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No. 67503-6-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DAVID MONK, an individual; and  
WHITE RIVER FEED COMPANY, INC.,  
a Washington corporation,

Appellants,

v.

KRISTINA A. DRIESSEN and JOHN DOE DRIESSEN,  
and the marital community composed thereof; and  
RYAN & DRIESSEN, INC., P.S.,

Respondents.

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BRIEF OF APPELLANTS

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**TABLE OF CONTENTS**

	<u>Page</u>
Preliminary Statement . . . . .	1
A.    Assignments Of Error . . . . .	3
B.    Issues Pertaining To Assignments Of Error. . . . .	3
C.    Statement Of The Case . . . . .	4
1.    Procedural Background . . . . .	4
2.    Factual Background . . . . .	5
D.    Argument . . . . .	8
1.    Under The Holding Of <u>King County v. Seawest Inv. Assoc.</u> , Monk Has Now Lost The Ability To Sue Pierson Because Monks’ Claims Were Not Pled As Counterclaims In Response To Pierson’s Lien Foreclosure Action . . . . .	8
2.    Monk’s Counterclaims For Legal Malpractice, Breach Of Fiduciary Duty And Violation Of The Consumer Protection Act Were Mandatory Counterclaims And Were Required To Be Pled Under CR 13(a) In Response To Pierson’s Lien Foreclosure Action . . . . .	11
3.    CR 13(a) Codifies The Doctrine Of Res Judicata And Which Also Now Precludes Monk From Filing Suit Against Pierson . . . . .	13
a.    Identity of Parties . . . . .	14

b. Suit Arises From The Same Cause Of Action . . . . .	15
1. Impairment Of Rights Or Interests Established In Pierson’s Lien Foreclosure Proceeding . . . . .	15
2. Substantially Same Evidence Element . . . . .	16
3. Any Claims That Monk May Now Assert Would Involve Infringement Of The Same Rights Adjudicated In The Lien Foreclosure Action . . . . .	16
4. Both Suits Arise Out Of The Same Transaction Or Nucleus Of Facts . . . . .	17
c. The Subject Of Both Suits Is The Same . . . . .	17
d. The Quality Of The Persons For Or Against Whom The Claim Is Made Is Identical . . . . .	17
4. The Trial Court Erred In Ruling That Monk Is Not Now Precluded From Suing Pierson And Therefore The Denial Of Monks’ Motion To Strike Driessen’s Affirmative Defenses Should Be Reversed . . . . .	18
5. Driessen’s CR 19 Affirmative Defense For Failing To Join An Indispensible Party Must Fail Because Pierson Is Not An Indispensible Party, And Driessen Has	

Not Identified Any Indispensible Party  
In Accordance With CR 19(c) . . . . . 18

6. Plaintiff's Allocation Of Fault Defense  
As To Richard Pierson Is Likewise  
Inapplicable And Should Be Dismissed  
As A Matter Of Law . . . . .20

E. Conclusion . . . . . 22

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Washington Cases</b>	
<i>Aungst v. Roberts Construction</i> , 95 Wn.2d 439, 625 P.2d 167 (1981) . . . . .	19
<i>Daugert v. Pappas</i> , 104 Wn.2d 254, 704 P.2d 600 (1985). . . . .	21
<i>Ensley v. Pitcher</i> , 152 Wn.App. 891, 222 P.3d 99 (2009) . . .	14, 16
<i>King County v. Seawest Inv. Assocs.</i> , 141 Wn.App. 304, 170 P.3d 53 (2007), <i>review denied</i> , 163 Wn.2d 1054 (2008) . . . . .	1, 2, 3, 8, 9, 10, 11, 22
<i>Krikava v. Webber</i> , 43 Wn. App. 217, 716 P.2d 916 (1986) . . . .	12
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 122, 897 P.2d 365 (1995) . . .	15
<i>Landry v. Luschen</i> , 95 Wn. App. 779, 976 P.2d 1274 (1999) . . .	14
<i>Marina Prop. Co. v. Port Comm'rs of Port of Seattle</i> , 97 Wn.2d 307, 644 P.2d 1181 (1982) . . . . .	14
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 11 P.3d 833 (2000) . .	14, 15
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986) . . . . .	12
<i>Seattle-First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978) . . . . .	14
<b>State Rules</b>	
CR 13 (a) . . . . .	4, 11, 12, 13, 22
CR 19 . . . . .	18

<b>State Rules (Continued)</b>	<b><u>Page</u></b>
CR 19(a) .....	18
CR 19(b) .....	20
CR 19(c) .....	18, 19
ER 201 .....	4
RCW 4.22 et seq. ....	4, 18
RCW 4.22.070 .....	3, 20, 21
RCW 8.25.075(3) .....	6, 7, 16
RCW 19.86 .....	1

**Other Authority**

<i>6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane,</i> <u>Federal Practice and Procedure</u> , Civil 2d sec. 1409 .....	12
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APPENDIX .....	A-1
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Appendix A:	Order Denying Richard Pierson’s Motion to Enforce Attorney’s Lien Pending Adjudication By Evidentiary Hearing, dated 02/27/09
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## PRELIMINARY STATEMENT

This Court meant what it said when in the attorney's lien foreclosure case of **King County v. Seawest Inv. Assocs.**, 141 Wn.App. 304, 170 P.3d 53 (2007), *review denied*, 163 Wn.2d 1054 (2008), this Court stated as follows:

Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding. A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds . . . The trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice. Here, the only persons asserting interests in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, bring counterclaims, and argue their theories of the dispute. In short, Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. While it now complains on appeal that it did not assert Consumer Protection Act, chapter 19.86 RCW, and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.

**King County, supra**, ¶¶20, 23 (Footnotes omitted).

The respondent attorney Kristina Driessen ("Driessen") represented

appellants David Monk and White River Feed Company, Inc. (hereinafter collectively “Monk”) in an attorney's lien proceeding brought by Monk’s former attorney Richard Pierson (“Pierson”). In the underlying matter, Driessen brought no claims against Pierson on behalf of her client Monk which were valid claims for legal malpractice, breach of fiduciary duty, and violation of the Consumer Protection Act.

The underlying trial judge, The Honorable Jay White, on February 27, 2009 set a hearing to adjudicate Pierson’s lien claim. In that notice, Judge White specifically directed the parties’ attention to **King County v. Seawest Inv. Assocs.** and invited Monk or Pierson to bring any claims that they chose to raise. Driessen brought none. (See App. A, pp. A 4-5).

It is from that failure to follow the directive of **Seawest** from which this malpractice case emanates. Upon competing motions for summary judgment, the Court granted Driessen’s summary judgment dismissing Monk’s case, holding that **Seawest** was not dispositive. In so ruling, the Court held that despite the language of **Seawest**, Monk had viable claims against Pierson.

It is from that grant of summary judgment of dismissal dated July 12, 2011 that Monk has timely appealed. (CP 587-592).

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it granted Driessen's summary judgment motion dismissing Monks' claims.
2. The trial court erred when it denied Monks' summary judgment motion seeking dismissal of Driessen's affirmative defenses of failure to join a necessary and indispensable party and allocation of fault to Pierson pursuant to RCW 4.22.070.
3. The trial court erred by ruling as a matter of law that Monk's claims against Pierson are not now barred by the doctrine of res judicata, collateral estoppel, and the holding of **King County v. Seawest Inv. Assocs.**, 141 Wn.App. 304, 170 P.3d 53 (2007), *review denied*, 163 Wn.2d 1054 (2008) when Monks claims for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act were not asserted against Pierson in the underlying lien foreclosure action.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Did the trial court err by granting relief to Driessen on the sole issue raised in her summary judgment motion by ruling as a matter of law that the holding of **King County v. Seawest** was not applicable, and

that Monk can still maintain a viable cause of action against Pierson, even though Monks' claims against Pierson for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act were compulsory counterclaims that are now barred by CR 13(a) and the doctrine of res judicata?<sup>1</sup>

2. Did the trial court err by failing to grant Monks' motion for summary judgment seeking dismissal of Driessen's affirmative defenses alleging failure to join a necessary and indispensable party, and requesting allocation of fault pursuant to RCW 4.22. et. seq. when joinder of Pierson is not "feasible" because Monks' claims against Pierson are barred due to the actions of Driessen; and where the issue of allocating fault to Pierson is irrelevant to Monks' claims against Driessen?

**C. STATEMENT OF THE CASE**

1. Procedural Background.

The sole issue Driessen raised on summary judgment is "whether Plaintiffs' malpractice claims against Driessen must be dismissed because Plaintiffs are not prevented by res judicata or collateral estoppel from suing

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<sup>1</sup> Pursuant to ER 201, Monk represents to the Court that they have filed post granting of Driessen's summary judgment an alternative action against Pierson and his law firm to preserve the statute of limitations, *Monk v. Pierson*, King County Superior Court Cause No. 11-2-26125-5 KNT. Monk intends to seek a stay in that action pending the outcome of this Appeal.

Pierson for malpractice, breach of fiduciary duty, and violation of the Consumer Protection Act”. (CP 27).

The trial court granted Driessen’s motion (CP 590-592) and denied Monks’ motion to dismiss Driessen’s affirmative defenses asserting the failure to join a necessary and indispensable party, and allocation of fault. (CP 587-589).

2. Factual Background

Monks’ claims arise out of a condemnation lawsuit filed against the cities of Kent and Auburn (hereafter “Cities”). David Monk owns realty located in Kent, WA that is occupied by White River Feed Company, Inc., a business in which David Monk is the sole shareholder. (CP 318).

The realty borders a road improvement project commenced by the Cities in 2001. Shortly after construction began, Monk grew concerned that the project encroached on his property. He consulted with engineers and surveyors who referred him to attorney Richard Pierson. (CP 318).

Pierson met with Monk and assured him that the Cities were liable and would have to reimburse Monk for all of his attorneys’ fees and costs under the condemnation statute. (CP 318). Based upon these assurances Monk retained Pierson to represent him (CP 318).

In March, 2002, the Cities requested that Pierson engage in negotiations to reach early resolution. Pierson refused to engage in good faith settlement negotiations with the Cities, and instead filed suit. (CP 382-383). Pierson filed a number of claims that were later found to be lacking a legal or factual basis and were dismissed on summary judgment (CP 381). However, Pierson continued to work on dismissed claims, generating substantial fees and causing Monk to incur unnecessary expense. (CP 7, 464)

Following summary judgment, Monk's only remaining claim for inverse condemnation was tried. (CP 381). Following a bifurcated trial, Monk was awarded \$39,918.00 in damages, after a finding that the Cities had encroached on a mere 5.4% of an acre of the Monk property. (CP 7, 8, 464-465).

Following the damages phase of the trial, Pierson petitioned for an award of Monk's costs and attorneys fees pursuant to RCW 8.25.075(3). The trial court initially found that the Cities had timely tendered a \$150,000.00 pre-trial offer to Monk, thereby precluding any recovery of fees and costs. This decision was appealed and Monk prevailed on appeal. (CP 567-572).

The matter was remanded to Judge White to fix an award of attorneys' fees and costs. (CP 8, CP 465). On September 22, 2008, Judge White issued his 108 Page Memorandum decision ruling on Monk's award of attorneys' fees and costs. (CP 8, 48-157, 465).

Judge White noted that Pierson was seeking \$488,539.09 in fees and costs from the Cities pursuant to RCW 8.25.075(3). (CP 78). Judge White awarded Monk only \$253,519.40 of the \$488,539.09 in fees and costs submitted. (CP 465). Additionally, Monk discovered, for the first time, that he was responsible for an additional \$243,852.40 in attorneys' fees and costs not submitted for consideration because those fees and costs could not be recovered under the condemnation statute. (CP 78, 317-319).

On October 8, 2008, Pierson filed an attorneys' lien on the proceeds of the judgment, claiming the remainder of the fees he alleged to be owed. (CP 485-488, 491-492). On January 16, 2009, Pierson filed a motion to enforce his attorneys' lien claim. (CP 490, 497-500).

Monk then retained Driessen to defend against Pierson's attorney lien foreclosure action. Driessen filed her Notice of Appearance on January 30, 2009. (CP 502-503). On February 27, 2009, Judge White set June 8, 2009 as the hearing date to adjudicate Pierson's lien claim. (CP

490 – 495). Judge White issued a case schedule, setting deadlines for: Disclosure of witnesses; discovery cutoff; ADR; hearing dispositive motions; filing motions in limine; filing joint statement of evidence; briefs; and submittal of proposed findings of fact and conclusions of law. (CP 495) (App. A).

At the hearing, the parties presented evidence in the form of witness testimony and documentary evidence. Judge White weighed the evidence, assessed the credibility of the witnesses, made his ruling and issued findings of fact and conclusions of law. (CP 508-516).

Monk advised Driessen, at the outset of her representation of him, that he wanted to pursue malpractice claims against Pierson. (CP 317-319). Driessen failed to assert any such claims against Pierson as counterclaims to the lien foreclosure action (CP 10, CP 18-19), and she failed to advise Monk that his counterclaims were required to be asserted in response to the lien foreclosure action. (CP 317-319).

**D. ARGUMENT.**

1. Under the holding of **King County v. Seawest Inv. Assoc.**, Monk has now lost the ability to sue Pierson because Monks' claims were not pled as counterclaims in response to Pierson's lien foreclosure action.

**King County v. Seawest Inv. Assoc. LLC**, 141 Wn.App. 304, 170

P.3d 53 (2007), *review denied*, 163 Wn.2d 1054 (2008), is on point and dispositive of the issues before this Court. (See App. A).

Where an attorney lien is claimed against a judgment, **the court has a right to determine all questions affecting the judgment in some form of proceeding.** A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies and we review those **remedies** for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds . . . (emphasis added). *Id.* at 314.

The trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice. **Here, the only persons asserting interests in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing.** Finally, the hearing gave them ample opportunity to present evidence, **bring counterclaims,** and argue their theories of the dispute. In short, Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. **While it now complains on appeal that it did not assert Consumer Protection Act and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.** (Emphasis added). *Id.* at 315.

In **Seawest**, the plaintiff hired Graham & Dunn to represent it in an eminent domain proceeding against King County that resulted in a substantial verdict for Seawest. *Id.* at 307-308. Shortly after trial

concluded, Graham & Dunn filed its Notice of Attorney's Claim of Lien in the underlying condemnation action. The court then entered orders disbursing part of the award to Seawest, together with the undisputed sums sought by Graham & Dunn. The disputed \$240,228.25 of attorney's fees, claimed by Graham and Dunn, remained in the court registry pending adjudication of the attorney's lien. *Id.* at 308 -309. Virtually the same facts exist in the underlying matter involving Monk.

The Seawest court then set a hearing date approximately four months after Seawest made its motion for disbursal of proceeds. *Id.* at 308. The time frame in this matter is virtually identical. The Seawest parties were afforded the opportunity to conduct discovery, present evidence and argue their respective theories, as were Monk and Pierson. The Seawest court took testimony from a number of witnesses, admitted exhibits and found Graham & Dunn's fees to be reasonable. *Id.* at 315. After the hearing, the court ordered disbursement of the balance of the \$240,228.45 from the court registry to Graham & Dunn. *Id.* at 307. In the Pierson lien foreclosure action, Judge White took testimony, admitted exhibits and issued findings of fact and conclusions of law.

Seawest appealed, arguing that Graham & Dunn's attorneys' lien

claim needed to be determined in a separate action so that Seawest's counterclaims could be considered. *Id.* at 309.

The court specifically rejected this argument, holding that Seawest was required to bring its counterclaims in response to the lien foreclosure action, noting that there was nothing that prevented Seawest from doing so. *Id.* at 315.

The Seawest holding mandates that a client faced with an attorney lien foreclosure proceeding must bring his counterclaims against the foreclosing attorney in response to the lien foreclosure proceeding, or be barred from subsequently asserting counterclaims in a "separate action."

Indeed, Judge White in his Order literally invites Driessen to do so.

2. Monks' counterclaims for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act were mandatory counterclaims and were required to be pled under CR 13(a) in response to Pierson's lien foreclosure action.

CR 13(a) mandates as follows:

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.

A counterclaim that arises out of the same transaction that is the subject of the opposing party's claim is compulsory. **6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure**, Civil 2d sec.1409. **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). (Emphasis added).

Washington has adopted the “logical relationship” test to determine whether a claim is compulsory under CR 13(a) and therefore barred if not asserted in response to a claim that arises out of the transaction asserted in the underlying action. **Schoeman v. New York Life Ins. Co.**, 106 Wn.2d 855, 863, 866, 726 P.2d 1 (1986).

The “logical relationship test” requires that any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim: only claims that are unrelated need not be pleaded. *Id.* at 866.

Under the logical relationship test, courts are required to 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. *Id.* at 865.

In his lien foreclosure action, Pierson asserted that he had properly discharged his duty as Monks' attorney and was entitled to fees.

Monk's claims for legal malpractice, breach of fiduciary duty and violation of the Consumer Protection Act are premised on his contention that he was misled by Pierson into believing that all of his attorneys fees and costs would be paid by the Cities, and that he shouldn't have been charged for fees and costs that Pierson pursued that were related to claims that were not viable, and not well grounded in fact or law. Further, that Pierson continued to charge for work on claims after they were dismissed on summary judgment.

Monks' claims for affirmative relief are not only logically related to the assertions Pierson set forth in the lien foreclosure action, they are inextricably interwoven, and therefore needed to be asserted by Monk in response to Pierson's lien claim as compulsory counterclaims.

3. CR 13(a) codifies the doctrine of res judicata and which also now precludes Monk from filing suit against Pierson.

Res judicata precludes duplicate litigation where there was the opportunity to litigate all the issues, it "puts an end to strife, produces

certainty as to individual rights, and gives dignity and respect to judicial proceedings. **Pederson v. Potter**, 103 Wn.App. 62, 67, 11 P.3d 833 (2000); **Ensley v. Pitcher**, 152 Wn.App. 891, 898, 899, 222 P.3d 99 (2009). (quoting **Marina Prop. Co. v. Port Comm'rs of Port of Seattle**, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982)).

The doctrine of claim preclusion is a prong of the defense of res judicata. Under claim preclusion, **all issues which might have been raised and determined in the original proceeding are precluded.** **Seattle-First Nat'l Bank v. Kawachi**, 91 Wn.2d 223, 228, 588 P.2d 725 (1978) (emphasis added).

Res judicata acts to bar subsequent litigation where four elements are met: (a) same persons and parties; (b) causes of action, (c) subject matter; and (d) the quality of the persons for or against whom the claim is made. See **Ensley**, 152 Wn.App. at 902 (quoting **Landry v. Luschen**, 95 Wn.App. 779, 783, 976 P.2d 1274 (1999)).

a. *Identity of Parties.*

The identity of persons and parties in a prior judgment and a subsequent action must be the same, and is satisfied when identical parties are involved in both actions. **Pederson**, 103 Wn.App. at 72.

This element is easily addressed. Pierson and Monk each were seeking an award of the same funds in the lien foreclosure action. In a subsequent malpractice suit, Monk and Pierson would, likewise, be adversaries.

b. Suit arises from the same cause of action.

There is a four-factor test to determine whether a subsequent suit arises out of the same cause: (1) Whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. **Pederson**, 103 Wn.App. at 72 (quoting **Kuhlman v. Thomas**, 78 Wn.App, 115, 122, 897 P.2d 365 (1995)).

1. Impairment of rights or interests established in Pierson's Lien foreclosure proceeding.

Any claim Monk would now attempt to file against Pierson would necessarily be a direct attempt to vitiate Judge White's prior ruling on Pierson's attorney's lien claim.

2. Substantially same evidence element.

Courts analyze whether the evidence presented to support each action and claim is substantially the same evidence. Ensley, 152 Wn.App. at 903.

Driessen's Brief in the lien foreclosure proceeding is instructive.

She states in as follows:

Pierson represented that all fees and costs including experts would be paid pursuant to the inverse condemnation statute. . . This Court found that Pierson's billing was highly excessive, duplicative, that he failed to submit proper documentation in regard to the hours actually spent, was excessive in proportion to the result achieved at trial (\$39,918.00), excessive because presumably due to the faulty advice of counsel, Monk never had a realistic understanding of the value of his case and thus, never engaged in good faith settlement negotiations as contemplated by RCW 8.25.075(3). . . The evidence will show that said amounts paid would more that [sic] cover the fees incurred on the inverse condemnation cause of action.

These same facts would necessarily be the subject of litigation in Monks' subsequent claims for affirmative relief against Pierson.

3. Any claims that Monk may now assert would involve infringement of the same rights adjudicated in the lien foreclosure action.

In order for Monk to now pursue Pierson, he would need to

overturn the findings of fact and conclusions of law issued by Judge White in the lien foreclosure action; a direct challenge to the same rights previously adjudicated.

4. Both suits arise out of the same transaction or nucleus of facts.

The “nucleus of facts” is the same in the lien action and Monks’ claims for affirmative relief, both actions deal directly with the attorneys’ fees and costs generated in condemnation suit.

c. The subject of both suits is the same.

The subject matter of Pierson’s lien foreclosure action and Monks’ claim for affirmative relief are the same. They both concern issues pertaining to costs and fees expended and incurred in the condemnation action.

d. The quality of the persons for or against whom the claim is made is identical.

This element is easily analyzed. Pierson and Monk had diametrically opposite, adversarial interests with regard to the subject matter of the lien foreclosure hearing.

All elements of the doctrine of res judicata are present in this matter preventing Monk from now proceeding against Pierson.

4. The trial court erred in ruling that Monk is not now precluded from suing Pierson and therefore the denial of Monks' motion to strike Driessen's affirmative defenses should be reversed.

Monk moved the court for an order striking Driessen's affirmative defenses for failure to join a necessary and indispensable party and allocation of fault pursuant to RCW 4.22. et. seq. (CP 229-316). It is presumed that the trial court denied Monks' motion on the basis that it was moot in light of the ruling in favor of Driessen.

5. Driessen's CR 19 affirmative defense for failure to join an indispensable party must fail because Pierson is not an indispensable party, and Driessen has not identified any indispensable party in accordance with CR 19(c).

CR 19 sets forth the rules requiring joinder of persons to an action.

While Driessen pled this affirmative defense, she didn't specify a particular person who needed to be joined to the action, nor did she set forth the reason why it was not feasible to join such person, presumably Pierson, as required by CR 19(c). (CP 20).

CR 19 states in relevant part:

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties . . .

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

An order requiring the joinder of Pierson would be futile because Pierson isn't needed as a party to adjudicate Monks' claims for Driessen's failure to perfect his claims against Pierson. In a legal malpractice claim, an attorney who fails to perfect her clients' claims is liable for the damage caused. The client can be afforded complete relief by way of a damage award against the attorney. Pierson's presence as a party is irrelevant to the foregoing analysis.

In fact, Pierson can't be joined as a party as Monk has no claims against Pierson because those claims are now barred as a result of Driessen's failure to perfect them. Driessen has no claim against Pierson because Pierson owed her no duty to properly perfect Monks' claims.

Not only can full relief be accorded without Pierson as a party, but it is not feasible to join him because there are now no claims that either Monk or Driessen can assert against Pierson.

In **Aungst v. Roberts Construction**, 95 Wn.2d 439, 625 P.2d 167 (1981), the court held:

Whenever joinder of a party is not feasible, the court must determine whether in "equity and good conscience" the action should proceed or be dismissed. In case of dismissal the absent party is regarded as indispensable. CR 19(b). The label of "indispensable" is attached only after deciding whether, in equity and good conscience, the action can proceed.

Applying the "equity and good conscious" analysis to this matter mandates a finding that Pierson is not an "indispensable party." To find otherwise would lead to the bizarre result that a negligent attorney who fails to file his client's personal injury claim within the statute of limitations period could then defeat his client's claim for legal malpractice by asserting that the offending driver is an indispensable party to adjudicate issues related solely to the attorney's subsequent, unrelated negligence. The aggrieved clients' malpractice claim could then never be prosecuted in such an instance.

6. Plaintiff's allocation of fault defense as to Richard Pierson is likewise inapplicable and should be dismissed as a matter of law.

Driessen alleged that fault should be allocated to Pierson pursuant to RCW 4.22.070. (CP 20). That statute provides in relevant part as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the

claimant's damages . . .

RCW 4.22.070 is only applicable where the “**action**” involves the fault of more than one entity” (emphasis added). In legal malpractice cases, the plaintiff must show that the attorney breached the standard of care and also must prove that he would have prevailed in the underlying action, but for the attorney’s negligence. **Daugert v. Pappas**, 104 Wn.2d 254, 260, 704 P.2d 600 (1985). This concept is known as the “case within the case.”

In this case, Pierson’s fault is only relevant as to causation and damages, it is not at issue in Monks’ claims against Driessen because Pierson did not have any fault in Driessen’s failure to perfect Monks’ counterclaims against Pierson.

If a negligent attorney is allowed to allocate fault to an underlying tortfeasor in the same “action,” an attorney who fails to perfect her clients’ claims against the underlying tortfeasor reaps the reward of her own negligence. This result is obviously absurd and is inapplicable because the fault of the negligent attorney does not “involve” the fault of the underlying tortfeasor.

**E. CONCLUSION.**

This matter is controlled by the very specific language and holding of this Court in **King County v. Seawest Inv. Assocs.** Its holding is logical and rational, and promotes judicial economy and the time and expenses of the parties to avoid multiplicity of litigation. The holding is in accord with CR 13(a) and the doctrine of res judicata.

To conclude as the trial court did that the client's claims against his attorney that arise out of the identical transaction and occurrence do not give rise to a mandatory counterclaim necessarily violates CR 13(a) and the doctrine of res judicata.

It is respectfully submitted that this Court should overturn the trial court's grant of summary judgment and in doing so direct that plaintiff's motion dismissing as a matter of law Driessen's affirmative defenses of July 12, 2011 should be granted and the affirmative defenses stricken.

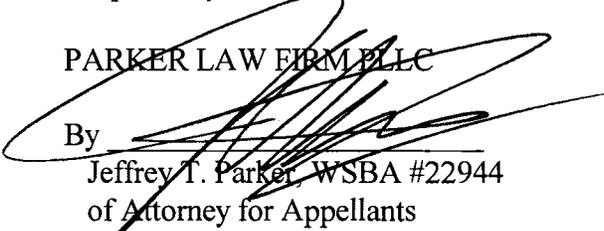
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DATED this 24<sup>th</sup> day of October, 2011.

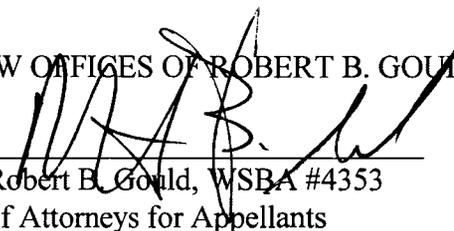
Respectfully submitted,

PARKER LAW FIRM PLLC

By 

Jeffrey T. Parker, WSBA #22944  
of Attorney for Appellants

LAW OFFICES OF ROBERT B. GOULD

By 

Robert B. Gould, WSBA #4353  
of Attorneys for Appellants

**Index To Appendices**

Appendix A:

Order Denying Richard Pierson's Motion to  
Enforce Attorney's Lien Pending Adjudication  
By Evidentiary Hearing, dated 02/27/09



dated January 27, 2009; David Monk's Response to Attorney Pierson's Motion to Enforce Attorney's Lien and Boyd's Motion to Enforce Engineer's (Surveyor's) Lien, dated February 6, 2009, and supporting Declaration of David Monk, dated February 6, 2009; and Memorandum of Richard W. Pierson in Response to David Monk's Objection to Enforcement of Attorney's Lien, dated February 10, 2009.

On September 22, 2008, this court entered its Memorandum Decision awarding to plaintiff David Monk reasonable attorney fees and reasonable expert witness fees within the meaning of RCW 8.25.075(3) and (4) against the defendants City of Auburn and City of Kent. On October 21, 2008, judgment was entered (filed October 22, 2008) in favor of David Monk in the total amount of \$253,519.40.<sup>2</sup>

On October 8, 2008, Richard Pierson filed with the court clerk a Notice of Attorneys' Lien reciting that Pierson "hereby declares an attorneys lien pursuant to RCW 60.40.010 *et seq.*" Notice of Attorneys' Lien at 2. For purposes of this motion only, the court assumes without deciding that Pierson has or could perfect a valid attorney's lien.<sup>3</sup>

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<sup>2</sup> Contrary the statement in Pierson's Motion at 2, the court has not "already determined that the *lien amount* of \$65,880 is reasonable (emphasis added)" nor has the court, as asserted in David Monk's Response at 2 "awarded Pierson \$65,880.00." This court has not adjudicated the lien amount, nor has it awarded anything to Pierson.

<sup>3</sup> Although Pierson generally claims an attorney's lien under RCW 60.40.010 (1), it appears that the only sections of the statute that would support Pierson's attorney's lien are RCW 60.40.010 (1) (d) and (e). It appears that Pierson is claiming a lien under RCW 60.40.010 (1) (e) because that is the only provision of the statute that applies to judgments and it is the only provision that requires a filing of the lien with the court clerk. RCW 60.40.010 (1) (e) provides for a lien on a judgment from the time of filing a notice of the lien or claim with the clerk of the court "in which such judgment has been entered...." In this case, the lien was filed on October 8, 2008 *before* judgment was filed on October 22, 2008; accordingly, it would appear that the lien has not attached to the judgment and therefore may be void. See Cline Piano Co. v. Sherwood, 57 Wash. 239, 242-243 (1910); Barney v. Kreider, 32 Wn. App. 904, 906-907 (1982). In Barney, however, the court noted that in that case the subsequently filed post-judgment amended "claim of lien was sufficiently definite to permit the clerk to note the claim in the execution docket, as the statute requires." In this case, the lien appears on the court clerk's execution docket "signed by John Marshall" [sic] without

ORDER DENYING RICHARD PIERSON'S  
MOTION TO ENFORCE ATTORNEY'S LIEN App. A-2  
PENDING ADJUDICATION BY  
EVIDENTIARY HEARING - 2

In the motion before the court, Pierson contends that because he has a fee agreement with Monk and because he asserts that Monk owes him fees in excess of the \$65,880 awarded to Monk as reasonable attorney fees pursuant to RCW 8.25.075 (3) and (4) on Monk's inverse condemnation claim, that the court should summarily order \$65,880 be paid to Pierson from the court registry.<sup>4</sup> Monk contends that nothing should be paid to Pierson, asserting that he, prior to the court's judgment, has paid Pierson \$67,634.80, and noting that in the court's Memorandum Decision the court "did not address whether the sums so ordered were in addition to any sums previously paid or whether the Court felt that that amount was sufficient in its entirety for the inverse condemnation claim." Declaration of David Monk at 2. Neither Pierson's nor Monk's position provides the court a basis for a dispositive ruling on Pierson's motion.

On the subject of Pierson's attorney fees, the court in its Memorandum Decision determined only the amount of reasonable fees to be awarded to Monk on his successful claim for inverse condemnation pursuant to RCW 8.25.075 (3) and (4). The court made no rulings about the existence, terms, scope and enforceability of any fee agreement Pierson and Monk may have, or whether the fee agreement is a "special agreement" within the meaning of RCW 60.40.010 (1)(d) and (e), nor did the court make rulings as to

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identifying the "claimant" (presumably Richard W. Pierson, the Notice of Attorneys' Lien having been signed by "Joseph H. Marshall...for Richard W. Pierson", Notice of Attorney's Lien at 3. In any event, under RCW 60.40.010 (1) (d), Pierson appears to have "an attorney's lien for compensation, whether express or implied, [which] arises by operation of law '[u]pon an action...and its proceeds after the commencement' of the action." Smith v. Moran Windes & Wong, 145 Wn. App. 459, 466 (2008) (court's emphasis, quoting the statute). "Unlike subsection 1(e) that requires filing of a notice with the clerk of the court where a lien against a judgment is sought, no such notice is required by (1) (d), establishing a lien against an action and its proceeds." Smith, 145 Wn. App. at 470.

<sup>4</sup> Pierson's January 16, 2009 declaration offers virtually no evidentiary support for these contentions.

the reasonableness of attorney fees billed to Monk by Pierson for legal services other than those billed for the inverse condemnation claim. Moreover, the showing made on this motion is insufficient for the court to determine whether any portion of the \$67,634.80 which Monk contends he paid Pierson prior to entry of the judgment was for services included within the \$65,880 in fees that the court previously ruled were reasonable and therefore reimbursable to Monk by the Cities for the inverse condemnation claim.

Accordingly, it is the court's conclusion that an evidentiary hearing is appropriate to resolve these and any other issues that Monk or Pierson may raise as to the enforceability of Pierson's lien, consistent with the Court of Appeals' decision in King County v. Seawest Investment Associates, 141 Wn. App. 304 (2007); see Ross v. Scannell, 97 Wn. 2d 598, 604, 606-609 (1982). As the court stated in King County, 141 Wn. App. at 313:

We conclude that a fair reading of the attorney lien statute requires us to hold that the legislature intended the summary procedures set forth in RCW 60.40.030 to apply only when RCW 60.40.020 applies. Specifically the procedures of RCW 60.40.030 are triggered when the claimed lien is asserted against money or papers of the client, but not when the lien is asserted against a judgment.

The court explained that an evidentiary hearing offers an appropriate "form of proceeding" to adjudicate an attorney's lien against a judgment, King County, 141 Wn. App at 314-316 (footnotes omitted):

Where an attorney lien is claimed against a judgment, the court has a right to determine all questions affecting the judgment in some form of proceeding. A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.

ORDER DENYING RICHARD PIERSON'S  
MOTION TO ENFORCE ATTORNEY'S LIEN App. A-4  
PENDING ADJUDICATION BY  
EVIDENTIARY HEARING - 4

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The trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice. Here, the only persons asserting an interest in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, bring counterclaims, and argue their theories of the dispute. \*\*\*

At the same hearing, the trial court also determined that the written fee agreement was enforceable and that the fees were reasonable. In Krein [v. Nordstrom, 80 Wn. App. 306, 308-311(1995)], this court considered whether the lack of a full adversarial hearing in adjudicating an attorney's lien was error. We held that in considering the fee involved, the statutory requirements, and the hearing actually held, that the procedure comported with due process. The procedure followed here also fully complies with due process.

Based upon the foregoing, NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Pierson's Motion to Enforce Attorney's Lien is denied pending adjudication by an evidentiary hearing.
2. An evidentiary hearing is set to adjudicate Pierson claimed attorney's lien before this court commencing at 9 a.m. on June 8, 2009.
3. Pierson is directed to provide notice and a copy of this order no later than March 9, 2009, to all persons and entities who may claim an interest in the judgment entered herein on October 22, 2008.<sup>5</sup>
4. The evidentiary hearing will be managed by the following case schedule:

Deadline for discovery cutoff	April 6, 2009
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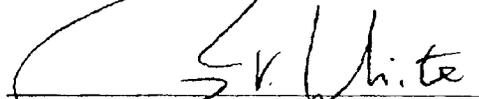
<sup>5</sup> As a courtesy, the court is faxing and mailing a copy of this order to the parties or attorneys who apparently had notice of Pierson's motion: Stephanie Croll, Robert Boyd, John M. Groen, and James J. Dore, Jr., as well as to Richard W. Pierson through the offices of Williams & Williams, and to Kristina A. Dreissen, attorney for David Monk; however, it is Pierson's responsibility to provide formal notice to all who may claim an interest in the judgment. See also Order Denying Robert Boyd's Motion to Enforce Engineering (Surveying) Lien, entered separately today.

ORDER DENYING RICHARD PIERSON'S  
MOTION TO ENFORCE ATTORNEY'S LIEN App. A-5  
PENDING ADJUDICATION BY  
EVIDENTIARY HEARING - 5

Deadline for disclosure of primary witnesses. <u>See</u> LCR 26 (b) (1),(3)	April 13, 2009
Deadline for disclosure of additional witnesses. <u>See</u> LCR 26 (b) (2), (3)	April 20, 2009
Deadline for engaging in Alternative Dispute Resolution <u>See</u> LCR 16 (b).	May 8, 2009
Deadline for exchange of witnesses exhibit lists and documentary exhibits. <u>See</u> LCR 4 (j):	May 18, 2009
Deadline for hearing Dispositive Motions	May 25, 2009
Deadline for Motions in limine	May 29, 2009
Deadline for Joint Statement of Evidence and Exhibit Notebooks (one for clerk, one for the judge) containing exhibits listed in Joint Statement of Evidence placed behind numbered tabs corresponding with numbers designated in Joint Statement of Evidence	June 1, 2009
Deadline for evidentiary hearing briefs	June 1, 2009
Deadline for proposed Findings of Fact and Conclusions of Law. <u>See</u> <u>Mahler v. Szucs</u> , 135 Wn. 2d 398, 433-435 (1998):	June 1, 2009
Evidentiary Hearing	June 8, 2009

5. This case schedule may be amended on motion of an interested party or the court on its own initiative utilizing the procedures set forth in LCR 4 (d).

DATED this 27<sup>th</sup> day of February, 2009.

  
 Judge Jay V. White

ORDER DENYING RICHARD PIERSON'S  
 MOTION TO ENFORCE ATTORNEY'S LIEN App. A-6  
 PENDING ADJUDICATION BY  
 EVIDENTIARY HEARING - 6