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WASHINGTON STATE
SUPREME COURT

No. 93330-8

SUPREME COURT OF THE STATE OF WASHINGTON

NORMAN W. COHEN, Plaintiffs/Appellant v. RALPH CARR JR. and MICHAEL FLYNN
Defendants/Respondents.

(Court of Appeals No. 72718-4-1).

Petition for Review of Norman Cohen

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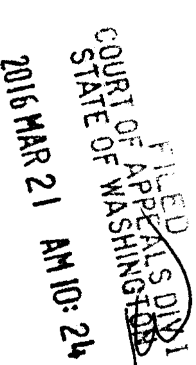

I. IDENTITY OF PETITIONER

The petitioner is plaintiff/appellant Norman Cohen

II. CITATION TO THE COURT OF APPEALS DECISION WHICH PETITIONER WANTS REVIEWED

Plaintiff/Appellant Norman Cohen requests the Court to grant review of the Court of Appeals' decision in *Norman Cohen v. Ralph Carr, Jr. and Michael Flynn*, No. 72718-4-1 (January 25, 2016) [1]

III. ISSUES PRESENTED FOR REVIEW

A. Does an action for judgment on a Supreme Court ELC 13.7(a) restitution order constitute an action for violations of RPCs within the meaning of *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2 646 (1992)?

B. Is CR 12(b)(6) a good and sufficient defense to a suit seeking money damages/restitution caused by an attorney's violations of the RPCs regardless of the label which might be affixed to such suit?

C. Does a grievant's suit for "judgment on a Supreme Court restitution order lie where, as here, the grievant is neither a judgment creditor nor authorized to file such a suit under ELC 5.1(c)

D. Has petitioner failed to present any fairly debatable issues where virtually all, if not literally all of the issues addressed by the Court of Appeals decision are fairly debatable is not substantively meritorious?

IV. STATEMENT OF THE CASE

A. RELEVANT FACTS

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[1] Petitioner attaches as Appendix A to this Petition a true and correct copy of the Opinion in this matter filed January 25, 2016 along with the Court of Appeals' Order Denying Motion for Reconsideration (filed February 18, 2016) pursuant to RAP 13.4(c)(9)

Petitioner Norman Cohen sued Ralph Carr Jr & Michael Flynn on November 13, 2013. CP 103-106, Ralph Carr is a person who was financially damaged by Petitioner's violations of the RPCs. Petitioner 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. 10-2 34254-I. CP 103-106. *Petitioner'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.* Cohen sued Carr for tortious misconduct - wrongful garnishment. CP 105

Ralph Carr is Petitioner's former client. Petitioner represented Carr in an employment action circa 1998 – 2000. Ralph Carr is a person who has been financially damaged by Petitioner's violations of the RPC's. See ELC 13. (a) In the course of representing Carr, Petitioner 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.

Carr filed a complaint with the Bar Association resulting in a March 2006 Supreme Court Disciplinary Order disbarring Cohen and, under authority of ELC 13.7(a) ordering Cohen to pay Carr

$8118.75 restitution/damages plus interest from the date of the December 12, 2000 judgment until fully paid. CP 4; CP 103-106.

On August 18, 2010 Ralph Carr served an unfiled summons and complaint[i] on Petitioner and his wife Verlaine Keith-Miller. That suit was drafted, signed, served and eventually filed by attorney Michael Flynn. Flynn called it "Complaint for Judgment on Supreme Court Order for Restitution". CP 150.

Carr prosecuted by tat suit although the right to prosecute that action was not a right conferred upon him by ELC 5.1(c). Since Carr was not a party to the disciplinary proceeding he was not a judgment creditor with respect to either component of this court's March 2006 disbarment/restitution order.The record is devoid of any evidence that the WSBA has assigned that judgment to Carr.

The 10-2-34254-1 matter was an action to recover money damages arising from Petitoner's violations of the RPCs. of the RPCs. CP 4; CP 43-45; CP 46-57; CP 58-62; CP 110-112. Petitioner asserted as a defense to Car's 10-2-34254-1 restitution matter the defense of failure to state a claim upon which relief can be granted. CR 12(b) (6). CP 29; CP 32.

The 10-2-24352-1 matter was not resolved until Petitioner's wife negotiated and entered into a May 27, 2014 accord.

Petitioner, as distinguished from Keith-Miller, did not settle. CP 153 Keith-Miller and Carr settled in 2014 the calendar year after Keith-Miller assigned to Petitioner all of her claims against Respondents. CP 162-163 Petitioner is pursuing these suits both on his own behalf and as Keith-Miller's assignee.

Both of Petitioner's suits are spawned by Respondents' misconduct in Case No 10-2-34254-1. The 10-2-34254-1 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. The 10-2-34254-1 complaint is not of record but the Supreme Court's March 2006 order is. CP 4.

At one point Flynn asserted that the 10-2-34254-1 complaint represented a mechanism to "convert the restitution order to a Superior Court Judgment" because, as Flynn stated it, Flynn" needed a Superior Court judgment in order to execute or garnish". CP 45. Although Messrs. Flynn and Carr" were demanding Superior Court enforcement and conversion of a "restitution order" they rejected as incorrect the idea that "the 10-2-34254-1 matter "was either a malpractice suit or a restitution suit. CP 60-62

On August 30, 2010, twelve days after service of process, Petitioner appeared at the King County Clerk's office with both

defendants' written notice of appearance CP 21 Petitioner's notice of appearance couldn't be filed because Flynn had not filed the Summons or Complaint. CP 21 The next day, August 31, 2010, thirteen days after service of process, Petitioner emailed defendants' notices of appearance to Carr's attorney, Michael Flynn. CP 21

On August 31, 2010 thirteen days after service of process. Flynn acknowledged receipt of those notices of appearance: "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, eighteen days after service of process, Petitioner 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. Had he done so, defendants would have been notified the case had been filed. CP 22 Although Flynn had received not one but two, notices of appearance, Flynn

moved for default without notice to either defendant on October 27, 2010. CP 22; CP 228-229.

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 sworn but false statement that "Defendants have neither appeared nor in any other way defended." CP 228-230 ; CP 20-24; CP 228 -229; CP 231.

On November 10 2010 the writ of garnishment at bench was issued. CP 22 Flynn delayed transmitting a copy of the court's default judgment to Petitioner or Keith-Miller until the time within which to file a motion to revise a commissioner's order had elapsed. Petitioner 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 Petitioner and his wife's first notice that Flynn had either moved for or obtained a default judgment. CP 20-24. Petitioner and Keith-Miller retained attorney Allan Munro who prepared their declarations in support of 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

cause 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 to determine whether to vacate the October 27, 2010 default judgment and the November 10, 2010 writ of garnishment. The parties to that litigation included Carr and Petitioner. Judge Yu granted Petitioner & Keith-Miller's "motion to vacate Order of Default, Default judgment and Garnishment ...." CP19 With the exception of Petitioner & Keith-Miller's request for terms the Petitioner and his wife won and Carr lost. CP 233-234; CP 19; CP 20-24. That order is final. Carr's untimely appeal to the Court of Appeals was dismissed.

Petitioner 's pleadings in response to Carr's 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* a defense which is predicated on *Hizey v.* Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) Flynn's affirmative defense to Petitioner 's suit against him for violations of the RPCs is the same affirmative defense Petitioner pleaded to "the 10-2-34254-1 matter"; i.e., Flynn

pleads "plaintiff has failed to state a claim upon which relief can be granted." CP 110

In May 2012, Flynn filed a motion for summary judgment against Petitioner on Carr's complaints against Petitioner on his Complaint for Judgment on Restitution Order. On June 8, 2012 Judge Yu granted Respondents' motion for summary judgment action against Petitioner for violations of the "rules of lawyer conduct", notwithstanding Petitioner's CR 12(b) (6) defense. Concurrently she entered money judgment against Petitioner. CP 109; CP 112 CP 153-154

Petitioner's brief in opposition to summary judgment focused on Petitioner's CR 12(b) (6) defense which is the affirmative defense Flynn raises to Petitioner's suit against Flynn. CP 29; CP 32; CP110

According to Petitioners' brief Carr's motion for summary judgment was not well taken because existing law embodied in *Hizey v. Carpenter*, 119 Wn.2d 251; 830 P.2d 646 (1992) compelled an order denying Carr's motion. According to Mr. Munro, the *Hizey* decision , later cited by the Supreme Court in *Bank of America v. David W. Hubert, P.C.*, 153 Wn. 2d 102 (2004)]"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".

Flynn argued to the contrary, he argued that neither *Hizey* or *Bank of America v. David W. Hubert, P.C.,* 153 Wn.2d 102 (2004) constitute a basis for Petitioner's CR 12(b) (6) defense. CP 60-62. In the June 8, 2012 10-2-34254-1 summary judgment proceeding Flynn's reply brief asserted in part:

> **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 . . .** CP 60-62

Flynn's pleadings in this case, Case No. 13-2-38375-6, contrast with his pleadings in 10-2-34254-1. Flynn persuaded Judge Yu that CR 12(b) (6) *does not* constitute a defense to an action for violations of the RPC. In the case at bench. wherein Flynn not Cohen is being sued for violations of the RPCs, Flynn persuaded Judge Rogoff that CR 12(b) (6) *is a good and sufficient defense* to a suit for violations of the RPCs. CP 123; CP 133

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 Petitioner on June 8, 2012. CP 109; CP 105

On September 2, 2014 the 13-2-38375-6 trial court granted both Respondents' July 14, 2014 motions for summary judgment and denied Petitioner's one motion for summary judgment. CP 121–138. The trial court dismissed Petitioner's suits and dismissed Flynn's counter claims for damages caused by Petitioner's alleged frivolous lawsuit. 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 **FINDING** and issues the following order :

[Emphasis added]

On October 21, 2014 the trial court denied Petitioner's motion(s) for reconsideration. Notice of Appeal was filed November 18, 2014. CP 222. Notwithstanding Judge Rogge's explicit statement tht he had made finding of fact the Court of Appeals concluded that Petitioner's claim that the trial court's fact finding procedure on motion for summary judgment constituted reversible error the Court of Appeals concluded that Petitioner was wrong on the merits of his claim and, in addition, Petitioner's claim of error was frivolous even though Respondents' brief at page 11 acknowledged that the trial court had made findings of fact.

As indicated in Appendix A, The Court of Appeals both affirmed the trial court's order granting Respondents' motions for summary judgment and concluded that Petitioner had raised no fairly debatable issue on appeal. The Court of Appeals concluded that Petitioner's appeal was frivolous within the meaning of RAP 18.9(a).

The Court of Appeals concluded Petitioner's Appeal is frivolous although the trial court agreed with Petitioner that RCW 6.26.040 trumps Respondents' mandatory counterclaim issue. The Court of Appeals concluded that Petitioner's claim that Judge Rogge had erred by engaging in a fact finding endeavor did not

raise a fairly debatable issue although Respondents agreed the trial court had engaged in a fact finding endeavor. Respondents did not argue that the trial court's fact finding endeavor err was harmless error.

The Court of Appeals concluded that Petitioner's appeal raised no debatable issue notwithstanding the salient fact that the Court of Appeals actually discussed Petitioner's wrongful garnishment collateral estoppel issue was frivolous and ruled nothing more than it was not meritorious, it did not state it was frivolous. The Court of Appeals rejected the collateral estoppel argument on the ground that petitioner's alleged failure to assert mandatory counterclaim trumps collateral stopped issue but refrained from describing Petitioner's collateral estoppel appeal as not fairly debatable. A review of the Court of Appeals' Decision manifests no principled basis for its conclusion that Petitioner has raised no debatable issue. A review of the opinion makes it manifest that virtually all if not literally all of Petitioner's issues are fairly debatable. Most, if not all of Petitioner's substantive claims are meritorious.

V. ARGUMENT

Petitioner has submitted for the Supreme Court's review no fewer than three issues related to the Court of Appeals' decision that Carr's 10-2-3454-1 action for Judgment on Supreme Court Restitution Order states does as opposed to does not state a claim relief can be granted. [RAP 13.4(b) (1) & (4)]

These issues are:

Q; Does an action for judgment on a Supreme Court ELC 13.7(a) restitution order constitute a suit for damages arising from violations of RPCs within the meaning of *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2 646 (1992)? [RAP 13.4(b) (1)]; and

A: Yes, a suit for judgment on a Supreme Court ELC 13.7(a) damage/restitution order does constitute a suit for damages arising from violations of RPCs. Therefore, under the rule of law expressed in *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) such an action does not constitute a claim upon which relief can be granted.

Q: Is CR 12(b)(6) a good and sufficient defense to a suit seeking money damages/restitution caused by an attorney's violations of the RPCs regardless of the label which might be affixed to such suit? [RAP 13.4(b) (1) & (4)]

A: Yes, CR 12 (b)(6) is a good and sufficient defense to a suit seeking money damages/restitution caused by an attorney's violations of the RPCs regardless of the label which might be affixed to such suit? Regardless of the label which might be affixed to such suit, where, as here, the relief sought is money compensation for violations of the RPCs, the exclusive remedy for violations of the RPCs is in the public disciplinary system. There is no private remedy for damages caused by violations of the RPCS.

Q: Does a grievant's suit for "judgment on a Supreme Court restitution order" lie where, as here; the grievant is neither a judgment creditor nor authorized to file such a suit under ELC 5.1(c)? [RAP 13.4(b) (1) & (4)]

A: No, a grievant's suit for judgment on Supreme Court restitution Restituting is does not state a claim upon which relief can be granted because such suit seeks money damages for violations of RPCs, because a grievant is not a party to a disciplinary action and therefore is not a judgment creditor and because a grievant's rights are delimited by ELC 5.1(c). This Court, the Supreme Court of the State of Washington has not authorized a grievant to prosecute such an action. The court of appeals' decision is in conflict with several decisions of this court, including, not least of all *Hizey v.*

Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992) *and Bank of America v. David W. Hubert, P.C.*, 153 Wn. 2d 102 (2004)]

It is as plain as day. The cause and effect relationship between this court's 2006 restitution order and Petitioner's violations of the RPCs is beyond doubt and is devoid of ambiguity. Simply stated, and in chronological order the sequence of event is crystal clear. Cohen violated the RPCs. As a consequence Carr was required to pay one of his former employer's attorney fees. Carr files a bar complaint. The WSBA and the Supreme Court in turn concluded that Carr is a person who has been financially injured by Petitioners' violations of the RPCs. Consequently the Supreme Court ordered Petitioner to pay Carr $8,118.75. Carr sues Petitioner for that money. By definition Carr sued for money damages caused by Petitioner's violations of the RPCs. It can be no other way. A restitution order IS an order requiring payment of compensation for a person damaged by violations of the RPCS. ELC 13.7(a)

Cohen fears the Court of Appeals has exalted package over content and form over substance. Carr's suit for judgment on Restitution Order is an action for violations of the RPCs. As night follow day, it is obvious Messrs. Flynn and Carr did take a different

position in the underlying case warranting estoppel. In the underlying case Messrs. Flynn and Carr not only argued that neither *Hizey* or *Bank of America* hold that there is no private cause of action for violations of RPCs but they actually filed a suit for violations of the RPCs AND were awarded summary judgment against Cohen on such suit.

Hence Petitioners' action for violations of RPCs based on judicial estoppel is well taken and this court should grant review and render a decision accordingly.

Under no circumstances can the Court of Appeals decision that Petitioner's Appeal was frivolous be allowed to stand uncorrected. RAP 13.4. (b)(1)(2). This Court and every division of the Court of Appeals has held that an appeal may not be deemed frivolous unless the appeal is totally devoid of any fairly debatable issue. See for example, *Biggs v. Vail*, 119 Wn.2d 129, P.2d 250(1992); *Rhinehart v. the Seattle Times, Inc.*, 59 Wn.2d 332, 789 P.2d 155 (1990). Petitioner's claim that Flynn is judicially estopped from asserting a CR 12(b) (6) defense in opposition to Petitioner's claim against him for violations of the RPCs is both meritorious and non-frivolous. RAP 13.4(b) (1) (2) and (4).

VI. CONCLUSION & RELIEF SOUGHT

For the foregoing reasons, Petitioner respectfully requests that pursuant to RAP 13.4(b(1),(2)&(4) this Court review and reverse the Court of Appeals' decision as it concerns *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992 as well as the merits of his claim Respondent Flynn is judicially estopped from asserting a 12(b)(6) defense to Petitioner's suit for violations of the RPCs and

Petitioner respectfully requests that the court review and reverse the Court of Appeals with respect to its decision that Petitioner's wrongful garnishment/collateral estoppel claims lacks merit pursuant to RAP 13.4(b)(1)and (2); and

Petitioner respectfully requests that the court review and reverse the Court of Appeals' decision that he has prosecuted a frivolous appeals pursuant to RAP 13.4(b)(1)&(2).

RESPECTFULLY SUBMITTED this 19th day of March, 2016.

S/Norman W. Cohen

Norman W. Cohen

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NORMAN COHEN,	)	
	)	
Petitioner	)	NO.
v.	)	
	)	Appendix A
	)	
	)	
	)	
RALPH CARR & MICHAEL FLYNN,	)	
Respondents	)	

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*2016 Wash. App. LEXIS 106, **

NORMAN **COHEN**, *Appellant*, v. RALPH **CARR**, JR. ET AL., *Respondents*.

NO. 72718-4-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2016 Wash. App. LEXIS 106

January 25, 2016, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at **Cohen** v. **Carr**, 2016 Wash. App. LEXIS 359 (Wash. Ct. App., Jan. 25, 2016)

PRIOR HISTORY: [*1] Appeal from King County Superior Court. Docket No: 13-2-38375-6. Judge signing: Honorable Roger S. Rogoff. Judgment or order under review. Date filed: 09/03/2014.
Carr v. **Cohen** (In re **Cohen**), 2010 Bankr. LEXIS 445 (Bankr. W.D. Wash., Feb. 10, 2010)

CORE TERMS: summary judgment, garnishment, prior suit, compulsory counterclaims, counterclaim, default judgment, de novo, attorney fees, reconsideration, restitution, earnings, notice, cause of action, nonmoving party, opposing party, garnished, favorable, asserting, frivolous, estopped, estoppel, lawsuit, vacated, waived, reply

COUNSEL: Norman **Cohen,** Appellant, Appearing Pro se, Seattle, WA.

For Respondent: Glenn Bishop, Law Offices of Glenn Bishop, PLLC, Federal Way, WA.

JUDGES: Authored by Michael S. Spearman. Concurring: James Verellen, Marlin Appelwick.

OPINION BY: Michael S. Spearman

OPINION

¶1 SPEARMAN, C.J. — Norman **Cohen** appeals from the summary judgment dismissal of his lawsuit

against Ralph **Carr,** Jr. and Michael Flynn. Finding no error, we affirm.

FACTS

¶2 Between 1998 and 2000, **Cohen** represented **Carr** in an employment law matter. On March 29, 2006, the Supreme Court disbarred **Cohen** for conduct related to his representation of **Carr** and ordered him to pay **Carr** $8,118.75 in restitution.

¶3 **Cohen** did not pay **Carr.** In 2010, **Carr** retained Flynn to file suit against **Cohen** and **Cohen's** wife Verlaine Keith-Miller in King County Superior Court Cause No. 10-2-34254-1 SEA. The complaint sought a judgment on the restitution order against **Cohen** and to set aside **Cohen's** alleged fraudulent transfer of real property to Keith-Miller.

¶4 After receiving service of the complaint, **Cohen** sent **Carr** a written statement **[*2]** of his intention to appear and defend in the suit. However, neither **Cohen** nor Keith-Miller ever filed a notice of appearance. **Carr** moved for default without providing notice to **Cohen** or Keith-Miller. Concluding that neither **Cohen** nor Keith-Miller had appeared in the action, a superior court commissioner entered a default judgment and issued a writ of garnishment against Keith-Miller's earnings. **Cohen** and Keith-Miller successfully vacated the default judgment and quashed the writ of garnishment based on lack of notice. All earnings garnished by Keith-Miller's employer were returned to her.

¶5 **Cohen** and Keith-Miller subsequently filed answers and asserted counterclaims for Civil Rule (CR) 11 sanctions. However, neither **Cohen** nor Keith-Miller asserted that the garnishment was wrongful. The parties ultimately reached a settlement in which Keith-Miller paid **Carr** $12,000 and all claims arising from the case were dismissed with prejudice.

¶6 In 2013, **Cohen** filed suit against **Carr** and Flynn in King County Superior Court Cause No. 13-2-38375-6 SEA. **Cohen's** complaint alleged that the earlier garnishment by **Carr** was wrongful and that Flynn violated the Rules of Professional Conduct (RPC) in bringing the prior suit. The **[*3]** parties filed competing motions for summary judgment. The superior court granted **Carr** and Flynn's motion and dismissed the action. The superior court denied **Cohen's** motion for reconsideration. **Cohen** appeals.

DECISION

¶7 We review a summary judgment order de novo, engaging in the same inquiry as the superior court.[1] *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Lybbert*, 141 Wn.2d at 34. If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552, 91 Led2d 265 (1986)).

FOOTNOTES

1 In both his opening and his reply brief, **Cohen** refers to pleadings from No. 10-2-34254-1 SEA that were not part of the record on appeal in No. 13-2-38375-6 SEA. **Carr** and Flynn moved to strike those portions of **Cohen's** brief. We grant the motion, as RAP 9.12 limits this court's review of a superior court order granting or denying summary judgment to evidence presented to the superior court. *Dewar v. Smith*, 185 Wn. App. 544, 566, 342 P.3d 328, *review denied*, 183 Wn.2d 1024 (2015).

¶8 We review the denial of a motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A court abuses its discretion when its decision is manifestly **[*4]** unreasonable or based on untenable grounds or reasons. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004).

¶9 **Cohen** first contends that the superior court erred in making findings of fact in a summary judgment order. **Cohen** points to the first paragraph in the summary judgment order, which 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 ... .

Clerk's Papers (CP) at 209. (Emphasis added). However, despite the inclusion of this language, the superior court did not make findings as to disputed facts. Instead, the superior court properly summarized the background of the case and determined that **Carr** and Flynn were entitled to dismissal as a matter of law. Moreover, even had the recitations been intended as findings, because our review is de novo they would be "'merely superfluous and of no prejudice.'" *Gates v. Port of Kalama*, 152 Wn. App. 82, 87 n.6, 215 P.3d 983 (2009) (quoting *State ex rel. Carroll v. Simmons*, 61 Wn.2d 146, 149, 377 P.2d 421 (1962)). **Cohen** also contends the superior court failed to view the evidence in a light most favorable to him as the nonmoving party. Again, our de novo standard **[*5]** of review renders this claim immaterial.

¶10 **Cohen** argues that the superior court erred in dismissing his claim for wrongful garnishment. However, **Cohen** waived this claim by failing to assert it as a counterclaim in the prior suit. CR 13(a), which governs compulsory counterclaims, states:

> 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 party who fails to assert a compulsory counterclaim is barred from asserting the claim in a subsequent action. *Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P.2d 916 (1986).

¶11 **Cohen's** claim for wrongful garnishment was a compulsory counterclaim under CR 13(a). Because it was based on the fact that Keith-Miller's earnings were garnished following a default judgment that was later vacated, it was mature and available to **Cohen** at the time he filed his answer. It also necessarily arose out of the judgment that was the subject of the prior suit. Finally, the claim did not require the presence of third parties because both **Cohen [*6]** and **Carr** were parties to the prior suit. Accordingly, **Cohen** waived the claim by failing to assert it in the prior suit and the superior court properly granted summary judgment.[2] Consequently, we need not address the merits of **Cohen's** claim that **Carr** is collaterally estopped from relitigating the issue of whether the garnishment was wrongful.

FOOTNOTES

2 The superior court declined to bar **Cohen's** wrongful garnishment claim as a compulsory counterclaim, citing RCW 6.26.040, which provides that an action for damages arising from a prejudgment writ of garnishment "may be brought by way of a counterclaim in the original action *or* in a separate action. ..." (Emphasis added). However, chapter 6.26 RCW applies only

to writs issued *prior* to a judgment. Here, the writ was issued *after* a judgment. Such writs are governed by chapter 6.27 RCW, which does not contain an equivalent provision. We may affirm the superior court's summary judgment decision on any ground supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

¶12 **Cohen** contends that the superior court "fail[ed] to recognize that **Carr's** liability is not predicated solely on RCW 6.26.040 [but] 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 **[*7]** to civil liability." Br. of Appellant at 7-8. **Cohen** did not plead any of these claims in his complaint or address them in his motion for summary judgment. A new theory of liability not properly raised in the superior court may not be raised for the first time on appeal. RAP 2.5(a).

¶13 **Cohen** also claims the superior court erred in dismissing his claim against Flynn for allegedly violating the RPC. However, it is well settled that violations of the RPC do not give rise to a civil cause of action. *Hizey v. Carpenter*, 119 Wn.2d 251, 259-60, 830 P.2d 646 (1992); *Behnke v. Ahrens*, 172 Wn. App. 281, 297, 294 P.3d 729 (2012). Rather, "breach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy." *Hizey*, 119 Wn.2d at 259 (citing 1 R. Mallen & J. Smith, *Legal Malpractice* § 6.27 (3d ed. 1989)). Because **Cohen** failed to show he had a viable cause of action, the superior court properly dismissed this claim.

¶14 **Cohen** appears to claim that Flynn was judicially estopped from seeking summary judgment dismissal on this ground because "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 [sic]. ..." Br. of Appellant at 6. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding **[*8]** and later seeking an advantage by taking a clearly inconsistent position.'" *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)). **Cohen** misapprehends the nature of the earlier suit. **Carr** sued **Cohen** for a judgment on a restitution order, not for **Cohen's** violations of the RPC in representing him. Because Flynn's position was not inconsistent with the prior suit, judicial estoppel does not apply.

¶15 Both parties request attorney fees on appeal. RAP 18.9(a) authorizes this court to order a party who files a frivolous appeal to pay attorney fees and costs to the opposing party. Because **Cohen's** appeal is frivolous, we exercise our discretion and grant **Carr** and Flynn their reasonable attorney fees and costs on appeal upon compliance with RAP 18.1(d).

APPELWICK and VERELLEN, JJ., concur.

Reconsideration denied February 18, 2016.

Source: **Legal > / . . . / > WA State Cases, Combined**
Terms: **cohen v carr**
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORMAN COHEN, Appellant, v. RALPH CARR, JR. and MICHAEL FLYNN, Respondents.	)	NO. 72718-4-I DIVISION ONE ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

Appellant Norman Cohen filed a motion for reconsideration of the opinion filed in the above matter on January 25, 2016. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 18th day of February 2016.

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Spearman, C.J.

Presiding Judge

CR 13 COUNTERCLAIM AND CROSS CLAIM

(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.

ELC 5.1
GRIEVANTS

(a) Filing of Grievance. Any person or entity may file a grievance against a lawyer who is subject to the disciplinary authority of this jurisdiction.

(c) Grievant Rights. A grievant has the following rights:

(1) to be advised promptly of the receipt of the grievance, and of the name, address, and office phone number of the person assigned to its investigation if such an assignment is made;

(2) to have a reasonable opportunity to communicate with the person assigned to the grievance, by telephone, in person, or in writing, about the substance of the grievance or its status;

(3) to receive a copy of any response submitted by the respondent, subject to the following:

(A) Withholding Response. Disciplinary counsel may withhold all or a portion of the response from the grievant when:

(i) the response refers to information protected by RPC 1.6 or RPC 1.9 to which the grievant is not privy; or

(ii) the response contains information of a personal and private nature about the respondent or others; or

(iii) the interests of justice would be better served by not releasing the response;

(B) Challenge to Disclosure Decision. Either the grievant or the respondent may file a challenge to disciplinary counsel's decision to withhold or not withhold all or a portion of a grievance or response within 20 days of the date of mailing of the decision. The challenge shall be resolved by a review committee, unless the matter has previously been dismissed under rule 5.6 or the time period for submitting a request for review of a dismissal has expired under rule 5.7(b)

(4) to attend any hearing conducted into the grievance, subject to these rules and any protective order issued under rule 3.2(e), except that if the grievant is also a witness, the hearing officer may order the grievant excluded during the testimony of any other witness whose testimony might affect the grievant's testimony;

(5) to provide relevant testimony at any hearing conducted into the grievance, subject to these rules and any protective order issued under rule 3.2(e);

(6) to be notified of any proposed decision to refer the respondent to diversion and to be given a reasonable opportunity to submit to disciplinary counsel a written comment thereon;

(7) to be advised of the disposition of the grievance; and

(8) to request reconsideration of a dismissal of the grievance as provided in rule 5.7(b).

(d) Duties. A grievant should do the following:

(1) give the person assigned to the grievance documents or other evidence in his or her possession, and witnesses' names and addresses;

(2) assist in securing relevant evidence; and

(3) appear and testify at any hearing resulting from the grievance.

ELC 13.7 RESTITUTION

(a) Restitution May Be Required. A respondent lawyer who has been sanctioned under rule 13.1 or admonished under rule 13.5(b) may be ordered to make restitution to persons financially injured by the respondent's conduct. or the Lawyers' Fund for Client Protection.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NORMAN COHEN,

Petitioner

v.

RALPH CARR & MICHAEL FLYNN,
Respondents

NO.

Declaration of Mailing

Norman Cohen declares that the following is true and correct under penalty of perjury of the laws of the state of Washington, that on March 21, 2016 I mailed a true and correct copy of:

[x] This Declaration of Mailing

[x] Petition for Supreme Court Review

First class postage prepaid to the person and address listed below with first class postage prepaid to

Glenn Bishop
33605 6th Ave S, Suite 102
Federal Way, WA 98003

The above and foregoing is true and correct.

Signed at Seattle, Washington on March 21, 2016

S/ Norman Cohen

Norman Cohen

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STATE OF WASHINGTON
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