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No. 68154-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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MWW, PLLC dba Moran Windes and Wong, PLLC and MORAN &
KELLER, PLLC its successor;
Appellants,
v.

RYAN and JANE DOE SMITH, and the marital community composed
thereof; JOHN AND JANE DOE GUARINO, and the marital community
composed thereof; all individually and as successors in interest to
INTERACTIVE OBJECTS, INC; YARMUTH, WILSDON CALFO,
PLLC; RICHARD AND JANE DOE YARMUTH, and the marital
community composed thereof; and the proceeds of the legal malpractice
settlement paid by or on behalf of CAIRNCROSS & HEMPELMANN,
P.S., a Washington professional service corporation, in res,
Respondents.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
A. Summary Of Reply	1
B. The Appellees Offer No Reasoned Argument As To Why They Were Not Obligated To Comply With The Obligation To Hold Disputed Funds In Their Trust Account Pending Resolution, Other Than The Claim That The Rules Just Don't Apply To Them	4
C. Yarmouth Incorrectly Relies On Unpublished Authority To Support A Circular Argument	8
D. Moran Would At Least Be Entitled To Quantum Meruit If The Court Were To Rule That That The Amount By Special Agreement Fails	8
E. The Statute Of Limitations Should Begin To Run When A Party Actually Has The Ability To Bring A Lawsuit	10
F. The Defendants Request For Attorney's Fees. It Is Not Frivolous To Expect A Law Firm To Have To Comply With The Trust Fund Rules	12
APPENDIX	18

TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.</i> , 137 Wn. App. 296, 308 (Wash. Ct. App. 2007)	15
<i>Barrett v. Friese</i> , 119 Wn. App. 823 (2003)	6

<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992)	15
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)	4, 5
<i>Davin v. Dowling</i> , 262 P-123 (1927)	7
<i>First Global Communications v. Bond</i> , 413 F. Supp.2d.1150 (W.D. WA. 2006)	8
<i>Hizey v. Carpenter</i> , 119 W.2d 251 (1992)	6, 7
<i>Johnson v. Si-Cor Inc.</i> , 107 Wn. App. 902, 906 (Wash. Ct. App. 2001)	16
<i>Smith, Guarino v. Cairncross v. MWW</i> , 145 Wn.App 459 (Div. I 2008)	1, 4, 12, 14
<i>Suarez v. Newquist</i> , 70 Wn. App. 827, 855 P.2d 1200 (1993)	15
<i>Suleiman v. Lasher</i> , 48 Wn.App. 373, 376, 739 P.2d 712 (1987)	4
<i>Woody's Olympia Lumber v. Roney</i> , 9 WN.App. 626 (1973)	7

RULES

R.P.C. 1.15(a)(g)	1, 2, 5
CR 12(b)(6)	5, 6
RCW 60.40.010(d)	10
RAP 10.4(h)	8
Wash GR 14.1	8

A. Summary Of Reply

In September 2007, the Appellees settled the Cairncross legal malpractice case. Before receiving the seven-figure settlement proceeds, however, they filed a motion in Superior Court to summarily disallow the MWW attorney's fee lien on those proceeds. The court granted that motion and MWW appealed.¹(CP 236-237). While that matter was on appeal, while the dispute was still unresolved, Cairncross paid the settlement proceeds into trust held by Appellees attorneys, the Yarmuth firm. The Yarmuth firm had a duty to hold those proceeds in trust until the dispute with the Moran firm was resolved. 1.15(A)(g): "If a lawyer possesses property in which two or more persons claim interests, the lawyer must maintain the property in trust until the dispute is resolved." Instead of holding those proceeds in trust until the dispute was resolved, or even until this Court handed down its decision on the appeal (*Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008), (see Appendix) the Yarmuth firm breached the trust and converted the

¹ These facts are part of the record at *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (2008),(CP 240-255), which is attached in the appendix to this appeal. Many of the facts regarding the background of this dispute can be found there. Additionally, this Court's previous denial of MWW's previous appeal that was denied and the Supreme Court's denial of review can be found in the appendix. These were all presented to the trial court below and are part of the record on review.

proceeds by paying them out to themselves. These facts are undisputed.
(CP 1-11)

Appellees do not argue with *the fact* that they paid the proceeds out of trust *before* the dispute was resolved. Neither do they present any argument whatsoever against the allegation that they violated RPC 1.15(A)(g) by doing so. They simply argue that the rule does not apply *to them*. They argue that there should be no consequence for their violation of this rule, for their conversion of the proceeds they were obligated to keep in trust. They argue it is “frivolous” to suggest otherwise, to suggest they are obligated to follow the rule, to suggest the rule applies to them. Opp. at p. 17.

This presents a problem, because if the rule does not apply to them, then the rule does not apply to anybody, and if that’s the case then there really is no rule. If there is no rule, then there is no prohibition against attorneys paying out money from trust whenever they please. The obligations of RPC 1.15(A)(g) are an important and integral part of the attorney business in Washington. It is an access to justice issue because it affects an attorneys’ ability to secure payment for work done, which directly affects an attorney’s decision to take on case in the first place. Without certainty that funds will be held at the end of a case to secure a fee, and held until the outcome of the fee dispute, there is no certainty and

the attorneys will be much less likely to take certain cases. Even outside the attorney-client context, this trust fund holding rule is fundamentally important. The certainty that this rule brings to the complex business of attorney-client and trust fund money management is absolutely necessary for this system to function. Attorneys, clients, courts and third parties must have confidence that attorneys will follow these trust fund rules, that they will not break them and pay money out to themselves whenever they please. If the system loses that trust, that confidence that attorneys will follow this rule and hold the money when they are supposed to, then people will act differently, rashly in some cases, to protect their interests in the money held by attorneys in trust. They will not turn money over to attorneys' trust accounts if they know attorneys can just take it. When money does make it into attorneys' trust accounts, people will not wait around until disputes are resolved because they will know that will be too late- the attorney could have disposed of trust money by then and with no rule to stop them, and no consequence for doing so, it would be expected.

What Appellees are essentially asking this court to do is to look the other way, to not enforce this rule and let them get away with breaking it, and in doing so, significantly undermine public confidence in a fundamental part of the legal system- the people's confidence in the

attorney's absolute obligation to hold funds in their trust account when the rules require it.

Otherwise, Appellees cleverly avoid any discussion of this issue with distraction, smoke and mirrors, circular and nonsensical logic. The net result of their arguments are, in short, that they are simply entitled to ignore the rule requiring them to hold the money in trust; they can pay it to themselves whenever they choose; they are not accountable and nobody has a remedy to get the money back. (See Appendix).

B. The Appellees Offer No Reasoned Argument As To Why They Were Not Obligated To Comply With The Obligation To Hold Disputed Funds In Their Trust Account Pending Resolution, Other Than The Claim That The Rules Just Don't Apply To Them

It is extremely rare for a case to be dismissed for failure to state a claim. "Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery." *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *Suleiman v. Lasher*, 48 Wn.App. 373, 376, 739 P.2d 712 (1987).

Appellant came into this case with a valid lien on the proceeds of the Cairncross settlement. *Smith, Guarino v. Cairncross v. MWW*, 145 Wn.App 459 (Div. I 2008). Those proceeds were held by Appellees in trust. Appellant's complaint presented sufficient facts to state a claim upon which relief may be granted on claims to foreclose the lien on those

proceeds and conversion against the law firm that took those proceeds out of trust and put them in its own pocket while the dispute was still unresolved. (CP 1-11). The Compliant pleaded these claims and the trial court was obligated to presume that the plaintiff's allegations were true at the CR 12(b)(6) level.

Appellees had an absolute obligation under RPC 1.15A(g) to hold those liened funds:

“If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust *until the dispute is resolved.*”

Appellee Yarmuth's response to the argument that this rule applied to them, at p. 17 of their brief, is simply “This argument is frivolous.” (Appellees Smith and Guarino do not even address it.) Yarmuth' frivolity argument contends it is “frivolous” to expect that firm, as attorneys, to comply with this RPC rule of trust fund accounting, for two reasons. One is, “the record does not support” the “factual assertions that Yarmuth's conduct violated RPC 1.15(A)(g). This is both incorrect and irrelevant to a *de novo* review of a CR 12(b)(6) motion. First, “factual assertions” on a CR 12(b)(6) motion are assumed to be true, so arguments that they are not are not a defense to either the CR 12(b)(6) motion and the appellate review of that motion. *Burton*, 153 Wn.2d at 422, 103 P.3d 1230. It would have been clear error to resolve a factual issue against the non-

moving party on a CR 12(b)(6) motion. Second, the material facts are correct and they are undisputed. It is undisputed that the Yarmuth firm paid the settlement proceeds of their trust before the dispute was resolved, *for the obvious reason that the money is gone and the dispute is still not resolved.*

The Yarmuth firm's second argument as to why it is "frivolous" to expect them to have to comply with RPC 1.15(A)(g), contends that violations of ethical rules do not give rise to an independent cause of action against an attorney nor may they be used as evidence. Opp. at 17. They cite no case from any jurisdiction, anywhere, for the proposition that an attorney can ignore RPC 1.15(A)(g) and pay trust money to him or herself. Instead, they cite two inapposite cases for this incorrectly sweeping proposition. Neither is on point or even helpful. Both *Hizey v. Carpenter*, 119 Wn.2d 251, 259-60 (1992) and *Barrett v. Friese*, 119 Wn.App 823, 842 (2003) stand for the proposition that violations of ethics rules do not give rise to independent liability for, or may be used as evidence of, *legal malpractice*. Both *Hizey* and *Freise* were legal malpractice actions where the clients sought to use the RPC's as evidence of standard of care issue on the negligence issue. *Id* at 257. The court in *Hizey* held that certain RPC's were too vague to be used as guides to standard of care in an attorney malpractice action:

“...CPR and RPC contain standards and phrases which, when relied upon to establish a breach of the legal standard of care, provide only vague guidelines” in a legal malpractice case.

Hizey at 261-262. (Emphasis added.)

RPC 1.15(A)(g) is not a “vague guideline” and this is not a legal malpractice action. Their citations to *Hizey* and *Friese* are inapposite. And they have no other authority whatsoever that supports their claim that RPC 1.15(A)(g) does not apply to them.

Defendant’s argument that *money* cannot be converted- because it *is money*, is nonsense. Money and a lien on money, or a car or lien on a car is all “property” in Washington State. *See, e.g. Woody's Olympia Lumber v. Roney*, 9 Wn. App. 626, 633-634 (1973)(The definition of “property” is broad and includes even unliquidated and contingent claims, so it certainly includes “money.”) Taking money out of a trust fund that one is obligated to hold in that trust fund, and giving that money to one’s self so one can spend it on meals, vacations, new cars or whatever, is a conversion of the money in the trust. Attorneys don’t get a pass for converting *money* out of trust, a but would be accountable for conversion if they were taking someone’s car out of trust. That’s the argument but it makes no sense. *See Davin v. Dowling*, 262 P. 123, 125 (Wash. 1927)(money can properly be the subject of a claim for *trover*).

C. Yarmouth Incorrectly Relies On Unpublished Authority To Support A Circular Argument

Appellees base this argument on some circular and difficult to understand logic in an unpublished opinion out of the Western District of Washington, *First Global Communications v. Bond*, 2006 WL 23164 (WD Wash. Jan 27, 2006). However, this court may not consider this unpublished authority pursuant to RAP 10.4(h); GR 14.1(b)(A party may only cite unpublished authority from another court if that authority is allowed to be cited in the issuing court); Ninth Circuit RAP 36-3(b, C)(Unpublished opinions after January 1, 2007 may be cited, opinions prior to 1/1/2007 may only be cited under limited circumstances which do not apply here.) Since the Ninth Circuit prohibits citation to unpublished opinions predating January 1, 2007 and *First Global* is an unpublished opinion predating January 1, 2007, it may not be properly cited to this court as authority.² Since the unpublished case is the only authority for the argument, it is unsupported on appeal and inapposite.

D. Moran Would At Least Be Entitled To Quantum Meruit If The Court Were To Rule That The Amount By Special Agreement Fails

² The same court did publish an opinion a week later in the same case but on an entirely different topic. See *First Global Communications v. Bond*, 413 F.Supp. 2d 1150 (WD WA. 2006). This opinion dealt with the application of the “clean hands doctrine” applicable to a party’s motion for preliminary injunction on the shutdown of a prostitution website entitled “World Sex Guide.” *Id* at 1154. It has nothing to do with the Appellee’s argument or issues in this case.

The record reflects that no judge has ever ruled that the lien claim for \$750,000 by special agreement is not valid. This Court did not make that ruling. (See Appendix (Denial of Discretionary Review)(CP 352-358)). Neither did Judge Cannova, even though Defendants incorrectly argue that he did, and the trial court apparently believed that lie. Judge Cannova denied Appellant's summary judgment motion for claim of lien under the special agreement finding that issues of fact remained for trial, including whether Appellants substantially performed, which would entitle them to the full agreed amount. Judge Heller, in his opinion, oddly found that a denial of summary judgment effectively ruled on the issue as a matter of law, and applied collateral estoppel to that decision- or non-decision, where the decision or even an interpretation of that MSJ denial was not even reviewable on appeal because there was no appeal as a matter of right. (CP 515-517, Also See Appendix). This was all clear error. There has been no finding, order or jury verdict, final judgment or appeal order determining that the MWW/MWK lien value is anything less than what it is claimed, at the face value of the fixed written agreement. All Judge Canova did was find a factual dispute existed preventing summary judgment. (CP 218-377, CP 352-358).

Based upon an incorrect interpretation of Judge Cannova's summary judgment denial, Judge Heller then dismissed Appellant's lien claim entirely finding that quantum meruit had not been pled. (CP 386-387, 515-517). Under any theory of collateral estoppel or res judicata Appellant is entitled to a judgment on the merits of his special agreement claim before Judge Heller can dismiss it as already being ruled upon. As this Court is aware, an attorney's lien can be based upon a special agreement as provided by the lien statute or based upon the hours worked: RCW 60.40.010(d) specifically provides for the lien to be established as *either* "the value of services performed by the attorney in the action" (*quantum meruit*) or "if the services were rendered under a special agreement, for the sum due under such agreement." MWK/MWW claims its lien is the amount stated in the written fee agreement- the amount due under the *special agreement*. It is entitled to a judgment on the merits of this claim.

E. The Statute Of Limitations Began To Run When Only After MWW Actually Has The Ability To Bring A Lawsuit, Not Before

Appellants have fully briefed this issue and Defendants' opposition does not add anything to the analysis. Either the time to bring a cause of action starts when a party actually has the right to bring a cause of action, or it starts at some arbitrary point determined on the whim of a decision

maker. As this Court is aware, in 2006, the King County Superior Court granted Smith and Guarino essentially a declaratory judgment finding that the plaintiff's lien was invalid. This Court reversed finding the lien valid, but the Defendants filed a petition for review so that the Court did not issue a mandate on its ruling until March 25, 2009, at which point plaintiffs could proceed with the lien claim. (CP 239-240). Until that point the trial court did not have jurisdiction over the claim. Prior to March 25, 2009, plaintiffs did not have a perfected lien and had no ability to prosecute the lien, as the elements of the claims did not yet exist. That is when the statute of limitations began to run on Appellee's claims. This is precisely why this Court would have specifically found that there was nothing in the record to evidence that the plaintiff's claims if re-filed would not be accepted by the trial court. Defendants even agreed with this premise arguing on appeal that there is no basis for the last appeal to go forward. Plaintiffs filed the new claims and now defendants call them frivolous and claim that the statute of limitations has passed, in spite of the previous arguments made.³ (CP 1-11). Plaintiff has a valid lien, the amount of which was to be determined. Whether the lien would be the

³ Appellants briefed the judicial estoppel issue in the opening materials. Defendants are seeking to argue that the first appeal be dismissed because claims were dismissed without prejudice, and then argue statute of limitations to a new court.

\$750,000 flat fee or quantum meruit was still up for discussion. It was not previously decided as suggested by Defendants.

This Court reinstated plaintiff's lien on proceeds and sent the case back to the Superior court on March 25, 2009, (CP 239), at which time plaintiff for the first time could prosecute the lien claim. *See Smith v. Moran Windes & Wong*, 145 Wn. App. 459 (2008), where plaintiff's lien was upheld and remanded solely for a determination of value. Now, after several odd decisions, which were noted by the Washington Supreme Court in its recent ruling denying review on the previous appeal, (See appendix), plaintiffs are left with no avenue to try and place a value on the lien except through appeal of this dismissal. This Court should reverse the trial court so that the merits of the lien amount may eventually be determined.

F. The Defendants Request For Attorney's Fees. It Is Not Frivolous To Expect A Law Firm To Have To Comply With The Trust Fund Rules.

Although Appellants hold a valid lien, Judge Cannova inexplicably dismissed the lien claim for want of prosecution after twice denying requests to set a trial date. The decision was appealed, and the appeal was denied because Cannova dismissed the claim without prejudice. However, the Supreme Court noted that plaintiff's arguments that dismissal was unwarranted have "some force." (See Appendix. Also see CP 425-433).

The Court should note that on appeal, Yarmuth and Smith and Guarino specifically argued that MWW's appeal should be denied because MWW could refile "without prejudice" and thereafter pursue its claims, unimpeded by a statute of limitations or other new defenses, in the new action. (CP 363-374). Indeed, this was the heading of Smith and Guarino's brief on Appeal before Division I.

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A. The Trial Court's Order of Dismissal Pursuant to CR 41(b)(1) is Without Prejudice and Not Appealable as a Matter of Right per RAP 2.2.

(CP 363-368). YWC, Smith and Guarino went on to successfully convince the Court of Appeals that the dismissal order was not a final judgment entitling MWW/MWK to an appeal as a matter of right, because MWW/MWK could refile a new action without prejudice- i.e. *there was no statute of limitations issue with refiling*. *Id* at p. 5:18-24. The Court of Appeals accepted this argument from YWC, ruling:

"..The appellant [MWW/MWK] argues that the bottom line is that the action has been terminated and so should be appealable under RAP 2.2(a)(3)...But the problem with this analysis is that the actual dismissal was without prejudice. It is well established that a dismissal without prejudice is not appealable unless its practical effect it to determine the action and prevent final judgment or discontinue the action (citing cases). **An example of a dismissal without prejudice that discontinues the action is when the statute of limitations would bar refilling the litigation...the trial court rulings do not reveal that a refilled**

action will be rejected by the trial court, if the party is properly identified and standing is established.⁴

July 5, 2011 Order denying review. (CP 376-377).

MWW/MWK filed this action. Now defendants having argued opposite positions in the appellate court and here, have succeeded in eliminating plaintiff's ability to collect its funds that were in the possession of the Yarmuth firm. There was nothing frivolous about plaintiffs filing. Plaintiff had no other avenue upon which to collect its lien. The request for fees should be denied.

The claims against Defendant were not frivolous, and were not brought in bad faith, but were brought as the only avenue available to try and collect on an earned attorneys fee line, which was upheld in the case *Smith v. Moran Windes & Wong*, 145 Wn. App. 459 (2008), *review denied*, 165 Wn.2d 1032 (2009). Prior to the Supreme Court denying review of that decision and entering a mandate granting jurisdiction back to the Superior Court, on March 25, 2009, at which time plaintiffs could begin seeking to recover the fee. Prior to that time, plaintiffs believed they had no right to bring a cause of action to recover on the fees. RCW 4.84.195 was enacted to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself

⁴ Defendants have not challenged standing in this action.

against meritless claims asserted for harassment, delay, nuisance or spite. *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993). A lawsuit, counterclaim, cross claim or defense must be frivolous in its entirety before attorney fees may be awarded under this statute. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992). In this case, Plaintiffs sought recovery of an attorney's lien, which had been found valid by the Court of Appeals. That, in and of itself, should demonstrate that the legal issues raised were not frivolous. *See e.g. Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 308 (Wash. Ct. App. 2007) (The fact that Atlantic was successful before the lower court is an indication that this legal issue was not frivolous.) Additionally, as the Court of Appeals stated in its Order dismissing the appeal which led to the filing of this action, **“the trial court rulings do not reveal that a refiled action will be rejected by the trial court, if the party is properly identified and standing is established.”** Indeed, Defendant and his clients did not argue that the refiling would be frivolous or that it would be defeated by the statute of limitations in the appellate court. They argued one thing to the appellate court and another to this Court, which very well could have led to this Court denying their motion to dismiss on grounds of judicial estoppel. In fact, judicial estoppel should have applied to the statute of limitations

claims and that estoppel would apply to both Yarmuth and Smith and Guarino as privity of parties is not required for judicial estoppel.

The majority of courts that have considered the matter have concluded that privity of the parties, reliance, and prejudice--generally recognized elements of estoppel--are inapplicable to the doctrine of judicial estoppel. 1B JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE, § 0.405[8] (2d ed. 1991); Eugene R. Anderson & Nadia V. Holober, Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions, 4 CONN. INS. L.J. 589, 622-36 (1997-1998). We note that cases such as Sprague and Witzel that have applied the Markley elements for judicial estoppel--including the problematical elements of privity, detrimental reliance, and final judgment--have done so without analysis of the issue. We agree with Professors Orland and Tegland that because the doctrine of judicial estoppel is designed to protect courts, courts should not impose elements of related doctrines like equitable and collateral estoppel, which are intended primarily to protect litigants. We conclude that the doctrine may be applied even if the two actions involve different parties. We further conclude that the doctrine may be applied even if there is no reliance, no resultant damage, and no final judgment entered in the first action.

See Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-908 (Wash. Ct. App. 2001). Consequently, even though this Court found that the claims were time-barred, plaintiffs had legally tenable theories as to (1) why they were not time-barred (mandate issued on March 25, 2009) and (2) judicial estoppel as defendants argued in the appeals court that claims could be refilled, and then argued here that they are time-barred.

Signed and dated this 1st day of June, 2012.

/s/Dennis Moran
Dennis Moran, WSBA # 19999
William Keller, WSBA # 29361
Attorney for Appellants

APPENDIX

1. *Smith, Guarino v. Cairncross v. MWW*,
145 Wn.App 459 (Div. I 2008).
2. COMMISSIONER'S RULING DENYING DISCRETIONARY
REVIEW
3. LETTER FROM COMMISSIONER JAMES VERELLEN OF
THE COURT DISMISSING APPEAL AND TERMINATING
REVIEW
4. SUPREME COURT DENIAL OF DISCRETIONARY REVIEW

H

Court of Appeals of Washington,
Division I.

Ryan SMITH and John Guarino, Respondents,
and

Cairncross & Hempelmann, Respondent,
v.

MORAN, WINDES & WONG, PLLC, Appellant.

No. 60712-0-I.

June 30, 2008.

Background: Judgment debtor brought legal malpractice action against law firm whose advice allegedly was the cause of the judgment against him in a securities action. Judgment creditors from the securities action purchased judgment debtor's interest in the malpractice action at a sheriff's sale, and were substituted as the plaintiffs. After judgment creditors negotiated a settlement with defendant law firm, the King County Superior Court, Harry J. McCarthy, J., granted judgment creditors' motion to invalidate attorney's lien of law firm that had been representing judgment debtor in the malpractice action. Law firm appealed.

Holdings: The Court of Appeals, Cox, J., held that: (1) attorney's lien of law firm that represented judgment debtor in legal malpractice action arose then the action was commenced and attached to the proceeds of the action, including settlement negotiated by judgment creditors after they replaced judgment debtor as plaintiffs; (2) attorney's lien was not discharged when judgment creditors purchased judgment debtor's interest in the action; (3) a recovery by judgment debtor was not required in order for law firm to enforce its attorney's lien; and (4) judgment creditors were not bona fide purchasers for value, and only took such interest that judgment debtor had in the malpractice action.

Reversed and remanded.

See also 122 Wash.App. 95, 86 P.3d 1175.

West Headnotes

[1] Statutes 361 ↪181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

A court's fundamental objective in reading a statute is to ascertain and carry out the legislature's intent.

[2] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

If a statute's meaning is plain on its face, then a court must give effect to that plain meaning.

[3] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

Statutes 361 ↪223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to

Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(.5) k. In General. Most

Cited Cases

Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question.

[4] Statutes 361 ↪217.4**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k217.4 k. Legislative History in

General. Most Cited Cases

If a statute is ambiguous, the reviewing court may look to outside sources such as legislative history to determine legislative intent.

[5] Statutes 361 ↪190**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

A statute is ambiguous if it is subject to more than one reasonable interpretation.

[6] Statutes 361 ↪206**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire

Statute. Most Cited Cases

In interpreting a statute, a court should not adopt an interpretation that renders any portion meaningless.

[7] Statutes 361 ↪181(2)**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and Con-

sequences. Most Cited Cases

When construing statutes, strained meanings and absurd results should be avoided.

[8] Appeal and Error 30 ↪893(1)**30 Appeal and Error**

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most

Cited Cases

The meaning of a statute is a question of law reviewed de novo.

[9] Attorney and Client 45 ↪182(2)**45 Attorney and Client**

45V Lien

45k182 Subject-Matter to Which Lien Attaches

45k182(2) k. Judgment or Proceeds

Thereof. Most Cited Cases

Attorney and Client 45 ↪183**45 Attorney and Client**

45V Lien

45k183 k. Time When Lien Attaches. Most Cited Cases

Attorney and Client 45 ↪189**45 Attorney and Client**

45V Lien

45k188 Protection Against Settlement Between Parties

45k189 k. In General. Most Cited Cases

Attorney lien of law firm, which represented

judgment debtor in legal malpractice action against attorneys who allegedly provided the advice that led to the judgment, arose when the legal malpractice action was commenced, attached to any proceeds of the action including settlement that judgment creditors, who were substituted as the plaintiffs in the legal malpractice action after they purchased judgment debtor's interest in the action at a sheriff's sale, negotiated with the defendant law firm in the malpractice action, and was not affected by the settlement the parties negotiated until it was satisfied in full. West's RCWA 60.40.010.

[10] Attorney and Client 45 ↪187

45 Attorney and Client

45V Lien

45k187 k. Protection Against Assignment by Client. Most Cited Cases

Attorney lien for compensation of law firm, which represented judgment debtor in legal malpractice action against attorneys who allegedly provided the advice that led to the judgment, was not discharged or otherwise affected when judgment creditors purchased judgment debtor's interest in the malpractice action at sheriff's sale; though provision in attorney's lien statute stated that attorneys had the same right and power over actions and judgments to enforce their liens as their clients had for the amount due thereon to them, such provision's purpose was to recognize an attorney's property interest in a client's case in order to avoid double federal income taxation, and provision was not intended to discharge or otherwise affect the property interest of a law firm in its client's case when the client was displaced by others during the case. West's RCWA 60.40.010(2).

[11] Attorney and Client 45 ↪187

45 Attorney and Client

45V Lien

45k187 k. Protection Against Assignment by Client. Most Cited Cases

Attorney's lien against proceeds of settlement of client's legal malpractice claim could be en-

forced against client's judgment creditors who purchased the malpractice cause of action from client at execution sale. West's RCWA 60.40.010.

[12] Execution 161 ↪273

161 Execution

161XI Sale

161XI(F) Title and Rights of Purchase

161k270 Bona Fide Purchasers

161k273 k. Judgment Creditor as Purchaser. Most Cited Cases

An execution creditor who directs a sheriff to levy upon and sell property of the judgment debtor is not a bona fide purchaser for value, taking only such interest as the judgment debtor has.

[13] Attorney and Client 45 ↪187

45 Attorney and Client

45V Lien

45k187 k. Protection Against Assignment by Client. Most Cited Cases

Execution 161 ↪273

161 Execution

161XI Sale

161XI(F) Title and Rights of Purchase

161k270 Bona Fide Purchasers

161k273 k. Judgment Creditor as Purchaser. Most Cited Cases

Client's judgment creditors, who caused sheriff to levy upon and sell client's interest in legal malpractice action, were not bona fide purchasers for value and took that interest subject to attorney's lien against settlement of the malpractice claim. West's RCWA 60.40.010.

[14] Attorney and Client 45 ↪183

45 Attorney and Client

45V Lien

45k183 k. Time When Lien Attaches. Most Cited Cases

Attorney's lien statute does not require any affirmative acts to establish an attorney's lien for an

attorney representing a plaintiff in a lawsuit other than commencing the lawsuit. West's RCWA 60.40.010.

[15] Liens 239 1

239 Liens

239k1 k. Nature and Incidents in General. Most Cited Cases

The purpose of a lien is to secure payment for amounts owed.

****277** Dennis Michael Moran, Moran Windes & Wong PLLC, Seattle, WA, for Appellant.

Richard Carl Yarmuth, Rachel L. Hong, Jordan Gross, Yarmuth Wilsdon Calfo PLLC, Robert M. Sulkin, Gregory J. Hollon, David Roy East, McNaul Ebel Nawrot & Helgren, Seattle, WA, for Respondents.

COX, J.

***461** ¶ 1 At issue are the rights of competing creditors to the settlement proceeds arising from this legal malpractice action. Ryan Smith and John Guarino are judgment creditors of Brent Nelson, the original plaintiff in this lawsuit.^{FN1} They purchased Nelson's interest in this action at a sheriff's execution sale that they requested. The other creditor is the law firm of Moran, Windes & Wong "Moran"), ***462** who represented Nelson in this action. Moran withdrew after Smith and Guarino intervened. Moran asserts an attorney's lien against the settlement proceeds paid by defendant Cairncross & Hempelmann to Smith and Guarino. The trial court invalidated the lien. Because the attorney's lien that Moran asserts against the settlement proceeds is valid and superior to any other liens, we reverse and remand for further proceedings.

FN1. In its Order Substituting Real Parties In Interest dated September 5, 2006, the trial court ordered that Ryan Smith and John Guarino be substituted in as plaintiffs in lieu of Brent Nelson, the original plaintiff in this action. The court further

ordered that "the caption will state that John Guarino and Ryan Smith are the plaintiffs and Brent Nelson's name will be removed." Clerk's Papers at 237.

¶ 2 The material facts and procedural history are not in dispute. Smith and Guarino are former executives and founders of Interactive Objects, Inc., a start-up technology company. They obtained a substantial judgment against Nelson and others arising from stock transactions that allegedly violated the Washington State Securities Act and other law. The facts of that other lawsuit are discussed in this court's two prior opinions.^{FN2}

FN2. *Guarino v. Interactive Objects, Inc.*, 122 Wash.App. 95, 86 P.3d 1175 (2004); *Guarino v. Interactive Objects, Inc.*, No. 57597-0, 137 Wash.App. 1029, 2007 WL 664878 (Wash.App. Mar. 5, 2007) (unpublished).

¶ 3 Following entry of that judgment, Nelson retained Moran and commenced this legal malpractice action against Cairncross & Hempelmann. Nelson alleged that the firm's legal advice was a cause of the judgment against him in the other lawsuit. Nelson and Moran entered into a written contingent fee agreement. Among other things, the agreement provided for "a first position lien on a) the claims any [sic] b) and all proceeds of this [malpractice] lawsuit."^{FN3}

FN3. Clerk's Papers at 1520.

¶ 4 Based on the judgment in the other lawsuit, Smith and Guarino obtained a writ of ****278** execution directed to the sheriff who then levied against Nelson's interest in this action. Thereafter, the sheriff conducted a sheriff's sale of that interest on August 7, 2006. Smith and Guarino bid \$25,000 of their judgment against Nelson and were the successful purchasers of Nelson's interest in this malpractice action at the sheriff's sale.

***463** ¶ 5 Thereafter, they moved to be substi-

tuted as plaintiffs for Nelson as the real parties in interest in this malpractice action. The court granted the motion and directed that the names of Smith and Guarino be added and Nelson's name be removed from the caption.^{FN4}

FN4. Clerk's Papers at 237.

¶ 6 Moran later withdrew as counsel. Smith and Guarino obtained new counsel, Yarmuth Wilsdon Calfo, PLLC, to represent them in this action.

¶ 7 In August 2007, Cairncross & Hempelmann negotiated a settlement of all claims in this case with Smith and Guarino. Moran asserted a claim of lien against the settlement proceeds. In response, Smith and Guarino moved to invalidate the lien. The trial court granted that motion.

¶ 8 Moran appeals.

LIEN FOR ATTORNEY FEES

¶ 9 Moran argues that the trial court erred in invalidating the attorney's lien that it asserts against the settlement proceeds. We agree.

Statutory Interpretation

[1][2][3] ¶ 10 Our fundamental objective in reading a statute is to ascertain and carry out the legislature's intent.^{FN5} If a statute's meaning is plain on its face, then we must give effect to that plain meaning.^{FN6} Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question.^{FN7}

FN5. *King County v. Seawest Inv. Assocs., LLC*, 141 Wash.App. 304, 309, 170 P.3d 53 (2007).

FN6. *Id.*

FN7. *Id.*

[4][5][6][7][8] ¶ 11 If, however, a statute is ambiguous, the reviewing court may look to outside

sources such as legislative *464 history to determine legislative intent.^{FN8} A statute is ambiguous if it is subject to more than one reasonable interpretation.^{FN9} In interpreting a statute, a court should not adopt an interpretation that renders any portion meaningless.^{FN10} Strained meanings and absurd results should be avoided.^{FN11} The meaning of a statute is a question of law that we review de novo.^{FN12}

FN8. *Cannon v. Dep't of Licensing*, 147 Wash.2d 41, 56-57, 50 P.3d 627 (2002).

FN9. *Id.* at 56, 50 P.3d 627.

FN10. *Seawest*, 141 Wash.App. at 309, 170 P.3d 53.

FN11. *Id.*

FN12. *Id.*

Creation of Lien

¶ 12 The 2004 amendments to RCW 60.40.010, the attorney's lien statute, provide in relevant part as follows:

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

....

(d) ***Upon an action***, including one pursued by arbitration or mediation, ***and its proceeds after the commencement thereof*** to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; ...

....

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due

thereon to them.

****279** (3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

***465** (5) *For the purposes of this section, "proceeds" means any monetary sum* received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

(6) Child support liens are exempt from this section.^[FN13]

FN13. (Emphasis added.) Former RCW 60.40.010 stated as follows:

An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided: (1) Upon the papers of his client, which have come into his possession in the course of his professional employment; (2) upon money in his hands belonging to his client; (3) upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party; (4) upon a judgment to the extent of the value of any

services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

Thus, the 2004 amendments designated the introductory paragraph of the former statute as subsection (1) of the amended statute and redesignated former subsections (1) through (3) as new subsections 1(a) through 1(c). Subsection 1(d) is new. Former subsection (4) is new subsection (1)(e). Subsections (2) through (6) are new.

The legislature also stated its purpose for the 2004 amendments:

The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, *Washington law clearly recognizes that attorneys have a property interest in their clients' cases* so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. *This statute should be liberally construed to effectuate its purpose.* This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation*466 and owed to their attorneys. Thus, except for RCW 60.40.010 (4), the statute is intended to apply retroactively.^[FN14]

FN14. Laws of 2004, ch.73, § 2 (emphasis added); *see also* S.B. Rep. 6270, 58th Leg., Reg. Sess. (Wash.2004); Final Bill Report on ESSB 6270, 58th Leg., Reg. Sess. (Wash.2004) (discussing these policies).

¶ 13 Here, Moran appears to argue that the written contingent fee agreement that Nelson executed in connection with this malpractice case is a source of the attorney's lien the law firm asserts. FN15 Moran further argues that Smith and Guarino, the successors to Nelson's interest in this malpractice action, "have a contractual lien obligation in addition to the statutory one." FN16

FN15. Brief of Appellant at 9-10.

FN16. Brief of Appellant at 20.

¶ 14 We need not address either whether Moran has a contractual lien or whether Smith and Guarino have any obligation under such a lien. The plain words of section 1(d) of the statute state that an attorney's lien for compensation, whether express or implied, arises by operation of law "[u]pon an action ... and its proceeds after the commencement" of the action. FN17 Subsection (5) states, **280 For the purposes of this section, "proceeds" means any monetary sum received in the action." FN18

FN17. RCW 60.40.010(1)(d) (emphasis added).

FN18. RCW 60.40.010(5) (emphasis added).

¶ 15 An action is "commenced" upon service of the summons and complaint or by filing a complaint. FN19

FN19. CR 3(a); *Banzeruk v. Estate of Howitz*, 132 Wash.App. 942, 945, 135 P.3d 512 (2006), *review denied*, 159 Wash.2d 1016, 157 P.3d 403 (2007).

[9] ¶ 16 Applying the plain words of the statute

to the undisputed facts of this case, we conclude that an attorney's lien for compensation in favor of Moran arose by operation of law upon this malpractice action and its proceeds. The lien arose when this action was commenced in March 2006. The lien attached to this action and any proceeds of the action, specifically settlement funds.

*467 ¶ 17 That lien is superior to all other liens. FN20 It is not affected by settlement of the parties until the lien is satisfied in full. FN21

FN20. RCW 60.40.010(3).

FN21. RCW 60.40.010(4).

¶ 18 Smith and Guarino do not argue that their interest in this malpractice action is superior in priority to that of Moran. Indeed, priority of competing lien claims is not at issue here. Rather, the question is whether Nelson's interest in this action and its settlement proceeds, which Smith and Guarino purchased at their execution sale, is subject to Moran's lien for attorney's fees.

¶ 19 Accordingly, we conclude that this action and its settlement proceeds became subject to an attorney's lien in favor of Moran in March 2006, at the commencement of this malpractice action.

Discharge of Lien

¶ 20 Smith and Guarino challenge the validity of Moran's lien on several bases. We consider and reject all of them.

[10] ¶ 21 They first argue that the attorney's lien statute does not authorize a lien against settlement proceeds in excess of amounts due a client. Specifically, they argue that since Nelson no longer has a right to recover settlement proceeds, Moran no longer has a lien for fees. For support, they rely on RCW 60.40.010(2) and several cases that were decided before the 2004 amendments to the attorney's lien statute. Their reliance is misplaced.

¶ 22 Smith and Guarino assert that RCW 60.40.010(2) grants attorneys a lien "that is limited

by the right of the client itself to recover.” FN22
We do not agree. RCW 60.40.010(2) states:

FN22. Brief of Respondents at 9.

Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and *468 over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

The meaning of this subsection is not entirely clear from the text. But the legislative intent is made clear by a reading of the legislature's stated purpose for the 2004 amendments to the attorney's lien statute:

The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. [FN23]

FN23. (Emphasis added.); see also S.B. Rep. 6270, 58th Leg., Reg. Sess. (Wash.2004) (citing *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, 114 Wash.App. 80, 55 P.3d 1208 (2002); *Banaitis v. Comm'r of Internal Revenue*, 340 F.3d 1074 (9th Cir.2003)) (The purpose of the amendments is to recognize an attorney's property interest in an action in order to avoid double taxation.).

¶ 23 It is clear from the above legislative history that the purpose of RCW 60.40.010(2) is to recognize an attorney's property interest in his or her client's case in order to avoid **281 double federal

income taxation. In short, counsel's property interest by way of the lien, not the client's interest, is to be taxed. Nowhere in this statement of legislative intent is there any suggestion that the purpose of the subsection is to discharge or otherwise affect the property interest of a law firm in its client's case where the client is displaced by others during the case.

¶ 24 To read the subsection in the manner Smith and Guarino argue sharply conflicts with the other 2004 amendments. For example, the amendments grant the attorney's lien a super priority. FN24 They also protect the lien despite *469 settlement between the parties. FN25 And the lien against settlement proceeds follows possession of the proceeds by the attorney's client, subject to the provisions of the Uniform Commercial Code (UCC). FN26 These provisions reinforce rather than diminish the nature and importance of the property interest of the attorney's lien in the action and its proceeds. Accordingly, we see no reason to conclude that the lien is discharged when the original client leaves the case.

FN24. RCW 60.40.010(3).

FN25. RCW 60.40.010(4).

FN26. RCW 60.40.010(5).

¶ 25 We conclude that RCW 60.40.010(2) does not support invalidating the attorney's lien in favor of Moran.

[11] ¶ 26 Smith and Guarino next contend, “Washington courts have consistently interpreted RCW 60.40.010 to require recovery by a client to enforce a lien for fees under the statute.” FN27 But the cases they cite do not support their argument that a lien cannot be enforced against a plaintiff who purchases a cause of action at an execution sale. Moreover, the cases they cite interpret the pre-2004 version of the statute. But the 2004 amendments significantly changed the statute, as we have already explained.

FN27. Brief of Respondents at 10.

¶ 27 For example, both *Wilson v. Henkle*^{FN28} and *Suleiman v. Cantino*^{FN29} involved a judgment against the client, rather than a judgment in the client's favor. This court held in both cases that the pre-amendment attorney lien statute authorized a lien against a judgment in the client's favor, not a judgment against the client in favor of the adverse party.^{FN30} The cases do not address the situation in this case, in which there is a settlement in favor of the current plaintiffs after *470 the original client was no longer the real party in interest. The other cases they cite are similarly inapposite.^{FN31}

FN28. 45 Wash.App. 162, 164, 724 P.2d 1069 (1986).

FN29. 33 Wash.App. 602, 604, 656 P.2d 1122 (1983).

FN30. *Wilson*, 45 Wash.App. at 170, 724 P.2d 1069; *Suleiman*, 33 Wash.App. at 606-07, 656 P.2d 1122.

FN31. *See In re Estate of Whitmire*, 134 Wash.App. 440, 447, 140 P.3d 618 (2006) (holding that the attorney lien statute did not entitle the attorney to funds derived from a *different* cause of action than the one in which the attorney represented the client); *Ross v. Scannell*, 97 Wash.2d 598, 606, 647 P.2d 1004 (1982) (concluding that the attorney lien statute does not apply to real property).

¶ 28 Smith and Guarino also argue that an attorney's lien is not enforceable against a non-client. While this is true, it is irrelevant to the issue we decide: whether settlement proceeds of this malpractice action are subject to Moran's lien for attorney's fees.

¶ 29 Smith and Guarino appear to argue that the Moran attorney's lien was somehow discharged by virtue of their purchase of Nelson's interest in this malpractice action at the sheriff's sale they re-

quested.^{FN32} We disagree.

FN32. Brief of Respondents at 11-12 ("On the contrary, the plain language of RCW 60.40.010 confirms that attorney's fees liens on an action and its proceeds do not follow that action in the event of a transfer, as other kinds of liens may do under other statutes.").

[12][13] ¶ 30 It is well established that an execution creditor who directs a sheriff to levy upon and sell property of the judgment debtor is not a bona fide purchaser for value, taking only such interest as the judgment debtor has.^{FN33} Here, Smith and Guarino caused the sheriff to levy upon and sell Nelson's**282 interest in this malpractice action. They are not bona fide purchasers for value and took that interest subject to Moran's lien for attorney fees.

FN33. *Anderson Buick Co. v. Cook*, 7 Wash.2d 632, 638, 110 P.2d 857 (1941).

[14] ¶ 31 We note further that the lien that Moran claims does not require any affirmative acts other than commencing the lawsuit. 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 subsection (1)(d), establishing a lien against an action and its proceeds.

¶ 32 Smith and Guarino argue that we should not apply the well-established principle that the creditor purchasing*471 at an execution sale takes only the debtor's interest. They claim that we should not apply this principle because we strictly construe the attorney's lien statute and do not apply cases involving other law. This argument is unconvincing.

¶ 33 We note that subsection (5) of the lien statute expressly refers to the UCC. Thus, reference to other statutes for purposes of determining competing rights of creditors is not barred.

¶ 34 More importantly, reference to the law of execution sales is not barred where the attorney's lien statute is silent on the point. In short, there is no violation of the strict construction rule, to the extent that it is even applicable to the 2004 amendments that are at issue here, by reference to other law.

¶ 35 We conclude that the interest in settlement proceeds that Smith and Guarino acquired at the sheriff's sale they requested remained subject to Moran's preexisting lien for attorney's fees.

¶ 36 Finally, Smith and Guarino argue that Moran's claim for fees is against Nelson, not them. That is true but irrelevant.

[15] ¶ 37 The purpose of a lien is to secure payment for amounts owed.^{FN34} The question here is whether Moran has a valid lien for attorney's fees against the settlement proceeds, not whether the law firm has a right of action against Nelson for unpaid fees.

FN34. *Ross*, 97 Wash.2d at 604, 647 P.2d 1004 (the attorney's lien statute is a tool to secure compensation).

¶ 38 We note that Smith and Guarino, as judgment creditors of Nelson, also have a right against other property that Nelson owns. But that does not diminish their right to claim ownership of Nelson's rights in this malpractice action. We see no reason to accept their argument that a right to recover elsewhere affects the right to the action and its proceeds in this case.

*472 ¶ 39 We conclude that Moran's right to sue Nelson for unpaid fees has no effect on the validity of its lien for attorney's fees against this action and its settlement proceeds.

Amount of Lien

¶ 40 The trial court did not have occasion to rule on arguments about the amount of the attorney's fee lien in light of its decision to invalidate the lien. Moreover, neither party in this appeal has satisfactorily addressed the amount of the Moran li-

en. We note that at oral argument counsel for Smith and Guarino represented to this court that settlement proceeds have been paid to their clients.

¶ 41 Because the question of the amount of the attorney's lien is not presently before us, we direct the trial court to consider and resolve it on remand.

CONFIDENTIALITY AGREEMENT

¶ 42 Respondent Cairncross & Hempelmann takes no position on the issues that are properly before us. However, the firm asks us to rule on matters pertaining to the confidentiality of its settlement agreement.

¶ 43 We decline to do so. Those matters are not presently before us and we do not address them.

¶ 44 To summarize, Moran has a lien for attorney's fees that arose by operation of law under RCW 60.40.010(1)(d) in March 2006. That lien was not discharged either by the subsequent sheriff's sale or the substitution **283 of Smith and Guarino as the real parties in interest in this malpractice action. The amount of the lien is to be decided by the trial court on remand.

¶ 45 We reverse and remand for further proceedings.

WE CONCUR: GROSSE and BECKER, JJ.

Wash.App. Div. 1, 2008.
Smith v. Moran, Windes & Wong, PLLC
145 Wash.App. 459, 187 P.3d 275

END OF DOCUMENT

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
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January 13, 2010

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CASE #: 64433-5-1
MWW PLLC, Petitioner v. Ryan Smith, et al., Respondents

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

c: Hon. Gregory P. Canova

enclosure

RECEIVED

JAN 19 2010

MORAN WINDES & WONG

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MORAN, WINDES AND WONG, a Washington Professional Corporation,)	
)	No. 64433-5-I
)	
Petitioner,)	COMMISSIONER'S RULING
)	DENYING DISCRETIONARY
v.)	REVIEW
)	
RYAN SMITH; JOHN GUARINO; STEVEN WOLLACH; THAD WARDALL; and FULLPLAY MEDIA SYSTEMS, INC., as successor-in- interest to INTERACTIVE OBJECTS, INC., CAIRNCROSS & HEMPELMANN, P.S., a Washington professional service corporation, its individual principals and their respective marital communities,)	
)	
Respondents.)	
_____)	

In this dispute over attorney fees, Moran, Windes and Wong PLLC (Moran) seeks discretionary review of the trial court order denying Moran's motion for summary judgment on the amount of an attorney's fee lien. For the reasons stated below, review is denied.

The lengthy procedural history is not in dispute and is set forth in this court's prior opinions, Smith v. Moran, Windes and Wong, PLLC, 145 Wn. App. 459, 187 P.3d 275 (2008); Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 86 P.3d 1175 (2004); and Guarino v. Interactive Objects, Inc., 137 Wn. App. 1029, 2007 WL 664878 (Wash. App. Mar. 5, 2007) (unpublished).

No. 64433-5-1/2

Smith and Guarino, former executives and founders of Interactive Objects, Inc., obtained a judgment against Brent Nelson and others in an action for securities violations. Nelson retained Moran to bring an attorney malpractice action against Cairncross and Hempelmann. After independent counsel reviewed the retainer agreement, Nelson and Moran entered into a written contingent fee agreement, which provided for a first position lien on the claims and any proceeds from the malpractice action. The agreement provided:

If client transfers any interest in the claims or proceeds to a third party, voluntarily or otherwise, that interest shall be subordinate to the Attorney's lien which shall automatically be fixed at \$750,000 immediately preceding an involuntary transfer. This lien is granted in addition to any other lien created by Washington law.

Based on the judgment in the securities lawsuit, Smith and Guarino obtained a writ of execution, levied against Nelson's interest in the malpractice action, and then purchased Nelson's interest in the action at the sheriff's sale. Thereafter, Smith and Guarino substituted for Nelson in the malpractice action.

Moran later withdrew as counsel, and Smith and Guarino obtained new counsel, Yarmuth, Wilsdon, Calfo, PLLC, in this action.

In August 2007, Cairncross and Hempelmann settled the malpractice action with Smith and Guarino for a seven figure sum. Moran asserted a lien claim of \$750,000 against the settlement proceeds based on the contingent fee agreement. The trial court granted Smith and Guarino's motion to invalidate the lien.

On appeal, this court rejected all Smith and Guarino's arguments and reversed. The court held that as of March 2006 when the malpractice action was commenced, by operation of law under RCW 60.40.101(1)(d), Moran had an attorney's lien for compensation upon the malpractice action and its proceeds. Smith v. Moran, 145 Wn. App. at 466-67. At the time the amount of the settlement was unknown. Moreover, the trial court had not had occasion to rule on arguments about the amount of the attorney's fee lien. Accordingly, the court directed the trial court to consider and resolve the amount of the lien on remand. Smith v. Moran, 145 Wn. App. at 472.

On remand Moran moved for summary judgment on the lien in the amount of \$750,000 with interest pursuant to the agreement. Smith and Guarino opposed summary judgment on several grounds. The trial court denied summary judgment:

The Court . . . finds that genuine issues of material fact exist in attempting to apply the factors set forth in RPC 1.5(a) to determine the reasonableness of the attorney fees sought pursuant to RCW 60.40.010(1)(d).

The Court further finds that the contingent nature of the fee agreement . . . creates a genuine issue of material fact as to the amount to be allowed under RCW 60.40.010(1)(d). When the attorney-client relationship is terminated before full performance by the attorney, as in this case, any contingent fee agreement is replaced by a reasonable hourly fee. *Forbes v. American Building Maintenance Co. West*, 148 Wn. App. 273, 288, (2009), citing *Taylor v. Shigaki*, 84 Wn. App. 723, 728 (1997). As noted in *Taylor*, at 728-29, there is an exception to this rule where the attorney has substantially performed the duties owed to the client before the attorney is discharged. *Taylor*, at 728. "The determination of substantial performance is a question of fact" *Taylor*, at 728, citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716 (1982).

The trial court also denied Smith and Guarino's motion to strike the fee agreement on grounds that it was not properly authenticated and may be void and/or unenforceable in whole or part based on a prior fee agreement with Nelson.¹

Moran seeks discretionary review under RAP 2.3(b), arguing that the trial court decision constitutes (1) obvious error that renders further proceedings useless, (2) probable error that substantially alters the status quo or substantially limits a party's freedom to act, and/or (3) such a far departure from the accepted and usual course of proceedings as to call for discretionary review.

In Taylor, the case relied on by the trial court, this court stated:

Generally, an attorney who is discharged before full performance under a contingency fee contract is not entitled to the contingency fee. Instead, the court will award the attorney the reasonable fees for the services rendered before the discharge. This award is normally made on the basis of quantum meruit, meaning 'as much as he . . . deserves,' to prevent unjust enrichment . . .

[But] Washington courts have recognized an exception where an attorney is discharged after "substantially" performing the duties owed to a client. This exception prevents clients from firing their attorneys immediately before the contingency occurs to avoid paying a contingency fee.

Taylor, 84 Wn. App. at 728 (citations omitted). Accord Forbes v. Am. Bldg.

Maint. Co., West, 148 Wn. App. at 288-89. The determination of substantial performance is a question of fact. Taylor, 84 Wn. App. at 728.

¹ At the time Smith and Guarino filed their answer to the motion for discretionary review, it believed the motion to strike was pending in the trial court. At oral argument counsel explained that the trial court has denied the motion to strike.

RCW 60.40.010 provides in part:

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

...

(d) Upon an action . . . and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, *or if the services were rendered under a special agreement, for the sum due under such agreement; . . .*

...

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

Moran contends that under the plain meaning of RCW 60.40.010, the amount of the lien is the amount set in the special contingent fee agreement, \$750,000, and that where independent counsel reviewed the agreement for fairness and reasonableness prior to Nelson and Moran entering into it, there is no basis for the trial court to conduct an inquiry into whether Moran substantially performed or to determine a reasonable fee based on the work performed. Put differently, Moran argues that while the issues of substantial performance and a reasonable fee under quantum meruit raise disputed questions of fact, the disputed facts are not material because under RCW 60.40.010, Moran provided services under a special agreement and is entitled to the sum due under the agreement.

Smith and Guarino respond that despite the agreement, a reasonableness inquiry is compelled by RPC 1.5(a).

Review under any of the enumerated grounds of RAP 2.3(b) is discretionary.² Remedy by appeal from a final judgment is generally adequate, and the court discourages piecemeal review.³ A party seeking discretionary review under RAP 2.3(b) bears a heavy burden.⁴

I agree with Moran that the attorney fee issue it has raised is an important issue with broad implications. But Moran has not met the strict criteria for discretionary review. Neither party has cited a Washington case that addresses the specific issue presented here, and I am unaware of any. Moran has not demonstrated obvious error, and even if it had, further proceedings are not useless as Moran may seek review after the trial court determines the amount of fees. Similarly, the trial court's ruling does not substantially alter the status quo or substantially limit Moran's freedom to act within the meaning of RAP 2.3(b)(2).⁵ Nor is the trial court's decision such a far departure from the accepted and usual course of proceedings as to call for interlocutory review.

² The 2002 amendments to RAP 2.3(b) altered the introductory phrase to read that "discretionary review may be accepted only in the following circumstances." (emphasis added). Drafters' Comment to 2002 Amendment ("The proposed amendment also changes the word 'will' to 'may' in the introductory clause, to make clear that review under any of the enumerated grounds is discretionary...")

³ Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 127, 467 P.2d 372 (1970).

⁴ In re Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

⁵ See Taskforce comments to RAP 2.3(b)(2) (rule narrowly applies primarily to orders pertaining to injunctions, attachments, receivers, and arbitration).

No. 64433-5-I/7

Now, therefore, it is

ORDERED that discretionary review is denied.

Done this 13th day of January, 2010.

Mary S. Neel

Court Commissioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 13 AM 8:11

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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July 5, 2011

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CASE #: 67179-1-I

MWW PLLC, dba Moran Wong & Keller formerly dba Moran Windes & Wong, App. v. Ryan Smith, et al., Res.

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on July 1, 2011:

The initial lien claimant and plaintiff-intervenor in this action is Moran, Windes and Wong, PLLC. Then Moran, Wong & Keller PLLC filed a motion to set a trial date. It appears that based upon the theory that a different entity than the plaintiff-intervenor lien claimant was attempting to join in this litigation without a formal substitution of parties or intervention, on May 12, 2011, the trial court denied the request of Moran Wong & Keller a Washington PLLC's for a trial date noting that there was "insufficient evidence that the moving non-party has standing to bring this motion at this time."

Then on May 18, 2011, the trial court granted the plaintiffs' motion to dismiss the claims of plaintiff-intervenor Moran, Windes and Wong, PLLC for want of prosecution. The dismissal was under CR 41(b)(1) and without prejudice.

The notice of appeal was filed by Intervener Appellant MWW PLLC dba Moran Wong & Keller formerly dba Moran Windes & Wong.

The question is whether the trial court orders are appealable. The appellant argues that the bottom line is that the action has been terminated and so it should be appealable under RAP 2.2(a)(3).

But the problem with that analysis is that the actual dismissal was without prejudice. It is well established that a dismissal without prejudice is not appealable unless its practical effect is to determine the action and prevent a final judgment or to discontinue the action. Munden v. Hazelrigg, 105 Wn.2d 39, 711 P.2d 295 (1985); Barnier v. City of Kent, 44 Wn. App. 868, n. 1 at 872, 723 P.2d 1167 (1986). An examples of a dismissal without prejudice that discontinues the action is when the statute of limitations would bar refiling the litigation. Here, the appellant does not assert that a statute of limitations would bar refiling the action. He argues that the motion to dismiss is tactical and he cannot anticipate what new or different defenses might be raised if appellant refiles the action. The dilemma is that appellant has the burden of establishing that this the action has been discontinued. The fear of a misstep in naming the plaintiff-intervenor is a new action on the lien claim is not sufficient. The trial court rulings do not reveal that a refilled action will be rejected by the trial court, if the party is proper identified and standing is established.

The appellant does not establish that the dismissal without prejudice is appealable under RAP 2.2(a)(3) or the Munden doctrine.

Therefore, this appeal is dismissed and review is terminated.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

TWG

THE SUPREME COURT
STATE OF WASHINGTON

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY



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January 9, 2012

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 86720-8 - MWW PLLC dba Moran Wong & Keller v. Ryan Smith et al.
Court of Appeals No. 67179-1-I

Clerk and Counsel:

Enclosed is a copy of the RULING DENYING REVIEW, signed by the Supreme Court Commissioner, Steven Goff, on January 9, 2012, in the above entitled cause.

Sincerely,

Ronald R. Carpenter
Supreme Court Clerk

RRC: daf

Enclosure



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MWW PLLC, dba MORAN, WONG &
KELLER PLLC, a Washington
Professional Corporation,

Petitioner,

v.

RYAN SMITH, JOHN GUARINO,
STEVEN WOLLACH, THAD
WARDALL, and FULLPLAY MEDIA
SYSTEMS, INC., as successor-in-interest
to INTERACTIVE OBJECTS, INC.,

Respondents,

v.

CAIRNCROSS & HEMPELMANN,
P.S., a Washington professional service
corporation, its individual principals and
their respective marital communities,

Defendant.

NO. 86720-8

RULING DENYING REVIEW

BY RONALD A. CAMPBELL
CLERK
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E

Ryan Smith and John Guarino obtained a judgment of several million dollars against Brent Nelson and others in a securities fraud case. *See Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 86 P.3d 1175 (2004).¹ In 2006, after the trial court entered judgment in that case, Mr. Nelson brought a malpractice action against the attorneys who advised him on the matter, Cairncross & Hempelmann. Mr. Nelson retained the firm of Moran, Windes & Wong, PLLC, to file the suit. The

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(2007).

¹ A later decision in the case is noted at 137 Wn. App. 1029, 2007 WL 664878

professional services agreement provided for a contingency fee should Mr. Nelson receive any proceeds from the suit, and that Moran, Windes & Wong had a lien for \$750,000 should the client transfer any interest in the claims. One month later, Mr. Smith and Mr. Guarino obtained a writ of execution on Mr. Nelson's interest in the malpractice case, and they bought the malpractice claim for \$25,000 at the ensuing sheriff's sale in August 2006.

Moran, Windes & Wong withdrew from the malpractice action in September 2006 because it could not represent Mr. Smith and Mr. Guarino, and another firm took over the action. In August 2007 Mr. Smith and Mr. Guarino settled with Cairncross & Hempelmann. Moran, Windes & Wong then asserted a lien against the settlement proceeds, and asked Mr. Smith and Mr. Guarino to settle the lien. They refused and filed a motion asking the superior court to invalidate the lien. The court granted the motion.

The Court of Appeals reversed, holding that Mr. Smith and Mr. Guarino obtained the case subject to the attorney lien and were thus responsible for Moran, Windes & Wong's fees expended during Mr. Nelson's participation in the case. *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008), *review denied*, 165 Wn.2d 1032 (2009). As this citation suggests, Mr. Smith and Mr. Guarino sought this court's review, but their petition was denied.

Back in superior court, Moran, Windes & Wong filed a motion for summary judgment, seeking a \$750,000 judgment on its claimed lien. In October 2009 the superior court denied this motion, and in January 2010 the Court of Appeals denied discretionary review of that decision, returning the case to superior court the next month. Apparently nothing happened in the case for over a year. In April 2011 "Moran, Wong & Keller, a Washington PLLC," filed a motion for case schedule and

trial date.² Mr. Smith and Mr. Guarino opposed this motion on grounds that it had been filed by a nonparty, and moved to dismiss the action because it had not been noted for trial within one year. By order dated May 12, 2011, the superior court denied Moran, Wong & Keller's motion for case schedule and trial date as having been filed by a nonparty without sufficient evidence that Moran, Wong & Keller had standing to bring the motion. On May 18 the court dismissed the case without prejudice.

Moran, Wong & Keller appealed to Division One of the Court of Appeals. Soon thereafter the Court of Appeals set a hearing to determine whether the dismissal order was subject to appeal, since it had been entered without prejudice. Mr. Smith and Mr. Guardine responded to this letter by filing a pleading on the appealability question, but Moran, Wong & Keller did not. On July, 1, 2011, Commissioner Verellen entered a ruling dismissing that appeal on grounds that the dismissal without prejudice was not appealable. *See Munden v. Hazelrigg*, 105 Wn.2d 39, 711 P.2d 295 (1985). Moran, Wong & Keller filed a motion for "reconsideration" of that decision, which was treated as a motion to modify the commissioner's ruling. On September 28, 2011, the Court of Appeals judges denied the motion to modify. Moran, Wong & Keller now seeks this court's review.

This court will grant a motion for discretionary review only if the party seeking review establishes that the Court of Appeals has committed an obvious error which would render further proceedings useless, has committed probable error substantially altering the status quo or limiting the party's freedom to act, or has significantly departed from the accepted and usual course of judicial proceedings.

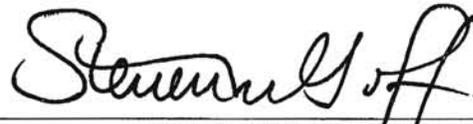
² Moran, Wong & Keller asserts that MWW, PLLC, formerly did business as Moran, Windes & Wong, but changed the name to Moran, Wong & Keller when Robert Windes left the firm. Records of the Secretary of State and the Department of Licensing seem to support much of this, though they do not clear up whether the change in membership of the law firm affects the claimed lien.

RAP 13.5(b). Unfortunately, Moran, Wong & Keller makes no direct attempt to address these criteria, or to demonstrate such an error or departure. It suggests that the result here is unjust, but it fails to discuss the Court of Appeals reliance on *Munden*, where this court held that a dismissal without prejudice is not appealable unless its practical effect is to determine the action and prevent a final judgment or to discontinue the action. To be sure, this rule admits of its own limitations, such as where the statute of limitations would bar refilling of the litigation. But Moran, Wong & Keller failed to respond to the Court of Appeals hearing on appealability, and neither its motion for “reconsideration” nor its motion to this court addresses whether the *Munden* doctrine should preclude this particular appeal. It argues at length that the motion for case schedule and trial date should not have been dismissed on standing grounds, and that the subsequent dismissal pursuant to CR 41(b)(1) was in error, both arguments having some force. But this misses the point: the Court of Appeals determined that the superior court’s decision was not appealable because it was entered without prejudice.

In their recently-filed reply Moran, Wong & Keller say that after Commissioner Verellen’s ruling it filed a new complaint in superior court “to collect on the lien.” In an order dated December 12, 2011, the superior court dismissed the claims against Mr. Smith and Mr. Guarino because the claims “can be adjudicated in *Moran v. Smith*, No. 06-2-10589-3, currently pending in the Court of Appeals.” This, unfortunately, is a reference to the current case, which the Court of Appeals had already dismissed. Thus, the Court of Appeals has said in this case that Moran, Wong & Keller may not appeal, and to go back to the superior court, whereas the superior court has said that the new lawsuit may not go forward, because the appeals court will

handle the matter.³ But however dubious this order may be, the current review cannot provide a means of fixing an order in that case. If Moran, Wong & Keller disputes the most recent superior court order, it may seek separate appellate review of that order, as it apparently already has. That order does not show that the Court of Appeals erred or departed from accepted practice in dismissing this appeal. RAP 13.5(b).

Accordingly, the motion for discretionary review is denied.


COMMISSIONER

January 9, 2012

³ The decision to dismiss Mr. Smith and Mr. Guarino from the new lawsuit is doubly curious because it was done on the motion of other parties to dismiss them, and the court amended by hand the proposed order to also dismiss Mr. Smith and Mr. Guarino on the grounds quoted above.