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No. 69220-8-1

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION ONE

BRIAN WAID, a non-party,

Appellant,

v.

THE FERGUSON FIRM PLLC,

Respondent.

APPEAL FROM THE KING COUNTY SUPERIOR COURT
AT SEATTLE

The Honorable Mariane Spearman, Judge

BRIEF OF RESPONDENT

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I. INTRODUCTION

Sandra Ferguson, a Seattle employment law attorney, successfully litigated a case against an Underlying Defendant. The case resulted in a settlement which included \$530,107.58 in attorney's fees, to be divided between Ms. Ferguson and another attorney, Teller. Teller agreed that Ms. Ferguson was entitled to half of the funds (\$265,053.79). He contended he was entitled to the other half. Due to her extensive work on the Underlying Matter, Ms. Ferguson sought a larger proportion of the funds, based on *quantum meruit*. Due to the apportionment dispute, the entire sum was deposited in the Court Registry.

Appellant Waid, an attorney, was retained to represent Ms. Ferguson regarding the fee dispute. After losing the case he filed on

the matter, Waid withdrew from representing Ms. Ferguson, on one day's notice. He then attempted to file a "lien" for "fees" which he claimed to be \$78,350.85.

The Superior Court invalidated Waid's "lien" and ordered disbursement of the funds to The Ferguson Firm. Waid's tardy motion for a stay, filed 19 days *after* the funds were disbursed, was denied as moot. Waid filed notices of appeal.

A. The Motion to Dismiss Waid's Appeal.

The Superior Court's thoughtful and well-reasoned interlocutory orders regarding Waid are not appealable as a matter of right. RAP 2.2(a). Accordingly, Respondent Ferguson Firm timely filed a motion in this Court to dismiss Waid's appeal. Our motion to dismiss was denied by the Commissioner without prejudice to renew it in the briefs on the merits. We do so here.

B. The Orders Should be Affirmed Because the Disbursement of Funds and Order II Denying Waid's Stay Motion Are Not Challenged on Appeal.

The Superior Court directed the Clerk to disburse the funds to the Ferguson Firm after the Court invalidated Waid's "lien". *Order I*, CP 415-417. Waid failed to seek a stay of the disbursement order until long after the funds had been disbursed. Moreover, Waid fails in this appeal to assign error to the denial of his stay motion. As a result, the order and the disbursement of the funds to the Ferguson Firm stand. The appeal is moot.

C. The "Lien" Was Not Valid Under RCW 60.40.010(1)(d).

The Superior Court properly found, based on the undisputed documentary evidence, that "[t]he funds were earned by Teller and Ferguson well before Mr. Waid was retained." CP 416-417. The Court also found that Ms. Ferguson did not receive any proceeds due to any services performed by Waid. CP 416. The Superior Court's findings are supported by substantial--indeed undisputed--evidence

and should be affirmed. Without proceeds, Waid's "lien" is not authorized by subsection (d) of the statute.

D. The "Lien" Was Not Valid Under RCW 60.40.010(1)(e).

The Superior Court also properly found, based on the undisputed documentary evidence, that "[t]he funds currently in dispute were not obtained by a 'judgment' on behalf of Ferguson against Teller. RCW 60.40.010(1)(e)." The "lien" was not authorized under subsection (e) of the statute, which requires a judgment as a predicate.

E. Waid's Request that this Court Sit as a Trial Court in Order to "Resolve the Amount of Waid's Lien" Must Be Rejected.

The Ferguson Firm contends that Waid owes it money. Waid takes the opposite, meritless position. Waid wants this Court to sit as a trial court and "resolve the amount of Waid's lien". Appellant's Brief, p. 23. Once again, Waid has no order to appeal from. The

Superior Court did not address this issue and neither should this Court. Jurisdiction is lacking.

II. STATEMENT OF THE CASE

(1) In August, 2009, Sandra Ferguson began representing four women who would eventually become the named plaintiffs (“SEBS”) in the Underlying Matter which gave rise to the fee dispute between Teller and The Ferguson Firm. CP 116.

(2) In February, 2010, Ms. Ferguson filed a lawsuit on behalf of the SEBS group. The case was filed in the wake of a settlement achieved by Ms. Ferguson in December, 2009, on behalf of a co-worker against the same Underlying Defendant. CP 116.

(3) In November, 2010, Teller agreed to finance the three experts who would be needed to litigate the SEBS case to trial or achieve the clients’ settlement goals. CP 116. He was associated on the case as co-counsel based upon this promise. CP 116-117.

(4) On April 28, 2011, The Ferguson Firm and the Teller

firm reached a settlement agreement in the Underlying SEBS matter. *Order Granting the Ferguson Firm's Motion to Set Aside Waid Attorney's Lien, and Ordering Disbursement of Funds ("Order P")*, CP 416; CP 118.

(5) The attorneys' fees portion of the settlement funds (\$530,107.58) was deposited into the Court Registry. *Order I*, CP 416; CP 118.

(6) On May 4, 2011, Ms. Ferguson retained Brian Waid for representation in the fee dispute with Teller. *Order I*, CP 416; CP118. Although Teller agreed that The Ferguson Firm was entitled to half of the attorney's' fees (\$265,053.79), Waid failed to obtain a disbursement of Ms. Ferguson's funds to her, or a judgment in her favor, at any time during his representation of her in the Teller-Ferguson lawsuit. CP 118, 121, 122-124; *Order I*, CP 416-417. This failure harmed Ms. Ferguson. CP123-124.

(7) On May 27, 2011, Ms. Ferguson filed a Complaint seeking a Declaratory Judgment that there was no enforceable

contract with Teller, and arguing that the Court should divide the fees based on a theory of *quantum meruit*, 90% to Ms. Ferguson and 10% to Teller. *Order I*, CP 416. Teller argued the existence of an express contract to divide the fees 50:50. *Ibid.* On January 30, 2012, the Superior Court entered an order which rejected Ferguson's argument and found the existence of a 50:50 contract. *Ibid.*; CP 19-25. This order is on appeal in this Court. *Ibid.*

(8) On February 13, 2012, Waid withdrew as Ms. Ferguson's attorney. *Order I*, CP 416. This was done on one day's notice. CP 123.

(9) The following day Waid filed what he styled as a "lien" for his attorney's fees in the amount of \$78,350.85. *Order I*, CP 416; CP 123.

(10) Ms. Ferguson moved to set aside the "lien" on the grounds that the lien was invalid under RCW 60.40.010(1)(c), (d), and (e). *Order I*, CP 416; CP 106-114.(i)

(i) The Waid "lien" purported to rely on RCW 60.40.010(1) (c) and (d).

(11) The Superior Court granted the motion. The Court invalidated the lien and ordered the Clerk of Court to disburse the \$78,350.85 in the Registry to the Ferguson Firm, together with interest accrued on that amount. *Order I*, CP 415-418.

(12) In its order, the Superior Court made the following findings, all of which are based on substantial and/or undisputed evidence:

(a) The funds are currently in the Court's registry, not in the "hands of an adverse party." RCW 60.40.010(1)(c) does not apply. *Order I*, CP 416.

(b) "The \$530,107.58 in attorneys' fees do not represent 'proceeds' received by Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW 60.40.010(1)(d). *The funds were earned by Teller and Ferguson well before Mr. Waid was retained.*" *Order I*, CP 416-417

CP 132. In later filings, Waid seems to have abandoned subsection (c) and now pushes for subsection (e).

(emphasis added); CP 123-124.

(c) “The funds that are currently in dispute were not obtained by a ‘judgment’ on behalf of Ferguson against Teller. RCW 60.40.010(1)(e); *Wilson v. Henkle*, 45 Wn.App 162, 170, 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson was entitled to half of the attorneys’ fees that were generated in the Underlying Matter. Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.” *Order I*, CP 417.

(13) Pursuant to the trial court’s order, the Clerk disbursed the funds to the Ferguson Firm, on or about August 3, 2012. CP 393; *Order Denying Waid Motion to Stay Disbursement of Funds in the Court Registry Pending Appeal* (“Order II”), CP 411.

(14) On August 22, 2012, 19 days after the disbursement of the funds, Waid filed a motion to stay disbursement of funds from the Court Registry pending appeal. CP 345.

(15) The Superior Court properly found that Waid’s motion was moot. *Order II*, CP 411. The stay motion was denied. *Ibid*.

(16) As noted above, Waid did not assign error to the denial of his stay motion. As a result, the order denying the stay as moot (*Order II*) and the disbursement of the funds to the Ferguson Firm stand.

III. MOTION TO DISMISS WAID'S APPEAL

A. *Identity of Moving Party*

Respondent, The Ferguson Firm, PLLC, asks for the relief designated in Part B.

B. *Statement of Relief Sought*

An order dismissing the “appeals” of attorney Brian Waid because (a) he has no RAP 2.2 order to appeal from; (b) the second “appeal” he filed is from the denial of a motion that was moot—as the Superior Court ruled in its order; and (c) Waid was not and is not a party to the underlying action (ii) with which he

(ii) *The Ferguson Firm, PLLC, v. Teller and Associates*, King County No.

is trying to involve himself in this Court.

C. Facts Relevant to Motion

The facts warranting dismissal of this appeal are set forth in (1) the Superior Court's *Order Granting the Ferguson Firm's Motion to Set Aside Waid "Attorney's Lien", and Ordering Disbursement of Funds*, ("Order I") (iii), and (2) the Superior Court's *Order Denying Motion to Stay Disbursement of Funds in the Court Registry Pending Appeal*, ("Order II") (iv), and (3) the facts set forth in Section II herein, the *Statement of the Case*.

As described in *Order I*, Mr. Waid filed a lawsuit on behalf of The Ferguson Firm, lost a ruling, and then withdrew as Ms. Ferguson's lawyer, leaving her unrepresented. One day later, Waid filed what he styled as an "attorney's lien" in the

11-2-19221-1 SEA, Court of Appeals No. 68329-2-I.

(iii) For the Court's convenience, a copy of *Order I* is attached hereto as Appendix A and by this reference incorporated herein.

(iv) For the Court's convenience, a copy of *Order II*, CP 410-412, is attached hereto as Appendix B and by this reference incorporated herein.

amount of \$78,350.85. See *Order I*, CP 416.

The Superior Court granted The Ferguson Firm's Motion to Set Aside the Waid "Attorney's Lien" and ordered the Clerk to disburse the \$78,350.85 to the Ferguson Firm. *Order I*, CP 416-417. The Clerk promptly complied, on August 3, 2012. *Order II*, CP 411 (v).

On August 22, 2012, Waid filed a motion to stay disbursement of the already-disbursed funds. CP 345. The Superior Court denied the motion because it is moot. *Order II*, CP 411, ¶ (3). Waid then filed an "amended notice of appeal" referring to both *Order I* and *Order II*. CP 413-421.

We timely moved to dismiss the appeal. The Commissioner denied the motion without prejudice to renew it in the briefs on the merits. *Notation Ruling*, October 1, 2012. We renew the motion here.

(v) Waid did not file his appeal notice from *Order I* until August 9, 2012.

D. Grounds for Relief and Argument

1. Order I is not an appealable order under RAP 2.2(a).

The only methods for seeking review of decisions of the superior court by the Court of Appeals are by appeal (review as a matter of right) and “discretionary review” (review by permission of the reviewing court). RAP 2.1(a). Waid seeks review as a matter of right. Dismissal of the appeal is warranted. *Order I* is interlocutory. It is not appealable as of right under RAP 2.2(a).

RAP 2.2(a) defines the decisions of the Superior Court which may be appealed as of right by a non-governmental party.

The Superior Court’s *Order I*, setting aside the “attorney’s lien” and for disbursement of funds, does not fall within RAP 2.2(a).

There are three reasons why *Order I* is not appealable as of right.

(1) First, RAP 2.2(a)(1) requires a “final judgment”.

Here, as the Superior Court found, there is no “judgment” here,

much less a “final judgment”. (vi). *Order I*, CP 417.

(2) Second, RAP 2.2 (a)(3), captioned “*Decision Determining Action*” requires a written decision “that in effect *determines the action and prevents a final judgment or discontinues the action.*” (Emphasis added). Here, the action was between The Ferguson Firm and the Teller Firm. The Superior Court’s decision, *Order I*, did not “determine” the *Ferguson v. Teller* action. It did not “prevent a final judgment” or “discontinue” the *Ferguson v. Teller* lawsuit.

The Ferguson Firm contends that Waid owes it money. That issue has not been tried or adjudicated in any court. Waid claims that The Ferguson Firm owes him money. That issue has

(vi) As the Superior Court noted, the funds currently in dispute in that Court were not obtained by a “judgment” on behalf of Ms. Ferguson against Teller. *Order I*, CP 417. The funds were earned by Ms. Ferguson “well before Mr. Waid was retained.” *Order I*, CP 416-417. Any dispute between Waid and The Ferguson Law Firm over whether Waid owes The Ferguson Firm money, or *vice versa*, would need to be addressed by a Superior Court in a separate proceeding.

likewise not been tried or adjudicated in any court. All the Superior Court *Order I* did was to correctly conclude that what Waid styled as a “lien” did not fit under the attorney’s lien statute.(vii). *Order I* does not preclude Waid from litigating whether The Ferguson Firm owes him money or vice versa in a future proceeding in Superior Court. *Order I* is not a final order—instead, it is procedural.

Waid is not a party to the *Ferguson v. Teller* lawsuit. There is no “action” pertaining to him. The Superior Court did not prevent Waid from filing a lawsuit in which he and the Ferguson firm can litigate their claims against each other. The Court’s order invalidating the “lien” did not “determine” any claim by Waid or the Ferguson Firm. The order did not “prevent a final judgment” by anyone, including Waid. It did not “discontinue” any action between Waid and the Ferguson Firm because there is none pending.

(vii) *Order I*, CP 416-417.

The order invalidating the “lien” did not order Waid to do anything. The Superior Court did not order him to pay anything. The Court did not order him to refrain from doing anything. The Court’s interlocutory order, Order I, is not appealable under RAP 2.2(a)(3).

(3) Third, none of the other provisions of RAP 2.2(a) apply either. Waid cannot appeal *Order I* as of right.

2. Order II is not an appealable order under RAP 2.2.

In *Order II*, the Superior Court determined that Waid’s motion to stay disbursement of funds—funds which had already been disbursed by the Clerk pursuant to the Court’s *Order I*--is moot. *Order II*, CP 411, ¶3. The Court’s order denying the stay motion as moot does not fall within RAP 2.2(a). Waid has no appeal as of right from *Order II*.

Our motion to dismiss Waid’s appeal should be granted.

**IV. THE ORDERS SHOULD BE AFFIRMED BECAUSE
WAID DOES NOT CHALLENGE THE DISBURSEMENT ON
APPEAL.**

The Superior Court directed the Clerk to disburse the funds to the Ferguson Firm after the Court invalidated Waid's "lien". *Order I*, CP 415-417. Waid failed to seek a stay of the disbursement order *until 19 days after the funds had been disbursed. Order II*, CP411; CP 345.

RAP 8.1(b) provides in pertinent part: "A trial court decision *may be enforced* pending review *unless stayed* pursuant to the provisions of this rule." (Emphasis added). Here, the trial court's disbursement decision was properly enforced. Waid did not obtain (or even timely seek) a stay as required by RAP 8.1(b).

Moreover, Waid fails in this appeal to assign error to the denial of his stay motion. See Appellant's Amended Brief, pp. 2-3. As a result, the order and the disbursement of the funds to the

Ferguson Firm stand. *Clark County v. W. Wash. Growth Mgmt. Hearings Review Bd.*, --Wash.2d--, --P.3d--(March 21, 2013), Slip Opinion, p. 2, 8-9 (prohibiting review of separate and distinct claims not raised on appeal); *State v. Sims*, 171 Wash.2d 436, 441-42, 256 P.3d 285 (2011) (“[A]n appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief”); *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wash.2d 68, 92, 838 P.2d 111 (1992) (issue not raised in assignments of error not considered on appeal). The principle of *res judicata* applies. See *Johnson v. Johnson*, 53 Wash.2d 107, 113-14, 330 P.2d 1075 (1958), cited in *Clark County, supra*, Slip Opinion, p. 9. Accordingly, Waid’s appeal is moot. It should be dismissed. (viii).

(viii) If Waid wants to try to take money from Sandra Ferguson, he can file a separate lawsuit in a trial court. That is the proper forum to litigate the claims of the Ferguson Firm against Waid, and vice versa. The instant case is not the place.

V. THE SUPERIOR COURT'S ORDER I, INVALIDATING THE WAID LIEN UNDER RCW 60.40.010, SHOULD BE AFFIRMED.

A. *The Statutory Scheme*

“[A]n attorney’s lien, as a statutory creation, is in derogation of the common law and must be strictly construed.” *Suleiman v. Cantino*, 33 Wn.App. 602, 606-607, 656 P.2d 1122 (1983) (attorney may not assert a lien in one action for services provided in a prior action), (*citing Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982) (attorney lien statute does not extend to real property belonging to the client)).

The statute provides in pertinent part as follows:

RCW 60.40.010---Lien created---Enforcement--
-Definition---Exception. An attorney has a lien
for his or her compensation, whether specially
agreed upon or implied, as hereinafter provided:

- (a) Upon the *papers of the client*, which have come into attorney’s possession in the court of his or her professional employment;
- (b) Upon the *money in the attorney’s hands* belonging to the client;

(c) *Upon money in the hands of an adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;*

(d) *Upon an action...and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and*

(e) *Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing the notice of such lien or claim with the clerk of the court in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.*

(2)...

(3)...

(4)...

(5) For the purposes of this section, “proceeds” means any monetary sum *received in the action*. . . .

[Emphasis added]

The Waid “lien” purports to rely on RCW 60.40.010(1)(c)

and (d).(ix). On appeal, Waid relies on subsections (d) and (e).

None of these provisions authorize the “lien”.

B. The “Lien” Was Not Authorized by RCW

60.40.010(1)(d).

The Superior Court properly found that Ms. Ferguson did not receive any proceeds due to any services performed by Waid. CP 416. The Court also properly found that “[t]he funds were earned by Teller and Ferguson well before Mr. Waid was retained.” CP 416-417. (Emphasis added).

The Superior Court’s findings are supported by substantial--indeed undisputed--evidence and should be affirmed. See *Humphrey Industries, Ltd., v. Clay Street Associates, LLC*, -- Wash.2d--, 295 P.3d 231, 237 (2013). Since *no proceeds were received* by The Ferguson Firm through Waid’s services in *Teller v.*

(ix) Waid “lien”, Exhibit C to the Ferguson Declaration, CP 132.

Ferguson, Waid's "lien" is not authorized by RCW 60.40.010(1)(d) or RCW 60.40.010(5).

The appellant's claims in his brief regarding subsection (d) are meritless.

(1) First, appellant claims that the "lien" attached "automatically" to the "fee dispute and its proceeds." Appellant's Amended Brief, p. 18. The lien statute, which is to be strictly construed [*Suleiman, supra*, 33 Wash.App, at 606-607], says no such thing. A "lien" does not "automatically attach" to a "fee dispute" under the statute. Appellant's claim ignores the trial court's finding, based on the unchallenged evidence, that the attorneys' fees were earned by Ms. Ferguson well before Waid was retained, and that those fees were *not proceeds*. CP 416-417. There were no "proceeds. . . received in the action" (the *Ferguson v. Teller* lawsuit) as required by the statute's provisions: RCW 60.40.010(1)(d) and RCW 60.40.010 (5).

(2) Appellant next claims that he could have a lien because he was “just attempting to recover fees under a *quantum meruit* theory.” Appellant’s Amended Brief, p. 18. “Attempting to recover fees” is not a statutory basis for a lien under subsection (1)(d).

(3) Appellant next claims that he could have a lien because he was “attempting to *protect Ferguson’s* share of the disputed fees” from Teller. Appellant’s Amended Brief, p. 18 (Emphasis by appellant). “Attempting to protect” one’s share of fees is not a statutory basis for a lien either.

Moreover, appellant’s claim here directly conflicts with the Superior Court’s findings: “Teller, the adverse party, consistently maintained that Ferguson was entitled to half of the attorney’s fees that were generated in the Underlying Matter. Ferguson retained Mr. Waid in her unsuccessful effort to obtain to obtain 90% of the fees.” *Order I*, CP 417. (x).

(x) The bottom line here is that Waid filed a lawsuit against Teller. Waid lost. Then he withdrew on one day’s notice. The attorney’s lien statute does not reward such behavior with a lien against funds Sandra Ferguson earned *before* Waid even got in the picture. See *Order I*, CP 416-417.

The trial court's findings rebut Waid's erroneous claim that he needed to "attempt to protect" The Ferguson Firm's share. They are supported by substantial evidence and should be affirmed.

(4) Appellant next claims that Sandra Ferguson received the funds "at the conclusion of the action against Teller, which resulted from Waid's efforts on Ferguson's behalf." Appellant's Amended Brief, p. 19. These assertions are incorrect. They conflict with both the record and the trial court's findings. As discussed above, Sandra Ferguson earned the funds "well before Mr. Waid was retained." *Order I*, CP 416-417. Although he had months to do so, Waid never prepared or presented any orders to disburse funds to Ms. Ferguson. No funds resulted from Waid's efforts. In fact, nothing resulted from his efforts except defeat. Once he lost the case, Waid abandoned Ms. Ferguson, left her without counsel, (xi), and attempted to slap an unauthorized "lien" on her.

(xi) Undersigned counsel appeared for The Ferguson Firm in March, 2012.

(5) Appellant next advances a legal argument which is in error. Appellant claims that this Court's important, well-reasoned and helpful cases of *Wilson v. Henkle*, 45 Wash.App 162, 724 P. 2d 1069 (1986) and *Suleiman v. Cantino*, 33 Wash.App. 602, 656 P.2d 1122 (1983) are "not controlling" because they were decided under the pre-2004 attorney's lien statute. Appellant's Amended Brief, p. 19. Appellant claims that the 2004 amendments "significantly changed the statute", but fails to reveal what "significant changes" are material to this appeal. *Ibid*.

In truth, the 2004 amendments reenacted all sections of the pre-2004 statute virtually *as is*. (xii). Subsection (1)(d) was added, along with definition of "proceeds" in subsection (5) (requiring proceeds "received in the action"). Neither new section impinges on *Wilson* or *Suleiman*. (xiii).

(xii) Subsections (1), (2), (3) and (4) of the pre-2004 statute were reenacted almost word for word as sections (a), (b), (c) and (e) of the current statute. Laws of 2004, c 73, § 2. The word "her" was added to subsection (1) and subsection (1)(a).

(xiii) The legislature has stated that the purpose of the 2004 amendments is to

(6) Appellant next claims that *Wilson* and *Suleiman* are “factually distinct” because they “both involved a judgment *against* the client, rather than a judgment in the client’s favor.” Appellant’s Amended Brief, p. 20 (emphasis by appellant). This proposed “distinction” has no merit. The trial court’s decision here was also against Waid’s client.

The trial court ruled that defendant Teller had established as a matter of law the existence of an express contract between the parties to divide attorney fees 50/50. *Order on Summary Judgment*, CP 19. The court dismissed Ferguson Firm’s claim for recovery in *quantum meruit*. *Order on Summary Judgment*, CP 23. As in the apposite cases of *Wilson* and *Suleiman*, there was no judgment in The Ferguson Firm’s favor. No “lien” was available to Waid under the statute and these facts.

end double taxation of attorney’s fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. *Smith v. Moran, Windes and Wong, PLLC*, 145 Wash.App. 459, 465, 187 P.3d 275 (2008).

Waid's "lien" was not authorized by RCW 60.40.010(1)(d) and (5). His claims fail.

C. The "Lien" Was Not Authorized by RCW 60.40.010(1) (e).

The Superior Court properly found, based on the undisputed documentary evidence, that "[t]he funds currently in dispute were not obtained by a 'judgment' on behalf of Ferguson against Teller. RCW 60.40.010(e)." Order I, CP 417. This finding should be affirmed.

This Court held in *Wilson* and *Suleiman* that the predecessor statute, RCW 60.40.010(4), authorized a lien against a judgment in the client's favor, but not a judgment against the client in favor of the adverse party. *Wilson*, 45 Wash.App. at 170; *Suleiman*, 33 Wash.App. at 606-607. In *Wilson*, this court stated:

However, no attorney's lien is authorized under RCW 60.40.010(3)[Now RCW 60.40.010(1)(c)] or (4)[Now RCW 60.40.010(1)(e)] where the attorney was unsuccessful in obtaining a judgment for his client against the adverse party. *Suleiman v. Cantino*,

33 Wash.App. 602, 606–07, 656 P.2d 1122 (1983). Here McCormick failed to obtain a successful judgment for his client against the Henkles. The attorney's lien statute is in derogation of the common law and must be strictly construed. *See Ross v. Scannell*, 97 Wash.2d 598, 604–05, 647 P.2d 1004 (1982). In the instant case McCormick had no prior right to the court-held funds based upon an attorney's lien.

Wilson, 45 Wash.App. at 170.

Similarly, this Court stated in *Suleiman*:

RCW 60.40.010(4)[Now RCW 60.40.010(1)(e)] authorizes a lien against a “judgment to the extent of the value of any services performed by [the attorney] in the action” “The action” refers back to the matter in which a “judgment” was entered for the attorney's client, not a judgment against the attorney's client. Cantino did not obtain any judgment against Suleiman which could be subjected to Franklin's lien. *Scannell*. Franklin's lien is not authorized by RCW 60.40.010(3). *See Department of Labor & Indus. v. Dillon*, 28 Wash.App. 853, 859, 626 P.2d 1004 (1981). Nor is it authorized by RCW 60.40.010(4).

Sulieman v. Cantino, 33 Wash.App. at 606-607; *accord*, *In re the Trustee's Sale of the Real Property of Jack Whitmore*, 134 Wash. App. 440, 447 (2006) (attorney could not reach foreclosure surplus

funds with lien because they were not yet in the hands of “the adverse party” for purposes of RCW 60.40.010(1)(c)); *accord, Wilson v. Henkle*, 45 Wash .App 162, 170, 724 P.2d 1069 (1986) (attorney who was unsuccessful in obtaining a successful judgment for his client had no prior right to court-held funds).

The wording of the current statute, subsection (1)(e), appears to be identical to the wording of the predecessor statute, RCW 60.40.010(4), which was in effect when *Wilson* and *Suleiman* were decided. Both cases and the trial court’s findings are persuasive. Waid did not obtain a judgment in his client’s favor. He did not earn a lien under subsection (1)(e).

In the face of this wall of authority, appellant attempts the present the following erroneous claims.

(1) Appellant chose to mischaracterize the trial court’s ruling, claiming it was “too narrow”. Appellant claims the lien statute should be broadly construed. Appellant is incorrect. The lien statute is strictly construed. *Suleiman, supra*.

(2) Appellant erroneously claims the trial court based its decision that no judgment occurred on the fact that Ferguson recovered 50% of the fees instead of 90%. See Appellant's Amended Brief, p. 21.

In fact, the trial judge said no such thing in her ruling. Instead, she found that Teller, the adverse party, had consistently maintained that Ferguson was entitled to half of the attorney's fees. Order I, CP 417. The trial judge found that there was no judgment in favor of The Ferguson Firm obtained by Waid, and certainly none that improved upon the amount that Teller had already agreed that The Ferguson Firm was entitled to.

(3) As discussed above, the trial court dismissed The Ferguson Firm's *quantum meruit* claim. This ruling was in favor of Teller and against The Ferguson Firm's position. The Court found that the fees were earned by Ms. Ferguson well before Waid was retained. Order I, CP 416-417. Contrary to Waid, the Superior

Court correctly found that the fees were *not* obtained by a judgment on behalf of The Ferguson Firm against Teller. *Order I*, CP 417.

(4) Appellant claims that a “technical dictionary” or “technical reference” should be turned to, instead of a general purpose dictionary, to decide what the word “judgment” means. Appellant’s Amended Brief, p. 21. However, even if the Court engaged in “a battle of the dictionaries”, the proffered definitions of the word “judgment” in Appellant’s Amended Brief (see pp 21-22)(xiv) support a ruling in The Ferguson Firm’s favor. Waid is not a party. The Superior Court’s *Orders I* and *II* are procedural, not final. No appeal lies from them. There was no final determination of any entitlement of Waid to any fees.

(5) Contrary to appellant (p. 22 of his amended brief), Waid did not obtain any funds for The Ferguson Firm through his “services”. In fact, even though he had months to do so, Waid failed

(xiv) “final determination of the rights and obligations of a party in a case”, or “final judgment which concludes the action by resolving the plaintiff’s entitlement to the requested relief”.

to withdraw the \$265,000 from the Court Registry (funds generated in the Underlying Matter well before Waid was retained) that Teller agreed belonged to Sandra Ferguson.

What Waid did do is file a case, lose it, and then withdraw on one day's notice. No lien for Waid is available under subsection (1)(e) of the statute. The trial court should be affirmed.

(6) Finally, appellant claims that in the event of reversal, this Court should require the Ferguson Firm to restore the funds which were disbursed by the Clerk from the Registry pursuant to the Superior Court's order. Appellant's Amended Brief, p. 22. Appellant cites RAP 12.8. That rule does not apply here.

The rule is restricted to a case where a party to a lawsuit "voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by an appellate court." The rule authorizes a trial court to issue process "to restore to the party any property taken from that party ...".

Here, the predicates for application of RAP 12.8 are absent. Waid did not pay any of his own funds or property to The Ferguson Firm to satisfy a trial court decision. None of Waid's property was taken from him. The Superior Court did not order Waid to do anything. The court did not order Waid to pay anything to anyone. The trial court's Orders I and II were procedural. As the trial court found, the funds in the Registry were earned by Sandra Ferguson well before Waid was retained. *Order I*, CP 416-417. The Registry funds did not belong to Waid and never did. Waid's citation to RAP 12.8 is frivolous. (xv).

(xv) As discussed herein, Waid failed to seek a stay of the disbursement order until long after the funds had been disbursed. Waid fails in this appeal to assign error to the denial of his stay motion. As a result, the order and the disbursement of the funds to the Ferguson Firm stand. The appeal is moot.

D. Waid's Request that this Court Sit as a Trial Court in Order to "Resolve the Amount of Waid's Lien" Must Be Rejected.

The Ferguson Firm contends that Waid owes it money. Waid takes the opposite, meritless position. Waid wants this Court to sit as a trial court and "resolve the amount of Waid's lien". Appellant's Amended Brief, p. 23. Waid "would require this court to conduct factual inquiries that are beyond the scope of appellate review." *Humphrey Industries v. Clay Street, supra.*, 295 P.3d at 238.

Waid did not file or note a motion to determine and award fees in the trial court. There was no hearing. The Superior Court did not address this issue. Waid has no order to appeal from. Jurisdiction is lacking.

Waid erroneously asserts that the parties had "ample time to prepare for the hearing" and "had ample opportunity to present evidence" pertaining to the amount of the lien. Appellant's Amended Brief, p. 23. These assertions are not true.

When we filed our motion to set aside the Waid “lien”, we noted the motion for July 25th, 2012. CP 134-135. On July 23rd, 2012, *two days before the noting date*, Waid filed his opposition to our motion, which included a request that the trial court order the Clerk to disburse the lien amount to him. CP 152-153. As discussed above, the trial court granted our motion to set aside the “lien”. The court declined to address Waid’s request for money.

The two-day interval between Waid’s request (as opposed to a motion) to disburse the funds to him and the noting date certainly did not give our side either notice or an opportunity to gather and present evidence on the amount of Waid’s lien. That issue was never even noted by Waid on the trial court’s calendar. There was no hearing. His assertions about “ample time to prepare for a hearing” and “ample opportunity to present evidence” (Appellant’s Amended Brief, p. 23) are simply untrue.

We contend that Waid owes Sandra Ferguson money. We also contend that The Ferguson Firm does not owe Waid anything.

A Superior Court trial is needed to resolve this conflict on the merits. (xvi). It is beyond the scope of appellate review for this Court to “resolve the amount of Waid’s lien”. Moreover, Waid’s “request” will become moot when this Court rules in The Ferguson Firm’s favor in this appeal.

VI. CONCLUSION.

(A) For the reasons stated, this Court should grant our motion to dismiss Waid’s appeal. (1) *Order I* is procedural; it is not appealable under RAP 2.2(a). (2) Waid did not assign error to *Order II*; the order is not appealable in any event. That order and the disbursement stand. The appeal is moot.

(B) In the alternative, this Court should affirm the trial court’s rulings in *Order I* that Waid’s “lien” was not authorized by

(xvi) Compare *King County v. Seawest Investment Associates*, 141 Wash.App. 304, 315-316, 170 P.3d 53 (2007), wherein the Superior Court held an evidentiary hearing in a lien dispute. The parties had three months to conduct discovery and prepare. The hearing afforded the parties the opportunity to present evidence, bring counterclaims, and argue their theories of the dispute. Nothing of the sort occurred here.

RCW 60.40.010(1)(c), (1)(d) or (1)(e), setting aside the “lien”, and ordering disbursement of the funds at issue to The Ferguson Firm, PLLC .

DATED this the 31st day of March, 2013.

Respectfully submitted,
MUENSTER & KOENIG

By: S/John R. Muenster
JOHN R. MUENSTER
Attorney at Law
WSBA No. 6237
Of Attorneys for The Ferguson Firm,
Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 1st day of April, 2013, a true and correct copy of the foregoing document was filed with the Clerk of the Court, and served via email and first class mail on opposing counsel.

S/John R. Muenster

John R. Muenster
Muenster & Koenig

*Order Granting the Ferguson Firm's
Motion to Set Aside Waid "Attorney's
Lien", and Ordering Disbursement of
Funds, ("Order I"), CP 415-418*

Appendix A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC.,

Plaintiff,

vs.

TELLER & ASSOCIATES, PLLC.,

Defendant.

NO. 11-2-19221-1 SEA

ORDER GRANTING THE
FERGUSON FIRM'S MOTION TO
SET ASIDE WAID ATTORNEY'S
LIEN, AND ORDERING
DISBURSEMENT OF FUNDS

[CLERK'S ACTION REQUIRED]

This matter came on for hearing without oral argument on The Ferguson Firm,
PLLC's Motion to Set Aside Waid "Attorney's Lien" and For Disbursement of Funds to
The Ferguson Firm, PLLC. Based on the evidence and Pleadings of Record, the Court
finds:

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 296-9490

A-1

1 On behalf of several clients, Plaintiff Ferguson and Defendant Teller reached a
2 settlement agreement in an Underlying Matter on April 28, 2011. Due to a dispute
3 concerning the apportionment of the resulting \$530,107.58 in attorneys' fees between
4 Ferguson and Teller, the entire sum was deposited into the Court's Registry. On May 4,
5 2011, Ms. Ferguson retained Brian Waid to represent her in her fee dispute with Mr.
6 Teller over how to divide the fees. On May 27, 2011, Ms. Ferguson filed a Complaint
7 seeking Declaratory Judgment that there was no enforceable contract with Mr. Teller
8 and arguing that the Court should divide the fees based on a theory of *quantum meruit*.
9 To Ms. Ferguson this meant 90% to her and 10% to Teller. Teller argued the existence
10 of an express contract to divide the fees 50:50. On January 30, 2012, this Court rejected
11 Ferguson's argument, found the existence of a contract and ordered the fees divided
12 50:50. This order is currently on appeal.
13

14
15 On February 13, 2012, Mr. Waid withdrew as Ms. Ferguson's attorney. The
16 following day he filed a lien for his attorney's fees in the amount of \$78,350.85.
17 Ms. Ferguson now seeks to set aside Mr. Waid's lien for attorney's fees on the grounds
18 that the lien is invalid under RCW 60.40.010(c), (d), and (e).
19

20 The funds are currently in the Court's registry, not in the "hands of an adverse
21 party." RCW 60.40.010(c). This subsection does not apply.

22 The \$530,107.58 in attorneys' fees do not represent "proceeds" received by
23 Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW
24 60.40.010(d). The funds were earned by Teller and Ferguson well before Mr. Waid was
25

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 256-9490

1 retained.

2 The funds that are currently in dispute were not obtained by a "judgment" on behalf
3 of Ferguson against Teller. RCW 60.40.010(e). *Wilson v Henkle*, 45 WnApp. 162, 170,
4 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson
5 was entitled to half of the attorneys' fees that were generated in the Underlying Matter.
6 Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.
7

8 THEREFORE, IT IS ORDERED that the Motion to Set Aside Waid "Attorney's
9 Lien" and For Disbursement of Funds to The Ferguson Firm, PLLC. is GRANTED,
10 and;

11 It is further Ordered that the Clerk of Court is authorized and directed to
12 disburse to the Ferguson Firm, the sum of \$78,350.85, held in the Court Registry in this
13 matter, together with all interest accrued on that amount.
14

15 DATED this 30th day of July, 2012.

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JUDGE MARIANE C. SPEARMAN

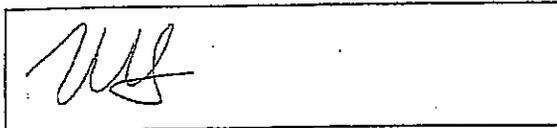
Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 286-9490

King County Superior Court
Judicial Electronic Signature Page

Case Number: 11-2-19221-1
Case Title: FERGUSON FIRM VS TELLER & ASSOCIATES

Document Title: ORDER

Signed by Judge: Mariane Spearman
Date: 7/30/2012 2:32:12 PM



Judge Mariane Spearman

This document is signed in accordance with the provisions in GR 30.
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Certificate effective date: 1/11/2011 8:36:01 AM
Certificate expiry date: 1/10/2013 8:36:01 AM
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington
CA, O=State of Washington PKI, C=US

Page 4 of 4

*Order Denying Motion to Stay
Disbursement of Funds in the Court Registry
Pending Appeal, (“Order II”), CP 410-412*

Appendix B

FILED

12 AUG 30 PM 3:47

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 11-2-19221-1 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC,

Plaintiff,

v.

TELLER & ASSOCIATES, PLLC

Defendant.

NO 11-2-19221-1 SEA

ORDER DENYING MOTION TO
STAY DISBURSEMENT OF
FUNDS IN THE COURT
REGISTRY PENDING APPEAL

THIS MATTER came before the Court on Attorney Brian Waid's Motion to Stay Disbursement of Funds in the Court Registry Pending Appeal. Sub. #160. The plaintiff, The Ferguson Firm, PLLC, was represented by its attorney, John R. Muenster. The defendant, Teller & Associates, PLLC, was represented by its attorney, Kelby Fletcher. Attorney Brian Waid was represented by his attorney, Emmelyn Hart.

This Court has considered the records and files herein, including all papers filed for and against the motion. Being fully advised, the Court finds as follows:

ORDER DENYING WAID MOTION TO
STAY DISBURSEMENT OF FUNDS IN
THE COURT REGISTRY PENDING
APPEAL [PROPOSED] - 1

MUENSTER & KOENIG
JOHN R. MUENSTER, INC., P.S.
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 467-7500
FAX: (206) 855-1027

B-1

1 (1) This Court has previously granted the Motion to Set Aside
2 Waid "Attorney's Lien" and For Disbursement of Funds to The Ferguson Firm.
3 Order, Sub. # 150.
4

5 (2) Pursuant to this Court's Order, the sum of \$78,350.85 was
6 disbursed by the Clerk of the Court to The Ferguson Firm, PLLC, on or about
7 August 3, 2012.
8

9 (3) Attorney Brian Waid's Motion to Stay Disbursement of Funds
10 in the Court Registry Pending Appeal, Sub. #160, filed August 22, 2012, is moot.
11 Accordingly,
12

13
14 IT IS HEREBY ORDERED that Attorney Brian Waid's Motion to
15 Stay Disbursement of Funds in the Court Registry Pending Appeal is DENIED.
16

17 DATED this 30th day of August, 2012.
18

19 _____ e-filed _____
20 Hon. Mariane C. Spearman
21 Judge of the Superior Court

22 Presented by:
23 MUENSTER AND KOENIG

24 By: S/ John R. Muenster
25 John R. Muenster
26 Attorney at Law
27 WSBA No. 6237

28 ORDER DENYING WAID MOTION TO
STAY DISBURSEMENT OF FUNDS IN
THE COURT REGISTRY PENDING
APPEAL [PROPOSED] - 2

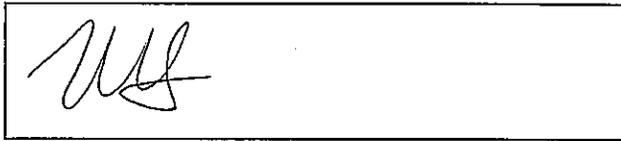
MUENSTER & KOENIG
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 11-2-19221-1
Case Title: FERGUSON FIRM VS TELLER & ASSOCIATES

Document Title: ORDER

Signed by Judge: Mariane Spearman
Date: 8/30/2012 3:47:36 PM



Judge Mariane Spearman

This document is signed in accordance with the provisions in GR 30.

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