

FILED

JAN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297411-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LK OPERATING, LLC,
a Washington Limited Liability Company,

Appellant,

v.

THE COLLECTION GROUP, LLC,
a Washington Limited Liability Company,
and BRIAN FAIR and SHIRLEY FAIR, husband and wife,
and the marital community composed thereof

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
THE HONORABLE THEODORE SMALL

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

SMITH GOODFRIEND, P.S.

HACKETT, BEECHER & HART

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REPLY ARGUMENT

Respondents/cross-appellants submit this reply in support of their cross-appeal challenging the trial court's failure to recognize the consequence of attorneys Powers and Therrien's violation of RPC 1.8 in the business transaction at issue.

LKO and Powers ignore the trial court's findings and its express refusal to find that Powers acted only as an agent of LKO in negotiating the agreement with TCG, in arguing that "[a]ccurately read, the findings and conclusions as a whole reveal Powers to be simply LKO's agent, not the contracting party." (LKO Cross-Resp. 28, emphasis in original)) In fact, the trial court affirmatively rejected Proposed Conclusions L, N and P (CP 2238), which LKO proposed in support of its theory that Powers was only acting at LKO's "agent." Instead, the trial court made findings directly contrary to those LKO now argues this court should infer in order to reject the cross-appeal:

The trial court found that "[t]he terms of the Proposal . . . were accepted *by Les Powers.*" (CP 2401, emphasis added), that "[u]ltimately, *Les Powers . . . chose to enter into the Investment Agreement* with TCG." (CP 2401, emphasis added), and that "*Les*

Powers accepted the business offer by having LKO provide the sum of \$17,000 to TCG . . . and by having Powers & Therrien, P.S. provide the legal services to TCG. (CP 2401, emphasis added) At a minimum, the trial court's findings compel the conclusion that Fair had an agreement that Powers, his attorney, could "pick" the party to the TCG transaction. LKO then sued TCG and the Fairs in this suit on the grounds it was entitled to value because of legal services that *Powers and Therrien* provided. (CP 5)

The argument in response to the cross-appeal is, in essence, that an attorney can evade the consequences of RPC 1.8 simply by arranging to have a business interest taken in the name of a corporate entity without so much as a verbal or written notification to the client. As the cases cited in TCG's cross-appeal brief at 36-41 (and not addressed by LKO and Powers in the cross-response) explain, however, attorneys are prohibited from entering into such business transactions with clients absent stringent safeguards that were admittedly not followed here, regardless of the entity used to enter into the transaction.

This court also should reverse the trial court's findings that Fair "did not care" and "left up to Powers' the entity that invested in

TCG," as they are irrelevant to the trial court's determination, not supported by the evidence, and inconsistent with the trial court's recognition that Powers' and Thierren's legal services to TCG constituted "acceptance" of TCG's offer. (CP 2401) The record was undisputed that Fair only discussed a potential investment with three different *attorneys*. (CP 1575-76; LKO Cross-Resp. 18) LKO's claim is that it simply accepted the offer made by Fair to attorneys Powers and Therrien, which Powers and Therrien had immediately rejected. There was no trial testimony from any representative of LKO that anyone but Powers discussed the potential transaction with Fair or accepted an offer from Fair. Nor was there any testimony what agreement LKO supposedly had with Fair. Indeed, neither Powers, Thierren, nor any other representative (or "agent") of LKO testified at trial. The trial record reflects that Fair was communicating electronically with the seller of debt that he was buying the accounts with an attorney. (RP 288-291; Exs. 10-13)

Even if this court holds these findings were supported by the evidence, they are irrelevant, because if Fair "didn't care" who his partner was in TCG, he clearly should have. In its Complaint (CP

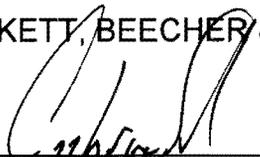
5), LKO alleged that Fair, the *uncompensated* manager of TCG, owed it fiduciary duties. At the same time, LKO, with its web of LLCs, Corporations, and Trusts as managers and owners, appears designed to evade potential exposure for individual liability on behalf of Powers and Thierren – the attorneys who controlled LKO. Indeed, that is the gravamen of the response to the cross-appeal.

Had Powers and Therrien followed the requirements of RPC 1.8 and advised Fair and TCG to seek independent counsel, however, cross-appellants could have been counseled as to the unfairness and questionable ethics and enforceability of the proposed contract. This Court should recognize that the attorneys' violation of RPC 1.8 provided an additional, and sufficient, basis for rescission of the agreement.

Dated this 23rd day of January, 2012.

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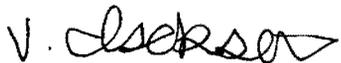
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 23, 2012, I arranged for service of the foregoing Reply Brief of Respondents/Cross-Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of January, 2012.



Victoria K. Isaksen