DATE FILED: June 14, 2021 4:00 PM
FILING ID: 3DCFDBF5DAA72
CASE NUMBER: 2020CA2097

COLORADO COURT OF APPEALS
2 E. 14th Street
Denver, Colorado 80203

Appeal from Arapahoe District Court
Honorable Frederick T. Martinez, Judge
Case No. 2018 CV 032620

Plaintiff-Appellee:
GIL GERSTEIN

v.

Attorney-Appellant:
ROBINS KAPLAN, LLP

▲ COURT USE ONLY ▲

Case No. 2020 CA 2097

Attorneys for Attorney-Appellant:
GORDON & REES LLP
John M. Palmeri, #14252
John R, Mann, #16088
Margaret L. Boehmer, #45169
555 17th Street, Suite 3400
Denver, Colorado 80202
(303) 534-5160
jpalmeri@grsm.com
jmann@grsm.com
mboehmer@grsm.com

REPLY BRIEF

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g)(1).

■ It contains 4,942 out of 5,700 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/John R. Mann
John R. Mann, #16088

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

STATUTES

OTHER AUTHORITIES

I. Reply to Appellee's Statement of Facts.

A. Scope of Robins Kaplan's involvement below.

In August 2018, Gil Gerstein was terminated from his employment at EyeFive, Inc., a company he owned with two childhood friends. (CF, pp.1483-1484). Following his termination, EyeFive attempted to redeem his ownership interest pursuant to a Buy-Sell Agreement Gerstein signed. (CF, p.1486). Disappointed with the ownership value he agreed to in the Buy-Sell Agreement, Gerstein retained the law firm of Moye White to handle his claims against EyeFive . (CF, pp.2-7, 1486).

On Gerstein's behalf, Moye White filed a Complaint against EyeFive in November 2018, and two Amended Complaints in January and June 2019. (CF, pp.1486-1487). The trial court's July 19, 2019 case management order set trial for April 6, 2020, and an expert disclosure deadline for December 2, 2019. (CF, p.1487). On October 8, 2019, Gerstein learned that the expert retained by Moye White was not a business valuation expert and that a new expert would have to be retained to prepare a business valuation. (*Id.*). A settlement conference on October 28, 2019 was unproductive due to the absence of a credible business valuation expert to support Gerstein's valuation of EyeFive. (*Id.*). On November 1, 2019, Gerstein wrote an email to Moye White expressing his frustration with the failed settlement conference. (*Id.*). Moye White responded on November 4, 2019, stating it would "be

seeking the court's permission to withdraw as your counsel next week." (*Id.*).

Approximately five months before trial and less than a month before the expert disclosure deadline, Gerstein retained Robins Kaplan LLP to litigate the case through trial. At the time Gerstein retained Robins Kaplan, he did not have an expert qualified to prepare a business valuation report. (CF, p.1487). Although Robins Kaplan is based in Minneapolis, Gerstein retained attorneys from Robins Kaplan's New York office (CF, pp.1203-1209), and specifically agreed to their rates. (CF, pp.1457, 1461). While Robins Kaplan's representation of Gerstein lasted approximately five months, it occurred during a particularly litigation-heavy and demanding part of the case. (CF, pp.1234-1236, 1266-1267, 1305-1306, 1386-1388, 1419-1432). Robins Kaplan's attorneys accomplished an enormous amount of work during that brief time, including settling Gerstein's claims and Defendants' counterclaims.[1] (CF, pp. 1435, 1452).

B. Gerstein's expert was not stricken because of Robins Kaplan's "gross negligence."

Four months before trial, a motion was filed on Gerstein's behalf seeking a continuance of the trial and pretrial discovery and disclosure deadlines (CF, pp.

[1]Although Gerstein states he paid Robins Kaplan more than $285,000 in fees during its representation, he doesn't dispute that he never paid it the $211,815.97 in fees which are the subject of its charging lien. (CF, p.1468).

1232-1238). Defendants opposed the continuance (CF, pp.1264-1271), pointing out that Gerstein did not provide an expert report or disclosures that complied with C.R.C.P. 26(a)(2)(B)(I). (CF, p.1268). The defendants also moved to strike Gerstein's disclosed valuation expert for failure to comply with the Rule. (CF, pp.1278-1283). The reply in support of the motion for continuance (CF, pp.1286-1294) expressly requested an extension of the expert disclosure deadline "to a reasonable amount of time following Defendants' completion of their document production and depositions" if the continuance was denied. (CF, p.1293-1294).

The trial court denied the continuance (CF, p.1296), and granted the defendants' motion to strike Gerstein's expert. (CF, pp.1381-1385). The court's principal reasons for striking the expert were that the complete Rule 26(a)(2)(B) disclosures were not made, no excuse was given for the failure to disclose, and "At no time did any of Plaintiff's five lawyers petition the Court for an extension of time to submit the C.R.C.P. 26(a)(2)(B) disclosures." (CF, p.1382).

Based on this order, Gerstein asserts the trial court held Gerstein's expert was stricken due to Robins Kaplan's "gross negligence." The court, however, never held that Robins Kaplan's conduct amounted to "gross negligence." Rather, it determined that the expert disclosures were not made and there was no motion for extension of time to make them. The trial court's order striking the expert stated:

> It also appears that based on the Case Management Order, Plaintiff knew that he was going to retain an expert in this precise field. Nonetheless, Plaintiff failed to petition the Court for an extension of time in which to disclose these reports.[2] Instead, Plaintiff made gross assumptions that opposing counsel and the Court would simply acquiesce to counsel's inaction. Now, Plaintiff asks for an opportunity to cure this gross defect. (CF, p.1384).

Gerstein assertion that the trial court found "gross negligence" mischaracterizes the trial court's ruling. The court did not determine this was "gross negligence," or even negligence. The "gross defect" the court perceived was the "gross assumptions" that opposing counsel and the court "would simply acquiesce" to inadequate or untimely expert disclosures. That counsel made "gross assumptions" amounting to a "gross defect" about how opposing counsel and the court would behave does not equate to "gross negligence."

C. The malpractice complaint's allegations are not facts.

Gerstein recites the allegations of his malpractice complaint as though they were facts instead of mere unsubstantiated allegations. Gerstein's assertion he was forced to settle because his valuation expert was stricken fails to acknowledge or

[2]The statement that "Plaintiff failed to petition the Court for an extension of time in which to disclose these reports" is not entirely accurate, since the reply in support of the motion for continuance expressly requested an extension of the expert disclosure deadline "to a reasonable amount of time following Defendants' completion of their document production and depositions" if the continuance was denied. (CF, p.1293-1294).

address the impact of the Shareholder Buy-Sell Agreement he signed, which contractually established share value and precluded him from litigating valuation of the business.[3] (CF, pp.258-271). Regardless of whether presented a valuation expert at trial, he was still bound by this contractual valuation. (CF, pp.1419-1432). Another motivating factor in Gerstein's decision to settle was that he could no longer afford to litigate the case, as evidenced by his failure to pay Robins Kaplan.

In any event, the specific allegations of Gerstein's malpractice complaint are beside the point because the issue on appeal does not concern the merits of that action but rather its use as a strategic device in the court below to avoid he attorney's lien proceeding. If Gerstein is able to substantiate his allegations in the malpractice action, he may be entitled to damages in that proceeding. But he is not entitled to presumptively determine his damages by making mere allegations of malpractice. He must pay the fees owed and separately pursue his legal malpractice claim.

---

[3]Section 7.1 of the Buy-Sell Agreement provides:

> The Fair Market Value per Share of the company will be determined by mutual written agreement of all of the Shareholders within thirty (30) days of the last day of each Taxable Year and shall initially be one million five hundred thousand dollars ($1,500,000.00). In the event that all of the Shareholders fail to agree upon a determination of the Fair Market Value per Share of the Company, then the Fair Market Value per Share of the Company shall be the most recent agreed upon Fair Market Value per Share, which shall initially be one million five hundred thousand dollars ($1,500,000.00). (CF, p.263).

II. Because the trial court had exclusive jurisdiction, it erred in denying Robins Kaplan's motion on the ground that its fees were being litigated in another action.

A. Reply concerning preservation statement.

Gerstein's assertion that the issue of the trial court's exclusive jurisdiction over the attorney's lien proceeding was not preserved for review is not well-taken. Robins Kaplan argued below that the trial court had exclusive jurisdiction over the charging lien (CF, pp.1516-1517), and specifically argued that "As Robins Kaplan's charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case, this Court alone has jurisdiction." (CF, p.1516). This argument that the trial court had exclusive jurisdiction because the "charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case" was sufficient to preserve the issue of prior jurisdiction for appeal.

It sufficiently preserved the issue because it intrinsically and inherently refers to priority as the source of that exclusive jurisdiction, inasmuch as an attorney's lien begins to accrue when the work is performed, *Cope v. Woznicki*, 140 P.3d 239, 241 (Colo.App.2006), and attaches "immediately" when judgment is obtained, *North Valley Bank v. McGloin, Davenport, Severson & Snow, P.C.*, 251 P.3d 1250, 1254 (Colo.App.2010), so that the trial court acquired jurisdiction over the lien when Robins Kaplan's work was first performed in November 2019, and no later than

March 19, 2020, when Gerstein's settlement was confirmed. (CF, p.1452). *See Martinez v. Mintz Law Firm, LLC*, 371 P.3d 671, 675 (Colo.2016). Robins Kaplan's argument that the trial court had exclusive, prior jurisdiction was thus sufficiently preserved for appeal by its argument that the court had exclusive jurisdiction because the "charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case," since that exclusive jurisdiction necessarily derives from the lien's priority in time over the subsequently filed malpractice action. *See Froid v. Zacheis*, 2021 COA 74, ¶ 21 (Colo.App.2021) (argument preserved for appeal notwithstanding failure to articulate specific grounds therefor in lower court); *Dill v. Rembrandt Grp., Inc*., 474 P.3d 176, 183 (Colo.App.2020) (use of specific terminology unnecessary to preserve issue for appeal).

B. The trial court had exclusive jurisdiction to enforce the lien.

Gerstein first argues the trial court did not have exclusive jurisdiction over the attorney's lien because his legal malpractice complaint was filed on July 16, 2020, more than two months before Robins Kaplan's motion to reduce the lien to judgment. This argument fails, however, because the trial court acquired jurisdiction over the lien no later than March 19, 2020, when Gerstein's settlement was confirmed. *North Valley Bank*, 251 P.3d at 1254. This priority made its jurisdiction exclusive over any subsequently filed action. *See Public Serv. Co. v. Miller*, 313 P.2d 998,

999-1000 (Colo.1957).

Gerstein next argues the trial court properly exercised its discretion in declining to invoke the priority rule or address the merits of Robin Kaplan's motion. but the court with prior exclusive jurisdiction has no discretion in this regard. *See Utilities Bd. of City of Lamar v. Southeast Colo. Power Assn.*, 468 P.2d 36, 37 (Colo. 1970); *Miller*, 313 P.2d at 999-1000. The only case Gerstein cites in support, *Battle North, LLC v. Sensible Housing Co.*, 370 P.3d 238, 245 (Colo.App.2015), is inapposite because it addressed the discretion of a court that had only concurrent jurisdiction, not prior jurisdiction, to stay the concurrent proceeding pending the outcome of the prior case. *Battle North* has no application in this case, which concerns the decision of the court with ***prior*** jurisdiction, not concurrent jurisdiction, to decline to grant relief altogether and not merely stay the proceeding, in contrast to *Battle North*, where the issue was whether a court with concurrent jurisdiction was required to stay that proceeding because another court had prior jurisdiction.[4] That a court with concurrent jurisdiction has discretion to stay a proceeding notwithstanding the priority rule does not mean that a court with prior jurisdiction has the discretion to refuse to grant relief because another court has concurrent jurisdiction over the same

[4]*Battle North* ultimately held the priority rule was not implicated because the concurrent action was brought under C.R.C.P. 105.1, which "creates an exception to the rule." *Id*., 370 P.2d at 246.

parties and subject matter. *See Miller*, 313 P.2d at 999-1000 (court that acquires jurisdiction first has "exclusive jurisdiction of both the subject matter and the parties, and no other court of co-ordinate power could interfere with its action.").

Battle North nevertheless recognized "The priority rule holds that '[w]here two courts may exercise jurisdiction over the same parties and subject matter, ... the first action filed has priority of jurisdiction, and ... the second action must be stayed until the first is finally determined.'" *Id*., 370 P.2d at 244 (quoting *Town of Minturn v. Sensible Housing Co*., 273 P.3d 1154, 1159 (Colo.2012)). Applying the priority rule here, because the lien proceeding has priority of jurisdiction, it should not yield to Gerstein's malpractice action, and entry of judgment on the lien would not interfere with the concurrent malpractice action. The trial court accordingly erred or abused its discretion in declining to enter judgment on Robins Kaplan's attorney's lien because it believed that would "preemptively enter a judgment on a contested issue which is currently being addressed in another proceeding." (CF, p.1523). *See Miller*, 313 P.2d at 999-1000.

In *Miller*, the supreme court rejected the attempt by party dissatisfied with a ruling of the Public Utilities Commission to appeal the ruling in a different district court from where other appeals were pending, on the ground that the court where the action was first commenced had prior and exclusive jurisdiction over it. Although

the court did not indicate whether the second action was filed for an improper purpose, it nevertheless noted that if both actions proceeded "the ultimate judgment of both courts could be brought into conflict, thus creating a serious situation, and enforcement of conflicting decisions would be impossible." *Id*. at 1000.

In *Martin v. District Court*, 375 P.2d 105, 106 (Colo.1962), the defendant in the first lawsuit filed a second lawsuit against the plaintiff in another district court in an attempt to gain a strategic advantage in the litigation. The facts in *Martin* make clear this was a matter of gamesmanship: the plaintiff commenced an action in Denver District Court by serving the defendant with the summons and complaint but did not file the complaint until two weeks after service; the defendant then filed his complaint against the plaintiff in Adams District Court a hour before the plaintiff filed her complaint in Denver. Relying on *Miller*, the court rejected this attempt to circumvent the first court's jurisdiction, holding that "since the action in the Denver district court was commenced prior to the Adams county action, exclusive jurisdiction rested with the Denver district court."

This case involves the same kind of attempt to gain a strategic advantage by filing a second action when another court already had jurisdiction. Even though the trial court here acquired jurisdiction over the lien first, Gerstein filed a separate civil action to challenge Robin's Kaplan's fees, thereby depriving Robins Kaplan of the

benefit of a judgment enforcing the lien and forcing Robins Kaplan into a forum it did not choose in order to enforce its lien, contrary to the intent of § 13-93-114. Allowing the trial court's order here to stand will only reward the kind of games-manship that the supreme court thwarted in *Martin*.

III. The trial court erred in requiring Robins Kaplan to enforce the lien in a separate and independent action.

Gerstein does not separately address Robins Kaplan's argument that § 13-93-114, C.R.S., entitles it to enforce its lien in the action in which the legal services were performed. An attorney's lien is a special statutory proceeding that expressly contemplates the lien will be enforced in the court in which the unpaid legal services were performed. Although § 13-93-114 provides that a lien may be enforced "by the proper civil action," this contemplates an independent action to enforce the lien brought ***by the lienor***, *see Gold v. Duncan Ostrander & Dingess, P.C.*, 143 P.3d 1192, 1193 (Colo.App.2006), and does not require an attorney to litigate the validity of a lien in any civil action other than the action that gave rise to the lien claim and in which it performed the services that are the subject of the lien. *Gee v. Crabtree*, 560 P.2d 835, 836 (Colo.1977). *See Davis v. King*, 560 Fed. Appx. 756, 758 (10th Cir. 2014) (federal court had jurisdiction over attorney lien proceeding because lien was based on work attorney did for lawsuit).

Because it affords no exception to enforcement of the lien against the funds

recovered, the charging lien statute does not contemplate any exception for allegations of legal malpractice, or requiring an attorney to litigate the lien in a collateral proceeding. *See Mintz Law Firm*, 371 P.3d at 679-80 (Colo. 2016) (Coates, J., dissenting) ("the express language of the statute provides that 'such lien may be enforced by the proper civil action'—not that the validity or enforceability of the lien may be challenged in a proper civil action.... The attorney's lien statute itself is unconcerned with, and simply fails to provide a vehicle for others to challenge, the validity of an attorney's lien, and we have never suggested otherwise."). Given the opportunity, moreover, Gerstein cites no authority in which a court declined to reduce a charging lien to judgment because of an unadjudicated legal malpractice claim.

The purpose of § 13-93-114 in giving "the court wherein such cause is pending" jurisdiction to adjudicate the lien is to prevent any monies obtained through the services of counsel from being paid to the client before the attorney is paid. *See Collins v. Thuringer*, 21 P.2d 709, 710 (Colo.1933); *Stiner v. Planned Mgt. Servs., Inc.*, 923 P.2d 186, 188 (Colo.App.1995). The lien interest is in the settlement funds themselves, and, because this interest arose in this action where the settlement was reached, the instant action is the proper action to enforce the lien because the settlement payor, EyeFive, is a party, and because, once judgment is entered on the lien,

the trial court can order EyeFive to pay the monthly settlement payments directly to Robins Kaplan until its lien is satisfied. *See Gee*, 560 P.2d at 836 ("The trial judge who heard the proceedings which gave rise to the lien is in a position to determine whether the amount asserted as a lien is proper and can determine the means for the enforcement of the lien."). Because, however, EyeFive is not a party to the malpractice action, that court cannot order it to pay the settlement funds directly to Robins Kaplan in satisfaction of the lien; only the *EyeFive* court can. This is why the trial court erred in refusing to order the lien reduced to judgment solely because the separate legal malpractice action was pending: it deprived Robins Kaplan of the precise remedy the statute was meant to provide—a judgment that will reach the settlement funds while they are still in the payor's hands. *See Stiner*, 923 P.2d at 188.

IV. The trial court erred in denying Robins Kaplan's motion in the absence of a valid objection by Plaintiff.

Once Robins Kaplan filed its motion to reduce the lien to judgment, the trial court was required to determine the validity of the lien. *See Seitz v. Seitz*, 516 P.2d 654, 655 (Colo.App.1973). Any objections by Gerstein to the amount or validity of the lien should have been presented in his response to the motion. Although Gerstein did not object to entry of judgment on the ground the fees claimed were unreasonable (CF, pp.1500-1509, 1515), he nevertheless argues he presented "evidence"—consisting of the trial court's orders denying the motion for continuance and striking

his expert witness—supporting his contention that Robin Kaplans was precluded from recovering its fees by the equitable doctrine of "unclean hands."

However, Gerstein presented no actual, admissible evidence of "unclean hands," but instead offered only legal argument and the unsubstantiated allegations of his malpractice complaint. Although the trial court did not rely on or refer to the "unclean hands" doctrine in its order (CF, p.1523), Gerstein nonetheless argues that "the district court's own prior findings of gross negligence committed by RK would have necessitated a finding that it represented Mr. Gerstein with 'unclean hands,' and would have resulted in the denial of RK's equitable motion for judgment on its charging lien." Answer Brief at 20. Yet Gerstein cites no authority either for the position that mere professional negligence constitutes "unclean hands," or even for what kind of evidence is required to establish "unclean hands."

The equitable doctrine of "unclean hands" holds that a "court will not consider a request for equitable relief under circumstances where the litigant's own acts offend the sense of equity to which he or she appeals." *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 276 (Colo.App.2000). Under the unclean hands doctrine, "a party engaging in improper or fraudulent conduct relating in some significant way to the subject matter of the cause of action may be ineligible for equitable relief." *Whiting Oil & Gas Corp. v. Atlantic Richfield Co.*, 321 P.3d 500, 508 (Colo.App.2010), *aff'd,*

320 P.3d 1179 (Colo.2014). *See Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 519 (Colo.App.2006) (unclean hands doctrine "simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation."); *Jameson v. Foster*, 646 P.2d 955, 958 (Colo.App. 1982) (same). "The rule as to 'clean hands' is one of public policy, for the protection of the integrity of the court, not for a defense." *Rhine v. Terry*, 143 P.2d 684, 685 (Colo.1943).

Consequently, for the unclean hands doctrine to apply, the party seeking judicial relief must have engaged in willful conduct that is illegal, fraudulent, unethical, or unconscionable. *See* H. McClintock, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26 (2d ed.1948) ("unclean hands" typically involves willful conduct that is illegal, unconscionable, or fraudulent); 30A C.J.S. *Equity* § 117 (2021) (unclean hands doctrine bars relief "for willful conduct which is fraudulent, illegal, or unconscionable"); *e.g., Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 548 (Colo. 1997) (employee who engaged in resume fraud did not have "clean hands"); *International Network, Inc. v. Woodard*, 405 P.3d 424, 432 (Colo.App.2017) (seller who intentionally breached exclusive listing agreement and concealed negotiations to deprive broker of commission had unclean hands).

Mere negligence, however, does not rise to the level of "unclean hands." *See*

Eresch v. Braecklein, 133 F.2d 12, 14 (10th Cir.1943) ("The [unclean hands] maxim refers to willful misconduct rather than merely negligent misconduct."). Courts have uniformly held that mere negligence is insufficient to bar relief under the unclean hands doctrine. *See Shearson/American Express, Inc. v. Mann*, 814 F.2d 301, 307 (6th Cir.1987); *International Union v. Local Union No. 589*, 693 F.2d 666, 672 (7th Cir.1982) ("The bad conduct constituting unclean hands must involve fraud, unconscionability or bad faith toward the party proceeded against."); *Chitkin v. Lincoln Nat. Ins. Co.*, 879 F.Supp. 841, 854 (S.D.Cal.1995) ("The doctrine of unclean hands applies only when the plaintiff's allegedly unclean conduct was willful or fraudulent. Mere negligence is not sufficient."); *O'Neil v. Picillo*, 682 F.Supp. 706, 727 (D.R.I. 1988) (same), *aff'd*, 883 F.2d 176 (1st Cir.1989); *Countrywide Home Loans, Inc. v. Sheets*, 371 P.3d 322, 327 (Idaho 2016) (for unclean hands doctrine to apply, "the conduct must be intentional or willful, rather than merely negligent"); *Hoffman Constr. Co. v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 360 (Alaska 2001) ("an allegation of negligence cannot suffice to raise the defense of 'unclean hands'"); *Roussalis v. Apollo Elec. Co.*, 979 P.2d 493, 497 (Wyo.1999) ("simple mistakes" insufficient to invoke unclean hands doctrine); *see also Wells Fargo & Co. v. Stagecoach Props., Inc.*, 685 F.2d 302, 308 (9th Cir.1982) ("Bad intent is the essence of the [unclean hands] defense."); *Omega Indus., Inc. v. Raffaele*, 894 F.Supp. 1425,

1431 (D.Nev.1995) (unclean hands "will bar a party from receiving an equitable remedy where that party has acted in bad faith"). *See generally* 30A C.J.S. *Equity* § 118 (2021) ("The conduct which forms the basis for the application of the maxim of clean hands refers to willful misconduct rather than merely negligent misconduct."). Tellingly, Gerstein cites no authority from any jurisdiction holding that mere allegations of professional negligence are sufficient to sustain the defense of "unclean hands."[5]

Calvert v. Mayberry, 442 P.3d 905 (Colo.App.2016), *aff'd in part & rev'd in part*, 440 P.3d 424 (Colo.2019), the sole case Gerstein relies on, involved an attorney's ethical misconduct, specifically a violation of COLO.R.PROF.COND. 1.8(a), rather than mere negligence. The attorney in *Calvert* loaned his mentally-impaired client more than $100,000 and then, to secure his interest in the loan, recorded a false deed of trust on the client's home in a second client's name without either clients'

[5]Gerstein cites *Saudi Basic Industries Corp. v. ExxonMobil Corp.*, 401 F.Supp.2d 383, 393-94 (D.N.J.2005) for the position that the "unclean hands" doctrine applies to "gross negligence," but the district court there did not hold that it does, and instead applied a standard of "blatant or reckless disregard." *Id*. Colorado law, in contrast, requires conduct that is fraudulent, unethical, or unconscionable for the defense of "unclean hands," *Whiting Oil & Gas*, 321 P.3d at 508, and does not recognize degrees of negligence such as "gross negligence." *See Adams v. Colorado & S. Ry. Co.*, 113 P. 1010, 1012 (Colo.1911) ("Degrees of negligence are not recognized in this jurisdiction."); *Dukeminier v. K-Mart Corp.*, 651 F.Supp. 1322, 1323 (D.Colo.1987) ("The gross negligence claim is merely a reaffirmation of the claim for negligence. As such it is redundant.").

knowledge or consent. The attorney then attempted to persuade the second client to assign the deed of trust to the attorney's real estate company as part of a calculated scheme to deprive the first client of her home. *Id.*, 442 P.3d at 909. The attorney also violated Rule 1.8(a) by entering into a business transaction with a client that failed to comply with the Rule. This was the kind of conduct at issue in *Calvert*, which did not involve an attorney's charging lien and did not even address the "unclean hands" doctrine.

Here, in contrast, Gerstein has alleged only negligence as the basis of his malpractice claim, not willful conduct that is illegal, fraudulent, unethical, in bad faith, or otherwise "unconscionable." Specifically, he alleges Robins Kaplan was negligent in failing to serve the expert documents and report by the expert disclosure deadline and in failing to file a motion to extend that deadline. (CF, p.1492, ¶ 69). These allegations appear based on the trial court's findings that Rule 26(a)(2)(B) disclosures were not made and there was no motion for extension of time to make them. But the court did not characterize this conduct as "gross negligence" or even as negligence.

Gerstein's "unclean hands" argument is thus based on a fundamental error: Gerstein simply presumes that an attorney's breach of a disclosure obligation to an

adverse party necessarily and automatically constitutes the breach of a duty of professional care to a client. But this conclusion does not follow because these are separate and distinct duties that arise from different sources, and legal malpractice cannot be inferred merely from the breach of a duty imposed by a procedural rule. Gerstein's argument that the trial court's order establishes that Robins Kaplan's conduct was negligent is just that, argument, not evidence.

Further, Gerstein offered no evidence of any willful conduct and no evidence of any fraud, illegality, bad faith, or other unconscionable conduct on Robins Kaplan's part. Nothing in the trial court's orders denying the motion for continuance and striking the expert witness even remotely suggests conduct rising to this level, and nothing in Gerstein's malpractice complaint alleges fraud, illegality, bad faith, or unconscionable conduct. (CF, pp.1482-1493). It does not even allege "willful" conduct on Robins Kaplan's part. (CF, p.1492, ¶¶ 69-71). Gerstein's argument that the unclean hands doctrine necessarily would have resulted in denial of Robins Kaplan's motion for judgment on its lien therefore fails because negligence, even "gross negligence" (which is not recognized in Colorado), is insufficient to sustain the defense of "unclean hands" as a matter of law and equity, and because there was no evidence of willful, fraud, illegality, bad faith, or any other unconscionable conduct by Robins Kaplan.

Moreover, no Colorado case has ever recognized "unclean hands" as a defense to an attorney's charging lien, not even *Calvert*. The only recognized challenges to a charging lien relate to the reasonableness of the fees claimed, *e.g.*, *In re Marriage of Rosenberg*, 690 P.2d 1293, 1295 (Colo.App.1984); *Apa v. Qwest Corp.*, 402 F.Supp.2d 1247, 1250 (D.Colo.2005), but Gerstein never challenged the reasonableness of Robins Kaplan's fees below.

Gerstein's argument that the result below would have been the same if the trial court had retained jurisdiction over it because the unclean hands doctrine precluded entry of judgment on the attorney's lien on equitable grounds thus fails at every turn. Gerstein presented no evidence that Robins Kaplan acted with "unclean hands": there was no evidence that its conduct toward Gerstein was in any way willfully illegal, fraudulent, in bad faith, or unconscionable, and mere negligence is insufficient to invoke the "unclean hands" doctrine. But there wasn't any evidence that Robins Kaplan's conduct was negligent either, since the trial court's orders on which Gerstein relies do not address any duty of professional care that Robins Kaplan owed to Gerstein. All Gerstein has offered, both below and on appeal, is argument and allegations of his malpractice complaint, which fail to establish either "unclean hands" or that the unclean hands doctrine is even a valid defense under § 13-93-114. But even if the unclean hands doctrine is a valid defense to an attorney's

charging lien, Gerstein still has offered no reason why the court below should not have entered judgment on the lien.

V. Conclusion.

Although this appeal involves competing jurisdiction between two district courts, the larger issue in this case is whether a client can avoid a charging lien by filing a legal malpractice action to circumvent the lien proceeding. Colorado courts have repeatedly rejected attempts by parties to divide a trial court of jurisdiction by filing another action concerning the same subject matter, and this Court should do the same.

GORDON & REES LLP

s/John M. Palmeri
John M. Palmeri, #14252
John R, Mann, #16088
Margaret L. Boehmer, #45169
555 17th Street, Suite 3400
Denver, Colorado 80202

Attorneys for Attorney-Appellant
Robins Kaplan, LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2021, a true and correct copy of the foregoing **REPLY BRIEF** was electronically filed and served via Colorado Courts E-Filing to the following:

Anthony Viorst, Esq.
The Viorst Law Offices, P.C.
950 S. Cherry St., Ste. 300
Denver, CO 80204

s/John R. Mann