

NO. 70126-6-I

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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DAVID MONK, individually and on behalf of the WHITE RIVER FEED  
COMPANY, a Washington corporation,

Appellants.

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,

Respondents.

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BRIEF OF RESPONDENT/CROSS APPELLANT

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## I. INTRODUCTION

Attorney Richard Pierson represented David Monk and his business, White River Feed Company (collectively “Monk”), between 2002 and 2004. After trial in March 2004, Monk retained replacement counsel to pursue an appeal and post-trial motions, which continued through 2008. Monk then brought this action in 2011 against Pierson after the statute of limitations had expired. Further, Monk sought to relitigate claims and issues that Monk litigated—or could have litigated—in the underlying action. Pierson denies any malpractice in his representation of Monk, but this appeal and cross-appeal do not focus on that dispute. Instead, they address the superior court’s summary judgment rulings on several of Pierson’s affirmative defenses.

Pierson filed a motion for summary judgment on his preclusion defenses: *res judicata*, collateral estoppel, and CR 13(a). The superior court denied the motion in May 2012, and the case continued. Later, Pierson filed a motion on his statute of limitations defense. The superior court granted summary judgment in March 2013, terminating the case. Monk appealed that ruling. Pierson asks the Court of Appeals to affirm the dismissal of Monk’s action, either on the basis of the expiration of the statute of limitations, as the superior court ruled, or on the basis of preclusion.

## II. ASSIGNMENTS OF ERROR

Pierson assigns no error to the superior court's March 1, 2013 decision granting Pierson's Motion for Summary Judgment regarding the statute of limitations.

The superior court erred in denying Pierson's Motion for Summary Judgment regarding preclusion defenses in an order dated May 24, 2012.

### *Issues Pertaining to Assignments of Error*

Pierson disagrees with Monk's statement of Issues Pertaining to Assignments of Error and believes that the issues on this appeal are more properly stated as follows:

A. Whether the superior court properly granted summary judgment for Pierson on the issue of the statute of limitations, where:

- Pierson's representation of Monk ended in 2004, at which time the continuous representation rule would no longer toll the statute of limitations;
- Monk failed to present any proof that he had a reasonable subjective belief that the attorney-client relationship extended past 2004;
- Monk discovered the conduct and statements he alleges are actionable at least six years before he sued Pierson;
- The statute of limitations for professional negligence is three years;
- The statute of limitations for violations of the CPA is four years; and
- Monk did not initiate a lawsuit until 2011, many years more than either statute of limitations extends.

B. Whether the superior court may alternatively be affirmed based on Pierson's preclusion defenses, where:

- The claims and issues Monk raises now were or could have been litigated in a prior action;
- Monk had a full and fair opportunity to litigate the issues in the prior action;
- Monk had an appropriate forum in the prior action in which to litigate the claims and issues in the prior action; and
- The claims Monk raises now arose out of the same transaction or occurrence as the claims against him in the prior action.

### III. STATEMENT OF THE CASE

A. **In 2004, Pierson's representation of Monk ended after the superior court ruled he could not recover attorney fees.**

David Monk operates White River Feed Company, which is a mill that serves the dairy industry in the Pacific Northwest. CP 489-90.

Monk first met Pierson in February 2002, when Pierson visited the White River Feed Company property in connection with Monk's concern that a road construction project undertaken by the Cities of Kent and Auburn was encroaching on his property. CP 490-92. Monk retained Pierson to represent him. CP 575. In June 2002, Pierson filed an inverse-condemnation action on Monk's behalf (the "Underlying Action"), seeking compensation for (a) encroachment on his property and (b) substantial impairment of access to his property. CP 505.

Monk alleges that during the Underlying Action, Pierson led him to believe that all attorney and expert fees and costs being incurred in the lawsuit were recoverable. CP 494; 495; 500-01. He alleges that he never knew that only **reasonable fees and costs associated with the inverse condemnation claim specifically** are recoverable under the statute. CP 500. He also alleges that Pierson pursued meritless claims, including seeking recovery for substantial impairment of access. CP 7 (¶ 3.14); 13-14 (¶ 4.1.4).

On the Cities' motion for summary judgment in September 2003, the superior court dismissed the bulk of the claims Pierson had filed on behalf of Monk, including Monk's impairment-of-access claim, on the basis that the claims lacked support in the law or in the evidence. CP 8 (¶ 3.19); 505.

The remaining issues, the extent of the Cities' encroachment and the amount of just compensation, were tried before Judge Jay White in bifurcated proceedings in December 2003 and March 2004. CP 506. The Cities made a settlement offer before the March 2004 proceedings, but Monk rejected it. *Id.* The jury returned a verdict for Monk, but it was less than the Cities' offer. *Id.*

**B. Monk retained new counsel to pursue an appeal of the superior court's ruling denying attorney fees.**

Pierson recommended that Monk hire attorney John Groen to pursue an appeal of the superior court's rulings, including the impairment-of-access claim that the superior court had dismissed on summary judgment. CP 575. Monk agreed. *Id.*; CP 578.

Pierson was in the midst of preparing, on Monk's behalf, a motion for an award of fees and costs pursuant to the inverse-condemnation statute when appellate counsel was engaged. CP 578. Pierson moved for an award of fees and costs in April 2004. CP 532 (Finding of Fact 13). Because the jury verdict was less than the Cities' offer, the superior court held that the Cities were not liable for the fees and costs of attorneys and experts under the inverse-condemnation statute, RCW 8.25.075(3). CP 506. Monk also appealed this ruling. CP 506.

**C. In 2004, Monk learned from appellate counsel that Pierson's alleged advice about recovery of expenses was incorrect.**

When Monk first spoke to appellate counsel in 2004, he asked a question he "was just dying to ask somebody" about whether Pierson had advised him correctly on fees and costs. CP 493. Appellate counsel told Monk that Pierson was quoting "bad case law." CP 494.

When he learned this, Monk felt that Pierson had taken advantage of him. *Id.* He did not want to have anything more to do with Pierson, as

he thought cutting off contact was in his own best interests. CP 498. Monk recalled that his last conversation with Pierson was probably when appellate counsel started the Court of Appeals action. CP 496-97.

**D. Pierson ceased representing Monk during Monk's appeal of the superior court's ruling on attorneys' fees.**

Monk and Pierson both appealed rulings by Judge Jay White in the

*Monk v. Cities* action:

Monk appeals from the final judgment, bringing up for review the issue of his entitlement to attorney fees under RCW 8.25.075(3) and the dismissal of his claim for impairment of access. [¶]

His trial attorneys, Richard Pierson and James Dore, Jr., appeal a post-judgment order imposing CR 11 sanctions against them personally.

CP 506 (*Monk v. City of Auburn*, Nos. 54223-1-I, 55477-8-I (Wash. Ct. App. filed August 8, 2005)). Monk and his appellate counsel resisted efforts to consolidate the two parties' appeals, as Monk did not want anything Pierson had done at the superior court level to reflect upon him or affect his chances on appeal. CP 497-98. Monk was not successful, and both appeals went forward together. *Id.*; CP 505-13.

By the time the Court of Appeals held oral argument, Monk had figured out what had, in his opinion, gone wrong at the superior court because of what appellate counsel had explained to him. CP 499. At oral argument, Monk and Pierson exchanged greetings but did not have any

conversation beyond that. CP 499. At that hearing, Monk did not even want to sit next to Pierson in the gallery. CP 498.

**E. Monk understood at the time of the Court of Appeals' ruling that he could not recover all fees and costs as he alleged Pierson had always advised him.**

In an unpublished opinion filed August 8, 2005, the Court of Appeals reversed the superior court's ruling denying all fees and costs, remanding the case to the superior court "for an award of Monk's **reasonable attorney and expert witness fees** under RCW 8.25.075(3)." CP 512 (emphasis added). The Court of Appeals ruled that Chapter 8.25 RCW required the Cities to make a settlement offer before the December 2003 proceedings, the start of the "trial" referenced in the statute. CP 507.

In Monk's own words, "It took me all the way to the Court of Appeals and talking to [appellate counsel] before I realized that the things I was being told [by Pierson] were not accurate." CP 493.

**F. Monk considered himself adverse to Pierson long before the award of fees and costs was calculated.**

On July 27, 2006, Monk wrote Pierson a letter challenging the extent of Pierson's attorneys' fees on the basis of what he perceived to be Pierson's incorrect advice:

I believe that due to what I was told about the specific laws regarding recovering fees in an inverse condemnation case, the information I was given was not accurate. In the case

that was cited to me (Brazil v. Auburn), the specific laws of that case were overturned. [¶]

I was told many times that fees were to be awarded in an inverse condemnation case. I have since learned that it is common knowledge that this is false. [¶]

I was also told that business loss was also compensable. This law does not apply in Washington state.

I believe that when you hire legal representation, it is the attorney's responsibility to know the laws that pertain to your case. I feel that considering the amount I was going to be able to collect in proving the property was mine vs. the fees I was charged is grossly out of balance. [¶]

I would like to resolve this issue in a fair manner to both parties. Please contact me with any questions or concerns.

Sincerely,

David Monk

CP 612 (corrected spelling added); *see also* CP 497 (Monk testified he sent a letter to Pierson showing he “was unhappy with his services”).

**G. Appellate counsel represented Monk in his request for fees and costs on remand to the superior court.**

Pierson did not appear as counsel for Monk in the motion for attorney and expert expenses; Monk's appellate counsel continued to represent him. CP 515-27. Instead, Pierson testified as a witness. *See* CP 516, 518. On September 22, 2008, Judge White issued his ruling on the motion for fees and costs. CP 533 (Finding of Fact 16).

**H. Monk already litigated the claims and issues he raises in this case in a 2008 attorney Lien Action.**

Following Judge White’s ruling, Pierson asserted an attorney-fee lien against Monk (the “Lien Action”) on October 8, 2008. CP 227-30. Pierson followed it with a Motion to Enforce Attorney’s Lien. *See* CP 233. Attorney Kristina Driessen of Ryan & Driessen appeared to represent Monk in the Lien Action. CP 286-87. Monk told Driessen he wanted to sue Pierson for malpractice and asked her take on the malpractice case. CP 91, ¶ 10. Monk opposed Pierson’s motion to enforce the attorney-fee lien. CP 243, ¶ 23.

On February 27, 2009, the superior court denied Pierson’s Motion to Enforce Attorneys’ Lien and instead held an evidentiary hearing. CP 233-38. The court set a hearing date for about three months later and issued a case schedule setting deadlines for discovery, alternative dispute resolution, dispositive motions, exchange of witness lists, trial briefing, and the like. CP 237-38. That order in all material respects was the same as a typical case scheduling order issued in civil actions in King County Superior Court. *Id.*

Importantly, the order referred to — and quoted extensively from — the Court of Appeals’ decision *King County v. Seawest Investment Assocs.*, 141 Wn. App. 304, 170 P.2d 53 (2007). CP 236-37. The superior

court specifically quoted the language stating that it is the superior court's right to determine all questions affecting the judgment in some form of proceeding, CP 236, and that an evidentiary hearing gives ample opportunity to present evidence, bring counterclaims, and argue theories of the dispute. CP 237.

Driessen apparently did not expressly agree to represent Monk in a malpractice claim. CP 91. Nor did she assert any counterclaims on behalf of Monk in the Lien Action. CP 258. Driessen did, however, work up Monk's theories of Pierson's supposedly improper conduct in Monk's defense to the Lien Action. *See* CP 65-69. Driessen filed a trial brief on Monk's behalf that argued:

Pierson represented that all fees and costs including experts would be paid pursuant to the inverse condemnation statute . . . . Arguably, Pierson as an experienced condemnation attorney should have known that only those fees associated with that claim were recoverable, and not those fees associated with the other causes of action. Even if it had been Pierson's first case, the statute is clear on its face what fees shall be paid . . . .

This Court found that Pierson's billing was highly excessive, duplicative, that he failed to submit proper documentation . . . [was] excessive because presumably due to the faulty advice of counsel, Monk never had a realistic understanding of the value of this case and thus, never engaged in good faith settlement negotiations [with the Cities].

CP 66. The brief also argued that Pierson failed to present Monk with a settlement offer the Cities made and thus proceeded to trial and recovered

only about 39 percent of what the Cities had offered. CP 67-68. The brief argued that had Monk known the offer's terms, he would have accepted it. CP 68. Monk's brief argued that Pierson continued to work on claims that had been dismissed. CP 68.

The superior court held the evidentiary hearing to adjudicate Pierson's attorney-fee lien in June 2009. CP 239-40. The judge conducted the hearing as an ordinary trial; it took testimony and entered documentary exhibits into the record. CP 239-47. An expert witness testified on Pierson's behalf that the fees were reasonable. CP 243.

In August 2009, Judge White entered findings of fact and conclusions of law, CP 529-31, which stated in relevant part:

Pierson provided legal representation of Monk pursuant to the retainer agreement **from February 2002 through March 2004.**

\* \* \*

Pierson provided legal services to Monk pursuant to the retainer agreement **between 2002 and 2004.**

CP 531 (Finding of Fact 6); 534 (Conclusion of Law 2) (emphasis added).

The superior court incorporated the September 2008 opinion into the August 2009 order by reference. CP 245.

- I. **Monk waited seven years after the end of Pierson's representation and six years after he knew the facts underlying his allegations against Pierson before suing both his attorneys for malpractice.**
  1. **Monk first sued Driessen, alleging her failure to assert counterclaims barred him from suing Pierson.**

In March 2011, Monk sued Driessen only, claiming that Driessen committed legal malpractice in failing to preserve Monk's claims against Pierson for legal malpractice, violation of the CPA, and violation of fiduciary duty. CP 249-61. Monk alleged:

Following the lien foreclosure hearing, findings of fact and conclusions of law were entered **fully adjudicating all matters that could have been brought by MONK against PIERSON. Since DRIESSEN failed to plead, prepare or present MONK'S claims against PIERSON for legal malpractice, violation of the [CPA], and breach of fiduciary duty claims which under Washington law are now forever barred.**

CP 259, ¶ 3.43 (emphasis added). Driessen moved for summary judgment on the question of whether Monk's claim against Pierson had been lost because of Driessen's error. *Monk v. Driessen*, No. 67506-6-I, 2012 WL 4857208, at \*1 (Wash. Ct. App. Oct. 15, 2012). Monk argued that because Driessen had failed to preserve his claims against Pierson, CR 13(a) and res judicata barred him from bringing those claims in a separate action. *Id.* The parties did not argue collateral estoppel. *See id.* The superior court granted Driessen's motion for summary judgment and

denied Monk's. *Id.* Monk appealed, and the Court of Appeals affirmed the superior court's decision in an unpublished opinion. *Id.*

**2. Monk sued Pierson after Driessen won summary judgment.**

Pierson ceased representing Monk in 2004. CP 531, 534. Monk knew no later than the Court of Appeals' ruling in 2005 that he could not recover **all** of his fees and costs in the action against the Cities. CP 493. Nevertheless, Monk waited another six years before filing a lawsuit against Pierson on August 1, 2011. CP 1-18. Monk's complaint against Pierson echoed his arguments in his trial brief in the Lien Action. *Compare* CP 22-30 with CP 65-69. Monk alleged Pierson is liable to him for overworking the case, overcharging the file, assuring him that all fees and costs would be paid by the Cities, working on dismissed claims, engaging in meritless litigation, refusing to engage in settlement discussions with the Cities, and placing his own economic benefit before his client's. CP 22-30. Monk had previously argued that Driessen's failure to assert them in the Lien Action barred all of these claims. *Monk v. Driessen*, 2012 WL 4857208, at \*1.

Monk and Pierson filed cross-motions for summary judgment on Pierson's preclusion defenses: Res judicata, collateral estoppel, and CR 13(a). CP 39-58; 74-88. Although the motions presented an issue of

law on undisputed facts, the superior court denied both motions. CP 459-66. The parties then filed cross-motions for discretionary review that this court denied. *See* Ct. App. No. 69000-1-I.

Later, Pierson filed a motion for summary judgment against Monk on the statute of limitations. CP 538-47. The superior court ruled as a matter of law that Monk knew the facts supporting his claim against Pierson almost exactly six years before he sued:

It could even be said that it was much earlier than the Court of Appeals' opinion, but certainly that ruling was definitive with regard to the fact that there was damage, and that happened on August 8th of 2005.

VRP 28:13-17 (March 1, 2013). The superior court also ruled that Monk had failed to present evidence that Monk's attorney-client relationship lasted beyond 2004:

[T]he only thing I have that contradicts the notion that this relationship no longer existed is the statement by the plaintiff that he believed that he was still being represented by the defendant . . . .

[T]here is no objective evidence that a reasonable person would have the belief that the defendant was still representing the plaintiff.

VRP 28:22-29:1; 29:13-16. The superior court granted Pierson's summary judgment motion on March 1, 2013, ruling that the statute of limitations for bringing any claims had expired. CP 892-94. Monk

appealed that ruling, and Pierson filed a notice of appeal on the previous ruling denying summary judgment on the preclusion defenses.

#### **IV. SUMMARY OF ARGUMENT**

In 2004, two events took place which started the running of the statute of limitations: (a) the attorney-client relationship between Pierson and Monk ended; and (b) Monk discovered the facts giving rise to his lawsuit. Monk claims he learned soon after trial there could be problems with Pierson's alleged conduct and statements during the period of representation in Monk's case. Monk, believing Pierson had made mistakes in the representation, ended communications with Pierson.

Nevertheless, Monk waited until 2011 to bring a lawsuit against Pierson for alleged professional negligence and alleged violation of the Consumer Protection Act (CPA). The three-year negligence statute of limitations and the four-year CPA statute of limitations bar Monk's claims against Pierson, and the superior court properly granted Pierson's motion for summary judgment. Pierson request this court affirm that decision.

In the alternative, the court can affirm the dismissal of Monk's action based on Pierson's preclusion defenses. Three separate doctrines bar relitigation of Monk's claims. These doctrines operate differently to preclude claims and issues:

Collateral Estoppel:	One cannot relitigate issues that <b>were actually litigated</b> in a previous action.
Res Judicata:	One cannot relitigate claims that <b>could have been brought</b> in a previous action.
Rule 13:	One cannot relitigate claims that <b>must have been brought</b> in a previous action.

These doctrines are neither interchangeable nor interdependent nor mutually exclusive. Each must be analyzed separately to determine whether a claim or issue is precluded in a later action.

In this case, each operates separately to preclude Monk's claims against Pierson. Issue preclusion bars relitigation of issues that Monk litigated in the Lien Action. Res judicata bars relitigation of the claims that Monk could have brought, but chose not to, in the Lien Action. Rule 13 bars relitigation of claims that were mandatory counterclaims in the Lien Action.

## V. ARGUMENT

### A. **This court reviews the superior court's summary judgment orders de novo.**

The superior court ruled, as a matter of law, that Monk failed to present sufficient evidence that either the discovery rule or the continuous-representation rule prevented the statutes of limitations from expiring in this case. Appellate courts review an order on summary judgment de novo and engage in the same inquiry as the trial court. *Hoffstatter v. City of*

*Seattle*, 105 Wn. App. 596, 599, 20 P.3d 1003 (2001). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* The Court of Appeals may affirm the superior court on any basis the record supports. *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). Here, as discussed more fully below, Pierson was entitled to judgment as a matter of law on his statute of limitations defenses. The record also supports affirming the ruling on the basis of one or more of his preclusion defenses.

**B. Monk discovered the facts which gave rise to his alleged cause of action against Pierson soon after Monk retained appellate counsel in 2004, at which time the statute of limitations began to run.**

The three-year statute of limitations for legal malpractice begins to run as soon as the client discovers, or in the exercise of reasonable diligence should have discovered, the facts which give rise to his or her cause of action. *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 816, 120 P.3d 605 (2005). The discovery rule also applies to the four-year statute of limitations under the CPA. *Mayer v. Sto Indus. Inc.*, 123 Wn. App. 443, 463, 98 P.3d 116 (2004), *affirmed in part, reversed in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006). The plaintiff has the burden of proving that the facts were not discovered,

or could not be discovered, in time. *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006); *G.W. Const. Corp. v. Professional Service Ind., Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993). Although the issues of when a plaintiff discovered the facts, or whether a plaintiff exercised reasonable diligence to discover them, are generally questions of fact, they can be decided as a matter of law if reasonable minds could not differ. *Cawdrey*, 129 Wn. App. at 818; *see also Streifel v. Hansch*, 40 Wn. App. 233, 237, 698 P.2d 570 (1985) (affirming summary judgment where evidence showed plaintiff discovered the facts more than three years before filing suit).

The discovery rule does not allow the plaintiff to wait until he discovers the specific **cause of action**. *Cawdrey*, 129 Wn. App. at 817. Rather, it requires the plaintiff to file suit within three years of the time when he knows the **facts** underlying the cause of action. *Id.* Further, the discovery rule does not require that *all* plaintiff's damages become fixed before the cause of action accrues. *Streifel*, 40 Wn. App. at 236, 237.

In *Cawdrey*, an attorney had a long-running attorney-client relationship with a family partnership. When the partnership was expanded, the attorney referred the senior partner (the mother) to separate counsel to represent her with regard to a buyout provision in the partnership agreement. The partnership agreement was revised and

approved under this arrangement. In 1997, the partnership's attorney represented both the partnership and the mother in her buyout — without obtaining a conflict waiver. In 1999, the attorney also assisted with a real estate transaction. After the buyout, the mother sued the partners and the partnership, and the matter was settled between them. Then, in 2003, she sued the attorney for legal malpractice, breach of contract, and breach of fiduciary duty.

The attorney successfully moved for summary judgment, and the Court of Appeals affirmed on the basis of the statute of limitations. Although the mother argued that she did not have a real understanding of the conflicted representation until she consulted independent counsel, the court invoked the rule that the limitations period begins when the plaintiff is aware of the facts underlying the claim. *Cawdrey*, 129 Wn. App. at 817. The Court of Appeals reasoned that the mother knew of the attorney's dual representation as it was happening. *Id.*

**1. Monk discovered all the facts necessary for the claim to accrue very soon after the end of the March 2004 trial.**

In this case, Monk does not dispute the facts in the record that support a ruling his causes of action accrued more than three or four years before he filed this action. Monk alleges that Pierson negligently advised him that all expenses were recoverable and negligently advised him to

pursue a baseless substantial impairment claim, actions which resulted in Monk's incurring excessive expenses in the litigation.

**a. Monk knew he had lost on almost every claim on summary judgment or at trial.**

Monk agrees Pierson represented him in an action in which (a) all but one of Monk's claims were dismissed on summary judgment in 2003 for lack of evidence, and (b) the superior court ruled in 2004 Monk could recover *none* of his attorney and expert fees and costs for prevailing at trial on that one remaining claim. Monk knew he had lost on large portions of his case, and losing puts a person notice that malpractice is one possible reason for the loss:

[A]s a matter of law upon entry of an adverse judgment at trial a client is charged with knowledge, or at least put on notice, that his or her attorney may have committed malpractice in connection with the representation.

*Richardson v. Denend*, 59 Wn. App. 92, 98, 795 P.2d 1192 (1990).

*Accord, Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 660-61, 37 P.3d 309 (2001).

**b. Monk knew Pierson's alleged statements about recovering fees and costs were incorrect when he retained new counsel.**

Monk agrees he retained substitute counsel very soon after the March 2004 trial to appeal rulings dismissing his impairment of access claim and denying his entitlement to fees and costs. He agrees he

immediately learned from substitute counsel that he had never had a legal basis to recover **all** the fees and costs Monk says Pierson led him to expect. Monk learned — in his first meeting with appellate counsel after Pierson’s representation ended in March 2004 — that Pierson had allegedly been advancing bad law in the superior court as to the recovery of expenses. What Monk learned upset him enough that he stopped communicating with Pierson.

Monk agrees he did not want his appeal heard with Pierson’s independent appeal of CR 11 sanctions because Monk did not want Pierson’s trial conduct to reflect badly on him. Monk did not even want **sit next to** Pierson in the Court of Appeals gallery during the oral argument.

In response to the motion for summary judgment, Monk did not dispute that, in 2004, substitute counsel corrected his erroneous understanding—which Pierson allegedly instilled—that he was entitled to recover all expenses of his suit. However, in his opening brief, he now seeks to downplay that position by taking an overly narrow view of his own testimony, stating substitute counsel told him only that *Brazil v. City of Auburn*, 93 Wn.2d 484, 497, 610 P.2d 909 (1980), was “bad law” — which is not actually true. App. Br. at 14-15. This digression from the central issue of the case is not relevant to the analysis. Pierson is not

relying on the holding of *Brazil*, or on whether it is good or bad law. Instead, Pierson relies on Monk's testimony that during Pierson's representation, Pierson told Monk that all fees and costs could be recovered, CP 494, 495, 500-01, but substitute counsel disabused him of this incorrect notion. CP 494. Monk knew in 2004 that Pierson's alleged position regarding Monk's entitlement to recover expenses was wrong.

**c. Monk knew he could not recover all expenses and that dismissal of his substantial impairment claim was proper when the Court of Appeals ruled on the *Monk v. Cities* appeal.**

If substitute counsel's explanation were not enough, the Court of Appeals' opinion in *Monk v. Cities*, filed August 8, 2005, informed Monk that (a) his substantial impairment of access claim had been properly dismissed at summary judgment because Monk's response had not set forth sufficient evidence to raise a genuine issue of material fact; and (b) Monk could recover limited attorney and expert fees and costs: only those that were reasonable under RCW 8.25.075(3). Monk argues that he could not have discovered any facts giving rise to a cause of action against Pierson based on the opinion because he prevailed on appeal. Br. of Appellant at 11. However, there are several problems with this argument.

First, Monk did not prevail on all issues: the Court of Appeals affirmed the superior court's ruling as a matter of law that Monk could not

prove substantial impairment. CP 510. Monk lost on this issue, and under *Richardson v. Denend, supra*, this outcome put him on notice of possible malpractice.

Second, the Court of Appeals also ruled that the Cities were “liable for the **reasonable** attorney fees and **reasonable** expert witness fees incurred by Monk **in connection with the claim he tried.**” *Monk v. City of Auburn*, No. 54332-1-I, \*4 (August 8, 2005); (emphasis added). Although he technically prevailed on the issue of **whether** he could recover fees, that is not the information at issue in the inquiry of whether Monk knew he had suffered injury. Monk’s case against Pierson is based on Pierson’s alleged misrepresentations that **all** attorney fees and costs, and **all** expert fees and costs, would be recoverable — not just those deemed reasonable, and not just those associated with the statutory claim. As soon as the Court of Appeals issued that ruling, Monk knew he could not recover everything he alleges Pierson told him he could recover. He knew he had suffered an injury.

**d. Monk demonstrated he was adverse to Pierson with regard to disagreements about the representation in 2006.**

Monk agrees that he wrote a letter to Pierson dated July 27, 2006, complaining that Pierson incorrectly informed him about the law and charged fees grossly out of balance with the amount he would be able to

recover and that he wanted to “resolve this issue in a fair manner to both parties.” CP 612.

Monk did not submit any evidence to contradict any of the above facts in the record. He therefore conceded that he had discovered all of the facts and circumstances underlying all elements of his claims. The statute of limitations in this case began to run as soon as Monk discovered the facts giving rise to his cause of action, which was — at the very latest — by the time the Court of Appeals entered its unpublished opinion in August 2005. Monk by then knew the facts supporting the elements of his cause of action for legal malpractice, CPA, and breach of fiduciary duty: that Pierson allegedly breached his duties to Monk by misrepresenting to Monk the state of the law and advancing claims that could not be won, thus causing Monk injury in the form of unrecoverable expenses paid to his attorney and experts to pursue such claims. Even though the discovery rule does not allow the plaintiff to wait until he discovers the specific cause of action, Monk’s substitute counsel even explained the legal implications of the facts underlying his cause of action. CP 494. The discovery rule requires that Monk file suit within three years (or four in a CPA action) of discovering the facts; he instead waited at least **six** years before suing Pierson. His claims are time-barred.

**2. The cause of action accrued before Monk discovered the extent of his claimed damages.**

Monk argues that he “could not” know the extent of his damages until September 22, 2008, at which point the superior court quantified his damages. Br. of Appellant at 11. However, that is not the test. Time and again, Washington courts considering legal malpractice claims have rejected the very argument Monk advances here. *E.g.*, *Huff v. Roach*, 125 Wn. App. 724, 106 P.3d 268 (2005); *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 660-61, 37 P.3d 309 (2001); *Richardson v. Denend*, 59 Wn. App. 92, 795 P.2d 1192 (1990); *Streifel v. Hansch*, 40 Wn. App. 233, 236, 237, 698 P.2d 570 (1985).

In *Huff*, the Court of Appeals distinguished between the concepts of “injury” and “damages.” *Huff*, 125 Wn. App. at 729. “In the legal malpractice context, injury is the invasion of another’s legal interest, while damages are the monetary value of those injuries.” *Id.* at 729-30. The plaintiff needs to know the fact of “injury,” rather than the amount of “damages,” for the cause of action to accrue. *Id.* at 729. The court described the “injury” in that case as the missed deadline, which invaded the former client’s legal interest. *Id.* at 730. Because the former client knew the facts supporting the “injury” element, the negligence claim

accrued even though they did not then know how much they may be entitled to in “damages.” *Id.*

In *Janicki Logging*, the former client argued it could not have known it was damaged until the appeal based on the error was concluded because any damage was only speculative up to that point. The Court of Appeals disagreed, ruling that denial of relief sought “was in itself an adverse consequence.” *Janicki Logging*, 109 Wn. App. at 660-61. It ruled *as a matter of law* that the former client was on notice that it had been damaged when its claim was dismissed. *Id.* at 660.

The single case Monk cites, *Murphey v. Grass*, 164 Wn. App. 584, 267 P.3d 376 (2011), does not help him. Although it is distinguishable on the basis of applying to a very narrow area of accountant malpractice (negligent preparation of state tax returns), there is more to it. *Murphey* does not hold that such an accounting malpractice claim does not accrue until the plaintiff discovers the **amount** of damages. If it did, it could not be applied in this context because case law regarding attorney malpractice holds the opposite. Instead, the *Murphey* court held that the claim accrues when an actual injury, a tax assessment, flows from the claimed negligence. *Murphey*, 164 Wn. App. at 595-96. The *Murphey* court stressed that its decision was consistent with *Huff* and *Janicki*, because “in

all three cases, the claims accrued when the plaintiffs learned of injury that was certain.” *Id.* at 594.

Here, Monk “learned of injury that was certain” long before his claimed “damages” were quantified. Under *Richardson v. Denend*, 59 Wn. App. at 98, Monk was charged with knowledge, or at least put on notice, upon the adverse rulings by the superior court in 2003 and 2004, that Pierson may have committed malpractice in connection with the representation. He was not, as Monk argues in his opening brief, asked to speculate as to what fees and costs might be awarded: Judge White at first denied all fees and costs. After the Court of Appeals affirmed summary judgment dismissing his impairment of access claim, Monk was certain he had expended resources trying to recover under a claim the courts said was not supported by sufficient evidence. Similarly, after the Court of Appeals ruled that he could recover only reasonable fees and costs—and only those fees and costs related to the claim he tried—he was certain he could not recover *all* the funds he had paid to attorneys and experts, as he alleged Pierson had promised him. The law does not require that he become certain of amounts. He knew the facts supporting all the elements of his claims, including injury, in August 2005 at the latest. CP 505-13. The statute of limitations began to run then — or sooner. The action filed against Pierson six years later in August 2011 is time-barred.

**C. The attorney-client relationship terminated in 2004, and the continuous representation rule does not apply.**

The continuous representation rule tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred. *Cawdrey*, 129 Wn. App. at 819. The limitations period begins to accrue when the attorney stops representing the client on that particular matter. *Id.* (no tolling of legal-malpractice claim as to one matter even where the attorney continuously represented the client as to other matters).

In *Janicki Logging*, the court adopted this rule to further the purposes of giving attorneys an opportunity to remedy their errors, establish there was no error, or attempt to mitigate the damage while still allowing the client the right to later bring a malpractice action. 109 Wn. App. at 662. Additionally, the *Janicki Logging* court expressly set important limits on the rule:

We emphasize, however, that the rule we adopt today is a limited one. *It does not apply to a client who retains new counsel on appeal.* In addition, the rule does not toll the statute of limitations until the end of the attorney-client relationship, but only during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose.

*Id.* at 663-64 (first emphasis added).

Whether an attorney-client relationship continues depends on the conduct and understanding of the parties:

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. *See* 1 R. Mallen & J. Smith § 11.2 n. 18; 7 Am.Jur.2d Attorneys at Law § 118 (1980). The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). Whether a fee is paid is not dispositive. *McGlothlen*, at 522, 663 P.2d 1330. [¶]

The existence of the relationship "turns largely on the client's subjective belief that it exists." *McGlothlen*, at 522, 663 P.2d 1330. **The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions.** *See* 1 R. Mallen & J. Smith § 8.2 n. 12; *Fox v. Pollack*, 181 Cal.App.3d 954, 959, 226 Cal.Rptr. 532 (1986); *In re Petrie*, 154 Ariz. 295, 299-300, 742 P.2d 796, 800-801 (1987).

*Bohn v. Cody*, 119 Wn. 2d 357, 363, 832 P.2d 71, 75 (1992) (emphasis added).

In this case, the record is clear. Monk hired substitute counsel to pursue his appeal in 2004. CP 575, 578. Under Washington law, this act alone would have been sufficient to terminate the attorney-client relationship. *Janicki Logging*, 109 Wn. App. at 663-64; *Lockhart*, 66 Wn. App. at 741. However, it is not the only evidence. Monk learned about what he claims are Pierson's errors, which made him so unhappy with Pierson that he broke off communication between them. CP 498. He no longer sought and received legal advice and assistance from Pierson after 2004. When Pierson pursued a legally-separate appeal of CR 11 sanctions

— on his own behalf — Monk tried to separate his own appeal from Pierson’s. CP 497-98. He resisted sitting with Pierson in the Court of Appeals gallery during oral argument. CP 498. He continued to use substitute counsel’s legal services — not Pierson’s — in the post-remand application for an award of fees and costs. CP 515-27. And he wrote a letter in July 2006 suggesting they resolve outstanding issues between them amicably. CP 612. Additionally, the superior court entered an order — binding on Monk — finding and ruling that Pierson represented Monk only until 2004. CP 531, 534. The continuous-representation rule did not toll the statute of limitations in this case any later than 2004.

**1. Monk did not have a reasonable subjective belief that Pierson was still his attorney after 2004.**

Monk submitted a declaration stating that after the Court of Appeals ruling in 2005, “I still considered Mr. Pierson to be one of my attorneys in the eminent domain proceedings.” CP 575 (¶ 6). However, the record does not bear out this assertion. Monk did not dispute that Pierson appeared in the post-remand proceedings only as a witness regarding fees and costs incurred. Given Monk’s unequivocal conduct starting in 2004, when he claims he was set straight after Pierson’s leading him astray, he could not have held a reasonable subjective belief that Pierson continued to represent him. He cannot cease seeking legal advice

from Pierson based on his dissatisfaction, cut off communications with Pierson, rely entirely on another attorney for legal advice and legal work, write to Pierson demanding resolution of claims of negligence and unreasonable fees against Pierson, then baldly assert that he believed Pierson was his attorney.

Monk submitted an April 2004 letter from Pierson, purportedly supporting his claimed subjective belief that Pierson continued as his attorney. CP 578-79. The letter does not state or imply that Pierson will continue to represent Monk. It says:

I have conferred with my co-counsel . . . and our client, David Monk . . . and he has agreed that **you would be the proper person to handle the Appeal of his case.** [¶]

We are in the process of attempting to get an award for attorneys fees, expert witness fees and costs through the Court . . . . Until the argument and decision or award on fees, we will need a portion of the files for the hearing.

CP 578 (emphasis added). While it appears from this letter that in April 2004, an attorney-client relationship still existed between Pierson and Monk, the intent is to hand over the reins for the appeal. Even if Pierson and Monk expected the attorney-client relationship to continue, Monk changed his mind after learning from substitute counsel of Pierson's claimed errors. If Monk believed Pierson still represented him after the 2005 Court of Appeals' ruling, it was not a reasonable belief under the circumstances.

**2. Pierson was not required to withdraw formally for the attorney-client relationship to end.**

Monk complains that he never received Pierson's notice of withdrawal. CP 575; App. Br. at 19, 20, 22. However, strict compliance with the procedural rules governing withdrawal is not necessary. *Lockhart*, 66 Wn. App. at 741-42. In *Lockhart*, plaintiff engaged an attorney who ultimately declined to continue the representation beyond filing the complaint. Plaintiff did not object, but immediately engaged substitute counsel, who failed to serve the defendants within the statute of limitations, resulting in dismissal of the case. Plaintiff sued both the first attorney and substitute counsel for malpractice. Although the first attorney did not formally withdraw, the court stated:

Employment of other counsel, which is inconsistent with continuance of a former attorney-client relationship, shows an unmistakable purpose to sever the former relationship.

*Id.* at 741 (citations omitted). It held the attorney-client relationship with the first attorney had been terminated. *Id.*

Although Monk latches onto the phrase "including the attorney's words or actions" from *Bohn v. Cody*, 119 Wn.2d at 363, Monk's own words and actions are the basis for determining that the attorney-client relationship came to an end. Monk engaged substitute counsel to pursue the appeal, then Monk cut off communications with Pierson. The point is not that "Monk was mad at Pierson," App. Br. at 21, but that Monk acted

on his anger by terminating Pierson's involvement in his case. Pierson was not required to file or serve a formal notice of withdrawal.

In this case, the continuous representation rule does not toll the statute of limitations. Pierson represented Monk from 2002 to 2004, according to the evidence, including Monk's own testimony. After that, Pierson did not represent Monk. The continuous-representation rule does not operate in this action to toll the statute of limitations.

**D. Collateral estoppel bars Monk's claims against Pierson.**

Collateral estoppel bars the relitigation of issues that have actually been litigated in a prior action in which the party to be estopped had a full and fair opportunity to litigate the issues. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Collateral estoppel prevents the endless relitigation of issues decided by a competent tribunal. *Id.* (citations omitted). The question is always whether the party to be estopped had a full and fair opportunity to litigate the issue. *Id.* If an issue was essential to the first judgment, such that the court in the first action could not have avoided considering the issue, it most likely received the attention of the parties and the court, which justifies giving it preclusive effect. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 305, 57 P.3d 300 (2002).

Whether a party had a full and fair opportunity to litigate turns on four considerations: (a) whether the identical issue was decided in a prior action; (b) whether the first action resulted in a final judgment on the merits; (c) whether the party against whom preclusion is asserted was a party to that action; and (d) whether application of the doctrine will work an injustice. *Nielson*, 135 Wn.2d at 263. An evidentiary hearing in which the parties to an attorney lien action can conduct discovery, present evidence, argue their theories, and bring counterclaims affords a full and fair opportunity to litigate all issues and “fully complies with due process.” *Seawest*, 141 Wn. App. at 315, 316. Therefore, any issues that were actually litigated in the Lien Action are barred from relitigation.

As set forth in more detail below, the issues that were actually litigated in the Lien Action include at least:

- Whether Pierson assured Monk his fees and costs would be paid by the defendants in the Underlying Matter, inducing Monk to approve the gross expenditures;
- Whether Pierson’s billing was excessive and duplicative;
- Whether Pierson fully explained the settlement proposals offered in the Underlying Matter;
- Whether Pierson failed to provide Monk with a realistic understanding of the value of the Underlying Matter;
- Whether Pierson continued to work on dismissed claims; and
- Whether any of the above actions or omissions caused Monk damages.

Monk did not address the requirements of collateral estoppel in his briefing on the motion for summary judgment. However, its elements are met here, and collateral estoppel applies in this case.

**1. The identical issues were decided in the Lien Action.**

Where the first fact-finder decided an identical issue, it will be precluded in the subsequent action. *Robinson v. Hamed*, 62 Wn. App. 92, 99-100, 813 P.2d 171 (1991). In *Robinson*, an arbitrator was called upon to decide whether an employee's fight with another employee outside of the workplace was just grounds for his termination. The arbitrator heard the two employees' contradictory versions of the facts, and determined which was true. Later, the employee who had been fired sued the other employee involved in the fight for defamation. The Court of Appeals held the defamation claim was barred by collateral estoppel, in part because the truth of the story had already been decided. *Id.*

This element is met here, as well. Monk raised multiple issues in the Lien Action to counter Pierson's claims for unpaid fees. Monk argued in the Lien Action that (a) Pierson told him all fees and costs including experts would be paid pursuant to the inverse condemnation statute although Pierson should have known that only certain fees were recoverable, CP 66, ll. 1-6; (b) Pierson's billing was highly excessive and

duplicative, *id.*, ll 9-14; (c) Pierson failed to present Monk with the full terms of a settlement offer the Cities made, and that had he known its terms, Monk would have taken that offer, CP 67, ll. 7-15; 68, ll. 11-13; (d) due to Pierson's faulty advice, Monk never had a realistic understanding of the value of this case and never engaged in good faith settlement negotiations with the Cities, CP 66, l. 14-16; and (e) Pierson continued to work on claims after they had been dismissed. CP 68, ll. 16-19. The superior court considered these issues when deciding the outcome of the Lien Action. Monk relied heavily on Judge White's lengthy September 2008 ruling in order to argue that Pierson was not entitled to recover any other fees, CP 66, ll. 7-16; CP 67, l. 16 through CP 68, l. 6, and Judge White could not have avoided considering them in the Lien Action — in fact, he incorporated that opinion into his conclusions of law. CP 245, ¶ 7. As the issues considered in the Lien Action are the same as those Monk raised in the amended complaint against Pierson, they cannot be relitigated.

**2. Application of the doctrine here will not work an injustice.**

In an attorney lien action, the trial court is authorized and required by statute to proceed in such as way so that all matters might be properly adjudicated. *King County v. Seawest Investment Assocs.*, 141 Wn. App.

304, 315, 170 P.2d 53 (2007). In *Seawest*, when a law firm and its client had a fee dispute at the close of an eminent domain action, the law firm asserted a lien on the judgment for outstanding fees pursuant to statute. The superior court set an evidentiary hearing at which it took live and deposition testimony and admitted exhibits. The superior court ruled the fees were reasonable, the fee agreement was binding, and the funds in the court registry should be disbursed to the law firm.

The client appealed, arguing, among other things, that adjudication of an attorney lien must be done in a separate action to permit the client to assert counterclaims. The Court of Appeals started with the principle that a trial court presiding over a lien action has the right to determine all questions affecting the judgment in some form of proceeding. *Id.* at 314. The statute itself does not prescribe the type of proceeding; it is up to the trial court to “fashion” it. *Id.* at 315. The Court of Appeals could find no support in the statute for the notion that a separate action was required. *Id.* On the contrary, “our supreme court placed the question of how to properly adjudicate an attorney’s lien on a judgment squarely within the discretion of the trial court.” *Id.* (citing *State ex rel Angeles Brewing & Malting Co. v. King County Super. Court*, 89 Wash. 342, 345, 154 P. 603 (1916)). It held that the trial court’s proceeding below was appropriate:

[T]he only persons asserting interests in the judgment were before the court. The parties had three months, which was ample time, to conduct discovery and otherwise prepare for the evidentiary hearing. Finally, the hearing gave them ample opportunity to present evidence, **bring counterclaims**, and argue their theories of the dispute. In short, **Seawest was given an opportunity to contest the lien asserted by Graham & Dunn by raising whatever issues it chose to raise. While it now complains on appeal that it did not assert Consumer Protection Act and other claims that it would have, there is nothing in the record to support the conclusion that it was denied the opportunity to assert such claims at the hearing.**

...

The procedure followed here also fully complies with due process.

141 Wn. App. at 315, 316 (emphasis added). The Court of Appeals affirmed the order granting the law firm's motion for disbursement of reasonable attorney fees and costs. *Id.* at 317. Thus, in an attorney lien action, a trial court may properly adjudicate all claims, counterclaims, and defenses as between the attorney asserting a lien and the client.

In the Lien Action Monk had a full and fair opportunity to present his case against Pierson. First, the superior court's order setting a hearing date deliberately invokes *Seawest* as it describes the proceeding in which all claims could be heard. CP 236-37. The superior court went so far as to quote the *Seawest* language that states, "the court has a right to determine all questions affecting the judgment in some form of proceeding." CP 236. The judge also quoted the language that said three months is

ample time to conduct discovery, present evidence, bring counterclaims, and argue theories of the dispute. CP 237. Finally, the judge set up a litigation schedule, including deadlines for discovery, disclosure of witnesses, ADR, exhibit lists, dispositive motions, motions in limine, and briefing. CP 237-38. He set the evidentiary hearing for just over three months later, mirroring the *Seawest* scheduling. CP 238. Monk was on notice that all issues were fair game.

Second, Monk knew he had a potential claim for malpractice against Pierson. In fact, he told the attorney who represented him in the Lien Action that he was going to sue Pierson, and asked her to bring a malpractice action. CP 91, ¶10. Although that attorney did not bring counterclaims in the Lien Action, she did argue on Monk's behalf that Pierson's actions in the representation were unreasonable and substandard in order to affect the amount the superior court would award Pierson in the Lien Action—that is, Monk addressed his complaints against Pierson in the evidentiary hearing even though he did not assert them as affirmative claims. CP 239-47; CP 65-69. Monk already raised the issues he raises now, and they were decided in the Lien Action. Barring relitigation of those issues will not work an injustice.

**3. The Lien Action resulted in a final judgment on the merits.**

Monk did not dispute, in his briefing below, that the Lien Action resulted in a final judgment on the merits. CP 289-93.

**4. Monk was a party to the Lien Action.**

Again, Monk did not dispute that he was a party to the Lien Action. CP 289-93.

**E. Res judicata bars Monk's claims against Pierson.**

Res judicata provides a safeguard against multiplicity of lawsuits brought about by claim splitting:

The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to **every point** which properly belonged to the subject of litigation, and **which the parties, exercising reasonable diligence, might have brought forward at that time . . . .**

If a matter has been litigated or there has been **an opportunity to litigate** the matter in a former action, the party-plaintiff should not be permitted to relitigate that issue.

*Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (emphasis added; citations omitted). That is, as long as a party **could have** brought a claim in the previous action, that party may not bring it later. *Id.* In order for res judicata to apply, there must be a final judgment on the merits, as well as an identity between that judgment and

a later action as to persons and parties, cause of action, subject matter, and the quality of persons for or against whom the claim is made. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000).

In *Pederson*, buyers entered into a Stock Purchase Agreement to obtain sellers' business. Over time, the buyers defaulted on the terms of the Stock Purchase Agreement. The buyers believed that the sellers had misrepresented certain things about the business, but did not raise that complaint with the sellers when they signed a settlement and release and a confession of judgment to settle their dispute over the default. When the buyers failed to meet the terms of the settlement agreement, the sellers filed the confession of judgment. The buyers then sued the sellers for misrepresentation and breach of the Stock Purchase Agreement. The sellers moved for summary judgment based on res judicata. On review of the denial of that motion, the Court of Appeals in *Pederson* fully analyzed the elements res judicata and ruled that the buyer's claim was barred. *Id.* at 73-74.

The superior court in the Lien Action provided an appropriate forum in which Monk **could have** brought any claim he had against Pierson. The superior court even cited *Seawest*, which held that an evidentiary hearing in an attorney lien action is the proper place to bring counterclaims. Monk agreed this is the *Seawest* holding. CP 289-91 (Part

II.a). The superior court gave Monk notice that he should bring his claims in the Lien Action. Monk testified he knew then that he wanted to bring claims against Pierson. Res judicata says that because Monk **could have** brought his claims then, he is precluded from bringing them later.

**1. The Lien Action resulted in a judgment on the merits.**

Res judicata applies where there is a “final judgment on the merits”:

In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases.

*Pederson*, 103 Wn. App. at 70 (citations omitted). Monk did not dispute this element in his briefing below.

**2. There was an identity of persons and parties and of quality of persons.**

In *Pederson*, the Court of Appeals found an identity of persons and parties because “[b]oth actions **involve[d]**” the same persons, *id.* at 72 (emphasis added), and an identity of quality of persons because “the parties are identical.” *Id.* at 73.

In the Lien Action, Pierson and Monk were adversaries as to their relative rights and duties. Here, Pierson and Monk are adversaries as to their relative rights and duties. Therefore, the Lien Action and the instant

action “involve” Monk and Pierson as adverse parties, so the identity of persons and parties and the identity of quality of persons elements are met.

**3. There was an identity of cause of action.**

The Court of Appeals considered the following criteria in determining whether there was identity in cause of action in the *Pederson* case: “(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.” *Pederson*, 103 Wn. App. at 72. The *Pederson* court held that this element was met on the following bases:

The confession of judgment entered determined that the Pedersons were financially liable to the Potters for the sale of [the business]. As a result of the confession of judgment the Pedersons’ debt to the Potters for the sale was satisfied. Now, the Pedersons claim that the Potters misrepresented facts to them and breached the Stock Purchase Agreement. If the Pedersons are permitted to pursue their complaint, they will in effect argue they were not obligated to pay the Potters under the terms of the sale because of the breach. Yet the settlement and confession of judgment already established the rights and liabilities of the parties. Thus, relitigating would impair the rights and liabilities already established. Both actions also involve the same evidence and the infringement of the same right—who owes who what under the sale agreement. Furthermore, both suits arise from the same transactional nucleus of facts.

*Id.* at 72-73.

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In this case, there is also identity of cause of action. The superior court determined that Monk was financially liable to Pierson for a portion of the fees incurred in the representation. CP 245, ¶ 7; CP 246, ¶ 1. As a result of the order, Monk's debt to Pierson for the representation was satisfied. Now, Monk claims that Pierson breached his standard of care and fiduciary duty in representing Monk. If Monk is permitted to pursue his complaint, he will in effect argue he was not obligated to pay Pierson under the terms of the representation because of the breaches. Yet the order already established the rights and liabilities of the parties. Thus, relitigating in the instant action would impair the rights and liabilities already established.

Both actions also involve the same evidence: testimony and documents related to Pierson's representation. Furthermore, both suits arise from the same transactional nucleus of facts: the relative rights and duties of the parties arising from the representation. This element is met.

**4. There was an identity of subject matter.**

In *Pederson*, the Court of Appeals found this element was met because “[b]oth actions involve[d] the Stock Purchase Agreement” between the parties. *Pederson*, 103 Wn. App. at 73. There, the first action was initiated to force the buyers to comply with their obligations under the

Agreement, and the second action was initiated by the buyers, accusing the sellers of misrepresentations in entering into the Agreement.

Here, both actions involve Pierson's representation of Monk. Pierson initiated the Lien Action alleging that Monk owed him attorney fees incurred in the representation. Monk initiated the instant action alleging that Pierson's conduct fell below the standard of care in the representation. The subject matter of the actions is identical.

**F. Rule 13 bars Monk's claims against Pierson.**

The rule of compulsory counterclaims is another preclusion doctrine that promotes judicial economy. CR 13(a) states in relevant part as follows:

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

According to the Washington Supreme Court, a "**liberal and broad construction** of Rule 13(a) is appropriate to avoid a multiplicity of suits." *Shoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 864, 726 P.2d 1 (1986). (emphasis added; citations omitted). A party who fails to assert a compulsory counterclaim is barred from asserting the claim in a subsequent action. *Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P.2d

916 (1986); *Moritzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023 (1985) (claims against contractor were compulsory counterclaims in mechanic's lien action). The term "transaction" in the rule may cover a series of occurrences that may not be immediately related but are logically connected:

[C]ourts should give the phrase "transaction or occurrence that is the subject matter" of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions . . . any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated . . . need not be pleaded.

*Shoeman*, 106 Wn.2d at 865-66.

In the Lien Action, Pierson and Monk were engaged in an adversarial hearing in which Pierson alleged Monk owed attorneys' fees, and Monk disputed the same. They were opposing parties although Pierson was not a party to the original Underlying Matter. Monk's claims for malpractice, CPA violations, and breach of fiduciary duty all arose out of the attorney-client relationship. The issue regarding fees was inextricably intertwined with Monk's claims that Pierson caused him to incur excessive fees and expenses that would have been avoided had it not been for Pierson's negligent representation in the Underlying Matter, coupled with Pierson's misrepresentations that all of Monk's attorney and expert fees would be paid by the Cities.

Further, the proceeding that the superior court fashioned in the Lien Action mirrored that in the *Seawest* case. The *Seawest* court noted a trial court presiding over an attorney lien action has the right to determine all questions affecting the judgment—including the client’s defenses and counterclaims. *Seawest*, 141 Wn. App. at 314-16. Further, the *Seawest* court recognized that both the attorney and the former client – “the only persons asserting interests in the judgment” – were before the court. *Id.* at 315. The same is true here: Pierson and Monk were both before the superior court in the Lien Action, CP 239-47, and Monk had ample opportunity to bring his counterclaims, argue his theories against Pierson, and have them adjudicated. That he failed to assert counterclaims should not subject Pierson to further litigation.

## VI. CONCLUSION

The superior court correctly dismissed Monk’s action. The three- and four-year statutes of limitations bar Monk’s claims against Pierson. Monk discovered the facts giving rise to his claims against Pierson no later than August 8, 2005, when the Court of Appeals affirmed summary judgment against him on most of his claims and confirmed that Monk could not recover all of the fees and costs he says Pierson assured him he could recover. He believed he had an actionable claim against Pierson even before the superior court quantified the amount of his alleged loss.

Therefore, the claim accrued no later than August 8, 2005. Moreover, Monk terminated the attorney-client relationship with Pierson soon after the trial ended in March 2004. Therefore, the continuous representation rule does not toll the statute. Monk waited six years before filing a lawsuit against Pierson, far more than the three- and four-year statutes of limitations applicable to his claims. He cannot pursue them.

The record also supports affirming the summary judgment dismissal on the basis of preclusion defenses. Monk seeks to relitigate the reasonableness of Pierson's legal fees and the quality of his representation. Because these issues were litigated in the Lien Action in 2008, collateral estoppel bars Monk from relitigating them here. Because Monk could have brought claims against Pierson in the Lien Action based on the same facts, circumstances, and arguments he raises in this action, res judicata bars these claims here. Because Monk's claims against Pierson arose from the same transactions or occurrences Pierson alleged in the Lien Action, Monk should have brought them as compulsory counterclaims, and CR 13(a) precludes Monk from bringing them now. If this court does not affirm the superior court's summary judgment order dismissing Monk's claims based on the expiration of the statute of limitations, it should reverse the superior court's denial of Pierson's summary judgment on his preclusion defenses and direct that this action be dismissed on that basis.

This court should affirm the superior court's order granting summary judgment of dismissal to Pierson.

Respectfully submitted this 29th day of August, 2013.

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## DECLARATION OF SERVICE

I, Vonnie Fredlund, declare that on the date shown below I sent a copy of the foregoing by e-mail, by prior agreement of counsel, to the following:

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

DATED this 30<sup>th</sup> day of August, 2013 at Seattle, Washington.

  
\_\_\_\_\_  
Vonnice Fredlund