

No. 67503-6-1-I

DIVISION I, COURT OF APPEALS  
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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ON APPEAL FROM KING COUNTY SUPERIOR COURT

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BRIEF OF RESPONDENTS KRISTINA DRIESSEN AND RYAN &  
DRIESSEN, INC., P.S.

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## I. INTRODUCTION AND SUMMARY

This legal malpractice action arises from the lengthy inverse condemnation lawsuit brought by David Monk and White River Feed Company, Inc. (collectively, “Monk”) against the Cities of Auburn and Kent (the “Cities”). When a road construction project undertaken by the Cities occupied approximately .05 acre of Monk’s land in 2001, he hired attorney Richard Pierson on an hourly basis and aggressively pursued numerous claims against the Cities (the “inverse condemnation lawsuit”), allegedly based on Pierson’s representation that Monk could recover his attorney’s fees from the Cities when he prevailed. However, all but one of Monk’s claims were dismissed on summary judgment, and a jury awarded a paltry \$47,000 for the encroachment on Monk’s land.

The real fight in the inverse condemnation lawsuit centered on Pierson’s attorney’s fees, which were recoverable pursuant to statute. Although Pierson had billed Monk for \$212,663, the trial court, Judge White,<sup>1</sup> awarded Monk only \$65,880 for fees attributable to Pierson’s work, finding that the remainder was either not attributable to claims covered by the inverse condemnation statute, or unreasonable. Judge White’s 109-page memorandum opinion excoriated Pierson for pursuing

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<sup>1</sup> To prevent confusion between the rulings in the inverse condemnation lawsuit and this case, Driessen will refer, where appropriate, to the judges – Judge White and Judge St. Clair – by name.

frivolous claims, refusing to negotiate in good faith, and for sanctionable conduct at trial. Pierson filed an attorney's lien on the judgment in the amount of \$65,880 and moved to enforce it, at which point Monk hired Kristina Driessen to defend his interest in the attorney's fee award. After an evidentiary hearing, Judge White allowed Pierson to enforce his lien for only 47% of the claimed amount, plus interest.

Nearly three years later, Monk brought a legal malpractice claim, not against Pierson, but against Driessen, alleging that because of her actions, he is now barred by the compulsory counterclaim rule of CR 13(a) and *res judicata* from pursuing claims for legal malpractice, breach of fiduciary duty, and violation of the Consumer Protection Act ("CPA") against Pierson. Driessen moved for summary judgment, arguing that Monk was not barred from pursuing his claims against Pierson. On July 12, 2011, Judge St. Clair granted Driessen's motion for summary judgment, ruling "against" Monk and implicitly holding that he may assert his claims against Pierson. This ruling would seem like good news for Monk and, indeed, he subsequently filed suit against Pierson. However, Monk would apparently prefer to proceed against Driessen, and has therefore appealed Judge St. Clair's ruling.

The issues presented by this appeal are straightforward. First, Monk argues that pursuant to CR 13(a), his claims against Pierson were

“compulsory counterclaims” to Pierson’s motion to enforce his attorney’s lien against the judgment in the inverse condemnation lawsuit. However, the plain language of CR 13(a) precludes this argument, because counterclaims may only be asserted in a “pleading” responding to a “claim” by an “opposing party” upon which the court has jurisdiction to enter a “personal judgment.” None of these requirements are met here.

Second, Monk argues that his claims against Pierson are barred by *res judicata*. But *res judicata* does not apply here because, at the time of Judge St. Clair’s ruling, Pierson had not sued Monk, and Monk had not sued Pierson, and so there was no “final judgment” that would preclude a subsequent action. Moreover, Washington courts consistently decline to apply *res judicata* to bar claims that are related to an earlier foreclosure or forfeiture proceeding where the court’s jurisdiction was strictly *in rem*, as was the case here. Finally, application of *res judicata* in those situations would result in manifest injustice, for it would effectively force a party to litigate valuable legal claims in a truncated equitable or statutory proceeding, or forever lose the right to raise those claims.

Finally, Monk’s reliance on *King County v. Seawest Inv. Assoc., LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), is misguided. *Seawest* does not cite or discuss CR 13(a), or the doctrine of *res judicata*, much less alter those well-established rules in the context of a motion to enforce an

attorney's lien. *Seawest* says only that, in overseeing such a motion, a trial court must give the client a sufficient opportunity to object to the lien and raise any defenses or counterclaims the client wants to raise. *Seawest* did not suggest that counterclaims were compulsory, or that *res judicata* would prevent the client from choosing to assert his or her claims against the attorney in a separate lawsuit. For this reason too, Monk's current claims against Pierson are not barred and, therefore, Judge St. Clair's grant of summary judgment in favor of Driessen must be affirmed.

## II. COUNTERSTATEMENT OF THE ISSUES

Appellant Monk's assignment of error raises the following issues:

1. Did Pierson's motion to enforce his attorney's lien require Monk to assert CR 13(a) "compulsory counterclaims"?
2. Does the doctrine of *res judicata* preclude Monk from asserting claims against Pierson if those claims were not raised in response to Pierson's motion to enforce his attorney's lien?

## III. COUNTERSTATEMENT OF THE CASE

### A. The Inverse Condemnation Case.

Monk owned property on 78<sup>th</sup> Avenue South in Kent. [CP 3, ¶ 3.6; CP 77.] In May 2001, the Cities began a road construction project on 277<sup>th</sup> Street South and 78<sup>th</sup> Avenue South. [*Id.* at ¶ 3.7.] In the course of this project, the Cities deposited fill dirt on Monk's property, and Monk

hired Pierson to pursue an inverse condemnation lawsuit after Pierson allegedly assured him that the Cities would have to pay all of his attorney's fees. [CP 3-4, ¶¶ 3.8-3.10.] Monk filed suit against the Cities, alleging inverse condemnation and a variety of other claims. [CP 5, ¶ 3.15.] Each of Monk's claims, except the inverse condemnation claim, was dismissed on summary judgment. [CP 6-7, ¶ 3.21.] Proceeding on Monk's inverse condemnation claim, Judge White found after a bench trial that a "taking" had occurred. Thereafter, the jury awarded Monk \$47,388 for the taking of .05 acre of his property. [CP 8, ¶ 3.29.]

Judge White originally denied Monk an award of fees under RCW 8.25.075(1), which allows a successful inverse condemnation plaintiff to recover reasonable attorney's fees, expert's fees, and costs, because he found that Monk had failed to improve upon the Cities' CR 68 offer of judgment. [CP 8, ¶ 3.30.] This Court reversed and remanded that ruling. *Monk v. City of Auburn*, 128 Wn. App. 1066, 2005 WL 1870790, \*4 (Wn. App.), *rev. denied* 157 Wn.2d 1023, 142 P.2d 608 (2006). On remand, Judge White entered a 109-page "Memorandum Decision" finding, among other things, that the majority of the fees incurred by Pierson were unreasonable. [CP 48-180.] Pierson billed a total of \$212,684.50 to Monk, of which Judge White evaluated the reasonableness

of approximately \$140,000 of those fees for purposes of determining what the Cities must pay as part of the judgment. [CP 188.]

Judge White found that many of Pierson's fees were "wasted on non-meritorious claims," and that "presumably due to the faulty advice of counsel, [Monk] never had a realistic understanding of the value of his claim and never engaged in good faith settlement negotiations." [CP 98.] Judge White was also sharply critical of Pierson's conduct at trial, which had resulted in CR 11 sanctions upheld by the Court of Appeals [CP 100], and noted that Pierson wasted time at trial

by repeated argument with the court over rulings already made; by multiple threats by Pierson that the court's ruling would require him to take a nonsuit or move for a mistrial or "just fold it up or go home"; by efforts to introduce exhibits not previously disclosed or, although admitted at the bench trial, not relevant in the jury trial; and by repeated violations of the court's rulings in limine which required the court to engage in sidebars or excuse the jury from the courtroom.

[CP 100-101.] Following his thorough analysis of Pierson's fees, Judge White required the Cities to pay \$65,880 out of the total claimed sum attributable to Pierson's work, or approximately 47%. [CP 188.]

**B. Pierson's Motion to Enforce Attorneys' Lien.**

The Cities paid \$317,769.19 into the court's registry, which included the actual judgment, as well as attorney's fees awarded for Pierson, Monk's two other attorneys, Jim Dore and John Groen, and various experts. [CP 186, ¶ 17.] On October 18, 2008, pursuant to

RCW 60.40.010(1)(e), Pierson filed a Notice of Attorney's Claim of Lien for that \$65,880. [CP 485-88.] On December 12, 2008, Judge White disbursed all funds in the court's registry not encumbered by Pierson's lien, leaving only \$65,880. [CP 186, ¶¶ 19-20.]

On January 16, 2009, Pierson filed a motion to enforce his attorney fee lien. [CP 497-500.] Pierson argued that "Monk signed a written fee agreement for attorney services," [CP 498], and noted that "[i]n determining the amount of an attorney's lien, RCW 60.40.010(1) plainly distinguishes between 'value of services' and sums due under a special agreement." [CP 499.] He argued that "Monk's claimed payment [to Pierson] of \$66,917.00 is still well short of the \$212,633 he owes pursuant to the fee agreement" [CP 499], and therefore moved to enforce his lien on the entire \$65,880 remaining in the Court's registry. [CP 497.]

Judge White initially denied Pierson's motion without prejudice. He noted that "Richard W. Pierson is not a 'plaintiff' or otherwise a party to this action. The court treats his motion as one to 'enforce attorney's lien' . . . ." [CP 192 n.1.] Judge White therefore set an evidentiary hearing for June 8, 2009 specifically "to adjudicate Pierson['s] claimed attorney's lien." [CP 196.]

Monk hired Driessen to oppose Pierson's motion. Monk opposed Pierson's argument by arguing that (a) he had already paid Pierson more

than the amount secured by the lien [CP 344], and (b) Pierson incurred unnecessary fees to which the lien should not apply. [CP 345.] At the hearing, Judge White received ten exhibits, including the fee agreement and billing statements, Pierson's notice of lien and declaration in support of fees, Monk's declaration for disbursement of funds not encumbered by the lien, letters between Monk and Pierson regarding the fees, and two 2004 letters from the Cities regarding settlement of the inverse condemnation case. [CP 183.] Judge White also heard oral testimony from witnesses, although his order does not indicate what witnesses testified, the subject-matter of their testimony, or Judge White's assessment of that testimony.<sup>2</sup>

Although Monk, represented by Driessen, challenged the validity of Pierson's lien, he did not assert any "counterclaims" for affirmative relief against Pierson in response to Pierson's motion. The result of Judge White's hearing was highly favorable to Monk. To resolve Pierson's motion to enforce his attorney's lien, Judge White referred to his previous Memorandum Decision. [CP 188, ¶ 7.] There, Judge White had addressed the reasonableness of \$140,591.20 of the total fees for which Pierson had billed Monk (for purposes of determining whether the Cities were required to pay the fees as part of the judgment), and determined that

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<sup>2</sup> Pierson subsequently placed only a few of these documents, and none of the testimony, before Judge St. Clair in opposition to Driessen's motion for summary judgment in this case.

47% of those fees were reasonable. [CP 188, ¶¶ 7, 9.] Judge White decided to apply the same 47% to the remaining \$72,093.30 of Pierson's fees that the Court had not previously addressed in the Memorandum Decision, and allowed Pierson to enforce his lien only up to \$33,883.85 plus interest. [*Id.* at ¶¶ 10-12.] Thus, despite the fact that Pierson had more than \$144,000 in outstanding invoices, Judge White allowed Pierson to enforce his lien against the judgment for only \$33,883.51 in fees plus interest. [CP 188, ¶¶ 10-12.]

**C. Monk's Malpractice Action Against Driessen.**

Although Monk says he has claims against Pierson for legal malpractice, breach of fiduciary duty, and violations of the CPA, he chose not to sue Pierson. Instead, Monk filed this lawsuit against Driessen on March 7, 2011, alleging that Driessen should have asserted Monk's claims against Pierson as "counterclaims" in response to Pierson's motion to enforce his attorney's lien in the inverse condemnation action. [CP 11, ¶ 4.14.] Even though no court has so held, Monk alleged that he was now barred by CR 13(a) and *res judicata* from asserting those claims against Pierson in a subsequent action. [CP 12, ¶ 4.15.]

Driessen moved for summary judgment on the ground that Monk's claims against Pierson were not compulsory counterclaims to Pierson's motion under CR 13(a), nor barred by *res judicata*. [CP 22-43.] Judge St.

Clair agreed, and dismissed Monk's claims with prejudice. [CP 590-92.] Judge St. Clair also denied Monk's cross-motion for summary judgment, which sought dismissal of two affirmative defenses. [CP 587-89.] On appeal, Monk argues that (1) his claims against Pierson are barred because they were compulsory counterclaims under CR 13(a), and (2) his claims against Pierson are barred by *res judicata*. Although only relevant in the event of a remand, Monk also appeals the trial court's denial of his cross-motion seeking dismissal of Driessen's affirmative defenses.

#### IV. ARGUMENT

##### A. **Standard of Review.**

This Court reviews a grant of summary judgment de novo, applying the same standard as the trial court. *Shields v. Morgan Fin. Inc.*, 130 Wn. App. 750, 755, 125 P.3d 164 (2005). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show no issues of material fact exist and that the moving party is entitled to judgment as a matter of law. CR 56(c). This Court may affirm the trial court's decision on any ground sufficiently developed in the record. RAP 2.5(a).

##### B. **The Trial Court Properly Granted Driessen's Motion for Summary Judgment.**

The sole basis of Monk's lawsuit against Driessen is his theory that Driessen's actions in the attorney's lien proceeding preclude him from

now suing Pierson for malpractice and other claims. The trial court properly rejected that theory. Monk is not now, and will not be, precluded from raising his claims against Pierson in a separate action because Monk's claims were not "compulsory counterclaims" in the lien proceedings and, for that and other reasons, the doctrine of *res judicata* does not apply. Finally, *King County v. Seawest Inv. Assoc., LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007), does not preclude Monk from bringing his claims against Pierson.

**1. Monk's Claims Against Pierson Were Not Compulsory Counterclaims in the Inverse Condemnation Lawsuit.** Monk's suit was properly dismissed because there were no "compulsory counterclaims" to Pierson's motion to enforce the attorney's lien in the underlying inverse condemnation lawsuit. The Washington rule for compulsory counterclaims is set forth in CR 13(a), which provides:

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. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party ***brought suit*** upon his ***claim*** by attachment or other process by which the court did not acquire jurisdiction to render a ***personal judgment on that claim***, and the pleader is not stating any counterclaim under this rule.

(Emphasis added.) “The considerations behind compulsory counterclaims include judicial economy, fairness and convenience.” *Chew v. Lord*, 143 Wn. App. 807, 181 P.3d 25 (2008) (quoting *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 866, 726 P.2d 1 (1986)). Monk focuses on whether a “logical relationship” existed between Pierson’s lien and Monk’s claims against Pierson. Monk’s argument regarding the “logical relationship” fails for the reasons discussed below in the context of *res judicata*. Moreover, Monk ignores entirely the prerequisites to a CR 13(a) counterclaim. None of those prerequisites were satisfied, and therefore the Court need reach the “logical relationship” issue.

**a. No Pleading.** By its plain terms, CR 13(a) applies only if Monk submitted a “pleading” in response to Pierson’s motion to enforce his attorney’s lien as that term is defined in the Civil Rules. He did not. CR 7(a) defines the term “pleadings” as follows:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of rule 14; and a third party answer, if a third party complaint is served. ***No other pleading shall be allowed***, except that the court may order a reply to an answer or a third party answer.

(Emphasis added.) By contrast, CR 7(b) defines “motions” separately, stating in relevant part: “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in

writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.”

Monk admits that Pierson did not file any “pleading” in the inverse condemnation lawsuit, but rather a “motion” to enforce his attorney’s lien. [CP 9, ¶ 3.35.] Pierson filed no “complaint;” Monk filed no “answer.” Indeed, Monk was *prohibited* from filing a “pleading” in response to Pierson’s motion. *See* CR 7(a) (“No other pleading shall be allowed . . .”). Instead, Monk did the only thing he could do in response to Pierson’s motion: with the assistance of Driessen, he filed an opposition brief. [CP 342-46.] It is well established that “[a] claim that should have been pleaded as a compulsory counterclaim in the first suit will only be barred in a subsequent action if a responsive pleading, such as an answer, was required to be or was served in the earlier action.” 3 James Wm. Moore, *Moore’s Federal Practice* § 13.15, p. 13-37 (3d. ed. 2011).<sup>3</sup>

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<sup>3</sup> *See also* *Lawhorn v. Atlantic Refining Co.*, 299 F.2d 353, 356 (5th Cir. 1962) (holding no compulsory counterclaim existed where complaint dismissed on motion under CR 12(b)(6) because “if the counterclaim is one which must be asserted, i.e., is compulsory, then it must be set forth in a *pleading*”) (emphasis in original); *U.S. v. Snider*, 779 F.2d 1151, 1157 (6th Cir. 1985) (holding no compulsory counterclaim existed where complaint dismissed on motion under CR 12(b)(6) because “Rule 13(a) only requires a compulsory counterclaim if the party who desires to assert a claim has served a pleading”); *Martino v. McDonald’s System, Inc.*, 598 F.2d 1079 (7th Cir. 1979).

Pierson's motion, and Monk's opposition, were not "pleadings" and, thus, CR 13(a)'s compulsory counterclaim rule was never triggered.

**b. No Opposing Party.** Nor was Pierson an "opposing party" in the inverse condemnation lawsuit—another requirement of CR 13(a). He was not a party at all. Pierson was not the plaintiff or defendant under CR 17; he was not a third-party plaintiff under CR 14; and he did intervene under CR 24. Indeed, Judge White addressed this issue directly, holding that "Richard W. Pierson is not a 'plaintiff' or otherwise a party to this action." [CP 192, n.1.] Judge White's ruling was entirely consistent with Washington's Civil Rules, and is dispositive under Washington law. *Nancy's Product, Inc. v. Fred Meyer, Inc.*, 61 Wn. App. 645, 811 P.2d 250 (1991), *rev. den.* 117 Wn.2d 1017, 818 P.2d 1099 (1991) ("To interpret the term 'opposing party' in the context of the court rules so as to include a nonparty with an adverse interest is a non sequitur. We hold that an opposing party for purposes of CR 13(a) is one who asserts a claim against the prospective counter claimant in the first instance."). As demonstrated below, Pierson never asserted a claim against Monk – he sought only to assert his lien against the judgment – and was therefore not an "opposing party." Case law from other jurisdictions is in accord.

Two state supreme courts have confronted this issue, both holding that Civil Rule 13(a) does not require a client to assert compulsory counterclaims in response to motion to enforce an attorney's lien. In *Computer One, Inc. v. Grisham & Lawless P.A.*, 144 N.M. 424, 431, 188 P.3d 1175 (N.M. 2008), the New Mexico Supreme Court noted that “ancillary participants in a lawsuit may find themselves at odds with each other, but not necessarily be ‘opposing parties.’” *Id.* The Court reasoned:

Given the grave consequences of [CR 13(a)], we think that rule is better served by a sense of certainty and predictability implicit in the notion that one must first be a “party” before one can be an “opposing party.” And as this Court made clear in *Bennett*, an attorney does not transform his former client into either, merely by taking steps to secure attorney fees in the same underlying proceeding.

*Id.* The Kansas Supreme Court similarly held that “[b]y moving to enforce an attorney’s fee lien in the underlying action, [the attorney] was proceeding against the judgment itself, not against the former client,” and was not “an ‘opposing party’ for purposes of the compulsory counterclaim rule.” *Tilzer v. Davis, Bethune & Jones LLC*, 204 P.3d 617, 624 (Kan. 2009). This Court should likewise conclude that Pierson was never an “opposing party” to Monk in the inverse condemnation action.

**c. No Personal Judgment On A Lien.** Finally, CR 13(a) states that it does not apply when “the opposing party brought suit upon his claim by attachment or other process by which the court did not

acquire jurisdiction to render a *personal judgment* on that claim.” (Emphasis added.) Thus, for example, where a party defends an *in rem* proceeding against specific property or proceeds, Washington courts routinely apply CR 13(a)’s “personal judgment” exception. *See Matter of Estate of Hansen*, 81 Wn. App. 270, 282, 914 P.2d 127 (1996) (citing 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1411; *United States v. 35 Fulling Ave., Tuckahoe, N.Y.*, 772 F. Supp. 1433, 1438 (S.D.N.Y. 1991)). This exception plainly applies here.

In the inverse condemnation lawsuit, Pierson did not sue Monk. He moved *in rem* against the funds deposited in the court registry. [CP 497-500.] Both Washington cases and the plain language of the attorney’s lien statute show that an attorney’s lien does not subject the client to a “personal judgment.” *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 471, 187 P.3d 275 (2008) (“The question here is whether [the attorney] had a valid lien for attorney’s fees against the settlement proceeds, not whether the law firm has a right of action against [the client] for unpaid fees.”); RCW 60.40.010(1)(e) (lien applies to “judgment”). *See also Lee v. Western Processing Co., Inc.*, 35 Wn. App. 466, 669, 667 P.2d 638 (1983) (“Proper service of the summons and complaint was necessary to invoke the court’s jurisdiction over

[defendant].”). Thus, if Monk had not responded to Pierson’s motion, Judge White would have no jurisdiction to enter a default judgment against Monk. *See* CR 4(b) (requiring that summons inform defendant that if no answer is filed, court may enter default judgment). Washington law on this point is consistent with case law from around the nation, which holds that an attorney’s lien “is asserted against the judgment or settlement fund arising from a lawsuit, not against the client; it is not an independent lawsuit.” *Computer One*, 424 N.M at 429. Judge White recognized this too. He ruled only that Pierson could enforce a portion of his lien against the judgment proceeds. [CP 189.] Judge White did not, and could not, decide or enter judgment on any claim Pierson had against Monk personally for unpaid legal fees.

In sum, Pierson’s motion to enforce his attorney’s lien was not a “pleading,” Pierson and Monk were not “opposing parties,” and Judge White had no jurisdiction to enter a “personal judgment” against Monk on the lien and did not do so. The compulsory counterclaim rule of CR 13(a) did not apply. While Monk could object to and oppose the motion, he was under no compulsion to assert any counterclaim.

**2. Monk Is Not Barred by *Res Judicata*, or Claim Preclusion, From Pursuing His Claims Against Pierson.** For virtually all the same reasons, Monk’s claims against Pierson are not barred by *res*

*judicata*. It is literally hornbook law that “any claims that do not meet the test for compulsory counterclaims are permissive counterclaims that may be brought in an independent action.” 3 James Wm. Moore, Moore’s Federal Practice § 13.30[1], p. 13-47 (3d. ed. 2011). *Cf. Krikava v. Webber*, 43 Wn. App. 217, 716 P.2d 916 (1986) (“Although *res judicata* may apply when co-parties are adversaries through cross pleadings, it applies only to those claims that were actually asserted through cross pleadings. Otherwise, application of *res judicata* in such circumstances would conflict with the rule that cross-claims are permissive”). Monk has cited no case in which *res judicata* has been applied, in contradiction of established black-letter law and common sense, to bar a subsequent independent action on a claim that was not a compulsory counterclaim in the first suit. *See Seawest*, 141 Wn. App. at 317 (“Because Seawest has cited no authority, we must presume it has found none.”); *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (same). Monk apparently agrees, because after Judge St. Clair’s dismissal of his claim against Driessen, Monk brought an independent action against Pierson. [Appellant’s Brief, p. 4 n.1.] Even though that action remains pending, Monk cynically argues that his own action is barred by claim preclusion because, notwithstanding the fact that CR 13(a) did not apply, Monk was

required to assert all his claims in response Pierson's motion to enforce his attorney's lien, or lose them forever.

Monk bears the burden of proving each element of *res judicata*. *Ensley v. Pitcher*, 152 Wn. App. 891, 222 P.3d 99 (2009). "*Res judicata*, or claim preclusion, applies where a prior final judgment is identical to the challenged action in (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." *Lynn v. Wash. State Dept. of Labor and Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005) (internal footnotes omitted). Monk must satisfy all four elements. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004). Whether *res judicata* bars a party pursuing an action is an issue of law. *Lynn*, 130 Wn. App. at 837. Monk cannot establish any of the requisite elements as a matter of law and, indeed, application of *res judicata* would work a manifest injustice in this context.

**a. No Prior Judgment.** "The threshold requirement of *res judicata* is a final judgment on the merits in the prior suit." *Hisle*, 151 Wn.2d at 865. Monk did not address this threshold issue, either in the trial court or his opening brief on appeal. There was not much he could say - there was no "prior suit" between Pierson and Monk, and neither Pierson nor Monk filed suit or asserted claims against the other. There is no judgment relating to Pierson's attorney's fees or representation of

Monk in the inverse condemnation action. Monk has made no argument, either below or on appeal, that Judge White's grant of Pierson's motion to enforce his attorney's fee lien was a "judgment on the merits," or that it was binding on Monk or Pierson personally. No further analysis is needed; *res judicata* does not apply.

**b. No Identity of Parties.** Monk's effort to satisfy the third and fourth elements – identical "persons and parties" and "the quality of the persons for or against whom the claim is made" – is similarly futile. Pierson was not a party to the inverse condemnation lawsuit at all, as Judge White explicitly recognized. [CP 192, n.1.] Monk did not, and could not, raise any affirmative claims against Pierson. And, while Monk was a party to the inverse condemnation lawsuit, he was not a party to any suit brought by Pierson; as noted, Judge White had no jurisdiction to enter a "personal judgment" against Monk in any event. In short, while both Pierson and Monk had a stake in the funds sitting in the court's registry, they were not parties to a lawsuit involving Pierson's claims for unpaid fees or Monk's claims for legal malpractice, breach of fiduciary duty, and CPA violations. That lawsuit remains pending.

**c. No Identity of Claims or Subject Matter.** By the same token, Pierson's motion to enforce his attorney's lien was not a "cause of action" with an identical "subject matter" as Monk's lawsuit

against Pierson. As established above, an attorney's lien motion is not a lawsuit or claim against the client. *Smith*, 145 Wn. App. at 471. And under well-established Washington law, collection efforts do not qualify as a "cause of action" and cannot trigger application of *res judicata*. See *Robin L. Miller Const. Co., Inc. v. Coltran*, 110 Wn. App. 883, 887-88, 43 P.3d 67 (2002) ("An attempt to execute a judgment lien, however, is not a cause of action. . . . Because an attempt to execute a judgment lien is not a cause of action, we find that *res judicata* principles do not apply to this case."). The judgment below can be affirmed on this basis alone; *res judicata* does not apply.

Even if Pierson's motion was tantamount to a claim, two causes of action are identical only if: "(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts." *Spokane County v. Miotke*, 158 Wn. App. 62, 67, 240 P.3d 811 (2010). Monk could not satisfy this test below, in no small part because there simply was nothing to compare; as noted, there was no action between Pierson and Monk in the inverse condemnation lawsuit, nor had Monk even filed a separate action against Pierson when Judge St. Clair ruled. Indeed, Monk sued Pierson only *after* judgment was entered below,

and that action remains pending. In any event, Judge St. Clair did not err in concluding that Monk failed to establish identity of actions.

To begin with, Monk's new action against Pierson will not "impair the rights" established by Judge White, nor was "infringement of the same right alleged in both actions." An attorney's lien reflects an attorney's property interest in a client's judgment, *Smith*, 145 Wn. App. at 468, and is a means "to secure his compensation." *Ross v. Scannell*, 97 Wn.2d 598, 604, 647 P.2d 1004 (1982). In granting Pierson's motion, Judge White only considered whether Monk was indebted to Pierson under a fee agreement and applied his previously-determined 47% "reasonableness" finding from the earlier Memorandum Decision. [CP 188.] The lien simply gave Pierson a right to collect a portion of what he said he was owed. *See Mead v. Park Place Properties*, 37 Wn. App. 403, 407, 681 P.2d 256 (1984), *rev. den.* 102 Wn.2d 1010 (1984) (refusing to apply *res judicata* to landlord's claim for damages following unlawful detainer proceeding because "since the unlawful detainer action was limited to the issue of possession, there was no identity of cause of action"). Judge White was not asked to consider and did not find that Pierson committed malpractice, breached a fiduciary duty, or violated the CPA. Monk's claims for legal malpractice, breach of fiduciary duty, and CPA violations

will be considered for the first time in his pending action against Pierson, and nothing that happens in that case will effect Judge White's ruling.

Nor do the two actions "arise out of the same nucleus of facts" or involve the same evidence. As a preliminary matter, Monk could not and did not establish an overlap between the two "actions"—presumably because Monk had not even filed an action against Pierson when Judge St. Clair considered the *res judicata* issue. Below, Monk offered no pleadings, claims or facts for Judge St. Clair to compare. For example, Monk did not place all the documentary evidence considered by Judge White, or the evidentiary hearing transcript, before Judge St. Clair, let alone identify the specific evidence and testimony he would use to establish his affirmative claims against Pierson in an independent action. Judge St. Clair did not err in holding that Monk failed to carry his burden to establish all elements of *res judicata*. Indeed, even with the benefit of hindsight and having subsequently filed suit against Pierson, Monk's conclusory argument on appeal, devoid of citation to the record, is equally deficient. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In any event, Monk's citation to a single quote from his opposition to Pierson's motion to enforce does not show an identity of subject matter. [Appellant's Brief, p. 15.] To be sure, the fact that the attorney's lien

motion and Monk's current action relate to Pierson's representation of Monk in the inverse condemnation action is insufficient. The Supreme Court has repeatedly held that for *res judicata* purposes, "the same subject matter is not necessarily implicated in cases involving the same facts." *Hisle*, 151 Wn.2d at 866. At most, the quote shows that Monk objected to Pierson's lien because Pierson's fees were "excessive," but facts relating to the "reasonableness" of a fee are not remotely relevant to any element of Monk's claims for legal malpractice, breach of fiduciary duty, and CPA claims against Pierson. Put simply, whether Pierson's representation of Monk fell below the professional standard of care, breached his fiduciary duty, or violated the CPA were not considered by Judge White in the context of the attorney's lien motion because those issues were not relevant.<sup>4</sup>

### **3. Application of *Res Judicata* Would Result in Injustice.**

The doctrine of *res judicata* should not be applied "so rigidly as to defeat the ends of justice, or to work an injustice." *Thompson v. Dept. of*

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<sup>4</sup> To take but one example, the CPA does not apply to the quality of an attorney's services, but only to the "entrepreneurial" aspects of Pierson's actions. *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007). Thus, Monk's CPA claims must relate to unfair or deceptive practices employed in obtaining his patronage. However, the record before Judge St. Clair and this Court is devoid of any suggestion that the evidence needed to determine the validity of Pierson's lien is the same as that needed to prove Monk's CPA claim.

*Licensing*, 138 Wn.2d 783, 794, 982 P.2d 601 (1999). It is for this reason that Washington courts refuse to apply *res judicata* where, as here, the first action was an accelerated statutory hearing based solely on *in rem* jurisdiction. For example, in *Hansen, supra*, the City of Kent seized Hansen’s property in a law enforcement action, and Hansen moved to have the property released within 90-days to avoid forfeiture under RCW 69.50.505(e)-(f). Hansen prevailed, and the forfeiture proceedings were dropped. Thereafter, Hansen brought a separate civil rights lawsuit against the City. 81 Wn. App. at 276-77. The City argued that the “second” lawsuit was barred by *res judicata* because Hansen could have raised his claims in the earlier forfeiture proceedings. *Id.* at 277.

Even though Hansen had objected to forfeiture on grounds similar to those raised in his later civil rights action—which the City characterized as “equitable counterclaims”—this Court refused to apply *res judicata*:

The short period following seizure and notice during which protesting parties are required to respond and seek a hearing cannot be imposed, directly or indirectly, on the parallel federal cause of action which may accrue by virtue of the seizure, under 42 U.S.C. § 1983. Consequently, a § 1983 claim is not foreclosed by reason of *res judicata* by a claimant’s failure to raise it when responding to the *in rem* forfeiture proceeding.

*Id.* at 282; *see also Hayes v. City of Seattle*, 76 Wn. App. 877, 880, 888 P.2d 1227 (1995) (“If *res judicata* applied, the limitation period for section 1983 claims involving land use permits would be effectively

reduced from 3 years to 30 days. This result is incompatible with and must yield to the policies which underlie the 3-year period for section 1983 claims.”), *aff'd on other grounds* 131 Wn.2d 706, 934 P.2d 1179 (1997). Moreover, the *Hansen* Court explicitly rejected the application of *res judicata* to *arguments* asserted in a previous proceeding where a counterclaim was not compulsory. 81 Wn. App. at 282-83 (“We also reject the City's contention that by moving for release of the seized property, Hansen interposed an ‘equitable’ counterclaim, so that he should have been required to raise his § 1983 claims, as well. The City cites no authority for this theory, and we know of none.”).

The same notions of fairness and due process preclude application of *res judicata* to Monk's claims against Pierson. For example, the limitations period is three years for legal malpractice, RCW 4.16.080(3), and does not begin to accrue until the attorney no longer represents the client. *See Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 661, 37 P.3d 309 (2001), *review denied*, 146 Wn.2d 1019, 51 P.3d 88 (2002). Pierson filed the motion to enforce his attorney's lien on January 16, and noted it for consideration on January 28, 2009. [CP 497.] Like *Hansen*, requiring a client to raise claims in response to an attorney's motion to enforce a lien would effectively eviscerate the limitations period on that claim. Even worse, because a

motion to enforce an attorney's lien is an equitable proceeding, forcing the client to litigate all claims he or she has against the attorney in that proceeding would deprive the client of a right to a jury trial for such claims.<sup>5</sup> In short, applying *res judicata* in cases like this one would force the client into a Hobson's choice of having valuable claims decided on a severely truncated basis, or losing them forever.

**4. *King County v. Seawest Did Not Require Monk to Raise “Counterclaims” in Response to Pierson’s Motion.*** Recognizing that the plain language of CR 13(a) and principles of *res judicata* do not preclude his claims against Pierson, Monk relies almost entirely on *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 170 P.3d 53 (2007). Monk argues that *Seawest* requires a client faced with a motion to enforce an attorney's lien to raise any and all potential counterclaims in response to that motion “or be subsequently barred from subsequently asserting counterclaims in a ‘separate action.’” [Appellant’s Brief, p. 11.] *Seawest* says no such thing. *Seawest* does not cite CR 13(a), much less

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<sup>5</sup> Wash. Const., Art. I, § 21 (“The right of trial by jury shall remain inviolate . . .”). See *Seawest*, 141 Wn. App. at 314 (“A proceeding to enforce a lien is an equitable proceeding.”); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 846 P.2d 550 (1993) (“Where the action is purely equitable in nature, however, there is no right to a trial by jury.”). Cf. *Evans Fin. Corp. v. Strasser*, 99 N.M. 788, 790, 664 P.2d 986, 988 (1983) (“Only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”).

analyze or apply the compulsory counterclaim rule. Nor does it mention, let alone analyze or discuss, *res judicata* or claim preclusion. Critically, nowhere in *Seawest* did the court hold, or even imply, that if an attorney seeks to enforce an attorney's lien against his or her client, the client is foreclosed from bringing a separate action against the attorney for malpractice, breach of fiduciary duty, violations of the CPA, or any other claim. For the reasons explained above, that is not the law.

The *Seawest* court addressed an entirely different question: what is the proper procedure for enforcing an attorney's lien? *Id.* at 313-14. The court noted that the statute "does not set out a procedure for enforcement," and "does not require that such an action be separate from the underlying proceeding." *Id.* at 315. It noted that the lien was a form of equitable relief, and held that "[t]he trial court's decision to adjudicate the attorney's lien by the evidentiary hearing in this case was a tenable choice." *Id.* at 314. The *Seawest* court held that the superior court did not abuse its discretion in resolving the attorney's lien by way of a truncated equitable proceeding, as Judge White did in the inverse condemnation action. *Id.* at 315. The court was *not* confronted with the question of whether CR 13(a) or *res judicata* required a client faced with a motion to enforce the lien to raise all potential counterclaims in that equitable proceeding.

In upholding a truncated procedure, the *Seawest* court noted that “the hearing gave [the clients] ample time to present evidence, bring counterclaims, and argue their theories of the dispute.” *Id.* at 315. To the same effect is the statement that “[w]hile [the client] now complains 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.” *Id.* Contrary to Monk’s wishful thinking, these statements do not mean that the clients *had* to bring counterclaims in the truncated equitable proceeding at the risk of losing them forever. However, without citing CR 13(a) it is not plausible that the *Seawest* Court intended to alter or amend the Rule,<sup>6</sup> or exempt attorney’s lien motions from the scope of the Civil Rules.<sup>7</sup> Similarly, in the absence of any discussion of *res judicata*, *Seawest* cannot be read as purporting to overrule *sub silentio* or creating an implicit exception to controlling Washington Supreme Court precedent.

The only issue of concern to the *Seawest* court was whether an equitable proceeding, short of a full-blown separate civil action, was fair

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<sup>6</sup> Alterations to the Civil Rules and other rules of court are the prerogative of the Washington Supreme Court, operating under the procedure proscribed by General Rule 9.

<sup>7</sup> Civil Rule 1 provides “[t]hese rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity . . . .”

and gave the client a meaningful opportunity to oppose the lien. The *Seawest* court recognized this itself: “In short, [the client] was given an opportunity *to contest the lien* asserted by [the attorney] *by raising whatever issues it chose to raise.*” *Id.* (emphasis added). Rather than creating a compulsory counterclaim rule or altering the elements of *res judicata*, at most, the *Seawest* court approved an equitable procedure that permits the client an opportunity to bring counterclaims *if he or she chooses*.<sup>8</sup> Nothing in the opinion requires the client to bring such claims and, for all the reasons stated above, there are many reasons why a client may elect not to do so.

Indeed, an examination of the mechanics under the Civil Rules for asserting a “counterclaim” in response to an attorney’s motion to enforce an attorney’s lien on a judgment reveals that starting a subsequent, independent action on those claims is not barred. Where a person is already a party to a lawsuit, “[n]o summons is necessary for a counterclaim” – instead, “[c]ounterclaims and cross claims against an *existing party* may be served as provided in rule 5.” CR 4(a)(4). However, Pierson was not a party to the inverse condemnation suit,

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<sup>8</sup> See 3 James Wm. Moore, Moore’s Federal Practice § 13.30[1], p. 13-46 (3d. ed. 2011) (“A pleader may state as a permissive counterclaim any claim against an opposing party that is not a compulsory counterclaim under Rule 13(a).”).

[CP 192 n.1,] and Judge White lacked jurisdiction to enter a personal judgment against him. As a result, CR 4(a)(4) could not apply. Because CR 4(a)(4) could not apply, Monk would have been required to serve a summons on Pierson together with a “counterclaim,” which would have been, in reality, the *first* claim by either Monk or Pierson against the other. CR 4(a)(1). Service of a summons and complaint is, of course, how a plaintiff *commences* an action, CR 3(a), which is the practical effect, since judgment had already been entered between the parties of the underlying suit (here, the inverse condemnation lawsuit). *Seawest* cannot be read to prohibit a client from taking precisely the same steps to assert his or her claims against the attorney in a subsequent lawsuit.

*Seawest*’s holding *allowed* Monk to assert “counterclaims” against Pierson in response to Pierson’s motion; it does not prevent Monk from pursuing those claims in an independent action.

**C. The Trial Court Did Not Err in Denying Monk’s Motion for Summary Judgment on Driessen’s Affirmative Defenses.**

Because Judge St. Clair did not err in granting Driessen’s motion for summary judgment and dismissing Monk’s claims against Driessen, the Court need not reach the issue whether denial of Monk’s motion for summary judgment was proper.

V. CONCLUSION

This Court should affirm the trial court's judgment in its entirety.

RESPECTFULLY SUBMITTED this 23 day of November, 2011.

LANE POWELL PC

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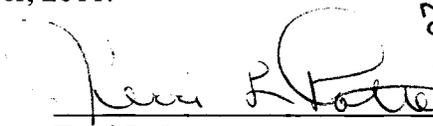
Attorneys for Respondents Kristina A.  
Driessen and John Doe Driessen, and the  
marital community composed thereof, Ryan  
& Driessen, Inc., P.S.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on November 23, 2011, I served a copy of the foregoing document on all counsel of record as indicated below:

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DATED this 23<sup>rd</sup> day of November, 2011.

  
Terri L. Potter

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