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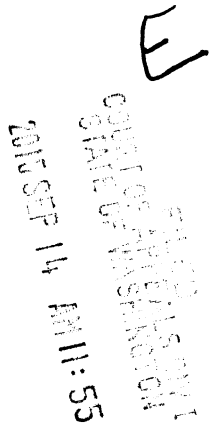
No. 72718-4-I

COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON



Norman Cohen,

Appellant,

v.

Ralph Carr, Jr. and Michael L Flynn,

Respondents.

APPELLANT'S REPLY BRIEF

On Appeal from the King County Superior Court

Case No. 13-2-38375-6 SEA

The Honorable Roger Rogoff

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORMAN COHEN, Appellant v. RALPH CARR & MICHAEL FLYNN, Respondents	)))))))))	NO. 14718-4-1 Declaration of September 9, 2015 filing by Mail

I declare under penalty of perjury under the laws of the state of Washington, that on the dates written below, I filed Appellant's Reply brief on September 9, 2015; I mailed a true and correct copy of:

[x] This Declaration of Mailing

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The above and foregoing is true and correct.

Signed at Seattle, Washington on September 9, 2015

S/ Norman Cohen

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Rules

Cohen's Reply to Respondents' Response Brief

-I. Respondents' Motion to Strike

Notwithstanding RAP 10.4(d) which prohibits incorporating in a brief any motion unless that motion "would preclude hearing the case on the merits´ , Respondents advance a spurious "motion to strike", moving that "the offending portions of Cohen's brief be stricken". Flynn and Carr cite RAP 9.12 which tracks CR 56 (h), a rule which the trial court did not abide by. The trial court declined to reconsider although Cohen made it clear that the trial court's failure to identify the documents and evidence brought to its attention was one of the grounds for his motion to reconsider. As a consequence the record does not manifest which "documents" and or what "evidence" was called to the trial court's attention before the order on summary judgment was entered.

Respondent's hypocrisy is made manifest if one reads that order word by word. By its plain language, that orders prohibits any party, not just Cohen, from designating any document which is not defined as a pleading by CR 7(a). It is noteworthy that Respondents have designated dozens if not more than a hundred

documents which are interdicted by the literal terms of the court's misbegotten April 8, 2015 order, an order which this court entered at Respondents' request and over Cohen's objections. By its express terms the April 8, 2015 order would prevent any party from designating the Order which is on appeal and Cohen's notice of appeal although RAP 9.6 (b) appears to conflict with that Order. With the exception of Respondent's answer herein and with the further exception of Cohen's answer and madden answer in the underlying case, the Court's April 2015 order preclude this Court from considering any of the evidence which Carr and Flynn have designated as Clerk's papers because, with four notable exceptions Carr and Flynn have introduced a clutch of documents and evidence, approximately one hundred pages which are not admissible herein because, with the four noted exceptions, Flynn and Carr would have this court consider dozens and dozens of with do not constitute a complaint, an answer, a reply to a counterclaim, a third party complaint or a third party answer. Even Cohen's answered and Cohen's amended answer in the underlying case should not be considered because they are not pleadings in this case.

Aside from four documents, Cohen's 13-2 38375-6 Complaint, Cohen's answers and Respondents' 13-2 38375-6 answer the April 2015 order, literally read, would oblige this court to disregard virtually Respondent's entire brief because that brief is predicated on documents and evidence which this court has branded with a scarlet letter. This court's April 2015 order goes so far as to prohibit introduction of Cohen's 13-2-38375-6 motion for summary judgment Cohen's 13-2 38375-6 Summons and Respondents' motions in the underlying case. Cohen's 13-2 38375-6 Appeal. Flynn's June 8, 2012 summary judgment, the parties' 13-2-38375-6 motions for summary judgment and the 13-2 38375-6 Summons.

All hyperbole aside, and more to the point, Cohen has not, Cohen repeats, he has not violated the substance of the of the April 8, 2015 order as that order *is reasonably construed*. The vast majority, if not virtually all of the 10-2-34254-1 documents Cohen has cited in his brief were designated by Respondents or by both Cohen and Respondents. To the best of Cohen's knowledge the number of interdicted documents he has cited equals "zero", "none" "nada" "gornisht" "zip' "zilch" none". Cohen's requests this court to take judicial notice of Cohen's several designations of Clerk's

papers. The court will see that the only 10-2-34254-1 documents Cohen has cited in his briefs are Clerk's papers designated by Respondents, or which were submitted by the parties pursuant to 13-2 38375-6 motion practice or attached to the court's order on summary judgment. Cohen has not cited to any of the documents he designated in the offending designation. the designation which the court struck from the record. To repeat, Cohen has not violated the obvious reasonable meaning of that order

II. The Trial Court Did Engage In A Fact Finding Endeavor

Respondents would defend the indefensible with verbal gymnastics and oral sleight of hand. Respondents have the unmitigated gall to claim that Cohen's assertion that the trial court engaged in a confessed fact finding adventure is "unsupported by the record!"!!! Flynn and Carr would foist off on this court the remarkable argument that Cohen's claim is "an unsupported assertion".

According to Respondents, Cohen points to "nothing that can specifically support this claim". Apparently Judge Rogoff's own words do not constitute evidence "specifically supporting this claim". Evidently the fact that Cohen has quoted Judge Rogoff, verbatim, to the effect that he, Judge Rogoff did engage in a fact

finding endeavor constitutes a "mere allegation" unsupported by the record. Once again, respectfully differs. Cohen quotes Judge Rogoff again,

> The above entitled court having read both parties motions for respective summary judgments, each party's response, and each party's reply, and having read and reviewed the exhibits and declarations attached thereto, and the Court having reviewed the files and pleadings herein, the Court hereby makes the following ***FINDINGS*** and issues the following order: (emphasis added) CP 225; Page 1, lines 13-16 Order on Summary Judgment

Anomalously, Respondents concede the point at Page 11 of their brief. They state:

> "Everything" from Judge Rogoff's ruling points to a "*finding*" that was based on documents in the record. despite the fact that Judge Rogoff declined Cohen's invitation to identify the documents Respondents refer to) "uncontroverted facts" and plain meaning of statutes. (Emphasis added)

Judge Rogoff did make findings of fact and he must be reversed on that ground alone.

III. Judged either by what Flynn did in 10-2-34254-1 or judged by what Carr said in 10-2-34254-1 Cohen made at least a prima facie case of Judicial Estoppel.

Briefly, on the RPC issue, Flynn is dead wrong, Cohen submitted a veritable avalanche of evidence contradicting or tending to contradict Flynn's claim that he **never advanced the claim that there is a cause of action** Lest we forget, the words "never advanced the claim that there is a cause of action for violations of the RPCs are Flynn's words not Cohen's words.

It is important for the court to notice that Flynn persistently misstates the rule of law expressed in *Hizey v. Carpenter*, 119 Wn.2d 102, 830 P.2d 646 (1992) The fact that Flynn persists in misstating the *Hizey* rule is simply the way Flynn operates. It is infuriating, but predictable. What is disappointing in the extreme is that the trial court echoed that misstatement. Both Flynn and trial court misstate the Hizey rule. The *Hizey* rules is NOT that violations of the rules of lawyer conduct **alone** do not support actions against attorneys as the trial court concluded in its order granting summary judgment.

Contrary to Flynn's claims in 10-2-34254-1 and contrary to Judge Rogoff's conclusions all of the pertinent case law is that "breach of an ethics rule gives rise to only a public remedy and not a private remedy."

Judge Rogoff is wrong. Flynn is wrong. Flynn's 10-2-34254-1 argument that "they [Hizey and Bank of America] simply hold that in the absence of traditional grounds for suit, violations of the rule of lawyer conduct alone do not support an action against a lawyer, is dead wrong. Flynn continues to peddle the same intellectual junk food that Judge Yu found persuasive. She granted summary judgment and rendered money judgment against Cohen on June 8, 2012. [1] Flynn's June 12, 2012 motion, brief and reply brief represent arguments which are inconsistent with his position in this case. In the underlying case, Cohen asserted a 12(b)(6) defense to an action for violations of the RPCs. In this case, it is Flynn who advances a 12 (b)(6) defense to an action for violations of the RPCs.

Although he denies it, Flynn has advanced the proposition that there is a cause of action for violations of the RPC's both by what he argued in June of 2012 and by the fact that he filed, served and prosecuted an action to collect money damages caused by Cohen's violations of the RPCs.

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[1] Beyond a shadow of doubt, had Flynn moved for summary judgment on the ground that the earth is flat and Cohen flattened it, the result would have been the same, Judge Yu would have granted Flynn's motion and she would have entered money judgment against Cohen.

Cohen asserts Flynn prosecuted an action for money damages for violations of the RPCs in 10-2-34254-1. Regardless of the label Flynn elected to assign to his f10-2-34254-1 action, the 10-2-34254-1 was a suit for money damages caused by an attorney's violations of the RPCs.

There is nothing abstruse about it. ELC 13.7(b) tells us all we need to know about the character of the 10-2-34254-1 matter. ELC 13.7(b) states that a respondent lawyer. Cohen in this case, who has been sanctioned under rule 13.1, Cohen in this case . . .may be ordered to make restitution to *persons financially injured* by the lawyers' violations of the RPCs. As applied to this case and the underlying 10-2-34254-1 case, Cohen, was the Respondent lawyer who was sanctioned under ELC rule 13.7. CP 4 As applied to this case and the underlying10-2-34254-1 case Carr was the individual financially injured by Cohen's violations of the RPCs. Cohen was the "respondent lawyer" who was ordered to pay Carr money damages caused by Cohen's violations of the RPCs.

Carr retained Flynn, who sued Cohen, in in the Superior Court lawyer, for money damages arising from Cohen's violations of the RPCs. ELC 13.7 CP 4, CP 43-62 Carr wanted money. Carr sought

damages because Cohen's violations of the RPCs cost him money CP4, CP 43-62. Carr was a person who suffered financial injury as a result of Cohen's violations of the RPCs. . . . i.e. Carr wanted his restitution, Carr wanted money because he Carr, was a person financially injured by Cohen' violations of the RPCs. Flynn sued Cohen to recover the money he had lost as a result of Cohen's violations of the RPCs. Flynn was Carr's lawyer in 10-2-34254-1. He signed, served and successfully prosecuted an action to collect that money. It is difficult to imagine or more unambiguous action for violations of the RPCs.

Moreover, Cohen argued there is no civil cause of action for violations of the RPCs, ***regardless of whether there is an "absence of traditional grounds for suit."*** Flynn, on the other hand argued *Hizey v. Carpenter*, 119 Wn.2d 102, 830 P.2d 646 (1992) simply holds THAT IN THE ABSENCE OF TRADITONAL GROUNDS FOR SUIT, VIOLATONS OF THE RULES OF LAWYER CONDUCT ALONE DO NOT SUPPORT ACTOINS AGAINST ATTORNEYS. CP 60-62. In other words according to Flynn, *Hizey v. Carpenter*, 119 Wn.2d 102, 830 P.2d 646 (1992) and *Bank of America v David W. Hubert PC* 153 Wn.2d 102, 101 P.3rd 409 (2004) constituted no impediment to the 10-2-34254-1

action but, in contrast, H*lzey* and *Bank of America* do constitute an insurmountable obstacle to Cohen's suit against Flynn, Cause No. 13-2 38375-6.

IV Wrongful Garnishment

Appellant denies his claims on appeal are different than at trial level. Moreover, it is noteworthy that Carr does not cite any Clerk's paper which would support his claim that Cohen's claims on appeal exceed his claims at the trial court are not supported by any citation to the record. Even if his claim was true it would be very difficult for him to substantiate that claim since the trial court has not identified the documents and evidence brought to its attention before entry of summary judgment.

Carr can hardly be surprised that Cohen would prosecute legal action as a consequence of Flynn's lamentable misconduct circa October 2010. Especially so, since Carr is collaterally estopped from claiming the garnishment issued especially given the fact that Judge Yu has already decided that the garnishment was unlawful for reasons this court is intimately familiar and as a consequence under the doctrine of collateral estoppel Carr may not dispute

Cohen's allegation that the November 2010 garnishment was wrongful in the sense it was issued without authority of law setting, aside the reprehensible circumstances under which that writ issued. Contrary to Carr's convoluted interpretation of *Olsen v. National Grocery Co.,* 15 W 2d 164, 130 P.2d 79 1(942) The term "wrongful" in the context of "wrongful garnishment" means a garnishment without authority of law. *Maib v. Md. Casualty Co.,* 17 Wn.2d 47; 135 P.2d 71; (1943). It would be difficult to think of a scenario more wrongful than an attorney sneaking down to the courthouse in order to procure a garnishment based on a perjurious declaration. Clearly the garnishment in question was wrongful; it was not only procured without authority of law, it was procured in violation of a criminal statute. In addition, Carr does not identify the unusual circumstances under which a wrongful garnishment would not constitute a conversion.

Still on the issue of wrongful garnishment Carr falsely claims that Cohen was not damaged which is the kind of argument Flynn would make. The wages which were garnished were community property, a fact most first year law students would grasp. Moreover, Cohen has introduced "Declaration of Defendants Attorney Allan W. Munro who charged the total of attorney fees and

costs in the amount of $4,916.29 in vacating the offending judgment and quashing the writ of garnishment. CP 148 – 152.

Carr makes a similarly dishonest claim. He claims Cohen was a party to the settlement embodied in Judge Heller's May 27, 2014 dismissal order. CP 153-154. That Dismissal Order makes it crystal clear the contracting parties were Carr and Keith-Miller. Cohen was not a contracting party. Carr claims that Cohen may not sue absent proof of an assignment in writing. However, case law does support his contention. In fact, it has been the case law of this jurisdiction for at least one hundred years that that a chose in action may be assigned verbally as well as by writing, and, where there is no written assignment, it is a question of fact whether there was a transfer. Cohen's declaration in support of and in opposition to summary judgment explicitly states that Keith-Miller assigned her chose in action to Cohen long before Keith-Miller settled with Carr in May of 2014. Cohen commends to the court's attention several Supreme Court cases including *Morehouse v. Spokane Sec. Fin* **Corp**, 175 Wash. 501, 27 P.2d 697, (1933) And Seattle *Nat'l Bank v. Emmons*, 16 Wash. 485, 48 P.2d 262 (1897), a case which held that an assignment need not be in writing to enable an assignee to sue on the assigned chose in action. To the same effect see

Western Elec. Co. v. Norway Pac. Constr. & Drydock Co., 124 Wash. 49, 213 P. 686 (1923).

Judge Rogoff addressed and rejected close to all of Carr's bogus defenses to Cohen's wrongful garnishment. Cohen agrees with Judge Rogoff to the extent he rejected those counterfeit allegations and will discuss some of them very briefly. Carr claims that Judge Yu's denial of CR 60 terms as determinative of Cohen's claim for damages in the amount of Munro's attorney fees and costs. Of course that decision is discretionary and has impact on Cohen's ENTITLEMENT to any element of compensable damages he can prove.

V. Respondents' claim for Attorney Fees.

Cohen is in a position comparable to a defense attorney who has just tried a case in which the plaintiff's action is "skinny". That attorney is reluctant to talk about damages because addressing damages might lead the jury to believe there is any basis for a plaintiff's verdict. Nonetheless, as an exercise of caution the defense lawyer does talk about damages, however reluctant he or she may be. As an exercise of caution Cohen will address Respondent's request for attorney fees.

Cohen has pursued no frivolous appeal. To the contrary, his appeals are well taken. If justice prevails, this court will reverse Judge Rogoff and remand the matter for trial. In all events there is nothing frivolous about any issue. For example, Cohen's claim that the trial court committed procedural error is not only non-frivolous, but it is meritorious. One indication of merit is that Respondents' response is so weak. They say little and what little they do say is far from persuasive.

As to judicial estoppel, there is nothing frivolous about that appeal. To the contrary Cohen's judicial estoppel claim has overwhelming merit. Flynn's 10-2-34254-1 suit did seek money damages from Cohen as compensation for damages caused by Cohen's violations of the RPCs. That suit was quintessentially an action for damages caused by violations of the RPCs.

The merits of Cohen's wrongful garnishment action are obvious. There is nothing frivolous about prosecuting an action for wrongful garnishment where it is previously determined that the plaintiff has procured a garnishment based on a mendacious declaration to a court commissioner.

As to Cohen's alleged illicit citation of documents, Respondents are simply totally dead wrong. Cohen has not advanced any wrongful citations to the record. As to alleged delays, there was a significant delay in getting the County Clerk to transmit Clerk's papers. Short of lobbing a grenade there was not a lot Cohen could have done. Cohen is not sure, but this court's concern with an alleged two day delay may be incorrect, Cohen is not sure. If correct, that delay as undesirable as it may be, is a misdemeanor at most, it certainly is not a felony warranting attorney fees

Cohen submits that this court should reverse the trial court's September 2, 2014 order. It should deny Respondents' request for attorney fees and remand for trial.

Respectfully submitted this 9th day of September, 2015

Norman W. Cohen