

No. 68154-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MWW, PLLC dba Moran Windes and Wong, PLLC and MORAN &
KELLER, PLLC its successor;
Appellants,
v.

RYAN and JANE DOE SMITH, and the marital community composed
thereof; JOHN AND JANE DOE GUARINO, and the marital community
composed thereof; all individually and as successors in interest to
INTERACTIVE OBJECTS, INC; YARMUTH, WILSDON CALFO,
PLLC; RICHARD AND JANE DOE YARMUTH, and the marital
community composed thereof; and the proceeds of the legal malpractice
settlement paid by or on behalf of CAIRNCROSS & HEMPELMANN,
P.S., a Washington professional service corporation, in res,
Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This Court should overturn the trial court's summary dismissal of all plaintiff's claims pursuant to a CR 12 Order. CP 386-38.¹ The Order of dismissal was an ill-considered rush to shield the defendant attorneys from wrongdoing (which profited them handsomely) and which denied the plaintiff its right to have its claims fairly resolved on the merits. Moreover, this express train ultimately prevented the Superior Court from complying with the intent this Court's Order in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008).² Central to this were the trial court's incorrect application of collateral estoppel to the dicta in another court's interlocutory ruling in a case that never even made it to Final Judgment; the incorrect conclusion that a lawyer can violate one of the most important IOLTA trust fund rules by disposing of disputed trust funds to himself without consequence while the appeal is pending to resolve ownership of those funds; and the tacit approval of the defendant's practice of "gaming" the Courts by failing to enforce the rule of Judicial Estoppel.

This action followed this Court's holding in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008), where this court held

¹ The Court made another order again denying claims against Smith & Guarino in response to a CR60 motion to vacate which will be part of the Supplemental Clerks Papers.

that the MWW firm had a valid lien in the settlement proceeds of a legal malpractice case. This Court remanded the matter for a trial court determination of the value of the lien, namely whether the \$750,000.00 flat fee agreed in the written contract applied or not. While that appeal was pending, however, the confidential seven figure settlement proceeds were paid by the defendants to the Yarmuth firm, to be held by the defendant Yarmuth firm in trust per RPC 1.15A(g) pending resolution of the dispute. RPC 1.15A(g) requires lawyers to either hold disputed funds in their trust account until the dispute is resolved, or interplead them into the court. Unbeknownst to the plaintiff at the time, during the pendency of the appeal the defendant Yarmuth firm violated RPC 1.15A(g) by converting the funds when they paid them out to themselves and their clients, Smith and Guarino.

On the remand from *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008) where the trial court was charged with merely determining the amount of the lien, the trial court (J. Canova) entered interlocutory orders denying MWW summary judgment on the amount of the lien and then dismissed the case *without prejudice to* refiling. MWW attempted to appeal this dismissal, but was denied on the grounds that it was not a *Final Judgment*. CP 376-377.

² Much of the background facts can be found in this Court's published opinion.

MWW promptly refilled the case, adding the conversion claim and the Yarmuth firm as a defendant because it was discovered in the course of the remand that the liened funds had been taken by both parties in violation of RPC 1.15A(g). The case was assigned to Judge Heller. Prior to even answering the complaint, the defendants filed a CR 12 motion to dismiss the complaint, which the court summarily granted. In doing so, this trial court made numerous errors, including applying the doctrine of collateral estoppel to the *dicta* in Judge Canova's interlocutory order denying MWW's motion for summary judgment in prior case (which was not even concluded with a *Final Judgment*); held that there is no conversion where an attorney convert's trust fund money in violation of RPC 1.15A(g); held that the statute of limitations for conversion apparently begins to run before the lawyer even receives the money which he later converted; and held that a party is not judicially estopped from arguing two completely contradictory positions regarding the application the statute of limitations before two different courts, resulting in two completely different and inconsistent results.

The net result is that the trial courts have still not ruled on the merits of MWW's fee lien as mandated by this Court in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008) and the defendants have converted and run off with the liened proceeds.

This appeal remains MWW only possible avenue to collect on the attorney's lien this Court found valid under the attorney fee lien statute.

II. ASSIGNMENTS OF ERROR

1. The Court erred in dismissing all plaintiff's claims pursuant to CR 12(b)(6).
2. The Court erred in dismissing all claims based upon the Statute of Limitations.
3. The Court erred in failing to apply judicial estoppel to bar the defense of statute of limitations.
4. The Court in failing to conclude that the complaint stated a valid claim for conversion.
5. The Court erred in applying the doctrine of collateral estoppel to the *dicta* in Judge Canova's interlocutory ruling that the amount of MWW's fee was set by the written contract at \$750,000, then concluding that a previous judge found that plaintiffs sole recovery could be quantum meruit.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did plaintiff present a cause of action for conversion against all the defendants? **Yes.**
2. May an attorney be liable for the tort of conversion, where the attorney pays money out to himself and others in violation of

RPC 1.15A(g) which requires a lawyer to hold disputed funds in trust until the dispute is resolved or otherwise or interplead.

Yes.

3. Does the statute of limitations for conversion begin running when the actual conversion occurs, or prior to the date the actual conversion occurs? **The date the actual conversion occurs or thereafter depending on circumstances.**
4. Does the doctrine of judicial estoppel prevent the defendants arguing the statute of limitations defense in this case, when they previously convinced this Court to hold that the dismissal of the case by Judge Canova was not appealable as a Final Judgment by arguing that there was no statute of limitations defense to refiling? **Yes.**
5. Can the doctrine of collateral estoppel be applied by a subsequent court to the dicta of an interlocutory ruling of a prior court which was never even taken to Final Judgment? **No.**
6. Should the matter be remanded for the trial court to finally address the merits of the plaintiff's fee contract? **Yes.**

IV. STATEMENT OF CASE

The background of this case is appropriate as it helps explain the facts underlying the MWW-Nelson fee agreement, why it was drafted the way it was to include the flat fee and lien, and that it was contemporaneously vetted by Nelson's private counsel for reasonableness at the time MWW got involved.

A. Background

Brent Nelson was an outside director of a company known as Interactive Objects, Inc. ("IO"). Smith and Guarino were also board members as well as the Chief Executive Officer and Vice President of Product Development, respectively. CP 242. Smith and Guarino resigned from IO in October 1998 under pressure from investors and the board of directors. Mr. Nelson remained an outside director but was not involved in the day to day management of IO. In October 1998, Smith and Guarino asserted a claim against IO for severance pay. On February 4, 1999, the parties mediated and entered into a Memorandum of Settlement, which provided for IO to repurchase some of the Smith and Guarino founders stock with an option to purchase additional shares over the next year. After Smith and Guarino received more than \$1.2m they sued IO and its directors for misrepresentation and violations of the Washington State Securities Act (WSSA), alleging that IO should have disclosed a proposed merger at the time of the mediation. This information was withheld from

them at the mediation on instructions from its securities attorneys, the Cairncross firm.

The parties tried the case before Judge Canova in March 2002. At the conclusion of the Smith and Guarino evidence, the trial court dismissed Mr. Nelson and Northwest Capital Partners (NWCP) without the need to hear their defense. The defense would have been that Mr. Nelson and the outside directors relied upon their counsel, Cairncross, for specific instruction as to what the law required they disclose about a potential pending acquisition.³ Judge Canova had found that Mr. Nelson did not know and could not have known of the alleged misrepresentations. In fact, Mr. Guarino testified that Mr. Nelson never made any misleading representations to him. IO's business failed and it filed for bankruptcy in 2003.

³ At the time, IO was technically a public company so there was, on one hand a set of rules prohibiting disclosure of potential deals that might be construed as simply an intention to inflate a stock price, and other hand there were rules preventing selective disclosure to selected individuals without disclosing the same information at the same time to the public at large. Here, IO was advised by its lawyers at Cairncross, basically, that it could not disclose the potential acquisition to only Smith and Guarino so if it was disclosed it would have to be disclosed publicly; but if disclosed publicly it would violate the an NDA and the rules against inflating stock prices by disclosing potential business deals. Cairncross advised IO to not disclose the potential deal privately to Smith and Guarino, IO followed the advice and the result was the outside directors, like Mr. Nelson, got the business end of an \$11.3m nondischargable fraud judgment.

Smith and Guarino appealed the trial court ruling. Then in *Guarano, Smith v. Interactive Objects, Inc., et. al*, 122 Wn. App. 95 (Div. I 2001) this court reversed the trial court's findings and conclusions, entering its own finding that Nelson breached the WSSA and committed common law fraud. *Guarino*, 122, Wn.App at 126. The Court based its findings solely on IO's alleged failure to disclose a proposed merger during negotiations of their employment dispute, a fact which the trial court had rejected as not material to Smith's and Guarino's decision to sell their shares to IO. *Id.* at 118. The Court legally imputed the alleged misrepresentations, to all the directors including Mr. Nelson. 122 Wn.App at 125, 127. The Court did not consider that Nelson had never had the opportunity to present his own defense because the dismissal was granted at the close of Smith and Guarino's case.

The remand obligated the trial court to assess damages according to the WSSA, which resulted in an enormously inflated number. On January 6, 2006 Judge Canova entered judgment against all the directors, including Mr. Nelson jointly and severally for a combined \$11.37 million dollars, ⁴ with post judgment interest accruing at \$1.36m annually. Further, IO was in a liquidation mode in the bankruptcy. Had Smith and

⁴ \$7.751m to Mr. Smith; \$ 3.607m to Guarino; both judgments accrued interest at 12% post judgment

Guarino actually held on to their stock rather than sell it back to IO in the first place, its value would have been worthless. Smith and Guarino had zero real world damages.

B. Mr. Nelson Hires MWW To Try To Find Some Way Out Of His Fix While All His Assets Are Subject To A Nondischargeable Fraud Judgment

Mr. Nelson was not a wealthy man. He lived in a modest house and had small children in school. In the fall of 2006 he did not have the financial ability to post a bond for the estimated \$18m that would be required to stay execution of the judgment, which was set to be entered by Judge Canova in January 2007. Further, given the findings of securities and common law fraud, the judgment would not even be dischargeable in bankruptcy, leaving him and his family with an insurmountable judgment and subjecting them to execution and wage garnishment for *the rest of their lives*. Mr. Nelson few options and needed a way out, some way to plan to continue.

Through his attorneys, he approached Mr. Moran and the MWW firm in October, 2006. Together they prepared a plan to try to extract Mr. Nelson from his seemingly insurmountable predicament, which would include a flurry of appeals, a new case in USDC, a possible coverage case against Lloyds on the Directors and Officers policy, and a legal malpractice case against Cairncross. However, it was just as clear Mr.

Nelson and MWW at the time, that once the Smith and Guarino judgment was entered, they would promptly execute on each and every asset Mr. Nelson had, including intangibles such as all his interests in the appeals and cases in USDC and against Cairncross for legal malpractice. Mr. Nelson had no money to pay lawyers to do any of the work he needed done; any money that he would acquire in the future would likely be executed upon by Smith and Guarino; and if MWW took the cases on contingency, Smith and Guarino could theoretically sit aside and watch to see which cases bear fruit and which did not, then once any one of those cases looked like it would pay off, they could simply execute on Mr. Nelson's interest in the case, take the asset and fire the attorney (MWW in this case), and avoiding any payment obligation on the attorneys fee. Mr. Nelson did not have the cash to pay attorneys and attorneys could not work without a pledge of security for fees. The only asset Mr. Nelson had to pledge to secure the fees was his interest in the legal malpractice claim against the attorneys who got him in trouble in the first place, Cairncross.

C. Fee Agreement

Therefore, beginning in October and November when MWW agreed to take the cases and began working on them, it was done on the condition that Mr. Nelson granted a first position attorneys fee lien on the cases, one that would likely survive the execution process if Smith and

Guarino tried to takeover the case through that avenue. Through the next several months MWW spent hundreds of hours preparing for the *Nelson v. Cairncross* filing, gathering the IO material (IO was then in liquidation) from various law firms, private storage facilities, private homes, etc.; preparing for and litigating the USDC case *Nelson v. Smith and Guarino*, USDC WDWA no. 06-CV-00432 MJB(essentially seeking a stay of execution on due process grounds as Mr. Nelson had never been given an opportunity to present a factual defense in State Court) and then the Ninth Circuit Appeal; investigating, preparing for but ultimately declining to not file the case against Lloyds for denial of coverage on the D and O policy; working to defend the collection proceedings in Superior Court following the entry in January, 2006 of an award of more than \$11m damages, and several other avenues.

Once the cases were developed and after an extended period of negotiation, the parties, MWW and Mr. Nelson executed a fee agreement for all these matters on March 28, 2006. MWW made sure that the agreement was negotiated properly, with Mr. Nelson represented by his counsel Rick Carlson of Peterson Russell Kelley. Mr. Carlson reviewed the retainer agreement on his behalf to ensure the reasonableness and fairness and so testified in his deposition, where he described to Mr. Jamnback how he and Mr. Nelson took great care to negotiate a fair

agreement to take into consideration the many complexities to the cases that Mr. Moran would represent Mr. Nelson. The written agreement granted MWW a first position lien on a) the claims any b) and all proceeds of the lawsuits. Further, it recognized the possibility that the case might be transferred to Smith and Guarino as either part of a global settlement or an execution, by securing MWW's fee lien in the event of either. It provided that if Mr. Nelson transferred any interest in the claims or proceeds to a third party, voluntarily or otherwise, that interest shall be subordinate to the Attorney's lien which shall automatically be fixed at \$750,000 immediately preceding an involuntary transfer. "This lien is granted in addition to any other lien created by Washington law."

MWW filed the complaint, initiated the discovery and handled the case for the next 6 months of intensive discovery. Once it looked good, Smith and Guarino executed on it then bought it out of their own Sheriff's execution sale for a paltry \$25,000 –debt. MWW and Mr. Nelson fought the execution on the claim vigorously, as that was Mr. Nelson's only way to ever potentially satisfy the \$11m judgment, even appealing it to Division I. However, Judge Canova upheld the execution writ and sale of the claim to Smith and Guarino.⁵

⁵ Mr. Nelson, through MWW, appealed Judge Canova's ruling in *Nelson v. Smith, Guarino*, No. 58693-9 but after briefing he was forced to abandon it

They permitted Mr. Moran to continue to work the case up, until they structured a conflict that required Mr. Moran to be forced to resign pursuant to a motion. Then they proceeded to settle the claim for a substantial seven figure (millions of dollars but confidential) settlement, which absolved Mr. Nelson of all liability towards Smith and Guarino on the judgment. However, on September 6, 2007 before any settlement funds were even paid out to anybody, thus before MWW had any right to demand payment of those funds subject to its lien, let alone bring an action, YWC filed what is best characterized as a motion for declaratory relief, requesting the court summarily disallow MWW's fee lien claim in advance of any payment. Judge McCarthy granted the order invalidating MWW's fee lien on September 24, 2007. CP 236-237. On June 30, 2008 Division one reversed the trial court in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008). CP 240-254. Smith and Guarino petitioned for review but the Supreme Court denied the petition on March 4, 2009 at 165 Wn.2d 1032. The Mandate was filed back with the Superior Court Clerk on March 25, 2009. CP 238-239.

Therefore, prior to Judge McCarthy's September 24, 2007 Order MWW could not file a claim against the defendants Smith, Guarino or

following the settlement by YWC with Cairncross, as a condition of staying the execution against him on the \$11m judgment, which had, by then, increased to

YWC to foreclose on the lien and recover the lien proceeds from them because they had not received them yet. After that date, September 24, 2007 MWW could not file a claim against the defendants Smith, Guarino or YWC because the Order invalidated MWW's lien claim, and that disability prevented MWW from being legally able to file a claim against the lien proceeds and the holders thereof, until the date the Mandate was issued on March 25, 2009.

D. March 25, 2009 Is The First Date MWW Could Have Filed Its Lawsuit

Instead of filing a new lawsuit, however, MWW proceeded along the path indicated by the Court of Appeals in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008), and sought to resolve the final issue on summary judgment. CP 254 (Remand to Trial Court). MWW filed a motion for summary judgment set for hearing on June 12, 2009 before Judge McCarthy again. However, Judge McCarthy withdrew on the remand and the case was assigned to Judge Doyle. YWC filed an affidavit of prejudice so the case was transitioned back full circle to Judge Canova, who reset the MSJ hearing for July 24, 2009. Judge Canova granted a CR 56(f) continuance to YWC, Smith and Guarino, allowing for additional discovery, namely the depositions of Mr. Moran, Mr. Kelly and Mr. Carlson. YWC deposed Mr. Moran for two full days

nearly \$14m due to interest.

and Mr. Carlson and Mr. Kelly, both Mr. Nelson's attorneys, both of whom stated that the MWW fee agreement was reasonable under the circumstances of the case. CP255-349. (Exhibit C To Moran Declaration-Depositions of Moran; Carlson; Kelly.)

Then on October 22, 2009 Judge Canova entered an interlocutory order denying the MWW MSJ. CP 353-354. Following that order, the parties engaged in heated discovery and motion practice, with the YWC and SYC filing its usual flurry of CR 11 and sanction motions (denied), its motions for protective orders (denied) and MWW motions for orders to compel (granted). The year ended with YWC's Mr. Jamnback filing his notice of unavailability on December 14, 2009 through January 5, 2010. On January 13, 2010 Division one denied discretionary review of Judge Canova's denial of MWW's MSJ. "I agree with Moran that the attorney fee issue it has raised is an important issue with broad implications. But Moran has not met the strict criteria for discretionary review." CP 356 (Exhibit D at p. 6.). The Certificate of Finality was issued on February 19, 2010. CP 361 (Exhibit E).

E. Facts Relating To Judicial Estoppel

Over the next 12 months little happened, except YWC produced discovery intermittently and during the latter part of the year Mr. Winders left the firm, causing a name change to Moran Wong and Keller. So on

April 26, 2011 MWW/MWK filed a motion for a trial date and case schedule. Judge Canova denied the motion for trial date and instead dismissed the case for failure to prosecute. MWW/MWK appealed the dismissal as clear error. (a court may not dismiss a case for want of prosecution while a motion for a trial date is pending).⁶ On appeal, YWC, Smith and Guarino specifically argued that MWW's appeal should be denied because the dismissal was not a "Final Judgment." Defendants argued that MWW could refile "without prejudice" and thereafter pursue its claims, *unimpeded by a statute of limitations or other new defenses*, in the new action.

Indeed, this was the heading of Smith and Guarino's brief on Appeal before Division I. CP 367.

5 |||
6 ||| **A. The Trial Court's Order of Dismissal Pursuant to CR 41(b)(1) is Without Prejudice and Not Appealable as a Matter of Right per RAP 2.2.**

CP 367. (Exhibit F to Moran Declaration, p. 5.).

YWC, Smith and Guarino went on to successfully convince the Court of Appeals that the dismissal order was not a final judgment

⁶ "The final sentence of CR 41(b)(1) means precisely what it says, a case shall not be dismissed for want of prosecution if it is noted for trial before the hearing on the he motion to dismiss. The rule...limits the power of the trial court to dismiss for failure to prosecute after the issue is joined and the case noted for trial." *Business Services of America, v. Wafertech*, 159

entitling to MWW/MWK as an appeal as a matter of right, because MWW/MWK could refile a new action without prejudice- i.e. *there was no statute of limitations issue with refiling*. *Id* at p. 5:18-24. The Court of Appeals accepted this argument from YWC, ruling:

“..The appellant [MWW/MWK] argues that the bottom line is that the action has been terminated and so should be appealable under RAP 2.2(a)(3)...But the problem with this analysis is that the actual dismissal was without prejudice. It is well established that a dismissal without prejudice is not appealable unless its practical effect it to determine the action and prevent final judgment or discontinue the action (citing cases). **An example of a dismissal without prejudice that discontinues the action is when the statute of limitations would bar refiling the litigation...**the trial court rulings do not reveal that a refilled action will be rejected by the trial court, if the party is properly identified and standing is established.⁷

CP 371, July 5, 2011 Order denying review, Exhibit G to Moran

dec. (emphasis added).

So MWW/MWK filed this action. Defendants promptly filed their CR 12 motion to dismiss.

V. LEGAL ARGUMENTS

A. The Court Erred By Dismissing The Complaint Under CR 12

In the context of a moving plaintiff's motion to dismiss, the Court

Wn.App 591, 597 (Div.2 2011) citing *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 168-169 (1988).

⁷ Defendants have not challenged standing in this action.

of Appeals has summarized our Supreme Court's cases elucidating the CR 12 standard as follows:

“Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *Suleiman v. Lasher*, 48 Wn.App. 373, 376, 739 P.2d 712 (1987). In making this determination, the court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. *Burton*, 153 Wn.2d at 422, 103 P.3d 1230. A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Fondren v. Klickitat County*, 79Wash.App. 850, 854, 905 P.2d 928 (1995). “Usually, dismissal is granted ...‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’ ” *Id.* (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 344 (2d ed.1990)).

Gaspar v. Peshastin Hi-Up Growers, 131 Wn.App. 630, 634-35, (2006).

B. The Court Erred By Dismissing The Complaint Under The Statute Of Limitations Because The Limitations Period Had Not Expired When This Case Was Filed

The first date the plaintiff could have filed a claim for conversion was March 25, 2009, the date the Mandate was issued in *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008). That Mandate established the MWW lien. Prior to that, Judge McCarthy's summary order disallowing the lien was the law of the case. Since that order was itself issued before the defendants even received the funds they later

converted, MWW had no basis or ability to bring a claim before the Mandate, March 25, 2009.

Under a three year statute of limitations, argued by defendants, the deadline for filing a lawsuit would be March 25, 2012. Further, since the MWW/MWK action is on a contract, the applicable period is six years from that date. RCW 4.16.030. The filing of this lawsuit on July 18, 2011, was timely. CP 1-11.

C. The Defendants Were Judicially Estopped From Asserting A Statute Of Limitations Defense In This Action Because Of Their Representations In The Prior Remand Action

The doctrine of Judicial estoppel precludes the defendants from taking one position before the commissioner about the statute of limitations and finality of Judge Canova's dismissal order, obtaining an order denying review on that basis, then taking another here, arguing for dismissal on statute of limitations grounds. "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 the waste of time." *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982); see also *Markley v. Markley*, 31 Wn.2d 605, 614-15 (1948), (quoting 19 AM. JUR. Estoppel § 73, at 709). See also *Johnson*

v. Si-Cor Inc., 107 Wn. App. 902, 906 (Wash. Ct. App. 2001). There are three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) a party's later position is clearly inconsistent with its earlier position; (2) judicial acceptance of the prior position which is inconsistent with the parties' later position; and (3) party seeking to assert an inconsistent derives an unfair advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-539 (Wash. 2007). The elements are here. Smith, Guarino and YMC clearly argued in the appellate court that MWW could not bring the appeal because MWW could merely refile and have its claim accepted. CP 363-374. That argument was successful, and now they are saying the exact opposite in an attempt to get this court to dismiss the case. They can't have it both ways.

Additionally, as the Court of appeals stated in its Order dismissing the appeal which led to the filing of this action, **“the trial court rulings do not reveal that a refilled action will be rejected by the trial court, if the party is properly identified and standing is established.”** CP 377. Indeed, Mr. Jamnback and his clients did not argue that the refiling would be frivolous or that it would be defeated by the statute of limitations in the appellate court. They argued one thing to the appellate court and another to this court, which very well court have led to this Court denying their motion to dismiss on grounds of judicial estoppel. In fact, judicial

estoppel should have applied to the statute of limitations claims and that estoppel would apply to both Yarmuth and Smith and Guarino as privity of parties is not required for judicial estoppel.

The majority of courts that have considered the matter have concluded that privity of the parties, reliance, and prejudice--generally recognized elements of estoppel--are inapplicable to the doctrine of judicial estoppel. 1B JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE, § 0.405[8] (2d ed. 1991); Eugene R. Anderson & Nadia V. Holober, Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions, 4 CONN. INS. L.J. 589, 622-36 (1997-1998). We note that cases such as Sprague and Witzel that have applied the Markley elements for judicial estoppel--including the problematical elements of privity, detrimental reliance, and final judgment--have done so without analysis of the issue. 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.

See Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-908 (Wash. Ct. App. 2001). Consequently, even if this court agreed that the trial court correctly found that the claims were time-barred, plaintiffs had legally tenable theories as to (1) why they were not time-barred (mandate issued on March 25, 2009) and (2) judicial estoppel as defendants argued in the

appeals court that claims could be refilled, and then argued here that they are time-barred.

D. The Plaintiff Plead A Valid Claim For Conversion

The defendants had a legal obligation to either hold in trust, or interplead the settlement funds which were subject to the MWW lien.

“If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, **the lawyer must** maintain the property in trust *until the dispute is resolved.*”

RPC 1.15A(g).

YWC received the liened proceeds and disbursed them before the dispute was resolved. The conversion tort could not be clearer.

The Tort of Conversion is:

“[r]ooted in the common law action of trover, that tort occurs when, without lawful justification, one willfully interferes with, and thereby deprives another of, the other's right to a chattel. It requires that the plaintiff have a possessory or other “property interest” in the chattel, and it treats money as a chattel only if the defendant “wrongfully received” the money or “was under obligation to return the specific money to the party claiming it.”

Davenport v. WEA, 147 Wn. App 704, 721-722 (Div.2 2009).

MWW/MWK's lien on the settlement funds is a property interest in those funds. There is no reasonable dispute to this after *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459. Further, RCW 60.40.010 (5)

provides that the attorney's lien continues in the cash proceeds even after transfer, thus any secondary or tertiary transferee who possesses the liened cash proceeds, who knowingly disposes of them in derogation of MWW/MWK's property interest, commits an independent tort of conversion. Defendants all did this when they converted liened proceeds to their own use.

As the complaint properly pleads, YWC and Yarmuth were acting on behalf of themselves and their principals, Smith and Guarino, so *respondeat superior* applies. When defendants released the liened funds from their trust in violation of RPC 1.15A(g), they committed conversion, which is imputed to their principals Smith and Guarino.

The Defendants countered with arguments about the amount of the lien, pointing to Judge Canova's interlocutory orders denying summary judgment. However, these had no precedential value simply because the doctrine of collateral estoppel does not apply to interlocutory orders unless there was a Final Judgment. *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489 (1985) ("The requirements for application of collateral estoppel are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine

must not work an injustice on the party against whom the doctrine is to be applied.”)

Defendants also argued as a curious defense to the conversion claim, an incorrect construction of the lien statute. They contended that the attorneys fee lien could *only be* an amount equal to the *quantum meruit* type analysis- for that action alone. This argument flies in the face of the clear language of RCW 60.40.010(d), which specifically provides for the lien to be established as *either* “the value of services performed by the attorney in the action” (*quantum meruit*) or “**if the services were rendered under a special agreement, for the sum due under such agreement.**” MWK/MWW claims its lien is the amount stated in the written fee agreement- the amount due under the *special agreement*. The statutory construction is pretty simple and defendant’s arguments concerning the measure of the lien as valued by the *quantum meruit* are not applicable to this calculation.

Furthermore, once Appellants proved that the money was received by Yarmuth subject to plaintiff’s lien and wrongfully retained belonged to plaintiff, recovery does not even depend on proof of fault, ie., contract breach, tortious activity such as conversion, only that the money ought to be returned “in equity and good conscience.” An action for money had and received may be maintained whenever one has money in his hands

belonging to another which in “equity and good conscience” should be paid over, *Atlantic Coast Line Railroad Co. v. Florida*, 295 U.S. 301, 309 (1935) and that such actions have been successfully brought for recovery of public monies paid in violation of the law. *State v. Maryman*, 181 Ark. 91 (1930); *In re Community Co-op Industries*, 279 Mich. 610 (1937). *Municipality of Anchorage v. Sisters of Providence in Washington Inc.*, 628 P.2d 22, 34 (Alaska 1981). “A person who is unjustly enriched at the expense of another is liable in restitution to the other.” Restatement (3d) Restitution § 1. “In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money.” *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, fn. 13 (2007)(quoting *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760).

It cannot be disputed that the Yarmuth firm had knowledge of plaintiffs lien, as they sought to quash it. Once the lien was upheld, the Yarmuth firm knew that it held at least some funds belonging to plaintiffs. Certainly they cannot deny that plaintiffs did work on the case giving rise to the lien since a lawsuit was filed and discovery undertaken. In equity and good conscience they should have turned the funds over or kept them in a trust account.

V. CONCLUSION

The Court should reverse the CR 12 order dismissing the complaint and remand with instructions for the Superior Court to, again, address the simple issue of whether the plaintiff's lien is valid in the amount stated, according to the clear and plain language of the statute. Further, the Court should make it clear that the defendant's violation of RPC 1.15A(g) by paying out the disputed, liened proceeds before the dispute was resolved, constitutes the tort of conversion. That should lead quickly, and finally to a final resolution of this case, namely a final judgment on the merits of the plaintiff's fee claim in the principal amount specified in the contract.

SIGNED AND DATED this 30th day of March, 2012 at
Seattle, Washington.

MORAN & KELLER, PLLC

/s/William A. Keller 
William A. Keller,
WSBA # 29361
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 30, 2012, the foregoing was sent via First Class Mail to the Division 1 Court of Appeals and to all counsel of record.

/s/ Marisa Testa
Legal Assistant
MORAN & KELLER, PLLC