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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,

v.

LES and PATRICIA POWERS and
KEITH and MARSHA THERRIEN

Intervenors.

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

BRIEF OF RESPONDENTS/CROSS-APPELLANTS TO BRIEF
OF INTERVENORS POWERS AND THERRIEN

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I. INTRODUCTION

The Brief of Intervenors Powers and Therrien comes down to the simple argument that Les Powers did not enter into a business transaction with TCG and therefore could not have violated RPC 1.8. Intervenors contend that the Findings of Fact and Conclusions of Law are supportive of their argument, but do not point to particular findings that they believe to be helpful. In fact, as explained in the Reply Brief of Respondents/Cross-Appellants, the Findings and Conclusions do not support Intervenors' position.

Intervenors would have the court believe that LKO is an independent company unrelated to Powers. Nothing could be farther from the truth. LKO, a Washington limited liability company, was formed by Intervenors as part of their overall estate planning. LKO is managed by PT Enterprises, Inc., a corporation wholly owned, managed, and controlled by Les Powers and Keith Therrien. The members of LKO are five corporations controlled by Les Powers, Keith Therrien and their spouses. The shareholders of those corporations are five trusts the beneficiaries of which are the adult children of Les Powers and Keith Therrien. All of these

entities were created by Les Powers and Keith Therrien. (CP 1252) (See Appendix A to Corrected Brief of Respondents/Cross-Appellants) As the trial court found, “[a]s an owner of Powers & Therrien Enterprises, Inc., Mr. Powers had a fiduciary duty to LK Operating, LLC at all time material hereto. The creation of LK Operating, LLC by Les Powers and Keith Therrien assisted their estate plans. The success of LK Operating, LLC benefitted their children. Les Powers and Keith Therrien had a personal interest in the success of LK Operating, LLC.” (CP 1980)

As a fallback position, Intervenors argue that Powers could not have violated RPC 1.8 because to violate that rule, the attorney must have gained some financial advantage from the transaction. Even if the law were that the attorney must stand to benefit personally from a business transaction in order to violate RPC 1.8, under the facts of this case Intervenors did stand to benefit from the success of LKO. Powers violated RPC 1.8. That violation constitutes an alternative ground to affirm the decision of the trial court.

II. RESTATEMENT OF THE CASE

In their Statement of the Case, Intervenors state that “a contract was formed between LKO and TCG.” (Intervenors 5) Throughout this case, in both the trial court and this court, Intervenors and LKO have made this assertion, which is without basis in fact. It is undisputed that no written contract exists. To establish an oral contract, the entity asserting the existence of the contract (in this case, LKO) bears the burden of proving mutual agreement as to all material terms of the contract. LKO, Powers and Therrien barely cleared the burden of this hurdle for purposes of summary judgment. (CP 125-126, 1113, 1259)

In the years leading up to this lawsuit, Fair dealt with Powers in his individual capacity, not as a representative of LKO or any other entity. The initial email that Powers claims to have accepted without change was directed to “Les, Keith.” (CP 2303) All communications were between Fair and either Powers or, to a much lesser extent, Therrien. As the court found after the trial, there were never any direct written communications from LKO to TCG, or from TCG to LKO. (CP 2306) In fact, Fair testified that he

had never heard of LK Operating, LLC until after the dispute arose in 2007. (RP 84)

From the commencement of this litigation, the defendants have consistently maintained that the real parties in interest on plaintiff's side of the case are Les Powers and Keith Therrien, because they are the persons with whom Fair dealt. Prior to trial, Intervenor Les Powers and Keith Therrien submitted twelve declarations, ten of which made it into this Court's record, (CP 125, CP 272, 968, 1381, 964, 1112, 1398, 1409, 843, 18) outlining the terms of an agreement with Fair and TCG they claim to have negotiated on behalf of LKO, studiously discussing this agreement in the passive voice. (CP 19, 125, 126) Only upon moving for reconsideration, after both attorneys had been found to have violated RPC 1.7, did Therrien finally declare what it is they alleged to have stated directly to Fair. (CP 1381-1383)

The parties thereafter agreed that Fair was never personally a party to the alleged transactions, and he was dismissed from the case. (CP 1903, 2303, 2312) Because there was still an issue of fact whether the contracting party was LKO, as opposed to Powers and Therrien, a trial was then warranted. Intervenor now wish to

have the court conclude that they were acting only in a representative capacity on behalf of LKO. But there was no evidence in the trial record to that effect. Powers and Therrien knew that an issue to be decided at the trial was the identity of the contracting parties, yet they elected not to attend the trial or to offer their sworn testimony at trial. In fact, no party representing LKO testified at trial as to the terms of the alleged agreement LKO struck with TCG. Appellants, and Intervenors, must now live with the consequences of that decision.

III. SUMMARY OF ARGUMENT

Intervenors contend that Powers was not acting as a potential contracting party but rather as a “conveyor of the offer and acceptance between LKO and TCG.” (Intervenors 8) The reference to an “offer” is presumably to Fair’s email dated October 27, 2004. (CP 216) That email was directed to the email address of Powers & Therrien and began with the words, “Les, Keith.” In the body of the email, Fair stated: “Regarding an agreement between myself and you two, this is how I would like to see it...” (CP 216) If this is interpreted as an offer, it could only be accepted by the persons to whom it was directed – namely, Powers and

Therrien. See *Restatement (Second) of Contracts*, § 52; ***Dorsey v. Strand***, 21 Wn.2d 217, 224, 150 P.2d 702 (1944); 2 *Williston on Contracts* § 6.27 (4th ed. 2011) (“an offer made to one person cannot be accepted by another”). It was not an offer that could be “conveyed” to an unknown entity to be accepted by that entity, all unbeknownst to the “offeror.” And the trial court concluded that Powers accepted this offer, making him the contracting party. (CP 2401)

Intervenors also state that Powers did not “draft or negotiate the LKO-TCG contract, but simply accepted TCG’s offer by causing LKO to convey its sole funds to TCG,” (Intervenor 8), citing Conclusion M in the Appendix to the Brief. In fact, Conclusion M states: “Les Powers did not draft *any* agreement between the Parties.” (CP 2401) (emphasis added) Omission of the word “any” is misleading in this context, because it suggests that someone else did negotiate “the LKO-TCG contract,” when in fact Intervenors are fully aware that no written contract exists. And Finding of Fact No. 15 was that “Powers and Therrien, P.S. [were] to provide legal services to help prepare any initial legal pleadings for TCG that it would need to file to collect on that debt, and *prepare legal*

documents to memorialize the agreement between the investor and TCG." (CP 2303) (emphasis added)

Intervenors thus seek to use their *breach* of the alleged contract as support for their argument that they did not violate RPC 1.8, concluding that an attorney cannot violate the rule prohibiting unfair business transactions between lawyers and clients if the attorney does not engage in a business transaction with the client. In making this claim, Intervenors ignore the fact that the trial court found that Powers was the contracting party. (CP 2308) But even if the contract had been between TCG and LKO, Powers had an ethical responsibility under RPC 1.8 because of his close family ties with LKO. His failure to comply with the rule under the circumstances is an alternate basis for this court to affirm the decision of the trial court.

IV. RESPONSE TO INTERVENORS' ARGUMENT

A. The Trial Court's Findings Confirm That Powers Was The Contracting Party.

Intervenors begin by claiming that cross-appellants cite "ambiguous" findings of fact in support of TCG's position that the trial court found that Powers was the contracting party. (Intervenors 9) The findings are not ambiguous and are not

inadvertent. They were carefully crafted by the trial court to reflect the evidence admitted at the trial, as three separate hearings were necessary before the final Order was signed.

Virtually all Fair's dealings in late 2004 and early 2005 were with Powers. In order for LKO to establish that it was the contracting party, LKO needed to prove at trial that Powers was acting in a representative capacity. After trial, LKO submitted proposed findings of fact and conclusions of law that Powers was acting in the capacity of president of Powers & Therrien Enterprises, Inc., the manager of LKO:

Proposed Finding of Fact 19. The proposed terms were accepted by Les Powers, *as an officer of LKO's manager, PTE.*

Proposed Finding of Fact 26. ...On that date, Les Powers, *as an officer of LKO's manager PTE,* authorized LKO's bookkeeper to send a third LKO check in this amount to TCG.

Proposed Finding of Fact 27. ...Les Powers, *as an officer of LKO's manager PTE,* authorized LKO's bookkeeper to send to TCG a check in this amount.

Proposed Finding of Fact 41. Powers, *as an officer of LKO's manager PTE,* caused the issuance of the LKO check to TCG in February 2005.

Proposed Conclusion of Law I. The terms of the Proposal by Fair as agent for TCG were accepted by Powers, *as an officer of LKO's manager PTE.*

Proposed Conclusion of Law L. Les Powers, *acting as an officer of LKO's manager PTE*, accepted the business offer...

Proposed Conclusion of Law N. Powers and Therrien, *as officers of LKO's manager PTE*, rejected the modification, and LKO filed this suit.

(CP 2230-2239) (emphasis added) The evidence at the trial, however, did not support these proposed findings and conclusions. Fair testified that he had never heard of LKO until the dispute erupted between the parties in 2007. (RP 84) LKO did not offer testimony of Powers, Therrien, or any other direct or indirect owners. Cross-appellants objected to the underscored language in the proposed findings and conclusions above, and the trial court judge ordered the underscored language to be stricken. (CP 2249-58, 2300-09) The Findings of Fact and Conclusions of Law as entered do not include any language that Powers was acting in a representative capacity. (CP 2300-09)

LKO also submitted Proposed Conclusion of Law J: "LKO entered into the Investment Agreement with TCG. LKO was both the investment party and the contracting party." (CP 2238) Again, cross-appellants objected to this proposed language due to the absence of any evidence of representative capacity at trial. The trial judge changed proposed Conclusion of Law J to simply state

that “[t]he terms of the Proposal by Fair as agent for TCG were accepted by Les Powers.” (CP 2308) The language in the proposed conclusion that LKO was both the investing party and the contracting party was ordered stricken by the court and was not included in the final version of the Findings and Conclusions entered by the court. (CP 2308)

Thus, the language in the findings and conclusions relating to Powers’ capacity is hardly ambiguous. Nor was it inadvertent. Instead it was the result of careful consideration by the trial court.¹ The deletion of the proposed agency language clearly shows that LKO failed to carry its burden to prove that in his dealings with Fair, Powers was acting in a representative capacity. In the absence of such evidence, the court found that Powers accepted the proposal. (CP 2308) As a consequence, the court did not find that LKO was the contracting party, as Intervenors seem to suggest. In truth, the

¹ The agency language was stricken by the court at a hearing on November 10, 2010. LKO then submitted LK Operating, LLC’s Submission in Support of Presentment of Findings of Fact and Conclusions of Law. (CP 2185-2229) Attached to that submission as Exhibit B is a redline version of the initial set of proposed findings and conclusions with notations of LKO’s counsel of the court’s rulings at the November hearing. (CP 2214-28) In this submittal, LKO’s counsel again attempted to insert agency language, although in a briefer form. Again, the court refused to include that language in final Findings of Fact and Conclusions of Law. (CP 2300-09)

language that LKO had proposed stating that LKO was the contracting party was stricken and is not included in the final Findings of Fact and Conclusions of Law.

B. An Attorney Need Not Profit From The Transaction To Violate RPC 1.8.

Intervenors also argue that an attorney's actions cannot violate RPC 1.8 unless there is some beneficial financial arrangement to the attorney. (Intervenors 12) Intervenors claim that they did not stand to benefit financially from the transaction, and therefore did not violate RPC 1.8. This argument fails for three reasons.

First, the court found that Powers was the contracting party. Given that finding, RPC 1.8 applies.

Second, the language of RPC 1.8 is not as narrow as Intervenors suggest. RPC 1.8 does not require that an attorney enter into a "business relationship" as a prerequisite for triggering RPC 1.8 responsibility. The rule is much broader, prohibiting a lawyer from "enter[ing] into a business transaction with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client" unless certain conditions are met. As has been previously discussed, LKO is not an independent

entity, but rather is a part of Intervenor's estate planning for their adult children. LKO is a limited liability company managed by Powers & Therrien Enterprises, Inc., a Washington corporation owned and managed by Powers and Therrien. They formed LK Operating, LLC, as well as the five corporate members, which are controlled through the spouses of Intervenor's. They also formed the trusts that are the shareholders of those corporate members. (CP 1252)

As the trial court observed in its September 25, 2009 Memorandum Decision, "[Powers] had a significant personal and financial interest in LK Operating, LLC as a parent, as an owner of its manager, Powers & Therrien Enterprises, Inc. and as the attorney for LK Operating, LLC." (CP 1998) Thus, even if LKO had been the contracting party, Powers had an obligation to fulfill his ethical duties under RPC 1.8.

Intervenor's cite numerous cases in which attorneys violated RPC 1.8 or its predecessor, DR 5-104, arguing that those cases establish the limits of the application of RPC 1.8 to fact patterns in which the attorney benefitted financially from the relationship:

What the Supreme Court's analysis in these cases reveals is that a "business transaction," between a

lawyer and client must confer some benefit to the attorney and/or the client arising from a legal obligation incurred between them, such as a contract, debtor-creditor relationship, share in business profits, or other beneficial financial arrangement.

(Intervenor 12) But none of the cases cited by Intervenors say this. And at least one of the cases considers a violation of the rule when the clients did not go into business directly with their attorneys, but the attorneys were managers of a limited liability company in which they caused a client to invest. *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988) (Intervenors 13). That is precisely the situation here.

Nor need a lawyer make a profit in order to violate the rule. In *Iowa State Bar Association v. Mershon*, 316 N.W.2d 895 (Iowa 1982) (Intervenors 12-13), for instance, a landowner was interested in developing land for residential purposes. Lacking the funds to pay engineering and legal costs, the landowner, attorney and engineer formed a corporation. The attorney and the engineer each received stock in the corporation to cover anticipated future expenses for their services. The development languished, financing was never obtained, and the landowner died.

Although the lawyer had expended \$900 in out-of-pocket expenses and had performed legal services worth more than \$6,000, he had not been paid and did not seek payment for those costs or services. Still, a grievance was filed against the lawyer for violation of DR 5-104(A), which stated: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." **Mershon**, 316 N.W.2d. at 897. The Iowa Supreme Court reprimanded the lawyer in spite of the fact that he had not acted dishonestly and did not make a profit on the transaction. **Mershon**, 316 N.W.2d. at 899-900.

None of the cases cited by Intervenors involves a fact pattern similar to the present case, where an attorney attempts to avoid responsibility for a RPC 1.8 violation by claiming that he did not go into business with the client because he caused a family member to do so instead. If Intervenors' argument were correct, an attorney could negotiate a deal with a client without informed consent, then substitute a family member as the contracting party

to avoid a violation of RPC 1.8. The unfortunate consequences of the narrow interpretation that Intervenors urge is aptly illustrated by this case.

Powers, a member of the bar, should have heard alarm bells as he was discussing entering into a joint venture or other agreement with Fair and TCG. The rules are not onerous. Powers should have informed Fair of the possible conflicts of interest that could result from the proposed venture and to recommend that Fair and TCG obtain independent legal advice. Certainly any competent lawyer would have negotiated an agreement among the parties and would have reduced any agreement to writing. If that had occurred, five years of costly litigation would have been avoided and TCG might still be a viable entity.

V. CONCLUSION

Intervenors are lawyers who owe a professional responsibility to their clients. Intervenors not only failed to comply with the Rules of Professional Conduct; at the end of the day, they caused LKO, the very company from which they now seek to distance themselves, to file and prosecute a lawsuit against their clients Fair and TCG. In fairness to TCG and to the Fairs, the end

result of this misconduct must be to rescind this amorphous transaction and end this litigation nightmare. RPC 1.8 provides an alternative basis to reach that end. Intervenors have not articulated any persuasive argument why this court should not set aside the transaction under RPC 1.8.

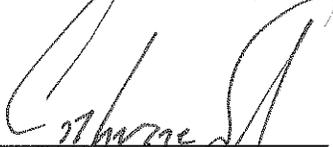
Dated this 18th day of April, 2012.

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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 April 18, 2012, I arranged for service of the foregoing Brief of Respondents/Cross-Appellants to Brief of Intervenor Powers and Therrien, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of April, 2012.



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