70414-1

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No. 70414-1-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

REED TAYLOR,

Appellant,

v.

SCOTT BELL and JANE DOE BELL, and their marital community; FRANK TAYLOR and JANE DOE TAYLOR, and their marital community; CAIRNCROSS & HEMPELMANN, a Professional Service Corporation,

Respondents.

BRIEF OF APPELLANT REED TAYLOR

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I. INTRODUCTION

The primary issue in this appeal is whether the trial court misapplied judicial estoppel to allow attorneys to avoid liability for malpractice. In 1995, the appellant Reed Taylor ("Taylor") owned the majority interest in AIA Services Corp. ("AIA"). Other shareholders sought to purchase his shares for over $10,000,000, which included a $6,000,000 promissory note due in 10 years ("$6M Note"). Cairncross & Hempelmann, P.S., Scott Bell, Frank Taylor and other attorneys at that firm (collectively "Cairncross") represented Taylor for "the matter of the sale of his stock in AIA." CP 596. As is normal for a transaction of that magnitude, Cairncross obtained for Taylor a third-party closing opinion letter from AIA's counsel opining that the transaction was legal and enforceable. Unbeknownst to Taylor, both the Idaho Lawyers and Cairncross failed to address the fundamental Idaho statute governing share repurchases and obtain the shareholder resolution required by Idaho law.

When Taylor filed suit on the $6M Note after it matured and AIA refused to pay it, an Idaho court ruled the agreements were illegal and unenforceable because the shareholders had not approved paying Taylor from AIA's capital surplus pursuant to I.C. § 30-1-6. ***Taylor v. AIA Services Corp.***, 261 P.3d 829, 844 (Idaho 2011). Thus, Taylor lost the benefit of the $6M Note, which was virtually all of his retirement. Taylor

also lost significant sums of money litigating the enforcement of the agreements associated with the sale of his AIA stock that Cairncross charged him over $95,000 to address in 1995 and again in 1996.

Taylor filed suit against Richard Riley, Robert Turnbow and the law firm of Eberle Berlin Kading Turnbow & McKlveen (collectively "Idaho Lawyers") in Idaho for the incorrect opinion letter and for jointly representing him and AIA. He also filed suit against his independent counsel Cairncross in the present lawsuit. The Idaho court dismissed Taylor's claims based on any joint representation, but allowed a claim against the Idaho Lawyers as a non-client for the incorrect opinion letter.

Even though Cairncross cannot hide behind the Idaho Lawyers' opinion letter as a basis to insulate itself from liability to Taylor, it used portions of Taylor's testimony from the Idaho proceedings to persuade the trial court here to dismiss his claims based on judicial estoppel. But judicial estoppel does not apply here because Taylor's positions were not inconsistent and he had a right to assert claims for the incorrect opinion letter as an additional avenue of recovery. Taylor is entitled to be made whole and Cairncross should be held accountable and liable for failing to address the most fundamental corporate governance statute, I.C. § 30-1-6, especially when its attorneys were aware when they represented Taylor that every state had statutes restricting share repurchases by corporations.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. The trial court erred by granting summary judgment in favor of Cairncross, making unsupported findings of fact and conclusions of law, failing to consider evidence and when, at a minimum, genuine issues of material fact precluded granting summary judgment.

2. The trial court abused its discretion by denying Taylor's motion to amend and supplement his complaint.

B. Issues Pertaining to Assignments of Error.

1. Did the trial court err by granting summary judgment to Cairncross on the equitable doctrine of judicial estoppel when Taylor had not taken inconsistent positions, the three core elements and six other considerations were not present, Cairncross was barred from asserting the defense, and genuine issues of material fact precluded applying judicial estoppel, even assuming his positions were inconsistent? [Assignment of Error No. 1]

2. Did the trial court err by granting summary judgment for failure to prove proximate causation when Idaho law applies to breach and proximate causation, Taylor proved proximate causation under both Idaho and Washington law, expert testimony was not required, and the issue had already been decided as a matter of law? [Assignment of Error No. 1]

3. Even if expert testimony is required and Washington law applies, did the trial court abuse its discretion by not considering McDermott's opinions to prove proximate causation simply because he was not licensed to practice law in Washington? [Assignment of Error No. 1]

4. Did the trial court err by not considering Libey's opinions and a supplemental declaration by Taylor's counsel submitted in response to newly raised issues on Cairncross' reply when both declarations were submitted before entry of the order granting summary judgment and Cairncross did object or move to strike them? [Assignment of Error No. 1]

5. Did the trial court abuse its discretion by denying Taylor's motion to amend and supplement his complaint? [Assignment of Error No. 2]

6. Should this Court award Taylor attorney fees and costs on appeal?

III. STATEMENT OF THE CASE

Reed Taylor[1] is 76 years old and has resided in Lewiston, Idaho for over 40 years. CP 1, 587. He was the founder, CEO and majority shareholder of AIA, an Idaho corporation based in Lewiston, Idaho. CP 6, 21, 588. Cairncross was aware that Taylor "held relatively little knowledge in accounting, law or the financial affairs of [AIA]." CP 1329.

In 1995, other shareholders solicited Taylor to sell his 613,494 shares (63% of the outstanding shares) back to AIA through a stock repurchase so that they could obtain control of AIA. CP 80, 221, 588, 648, 1041, 1329-30. During the early negotiations, Taylor did not have separate counsel and he, like AIA, relied only on the Idaho Lawyers—who had jointly represented Taylor and AIA in the past. CP 76-77, 80-83. On March 7, 1995, AIA held a board and shareholder meeting regarding the repurchase of Taylor's shares. CP 79, 90-91, 205, 221. At that meeting, the shareholders authorized the repurchase of Taylor's shares, but failed to authorize the use of capital surplus. ***Taylor***, 261 P.3d at 833-34. CP 79. AIA's board also advised Taylor to obtain separate counsel. CP 89, 588.

Taylor's accountant referred him to Cairncross, a Seattle firm that did not have an office in Idaho. CP 34-35, 546-47, 588. Cairncross began

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[1] Taylor is unrelated to Frank Taylor and Dawson Taylor, two of Cairncross' attorneys who represented him for the 1995 sale of his shares and restructuring in 1996.

representing Taylor on March 17, 1995 and the fee agreement confirmed that it would represent him "in the matter of the sale of his stock in AIA." CP 596, 598. Cairncross never disclosed to Taylor that its attorneys representing him were not licensed to practice law in Idaho. CP 21, 309-10, 588-89, 594. Cairncross purported to represent and advise Taylor in all aspects of the stock sale, including: negotiating and drafting agreements, drafting memos, analyzing the need for a shareholder meeting, legal research, analyzing AIA's authority to enter into the agreements, drafting closing checklists, tax issues, UCC issues, drafting demand letters, and closing the transactions. CP 539-45, 588-90, 596-613, 761-63, 754-73, 791-800, 943-57, 1244-1319, 1324-26, 1329, 1352-60.

Under the final sale terms Cairncross negotiated for him, Taylor received a $6M Note due in 10 years, a $1.5 million down payment note, and other consideration. CP 650, 666-67. Cairncross negotiated and drafted the stock redemption agreement and ancillary agreements. CP 35, 648-98, 1329. Cairncross included thirteen required deliveries of documents prior to closing. CP 651-52. AIA was required to deliver any such documents as Cairncross may have required for the transactions, e.g., shareholder or board resolutions. CP 652. AIA's counsel was also required to deliver to Taylor a third-party closing opinion letter. CP 150-54, 651. Cairncross and AIA's counsel negotiated the content of the opinion letter,

which was addressed only to Taylor and provided that only he could rely on it.[2] CP 150-154, 1331. During 1995 and 1996, AIA had no earned surplus to repurchase shares under I.C. § 30-1-6. ***Taylor***, 261 P.3d at 837. Nevertheless, Cairncross advised Taylor to sell his shares and close the transaction without seeing proof of compliance with I.C. § 30-1-6.[3] CP 590, 759-60, 768-73, 1033-43. In 1996, Cairncross also represented Taylor in restructuring the obligations, but it did not obtain a new opinion letter for him. CP 614-47, 699-736, 702-03, 770-71, 942-61, 1037.

Although Cairncross knew "that every state has its statute restricting the use of its capital" and a shareholder meeting had been held for the purchase of Taylor's shares on July 18, 1995, it failed to ensure that AIA adopted a simple shareholder resolution authorizing the use of capital surplus pursuant to I.C. § 30-1-6. CP 200-02, 542-43, 590, 759-60, 771-73, 1036-43, 1298-1315. ***Taylor***, 261 P.3d at 837-42. Nevertheless,

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[2] "Receipt, therefore, of an opinion from the other party's counsel is no substitute for the general legal advice an opinion recipient is expected to receive from its own counsel." **Glazer and Fitzgibbon on Legal Opinions, §1.3.1** at 12 (3d ed.) ("Glazer").

[3] During Cairncross' representation of Taylor in 1995 and 1996, Idaho corporation share repurchases were governed by I.C. § 30-1-6, which provided in pertinent part:

> A corporation shall have the right to purchase...its own shares, but purchases of its own shares, whether direct or indirect, shall be made only to the extent of unreserved and unrestricted earned surplus available therefor, and, if the articles of incorporation so permit or with the affirmative vote of the holders of a majority of all shares entitled to vote thereon, to the extent of unreserved and unrestricted capital surplus available therefor.

I.C. § 30-1-6. A copy of I.C. § 30-1-6 is in the record. CP 200-01.

Cairncross drafted the agreements, advised Taylor to sign them, and advised him to close the transactions in 1995 and again for the restructuring in 1996. CP 590, 759-60, 768-73, 1036-43, 1329.

In 2007, Taylor filed suit against AIA after the $6M Note matured and AIA refused to pay it, even though it had generated over $67 million in revenues since he sold his shares. CP 223, 591. In early 2008, Taylor obtained a partial summary judgment against AIA on the default of the $6M Note. CP 415. But then AIA alleged for the first time that the purchase of Taylor's shares was illegal. CP 208, 223, 415, 593. An Idaho trial court ruled that the repurchase of Taylor's shares violated I.C. § 30-1-6 and, thus, the agreements were illegal and unenforceable. CP 203-17. That court also found Taylor "was represented by counsel" and that "[t]here is no question that all parties, including [Taylor], either ignored or failed to consider I.C. § 30-1-6." CP 213, 215, 591. That Idaho court then denied Taylor's motion for reconsideration and reiterated that "Taylor was represented by [Cairncross] throughout the negotiations for, and entry into, the stock redemption agreement." CP 462. Thus, Taylor lost his right to collect the sums owed on the $6M Note and spent over $1,000,000 in attorney fees and costs litigating. CP 82-84, 592, 773, 1043. Taylor appealed the Idaho court's illegality decision. CP 223. On September 7, 2011, the Idaho Supreme Court affirmed the trial court's decision on the

illegality and unenforceability of the agreements and noted that it appeared that everyone involved missed I.C. § 30-1-6. ***Taylor***, 261 P.3d at 837-44.

In October, 2009, Taylor filed suit against the Idaho Lawyers asserting claims for negligent misrepresentation, fraud, breach of fiduciary duty, malpractice and violations of the Idaho CPA, which were based on Taylor being a non-client recipient of the opinion letter and a joint client with AIA. CP 74-84, 252-77, 416, 1236-43. When the Idaho Lawyers moved for summary judgment, the Idaho trial court found that Taylor was represented by Cairncross, that he had no attorney-client relationship with the Idaho Lawyers, and dismissed all of Taylor's claims as a client—but it did allow his claim as a non-client for the incorrect opinion letter to proceed. CP 150-54, 252-97.

In March, 2012, Taylor filed suit in the King County Superior Court against Cairncross for malpractice, breach of fiduciary duty and violations of the Washington CPA. CP 1-16. The Idaho Lawyers renewed their motion for summary judgment on the opinion letter claim and submitted Taylor's complaint against Cairncross to the Idaho trial court. CP 417, 925-41, 981-82, 962-1002. The Idaho trial court ruled again that the Idaho Lawyers owed a duty to Taylor as a non-client for the incorrect opinion letter, but again rejected his position as a client of the Idaho lawyers and found again that Cairncross was his separate counsel. CP 970-

77, 987-1002. In early 2013, the Idaho Supreme Court allowed the Idaho Lawyers to appeal Taylor's claim as a non-client on the incorrect opinion letter, which is now pending. CP 535-36, 1009-14.

In February, 2013, Cairncross moved for summary judgment in the present action asserting the undisclosed defenses of judicial estoppel and an alleged limited scope of representation of Taylor.[4] CP 23-24, 33-68. Relying on portions of three paragraphs in Taylor's affidavit from the Idaho trial court, Cairncross argued that Taylor had taken inconsistent positions in that Idaho court and that his claims here should be dismissed based on judicial estoppel. CP 53-56, 74-84, 252-97. Taylor moved to amend to include new claims and declaratory relief based on Cairncross' new defenses. CP 313-340, 869. The trial court denied amendment, even though Cairncross presented no evidence of actual prejudice, bad faith or other basis to deny that motion. CP 316-40, 869-71, 912-14.

Taylor opposed Cairncross' motion for summary judgment and filed a cross-motion. CP 343-839. Taylor also submitted expert opinions from Professor Richard T. McDermott ("McDermott"), who has extensive experience in multi-jurisdictional corporate law and third-party opinion practice in large transactions. CP 747-84. Cairncross asserted for the first

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[4] Bell testified, for the first time, that Cairncross *only* "assisted with the remaining negotiations and with 'papering' the transaction." CP 35, 538-45, 1324-36, 1358-60.

time in its reply that McDermott was not licensed in Washington. CP 65, 881. The trial court orally dismissed Taylor's claims based on judicial estoppel and for lack of proximate causation because McDermott was not licensed to practice law in Washington. RP 63-72. Then Cairncross first asserted in its proposed order that the trial court was misled. CP 1044-61. In response to the new issues, Taylor submitted opinions from Gary J. Libey ("Libey"), a respected Washington attorney with over 35 years of experience in cross-border Idaho transactions and opinion letters, and a supplemental declaration by Taylor's counsel with additional pleadings and deposition transcripts to show that the trial court was not misled. CP 916-1061. Libey agreed with McDermott's opinions and rendered his own. CP 1037-43. Despite Taylor's objections, the trial court signed a formal order granting summary judgment.[5] CP 1044-66. Taylor moved for reconsideration, but the trial court denied that motion without explanation. CP 1069-81, 1090. Taylor timely appealed. CP 1082-89, 1091-99.

IV. SUMMARY OF ARGUMENT

The trial court erred by dismissing Taylor's claims based on judicial estoppel because that rule does not apply here. Taylor's assertion that the Idaho Lawyers were liable to him as a client in jointly

[5] The trial court also dismissed Taylor's Washington CPA claim and found issues of fact on Cairncross' statute of limitations defense, but it did not reach proximate causation under Idaho law or Cairncross' alleged limited scope of representation. CP 56-57, 1064.

representing him and AIA, positions later rejected by the Idaho court, is not inconsistent with the position that Cairncross, too, represented him. Moreover, Cairncross was barred from asserting the equitable defense because of its unclean hands. The trial court also erred by dismissing Taylor's claims for lack of proximate causation by refusing to consider McDermott's opinions when he was a well-recognized expert and Cairncross first asserted Washington law applied in its summary judgment reply. It also erred by not considering Libey's opinions, a well-respected Washington lawyer. The trial court also abused its discretion by denying Taylor's motion to amend, as Cairncross failed to show actual prejudice.

V. ARGUMENT[6]

A. The Trial Court Erred by Dismissing Taylor's Claims Based on the Equitable Doctrine of Judicial Estoppel.[7]

"Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms of

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[6] Summary judgment orders and evidentiary rulings made in conjunction with summary judgment are reviewed de novo. ***Kellar v. Estate of Kellar***, 172 Wn. App. 562, 573, 291 P.3d 906 (2012); ***Cotton v. Kronenberg***, 111 Wn. App. 258, 264, 44 P.3d 878 (2002) (citations omitted). The burden is on the moving party to offer "factual evidence" that it is entitled to "judgment as a matter of law." ***Graves v. P.J. Taggares Co.***, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980); **CR 56(c)**.

[7] When summary judgment dismissal is granted based on judicial estoppel, this Court engages "in de novo review." ***Haslett v. Planck***, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (citation omitted). "The burden is on [Cairncross] to establish the elements of estoppel by 'clear and convincing' evidence." ***Lilly v. Lynch***, 88 Wn. App. 306, 318, 945 P.2d 727 (1997) (citation omitted); ***Smeilis v. Lipkis***, 967 N.E. 2d 892, 898 (Il. Ct. App. 2012). Clear and convincing is a proof greater than preponderance or a "high probability," e.g., the proof required for fraud. ***Dalton v. State***, 130 Wn. App. 653, 666, 124 P.3d 305 (2005); **5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 301.3** (5th ed.).

redolent of intentional wrongdoing." ***Miller v. Campbell***, 137 Wn. App. 762, 772, 155 P.3d 154 (2007) (citation omitted). Judicial estoppel is an affirmative defense that must be proven by clear and convincing evidence:

> In determining whether the doctrine applies, [this Court] look[s] at three primary considerations: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped...These factors are not an exhaustive formula and additional considerations may guide a court's decision. These include: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must have been clearly inconsistent; (4) the parties and questions must be the same; (6) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other party to change.

Kellar, 172 Wn. App. at 580. The Washington Supreme Court has stated that the six other considerations "are essentials to the establishment of estoppel." ***Markley v. Markley***, 31 Wn.2d 605, 614, 198 P.2d 486 (1948).

Here, the trial court erred by considering[8] and applying judicial estoppel to dismiss Taylor's claims because that defense does not apply

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[8] "Judicial estoppel is an affirmative defense." ***Petock v. Asante***, 240 P.3d 56, 63 (Or. App. 2010). But Cairncross never pleaded judicial estoppel as an affirmative defense. CP 17-24; **CR 8(c)**. Taylor objected to Cairncross' assertion of judicial estoppel and it never sought leave to amend its answer. CP 397, 877-83; RP 36. ***Farmers Ins. Co. of Wash. v. Miller***, 87 Wn.2d 70, 76, 549 P.2d 9 (1976). Thus, Cairncross has waived the defense.

here and Cairncross failed to meet its burden.[9] CP 34-304, 394-97, 1064. At a minimum, like the heavy burden to prove fraud, genuine issues of material fact required the trier of fact to decide whether the defense was proven by clear and convincing evidence. ***Lilly***, 88 Wn. App. at 318; ***Lipkis***, 967 N.E. 2d at 898; **WPI 21.01**; **WPI 160.02**. Even though the application of judicial estoppel is reviewed de novo here, the trial court also abused its discretion by applying judicial estoppel because its decision was based on errors of law and untenable grounds and reasons.

1. Taylor Has Not Taken Any Inconsistent Positions.

With respect to the first core element, the trial court's view that Taylor had taken clearly inconsistent positions was erroneous because he never asserted any inconsistent positions in his complaints, testimony or pleadings submitted in the Idaho trial court or in the trial court here. CP 1-15, 74-84, 150-54, 252-97, 389-413, 416-17, 587-95, 747-84, 768-73, 900-11, 967-77, 981, 987-1002, 1015-32, 1033-43, 1064, 1069-81; RP 69-71. Taylor's positions against Cairncross were based on claims pertaining to it being his independent counsel, while his positions against the Idaho Lawyers were largely based on the incorrect third-party opinion letter and

[9] The trial court made findings of fact and conclusions of law over Taylor's objections. CP 1044-66. "Findings of facts and conclusions of law are not necessary on summary judgment and, if made, are superfluous and will not be considered on appeal. A litigant need not assign error to superfluous findings." ***Concerned Coupeville Citizens v. Town of Coupeville***, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (citations omitted); **CR 52(a)(5)(B)**. This Court should disregard those findings of fact and conclusions of law.

their joint representation of him and AIA. *Id.* Taylor's positions, even if accepted in full by both courts, were not inconsistent positions.[10] *Id.*

In order to be clearly inconsistent, "[t]he positions taken must be diametrically opposed." ***Kellar***, 172 Wn. App. at 582; ***Bell v. Wells Fargo Bank, N.A.***, 73 Cal.Rptr.2d 354, 357 (Cal. Ct. App. 1998) (the positions must be "totally inconsistent" or "one [position] necessarily excludes the other") (citations omitted). Washington courts have consistently rejected applying judicial estoppel, even when the positions were inconsistent.

In ***Kellar***, the plaintiff obtained gaming licenses by submitting a copy of her prenuptial agreement to the South Dakota Gambling Commission to prove that she was keeping her assets separate from her husband's so that he would not benefit from the licenses. ***Kellar***, 172 Wn. App. at 581-82. The Gambling Commission stated in its ruling that the prenuptial agreement was valid and unquestionably relied on that finding. ***Id.*** at 582. When the plaintiff later asserted that the prenuptial agreement was unenforceable after having successfully obtained the gaming licenses, this Court reversed the trial court's application of judicial estoppel because the plaintiff's positions were not diametrically opposed and the issue of enforceability of the prenuptial agreement was never adjudicated before

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[10] The Idaho trial court rejected Taylor's testimony and positions that the Idaho Lawyers jointly represented him and AIA or that they owed him any duties other than through the preparation and delivery of the third-party opinion letter. CP 279-97, 987-1002.

the Gambling Commission. ***Kellar***, 172 Wn. App. at 582-83.

In ***Miller***, the plaintiff's claims were dismissed because he had not disclosed his sexual abuse claims as an asset in the bankruptcy court. ***Miller***, 137 Wn. App. at 772-74. This Court reversed and explained that judicial estoppel is applied in situations "redolent of intentional wrongdoing" and held that Miller's reasons for failing to disclose the claim were "not tenable grounds for concluding that [his] present lawsuit is clearly inconsistent with his position in bankruptcy." ***Id.*** at 772.

In ***Ingram v. Thompson***, 141 Wn. App. 287, 169 P.3d 832 (2007), the trial court applied judicial estoppel because the plaintiff had valued a personal injury claim in bankruptcy court at $5,000 and then later pursued that claim "seeking upwards of thirty times the value stated in his sworn bankruptcy submissions." ***Id.*** at 291. This Court reversed and held that the bankruptcy trustee had the opportunity to inquire into the claim and the plaintiff had at least disclosed the claim. ***Id.*** at 292-93.

Here, a comparison of Taylor's testimony and positions against the Idaho Lawyers and Cairncross demonstrates that he has not taken any inconsistent positions. CP 1-15, 74-84, 150-54, 252-97, 389-413, 416-17, 587-95, 747-84, 900-11, 925-41, 967-77, 981, 987-1002, 1015-32, 1033-43. Taylor was entitled to argue that <u>both</u> the Idaho Lawyers and Cairncross represented him and those positions are not inconsistent,

irreconcilable and diametrically opposed. *Id.* Cairncross broadly undertook a duty, as Taylor's independent counsel, to advise him whether he could sign the agreements, determine whether the agreements violated any laws, and determine whether he could legally sell his shares and close the transactions, among other duties.[11] CP 1-15, 590, 593, 596, 759-73, 1036-43. Cairncross' advice to Taylor, who was the majority shareholder in 1995 and a secured creditor of AIA in 1996, should have been based on its independent determination that the transactions complied with Idaho law—there cannot be one without the other. *Id.*; CP 596-736, 1036-43, 1064, 1329. In 1995 and again in 1996, Cairncross was required to address the critically important compliance with I.C. § 30-1-6 before it began to draft the agreements. CP 768-73, 1037-43; *see infra* note 25.

The Idaho Lawyers' duties to Taylor were different, though significant—they provided him with an opinion letter and represented him and AIA jointly. But Cairncross cannot hide behind that opinion letter as a defense and that letter provides no basis to apply judicial estoppel here.

> In a financial transaction, the parties count on their own lawyers to see to it that, as a legal matter, they will be receiving the benefit of the bargain they negotiated. If the transaction is significant enough, the party putting up the funds also often looks to the counsel for the party on the

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[11] *See* ***In re Marriage of Matson***, 107 Wn.2d 479, 488, 730 P.2d 668 (1986) (the purpose of "independent counsel...[is] to receive objective and independent information regarding the legal consequences of the agreement").

> other side to deliver to it, at closing, a letter expressing that counsel's legal opinion on various aspects of the transaction.
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> * * * *
>
> A third-party closing opinion, however, is only a building block in the recipient's due diligence...Receipt, therefore, of an opinion from the other party's counsel is no substitute for the general legal advice an opinion recipient is expected to receive from its own counsel.
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> * * * *
>
> The general rule on liability is that a lawyer owes a duty of care to a non-client addressee of a closing opinion...

Glazer, §§1.1, 1.3.1 & 2.3.2 at 1, 10-12 & 67; *see also* **RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 51(2), 95(1)** and **(3)** (2000). The opinion letter was only ***part*** of Cairncross' required duty of care for a transaction of that magnitude. CP 769-71, 1037-41. Consistent with these authorities, Taylor's two experts opined that he had a right, independent of any claims against Cairncross, to assert claims against the Idaho Lawyers for the opinion letter and the Idaho trial court and Cairncross itself agreed.[12] CP 66, 286, 749 n. 1, 770, 780, 783 n. 2, 998-1000, 1037-41.

Moreover, in each of its orders, the Idaho trial court found that Cairncross was Taylor's "separate counsel." *Id.*; CP 280, 988. Taylor never asserted in the Idaho trial court that Cairncross was not *his* counsel or that he had no claims against it. CP 74-84, 417, 588-93, 767-68, 768-

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[12] Cairncross conceded in another section of its summary judgment brief: "[t]he recipient enjoys the right to rely on that opinion, and to seek recourse against the opinion giver if it turns out to be incorrect—just as Taylor has recourse here against Riley and Eberle Berlin in Idaho." CP 66.

73, 783 n. 2, 921-86, 981, 1036-43. McDermott, an expert in both cases, was clear that Taylor's positions against the Idaho Lawyers were different from his positions against Cairncross. CP 767-68, 783 n. 2, 780-84, 1040.

With respect to the two positions that the trial court viewed as being inconsistent, Taylor has never taken the position that Cairncross was responsible for ensuring that AIA was authorized to enter into the stock redemption transaction, even though Cairncross charged Taylor for that work. CP 1-15, 74-84, 587-95, 608, 900-11, 981, 1064, 1115-32, 1326. Taylor has never taken the position that he retained Cairncross to represent AIA. *Id.* Taylor argued consistently in Idaho and Washington that Cairncross was responsible for advising him whether he was authorized to enter into the transactions and for allowing the transactions to be closed in 1995 and 1996 in violation of I.C. § 30-1-6. CP 1-16, 588-93, 768-73, 900-11, 1017-31, 1036-43. Taylor has never taken the position that *only* the Idaho Lawyers were responsible for ensuring that the agreements were enforceable under Idaho law or that he *only* relied upon them for that work. CP 1-15, 53-54, 74-84, 252-77, 587-95, 767-73, 783 n. 2, 790-84, 900-11, 964-81, 1015-32, 1064.

As in the trial court, it is expected that Cairncross will rely upon and quote portions of three paragraphs of Taylor's sixteen paragraph affidavit filed in the Idaho trial court. CP 53-54, 74-84. A careful reading

of those three paragraphs and the rest of his affidavit shows that he was not taking inconsistent positions. CP 74-84. There is nothing inconsistent about him relying on Cairncross, while at the same time relying on the opinion letter and the Idaho Lawyers for jointly representing him and AIA. CP 749 n. 1, 768-84, 1037-41. While Cairncross quoted most of paragraph 3 in Taylor's affidavit, it omitted the most important first two sentences:

> I retained Scott Bell to represent[] me in connection with negotiating and drafting the Redemption Agreement...the $6 Million Promissory Note...and the ancillary agreements. Mr. Bell and [Cairncross] were not retained by me to act as counsel for AIA Services, rather, that job was left to my attorneys at Eberle Berlin.

CP 75, 53-54. This testimony establishes the context for Taylor's entire affidavit as it pertained to his position that the Idaho Lawyers owed him duties through the representation of AIA. CP 593, 1018-24. In paragraph 5 of his affidavit, the context again related to Taylor's reliance on the Idaho Lawyers to properly represent AIA. CP 54, 77. Cairncross also omitted a sentence wherein Taylor testified that he was never asked by the Idaho Lawyers to sign a conflict waiver. CP 77. Taylor explained his belief that the Idaho Lawyers owed him and the other shareholders duties too.[13] CP 77. He stated that, had he known that he could not rely on the Idaho Lawyers, he "would have retained new counsel for AIA." CP 77. In

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[13] *See* ***Wick v. Eisman***, 838 P.2d 301, 303-04 (Idaho 1992) (whether an attorney represented both a corporation and a shareholder is an issue of fact).

paragraph 7, Taylor explained his reliance on the Idaho Lawyers for the opinion letter and to properly jointly represent him and AIA:

> I would have never agreed to sell my shares without being provided the Opinion Letter by [the Idaho Lawyers]. I relied upon [the Idaho Lawyers] to provide the legal representation necessary to legally and properly complete the redemption of my shares for me and AIA Services. Neither I nor AIA Services had any other attorneys retained for the purpose of providing the legal representation to ensure the redemption of my shares had all necessary consents and did not violate any laws. I would have never agreed to sell my shares had I known the transaction was not legal and that all necessary shareholder consents had [not] been obtained, which was contrary to the express written opinions and representations provided to me by [the Idaho Lawyers].

CP 78-79. Thus, Taylor's testimony was consistent in all three paragraphs of his affidavit and it had nothing to do with his claims or positions against Cairncross. Taylor believed that, as the CEO and majority shareholder, he controlled who represented AIA and that the Idaho Lawyers owed him and the other shareholders duties too. CP 908. Taylor made it abundantly clear that only the Idaho Lawyers were hired to represent AIA and he has never asserted that it was Cairncross' responsibility to represent AIA. CP 75, 589-93, 900-11, 1015-32. As Taylor consistently explained, both Cairncross and the Idaho Lawyers failed to comply with I.C. § 30-1-6:

> Well, [the Idaho Lawyers] didn't do it correctly and [Cairncross] didn't do it correctly, because...we could have passed it to where we could have used the capital and surplus, so it could not have been declared illegal.

CP 1024. The timing of when Taylor retained Cairncross is also important to understand his positions. Prior to retaining Cairncross, one AIA shareholder meeting was held on March 7, 1995 and several board meetings had been held. CP 79-80, 89-91, 205, 1339-40; ***Taylor***, 261 P.3d at 833-34. Taylor was advised to retain separate counsel at the board meeting on March 7, 1995, and he did so, retaining Cairncross ten days later. CP 89, 598. The Idaho Lawyers' representation of AIA had already begun before Cairncross was retained as Taylor's independent counsel—Cairncross was never retained to represent AIA. *Id.*; CP 75, 77, 1039-40.

When Cairncross deposed Taylor *one* day before it *first* disclosed and asserted judicial estoppel as an affirmative defense, it was unsuccessful in eliciting testimony from Taylor to support its positions.[14]

Q. (Hollon): And in your opinion, as you sit here today, part of that scope of work – is it your testimony that that scope of work that Mr. Bell and Cairncross were doing included making sure that the transaction was legal under Idaho law? Do you believe they had that responsibility as you sit here today?

A. (Taylor): He had the responsibility to make sure everything was legal and protect me, and that wasn't done, or we wouldn't be here today.

Q. (Hollon): And is it also your testimony as you sit here today, February, 2013, that Mr. Bell had the responsibility to

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[14] It appears that Cairncross tactically failed to plead judicial estoppel in order to surprise Taylor at his deposition. CP 23-24, 53-56, 397, 1064. The purpose of CR 8(c) is for Cairncross "to provide notice to [Taylor]" and "prevent an unfair surprise." **AMJUR PLEADING § 273**. Notably, Taylor's testimony remained consistent. CP 1015-32.

determine that AIA had the authority to enter into the transaction?

* * * *

Q. (Hollon): Was that part of what he was responsible for as well?

A. (Taylor): I am not an attorney, and all these specific questions, I can't answer them as an attorney or otherwise. He was hired to protect my interest, make sure that I was protected. Whatever that encompasses, it encompasses.

CP 1020-22. Taylor's positions against Cairncross and the Idaho Lawyers have always been consistent. CP 74-84, 588-93, 900-11, 1015-32.

Significantly, the trial court's perceived inconsistent positions have nothing to do with Taylor's last remaining claim against the Idaho Lawyers, which is asserted as a non-client for the incorrect opinions in the opinion letter. CP 150-54, 286, 770, 780-84, 989, 1040-41, 1064. Taylor's positions to hold Cairncross liable to him as a client and the Idaho Lawyers liable to him as a non-client for the opinion letter are not inconsistent positions. *Id.*; CP 1-15, 768-73, 1015-43. That opinion letter could not have made the transaction legal, but Cairncross could have. *Id.*

In sum, there is nothing inconsistent about Taylor's positions against the Idaho Lawyers based on a joint attorney-client relationship with AIA (positions later rejected in the Idaho trial court) and the incorrect opinion letter (which induced him to sell), while at the same time asserting positions against Cairncross for its failure to ensure the transaction was legal and advising him to sell and close the transactions in 1995 and 1996.

CP 1-15, 74-84, 150-54, 252-77, 587-95, 747-84, 900-11, 962-86, 981, 1015-32, 1033-43. Likewise, there is nothing inconsistent about Taylor taking the position that he relied on *both* Cairncross and the Idaho Lawyers. *Id.* Taylor has never taken a position in the Idaho court that he had no claims or recourse against Cairncross. *Id.* Thus, Taylor's positions are *not* clearly inconsistent, irreconcilable and diametrically opposed. *Id.* Taylor has not shown any duplicity or lack of respect for either court and it would be inappropriate to deprive him of his right to be made whole. CP 1-15, 74-84, 252-77, 587-95, 747-84, 900-11, 981, 987-1002, 1015-43.

2. There Was No Perception that Either Court Was Misled.

With respect to the second core element of judicial estoppel, the trial court erred because the acceptance of Taylor's positions by either the Idaho courts or the Washington trial court would *not* create the perception that either court was misled.[15] CP 1064. Cairncross' sole argument was that the Idaho court was misled, but the Idaho court's order did not accept the positions that Cairncross asserted were inconsistent. *Id.*; CP 55-56, 74-84, 279-97. Cairncross did not submit any argument or evidence to prove that the trial court was misled and Taylor never misled either court. *Id.*

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[15] Cairncross also improperly first raised the argument that the trial court would be misled *after* its reply in its proposed order, which the trial court erroneously entered over Taylor's objections. CP 55-56, 1062-66, 1044-66. ***White v. Kent Med. Center, Inc., P.S.***, 61 Wn. App. 163, 169, 810 P.2d 4 (1991). That argument was never before the trial court.

Washington courts have consistently held that in order to demonstrate that a court was misled the earlier inconsistent position must have been successful. ***City of Walla Walla v. $401,333.44***, 164 Wn. App. 236, 252, 262 P.3d 1239 (2011); ***CHD, Inc. v. Taggart***, 153 Wn. App. 94, 103-04, 220 P.3d 229 (2009); ***Miller***, 137 Wn. App. at 769. In ***Taggart***, the plaintiff, CHD, had taken a position in the bankruptcy court that Taggart was owed $41,000 as a secured creditor. ***Taggart***, 153 Wn. App. at 102. Later, CHD filed a quiet title action to determine the amount secured by the deed of trust and the trial court ruled that CHD was judicially estopped from asserting any position less than $41,000. ***Id.*** at 103. Division III reversed and held that CHD had not convinced the bankruptcy court to accept its position because the bankruptcy action was dismissed, so there was "no judicial acceptance." ***Id.*** at 104. Division III held that there would be no perception that the bankruptcy court or trial court was misled by accepting CHD's positions "because the inconsistent representations in the bankruptcy as to the amount secured by the deed of trust highlights the need for judicial resolution of the issue." ***Id.*** at 105.

Here, as a matter of law, neither the trial court nor the Idaho court was misled because the Idaho court rejected all of Taylor's testimony and positions supporting his claims as a client of the Idaho Lawyers. CP 53-56, 252-97, 767-84, 783 n. 2, 987-1002, 1036-41, 1064. Taylor's one and only

remaining claim is based on being the non-client recipient of an incorrect opinion letter—which could not have made the transaction legal and is not the factual or legal basis for Taylor's claims against Cairncross. *Id.*; CP 1-15, 1015-32. The Idaho court twice found that Taylor was represented by Cairncross and that "no attorney-client relationship" existed between Taylor and the Idaho lawyers. CP 280, 286, 943, 988. When the Idaho Lawyers renewed their motion for summary judgment, they submitted Taylor's complaint against Cairncross as evidence and asserted several other defenses that directly or indirectly blamed Cairncross. CP 416-17, 511-34, 925-41, 952-54. McDermott explained in both lawsuits that Taylor's last claim against the Idaho Lawyers had nothing to do with Cairncross' negligence. CP 767-68, 770, 783 n. 2. There is no way that the Idaho trial court was misled when it again ruled that Taylor was represented by Cairncross and that the Idaho Lawyers owed Taylor a duty, as a non-client, on the incorrect opinion letter when it was fully advised of Taylor's positions and claims against Cairncross. CP 150-54, 416-17, 780-84, 925-41, 964-81, 988, 998-1000. The Idaho Lawyers and Cairncross' defenses in both lawsuits of blaming each other for Taylor's damages simply demonstrates the need to adjudicate the claims in both courts and proves that neither court was misled. *Id.*; CP 1-15, 23, 269-70, 279-97, 482-84, 511-34, 590, 593, 768-73, 921-61, 1010, 1015-32, 1036-43.

Taggart, 153 Wn. App. at 105.

Taylor did not mislead the trial court below as he has never taken the position that Cairncross was liable for the incorrect opinion letter. CP 1-15, 74-84, 587-95, 768-73, 780-84, 900-11, 1015-32, 1037-43. Indeed, Taylor's complaint here alleges that Cairncross should have known that the opinion letter was incorrect. CP 6. There was no perception that the trial court was misled through the Idaho court's acceptance of Taylor's position that he had claims, as a non-client, against the Idaho Lawyers based on the incorrect opinion letter. CP 268-70, 286, 780-84. Taylor is pursuing claims against Cairncross for breaching its various duties owed to him as a client. CP 1-16, 768-73, 1036-43. McDermott and Libey's opinions are consistent with all of Taylor's positions in both cases.[16] CP 747-84, 1033-43. The trial court here did not even indicate that either court was misled in its oral decision, but instead only focused on Taylor's purported inconsistent positions. RP 69-71. The trial court apparently incorrectly believed that it or the Idaho court was misled when Taylor purportedly took the position that "no other lawyer had a duty" other than the Idaho Lawyers—when Taylor never took such a position. RP 70; CP 1-15, 74-84, 252-77, 587-95, 767-68, 780-84, 900-11, 1015-32, 1037-43.

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[16] McDermott attached a copy of his affidavit filed in the Idaho court to his affidavit filed in the trial court here to ensure that full disclosure was made of his opinions. CP 747-84.

Taylor never testified that Cairncross did not owe him a duty. *Id.* Finally, even if Taylor's positions in both courts were accepted, there would still be no perception that either court was misled because there is no rule of law that Taylor could not be owed duties by both the Idaho Lawyers for jointly representing him and Cairncross for acting as his independent counsel. CP 1-15, 74-84, 252-97, 747-84, 987-1002, 1037-43.

3. Taylor Has Not Obtained an Unfair Advantage and No Unfair Detriment Could Be Imposed on Cairncross.

With respect to the third core element of judicial estoppel, the trial court erred because Taylor did not and could not obtain an unfair advantage or impose an unfair detriment on Cairncross. CP 1064. Cairncross' argument was not supported by any evidence and the trial court never even mentioned either issue at the hearing. CP 56; RP 69-71. Taylor could not receive an unfair advantage by being made whole. If any detriment is present in this case, it was caused by Cairncross when it committed malpractice by missing I.C. § 30-1-6. *Id.*; CP 768-73, 1037-43.

In ***Kellar***, this Court held that the Estate had "not shown" that by accepting the wife's position that the prenuptial agreement was unenforceable after she used that agreement to obtain gaming licenses "would allow her to obtain an unfair advantage or impose an unfair detriment on the Estate." ***Kellar***, 172 Wn. App. at 582-83. This Court held that the husband would benefit if the agreement was set aside because the

licenses would become part of the marital estate and that any unfairness to the husband would be derived from proving that the prenuptial agreement was "invalid from the inception, not from the [husband's] reliance on [the wife's] position before the Gaming Commission or any other time during their marriage." ***Kellar***, 172 Wn. App. at 583.

In ***Taggart***, Division III rejected Taggart's arguments that CHD would obtain a "windfall of almost $28,000 of the $41,000 owed" if it was permitted to change positions. ***Taggart***, 153 Wn. App. at 106. Division III held that even if CHD was successful to limiting the deed of trust obligations to $17,000, the other amounts purportedly owed still exist. ***Id.*** Finally, Division III held that CHD's success would not result in a windfall at Taggart's expense because the "events underlying these claims were wholly within Taggart's control." ***Id.*** In ***Seattle-First Nat. Bank v. Marshall***, 31 Wn. App. 339, 641 P.2d 1194 (1982), this Court refused to apply judicial estoppel and held there was no unfair advantage or detriment because it would be inappropriate to "deprive [the] Olsen's estate of the full worth of her partnership interest." ***Id.*** at 343-44.

Here, Cairncross failed to submit any evidence that Taylor would obtain an unfair advantage or impose an unfair detriment on it. CP 34-36, 53-56, 537-48, 1328-33. Cairncross' only argument is that it would be unfair for it to be dragged into court years later, but it knew that it could

be sued many years later because the $6M Note that it negotiated and drafted for Taylor was not due for 10 years. *Id.*; CP 56, 666-67, 1029.

Taylor will not obtain an unfair advantage or impose an unfair detriment on Cairncross nor will he receive a windfall.[17] He has lost over $10,000,000 and incurred over $1,000,000 in fees litigating over the illegal agreements that Cairncross drafted and advised him to sign without independently confirming compliance with I.C. § 30-1-6. CP 82, 542-43, 768-73, 1037-43. He is merely seeking what the agreements that Cairncross recommended to him should have provided him, but for Cairncross' negligence. *Id.*

Cairncross cannot show that Taylor would obtain an unfair advantage or impose an unfair detriment on it because it bears the responsibility for missing I.C. § 30-1-6 in 1995 and again in 1996. CP 55-56, 768-73, 1036-43. Cairncross committed malpractice and breached its duties to Taylor based on events that transpired in 1995 and 1996—so it could not have relied to its detriment upon any of Taylor's positions in the Idaho trial court in 2009 or thereafter. CP 1-15, 74-84, 252-77, 747-73, 1033-43. Moreover, Taylor will not obtain an advantage through Cairncross and the Idaho Lawyers' assertion of the "empty chair" defenses

[17] "The guiding principle of tort law is to make the injured party as whole as possible." ***Shoemake v. Ferrer***, 168 Wn. 2d 193, 198, 225 P. 3d 990 (2010). Taylor is entitled to be made whole and there can be no unfair advantage or detriment pertaining to that right.

blaming each other for his claims in each lawsuit. CP 23, 482-84, 511-34, 921-61, 1010. This simply demonstrates the need to "resolve these issues on the merits, which is the preference under Washington law." ***Taggart***, 153 Wn. App. at 106 (citation omitted).

No unfair advantage or detriment can occur based on the opinion letter. Cairncross admitted that obtaining the opinion letter had nothing to do with its attorneys not being licensed in Idaho, that obtaining the opinion letter came up "during the course" of representing Taylor and was "appropriate and normal" for a transaction of that magnitude, and that he was entitled to assert claims against the Idaho Lawyers for the incorrect opinion letter as an avenue of recovery. CP 66, 150-54, 547, 749 n. 1, 767-73, 783 n. 2, 780-84, 1040-41, 1331. **Glazer, §§1.1, 1.3.1** at 1, 10-12. Indeed, when a third-party opinion letter is obtained, "the parties count on their own lawyers to see to it that, as a legal matter, they will be receiving the benefit of the bargain they negotiated" and "[r]eceipt, therefore, of an opinion from the other party's counsel is no substitute for the general legal advice an opinion recipient is expected to receive from its own counsel." **Glazer, §§1.1, 1.3.1** at 1, 10-12; **LEGAL OPINION LETTERS A Comprehensive Guide to Opinion Practice, §3.2** at 3-4 (3d ed.) (an opinion letter is predicated upon "the professional obligation of the

recipient's counsel to exercise reasonable care");[18] CP 770, 1037-41. Cairncross cannot use the opinion letter as a defense and it was not an addressee or invited reliance party.[19] CP 20, 150-54, 770, 981. **Glazer, §§ 1.6.3, 2.3.2** at 39 and 67. The opinion letter does not absolve Cairncross of its duties owed to Taylor, who was in the distinct position of being the majority shareholder and later a creditor of AIA. CP 768-73, 1036-43.

Although Cairncross charged Taylor for work for the opinion letter, he may never recover anything because his last claim on that incorrect letter is now before the Idaho Supreme Court on permissive review. CP 535-36, 610-13, 1009-14, 1331, 1352-59. On appeal, the Idaho Lawyers are asserting that they owed no duty to Taylor through the opinion letter, that he waived his right to assert claims on the opinion letter because Cairncross did not obtain a new letter in 1996, and that the 1996 restructured agreements withdrew the opinion letter. CP 482-83, 499-503, 509-09, 511-36, 699-736, 952-53, 954, 985, 1010. In short, the Idaho Lawyers are asserting that the opinion letter (that Cairncross required as a condition of closing) was or has become worthless. *Id.*; CP 651, 1331.

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[18] McDermott, one of Taylor's expert witnesses, is the author of this Chapter. CP 748.

[19] **Report on Third-Party Legal Opinion Practice in the State of Washington**, p. 15 n. 3 (1998) ("Each opinion letter addressee will be entitled to rely on the opinion letter. If the opinion giver permits any other person to rely on the opinion letter, that person should be identified in the last paragraph of the opinion letter"). When Cairncross negotiated the content of the opinion letter, it did not include itself as an addressee or authorized reliance party. *Id.*; CP 150-54, 770, 981, 1331. Even if Cairncross had, its recourse would have been to sue the Idaho Lawyers for any damages that it ultimately paid to Taylor.

Thus, the opinion letter may well prove to be even more of a detriment to Taylor, as he is facing fee requests, instead of another avenue of recovery.

Moreover, it is impossible for Taylor to receive an unfair advantage or impose an unfair detriment when Cairncross' scope of representation was unlimited. CP 587-94, 596-613, 768-69, 1034, 1040-41. Cairncross should receive no sympathy for botching work regarding the legality, including: "[a]nalysis re need for shareholder meeting," analysis regarding "corporate authority issues," drafting a "closing checklist," and work regarding "remaining closing issues." CP 607, 608, 611, 1326, 1358-60. Cairncross represented Taylor for restructuring the transaction when he was a secured creditor of AIA in 1996. CP 590, 598-613, 699-736, 768-73, 843-968, 1037-43. Notably, Cairncross attorney Frank Taylor hand wrote to his colleague Dawson Taylor about AIA's authority to enter into the transaction—an issue that Cairncross later denied was within its scope of representation. CP 34-36, 56-57.

> Dawson: What about: (1) The issue of their authority to enter into the Stock Redemption Agreement—Riley's proposal says [AIA's] authority to do this and to close and consummate the transaction is dependent upon...S[hare] H[older] approval.

CP 1326. This Memo, along with the billing records, proves that Cairncross' scope of representation included the very issues it now asserts were not included in its scope of representation. *Id.*; CP 35-36, 56-57, 598-

613, 878-79, 1064. According to Bell, Cairncross' scope of representation allegedly became more limited as time passed. CP 34-36, 537-40, 596, 1326, 1329, 1331. Cairncross simply missed I.C. § 30-1-6 in 1995 and 1996, as confirmed by its billing records. *Id.*; CP 598-647, 770-73, 1040.

Cairncross, through Bell, admitted that it "was aware that every state has its statute restricting the use of its capital" but it did nothing to inquire about or ensure compliance with I.C. § 30-1-6. CP 542-44, 772-73, 1037-38. When the Idaho trial court ruled the agreements were illegal, it stated that "[t]here is no question that all parties, including [Taylor], either ignored or failed to consider I.C. § 30-1-6." CP 213, 215, 462. Bell could not recall whether he looked at any of the restrictions under I.C. § 30-1-6. CP 543. Bell also didn't know whether Cairncross had copies of Idaho Code or where it obtained copies of Idaho Code. CP 545, 1244-61, 1316-19. Cairncross simply missed I.C. § 30-1-6. CP 598-647, 768-73, 1037-43.

In sum, the trial court erred because Taylor has not obtained an unfair advantage or imposed an unfair detriment on Cairncross—he has the right to be made whole. To the extent that any detriment exists, Cairncross imposed that detriment on itself and it is hardly unfair. Cairncross charged Taylor over $96,000 for over 100 days of negligent work and it would expect to be held liable for missing I.C. § 30-1-6. CP 596-647, 768-73, 1033-43. ***Taylor***, 261 P.3d at 844 ("it appears that none

of the parties recognized the potential violation of I.C. § 30-1-6").

4. None of the Six Other Considerations of Judicial Estoppel Are Present.

The trial court erred by not addressing the six other considerations, especially when the three core elements were not proven and in light of the factual contexts of Taylor's positions, his right to be made whole, and Cairncross' duties. ***Miller***, 137 Wn. App. at 772-73; CP 1064; RP 69-71.

With respect to the first other consideration of judicial estoppel, Taylor has not successfully maintained the purported inconsistent positions, which were rejected by the Idaho court when it dismissed all of his claims as a client. CP 53-56, 74-84, 268-70, 286, 770, 780-84, 989, 1064. His last claim is based solely on the incorrect opinion letter, which simply induced Taylor to sell and could not make the transaction legal. *Id.*

With respect to the second other consideration, no judgment has been entered against the Idaho Lawyers and Taylor's last claim as a non-client is on appeal before the Idaho Supreme Court. CP 535-36, 1009-14. Even if Taylor obtained a favorable judgment, it would be irrelevant because he is entitled to be made whole. ***Ferrer***, 168 Wn. 2d at 198.

With respect to the third other consideration, Taylor's positions have not been "clearly" inconsistent, as discussed *supra* at 13-23. CP 1-16, 74-84, 252-77, 286, 747-84, 962-86, 981, 989, 1033-43. Taylor, having been represented by the Idaho Lawyers for many years, believed that they

too owed duties and were responsible. CP 74-84, 908, 970-77, 1024. He has always maintained that Cairncross was his *independent counsel* representing *only* his interests. CP 1-15, 589-93, 1015-32.

With respect to the fourth other consideration of judicial estoppel, the parties and questions in both lawsuits are not the same. CP 1-15, 74-84, 252-77, 747-84, 1033-43. The issue of Cairncross' liability to Taylor was never and will never be adjudicated in the Idaho court. *Id.* Cairncross is not a party to Taylor's case against the Idaho Lawyers. CP 279. Even accepting the trial court's view of Taylor's positions, the questions are still not the same because Taylor's claims here pertain to Cairncross being his independent counsel in his distinct positions of being the majority shareholder of AIA and later as a secured creditor of AIA. CP 1-16, 252-277, 593, 768-73, 1015-32, 1036-43. Taylor is not suing Cairncross for the incorrect opinions contained in the opinion letter or for representing AIA. *Id.* Taylor's positions against Cairncross have only been asserted here. *Id.*

With respect to the fifth other consideration of judicial estoppel, Cairncross has failed to submit any evidence that it was misled or changed its positions. CP 34-304. In ***Marshall***, 31 Wn. App. 339, this Court rejected the application of judicial estoppel and "note[d] that Marshall was not misled by Seattle-First's initial valuation of the partnership interest" and that "[h]ad Marshall relied on the initial valuation, the case for

[judicial estoppel] would be much stronger." ***Marshall***, 31 Wn. App. at 343-44. Here, it would be impossible for Cairncross to have been misled by Taylor's positions taken against the Idaho Lawyers in 2009 or thereafter because it had already failed to ensure compliance with I.C. § 30-1-6 and committed malpractice when it represented him for "the sale of his stock in AIA" in 1995 and again for the restructuring of the obligations in 1996. CP 538-45, 596-647, 768-73, 1036-43, 1324-26, 1358-60.

With respect to the sixth other consideration, there is no evidence that it would be unjust for Cairncross to be held liable for its malpractice and breached duties that caused Taylor to lose over $10,000,000. CP 592, 768-73, 1036-43. Cairncross charged Taylor over $96,000 and knew that the $6M Note was not due for 10 years, so it can hardly complain about being sued now. *Id.*; CP 589-90. It would not be unjust for Cairncross to be held liable to Taylor in order to help make him whole.

5. Cairncross Is Barred from Asserting the Equitable Doctrine of Judicial Estoppel Because of Its Unclean Hands.

The trial court erred and abused its discretion by applying judicial estoppel because Cairncross has unclean hands. CP 1064. "Judicial estoppel is an equitable doctrine." ***Kellar***, 172 Wn. App. at 579. A litigant's unclean hands bar it from asserting equitable defenses. ***Retail Clerks Hlth. & Welfare Trust Funds v. Shopland Supermarket***, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982); ***Seller Agency Council, Inc. v.***

Kennedy Center For Real Estate Ed., 621 F.3d 981, 986 (9th Cir. 2010).

Here, Cairncross' attorneys were not licensed to practice law in Idaho when they represented Taylor (who was an Idaho resident) for an Idaho transaction involving AIA (an Idaho corporation). CP 19, 21, 309-10, 587-88; RP 70. Cairncross, through its attorneys, violated the RPCs and Idaho law by representing Taylor, entering into a fee agreement with him, and it was "prohibited from and obligated to decline or withdraw from representing Reed Taylor." CP 768, 1037. As a matter of law, Cairncross violated Idaho law, Idaho RPCs and Washington's RPC 5.5 by unlawfully practicing law in Idaho on over 100 days in 1995 and 1996, and by failing to terminate that representation.[20] CP 430, 577, 598-647, 768-70, 831, 1037. **I.C. § 3-420**; **IRPC 1.2(c)**, **IRPC 1.2 cmt.**,[21] **IRPC 1.16(a)(1)**, **IRPC 5.5**, **IRPC 8.5** (1986); **RPC 5.5**; ***Idaho State Bar v. Meservy***, 335 P.2d 62, 64 (Idaho 1959) (drafting contracts constitutes the unauthorized practice of law); ***Cotton***, 111 Wn. App. at 269 (violation of RPCs may be determined as a matter of law). Thus, Cairncross has

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[20] In addition, as a matter of law, the fee agreement and any purported agreement to limit Cairncross' scope of representation are void and unenforceable. ***Cotton***, 111 Wn. App. at 269 ("Attorney fee agreements that violate the [RPCs] are...unenforceable" and the issue "is...not factual"). CP 427, 596-97. Thus, even if the trial court applied judicial estoppel under the mistaken belief that Cairncross' scope of representation was somehow limited, its scope of representation was unlimited and could not be limited. *Id.*; CP 427, 588-93, 596-647, 768-73, 1037-43. For the same reasons, Taylor's breach of fiduciary duty claim seeking disgorgement of fees was improperly dismissed, irrespective of judicial estoppel.

[21] "An Agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." **IRPC 1.2(c) cmt.** The 1986 Idaho RPCs apply.

unclean hands and is barred from asserting the equitable defense of judicial estoppel. CP 430, 1064. ***In re Benninger***, 357 B.R. 337, 352 (Bkrtcy. W.D. Pa. 2006) (a party has unclean hands when it engages in the unauthorized practice of law); **CJS EQUITY §§ 109** and **124**.

B. The Trial Court Erred by Dismissing Taylor's Claims For Lack of Proximate Causation.[22]

1. The Trial Court Erred Because Idaho Law Governed Proximate Causation and the Standard of Care.

In Washington, "[t]he plaintiff must demonstrate that 'but for' the attorney's negligence he would have obtained a better result." ***Smith v. Preston Gates Ellis, LLP***, 135 Wn. App. 859, 864, 147 P.3d 600 (2006). In Idaho, the plaintiff need only demonstrate that he had "some chance of success." ***Jordan v. Beeks***, 21 P.3d 908, 912-13 (Idaho 2001). Idaho has no local standard of care, while Washington has adopted a state-wide one. ***Id.***; ***Walker v. Bangs***, 92 Wn.2d 854, 859, 601 P.2d 1279 (1979); CP 1037-39. Taylor's claims in this lawsuit are based on violations of Idaho law. *See e.g.*, **I.C. § 30-1-6**; **I.C. § 3-420**; ***Meservy***, 335 P.2d at 64.

Here, the trial court erred by not applying Idaho law because there is no state-wide standard of care in Idaho and Taylor need only show that

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[22] Evidentiary rulings involving summary judgment are reviewed de novo. ***Cotton***, 111 Wn. App. at 264. "An expert's qualifications and opinions are part and parcel of a summary judgment. [This Court] do[es] not, then, defer to the trial judge's rulings on evidence when passing on the propriety of a summary dismissal." ***Hill v. Sacred Heart Med. Center***, 143 Wn. App. 438, 445-56, 177 P.3d 1152 (2008) (citations omitted).

he had "some chance of success" to prove proximate cause under Idaho law—which are different legal standards than under Washington law. CP 1037-38, 1063-64. Under the significant relationship rule, Idaho law applies to the standard of care and proximate cause for Taylor's claims.[23] ***Southwell v. Widing Transp., Inc.***, 101 Wn.2d 200, 204-05, 676 P.2d 477 (1984); **RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 AND § 145** (1971). Taylor was an Idaho resident when Cairncross represented him in 1995 and 1996 for "the sale of his shares in AIA." CP 587, 596. AIA was an Idaho corporation and had no offices in Washington. CP 588. The parties' relationship was centered in Idaho because Cairncross *communicated* legal advice to Taylor in Idaho through telephone calls, memos, facsimiles, and letters.[24] CP 588-95, 598-647, 1324-26, 1329-31, 1358-60. The agreements that Cairncross drafted and advised Taylor to sign were governed by Idaho law. CP 35, 664, 675, 686, 705, 721, 729. The transactions were closed in Idaho and the security pledged to Taylor was in Idaho. CP 590, 649, 668-87, 701, 710-30. Taylor was injured in Idaho since the 1995 and 1996 agreements violated I.C. § 30-1-6 and were

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[23] Taylor gave sufficient notice by pleading Idaho law and statutes numerous times in his complaint and response. CP 1-15, 393-94, 397-404, 406-12. **CR 9(k)(1)**; **RCW 5.24.010**; ***Erickson v. Sentry Life Ins. Co.***, 43 Wn. App. 651, 654-55, 719 P.2d 160 (1986).

[24] *See* ***St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolash & Birch, LLP***, 233 F.Supp.2d 171, 177 (D. Mass. 2002) (applying Massachusetts law because, although the attorney was in Virginia, the advice was *communicated* to the client in Massachusetts).

declared illegal and unenforceable by an Idaho court. ***Taylor***, 261 P.3d 829. Cairncross agreed to be bound by the Idaho RPCs when it represented Taylor in Idaho. **IRPC 8.5** (1986). Idaho has a public interest in the practice of law in Idaho and the enforcement of its RPCs, statutes and common law. *See e.g.*, **I.C. § 30-1-6**; **I.C. § 3-420**; ***Meservy***, 335 P.2d at 64. In fact, the trial court here found "everybody knew...that the problems arose out of issues that occurred in Idaho."[25] RP 65. Cairncross' position was that: "Taylor has no evidence that any other Idaho lawyers would have expressed an opinion different than Eberle Berlin's." CP 65. Thus, Idaho law governs the standard of care and proximate causation.

Having established that Idaho law applies to the standard of care and proximate causation issues, McDermott's opinions were admissible and proved breach and proximate causation because the trial court had already determined that he was qualified under Idaho law. RP 45; CP 768-73. Libey also opined that the Idaho standard of care applied and he opined as to breach and proximate causation. CP 1036-43. Thus, the trial court erred by not determining Idaho law governed the standard of care and proximate causation, and by dismissing Taylor's claims for lack of

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[25]*See* **Mark J. Fucile, Know Before You Go: Practicing Across State Lines in the Northwest, Washington State Bar News**, at 44 (Aug. 2012) ("Lawyers need to be as familiar with the nuances of the RPCs in the particular state in which they are handling a matter as they are with the substantive law of the matter involved"). Here, Cairncross' representation of Taylor was prohibited because he was a resident of Idaho. CP 768-69.

proximate causation. CP 1063-64; RP 66-67.

2. Even if Washington Law Applied, Taylor Proved Proximate Causation.

The trial court erred by dismissing Taylor's claims for lack of proximate cause only because McDermott's opinions were not considered because he was not licensed in Washington. RP 44-45; CP 1063.

In ***Bangs***, 92 Wn.2d 854, the trial court dismissed the plaintiff's claims pertaining to malpractice involving federal maritime law by excluding the opinions of the plaintiff's expert because he was not licensed to practice law in Washington. ***Id.*** at 856-57. The Washington Supreme Court reversed and held that the trial court abused its discretion:

> We hold that a lawyer not admitted to the Washington bar is not, per se, unqualified an as expert witness in a legal malpractice action in this state....the fact that [an attorney] is not licensed to practice in this state should go to weight, not the admissibility of his testimony, assuming he is otherwise qualified.

Bangs, 92 Wn.2d at 858-59. Thus, McDermott's opinions were admissible as to breach and proximate causation, and his not being licensed in Washington should have gone to the weight of his opinions and not their admissibility. ***Id.***; RP 45; CP 747-73. His opinions were also admissible because he consulted with an attorney licensed in Washington and Idaho for his opinions. CP 752. **ER 703**; **5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 703.6** (5th ed.). Moreover, Cairncross never challenged any

of his other qualifications and it conceded his opinions were correct by not rebutting them or explaining how they were incorrect. McDermott has extensive experience in multi-jurisdictional practice, is an over 20-year member of the TriBar Opinion Committee, has experience in the preparation or receipt of over 100 third-party opinion letters, has over 33 years of experience as a Professor of Law on corporate finance, is the author of a law school text book on corporate finance, is the author on a chapter in a treatise on opinion letters, and has over 35 years of experience in all aspects of corporate law, including transactions over $1 billion. CP 747-51. Thus, McDermott was qualified to render opinions on Cairncross' multi-jurisdictional representation of Taylor in Idaho for an Idaho transaction and the limited role that a third-party opinion letter played in that representation, which is the correct standard of care in any event. CP 747-73, 1037-39; RP 45. It is inconceivable how the Washington standard of care would apply to an Idaho transaction that violated Idaho law. *Id.*

Thus, the trial court abused its discretion because its reasons for excluding McDermott's opinions were not "fairly debatable." ***Bangs***, 92 Wn.2d at 859; **ER 702**; **ER 703**; CP 1063, 747-73; RP 44-45, 66-67. Thus, the trial court erred by ruling that Taylor failed to prove proximate causation when McDermott and Libey's opinions proved that Cairncross breached the applicable standard of care and was a proximate cause of

Taylor's damages, including over $1,000,000 in fees. CP 768-73, 1036-43.

3. In any Event, Expert Witness Testimony Is Not Required to Prove Breach and Proximate Causation.

The trial court also erred because the issues of breach and proximate causation did not require expert testimony to prove and were issues of law. CP 1063. Under Idaho and Washington law, expert testimony is generally required, unless the matter is within the common knowledge of a lay person. ***Hansen v. Wightman***, 14 Wn. App. 78, 93, 538 P.2d 1238 (1975); ***Jarman v. Hale***, 731 P.2d 813, 816 (Idaho Ct. App. 1986); ***Daugert v. Pappas***, 104 Wn. 2d. 254, 257, 704 P.2d 600 (1985) (proximate causation may be an issue of law).

Here, this case presents the unique circumstance were a court has already determined the "case within a case" issue. The Idaho Supreme Court ruled, as a matter of law, that AIA had insufficient earned surplus, its shareholders did not authorize the use of capital surplus in violation of I.C. § 30-1-6, and the agreements were illegal and unenforceable. ***Taylor***, 261 P.3d at 838-44. Cairncross admitted that it would not have advised Taylor to sell or close the transactions if it knew that the transaction was illegal. CP 1332. And if Cairncross had advised Taylor to do so, he would have readily voted his majority interest to comply with I.C. § 30-1-6. CP 590-91. Taylor had already obtained summary judgment against AIA on the default of the $6M Note, so he was already successful. CP 415. Thus,

there is no expert testimony required to determine issues that have already been decided as a matter of law. Cairncross' failure to ensure that Taylor's stock repurchase complied with I.C. § 30-1-6 is the equivalent of it missing the statute of limitations—both issues which expert testimony is not required to prove. No expert can opine that Cairncross ensured compliance with I.C. § 30-1-6 or that the agreements are enforceable because neither are true, as a matter of law. Thus, the trial court erred because no expert testimony was required to prove breach or proximate causation, and those issues have been decided as a matter of law. CP 1063.

C. The Trial Court Abused Its Discretion by Not Considering Taylor's Two Additional Declarations.[26]

The trial court abused its discretion by not considering Libey's declaration and the supplemental declaration submitted by Taylor's counsel. CP 916-1061, 1066. In its motion, Cairncross first asserted that no other Idaho lawyer would give opinions differently than the Idaho Lawyers. CP 65. After Taylor submitted McDermott's opinions, Cairncross abandoned its prior position that Idaho law applied and asserted for the first time that he was not licensed in Washington. CP 768-73, 881, 1046. In response to that new argument, Taylor submitted Libey's opinions to prove breach and proximate causation. CP 1033-43. In

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[26] Evidentiary rulings made in conjunction with summary judgment are reviewed de novo. ***Cotton***, 111 Wn. App. at 264.

response to Cairncross' new argument in its proposed order that the trial court was misled, Taylor submitted a supplemental declaration from his counsel with additional pleadings filed in the Idaho trial court and portions of Taylor's deposition transcripts to show that the trial court was not misled. CP 916-1032. These two declarations were submitted and called to the trial court's attention *before* it entered a formal order granting summary judgment. *Id.*; ***Applied Indus. Materials Corp. v. Melton***, 74 Wn. App. 73, 77, 872 P.2d 87 (1994); ***Goodwin v. Wright***, 100 Wn. App. 631, 648, 6 P.3d 1 (2000). The trial court refused to consider the two declarations based on procedural grounds, but those two declarations were submitted in response to Cairncross' procedurally improper assertion of new issues on reply. CP 1044-61. The trial court, however, acknowledged that the declarations were called to its attention. CP 1066; **RAP 9.12.** Significantly, the trial court's decision to not consider the two declarations was *not* based on admissibility grounds; and Cairncross did not object or move to strike the two declarations thereby waiving any procedural or admissibility objections. *Id.*; ***Smith v. Showalter***, 47 Wn. App. 245, 248, 734 P.2d 928 (1987) ("[W]here no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency"). Thus, the trial court abused its discretion by not considering the two declarations. In any event, the two declarations are properly before

this Court to consider on appeal. ***Wright***, 100 Wn. App. at 648; **RAP 9.12.**

D. The Trial Court Abused Its Discretion by Denying Taylor's Motion to Amend His Complaint.[27]

"The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." ***Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters***, 100 Wn. 2d 343, 350, 670 P.2d 240 (1983) (citation omitted); **CR 15(a)** ("leave shall be freely given...").

Here, the trial court abused its discretion when it denied Taylor's motion to amend. CP 313-40, 912-14. The burden was on Cairncross to show prejudice or bad faith and it failed to meet that burden. CP 851-61, 852; ***Caruso***, 100 Wn. 2d at 350; ***Hartley v. Wisconsin Bell, Inc.***, 167 F.R.D. 72, 74 (E.D. Wis. 1996) ("the non-movant has the burden to show prejudice"). In ***Caruso***, the Washington Supreme Court held:

> Petitioner did not set forth any specific objections other than it might be unable to contact some union officials....petitioner did not relate this objection to any actual prejudice and never asserted that respondent's delay was occasioned by bad faith...Petitioner simply failed to present any evidence of actual prejudice to the trial court...

Caruso, 100 Wn.2d at 350-51; CP 852. Like the petitioner in ***Caruso***, Cairncross failed to submit any specific evidence to show any actual prejudice or bad faith, and its attorney's statement did not show either:

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[27] The denial of a motion to amend is reviewed for abuse of discretion. ***Kirkham v. Smith***, 106 Wn.App. 177, 181, 23 P.3d 10 (2001).

> I deposed Plaintiff Reed Taylor on February 21, 2013. In doing so I relied on the factual allegations and legal claims asserted in Plaintiff's original complaint....In certain cases, however, even the liberal standard of CR 15(a) cannot be met. This is such a case.

CP 852. Even though Cairncross failed to meet its burden, Taylor still proved there was no prejudice, including: the trial date was months away, the claims in both complaints involved the same facts and witnesses, no witnesses or experts had been disclosed or deposed, only he had been deposed for one day, no pertinent scheduling deadlines had passed, and the timing of the motion to amend was not intentional or tactical. CP 1-15, 30-33, 316-40, 862-76. Moreover, delay alone, whether excusable or not, is not a sufficient reason to deny amendment. CP 914. ***Caruso***, 100 Wn. at 349. In fact, Cairncross conceded that there was no prejudice by not moving for a continuance. ***State v. Murbach***, 68 Wn. App. 509, 511-13, 843 P.2d 551 (1993). CP 840-61. Moreover, the trial court did not base its decision on any pleading deficiency or lack of evidence to support the claims in the proposed amended complaint. CP 912-14. **CR 12(b)(6)**. And if the Court reverses the order granting summary judgment, it would not be futile to allow Taylor to amend, as justice requires.[28] **CR 15(a)**. Thus, the trial court abused its discretion by denying Taylor's motion to amend.

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[28] On remand, Taylor would not assert a Washington CPA claim (which appears to be the portion of amendment the trial court ruled would be futile) since he elected to not appeal the dismissal of that claim, but he would pursue the other claims. CP 328-40, 914, 1063.

E. Taylor Should Be Awarded Costs on Appeal and an Award of Attorney Fees Should Be Reserved for Remand.

The substantially prevailing party on appeal is entitled to costs. **RAP 14.2**. Attorney fees may be awarded if permitted by law. **RAP 18.1(a).** Under Idaho law, attorneys' fees are recoverable for legal malpractice involving a commercial transaction. **I.C. § 12-120(3)**; ***Reynolds v. Trout Jones Gledhill Fuhrman P.A.***, 293 P.3d 645, 650-51 (Idaho 2013); ***Parrott Mechanical, Inc. v. Rude***, 118 Wn. App. 859, 869, 78 P.3d 1026 (2003). Although AIA's purchase of Taylor's shares was a commercial transaction that should have been legal, Taylor has not yet been named the prevailing party. ***Id.***; CP 771-73, 1037-43. Thus, this Court should award costs to Taylor on appeal and reserve an award of his attorney fees incurred on appeal for remand. ***Id.***; **RAP 18.1(i)**.

VI. CONCLUSION

This Court should reverse the trial court's orders granting summary judgment and denying Taylor's motion to amend, award him costs on appeal, reserve an award of fees, and remand this case for trial.

DATED this 21st day of October, 2013.

RODERICK BOND LAW OFFICE, PLLC

By:_____
Roderick C. Bond, WSBA No. 32172
Attorney for Appellant Reed Taylor

CERTIFICATE OF SERVICE

I, Roderick Bond, declare that under penalties of perjury under the laws of the state of Washington that, on the date indicated below, I served a true and correct copy of the foregoing on the following party(ies) via the method(s) indicated below:

	Via:
Gregory J. Hollon Avi Lipman McNaul Ebel Nawrot & Helgren 600 University Street, Suite 2700 Seattle, WA 98101-3143	( ) U.S. Mail, Postage Prepaid (**X**) Hand Delivered ( ) Overnight Mail ( ) Facsimile (**X**) Email (pdf attachment) (by Agreement)
Philip A. Talmadge Sidney Tribe Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188 [Co-Appellant Counsel for Appellant]	**Via:** (**X**) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile (**X**) Email (pdf attachment)

Dated the 21st day of October, 2013 at Bellevue, Washington.

RBB

Roderick C. Bond