

FILED \_\_\_\_\_

AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife,,** )  
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 )  
 *Plaintiffs,* )  
 )  
 )  
 vs. )  
 )  
 )  
 **D.L. WHITE CONST., INC., DAVID L. WHITE** )  
 **and MICHELLE WHITE, husband and wife,** )  
 **and VERNON J. MORTENSEN and MARTI** )  
 **E. MORTENSEN, husband and wife,** )  
 *Defendants.* )  
 )  
 )  
 \_\_\_\_\_ )

Case No. **CV 2002 222**

**MEMORANDUM DECISION AND  
ORDER DENYING DEFENDANT  
VERNON MORTENSEN'S MOTION  
FOR PARTIAL RELEASE OF BOND  
TO SATISFY ATTORNEY FEES LIEN**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND.**

On May 20, 2009, Terri Pickens, counsel for defendant Vernon J. Mortensen, filed a "Motion for Partial Release of Bond to Satisfy Attorney Fees Lien", and a "Second Amended Notice of Attorney Lien" in the amount of \$65,505.47. No brief was filed in support of that motion. That motion contained no rule or statutory basis in support of that motion. On that same date, May 20, 2009, counsel for defendant Vernon J. Mortensen also filed a "Motion to Withdraw as Attorney of Record." Neither motion was noticed up by Vernon J. Mortensen's attorney.

Following the filing of the Remittitur by the Idaho Supreme Court, on June 1, 2009, the Court scheduled a status conference to be held on June 30, 2009. On June 11, 2009,

defendant Marti Mortensen filed a “Memorandum Opposing Motion for Release Bond for Attorney’s Lien.” On June 17, 2009, plaintiffs Akers filed a “Memorandum in Opposition to Motion for Partial Release of Bond to Pay Attorney’s Lien.” On June 22, 2009, counsel for Vernon J. Mortensen filed two briefs, the first, dated June 18, 2009, entitled “Reply in Support of Motion to Release Bond for Attorney Fees Lien” (responding to Marti Mortensen’s opposition), and the second entitled “Response to Akers’ Memorandum in Opposition for Partial Release of Bond to Pay Attorney’s Lien.”

Earlier, on May 4, 2009, Vernon J. Mortensen filed a “Motion to Disqualify” the undersigned pursuant to I.R.C.P. 40(d)(2). No hearing on that motion was noticed by counsel for Vernon J. Mortensen. Because I.R.C.P. 40(d)(2) requires a hearing, and since the mere filing of such a motion divests a court of taking any other action in a case until a motion to disqualify is decided, on May 6, 2009, this Court noticed up oral argument on the motion for May 21, 2009. At the conclusion of oral argument, the Court took the matter under advisement to re-read past decisions of this Court in this case, and to re-read the decisions of the Idaho Supreme Court in this case, all with an eye toward Vernon J. Mortensen’s claims in his motion to disqualify. On June 1, 2009, this Court filed its Order on Defendant Vernon Morentsen’s Motion to Disqualify, and denied said motion and also denied defendant Whites’ joinder in that motion. On June 19, 2009, defendant Vernon J. Mortensen filed his “Motion for Reconsideration of Defendant’s Motion to Disqualify.” In that Motion for Reconsideration of Defendant’s Motion to Disqualify, Vernon J. Mortensen did not request oral argument. Counsel for Vernon J. Mortensen did not notice up for hearing his Motion for Reconsideration of Defendant’s Motion to Disqualify. Because this Court had concerns that a Motion to Reconsider a Motion to Disqualify might pose the same divesting of jurisdiction problems (and might pose the same requirement for a

hearing) that a motion to disqualify poses in the first instance, the Court, *sua sponte*, utilized the time the Court had previously set aside for a status conference on June 30, 2009, to provide time for oral argument by counsel for Vernon J. Mortensen to present oral argument on her client's Motion for Reconsideration of Defendant's Motion to Disqualify. At that hearing, counsel for defendants Whites took no position on the Motion for Reconsideration, and filed no pleading joining or opposing Vernon J. Mortensen's Motion for Reconsideration. Counsel for plaintiffs presented argument opposing the Motion for Reconsideration. At the conclusion of oral argument, this Court denied Vernon J. Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify, but stated on the record a written ruling would detail the reasons for that decision. On June 30, 2009, this Court entered its "Memorandum Decision and Order on Defendant Vernon Mortensen's Motion for Reconsideration of Denial of Defendant Vernon Mortensen's Motion to Disqualify."

Having ruled on Vernon J. Mortensen's Motion for Reconsideration of Defendant's Motion to Disqualify at oral argument on June 30, 2009, that then allowed the Court to hear (due to curing any jurisdictional problem from the motion to reconsider the motion to disqualify) oral argument on defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien, and counsel for defendant Vernon J. Mortensen's Motion to Withdraw as Attorney of Record for defendant Vernon J. Mortensen. At the conclusion of oral argument on both of those motions, both motions were taken under advisement. The Court granted Terri Pickens, presently counsel for Vernon J. Mortensen, seven additional days to submit an affidavit or other evidence showing that either one of her clients at the time (Vernon J. Mortensen and Marti Mortensen), agreed to have Pickens' attorney fees taken from the cash appeal bond. Seven days have passed as of

the date of this opinion, and no submissions have been filed. I.R.C.P. 6(a).

## II. ANALYSIS.

This matter was appealed to the Idaho Supreme Court. At the time it was appealed, this Court had entered judgment in favor of the plaintiffs, the Akers, and against all defendants. In order to appeal, a party against whom judgment has been entered must post a cash deposit or supersedeas bond in the amount of 136% of the judgment amount. I.A.R. 13(b)(15). Terri Pickens, counsel for Vernon J. Mortensen, requests part of the bond posted by her client for the appeal be paid over to her to satisfy her attorney fees lien in the amount of \$65,505.47.

The purpose of the bond was to provide to “Plaintiffs security for payment of the judgment entered against said Defendants in the above entitled matter.” Notice of Posting Cash Bond With Clerk of Court, Reply in Support of Motion to Release Bond for Attorney Fees Lien, Exhibit A. That Notice of Posting Cash Bond With Clerk of Court indicates that both defendants “Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost (now Pickens), of the firm Givens Pursley LLP (now with Pickens Law) have posted a cash bond in the amount of \$317,248.97, with the clerk of the District Court of Kootenai County...”

The applicable statute is Idaho Code § 3-205

ATTORNEYS' FEES -- LIEN. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, *which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come*; and can not be affected by any settlement between the parties before or after judgment.

I.C. § 3-205. (emphasis added). Thus, Pickens has a lien on her client's cause of action,

and that lien attaches to the Idaho Supreme Court's decision, which was entered in her client Vernon J. Mortensen's favor, in part. The next question is, does Pickens lien attach to the cash bond on appeal?

Defendant Marti Mortensen raises the following arguments, none of which are supported by affidavit:

This is a case that started while Jerry Mortensen and Mari Mortensen were still married. They retained Terri Pickens at that time, but Mortensens have since divorced. Ms. Pickens no longer represents Ms. Mortensen and Ms. Mortensen was of the belief that Ms. Pickens' bills were paid current through about 2 years ago.

A cash appeal Bond was posted in this matter by Marti Mortensen on 08/07/2007 (Receipt 756456 Dated 8/7/2007) for \$317,248.97. These funds were supplied by Marti Mortensen, after the effective date of her divorce, and thus are separate property. Appeal was heard in this matter by the Idaho Supreme Court filed 6/10/2008 resulting a remittitur of the case to the District Court.

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In this case the money that Ms. Pickens seeks to attach her lien against, is a bond posted by Marti Mortensen, which is being returned to her after not being levied against on appeal.

The money, then, is not the proceeds of a "verdict, report, decision or judgment" in the sense that Ms. Pickens' efforts did not secure that money for Ms. Mortensen: it was Ms. Mortensen's money in the first place, which was merely posted as surety and returned when no longer needed.

Memorandum Opposing Motion to Release Bond for Attorney's Lien, pp. 2-3. Even though Marti Mortensen's positions are not supported by an affidavit, Vernon J. Mortensen bears the burden of production and persuasion on this issue, since it is his attorney's motion.

Counsel for Vernon J. Mortensen has done nothing to show that it was Vernon J.

Mortensen who posted the cash bond. Instead, Vernon J. Mortensen's attorney argues:

Moreover, it is irrelevant which of the Mortensens actually paid the money for the bond. The bond was posted through counsel for both Vernon and Marti Mortensen on May 11, 2007. (A true and accurate copy of the Notice and Cover Letter is attached hereto as Exhibit "A.") At that time, the Mortensens were being jointly represented and were jointly responsible for all costs and fees incurred in the action. Current counsel for Marti Mortensen did not appear in the above entitled matter until after the first decision on appeal was

rendered. At that time, the attorneys fees lien was initially filed with this Court.

Reply in Support of Motion to Release Bond for Attorney Fees Lien, p. 4.

While the genesis of the cash bond certainly raises issues, the dispositive issue is whether the cash bond does or does not satisfy Idaho Code § 3-205. Pickens clearly has a lien "...upon his [her] client's cause of action or counterclaim,..." but that lien upon Vernon J. Mortensen's cause of action does not attach "...to a *verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come...*" While the Idaho Supreme Court's decision in this case was a "decision" which was in part in Ms. Pickens' client's favor, the cash bond is not in any way the "proceeds" of that decision. Under Idaho Code § 3-205, Pickens is not entitled to enforce her attorney lien upon the cash bond.

There are additional reasons the requirements for a charging lien have not been met. "The law is well settled that an attorney in asserting a charging lien is entitled to recover against sums which his [her] efforts have brought forth." *Skelton v. Spencer*, 102 Idaho 69, 75, 625 P.2d 1072, 1078 (1981). The Idaho Supreme Court in *Skelton* cited with approval, *Almi, Inc. v. Dick Corp.*, 31 Pa.Cmwlth. 26, 375 A.2d 1343 (1977), which in turn quoted from the Pennsylvania Supreme Court decision of *In Recht v. Clairton Urban Redevelopment Authority*, 402 Pa. 599, 608, 168 A.2d 134, 138-39 (1961). That quote noted by the Idaho Supreme Court in *Skelton* is as follows:

...the Pennsylvania Supreme Court, after an extensive review of the case law, determined the requisites of an attorney's charging lien to be:  
(1) That there is a fund in court or otherwise available for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his [her] compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the

recognition and application of the charging lien.

102 Idaho 69, 76, 625 P.2d 1072, 1079. In the present case, criteria two and three are not met. The services of Vernon J. Mortensen's attorney did not "substantially or primarily secure the fund out of which [Pickens] seeks to be paid". The cash bond was paid out of Marti Mortensen's own pocket, or the combined pocket of the marital estate of Vernon J. and Marti Mortensen. The cash bond had to be paid by one or both of them in order for the Mortensens to maintain their appeal. Pickens' services had nothing to do with the creation of or securing of that fund. As to item three, Pickens made the representation at oral argument that Vernon J. Mortensen agreed that Pickens could look to that fund rather than to Vernon J. Mortensen for her compensation for attorney's fees. Pickens also stated to the Court that Idaho State Bar counsel agreed with Pickens that she could look to this cash bond for her lien. This Court gave Pickens seven additional days after oral argument within which to file an affidavit or affidavits regarding those claims by Pickens. Even though Pickens is an officer of the Court, those claims would be hearsay, and accordingly, those claims would not properly be before the Court. Pickens has not filed any submissions since oral argument.

At oral argument, Pickens argued that these criteria from *Almi* discussed in *Skelton* were not adopted by the Idaho Supreme Court in *Skelton*. This Court disagrees. The Idaho Supreme Court specifically stated: "Though this court has never specified the requisites for enforcement of a charging lien in such a manner, the similarity of the situation makes the *Almi* case persuasive, and certainly Rigby & Thatcher could meet the requirements there set forth." 102 Idaho 69, 76, 625 P.2d 1072, 1079.

In *Frazee v. Frazee*; *Reeves v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983), an attorney instituted a petition for a charging lien. Reeves, an attorney, represented Mrs.

Fraze during her divorce from Mr. Frazee. Reeves sought a lien on Mr. Frazee's property, for his legal services incurred for his wife. The district court denied such lien and the Idaho Supreme Court affirmed. In discussing *Skelton*, the Idaho Supreme Court in *Fraze* held:

In sum, an attorney's charging lien is not passive as is the possessory or retaining lien. A charging lien is only brought about by some affirmative act of the party asserting the lien in reducing it to a judgment or order of the court. We note the difference in the instant case from the situation in *Skelton v. Spencer, supra*. There a "fund" was in existence representing the sums that the attorney had obtained for his client. Here no such "fund" existed, since the moneys had already been paid to the client. Again, we note that since Reeves had immediately withdrawn as attorney, no authority existed to pay him any sum of money on behalf of his erstwhile client.

104 Idaho 463, 466, 660 P.2d 928, 931. The same problems are in place in the present case. No act of Pickens caused the cash bond to come into existence. Pickens did not obtain those funds for her clients; they were her clients' funds to begin with.

For the above stated reasons, defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien must be denied.

IT IS HEREBY ORDERED defendant Vernon J. Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien is DENIED. Following the filing of this Order, the Court will enter and file the Order allowing Terri Pickens to withdraw as counsel for Vernon J. Mortensen.

Entered this 8<sup>th</sup> day of July, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of July, 2009, a true copy of the foregoing was mailed

postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Susan P. Weeks	208 664-1684	Robert E. Covington	208 762-4546
Dustin Deissner	509 326-6978	Terri R. Pickens	208 954-5099

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Jeanne Clausen, Deputy Clerk