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COURT OF APPEALS, DIVISION I
OF 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 RESPONDENTS

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I. INTRODUCTION

Seventeen years after the transaction in question, Appellant Reed Taylor brought this unfortunate afterthought of a lawsuit against Respondents Cairncross & Hempelmann and two of its lawyers, Scott Bell and Frank Taylor (collectively, "Cairncross"). Taylor sued Cairncross only after pursuing the same alleged damages in four other lawsuits against thirteen other defendants. The timing of Taylor's lawsuit speaks volumes, but what speaks even louder are the dispositive admissions he made in the course of his previous lawsuits. Those admissions are fatal to his case against Cairncross, and the trial court appropriately dismissed his claims.

Cairncross represented Taylor in 1995-96 in connection with the redemption of shares Taylor owned in an Idaho corporation, AIA Services Corporation ("AIA"). Cairncross advised Taylor against proceeding with the transaction unless AIA's lawyers, who were licensed in Idaho and familiar with financial condition of the company, agreed to provide an opinion letter attesting to AIA's authority to consummate the transaction and to its enforceability under Idaho law (which they did).

When AIA failed to perform under its contract with Taylor, Taylor sued it in Idaho. AIA successfully argued the redemption transaction was unenforceable under a technical provision of the Idaho Code. In response, Taylor appropriately sought recourse against the Idaho law firm (Eberle

Berlin) that provided the opinion letter. In the course of that lawsuit, which is still pending, Taylor testified under oath that the Idaho lawyers had ***sole*** responsibility for ensuring the legality of the transaction :

> I relied upon Mr. Riley, Mr. Turnbow and Eberle Berlin 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.***

CP 78-79 ¶ 7 (emphasis added). This sworn admission was consistent with an affidavit Taylor had solicited from Cairncross attorney Scott Bell and filed in support of his earlier lawsuit against AIA (the substance of which Taylor now conveniently attacks). Yet, despite his own prior admissions and the parties' undisputed agreement about the limited scope of Cairncross's representation, Taylor sued Cairncross for allegedly failing to do the very work he had delegated to Eberle Berlin.

Faced with the irreconcilable inconsistency between Taylor's testimony in Idaho and his current claims, the Honorable Dean Lum observed that "there is no clearer case, that I can think of, for application of the judicial estoppel doctrine than the present one." RP 71:14-17.

In granting summary judgment in favor of Cairncross, the trial court committed no error and exercised its discretion reasonably. Taylor's arguments to the contrary are unsupported by evidence or authority, ignore

the undisputed testimony by both parties regarding the scope of Cairncross's representation, and rely heavily on mischaracterizations of Washington law. This Court should affirm the judgment in all respects.

II. RESTATEMENT OF ISSUES

1. Should the Court deviate from established Washington State Supreme Court precedent by accepting Taylor's invitation to review the trial court's application of judicial estoppel under a standard other than "abuse of discretion"?

2. Did the trial court, which reviewed the inconsistency at issue approximately "a dozen times," abuse its discretion by concluding that Taylor's current position against Cairncross contradicts his prior sworn testimony in Idaho, jeopardizes the "integrity of court," and thus warrants dismissal of Taylor's claims under judicial estoppel?

3. Regardless of judicial estoppel, is Cairncross nonetheless entitled to summary judgment based on the undisputed testimony from all parties regarding the scope of Cairncross's representation?

4. Did the trial court properly conclude Taylor's claims fail for lack of proximate cause?

5. Did the trial court abuse its discretion by refusing to allow Taylor to amend his complaint after Cairncross's summary judgment motion had been filed, in a transparent effort to avoid dismissal?

6. Did the trial court refuse to consider submissions filed by Taylor after oral argument and, if so, was its refusal an abuse of discretion?

7. Is Cairncross entitled to an award of its costs and fees on appeal?

III. RESTATEMENT OF FACTS

A. Identity of Parties and Nature of the Case

The gravamen of Taylor's complaint is that Cairncross was negligent by (1) allegedly failing to identify that a statutory solvency requirement in effect at the time, Idaho Code § 30-1-6, rendered AIA's redemption transaction with Taylor unlawful and thus unenforceable; and, (2) despite the fact that it did not represent AIA, by failing to ensure AIA took all necessary steps to render the redemption transaction legal.[1]

Specifically, Taylor alleged that Cairncross and its assigned lawyers never determined that (1) I.C. § 30-1-6 authorized the use of *capital* surplus (as opposed to *earned* surplus) to redeem shares only if authorized by the Articles of Incorporation or a majority shareholder vote; and (2) that it prohibited redemption "at a time when the corporation is insolvent or when such purchase or payment would make it insolvent." CP 5, 9-10; *see also* 200-01. Thus, Taylor alleged, Cairncross failed to counsel Taylor that the transaction would be illegal under the

---

[1] I.C. § 30-1-6 was in effect during the course of Taylor's redemption transaction with AIA, but was repealed by the Idaho Legislature. *See* I.C. § 30-1-1 – 30-1-153 (repealed 1997). In essence, the statute was designed to ensure corporate solvency following a redemption.

circumstances, and failed to ensure AIA (which it did not represent) took corporate action to prevent the illegality. CP 9-10 ¶ 27.[2]

The trial court granted summary judgment on three separate bases. First, it dismissed Taylor's Consumer Protection Act ("CPA") claim because Taylor's allegations were "not directed at the 'entrepreneurial' aspects of the practice of law." CP 1063.[3] Second, the trial court dismissed all of Taylor's claims (legal malpractice, breach of fiduciary duty, and violation of the CPA) for lack of proximate causation.[4] *Id.* at 1063-64. Third, the trial court dismissed all of Taylor's claims under the doctrine of judicial estoppel. *Id.* at 1064.

B. Background Facts

Taylor founded AIA, an insurance-related business, and worked there for much of his professional career. CP 588 ¶ 4. Taylor eventually decided to exit the business, and the remaining shareholders, including Taylor's brother John Taylor, elected to have AIA redeem Taylor's

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[2] AIA had no earned surplus at the time it entered the redemption transaction with Taylor, nor did it have authority under either its articles or by a majority shareholder vote to use capital surplus to fund the redemption. CP 211.

[3] Taylor does not challenge the dismissal of his CPA claim.

[4] The trial court expressed no opinion as to whether Idaho or Washington law governs. CP 1063. The court concluded that if Idaho law governs, it lacked sufficient information to determine whether Taylor's claims fail for lack of proximate causation. *Id.*

shares.[5] In March 1995, Taylor retained Cairncross to represent him in connection with the redemption of shares he owned in AIA. CP 34-35 ¶ 3.

Respondent and Cairncross lawyer Scott Bell had primary responsibility for the transaction. CP 35 ¶ 4. Mr. Bell is an accomplished transactional lawyer, with over 30 years of experience in corporate finance and business transactions. CP 34 ¶ 2. A Cairncross associate attorney, Respondent Frank Taylor, assisted with the representation. CP 35 ¶ 4. From his initial meetings with Reed Taylor, Bell understood that the overall structure and many details of the transaction had largely been negotiated prior to Taylor's retention of Cairncross. CP 35 ¶ 5. As Bell describes it, Cairncross assisted with the remaining negotiations and "papering" the transaction. *Id.* AIA's board minutes similarly reflect that the board advised Taylor to obtain outside counsel, apparently because Taylor's personal lawyer, Richard Riley, was representing AIA in the transaction.[6] CP 89.

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[5] Confusingly, there are several individuals referenced herein with the last name of Taylor: (1) Appellant Reed Taylor; (2) John Taylor (Reed Taylor's brother); and (3) Respondent Frank Taylor. For the sake of simplicity, Appellant Reed Taylor is referred to herein as "Taylor." References to the other Taylors include their first names.

[6] Mr. Riley was at the time a lawyer at the Eberle Berlin firm in Boise. CP 1330. He has since moved to another Boise firm, Hawley Troxell. CP 252, 470.

1. Cairncross Insists on AIA's Counsel Providing an Opinion Letter

During negotiation of the redemption documents, Cairncross was focused on issues concerning AIA's solvency and its corporate authority to proceed with the transaction. CP 1324-1326. Given those concerns, Cairncross determined that, as a condition of the redemption, AIA's counsel (Eberle Berlin), should deliver to Taylor a written legal opinion regarding certain key issues. CP 35 ¶ 6. In an affidavit that Taylor solicited, relied on in his Idaho suit against AIA, and never disputed until the instant lawsuit, Bell explained the role of the Eberle Berlin opinion letter as follows:

> During the course of my firm's representation of Reed Taylor, my firm determined that, as a condition to the redemption, AIA Services Corporation's outside counsel should deliver to Reed Taylor a written legal opinion regarding certain legal matters surrounding the redemption. ***Reed Taylor agreed with this assessment.*** Eberle, Berlin was in a position to analyze whether, with respect to AIA Services Corporation, the transactions were authorized, complied with applicable Idaho laws, triggered complications with third parties, etc. ***Without access to the confidential books, records and proceedings of AIA Services Corporation, and not being a licensed Idaho lawyer, my firm was not in a position to make these determinations.*** Moreover, in my experience, it is customary for the party seeking to redeem shares [AIA] and its counsel to carry out the "due diligence" associated with determining the legal viability of the redemption. Richard Riley was extremely well-versed in the legal, financial and operational affairs of AIA Services Corporation as a result of his long-standing relationship with the company. With the advice from my firm, Reed

> Taylor determined that he should receive a legal opinion from Eberle, Berlin, who had superior knowledge of AIA Services Corporation's legal affairs ***to confirm AIA Services Corporation's legal ability to honor its obligations under the redemption***. In my experience, a written legal opinion in these circumstances is appropriate and normal. Mr. Riley and Eberle, Berlin agreed to provide the opinion. ...

CP 1331 ¶ 8 (emphasis added).

Cairncross's insistence on an opinion letter from AIA's counsel was standard and appropriate. As a seminal 1998 report from the TriBar Opinion Committee makes clear, legal opinions are designed to facilitate transactions by giving the recipient a right to rely on the opinions:

> The recipient of a third-opinion letter is entitled (except in a few jurisdictions) to rely on the opinions expressed without taking any action to verify those opinions.
>
> ...
>
> The opinion recipient's "right to rely" means that a professional duty is owed by the third-party opinion giver to the opinion recipient. As a result, in most jurisdictions, if the opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver.

TRIBAR OPINION COMMITTEE, THIRD-PARTY "CLOSING" OPINIONS, 56 Bus. Law. 591, 604 § 1.6 & n.29 (1998) (referred to herein as the "TRIBAR II REPORT"). According to Taylor's own expert, Mr. McDermott, a "twenty-two year member of the TriBar Opinion Committee":

> The purpose of a properly drafted opinion letter is for an opinion giver to provide the opinion recipient with "comfort" that the transaction is a legal and valid transaction and that the agreement is binding and

> enforceable in accordance with its terms, among other opinions. This "comfort" includes the opinion giver and opinion recipient's knowledge that the opinion giver could be subject to claims for damages should any relevant opinions prove to be incorrect.

CP 137-38 ¶ 4. In accordance with this standard practice, Eberle Berlin specifically informed Taylor that the opinions expressed in its letter were for his benefit and invited Taylor's reliance on those opinions. CP 154.

The form of Eberle Berlin's opinion letter, drafted by Cairncross, included standard "authority" and "enforceability" provisions. CP 1355-56 ¶¶ 2, 3. Those provisions, pursuant to customary practice, warranted that AIA had the legal power and authority to enter into the transaction and that the redemption agreement was enforceable under Idaho law. Notably, Riley and Eberle Berlin attempted to negotiate changes to the form of the opinion letter that would have removed or modified certain key opinions, including those regarding "authority" and "enforceability." CP 1359 ¶ 6. After Cairncross pushed back, Riley and Eberle Berlin agreed they could give the requested opinions in compliance with Idaho law, and Cairncross thus proceeded to close the transaction with an opinion letter in the original form it had proposed. CP 35 ¶ 7.

Taylor clearly understood the import of the opinion letter, and that Eberle Berlin was specifically tasked with ensuring the redemption was enforceable under Idaho law. As he testified in Idaho: "I relied upon Mr.

Riley, Mr. Turnbow and Eberle Berlin to ensure that the redemption agreement, $6 Million Promissory Note, and ancillary agreements and documents could be executed by AIA services and that the transaction was even permissible." CP 76 ¶ 3. According to Taylor's expert, Taylor's reliance on Eberle Berlin was appropriate. CP 132 ¶ 41 ("Reed Taylor relied upon the Opinion Letter and he was entitled to rely up [sic] it.").

The final terms of the transaction provided that AIA would redeem all of Taylor's AIA shares in exchange for (1) a down payment of $1,500,000;[7] (2) a $6 million promissory note, with interest–only payments for ten years and the principal due in a balloon payment in year ten; (3) forgiveness of certain debt owed by Taylor and related entities to AIA; and (4) transfer of title of several airplanes to Taylor. CP 178.

2. AIA Fails to Perform; Taylor Sues AIA in Idaho and Solicits Testimony From Scott Bell

Within the year following the closing of the redemption transaction, AIA defaulted on its obligations. CP 35 ¶ 8. Cairncross represented Taylor in a negotiation to restructure those obligations. Ultimately, the parties reached agreement and the restructure closed in

[7] Pursuant to an amendment, the $1,500,000 was paid in the form of a separate promissory note, as opposed to cash at closing. CP 1362.

1996. *Id.* Cairncross's involvement in the matter concluded at that point, and Cairncross provided no further legal services to Taylor. *Id.*

After Cairncross's involvement ended, AIA apparently failed to perform—even under the restructured agreement. In 2007, with the assistance of new counsel, Taylor sued AIA and certain of its officers and directors in Idaho. In 2008, in the course of that lawsuit, certain of the defendants filed a partial summary judgment motion alleging that the Stock Redemption Agreement violated I.C. § 30-1-6. CP 208. That statute (since repealed) authorized corporations to redeem their shares, but placed restrictions on the sources of funds used for that purpose. *See* CP 200-01.

As discussed above, in May 2009, Taylor solicited an affidavit from Scott Bell in support of his claims against AIA. In that affidavit, Bell described the scope of Cairncross's representation in a manner consistent with the testimony Taylor himself would later offer in support of his claims against Eberle Berlin. CP 1328-1334.[8]

In a June 17, 2009 order, CP 203-16, the Idaho trial court held the redemption agreement violated I.C. § 30-1-6 because AIA had no earned surplus at the time of the redemption, nor did it have authority under either its articles or by a majority shareholder vote to use capital surplus to fund

[8] *See* pp. 7-8 *supra* (quoting Bell's affidavit).

the redemption. The court accordingly found the redemption agreement unenforceable and held that Eberle Berlin's opinion regarding enforceability was incorrect. CP 214 n.15. Taylor appealed that decision to the Idaho Supreme Court. On September 7, 2011, the Idaho Supreme Court affirmed the trial court. CP 219, 248.[9]

3. Taylor Sues Riley and Eberle Berlin in Idaho

On October 1, 2009, Taylor filed a lawsuit against, among others, Richard Riley and Eberle Berlin. In relevant part, that lawsuit alleged that Riley and Eberle Berlin negligently drafted the opinion letter. *See, e.g.*, CP 252, 267-77. Riley, his former partner Turnbow (now deceased), and Eberle Berlin moved for summary judgment. They argued that they had no attorney-client relationship with Taylor and therefore owed him no duty.

Consistent with Bell's earlier testimony in Taylor's action against AIA, Taylor testified in opposition to Eberle Berlin's dispositive motion that, among other things:

- He "relied upon Mr. Riley, Mr. Turnbow and Eberle Berlin to provide the legal representation necessary to legally and properly complete the redemption of my shares for me and AIA Services." CP 78 ¶ 7.
- "[A]lthough Mr. Bell drafted the agreements and reviewed and approved the form of the Opinion Letter to ensure that I was protected, I relied upon Mr. Riley, Mr. Turnbow and Eberle Berlin to ensure that

[9] In so ruling, the Idaho Supreme Court noted that Taylor had "already received over $9 million pursuant to the Stock Redemption Agreement, including over $6.5 million in cash paid on the two notes." CP 238 n.3.

the Redemption Agreement ... $6 Million Promissory Note ... and ancillary agreements and documents could be executed by AIA Services and that the transaction was even permissible. However, ***my use of Scott Bell had no impact on my expectations for Mr. Riley, Mr. Turnbow and Eberle Berlin*** to properly represent me and AIA Services for corporate formalities, shareholder consents and to comply with all laws as a condition of the redemption of my shares." CP 76 ¶ 3 (emphasis added).

- "***It was clear to me and everyone involved that Mr. Riley, Mr. Turnbow and Eberle Berlin were representing the interests of me, the other shareholders and AIA Services to ensure that the redemption was completed properly, that all necessary shareholder consents were obtained, and that the redemption was completed in accordance with Idaho law***...." CP 77 ¶ 5. (emphasis added).
- "***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***." CP 78-79 ¶ 7. (emphasis added).

In a May 7, 2010 opinion and order, the Idaho trial court partially denied Eberle Berlin's motion for summary judgment, ruling that while there was no attorney-client relationship, Eberle Berlin and its lawyers owed Taylor a duty owed in connection with the opinion letter. CP 286. The defendants moved for reconsideration, but the trial court reaffirmed its ruling that, by virtue of the opinion letter, Riley, Turnbow, and Eberle Berlin owed a duty to Taylor as a non-client. CP 1000.[10]

[10] Riley, Turnbow, and Eberle Berlin have sought review of that decision in the Idaho Supreme Court.

4. Taylor's Claims Against Cairncross

On April 1, 2010, Taylor, apparently wishing to keep open the possibility of suing every possible party in connection with AIA's nonperformance, requested that Cairncross enter a tolling agreement. On March 28, 2012 Taylor filed the instant case against Cairncross. It was the fifth action he had filed in a multi-year campaign to recover the same alleged damages he now seeks from Cairncross, and Respondents are the 14th, 15th, and 16th defendants he has sued.

On April 12, 2013, the trial court granted Cairncross's motion for summary judgment. As to Taylor's unambiguous, sworn testimony regarding the limited scope of Cairncross's representation, the trial court concluded:

> Basically, what the plaintiff did in Idaho is he pointed the finger at Eberle Berlin and said: These are the Idaho lawyers who were representing me. I mean, he didn't say they were representing some third party ... [H]e said, "They were representing me," and that no other lawyer, specifically Cairncross & Hempelmann – no other lawyer was involved. ***In other words, no other lawyer had a duty***. This was done in Idaho so that he could pursue liability against those Idaho lawyers.
>
> Now he says, "No, that's not true, I didn't mean that, and Cairncross were the other lawyers." ***It is a direct and irreconcilable conflict stated under oath, inconsistent with the course of dealing and all the other evidence under oath that was submitted.***
>
> Yes, Cairncross was not licensed to practice law in the state of Idaho – everybody concedes that – and that's the reason they went out and got the Eberle Berlin opinion letter.

> That's why it was abundantly clear ... why the plaintiff had to do that, and that's why that opinion letter, that Idaho representation, was ***clearly beyond the scope of their representation*** here in Washington.

RP 70:1-25 (emphasis added).

The trial court therefore concluded in its order on Cairncross's motion for summary judgment that because (1) Taylor's position was "clearly inconsistent with his earlier position" in the Idaho litigation; (2) the trial court's acceptance of that inconsistent position "would create the perception that either the Idaho court or" it was misled by Taylor; and (3) Taylor, "if not estopped, would derive an unfair advantage or impose an unfair detriment" on Cairncross as a result of his inconsistent position, "the doctrine of judicial estoppel bars all of Plaintiff's claims." CP 1064. It further concluded that Taylor's CPA claim fails as a matter of law, and that if Washington law governs this dispute (it does), all of Taylor's claims fail for lack of proximate cause. CP 1063-64.

On May 16, 2013 the trial court denied Taylor's motion for reconsideration. CP 1090. This appeal followed.

IV. ARGUMENT

A. The Application of Judicial Estoppel Is Reviewed for An Abuse of Discretion

Judicial estoppel protects the "integrity of the judicial system" by ensuring that litigants are "straightforward, forthright, and honest in their

dealings with the courts." *Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300, 303-04 (2007).

> Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224-25, 108 P.3d 147, 148 (2005) (internal quotation marks and citations omitted). Judicial estoppel provides for the dismissal of claims predicated on a party's taking "contrary positions in two different proceedings," *Holgate*, 141 Wn. App. at 850, just as Taylor has done here.

> Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (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.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13, 15 (2007) (internal quotation marks).

Washington law is crystal clear that a trial court's application of judicial estoppel is reviewed for an abuse of discretion. *See, e.g., Arkison,*

160 Wn.2d at 538; *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103, 1105 (2006); *Holgate*, 141 Wn. App. at 847-48; *Cunningham*, 126 Wn. App. at 227. "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352, 355 (2008) (reviewing application of judicial estoppel by lower court for abuse of discretion) (citing *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Taylor cites to a single decision from Division Three, *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866, 869 (2007), to support the proposition that, in reviewing a dismissal based on judicial estoppel, this Court engages "in de novo review." Br. at 11 n.7. That is not at all what *Haslett* concluded, and Taylor's selective quotation of the decision is at best misleading. What the decision actually says is:

> ***We review a trial court's application of judicial estoppel to the facts of a case for abuse of discretion.*** *Arkison v. Ethan Allen, Inc.,* 160 [Wn.2d] 535, 538, 160 P.3d 13 (2007). Where, as here, summary judgment of dismissal is granted based on judicial estoppel, we engage in de novo review ***of the record*** to determine ***if there are no genuine issues of material fact*** and the moving party is entitled to judgment as a matter of law.

Haslett, 140 Wn. App. at 665 (emphasis added). In other words, while this Court's review of the *facts* to determine if there is a material dispute may be de novo, its review of Judge Lum's *application* of judicial estoppel is for an abuse of discretion. Taylor has cited no authority to the contrary, because none exists.

Taylor's assertion that "judicial estoppel is an affirmative defense that must be proven by clear and convincing evidence" is even more misplaced. *See* Br. at 11 n.2. Indeed, it appears that not a single Washington appellate court has ever held as much, and the citations Taylor offers in support of his novel theory are inapposite. *Lilly v. Lynch*, for example, addresses the doctrine of "estoppel in pais," a method by which real property boundaries between adjoining parties may be established. 88 Wn. App. 306, 318, 945 P.2d 727, 734 (1997); *see* Br. at 11 n.2. Not only do the elements of "estoppel in pais" differ from those of judicial estoppel, but its purpose—to resolve disputes between competing claims to real property—is readily distinguishable from judicial estoppel, which is aimed at protecting the integrity of the courts. *Lilly*, 88 Wn. App. at 318 (citing *Thomas v. Harlan*, 27 Wn.2d 512, 518, 178 P.2d 965, 968 (1947) ("Title to real property is a most valuable right which will not be disturbed by estoppel unless the evidence is clear and convincing.")).

Likewise, *Kellar v. Estate of Kellar* does not mention the "clear and convincing" standard or the term "affirmative defense." 172 Wn. App.

562, 581, 291 P.3d 906, 916 (2012), *review denied,* 312 P.3d 652 (Wash. 2013); *see* Br. at 12. It merely holds that "judicial estoppel does not apply absent a prior judicial proceeding in which the alleged inconsistent position was taken," a proposition obviously inapplicable here, where Taylor's prior testimony was offered to an Idaho court adjudicating his lawsuit against Eberle Berlin.

As to Taylor's argument that Cairncross waived its right to assert judicial estoppel by not raising the issue in its answer, Cairncross is unaware of any decision by a Washington court holding that judicial estoppel is an affirmative defense. Even if it were, "there is no state case law holding that an affirmative defense is waived if not asserted in the answer." *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981, 986 (2008). Instead, waiver of an affirmative defense can occur in two ways: if the assertion of the defense is "inconsistent with the defendant's previous behavior" or if defendant is "dilatory in asserting the defense." *Id.* at 246. Neither of those scenarios is presented here.

Taylor does not even attempt to argue Cairncross's assertion of judicial estoppel is inconsistent with its prior behavior. As to Cairncross's timing, it is hardly dilatory to file a summary judgment motion five months before the discovery cutoff and six and half months before trial, based in part on information that became available to defense counsel only upon a review of papers filed by Taylor in a separate lawsuit in Idaho. Nor

can Taylor seriously maintain he was prejudiced by Cairncross's timing, especially since he made no request to continue the hearing on Cairncross's motion under CR 56(f).

Taylor "has failed either to show that [he] was prejudiced by the court's decision to consider [judicial estoppel] or that the court otherwise abused its discretion by considering the matter." *State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 282, 150 P.3d 568, 570 (2006). Taylor's argument regarding waiver fails.

B. The Trial Court Exercised Its Discretion Reasonably in Applying Judicial Estoppel to the Undisputed Facts

If there were ever a case for the application of judicial estoppel, this is it. Taylor has testified, under oath and in support of an argument accepted by an Idaho court (i.e., that Eberle Berlin and its lawyers assumed a duty of care to Taylor by furnishing the opinion letter), that he relied ***exclusively*** on those lawyers to ensure that AIA was authorized to consummate the transaction and that the transaction was enforceable under Idaho law. In other words, Taylor has explicitly conceded that Cairncross's scope of representation excluded the very work that forms the basis for his claims here. That is why the trial court, after comparing Taylor's February 2010 testimony to his current position "probably a dozen times," concluded "there is no clearer case, that I can think of, for

application of the judicial estoppel doctrine than the present one." RP 71:14-17.

1. The Court Need Not Look Beyond the Three "Core Factors" of Judicial Estoppel

Taylor cites to *Markley v. Markley*, 31 Wn.2d 605, 614, 198 P.2d 486 (1948) for the proposition that beyond the three "core factors" of judicial estoppel, *see Arkison*, 160 Wn.2d at 538-39, six others are "essentials to the establishment of estoppel." Br. at 12. Once again, Taylor's characterization of Washington precedent is misleading. *Markley*, a case decided more than sixty years ago, has not been interpreted to require that trial courts look beyond the three "core factors" of judicial estoppel. Indeed, that reading of *Markley* has been explicitly rejected. As Division Three held in a 2001 decision:

> Professors Lewis H. Orland and Karl B. Tegland have ***criticized Markley***, arguing that the court inappropriately interjected ordinary estoppel principles into the doctrine of judicial estoppel....
>
> ***We agree with Professors Orland and Tegland*** that because the doctrine of judicial estoppel is designed to protect courts, courts should not impose elements of related doctrines like equitable and collateral estoppel, which are intended primarily to protect litigants. We conclude that the doctrine may be applied even if the two actions involve different parties. We further conclude that the doctrine may be applied even if there is no reliance, no resultant damage, and no final judgment entered in the first action.

Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-08, 28 P.3d 832, 835 (2001) (emphasis added); *see also Cunningham*, 126 Wn. App. at 233 n.27

("One issue before the court [in *Si-Cor*]was whether all six possible elements addressed by *Markley* were required for the application of judicial estoppel. ***The court held that they were not.***") (emphasis added).

In short, Taylor's insistence that this Court must look beyond the three "core factors" of judicial estoppel—upon which numerous Washington appellate courts have relied—is totally unsupported. The trial court properly focused its attention on (1) whether Taylor's current position is "clearly inconsistent with its earlier position" in Idaho (it is); (2) whether its acceptance of that inconsistent position "would create the perception" that either the first or the second court was misled (it would); and (3) whether Taylor would "derive an unfair advantage or impose an unfair detriment" on Respondents if not estopped (he would).

2. Taylor's Positions Were Clearly Inconsistent

Taylor makes the incredible claims that (a) he "never asserted any inconsistent positions in his complaints, testimony or pleadings submitted in the Idaho trial court or in the trial court here"; and (b) he "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." Br. at 13, 18. This is impossible to square with the record, which reveals a contradiction so apparent that the trial court concluded that it "can't really say that there is anything more conflicting than what's happened here." RP 69:23-25.

Specifically, Taylor has claimed in the instant action that, among other things, Cairncross committed malpractice, in part, by "[r]ender[ing] opinions and advice regarding legal matters which defendants were not qualified to do so [sic], including the impact of Idaho law on plaintiff … fail[ing] to recognize that the redemption agreement and transaction were illegal and void as a matter of law if not in compliance with [I.C.] § 30-1-6 … fail[ing] to understand the implications of [I.C.] § 30-1-6." CP 9-10 ¶ 27. But in Idaho, Taylor testified under oath that he did not have ***any*** attorneys other than Eberle Berlin 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***." CP 78-79 ¶ 7 (emphasis added).

This direct contradiction cannot be reconciled—but that has not stopped Taylor from trying. Specifically, Taylor argues he "was entitled to argue that both the Idaho lawyers and Cairncross represented him and those positions are not inconsistent, irreconcilable and diametrically opposed." Br. at 15 (emphasis original). Assuming the truth of that statement for the sake of argument, it is utterly beside the point. What matters for purposes of judicial estoppel is not what Taylor was ***entitled*** to argue, but what he ***actually stated under oath*** in a prior proceeding. And what Taylor actually stated was that the Eberle Berlin lawyers were the ***only*** lawyers responsible for ensuring that AIA was authorized to conduct

the transaction and that the transaction did not violate "any laws." Taylor took these positions in connection with and for the purpose of trying to establish Eberle Berlin's liability for advising him inaccurately with respect to the applicability of I.C. § 30-1-6 to the redemption transaction.[11]

The law is not a game. Taylor cannot submit a sworn statement to an Idaho court to maximize his chances against one set of defendants and then disavow that very statement before a Washington court in order to "take another shot" at a new set of defendants. Judicial estoppel exists to preclude precisely that type of mischief.

3. Respondents Established a Perception of the Court Being Misled; "Evidence" of Actual Misleading Is Not Required

In deciding whether judicial estoppel applies to a given set of facts, Washington courts consider 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." *Arkison,* 160 Wn.2d at 538-39. Taylor has repeatedly argued, below and before this Court, that "Cairncross did not submit any argument or evidence to prove that the trial

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[11] Taylor also argues that "the context" of the statement at issue reveals that it was intended to address his "reliance on the Idaho Lawyers to properly represent ***AIA***"—as opposed to Taylor himself. Br. at 19 (emphasis added). This is wishful thinking. The statement starts with the phrase "Neither ***I*** nor AIA Services had any other attorneys…" CP 78-79 ¶ 7 (emphasis added). No matter how much Taylor might prefer otherwise, those words do not mean "AIA Services had no other attorneys…."

court was misled." Br. at 23. Under *Arkison* and other Washington precedent, however, this was not Cairncross's burden, and no Washington case has ever required the party asserting judicial estoppel to submit evidence that a court was actually misled.[12]

To establish the possibility of a ***perception*** that either the first or the second court was misled, the proponent of judicial estoppel need only show that the prior inconsistent statement was "accepted by the court." *Si-Cor*, 107 Wn. App. at 909. Here, the Idaho court—which upheld Taylor's right to seek relief against Eberle Berlin—accepted Taylor's allegation that he relied exclusively on Eberle Berlin to "to ensure the redemption of my shares had all necessary consents and did not violate any laws." CP 78-79 ¶ 7. Indeed, the court, which dismissed certain Idaho defendants and other causes of action, endorsed Taylor's allegation of reliance to preserve him recourse; i.e., a negligence claim against the opinion letter drafters at Eberle Berlin.[13] Put differently, the Idaho court accepted Taylor's

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[12] Nor, as a practical matter, would that make any sense. The parties were prohibited under ER 605 from deposing Judge Lum on the issue, and it is very unlikely the Idaho trial could have been compelled to testify either. *See, e.g., State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 482 P.2d 775 (1971) ("Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity....").

[13] In its original order, the Idaho trial court ruled: "Riley and Turnbow had a duty to [Taylor], as a non-client, to draft the opinion letter in a non-negligent fashion. That is, to exercise the ordinary care, skill and prudence of a lawyer under the circumstances." CP 286. In its order on the parties' cross-motions for reconsideration, the court stated further: "The lawyer issuing the [opinion] letter is specifically aware of the reliance by the non-client. The universe of potential

testimony that Eberle Berlin represented his only potential source of recovery.[14] As a result, Judge Lum's acceptance of Taylor's contrary allegation in Washington would create the perception that either Judge Lum's court or the Idaho court was misled.[15]

Taylor further argues that the Idaho court's rejection of his legal theory that Eberle Berlin owed him a duty of a care *as a client* means the Idaho court never "accepted" his testimony. This misses the mark. The Idaho court in fact concluded that Eberle Berlin owed Taylor a duty of care, and that Taylor was entitled to rely on the accuracy of Eberle Berlin's opinion letter. CP 268, 1000. In concluding that Taylor was owed a duty of care by Eberle Berlin, was entitled to rely on its opinions, and may pursue a negligence claim against it, the Idaho court clearly accepted Taylor's sworn testimony that he relied exclusively on Eberle Berlin with respect to the enforceability of that transaction under Idaho law.

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injured parties is limited to those to whom the letter is addressed. The rule proposed by [Eberle Berlin] is tantamount to a grant of immunity to the attorney." CP 1000.

[14] That avenue of recourse provides Taylor with the ability to pursue the full measure of damages he now seeks against Cairncross.

[15] *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 104, 220 P.3d 229, 234 (2009) is consistent with this conclusion. In that case, the Court found no prior "judicial acceptance" by a bankruptcy court because the bankruptcy case was "dismissed without the implementation of a reorganization plan" and "[t]he bankruptcy was not successful." *Id.* In Taylor's Idaho litigation, however, he ***prevailed*** at summary judgment on his argument that he has a cause of action against Eberle Berlin for relaying inaccurate conclusions in its opinion letter.

4. The Trial Court Correctly Applied Judicial Estoppel to Prevent Unfairness to Cairncross

Taylor would unquestionably derive an unfair advantage or impose an unfair detriment on Cairncross if not estopped from taking a position against Cairncross that contradicts his testimony in Idaho. Taylor's arguments to the contrary lack merit.

To begin with, the very purpose of judicial estoppel is to "preclude[] a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147, 148 (2005). That is precisely what Taylor attempted to do here, by alleging in his complaint that Cairncross negligently performed work Taylor testified previously he had delegated exclusively to Eberle Berlin. The advantage Taylor sought by doing so is obvious: he hopes to make Cairncross an insurance policy against an adverse result in his litigation against Eberle Berlin.

Moreover, Cairncross ceased representing Taylor nearly two decades ago, and performed ably the work with which it was tasked. Indeed, to be forced into court so many years later to defend against allegations directly contrary to the position Taylor took in Idaho (in order to further his claims against Eberle Berlin) epitomizes the notion of "unfair detriment."

Taylor repeatedly protests that Cairncross did not offer any "evidence" of an advantage to Taylor or a detriment to Cairncross. *See, e.g.,* Br. at 27-28. The basis of this argument is unclear. Taylor indisputably seeks to recover millions of dollars from Cairncross by claiming it failed to perform certain work for him in connection with the redemption transaction. These funds are the same as those he is continuing to pursue from Eberle Berlin in Idaho. Taylor's contradictory assertions—i.e., his prior testimony in Idaho regarding the scope of Cairncross's representation as compared to his allegations against Cairncross here—were both squarely before the trial court when it granted summary judgment in Cairncross's favor. The record was amply developed for the trial court to apply judicial estoppel under these circumstances. *See, e.g., Cunningham*, 126 Wn. App. at 224-25 (upholding trial court's application of judicial estoppel to grant summary judgment in defendant's favor).

None of the cases Taylor cites supports a contrary result, and each is readily distinguishable because (a) the moving party either facilitated the non-movant's prior inconsistent statement or slept on its rights; (b) the prior statement was the result of mere error; and/or (c) other core factors of judicial estoppel were absent. *See Kellar v. Estate of Kellar*, 172 Wn. App. 562, 582-83, 291 P.3d 906 (2012) (in wife's action against husband's estate challenging validity of prenuptial agreement, no unfair advantage to wife or detriment to estate found with respect to wife's prior

acknowledgment of prenuptial agreement in an application to the South Dakota Gaming Commission, because husband sought benefit for himself by urging wife to apply); *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 106, 220 P.3d 229, 234 (2009) (where defendant asserting judicial estoppel failed to reduce its claim to judgment and execute on it, defendant could not later claim such failure "would derive an unfair advantage to [plaintiff] or impose an unfair detriment on" him); *Seattle First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 344, 641 P.2d 1194 (1982) (where judicial estoppel asserted based on erroneous prior valuation of partnership interest, court refused "to correct that error by the application of an equitable doctrine which would deprive [non-movant's] estate of the full worth of her partnership interest").

5. Cairncross Was Not Barred From Asserting Judicial Estoppel Under the "Unclean Hands" Doctrine

Taylor argues that because Cairncross allegedly engaged in the unauthorized practice of law, it should have been barred from asserting judicial estoppel. Because he raised this argument for the first time in a motion for reconsideration challenging the trial court's grant of Cairncross's motion for summary judgment, it was not preserved for appeal and should therefore be disregarded by this Court. Cairncross was fully prepared to contest Taylor's allegation of "unclean hands," including through expert testimony from one of Seattle's leading transactional

attorneys, Patrick Schultheis of Wilson Sonsini. CP 889-895. Such evidence was never required, however, because the trial court properly denied Taylor's motion for reconsideration without requesting briefing or argument from defense counsel, CP 1090, effectively recognizing that the issue of unauthorized practice was irrelevant to Cairncross's motion.

Taylor's effort to raise the issue again before this Court fails for at least three different reasons: (1) Taylor failed to preserve it for appeal; (2) judicial estoppel (unlike other equitable doctrines) is designed to protect the integrity of the courts—and thus the question of whether the party raising it has "unclean hands" has no bearing on its application; and (3) even if this Court were to conclude otherwise, Taylor cannot show the required causal relationship between the alleged "dirty hands" conduct (i.e., unauthorized practice) and the substance of Cairncross's judicial estoppel argument (i.e., Taylor's prior admission that he relied exclusively on Eberle Berlin to ensure the lawfulness of the redemption transaction under Idaho law).

a. Taylor Failed to Preserve His "Unclean Hands" Theory for Appellate Review

As a general matter, "[w]hen reviewing a grant of summary judgment," the Court of Appeals considers "solely the issues and evidence the parties called to the trial court's attention on motion for summary

judgment." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407, 410 (2013) (citing RAP 9.12). Issues raised for the first time in a motion for reconsideration may be preserved only when "they are not dependent upon new facts and are closely related to and part of the original theory." *Id.* (citing *Nail v. Consol. Res. Health Care Fund I,* 155 Wn. App. 227, 232, 229 P.3d 885 (2010)).

Taylor presented his "unclean hands" theory for the first time in a motion for reconsideration that challenged the trial court's dismissal of his claims on summary judgment. Taylor's motion was supported by two new declarations—one from Taylor's counsel Roderick Bond and another from expert witness Gary Libey. CP 916-1032; CP 1033-43. Both declarations were filed after oral argument on Cairncross's dispositive motion. CP 916, 1033. Mr. Bond's declaration was 117 pages long (including numerous exhibits), and Mr. Libey's declaration was 11 pages long. *Id.* The trial court denied Taylor's motion for reconsideration. CP 1090.

In short, the "unclean hands" theory Taylor asserted in his motion for reconsideration, and that he improperly seeks to assert here, was (1) based on new facts that were not presented to the trial court until after oral argument on Cairncross's dispositive motion; and (2) unrelated to the original theory Taylor asserted in opposition to that motion. For these reasons, Taylor failed to preserve the issue and this Court should disregard

it. *Schreiner Farms*, 173 Wn. App. at 158; *Consol. Res. Health Care Fund I,* 155 Wn. App. at 232.

b. Judicial Estoppel Protects the Courts—Not Litigants

In any event, the Court need not even reach the question of Cairncross's allegedly "unclean hands" in order to reject Taylor's position, because whether or not a party has "unclean hands" is irrelevant to the application of judicial estoppel. As the United States Supreme Court has recognized, the purpose of judicial estoppel is "to protect the integrity of the judicial process, by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 1814-15, 149 L. Ed. 2d 968 (2001) (citing *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993); *In re Cassidy,* 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Scarano v. Central R. Co.,* 203 F.2d 510, 513 (3rd Cir. 1953) (judicial estoppel prevents parties from "playing fast and loose with the courts") (internal quotation marks omitted)). "Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion," *New Hampshire*,

532 U.S. at 749-50 (citing *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990) (internal quotation marks omitted)).

Thus, judicial estoppel differs from other equitable doctrines insofar as its application turns on what the trial court determines is necessary to protect the integrity of the judicial process, not the interests of the party raising the issue. Thus, whether that party has "unclean hands" is irrelevant. As one federal district court recently observed:

> Courts have uniformly recognized that the purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. ***Even when one party's hands are unclean, another party's inconsistent positions may threaten judicial integrity.*** *See Intamin, Ltd. v. Magnetar Technologies Corp.,* 623 F. Supp. 2d 1055, 1074 (C.D.Cal. 2009); *see also Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC,* 692 F.3d 983, 996 (9th Cir. 2012) ....

In re Richardson, 497 B.R. 546, 558 (Bankr. S.D. Ind. 2013). The weight of authority is consistent with *Richardson. See, e.g., Galin v. Goldfischer*, 2008 WL 5484318, at *6 (S.D.N.Y. Dec. 31, 2008) ("[T]he doctrine of 'unclean hands' does not limit the Court's discretion to apply judicial estoppel."); *Cricket Commc'ns, Inc. v. Trillium Indus., Inc.*, 235 S.W.3d 298, 309 (Tex. App. 2007) (same).

c. No Causal Connection

In Washington, "equity disqualifies a plaintiff with unclean hands only where the inequitable behavior is in the very transaction concerning

which he complains." *Landmark LLC v. Sakai QTIP Trust*, 151 Wn. App. 1003 (2009) (quoting *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961)). In other words, the allegedly "dirty hands" conduct must have a "causal relationship with the substance of the equitable claim at issue." *Id.* at 1003 (internal quotation marks omitted); *see also Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 986-87 (9th Cir. 2010) ("It is fundamental to [the] operation of the doctrine that the alleged misconduct by the [party] relate directly to the transaction concerning which the complaint is made … [U]nclean hands does not constitute misconduct in the abstract…") (internal quotation marks omitted).

Here, the prior statement upon which Cairncross relied to assert judicial estoppel consisted of Taylor denying that he had relied on any counsel other than Eberle Berlin "to ensure the redemption of my shares had all necessary consents and did not violate any laws." CP 78-79 ¶ 7. Thus, with respect to determining whether AIA met the solvency requirements of I.C. § 30-1-6 and was authorized to proceed with the transaction, Taylor simultaneously disclaimed any reliance on Cairncross and confirmed that Eberle Berlin had sole responsibility for those issues. This, of course, was consistent with Bell's prior sworn testimony—which Taylor offered in support of his claims against AIA—that "[w]ithout

access to the confidential books, records and proceedings of [AIA], and not being a licensed Idaho lawyer, my firm was not in a position to make these determinations" (i.e., "to analyze whether, with respect to AIA Services Corporation, the transactions were authorized, complied with applicable Idaho laws, triggered complications with third parties, etc."). CP 1331 ¶ 8.

Thus, even if Cairncross engaged in unauthorized practice (an allegation it hotly disputes), it indisputably did not do so with respect to the issues underlying Taylor's theories of liability in this lawsuit; i.e., the alleged failures to spot the illegality of the redemption transaction under I.C. § 30-1-6 and to ensure AIA took corporation action sufficient to render the transaction legal.[16] Indeed, Taylor conceded that the alleged unauthorized practice was unrelated to any of his alleged damages. CP 408. Moreover, Bell—in a declaration ***solicited in 2009 by Taylor and on which Taylor relied in Idaho***—forthrightly admitted that he was not licensed in Idaho, and that his inability to opine on issues of Idaho law was precisely why it was necessary to obtain an opinion letter from Idaho

[16] Taylor has abandoned on appeal his previous, baseless argument that Cairncross committed malpractice with respect to the structure of the redemption transaction. *See* n. 19, *infra*. Even with respect to that theory, however, there is no causal relationship between Taylor's allegation of unauthorized practice and the manner in which the deal was structured (and subsequently restructured).

counsel. Taylor's convenient effort to now twist those same facts on which he previously relied into something "unclean" is meritless.

C. The Parties' Agreement on the Scope of Cairncross's Representation Warranted Summary Judgment

Summary judgment in this case was fundamentally the product of undisputed agreement by the parties under oath about the scope of Cairncross's representation of Taylor in 1995-96. Indeed, a comparison of Bell's sworn testimony with Taylor's sworn testimony reveals that Cairncross was entitled to summary judgment on this basis alone. That is, separate and apart from judicial estoppel, the parties repeatedly agreed under oath about the crux factual issue presented; i.e., the scope of Cairncross's representation.

In support of his claims against AIA in Idaho, Taylor requested, filed, and relied on an affidavit from Bell that specifically described the limited scope of Cairncross's representation, including that Cairncross was not licensed in Idaho and thus relied on Eberle Berlin to opine on the legality of the transaction and AIA's authority to consummate it. Bell also testified that Taylor understood and agreed to that limitation. CP 1331 ¶ 8. Bell testified to the same effect in the instant case. CP 36 ¶ 9.

Similarly, in support of his claims against Eberle Berlin, Taylor himself testified that Eberle Berlin—and not anyone else—was tasked

exclusively with "ensur[ing] the redemption of my shares had all necessary consents and did not violate any laws." CP 78-79 ¶ 7. Taylor then testified in his deposition in the instant case that his previous testimony about Cairncross's limited scope of representation was truthful. CP 908-09.

Under the version of RPC 1.2 applicable at the time of Cairncross's representation of Taylor, a narrowed scope of representation simply required consent "after consultation." CP 552, 805. A writing was not required. *Id.* As demonstrated by the sworn testimony of both Taylor and Bell—both in prior cases and in this case—Taylor unequivocally understood and agreed that Cairncross's representation excluded issues of corporate authority and enforceability under Idaho law. Indeed, after considering all of the testimony, the trial court properly concluded that the issues addressed by the opinion letter were "***clearly*** beyond the scope of Cairncross's representation." RP 70:20-25.

In short, summary judgment was warranted here not just because Taylor's current claims against Cairncross are inconsistent with prior sworn statements, but also because the parties undisputedly agreed regarding the core factual issue presented.

D. Taylor's Claims Fail for Lack of Proximate Cause

1. Taylor Presents No Evidence That Another Idaho Lawyer Would Have Expressed an Opinion Different Than Eberle Berlin's[17]

Washington law recognizes two elements of proximate cause: "cause in fact" and "legal causation." *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77, 82 (1985) (citation omitted). Cause in fact refers to the "but for consequences of an act—the physical connection between an act and an injury…It is a matter of what has in fact occurred." *Hartley*, 103 Wn.2d at 778 (internal citations and quotation marks omitted). Legal causation "rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* at 779.[18]

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[17] As discussed further below, the trial court conditionally dismissed Taylor's claims for lack of proximate cause because Taylor relied on an expert witness not licensed to practice law in Washington. Cairncross presented a different proximate cause theory in its papers and at oral argument (and again advances that alternate argument here). This Court may affirm the trial court's judgment on any alternative legal basis supported by the record. *State v. Vanderpool*, 145 Wn. App. 81, 85, 184 P.3d 1282, 1283 (2008) (citing *Bock v. Bd. of Pilotage Comm'rs,* 91 Wn.2d 94, 95 n.1, 586 P.2d 1173 (1978); RAP 12.2). Because Idaho law regarding proximate cause is substantially the same as Washington's, this alternate argument does not depend on which state's law governs the dispute.

[18] Proximate cause is susceptible to summary adjudication, and "must be accorded the same treatment as any other following a motion for summary judgment, [i.e.,] if the court determines there is no genuine issue of material fact then it must determine whether the moving party is entitled to a judgment as a matter of law. Further, where the facts are undisputed and do not admit of reasonable differences of opinion, the question of proximate cause is one of

Cairncross structured the redemption transaction to obtain for Taylor an opinion from Eberle Berlin on the key issues of authority and enforceability. Despite the fact that Cairncross squarely raised the issue in its opening brief, Taylor presented no evidence to the trial court that any other Idaho lawyers would have expressed an opinion different than Eberle Berlin's. Moreover, Cairncross advised Taylor that an opinion letter from AIA's counsel was a necessary pre-condition for closing the transaction. CP 35-36 ¶¶ 6, 9. There is thus no "but for" connection between Cairncross's alleged unauthorized practice and Taylor's alleged injury.

Indeed, even if Cairncross had done what Taylor now claims it should have (e.g., referred him to Idaho counsel), Taylor would have been in precisely the same position; i.e., in need of (and in possession of) an opinion from Idaho counsel regarding the enforceability of the transaction under Idaho law and AIA's authority to enter the transaction, with recourse against the Idaho lawyer if he or she got it wrong. In other words, regardless of what Cairncross did or did not do, Taylor received what he

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law..." *LaPlante v. State*, 85 Wn.2d 154, 159-60, 531 P.2d 299, 302-03 (1975) (internal citations omitted).

claims he should have received: advice from and recourse against an Idaho lawyer.[19]

The element of legal causation also weighs in favor of upholding the trial court's ruling. With respect to "policy considerations as to how far the consequences of defendant's acts should extend," *Hartley*, 103 Wn.2d at 778, it is clear that transactional lawyers and their clients regularly rely on opinion letters for advice from either opposing counsel or third party counsel:

> Substantial business transactions often involve the delivery of an opinion letter to parties to the transaction who are *not* the opinion giver's client... A consensus has developed regarding the meaning of language used in third-party opinion letters as well as the factual and legal investigation required to support particular opinions (together referred to as ***"customary practice"*** ...).

TRIBAR II REPORT at 595, § 1.1 (emphasis original). The purpose of such opinion letters is to facilitate transactions and to provide the receiving party recourse in the event the transaction turns out to be unenforceable.

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[19] The same is true for Taylor's other allegation against Cairncross—that it failed to structure the transaction in order to give Taylor direct recourse against AIA insiders in the event of default (either by effectuating sales of stock rather than a redemption, and/or by obtaining personal guarantees). Taylor made this argument below, but appears to have abandoned it on appeal. *See, e.g.,* Br. at 27. In any event, it fails because Taylor presented no evidence that AIA or its remaining shareholders were willing to offer such alterative terms, or that different counsel could have obtained them. Thus, Taylor failed to "demonstrate that 'but for' [Cairncross'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).

See id. at 596. The benefits of such an arrangement for the receiving party are clear and established. The recipient receives assurance, often from the party on the other side of the transaction, that the transaction is enforceable in the relevant jurisdiction. The 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 Eberle Berlin in Idaho.

Allowing plaintiffs like Taylor to do an "end-run" around the liability of the opinion giver for a deficient opinion—by asserting claims again the lawyer who neither furnished nor endorsed the opinion—would result in tremendous inefficiencies and expense and effect a judicially created sea-change in the handling and structure of complex transactions throughout Washington and the United States. That result is neither warranted nor appropriate. Instead, this Court should uphold the trial court's conclusion regarding Taylor's failure to establish legal causation.

This same result is warranted regardless of whether Washington or Idaho law governs Taylor's malpractice claim. Contrary to Taylor's argument, the proximate cause standard is the same in both states. *See, e.g., Hayes v. Union Pac. R. Co.*, 143 Idaho 204, 208, 141 P.3d 1073, 1077 (2006) ("Proximate cause consists of two factors, cause in fact and legal responsibility.")

Taylor's reliance on *Jordan v. Beeks*, 21 P.3d 908, 912-13 (Idaho 2001) for the proposition that he need only establish "some chance of success" is both misleading and inapposite. *Jordan* observed that in a legal malpractice action in which the defendant-attorney is alleged to have negligently precluded the plaintiff from pursuing *litigation* claims, the plaintiff must establish that he had "some chance of success" in the *litigation* that was not pursued. *Id.* at 591. Here, of course, Cairncross handled a transactional matter for Taylor. Thus the modified proximate standard referenced in *Jordan* has no application, and Cairncross is unaware of any Idaho court holding otherwise.

2. The Trial Court Correctly Concluded That Taylor's Expert Was Not Qualified

The trial court granted Cairncross's motion for summary judgment as well on the ground that Taylor's expert Mr. McDermott—who has never been licensed to practice law in Washington—was not qualified to testify on Taylor's behalf. In reaching that conclusion, the court issued a conditional order that if Washington law governs Taylor's malpractice claim, then the claim fails for lack of proximate cause as a result of Mr. McDermott's lack of qualification.[20]

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[20] In its oral ruling, RP 66-67, the court held in relevant part:

> ... [U]nder Washington law, I don't think there's any admissible evidence that there is proximate causation ... because [Taylor's expert

As a threshold matter, Washington law plainly governs each of Taylor's claims, including his claim for legal malpractice. CP 10 ¶ 28 (referencing specifically "the standard of care in King County and the State of Washington").[21]

As to the trial court's refusal to admit Mr. McDermott's testimony, "[t]he qualifications of an expert witness to testify on a particular subject are determined by the trial court within its sound discretion." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279, 1282 (1979). While it is true that "a lawyer not admitted to the Washington bar is not, per se, unqualified as an expert witness in a legal malpractice action," *id.* at 858-59, the trial court properly disregarded Mr. McDermott's testimony

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> witness] Mr. McDermott doesn't have the requisite expertise for us to admit his declaration as admissible evidence....
>
> Clearly, if Washington substantive law applies to malpractice claims, there is a lack of proximate causation and the court would so conditionally find and grant partial summary judgment ... independent of our judicial estoppel issue....

[21] With respect to choice-of-law analysis, Washington courts apply the "most significant relationship" test, which considers "the relative importance to the particular issue of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties." *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008). Each of these factors is either neutral—because Taylor was an Idaho resident at the time—or favors the application of Washington law. Notably, Taylor never pled the application of Idaho law in his Complaint, as would be required under CR 9(k)(2) if Taylor believed Idaho law governed this dispute. *See* CP 1-16.

because Mr. McDermott was unqualified to opine on the standard of care for a transactional lawyer in Washington.

Taylor originally took the position that "no expert witness is required to prove negligence/malpractice in this lawsuit." CP 303. Then—likely in response to Defendants' argument under *Walker v. Bangs*—Taylor decided otherwise, and had Mr. McDermott (his expert in Idaho) duplicate in this case the opinions he offered previously against Eberle Berlin. *Compare* CP 141 ¶ 19 (Eberle Berlin demonstrated a lack of "even slight diligence and care") *with* CP 368 ¶ 94 (Cairncross demonstrated a lack of "even slight diligence and care"). These circumstances alone call into question Mr. McDermott's familiarity with the standard of care applicable to lawyers practicing in Washington.

Put simply, as to the standard of care applicable to a *Washington* lawyer representing a client in a transaction involving an opinion letter from out-of-state counsel, the trial court reasonably concluded that Mr. McDermott was unqualified. On this basis alone, it reasonably exercised its discretion to exclude Mr. McDermott's testimony.

E. The Trial Court Reasonably Denied Taylor's Motion to Amend and Supplement His Complaint

After Cairncross had already filed its motion for summary judgment, Taylor moved tactically to "amend and supplement" his complaint in order to add three new claims, assert numerous additional

factual allegations, and add a section entitled "Conflict/Choice of Law," which incorrectly argued that certain Idaho law governs this dispute (in addition to Washington law).[22] CP 313, 316-40. The motion was denied. CP 912-14. To conclude the trial court did not abuse its discretion, this Court need only review the court's written order:

> The Court finds that plaintiff engaged in undue delay, and that the proposed amendment would a hardship on defendants, that defendants would suffer actual prejudice if this proposed amendment were allowed and the proposed amendment would, at least in part, be futile. The present motion also needs to be placed in context of the litigation conduct and motion practice already before the Court. The Court notes that plaintiff provided no factual support whatsoever in his opening brief, but apparently for tactical reasons, waited until he had seen defendants' opposition to file a declaration to his reply brief, thereby depriving defendants an opportunity to respond. (Even if the Court considers the factual evidence attached to the reply, the Court is not persuaded that the amendment is based on newly discovered evidence.) Similarly, plaintiff recently moved to shorten time on his cross-motion for summary judgment in an attempt to tactically shorten the amount of time defendant would have to respond to the cross-motion. The motion to shorten time was denied by separate order (dated March 15, 2013). Now, plaintiff seeks to amend after defendants have conducted discovery and depositions and after he has seen the pending summary judgment motion and tailored his proposed amendments to defeat the motion. While Washington law holds that proposed amendments should be liberally granted, they should not be allowed if the result would be hardship, actual prejudice, and futility. The Court has considered all of these matters in exercising its discretion, and denies the motion to amend and supplement [the] complaint.

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[22] The three proposed additional claims were (1) violation of Idaho's Consumer Protection Act; (2) declaratory relief; and (3) equitable estoppel.

CP 914. Because Taylor's proposed amended complaint (1) was the product of undue delay; (2) would have imposed undue hardship or otherwise prejudiced Cairncross; and (3) asserted at least one futile claim, the trial court reasonably refused to allow it.

F. The Trial Court's Refusal to Consider Post-Argument Submissions by Taylor Was a Reasonable Exercise of Discretion—If It in Fact Refused

After the trial court issued its oral rulings from the bench on the parties' cross-motions for summary judgment, but before the court issued its written order and before Taylor filed a motion for reconsideration, Taylor filed two additional declarations—one by Taylor's counsel Roderick Bond and another by expert witness Gary Libey. CP 916-1032; CP 1033-43. Taylor asks this Court to conclude the trial court abused its discretion by refusing to consider those declarations. There is no merit to Taylor's position.

As a preliminary matter, it appears the trial court in fact considered the declarations at issue. Specifically, in denying Taylor's motion for reconsideration on May 16, 2013, the trial court "reviewed the files and records herein." CP 1090. At that point, the "files and records herein" included the Bond and Libey declarations, which were filed on April 13, 2013. CP 916, 1033. Indeed, Taylor's motion for reconsideration specifically relied on the Bond and Libey declarations. CP 1070.

Even if the trial court refused to consider the Bond and Libey declarations, however, its refusal was a reasonable exercise of discretion. As the trial court noted in its written order granting Cairncross's motion for summary judgment:

> Attached to plaintiff's objections to defendants' proposed order was a document entitled "Supplemental Declaration of Roderick [C.] Bond and Notice Regarding Submitting Additional Evidence and Testimony Respectfully Requesting that the Court Change Its Mind in Paragraph 3 Below" and the Expert Witness Declaration of Gary J. Libby [sic]. No Motion for Reconsideration or CR 59 or CR 60 motion has been noted or is before the Court, and it appears plaintiff is attempting to inject new evidence in to the record after the Court has made a decision adverse to plaintiff at oral argument (and indeed, after the opposing party has filed and argued a summary judgment ruling), without noting a motion. This document [sic] is procedurally improper for multiple reasons, and the Court need not consider these documents. Should plaintiff wish to file and serve a proper motion, the Court will consider the motion on its own merits.[23]

CP 1066.

"Although the trial court may accept affidavits anytime prior to issuing its final order on summary judgment, whether to accept or reject untimely filed affidavits lies within the trial court's discretion." *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188, 1191 (1987) (internal citation omitted). Moreover, "a trial court has discretion to

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[23] As noted above, Taylor accepted the trial court's invitation to reframe his defective request that the "Court Change Its Mind," CP 916, into a proper motion for reconsideration that relied on the Bond and Libey declarations. CP 1070. The trial court then considered and denied the motion for reconsideration. CP 1090.

reject an affidavit submitted after the motion has been heard." *Id.* at 1191-92. The record demonstrates that the trial court considered (and denied) Taylor's motion for reconsideration "on its own merits," including the declarations at issue. CP 1090. But even if this Court concludes otherwise, Taylor "had no excuse for failing to address the issues in prior materials submitted to the court," *Brown*, 48 Wn. App. at 560, and thus the trial court's refusal to consider the "supplemental" Bond and Libey declarations would have been a reasonable exercise of its discretion.

G. Cairncross Should Recover Its Fees and Costs on Appeal

Pursuant to RAP 14.2, Cairncross respectfully requests an award of its costs on appeal. Although Cairncross denies that Idaho law governs any of Taylor's claims, if this Court decides otherwise, Cairncross requests an award of its reasonable attorneys' fees under I.C. § 12-120(3). *See Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 154 Idaho 21, 293 P.3d 645, 651 (2013) (where Idaho Supreme Court upheld trial court's dismissal of legal malpractice action on summary judgment, defendant law firm was entitled to recover its attorneys' fees and costs on appeal).

V. CONCLUSION

The trial court appropriately resolved on summary judgment this afterthought of a lawsuit brought by a plaintiff who had already pursued the same alleged damages against thirteen other defendants in four other

actions. Under judicial estoppel, the dispositive admissions Taylor made in the course of those previous lawsuits are fatal to his claims here. Moreover, Cairncross was entitled to summary judgment because there is no dispute of fact regarding the scope of Cairncross' representation and because Taylor failed to establish proximate cause as a matter of law. For these reasons, and for the reasons set forth above, Cairncross respectfully requests that this Court affirm the trial court's dismissal of Taylor's claims.

DATED this 4th day of December, 2013.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____
Gregory J. Hollon, WSBA No. 26311
Avi J. Lipman, WSBA No. 37661

Attorneys for Respondents

DECLARATION OF SERVICE

On December 4, 2013, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 4th day of December, 2013, at Seattle, Washington.

Lisa Nelson, LEGAL ASSISTANT