

FILED

JUN 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28552-9-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JESSICA TURBIN
Respondent,

v.

AARON LOWE P.S. ET AL.
Appellant

Brief of Respondent

Dustin Deissner
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Attorney for Respondent

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STATEMENT OF THE CASE

FACTS¹

Subsequent to an automobile accident on April 15, 2004, [CP 61] JESSICA TURBIN retained AARON LOWE. [CP 19] At the time, Ms. TURBIN was a minor [CP 30, 33] and her father, and later her mother, signed substantially identical contingency fee agreements on her behalf. [CP 19, 21] Between the time of the incident and April of 2007, Mr. Lowe negotiated settlement offers and counteroffers with Travelers Insurance. [CP 50 - 60] On June 15, 2006, Ms. Turbin reached the age of majority and continued to work with Mr. Lowe. [id]

Both parties concede Ms. TURBIN's actions ratified the existing contingent fee agreement between the parties after she turned 18. [CP 64] Mr. LOWE agrees there was no modification of the contract from the forms signed by Ms.

¹ Mr. LOWE's statement of facts set out argument and conclusion contrary to RAP 10.3(a)(5) and does not contain specific references to record citations.

TURBIN's parents while she was a minor. [Brief of Appellant at 2]

On April 10, 2007, Mr. Lowe informed Travelers Insurance that Ms. Turbin would accept their last offer of \$85,000 general damages and \$30,932.69 medical damages (previously paid), for a total of \$115,932.69. [CP 35] Mr. LOWE accepted the settlement offer on Ms. TURBIN's behalf: however Ms. TURBIN testifies that she clearly instructed LOWE not to accept the offer, and when pressured by him to accept, discharged him and retained new counsel. [CP 36]

Ms. TURBIN then asserted that Mr. LOWE settled without her consent, and refused to accept the pending settlement. Represented by Van Camp & Deissner she sued Travelers to vacate the settlement, and successfully opposed a summary judgment motion by Travelers. [CP 17] However it became apparent that she was not likely to obtain a more favorable settlement with Travelers: so two years later, on April 3, 2009, Ms. TURBIN accepted a settlement of

\$115,932.69 [CP 4] from Travelers Insurance. [CP 17]

Travelers issued settlement checks naming TURBIN, LOWE and VAN CAMP & DEISSNER as payees.

PROCEDURE

On May 1, 2007, Mr. LOWE filed an attorneys lien for \$28,305.00 fees and costs of \$270.43. [CP 17]

TURBIN filed suit to determine the amount of the fee due Mr. LOWE, asserting that Mr. LOWE was not entitled to his contingent fee because of:

- breach of fiduciary duty for settling against her wishes [CP 42].
- whether the fee was reasonable [CP 44].
- Whether the contract provided for a 25% or 33.3% fee [CP 44]
- Whether the fee percentage applied to \$85,000.00 or \$115,392.69 [CP 4, 44].
- Whether prejudgment interest applied and from when [CP 45]

- Whether the contract was illegal [CP 46]

Ms. TURBIN then filed a motion to pay the settlement checks into the Court Registry. An agreed order was entered placing the funds in the Van Camp & Deissner Trust account pending further order.

Mr. LOWE then filed what amounted to a summary judgment motion to determine the fee, [CP 1] in which he demanded his fees, costs and prejudgment interest totaling over \$50,000.00. [CP 6] Judge Eitzen decided the lien issue upon the written record after oral argument. [CP 64] Her decision was entered October 2, 2009 and appealed by Mr. LOWE. [CP 62] JESSICA TURBIN has not cross-appealed.

ARGUMENT

JESSICA TURBIN is willing to live with the decision made by Judge Eitzen below and requests that it be upheld. This is not a disputed claim for fees between two lawyers: JESSICA TURBIN benefits from the reduction from the amount claimed.

I. JUDGE EITZEN PROPERLY EXERCISED DISCRETION IN HER DECISION

A. THE COURT CORRECTLY FOLLOWED A SUMMARY PROCEDURE IN EXERCISE OF DISCRETION

This matter was before the Court in JESSICA TURBIN'S lawsuit to determine Aaron Lowe's fee: but it is undisputed that Mr. LOWE filed an Attorney's lien (albeit for less than he was claiming) and the court proceeded under that authority.

1. A Summary Procedure is Proper to Determine Fee

Judge Eitzen decided the fee issue summarily upon affidavits. She had the right to do so pursuant to the attorney lien statute, RCW 60.40.030, which provides,

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

Krein v. Nordstrom, 80 Wn.App. 306, 908 P.2d 889 (1995)

held that such a summary disposition meets the requirements of due process, both to protect the client whose property is summarily encumbered, and for the lawyer to secure his fee. *Id.* at 310.

Neither party objected to this procedure.

2. Review is based upon Abuse of Discretion

The judge's decision as to the fee is upheld absent an abuse of discretion. *King County v. Seawest Inv. Associates, LLC*, 141 Wn.App. 304, 170 P.3d 53 (2007). A proceeding to enforce a lien is an equitable proceeding, *Price v. Chambers*, 148 Wash. 170, 172, 268 P. 143 (1928). Trial courts have broad discretion fashioning equitable remedies, which are reviewed only for abuse of discretion. *Sorenson v. Pyeatt*, 158 Wash.2d 523, 531, 146 P.3d 1172 (2006). *King County v. Seawest*, *supra*, citing *State ex rel. Angeles Brewing & Malting Co. v. King County Superior Court*, 89 Wash. 342, 154 P. 603 (1916).

An abuse of discretion occurs only when the court

exercises its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In this case Judge Eitzen's discretion is fully supported by the record. There are no disputed facts relevant to this appeal. AARON LOWE did not object to the procedure followed and he had the opportunity to supplement the record if he so chose. Judge Eitzen based her decision on tenable grounds and reasons.

3. The Court Made a Determination of Reasonableness

Necessarily, the Court resolved the reasonableness of the fee [CP 65]. There was no objection to her making the decision on that procedural basis and since Ms. TURBIN has not cross-appealed, her position is that the Court has decided the reasonable fee.

An attorney requesting fees bears the burden of proving the reasonableness of the fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993); *In Re Estate of Morris*,

89 Wn.App. 431, 434, 949 P.2d 401 (1998). Determining reasonableness requires evaluation of the factors set out in RPC 1.5(a) which provides that an attorney "shall not make an agreement for, charge, or collect an unreasonable fee." The rule then lists the following factors for determining whether a fee is reasonable:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

RPC 1.5(a). RCW 4.24.005 contains essentially identical requirements for determining reasonable attorney fees in a tort action.

Judge Eitzen exercised discretion in determining the fee, with particular reference to items 4, 6 and 9 above.

B. SPECIFIC ISSUES

1. Was a contingent fee earned

JESSICA TURBIN does not dispute that Mr. LOWE ‘substantially completed’ the contract and was entitled to some contingent fee. It remains her contention that he should forfeit that fee due to misfeasance, but she does not raise the issue in this appeal. Should the court reverse Judge Eitzen and remand this matter, TURBIN reserves those defenses.

2. 25% Contingent Fee

The fee agreement provides,

SECTION TWO, ATTORNEY’S FEES

The fee shall be twenty-five percent (25%) for minor children.

Judge Eitzen decided [CP 65],

This Court looks to contractual interpretation. The interpretation of a contract provision is a mixed question of law and fact. *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn.App. 273, 286, 198 P.3d 1042 (Div. III 2009). Attorney fees must be reasonable in light of the circumstances. RCW 4.24.005; RPC 1.5(a). Further, any fee agreement that is "modified to increase an attorney's compensation after the attorney is employed is unenforceable if it is not supported by new consideration." *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn.App. 423, 432, 754 P.2d 120 (1988) (citing *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1980)).

Here, the Attorney-Client Contingent Fee Contract, Section Two, appears to be a boilerplate provision. The provision does not specifically state the adult rate is 33%. It simply states, "Client shall pay attorney.. .a sum equal to thirty-three percent (33%) of the total amount of recovery..." The provision, however, provides two exceptions to the 33% rate: "The fee shall be twenty-five percent (25%) for minor children and workman's compensation claims." Nowhere does the contract state that the contingency fee would increase should Ms. TURBIN reach the age of majority. Any ambiguities shall be construed against the drafter. *Forbes*, 148 Wn.App. at 1051.

At the time Ms. TURBIN turned 18 years old, she did not sign an agreement with Mr. Lowe. There is no evidence Mr. Lowe informed Ms. TURBIN that the contingency rate would increase to 33%, nor any evidence there was a meeting of the minds. ...

[Discussion of ratification omitted]

In the absence of an express provision, it is unreasonable that a client should expect the 25% rate would increase to 33% should the case not settle before the minor reaches the age of majority. If that were the case, minors

would quickly settle their case in fear of the increased rate, even if they felt the settlement was inadequate. Such a result is unacceptable. Further, there is no evidence Ms. TURBIN Further, there is no evidence Ms. TURBIN was provided any new consideration for this contractual modification. Without new consideration, a modification to increase an attorney's fees is unenforceable. *Ward*, 51 Wn.App. at 432.

Thus, because Ms. TURBIN was a minor when she entered into the contract and did not authorize modification or increase of the contingent fee, the contingency fee rate shall remain at 25%.

At the time the fee was entered, Ms. TURBIN was a minor. [CP 33] We do not at this time assert that she failed to ratify the agreement upon attaining majority: but a 25% fee is what she agreed to, not 33%.

a. Contract Interpretation

Judge Eitzen properly based her decision upon *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn.App. 273, 198 P.3d 1042 (2009). That case explores in detail the interpretation of an attorney fee contract beginning on page 286:

¶ 23 The meaning of a contract provision is a **mixed question of law and fact, with the intent of the**

parties controlling. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash.2d 411, 424 n. 9, 191 P.3d 866 (2008). We determine this intent by viewing the **contract as a whole, its objective, the conduct of the parties, and the reasonableness of the parties' interpretations.** *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254, 510 P.2d 221 (1973)). Extrinsic evidence may be considered whether or not the contract terms are ambiguous. *Id.* at 669, 801 P.2d 222.

¶ 24" [R]esolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts." *Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 403, 858 P.2d 494 (1993). When, as here, the trial court has weighed the evidence, we review the findings of fact for substantial evidence and then determine whether the findings support the conclusions of law and judgment. *City of Tacoma v. State*, 117 Wash.2d 348, 361, 816 P.2d 7 (1991); *Bloor v. Fritz*, 143 Wash.App. 718, 730, 180 P.3d 805 (2008). We presume the trial court's findings are adequately supported by the evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 369, 798 P.2d 799 (1990). Additionally, this court defers to the trial court's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence as well as the credibility of the witnesses. *Boeing Co. v. Heidi*, 147 Wash.2d 78, 87, 51 P.3d 793 (2002).... **Generally, an ambiguity in a contract is resolved against the drafter.** *Felton v. Menan Starch Co.*, 66 Wash.2d 792, 797, 405 P.2d 585 (1965).

In this case the issue is whether JESSICA TURBIN should pay 25% or 33 %. Judge Eitzen made a decision based on the

contract and the testimony, which is supported by substantial evidence.

Applying the law to the facts:

- The fee agreement states, "The fee shall be twenty-five percent (25%) for minor children." [CP 19, 24] TURBIN was a minor when the agreement was entered.[CP 33]
- In fact 2 fee agreements with identical fee language were presented to TURBIN's parents who signed for her. [CP 19, 24]
- No contract language addresses any change in fee percentage when the client attains majority. [Id.]
- As such the contract language is ambiguous at best for Mr. LOWE's interpretation, and in fact is clearly contrary in meaning to his interpretation.
- LOWE drafted the agreement and did not expressly provide that the fee would increase if the agreement started out with a minor who then came of age.
- There was no new fee agreement signed after TURBIN turned 18.
- There is no evidence that Mr. LOWE ever advised TURBIN that the percentage would change when she became an adult.
- TURBIN expected a 25% fee.[CP 65]
- LOWE himself advised her at the time of his settlement

that his fee would be 25%

- TURBIN therefore relied on the 25% fee in deciding to seek other counsel to try to get more money.

It seems clear that Judge Eitzen correctly interpreted the contract to provide 25% when entered into by a minor.

b. Amended Contract

Judge Eitzen also recognized that to increase the contract percentage from 25% to 33% is an amendment of the contract. If the parties did not initially agree that the fee would increase upon reaching majority – which the court found – then such an increase is a modification. *Forbes* held at 295,

¶ 50 Modification of a contract by a subsequent agreement requires a meeting of the minds and consideration separate from that of the original contract. *Dragt v. Dragt/DeTray, LLC*, 139 Wash.App. 560, 571, 161 P.3d 473 (2007). Consideration is a bargained for act or forbearance, such as a new promise or exchange. *Id.* at 572, 161 P.3d 473. Generally the renegotiation of an attorney's fee after establishment of the attorney-client relationship requires particular attention and scrutiny. *Ward v. Richards & Rossano, Inc.*, 51 Wash.App. 423, 428, 754 P.2d 120 (1988) (citing *Perez v. Pappas*, 98 Wash.2d 835, 841, 659 P.2d 475 (1983)). When renegotiation results in higher fees, the court may refuse to enforce the amended contract unless it is supported by

new consideration. *Perez*, 98 Wash.2d at 841, 659 P.2d 475.

In this case there was no discussion, no renegotiation and no new exchange of promises. AARON LOWE simply assumed that his ambiguous contract allowed him to charge 33% after TURBIN turned 18: but the contract doesn't say that.

Mr. LOWE confuses ratification with approval of amendment. Ms. TURBIN ratified the agreement by accepting its benefits: but what she was ratified was the original contract, not an amended contract. By definition, ratification is the acceptance of an existing contract, not making a new one. See *e.g., Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3 (Wash. 1930)(ratification relates to the original authority to contract).

c. Reasonableness

Most important, Judge Eitzen found that LOWE's interpretation of the contract was *unreasonable*. This takes the issue out of the normal rules of contract interpretation and into

the realm of RPC 1.5. Again, from the *Forbes* decision p. 291-292:

Contracts for attorney fees are continually reviewed for reasonableness throughout the relationship of the client and attorney. *Holmes v. Loveless*, 122 Wash.App. 470, 473, 94 P.3d 338 (2004). The factors set forth in RPC 1.5(a) are properly used by the trial court as a guideline for determining whether the fee agreement is reasonable. See, e.g., *Allard v. First Interstate Bank*, 112 Wash.2d 145, 149-50, 768 P.2d 998, 773 P.2d 420 (1989). . . . A fee agreement that violates the RPC is against public policy and unenforceable. *Holmes*, 122 Wash.App. at 475, 94 P.3d 338.

Under RPC 1.5(a)(8):

Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

Judge Eitzen properly found that Ms. TURBIN did not get appropriate disclosure of the fee amount.

3. Amount Fee Percentage Applies To

Judge Eitzen found the fee applied to the entire \$115,000 recovery Mr. LOWE claimed. We disagree: Judge Eitzen should have determined the fee only on \$85,000.00, the 'new

money' portion.

Since the trial court may be affirmed on any theory within the pleadings and proof, *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), this issue provides additional support for the fee actually awarded.

The fee agreement states the percentage applies to the total amount of recovery, and:

The total amount of recovery includes all sums and monies paid in settlement or award of damages, attorneys fees, costs, penalties, interest, and sums recovered from Personal Injury Protection or Uninsured Motorist provisions.

In this case Mr. LOWE recovered about \$ 85,000.00 “new money” plus waiver of offset of the PIP payments made previously to Ms. TURBIN. However, the PIP reimbursement waiver is not “monies paid.” Ms. TURBIN received that money without Mr. LOWE’s efforts, and would have kept the benefit of that money had no claim been presented. To the extent that Mr. LOWE *increased* her final recovery by preventing offset of the PIP against the final recovery, Mr.

LOWE is compensated once by his percentage of the actual recovery. He should not then be permitted to claim an additional percentage of the PIP offset that *didn't* happen when Ms. TURBIN received no actual value for the work.

4. Prejudgment Interest Date

Judge Eitzen correctly stated the rules for prejudgment interest, which are found in the *Forbes* decision at 297-298: a contingent fee is liquidated and subject to prejudgment interest. However the decision goes on,

¶ 60 Although prejudgment interest on a liquidated claim ordinarily is a matter of right, a trial court has discretion to disallow that interest when justice requires it. *Colonial Imports*, 83 Wash.App. at 245, 921 P.2d 575.

Judge Eitzen decided:

Here, the contingency fee could not have been calculated with exactness until the settlement was finalized. See, e.g., *Forbes v. American Bldg. Maintenance Co. West*, 148 Wn.App. 273, 198 P.3d 1042. Thus, prejudgment interest began to accrue on the date the settlement was finalized: April 3, 2009. In the absence of any interest rate in the agreement, prejudgment interest shall be at the rate of 12% per annum. RCW 19.52.010.

The logic of prejudgment interest is sometimes tricky, but there

are 2 key points supporting Judge Eitzen's choice of this date, which is the date Travelers issued checks to TURBIN:

First, the policy supporting prejudgment interest arises from the view that one who has had the use of money owed to another should in justice make compensation for its wrongful detention. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). Since neither LOWE nor TURBIN had, or would have had use of the money prior to Travelers' paying, the date she got control of the funds makes sense as the start date.

Second, the rule that the client decides when to settle, and not the lawyer, has to have some value. The cases leading up to *Goncharuk v. Barrong*, 132 Wash.App. 745, 133 P.3d 510 (2006) rev. den. 153 P.3d 195 (2007), give lip service to the rule while stating that the client may not refuse to settle in order to deprive the lawyer of a fee. But it was still her right to refuse or delay: Ms. TURBIN could have instructed Mr. LOWE to hold out – in fact she testified that she did and he

ignored her. Changing lawyers is irrelevant to the issue of timing. If Ms. TURBIN had kept Mr. LOWE and insisted he hold out, he would not have had the money either until Ms. TURBIN finally agreed to settle.

The public policy contained in the Bar Association's opinions on this subject have some relevance. A client is not supposed to be subject to economic pressure to accept an unwanted settlement. WSBA Formal Ethics Opinion 191 (1994, Amended 2009), which addressed whether a lawyer may include a provision in a contingent fee contract which states that if the client rejects a settlement offer that the lawyer deems "reasonable in light of all the circumstances," then the contingent fee will be based upon the larger of the recovery obtained at trial/arbitration or the amount offered in settlement, states,

A lawyer shall abide by a client's decision whether to settle a matter.

The proscription is phrased in mandatory terms.

Although not defined by the RPCs, "abide" is generally understood to mean "to await submissively; accept

without question or objection ... to submit to." See, Webster's Third International Dictionary (1986). Thus, RPC 1.2(a) requires a lawyer to "accept without question" a client's decision to accept or reject a settlement offer. ... **The proposed provision is antithetical to a lawyer's duty to "abide by" a client's decision regarding settlement. Rather than accept a client's settlement decision without question, the provision—and thus the lawyer by extension—restricts the client's freedom to reject a settlement offer. In very real terms, the provision functions to economically coerce the client into accepting an offer that the client might otherwise perceive to be inadequate.** ... For the foregoing reasons, it is the opinion of the Rules of Professional Conduct Committee that a contingent fee contract may not include a provision that bases the contingent fee upon the larger of the recovery obtained at trial/arbitration or the amount offered in settlement in the event that the client rejects a settlement offer that the lawyer deemed reasonable. Such a provision is unduly coercive to a client's choice with respect to settlement or trial of the client's matter.

Mr. LOWE's fee agreement doesn't contain this language, but if it is interpreted to start prejudgment interest running from the first time a settlement offer is obtained, rather than when the client in fact does settle, it coerces the client to accept anything the lawyer gets for her, and makes a mockery of her right to change lawyers when her lawyer disregards her instructions

and insists on settling against her will.

The trial court should be affirmed as to prejudgment interest start date.

II. AARON LOWE IS ENTITLED TO NO FEE AT ALL

The issues of the breach of fiduciary duty and malpractice were not addressed by the court below and frankly JESSICA TURBIN will abandon those issues if the decision is upheld. That stated, Judge Eitzen could and should have limited Mr. LOWE's fee to nothing. This is an alternative basis for approving Judge Eitzen's decision in light of Ms. TURBIN's decision not to cross appeal.

Mr. LOWE argues this is a claim for malpractice tort damages, separate and distinct from the issue of the contract. However the law is clear that a violation of fiduciary duty affects the professional's right to collect a fee: not as a matter of consequent damages but as a penalty for misfeasance. In fact, in *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) the court found in a conflict of interest scenario that a

fee should be forfeited for breach of fiduciary even though there was no malpractice by an attorney:

The trial court specifically relied on *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941) and *Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917 (2d Cir.1950), *cert. denied*, 340 U.S. 831, 71 S.Ct. 37, 95 L.Ed. 610 (1950) in ordering disgorgement. In *Woods* a unanimous Court noted:

Where [an attorney] ... was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted....

... A fiduciary who represents [multiple parties] ... may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well.... Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545 [(1928)].

Woods, 312 U.S. at 268-69, 61 S.Ct. at 497. The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized. S. Gillers & N. Dorsen, *Regulation of Lawyers: Problems of Law and Ethics* 265 (2d ed. 1989); *Ross v. Scannell*, 97 Wash.2d 598, 610, 647 P.2d 1004 (1982) ("[p]rofessional misconduct may be grounds for denying an attorney his fees").

The trial court found that Denver violated the CPR and breached his fiduciary duty to his clients.

Disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." *In re Eastern Sugar Antitrust Litig.*, 697 F.2d at 533. Such an order is within the inherent power of the trial court to fashion judgments. *Allen v. American Land Research*, 95 Wash.2d 841, 852, 631 P.2d 930 (1981).

Numerous other Washington case hold that Professional misconduct may be grounds for denying an attorney his fees. *Forbes* at 292; *Cotton v. Kronenberg*, 111 Wn. App. 258, 265, 44 P.3d 878 (2002); *Dailey v. Testone*, 72 Wash.2d 662, 664, 435 P.2d 24 (1967); *Yount v. Zarbell*, 17 Wash.2d 278, 135 P.2d 309 (1943).

The scope of Mr. LOWE's fiduciary duty can be determined from the RPCs. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). RPC 1.2 provides:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Accord: *Ausler v. Ramsey*, 73 Wn. App. 231, 232 n. 1, 868 P.2d 877 (1994).

Mr. LOWE's failure to abide Ms. TURBIN's decision breached his duty, and he should forfeit his whole fee. Of course this is a disputed fact question which would have to be determined at trial. The court properly avoided reaching this question by deciding the case as argued above, and Ms. TURBIN will accept that decision if upheld. But this Court could find that Judge Eitzen should have ruled that Mr. LOWE is entitled to no fee at all, so his claim on appeal for more money should be denied.

III. ATTORNEYS FEES ON APPEAL

Mr. LOWE should not prevail and should not, therefore, be awarded additional fees. Should he prevail, he is still not entitled to additional fees. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Landberg v. Carlson*, 108 Wash.App. 749, 758, 33 P.3d 406 (2001), *review*

denied, 146 Wash.2d 1008, 51 P.3d 86 (2002). If such fees are allowable at trial, the prevailing party may recover fees on appeal as well. *Landberg*, 108 Wash.App. at 758, 33 P.3d 406 (citing RAP 18.1). But no such basis exists here: neither the contract nor the lien statute provide for additional attorneys fees. He merely argues that he is unhappy that he has been accused of misfeasance and should get his fees. [App. Brief at 28]

The case cited by Mr. LOWE, *Perkins Coie v. Williams*, 84 Wn.App. 733, 742 – 43, 929 P.2d 1215 (1997) was based on fees due after a de novo trial arising out of Mandatory Arbitration: in fact it holds that absent such a de novo trial, no fees may be awarded. The Court states,

Richard and Chris argue that if successful in this appeal, they are presently entitled to attorney fees. We disagree.

Attorney fees may be recovered only when authorized by statute, a recognized ground of equity, or agreement of the parties. An appellate court may grant attorney fees pursuant to RAP 18.1.

MAR 7.3 provides that:

The court shall assess costs and reasonable

attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

Courts have awarded fees against appellants who failed to improve their position both at trial de novo and on appeal. A full trial need not occur. Fees may be awarded following summary judgment or voluntary dismissal, or when the appellant voluntarily withdraws the request for a trial de novo.

This case does not fall into any of the above categories. There has been no trial de novo or summary judgment. There has been no withdrawal of the request for a trial de novo. Thus, the award of fees on this appeal is premature.

In the case *sub judice* there was no Mandatory Arbitration, no trial de novo and the summary judgment did not arise out of a de novo trial. There is no other basis for Mr. LOWE to claim fees.

There is, however, a basis for JESSICA TURBIN to claim fees: Mr. LOWE's appeal is frivolous. Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute

authorizes the award. RAP 18.9 authorizes this court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn.App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999). An appeal is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

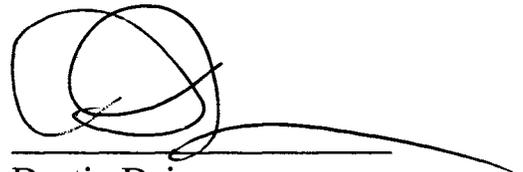
This appeal is frivolous because Judge Eitzen's decision was discretionary, supported by the record and determined by a procedure not objected to by either party. Mr. LOWE's brief extensively discusses the application of *Goncharuk v. Barrong*, obviously because that case involved the same law firm and he believes it is embarrassing; but 'substantial completion' was conceded in this matter at the trial court. Mr. LOWE spends pages discussing whether his fee was 'liquidated,' again an issue conceded by Respondent, where the only question on appeal was the timing.

This court should award costs and fees to JESSICA
TURBIN.

CONCLUSION

This Court should affirm the trial court and award costs
and fees to Ms. TURBIN on appeal.

June 3, 2010

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Dustin Deissner
WSB# 10784
Attorney for:
JESSICA TURBIN

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2010 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

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To: AARON LOWE
Attorney at Law
W. 430 Indiana Ave.
Spokane WA 99205

June 3, 2010



Dustin Deissner WSB# 10784

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FILED
JUN 23 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: *[Signature]*

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

JESSICA TURBIN,
Respondent
v.
AARON LOWE,
Petitioner

No. 285529

**STATEMENT OF ADDITIONAL
AUTHORITY**

With regard to the issue of the possible forfeiture of fees, the Court's attention is respectfully directed to *Shoemaker ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010).

June 21, 2010

[Signature]
Dustin Deissner WSB# 10784

CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
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**STATEMENT OF
ADDITIONAL AUTHORITIES p. 1**

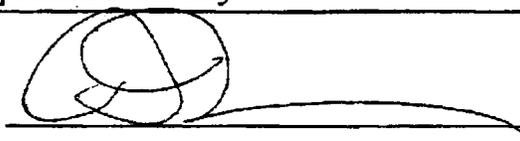
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STATEMENT OF
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