72718-4

72718-4

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 OPENING BRIEF

On Appeal from the King County Superior Court

Case No. 13-2-38375-6 SEA

The Honorable Roger Rogoff

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUN -2 AM 11:31

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I. Introduction:

In November, 2013 appellant Norman Cohen, hereinafter "Cohen" sued attorney Michael Flynn, hereinafter "Flynn" and Ralph Carr, Jr., hereinafter "Carr". Cohen sued both of them for their misconduct in the course of litigating "the 10-2-34254-1 matter".

A. Cohen's suit against Flynn

Cohen, who is suing as his wife's assignee as well as in his own right, has sued Flynn for violating the rules of professional conduct, based on a juridical estoppel theory. Cohen claims Flynn is estopped from asserting CR 12(b) (6) as a defense to Cohen's action for violating the rules of professional conduct because, in a case of role

reversal, "Messrs. Flynn and Carr prosecuted an action for violations of the RPCs against Cohen,

B. Cohen's Suit against Carr

Appellant sues Carr for wrongful garnishment alleging several theories of recovery. Appellant's primary theory is that Carr is collaterally estopped from denying the wrongfulness of that garnishment.

C The trial court committed reversible procedural error

The trial court erroneously embarked upon a fact finding process when considering three motions for summary. The reversible error Cohen complains about is manifested at Page 1, lines 13-16 Order on Summary Judgment CP 225. The court stated

> 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

The trial court effectively transformed three motions for summary judgment into three mini trials by affidavit, an impermissible adventure. When a court considers a motion for summary judgment the court is not permitted to make findings; au contraire.

II. Assignments of Error

1. The trial court erred by granting Flynn's motion for summary judgment and erroneously dismissed appellant's action against him for damages caused by attorney Flynn's violations of the rules of professional conduct.
2. The trial court erroneously granted Carr's motion for summary judgment and erroneously dismissed appellant's wrongful garnishment action.
3. The trial court erred by denying appellant's motion for partial summary judgment against Carr on appellant's cause of action for wrongful garnishment. Appellant sought summary judgment on the liability issue and for one specific element of damage.

A, Issues Pertaining to Assignments of Error

1. When considering three motions for summary judgment did the trial court err by engaging in a fact finding endeavor and or by failing to view the evidence in a light most favorably to the non-moving party. Assignments 1, 2,3,4 & 5
2. Is attorney Flynn judicially estopped from defending appellants' claims for damages arising from his violations of the RPCs? Assignment I & 4
3. Has appellant made at least a prima facie case that "Flynn took a different position" in the underlying case by virtue of adducing evidence that

   (a) Flynn prepared, signed and served Carr's Case No. 10-2-34254-1 which is a lawsuit seeking money judgment for appellant's violation of the RPC's constitute within the meaning of *Hizey v. Carpenter*, Assignments 1 & 4 & 5; and/or

   (b) Flynn has interposed a CR 12 (b)(6) defense to Appellant's suit against Flynn for violations

of the RPCs, but Flynn argued that CR 12 (b)(6) was not a good and sufficient defense to Carr's suit against Cohen for violations of the RPCs.

(c) On June 8. 2012 Flynn persuaded Judge Yu to grant Carr's motion for summary judgment and enter money judgment against appellant for damages caused by appellant's violation of the RPC? Assignments 1 & 4 & 5,

(d) The parties' briefs in the above and foregoing summary judgment proceeding portray a stark contrast between Flynn's position in the case sub judice and the underlying case. (E) Is Carr collaterally estopped from denying that he tortiously wrongfully) garnished Keith-Miller's wages? Assignments 2, 3, 4

(e) Did the trial court fail to recognize that Carr's liability is not predicated solely on RCW 6.26.040? Carr' liability is also based on a conversion theory, negligence per se theory, an outrageous conduct theory, and on the theory that violations of some

criminal statutes give rise to civil liability. In all events did the trial court misconstrue the statute? Assignments 2, 3, 4

(f) Is Carr collaterally estopped from denying liability for the wrongful garnishment of November 10, 2010. Did the trial court misconstrue the wrongful garnishment statute leading it to erroneously dismiss both his statutory and his common law tort action? Did the trial court erroneously under appreciate the effect of Keith-Miller's 2013 assignments and erroneously dismiss Appellant' lawsuit based on a settlement to which he was not a party? Assignments 2, 3 & 4

III. Statement of the Case

Appellant sued Ralph Carr Jr & Michael Flynn on November 13, 2013. CP 103-106. Appellant sued Carr for wrongful garnishment. He sued attorney Flynn for damages caused by Flynn's violation of the Rules of Professional Conduct in the course of

representing Carr in Cause No. 2 34254-I. CP 103-106. Appellant's theory of recovery is that Flynn is judicially estopped from interposing his otherwise valid defense of failure to state a claim upon which relief can be granted. CP 105

Ralph Carr is appellant's former client. Appellant represented Carr in an employment action circa 1998 – 2000. In the course of representing Car appellant violated the RPC's. These violations resulted in a December 12 2000 $8,118.75 money judgment against Carr in favor or one of the defendants. CP 4; CP 43-45; CP 46-57; CP 58-62; CP 110-113. Before the 10-2-34254-1 civil action was initiated, Carr filed a complaint with the Bar Association resulting in a March 23, 2006 Supreme Court Disciplinary Order disbarring appellant and 1ordering Appellant to pay Carr $8118.75 and interest from the date of the December 12, 2000 judgment until fully paid. CP 4; CP 103-106

The record is not clear as to whether Carr filed a bar complaint because he knew the Supreme Court had previously decreed that breach of an ethics rule gives rise to only a public, e.g., disciplinary remedy and not a private remedy.

On August 18, 2010 Ralph Carr served an unfiled summons and complaint on Norman Cohen and Verlaine Keith-Miller. That suit was drafted, signed, served and eventually filed under cause no. 10-2-34254-1 by attorney Michael Flynn. Flynn called it "“Complaint for Judgment on Supreme Court Order for Restitution”. CP 150. That lawsuit, the “10-2-34254-1 matter” was a civil cause of action for violations of the RPCs. CP 4; CP 43-45; CP 46-57; CP 58-62; CP 110-112

The “10-2-24352-1 matter” was not resolved until May 27, 2014 when appellant’s co- defendant Verlaine Keith-Miller negotiated and entered into a May 27, 2014 accord. Cohen did not settle. CP 153 Keith-Miller and Carr settled the year after

Keith-Miller assigned to Cohen all of her claims – choses in action- against Respondents. [CP 162-163] Plaintiff is pursuing these suits both on his own behalf and as Keith-Miller's assignee.

Carr's August 2010 cause of action against Cohen is the subject of appellant's first and fourth and fifth assignments of error. The complaint, was drafted, signed, served and prosecuted on Carr's behalf by attorney Michael Flynn. He attached a copy of the Supreme Court's March 23, 2006 order CP4: CP 44.

Although the 10-2-34254-1 complaint is not of record [1] the Supreme Court's March 23, 2006 order is of record. CP 4. At one point Flynn the 10-2-34254-1 complaint as mechanism to convert the restitution order to a Superior Court Judgment" because Flynn" needed a Superior Court judgment

[1] An April 8, 2015 order sustaining Respondents' objections to appellant's request for Clerk's Papers prevents appellant from making the 10-2-34254-1 complaint a matter of record. In the quantitative sense, if not the qualitative sense, the April 8, 2015 has stultified appellant's capacity to submit a satisfactory clutch of Clerk's Papers.

in order to execute or garnish. CP 45. Flynn labelled the suit "Complaint for Judgment on Supreme Court Order for Restitution". CP 150. Although he was seeking enforcement and/or conversion of a restitution order he unequivocally rejected the idea that the 10-2-34254-1 matter was malpractice suit or a restitution suit. CP 60-62

On August 30, 2010, twelve days after service of process, Cohen appeared at the Clerk's with both defendants' written notice of appearance CP 21 it was impossible to file them because the Summons and Complaint had not been filed. CP 21 On August 31, 2010 Cohen emailed defendants' notices of appearance to Carr's attorney Michael Flynn. CP 21

On August 31, 2010 Flynn acknowledged receipt of those notices of appearance. Flynn responded "Email is not a proper notice of appearance under the court rules. I will consider you as having appeared when I receive proper

service of appearances." CP 21 At 9:45 p.m. on Labor Day, 2010 Cohen left a voice mail on attorney Flynn's phone message stating: "This is Norman Cohen. This is Defendants' second notice of appearance." CP 21-22

On September 28, 2010 Flynn filed the Summons and Complaint but Flynn did not mail the Court's order Assigning Judge and Establishing Case Schedule. If Flynn had done so, defendants would have been notified the case had been filed. CP 22

Although Flynn had received defendants' written unsigned notice of appearance on August 31, 2010 as well as defendants' verbal notice of appearance on Labor Day 2010, Flynn moved for default without notice to either defendant on October 27, 2010. CP 22; CP 228-229.

As Flynn phrased it, "Carr submitted and was awarded Judgment". CP 22; On October 27, 2010 an order of Default and a Default judgment

were entered over the signature of Commissioner Carlos Velatagui based on Flynn's perjurious declaration. CP 230 According to Flynn's sworn statement, "Defendants have neither appeared nor in any other way defended." CP 228-229 the default judgment which Flynn presented also included Flynn's false statement that defendants have "neither appeared nor in any other way defended". CP 20-24; CP 228 -229; CP 231.

On November 10 2010 the writ of garnishment which constitutes the basis of appellant's cause of action against Mr. Carr was issued. CP 22 Flynn delayed transmitting a copy of the court's default judgment to Cohen or Keith-Miller until the time within which to file a motion to revise a commissioner's order had elapsed. Appellant and his wife received a copy of the court's Default Judgment and a copy of the Court's Writ of Garnishment on November 17, 2010. This was Cohen & Keith-Miller's first notice that Flynn

had either moved for or obtained a default judgment. CP 20-24

Cohen & Keith-Miller retained attorney Allan Munro who prepared their declarations in support of appellant's motion to vacate the default judgment of October 27, 2010 and to vacate the Writ of Garnishment issued November 10, 2010. CP 150; CP 233-234. On November 30, 2010 an Order to Show Cause issued directing Carr to appear before Judge Mary Yu on January14, 2011 to show because why the court should not vacate the October 27, 2010 default judgment and why the court should not vacate the writ of garnishment. CP 233-234

On January14, 2011 Judge Yu presided over a hearing which was to determine whether to vacate the October 27, 2010 default judgment and whether to vacate the November 10, 2010 writ of garnishment. The parties to that litigation were Ralph Carr, Norman Cohen and Verlaine Keith-

Miller. Judge Yu granted Cohen & Keith-Miller's "motion to vacate Order of Default, Default judgment and Garnishment ...." CP19 With the exception of Cohen & Keith-Miller's request for terms the Cohen - Keith-Miller tandem won and Carr lost. CP 233-234; CP 19; CP 20-24. That order is final. Carr's untimely appeal to this court was dismissed. Mr. Munro's fees and expense equaled $4916.29 including defense of Carr's appeal to this court. CP 148-152

Appellant's pleadings in response to the 10-2-34252-1 complaint included failure to state a claim upon which relief can be granted CR 12(b)(6) CP 38; CP 109; CP 29; CP 32 based on *Hizey v.* Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) appellant interposed the affirmative defense " failure to state a claim upon which relief can be granted." CP 29; CP 32.

On June 8, 2012 Judge Yu granted Respondents' motion for summary judgment action against

appellant for violations of the "rules of lawyer conduct". Concomitantly she entered money judgment against Cohen. CP 109; CP 112

So far as relevant to this case, the gravamen of Mr. Munro's brief in opposition to summary judgment was predicated on Cohen's CR 12(b)(6) defense; summary judgment could not be granted because: Hizey v. Carpenter 119 Wn.2d 251; 830 P.2d 646 (1992),[later cited by the Supreme court in Bank of America v. David W. Hubert, P.C., 153 Wn. 2d 102 (2004)] *Bank of America*, supra, will be referred to hereinafter as "Bank of America" and *Hizey v. Carpenter*, supra, will be referred to as "Hizey"

As noted, Munro argued, "Hizey"

"Unequivocally and clearly holds that a violation of the professional code for attorneys may be remedied only by a disciplinary proceeding. Such violation may not serve as the basis for a private cause of action".

Mr. Munro made it clear that Cohen's CR 12 (b) (6) defense was predicated on *Hizey and Bank of*

America, supra. He also made voiced his view that the *Hizey and Bank of America were absolute.* He argued

"Unequivocally and clearly holds that a violation of the professional code for attorneys may be remedied only by a disciplinary proceeding. Such violation may not serve as the basis for a private cause of action".

(a) The parties' briefs in the above and foregoing summary judgment proceeding portray a stark contrast between Flynn's position in the case sub judice and the underlying case. Appellant's attorney Allan Munro's brief in opposition to Carr's motion for summary judgment included the following language:

The Supreme Court of Washington . . . has held plainly and unequivocally that violations of the Code do not give rise to an independent cause of action. Breach of ethics rule provides only a public, e.g., disciplinary and not a private remedy. In *Hizey v Carpenter*, 119 Wn.2d 251 (1992) the Supreme Court held the Code of Professional Responsibility and the Rules of Professional Conduct do not set forth a standard for civil liability. Thus violations of the provisions do not give rise to an independent cause of action against an attorney. The court held that

"Breach of an ethics rule provides only a public, e.g. disciplinary remedy and not a private remedy.

Flynn's reply brief asserts:

Cohen argues that "breach of an ethics rule gives rise to only a public , e.g., disciplinary remedy and not a private remedy" Cases cited by Cohen (*Hizey and Bank of America v. David W. Hubert, P.C.*, 153 Wn. 2d 102 (2004) do not support his position. They simply hold that in the absence of traditional grounds for suit, violations of the rule of lawyer conduct alone do not support actions against attorneys. (Emphasis added) CP 60-62

Appellant's position as articulated by Mr. Munro fell on deaf ears. "Messrs. Flynn and Carr's" position that neither Hizey nor Bank of America; preclude an action for violation of the RPC prevailed. Cohen's CR 12(b) (6) was, as a matter of law, not a good and sufficient defense to the 10-2-34254-1 matter. The June 8, 2012 judgement was a judgment based on a civil cause of action for

violation of the RPCs. CP 4; CP 43-45; CP 46-57; CP 58-62; CP 110-112

Flynn's 13-2-38375-6 answer admits:

"In May of 2012 defendant Flynn prepared a motion for summary judgment as to Carr's first cause of action in Cause No. 10-2 34254-1. Cohen asserted several defenses to that motion including the defense that an individual's sole remedy for an attorney's breach of the RPC's lie in the attorney disciplinary system. That defense was based on case law that holds that an attorney' violation of the RPC does not give rise to a civil cause of action. The court granted summary judgment and entered a money judgment against Cohen on June 8, 2012. CP 109; CP 105

On September 2, 2014 the trial court granted two motions for summary judgment and denied Appellant's one motion for summary judgment. The trial court dismissed appellant's suit and dismissed Flynn's counter claims for damages caused by Appellant's alleged frivolous lawsuit. CR 11 and RCW 4.84.185. CP 224 The trial court's September 2, 2004 order states:

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]

On October 21, 2014 the trial court denied appellant's motion(s) for reconsideration. Notice of Appeal was filed November 18, 2014. CP 222.

IV. Summary of Argument

A. The trial court erroneously engaged in a forbidden fact finding endeavor. At CP 224 – line 15 the trial court effectively transformed three motions for summary judgment into mini-trials by affidavit.

B. The "inconsistent position" element of judicial estoppel is the only issue Flynn raised and the "inconsistent position" issue is the only judicial estoppel issue decided. Appellant has adduced abundant evidence constituting, at the very least, a prima facie case of "inconsistent position" within the meaning of judicial estoppel. These facts include, but are not necessarily limited to:

a. Flynn "advanced the position that there is a civil cause of action for violation of the RPCs by means of signing, serving and prosecuting an action grounded on appellant's violations of the RPC's.

b. Flynn signed, served and **prosecuted** a motion for summary judgment in the 10-2-34254-1 matter. He argued that CR 12(b)(6) was not a defense to his action for violations of the RPC's.

c. Flynn' June 2012 summary judgment reply brief portrays a clearly inconsistent position as compared to this case. In this case he posits *Hizey* as the precedential basis for his CR 12 (b)(6) defense. In the previous case he claimed that Hizey does not support a CR 12(b)(6) defense.

d. In sum, and as a matter of law, the fact that Flynn moved for and was granted summary judgment in the 10-2-34254-1 matter means that he persuaded a court that CR 12(b)(6) is not a good and sufficient defense to civil action for violations of the RPCs. By contrast in this case he

has advocated for and been awarded summary judgment on the ground that THIS action for violations of the RPC is subject to dismissal for failure to state a claim upon which relief can be granted.

B.. Wrongful Garnishment

1. Carr is collaterally estopped from denying that the November 10, 2010 writ of garnishment was wrongfully issued. The wrongful garnishment statute which the trial court misconstrued is neither the only nor the most important ground of this appeal. Carr can be held civilly liable for violating least one criminal statute. He can be held civilly liable because he converted appellant's property. He can be held for outrageous conduct and he can be held liable for fraud and for negligence per se.

3. The trial court failed to appreciate the significance of Keith-Miler's May 2013 assignment of her chose in action to Cohen.

4. The trial court misconstrued RCW 6.26.040. The trial court did not take into consideration that the underlying case was a one plaintiff two defendant case. The statute contemplates only one defendant.

V. ARGUMENT

A. SUMMARY JUDGMENT RULES IN GENERAL

This court is reviewing an order granting summary judgment. Consequently this court engages in the same inquiry under CR. 56 as the trial court did, or as applied to this case, this court will engage in the same inquiry you are the trial court should have. The trial court violated a basic principle governing motions for summary judgment. This court would be loath to repeat it. In all events, summary judgment should be granted if the admissible evidence shows there is no genuine issue as to any material fact **and** that the moving party is entitled to a judgment as a matter of law. CR 56(c). (emphasis added) *Mielke, v. Yellowstone Pipeline*

Company 73 Wn. App. 621; 870 P.2d 1005 (1994) The obverse of the same coin is that summary judgment must be denied if there is a genuine issue as to material fact or if the substantive law does not entitle the moving party to judgment. . When deciding a motion for summary judgment, a court must consider the evidence and the reasonable inferences therefrom most favorably toward the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17; 896 P.2d 665

B. The trial court's self-confessed fact finding adventure constitutes reversible error. That endeavor violates a cardinal rule of summary judgment jurisprudence,

The trial court transformed three motions for summary judgment into mini trials by affidavit. It ventured far beyond the function of a court on summary judgment is to determine whether is a genuine issue as to any material fact and the moving party is entitled to judgment as a matter of

law, CR 56(c). The trial court committed reversible error. This court took a dim view of similar conduct a little more than thirty five years ago. "

Our beginning premise is that the function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. It is not . . . to resolve the issues of fact or to arrive at conclusions based thereon." *Duckworth v. Bonney Lake,* 91 Wn.2d 19, 21, 586 P.2d 860 (1978). The function of the trial court and of this court on review is to determine whether as a matter of law summary judgment should have been granted on the basis of uncontroverted facts in the record. Hoagland v. Mt. Vernon Sch. Dist., 23 Wn. App. 650, 654, 597 P.2d 1376 (1979) This court's *Hoagland* decision is no outlier.

Our Supreme Court has rendered similar decisions both before and after this court's Hoagland decision. *Fairbanks v. Mcloughlin* 131 Wn.2d 96, 929 P.2d 433 (1997) is but one example.

C. Judicial Estoppel Defined

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking advantage by

taking a clearly inconsistent position.'" Judicial Estoppel prevents manipulation of the courts by litigants. This doctrine is also known as "preclusion of inconsistent positions." See Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 809-10 (1985).

This doctrine is also known as "preclusion of inconsistent positions." *Arkison v. Ethan Allen, Inc*., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)(quoting *Bartley-Williams v. Kendall,* 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). In this case the only judicial estoppel material issue is whether a party has taken a position that is clearly inconsistent with its earlier position, According to Flynn . . .At no time in litigation did Flynn advance the proposition that there is a civil action for violations of the RPC's "CP 111, lines 13-14. Appellant intends to demonstrate that he has adduced abundant evidence sufficient to defeat summary judgment on the "clearly inconsistent – "never advanced the proposition that

there is a cause of action for violations of the RPC" judicial estoppel issue.

D. CR 11, Clearly Inconsistent Position and Flynn's Signature on a Complaint seeking Money Damages for Violations of the RPC

As appellant sees it, the fact that Flynn *signed*, served and filed an action for violations of the RPC means, *ipso facto,* that Flynn has advanced the position that there is a cause of action for violations of the RPC. It can be no other way. Flynn's signature on a complaint for violations of the RPC necessarily implies he has "advanced the position that there is a cause of action for violations of the RPC even if one does not consider the CR 11 consequences associated with a lawyer's signature on any pleading.

The fact is that Flynn signed a complaint for violations of the RPC. The minute Flynn's pen touched paper, Flynn advanced the position that there is a cause of action for violations of the

RPCs. Flynn's signature implies he read the complaint before he signed it. Flynn's signature on the 2010 complaint constitutes his certificate that the complaint was well grounded in law. In context, Flynn's signature on the August 18, 2010 complaint means Flynn certified his well-grounded belief that the law recognized as valid an action for violations of the RPCs.

E. CR 11, CR 56 – Flynn Pursued Carr's Civil Action for Violations of RPC Beyond Certifying the Merits of his Action.

In May 2012 Flynn prepared, signed, served and briefed a motion for summary judgment. That motion, which was argued on June 8, 2012 represents another example of Flynn advocating the proposition that there is a cause of action for violations of the RPCs replete with ramifications arising from both CR 11 and CR 56. Appellant has identified the significant components of CR 11 in above and foregoing paragraphs of this brief. In sum, CR 11 requires attorneys to sign pleadings,

motions and memoranda of law. . In over simplified terms an attorney's signature means the lawyer has read the document in issue and the lawyer certifies that pleading motion or memorandum is warranted by existing law. Cr adds another layer to the equation. A motion for summary judgment means the lawyer certifies that the client is entitled to judgment as a matter of substantive law.

Contextually, the inference is that Flynn certified that Carr was entitled to judgment on his action for violations of the RPC as a matter of substantive law. By necessity, these rules also meant that Flynn certified the failure to state a claim upon which relief can be granted" defense to an action for violations of the RPCs is not well taken.

For the sake of brevity Cohen will ask the court to consider the implications of the fact that Flynn's motion for summary judgment was successful. Flynn's June 8, 2012 summary judgment success

implies that Flynn was a forceful and articulate advocate of the position that there IS a cause of action for violations of the RPC, a position which is the polar opposite of the position has advocated in the case now before the appellate court.

F. Wrongful Garnishment

Introduction: The trial court granted Carr's motion for summary judgment of dismissal and, for all intents and purposes denied appellant's motion for summary judgment. Appellant moved for summary judgment on the liability issue. He also sought summary judgment for a little less than $5,000 attorney fees incurred in moving to vacate a default judgment and to vacate the November 10 2010 writ of garnishment. His arguments in support of Assignments of Error 2 and 3 are virtually identical. Appellant does not abandon any Assignment of Error. His arguments in support of Assignment #4 are subsumed in Assignments 1, 2 and 3.

Although the trial court's order was entirely adverse to appellant, the trial court did reject some of Carr's

grounds for relief. Appellant is not dissatisfied with those components of the trial court's order and will not discuss them further.
the liability issue. He also moved for summary judgment for one element of damage, attorney fees. summary judgment. The trial court rejected some, but regrettably not all of Carr's defenses. Appellant is not dissatisfied with those elements of the court's September 2, 2014 order and he will not discuss them further.

Appellant most emphatically does not abandon his claim that the trial court erroneously denied his motion for affirmative relief. The reasons why the trial court erred in dismissing appellant's wrongful garnishment are the same reasons the trial court erred in denying his motion for affirmative relief. Appellant moved for summary judgment on the liability issue and for summary judgment on one element of damage, attorney fees. Carr has correctly labelled his motion and appellant's motion as "competing motion. Without

doubt appellant has proved the nearly $5,000 damages he has requested. See CP 150-153

H. Carr is Collaterally Estopped from disputing liability for wrongful garnishment.

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. Collateral estoppel bars relitigation of issues between the parties, even though a different claim or cause of action is asserted. Collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation. *Christensen v. Grant County Hosp. Dist. No. 1*, 114 Wn. App. 579, 60 P.3d 99, (2002) Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic,* Inc., 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998). For collateral estoppel to apply, the party seeking

application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Appellant acknowledges it is his burden to prove all elements of collateral estoppel. Appellant has no doubt that he has satisfied that test with flying colors.

On January 14, 2011 Judge Yu presided over Cohen & Keith-Miller's motion to vacate Carr' October 27 2010 default order, Carr's October 27, 2010 default judgment and Carr's November 2010 writ of garnishment.

Judge Yu entered an order granting Cohen & Keith-Miller's several motions to vacate. On January 27, 2011, Judge Yu, entered findings and conclusions wholly in favor of Cohen & Keith-Miller and on the issue of wrongfulness. In fact with the exception of Appellant's request for terms, Judge Yu's findings and conclusions were entirely in favor of Cohen and Keith-Miller and contrary to Carr's positions.

She concluded that the October 27, 2010 default judgment as well as the writ of garnishment which issued on November 10, 2010 had to be vacated because they were both wrongful. Flynn obtained the writ of garnishment by illegitimate deceitful means. Judge Yu's decision is final. Carr's appeal therefrom was dismissed.

The January 14, 2011 litigation has consequences. That litigation estops Carr from disputing the wrongfulness of the writ which was as a subject of the January 14, 2011 litigation exactly as Appellant has alleged at Page 2, lines 17-21 of

his first cause of action in Cause No. 13-2-38375-6. These consequences are exactly what appellant asserted them to be at page 2, lines 17-21, CP 37.

Appellant contends that the venerable rule of law known as collateral estoppel does estops Carr from disputing the unlawfulness of his November 10, 2010 writ of garnishment.

Appellant is the party asserting collateral estoppel so he bears the burden of establishing all elements of proof, a burden which he gladly undertakes. Appellant has proved all four requirements which must be met.

(1) In this case, the issue decided in the prior January 14, 2011 litigation is identical with the issue presented in this case. The issue on January 14, 2011 was whether the November 10, 2010 writ was issued with authority of law, or whether it had been obtained by illegitimate, pernicious means, means which were the functional equivalent of fraud. The answer to

that question is reflected by Judge Yu's order of even date as well as Judge Yu's findings and conclusions dated January 26, 2011, Judge Yu effectively call Flynn a liar and a cheat. As it happens she is correct Flynn is a liar and a cheat. (2). There is not a shadow of the doubt as to the same parties element. Both Cohen and Carr were parties to the January14, 2011 proceeding. (3) Likewise, there can be no doubt that Flynn had a full, complete and fair hearing. 4 Judge Yu's decision is final and nothing on the legal landscape which would even suggest that denying Flynn a second or third bite of the apple would work an injustice.

RCW 6,26.240 is far from an exclusive remedy for Carr's wrongful conduct.

It is black letter law in this jurisdiction that a a plaintiff who sustains injury as a proximate result of another persons breach of duty to that plaintiff has a cause of action for those injuries. It is also

commonplace that a duty may arise from the common law, it may arise from statute and it may evenarise from an administrative regualton. In fact for at least one hundred years this state has e conferred rights of action arising from breaches of criminal statute. See *Browning v. Slenderella* 54 Wn.2d 440, 341 P.2d 859 (1959); *Dick v. Northern P.R Co*. 86 Wash. 211, 150 P.8 (1915)

Applying these basic principles to the case at bench becomes clear that the appellant's wrongful garnishment has been wrongfully dismissed eveni in the event it should be incorrectly determined that appellant's RCW 6,26.040 was properly dismissed. Certainly Carr has excercised tortious dominion on appellants'wages, a virtual formula for a conversion action in this state because in this state intanglible property may be the subject of a converson acton, whatever the law may be in othr states. See *Langv.Hougan*, 136 Wn.App. 708, 150 P.3rd 622 (2007). Likewise, there is every reason that Carr's wrongful garnishment may be actionable as the tort

of outrageous conduct. See _Phillips v. Hardwick_, 29 Wn.App. 382, 628 P.2d 506 (1981).

Finally, appellant submits the trial court badly misconstrued RCW 6.26.040. Accordingly to the trial court Keith-Miller's settlement contract with Carr vitiates appellant's cause of action. Carr is going to be hard put to find any authority that parties one and two are empowered to contract away, to sell if you will, the rights of party three a non contracting party. Appellant knows of no such authority and there is very certainly no rule of statutory construction which would suggest such an interpretation.

The trial court' interpretation becomes all the more problematic when one considers the fact that Keith-Miller enterd into her accord with Carr about a year after she had divested herself of any property right in her choses in acton by means of assigning her choses in action to Appellant As a result of that assignment she had divested herself

of any property right in the chose in actions Carr may think were dismissed. Appellant has barely mentioned still another problematic component with the trial court's interpretation of RCW 6.26.040 The issue is embedded the exact language of the statute the pertinent part of which reads: . .

. in the event judgment is not entered for the plaintiff on the claim sued upon by plaintiff, and the claim has not voluntarily been settled or otherwise

The statute does not address a multi party lawsuit and especially not multi party lawsuit where only two of the parties settle. It is also true that appellant has found no case law, and, appellant assumes neither did the trial court.

Attorney Fees (RAP) 18.1(b)

Appellant moves the court for an award of attorney fees under authority of RCW 6.26.040 which reads in pertinent

part as follows: in addition to other actual damages sustained by the defendant, (sic) may award the defendant reasonable attorney's fees.

Appellant recognizes the discretionary statutory language. Appellant believes the court should award attorney fees in this case, because of the singularly noxious conduct which generated the the wrongful garnishment now in litigation. It seems to this moving party that an attorney fee should not be awarded when the underlying circumstances portray nothing more sinister than negligence, ignorance, youth or even an inferior intellect. Appellant believes that if an award or denial of attorney fees is predicated on malign or benigh behavior, respectively, this case is a very good candidate for an award ofattorney fees.

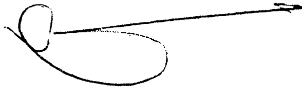
Conlusions and Relief Requested

Appellant Concludes that the appellant's assignments of error are well taken.

This court should reverse the trial court, reinstate appellant's causes of action, grant appelant' motion for partial summary

judgment, award appellant attorney fees and award appellant his taxable costs.

Respectfully submitted this 1st day of June, 2015



Norman W. Cohen