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No. 642740-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

JOHN B. FREEMAN,

Appellant,

v.

GARY C. BERGAN, THOMAS  
WHITTINGTON BERGAN STUDEBAKER,  
INC. P.S., a Washington law firm,

Respondents.

BRIEF OF RESPONDENTS

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WSBA #1883

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2010 APR -5 AM 9:08

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## STATEMENT OF THE CASE

John Benjamin Freeman (“appellant” herein) commenced an action in the Superior Court on May 5, 2009, against Gary C. Bergan and Thomas Whittington Bergan Studebaker, Inc. P.S. (“respondents” herein) asking that a judgment entered against Appellant on August 15, 2007 dismissing an earlier case brought by appellant against respondents in 2005, be vacated and that Appellant be allowed to proceed against Respondents for the same relief Appellant had requested in the earlier case. (CP 1 and CP 30).

Respondents moved for Judgment on the Pleadings (CP 14) on the grounds that Appellant had already had his day in court citing the Judgment of Dismissal (EX 6 to CP 30), the dismissal of his appeals by the Court of Appeals and Supreme Court (Ex A-27 to CP 45/46), the Show Cause Order for Vacation of the August 15, 2007 Judgment of Dismissal (Ex 1 to Affidavit of Lauren D. Studebaker being a part of CP 14), the Motion for Vacation of the August 15, 2007 Judgment of Dismissal (Ex 2 to Affidavit of Laruen D. Studebaker being a part of CP 14) and the Order denying Appellants motions for Vacation of the Judgment of Dismissal. (Ex 11 to CP 30). Appellant did not appeal this Order. The trial court (Honorable Steven Gonzalez) granted Respondents’ Motion and entered its Order of Dismissal with Prejudice. (CP 53).

Thereafter Appellant moved for reconsideration (CP 57) which was denied by the trial court. (CP 64) Appellant also obtained an Order to Show Cause requiring Respondents to Show Cause why the Order of Dismissal (CP 53) should not be vacated. (CP 63). The Court denied Appellant's request for relief. (CP 76).

#### ARGUMENT

In 2005, Appellant brought a lawsuit against Respondents seeking a judgment in the sum of \$10,000.00, the amount he says his son was overbilled in connection with a divorce proceeding in which Gary C. Bergan represented Appellant's son. That case resulted in a judgment of dismissal that was entered by the trial court judge on August 15, 2007. It is this judgment of dismissal that Appellant seeks to vacate herein.

(a) Appellant has failed to express any grounds for relief.

Vacation of judgment procedures are set forth in CR 60. (see Appendix) The rule lists eleven reasons which might justify a court to relieve a party from a final judgment. In carefully reviewing Appellants pleadings Respondents have not found that Appellant has cited any portion of CR 60 as giving cause for relief, nor has he pleaded facts which demonstrate any such cause. Furthermore, Appellant has not called this Court's attention to any such cause, both omissions being contrary to the requirements of CR 60(e)(1). At oral argument on Respondent's motion to dismiss

Appellant's claim, Appellant told the court that he was relying on subdivision (4) of the rule-fraud. However, he has not brought to the Court's attention any fraud that would justify vacating the judgment to the court's attention in his pleadings below or in Appellant's Opening Brief. Appellant's claim therefore, is defective on the merits.

(b) Appellant has had his day in Court and cannot now relitigate his claims. The principles of res judicata and collateral estoppel apply respectively to prevent relitigation of the same claim or the same issues between the same parties. Garcia v. Wilson, 63 Wash App 516, 820 P2d 964 (1991). The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. Rains v. State, 100 Wash 2d 660, 674 P.2d 165 (1983).

In order for collateral estoppel to bar a cause of action there must be affirmative answers to the following questions;

“(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior litigation? Will the application of the doctrine not work an injustice on the

party against whom the doctrine is to be applied?” Rains, supra, at p. 665.

(i) Identical Issue. The issue in the prior litigation was whether the judgment of August 15, 2007, should be vacated. Obviously, the same issue is present here.

(ii) Final Judgment on the Merits. Final judgment was entered on August 15, 2007. This is the judgment Appellant seeks to vacate so he can relitigate his claim that Respondents overbilled for their services.

(iii) Same Parties. The parties in both matters are exactly the same.

(iv) Injustice against Appellant. In determining whether application of the doctrine of collateral estoppel would work an injustice, focus is on whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum. Nielson By and Through Nielson v. Spanaway General Medical Clinic, 135 Wash 2d 255, 956 P.2d 312 (1998). Appellant not only appealed the judgment of August 15, 2007, to the Court of Appeals and Supreme Court, but he also brought a motion to vacate the judgment and order to show cause why the judgment should not be vacated and was afforded a full hearing on the matters, all of which were denied. While Appellant’s dissatisfaction with the judgment entered against him after trial or the denial of his motion to

vacate the judgment may be the basis for an appeal it is not an “injustice” which would preclude the application of the doctrine of collateral estoppel. (see Nielson, supra.)

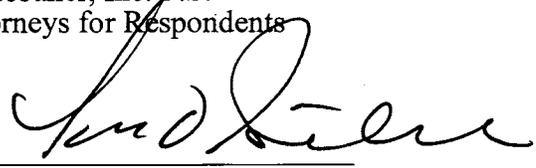
#### CONCLUSION

Appellant, despite filing a 43 page opening brief, has failed to identify a basis for vacating the August 15, 2007 judgment against him. He has had his day in court and should be precluded by principles of collateral estoppel from the relief he seeks – vacation of the August 15, 2007 judgment. The order of dismissal entered herein by the trial judge should be affirmed.

Respectfully submitted this 5<sup>th</sup> day of April, 2010.

Thomas Whittington Bergan  
Studebaker, Inc. P.S.  
Attorneys for Respondents

By

  
Lauren D. Studebaker  
WSBA #1883

APPENDIX

See CR.60 Attached



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RULE 60  
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

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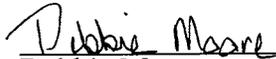
AFFIDAVIT OF MAILING

Debbie Moore, being first duly sworn on oath, deposes and says: I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled proceedings and competent to be a witness therein.

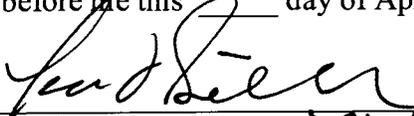
On April 5<sup>th</sup>, 2010, at the request of Lauren D. Studebaker, one of the Attorneys for the above-referred matter, I mailed a copy of the Brief of Respondents to:

John Benjamin Freeman  
22123 244<sup>th</sup> Ave Southeast  
Maple Valley, WA 98038

by placing the same in an envelope with postage fully prepaid thereon and sending it by regular mail.

  
Debbie Moore

SUBSCRIBED and SWORN to before me this 5<sup>th</sup> day of April, 2010.

  
Printed Name: Lauren D Studebaker  
NOTARY PUBLIC in and for the State  
of Washington, residing at Belleve  
My Commission Expires: 2/26/2014