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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/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.

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# CROSS-APPELLANT/RESPONDENT PIERSON'S REPLY BRIEF

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Sam B. Franklin, WSBA No. 1903
Pamela J. DeVet, WSBA No. 32882
Of Attorneys for Defendants Pierson,
Askey and Williams & Williams, PSC

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

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## I. INTRODUCTION

In 2008, when Pierson asserted an attorney's lien against Monk, the superior court fashioned a proceeding in which all of Monk's claims against Pierson could have been heard. Monk wanted to sue Pierson at that time, according to his own testimony, and he made multiple arguments against Pierson in that proceeding (the "Lien Action" here and in other briefing). The superior court considered these arguments and entered a ruling showing that they had been a part of the final adjudication of the attorneys' fees.

Monk should have, and could have, asserted counterclaims against Pierson in that Lien Action. His doing so would have preserved judicial resources: The judge who had been intimately acquainted with all the proceedings in which Pierson had represented Monk made the decisions, and the matter would have been concluded.

Instead, Monk instituted two other lawsuits, both of which have been in the Court of Appeals and superior court, years after the conclusion of the Lien Action. His actions fly in the face of the policies of finality and judicial economy. Res judicata, collateral estoppel, and CR 13(a) bar the lawsuit against Pierson. The superior court should have granted Pierson's motion for summary judgment. This court should reverse the superior court's denial of that motion and order dismissal of this action.

## II. ARGUMENT

### A. The *Driessen* unpublished decision has zero precedential value and zero applicability in this matter.

Monk relies heavily throughout his response brief on this court's unpublished opinion in *Monk v. Driessen*. That decision has no bearing on the outcome of this appeal because: (1) it is unpublished, and therefore is not authority; (2) it is a decision in a different matter; and (3) even if it were binding on Pierson, it does not address all of Pierson's arguments.

#### 1. The unpublished *Driessen* opinion cannot be cited as binding authority in this case.

Washington courts have a "longstanding prohibition against citing unpublished opinions":

> We long ago held that unpublished opinions are not part of Washington's common law. **We do not consider unpublished opinions in the Court of Appeals.**

*Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005) (emphasis added). Courts unequivocally and uniformly prohibit the use of unpublished Court of Appeals decisions as authority. GR 14.1 ("[a] party may not cite as an authority an unpublished opinion of the Court of Appeals"); RAP 10.4(h); *Bloor v. Fritz*, 143 Wn. App. 718, 746, 180 P.3d 805 (2008); *Kenneth W. Brooks Trust v. Pac. Media LLC*, 111 Wn. App. 393, 401, 44 P.3d 938 (2002); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000), *review denied*, 143

Wn.2d 1024, 29 P.3d 717 (2001) ($500 sanction for relying extensively on unpublished decisions). While the existence of the unpublished *Driessen* decision has some factual import, it is not binding authority.

Nevertheless, Monk relies heavily on the unpublished *Driessen* decision as authority for his argument that Pierson's defenses do not apply. *E.g.*, Cross-Rspt's Br. at 18, 23-24, 24-25. In a footnote, Monk asserts he did not cite to the unpublished opinion in violation of RAP 10.4(h) and GR 14.1. Cross-Respondent's Br. at 1 n.1. This footnote demonstrates that Monk was well aware of the prohibition against citation to unpublished opinion as authority but chose to ignore it.

**2. The "law of the case" doctrine does not operate to make an unpublished opinion in another case binding authority in this case.**

Monk also invokes the law of the case doctrine in order to apply the holding of that unpublished decision to this case. The law of the case doctrine does not apply.

"[T]he law of the case doctrine stands for the proposition that **once there is an appellate holding enunciating a principle of law**, that holding will be followed in **subsequent stages of the same litigation**." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (emphasis added). Under this doctrine, the Court of Appeals is bound by its holdings on a prior appeal *in the same case only*. *Folsom v. Cnty. of Spokane*, 111

Wn. 2d 256, 264, 759 P.2d 1196 (1988).

**a. A decision in a different action altogether is not law of the case in this action.**

Here, the Court of Appeals has made a prior ruling in the *Driessen* case, not in the *Monk v. Pierson* case. The prior ruling is not applicable here because *Monk v. Pierson* is an entirely separate action, not a later stage of the *Driessen* litigation. Incidentally, Monk chose to sue Driessen alone at first and to file a separate action against Pierson later, instead of adding him to the existing action. A decision in another, completely separate, action cannot be law of the case in this action.

Additionally, even if the *Driessen* were law of the case in *Monk v. Pierson*, which it is not, the Court of Appeals may review the propriety of that decision and decide the current appeal without reliance on the earlier decision. RAP 2.5(c)(2).

Finally, "the law of the case doctrine is discretionary, not mandatory." *Folsom*, 111 Wn.2d at 264. The doctrine need not be slavishly applied where, as here, the Court of Appeals is being asked whether Monk can even pursue his cause of action:

> Rigid adherence to the law of the case doctrine where the issue on appeal involves the threshold determination of whether plaintiff possesses a cause of action may actually violate the very purpose for which the law of the case doctrine exists—promoting finality and efficiency in the judicial process. The determination that a plaintiff cannot

> maintain a cause of action conserves judicial resources for those whose grievances are properly before the courts. Such a ruling also prospectively precludes suits by potential litigants with similar claims.

*Roberson*, 156 Wn. 2d at 44. In the interest of preserving judicial resources, the Court of Appeals should decline to use the unpublished holding in *Driessen* to determine the outcome of this appeal.

**b. A commissioner's procedural ruling is not law of the case as to substantive issues on appeal.**

Monk seeks to shoehorn the law of the case into this matter using the commissioner's "notation ruling" denying the parties' motions for discretionary review, because the commissioner stated the issues would be resolved by the *Driessen* appeal. Monk did not include this notation ruling in the record, but rather attached it to his response brief. For several reasons, the law of the case does not apply notwithstanding the language of the notation ruling. First, the commissioner's statement is not "an appellate holding enunciating a principle of law," the threshold requirement for the application of the law of the case doctrine. *Roberson*, 156 Wn. 2d at 41. Instead, the commissioner made a procedural ruling denying review. Therefore, the commissioner's statements about the *Driessen* appeal are mere surplusage.

Second, neither party moved for a determination on the applicability of the as-yet-undecided *Driessen* appeal. The commissioner

lacked authority to decide prospectively the applicability of *Driessen*.

Third, even if the commissioner were empowered to make an advance ruling about the applicability of a decision that had not yet been entered by the Court of Appeals, which is disputed, the commissioner's decision was wrong for at least two reasons: (a) the Court of Appeals decided not to publish the *Driessen* opinion, which makes it inapplicable to *any* other case; and (b) the Court of Appeals did not address all of Pierson's arguments in the *Driessen* appeal, as discussed below. If the commissioner's notation ruling could be considered as law of the case here, this panel can both review the propriety of that decision, and decide the issues in the *Monk v. Pierson* appeal on the basis of its opinion of the law without regard to the commissioner's ruling. RAP 2.5(c)(2).

**3. The *Driessen* decision does not address issue preclusion at all.**

Even if the holding in *Driessen* could apply to this case, which Pierson disputes, the holding does not dispose of all Pierson's preclusion defenses. Pierson has argued that three separate rules bar Monk from pursuing claims against him: (a) issue preclusion, or collateral estoppel; (b) claim preclusion, or res judicata; and (c) CR 13(a) compulsory counterclaims. The parties and the Court of Appeals in *Driessen* never addressed issue preclusion, a separate doctrine with distinct elements.

Monk argues that the Court of Appeals ruled on issue preclusion as well, but his reading of the unpublished opinion is unquestionably erroneous. The *Driessen* opinion states that Monk's res judicata argument fails then sets out the elements for claim preclusion, not issue preclusion. *Monk v. Driessen*, No. 67506-6-I, 2012 WL 4857208, at *3 (Wash. Ct. App. Oct. 15, 2012). The analysis of res judicata (claim preclusion) is quite short, and certainly does not address collateral estoppel (issue preclusion). The Court of Appeals never determined which issues had been litigated in the previous action, and which issues were therefore precluded in a later action against Pierson. Unlike in the *Driessen* matter, issue preclusion is an important aspect of Pierson's cross-appeal. Even if the holding of the unpublished opinion in *Driessen* were to bar Pierson from arguing claim preclusion and CR 13(a)—which, again, Pierson disputes—it would not bar him from arguing issue preclusion.

### B. Collateral estoppel bars relitigation of the issues Monk raises in his action against Pierson.

Although Monk's briefing to the trial court did not address the elements of collateral estoppel, his Brief of Cross-Respondent does. An argument raised for the first time on appeal will not normally be reviewed absent unusual circumstances. RAP 2.5(a). Additionally, Monk's late challenge to Pierson's issue preclusion defense lacks merit. Summary

judgment should have been granted, and the trial court should be reversed.

### 1. Monk raises identical issues in this action as those decided in the Lien Action.

Collateral estoppel applies to bar relitigation of an issue where that identical issue was decided in a previous action. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 263, 956 P.2d 312 (1998). In response to the extensive evidence in the record that the trial court considered the same issues in the Lien Action as are presented in the instant case, Monk's sole statement is that the trial court did not rule on claims for legal malpractice and violation of the Consumer Protection Act. Br. of Cross-Resp't. at 22. Monk forgets that collateral estoppel is concerned not with specific claims that were or could have been asserted, but rather with *issues actually asserted and adjudicated. Nielson*, 135 Wn.2d at 262-63. Notwithstanding Monk's cursory treatment of this requirement, the superior court decided the same issues in the prior action as Monk raises against Pierson in the present action. The superior court determined the reasonable attorneys' fees to be awarded based in large parts on the issues Monk raised and argued in the Lien Action. *See* CP 245 (incorporating the Sept. 2008 order into findings of fact and conclusions of law).

Notwithstanding Monk's dismissive and conclusory treatment of this element, he cannot dispute the following issues were decided before:

**Issue**: Whether Pierson assured Monk his fees and costs would be paid by defendants in the *Monk v. Cities* matter. Monk raises this as a basis for his claims against Pierson in his Complaint:

> 3.9 Pierson assured Monk that the facts of his case would result in a ruling that the Cities would have to pay Monk's costs of suit and attorneys' fees.

CP 23. *Accord*, CP 26 (¶ 3.18), 29 (¶3.32). He also raised it as a basis for reducing any fees and costs Monk owed to Pierson in the Lien Action, alleging "Pierson represented that all fees and costs *including experts* would be paid pursuant to the inverse condemnation statute . . . . [Pierson] should have known that only those fees associated with that claim were recoverable, and not those fees associated with the other causes of action." CP 66 (emphasis added). The superior court considered—indeed, could not avoid considering—this issue when determining a reasonable fee.

**Issue**: Whether Pierson's billing was wasteful, excessive, and duplicative. Monk alleged this in his complaint. CP 25-26 (¶¶ 3.16, 3.20), 29 (¶3.32). He had also alleged it in the Lien action. CP 66 ("Pierson's billing was duplicative, wasteful, and exaggerated"). Again, the superior court could not avoid this issue, and expressly adjudicated it in the Lien Action. CP 166, 167, 169-70, 172, and 24-5 (¶ 7, incorporating memorandum opinion into conclusions of law).

**Issue**: Whether Pierson engaged in settlement negotiation in good

faith or fully explained the Cities' settlement proposals to Monk. Monk alleged Pierson failed to do so in ¶¶ 3.26-3.28 of his Complaint. CP 28; *see also* CP 30 (¶ 3.36). He had also alleged it in the Lien Action. CP 67 (ll.7-15); 68 (ll. 11-13). The superior court considered this issue and ruled on it. CP 167, 245 (¶ 7).

**Issue**: Whether Pierson failed to provide Monk with a realistic understanding of the value of his case against the Cities. Monk alleges this in ¶ 3.23 of his Complaint against Pierson. CP 27. He also argued the same issue in the Lien Action. CP 66 ("Monk never had a realistic understanding of the value of this case"). The superior court considered and adjudicated this issue. CP 167, 245 (¶ 7).

**Isssue**: Whether Pierson continued to work on dismissed claims. This is an allegation in Monk's current action against Pierson. CP 27 (¶¶ 3.22-3.23). Monk also argued this issue as a basis to reduce attorneys' fees owed to Pierson. CP 68 ("Despite the dismissal of those claims, Pierson continued to work on the dismissed claims as well as employ expert witnesses to testify in regard to the same"). The superior court considered this issue in determining the amount to award in fees. CP 167, 169-70, 171 ns. 33 and 36, and 245 (¶ 7).

**Issue**: Whether any of the above actions or omissions caused Monk damages. This issue is part of Monk's case against Pierson. CP 30

(¶ 3.35), 32 (¶ 4.15), 34 (¶¶ 4.2.5-4.2.6), 36 (¶4.3.9). It was also the overarching theme of Monk's opposition to Pierson's attempt to recover fees in the Lien Action. CP 68-69 (Monk would have taken the $100,000 settlement offer instead of the $39,000 verdict; Monk would not have incurred additional fees and costs after the summary judgment motion and the settlement agreement). The superior court judge decided this issue when he made determined, in the prior action, to reduce the amount of fees Pierson could recover for trial preparation from $130,903.85 to $54,740. CP166, 173, and 245 (¶ 7).

Monk cannot point to anything in the record to support his statement that the identical issues he raises in his complaint against Pierson were not part of the Lien Action. This element is met.

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

The second element of collateral estoppel is a final judgment on the merits. *Nielson*, 135 Wn.2d at 263. Monk has never, until this appeal, argued that no final judgment on the merits was entered in a prior action. Thus, he should not be permitted to advance the argument on appeal. RAP 2.5(a). Moreover, "final judgment" is not strictly interpreted in Washington, which joins the majority of courts which employ a pragmatic approach to determine finality for purposes of collateral estoppel:

> "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

*Cunningham v. State*, 61 Wn. App. 562, 566-67, 811 P.2d 225 (1991) (citations omitted). The court considers "whether the prior decision was adequately deliberated, whether it was firm, rather than tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or in fact was reviewed on appeal." *Id.* at 567.

Here, the superior court entered a final judgment for the purposes of collateral estoppel at two points in time: the memorandum decision terminating the post-trial proceedings, CP 117-225, and the findings of fact and conclusions of law terminating the attorney lien proceedings. CP 239-47. In both of these rulings, the court deliberated adequately, made firm, rather than tentative, rulings, heard the parties fully on the issues, and supported each decision with a reasoned opinion subject to appeal. This element is met in this case.

Without citing to any authority, Monk appears to argue that since these rulings did not address the very *claims* he has asserted against Pierson, they cannot satisfy the "final judgment" element. Br. of Resp't at 22. However, that is not the inquiry; the claims need not be identical in

the collateral estoppel analysis. *Nielson*, 135 Wn.2d at 263.

### 3. Monk was a party to the Underlying Action and the Lien Action.

Collateral estoppel requires that the party against whom the plea is asserted be a party or in privity with a party to the prior adjudication. *Nielson*, 135 Wn.2d at 263. Monk argues that he was not a party to the Lien Action because it was a proceeding against property. Br. of Cross-Resp't at 23. However, Monk's hyper-technical view of this element is not in keeping with the law—and he understandably cites zero authority to support his view. The requirement is applied where the party against whom collateral estoppel is pled "had a mutual interest and shared a common purpose" with the party to the previous action. *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 143, 925 P.2d 1289 (1996). The courts construe this collateral estoppel requirement broadly. It is met here.

Monk clearly was a party to the Underlying Action. Additionally, despite the fact that Pierson sought recovery only from the proceeds of a judgment in the Lien Action, Monk was clearly a party to the Lien Action, too. He had a keen interest in the judgment proceeds, and his purpose was to prevent Pierson from recovering much of those proceeds. Moreover, Monk, not his property, hired counsel to appear for him. He, not his property, argued that Pierson was not entitled to recover from the proceeds

of the judgment. And he, not his property, stood to gain if the superior court reduced the amount Pierson could recover. Monk was a "party or party in privity" as required under the doctrine of collateral estoppel.

**4. Application of collateral estoppel will not work an injustice against Monk.**

The third element of collateral estoppel is that application of the doctrine must not work an injustice. *Nielson*, 135 Wn.2d at 263. Long before Monk brought this action against Pierson, the superior court decided whether Pierson was entitled to the fees and costs he asked for, based on Monk's arguments that Pierson did not meet the standard of care, charged an unreasonable fee, and prosecuted meritless claims, among others. The superior court drastically reduced the amount of attorneys' fees and costs (as well as expert fees and costs) after Monk had a full and fair opportunity to put the evidence before the court. It is not an injustice to bar Monk from raising the same issues in this action. In fact, it is just the opposite. There is no injustice if the issues were already decided in a previous action—Monk obtained the benefit of the previous decisions on the issues and should not be able to relitigate the identical issues now.

The central issue in any collateral estoppel inquiry is whether the party to be estopped had a full and fair opportunity to litigate the issues in a prior action. *Nielson*, 135 Wn.2d at 262. An evidentiary hearing in an

attorney lien action provides a full and fair opportunity to present evidence and argument on all issues. *Seawest*, 141 Wn. App. at 315, 316. Monk does not even address this central inquiry nor the *Seawest* gloss with regard to an attorney lien proceeding. Instead, Monk tries to re-cast this argument in terms of the Court of Appeals' determination in *Driessen* working an injustice for Monk if Pierson prevails on his collateral estoppel argument. Br. of Cross-Resp't at 23-24. Monk is wrong for several reasons. First, any determination in *Driessen* is beside the point: collateral estoppel bars relitigation where issues decided in a prior action are identical to those raised in a later action. Thus, the inquiry is whether issues were decided in Underlying Action and/or the Lien Action such that Monk should be prevented from relitigating them in this action.

Second, even if the determination in *Driessen* bears on this analysis at all, the Court of Appeals did not rule in *Driessen* on collateral estoppel. The sole mention of "issues" is in the context of a determination on the doctrine of res judicata. The Court of Appeals did not rule on collateral estoppel at all. Indeed, Monk never pushed for a ruling on collateral estoppel. It cannot be an injustice to apply collateral estoppel in this case if it was never applied differently in the *Driessen* case. It is not a matter of the Court of Appeals ruling inconsistently.

### C. Monk was required to bring his claims against Pierson under CR 13(a).

Monk's claims against Pierson were compulsory counterclaims. CR 13(a). Monk appears to concede that this case meets the threshold requirement for application of CR 13(a), because his claims against Pierson arose out of the same transaction and occurrence as Pierson's claims for fees and costs. *See* Br. of Cross-Resp't at 16. However, he argues that CR 13(a) should not apply for other reasons.

#### 1. CR 13(a) does not require a hyper-technical application of the term "pleading."

Washington courts must give CR 13(a) "a liberal and broad construction" so as "to avoid a multiplicity of suits." *Shoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 864, 726 P.2d 1 (1986). Nevertheless, Monk ignores our Supreme Court's pronouncement and argues that the word "pleading" in CR 13(a) must be read to only include court filings described in CR 7(a). Monk has set forth no binding authority for the proposition that the use of the word "pleading" must be interpreted narrowly to exclude a response to an attorney's claim of lien. Even Monk himself relies upon authority regarding rules of pleading to make his arguments. Br. of Cross-Resp't at 17-18 (citing *Krikava v. Webber* 43 Wn. App. 217, 220-21, 716 P.2d 916 (1986)).

Further, no such authority exists to support Monk's argument.

"Pleading" is defined inclusively as, "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses." Black's Law Dictionary, 1173 (Seventh Ed. 1999). Monk was given the opportunity to set forth and respond to allegations, claims, denials, and defenses.

The superior court made it clear in the Lien Action that it stood ready to hear and determine all of Monk's claims against Pierson. The superior court set an evidentiary hearing to permit both parties to assert all claims in the Lien Action:

> Accordingly, it is the court's conclusion that **an evidentiary hearing is appropriate to resolve these and *any other issues* that Monk or Pierson may raise as to the enforceability of Pierson's lien**, consistent with the Court of Appeals' decision in *King County v. Seawest Investment Associates*, 141 Wn. App. 304, 170 P.2d 53 (2007).

CP 236 (emphasis added). Monk already had received the superior court's 108-page ruling, which gave him a strong indication that the judge would side with Monk as to any claims he chose to assert against Pierson. Indeed, Monk argued that Pierson's tortious conduct affected his representation and caused Monk harm—he just did not set forth these arguments as counterclaims.

Finally, the fact that Monk did not specifically set forth his arguments as counterclaims is not dispositive. "When a party has

mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." CR 8(c). Indeed, the superior court took into account all of Monk's arguments about Pierson's conduct in the ruling drastically reducing Pierson's claim to fees and costs. The superior court appears to have treated Monk's defenses as counterclaims.

**2. The superior court had jurisdiction over Monk and the judgment awarded to Monk.**

Monk also argues that one of the exceptions to the compulsory counterclaim rule applies:

> [T]he pleader need not state the claim if . . . 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.

CR 13(a)(2). However, Pierson did not bring suit by any process by which the superior court did not acquire jurisdiction to render a personal judgment. The court *already had* personal jurisdiction over Monk, and the exception does not apply. Monk quotes extensively from the advisory committee notes to the Federal Rules of Civil Procedure, but these notes illustrate just how inapplicable the CR 13(a)(2) exception is in this case:

> 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 would not otherwise ordinarily be subjected, fairness suggests he should not be required to assert counterclaims.

In this instance, Monk was not obliged to litigate in a court which ordinarily could not have obtained jurisdiction over him. Instead, he was fully subject to the superior court's jurisdiction. In fact, *he* originally invoked the superior court's jurisdiction by bringing the lawsuit against the Cities, which action was the context for the Lien Action.

**3. Washington courts have not held that res judicata or collateral estoppel cannot be applied in the case of permissive counterclaims.**

The sole Washington case that Monk cites for the proposition that preclusion defenses cannot stand if a counterclaim is permissive is *Krikava v. Webber*, 43 Wn. App. 217, 221-22, 716 P.2d 916 (1986). *Krikava* addressed preclusion defenses where one co-party did not assert *cross-claims* against another co-party. CR 13(g) governs cross-claims, and the assertion of a cross-claim is always permissive. *Id.* at 221.

However, *Krikava* does not hold that either res judicata or collateral estoppel cannot preclude permissive counterclaims. In fact, the Court of Appeals expressly held the opposite as to collateral estoppel, stating collateral estoppel principles apply *even if* assertion of certain cross-claims was permissive, so long as the issues were actually litigated in the prior action. *Id.* at 221-22. As set forth above, in Part II.B., that is no different from the general rule.

As to res judicata, the Court of Appeals did not apply it to the

unasserted cross-claim because cross-claims are permissive. However, the Court of Appeals acknowledged that where co-parties had become adversaries against one another, res judicata would apply to claims asserted. *Id.* Here, as discussed above in Part II.C.1., although Monk did not plead his arguments as counterclaims, he and Pierson were adversaries, and Monk did assert arguments that the superior court considered in order to rule on the reasonable fees in the case.

Monk also relies heavily on two non-Washington cases to support his position that neither res judicata nor collateral estoppel may be invoked because a counterclaim is permissive in an attorney's lien proceeding. *Tilzer v. Davis, Bethune & Jones, LLC*, 288 Kan. 477, 204 P.3d 617 (2009); *Computer One, Inc. v. Grisham & Lawless P.A.*, 144 N.M. 424, 188 P.3d 1175 (2008). Neither case is binding. Each is also factually distinguishable. In *Tilzer*, the former client did file a counterclaim in the lien action, but only dismissed it when the court stated its ruling was not intended to affect future litigation on the former client's malpractice claims against the attorney. *Tilzer*, 204 P.3d at 620-21. Here, even though Monk was given every opportunity to assert a counterclaim, told his attorney to sue Pierson, and made all of his arguments against Pierson in the Lien Action, he did not actually assert counterclaims as such. In *Computer One*, the client's objections to the lien "differed

markedly" from the allegations in the later malpractice action. *Id.* at 1183. Here, Monk is simply rehashing the identical arguments it brought before the superior court in the Lien Action.

Further, Washington law contemplates the doctrine of res judicata will apply even where the counterclaim was permissive:

> The court from early years has dismissed a subsequent action on the basis that relief sought **could have been and should have been** determined in a prior action . . . .
>
> **[T]he 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 the time**.
>
> The matter in controversy here was included within the matter in controversy there. It either was, **or else could have been, adjudicated in the former action**. The judgment, therefore, became *res judicata* of the issues and matters here presented . . . .
>
> If the matter has been litigated or **there has been an opportunity to litigate on the matter in a former action**, the party-plaintiff should not be permitted to relitigate that issue.

*Shoeman*, 106 Wn.2d at 859 (emphasis added; citations omitted). That is, our Supreme Court has made it clear that the opportunity to litigate, not the requirement to bring a compulsory counterclaim, is the basis for precluding a party from bringing a claim in a later action. The holdings of out-of-jurisdiction courts cannot alter that rule.

### D. Res judicata bars Monk's claims.

Res judicata bars claims which have already been, or could have been, adjudicated in a prior action. *Shoeman*, 106 Wn.2d at 859. The elements are final judgment on the merits in the previous action, as well as identity of subject matter, cause of action, persons and parties, and the quality of the persons and parties for or against whom the claim is made. *Id.* at 858, 860. In this case, all the elements are met.

#### 1. A final judgment on the merits exists.

As stated in the Brief of Cross-Appellant, Monk did not dispute this element below. When he responded to the cross-appeal, however, he put forth new arguments which should not be considered on appeal.

The definition adopted by Washington courts for a final judgment on the merits for the purposes of applying res judicata is:

> 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 v. Potter*, 103 Wn. App. 62, 70, 11 P.3d 833 (2000) (citations omitted). In *Pederson*, the court held a confession of judgment qualified as a judgment on the merits because one party knew of potential claims against the other when they signed the confession of judgment, had the opportunity to be heard on these claims, but chose not to do so. *Id.* at 71.

Here, the superior court's decisions operate as final judgments as defined by the case law. As in *Pederson*, Monk knew about his potential claims for legal malpractice and CPA violations against Pierson. He testifies he asked his attorney to pursue such claims in the Lien Action. The superior court gave him the opportunity to be heard on his potential claims. Although he did not assert counterclaims as such, he argued his theories, and the superior court ruled, as if he had. Therefore, the rulings in the Underlying Action and the Lien Action fit this definition.

**2. An identity of cause of action exists.**

Res judicata is applicable where there is an identity of cause of action. *Pederson*, 103 Wn. App. at 72. This does not mean that the cause of action must have been identified and asserted, rather:

> [T]he following criteria should be considered: (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.

*Id.* In *Pederson*, the court found identity of cause of action where (a) the judgment established the parties' rights and liabilities; (b) both actions involved the same evidence and the infringement of the same right; (c) both suits arose from the same transactional nucleus of facts. *Id.* at 73.

Here, Pierson's right to recover a reasonable fee, established in the

prior rulings after Monk argued that Pierson's actions should serve to reduce the amount recoverable, would be destroyed or impaired by Monk's pursuing Pierson in this action for disgorgement and damages. Substantially the same evidence presented in the determination of reasonable fees and costs and the lien would be presented in this action. The prior actions and the current one involve alleged infringement of the same right: Monk's right to competent representation. Both arise out of the same transactional nucleus of facts. This element is met.

**3. An identity of parties exists.**

Monk urges form over substance on the question of parties, stating that because Pierson was not a party to the Underlying Action, this element does not apply. However, courts look at the "nature of the relationship," rather than looking only at the actual parties. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995). Parties which are "sufficiently the same" satisfy this test. *Id.* at 122 (employer/employee satisfied identity of parties element). Here, Monk and Pierson were adverse to one another in the Lien Action: Pierson asserted a claim to fees and costs, and Monk asserted he was not entitled to them. They are adverse to one another in this action.

**4. An identity of subject matter exists.**

Even where claims are stated differently, both suits may involve

the same subject where the party alleges in both suits the same tortious acts and resulting harm. *Kuhlman*, 78 Wn. App. at 124. Here, Monk alleged the same tortious conduct in the Lien Action that he alleges in this matter. The fact that Monk more artfully asks for affirmative relief in this complaint than before does not change the subject matter of the case.

All of the elements of res judicata are met in this case. The claims that Monk has brought against Pierson are barred because they were or could have been brought in the Lien Action. Pierson's summary judgment on res judicata should have been granted below, and Pierson asks that this court reverse the summary judgment ruling.

## III. CONCLUSION

In the Lien Action, Monk had, and took full advantage of, the opportunity to argue that Pierson's conduct caused him harm. He argued that Pierson had overcharged him, had not explained the case to him, and had violated the standard of care. The superior court heard all of these arguments and made its ruling in the Lien Action based on Monk's arguments. Although Monk did not assert his arguments as counterclaims, that does not prevent this court from applying res judicata, collateral estoppel, and/or CR 13(a) to bar relitigation many years later, of the claims and issues that were or could have been brought in a prior action.

Respectfully submitted this 25th day of November, 2013.

LEE SMART, P.S., INC.

By: _____
Sam B. Franklin, WSBA No. 1903
Pamela J. DeVet, WSBA No. 32882
Of Attorneys for Defendants Pierson,
Askey and Williams & Williams, PSC

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## DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on November ~~22~~ 25th, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA EMAIL**

Parker Law Firm
Mr. Jeffrey T. Parker
1524 Alaskan Way, Suite 109
Seattle, WA 98101
jeff@parkerlegalgroup.com
maryellen@parkerlegalgroup.com

Law Offices of Robert B. Gould
Mr. Robert B. Gould
Sparling Technological Center
4100 194th Street SW, Suite 215
Lynnwood, WA 98036
rbgould@nwlegalmal.com
sjdouglas@nwlegalmal.com

DATED this 25th day of November, 2013 at Seattle, Washington.

Jennifer A. Jimenez, Legal Assistant