72718-4

72718-4

No. 72718-4-I

IN THE WASHINGTON COURT OF APPEALS DIVISION ONE

Norman Cohen,

Appellant,

v.

Ralph Carr, Jr. and Michael L Flynn,

Respondents.

On Appeal from the King County Superior Court, Seattle Courthouse

Case No. 13-2-38375-6 SEA

The Honorable Roger Rogoff

RESPONDENTS' BRIEF IN RESPONSE

AND

DECLARATION OF MAILING

LAW OFFICES OF GLENN BISHOP, PLLC
33650 6TH Ave South, Suite 102
Federal Way, WA 98003
Tel: (206) 400-7278

Glenn Bishop
WSBA No. 41269
Attorney for Respondents

ORIGINAL

TABLE OF CONTENTS

Table of Contents	i.
Table of Authorities	v.
Introduction	1.
Counterstatement of the Issues	2.
Counterstatement of the Case	2.
Motion To Strike	6.
Argument	7.
A. Standard of Review	8.
B. Alleged "Assignments of Error" Identified by Cohen Are Not Errors.	9.
C. Did The Trial Court Engage In A Fact Finding Endeavor and Fail to View the Evidence in the Light Most Favorable To Cohen, Or Was Summary Judgment Rendered On Undisputed Facts?	10.
D. Is Flynn Judicially Estopped From Asserting a CR 12(b)(6) Defense to Cohen's RPC Claim?	12.
1. Judicial Estoppel is Inapplicable Because Flynn's Position Has Been Consistent From Case to Case.	14.
2. Cohen Cannot Show That Flynn Signed a Complaint For Violations of the RPCs.	15.
3. Flynn Did Argue that CR 12(b)(6) Was Not a Good Defense, Because It Did Not Address the Lawsuit.	17.

4. Cohen Cannot Show that Flynn Persuaded Judge Yu to Enter a Judgment For Violations of the RPCs. 18.

5. Cohen Has Failed to State a Claim. 19.

E. Is Carr Prevented by Collateral Estoppel From Asserting the Judgment Was Not Wrongful? 19.

F. May Cohen Raise New Causes of Action and Arguments on Appeal? 21.

1. Cohen's Causes of Action Are Limited to RCW 6.26.040 Because That Was All He Pled and Asserted Below. 22.

2. Cohen Raises Issues About An Alleged Assignment For the First Time On Appeal. 23.

3. The Rules of Construction Make RCW 6.26.040 Applicable to Multiple Defendant Lawsuits. 24.

4. Cohen Was a Party to the Settlement. 26.

G. Can This Court Affirm On Previously Rejected Defenses? 27.

1. Carr and Flynn Re-Assert the Defenses Of Compulsory Counterclaim and *Res Judicata*. 27.

a. Wrongful garnishment was a compulsory counterclaim, waived when neither Cohen nor VKM asserted it in Carr/Cohen. 29.

i. Cohen's cause of action for wrongful garnishment existed when he served his answers in Carr/Cohen 30.

ii. The wrongful garnishment cause of action arose "out of the same transaction or occurrence" as did Carr's suit against Cohen. 30.

iii. This action requires no new parties over whom the Court lacks jurisdiction. 32.

iv. Cohen's failure to assert a counterclaim in Carr/Cohen bars this later suit. 33.

b. *Res judicata* barred Cohen from bringing a second action. 33.

i. The Subject Matter Is Identical. 34.

ii. The Causes of Action Are Identical. 35.

(a). Carr's and Flynn's rights are impaired through prosecution of the present suit. 35.

(b). There is commonality in the evidence presented, the rights allegedly infringed, and the suits arise from the same transactional nucleus. 37.

iii. Both cases share identity of subject matter. 37.

iv. Both cases share identity in the quality of persons. 38.

2. Cohen Cannot Make A *Prima Facie* Case For Wrongful Garnishment. 39.

a. Cohen Cannot Meet the Olsen Standard Of Wrongfulness. 39.

b. The Garnishment Was Issued On a Valid Judgment. 40.

c. Cohen Has Sustained No Injury. 40.

d. Cohen Was Not the Real Party In Interest. 41.

H. Does Cohen Provide A Legitimate Basis For Attorney Fees? 42.

1. RCW 6.26.040 Does Not Apply To The Present Case And Attorney Fees Are Not Available 42.

2. Attorney Fees Have Been Once Denied And This Request Is Subject to *Res Judicata*. 43.

I. Should Carr and Flynn Be Awarded Attorney Fees Under RAP 18.9(a)? 44.

1. Cohen Repeatedly Failed to Follow Court Rules Requiring Him to Perfect the Record on Appeal. 44.

2. Cohen's Appeal is Frivolous And Thus Subject to Sanctions. 46.

Conclusion. 48.

Declaration of Mailing 50.

Appendix A - Text from Cohen Brief referred to in Motion to Strike.

Appendix B - Carr/Flynn Motion to Strike and for sanctions. June 3, 2015.

Appendix C - Commissioner Kanazawa Order on Motion to Strike.

TABLE OF AUTHORITIES

CASES

Ainsworth v. Progressive Cas. Ins. Co., 180 Wn.App. 52, 322 P.3d 6 (2014)	22, 23, 26.
Arkinson v. Ethan Allen, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)	12.
Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989)	9, 12, 21, 39.
Banchero v. City Council of City of Seattle, 2 Wn.App 519, 525, 468 P.2d 724 (1970)	36.
Bank of America v. David W Hubert, PC, 153 Wn.2d 102, 101 P.3d 409 (2004)	19.
Celotex Corp. v. Cattrett, 477 U.S. 317, 322, 106, S. Ct. 2548 (1986)	39, 41.
City of Anacortes v. Demopoulos, 81 Wn.2d 166, at 170; 500 P.2d 547 (1972)	40.
Cook v. Brateng, 180 Wn.App 368, 373, 321 P.3d 1255 (2014)	34, 35.
Hanson v Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)	20, 21.
Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005)	8, 10.
Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992)	19.
Loveridge v Fred Meyer, 125 Wn.2d 759, 763, 887 P.2d 898 (1995)	34, 37, 38.
Olsen v. National Grocery Co., 15 Wn.2d 164, 169, 130 P.2d 78 (1942)	39.
Pederson v. Potter, 103 Wn.App 62, 72, 11 P.3d 835 (2000)	35, 36, 37, 38.
Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 581, 754 P.2d 1243 (1988)	47, 48.
Schoeman v. New York Life Ins Co., 106 Wn.2d 855, 864, 726 P.2d 1 (1986)	31, 33.
Seven Gables Corp. v. MGM/US Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)	9, 23.
Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 783 P.2d 78 (1989)	32.

Stansbery v. Medo-Land Dairy, Inc., 5 Wn.2d, 328, 337, 105 P.2d, 86 (1940) 24.
Stottlemyre v. Reed, 35 Wn.App. 169, 173, 665 P.2d 1383 (1983) 26.
Swinehart v. City of Spokane, 145 Wn.App 836, 844, 187 P.3d. 345 (2008) 8, 10, 27, 41.
Vallandigham v. Clover Park School District No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) 9.

STATUTES

RCW 1.12.010 25.
RCW 1.12.050 25.
RCW 4.08.030(1) 41.
RCW 4.08.080 23.
RCW 6.26.010 42.
RCW 6.26.040 24-25, 42.
RCW 6.26.070 28.
RCW 6.27.020 40.
RCW 6.27.020(1) 43.
RCW 6.27.330 40.
RCW 26.16.030 24, 48.

COURT RULES

CR 13(a) 28, 29-30.
CR 17 41.
CR 56(c) 9.
RAP 9.12 7.
RAP 18.9(a) 45, 46.

I. INTRODUCTION.

This case involves two different lawsuits and two claims: wrongful garnishment and a civil action for damages for an alleged violation of the Washington Rules of Professional Conduct (RPC). The claims are brought by Norman W. Cohen ("Cohen"), a defendant in the earlier lawsuit. The claims are brought against attorney Michael L Flynn ("Flynn"), and Ralph Carr, Jr. ("Carr"). Flynn represented Carr in his earlier action against Cohen and his wife, in which Carr was the plaintiff.

The garnishment claim alleges that a garnishment was wrongful where it was issued after entry of a default judgment, which judgment was later vacated. That garnishment was quashed and the garnished funds returned to the defendant. The parties later settled the lawsuit in which the garnishment had been issued.

In his RPC claim Cohen alleges that Flynn violated the Washington RPCs in prosecuting the earlier lawsuit, and he now asserts a civil action for said alleged violation(s). Although Cohen acknowledges and has argued that no civil cause of action exists in Washington for RPC violations, he asserts that judicial estoppel bars Flynn from a CR 12(b)(6) defense of failure to state a claim.

The Hon. Roger Rogoff dismissed both claims on summary judgment and denied Cohen's motion for summary judgment.

II. COUNTERSTATEMENT OF THE ISSUES.

A. Did The Trial Court Engage In A Fact Finding Endeavor and Fail to View the Evidence in the Light Most Favorable To Cohen, Or Was Summary Judgment Rendered On Undisputed Facts?

B. Is Flynn Judicially Estopped From Asserting a CR 12(b)(6) Defense to Cohen's RPC Claim?

C. Is Carr Prevented by Collateral Estoppel From Asserting the Garnishment Was Not Wrongful?

D. May Cohen Raise New Causes of Action and Arguments on Appeal?

E. Can This Court Affirm On Defenses Rejected By The Trial Court?

F. Does Cohen Provide A Legitimate Basis For Attorney Fees?

G. Should Carr and Flynn Should Be Awarded Attorney Fees Under RAP 18.9(a)?

III. COUNTERSTATEMENT OF THE CASE.

Underlying Debt. On March 23, 2006, the Washington Supreme Court disbarred Cohen and ordered him to pay restitution to his former client, Carr. CP at 27. He didn't pay. After Cohen's

Chapter 7 Bankruptcy was completed Carr reopened the case and initiated an adversary proceeding against Carr; the debt was reinstated by the Bankruptcy Court for the Western District of Washington upon a determination the debt was a non-dischargeable judgment. CP at 40, 42.

Prosecution of Initial Lawsuit. Carr hired Flynn who filed suit against Cohen and his wife, Verlaine Keith-Miller ("VKM," not a party to this action), in King County Cause #10-2-34254-1 SEA ("Carr/Cohen"). Carr asserted a claim against Cohen for judgment on the Supreme Court's restitution order and against VKM as the recipient of Cohen's alleged fraudulent transfer of his interest in certain real property. CP at 144, lines 7-9, 76.

Flynn obtained a default judgment and then garnished VKM's earnings. CP at 72-74, 144. Cohen and VKM then successfully vacated the default judgment and quashed the garnishment. CP at 44. In their motion to quash the garnishment Cohen and VKM sought an award of attorney fees as terms, which the Hon. Mary Yu denied on January 27, 2011. CP at 44, 100. VKM and Cohen then filed separate answers to the suit; Cohen later filed an amended answer. CP at 52-54, 56-58, 60-62, respectively. Never in the period between January 27, 2011, and

the eventual settlement of the case, did either defendant assert a counterclaim for wrongful garnishment.

Origin of RPC Claim. At one of his several summary judgment motions in Carr/Cohen, Cohen argued that Carr's claim for a money judgment based on the Supreme Court's restitution order failed to state a claim under CR 12(b)(6) . He argued that Carr's prayer for judgment was actually a veiled lawsuit for damages for Cohen's violation of the RPCs; and that since no civil cause of action for a violation of the RPCs exists under Washington law, Carr had not stated a claim. CP at 88, para. 2, 84-86, respectively.

Cohen's claim against Flynn in the current lawsuit is based on Flynn's counterargument to that theory in the Carr/Cohen summary judgment motion. Flynn agreed that Washington law does not recognize a RPC claim, but explicitly disagreed that the suit could be characterized as such; arguing instead that the suit was brought to enforce an existing order of restitution issued by the Washington Supreme Court and that Cohen had not addressed that reality. CP at 93-97. Carr, through Flynn, prevailed at summary judgment. CP at 134, #33.

Cohen now claims that in his response to Carr/Cohen, Flynn asserted that violations of the RPCs do support an action under Washington law and that Flynn is now barred by judicial estoppel from asserting a CR 12(b)(6) defense. Cohen Brief at Pgs. 6-7.

Settlement of Carr/Cohen. The parties ultimately settled Carr/Cohen with VKM paying Carr an agreed sum of money. CP at 64-65. That stipulated "Judgment of Dismissal," was "Approved for Entry" by Cohen and contains the recitation, "Defendant Cohen has agreed to dismiss with prejudice all claims he does or may have against either Carr or Attorney Flynn in cause No. 10-2-34254-1 SEA." CP at 64-65.

Prosecution of Present Lawsuit. Cohen filed the current action against Carr and Flynn, alleging the earlier garnishment was wrongful, and that Flynn had violated the RPCs in the course of Carr/Cohen. CP at 67-70. Carr and Flynn filed separate Answers to Cohen's suit, with Flynn asserting a counterclaim against Cohen and his marital community for frivolous lawsuit and violations of CR 11. CP at 138-142, 130-135.

The parties filed competing motions for summary judgment. Carr and Flynn sought dismissal of the wrongful garnishment claim. They argued the claim was a compulsory counterclaim that should

have been brought in Carr/Cohen; that Cohen's claim for damages was *res judicata*, having been previously denied in Judge Yu's order of January 27, 2011; and that Cohen had failed to make a *prima facie* case for wrongful garnishment. CP at 147-154.

On the claimed RPC violations, Flynn argued he was not judicially estopped from asserting failure to state a cause of action because, contrary to Cohen's current position, he had explicitly agreed in Carr/Cohen that no such cause of action exists in Washington. CP at 154-155.

Judge Rogoff dismissed the action. CP at 246-249. Flynn moved for reconsideration since Judge Rogoff's order did not address his counterclaims. CP at 221-222. Cohen also moved for reconsideration (CP at 223-230); each motion was denied. CP at 239-240, 243. Cohen has appealed from those orders; Carr and Flynn have not. CP at 244.

IV. MOTION TO STRIKE.

Cohen previously filed designations of clerk's papers that included documents from King Co. Cause #10-2-34254-1 SEA that were not before the trial court on summary judgment. Carr/Flynn objected to the attempted inclusion of those. On April 10, 2015, a notation ruling from the Court was entered, which

states, "The supplemental designation of clerk's papers designating pleadings from trial court number 10-2-34254-1 is stricken. Only pleadings before the trial court in cause number 13-2-38375-6 can be made part of the record on appeal in this case".

Despite that order, Cohen references stricken documents repeatedly in his briefing on appeal, even going so far as to mention the fact they were disallowed in the case. (See, *e.g.,* Cohen Brief at Pg. 11, para. 3 and footnote).

Carr and Flynn move that the offending portions of Cohen's brief be stricken. RAP 9.12. That rule requires that on review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. For the convenience of the Court, an appendix is attached to this brief that lists the documents not made a part of the record, and the portions of Cohen's brief referring to those documents.

V. ARGUMENT.

Cohen apparently believes that if he tells the same story enough times, someone will believe him. The truth is that he was not sued for a violation of the RPCs and Flynn consistently said as much. Flynn specifically said that no cause of action exists for

violations of the RPCs. Flynn's statements have been consistent, and he is not judicially estopped from asserting a CR 12(b)(6) defense of failure to state a claim.

Carr is not collaterally estopped from denying the wrongfulness of the default judgment, because it was never adjudged wrongful. Cohen cannot rely on new arguments or causes of action on appeal, as they were not brought before the trial court. Even if he can, they all fail. This Court can affirm the trial Court on arguments presented there, but rejected below.

Cohen should not be awarded attorney fees because he provides no legitimate basis for such an award. Carr and Flynn do, and should be awarded attorney fees as sanctions.

A. Standard of Review.

The Court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). An appellate court may affirm on any basis supported by the record. Swinehart v. City of Spokane, 145 Wn.App 836, 844, 187 P.3d. 345 (2008). Summary judgment is appropriate only where there is no genuine

issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. Vallandigham v. Clover Park School District No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on "speculation, argumentative assertions that unresolved issues remain, or in having its affidavits considered at face value." Seven Gables Corp. v. MGM/US Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. Alleged "Assignments of Error" Identified by Cohen Are Not Errors.

The trial court correctly denied Cohen's motion for summary judgment and granted summary judgment of dismissal to Carr/Flynn. Cohen has identified those orders as Assignments of Error 1-3[1]. None of the orders to which those Assignments of Error refer constitute reversible error.

[1] Cohen also refers in his Brief to Assignments of Error #4 and #5, which do not exist. They will not be addressed here.

Cohen further identifies several "Issues Pertaining to Assignments of Error" (Cohen Brief at Pgs. 5-8), all of which are subsumed into the Carr/Flynn counterstatement of the issues, *supra*, at page 2.

Regardless of the assignments of error identified by Cohen, and the issues pertaining to them, this Court reviews an appeal from summary judgment *de novo*. Hearst, *supra*, at 501. This Court may affirm the trial court on any reason it deems sufficient, provided it is supported by the record. Swinehart, *supra*, at 844.

C. Did The Trial Court Engage In A Fact Finding Endeavor and Fail to View the Evidence in the Light Most Favorable To Cohen, Or Was Summary Judgment Rendered On Undisputed Facts?

The trial court entered summary judgment of dismissal in favor of Carr and Flynn and rejected Cohen's motion. CP at 246-249. On the RPC claim Judge Rogoff ruled there is no cause of action for violations of the RPCs, that Flynn had not taken a contrary position, and that judicial estoppel does not apply. CP at 248-249. This ruling was supported by Carr/Flynn briefing, CP at 143-146, 154-155, 190-194, and the evidence before the court; specifically, the parties' briefing for the summary judgment motion on which Cohen based his arguments. CP at 76-78, 80-91, 93-97.

On the issue of wrongful garnishment, Judge Rogoff ruled that RCW 6.26.040 does not allow a suit for wrongful garnishment where the underlying claim has been settled. CP at 248, lines 24-26, and 249, line 16. He found that the debt had been settled through payment according to the "Judgment of Dismissal." CP at 64-65. No evidence controverted the fact that the underlying claim had been settled. CP at 249, line 17. This was supported by the statute itself, and by Cohen's own admission that "[a]ll three parties dismissed all of their Case No. 10-2-34254-1 causes of action." CP at 163, para. 4.

In reaching his decision Judge Rogoff specifically stated that, "...Even taking all of the facts and inferences in a light most favorable to Mr. Cohen, he cannot as a matter of law prevail on a wrongful garnishment claim." CP at 249, lines 3-4.

Everything from Judge Rogoff's ruling points to a finding that was based on documents in the record, uncontroverted facts, and plain reading of statutes. Cohen's assertion that the trial court engaged in a "confessed fact finding adventure" (Cohen Brief at Pg. 25) is an unsupported assertion. He points to nothing that can specifically support this claim. Mere allegations or conclusory

statements of facts unsupported by evidence are not sufficient to establish a genuine issue. Baldwin, *supra,* at 132.

D. Is Flynn Judicially Estopped From Asserting a CR 12(b)(6) Defense to Cohen's RPC Claim?

Cohen's position, outlined in the facts stated above, collapses with a review of the text of the arguments in Carr/Cohen. The linchpin of Cohen's judicial estoppel argument is his assertion that in Carr/Cohen, Flynn argued that Washington law provides a cause of action for violation of the RPCs. The argument Flynn made is both unambiguous and contrary to Cohen's current position.

1. Judicial Estoppel is Inapplicable Because Flynn's Position Has Been Consistent From Case to Case.

Judicial estoppel prevents a party from taking one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Arkinson v. Ethan Allen, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Thus, for the doctrine of judicial estoppel to apply, a party must necessarily take an inconsistent position from one case to the next. Flynn has done no such thing.

Flynn's reply at the Carr/Cohen summary judgment was a five page brief. CP at 93-97. His opening paragraph summarized

his position with respect to Cohen's claim that Carr/Cohen was about RPC violations:

> Defendant Norman W Cohen ("Cohen") premises his response to Plaintiff's summary judgment motion on a fundamental error: Cohen ignores the fact that Plaintiff's action against him is nothing more or less than enforcement of the Order of the Supreme Court of March 23, 2006. Please examine the Complaint (copy attached.) Instead, Cohen styles Plaintiff's action variously as a Bar disciplinary proceeding, an action on Cohen's RPC violations, as a restitution action, and as an attorney malpractice action. He then argues his various theories with respect to those golems, misdirecting this Court's attention from the actual cause of action. Cohen's Response is an artful iteration of the classic maneuver of creating straw men for the purpose of cutting them down.

CP at 93-94.

Flynn then addressed cases relied upon by Cohen; Flynn's explicit position was exactly contrary to what Cohen now claims Flynn said:

> Cases cited by Cohen do not support his position. They simply hold that, in absence of traditional grounds for suit, violations of the rules of lawyer conduct alone do not support actions against attorneys. In no case cited by Cohen was the Superior Court's enforcement of an order of the Supreme Court at issue." See *Bank of America v. David W Hubert, P.C.*, 153 Wn.2d 102 (2004), (a bank sought to impose personal liability in the absence of personal negligence on an attorney without knowledge that his paralegal was using his trust account in a check kiting scheme); and *Hizey v.*

> *Carpenter*, 119 Wn.2d 251 (1992), (in attorney malpractice case, Supreme Court approved trial court's refusal to allow expert witness to testify about RPCs or to include RPCs in jury instructions.

CP at 95. (Emphasis added).

The court apparently agreed with Flynn and granted Carr's summary judgment motion.

Returning to the present, Cohen now argues from the same passage referenced above. Cohen Brief at Pg. 19, para. 1. Cohen attempts to mislead the Court, as he takes sentences from two different paragraphs and presents them as one continuous statement from Flynn. Flynn's complete statement reads as follows, (sentences used by Cohen in his brief at Pg. 19 are in **bold**):

> Carr seeks a money judgment on the unpaid restitution order. This is the same as any other action to obtain judgment for money owing. Here Cohen's legal obligation to pay Carr was established by the Supreme Court's order. It is left to this Court to determine the balance owing and to render the judgment necessary to enforce payment.
>
> **Cohen argues that "breach of an ethics rule gives rise to only a public, e.g. disciplinary remedy and not a private remedy."** Remarkably, he thus urges that an attorney's RPC violations obligations give her a defense to an action by the injured client!. Here, the "public" disciplinary action resulted in an order to Cohen to compensate Carr for monetary damage. Carr now seeks only the enforcement of that order.

> **Cases cited by Cohen do not support his position. They simply hold that, in absence of traditional grounds for suit, violations of the rules of lawyer conduct alone do not support actions against attorneys.** In no case cited by Cohen was the Superior Court's enforcement of an order of the Supreme Court at issue.

CP at 94-95.

Flynn clearly states that the holdings of the cases cited by Cohen do not support actions against attorneys for violations of the RPCs, a position Flynn asserted below, and continues to assert here. Nowhere in that brief, or elsewhere, has Flynn asserted that Washington law permits an independent cause of action for violations of the RPCs.

Cohen presents no evidence that Flynn took a contrary position in the two suits, and the evidence before the Court demonstrates that he explicitly rejected Cohen's argument in a consistent way from one case to the next. As Flynn has consistently made the same statements, judicial estoppel is not effective, and Cohen's claim is subject to a CR 12(b)(6) defense of failure to state a claim.

2. Cohen Cannot Show That Flynn Signed a Complaint For Violations of the RPCs.

Cohen's entire argument against Flynn is predicated upon the concept that Cohen was sued for violations of the RPCs,

something that is altogether untrue. Despite this, Cohen repeatedly mischaracterizes the underlying lawsuit against him as one for violations of the RPCs. (See *e.g.*, Cohen Brief at Pg. 4, para. 1, Pg. 6, para. 4, Pg. 10, para. 2, Pg. 17, para. 1, Pg. 19, para. 3).

The Complaint in Carr/Cohen was stricken by this Court because it was not before the trial court below. The portions of Cohen's brief referring to that Complaint should be stricken or ignored. (See Motion to Strike, *supra*, at Pgs. 6-7, and Appendix at A). The issue posed by Cohen as to whether Flynn signed a Complaint for violations of the RPCs is not supported by the record.

Assuming, *arguendo*, the issue is considered by the Court, unlike the Complaint, Cohen's own comments are before this Court and contradict his current argument. Cohen himself stated, "That complaint was to convert a 2006 -- disciplinary restitution order to money judgment". CP at 67, para I. He also said, "Although [Flynn] 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" (sic). Cohen Brief at Pg. 12, para. 1.

Thus Cohen's current position is belied both by Flynn's actual statement in 2012, quoted and described *supra*, and by

Cohen's two admissions quoted in the paragraph above. On the one hand he argues that judicial estoppel applies because Flynn argued in Carr/Cohen that his restitution claim alleged violations of the RPCs; on the other hand he admits that Flynn did no such thing. The latter. but not the former, agrees with the evidence.

3. Flynn Did Argue that CR 12(b)(6) Was Not a Good Defense, Because It Did Not Address the Lawsuit.

Flynn's summary judgment brief in Carr/Cohen presented one issue, "Is Carr entitled to judgment for his restitution?" CP at 77. Cohen responded by asserting the defense of CR 12(b)(6), failure to state a claim. CP at 84-86. Flynn's reply argued that Cohen's brief, "ignores the fact that Plaintiff's action against him is nothing more or less than enforcement of the Order of the Supreme Court of March 23, 2006." CP at 93. Flynn closed his brief by stating that Cohen "hasn't addressed the issues" and that "Cohen offers no on-point rebuttal to Carr's motion for summary judgment."

Thus Flynn responded to Cohen by stating that Cohen's response was not a good defense to the summary judgment motion; not, as Cohen asserts, that "CR 12(b)(6) was not a good and sufficient defense to Carr's suit against Cohen for violations of the RPCs." Cohen Brief at Pg. 7.

Flynn's direct response to Cohen's CR 12(b)(6) defense is cited more completely *supra*, at pages 14-15, a portion of which is reproduced below:

> Cases cited by Cohen do not support his position. They simply hold that, in absence of traditional grounds for suit, violations of the rules of lawyer conduct alone do not support actions against attorneys.

CP at 95. Again, Flynn specifically agreed that there is no cause of action in Washington for violations of the RPCs. Cohen failed to support his position by actually addressing the claim asserted by Carr.

Flynn did not argue that CR 12(b)(6) is not a valid defense to a claim for violations of the RPCs, because that was not the claim before the court in Carr/Cohen.

4. Cohen Cannot Show that Flynn Persuaded Judge Yu to Enter a Judgment For Violations of the RPCs.

Like the Complaint in Carr/Cohen, the June 8, 2012 order on summary judgment was stricken. Thus, Cohen cannot show that the order on that motion was granted for, as he alleges, the cause of action of a violation of the RPCs. The question presented is again unsupported by the record and a subject of Carr/Flynn's Motion to Strike, *supra*. The Court should ignore the question entirely.

Carr/Flynn will address the question with what is in the record; specifically, as cited previously, the summary judgment motion itself. CP at 77. The motion presented only one issue, "Is Carr entitled to judgment for his restitution?" It is reasonable to infer that when Carr prevailed at summary judgment it was on the one issue he had presented to the court, rather than on an issue not before the court as Cohen contends.

5. Cohen Has Failed to State a Claim.

Washington law holds that that there is no cause of action for violations of the RPCs. As Flynn stated in Carr/Cohen, "Violations of the rules of lawyer conduct alone do not support actions against attorneys." See Bank of America v. David W Hubert, PC, 153 Wn.2d 102, 101 P.3d 409 (2004); and Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992). As our Supreme Court has repeatedly addressed this question and found that no claim exists at law, Cohen has failed to state a claim upon which relief can be granted pursuant to CR 12(b)(6).

E. Is Carr Prevented by Collateral Estoppel From Asserting the Judgment Was Not Wrongful?

Carr is not prevented from denying the garnishment was wrongful because no court has ever determined that it was. Cohen argues that collateral estoppel bars Carr/Flynn from contesting the

"wrongfulness" of the garnishment. His argument hinges on Cohen's assertion that the post-judgment wage garnishment issued against VKM was adjudged "wrongful" by Judge Yu in the January 27, 2011 show cause hearing. Cohen Brief at Pg. 35, para. 2. This is simply untrue.

Collateral estoppel prevents a single issue from being relitigated, rather than an entire claim. Hanson v Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). Collateral estoppel requires that (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. Hanson, *supra*, at 562.

The issue of "wrongfulness" was never litigated at all in Carr/Cohen, let alone a determination made. Cohen's briefing on this topic admits the show cause order directed Carr to appear,

> To show cause why the court should not vacate the October 27, 2010 default judgment and why the court should not vacate the writ of garnishment.

Cohen Brief at Pg.15, para. 2. Cohen does not claim that the show cause order was for the purpose of determining whether the writ

was wrongful. This is supported by the order to show cause itself, which is also silent on the topic of wrongfulness. CP at 99-101. The outcome of the hearing was that Judge Yu vacated the default judgment and quashed the garnishment that depended upon it; but she voiced no opinion at any time about whether the garnishment was wrongful. CP at 46-50.

Further, assuming *arguendo* that Judge Yu had made this determination, no final determination was made as to the merits of Carr/Cohen; instead, it ended in settlement. CP at 64-65.

Wrongfulness was never litigated in Carr/Cohen, and that suit never produced a judgment on the merits; collateral estoppel cannot apply. Hanson, *supra*, at 561. Cohen's false assertion of a finding of wrongfulness, a "fact" critical to his argument, is unsupported by the record and is insufficient for summary judgment under Baldwin, *supra,* at 132. Carr is thus free to assert in this case that the garnishment in question was not wrongful.

F. May Cohen Raise New Causes of Action and Arguments on Appeal?

Cohen raises issues on appeal that were not included in his complaint or argued at summary judgment. He raised none of

these issues in the lower court and may not raise them for the first time on appeal.

1. Cohen's Causes of Action Are Limited to Wrongful Garnishment Because That Was All He Pled and Asserted Below.

Cohen urges this Court to consider that "RCW 6.26.040 is far from an exclusive remedy," and reconsider his case based on new causes of action for conversion, negligence, outrageous conduct, and civil liability arising out of criminal conduct. Cohen Brief at Pgs. 37, 7-8. Each of these is raised for the first time on appeal. Cohen did not plead these causes of action in his Complaint, CP at 67-70, or raise them in any briefing on summary judgment. The appellate court will not review an issue, theory, argument, or claim of error raised for the first time on appeal. Ainsworth v. Progressive Cas. Ins. Co., 180 Wn.App. 52, 80-81, 322 P.3d 6 (2014). Carr and Flynn had no opportunity to address any of these claims in the lower court. The lower court never considered them at all. They are improper, and should be disregarded by this Court.

Moreover, Cohen provides no evidence to support any of these new claims; instead positing merely that they exist. Washington courts have held that summary judgment cannot be

granted on mere speculation and argumentative assertions that some unresolved issue remains in the case. Seven Gables, *supra*, at 13.

2. Cohen Raises Issues About An Alleged Assignment For the First Time On Appeal.

Cohen now asserts for the first time arguments related to an alleged assignment of claims from VKM to himself. Cohen made no mention of assignment in his Complaint to this lawsuit. CP at 67-70. He did mention an assignment in his summary judgment motion, CP at 162, but made no argument related to it in his briefing. He provided no evidence of an assignment. Cohen raises his argument related to assignment for the first time in this appeal, which he cannot do. Cohen Brief at Pgs. 39-40. Ainsworth, *supra,* at 80-81.

Assuming, *arguendo,* that Cohen had raised this issue below, the argument must fail.

First, the assertion of an assignment is unsupported by the record. One can bring suit on an assigned claim only where the assignment is in writing. RCW 4.08.080. Nothing in the record indicates that the alleged VKM-to-Cohen assignment was in writing.

Moreover, even if an assignment actually exists, Cohen mentioned it for the first time in briefing for summary judgment, CP at 162, months after the settlement. Since he had not previously notified Carr of the assignment, Carr's settlement of the case with VKM is enforceable. Stansbery v. Medo-Land Dairy, Inc., 5 Wn.2d, 328, 337, 105 P.2d, 86 (1940).

Finally, and again, assuming the assignment actually exists, even if assigned, VKM thereafter maintained the ability to manage community property. RCW 26.16.030. Her claim against Carr was property and her settlement of that chose in action was a valid act of managing it. RCW 26.16.030.

3. The Rules of Construction Make RCW 6.26.040 Applicable to Multiple Defendant Lawsuits.

Carr/Flynn frankly do not understand Cohen's argument which he makes here for the first time on appeal. They address the most likely connotation below.

Cohen urges this Court to rule that since RCW 6.26.040 does not specifically address a multi-party lawsuit it cannot be applied to him. The rules of construction say otherwise.

RCW 6.26.040 appears below in its entirety:

> In all actions in which a prejudgment writ of garnishment has been issued by a court and served

> upon a garnishee, 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 satisfied, the defendant shall have an action for damages against the plaintiff. The defendant's action for damages may be brought by way of a counterclaim in the original action or in a separate action and, in the action the trier of fact, in addition to other actual damages sustained by the defendant, may award the defendant reasonable attorney's fees.

Among other things, the statute allows a lawsuit for wrongful garnishment on a pre-judgment writ only where the claim was not settled by the defendant.

The Rules of Construction codified within the Washington Revised Code provide guidance on singular and plural nouns, stating that:

> Words importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular; and words importing the masculine gender may be extended to females also.

RCW 1.12.050. Thus, the code drafters provide the Court with the direction to view single defendants as multiple, and multiple as singular.

Further, RCW 1.12.010, "Code to be Liberally Construed" uses the mandatory "shall" in stating that "[t]he provisions of this

code shall be liberally construed, and shall not be limited by any rule of strict construction."

Moreover, this is, again, an argument raised for the first time on appeal and subject to the prohibition of new arguments on appeal. Ainsworth, *supra,* at 80-81.

4. Cohen Was a Party to the Settlement.

The parties settled Carr/Cohen on May 27, 2014, by written agreement. CP at 64-65. There Cohen and VKM each agreed to "dismiss with prejudice all claims" against both Carr and Flynn in that suit. Cohen now contends that he was not a party to that settlement, and thus, his claims should not have been dismissed.

Aside from the fact that the language of the document states that Cohen dismissed his claims (CP at 64-65), Cohen admits "[a]ll three parties dismissed all of their Case No. 10-2-34254-1 causes of action." CP at 163, para. 4. The parties to that settlement were Cohen, VKM, and Carr. CP at 64-65. Thus Cohen contradicts his numerous statements that he was not a party to the settlement. Cohen Brief at Pgs. 8, 10, 39-40.

Finally, Cohen's status as a party to the settlement is not critical in view of the public policy in favor of settling debts. Stottlemyre v. Reed, 35 Wn.App. 169, 173, 665 P.2d 1383 (1983).

("The Law favors the private settlement of disputes and is inclined to view them with finality"). As the lower court pointed out, public policy supports the concept of disallowing a wrongful garnishment claim against a creditor who subsequently settles a legitimate debt with the debtor. To rule otherwise would be out of step "with commonsense and public policy," because "[i]f the debt (not the ***order***, but the ***debt***) was valid, then allowing the debtor to sue the creditor for trying to collect that valid debt makes little sense." CP at 249. **Emphasis** in the original.

G. Can This Court Affirm On Previously Rejected Defenses?

Defenses raised by Carr and Flynn and improperly rejected below can support this Court's affirmation of the trial court's decision to dismiss Cohen's action. Carr and Flynn reassert them here. This Court may affirm on any basis supported by the record. Swinehart, *supra,* at 844.

1. Carr and Flynn Re-Assert the Defenses Of Compulsory Counterclaim and *Res Judicata.*

Carr/Flynn argued the defenses of compulsory counterclaim and *res judicata* on summary judgment. CP at 147-149,149-152, respectively. They argued that the garnishment of VKM's earnings was a compulsory counterclaim that arose prior to the filing of their

Answers in Carr/Cohen, and that Cohen could not thereafter raise it in this case. CR 13(a).

Judge Rogoff rejected Carr/Flynn's position and held that RCW 6.26.040 allows one to bring a suit for wrongful garnishment in an action separate from the underlying suit.

Judge Rogoff's reliance on RCW 6.26.040 was erroneous. The garnishment of VKM's earnings was issued under a different RCW Chapter, RCW 6.27. It was not a pre-judgment writ, it was issued after entry of a default judgment. The two types of garnishment are further discussed in a request for attorney fees, *infra*, at pages 42-43.

The undersigned could find no Washington court decisions that apply RCW 6.26 to post-judgment garnishments, which are the subject of RCW Chapter 6.27. However, the language of RCW 6.26.070 is significant. It states:

> **Application of chapter 6.27 RCW to prejudgment garnishments.** Except as otherwise provided, the provisions of chapter 6.27 RCW governing garnishments apply to prejudgment garnishments.

The legislature thus applies RCW 6.27 to prejudgment writs, but says nothing about applying RCW 6.26 to post-judgment writs. No section corresponding to RCW 6.26.070 appears in RCW 6.27.

It is evident that the legislature considered the cross-application of these two forms of garnishment and decided not to apply the provisions of RCW 6.26 to writs issued after judgment.

Since RCW 6.26.040, allowing a separate action for a wrongful garnishment, does not apply to the post-judgment writ at issue here, the lower court's refusal to dismiss the claim as a violation of the compulsory counterclaim rule was erroneous. A compulsory counterclaim defense should have prevailed, particularly in light of the fact that all three Carr/Cohen Answers were filed after the vacation of the default judgment and the garnishment was quashed. CP at 52-54, 55-58, 60-62, 72-74, respectively. If Cohen wanted to bring a claim for wrongful garnishment, CR 13(a) required that he do so in Carr/Cohen, not in a separate suit, and he had ample opportunity to do so.

a. Wrongful garnishment was a compulsory counterclaim, waived when neither Cohen nor VKM asserted it in Carr/Cohen.

Compulsory counterclaims are governed by CR 13(a) which states in relevant part:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing

party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction...

A counterclaim is therefore compulsory if (1) it exists at the time the party asserting the claim serves its pleading on any opposing party, (2) it arises out of the "transaction or occurrence" that forms the basis for the original filed claim; and (3) the counterclaim requires no new parties over whom the court lacks jurisdiction.

i. Cohen's cause of action for wrongful garnishment existed when he served his answers in Carr/Cohen.

If Cohen's cause of action against Carr/Flynn exists now it also existed when the garnishment was quashed on Jan 14, 2011, weeks prior to the filing of Cohen and VKM's Answers, and five months before Cohen filed his Amended Answer on June 6, 2011. CP at 44, 52-54, 56-58, 60-62.

ii. The wrongful garnishment cause of action arose "out of the same transaction or occurrence" as did Carr's suit against Cohen.

Both the collection action and the garnishment action arose from Carr's effort through the Carr/Cohen action to enforce the Supreme Court Order that required Cohen to pay Carr restitution. It was all part of the same undertaking.

"A liberal and broad construction of Rule 13(a) is appropriate to avoid a multiplicity of suits." Schoeman v. New York Life Ins Co., 106 Wn.2d 855, 864, 726 P.2d 1 (1986). In Schoeman, *id.,* the Court addressed the question of when a claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and adopted a "logical relationship" test. In adopting this test the court quoted from Moore's Federal Practice, Schoeman, *supra*, at 865:

> [C]ourts should give the phrase "transaction or occurrence that is the subject matter of the suit" a broad realistic interpretation in the interest of avoiding a multiplicity of suits. [...] any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim.

Again quoting Moore, the Court stated that, "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Schoeman, at 866.

The Court's use of a broad and liberal construction of "arises from" in the CR 13(a) context is consistent with the Court's analysis of the phrase in another context. A claim against a defendant under the Long Arm Statute, RCW 4.28.185, "arises from" the

defendant's Washington contacts if it would not have occurred "but for" those contacts. Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 783 P.2d 78 (1989). (Plaintiff injured on cruise booked as a result of defendant's advertising within State "arises from" the advertising).

Garnishments arise from the suit from which they originate, a fact that Cohen admits when he states that a garnishment "is not an original proceeding, rather it is an ancillary proceeding," dependent upon a principal action. CP at 166.

One can't imagine a garnishment action that is logically unrelated to the suit from which it arose, since post-judgment garnishment is no more than enforcement of the rights and obligations determined in the underlying suit. That direct relation compels the conclusion that both the underlying claim and the garnishment arise from the same transaction or occurrence.

iii. This action requires no new parties over whom the Court lacks jurisdiction.

Cohen and Carr are both parties to the previous and the present action. Cohen added Flynn as a new party to the action; but Flynn was served with process, appeared, and is subject to the jurisdiction of the Court.

iv. Cohen's failure to assert a counterclaim in Carr/Cohen bars this later suit.

"The failure to assert a mandatory counterclaim bars a later action on that claim." Schoeman, at 863, citing Krivaca v. Weber, 43 Wn.App. 217, 716 P.2d 916 (1986). Cohen's failure to assert his claim in the prior action served as a bar to bringing it in this subsequent action. As Cohen's claim is barred, there is no material issue of fact to address; the Court should have dismissed the wrongful garnishment claim at summary judgment.

Thus all elements which bar Cohen's action for wrongful garnishment under CR 13(a) are here in play: his alleged wrongful garnishment claim existed when all three answers were filed in Carr/Cohen; it arose from the same transaction or occurrence here as there; and this action requires no new parties over whom the Court lacks jurisdiction.

b. *Res judicata* barred Cohen From bringing a second action.

The lower court did not reject the defense of *res judicata* outright, but apparently conflated it with the compulsory counterclaim defense under the impression that the compulsory counterclaim argument made the wrongful garnishment claim "subject to res judicata". Please see CP at 247, para 2. The claim

of compulsory counterclaim is separate and distinct from that of *res judicata*, and Carr/Flynn contend that each is applicable to the present case.

Res judicata bars a party from bringing a claim already decided in a prior suit, as well as a claim that could have been raised in the prior suit but was not. Cook v. Brateng, 180 Wn.App 368, 373, 321 P.3d 1255 (2014). Cohen and VKM each had the opportunity to assert a wrongful garnishment counterclaim when they filed their Answers in Carr/Cohen after the default judgment was vacated; neither did so. The claim was therefore adjudicated in Carr/Cohen despite their failure to raise it, and *res judicata* barred Cohen from bringing a new action on the claim.

Res judicata applies where a prior judgment on the merits has concurrence of identity with a subsequent action in all of the following: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. Loveridge v Fred Meyer, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

i. The Subject Matter Is Identical.

The allegedly wrongful garnishment occurred in the opening phase of Carr/Cohen and is a subject of this suit. *Res judicata*

applies to issues decided by judgment as well as to issues that could have been, but were not, raised in prior litigation. Cook, *supra*, at 373. If Cohen's claim for wrongful garnishment exists now, it arose when the default judgment was vacated and the garnishment quashed in Carr/Cohen. It could have been raised there and was not.

ii. The Causes of Action Are Identical.

Washington law does not provide a specific test for identity in cause of action, but considers four factors: whether (1) rights or interests established by a prior judgment would be destroyed or impaired by prosecution of a second action; (2) substantially the same evidence is presented in both actions; (3) the actions involve infringement of the same right; and (4) the actions arise out of the same transactional nucleus of facts. Pederson v. Potter, 103 Wn.App 62, 72, 11 P.3d 835 (2000) citing Kuhlman v. Thomas, 78 Wn.App 115, 122, 897 P.2d 365 (1995).

These factors, when presented to the uncontested facts before the Court, provide identity of cause of action.

(a). Carr's and Flynn's rights are impaired through prosecution of the present suit.

Carr/Cohen was ultimately dismissed by an agreed "judgment of dismissal". CP at 64-65. That judgment reads in

relevant part, "Defendant Cohen has agreed to dismiss with prejudice all claims he does or may have against either Carr or Attorney Flynn in No. 10-2-34254-1 SEA." CP at 64. The Order states that "All claims by all parties in this case are hereby dismissed with prejudice." Dismissal of an action "with prejudice" is a final judgment on the merits of a controversy. Banchero v. City Council of City of Seattle, 2 Wn.App 519, 525, 468 P.2d 724 (1970).

Cohen's agreement to dismiss all claims he "may have" in the prior suit includes an unpled wrongful garnishment claim which was properly part of that suit. Under Banchero, *supra*, that dismissal is now a final judgment on the merits that works not only to close out claims raised in that suit but, in the language of the Judgment of Dismissal, "all claims he does *or may have* against either Carr or Attorney Flynn" (*emphasis* added). CP at 64. Allowing Cohen to maintain this action impairs the rights of both Carr and Flynn to rely on the release of claims included in the Judgment of Dismissal, as well as to move forward unhindered by litigation on these same matters.

Finally, Washington courts have found that a stipulated dismissal amounts to a consent judgment. Pederson, *supra,* at 68,

citing, Dunning v. Paccerelli, 63 Wn.App. 232, 818 P.2d 34 (1991), *review denied,* 118 Wn.2d 1024, 827 P.2d 1392 (1992). The Pederson court also held that "the cases dealing with the issue of whether a 'consent judgment' was a final judgment for purposes of *res judicata* concluded that [it was]. Pederson, *supra,* at 69.

(b). There is commonality in the evidence presented, the rights allegedly infringed, and the suits arise from the same transactional nucleus.

Res judicata requires that two claims have common evidence presented, rights infringed, and the transactional nucleus of the claims. Pederson, *supra,* at 72. This suit involves a claim that was not brought but could have been, and its litigation in a subsequent suit. The claims are identical. Cohen bases his Complaint (CP at 67-70) on the exact sequence of events occurring prior to Judge Yu's January, 2011 decision to vacate the default judgment and quash the garnishment. Those events are: entry of default judgment; garnishment of VKM's earnings; vacation of judgment and quashing of writ; release of garnished funds.

iii. Both cases share identity of subject matter.

Res judicata requires identity of subject matter of both actions. Loveridge, *supra,* at 763. In Carr/Cohen the court ruled on a motion to quash the writ of garnishment and to award

Cohen/VKM reasonable attorney fees and costs for so doing, the very issue that forms the basis of the present suit. CP at 100, para. 2. There is identity of subject matter.

iv. Both cases share identity in the quality of persons.

Finally, *res judicata* requires identity in the quality of persons for or against whom the claim is made. Pederson, *supra*, at 73. Cohen and Carr were both parties to the previous case. Both there and here, Carr performed and Cohen resisted the same garnishment. There is identity in the quality of those persons.

Res judicata binds not only the parties of a lawsuit to a judgment, but also parties in privity to those parties. Loveridge, *supra*, at 764. Flynn was not a party to Carr/Cohen but was Carr's attorney, and substantially participated in the litigation. A party is in privity to another when they have actual control over a case or substantially participate in it even though not in actual control. Loveridge, *supra*, at 764. Flynn substantially participated in the litigation by representing Carr, creating privity between them. Thus, quality of persons exists as to all parties in the two matters.

2. Cohen Cannot Make A *Prima Facie* Case For Wrongful Garnishment.

In addition to the defenses discussed *supra*, Carr/Flynn argued below that Cohen could not prove the essential elements of his case, and therefore could not withstand summary judgment review. CP at 152-154. Celotex Corp. v. Cattrett, 477 U.S. 317, 322, 106, S. Ct. 2548 (1986); Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Carr/Flynn argued there that Cohen could not meet the appropriate standard of wrongfulness, that the judgment was issued on what was then a valid judgment, and that Cohen could not bring a tort claim because he had sustained no damages.

a. Cohen Cannot Meet the Olsen Standard Of Wrongfulness.

A garnishment is wrongful only if the garnishing party loses its suit on the principal claim. Olsen v. National Grocery Co., 15 Wn.2d 164, 169, 130 P.2d 78 (1942). Carr did not lose his principal suit, he settled it with the defendants. CP at 64-65. No court made a final determination of the merits of the underlying suit, and wrongful garnishment cannot possibly be an outcome. Olsen, *supra*, at 169.

b. The Garnishment Was Issued On a Valid Judgment.

Judgment was entered by default against VKM on October 27, 2010. CP at 72-74. RCW 6.27.020 permits the Superior Court Clerk to issue a writ of garnishment "for the benefit of a judgment creditor who has a judgment wholly or partially unsatisfied in the court from which the garnishment is sought." RCW 6.27.330 states that "a judgment creditor may obtain a continuing lien on earnings by a garnishment".

Although the default judgment was vacated on Jan. 14, 2011, CP at 44, it was valid and enforceable until that date. City of Anacortes v. Demopoulos, 81 Wn.2d 166, at 170; 500 P.2d 547 (1972). Between the date of judgment entry, October 27, 2010, and date of vacation, Jan. 14, 2011, Carr was legally entitled to obtain a writ garnishing VKM's earnings.

c. Cohen Has Sustained No Injury.

Carr and Flynn argued below that Cohen sustained no personal damage as a result of the garnishment. CP at 153. It is axiomatic that damages are a necessary element of a tort claim. Cohen provided no argument, contrary principles, or evidence of any damage from the garnishment. Without evidence of damage

he did not meet his *prima facie* burden for a tort claim; summary judgment of dismissal was appropriate. Celotex at 322.

d. Cohen Was Not the Real Party In Interest.

Cohen claims that he was damaged by virtue of the "wrongful" garnishment yet it was VKM's wages that were garnished. She was a necessary party to the action, RCW 4.08.030(1); CR 17. Since she was not included as a party, the Court would have been justified in dismissing the action on that basis, had Carr/Flynn so argued at summary judgment. Swinehart, at 844.

Cohen now claims he brought suit as assignee of his wife, contrary to his initial pleading. Cohen cannot bring the suit on his own behalf because he has offered no evidence of his own injury. He has failed to join his wife, who arguably was the injured party, although the record contains no proof of her injuries either. In fact, Cohen's briefing suggests she was not injured at all; he stated "Keith-Miller got her money back on or about February 20, 2011." CP at 163, para. 3.

Where this suit is brought by a party sustaining no damages and not in the name of the real party in interest, the granting of summary judgment of dismissal reached the correct result.

H. Does Cohen Provide A Legitimate Basis For Attorney Fees?

Cohen requests an award of attorney fees under authority of RCW 6.26.040, which governs pre-judgment writs of garnishment. Cohen Brief at Pgs. 40-41. The Court should deny this request as the statute cited is not applicable to the garnishment here, and his claim for attorney fees is subject to *res judicata*.

1. RCW 6.26.040 Does Not Apply To The Present Case And Attorney Fees Are Not Available.

RCW 6.26.040, cited previously in its entirety, is reproduced below, in relevant part:

> In all actions in which a prejudgment writ of garnishment has been issued by a court and served upon a garnishee, 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 satisfied, the defendant shall have an action for damages against the plaintiff.

RCW 6.26.040 is not applicable to the present case; it applies to pre-judgment writs of garnishment, a different type of writ than that at issue here. A pre-judgment writ, as the name implies, may only be obtained prior to an award of judgment in a case. RCW 6.26.010. The garnishment here was issued after a default judgment had been awarded. CP at 72-74.

The chapter of the Washington Code devoted to garnishments not issued pre-judgment is RCW Chapter 6.27. It only allows issuance of a writ "...for the benefit of a judgment creditor who has a judgment wholly or partially unsatisfied in the court from which the garnishment is sought." RCW 6.27.020(1). As these garnishments are issued post-judgment, there is no opportunity for the underlying suit to be "wrongfully sued out" as with a prejudgment writ. Chapter 6.27 has no correlating statute allowing for a claim of wrongful garnishment, and no opportunity for an award of attorney fees.

Cohen himself recognized that RCW chapter 6.26 does not govern the writ at issue when he said "the governing statute is RCW 6.27.020(1)." CP at 164. If Cohen acknowledges that RCW 6.27.020(1) governs he cannot possibly make a reasoned claim for attorney fees under RCW 6.26.040.

2. Attorney Fees Have Been Once Denied And This Request Is Subject to *Res Judicata*.

Cohen asks for the same attorney fees here that were denied by Judge Yu at the show cause hearing. CP at 99-100, 46-50. In fact, Judge Yu went so far as to specifically cross out the

portion of the order referring to that award, and then to handwrite into the order that they were not to be awarded. CP at 50. Once denied in the prior action, these attorney fees are now subject to *res judicata* and should be denied again.

Carr/Flynn further address *res judicata* in connection with this same request for attorney fees at section G.1.b., *supra*, pages 34-39, and adopt that argument here by this reference.

I. Should Carr and Flynn Be Awarded Attorney Fees Under RAP 18.9(a)?

Cohen repeatedly failed to perfect the record on appeal, which necessitated a motion to strike by Carr and Flynn forcing him to do what the rules require. Further, Cohen repeatedly mischaracterizes the earlier suit, and relies on documents not in the court record. He cannot possibly prevail, which is the very basis for a frivolous appeal. Both grounds support an award of attorney fees and sanctions against Cohen in favor of Carr/Flynn under RAP 18.9(a).

1. Cohen Repeatedly Failed to Follow Court Rules Requiring Him to Perfect the Record on Appeal.

On June 3, 2015 Carr/Flynn asked for sanctions against Cohen based on his repeated failure to perfect the record on appeal. The Court is directed to the copy of that motion and the

resulting decision found in Appendix B and C for an exact recitation of the facts and the resulting prejudice to Carr/Flynn. In short, Cohen missed all deadlines to perfect the record, and finally filed his brief late on June 2, 2015, with the record still unperfected. Carr/Flynn requested dismissal of the appeal. Since Carr/Flynn were then faced with writing a response upon no record, they requested attorney fees under 18.9(a), which allows for attorney fees or sanctions for failure to follow rules. Cohen subsequently perfected the record on June 24, 2015, over seven months after filing his appeal. Commissioner Kanazawa denied the request for sanctions without prejudice, and reserved the issue for review by the panel.

RAP 18.9(a) provides the court with broad latitude to impose sanctions upon parties to an appeal, stating:

> The appellate court on its own initiative or on motion of a party may order a party or counsel ... who... fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

Cohen failed to perfect the record on appeal after numerous extensions granted by this Court. Each failure to perfect the record was a violation of the rules of Appellate Procedure. More

importantly, these violations ultimately placed Carr/Flynn in the position of having to compose a reply brief upon no record; which necessitated the filing of a motion to strike. The only reason that Cohen finally perfected the record was because Carr/Flynn expended the capital to file that motion; and it is entirely probable that, had he failed to do so, the motion to strike his brief would have been successful as it had no legal foundation upon which to stand.

Carr/Flynn should be awarded sanctions against Cohen for the necessity of having to file a motion to strike to force him to perfect the record on appeal.

2. Cohen's Appeal is Frivolous And Thus Subject to Sanctions.

In addition to allowing sanctions for a failure to follow the rules of appellate procedure, RAP 18.9(a) gives the Court latitude to grant sanctions for a frivolous appeal:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, ... who... files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a).

An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds

might differ and is so devoid of merit that there is no reasonable possibility of reversal. Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 581, 754 P.2d 1243 (1988).

Cohen sued Flynn on a cause of action -- violation of the RPCs -- which Cohen recognized as not allowable under Washington law. He attempted to justify that allegation of an invalid cause of action by asserting that judicial estoppel bars Flynn from claiming in defense that no such cause of action exists in this State. His judicial estoppel required proof of Flynn's supposed inconsistent statements from one case to the next, but Cohen provided absolutely no evidence of an inconsistent statement. Instead, he attempted to sell the Court his own mischaracterizations of Flynn's words, and his mischaracterizations of the lawsuit itself. He provided no evidence for either. The RPC issue cause of action presents no debatable issues, and is so devoid of merit that there is no possibility for reversal. It is utterly frivolous.

Cohen's suit against Carr is predicated upon a fundamental untruth, that Judge Yu adjudged the underlying garnishment as wrongful, yet there is no evidence that this is the case. Further, Cohen brings suit against his former client, with whom he has

already settled the underlying suit. As Judge Rogoff recognized, this was in clear opposition to commonsense and public policy.

It is worth noting that Cohen's complaint was for two different causes of action against two different parties. Even if, assuming *arguendo*, one cause of action is determined to not be frivolous, the cause of action against the other party, can still be determined to be frivolous.

Carr and Flynn have been embroiled in litigation with Cohen far too long, in a meritless suit. His appeal is frivolous within the definition of Rhinehart, *supra*, and Carr and Flynn should be awarded attorney fees as sanctions against Cohen.

The attorney fee award should be against both Cohen and his marital community. Whether Cohen's suit and this appeal are based on his own damages, as he alleged in the Complaint, or whether he is VKM's assignee, as he now urges, the obligation to Carr and Flynn is a community debt. RCW 26.16.030.

VI. CONCLUSION.

Cohen brought a claim against Carr and Flynn he should not have brought. He lost on summary judgment. Instead of admitting defeat he then appealed, mischaracterized prior litigation, misled the Court, and resorted to raising new causes, and raising issues

for the first time on appeal. Some of these arguments were based on an alleged assignment which has never seen the light of day and, if it exists, is not part of the record. He then styled himself as the aggrieved party and requested attorney fees for his trouble. This Court should give Cohen's tactics the result they deserve. It should affirm the trial court's dismissal on summary judgment and award Carr/Flynn attorney fees for this appeal.

August 7, 2015.

Respectfully submitted,

Glenn Bishop, WSBA #41269
Attorney for Respondents
33650 6th Ave S, Suite 102
Federal Way, WA 98003
Phone: (206) 400-7278
Email: glenn@gbishoplaw.com

DECLARATION OF MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct:

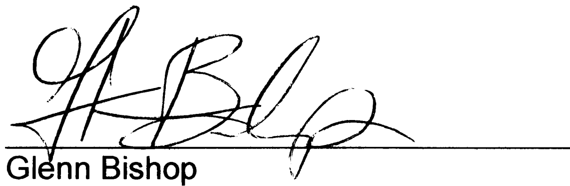
That at approximately 3:00, p.m., on the 7th day of August, 2015, he deposited into the U.S. Mail, postage pre-paid, an envelope containing the following document:

Response to Appellant's Brief

The envelope was addressed to the following person:

Norman Cohen
5423 35th Ave SW
Seattle, WA 98126

SIGNED AND DATED this 7th day of August, 2015.



Glenn Bishop

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 AUG 10 AM 11:45

Appendix A

Text from Cohen Brief referred to in Motion to Strike

APPENDIX A

The following portions of Appellant Norman W. Cohen's Brief rely on material that was not before the trial court, and not before the appellate court on review, pursuant to the Order entered by Mr. Richard Johnson on April 10, 2015. For brevity sake, the text to be stricken is not reproduced here in its entirety, but merely the first few words of each paragraph in the brief.

Where Found In Brief	Document Referred To	Language To Be Stricken
Page 6, #3(a)	Complaint from case #10-2-34254-1	Flynn prepared, signed and served Carr's case #10-2-34254-1.
Page 7, #3(c)	Summary Judgment Order of June 8, 2012	On June 8, 2012 Flynn persuaded Judge Yu to grant Carr's motion for...
Page 10, para. 2	Complaint from case #10-2-34254-1	On August 18, 2010, Ralph Carr served an unfiled summons and complaint...
Page 11, para 2	Complaint from case #10-2-34254-1	The complaint, was drafted, signed, served and prosecuted...
Page 11, para 3	Complaint from case #10-2-34254-1	Although the 10-2-34254-1 complaint is not of record...
Page 16, para 3-Page 17	Summary Judgment Order of June 8, 2012	One June 8, 2012 Judge Yu granted Respondents' motion for summary judgment action against..., through paragraph ending Concomitantly, she entered money judgment against Cohen. CP 109; CP 112
Page 19, para 2	Summary Judgment Order of June 8, 2012	The June 8, 2012 judgment was a judgment based on a civil cause of action for violations of the RPCs.
Page 22, a	Complaint from case #10-2-34254-1	Flynn "advanced the position that there is a civil cause of action for...
Page 28 Heading	Complaint from case #10-2-34254-1	CR 11, Clearly Inconsistent Position and Flynn's signature on a Complaint...
Page 28, para 2	Complaint from case #10-2-34254-1	As appellant sees it, the fact that Flynn signed, served and filed...
Page 28-29, para 3	Complaint from case #10-2-34254-1	The fact is that Flynn served a complaint for violations of the RPC.

Appendix B

Motion to Strike and for sanctions

June 3, 2015

No. 72718-4-I

IN THE WASHINGTON COURT OF APPEALS DIVISION ONE

Norman Cohen,

Appellant,

v.

Ralph Carr, Jr. and Michael L Flynn,

Respondents.

On Appeal from the King County Superior Court, Seattle Courthouse

Case No. 13-2-38375-6 SEA

The Honorable Roger Rogoff

MOTION TO DISMISS

LAW OFFICES OF GLENN BISHOP, PLLC
33650 6th Ave South, Suite 102
Federal Way, WA 98003
Tel: (206) 400-7278
Email: glenn@gbishoplaw.com

Glenn Bishop
WSBA No. 41269
Attorney for Respondents

I. IDENTITY OF MOVING PARTIES.

Ralph Carr, Jr., and Michael L. Flynn, Respondents (Carr and Flynn), by and through their attorney of record, the Law Offices of Glenn Bishop, PLLC, ask the Court for the relief designated in part II, below.

II. STATEMENT OF RELIEF SOUGHT.

Dismiss the appeal due to the inadequacy of the record. Reserve jurisdiction to consider Carr and Flynn's motion for sanctions.

III. FACTS RELEVANT TO MOTION.

The parties filed competing motions for summary judgment. All issues were resolved by entry of summary judgment in favor of Carr and Flynn on September 3, 2014 and denial of Appellant Norman Cohen's ("Cohen") motion for summary judgment.

On November 18, 2014, Cohen filed a notice of appeal regarding the Court's orders on summary judgment.

Cohen requested and received an extension until February 25, 2015 to designate his clerk's papers. (Exh. A).

Cohen subsequently requested an additional extension beyond February 25, 2015 to designate his clerk's papers, which was denied. (Exh. B).

Despite the Court's decision to the contrary, Cohen then filed several designations of Clerk's Papers after the February 25, 2015 deadline. One was denied by the Appellate Court as it was not part of the trial court's record (Exh. C). The others were never transmitted to the Court.

In its letter of April 10, 2015 (Exh. D), the Court advised Cohen of his obligation to perfect the record and it also extended the date for filing his brief to May 15, 2015. The Court warned that "[n]o further extension should be anticipated".

After Cohen missed the court's deadlines for perfecting the record and filing his brief, the Court extended Cohen's deadline for filing his brief to June 1, 2015. The Court also requested a status report of regarding the Clerk's Papers. (Exhs. E and F, respectively).

Cohen filed his brief June 2, 2015. As of this writing, Cohen has not transmitted the Clerk's Papers to the Appellate Court.

IV. GROUNDS FOR RELIEF AND ARGUMENT.

Cohen, the appellant, has the burden of perfecting the record on appeal, a burden that he has failed to fulfill in any meaningful way. The Clerk's Papers do not contain the lower court order from which the appeal is taken. Further, every section of Cohen's brief, from Introduction through Argument, is based at least in part on documents that are either

not part of the record or which this Court specifically prohibited from being made part of the record. As the Court has no record to review, or upon which to consider Cohen's arguments, it should dismiss this appeal.

A. Cohen has the Burden of Perfecting the Record on Appeal.

The party seeking appellate review has the burden of perfecting the record on appeal. State v. Vazquez, 66 Wn.App. 573, 583, 832 P.2d, 883 (1992) RAP 9.6(a).

As the Appellant, Cohen's obligation to perfect the record on appeal is apparent from a plain reading of RAP 9.6(a). The Court made Cohen's obligation even clearer in its letter of April 10, in which it stated, "[t]he appellant is responsible for perfection of the record on appeal." (Exh. D). And yet, more than six months after filing his Notice of Appeal and despite a subsequent letter from the Appellate Court requesting the status of Cohen's Designation of Clerk's Papers (Exh. F), Cohen has failed to do so.

At present, the only record before the court is that provided by Carr and Flynn: three declarations made in support of their summary judgment motion before the lower court.

B. The Appellate Court Cannot Perform Meaningful Review on an Inadequate Record.

An insufficient record on review precludes review. Allemeier v. UW, 42 Wash.App. 465, 472-473, 712 p.2d. 306 (1985).

Conspicuously absent from the record is the trial court's order on summary judgment, from which Cohen appeals. Without the lower court's order there is no decision upon which to base an appeal, and the appellate court has an insufficient record on which to consider an appeal. This insufficient record precludes appellate review entirely and the court should dismiss this appeal. Id.

C. The Court Cannot Consider Broad Portions of Cohen's Brief.

Appellate courts cannot consider matters referred to in the brief but not included in the record. State v. Meas, 118 Wn.App 297, 307, 75 P.3d 998 (2003).

Of Cohen's 70 references to Clerk's Papers in his brief, 32 -- nearly 46% -- of those references are not part of the record. Those 32 non-references are made, among others, to the order on summary judgment, to factual summaries and to arguments concerning the parties' competing motions for summary judgment. They are so widely intertwined in the brief that weeding out the improper ones and attempting to make sense of what's left would be a difficult, time-consuming and most uncertain

undertaking. As this court determined in Meas, if the briefed matters are not a part of the record, the court cannot consider them on appeal. As the court cannot consider approximately half of Cohen's brief and there is no lower court order on which to base an appeal, the court cannot consider Cohen's brief and this matter should be dismissed.

In addition to the deficient record in the present case, Cohen's brief makes numerous references to documents from King County Superior Case No 10-2-34254-1, which records were specifically disallowed by this Court. (Exh. C). Despite this prohibition, Cohen references the documents anyway, even going so far as to complain that the prohibition has "stultified appellant's capacity to submit a satisfactory clutch of Clerk's Papers" (See Cohen Brief, Page 11, Fn 1). These multiple references to documents previously disallowed, coupled with the limited proper, perfected record, provides the Court with precious little, if anything, upon which to render a decision. Carr and Flynn respectfully request that the matter therefore be dismissed.

D. Request for Sanctions and Attorney Fees.

RAP 18.9(a) provides the court with broad latitude to impose sanctions upon parties to an appeal, stating:

> The appellate court on its own initiative or on motion of a party may order a party or counsel, ... who... files a frivolous appeal, or fails to comply with these rules to pay

terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

Cohen's failure to perfect the record on appeal after numerous extensions granted by this Court, is a clear violation of the rules and worthy of sanctions.

The Court also has the ability to levy sanctions is an appeal is determined to be frivolous. An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 581, 754 P.2d 1243 (1988). As there is no order or record from which to appeal, and current case law leaves Cohen's brief unreviewable by this Court, there is no possibility for debate, or for the Court to reverse the decision by the trial court.

Carr and Flynn ask that the Court retain jurisdiction to consider their motion for sanctions in the form of attorney fees.

E. Conclusion.

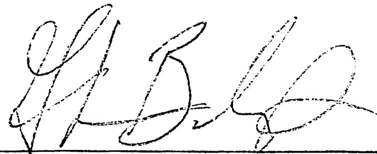
This Court has provided Cohen with multiple opportunities and ample warning to perfect the record on appeal over the past six-plus months. Cohen has failed to perfect the record. He has filed a brief that is largely unsupported by the record and which is based in part on documents

the Court rejected. The Court has been generous with giving Cohen opportunities but it is time for that generosity to come to an end with dismissal of this appeal.

The Court should retain jurisdiction for Carr and Flynn's motion for sanctions.

June 3, 2015.

Respectfully submitted,



Glenn Bishop, WSBA#41269
Attorney for Respondents
33650 6th Ave S, Suite 102
Federal Way, WA 98003
Phone: 206.400.7278
Email: glenn@gbishoplaw.com

Appendix C

Commissioner Kanazawa Order on Motion to Strike

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 8, 2015

Norman Cohen
5423 35th Avenue SW
Seattle, WA, 98126
cohenvcarr@comcast.net

Glenn Bishop
Law Offices of Glenn Bishop, PLLC
33650 6th Ave S Ste 102
Federal Way, WA, 98003-6754
glenn@gbishoplaw.com

CASE #: 72718-4-I
Norman Cohen, App. v. Ralph Carr, Jr. and Michael Flynn, Res.

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on July 8, 2015, regarding respondent's motion to dismiss:

"This is an appeal from a summary judgment dismissal. On June 4, 2015, respondents Ralph Carr and Michael Flynn filed a motion to dismiss for appellant Norman Cohen's failure to timely file the record on review. As explained below, the motion to dismiss is denied, except that Carr and Flynn may request attorney fees as sanctions against Cohen in their brief of respondent for consideration of the panel of judges determining this appeal.

On February 27, 2015, after more than two months of delay, Cohen filed the designation of clerk's papers originally due in December 2014. In my February 18, 2015 ruling, I denied Cohen's motion for extension and directed him to file it by February 25, 2015. He filed it two days late without any explanation or a motion for extension. In April 2015, the clerk of this Court rejected Cohen's later-filed supplemental designation of clerk's papers, which designated pleadings from a different case.

On May 21, 2015, the clerk of this Court sent letters to Cohen, reminding him that the clerk's papers and his appellant's brief are overdue. This Court directed Cohen to file a status report about the clerk's papers and his brief by June 1, 2015.

Cohen filed his brief on June 2, 2015. On June 4, 2015, Carr and Flynn filed a motion to dismiss and impose sanctions against Cohen for his continuing failure to ensure the filing of the clerk's papers. Carr and Flynn also point out that every section of Cohen's brief is based at least in part on documents that are not part of the record, including those this Court specifically prohibited Cohen from designating.

On June 12, 2015, Cohen filed a status report about the clerk's papers, stating that he "took all reasonable steps" to ensure a timely transmission of clerk's papers by mailing a check to pay for the clerk's papers on April 29, 2015. On June 23, 2015, Cohen filed a response to the motion to dismiss, arguing that the motion should be denied because it was not noted, that Carr and Flynn were not prejudiced by the trial court's delay in transmitting the clerk's papers, and that he is not responsible for the trial court's delay.

On June 24, 2015, the clerk's papers were filed.

The motion to dismiss need not be noted for consideration. However, I deny the motion now that the clerk's papers have been filed. To the extent Cohen refers to extraneous materials in his brief, Carr and Flynn may properly point them out as not part of the record, and the panel of judges considering this case can decide whether to consider the materials. See Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012). Any improper reference to extraneous materials would not help Cohen in this appeal. Carr's and Flynn's request for attorney fees as sanctions is denied at this time without prejudice for them to request relief in their brief of respondent for consideration of the panel determining this appeal.

In his response to the motion to dismiss, Cohen requests recusal of Commissioner Mary Neel of this Court. Cohen bases his request on Commissioner Neel's decisions that he disagrees with. His mere disagreement with Commissioner Neel's decisions is not a ground for recusal or disqualification. Cohen presents no legal basis for recusal or disqualification. His request is denied.

Therefore, it is

ORDERED that Carr's and Flynn's motion to dismiss is denied, without prejudice for them to request attorney fees as sanctions in their brief of respondent for consideration of the panel determining this appeal. It is further

ORDERED that Cohen's request for Commissioner Neel's recusal or disqualification is denied. It is further

ORDERED that Carr's and Flynn's brief of respondent shall be filed by August 10, 2015."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp