88846-9

No. 30161-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

LES and PATRICIA POWERS and
KEITH and MARSHA THERRIEN

Respondents.

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

BRIEF OF APPELLANTS

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I. ASSIGNMENT OF ERROR

The trial court erred by granting summary judgment dismissing malpractice claims against respondent attorneys as a matter of law on the grounds that appellant clients could not prove that they were damaged by their attorneys' breach of duties under the "ABC" rule. (CP 928-37, 939-41, 912-26)

II. ISSUE RELATED TO ASSIGNMENT OF ERROR

Two attorneys agreed to go into business with their clients, exchanging legal services for an interest in a debt collection business. The attorneys then purported to make an undisclosed gift of the business opportunity to another client, a family business benefitting the attorneys' children. In the subsequent malpractice action against the attorneys, could the clients seek as consequential damages the attorney fees and costs they incurred in defending a lawsuit that the attorneys caused their family business to commence against their clients?

III. STATEMENT OF FACTS

A. Statement Of The Case.

This malpractice action arose out of respondent attorneys' breach of the standard of care by going into business with their clients, without required disclosures and waivers, and by then causing another client, a family business managed by the attorneys, to sue the clients over the business opportunity. This business arrangement has been the subject of a previous appeal, and this statement of facts is largely supported by citation to the numbered paragraphs in Division Three's decision in *LK Operating, LLC v. Collection Group, LLC,* 168 Wn. App. 862, 279 P.3d 448, *amended on reconsideration,* 287 P.3d 628 (2012), which is attached as Appendix A, and in which all of the parties to this action were also parties.

In its decision in that case, Division Three concluded that the trial court properly rescinded the business deal between the attorneys and their clients, albeit for different reasons than that relied on by the trial court. Appendix ¶ 1. In this malpractice action, the same trial court concluded as a matter of law that appellant clients could not recover fees and costs incurred in defending the first lawsuit, on the grounds that the clients themselves were partially responsible for the litigation. (CP 936-67) The clients appeal.

Respondents Leslie Powers and Keith Therrien practice law as Powers & Therrien, P.S. in Yakima, Washington. Appendix ¶ 2. Appellant Brian Fair was a client of Powers & Therrien, P.S. in

2004, when Mr. Fair and his wife formed appellant The Collection Group LLC (TCG) to engage in the business of debt collection. Appendix ¶ 3.

Mr. Fair asked Mr. Powers whether he or Mr. Therrien would be interested in his new business venture, to which Mr. Fair proposed he would contribute administrative and management services and Mr. Powers and Mr. Therrien would contribute legal services. Appendix ¶ 3. Mr. Fair outlined his joint venture proposal in an October 2004 e-mail regarding the purchase of debt from Unifund, a debt vendor:

> Les, Keith,
>
> ...
>
> Attached is a sample purchase agreement from Unifund, the company selling the debt, and the attachment for when they sell FUSA debt (aka First USA). I have not had a chance to review it, but I will do so tonight.
>
> Regarding an agreement between myself and you two, this is how I would like to see it:
>
> A. We will split the purchase price and other out of pocket costs, including legal services that your firm cannot provide.
>
> B. You will contribute legal services you can provide (review the purchase agreement contract, legal doc for this JV [joint venture] (if needed), demand letter, ask smart questions, kick the tires, etc.)

> C. My contribution will include no charge for finding this debt, negotiations with debtor and debt seller (unless you prefer to do this), and keeping you informed.

Appendix ¶ 3.

Mr. Powers reviewed the attached Unifund purchase agreement, and returned it to Mr. Fair marked up with extensive suggested changes. But he did not respond directly to Mr. Fair's inquiry about an agreement for a joint venture. Appendix ¶ 4. Mr. Fair continued to negotiate with Unifund, and TCG was eventually named as the prospective purchaser of the debt. Appendix ¶ 4.

Mr. Powers also did not respond to Mr. Fair's January 2005 e-mail asking whether he was still interested in the deal with Unifund. Appendix ¶ 4. Mr. Fair then caused TCG to invest in the Unifund debt portfolio with $7,969.23 of its own money and began work to collect the debt that TCG had purchased. Appendix ¶ 4.

Mr. Fair and Powers & Therrien, P.S. exchanged e-mails about the legal services required to collect the debt. Appendix ¶ 5. The law firm drafted legal documents for TCG, and TCG made progress collecting the accounts in the Unifund portfolio. Appendix ¶ 5. Mr. Fair sent a fax to Mr. Powers' legal assistant asking her to arrange for a check for $3,984.61 (one-half the cost of the Unifund portfolio) made out to "The Collection Group, LLC." Appendix ¶ 5. When he did not receive the funds, Mr. Fair re-sent the fax to the law firm's bookkeeper several days later. Appendix ¶ 5.

On February 21, 2005, TCG received a check in the amount requested signed by Michelle Briggs, who Mr. Fair knew to be an employee of Powers & Therrien, P.S. Appendix ¶ 6. The check was a "counter check" with the name "LK Operating LLC" handwritten in the upper left-hand corner. Appendix ¶ 6. Mr. Fair assumed this was an account owned by Les and Keith (LK) of Powers & Therrien, P.S. Appendix ¶ 6. Mr. Fair faxed an accounting to Powers & Therrien, P.S. that stated: "Les, this gives you guys 1/2 ownership in the company. You can formalize however you wish." Appendix ¶ 6.

Neither Mr. Powers nor Mr. Therrien ever formalized any agreement with the Fairs or TCG. Appendix ¶ 6. Nor did either Mr. Powers or Mr. Therrien tell their clients the Fairs and TCG that LK Operating, LLC (LKO) was a limited liability company that the lawyers had formed in December 2003, and that the lawyers managed as officers of Powers & Therrien Enterprises Inc. Appendix ¶¶ 2, 22. Nor did Mr. Powers or Mr. Therrien disclose to their clients the Fairs and TCG that LKO is owned by five corporations, each owned by an irrevocable trust established for the benefit of Mr. Powers' and Mr. Therrien's five adult children, each of whom was the sole trustee and beneficiary of the separate trust set up on his or her behalf. Appendix ¶¶ 2, 22.

Mr. Fair continued to expand the TCG business. Appendix ¶ 7. When an opportunity to purchase additional debt portfolios arose, he contacted Powers and Therrien, P.S. for additional funds. Appendix ¶ 7. They responded, sending three additional LKO counter checks on March 3, 2005, for $13,015.39; on December 23, 2005, for $10,000; and on September 11, 2006, for $25,000. Appendix ¶ 7.

Mr. Powers and Mr. Therrien still did not propose any agreement to spell out the relationship among the parties. Appendix ¶ 7. Nor did they disclose their family relationship or management of their client LKO to their clients the Fairs and TCG. Appendix ¶ 22.

Mr. Fair in April 2007 again requested that Mr. Powers and Mr. Therrien formalize their ownership interest in TCG. Appendix ¶ 4. Over two years after beginning and developing the business, and based on both the financial and service-related contributions of the parties, Mr. Fair now proposed that Mr. Powers and Mr. Therrien own a 38 percent interest, that Mr. Fair's mother (who also had contributed funds) would own 7 percent, and that the Fairs would own a 55 percent interest. Appendix ¶ 9.

Mr. Powers and Mr. Therrien rejected Mr. Fair's proposal, insisting that they were entitled to a 50 percent ownership interest in TCG. Appendix ¶ 9. For the first time, Mr. Powers and Mr. Therrien claimed that *LKO*, not them, owned an interest in their client TCG. Appendix ¶¶ 10, 15. Mr. Powers and Mr. Therrien caused LKO to sue TCG and the Fairs for a judicial declaration of the ownership rights of the parties, for breach of fiduciary duty, and for breach of contract (the contract action). Appendix ¶ 10. The Fairs responded by suing Mr. Powers and Mr. Therrien personally for legal malpractice and breach of the Consumer Protection Act (the malpractice action). Appendix ¶ 10.

B. Procedural History.

The contract and malpractice actions were initially consolidated. After the trial court, Chelan County Superior Court Judge Ted Small, granted summary judgment that the debt collection joint venture should be rescinded based on the attorneys' violation of RPC 1.7, which prohibits concurrent representation of clients with potentially conflicting interests, the actions were bifurcated in preparation for a trial in the contract action limited to the appropriate amount of damages that should flow from the rescission of the claimed agreement between LKO and TCG that the trial court ordered based on this violation. Appendix ¶ 14. Following a bench trial, the trial court entered judgment in favor of LKO for the principal amount of all sums LKO had invested with TCG plus interest, $78,431.61. Appendix ¶ 14.

LKO appealed. Mr. Powers and Mr. Therrien intervened in the appeal, submitted a brief arguing that their actions did not violate RPC 1.7 and 1.8, and conceded they would be bound by the result of the contract action appeal. Appendix ¶ 10; *see* Brief of Intervenors No. 287411-III at 4 ("Powers and Therrien [have] a powerful and very personal interest in the outcome of this appeal.").

In a published decision, Division Three held that the attorneys had violated both RPC 1.7 and RPC 1.8, which prohibits most business arrangements between attorney and client. Appendix ¶¶ 19-22, 35-42. The appellate court held that although rescission of the agreement was not an appropriate remedy for violation of RPC 1.7, because an innocent client might be penalized for an attorney's misconduct under the rule's prohibition of concurrent representation, rescission was the appropriate remedy for the attorneys' violation of RPC 1.8, which prohibits most business arrangements with clients. Appendix ¶¶ 23-33, 35-42.

In June 2011, while the appeal in the contract action was pending, the trial court dismissed this malpractice action on summary judgment, holding as a matter of law that TCG and the Fairs could not recover as consequential damages the fees and costs incurred in defending the contract action that their attorneys had caused LKO to bring against them, both because LKO was not a "stranger" to the initial business venture, and because Mr. Fair had been partially responsible for the contract action when he proposed a different ownership interest than originally agreed with Mr. Powers. (CP 937-37) TCG and the Fairs appealed. The briefing schedule was stayed pending resolution of the appeal in the underlying action.

IV. ARGUMENT

"The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct." *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 848, 28 P.3d 802 (2001), *rev. denied,* 145 Wn.2d 1025 (2002) (*quoting Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000)). Courts routinely award malpractice plaintiffs as damages attorney fees and costs incurred in separate litigation that were proximately caused by the defendant attorney's malpractice. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §§ 21.06, 21.10 at 34-35 (2012) ("A client may incur attorneys' fees and litigation expenses in attempting to avoid, minimize or reduce the damage caused by attorneys' wrongful conduct. Those may be the only damages.") (listing cases); *see also Restatement (Third) of The Law Governing Lawyers* § 53 comment f (2000) ("The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct."). Whether an attorney's conduct caused his client's damages is generally a question of fact. *See Brust v. Newton*, 70 Wn. App. 286, 293, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010 (1994) (*citing* Mallen § 27.10) ("courts agree that the determination of the extent of the injury is for the trier of fact").

In this case, the Fairs and TCG seek as damages the hundreds of thousands of dollars in attorney fees and costs they incurred in defending against the lawsuit that their attorneys Powers and Therrien caused LKO, the family corporation the lawyers managed, to commence against their clients the Fairs and

TCG. A plaintiff may "recover damages for reasonable expenses incurred in a prior litigation against a third party when that action was a natural and proximate consequence of the defendant's wrongful act or omission." *George v. Farmers Ins. Co. of Washington*, 106 Wn. App. 430, 445, 23 P.3d 552 (2001); *Wells v. Aetna Ins. Co.,* 60 Wn.2d 880, 882, 376 P.2d 644 (1962) ("when the natural and proximate consequences of a wrongful act by defendant involve plaintiff in litigation with others, there may, as a general rule, be a recovery of damages for the reasonable expenses incurred in the litigation, including compensation for attorney's fees."). Damages recovered under this rule are distinct from attorney fees awarded as costs for the present litigation. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC,* 139 Wn. App. 743, 759-60, 162 P.3d 1153 (2007) ("such attorney fees are considered to be damages rather than costs").

Three elements are needed in order to create a right to attorney fees as damages: "(1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the original wrongful act or omission of A towards B." *Thomas v. Gaertner*, 56 Wn. App. 635, 638, 784 P.2d 575 (1990) (internal quotations omitted). Whether this rule authorizes attorney fees is a legal question this court reviews de novo. *See Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).

Historically, the ability to obtain damages under this "ABC rule" has depended upon the third element – the characterization of the connection between the wrongful conduct and the entity with whom the injured party is exposed to litigation. *Armstrong Construction Co. v. Thomson*, 64 Wn.2d 191, 196, 390 P.2d 976 ("The fulcrum upon which the rule balances, then, is whether the action, for which attorney's fees are claimed as consequential damages, is brought or defended by third persons-that is, persons not privy to the contract, agreement or events through which the litigation arises.") And historically, this element has been narrowly defined, because the courts recognize that the attorney's malpractice generally pre-dates the litigation between the client and a third party.

For instance, this court recognized that attorney fees were a proper element of damages for legal malpractice when an attorney failed to retain the seller's perfected security interest in a business's assets in *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996). When the buyer defaulted, the seller became involved in litigation over the resulting unsecured bankruptcy claim. This court rejected the attorney's argument that the buyer was "connected" with the attorney's wrongful act or omission toward the client, holding that because the attorney's failure to perfect the security interest pre-dated the litigation caused by the buyer's default, attorney fees incurred in that litigation could be awarded as consequential damages. *Flint,* 82 Wn. App. at 224. *See also Brock v. Tarrant,* 57 Wn. App. 562, 789 P.2d 112 (seller's wrongful failure to disclose property defect pre-dated purchase agreement that caused buyer to sue agent and seller), *rev. denied,* 115 Wn.2d 1016 (1990); *North Pacific Plywood, Inc. v. Access Road Builders, Inc.,* 29 Wn. App. 228, 628 P.2d 482, *rev. denied,* 96 Wn.2d 1002 (1981) (contractor's fraud pre-dated assignment of contract).

Here too, the defendant attorneys' wrongful acts pre-dated any "connection" with LKO, the family business (and concurrent client) to which the attorneys purported to "gift" the debt collection business venture they had entered into with their clients Mr. Fair and TCG. In breach of the standard of care, the attorneys agreed to go into business with their clients Mr. Fair and TCG, while simultaneously (and without disclosure) representing their family business LKO – all before the dispute that gave rise to the contract litigation. Appendix ¶¶ 22, 35-42. The attorneys' undisclosed decision to pass the TCG business opportunity on to LKO, which they then caused to sue the Fairs and TCG, was not connected with their breach of their duty to their clients Mr. Fair and TCG.

Further, LKO was not involved in the wrongful act that gave rise to this litigation. Instead, that wrongful act was the antecedent failure of the defendant attorneys to meet the standard of care for transactions involving clients. *Tradewell v. Mavis*, 71 Wn. App. 120, 857 P.2d 1053 (1993), on which the trial court relied in dismissing this action, is therefore easily distinguishable. *Tradewell* rejected an award of attorney fees as damages when *both parties* to the underlying lawsuit had signed an agreement that was the basis for the suit. 71 Wn. App. at 128. Here, TCG and LKO had not signed an agreement that *because of* the attorneys' breach of duty. *See also Stevens v. Security Pacific Mortg. Corp.*, 53 Wn. App. 507, 523-24, 768 P.2d 1007 (lender not entitled to fees when its own conduct was a breach of contract with the third party), *rev. denied*, 112 Wn.2d 1023 (1989); *Western Community Bank v. Helmer*, 48 Wn. App. 694, 699-701, 740 P.2d 359 (1987) (mortgage obligor not entitled to fees from individual she claimed had agreed to pay her loan with a third party).

Jain v. J.P. Morgan Sec., Inc., 142 Wn. App. 574, 177 P.3d 117 (2008), *cert. denied,* 129 S.Ct. 1584 (2009) is also distinguishable. In *Jain*, federal security laws prohibited the Jains from pursuing indemnity claims against their brokerage and law firms for violations of federal securities law, and the Jains "were not blameless in the transactions giving rise to their liability." 142 Wn. App. at 587. Unlike the Jains, who participated in the wrongful conduct (violation of securities law) that caused them to be sued, as a matter of law and policy the defendant attorneys here bear the responsibility when going into business with a client without necessary safeguards.

At a minimum, and contrary to the trial court's reasoning, whether Mr. Fair's April 2007 conduct in seeking to formalize the business arrangement after the attorneys' failure to do so for over two years contributed to the litigation was a question for the fact-finder in *this* action. Whether a defendant's conduct caused a plaintiff to incur attorney fees is a question of causation no different than whether a defendant caused any other type of damages. *Jacob's Meadow*, 139 Wn. App. at 760 ("As an element of damages, the measure of the recovery of attorney fees . . . must be determined by the trier of fact. When trial is to a jury, therefore, the measure of such damages is a jury question."); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 326, 111 P.3d 866 (2005) (genuine issue of fact existed whether attorney's malpractice in negligently drafting loan and license documents caused plaintiff's damages, including "attorney fees and arbitration costs" incurred in the underlying dispute), *rev. denied*, 156 Wn.2d 1008 (2006).

The trial court's reasoning, premised on an absolute prohibition on the recovery of attorney fees caused by an attorney's wrongful conduct whenever the plaintiff's own conduct "contributed" in any way to the ensuing litigation, conflicts with the principles of comparative fault governing all tort actions, including those for attorney malpractice. Under RCW 4.22.005, a plaintiff's comparative fault serves only to reduce recoverable damages, not to prohibit an award altogether. Particularly in cases of concurrent representation, or where an attorney has entered into an improper business arrangement with a client, rigid application of the ABC rule would wrongly eliminate recovery of attorney fees as consequential damages for malpractice, because the other litigant will never be a "stranger" and wholly unconnected to the lawyer's wrongful act.

Interpreting the rule to prohibit an award of fees as consequential damages as a matter of law in this case, as the trial court did here, improperly resurrects a malpractice plaintiff's contributory negligence as an absolute bar to recovery. To the contrary, "[s]ince 1974, a plaintiff's contributory negligence has not barred recovery in Washington." *Smith v. Fourre*, 71 Wn. App. 304, 310, 858 P.2d 276 (1993) (*citing* RCW 4.22.005 and former RCW 4.22.010). *See Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 552, 55 P.3d 619 (2002) (contributory negligence was not a bar to title company's negligent misrepresentation claim against attorneys who furnished erroneous tax opinion; instead, on remand jury could "reduce [the title company]'s award proportionally upon a finding that the company was to some degree negligent in causing or increasing its own damages").

Courts outside Washington do not bar a client from recovering attorney fees and costs as consequential damages for an attorney's malpractice arising from concurrent representation. *See, e.g., Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 907 P.2d 506, 517 (Ct. App. 1995) (fees incurred in correcting conflict in representing both hotel developer and general contractor were proper element of compensatory damages), *cert.*

denied, 517 U.S. 1234 (1996); *Nilson-Newey & Co. v. Ballou,* 839 F.2d 1171, 1177 (6th Cir. 1988) (affirming damage award for fees incurred by land purchaser to clear title where attorney concurrently represented land purchaser and party who facilitated land purchase); *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.,* 79 Ohio App. 3d 786, 607 N.E.2d 1173, 1180 (1992) (affirming jury verdict that included additional attorney fees caused by attorney's conflict in representing both wife and husband in dissolution), *cert. denied,* 605 N.E.2d 1259 (1993); *see also Collier v. Manring,* 309 S.W.3d 848, 853 (Mo. Ct. App. 2010) (reversing trial court's dismissal of malpractice claim for lack of recoverable damages because plaintiff could recover attorney fees "in a different cause of action, involving a different party, caused by a breach of duty by the defendant"). Neither should this court. As it did in *Flint,* this court should reject artificial application of the ABC rule to eliminate as an element of consequential damages the attorney fees incurred by a client because of his lawyer's malpractice.

As this court concluded in the underlying contract lawsuit, the wrongful conduct of the attorneys included not only concurrent representation of clients with differing interests, but going into business with an existing client without necessary safeguards.

Appendix ¶¶ 35-42. The *only* reason the Fairs and TCG were sued by LKO was because the defendant attorneys purported to pass their "business opportunity" with Mr. Fair off to LKO, a family corporation they created and managed for their children's benefit that the Fairs and TCG did not know existed until their attorneys Mr. Powers and Mr. Thierren caused the corporation to sue them. Appendix ¶¶ 6, 22. The trial court erred in ruling as a matter of law that appellants were not entitled to attorney fees and costs incurred in defending the contract action.

V. CONCLUSION

This court should reverse the trial court's order dismissing this malpractice action and remand for trial on the damages proximately caused by defendant's breach of their duties to their clients TCG and Fair.

Dated this 27th day of November, 2012.

LACY KANE, P.S.	SMITH GOODFRIEND, P.S.
By: Catherine Smith for	By: Catherine Smith
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Attorneys for Appellants

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 November 27, 2012, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of November, 2012.

V. Isaksen

Victoria K. Isaksen

168 Wash.App. 862
Court of Appeals of Washington,
Division 3.

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 their marital community composed thereof, Respondents and Cross–Appellants,
Leslie Alan Powers and Patricia Powers, husband and wife, and Keith Therrien and Marsha Therrien, husband and wife, Intervenors.

No. 29741–1–III. | June 19, 2012.

Synopsis

Background: Manager of trusts for the children of law firm's principles brought action against law firm's clients, from whom manager had purchased an interest in a debt collection business, for a judicial declaration of the ownership rights of the parties, breach of fiduciary duty, and breach of contract. Clients brought action against attorneys for legal malpractice and breach of the Consumer Protection Act. Actions were consolidated. The Superior Court, Chelan County, Ted W. Small, Jr., J., entered partial summary judgment in favor of clients and, following trial as to damages, entered judgment for approximately $78,400. Attorneys appealed and clients cross-appealed.

Holdings: The Court of Appeals, Sweeney, J., held that:

[1] attorneys had a duty to disclose their personal interest in manager, legal duties as principals of manager, and professional duties as attorney for manager;

[2] Rule of Professional Conduct governing conflicts of interest did not provide the basis for rescission of agreement; but,

[3] Rule of Professional Conduct that prohibited attorneys from entering into business transactions with clients unless certain conditions were met provided a basis to rescind purchase agreement.

Affirmed.

West Headnotes (11)

[1] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
Court of Appeals reviews a trial court's order granting summary judgment de novo and engages in the same inquiry as the trial court.

[2] **Appeal and Error**
Judgment
30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In general
Court of Appeals considers facts and reasonable inferences in the light most favorable to the party who is not moving for summary judgment. CR 56(c).

[3] **Appeal and Error**
Cases Triable in Appellate Court
30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general
Court of Appeals reviews de novo whether an attorney's conduct violates the Washington Rules of Professional Conduct. RPC 1.1 et seq.

[4] **Attorney and Client**
Miscellaneous particular acts or omissions

Attorney and Client
Dealings Between Attorney and Client

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(7) Miscellaneous particular acts or omissions
45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

Attorneys who represented a debt collection client in an unrelated matter and then represented a manager of trusts for attorneys' children in a purchase of an interest in the debt collection business had a conflict of interest that resulted in application of attorneys' duty under the Rules of Professional Conduct to disclose their personal interest in manager, legal duties as principals of manager, and professional duties as attorney for manager. RPC 1.7 comment.

[5] **Attorney and Client**
Skill and care required

Attorney and Client
Acts and omissions of attorney in general

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 Skill and care required
45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 Acts and omissions of attorney in general

The Rules of Professional Conduct are not intended to serve as a basis for civil liability, nor do they establish the appropriate standard of care in a civil action. RPC 1.1 et seq.

[6] **Attorney and Client**
Grounds for Discipline

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 In general

The Rules of Professional Conduct simply establish the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. RPC 1.1 et seq.

[7] **Attorney and Client**
Dealings Between Attorney and Client

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

Rule of Professional Conduct governing conflicts of interest did not provide the basis for rescission of agreement for manager of trusts for the children of attorneys to purchase interest in debt collection business of attorneys' client; application of rescission could easily fall on an innocent client. RPC 1.7.

[8] **Attorney and Client**
Dealings Between Attorney and Client

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

An attorney-client transaction is prima facie fraudulent. RPC 1.8.

[9] **Attorney and Client**
Dealings Between Attorney and Client

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there was no undue influence. RPC 1.8.

[10] **Attorney and Client**
Dealings Between Attorney and Client

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

The lawyer who enters into a business transaction with a client or acquires an interest adverse to a client must show that he or she gave the client the same information or advice as a disinterested lawyer would have given and that the client would have received no greater benefit had he or she dealt with a stranger. RPC 1.8.

[11] **Attorney and Client**
Dealings Between Attorney and Client

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) In general

Attorneys who represented a debt collection client in an unrelated matter and then represented a manager of trusts for attorneys' children in a purchase of an interest in the debt collection business violated Rule of Professional Conduct that prohibited attorneys from entering into business transactions with clients unless certain conditions were met, where attorneys had interest in transaction as parents, their spouses headed corporate members that controlled manager, and at least one attorney was officer of manager as well as acting as manager's attorney, and, thus, Rule provided a basis to rescind the agreement. RPC 1.8.

Attorneys and Law Firms

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Sidney Charlotte Tribe, Talmadge/Fitzpatrick, Tukwila, WA, for Intervenors.

Opinion

SWEENEY, J.

***863** ¶ 1 Rules of professional conduct have been used to prohibit lawyers from enforcing agreements with clients that lawyers were a party to. But those same rules have not been applied to support actions for legal malpractice or for equitable relief or damages based on a lawyer's ethical lapses. Here, the court refused to enforce a business agreement between two limited liability companies (LLCs) after concluding that the lawyer representing the parties represented both sides at the same time and therefore violated Rule of Professional Conduct (RPC) 1.7 (prohibiting lawyers from representing clients if there is a conflict of interest). We conclude that the remedy of rescission cannot ***864** be based on a violation of RPC 1.7. We, however, also conclude based on the court's findings that the interests of the lawyer and one of the LLCs were sufficiently aligned to warrant rescission of the agreement based on a violation of RPC 1.8 (prohibiting lawyers from entering into business agreements with their clients). We therefore affirm the superior court's judgment ordering rescission.

FACTS

Background

¶ 2 Leslie Powers and Keith Therrien practiced law as Powers & Therrien, P.S. in ****450** Yakima, Washington. Together they formed LK Operating, LLC (LKO) in December 2003. LKO managed irrevocable trusts for the benefit of Mr. Powers' and Mr. Therrien's adult children. Each of the five adult children of Mr. Powers and Mr. Therrien is the sole trustee and the beneficiary of a separate trust. Each trust is the sole shareholder of a corporation and the five corporations are the sole members of LKO. Powers & Therrien Enterprises Inc. manages LKO. Mr. Powers and Mr. Therrien are the officers of that management corporation.

¶ 3 Brian Fair was a client of Powers & Therrien, P.S. in 2004. That same year, Mr. Fair and his wife formed The Collection Group LLC (TCG) to engage in the business of debt collection. Powers & Therrien, P.S. had no role in the formation of TCG. TCG is managed by Mr. Fair. Mr. Fair asked Mr. Powers whether he or Mr. Therrien would be interested in his new business venture. Mr. Fair proposed an equal investment of funds and ownership. Mr. Fair proposed that he would contribute administrative and management services and that Mr. Powers and Mr. Therrien would contribute legal services. Mr. Fair outlined his joint venture proposal in an October 2004 e-mail regarding the purchase of debt from Unifund, a debt vendor:

Les, Keith,

...

***865** Attached is a sample purchase agreement from Unifund, the company selling the debt, and the attachment for when they sell FUSA debt (aka First USA). I have not had a chance to review it, but I will do so tonight.

Regarding an agreement between myself and you two, this is how I would like to see it:

A. We will split the purchase price and other out of pocket costs, including legal services that your firm cannot provide.

B. You will contribute legal services you can provide (review the purchase agreement contract, legal doc for this JV [joint venture] (if needed), demand letter, ask smart questions, kick the tires, etc.)

C. My contribution will include no charge for finding this debt, negotiations with debtor and debt seller (unless you prefer to do this), and keeping you informed.

Clerk's Papers (CP) at 216.

¶ 4 Mr. Powers later reviewed the attached Unifund purchase agreement and returned it to Mr. Fair marked up with extensive suggested changes. Mr. Powers did not respond to Mr. Fair's inquiry about an agreement. Mr. Fair continued to negotiate with Unifund; TCG was eventually named as the prospective purchaser of the debt. Mr. Fair sent an e-mail to Mr. Powers in January 2005 asking whether he was still interested in the deal with Unifund. Mr. Powers did not respond. Mr. Fair then caused TCG to invest in the Unifund debt portfolio with $7,969.23 of its own money. Mr. Fair began work to collect the debt that TCG had purchased.

¶ 5 Mr. Fair exchanged e-mails with Powers & Therrien, P.S. that discussed the legal services required to collect the debt. The law firm drafted legal documents for TCG and TCG made progress collecting the accounts in the Unifund portfolio. In early February 2005, Mr. Powers apparently indicated in a telephone conversation with Mr. Fair that LKO, the company owned by the adult children, was interested ***866** in making the proposed investment. Mr. Fair sent a fax to Mr. Powers' legal assistant asking her to arrange for a check for $3,984.61 (one-half the cost of the Unifund portfolio) made out to "The Collection Group, LLC." CP at 1153. Mr. Fair again sent the fax to the firm's bookkeeper several days later after he did not receive the funds.

¶ 6 TCG received a check in the amount requested on February 21, 2005. The check was signed by Michelle Briggs, whom Mr. Fair knew to be an employee of Powers & Therrien, P.S. The check was a "counter check" with the name "LK Operating LLC" handwritten in the upper left-hand corner. CP at 197, 441. Mr. Fair did not know the identity of LKO but assumed it was an account owned by Les and Keith (LK) of Powers & Therrien, P.S. Mr. Fair faxed an accounting to Powers & Therrien, P.S. that stated: "Les, this gives you guys 1/2 ownership ****451** in the company. You can formalize however you wish." CP at 311. Neither Mr. Powers nor Mr. Therrien formalized any agreement.

¶ 7 Mr. Fair continued to expand the business and when an opportunity to purchase additional debt portfolios arose, he contacted Powers and Therrien, P.S. for additional funds. They responded and sent three additional checks: one on March 3, 2005, for $13,015.39; one on December 23, 2005, for $10,000; and one on September 11, 2006, for $25,000. Each check was a "LK Operating LLC" counter check. Mr. Powers and Mr. Therrien still had not proposed any formal agreement to spell out the relationship among the parties.

¶ 8 Mr. Fair asked Mr. Powers to draft an operating agreement for a new entity, OPM I, LLC (OPM), in early 2007. OPM was a limited liability company formed by TCG and Mr. Fair to collect delinquent debt in states other than Washington. TCG was a member of OPM, and TCG and Mr. Fair were its managers. The OPM operating agreement drafted by Mr. Powers included a waiver of "legal conflict": "Members of Counsel's family have an interest in the Manager and through it the Company [OPM]." CP at 1478–79. Mr. Fair signed the OPM operating agreement personally and as TCG's manager.

***867** ¶ 9 Mr. Fair again requested that Mr. Powers and Mr. Therrien formalize their ownership interest in TCG in April 2007. This time Mr. Fair proposed that Mr. Powers and Mr. Therrien would own a 38 percent interest, that Mr. Fair's mother would own a 7 percent interest, and that he and his wife would own a 55 percent interest. The percentages were based on both the financial and service related contributions of the parties. Mr. Fair estimated that the value of TCG had grown to approximately $1.5 million. Mr. Powers and Mr. Therrien rejected the proposal and insisted that they were entitled to a 50 percent ownership interest in TCG.

Procedural History

¶ 10 Mr. Powers and Mr. Therrien caused LKO to sue TCG and Mr. Fair for a judicial declaration of the ownership rights of the parties, for breach of fiduciary duty, and for breach of contract. The Fairs responded by suing Mr. Powers and Mr. Therrien personally for legal malpractice and breach of the Consumer Protection Act, chapter 19.86 RCW. Both matters were consolidated. TCG and the Fairs moved for partial summary judgment against LKO on the ground that RPC 1.8 prohibits business dealings between an attorney and his client unless the client gives informed consent. LKO also moved for summary judgment against the Fairs on the ground that Mr. Fair was not a client of Powers & Therrien, P.S. at the time of the disputed transaction, and neither Mr. Powers, Mr. Therrien, nor Powers & Therrien, P.S. had any ownership or financial interest in LKO.

¶ 11 The court ruled in a memorandum decision that Mr. Fair personally was at all times a client of Powers & Therrien, P.S. The court ruled that any attempted purchase of an interest in TCG by Mr. Powers and Mr. Therrien personally or through Powers & Therrien, P.S. would be against public policy and void because it violated RPC 1.8. The court, however, also concluded that a question of fact remained about whom Mr. Fair actually entered into the agreement with, Powers & Therrien, P.S. or LKO.

***868** ¶ 12 The court went on to conclude, sua sponte, that Mr. Powers and Mr. Therrien had a conflict of interest under RPC 1.7 (concurrent conflict of interest). This was because Powers & Therrien, P.S. represented LKO, and LKO was a potential purchaser of an ownership interest in TCG, and neither entity consented to the representation. The court denied LKO's motion for summary judgment, partially granted TCG's motion for summary judgment, and requested additional briefing on whether rescission was an appropriate remedy for a violation of RPC 1.7.

¶ 13 LKO and Mr. Powers and Mr. Therrien each moved to reconsider. The court granted LKO's motion in part by ruling that a question of fact remained as to whether Mr. Therrien had violated RPC 1.7, but denied the balance of the motions. Mr. Fair later stipulated at a discovery hearing that ****452** the contract at issue was not a sale of personal equity, but was a direct transaction with TCG. He stipulated that he acted as an agent for TCG, and not personally. LKO then again requested that the court reverse the previous ruling on the ground that the stipulations effectively meant the contract at issue was solely between LKO and TCG, not with Mr. Fair personally, and therefore there could not be the basis for a RPC 1.8 violation by Powers & Therrien, P.S. LKO also again argued that a question of fact remained as to whether there was an attorney-client relationship between TCG and Powers & Therrien, P.S. at the time they contracted with LKO. The court rejected those arguments in a second memorandum decision:

> Now, based upon the parties' stipulation, the issue has become whether the violation of RPC 1.7 by Les Powers voids any agreement between LK Operating, LLC and The Collection Group, LLC? Mr. Powers and Mr. Therrien controlled the operation of LK Operating, LLC through their ownership of Powers & Therrien Enterprises, Inc., the manager of LK Operating, LLC. As an owner of Powers & Therrien Enterprises, Inc., Mr. Powers had a fiduciary duty to LK Operating, LLC at all times material hereto.
>
> ***869** 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.
>
> There is clearly a question of fact as to when Powers & Therrien, P.S. began to represent The Collection Group, LLC. However, at the time their client, the owner of a new collection business, first approached them about joining him as partners in this business, they had a duty *inter alia* to disclose their personal interest (as parents), legal duties (as manager) and professional duties (as attorneys) that they had to LK Operating, LLC pursuant to RPC 1.7.
>
> They also owed professional duties to Brian Fair, their existing client, the individual who represented to them that he was the sole owner of the collection business. They owed these professional duties to Brian Fair regardless of the fact that he approached them as an agent of The Collection Group, LLC because he was still their client and he owned The Collection Group, LLC. His ownership interest in The Collection Group, LLC would be affected by the addition of any investors. Consequently, any representation of LK Operating, LLC by Mr. Powers would be adverse to the interests of Brian Fair, even if the

transaction was going to be between LK Operating, LLC and The Collection Group, LLC, Mr. Fair's company.

It is not necessary to determine when Mr. Powers began representing The Collection Group, LLC in order to conclude RPC 1.7 was violated by Mr. Powers as a matter of law. He represented LK Operating, LLC. He 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. He represented Brian Fair, who had significant personal interest in any transaction between LK Operating, LLC and The Collection Group, LLC.

As a result, Mr. Powers had a concurrent conflict of interest as a matter of law. Because he failed to disclose his relationships to LK Operating, LLC to Brian Fair and he failed to obtain written informed consent from Brian Fair and LK Operating, LLC, he violated RPC 1.7 as a matter of law.

***870** CP at 2371–72. The court acknowledged the absence of controlling authority in Washington on whether a violation of RPC 1.7 made the transaction voidable but cited the New Mexico case of *C.B. & T. Co. v. Hefner* [1] in support of its ultimate conclusion that it did. The court also dismissed the question of whether Mr. Powers violated RFC 1.8 as moot.

¶ 14 The court bifurcated the malpractice action from the contract action in preparation for trial limited to the appropriate amount of ****453** damages that should follow from the rescission. Following trial, the court entered judgment in favor of LKO for the principal amount of all sums which LKO invested with TCG plus interest, $78,431.61. The court entered findings of fact and conclusions of law. LKO appeals and TCG and Mr. Fair cross-appeal. In June 2011, the court summarily dismissed Mr. Fair's malpractice action on the basis that there were no cognizable damages from Mr. Powers' violation of RPC 1.7.

DISCUSSION

VIOLATION OF RPC 1.7 AND REMEDY OF RESCISSION

¶ 15 LKO contends that the court's conclusion that Mr. Powers represented either LKO or Mr. Fair in this investment agreement is wrong. LKO admits that Mr. Fair personally was a client of Powers & Therrien, P.S., but contends that when Mr. Fair presented the investment proposal to Mr. Powers he was acting as the managing agent for TCG. LKO contends that Mr. Fair never acted in his personal capacity. LKO argues that it, not Mr. Powers, invested in TCG. LKO argues that is precisely why the trial court could not, and did not, rule that Mr. Powers violated any RPC 1.7 obligation owed to TCG, only to Mr. Fair. But, again, LKO contends that because Mr. Fair was not personally a party to the investment agreement and also did not ask for personal representation, there can be no finding ***871** that Mr. Powers violated any RPC 1.7 obligation owed to Mr. Fair.

¶ 16 LKO contends that the court's use of RPC 1.7 to impose civil legal obligations was wrong because the RPCs are ethical rules, not intended to be used to impose civil liability. LKO argues that RPC 1.7 was the only basis for approving rescission here since the court refused to find fraud or misrepresentation, breach of fiduciary duties, or breach of contract. LKO contends it is a nonlawyer and therefore owed no ethical duties and should not have been subject to this civil sanction based on violation of a RPC.

¶ 17 TCG responds that Powers & Therrien, P.S. represented LKO at the time of the investment proposal and worked on LKO's behalf to make it a member of TCG. TCG contends that Powers & Therrien, P.S. also represented Mr. Fair. TCG argues that it is irrelevant whether a lawyer's two clients are both involved in the same transaction for purposes of a RPC 1.7 violation. RPC 1.7 bars a lawyer from representing a client in a negotiation with someone who is a client of the lawyer in an unrelated matter. TCG argues that the investment opportunity was offered directly to Mr. Powers and Mr. Therrien, and that Mr. Fair did not even know who LKO was. Indeed, Mr. Fair assumed that because the initials were "LK," it was Les's and Keith's company. So, TCG urges that the court was correct in holding that Powers & Therrien, P.S. simply could not ethically represent LKO in a negotiation when Mr. Fair was still a client. And TCG says that the court's remedy, rescission, is proper. *See C.B. & T. Co. v. Hefner,* 98 N.M. 594, 651 P.2d 1029 (1982).

[1] [2] [3] ¶ 18 We review a trial court's order granting summary judgment de novo and engage in the same inquiry as the trial court. *Hubbard v. Spokane County,* 146 Wash.2d 699, 706–07, 50 P.3d 602 (2002) (quoting *Ellis v. City of Seattle,* 142 Wash.2d 450, 458, 13 P.3d 1065 (2000)). Summary judgment is appropriate when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***872** CR 56(c). We consider facts and reasonable inferences in the light most favorable to the nonmoving party. *Hubbard,* 146 Wash.2d at 707, 50 P.3d 602. And we review de novo whether an attorney's conduct violates the Washington Rules of Professional Conduct. *See Gustafson v. City of Seattle,* 87 Wash.App. 298, 302, 941 P.2d 701 (1997).

CONFLICT OF INTEREST (RPC 1.7)

¶ 19 A lawyer shall not represent a client if the representation of that client may be directly adverse to another client or materially limited by the lawyer's responsibilities to another client, third person, or by the lawyer's own interests unless the lawyer reasonably believes that the representation will not be adversely affected, and the client consents in **454 writing after consultation and a full disclosure of material facts. RPC 1.7(a), (b). Direct conflicts can even arise in transactional matters involving the representation of multiple clients in unrelated matters. RPC 1.7 cmt. 7 ("For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.").

¶ 20 LKO does not dispute that Mr. Powers represented Mr. Fair prior to the formation of TCG in an unrelated matter. And this record supports that this attorney-client relationship had not ended at the time of the agreement that is the center of the dispute. LKO also does not dispute that Mr. Powers represented LKO, his children's company. Mr. Powers managed LKO through a separate corporation. Mr. Fair solicited investments from Mr. Powers and Mr. Therrien, not LKO. The initial proposal is set out in an e-mail with an attached sample purchase agreement from a debt vendor. Mr. Powers marked up that sample agreement with suggestions and returned it to Mr. Fair. Mr. Powers performed those legal services for Mr. Fair, not LKO. Mr. *873 Powers later created legal documents for Mr. Fair and his new company, TCG. We are led then to conclude, as the trial judge did, that Mr. Powers simultaneously represented both Mr. Fair and LKO.

[4] ¶ 21 LKO contends, nonetheless, that such simultaneous representation still does not give rise to a RPC 1.7 violation because the representations occurred in unrelated matters and not the transaction at issue. We disagree. There is a conflict of interest even when a lawyer represents a client in another unrelated matter and then represents a second client in a business transaction with the current client. RPC 1.7 cmt. 7. And that is what we have here.

¶ 22 Mr. Powers represented both Mr. Fair and LKO in separate unrelated matters and then represented LKO in the business transaction with Mr. Fair by relaying the investment proposal and forwarding the funds. Mr. Powers had a duty to disclose his personal interest in LKO, his legal duties as manager of LKO, and his professional duties as an attorney for LKO. The representation of Mr. Fair was directly adverse to the representation of LKO in the transaction and there is no evidence that either client gave informed consent in writing. Mr. Powers violated RPC 1.7.

RPC AS BASIS FOR RESCISSION

¶ 23 LKO next contends that, even if Mr. Powers violated RPC 1.7, LKO's agreement with TCG should not be subject to rescission.

[5] [6] ¶ 24 The Supreme Court adopted the RPCs pursuant to its power to regulate the practice of law in Washington. *Hizey v. Carpenter,* 119 Wash.2d 251, 261, 830 P.2d 646 (1992). The RPCs are not intended to serve as a basis for civil liability, nor do they establish the appropriate standard of care in a civil action. *Id.* at 259–61, 830 P.2d 646. The RPCs simply establish the " 'minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.' " *Id.* at 261, 830 P.2d 646 (quoting former RPC Preliminary Statement (1985)). But agreements that violate RPCs or, at least, *874 RPC 1.8, have been held to be contrary to public policy and the courts of this state have refused to enforce agreements based on a violation of RPC 1.8. *In re Corp. Dissolution of Ocean Shores Park, Inc.,* 132 Wash.App. 903, 910, 134 P.3d 1188 (2006); *Danzig v. Danzig,* 79 Wash.App. 612, 616–17, 904 P.2d 312 (1995); *Marshall v. Higginson,* 62 Wash.App. 212, 217–18, 813 P.2d 1275 (1991). Here LKO sued for a judicial declaration of its understanding of the agreement with Mr. Fair and TCG.

¶ 25 In *Hizey,* clients sued their attorney and alleged legal malpractice based on the lawyer's conflict of interest. *Hizey,* 119 Wash.2d at 256–57, 830 P.2d 646. The trial judge refused to let an expert testify on rules of professional conduct and refused to instruct the jury on those rules. *Id.* at 257–58, 830 P.2d 646. The Supreme Court affirmed. The court held that a violation of ethics rules must be pursued through a disciplinary proceeding. *Id.* at 259, 830 P.2d 646. And the court held that such violations may not serve **455 as the basis for a private cause of action. Id. at 259, 261, 830 P.2d 646. The court reasoned that a claim for legal malpractice focuses on the duty of care owed to the client, which is established by the relationship and not by the RPCs. *Id.* at 260–62, 830 P.2d 646.

¶ 26 The *Hizey* decision, however, addressed application of the RPCs only in the legal malpractice setting. The court did not answer whether the court would also separate the ethics and potential civil liability in other suits, such as fee disgorgement, breach of contract, or disqualification motions. Indeed, the court noted that other courts had "relied on the CPR [Code of Professional Responsibility] and RPC for reasons other than to find malpractice liability and our holding today does not alter or affect such use." *Hizey,* 119 Wash.2d at 264, 830 P.2d 646 (citing *Singleton v. Frost,* 108 Wash.2d 723, 742 P.2d 1224 (1987) (relying on disciplinary rule to determine reasonableness of attorney fees); *Eriks v. Denver,* 118 Wash.2d 451, 824 P.2d 1207 (1992) (holding violation of CPR is a question of law, not fact); *Walsh v. Brousseau,* 62 Wash.App. 739, 815 P.2d 828 (1991) (holding contract for sale of law ***875** practice, which included duty on part of selling attorney to refer clients as consideration for the sale, violated RPC)). At least one legal scholar has suggested that the court did not need to be so cautious, as many of the other cases are distinguishable. Stephen E. Kalish, *How to Encourage Lawyers To Be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions,* 13 GEO. J. LEGAL ETHICS 649, 672 (2000) ("None of the cases that [the court] cites suggests that a judge in his instructions or an expert in his opinion may explicitly refer to ethics law.").

¶ 27 The courts of this state have applied RPC 1.8 (restricting business transactions with a client) to refuse to enforce fee agreements with attorneys as being against public policy. *See Valley/50th Ave., LLC v. Stewart,* 159 Wash.2d 736, 743, 153 P.3d 186 (2007); *Ocean Shores Park,* 132 Wash.App. 903, 134 P.3d 1188; *Holmes v. Loveless,* 122 Wash.App. 470, 475, 94 P.3d 338 (2004); *Cotton v. Kronenberg,* 111 Wash.App. 258, 270–71, 44 P.3d 878 (2002). The application of the RPC and result in these cases was not however categorical. The lawyer could show that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts before the court would hold any agreement void or voidable. *Valley/50th Ave.,* 159 Wash.2d at 743–44, 153 P.3d 186.

¶ 28 The issue in *Valley/50th Avenue* was the enforceability of a promissory note and fee agreement a client executed in favor of a law firm to secure a fee and cost bill owed by another client. 159 Wash.2d at 740–41, 153 P.3d 186. The court concluded that "the note and deed of trust was more like a business transaction than a fee agreement, [so] the issue then is whether [the law firm] satisfied the minimum notice, disclosure, and reasonable opportunity to seek the advice of independent counsel." *Id.* at 745, 153 P.3d 186. The court ultimately concluded that there were material issues of fact as to whether the law firm discharged its duty under RPC 1.8 and remanded for further proceedings. *Valley/50th Ave.,* 159 Wash.2d at 747, 153 P.3d 186.

¶ 29 Here, the court concluded that Mr. Powers had violated RPC 1.7 and based on the New Mexico case, ***876** *C.B. & T. Co.,* it held that the agreement between LKO and TCG was voidable.

[7] ¶ 30 We conclude, however, that RPC 1.7 cannot provide the basis for rescission. RPC 1.8, which has provided the legal basis for rescission, is different in its wording and its effect from RPC 1.7. A lawyer violates RPC 1.8 when the lawyer enters into a business transaction with his or her client without the minimum notice, disclosure, and without giving the client the opportunity to seek the advice of independent counsel. We will then generally refuse efforts by the lawyer to enforce those agreements. *Valley/50th Ave.,* 159 Wash.2d at 743, 153 P.3d 186; *Ocean Shores Park,* 132 Wash.App. at 912–13, 134 P.3d 1188.

¶ 31 What we have with RPC 1.7 is a rule to regulate the attorney-client relationship and ensure that an attorney's representation is not materially limited by conflicting interests. *In re Disciplinary Proceeding Against Marshall,* 160 Wash.2d 317, 336, 157 P.3d 859 (2007) ("The rule assumes that multiple representation ****456** will necessarily require consultation and consent in writing, reasonably so since the rule imposes these requirements anytime there is a *potential* conflict."). The differences are important.

¶ 32 The problem with applying RPC 1.7 here is that the remedy, rescission, could easily fall on an innocent client. And it is not the client who should pay for the sins of its lawyer. Even if the lawyer breached his or her fiduciary duties, it is the lawyer who should suffer the consequences not the client. It is not the client(s) who did anything wrong; it is the lawyer by representing clients on both sides. The appropriate remedy is to file a disciplinary action with the Washington State Bar Association.

¶ 33 In sum, we agree Mr. Powers violated RPC 1.7. But that violation cannot be grounds to rescind any investment agreement between LKO and TCG.

*877 CROSS–APPEAL

¶ 34 TCG cross-appeals and urges that we affirm the court's decision to rescind the contract based on a violation of RPC 1.8 since we may affirm on any ground argued at the trial court. TCG argues essentially that there was sufficient evidence of a de facto contract between Mr. Powers and TCG and Mr. Fair, a contract sufficient to invoke the strictures of RPC 1.8. Mr. Powers again responds that the agreement was between LKO and TCG, not LKO and Mr. Powers and so he did not enter into this business relationship with a client. LKO responds that it accepted the investment offer and it provided the investment funds. Mr. Powers also urges that the court's conclusions show that there was not the commonality of interest between Powers & Therrien, P.S. and LKO that TCG and Mr. Fair suggest. CP at 2307 (Conclusion of Law F) ("LKO is not the 'alter ego' of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence.").

BUSINESS TRANSACTION WITH CLIENT (RPC 1.8)

¶ 35 TCG became a client of Powers & Therrien, P.S. in February 2005, when the firm drafted legal pleadings for TCG to use to collect debt. Accordingly, TCG argues that the resulting agreement between Mr. Powers and TCG is voidable as a violation of public policy pursuant to RPC 1.8.

[8] [9] [10] ¶ 36 RPC 1.8 sets out rigorous requirements a lawyer must meet before he enters into a business transaction with a current client or knowingly acquires an ownership, or possessory, security, or other pecuniary interest adverse to a client. RPC 1.8. " '[A]n attorney-client transaction is prima facie fraudulent.' " *Valley/50th Ave.,* 159 Wash.2d at 745, 153 P.3d 186 (quoting *In re Disciplinary Proceedings Against Johnson,* 118 Wash.2d 693, 704, 826 P.2d 186 (1992)). The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there ***878** was no undue influence. The lawyer must show that he or she gave the client the same information or advice as a disinterested lawyer would have given. And the lawyer must show that client would have received no greater benefit had he or she dealt with a stranger. *In re Disciplinary Proceeding Against Haley,* 157 Wash.2d 398, 406, 138 P.3d 1044 (2006) (quoting *In re Disciplinary Proceeding Against McMullen,* 127 Wash.2d 150, 164, 896 P.2d 1281 (1995)).

¶ 37 It is undisputed that Powers & Therrien, P.S. represented Mr. Fair, the manager of TCG, in 2004 on a separate matter. After Mr. Fair formed TCG in 2004, Powers & Therrien, P.S. drafted legal documents for TCG to facilitate collecting the debt TCG had purchased. The documents included promissory notes, mutual releases, and a summons and complaint. Powers & Therrien, P.S. then represented TCG and performed legal services on TCG's behalf.

¶ 38 The matter proceeded to a bench trial after the court ordered rescission of the contract and the court entered findings and conclusions following that bench trial that are helpful here.

FINDINGS OF FACT

13. On or about October 27, 2004, an email was sent from Brian Fair to the Powers & Therrien, P.S. email account ****457** addressed to "Les, Keith" setting forth Brian Fair's proposal.

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19. The proposed terms were accepted by Les Powers when the money was sent to TCG.

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30. Professional legal services sought by TCG as part of the Proposal were provided by Powers & Therrien, P.S.

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41. Powers caused the issuance of the LKO check to TCG in February 2005.

*879 *CONCLUSIONS OF LAW*

F. LKO is not the "alter ego" of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence.

....

H. Les Powers was both a principal in the law firm of Powers & Therrien, P.S., and an officer of LKO's manager, PTE.

....

J. The terms of the Proposal by Fair as agent for TCG were accepted by Les Powers.

K. Ultimately, Les Powers, pursuant to his agreement with Brian Fair, as agent for TCG, chose to enter into the Investment Agreement with TCG.

L. Les Powers made sure at all times that performance of the terms of the Proposal, including investing $52,000 from LKO to TCG, and Powers & Therrien, P.S. providing legal services to TCG was accomplished. The court makes no ruling regarding whether LKO was involved in the unauthorized practice of law.

M. Les Powers accepted the business offer by having LKO provide the sum of $17,000 to TCG, which occurred beginning February 21, 2005.

CP at 2303–08.

¶ 39 Mr. Fair and TCG were clients of Powers & Therrien, P.S.; the attorneys provided legal services for them. And, the October 2004 e-mail from Mr. Fair was an offer to Mr. Powers and Mr. Therrien to invest in TCG and provide legal services as part of the deal. Mr. Powers and Mr. Therrien were the only persons who could accept the specific investment offer from Mr. Fair because the offer was a bilateral offer to them. *Dorsey v. Strand,* 21 Wash.2d 217, 224, 150 P.2d 702 (1944) ("[W]hen an offer is made, it can be accepted only by the offeree."). The trial court concluded that LKO is not the "alter ego" of Mr. Powers or Mr. Therrien. But Mr. Powers is both a principal in the law firm of Powers & Therrien, P.S., and a controlling officer of LKO's manager, ***880** Powers & Therrien Enterprises, Inc. There is no finding that Mr. Powers acted in any other capacity than a lawyer when he accepted the deal and forwarded the funds. In fact, TCG contends that the court specifically struck such agency language from the findings because it was unsupported. Br. of Resp'ts to Br. of Intervenors at 8–9.

¶ 40 Mr. Powers and Mr. Therrien organized LKO as part of their estate planning for their adult children. It is controlled by five corporate members headed by the spouses of Mr. Powers and Mr. Therrien and the shareholders of those corporate members are trusts for their children. Mr. Powers then had a significant personal and financial interest in LKO as a parent, as an owner/officer of its manager, and as its attorney. The court concluded that he alone chose to enter into the business deal with Mr. Fair. CP at 2308 (Conclusions of Law J, K, L) Those conclusions are supported by the fact that Mr. Powers personally received the offer and he forwarded the funds from his law office. Mr, Powers may not have been the "alter ego" of LKO but that is not dispositive. He accepted the offer to invest in TCG in his capacity as an attorney and then caused LKO to contribute the funds. He had a substantial interest in the success of LKO—it was his family.

¶ 41 Mr. Powers and Mr. Therrien contend that a business transaction between a lawyer and a client must confer some benefit to the attorney or client. See *Valley/50th Ave.,* 159 Wash.2d at 747, 153 P.3d 186; *In re Disciplinary Proceeding Against Miller,* 149 Wash.2d 262, 66 P.3d 1069 (2003); *In re Disciplinary Proceeding Against Holcomb,* 162 Wash.2d 563, 173 P.3d 898 (2007); ****458** *Holmes,* 122 Wash.App. at 475, 94 P.3d 338. Neither the cases cited nor RPC 1.8 seems to require that an actual benefit be conferred. In *Holmes,* an attorney's ownership stake in a client's joint venture actually declined and the court still found that the accompanying fee agreement fell within the scope of the business transaction rule. 122 Wash.App. at 475, 94 P.3d 338. Regardless, there is evidence in this record that Mr. Powers stood to benefit from LKO's success in many ways. Again, it was his family.

[11] ***881** ¶ 42 We are led to conclude that Mr. Powers entered into a business transaction with a client (TCG) in violation of RPC 1.8. *See Valley/50th Ave.,* 159 Wash.2d at 745, 153 P.3d 186 (quoting *Johnson,* 118 Wash.2d at 704, 826 P.2d 186) (" '[A]n attorney-client transaction is prima facie fraudulent.' "). The fact that the trial court ruled LKO was entitled to the return of the $52,000 investment does not necessarily mean it was the contracting party. Mr. Powers entered into the transaction and then used funds from his children's company, a company he also controlled. We then conclude that RPC 1.8 provides an alternative basis to rescind the agreement because it was against public policy. *Ocean Shores Park,* 132 Wash.App. at 912–13, 134 P.3d 1188 (business deal between attorney and client void as against public policy).

¶ 43 We affirm the superior court's judgment ordering recession.

WE CONCUR: KULIK, J., and SIDDOWAY, A.C.J.

Parallel Citations

279 P.3d 448

Footnotes

1 98 N.M. 594, 651 P.2d 1029 (1982).

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287 P.3d 628 (Mem)
Court of Appeals of Washington,
Division 3.

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 their marital community composed thereof, Respondents and Cross–Appellants,
Leslie Alan Powers and Patricia Powers, husband and wife, and Keith Therrien and Marsha Therrien, husband and wife, Intervenors.

No. 29741–1–III. | Oct. 11, 2012.

PANEL: Judges SWEENEY, KULIK, and SIDDOWAY.

Opinion

ORDER GRANTING LK OPERATING'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

¶ 1 The court has considered LK Operating's motion for reconsideration, Powers' and Therrien's motion for reconsideration, and the answer filed by the Collection Group. The court is of the opinion that LK Operating's motion should be granted and the opinion should be amended. Therefore

¶ 2 IT IS ORDERED that LK Operating's motion for reconsideration is granted and the opinion shall be amended as follows:

¶ 3 The first full sentence at the top of page 10 that begins, "The court also dismissed" shall be deleted and the following shall be substituted in its place:

> The trial court's decision on the motion for reconsideration stated that it was "no longer necessary to rule on whether RPC 1.8 was violated." CP at 2373.

¶ 4 The following footnote shall be added at the end of the first full paragraph on page 21 that ends "are helpful here":

> In motions for reconsideration, LK Operating and Powers and Therrien argue that in the evaluation of RPC 1.8 as a basis for decision, we should not review these findings and conclusions but should limit ourselves to the summary judgment record, viewed in the light most favorable to them. While TCG always relied on the trial court's findings following trial as the basis for its cross appeal, the appellant and intervenors raise this objection for the first time in their motions for reconsideration.
>
> The trial court was not required to reach the RPC 1.8 issue in ruling on summary judgment but it did not dismiss TCG's and Mr. Fair's claim based on that ethical rule. (The statement to the contrary in our original opinion was mistaken.) And while the trial focused on LK Operating's right to recover rescissory damages, TCG persisted in contending that both ethical rules had been violated, *see, e.g.,* CP at 2121, just as LK Operating continued to contend that TCG had not established an ethical ***629** breach by the lawyers. *See, e.g.,* RP at 384 ("[T]hey're trying to, from the other side, turn an innocent party's investment into, You don't get any money back, because we think ... some other third party ... did something wrong."). In any event, a judge may reverse or modify a summary judgment ruling at any time prior to the entry of final judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.,* 123 Wash.2d 15, 37, 864 P.2d 921 (1993). The court's findings following trial are the appropriate focus of our review. *See Johnson v. Rothstein,* 52 Wash.App. 303, 306, 759 P.2d 471 (1988) (rulings made at the time summary judgment was denied affecting the final judgment " 'can be reviewed at that time in light of the full record' ") (quoting *Evans v. Jensen,* 103 Idaho 937, 942, 655 P.2d 454 (1982)).

FOR THE COURT:

/s/ Kevin M. Korsmo
KEVIN M. KORSMO

CHIEF JUDGE

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