal malpractice requires that defendant "*would have prevailed* in the underlying action." (Emphasis added.) *Ignarski*, 271 Ill. App. 3d at 525. Thus, defendant needed to plead that [\*\*365] plaintiff *would have been able to successfully oppose* the TRO if it had filed an answer, not simply that it could not succeed without filing one. As defendant failed to adequately plead proximate cause, we find that the trial court's deci-

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sion to dismiss his claim for legal malpractice was not error.

As for the breach-of-contract claim, defendant was required to plead the existence of a contract; that he performed his obligation under the contract; a breach by plaintiff; and damages. *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 450, 907 N.E.2d 478, 329 Ill. Dec. 887 (2009). Moreover, it has been held that, "[t]o state a sufficient cause of action for legal malpractice in tort or contract, the plaintiff must plead facts establishing that the breach [\*\*\*12] was the proximate cause of the alleged damages." *Radtke v. Murphy*, 312 Ill. App. 3d 657, 665, 728 N.E.2d 715, 245 Ill. Dec. 633 (2000). This is because legal-malpractice claims blur the distinction between tort and contract. See *Collins v. Reynard*, 154 Ill. 2d 48, 50, 607 N.E.2d 1185, 180 Ill. Dec. 672 (1992). Thus, defendant's contract claim fails for the same reason his tort claim did--failure to adequately allege proximate cause.

Defendant offers no sustained argument regarding the dismissal of his affirmative defenses; accordingly, we will not address this issue. See *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 191 Ill. Dec. 740 (1993) ("A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research \*\*\*."). Having rejected defendant's arguments regarding his counterclaims and affirmative defenses, we now proceed to his next argument.

### III. EVIDENTIARY RULINGS

Defendant next complains of several of the trial court's evidentiary rulings. He argues that the trial court's erroneous evidentiary rulings resulted in the jury's verdict being contrary to the manifest weight of the evidence. However, evidentiary [\*\*\*13] errors are generally remedied by ordering a new trial. See, e.g., *Bargman v. Economics Laboratory, Inc.*, 181 Ill. App. 3d 1023, 1034, 537 N.E.2d 938, 130 Ill. Dec. 609 (1989). We will not strike any improperly admitted evidence, reweigh the balance of the evidence, and render a decision. Evidentiary rulings are reviewed for an abuse of the trial court's discretion. See, e.g., *Matthews v. Aganad*, 394 Ill. App. 3d 591, 597, 914 N.E.2d 1233, 333 Ill. Dec. 421 (2009). Hence, we will examine defendant's arguments, but we deem the proper remedy, should a remedy be necessary, to be a new trial. Defendant identifies five potential errors: (1) the admission of undisclosed opinion testimony; (2) the admission of evidence that defendant [\*\*374] failed to pay on professional contracts unrelated to this case; (3) the exclusion of his testimony that time plaintiff billed for [\*366] various services was excessive; (4) the admission of evidence that plaintiff represented defen-

dant in a criminal matter; and (5) the admission of evidence concerning the gross sales of the two corporations. We will address these in turn.

#### A. Undisclosed Opinion Testimony

Defendant argues that the trial court erred in permitting Timothy Whelan and Gary Fernandez to testify regarding the reasonableness of plaintiff's [\*\*\*14] fees. Fernandez is an accountant and attorney who shares office space with plaintiff. *Illinois Supreme Court Rule 213(f)* provides, in pertinent part:

"Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:

(1) *Lay Witnesses*. A 'lay witness' is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses*. An 'independent expert witness' is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the [\*\*\*15] witness.

(3) *Controlled Expert Witnesses*. A 'controlled expert witness' is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." *Ill. S. Ct. R. 213(f)* (eff. Jan. 1, 2007).

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We will disturb a trial court's determination regarding compliance with this rule only if an abuse of discretion has occurred. *Bauer ex rel. Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 914, 879 N.E.2d 478, 316 Ill. Dec. 411 (2007). An abuse of discretion occurs when no reasonable person could agree with the trial court. *Davis v. Kraff*, 405 Ill. App. 3d 20, 28, 937 N.E.2d 306, 344 Ill. Dec. 600 (2010).

Plaintiff made the following disclosures regarding the facts and opinions to which Whelan would testify:

[\*367] "Whelan may be called to testify about the following matters: The existence of contract(s) between the parties, the services rendered and/or materials provided to Frank Kruppe by the Plaintiff, damages incurred by the Plaintiff and [\*\*\*16] communications between the parties."

Plaintiff also disclosed that Whelan would "testify regarding the services performed for the client and monthly billing."

Regarding Fernandez, plaintiff disclosed the following:

"Gary Fernandez may testify about the following: the facts and terms of the agreement between [plaintiff and defendant]; [\*\*375] the existence of a contract between them; discussion of legal issues involved in the allegations of the amended complaint and the answers thereto; the time that [plaintiff] expended in the provision of legal services to [defendant] during [the] September 2006 to January 2007 time period; oral statements by [defendant] that there was no record of theft by company employees, the Brandners; delay in payment of fees for accounting due Fernandez by [defendant] for accounting assistance in the Cook County litigation."

Additionally, plaintiff disclosed that Fernandez would "testify regarding the services performed for the client." Finally, plaintiff also made this disclosure:

"Gary J. Fernandez \*\*\* will testify to assistance in this litigation and the accounting he performed as a CPA as well as [defendant's] refusal to pay his profes-

sional fees and [defendant's] conversation [\*\*\*17] with him admitting there was no damage to the company during the period of the TRO."

Thus, there was no explicit disclosure that either witness would testify regarding whether the fees charged by plaintiff were reasonable or customary. Whelan in fact testified that the rates charged by his firm were reasonable and that the services he provided were necessary. He also testified to the customary rate in Du Page and Cook Counties. Fernandez testified to the customary rate that attorneys charge in Cook County.

As a threshold matter, we conclude that the opinions at issue here were the subject of expert rather than lay testimony. Expert testimony concerns matters that implicate specialized knowledge. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800, 914 N.E.2d 1195, 333 Ill. Dec. 383 (2009). The value of legal services is a subject that requires such knowledge. See *In re Marriage of Salata*, 221 Ill. App. 3d 336, 338-39, 581 N.E.2d 873, 163 Ill. Dec. 719 (1991) ("Generally then, case law establishes that the reasonableness of an attorney's fees must be shown by expert testimony either by the petitioning attorney, an outside attorney or both."). [\*\*\*18] We further note that the parties treat Fernandez as an independent expert witness, and we will do so as well.

[\*368] We begin with Whelan's testimony. Plaintiff points out that it disclosed that Whelan would testify regarding the existence of a contract between plaintiff and defendant, the nature of the services provided, and the damages it incurred as a result. The damages, according to plaintiff, are the value of the legal services that defendant received. An opinion may be admitted if it is encompassed by its proponent's disclosure. *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 800, 776 N.E.2d 262, 267 Ill. Dec. 125 (2002); *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 576, 755 N.E.2d 1021, 258 Ill. Dec. 202 (2001) ("Opinion testimony is 'limited to comments within the scope of and consistent with the facts and opinions disclosed in discovery.'") (quoting *Parker v. Illinois Masonic Warren Barr Pavilion*, 299 Ill. App. 3d 495, 501, 701 N.E.2d 190, 233 Ill. Dec. 547 (1998)). Keeping in mind that we are applying an abuse-of-discretion standard of review (*Brdar v. Cottrell, Inc.*, 372 Ill. App. 3d 690, 700, 867 N.E.2d 1085, 311 Ill. Dec. 99 (2007)), we find no reversible error in the trial court's decision here. As noted, doing so would require us to find that no reasonable person could agree with the [\*\*\*19] trial court's decision. *Davis*, 405 Ill. App. 3d at 28. Quite simply, a reasonable person could conclude that plaintiff's disclosure that Whelan would testify about the damages that plaintiff

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incurred did encompass opining that its [\*\*376] legal fees were reasonable. That is, after all, an essential element of proving damages. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983, 518 N.E.2d 424, 115 Ill. Dec. 899 (1987). We therefore find no error in this portion of the trial court's ruling.

Regarding Fernandez, we arrive at a different conclusion. Plaintiff points to its disclosure that Fernandez would testify regarding the time that plaintiff spent providing legal services to defendant. We do not see how this disclosure can be read to encompass Fernandez's testimony regarding the customary rate that attorneys charge in Cook County. Plaintiff also points out that it disclosed that Fernandez would testify as an expert in the proceedings. This is immaterial, as *Rule 213(f)(2)* requires that a party disclose the subjects upon which such an expert will testify as well as the opinions the party expects to elicit. *Ill. S. Ct. R. 213(f)(2)* (eff. Jan. 1, 2007). That plaintiff intended to call Fernandez as an expert witness [\*\*\*20] says nothing about what Fernandez would opine. In sum, we are compelled to conclude that the trial court abused its discretion regarding Fernandez's testimony. This portion of its decision was erroneous. Errors regarding *Rule 213(f)* are amenable to a harmless-error analysis. However, because we are reversing and remanding on a different basis, we need not address prejudice with respect to this argument and have addressed it merely should it recur on retrial.

#### B. Alleged Unrelated Misconduct

Defendant next contends that the trial court erred by allowing [\*369] plaintiff to present testimony that defendant failed to pay other professionals for their services. Specifically, Whelan testified that plaintiff had represented defendant in defense of a fee petition brought by another law firm and that defendant did not want to pay another attorney. Additionally, Fernandez testified that he had not been paid for services rendered to defendant. The trial court asked, "So tell me why should I allow this to come forward if it doesn't show a course of conduct or, in fact, it supports his position which is that not all professionals bill properly." The trial court further questioned, "Because if it's a course [\*\*\*21] of [sic] pattern and effect that he doesn't pay until he gets sued, isn't that relevant to the issue of why he is not paying [plaintiff]?" The trial court then explained its ruling: "I think it's highly relevant. I think the jury wants to hear the credibility of your client as well as Mr. Whelan, and this case is about credibility." Defendant's attorney then stated that he believed this evidence was "highly prejudicial." The trial court responded, "Of course it is."

It is axiomatic that "[e]vidence of specific prior bad acts unrelated to a material issue is prohibited." *Sharma*

*v. Zollar*, 265 Ill. App. 3d 1022, 1025 n.4, 638 N.E.2d 736, 202 Ill. Dec. 868 (1994) (citing *Fugate v. Sears, Roebuck & Co.*, 12 Ill. App. 3d 656, 299 N.E.2d 108 (1973)). While this rule is more commonly encountered in criminal cases, it applies in civil cases as well. See, e.g., *Doe v. Lutz*, 281 Ill. App. 3d 630, 637-38, 668 N.E.2d 564, 218 Ill. Dec. 80 (1996). *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088-89, 657 N.E.2d 12, 212 Ill. Dec. 317 (1995), involved a suit between a cab driver and a customer who were involved in an altercation. The court held that evidence that the cab driver had been involved in disputes with other customers and drivers was inadmissible. *Plooy*, 275 Ill. App. 3d at 1089. The court explained, "Evidence [\*\*\*22] of misconduct other than that in issue is not properly admissible to establish a person's disposition to behave in a certain way." *Plooy*, 275 Ill. App. 3d at [\*\*377] 1089; see also *Doe*, 281 Ill. App. 3d at 642 ("As previously discussed, evidence of prior bad acts is not admissible to show a defendant's character or propensity to commit the alleged crime.").

The trial court's justification for admitting the evidence was erroneous. The trial court believed that this evidence showed a "course or pattern" of behavior. Showing a pattern of behavior--often referred to as a *modus operandi*--is a proper basis for the admissibility of such evidence only if identity is at issue. See *People v. Barbour*, 106 Ill. App. 3d 993, 1000, 436 N.E.2d 667, 62 Ill. Dec. 641 (1982). Another possible analog would be the common-design exception; however, that requires that the earlier bad acts be part of a single larger scheme. *People v. Walston*, 386 Ill. App. 3d 598, 606, 900 N.E.2d 267, 326 Ill. Dec. 631 (2008). There is no indication that defendant's purported earlier failure to pay other professionals was part of such an enterprise. We also fail to see how the failure to pay other professionals could have motivated defendant to not pay plaintiff.

[\*370] Instead, the only possible relevance [\*\*\*23] we see for this evidence is to impugn defendant's character in an attempt to show that he acted in conformity therewith when he allegedly declined to pay plaintiff for its services. That, however, is not a permissible purpose for admitting such evidence. *Village of Kildeer v. Munyer*, 384 Ill. App. 3d 251, 255, 891 N.E.2d 1005, 322 Ill. Dec. 714 (2008); *Clemons v. Mechanical Devices Co.*, 292 Ill. App. 3d 242, 256, 684 N.E.2d 1344, 226 Ill. Dec. 141 (1997) (Cook, J., dissenting). In criminal cases, the danger that evidence of other bad acts is likely to overpersuade the fact finder and lead to a conviction by causing the fact finder to dislike the defendant is well recognized. E.g., *People v. Manning*, 182 Ill. 2d 193, 213-14, 695 N.E.2d 423, 230 Ill. Dec. 933 (1998); *People v. Hensley*, 354 Ill. App. 3d 224, 232, 819 N.E.2d 1274, 289 Ill. Dec. 474 (2004). The same danger is pre-

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sent here. Thus, the trial court abused its discretion in permitting the admission of this evidence

Further, defendant was prejudiced by the error. In responding to defendant's final argument, regarding the manifest weight of the evidence, plaintiff identifies several conflicts in the evidence. In support of the jury's verdict, plaintiff then argues that "the jury determined that Whelan was the more credible witness [rather than defendant] and that [plaintiff] [\*\*\*24] was entitled to the fees and costs requested." Given plaintiff's acknowledgment of the role that credibility played in the trial below, the fact that the jury was assessing defendant's credibility in light of a number of inadmissible other bad acts leads us to the conclusion that their admission was prejudicial. Accordingly, we reverse the judgment of the trial court and remand this matter for a new trial.

#### C. Reasonableness of Time Spent by Plaintiff on Various Tasks

Defendant next argues that the trial court erred in barring him from testifying and arguing that the amount of time that plaintiff spent on various tasks that it included in its billing was unreasonable. Defendant claims that matters such as how long it takes to write a letter are within the common sense of a jury. He further argues that he should have been allowed to argue that time spent researching and drafting various legal documents--such as a motion to dismiss--was something the jurors could assess "[b]ased on their own experiences." Initially, we note that defendant cites nothing to support his contention that such matters are within the [\*\*378] competence of laypersons, thus forfeiting the issue. *Britt v. Federal Land Bank Ass'n of St. Louis*, 153 Ill. App. 3d 605, 608, 505 N.E.2d 387, 106 Ill. Dec. 81 (1987). [\*\*\*25] Similarly, defendant cites nothing that would indicate that the trial court abused its discretion by concluding otherwise.

Moreover, we find these contentions by defendant unpersuasive. As noted, the standard of review is abuse of discretion. *Matthews*, 394 [\*\*371] Ill. App. 3d at 597. Thus, we would have to find that no reasonable person could agree with the trial court before we could reverse its decision. *Davis*, 405 Ill. App. 3d at 28. Regarding this issue, we have no difficulty in finding that what it takes to draft a legal document is a matter beyond the competence of people who are not legal professionals. While drafting a letter might be a closer question, we simply cannot say that no reasonable person could adopt the position taken by the trial court. Accordingly, we find no error here.

#### D. Plaintiff's Representation of Defendant in a Criminal Matter

Defendant next complains that the trial court permitted testimony regarding plaintiff's representation of defendant in a criminal matter. Defendant argues that the criminal matter was not mentioned in plaintiff's pleadings and that therefore any evidence regarding plaintiff's representation of him in the criminal case was irrelevant. Defendant [\*\*\*26] cites *In re J.B.*, 312 Ill. App. 3d 1140, 1143, 728 N.E.2d 59, 245 Ill. Dec. 328 (2000), which holds that "[a]ny proof presented to the court that is not supported by proper pleadings is as defective as pleading a claim that is not supported by proof." Whether a matter is within the scope of the pleadings is a matter committed to the discretion of the trial court. See *Sullivan v. Berardi*, 80 Ill. App. 3d 417, 421-22, 399 N.E.2d 708, 35 Ill. Dec. 642 (1980) ("We believe the theories of recovery had an adequate basis in the pleadings and that the court acted within the scope of its discretion in deciding the issues on the basis of the pleadings and evidence."). Here, we believe the trial court properly exercised its discretion in permitting this testimony.

It was plaintiff's position that, while it was primarily representing defendant on litigation involving the two corporations, defendant requested that it perform additional legal services in the criminal matter while this litigation was ongoing. Plaintiff suggested that it was not uncommon for a client to come to his or her attorney with unrelated legal matters during the course of a representation. The trial court apparently accepted this argument, and we cannot say that the trial court's decision was [\*\*\*27] such that no reasonable person could agree with it. Accordingly, we find no error here. Defendant also argues that reference to the criminal case was prejudicial; however, that argument is unsupported by authority and therefore forfeited. See *Obert*, 253 Ill. App. 3d at 682.

#### E. Gross Sales of the Corporations

Defendant complains that the trial court permitted plaintiff's counsel to elicit testimony from defendant's son regarding the gross sales of the corporations. He asserts that this evidence could serve only to improperly emphasize defendant's wealth and suggest he had [\*\*372] the ability to pay a judgment. See *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 862, 692 N.E.2d 798, 229 Ill. Dec. 809 (1998). Plaintiff responds that defendant opened the door to this testimony. During the trial, [\*\*379] Whelan explained the services that plaintiff provided to defendant. As part of this testimony, he described the nature of the corporations' business as well as their size. In the course of this testimony, Whelan testified generally to the gross sales of the corporations from 2004 to 2006. The size of the corporations, one measure of which is gross sales, bears arguable relevance to the nature of the representation rendered by plaintiff.

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[\*\*\*28] Further, prior to eliciting testimony from defendant's son regarding the gross sales of the corporations, defendant's son testified that the corporations were "very small." The trial court could reasonably conclude that this opened the door to questioning defendant's son about gross sales to rebut the notion that the corporations were "very small." As there are colorable bases for the trial court's ruling, we cannot say that the trial court abused its discretion here.

#### IV. MANIFEST WEIGHT OF THE EVIDENCE

Finally, defendant argues that the jury's verdict was contrary to the manifest weight of the evidence and that he therefore is entitled to judgment notwithstanding the verdict, a new trial, or a remittitur. A factual finding is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *In re Gwynne P.*, 215 Ill. 2d 340, 354, 830 N.E.2d 508, 294 Ill. Dec. 96 (2005). After reviewing defendant's arguments, we conclude that such is not the case here.

Defendant identifies five issues upon which he contends the jury came to the incorrect conclusion. First, he contends that "no evidence was presented that the handling of any criminal matter was part of the contract issue in this case." [\*\*\*29] This is merely a reiteration of defendant's admissibility argument on this issue, which we have already rejected. Second, he points to the testimony of his son regarding the length of certain meetings he had with counsel. His son testified that they were not as long as plaintiff billed for them. This merely created a conflict in the evidence, the resolution of which was primarily a matter for the jury. *Pavnica v. Veguilla*, 401 Ill. App. 3d 731, 738, 929 N.E.2d 52, 340 Ill. Dec. 748 (2010). Defendant does not explain the legal basis of his third and fourth contentions, but they appear to be related to his first argument regarding public policy, which we also have previously rejected. Fifth, he argues that Whelan was not credible, as demonstrated by his desire to borrow \$10,000 from defendant. Defendant contends that this showed that Whelan was determined to "get this money from his client--one way or the other." Credibility is also a matter primarily for the jury. *Pavnica*, 401 Ill. App. 3d at 738. Having rejected defendant's [\*373] individual assertions, we perceive no basis for us to conclude that the jury's verdict is contrary to the manifest weight of the evidence. Before closing this section, we further note that defendant [\*\*\*30] does not support this argument with citation to pertinent authority, forfeiting the issue in any event. See *Obert*, 253 Ill. App. 3d at 682.

#### V. PLAINTIFF'S CROSS-APPEAL

In its cross-appeal, plaintiff contends that the trial court erroneously concluded that it had the authority to award plaintiff only up to \$50,000. Questions concerning

the authority of a court present issues of law subject to *de novo* review. See *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231, 867 N.E.2d 577, 310 Ill. Dec. 886 (2007). Similarly, resolution of this issue requires us to construe two court rules, which present issues of law as well. See *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 826, [\*\*380] 932 N.E.2d 184, 342 Ill. Dec. 293 (2010).

The following facts are pertinent to this portion of this appeal. The parties agreed that, following the jury's verdict, the trial court would decide the issues of any fees and costs that plaintiff would receive for prosecuting the instant action. Based on the provision in the retainer agreement stating, "In the even [*sic*] it becomes necessary to bring a collection proceeding against you for nonpayment of fees and costs, I may include reasonable attorney fees and cost [*sic*] in those proceedings," plaintiff sought fees of \$29,122.50. The trial court found that [\*\*\*31] plaintiff was entitled to \$21,250. However, it also found that it was subject to a jurisdictional limit whereby it could award only up to \$50,000. Thus, the trial court subtracted the amount awarded pursuant to the jury's verdict (\$30,339.14) from \$50,000 and determined that it could award only an additional \$19,660.86. It entered an additional judgment accordingly.

The rules upon which the trial court relied in finding that it was limited in the amount it could award were *Illinois Supreme Court Rule 86* (Ill. S. Ct. R. 86 (eff. Jan. 1, 1994)) and Rule 13.01 of the Eighteenth Judicial Circuit (18th Judicial Cir. Ct. R. 13.01 (Jan. 23, 2006)). *Illinois Supreme Court Rule 86* provides:

"Rule 86. Actions Subject to Mandatory Arbitration

(a) Applicability to Circuits. Mandatory arbitration proceedings shall be undertaken and conducted in those judicial circuits which, with the approval of the Supreme Court, elect to utilize this procedure and in such other circuits as may be directed by the Supreme Court.

(b) Eligible Actions. A civil action shall be subject to mandatory arbitration if each claim therein is exclusively for money in an amount or of a value not in excess of the monetary limit [\*\*\*32] authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs.

[\*374] (c) Local Rules. Each judicial circuit court may adopt rules for the conduct of arbitration proceedings which are consistent with these rules and may determine which matters within the gen-

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eral classification of eligible actions shall be heard in arbitration.

(d) Assignment from Pretrials. Cases not assigned to an arbitration calendar may be ordered to arbitration at a status call or pretrial conference when it appears to the court that no claim in the action has a value in excess of the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, irrespective of defenses.

(e) Applicability of Code of Civil Procedure and Rules of the Supreme Court. Notwithstanding that any action, upon filing, is initially placed in an arbitration track or is thereafter so designated for hearing, the provisions of the Code of Civil Procedure and the rules of the Supreme Court shall be applicable to its proceedings except insofar as these rules otherwise provide." *Ill. S. Ct. R. 86* (eff. Jan. 1, 1994).

Also relevant here is *Illinois Supreme Court Rule 92(b)*, which [\*\*\*33] states:

"The panel shall make an award promptly upon termination of the hearing. The award shall dispose of all claims for relief. The award may not exceed the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs. The award shall be signed by the arbitrators or the majority of them. A dissenting vote without further comment may be noted. Thereafter, the award shall be filed immediately with the clerk of the court, who shall serve [\*\*381] notice of the award, and the entry of the same on the record, to other parties, including any in default." *Ill. S. Ct. R. 92(b)* (eff. Jan. 1, 1994).

Finally, *Illinois Supreme Court Rule 93(a)* provides:

"Within 30 days after the filing of an award with the clerk of the court, and upon payment to the clerk of the court of the sum of \$200 for awards of \$30,000 or less or \$500 for awards greater than \$30,000, any party who was present at the arbitration hearing, either in person or by counsel, may file with the clerk a written

notice of rejection of the award and request to proceed to trial, together with a certificate of service of such notice on all other parties. The filing of a single rejection [\*\*\*34] shall be sufficient to enable all parties except a party who has been debarred from rejecting the award to proceed to trial on all issues of the case without the necessity of each party filing a separate rejection. The filing of a notice of rejection shall not be effective as to any party who is debarred from rejecting an award." *Ill. S. Ct. R. 93(a)* (eff. Jan. 1, 1997).

The question before us requires that we consider these rules.

Court rules are interpreted in the same manner as statutes. See *People v. Calabrese*, 398 Ill. App. 3d 98, 120, 924 N.E.2d 6, 338 Ill. Dec. 146 (2010) ("We interpret [\*\*375] supreme court rules in the same manner as statutes, applying the cardinal rule of construction in which we ascertain and give effect to the intent of the drafter, using the plain and ordinary language of the rule."). Thus, our primary goal is to ascertain and give effect to the intent of the drafter of the rule. *Stemple v. Pickerill*, 377 Ill. App. 3d 788, 792, 879 N.E.2d 1042, 316 Ill. Dec. 654 (2007). The best indication of the drafter's intent is the plain language of the rule itself. *Whitledge v. Klein*, 348 Ill. App. 3d 1059, 1062, 810 N.E.2d 303, 284 Ill. Dec. 650 (2004). Where the language of a rule is clear as written, it must be applied without reading into it any conditions, exceptions, or [\*\*\*35] limitations not expressed by the drafter. *Melrose Park Sundries, Inc. v. Carlini*, 399 Ill. App. 3d 915, 920, 927 N.E.2d 132, 339 Ill. Dec. 591 (2010).

In this case, the plain language of the various rules indicates that the trial court's authority to enter an award is not limited to any particular amount. *Illinois Supreme Court Rule 86* allows cases involving claims for not more than an amount set by local rule (here \$50,000) to be ordered to arbitration. *Ill. S. Ct. R. 86* (eff. Jan. 1, 1994). *Illinois Supreme Court Rule 92(b)* expressly makes that limit applicable to awards entered by arbitrators. *Ill. S. Ct. R. 92(b)* (eff. Jan. 1, 1994). *Illinois Supreme Court Rule 93(a)*, which controls what happens following the rejection of an award, contains no similar limitation. See *Ill. S. Ct. R. 93(a)* (eff. Jan. 1, 1997). As such, the monetary limitation applies only to awards entered by arbitrators and not to the trial court.

Defendant argues, nevertheless, that the limit applies to the trial court. He points to the following language of *Illinois Supreme Court Rule 86* in support: "A civil ac-

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tion shall be subject to mandatory arbitration if *each claim therein is exclusively for money in an amount or of a value* not in excess of [\*\*\*36] the monetary limit authorized by the Supreme Court for that circuit or county within that circuit, exclusive of interest and costs." (Emphasis added.) *Ill. S. Ct. R. 86(b)* (eff. Jan. 1, 1994). Defendant contends that the trial court's authority to enter an award is thus limited by the claim made. However, a "claim" is simply "[a] demand for money or property to which one asserts a right." Black's Law Dictionary 240 (7th ed. 1999). An "award," on [\*\*382] the other hand, is "[a] final judgment or decision, esp[ecially] one by an arbitrator or jury assessing damages." Black's Law Dictionary 132 (7th ed. 1999). The fact that \$50,000 is claimed makes the case arbitration eligible under *Illinois Supreme Court Rule 86*. This does not limit the authority of the trial court to enter any award of damages. The limitation upon the arbitrator's ability to enter an award is found in *Illinois Supreme Court Rule 92(b)*, and there is no similar limitation on the trial court's authority. This is consistent with *section 2-604* of the Civil Practice Law, which states, "Except in case of default, the prayer for relief does not limit the relief obtainable \*\*\*." 735 ILCS 5/2-604 [\*376] (West 2006). In other words, the amount [\*\*\*37] of the claim does not limit the trial court's authority.

Accordingly, we conclude that the various rules pertaining to arbitration do not limit the trial court's ability to award damages. Before closing, we note that defendant also relies upon *Illinois Supreme Court Rule 222* (eff. July 1, 2006) in arguing that the trial court properly reduced the damages awarded to plaintiff to \$50,000. This rule provides, in pertinent part, as follows:

"Any civil action seeking money damages shall have attached to the initial pleading the party's affidavit that the total of money damages sought does or does not exceed \$50,000. If the damages sought do not exceed \$50,000, this rule shall apply. Any judgment on such claim which exceeds \$50,000 shall be reduced posttrial to an amount not in excess of \$50,000. Any such affidavit may be amended or superseded prior to trial pursuant to leave of court for good cause shown, and only if it is clear that no party will suffer any prejudice as a result of such amendment." *Ill. S. Ct. R. 222(b)* (eff. July 1, 2006).

We decline to address the applicability of this rule here. Given our disposition of this appeal, this issue is not likely to recur on retrial. See *People v. Wilkerson*, 87 Ill. 2d 151, 160, 429 N.E.2d 526, 57 Ill. Dec. 628 (1981). [\*\*\*38] *Rule 222(b)* permits affidavits regarding damages to be amended before trial, and plaintiff will have such an opportunity in the present case.

## VI. CONCLUSION

In light of the foregoing, the judgment of the circuit court of Du Page County is reversed. This cause is remanded for a new trial. We do not intend this opinion to limit the pretrial procedures the trial court may engage in on remand.

Reversed and remanded.





Analysis

As of: Oct 01, 2012

UNIVERA, INC., a Delaware corporation, Plaintiff, v. JOHN TERHUNE, an individual; TERHUNE ENTERPRISES, LLC, a Florida limited liability company; MARSHALL DOUGLAS, an individual; DOUGLAS ENTERPRISES INTERNATIONAL, LLC, a Florida limited liability company, Defendants.

No. C09-5227 RBL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
WASHINGTON

2009 U.S. Dist. LEXIS 111660

November 18, 2009, Decided  
November 18, 2009, Filed

**SUBSEQUENT HISTORY:** Dismissed by, in part *Univera, Inc. v. Terhune*, 2010 U.S. Dist. LEXIS 89992 (W.D. Wash., Aug. 31, 2010)

**PRIOR HISTORY:** *Univera, Inc. v. Terhune*, 2009 U.S. Dist. LEXIS 103038 (W.D. Wash., Nov. 3, 2009)

**COUNSEL:** [\*1] For Univera Inc, a Delaware corporation, Plaintiff: Charles S Wright, LEAD ATTORNEY, Matthew S Sullivan, DAVIS WRIGHT TREMAINE (SEA). SEATTLE, WA.

For John Terhune, an individual, Patricia Terhune, an individual, Terhune Enterprises LLC, a Florida limited liability company, Marshall Douglas, an individual, Diana Douglas, an individual, Douglas Enterprises International LLC, Defendants: D.J. Poyfair, Paul S Swedlund, LEAD ATTORNEYS, PRO HAC VICE, BAKER & HOSTETLER LLP, DENVER, CO; David C Lundsgaard, GRAHAM & DUNN, SEATTLE, WA.

**JUDGES:** RONALD B. LEIGHTON, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** RONALD B. LEIGHTON

**OPINION**

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO COMPEL ARBITRATION

THIS MATTER is before the Court for consideration of Plaintiff's Motion for Partial Summary Judgment to Compel Arbitration [Dkt. #45]. The Court has reviewed the materials in support of and opposition to the motion. For the following reasons, Plaintiff's motion is GRANTED IN PART and DENIED IN PART.

#### Background

Plaintiff Univera asks this Court to compel defendants John Terhune, Marshall Douglas, Terhune Enterprises, LLC ("Terhune Enterprises"), and Douglas Enterprises International, LLC ("Douglas [\*2] Enterprises"), into arbitration based on the existence of a valid and enforceable arbitration clause.

In 2004, both Terhune Enterprises, Inc. (now Terhune Enterprises, LLC) and Douglas Enterprises International, LLC, became Univera Associates. <sup>1</sup> Univera requires its Associates to renew their agreements with Univera for each calendar year. The form includes a statement that the Associate has "read and accept[ed] all of the terms and conditions as outlined in the company's

policies and procedures manual." On the reverse side of the form, the agreement includes the following clause:

Any controversy or claim arising out of or relating to the Associate Agreement, or any alleged breach thereof, shall be settled by arbitration administered by the American Bar Association under its Commercial Arbitration Rules . . . If an Associate files a claim or counter-claim against Oasis, he or she may only do so on an individual basis and not with any other Associate or as part of a class or consolidated action.

1 In 2004, Univera conducted business under the name Oasis Lifesciences.

As of December 2008, the Univera policies and procedures manual required any arbitration to take place in Seattle, Washington. [\*3] <sup>2</sup> The manual also included a provision entitling the prevailing party in any such arbitration to costs and expenses of arbitration, including attorney's fees and filing fees.

2 15.2 of the Univera Policies and Procedures Manual states:

A. Any controversy or claim arising out of or relating to the Associate Agreement, these Policies and Procedures, or the breach thereof, the Associate's business or any dispute between Univera and the Associate, shall be settled by binding arbitration administered by the American Arbitration Association under its commercial arbitration rules . . . . Any such arbitration shall be held in Seattle, Washington, USA . . . .

B. If an Associate files a claim or counterclaim against Univera, he or she may only do so on an individual basis and not with any other Associate or as part of a class or consolidated action . . . .

C. The prevailing party in any such arbitration shall be entitled to receive from the losing party all costs and expenses of arbitration, including attorney's fees and filing fees . . . .

On the Terhune 2005 renewal form, the Associate Agreement lists Terhune Enterprises as the "Associate". It was signed by "Patricia Terhune, VP." On the Douglas [\*4] 2004 Associate Agreement form, the "Associate" is listed as Douglas Enterprises International, LLC. The form was signed by Marshall and Diana Douglas, Directors. In January 2009, John Terhune resigned as a member of Terhune Enterprises, LLC. In February 2009, Marshall Douglas resigned as a member of Douglas Enterprises International, LLC. Univera alleges that Mr. Terhune, Mr. Douglas, Terhune Enterprises, and Douglas Enterprises violated Univera's policies and procedures, and as such should be compelled to arbitrate the disputes between the parties. This Court GRANTS IN PART and DENIES IN PART the plaintiff's Motion to Compel Arbitration. Terhune Enterprises, LLC, and Douglas Enterprises International, LLC, are compelled to arbitrate with Univera. Mr. Terhune and Mr. Douglas did not personally enter into any agreement with Univera, and cannot be compelled to arbitration on the basis of the arbitration clause.

#### Discussion

The Federal Arbitration Act ("FAA") provides that any arbitration agreement within the scope of the parties' agreement is valid, irrevocable, and enforceable. The FAA leaves the Court no room for discretion, but requires the Court to "direct the parties to proceed to [\*5] arbitration on issues as to which an arbitration agreement has been signed." *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). Under the FAA, the Court must first determine whether or not a valid agreement to arbitrate exists. *Chiron*, 207 F.3d at 1130. If an agreement exists, the Court then examines whether that agreement encompasses the dispute at issue. *Id.*

#### A. Existence of an agreement to arbitrate

Univera entered into Associate Agreements with both Terhune Enterprises and Douglas Enterprises. The Associate Agreements included an arbitration clause, and required the Associates to be bound by Univera's policies and procedures manual. An agreement to arbitrate exists between Univera and the LLCs.

Univera also seeks to compel John Terhune and Marshall Douglas individually to arbitration. Mr. Terhune and Mr. Douglas were both officers of their respective LLCs until early 2009. Mr. Douglas signed an Associate Agreement in 2004 as "Marshall Douglas, Director." In addition, Mr. Douglas signed a Business Regis-

tration Form in conjunction with the Douglas Enterprises Associate Agreement. The form was [\*6] signed on the line indicated for "President." Mr. Terhune's signature does not appear on Terhune Enterprises' 2005 renewal form, but he was an officer of the company at the time. Neither Mr. Terhune nor Mr. Douglas signed the Associate Agreement in their individual capacity. The question of whether a non-signatory to an arbitration agreement may be compelled to arbitration is governed by federal law. *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986).

### 1. Estoppel

Univera argues that Mr. Terhune and Mr. Douglas may be compelled to arbitrate under a theory of equitable estoppel. Non-signatories of an arbitration agreement may be bound by the agreement under ordinary principles of contract and agency law. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (quoting *Letizia*, 802 F.2d at 1187). Under an equitable estoppel theory, a signatory to an arbitration agreement cannot compel a non-signatory into arbitration unless the non-signatory knowingly exploits the agreement containing the arbitration clause. *Comer*, 436 F.3d at 1101. Theories of alternative estoppel advanced by Univera are not applicable to this case, as they only apply where a non-signatory seeks [\*7] to compel a signatory to arbitrate. See *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).

Equitable estoppel precludes a party from simultaneously enjoying the benefits of a contract while avoiding the obligations imposed by that contract. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009). In order to compel arbitration under an equitable estoppel theory, a non-signatory must have either received a direct benefit or must have relied on the contract containing the arbitration clause. See *Thomson-CSF, S.A.*, 64 F.3d at 778-79.

While Mr. Terhune and Mr. Douglas earned money through their LLC's contracts with Univera, they have not received the type of direct benefit necessary to compel them to arbitration as a non-signatory to the Associate Agreement. Instead, Mr. Terhune and Mr. Douglas are indirect beneficiaries who did not knowingly exploit the Associate Agreement. Mr. Terhune and Mr. Douglas acted in their official capacities as company officers throughout their relationship with Univera. The Florida Action brought by the defendants includes claims based on [\*8] the Associate Agreement. These claims were brought only by the LLCs, not by Mr. Terhune or Mr. Douglas individually. The claims brought individually by Mr. Terhune and Mr. Douglas are based on common law tort principles, including tortious interference, unfair

competition, and defamation. None of these causes of action shows that Mr. Terhune or Mr. Douglas "knowingly exploited" the Associate Agreement that their respective LLCs had with Univera. Mr. Terhune and Mr. Douglas cannot be compelled to arbitration under an estoppel theory.

### 2. Veil Piercing

Univera argues that Mr. Terhune and Mr. Douglas must be compelled to arbitrate because there is a possibility that the Court might pierce their respective LLC's corporate veils. In order to compel arbitration because the defendants have disregarded corporate separateness, there must be more than a mere possibility that the veil will be pierced. See *Carpenters 46 v. ZCon Builders*, 96 F.3d 410, 414-415 (9th Cir. 1996). Univera fails to meet its burden of proving that Mr. Terhune or Mr. Douglas have disregarded the separation between themselves and their respective LLCs. They maintained separate personal and business bank accounts, filed annual [\*9] reports and corporate tax returns, and may have received payments for travel reimbursements personally only because Univera issued those reimbursements to them personally. Univera has failed to show that either Mr. Terhune or Mr. Douglas has become the alter ego of his respective LLC, and cannot compel them to arbitrate by piercing the corporate veil at this juncture.

### B. Whether the dispute is encompassed by the arbitration clause

The arbitration clause between Univera and its Associates is very broad, binding the parties to arbitrate any claim or controversy arising out of or relating to the Associate Agreement or Univera's Policies and Procedures Manual. Univera alleges impermissible recruiting activities on the part of Terhune Enterprises and Douglas Enterprises. This claim is within the scope of a valid arbitration clause with respect to Terhune Enterprises and Douglas Enterprises International. Univera's claims are not within the scope of a valid arbitration clause with respect to the individual defendants because there is no valid arbitration clause.

### C. Unconscionability

Defendants argue that Univera's arbitration clause is unconscionable and unenforceable. Generally applicable defenses [\*10] to contractual obligations, including unconscionability, may be applied to invalidate an agreement to arbitrate without undermining the Federal Arbitration Act. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Washington state law controls the Court's analysis of unconscionability. See *Hoffman v. Citibank*, 546 F.3d 1078, 1082 (9th Cir. 2008). Washington recognizes both

procedural and substantive unconscionability. *McKee v. AT&T Corp.*, 164 Wash.2d 372, 396, 191 P.3d 845, 857 (2008). Substantive unconscionability "involves those cases where a clause or term in the contract is one-sided or overly harsh." *Id.* Washington courts have previously recognized that the commercial nature of the contract should be considered when examining a potentially unconscionable clause or contract. *See Luna v. Household Fin. Corp.*, III, 236 F. Supp. 2d 1166, 1183 (W.D. Wash. 2002); *MA Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash.2d 568, 587, 998 P.2d 305, 314-15 (2000).

Defendants argue that three specific clauses are unconscionable: (1) requiring arbitration to be held in Seattle; (2) limiting claimants to bringing only individual claims; and (3) the "loser pays all" clause, including [\*11] all arbitration expenses. Defendants rely on *McKee and Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), to support their argument that Univera's arbitration clause is unconscionable. In *McKee*, the Washington Supreme Court held that a class action waiver was unconscionable where small claims were involved. *McKee*, 164 Wash.2d at 397-98. The *McKee* Court also held that a "loser pays all" clause is substantively unconscionable where it applies only to one side. *Id.* at 399-400. Neither of these circumstances are present here. First, the claims involved in this case are not small enough to render the class action prohibition substantively unconscionable. Unlike *McKee*, no small claims are involved. Second, the "loser pays all" clause applies to both sides. If the defendants prevail at arbitration, Univera will bear all costs under the agreement. In *McKee*, the loser pays clause applied only to the consumer claimants and attempted to limit what type of damages an arbitrator could award. *Id.* Here, the clause applies equally to both sides.

Under Washington law, forum selection clauses are prima facie valid absent a showing of unreasonableness

or fraud by the party challenging [\*12] the clause. *See Dix v. ICT Group, Inc.*, 160 Wash.2d 826, 834-35, 161 P.3d 1016, 1020-21 (2007). A forum selection clause may be invalidated if (1) it was induced by fraud; (2) the selected forum would be so unfair that it would effectively deprive a party of their day in court; or (3) enforcement of the clause would contravene Washington state public policy. *Id.* at 834. Neither party alleges any fraud in relation to the arbitration clause. The defendants have not cited any public policy that would be violated by arbitrating in Seattle. While the defendants will likely experience inconvenience in a Seattle arbitration, that inconvenience does not rise to the level of depriving them of their day in court. Accordingly, because the defendants have not met their burden of showing that the forum selection clause is unconscionable, it is valid and enforceable with regard to the parties to the agreement.

### Conclusion

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment to Compel Arbitration [Dkt. #45] is GRANTED with respect to defendants Terhune Enterprises, LLC, and Douglas Enterprises International, LLC. Plaintiff's Motion to Compel Arbitration is DENIED with respect to [\*13] defendants John Terhune and Marshall Douglas individually. The Court hereby STAYS all proceedings in this Court with respect to Plaintiff's continuing claims against John Terhune and Marshall Douglas pending arbitration between Univera, Terhune Enterprises, LLC, and Douglas Enterprises LLC.

DATED this 18TH day of November, 2009.

/s/ Ronald B. Leighton

RONALD B. LEIGHTON

UNITED STATES DISTRICT JUDGE





Analysis  
As of: Oct 01, 2012

**VILES & BECKMAN, P.A.; MARCUS W. VILES, Plaintiffs, vs. MARY P. LAGARDE, Defendant.**

Case No. 2:05-cv-558-FtM-29SPC

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION**

*2006 U.S. Dist. LEXIS 62659*

**September 1, 2006, Decided**

**COUNSEL:** [\*1] For Viles & Beckman, PA, formerly known as Viles & Ellis, PA, Marcus W. Viles, Plaintiffs: Scott Wm. Weinstein, Jordan Lucas Chaikin, Weinstein, Bavly & Moon, PA, Ft. Myers, FL US.

For Mary P. Lagarde, formerly known as Mary P. Ellis formerly known as Mary P. Viles, Defendant, Counter Claimant: Theodore Lawton Tripp, Jr., Kevin Patrick Fularczyk, Garvin & Tripp, PA, Ft Myers, FL US.

For Michael Beckman, Viles & Beckman Properties LLC, Viles & Beckman, LLC, Movants: Mark C. Menner, Viles & Beckman, P.A., Ft. Myers, FL.

For Richard Helms, Movant, Pro se, Miller, Helms & Folk, PA, Ft. Myers, FL.

For Viles & Beckman, PA, Marcus W. Viles, Counter Defendants: Scott Wm. Weinstein, Weinstein, Bavly & Moon, PA, Ft. Myers, FL US.

**JUDGES:** JOHN E. STEELE, United States District Judge.

**OPINION BY:** JOHN E. STEELE

**OPINION**

**OPINION AND ORDER**

This matter comes before the Court on Defendant's Motion for Partial Summary Judgment as to Plaintiffs' Continuing Obligation to Pay Defendant a Share of Firm Revenues (Doc. # 19), filed on February 21, 2006. Plaintiffs Viles & Beckman, P.A., f/k/a Viles & Ellis, P.A. and Marcus W. Viles filed their Response on March 13, 2006. (Doc. # 25.) On March 22, 2006, defendant [\*2] filed a Motion for Leave to File a Reply (Doc. # 28), with a proposed Reply attached. Defendant represents that plaintiffs oppose the Motion for Leave to File a Reply. The Court will grant the Motion for Leave to File a Reply, and will allow the Reply to be filed.

After being divorced, two formerly married law partners signed a Shareholder Purchase Agreement (the Agreement) in which one agreed to sell all her shares of stock in their law practice to the other. Despite the fact that the Agreement recites that each had access to counsel in reviewing, negotiating, and executing the Agreement, that each had full access to all financial information necessary to make an informed decision, and that the Agreement was negotiated at arms length (Doc. # 2-2, P 18), the two former partners now see the Agreement quite differently. Not surprisingly, this gave birth to the instant lawsuit. The matter is currently before the Court on a motion for partial summary judgment as to a portion of the declaratory judgment requested by plaintiffs. For the reasons set forth below, the Court grants the motion.

**I.**

Summary judgment is appropriate only when the Court is satisfied that "there is no genuine [\*3] issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue is "genuine" if there is sufficient evidence such that a reasonable jury or the factfinder at trial could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" if it may affect the outcome of the suit under governing law. *Id.* The moving party bears the burden of identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or affidavits which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004).

To avoid the entry of summary judgment, a party faced with a properly supported summary judgment motion must come forward with extrinsic evidence, i.e., affidavits, depositions, answers to interrogatories, and/or admissions, which are sufficient to establish the existence of the essential elements to that party's [\*4] case, and the elements on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322; *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999). In ruling on a motion for summary judgment, if there is a conflict in the evidence, the non-moving party's evidence is to be believed and all reasonable inferences must be drawn in favor of the non-moving party. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003).

## II.

It is undisputed that prior to a December 5, 2002, divorce plaintiff Marcus Viles (Mr. Viles) and defendant Mary P. La Garde, formerly Mary Pat Ellis (Ms. Ellis) were married and were the sole shareholders of a Fort Myers law firm then known as Viles & Ellis, P.A. (Viles & Ellis or the Firm). Both held fifty percent of the shares in Viles & Ellis.

On May 20, 2003, Mr. Viles and Ms. Ellis entered into the Agreement in which Mr. Viles agreed to purchase, and Ms. Ellis agreed to sell, all her shares of stock in Viles & Ellis upon the terms and conditions set forth in the Agreement (Doc. # 2-2, p. 1). The Agreement stated that "[t]he parties are desirous [\*5] of confirming the contractual relationship between Mary Pat Ellis and Viles & Ellis, P.A. [the Firm] and Marcus Viles, individually, [Purchaser]." (*Id.*) The Agreement provided that the sale of the shares of stock would be effective at a March 31, 2003, closing, at which time Ms. Ellis would

endorse her shares of stock and Mr. Viles would acquire all shares in Viles & Ellis, P.A. without recourse. (*Id.*)

In consideration for Ms. Ellis selling her shares of stock, Mr. Viles agreed to perform certain terms and conditions. These included payment for the stock shares, continued employment of Ms. Ellis by the Firm for a period of time, reimbursement of certain client costs, payment of certain expenses, and non-monetary conditions.

While the Agreement did not set a total price for the shares of stock, it did set forth a formula to be followed. The parties agreed that Ms. Ellis's basis in the stock was \$ 473,541.00. The price of the stock, however, was not limited to this basis. Mr. Viles agreed to pay Ms. Ellis \$ 80,000.00 as partial payment toward Ms. Ellis's basis, to be paid by a lump sum of \$ 20,000.00, plus monthly payments of \$ 5,000.00 for the next twelve months pursuant [\*6] to a Promissory Note guaranteed by the Firm. (*Id.*) In addition to this \$ 80,000, Mr. Viles agreed to pay Ms. Ellis amounts equal to certain percentages of gross attorney's fees as recovered by the Firm. Specifically, Mr. Viles agreed as follows:

Purchaser shall pay to the Seller 15% of 100% of the gross attorney's fees recovered by the Firm on each case in which the Firm has been retained to provide legal services on or before December 31, 2005. Purchaser shall pay to Seller the sum of 10% of 100% of the gross attorney's fees recovered in each case on which the Firm has been retained to provide legal services between January 1, 2006 and December 31, 2006. Purchaser shall pay to the Seller 5% of 100% of the gross attorney's fees recovered on each case in which the Firm is retained to provide legal services from January 1, 2007 to December 31, 2007. All payments under this subparagraph are to be paid directly to Seller from the Trust Account of the Firm at the same time that either the client is paid or the Firm is paid, whichever first occurs. All sums received by the Seller under this subparagraph shall first be applied to reimburse Seller for her basis in the Viles & Ellis, [\*7] P.A. stock. All such funds paid in excess of Seller's basis as of March 31, 2003, will be applied to the total purchase price of the stock.

(*Id.* P 2.) As further consideration for Ms. Ellis's stock, Mr. Viles agreed to reimburse her for 50% of all client costs advanced by the Firm prior to the closing date of the Agreement, to be paid at the time each case expense was reimbursed to the Firm. (*Id.* P 3.)

In addition to paying for the shares of stock pursuant to the formula set forth above, the Agreement also imposed other conditions upon Mr. Viles and the Firm as consideration for the stock. First, on and after March 31, 2003, for so long as Ms. Ellis had the right to receive a fee on any of the Firm's cases as described in paragraph 2 of the Agreement, Mr. Viles and the Firm agreed to retain Ms. Ellis to provide legal services in an "of counsel" status as an employee of the Firm. (Doc. # 2-2, P 4.) During this "of counsel" period, Ms. Ellis had the right to actively work on certain types of cases she selected, and "in addition to other payments set forth in this Agreement", was entitled to receive from the Firm and Mr. Viles 40% of the gross attorney fees recovered [\*8] in each of these cases, to be paid directly from the Firm's trust account. (*Id.*)

Second, Mr. Viles and the Firm agreed to employ Ms. Ellis for three years to consult with the Firm on marketing efforts, for which she would be paid a total salary of \$ 180,000.00, payable in monthly installments of \$ 5,000.00. (*Id.* P 13.) During this time period, Ms. Ellis agreed not to compete with the Firm in Southwest Florida, which was defined as not advertising or marketing legal services (although Ms. Ellis could practice law) in Lee, Charlotte, Collier, and Hendry Counties for personal injury cases.

Third, Mr. Viles and the Firm agreed to pay certain other expenses on Ms. Ellis's behalf. Mr. Viles and the Firm agreed to: (1) maintain errors and omissions insurance with Ms. Ellis named as an additional insured for as long as she had a fee interest in any of the Firm's cases, and to provide tail coverage after separation of the relationship between Ms. Ellis and the Firm if it is commercially available (*id.* P 7); (2) maintain health, life, and disability insurance coverage for Ms. Ellis for so long as she had a right to receive a fee in any of the Firm's cases (*id.* P 8); (3) to [\*9] make contributions to Ms. Ellis's 401K and Retirement Plans at levels equal to contributions to Mr. Viles' plans, for as long as she retained the right to participate in a fee generated by any of the Firm's cases (*id.* P 11); and (4) to maintain and pay for Ms. Ellis's Florida law license, legal memberships, and Bar dues for as long as she retained the right to participate in the fee income of any of the Firm's cases (*id.* P 12).

Fourth, Mr. Viles agreed to pay Ms. Ellis 50% of any loan repayment received by the Firm with regard to a \$ 96,504.97 debt plus interest owed to Viles & Ellis, P.A. by the Lagarde Law Firm, PC, as a receivable and not to

be included as fee income. Both Mr. Viles and the Firm agreed to execute a Promissory Note upon request confirming the assignment of 50% of that receivable to Ms. Ellis. (Doc. # 2-2, P 17.)

Finally, Mr. Viles and the Firm agreed to certain non-monetary items. These included: Holding Ms. Ellis harmless and indemnifying her from any debts or liabilities of the Firm (Doc. # 2-2, P 6); causing Ms. Ellis to be released from any personal guaranty or liability on Firm obligations, including lines of credit or loan indebtedness (*id.* P [\*10] 6); not making further draws on the Firm's line of credit until Ms. Ellis's name was removed from the Firm's credit line, and not incurring further loan indebtedness on behalf of Mr. Viles or the Firm in Ms. Ellis's name (*id.*); not diluting or reducing Ms. Ellis's fee interests in any matter or case without her prior written consent (*id.* P 9); not alienating, selling, encumbering, or assigning the Firm's assets or stock for so long as Ms. Ellis retained a right to participate in the fee generated by any of the Firm's cases without her written permission (*id.* P 10); and conducting themselves in full compliance with all applicable Bar regulations and requirements and hold Ms. Ellis harmless and indemnify her for any and all grievances against the Firm or its attorneys, agents, employees or assigns (*id.* P 15).

In addition to conveying the stock shares, Ms. Ellis agreed to provide "of counsel" legal services (Doc. # 2-2, P 4), marketing consultation services (*id.* P 13), and allow her name and likeness to be used by the Firm in advertising through December 31, 2007 (*id.* P 5).

After the March 31, 2006, closing, Mr. Viles operated Viles & Ellis as its sole shareholder [\*11] until July 8, 2004. At that time, Mr. Viles changed the name to Viles & Beckman, P.A., which is the other plaintiff in the instant action. Plaintiffs continued to make payments to Ms. Ellis in accordance with the Agreement until October 26, 2005.

On August 26, 2005, Mr. Viles and Viles & Beckman initiated a declaratory action in the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida. After Ms. Ellis was served with the Amended Complaint on November 8, 2005, she timely removed the action to federal court. According to the Amended Complaint, plaintiffs seek a declaratory judgment stating that: (a) They have no obligation to continue paying Defendant a share of the Firm's revenues; (b) They have no obligation to continue to reimburse Defendant for the costs recovered by the Firm; (c) They have no obligation to continue to employ Defendant as a marketing director, nor pay Defendant for same, or provide her with health insurance coverage; (d) They have no obligation to retain Defendant on an "of counsel" basis; and (e) They have no obligation to give Defendant access to the Firm's da-

tabases and financial records. (Doc. # 2-1, p. 4-5.) On November 23, 2005, defendant [\*12] filed her Answer, Affirmative Defenses and Counterclaim, which alleges a breach of contract claim. (Doc. # 3-1.) Defendant now moves for partial summary judgment as to the declaratory action, and asks the Court to find that plaintiffs have a continuing obligation to pay defendant a share of the Firm's revenues in accordance with the Agreement.

### III.

This case requires the Court to consider and apply Florida contract law.<sup>1</sup> Florida contract principles are well-settled. "The construction of a contract is a question of law for the courts." *AT & T Wireless Servs. of Fla., Inc. v. WCI Communities, Inc.*, 932 So. 2d 251, 254, 932 So. 2d 251, 2005 Fla. App. LEXIS 14108 (Fla. 4th DCA 2005). "Contract interpretation principles under Florida law require us to look first at the words used on the face of the contract to determine whether that contract is ambiguous." *Rose v. M/V "Gulf Stream Falcon"*, 186 F.3d 1345, 1350 (11th Cir. 1999) (citing *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432 (Fla. 1980)); *University of Miami v. Frank*, 920 So. 2d 81, 86 (Fla. 3d DCA 2006) ("Whether a contract term is ambiguous is a question of law for the court."). "A party is bound by, [\*13] and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract." *Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999) (quoting *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990)) (internal quotation marks omitted). "[T]he terms of the contract should control where the rights and interests of the parties are definitely and clearly stated." *American Exp. Fin. Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 940 (11th Cir. 1997). "When a contract is clear and unambiguous, the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of the language controls." *AT & T Wireless*, 932 So. 2d at 255, 2005 Fla. App. LEXIS 14108.

<sup>1</sup> "Under the Erie doctrine, a federal court adjudicating state law claims applies the substantive law of the state." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 F.3d 1224, 1227 (11th Cir. 2005) (internal citation omitted); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[\*14] On the other hand, "[w]hen a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties." *AT & T Wireless*, 932 So. 2d at 255, 2005 Fla. App. LEXIS 14108. Thus, "when the terms of a written instrument are

disputed and rationally susceptible to more than one construction, an issue of fact is presented which cannot properly be resolved by summary judgment." *Chhabra v. Morales*, 906 So. 2d 1261, 1262 (Fla. 4th DCA 2005) (citing *Segal v. Rhumblin Int'l, Inc.*, 688 So. 2d 397, 398 (Fla. 4th DCA 1997)).

### IV.

Ms. Ellis contends that she is entitled to partial summary judgment because the Agreement's language unambiguously provides that the total purchase price for her shares was not limited to a reimbursement of her "basis" in Viles & Ellis stock, and consequently plaintiffs have a continuing obligation to make payments in accordance with the payment formula. (Doc. # 19-1, p. 8.) Specifically, defendant highlights the language in paragraph 2 of the Agreement, quoted in full earlier. (Doc. [\*15] # 3-2, p. 2, P 2.) Plaintiffs agree that the purchase price of the shares was not limited to Ms. Ellis's basis, and concede that they have paid more than that amount to date. The Firm argues, however, that it never had an obligation under the Agreement. In addition, plaintiffs argue that for various reasons the amount paid to date completes their obligations under the Agreement.

The Court finds that the Agreement is clear and unambiguous as to the formula for payment of the price of Ms. Ellis's shares of Viles & Ellis stock; that the price was not limited to her basis in the stock; that plaintiffs were required to pay the \$ 80,000.00 set forth in paragraph 1 and the amounts as calculated in paragraph 2; that plaintiffs were required to pay additional amounts pursuant to paragraph 2; that plaintiffs must continue to make payments in accordance with paragraph 2; and that plaintiffs obligations under paragraph 2 are not complete. Therefore, unless one of plaintiffs' argument is meritorious, defendant is entitled to partial summary judgment as to plaintiff's obligations to continue to pay in accordance with the Agreement.

### A.

The Firm argues that it never had any obligations under [\*16] the Agreement, and therefore partial summary judgment must be denied as to it. The Firm asserts that it was not a party to the Agreement and that it received no consideration, and therefore it has no obligations, continuing or otherwise, under the Agreement. In her Reply, Ms. Ellis claims that the Firm is estopped from making this argument because the Firm adopted the obligations under the Agreement.

It appears clear that the Firm was a party to the Agreement. As noted earlier, the introductory paragraphs of the Agreement included the statement that "[t]he parties are desirous of confirming the contractual relation-

ship between Mary Pat Ellis and Viles & Ellis, P.A. [the Firm] and Marcus Viles, individually, [Purchaser]." (Doc. # 2-2, p. 1.) "The Firm" is a defined term in the Agreement for "Viles & Ellis, P.A." (*Id.*, first paragraph). Not only is the subject of the Agreement shares of stock in the Firm, but the Firm is repeatedly referenced throughout the Agreement, and is a specifically intended beneficiary of the Agreement. The Agreement is signed by all shareholders in the Firm, one in the capacity as seller and the other in the capacity as buyer.

Even if the Firm [\*17] is not considered a formal party to the Agreement, the Court agrees with defendant that the undisputed facts establish that the Firm is bound by the Agreement. It is certainly true that under Florida law, "[g]enerally, the obligation of contracts is limited to the parties making them." *Pozo v. Roadhouse Grill, Inc.*, 790 So. 2d 1255, 1260 (Fla. 5th DCA 2001) (internal quotation marks and citation omitted). However, "[i]f a person conduct[s] himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations." *Ayala v. Murrell*, 97 So. 2d 13, 15 (Fla. 1957). Viewing the evidence in the light most favorable to the Firm, it is undisputed that the Firm behaved in a manner to lead defendant to believe that the Firm had adopted Mr. Viles' contractual obligations as its own. Indeed, there is no other explanation for the Firm's conduct in the two and one-half years between the closing and its ceasing to make payments. As required under the Agreement, the Firm employed Ms. Ellis, contributed to her retirement [\*18] account, and made payment to her from the Firm's account.

## B.

The Firm next argues that it received no consideration, and therefore it has no obligations under the Agreement. The Court disagrees.

Under Florida law, "[t]he consideration required to support a contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee." *Real Estate World Fla. Commercial, Inc. v. Piemat, Inc.*, 920 So. 2d 704, 706 (Fla. 4th DCA 2006). "It is not necessary that a benefit should accrue to the person making the promise. It is sufficient that something of value flows from the person to whom it is made, or that he suffers some prejudice or inconvenience and that the promise is the inducement to the transaction." *Id.* (internal citations omitted). "The law recognizes that it is immaterial whether there is any actual pecuniary loss to the promisee or actual pecuniary benefit to the promisor; inadequacy of consideration does not render it insufficient to support a promise." *Lamborn v. Slack*, 107 So. 2d 277, 281 (Fla.

2d DCA 1958). "The detriment which will constitute a consideration [\*19] for a promise need not be an actual loss to the promisee. It is sufficient if he does something that he is not legally bound to do." *Mangus v. Present*, 135 So. 2d 417, 418 (Fla. 1961).

As the Firm anticipates, there is ample consideration shown on the face of the Agreement. The Firm received Ms. Ellis's continued legal services in an "of counsel" capacity; it received Ms. Ellis's marketing consulting services; and it received the right to use Ms. Ellis's name and likeness in advertising through December 31, 2007. The fact that the Firm and Mr. Viles now disclaim any value to this consideration is immaterial. Without the Agreement, Ms. Ellis would not have been legally bound to provide her services, name, or likeness to the Firm during the relevant period. Thus, the Court finds that plaintiffs' argument of no consideration for the Agreement is without merit.

## C.

Mr. Viles now asserts that the Agreement he helped draft, signed, and at least partially completed is unenforceable because: (1) there is no severability clause; (2) compliance with paragraphs 8, 11, and 14 is impossible; and (3) the fee-sharing provisions and indemnification clause violate *Rules 4-1.5* [\*20] or *4-5.6* of the Florida Rules of Professional Conduct. The Court finds that none of these reasons preclude partial summary judgment.

**(1) Severability:** The Court first addresses plaintiffs' argument that in the absence of a severability clause a single clause's invalidity and unenforceability undermines the entire Agreement, and therefore plaintiffs have no obligations at all under the Agreement. The Court disagrees.

"In determining whether a contract provision is severable, Florida courts look to the entirety of the agreement." *Frankenmuth Mut. Ins. Co. v. Escambia County, Fla.*, 289 F.3d 723, 728 (11th Cir. 2002). "[A] contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement." *Wilderness Country Club v. Groves*, 458 So. 2d 769, 771 (Fla. 2d DCA 1984) (quoting *Local No. 234 v. Henley & Beckwith*, 66 So. 2d 818 (Fla. 1953)). It is well established that "[a] bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one [\*21] side which are wholly supported by valid legal promises on the other." *Gold, Vann & White, P.A. v. Friedenstab*, 831 So. 2d 692, 696 (Fla. 4th DCA 2002) (internal citations omitted). In short, where an agreement includes an invalid and unenforceable provision, Florida courts do not require a severability clause to save the legal portions of

a contract. Thus, the Court finds that plaintiffs' position is contrary to Florida law.

(2) **Impossibility:** Plaintiffs argue that certain contract provisions are invalid because plaintiffs cannot perform these obligations, and consequently, plaintiffs are relieved from fulfilling those duties. Specifically, plaintiffs claim that compliance with paragraph 8 (providing health insurance to Ms. Ellis); paragraph 11 (contributing to Ms. Ellis' retirement plan); and paragraph 14 (allowing Ms. Ellis to have full access to the Firm's databases) is impossible.

Under Florida law, "[t]he doctrine of 'impossibility' must be applied with caution and is not available concerning intervening difficulties which could reasonably have been foreseen and could have been controlled by an express provision of the agreement." *Walter T. Embry, Inc. v. LaSalle Nat'l Bank*, 792 So. 2d 567, 570 (Fla. 4th DCA 2001). [\*22] "Where performance of a contract becomes impossible after it is executed, if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance." *American Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. 4th DCA 1998) (citing *Shore Inv. Co. v. Hotel Trinidad*, 158 Fla. 682, 29 So. 2d 696 (Fla. 1947)). "If the risk of the event that has supervened to cause the alleged frustration was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." *Id.* But, "a contracting party will not be relieved from his agreement to perform because of an inability that develops which could have been prevented or avoided, and a promisor will not be permitted to take advantage of an obstacle to performance which he has created or which lay within his power to remove or avoid." *Metropolitan Dade County v. Babcock Co.*, 287 So. 2d 139, 142 n.1 (Fla. 3d DCA 1973).

Plaintiffs premised their impossibility argument on the fact that defendant is no longer an employee of the Firm. Plaintiffs [\*23] assert that they cannot provide health insurance benefits or contributions to the retirement accounts of non-employees. However, it is undisputed that plaintiffs terminated defendant as an employee, and thus plaintiffs' action appears to have created the claimed obstacle to their performance. Additionally, none of these provisions impact plaintiffs' obligation to pay the agreed-upon purchase price for the stock. Further, it is clear from the face of the Agreement that none of these provisions are impossible. For example, the Agreement did not require plaintiffs to provide health insurance from the Firm's carrier, only that they maintain

Ms. Ellis's health insurance. It did not require that the retirement plan be through the Firm, only that contributions at certain levels be made to Ms. Ellis's retirement plans. Nothing precludes Ms. Ellis's full access to the Firm's databases.

(3) **The Florida Bar Rules:** Plaintiffs also claim that paragraphs 2, 9, and 15 violate Florida's Rule of Professional Conduct, and thus, plaintiffs are not required to comply with these provisions. Paragraphs 2 and 9 refer to sharing attorney's fees with Ms. Ellis, and paragraph 15 refers to an indemnification [\*24] clause.

Plaintiffs assert that the fee-sharing provisions violate *Rules 4-1.5* or *4-5.6* of the Florida Rules of Professional Conduct, and therefore, plaintiffs are excused from performing under the Agreement. The Court disagrees. Florida courts have held that it is error to use an ethical rule as a basis to invalidate or render void a provision in a private contract between two parties. *See Lee v. Florida Dep't of Ins. and Treasurer*, 586 So. 2d 1185, 1188 (Fla. 1st DCA 1991) ("To use rule 4-5.6 as the basis for invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect."). In other words, even if a fee-splitting contract divides the fee between the parties in an inconsistent manner with *4-1.5*, a party "may not rely upon the rule to avoid its contractual obligations." *Id.* Thus, the Court finds that plaintiffs' argument is without merit. For the same reasons as the contract's fee-sharing provisions, the Court concludes that plaintiffs cannot invalidate the indemnification clause because the provision may violate the ethical rules.

Accordingly, it is now

**ORDERED:**

1. Defendant's Motion for [\*25] leave to File Reply (Doc. # 28) is **GRANTED**. The Reply shall remain as filed.

2. Defendant's Motion for Partial Summary Judgment as to Plaintiffs' Continuing Obligation to Pay Defendant a Share of Firm Revenues (Doc. # 19) is **GRANTED**. The Court finds that plaintiffs are under a continuing obligation under the Agreement to pay defendant a share of the Firm revenues.

**DONE AND ORDERED** at Fort Myers, Florida, this 1st day of September, 2006.

**JOHN E. STEELE**

**United States District Judge**





Caution  
As of: Oct 01, 2012

**GARY W. WHITEAKER, Appellant, v. STATE OF IOWA, Appellee**

No. 84-1943

Supreme Court of Iowa

*382 N.W.2d 112; 1986 Iowa Sup. LEXIS 1080*

February 19, 1986, Filed

**PRIOR HISTORY:** [\*\*1] Appeal from the Iowa District Court for Polk County, Theodore H. Miller, Judge. Appeal from judgment for defendant State in malpractice action alleging negligence of an assistant attorney general.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** Robert A. Nading II of Hall & Nading, Ankeny, for Appellant.

Thomas J. Miller, Attorney General, and Charles S. LAVORATO, Assistant Attorney General, for Appellee.

**JUDGES:** Reynoldson, C.J., and McGiverin, Larson, Carter, and Wolle, JJ.

**OPINION BY:** WOLLE

**OPINION**

[\*113] Plaintiff Gary W. Whiteaker brought this law action against the State for damages allegedly caused by malpractice of a lawyer (the State attorney) working in the consumer protection division of the Iowa Attorney General's office. Whiteaker's malpractice lawsuit is premised on his contention that an underlying claim and lawsuit would have resulted in a judgment for damages, or at least a favorable settlement, if the State attorney had not been negligent in several respects. Following a bench trial the trial court found that Whiteaker had not proved

several elements of his malpractice action and entered judgment for the State. We affirm.

The underlying claim which Whiteaker alleges was mishandled by the [\*\*2] State attorney arose out of his investment in postal vending machines. In 1975 Whiteaker had contacted a California-based company known as United Postal Corporation (UPC) to inquire about a newspaper advertisement for the sale of postal vending machines. He eventually purchased several machines, then became convinced that UPC had defrauded him. Whiteaker filed a complaint against UPC with the consumer protection division of the attorney general's office. He then met with the State attorney and had him write a letter demanding full restitution of Whiteaker's investment in the postal machines. UPC rejected that proposal.

In October of 1976 UPC hired an Iowa attorney to defend against the claim which the State attorney was threatening to file on behalf of Whiteaker and other persons who had purchased the vending machines. In a conversation concerning the possibility of settling both Whiteaker's personal damage claim and UPC's attempt to collect amounts due on his contract, UPC's attorney refused to negotiate with the State attorney because of what he believed was a conflict of interest. The conflict arose from the fact that the State attorney was representing all Iowa consumers and also [\*\*3] the plaintiff on his individual stake in the matter. UPC's attorney at that point requested that the State attorney advise the plaintiff to obtain separate, private counsel. Plaintiff contends that the State attorney never informed him of this conversa-

tion or of UPC's willingness to negotiate a settlement with plaintiff through such separate private counsel as the plaintiff might have retained.

Subsequent proceedings on the underlying claim proved less than satisfactory to plaintiff. The State attorney filed a consumer fraud action to enjoin UPC from allegedly unfair sales practices and to require UPC to make restitution to Whiteaker and all other claimants. UPC responded with a cross-petition against Whiteaker for the unpaid balance owing on his contract to purchase vending machines.

After trial commenced on the underlying lawsuit, the trial court decided that the State attorney's conflict of interest required a separate, later trial of UPC's cross-petition against Whiteaker, and trial proceeded only on the State's action for injunctive relief. Following submission of the narrowed issues, the court granted the injunctive relief the State had requested, thereby prohibiting UPC from [\*\*4] engaging in unfair sales practices and from collecting payments still due on outstanding UPC contracts.

[\*114] The trial court conditioned granting Whiteaker relief in that action on his return of postage vending machines sold to him. This election requirement confused Whiteaker and the private counsel he by then had retained. When the trial court in the underlying lawsuit subsequently clarified its decree concerning the required election, it also directed Whiteaker to amend his pleadings by filing a separate cross-petition if he wished to proceed with his claim against UPC for damages personal to him. Whiteaker's private counsel did not file that amended cross-petition until eight months later, and permission to amend was denied. UPC's cross-petition against Whiteaker was still pending in district court in January of 1980 when UPC dissolved as a corporation.

Whiteaker filed his state tort claim and then this malpractice lawsuit on May 25, 1982, alleging that the State attorney's negligent handling of his personal interest in the UPC litigation had cost him a judgment for damages against UPC or at least an opportunity to receive a fair settlement of the claim personal to him. [\*\*5] Following a bench trial, judgment was entered dismissing Whiteaker's malpractice action. The trial court's findings of fact and conclusions of law identified several issues on which Whiteaker had failed to satisfy his burden of proof. Whiteaker contends in this appeal that the evidence fully supported both his malpractice theories: (1) that the mishandling of his stake in the litigation deprived him of a favorable judgment for money damages against UPC on his underlying claim that never was brought to trial; and (2) that the State attorney's negligence deprived him of a favorable settlement.

#### I. Scope of Review.

In our review of this law action the trial court's findings of fact have the effect of a special verdict. *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 54 (Iowa 1977); *Baker v. Beal*, 225 N.W.2d 106, 109 (Iowa 1975). We review the evidence in the light most favorable to the judgment. *Briggs Transportation Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978). When there is doubt or ambiguity in the trial court's findings, they will be construed to uphold rather than defeat the judgment. *Eldridge v. Herman*, 291 N.W.2d 319, 321 (Iowa 1980). Moreover, when the trial [\*\*6] court following a bench trial denies recovery because a party has failed to sustain its burden of proof on an issue, we will not interfere unless we find the party carried its burden as a matter of law. *Anthony v. State*, 374 N.W.2d 662, 664 (Iowa 1985); *Kurtenbach*, 260 N.W.2d at 54. To support a contrary judgment, the evidence supporting such a result must be so overwhelming that only one reasonable inference on each critical fact issue could be drawn. *Anthony*, 374 N.W.2d at 664-65; *Roland A. Wilson & Associates v. Forty-O-Four Grand Corp.*, 246 N.W.2d 922, 925 (Iowa 1976).

In reviewing the trial court's determination that Whiteaker had not sustained his burden of proof, we need focus only on two damage issues. The trial court found against Whiteaker on both issues. One issue concerns Whiteaker's claim that the underlying lawsuit would have been terminated with a favorable and collectible judgment against UPC but for negligence of the State attorney. The second issue concerns Whiteaker's claim that the State attorney's negligence deprived him of a favorable and collectible settlement. On neither issue was the evidence so strong as to compel the conclusion that Whiteaker [\*\*7] satisfied his burden of proof as a matter of law.

#### II. Proof of Success in the Underlying Lawsuit.

Proof of damages proximately caused by negligence is a fundamental element of a malpractice action. When the alleged legal malpractice consists of a client's assertion that the defendant lawyer has mishandled a claim or lawsuit, proof of damages necessarily involves analysis of the value of that underlying cause of action. *See Baker v. Beal*, 225 N.W.2d 106, 110-11 (Iowa 1975). The measure of injury [\*115] to the client's cause of action is the difference between what the client should have recovered but for the negligence, and what the client actually recovered. R. Mallen & V. Levit, *Legal Malpractice* § 303, at 354-55 (2d ed. 1981). Moreover, in proving the value of the underlying claim the client has the burden to show not just that a judgment in an ascertainable amount would have been entered, but the amount that would have been collected on that judgment. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 160

(Iowa 1984); *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524, 526 (Iowa 1983).

The rationale of this collectibility requirement is fully explained [\*\*8] in *Beeck*:

At the trial of the malpractice action, can the lawyer successfully contend that, regardless of the substantial amount of the probable verdict in the underlying suit, the measure of the client's damages is limited to the amount he would have actually recovered by way of a satisfied judgment? The question should be answered affirmatively, since otherwise the client would be placed in a better position as a result of the lawyer's malpractice than he would have been in had the attorney not been negligent.

350 N.W.2d at 160-61 (quoting from Barry, *Legal Malpractice in Massachusetts*, 63 Mass. L. Rev. 15, 18-19 (1978)).

The trial court found that Whiteaker had failed to prove by a preponderance of the evidence that any potential judgment against UPC would have been collectible. We must uphold that finding and the trial court's judgment on this first prong of Whiteaker's two-pronged damage theory unless the evidence established the contrary as a matter of law. The evidence was not that overwhelming.

Whiteaker did present some evidence concerning the litigation-related activities of UPC in several states, including Iowa, at about the time that the State [\*\*9] obtained injunctive relief against it. UPC was operating in some fashion in thirty-six states, had offices and attorneys representing it in three states, paid at least one of those attorneys, and had posted a security bond in the amount of \$22,245.00 in a Texas court. The trial court appropriately noted in its written decision, however, that it considered and gave little weight to that evidence. The court held that Whiteaker had produced insufficient evidence of UPC's financial status, assets, or ownership of property to satisfy his burden of proof on the collectibility issue.

The evidence in this record falls far short of establishing as a matter of law -- the appropriate standard for our review -- that UPC had the ability to pay all or part of any judgment Whiteaker might have obtained against it prior to January of 1980 when its corporate existence terminated.

### III. Proof of a Lost Settlement Opportunity.

On the second prong of Whiteaker's malpractice action, his allegation that he was deprived of a settlement opportunity, the evidence likewise was insufficient for us to find as a matter of law that the alleged negligence caused him to sustain damages.

We have not previously [\*\*10] been called upon to identify the elements of this breed of malpractice claim. It appears that other courts have been addressing with increasing frequency clients' allegations that their attorneys have mishandled or misinformed them concerning settlement proposals. See R. Mallen and V. Levit, *supra*, § 580, at 722.

Attorneys handling claims certainly do have an obligation to communicate settlement proposals to their clients. See, e.g., *Joos v. Auto-Owners Insurance Co.*, 94 Mich. App. 419, 424, 288 N.W.2d 443, 445 (1979) ("An attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle."); *Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615, 615, 295 N.Y.S.2d 876, 877 (1968), *aff'd* 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508, (1969) ("failure to disclose an offer of settlement and submit to the client's judgment for acceptance or rejection is improper practice"). This obligation [\*116] is an important part of the attorney's duty to keep the client fully informed; "it is for the client to decide whether to accept a settlement offer." Iowa Code of Professional Responsibility for Lawyers EC 7-7; see [\*\*11] EC 7-8:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.

Of course the client asserting this type of malpractice claim against an attorney must prove not only a breach of that duty but also that the breach proximately caused damages. Here, Whiteaker was obligated to establish by a preponderance of the evidence that a settlement probably would have occurred but for the negligence of the State attorney. See R. Mallen and V. Levit, *supra*, § 580, at 729-31. An element of this cause of action is

proof that the client and party against whom a claim has been asserted would have reached agreement upon a settlement in an ascertainable amount. *Id.*

In support of its conclusion that Whiteaker [\*\*12] had not proved he was deprived of a favorable settlement with UPC, the trial court wrote:

No firm offer of settlement was made by UPC through [UPC's attorney] which was communicated to [the State attorney]. [The State attorney] did make an initial offer of settlement on behalf of Whiteaker for full restitution of monies in exchange of the machines. This is what Whiteaker wanted and he (Whiteaker) did not communicate anything differently to [the State attorney]. UPC did not give [UPC's attorney] authorization to settle under specific terms or for a definite amount. UPC was considering a settlement for less than full restitution and the specific amount which was never resolved ultimately was to include a consideration of whether the machines would be returned or not -- and if not returned, then UPC would have insisted on recapturing the value of the machines, as well as the amount of commission that went to the salesman. No evidence was presented on the value of the machines to UPC for potential settlement purposes or the amount of the salesman's commission. [UPC's attorney] received a communication from the company in April, 1977, that considered or discussed the plausibility [\*\*13] of cancellation of Mr. Whiteaker's debt to UPC in return for Whiteaker dropping his claim against UPC. This was never transmitted in the form of an offer of settlement. There is no evidence, as of April, 1977, that UPC was willing to return any monies to Whiteaker. [UPC's attorney] testified that he personally would have considered a settlement offer of \$16,000 but this was never authorized by UPC, nor made in form of offer to settle. He could not and did not speak for UPC.

From those findings, which are fully supported by the evidence, the trial court concluded that Whiteaker had failed to prove an element of this settlement prong of his malpractice action -- the likelihood that a satisfactory settlement would have been concluded and paid by UPC. Nothing in the record establishes that UPC would in fact have authorized its attorney to offer Whiteaker the somewhat indefinite \$16,000.00 proposal that UPC's attorney had in mind. Indeed, nothing in the record establishes the dollar value of any settlement proposal that UPC might have made in the event Whiteaker had retained private counsel at the outset. This is simply not a case where the State attorney failed to communicate [\*\*14] to Whiteaker any concrete settlement offer made by UPC, or failed to communicate to UPC any proposal Whiteaker authorized him to make. UPC rejected the only proposal that Whiteaker authorized [\*\*117] the State attorney to make, an offer the State attorney properly communicated to UPC.

Whiteaker did not establish as a matter of law on this record that his claim would have resulted in a favorable settlement if the State attorney had more fully counseled Whiteaker or otherwise handled the claim differently in any respect.

The element of uncertainty as to collectibility, fatal to the first prong of Whiteaker's malpractice claim, also flaws his settlement theory. The evidence does not overwhelmingly establish that UPC had the financial wherewithall to fund any settlement proposal which its attorney may have thought reasonable. Neither does the record establish that the lawyer defending UPC in the Iowa litigation had full knowledge of UPC's ability or inability to pay any settlement offer he might have recommended.

We need not address Whiteaker's other assignments of error in this vigorously-contested malpractice action. Whiteaker did not satisfy his obligation in this appeal to show [\*\*15] as a matter of law that the alleged negligence of the State attorney, which the State contested, proximately caused damages on either of his two theories -- a more favorable outcome by judgment or by settlement. We do note that the trial court found Whiteaker had not proved other elements of his action for legal malpractice.

We affirm the judgment entered by the trial court denying Whiteaker's claim against the State.

AFFIRMED.