

NO. 47695-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

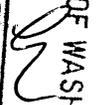
JOSH F. GLATT,

Defendant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BY  DEPUTY
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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I. INTRODUCTION

An attorney cannot use CR 60 to undo a former client's settlement in order to seek attorney fees and costs from the other party to the resolution. RCW 51.52.130 allows a trial court to award attorney fees and costs to a workers' compensation claimant if the worker prevails in a superior court appeal and receives additional benefits as a result. Vail, Cross, & Associates (Vail Firm) objects to the parties' settlement provision to bear their own attorney fees and costs and seeks to undo the settlement to aid it in its collection of litigation costs it loaned to Mr. Glatt.

CR 60 allows only a "party or the party's legal representative" to move to vacate a judgment. In this workers' compensation appeal, because the Vail Firm no longer represents Mr. Glatt, it lacks standing to move to vacate the stipulated order under CR 60. RCW 51.52.130 also gives no independent right to an attorney to seek an award of attorney fees if the worker elects not to seek them. Even if this Court concludes that the Vail Firm has standing to make a CR 60 motion, none of its claims under CR 60 have any support in the law, and the superior court did not abuse its discretion in declining to unwind the settlement and resolution of Mr. Glatt's claim.

The Vail Firm has styled itself as a party appealing a superior court decision, unilaterally changing the caption to so indicate. In fact, it was

not a party below, nor did the firm intervene below or file a separate action. Because the Vail Firm was not a party in the superior court, it is not an aggrieved party under RAP 3.1 and this appeal is improperly filed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court err when it concluded that the law firm lacked standing to seek vacation of the stipulated judgment when CR 60 only allows a “party or the party’s legal representative” to file such a motion and when former attorneys do not have any right independent of their former client to bring a claim for attorney fees and costs?
2. Did the trial court abuse its discretion when it declined to vacate the judgment under CR 60(b)(4), CR 60(b)(5), and CR 60(b)(11), when it concluded that there was no misrepresentation of an existing fact, that the judgment was not void because the court had personal and subject matter jurisdiction over the parties in interest, and when there could be no injustice to allowing a worker to decide to settle his case?
3. Is this appeal improperly filed because the Vail Firm is not an “aggrieved party” under RAP 3.1?

III. COUNTERSTATEMENT OF FACTS

A. The Department Accepted Mr. Glatt’s Workers’ Compensation Claim and Provided Benefits Including Time-Loss Compensation and Treatment

In 2007, Mr. Glatt injured his low back while working at Gensco, a wholesale HVAC warehouse in Fife. CP 162, 166, 218. The Department provided treatment, including lumbar facet injections, medications, and physical therapy, and paid time loss compensation. CP 80, 121-22, 658-59. Ultimately, the claim was closed with a

Category 2 permanent partial disability award for his mental health condition on July 11, 2011. CP 18, 110, 112. He received no disability award for his low back condition. *See* CP 110, 112.

Mr. Glatt appealed the closing order and the parties litigated this matter at the Board of Industrial Insurance Appeals (Board). The Department presented medical evidence that showed Mr. Glatt was not entitled to any further benefits above what he was provided by the Department's closing order and that he had a congenital pars defect, pre-existing lumbar facet syndrome, and lumbar degenerative disc disease that were not proximately caused by or aggravated by the 2007 industrial injury. CP 676-80, 822-28. The Vail Firm advanced costs to Mr. Glatt to pay for expert testimony hired for the purposes of litigation, including testimony from an orthopedist, Dr. H.R. Johnson, and a psychiatrist Dr. Jeffrey Hart. CP 454, 959. These experts testified that Mr. Glatt had greater mental health and low back impairment than provided for by the Department's impairment awards and that he was not capable of returning to work. CP 100-102.

The Department's closing order was affirmed by the Board. CP 75, 97-108. The industrial insurance appeals judge was persuaded by Dr. Jones's testimony, elicited by the Department, that Mr. Glatt had a back strain, but that the lumbar degenerative disc disease and pars defect

were unrelated, and that as of the date of claim closure “there was no significant mechanical or neurological abnormality caused by the industrial injury, [which merited] no permanent partial disability award, and . . . no further medical treatment.” CP 104; *see also* CP 108.

B. Mr. Glatt Ended Vail Firm’s Representation; He and the Department Then Settled the Dispute and Filed a Stipulation Memorializing Their Agreement

Mr. Glatt appealed to superior court. CP 67-70. But before any substantial preparation for trial occurred, Mr. Glatt called the Department’s attorney seeking to end the Vail Firm’s representation. CP 35.¹ The attorney told Mr. Glatt that he could not discuss anything with him about his case because Mr. Glatt was represented by counsel, and he asked Mr. Glatt instead to contact the Vail Firm’s office to discuss his case. CP 35. Mr. Glatt contacted the Vail Firm and then wrote a letter terminating representation. CP 12. He stated that he felt that they gave him “bad advice” and “[g]ambl[ed] with his case” by “trying to get a full pension and not trying to negotiate a better settlement.” CP 12.

After several weeks, the Vail Firm filed a notice of withdrawal. The Vail Firm filed a “Notice of Intent to Apply for Attorney’s Fees and Costs.” CP 14-15. It cited RCW 51.52.130 and indicated that it would ask

¹ After the appeal to superior court, Vail Firm did not discuss any proposed resolutions with the Department’s representative, filed no motions on Mr. Glatt’s behalf, and because this was an administrative appeal based on the Board record, performed no additional discovery or witness preparation.

that “the court set fees and appropriate costs,” “in the event Joshua Glatt’s entitlement decision and order of the BIIA is reversed, modified, or additional relief is granted.” CP 15. The document did not outline any fees or costs or describe any specific work performed by the Vail Firm.

Mr. Glatt contacted the Department’s counsel. CP 36. After several discussions between Mr. Glatt and the Department, the parties settled the case. CP 36. The trial court entered the stipulated judgment on March 4, 2014. CP 18. One of the issues in the case was whether the Department owed Mr. Glatt further time-loss compensation, a wage replacement benefit. The parties agreed to split the difference on the time-loss compensation for the disputed time period. *See* CP 19, 21. Mr. Glatt received time-loss compensation for the period of February 2, 2011, through April 23, 2011, but not for April 24, 2011, through July 12, 2011. *See* CP 19, 21, 40, 44, 47.

Mr. Glatt also received a Category 2 permanent partial disability award for his low-back condition, but agreed that his congenital pars defect and pre-existing degenerative changes were not “caused by or aggravated” by his industrial injury. CP 19, 21. The Department agreed to waive attorney fees and costs awarded against Mr. Glatt in an earlier

appeal denying ongoing time-loss compensation. *See* CP 21.² Finally, the parties agreed that “[e]ach party would bear his own costs and attorney fees in this appeal.” CP 60-63.

C. The Vail Firm Filed Several Pleadings Claiming Attorney Fees, but Did Not Intervene or File a Cost Bill

The Vail Firm received state warrants for Mr. Glatt representing the settlement amounts around March 11, 2014, and March 20, 2014. CP 979.³ The Vail Firm destroyed them rather than provide them to Mr. Glatt. CP 979. On March 17, 2014, the Vail Firm filed a “Notice of Attorney’s Claim of Lien” with the trial court. CP 36. The Vail Firm also filed a temporary injunction against Mr. Glatt to require the payment of disbursed settlement funds into the court registry. CP 1011-13.

After a show cause hearing, the superior court entered an order granting the Vail Firm an injunction requiring Mr. Glatt to pay the amount awarded by the agreed judgment into the court registry. CP 1016-18. The order was to remain in effect for one year (until March 2015), provided the Vail Firm “file[d] an action to collect on Glatt’s collectible debt within six months.” CP 1016-17. The order

² Mr. Glatt had appealed an earlier Department order denying a period of time-loss compensation. After a bench trial, the superior court affirmed the Department order and ordered that Glatt pay the Department statutory attorney fees and costs in the amount of \$1,341.80. *See* CP 49. This judgment is not on appeal here, but the fees and costs awarded to the Department in that matter are addressed in the stipulated judgment the Vail Firm seeks to vacate.

³ The Vail Firm was still listed as Mr. Glatt’s representative in the Department’s claim system at that time. CP 40, 42, 44-45, 47, 49.

allowed the Department to make payment to Mr. Glatt under the settlement, and the Department reissued the settlement checks that the Vail Firm had destroyed. CP 979.

The Department has found no court record indicating that the Vail Firm filed an independent action to enforce its injunction against Mr. Glatt. On that basis, the Department assumes the Vail Firm has abandoned its collection action against Mr. Glatt.

The Vail Firm was not a party in the administrative proceeding or the superior court and has never filed to intervene as a party in this case.

D. The Superior Court Rejected the Vail Firm's Request To Vacate the Judgment Under CR 60 Because the Vail Firm Lacked Standing and Because Relief Was Not Justified on the Merits

Nearly a year after Mr. Glatt and the Department entered their stipulated agreement reflecting their settlement, the Vail Firm moved to set aside the settlement, claiming that the judgment should be reversed under CR 60(b)(4), (5), and (11). CP 4-7. The Vail Firm asserted standing to bring the motion, claiming a right to recovery under RCW 51.52.130 independent of Mr. Glatt. CP 8, 50-53.

The superior court rejected the Vail Firm's claim that it had standing, concluding that RCW 51.52.130 "does not give automatic

standing to claimant's counsel after discharge to apply for fees." RP 20; *see* Finding of Fact 1.5; Conclusion of Law (CL) 2.2.

The superior court also rejected the Vail Firm's CR 60 claims on the merits. CP 62.⁴ It concluded that CR 60(b)(4) relief was not warranted because there was no misrepresentation of an existing fact.

CL 2.3. It concluded that the stipulation was not void and that vacating it under CR 60(b)(5) was not warranted because the court had both personal jurisdiction and subject matter jurisdiction. CL 2.4. And it concluded that the catch-all provision under CR 60(b)(11) should not be applied because the Vail Firm would suffer no injustice since it had no independent right to claim attorney fees and costs from the Department. CL 2.5. This appeal follows.

IV. STANDARD OF REVIEW

Review is governed by RCW 51.52.140, which provides for the same appellate procedure as in other civil cases. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

Questions of law are reviewed de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Although this Court may substitute its judgment for that of the Department, great weight is

⁴ The Department also sought terms for Vail Firm's procedural abuses. CP 33. The superior court denied terms and the Department does not renew its request here. CP 62.

accorded to the agency's view of the law it administers. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). The questions of standing and statutory interpretation of RCW 51.52.130 are questions of law reviewed de novo. See *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009).

A superior court's denial of a CR 60 motion is reviewed for abuse of discretion—whether the denial was based on “untenable grounds or untenable reasons.” *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn. App. 280, 284, 285, 673 P.2d 634 (1983). This standard applies equally to a court's refusal to grant a CR 60 motion to vacate a stipulated judgment. *Gustafson v. Gustafson*, 54 Wn. App. 66, 68-70, 772 P.2d 1031 (1989). Review of a decision on a motion to vacate is limited to the decision on the motion, not the underlying judgment. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

V. ARGUMENT

Under multiple theories, the Court should reject the Vail Firm's claims. First, the Vail Firm lacks standing here on two independent grounds. CR 60 allows only a party or the party's representative to move to vacate a judgment, and the Vail Firm is neither. And the Vail Firm does not have a right to enforce RCW 51.52.130 independent of Mr. Glatt because the right to seek attorney fees and costs belongs to the client, not

the attorney. Second, even if the Vail Firm had standing, the Department owes no fees to Mr. Glatt, who did not prevail under RCW 51.52.130 because this case was resolved in a settlement. Mr. Glatt and the Department may settle a case without the provision for attorney fees under well-established case law allowing the Department to enter into settlements with workers, in order to further the speedy and certain resolution of claims without litigation, and to further judicial economy.

Third, even if the Court were to consider the Vail Firm's arguments under CR 60, they have no merit. Its arguments boil down to two allegations: that Mr. Glatt could not settle his case because he has a mental health impairment, and that the settlement was not in his best interest. A permanent partial disability rating of Category 2 mental health does not indicate that a worker is unable to conduct his or her legal affairs. Mr. Glatt was competent to make his own decisions about the relative risks and rewards of settlement. This Court should reject the Vail Firm's attempt to second guess the parties' settlement to aid in its collection efforts.

Finally, because Vail Firm was not a party below, nor did the firm intervene below or file a separate action, it is not an aggrieved party under RAP 3.1 and this appeal is improperly filed. This Court should dismiss Vail Firm's appeal on that basis alone.

A. The Vail Firm Lacks Standing To Move To Set Aside the Settlement Agreement Between Mr. Glatt and the Department Because the Vail Firm Is Not a Party to the Stipulated Judgment and Has No Separate Right To Seek Fees and Costs Under RCW 51.52.130

1. The Vail Firm Has No Standing To Seek To Vacate the Judgment Because It Is Not a Party to Mr. Glatt's Appeal

The Vail Firm lacks standing to make a CR 60 motion because it is not a party to the lawsuit or the representative of a party and has no separate right to undo a settlement agreement entered between parties by stipulation. CR 60 provides “on motion and upon such terms as are just, the court may relieve *a party or the party's legal representative* from a final judgment, order, or proceeding for” one of 11 listed reasons. (emphasis added).⁵ The plain language of CR 60 does not allow a *former* attorney to move to vacate a judgment after he has withdrawn.

The Vail Firm lacks standing because it is not a party to this workers' compensation appeal. In the superior court, the Vail Firm confirmed that “[o]n January 15, 2014, [it] was discharged by client Joshua Glatt” and it correctly identified Mr. Glatt and the Department as parties to Glatt's workers' compensation appeal. CP 1-2. But on appeal, the Vail Firm now incorrectly identifies itself as a party to this lawsuit.

⁵ CR 60 was amended in April 2015 from “his legal representative” to “the party's legal representative” to make the rule gender-neutral. The original motion in this matter was filed in March 2015 under the old rule, but heard and decided in May 2015. In any case, it does not change the analysis here.

Vail Br. 1-3, 5, 10-12, 15 (calling itself appellant throughout its brief, and changing the caption of the case to identify itself as the appellant). Its desire for attorney fees and costs does not negate its withdrawal as Mr. Glatt's attorney or substitute for a timely motion to intervene to obtain party status.

Shortly after it withdrew its representation, it filed a "Notice of Intent to Seek Attorney's Fees." CP 14-15. But it never intervened in this lawsuit and its "notice" does not give it the rights of an intervenor. Intervention requires an order of the court, issued in response to a proper motion. CR 24(a). The Vail Firm was neither a party nor the legal representative of a party. Under the plain language of CR 60, the Vail Firm therefore lacks standing to move for relief from judgment.

2. RCW 51.52.130 Does Not Authorize an Attorney to Seek Fees Separate From the Client

The Vail Firm also lacks standing because RCW 51.52.130 confers no independent right on the attorney for the attorney fees if the worker elects not to seek them. The doctrine of standing under Washington law "prohibit[s] a plaintiff from asserting another's legal rights." *Trinity Universal Ins. Co. v. Ohio Casualty Ins. Co.*, 176 Wn. App. 185, 199, 312 P.3d 976 (2013) (citation omitted); *see also Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994); *Burnett v. Dep't of Corrs.*, 187 Wn. App.

159, 172, 349 P.3d 42 (2015); *Aguirre v. AT&T Wireless Servs.*, 109 Wn. App. 80, 85, 33 P.3d 1110 (2001). Here, the Vail Firm repeatedly claims Mr. Glatt's interests as the basis of its motion, but it is not Mr. Glatt's attorney and it cannot independently assert his legal rights. The Vail Firm cannot assert standing under RCW 51.52.130, because that statute confers no independent right on the attorney to seek attorney fees from the Department if the worker elects not to seek them. The Vail Firm has no legal right upon which it can claim standing.

RCW 51.52.130(1) provides for the fixing and award of attorney fees based in part on the worker's successful result in trial:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, . . . , a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

. . . .

If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation . . . , the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department

Under this language, it is the worker's successful appeal that triggers the worker's right to attorney fees—the right is premised on the “worker or beneficiary appeal,” which is the worker's own interest, not the

attorney's. *See Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667-68, 670, 989 P.2d 1111 (1999) (holding that the purpose of RCW 51.52.130 is to benefit workers by facilitating legal representation). The Vail Firm fails to point to any language in RCW 51.52.130(1) that provides it the ability to seek attorney fees and costs separate and apart from Mr. Glatt's right to choose to seek them. The Vail Firm's suggestion that the language "shall be fixed by the court" conveys standing because "the attorney would be the vehicle to bring the information to the court" ignores how the civil rules operate. *See Vail Br. 11; CR 54(d)*. A trial court does not set attorney fees and costs *sua sponte*, it sets fees after a party files a motion and it fixes costs after a party files a cost bill. CR 54(d)(1), (2); *but see* CR 78(e) (taxable costs set by court clerk). The fact that a party is (or was) represented by an attorney does not turn the attorney into a party or into someone who can independently ask a court to award fees and costs.

The Vail Firm cites no case in support of its proposition that it has an independent right to fees from the Department. None of the attorney fee cases cited by the Vail Firm stands for the proposition that an attorney has a separate right to fees, as they address a worker's right to fees. *See Vail Br. 8, 10-11*. In fact, the case it relies on most heavily, *Brand v. Dep't of Labor & Indus.*, is explicit that attorney fees are awarded to the worker, not the attorney: "Awarding full attorney fees *to workers* who succeed on

appeal before the superior or appellate court will ensure adequate representation for injured workers.” *Brand*, 139 Wn.2d at 670. The Court recognized that it is the worker that is the beneficiary. The other two cases cited by the Vail Firm addressed only whether the worker in each case was entitled to an attorney fee at all. *See Carnation Co. v. Hill*, 115 Wn.2d 184, 187-89, 796 P.2d 416 (1990) (no attorney fee award against the self-insured employer where the superior court sustained the worker’s relief, but did not reverse or modify the Board’s order resulting in additional benefits for the worker); *Harbor Plywood Corp. v. Dep’t of Labor & Indus.*, 48 Wn.2d 553, 558-60, 295 P.2d 310 (1956) (no attorney fee award against the Department where the superior court upheld the Board’s order).

The reason why the Vail Firm cites no case law in support of its position that an attorney should be able to force a client to seek attorney fees and costs is that the case law provides to the contrary. It is a well-accepted legal principle under federal law that the right to seek attorney fees and costs under fee-shifting statutes lies with the party rather than his or her attorney; only after the prevailing party exercises his or her right to receive fees does the attorney’s right to collect them vest. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 730-32, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986) (rejecting argument that fee-shifting statute precluded litigant from

waiving attorney fee in settlement negotiation); *Pony v. Cty. of Los Angeles*, 433 F.3d 1138, 1142 (9th Cir. 2006) (attorney has no right to collect fee under fee-shifting statute unless and until the party exercises her right to receive fees, and a prevailing party may waive her statutory eligibility for attorney fees as a condition of settlement); *U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 577-78 (9th Cir. 1996) (under a fee-shifting statute, “the attorney remains at the mercy of the client, who can either demand attorneys’ fees from the defendant, or not, as he chooses. If the client chooses not to ask for the fees, the attorney has no standing to request them. . . . [O]nly the plaintiff has the power to demand that the defendant pay the fees of the plaintiff’s attorney.”), abrogated by *Astrue v. Ratliff*, 560 U.S. 586, 588-89, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010) (holding that attorney fees awarded to a prevailing party under a fee-shifting statute requires a direct payment to the litigant rather than the attorney). Although no Washington case addresses who controls the award of fees and costs, these federal court interpretations of analogous provisions of federal law are persuasive authority. *See, e.g., Marquis v. City of Spokane*, 130 Wn.2d 97, 113, 922 P.2d 43 (1996). Such guidance is particularly helpful here, where the federal courts have substantial experience with fee-shifting statutes because they are common in the federal system. *See Jane M. Kravcik,*

Attorneys' Fees: The D.C. Circuit Revises its Test for Determining a Reasonable Hourly Rate, 57 Geo. Wash. L. Rev. 1122, 1124, n.15 (1989) (noting that by the late 1980s, Congress had created 132 federal statutes providing for fee-shifting attorney fees).

Washington courts have recognized that RCW 51.52.130 is a fee-shifting statute. *See Brand*, 139 Wn.2d at 668 n.4. Once the prevailing party exercises his or her right to receive fees under a fee-shifting statute, the attorney's right to collect them vests, and he or she may then pursue them on his or her own. *Pony*, 433 F.3d at 1142; *Virani*, 89 F.3d at 578. Unless and until the party exercises this power, however, the attorney has no right to collect fees from the non-prevailing party, and the non-prevailing party has no duty to pay them. *Virani*, 89 F.3d at 578.

Lacking a viable plain language argument for RCW 51.52.130, the Vail Firm seeks to invoke the doctrine of liberal construction of the Industrial Insurance Act. Vail Br. 7-8. The statute is not ambiguous and does not require construction, so the doctrine does not apply. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). But even if it applies, the Vail Firm incorrectly assumes that a liberal construction should benefit the law firm seeking to collect fees from a worker, rather than the worker. If the doctrine were to be applied, it

should be applied to aid Mr. Glatt, not the law firm. The *Brand* Court recognized the importance of allowing workers to collect attorney fees because it enabled them to obtain legal representation. *Brand*, 139 Wn.2d at 667-68. But the statutory beneficiary is the worker, not the attorney, and not even a liberal construction of the statute can provide a right of independent action to the attorney.

Liberal construction is to serve “the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment,” not to aid former attorneys in their collection actions. RCW 51.12.010. Allowing workers autonomy in making strategic decisions whether to seek attorney fees advances the goal of reducing economic suffering. Industrial insurance benefits may include ongoing medical treatment, ongoing vocational services, and ongoing wage replacement benefits. Ceding the worker’s control over the right to seek fees and costs to attorneys may act as a barrier to a worker’s relief under the Industrial Insurance Act where a former attorney puts the collection of fees and litigation costs before the interests of a former client.⁶

The Vail Firm does not have standing to independently request

⁶ In *Evans*, the Supreme Court observed that a general proscription against negotiated waiver of attorney fees in exchange for a settlement on the merits could itself impede vindication of the rights of plaintiffs by reducing the attractiveness of settlement. 475 U.S. at 732.

attorney fees under RCW 51.52.130, and it does not have standing to bring this appeal.

3. The Department Does Not Owe Mr. Glatt Attorney Fees Because He Did Not Prevail; the Case Was Settled

Even if the Vail Firm could establish standing to independently seek attorney fees from the Department, the Department does not owe attorney fees to Mr. Glatt, contrary to the Vail Firm's arguments. The Vail Firm agrees with the Department that a worker "is entitled to an award of attorney fees and costs of medical witnesses" where "an injured worker prevails in Superior Court." Vail Br. 8 (citing *Carnation Co.*, 115 Wn.2d at 187-88). Glatt did not *prevail* here. He entered into a settlement to resolve his dispute with the Department and each party received a benefit.

RCW 51.52.130(1) provides for four things when a worker prevails against the Department in an appeal. First, it gives the court the authority to set a reasonable attorney fee. RCW 51.52.130(1) ("[a] reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.").⁷ Second, it allows a "worker or beneficiary" who has received such relief from the "litigation" to request the portion of reasonable attorney fees "for services before the [superior] court only," but only "*if* the accident fund or medical aid fund is affected by the

⁷ "Beneficiary" means a husband, wife, child or dependent of a worker; it does not mean a worker's attorney. RCW 51.08.020.

litigation.” *Id.* (emphasis added). Third, it allows the “worker or beneficiary” to ask the court to set an award of costs, including “the fees of medical and other witnesses” to be applied “if the accident fund or medical aid fund is affected by the litigation.” *Id.* (emphasis added).⁸ And finally it gives the Department authority to pay those attorney fees and costs awarded out of the “administrative fund of the department.” *Id.*

The Vail Firm is correct that when an injured worker *prevails* in superior court that the worker is entitled to fees and costs, but here the parties settled the claims and Mr. Glatt waived his fees and costs. *See Pearson v. Dep’t of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3D 837 (2011) (“An award of fees and costs under RCW 51.52.130 requires both that the injured worker requesting fees *prevail* in the action and that the accident fund or medical aid fund be affected.”) (emphasis added). Likewise, the Department waived its costs incurred under a previous judgment against Mr. Glatt and waived the costs it would have been entitled to from Mr. Glatt had it prevailed at trial, such as the transcription costs for witnesses. *See* RCW 4.84.010(7), .030.

Under the Vail Firm’s logic, the Department and a worker could never enter into a resolution of a claim that included an agreement to

⁸ Because little work was done by the Vail Firm after Mr. Glatt’s appeal to superior court, the true gravamen of Vail Firm’s demands is its claim for reimbursement of the “fees of medical and other witnesses” Mr. Glatt might have been entitled to if he prevailed in his appeal, not the attorney fees.

waive fees and costs by either party, even if the parties wished to do so. But Washington courts have long recognized that a worker can compromise the relief being sought in an appeal in order to receive a sum certain. *See, e.g., Godfrey v. Dep't of Labor & Indus.*, 198 Wash. 71, 86 P.2d 1110 (1939).

In a new argument, the Vail Firm argues that the Department and worker may not settle for waiver of attorney fees under RCW 51.04.060, which precludes waivers of industrial insurance benefits between workers and employers. This Court has concluded, however, that “a plain reading of RCW 51.04.060 indicates that an employee may not contract with the employer to forego entitlement to benefits under the Act,” but it does not bar a worker from entering into an agreed resolution with the Department. *Solven v. Dep't of Labor & Indus.*, 101 Wn. App. 189, 195-96, 2 P.3d 492 (2000).

The Department does not concede that the Vail Firm would have the right to intervene, since the Vail Firm has no right to force Mr. Glatt to claim attorney fees under RCW 51.52.130 and has no right to independently claim attorney fees under that statute. But without even attempting to intervene as a party, the Vail Firm essentially asks for a veto power over a former client's right to resolve a claim subject to its demand

for attorney fees and repayment of costs.⁹

Taking the Vail Firm's assertion to its logical conclusion, the Vail Firm could intervene and then have an independent stake in any subsequent trial between the Department and Mr. Glatt. Having a former attorney intervene and participate in a trial to obtain fees and costs from earlier representation is an absurd result. In any case, the Legislature could not have intended to allow a former attorney to hold a claimant's workers' compensation claim hostage to his or her attorney's interests regarding the reimbursement of costs. And this Court should not interpret the statute to undermine powerful public policies supporting resolution of claims absent litigation. *See City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) (interpreting rule to advance "the express public policy of this state which strongly encourages settlement").

B. Because the Vail Firm Fails To Provide Any Legally Cognizable Basis To Vacate the Order Under CR 60, the Superior Court Did Not Abuse its Discretion When It Declined to Vacate the Stipulated Judgment

This Court need not consider the merits of the Vail Firm's claims because the Vail Firm's failure to show standing or entitlement to fees resolves the question of whether CR 60 relief is warranted. But if this

⁹ The Vail Firm has never attempted to intervene. It likely did not attempt after the judgment was entered because a party is not allowed to intervene after the judgment is entered without showing "extraordinary circumstances justify[ing] its delay." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 833, 766 P.2d 438 (1989) (denying party's motion for intervention after judgment entered when the party was aware of the suit).

Court reaches the questions on the merits, none of the Vail Firm's stated bases for seeking to vacate the judgment is supported by CR 60 under the facts here.

CR 60(b) motions are "addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion." *In re Marriage of Newlon*, 167 Wn. App. 195, 199, 272 P.3d 903 (2012) (quotation marks and citation omitted); *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). The Vail Firm fails to show an abuse of discretion by the trial court.

1. The Vail Firm's Claim of Fraud Is Baseless Because the Court Was Aware of the Vail Firm's Claim for Costs and the Parties Had No Duty To Negotiate a Settlement That Required the Department to Repay Mr. Glatt's Litigation Costs

The Vail Firm's claim of fraud under CR 60(b)(4) fails because the trial court was aware of the Vail Firm's claim for costs and fees, and because nothing required the Department or Mr. Glatt to consult with Glatt's former attorney about settlement. CR 60(b)(4) allows relief from "[f]raud . . . , misrepresentation, or other misconduct of an adverse party." (emphasis added). CR 60(b)(4) case law contemplates vacating a judgment only when one party commits fraud against another party to the proceeding. *See Lingren v. Lingren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) ("[T]he fraudulent conduct or misrepresentation must cause the

entry of the judgment such that the *losing party* was prevented from fully and fairly presenting its case or defense.”) (emphasis added). The rule does not create an avenue for a former attorney to vacate an agreement between the true parties in interest in order to enable the collection of costs from a former client in the absence of fraud.

In order to claim fraud there must be a “[mis]representation of an existing fact” along with the other elements of fraud. *See Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).¹⁰ Such a misrepresentation of an existing fact might include a factual misrepresentation to a court that it relies on. *See, e.g., Mitchell v. Wash. State Inst. of Pub. Pol’y*, 153 Wn. App. 803, 225 P.3d 280 (2009) (affirming trial court’s amendment of the judgment based on CR 60(b)(4) motion after cost bill shown to fraudulently inflate costs). But the Department and Mr. Glatt misrepresented no fact to the tribunal. The superior court knew that the Vail Firm was claiming attorney fees and costs *before* the parties entered the stipulation because the Vail Firm filed its “Notice of Intent to Seek Attorney’s Fees.” CP 14-15.

¹⁰ The elements necessary to establish fraud—all of which must be shown by clear, cogent, and convincing evidence—are a representation of an existing fact; its materiality; its falsity; the speaker’s knowledge of its falsity; his or her intent that it shall be acted upon by the person to whom it is made; ignorance of its falsity on the part of the person to whom it is addressed; the latter’s reliance on the truth of the representation; his or her right to rely upon it; and his or her consequent damage. *Beckendorf*, 76 Wn.2d at 462.

It is true that Mr. Glatt and the Department did not include the *withdrawn* attorneys from the Vail Firm in the parties' negotiations to resolve this matter after the Vail Firm filed its "Notice of Intent to Seek Attorney's Fees," but they had no duty to do so because the Vail Firm has no right to attorney fees independent of Mr. Glatt and also because it did not intervene as a party. *See* Part V.A.2-3 *supra*.¹¹ By making no attempt to intervene before judgment was entered, in a case of which it was well informed, the Vail Firm sat on any purported rights it might have to second guess the settlement. A former attorney's failure to act when given the opportunity does not equate to fraud on the client's part.

Even if the stipulated judgment should have contained attorney fees and costs, which the Department does not concede, this would not be a reason to vacate the judgment for fraud, or any other ground under CR 60(b). The Vail Firm sat on its claim by not filing a motion to intervene before the judgment was entered, and it cannot now be heard to complain about the judgment.

The Vail Firm attempts to elevate its business dispute with Mr. Glatt to a claim of fraud. But Mr. Glatt's decision to not include such

¹¹ For the Vail Firm to hold Mr. Glatt's claim captive to its collection action—as it apparently attempts to do here—presents potential ethical problems. *See* RPC 1.8(a); *see also* RPC 1.9. The Vail Firm cannot dispute that it withdrew from representation of Mr. Glatt and there is no legal authority holding that it needed to be consulted any further by Mr. Glatt or the Department regarding his superior court appeal after it withdrew.

costs in the settlement does not constitute fraud. The trial court did not err when it concluded that there was no fraud justifying relief under CR 60(b)(4). CL 2.3.

2. The Court Should Reject the Vail Firm’s Newly Raised Argument About Voidness Under CR 60(b)(5), but the Argument Lacks Merit in Any Case

The superior court correctly concluded that the judgment was not void because the court had personal jurisdiction over the parties and subject matter jurisdiction to hear the appeal. *See* CL 2.4. The Vail Firm agrees that a court enters a void order subject to CR 60 only when it lacks personal jurisdiction or subject matter jurisdiction over a claim. Vail Br. 13; *see Trinity*, 176 Wn. App. at 198; *see also Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 540, 886 P.2d 189 (1994). And it does not dispute that the trial court had both personal jurisdiction and subject matter jurisdiction. Instead, the Vail Firm now claims that the stipulation—or that at least the fee and costs provision it does not like—is void based on a claim that Mr. Glatt waived benefits in violation of RCW 51.04.060. Vail Br. 13-14. This is a new argument.

In the superior court, the Vail Firm argued that “[t]he fact that applicant [the Vail Firm] was not a party to the agreed order makes the order void as to the applicant[.]” and that the stipulation should not be construed to bind the Vail Firm. CP 5-6. It did not argue that the provision

violated RCW 51.04.060 and was void on that basis. Absent a manifest error affecting a constitutional right, the court should not consider an issue when the party raises the issue for the first time at the appellate level. *See* RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Regardless, Vail Firm’s new argument lacks merit as discussed above. As this Court has held, RCW 51.04.060 does not prevent the Department from settling a case, which would include waiving attorney fees. *See Solven*, 101 Wn. App. at 197.

The superior court did not err when it concluded it had personal jurisdiction over Mr. Glatt and the Department and that it had subject matter jurisdiction over a workers’ compensation appeal—rulings that the Vail Firm does not now contest. The superior court also could not have “abused its discretion in denying CR 60” relief on Vail Firm’s new voidness claim when Vail Firm failed to present such argument below and when it lacks merit.

3. The Interests of Justice Do Not Compel Unwinding a Settlement Between Two Parties To Aid One Party’s Former Attorney in Its Collection Effort

CR 60(b)(11) allows relief from a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” But Washington courts have confined this “catch-all” rule’s application “to situations

involving *extraordinary* circumstances not covered by any other section of the rule” *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)) (emphasis added); see *State v. Ward*, 125 Wn. App. 374, 380-81, 104 P.3d 751 (2005). The Vail Firm provides no argument that directly addresses the standard used to apply CR 60(b)(11) and has waived any such argument. See *Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012) (holding that the court does not consider arguments raised and argued for the first time in the reply brief).

The Vail Firm characterizes its CR 60 motion as one to benefit Mr. Glatt in addition to itself. Vail Br. 10. But the Vail Firm acts solely to benefit itself in the absence of any intent by Mr. Glatt to obtain the services of the Vail Firm. The Court should reject the Vail Firm’s paternalistic arguments that the trial court should have vacated the judgment because Mr. Glatt has a mental health impairment and because Mr. Glatt allegedly may have not made an economically prudent choice to not obtain the fees. Vail Br. 14. Vail Firm claims that “[w]ith the information that Mr. Glatt had mental health problems, he should not have been able to enter into the agreed judgment.” Vail Br. 14. The Vail Firm raises a chimera that Mr. Glatt did not understand the meaning of the words “[e]ach party shall bear their own costs and attorney fees in this

appeal.” Vail Br. 12. The Vail Firm cites to no evidence to support such a proposition beyond its bald assertion that Mr. Glatt’s prior mental health award for depression somehow compromised his ability to understand the stipulation. “Argument of counsel does not constitute evidence.” *Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

The fact that Glatt was awarded permanent partial disability for depression hardly renders him incapable of managing his own affairs. Rather, a permanent partial disability award for mental health is a determination that despite a finding that the worker has permanent impairment, he or she is still capable of reasonable continuous gainful employment. *See Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). A worker capable of working is certainly competent to manage his or her legal affairs under the standards of competency.

Further, as explained above, Mr. Glatt did obtain a significant benefit from the settlement that he likely would not have received had he proceeded to trial; but even if the deal was allegedly not the best one, it was Mr. Glatt’s choice to make. The Vail Firm cites no authority for the proposition that if a settlement is somehow not perfect and allegedly “not in Mr. Glatt’s favor” that this forms a basis for relief under CR 60(b)(11). Such a proposition would open the door to vacation of judgments beyond

anything contemplated in the rule and case law.

Mr. Glatt has not asked for relief from this judgment himself. Because Washington's law of standing prohibits "a plaintiff from asserting another's legal rights," the Vail Firm lacks authority to do so on Mr. Glatt's behalf. *See Trinity*, 176 Wn. App. at 199.

There is no "injustice" to the Vail Firm here. Vail Br. 15. The stipulation does not purport to bind the Vail Firm to a waiver of attorney fees owed to it by Mr. Glatt. The Vail Firm still has the right to claim attorney fees and reimbursement for costs from Mr. Glatt under its representation agreement with him. The stipulation does not purport to change (nor could it) any agreement between Mr. Glatt and the Vail Firm. The Vail Firm's remedy for any uncompensated attorney fees lies with Mr. Glatt, not the Department.

The relief from the stipulation the Vail Firm purports to seek also does not comport with the Legislature's policy goals embodied in the Industrial Insurance Act. Vail Br. 15. The Act represents a compromise between business and labor. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002). Workers such as Mr. Glatt forfeited the right to seek relief in a "private controversy" in exchange for the "sure and certain relief" provided by the Act. RCW 51.04.010; *see Minton*, 146 Wn.2d at 390. The Vail Firm's request to vacate the order does not satisfy

the goal of “sure and certain relief for workers” because providing the Vail Firm the opportunity to vacate the stipulated order will undo the final and binding orders providing additional benefits to Mr. Glatt and will necessitate a jury trial in superior court.¹² *See* Vail Br. 7, 16. If the result at superior court is consistent with the Board’s findings below (BR 28-29), Mr. Glatt would have a significant overpayment to the Department and still owe the Vail Firm the litigation costs expended.

The Legislature has made a policy decision to provide attorney fees and costs incurred when the “litigation” at superior court successfully reverses a Board order, not whenever an appeal is filed. The Vail Firm’s reading of RCW 51.52.130 is inconsistent with the Legislature’s intent and

¹² The Vail Firm asks for vacation of the judgment. Vail Br. 16. Below the Vail Firm claimed that the trial court could simply strike a material portion of the stipulated agreement between Mr. Glatt and the Department and award *it* costs and attorney fees. CP 5. But a court cannot simply strike one provision of an agreed stipulation without fundamentally changing the terms of this agreement. To place the Vail Firm’s demand in context, the costs that the Vail Firm claimed in the amount of \$22,530.28, exceeded the compensation paid out under this resolution—a Category 2 low back award for Glatt’s date of injury (\$8,469.03), time loss compensation for a period of time (\$3,990.12), and relief from costs assessed for an earlier judgment (\$1,341.80). *See* CP 19, 40, 49. A provision that more than doubles the Department’s liability under the agreement is a material term of the agreement that cannot simply be struck without modifying the contract. Courts do not modify unambiguous contracts. *See Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014), *review denied*, 181 Wn.2d 1009 (2014). The Vail Firm apparently has abandoned this approach and seeks to require a new trial between the parties with the vacation of judgment.

would create a significant disincentive for parties to resolve claims. Such a reading should be rejected.¹³

4. Because the Vail Firm Was Not a Party in the Superior Court, This Appeal From the Superior Court’s Judgment Is Not Authorized Under the Rules of Appellate Procedure

RAP 3.1 provides that “[o]nly an aggrieved *party* may seek review by the appellate court.” (emphasis added). As explained above, the Vail Firm was not a party in the superior court proceeding. It never sought party status through intervention or other means, even though it was given an opportunity to do so by the superior court. And, as also explained above, it is asserting no legal right or interest of its own that is cognizable against the Department—all of its asserted rights and interests belong to Mr. Glatt, not to the Vail Firm. In short, the Vail Firm is not an aggrieved party. *See Breda v. B.P.O. Elks Lake City 1800 SO-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (attorney who is sanctioned by a court may appeal the sanctions, but may not appeal decisions that solely affect his clients’ rights); *see also In re Guardianship of Lasky*, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989) (guardian removed by court order has no

¹³ The Vail Firm is also not entitled to attorney fees on appeal. The Vail Firm did not include its fee request in a separate section as required by RAP 18.1(b) and, therefore, this Court need not consider its request for fees. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). More significantly, the Vail Firm is not a worker, beneficiary, or employer entitled to fees. RCW 51.52.130; RCW 51.08.020. Even if the Vail Firm could stand in Mr. Glatt’s shoes, an award of attorney fees comes from the administrative fund, and does not affect the accident or medical aid funds as required under the statute. RCW 51.52.130(1).

authority to bring appeal on behalf of his ward and is not aggrieved party under RAP 3.1; he had standing only to appeal CR 11 sanctions imposed against him).

In filing this appeal, the Vail Firm disregarded its non-party status and unilaterally changed the caption of the case to make it appear as if it were a party to the case. It is not a party and has never been a party, and its unilateral change in the case caption is contrary to RAP 3.4 (“The title of a case in the appellate court is the same as in the trial court” except for the designation of the *parties* as appellant, petitioner, or respondent).

Changing the caption is permissible only upon motion of a *party* or the court. It was improper for the Vail Firm to have done so unilaterally.

Because the Vail Firm is not an aggrieved party as required in RAP 3.1, this appeal is not permitted.

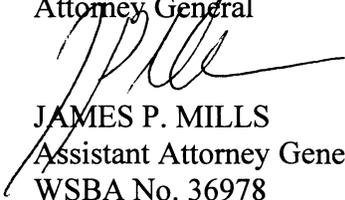
VI. CONCLUSION

This Court should reject the Vail Firm’s attempt to undo a settlement agreement that it is not a party to. Vail Firm’s remedies for cost reimbursement are against Mr. Glatt in a separate action to enforce its contract, not in this workers’ compensation appeal under RCW Title 51. The Vail Firm is not an aggrieved party as it did not intervene and because it lacks standing to move to vacate the order and none of the stated reasons under CR 60 are supported by the facts here. This appeal should be

dismissed or, in the alternative, the superior court should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

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DATED this 4th day of January, 2016, at Tacoma, WA.

Desirae Jones
DESIRAE JONES, Legal Assistant