

COURT OF APPEALS
STATE OF WASHINGTON
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No. 70126-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID MONK, an individual; and
WHITE RIVER FEED COMPANY, INC.,
a Washington corporation,
Appellants/Cross-Respondents,

v.

RICHARD PIERSON and JOAN ASKEY,
individually and as the marital community comprised thereof;
KINGMAN PEABODY PIERSON & FITZHARRIS, P.S.,
a Washington corporation,
n/k/a KINGMAN RINGER & HORNE, INC., P.S. and
WILLIAMS & WILLIAMS, P.S.C.,
a Washington professional service corporation,
Cross-Appellants/Respondents.

**APPELLANTS/CROSS-RESPONDENTS' RESPONSE
TO CROSS-APPELLANTS/RESPONDENTS'
BRIEF**

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Appendix A: Commissioner Mary Neel’s Order
dated 08-13-12, Case No. 69000-1-I

I. INTRODUCTION.

Cross-Appellant Pierson's position that the trial court erred in not dismissing Monk's claims based upon the doctrines of res judicata, collateral estoppel and CR 13(a) ignores the law of this case as set forth in this Court's ruling in Monk v. Driessen, No. 67503-6-1 (unpublished opinion) of October 15, 2012.¹

Monk's claims were not compulsory counterclaims, required to be asserted, under CR 13(a) in response to Pierson's attorney's lien foreclosure motion because a pleading is not required to be asserted in response to a motion.

Pierson's argument that the equitable defenses of res judicata and collateral estoppel preclude Monk's claims fails because Pierson cannot meet the elements of those doctrines.

II. REBUTTAL TO ASSIGNMENTS OF ERROR.

1. Did the Superior Court err in denying Pierson's Motion for Summary Judgment regarding preclusion defenses in an Order dated May 24, 2012?

¹ This unpublished decision is cited to show the applicability of the law of the case doctrine as argued herein and not as a citation to an unpublished opinion in violation of RAP 10.4(h) and GR 14.1.

Issues Pertaining to Assignment of Error:

A. Does the law of the case doctrine preclude Pierson from obtaining the relief he requests when this Court has ruled that Monk's claims against Pierson were not foreclosed by the doctrines of res judicata or collateral estoppel, and were not mandatory counterclaims under CR 13(a)?

B. Should this Court disregard Pierson's argument that CR 13(a) required that Monk assert his claims against Pierson in response to the underlying attorney lien motion when an analysis of CR 13(a) and CR7(a) demonstrate that a response to an attorney's lien motion does not give rise to a mandatory requirement that the client file his counterclaims in response to the attorney's lien foreclosure motion?

C. Should the Court disregard Pierson's argument that the doctrines of res judicata and collateral estoppel apply when Pierson was proceeding against proceeds of a judgment, rather than proceeding against Monk?

D. Should this Court reject Pierson's assertion that the doctrines of res judicata and collateral estoppel bar Monk's claims when: 1) those doctrines do not apply when a counterclaim is permissive, rather than

compulsory; and 2) when Pierson cannot meet the elements of these preclusion defenses?

E. Is King County v. Seawest Investment Associates, 141 Wn.App. 304, 170 P.3d 53 (2007) distinguishable when that decision did not concern an analysis of CR 13(a)?

III. REBUTTAL STATEMENT OF THE CASE.

A. Underlying Facts.

The parties have thoroughly briefed the facts of the underlying case. Monk² adopts and incorporates his recitation of his statement of the case set forth in the Opening Brief of Appellants.

B. Procedural Facts Pertinent To This Cross-Appeal.

The Hon. Jay White presided over the bifurcated trial of the underlying matter. (CP 505). Following the conclusion of the damages phase of the trial, Pierson petitioned for an award of Monk's costs and attorneys fees pursuant to the condemnation statute, RCW 8.25.075(3). (CP 506, 578). Judge White denied the request, finding that the underlying defendant Cities had timely made an offer of settlement that exceeded Monk's award at trial, thereby precluding Monk from receiving

² "Monk", as that term is used herein, is intended to collectively refer to the Appellants/Cross-Respondents David Monk and White River Feed Company, Inc. (See Opening Brief of Appellants/Cross-Respondents dated 6/21/13, p.1, n.1.)

an award of fees and costs pursuant to the condemnation statute. (CP 506).

Monk appealed and was successful on appeal. (CP 505 – 513).

This Court remanded the matter to Judge White for a determination of fees and costs to be awarded to Monk. (CP 512).

On September 22, 2008, Judge White issued a 109 page Memorandum Decision setting forth his ruling on Monk's award of fees and costs. (CP 117 – 225).

On October 8, 2008, Pierson filed an attorney's lien. (CP 227 – 230). Pierson then filed a Motion to Enforce Attorney's Lien dated January 26, 2009. (CP 233).

On February 29, 2009, Judge White issued an Order setting June 8, 2009 as the evidentiary hearing date to hear Pierson's lien foreclosure claim. (CP 233- 238). Judge White issued a Case Scheduling Order, much the same as a standard civil case scheduling order in King County. (CP 238).

Monk retained attorney Kristina Driessen to represent him in defense of Pierson's attorney's lien foreclosure motion. (CP 91, 286).

Judge White issued his Order on Pierson's attorney's lien motion on August 12, 2009. (CP 239 – 247).

On March 17, 2011, Monk filed suit against attorney Kristina Driessen. (CP 249 - 261).

Monk initially filed suit against Driessen rather than Pierson because Monk was of the good faith belief that the holding in King County v. Seawest Investment Associates, *supra*, precluded Monk from pursuing Pierson directly, and that Driessen had committed malpractice by not preserving Monk's claims against Pierson by not asserting those claims in response to the attorney's lien foreclosure motion. (CP 249 – 261).

Judge Wesley Saint Clair heard cross-motions for summary in the Monk v. Driessen case on the sole issue of whether Monk's claims against Pierson remained viable, or whether the doctrines of res judicata, collateral estoppel and/or CR 13(a) precluded Monk from claiming against Pierson. Judge Saint Clair ruled, by Order dated July 12, 2011, that Monk's claims against Pierson remained viable and were not foreclosed by Driessen's failure to plead and present those claims in response to Pierson's motion to enforce the attorney lien. (CP 263 – 265).

Monk timely appealed Judge Saint Clair's ruling to this Court and also filed suit against Pierson in the King County Superior Court on August 1, 2011, based upon Judge Saint Clair's ruling that Monk's claims

against Pierson were not foreclosed. (CP 1 – 18).

Monk moved the trial court for an Order to Stay Proceedings in this case, pending ruling by this Court on Monk's appeal in the Monk v. Driessen appeal, No. 67503-6-I. Pierson resisted that Motion. Judge Brian Gain denied Monk's Motion to Stay Proceedings by Order dated December 19, 2011. (CP 270 – 271).

On April 6, 2012, while the Monk v. Driessen matter was on appeal, Judge Gain heard cross-motions for summary judgment in this case. (CP 387 – 403). Pierson essentially adopted Monk's arguments in the Driessen matter, asserting that the doctrines of res judicata, collateral estoppel and CR 13(a), coupled with this Court's holding in King County v. Seawest Investment Associates, *supra*, precluded Monk from suing Pierson. (CP 39 – 58).

Judge Gain denied both Pierson's request to dismiss Monk's case, pursuant to the aforementioned theories, and he also denied Monk's cross-motion to dismiss Pierson's affirmative defenses pertaining to the res judicata issues. (CP 244, 385-402).

Upon Pierson's suggestion at the summary judgment hearing, and concurrence by Monk, Judge Gain directed Monk and Pierson to craft an

order that would allow the issues pertaining to Pierson's res judicata and collateral estoppel defenses to be certified for review by this Court and consolidated with the Monk v. Driessen appeal. (CP 396 – 398).

Pierson instead filed a Motion for Reconsideration of the summary judgment denial on April 16, 2012. (CP 374 – 376). On April 25, 2012, Monk moved before Judge Gain for Entry of Judgment Denying Cross Motions for Summary Judgment and for Order Requesting Written Findings on Plaintiffs' Request for Certification Pursuant to RAP 2.3(b)(4). (CP 377 – 382).

On May 24, 2012, Judge Gain issued his Order Denying Cross Motions For Summary Judgment and Findings and Certifications Pursuant to RAP 2.3(b)(4). (CP 459 – 466).

The parties then moved for discretionary review before this Court. By Order dated August 13, 2012, Commissioner Mary Neel ruled as follows in Case No. 69000-1-I:

The trial court certified these matters for discretionary review under RAP 2.3(b)(4). Respondent/cross petitioner Richard Pierson also seeks review under RAP 2.3(b)(1) and (2). Because the issues raised in these matters will be resolved by an appeal pending in this court, Monk v. Driessen, No. 67503-6-I, discretionary review is not warranted. The certification is respectfully denied, as is Pierson's motion. Review is dismissed.

(See ruling attached to this brief as App. A.)

On October 15, 2012, this Court issued its unpublished opinion in Monk v. Driessen, No. 67503-6-I. This Court held:

Because neither CR 13 nor res judicata bars Monk from bringing a malpractice action against Pierson, the court properly granted Driessen's motion for summary judgment. We affirm.

This Court in Driessen distinguished King County v. Seawest Investment Associates, *supra*.

We said Seawest could not complain on appeal that the trial court did not consider possible counterclaims when the trial court provided Seawest with the opportunity to assert them, and Seawest chose not to. Thus, Seawest does not even address the permissive or compulsory nature of any counterclaim.

A review of the applicable rules, CR 13(a) and CR 7(a) demonstrates that a party defending against its former attorney's lien enforcement motion in the original lawsuit need not assert any counterclaim to preserve the right to assert that claim later. CR 13(a) generally requires that

[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 same 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.

CR 7(a) defines as “pleadings” a complaint, an answer, a reply to a counterclaim, an answer to a cross claim, a third party complaint and a third party answer. With two exceptions not relevant to this discussion, the rule prohibits any other pleading. Thus, a motion is not a pleading for purposes of CR 13(a), and the rule does not make compulsory any counterclaim to the relief requested.

This Court, in its Driessen decision, also disposed of the res judicata arguments Pierson now makes with the following analysis:

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated in a prior action. It generally applies where the subsequent action is identical with a prior action in four respects: (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made. But application of res judicata principals in this case is inconsistent with our determination that Monk’s counterclaims against Pierson were permissive rather than compulsory.

IV. ARGUMENT.

A. The Law Of The Case Doctrine Precludes Pierson From Now Asserting That The Trial Court Erred In Not Dismissing Monk’s Claims Based On Res Judicata Principals And CR 13(a), When This Court Has Subsequently And Specifically Ruled That Those Theories Do Not Bar Monk From Bringing An Action Against Pierson.

The law of the case doctrine provides that where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent

appeal. Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988).

It is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. The Supreme Court is bound by its decision on the first appeal until such time as it might be authoritatively overruled. Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965); Greene v. Rothschild, 68 Wn.2d 1, 7, 402 P.2d 356, 414 P.2d 1013 (1965).

In this matter, there was a specific determination by Commissioner Neel that the issues raised by Pierson before this Court as to the applicability of his CR 13(a) and preclusion defenses would be resolved by this Court's then pending decision in the Monk v. Driessen appeal, No. 67503-6-I. Those issues were in fact resolved in that appeal when this Court specifically held that neither CR 13 nor res judicata principals bar Monk's claims against Pierson. That ruling is and has become the law of the case.

B. An Analysis Of CR 13(a) And CR 7 Show That Pierson's Assertion That Monk Was Required To Plead His Claims Against Pierson In Response To The Lien Foreclosure Motion Is In Error.

CR 13 (a) governs compulsory counterclaims.

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. 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.

CR 7(a) defines pleadings as follows:

Pleadings. 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.

A response to an attorney's motion to enforce a lien is not a "pleading" as defined in CR 7(a), and consequently there can be no requirement to file mandatory counterclaims in response to such a motion. Counterclaims, compulsive or permissive, must be asserted as pleadings.

Furthermore, a compulsory counterclaim is only required to be asserted against an "opposing party." In this case, Judge White

specifically found that Pierson was not a “party” in the underlying lien action. It follows that before one can be an “opposing party”, one must first be a party.

Richard Pierson is not a “plaintiff” or otherwise a party to this action. The court treats his motion as one to “enforce attorney’s lien” although the supporting declaration references a “motion for an award of attorney’s fees, expert witness fees and costs” which is not before this court. (CP 233, *n.1*).

Courts from other jurisdictions having considered this precise issue and have held that an attorney does not transform his client into a “party” much less an “opposing party” within the construct of CR 13(a) by filing motions to secure attorney’s fees in the same underlying case.

In Computer One, Inc. v. Grisham & Lawless, P.A., 144 N.M. 424,431, 188 P.3d 1175 (2008), the New Mexico Supreme Court held:

Given the grave consequences of Rule 1-013(A) [New Mexico’s counterpart to 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 v. Kisluk, 112 N.M. 221, 814 P.2d 89 (1991), an attorney does not transform his former client into either, merely by taking steps to secure attorney fees in the same underlying proceeding.

In Tizler v. Davis, Bethune & Jones, LLC, 288 Kan. 477, 486, 204

P.3d 617 (2009), the Court stated:

By moving to enforce an attorney's fee lien in the underlying action, Davis was proceeding against the judgment itself, not against the former client. Such an action does not transform the former client into an "opposing party" for purposes of the compulsory counterclaim rule. To invoke that rule, Davis had to file an independent action against Tilzers, i.e., had to become a "party" in the first instance.

C. Monk's Claims Were Not Compulsory Counterclaims Because Pierson Proceeded Against The Judgment Solely, And Not Monk Personally.

Even if Pierson and Monk are deemed to be "opposing parties" under CR 13(a), Monk's claims are still not compulsory counterclaims under the second prong of CR 13(a), which sets forth the rule that a counterclaim which arises out of the same transaction or occurrence is not compulsory where the opposing party brings suit "by attachment or other process by which the court does not acquire jurisdiction to render a personal judgment on that claim."

Pierson filed his motion to enforce his statutory attorney lien against the proceeds of the judgment in the underlying matter, not against Monk personally. This then is an *in rem* proceeding, not an *in personam*

proceeding. The attorney's lien statute only confers jurisdiction over the proceeds of the judgment, to the extent of the value of the services rendered by Pierson. RCW 60.40.010(1)(e). The lien statute does not give Pierson the right to request that the Court render a personal judgment against Monk. *Id.* Certainly if Pierson had chosen to do so, he could have filed his lien to secure his interest in the judgment and also sued Monk personally. If Pierson had personally sued Monk, then the Court would have acquired jurisdiction to render a personal judgment against Monk, and Monk's claims against Pierson would have been compulsory and subject to waiver if not plead.

There is no Washington case law that counsel could find interpreting CR 13(a)(2), but Washington's Civil Rules are modeled after the Federal Rules, and FRCP 13(a)(2) is nearly identical to Washington's rule. Where the Federal Rules of Civil Procedure are substantially the same as the rule adopted by Washington, Washington courts will look toward the FRCP. Eberle v. Sutor, 3 Wn. App. 387, 475 P.2d 564 (1970).

FRCP CR 13(a)(2) provides as follows:

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has

against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule. (Emphasis added).

The Advisory Committee notes on this rule are instructive.

Notes of Advisory Committee on Rules—1963
Amendment

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced

in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

Since Pierson's attorney lien claim was a proceeding against the judgment itself, and not against Monk personally, Monk's counterclaims were not compulsory, even though they may have arisen out of the same transaction or occurrence. Since Monk did not assert any claims in response to Pierson's lien foreclosure action, those claims have not been waived pursuant to the rules of pleading set forth in CR 13(a)(2).

The policies embodied in the second prong of CR 13(a) do not offend any notion of public policy as suggested by Pierson. Pierson had the option of both filing his attorney lien to secure his purported interest in the judgment, and suing Monk personally on that lien. If he had done so, Monk's counterclaims would have then been mandatory because Pierson would not only have been proceeding against the property, but against a "party", i.e. Monk personally.

D. The Doctrine Of Res Judicata Is Subordinate To The Procedure Set Forth In CR 13(a) And CR 7(a).

The general term res judicata encompasses claim preclusion (often itself called res judicata) and issue preclusion, also known as collateral estoppel. Under the former, a plaintiff is not allowed to recast his claim

under a different theory and sue again. Where a plaintiff's second claim is unequivocally a new and distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded. Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 228, 588 P.2d 725 (1978).

Where a rule of pleading provides that a claim is permissive, rather than compulsory, the claim preclusive effect of res judicata does not apply to bar a subsequent claim that could have been litigated in the preceding matter, but was not. Krikava v. Webber, 43 Wn.App. 217, 220–221, 716 P.2d 916 (1986).

The Krikava case concerned rules of pleading regarding cross-claims. In that action, a co-defendant asserted a claim against a fellow co-defendant following settlement of suit in which both were named defendants.

Res judicata was asserted as a defense to the subsequent lawsuit, by the defendant – former co-defendant.

The Krikava Court held that res judicata did not apply because under CR 13(g) the assertion of a cross claim is permissive, not compulsory.

As this Court explicitly concluded in Monk v. Driessen, No. 67503-6-I, analyzed in the law of the case portion of this brief, it would be inconsistent to find that res judicata principals apply to bar what would, under the applicable rules of pleading, be permissive counterclaims. Monk's response to Pierson's attorney lien motion does not result in a compulsory counterclaim under CR 13(a) because no "pleading" as defined in CR 7(a) is required.

E. The Elements Of Res Judicata Are Not Present In This Matter As Monk Was Not A "Party" To The *In Rem* Lien Motion; The Causes Of Action And Subject Matter Are Different And Judge White Did Not Adjudicate Nor Enter Any Final Judgment On Monk's Legal Malpractice Or Consumer Protection Act Claims.

Application of the doctrine or res judicata requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Res judicata also requires a final judgment on the merits. Schoeman v. New York Life Ins. Co., 106 Wash.2d 855, 860, 726 P.2d 1(1986).

Res judicata is inapplicable because the first element is lacking. Res judicata requires identity between a prior judgment and a subsequent action as to (1) “persons and parties.” As Judge White explicitly found (CP 233), Pierson was not a party, but rather merely an attorney moving to enforce a lien. Nor was Monk a party.

RCW 60.40.010(1)(e) provides in pertinent part:

An attorney has a lien for his or her compensation . . .

(e) Upon a judgment 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, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered. . . .

An attorney lien foreclosure action is an *in rem* action. It is a proceeding against property, not a proceeding against a “person” or a “party.”

The second element or res judicata, identity of the causes of action, cannot be met. The only issue before Judge White on the lien foreclosure motion was the validity and the extent to which Pierson was entitled to enforce his claimed lien in the amount of \$65,880.00 for fees against proceeds of the judgment pursuant to RCW 60.40.010(1)(e). No claims

for legal malpractice, violation of the Consumer Protection Act, or violation of Pierson's ethical duties were considered in the underlying lien motion, nor at all addressed in Judge White's Findings and Conclusions of Law. (CP 239 – 246).

The third element of res judicata is also absent. The subject matter of the lien motion and the claims that Monk has asserted against Pierson in this case are different. In his September 22, 2008 ruling, Judge White found that Pierson's reasonable fees under the condemnation statute were \$65,880.00 out of the total \$212,663.50 charged by Pierson (CP 118, CP 157). Pierson filed his lien on October 8, 2012, claiming a lien for the \$65,880.00 Judge White found to be his reasonable fees. Pierson's motion to enforce his lien was therefore limited to his claim against the judgment for the amount remaining in the registry of the court which were designated as his fees.

However, the subject matter of Monk's claims against Pierson are far more expansive than the relatively small amount of fees awarded to Pierson by Judge White. Not only did Pierson tell Monk that all of his legal fees and costs would be paid, but he also advised Monk that all of his expert witness fees and costs would be paid by the Cities. Monk incurred

at least \$281,463.01 for expert services (CP 186), yet Judge White awarded only expert fees and costs of \$37,772. (CP 118 – 119).

Judge White stated:

Monk either had a completely unrealistic view of the value of his case, or he received bad legal advice about what reasonably might be achieved through litigation or both. . . What was Monk to make of all this? Presumably he had no idea that his attorney was engaging in meritless litigation. (CP 147).

Pierson's lien motion only concerned lien fees, not the fees of expert witnesses, and not any legal malpractice issues related to expert fees, or failure to communicate settlement offers, or engaging in meritless litigation. The Consumer Protection Act applies to the entrepreneurial aspects of the practice of law. Short v. Demopolis, 103 Wn.2d. 52, 691 P.2d 163 (1984). Monk has asserted that claim against Pierson and Pierson's lien foreclosure motion did not at all concern any claim for violation of the Consumer Protection Act.

Res judicata also requires a final judgment on the merits of a claim. At best, Pierson can only show that Judge White determined issues solely related to Pierson's claim of lien relative to his entitlement against the underlying judgment. There was no legal malpractice nor Consumer

Protection Act claims pled in that matter, let alone final determination by way of underlying judgment on those explicit claims.

F. Pierson Cannot Satisfy The Elements Of Collateral Estoppel.

The elements of collateral estoppel have been stated as follows:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Shoemaker v. City of Bremerton, 109 Wn.2d. 504, 507, 745 P.2d 858 (1987).

Pierson cannot meet the first element because there is not an identity of issues between Pierson's lien foreclosure motion and the issues Monk raises against Pierson in this action. As analyzed above, Pierson's lien foreclosure motion was limited in scope and did not concern any issues pertaining to Monk's legal malpractice or Consumer Protection Act Claims.

Likewise, the second element is missing. Judge White made no finding, nor did he render any judgment with regard to expert witness fees and Consumer Protection Act claims in deciding the lien motion.

The third element is also missing. Monk was not a party to the lien motion. The lien motion was a proceeding against property. Monk's personal claims against his attorney cannot be extinguished when he was not a party.

Finally, the fourth element cannot be met. Application of collateral estoppel would work an injustice on Monk. Monk initially sued Driessen on the basis that she had not properly preserved Monk's claims against Pierson in the underlying lien foreclosure motion based upon the language of Seawest. Judge Saint Clair dismissed the Driessen case because he found that neither CR 13(a), nor the doctrines of res judicata and collateral estoppel precluded Monk from pursuing Pierson directly. Monk appealed that decision and filed suit against Pierson. This Court specifically held as follows:

Monk's res judicata claim also fails. "Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated in a prior action. . . . But application of res judicata principals in this case is inconsistent with our determination that Monk's counterclaims against Pierson were permissive rather than compulsory. . . . Because neither CR 13, nor res judicata bars Monk from bringing a malpractice action against Pierson, the court properly granted Driessen's motion for summary judgment.

Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. Hadley v. Maxwell, 144, Wn.2d 306, 27 P.3d 600 (2001). This Court did consider collateral estoppel issues in rendering its decision in Monk v. Driessen, No. 67503-6-I, contrary to Pierson's assertion and held that relitigation of claims and issues that were litigated, or might have been litigated in a prior action, did not bar Monk from pursuing his malpractice claims against Pierson.

It would indeed be an injustice to hold that Monk's claims against Driessen are not viable because claim and issue preclusion do not apply to prevent Monk from suing Pierson, and then to allow Pierson to use these defenses to defeat Monk's claims.

G. Seawest Is Distinguishable And Pierson's Reliance On Seawest Is Misplaced Given This Court's Analysis Of The Differences Between The Facts Of Seawest And This Matter Set Forth In The Monk v. Driessen Ruling.

As set forth above, plaintiff took the position in the Monk v. Driessen litigation that King County v. Seawest, Inv. Assoc., LLC, supra, controls and prevented Monk from suing Pierson. Judge Saint Clair found otherwise, as has this Court.

The Seawest case is, however, distinguishable, as this Court has

now confirmed. The strict issue at bar in Seawest was whether a separate action is required to adjudicate an attorneys' lien for fees. The Seawest Court did not answer that precise question of whether all potential counterclaims must be pled in response to an attorney's lien foreclosure motion because Seawest had not asserted a subsequent malpractice action, as Monk has in this matter. Consequently, Seawest did not address the permissive or compulsory nature of any counterclaim. This Court has now performed that analysis and held that Monk's counterclaims are permissive and were not required to be pled in response to Pierson's motion to enforce his attorney's lien.

V. CONCLUSION

The trial court correctly denied Pierson's Motion for Summary Judgment regarding preclusion defenses.

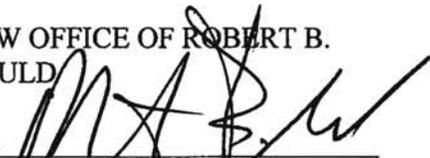
DATED this 30th day of September, 2013.

PARKER LAW FIRM, PLLC

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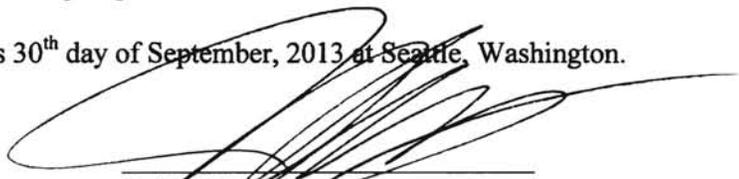
DECLARATION OF SERVICE

I, Jeffrey T. Parker, declare that on the date shown below I had Sandra Douglas, Paralegal to Robert B. Gould of The Law Office of Robert B. Gould's office, serve a copy of the foregoing BY EMAIL, by prior agreement of counsel, to the following individuals:

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Attorneys for Cross-Appellants/Respondents

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of September, 2013 at Seattle, Washington.



Jeffrey T. Parker, Esq.
PARKER LAW FIRM, PLLC
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APPENDIX A

*The Court of Appeals
of the
State of Washington*

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Court Administrator/Clerk

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August 13, 2012

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CASE #: 69000-1-I

David Monk, et al., Pet./Cross-Resps. v. Richard Pierson et ano., Resp/Cross-Pets.

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 13, 2012:

RULINGS ON DISCRETIONARY REVIEW

Monk v. Pierson, No. 69000-1-I

Monk v. Pierson, No. 69002-7-I

August 13, 2012

The trial court certified these matters for discretionary review under RAP 2.3(b)(4). Respondent/cross petitioner Richard Pierson also seeks review under RAP 2.3(b)(1) and (2). Because the issues raised in these matters will be resolved by an appeal pending in this court, Monk v. Dreissen, No. 67503-6-I, discretionary review is not warranted. The certification is respectfully denied, as is Pierson's motion. Review is dismissed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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