

No. 68154-1-I

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

MWW, PLLC dba Moran Windes and Wong, PLLC and MORAN &
KELLER, PLLC its successor;
Appellants,

v.

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

**BRIEF OF RESPONDENTS RYAN AND JANE DOE SMITH AND
JOHN AND JANE DOE GUARINO**

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I. INTRODUCTION

Years ago, attorney Dennis Moran, through his law firm Moran Windes and Wong, signed a fee agreement with client Brent Nelson. The Moran firm was to represent Nelson in a malpractice action against Cairncross and Hempelmann. The fee agreement provided that if Nelson's interest in the malpractice action was transferred to anyone else, the Moran firm would automatically – and immediately – have an attorney lien on the proceeds of the case in a fixed amount of \$750,000 – regardless of the amount of work, the quality of work, and the status of the case. Shortly after the Moran firm filed the complaint on Nelson's behalf, Nelson's interest in the malpractice case was acquired by respondents Ryan Smith and John Guarino (“Smith/Guarino”) in 2006. This property right was obtained in the process of executing on Nelson's assets in efforts to satisfy a large judgment for violation of securities law. Smith/Guarino hired Respondents Yarmuth Wilsdon Calfo PLLC to represent them in the malpractice case.

After over a year of discovery and motions practice, Smith/Guarino settled the malpractice case. Thereafter, the Moran firm asserted its alleged \$750,000 fixed-fee attorney lien on the settlement proceeds. In response, Smith/Guarino immediately sought and obtained a ruling from the Trial Court invalidating the Moran firm's lien.

The Moran firm appealed, but did not seek a stay of the Trial Court's ruling invalidating the lien, nor did Moran file a supersedeas bond. The Court of Appeals determined that the Moran firm had the right to seek to enforce a statutory attorney's fee lien, but did not fix the amount of the loan. Instead, the Court of Appeals remanded the case to the Trial Court to determine what amount, if any, the Moran firm was entitled to.

On remand, the Moran firm again asserted its \$750,000 lien claim against Smith/Guarino. Moran moved for summary judgment on his claim for a fixed fee of \$750,000. The Trial Court denied the Moran firm's motion for summary judgment on the basis that because Moran did not complete his contract to prosecute the malpractice case, Moran was not entitled to the contingent fee. Moran filed an interlocutory appeal of this order but review was denied. After fourteen months of no activity in the case, Smith/Guarino moved to dismiss the case for lack of prosecution and the case was dismissed on that basis pursuant to CR 41(b)(1). The Moran firm appealed this order as well (now the third appeal) but again failed to make the necessary showing to justify discretionary review. Both this Court and the Supreme Court rejected Moran's motions/petitions for discretionary review of the dismissed order.

The appellant in the present case, "MWW, PLLC dba Moran Windes and Wong, PLLC and Moran & Keller, PLLC its successor" ("Moran") then filed a new lawsuit, attempting to collect on the same alleged \$750,000 attorney lien. Moran filed this lawsuit July 18, 2011 – well over three years after any lien claim arose.

Moran's arguments in this appeal are legally flawed and in several important instances are unsupported by the record. The record demonstrates that the claims against Smith/Guarino fail as a matter of law – because Moran did not allege actionable facts that are cognizable under well established rules of law. Because the Trial Court properly dismissed the claims against Smith/Guarino, Smith/Guarino respectfully requests that the Court affirm the Trial Court's dismissal.

II. ISSUES REGARDING ASSIGNMENT OF ERRORS

1. Did the Trial Court correctly dismiss Moran's claim for attorney fees against Smith/Guarino because, as a matter of law, Moran does not have a contract-based attorney lien claim against Smith/Guarino?
2. Did the Trial Court correctly dismiss Moran's claim to foreclose an attorney lien against Smith/Guarino because Moran did not assert a legally viable theory of recovery against Smith/Guarino?
3. Did the Trial Court correctly dismiss Moran's conversion claim against Smith/Guarino because the Complaint does not allege that Smith/Guarino improperly received specific money or that Smith/Guarino had an obligation to return specific money?
4. Did the Trial Court correctly dismiss Moran's conversion claim against Smith/Guarino because the claim is time-barred by a three-year limitations period where the lien

claim arose at latest in 2007, and Moran filed the Complaint in 2011?

5. Did the Trial Court properly dismiss Moran's claim to foreclose on the attorney lien against Smith/Guarino because the claim is time-barred by a three-year limitations period, the lien claim arose at latest in 2007, and Moran filed the Complaint in 2011?
6. Did the Trial Court properly decline to apply judicial estoppel because Smith/Guarino did not contradict factual positions asserted in prior proceedings?

III. STATEMENT OF THE CASE

On March 28, 2006, the Moran firm allegedly entered into a fee agreement with Brent Nelson (“Nelson”). Moran agreed to represent Nelson in a legal malpractice claim on a contingent fee basis against the law firm Cairncross & Hempelmann.¹ CP 4-5. Moran filed that action on Nelson’s behalf on March 29, 2006. CP 71-74. In a sheriff’s sale on August 7, 2006, Smith/Guarino – Nelson's creditors – acquired Nelson’s rights, title, and interest in the claims. CP 5. Smith/Guarino were

¹ Moran’s “Statement of the Case” cites to the record only a handful of times, even though Moran includes more than 12 pages of “facts” in its brief. Smith/Guarino respectfully requests that the Court disregard Moran’s Statement of the Case to the extent the record does not support it. *See* RAPs 10.3, 10.7; *Hirata v. Evergreen State Ltd P’ship No. 5*, 124 Wn. App. 631, 637 n.4, 103 P.3d 812 (2004) (striking portions of brief not supported by record); *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 184-85, 19 P.3d 1081 (2001) (disregarding portions of brief not supported by record); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 492, 513, 857 P.2d 283 (1993) (“Allegations of fact without support in the record will not be considered by an appellate court.”).

substituted as plaintiffs in Nelson's malpractice claim as the real parties-in-interest. *Id.* Moran withdrew as plaintiff's counsel, before any significant activity occurred. CP 75; CP 170-72. Yarmuth Wilsdon Calfo PLLC subsequently appeared as Smith/Guarino's attorneys. CP 176.

The legal malpractice case settled. On August 24, 2007, a law firm identifying itself as Moran Windes & Wong, PLLC served a letter on various entities, including counsel for Plaintiffs Smith/Guarino, asserting an attorney's lien of \$750,000 in the name of Moran Windes & Wong PLLC against the settlement proceeds in the underlying case.² CP 177. On September 6, 2007, Smith/Guarino moved to invalidate the claimed lien. CP 6. Judge McCarthy dismissed Moran's attorney's lien claim on September 24, 2007. The underlying legal malpractice claim in Civil Action No. 06-2-10589-3 SEA settled and was dismissed September 27, 2007. CP 48-52. At this point in time, Moran had no right to any of the settlement proceeds.

Moran appealed the order invalidating the lien. However, Moran did not seek to stay the order or bond the appeal pursuant to the super-seedeas procedures of RAP 8.1. CP 5, 79. On June 30, 2008, this Court reversed the order dismissing the lien and remanded the case to determine what amount, if any, Moran was entitled to assert. *Smith v. Moran, Windes & Wong PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008). The Washington Supreme Court thereafter denied Smith/Guarino's petition for

² These background facts are set forth in this Court's prior opinion, *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008).

review (165 Wn.2d 1032, 203 P.3d 381 (2009)), and the case was mandated back to the trial court. Moran Windes & Wong PLLC then filed a motion for summary judgment on May 15, 2009, as a plaintiff-intervenor, seeking a judgment for its claimed \$750,000 lien based on its purported fee agreement with Nelson and its contract lien. CP 54. Moran Windes & Wong was the only entity to assert this alleged attorney's lien. Judge Canova denied the motion for summary judgment on October 22, 2009. CP 54-56. Rather than proceeding to trial after the denial of its summary judgment motion, Moran Windes & Wong PLLC instead filed a motion for discretionary review of that order on November 15, 2009. This Court denied the motion for discretionary review on January 13, 2010, and sent the case back to the trial court on February 26, 2010. CP 58-64. After that date, no action of record occurred for 14 months. CP 78.

On May 6, 2011, Smith/Guarino moved to dismiss the case for want of prosecution pursuant to CR 41(b)(1) because Moran had failed to note the action for trial or hearing within one year after the issues of law or fact had been joined. On May 18, 2011, the case was dismissed, without prejudice. CR 41(b)(1) CP 45-46.

On May 19, 2011, an entity identifying itself as "MWW PLLC, dba Moran Wong & Keller, formerly dba Moran, Windes & Wong, a Washington PLLC" filed a notice of appeal seeking review of the order of dismissal without prejudice, the order denying the motion of the non-party

to set the case for trial, and three earlier orders issued in the case.³ Appendix A1-A13 to Brief of Respondents Yarmuth Wilson Calfo and Richard Yarmuth. By letter dated June 7, 2011, this Court advised the parties that it had placed the matter on the docket to determine (1) whether the notice of appeal presented issues that were reviewable as of right, or alternatively, (2) whether the issues presented should be accepted for discretionary review, and setting a hearing for July 1, 2011. Appendix A14 to Brief of Respondents Yarmuth Wilson Calfo and Richard Yarmuth. The Appellant in that proceeding did not submit a brief or legal memorandum addressing either issue, or even respond to the brief submitted by Smith/Guarino. Commissioner James Verellen ultimately terminated the appeal by notation ruling dated July 1, 2011. CP 214-15. The Supreme Court likewise denied discretionary review on January 9, 2012. CP 428-33.

On July 18, 2011, Moran (the appellant in this case)⁴ filed a new lawsuit concerning the attorney lien in King County Superior Court against Smith/Guarino and added their marital communities. CP 1-9. In addition, plaintiff named as new defendants Yarmuth Wilsdon Calfo,

³ The three additional orders included in the Notice of Appeal were: (1) a November 30, 2009, order denying Moran, Windes & Wong's Motion to Compel Arbitration, (2) an October 22, 2009 order denying Moran, Windes & Wong's Motion for Summary Judgment, and (3) an August 9, 2009 order granting Plaintiffs Smith/Guarino's CR 56 (f) continuance to conduct discovery. Notably, the Court of Appeals had already denied Moran Windes & Wong's request for discretionary review of the October 22, 2009 order denying its Motion for Summary Judgment.

⁴ In its last briefing to the Court of Appeals and Supreme Court, Appellant alternately referred to itself as "Moran, Wong & Keller," and "Moran & Keller." The record does not demonstrate whether these are the same entities.

PLLC, and partner Richard Yarmuth and his marital community individually. Because Yarmuth were now named as defendants, they could no longer serve as counsel for Smith/Guarino. Smith/Guarino obtained new counsel in the trial court, as they have for this appeal.

The new complaint asserts two causes of action: (1) a claim for a fixed fee of \$750,000 and a lien to secure that amount against settlement proceeds, and (2) a claim for conversion based on the disbursement of the malpractice settlement proceeds to Smith/Guarino and Yarmuth. The Yarmuth parties moved to dismiss the complaint under CR 12(b)(6) for two reasons: (1) the claims against them failed as a matter of law, and (2) the claims were barred by the statute of limitations. CP 11. Smith/Guarino joined in that motion. CP 20. Yarmuth (and Smith/Guarino) argued that Moran did not have a valid claim for the fixed amount of \$750,000. Both causes of action against Smith/Guarino – for conversion and “foreclosure on attorneys’ fee lien” – are premised on Moran having an enforceable attorney’s contract lien of a liquidated amount, and these claims cannot be prosecuted as a matter of law against Smith/Guarino. *Id.* Second, they argued that claims under either cause of action had to be brought within three years, and the Complaint failed to allege any actionable conduct by defendants within that period. *Id.* Moran opposed the motion. CP 218-377.

The Trial Court granted Yarmuth's motion to dismiss on December 12, 2011 finding both that the claims against Yarmuth failed as a matter of law and were barred by the statute of limitations. CP 386-87. The Trial Court also dismissed as against Smith/Guarino on the basis that the

claims against them could be pursued in the pending appeal. CP 386-87. However, once the Supreme Court denied review in the then-pending appeal, Moran filed a CR 60 motion as to set aside the dismissal of Smith/Guarino. In response, Smith/Guarino moved to dismiss on the merits. The Trial Court denied the CR 60 motion and affirmed its prior dismissal of Smith/Guarino on the merits by order dated February 21, 2012. Moran has also appealed that decision, now the fourth appeal filed by Moran relating to this matter.

IV. SUMMARY OF ARGUMENT

The Trial Court correctly dismissed the claims against Smith/Guarino under CR 12(b)(6), and this Court should affirm. Moran asserted two claims against Smith/Guarino for a \$750,000 fixed attorney's fee and for conversion for failure to pay that claimed fee. Both fail as a matter of law. First, the conversion claim against Smith/Guarino fails because Moran did not allege the elements necessary to hold Smith/Guarino liable for conversion. Specifically, Moran did not allege that Smith/Guarino wrongfully received certain money, or that Smith/Guarino had an obligation to return specific money. In the absence of such allegations, the claim fails as a matter of law.

Second, the claim for the attorney lien fails as a matter of law because Moran did not assert a viable theory of recovery (such as quantum meruit) against Smith/Guarino. Moran does not, as a matter of law, have a contract-based attorney lien claim against Smith/Guarino. Moran's alleged fee agreement with Nelson was a type of contingent agreement.

Washington law is clear that when an attorney has a contingent fee agreement but withdraws from the case prior to its conclusion, the contingent agreement is replaced by the reasonable value of the services the attorney actually provided. Here, Moran withdrew shortly after filing the complaint on Nelson's behalf, leaving it with a claim only for the reasonable value of its services – a claim Moran has not asserted in this case and has clearly chosen not to pursue. Because Moran has no theory of recovery against Smith/Guarino, the related claim to foreclose on the attorney lien fails.

Finally, both claims are barred by the three year limitations period. The limitations period on both claims began to run, at latest, in 2007 when the Trial Court dismissed Moran's lien claim and the underlying case upon settlement. Moran did not file this case until 2011, more than three years after the claim arose. Accordingly, the claims are untimely, providing the Court an additional reason to dismiss them.

V. ARGUMENT

A. Standard of Review

Smith/Guarino adopt and incorporate herein the argument set forth in part V.A. of the Brief of Respondents Yarmuth Wilsdon Calfo PLLC and Richard and Jane Doe Yarmuth. The argument set forth therein applies with equal force to Smith/Guarino and therefore it is unnecessary to set forth that argument here.

B. Moran Does Not, As a Matter of Law, Have A Contract Based Attorney's Fee Claim Against Smith/Guarino.

The Trial Court properly dismissed the contract-based attorney fee claim against Smith/Guarino. This Court should affirm the dismissal. The complaint in this case asserts that Moran⁵ is entitled to a remedy against Smith/Guarino based on a contract Moran had with Nelson. CP 1-9. Moran assumes that Smith/Guarino is somehow bound by that contract even though they made no such agreement with Moran. The contract at issue is a form of contingent fee agreement between Moran and Nelson. *Id.* The operative provision states that if Nelson transfers the malpractice claim to any other person, voluntarily or involuntarily, then Moran immediately and automatically earns \$750,000 and a corresponding lien attaches to any recovery from that action.⁶ This is apparently so regardless of amount of work done, the status of the case at the relevant time, the result obtained or Moran's contribution to that result. CP 4-5. Curiously, the contract does not even characterize the \$750,000 as a "fee" but is simply an amount that becomes owing upon a transfer of the case to another party.

⁵ Moran states that "Defendants have not challenged standing in this action." Moran's Opening Brief, at 17 n.7. As set forth above in Smith/Guarino's Statement of the Case, Smith/Guarino has previously successfully challenged that "Moran, Wong & Keller" (and/or Moran & Keller) is not the real party-in-interest in this case. However, because Smith/Guarino moved to dismiss this case solely on the basis that the complaint failed to state a claim, regardless of the true plaintiff's identity, Smith/Guarino did not need to raise the standing issue. Should this Court reverse the dismissal, Smith/Guarino reserve the right to challenge the current Plaintiff's standing to prosecute the attorney lien.

⁶ The language of the purported fee agreement between Moran and Nelson quoted in the Complaint at ¶ 3.1 appears to be an agreement by Nelson that an unidentified non-party to the contract will be liable to pay the law firm a fixed fee of \$750,000. CP 4-5.

Neither Smith/Guarino nor Yarmuth are in contractual privity with Moran. The Complaint does not allege as much. *See* CP 1-9. Further, it is clear, and acknowledged in the Complaint, that Moran was not representing Smith or Guarino in the underlying litigation when the case settled and in fact had withdrawn as counsel about a year prior to the settlement. CP 5-6. Moran withdrew from the case in September of 2006, shortly after the case was filed, when Smith/Guarino purchased Nelson's interest.⁷ CP 113. The case was settled almost a year later in late August of 2007.

It is well settled in this state that in the case of a contingent fee agreement when an attorney withdraws or is discharged prior to concluding the matter the contract contingent fee is converted to a reasonable fee based on the time and effort expended on the matter.

It has long been the rule in this state that where the compensation of an attorney is to be paid contingently, and the attorney is discharged prior to the occurrence of the contingency, the measure of the fee is not the contingent fee agreed upon but reasonable compensation for the services actually rendered.

Barr v. Day, 124 Wn.2d 318, 329, 879 P.2d 912 (1994) (citing *Ross v. Scannell*, 97 Wn.2d 598, 608-09, 647 P.2d 1004 (1982)); *see also Krein v. Nordstrom*, 80 Wn. App. 306, 311, 908 P.2d 889 (1995); *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920).

There is one limited exception to this long established rule. If the attorney has prosecuted the matter to a point where only minor and relatively unimportant matters remain to be accomplished for complete

⁷ *See* CP 66-67. Notably, Moran also filed a motion to dismiss the complaint it had filed on behalf of Nelson, which was denied by Order dated September 5, 2006. CP 69-70.

contractual performance and the attorney is discharged before they can be done then the contingent fee may still apply. E.g., *Taylor v. Shigaki*, 84 Wn.App. 723, 930 P.2d 340 (1997). However, Moran did not assert this doctrine as a basis for his fee claim and did not allege any facts that even arguably give rise to the application of this doctrine.

Judge Canova correctly applied the *Barr* rule when he denied Moran's Motion for Summary Judgment. CP 54-56. In responding to Moran's argument that the lien amount was \$750,000 based on Moran's alleged contract with Nelson, Judge Canova stated:

The Court further finds that the contingent nature of the fee agreement (conceded by plaintiff-intervener (sic) at page 4 of MW&W's Response to Plaintiffs' Supplement Opposition to MW&W's Motion for Summary Judgment) creates a genuine issue of fact as to the amount to be allowed under RCW 60.40.010(1)(d). When the attorney-client relationship is terminated before full performance by the attorney, as in this case, any contingent fee agreement is replaced by a reasonable hourly fee. *Forbes v. American Building Maintenance Co. West*, 148 Wn. App. 273, 288 (2009), *citing Taylor v. Shigaki*, 84 Wn. App. 723,728 (1997).

CP 56 (emphasis added).

The Complaint does not allege full or even substantial performance (CP 1-9). The record in the underlying case demonstrates Moran withdrew from the case on its own motion a year before the case settled. CP 75. Moran's causes of action for conversion and to "foreclose on attorney lien" are both based on the fixed fee contract with Nelson. Based on the *Barr* rule Judge Canova rejected Moran's argument that he was entitled to a fixed fee. Similarly, the Trial Court here also concluded that the Com-

plaint failed to state a contract-based attorney lien claim against Smith/ Guarino and properly dismissed the claim under CR 12(b)(6). CP 386-87. Judge Heller stated: "...since [Moran] withdrew from the case over a year before resolution it is not entitled to the contract amount. Forbes v. American Building Maintenance Co. West, 148 Wa.App 273, 288 (2009)." This is the correct ruling and this Court should affirm.

Curiously, Moran totally ignores the *Barr* doctrine, which has jurisprudential roots going back ninety years. Rather, he boldly asserts that he is entitled to a lien because RCW allows for a lien for fees, including amounts earned under a contract. However, the time honored *Barr* doctrine clearly governs the factual situation we have here and the more general authority in RCW 60.40.010 does not compel a different analysis or result.

C. The Complaint Fails to State a Claim for Conversion Against Smith/Guarino.

The Trial Court properly concluded that the facts alleged in the Complaint are insufficient to state a cause of action for conversion against Smith/Guarino. Conversion is "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001) (quoting *Wash. State Bank v. Medalia Healthcare, LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999)); *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 722, 197 P.3d 686 (2008).

Money is not considered chattel and cannot become the subject of conversion unless (1) it has been wrongfully received, or (2) there was an obligation to return the “specific money” to the party claiming it. *Consulting Overseas*, 105 Wn. App. at 83, 18 P.3d 1144; *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 817-18, 239 P.3d 602, 609-10 (2010). “[T]here can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it.” *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195, 1211 (1985) *modified*, 713 P.2d 1109 (1986) (citing *Davin v. Dowling*, 146 Wash. 137, 262 P. 123 (1927) and *Seekamp v. Small*, 39 Wn.2d 578, 237 P.2d 489 (1951)).

Further, “[k]nowledge of a lien against money does not make the recipient liable for conversion.” *Reliance Ins. Co. v. U.S. Bank of Washington, N.A.*, 143 F.3d 502, 506 (9th Cir. 1998) (applying Washington law) (citing *Davin*, 146 Wash. 137). The *Reliance Ins. Co.* decision noted that “[t]hough money or a check could in some circumstances be the subject of conversion, for example if someone wrongfully took a check from another’s desk, the tort traditionally involves the wrongful taking and carrying away of something tangible.” *Reliance Ins. Co.*, 143 F.3d at 506 (internal citation omitted).

None of the elements of a conversion are present in this case. As to the “wrongfully received” element, the Complaint alleges that Smith/Guarino received the settlement proceeds when Smith/Guarino’s claim

against Cairncross settled and “the liened proceeds of the Settlement were transferred to [Yarmuth] and placed in its IOLTA trust account.” CP 5. This occurred after Judge McCarthy ruled that Moran did not have a lien claim against the settlement proceeds. Taking the proceeds under these circumstances cannot be wrongful. There is no allegation in the Complaint (nor can there be) that either Smith/Guarino or Yarmuth “wrongfully received” these funds during the settlement process. *See* CP 1-9. Thus, not only is it clear that Smith/Guarino had the right to the settlement proceeds, Moran does not even allege that the money at issue was “wrongfully received.”

Further, the Complaint does not allege that Smith/Guarino failed to return an identified sum of money to Moran at a time when Smith/Guarino was obligated “to return the specific money to the party claiming it.” *See* CP 1-9; *Pub. Util. Dist. No. 1 of Lewis County*, 104 Wn.2d at 378. Moran has not sufficiently alleged facts that support a past or present, or even future, entitlement to any “specific” sum – much less \$750,000 – that provides a basis for a conversion claim against Smith/Guarino.

Moran conflates notions of conversion with breach of contract. The United States District Court for the Western District of Washington, Pechman, J., reached the following conclusion regarding conduct analogous to the Complaint’s allegations against Smith/Guarino:

Here, Defendants do not allege that Plaintiff wrongfully received any money. Defendants also do not allege that Plaintiff took money from them and then failed to return such funds. Instead, Defendants allege that Plaintiff has retained money that Defendants are owed under the

Agreement. This allegation amounts to a breach of contract claim, not an action for conversion.

First Global Commc'ns, Inc. v. Bond, C05-749P, 2006 WL 231634, at *5 (W.D. Wash. Jan. 27, 2006) (applying Washington law).

There has been no enforceable determination of any specific lien amount that Smith/Guarino may be alleged to have converted.⁸ It is uncontested, and acknowledged in the Complaint, that Moran withdrew from the case prior to the settlement, and that Smith/Guarino, represented by another law firm, had substituted in as plaintiffs prior to the settlement. *Id.* Based on these uncontested facts, undisputed Washington law, and a prior ruling by Judge Canova, the amount (if any) of Moran's lien claim remains undetermined. Accordingly, Smith/Guarino could not have "converted" the claimed lien amount or any other amount for that matter. Judge Canova's ruling precludes Plaintiff's argument that Smith/Guarino "converted" the amount of \$750,000 because absent an established legal right to this specific amount, there can be no conversion as a matter of law. Indeed, at best, all Moran can claim is a statutory attorney's lien against settlement proceeds in an amount yet to be determined. However, such a statutory lien claim does not provide the basis for a claim of

⁸ Moran argues that Judge Canova's order denying its motion for summary judgment to establish the lien in the amount of \$750,000 has no precedential value (Moran's Opening Brief, at 23). Moran misses the point. Judge Canova's order simply shows there has been no enforceable determination of the amount of Moran's lien. Without a concrete determination as to the amount of the lien, Smith/Guarino cannot, as a matter of law, have "converted" the settlement funds that were allegedly subject to the lien. *See Pub. Util. Dist. No. 1 of Lewis County*, 104 Wn.2d at 378.

conversion against Smith/Guarino. The Trial Court properly dismissed the conversion claim, and this Court should affirm.

D. Plaintiff's Conversion Claim Against Smith/Guarino Is Time Barred.

Smith/Guarino adopt and incorporate herein the argument set forth in part V.D. of the Brief of Respondents Yarmuth Wilson Calfo PLLC and Richard and Jane Doe Yarmuth. The argument set forth therein applies with equal force to Smith/Guarino and therefore it is unnecessary to set forth that argument here.

E. Plaintiff's Complaint Fails to State a Claim to Foreclose Attorney's Lien Against Smith/Guarino.

Smith/Guarino adopt and incorporate herein the argument set forth in part V.E. of the Brief of Respondents Yarmuth Wilson Calfo PLLC and Richard and Jane Doe Yarmuth. The argument set forth therein applies with equal force to Smith/Guarino and therefore it is unnecessary to set forth that argument here.

F. Plaintiff's Claim to Foreclose Attorney's Lien Against Smith/Guarino is Time Barred.

Smith/Guarino adopt and incorporate herein the argument set forth in part V.F. of the Brief of Respondents Yarmuth Wilson Calfo PLLC and Richard and Jane Doe Yarmuth. The argument set forth therein applies with equal force to Smith/Guarino and therefore it is unnecessary to set forth that argument here.

G. Judicial Estoppel

Moran's arguments regarding judicial estoppel are misplaced, and the Trial Court properly found that the doctrine is inapplicable. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (citations omitted and emphasis added). A court focuses on three core factors when deciding whether to apply the doctrine of judicial estoppel:

(1) whether a *party's* later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Mavis v. King County Pub. Hosp. No. 2, 159 Wn. App. 639, 650, 248 P.3d 558, 563 (2011) (quoting *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008)) (emphasis added). Importantly, judicial estoppel applies only to prevent "inconsistent positions as to facts. It does not require counsel to be consistent on points of law." *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 63, 244 P.3d 32 (2010), review granted, 172 Wn.2d 1001, 258 P.3d 685 (2011) (citing *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974)).

Judicial estoppel is not applicable here for several reasons. First, the supposedly contradictory position taken previously is not a factual

position. Again, judicial estoppel applies only to facts, not legal conclusions. *Anfinson*, 159 Wn. App. at 63. Moran cites the argument heading in a brief submitted in opposition to discretionary review as the basis to apply estoppel. This "position" was clearly a legal argument, asserting merely that Moran did not make the necessary showing under the applicable standards. This was not a position on a specific fact. The only "fact" that was asserted as the basis for the argument was that the dismissal order was "without prejudice" which was obvious from the face of the order.

In any event, Smith/Guarino's positions in the prior case are not inconsistent with their position here. As the record demonstrates, this Court (and the Supreme Court) denied the Moran firm's prior appeals because the Moran firm failed to make the required showing necessary for the Court to accept discretionary review. CP 214-15, 367-77; CP 428-33. Moran did not even file a brief in this Court addressing why the Court should accept review, given that the Trial Court's dismissal was without prejudice. This Court and the Supreme Court denied review because Moran failed to address the relevant standard for discretionary review. CP 214-15, 367-77; CP 428-33. The record simply does not support Moran's assertion that Smith/Guarino argued "that MWW could not bring the appeal because MWW could merely refile and have its claim accepted." Moran's Opening Brief, at 20. Rather, the record demonstrates that Smith/Guarino made no such argument; rather, they pointed out that Moran, as the appellant, simply failed to meet his burden of showing this Court why

it should accept review. *See, e.g.*, CR 367 (“Appellant’s new submission fails to make any showing or plausible argument demonstrating why, in this instance, the dismissal without prejudice constitutes a final judgment or decision determining action subject to appeal as a matter of right pursuant to RAP 2.2(a)(1) and (3).”). As Commissioner Verellen stated in denying review,

Here, the appellant does not assert that a statute of limitations would bar refiling the action. He argues that the motion to dismiss is tactical and he cannot anticipate what new or different defenses might be raised if the appellant refiles the action. The dilemma is that appellant has the burden of establishing that this [sic] the action has been discontinued The appellant does not establish that the dismissal without prejudice is appealable under RAP 2.2(a)(3) or the Munden doctrine.

CP 215, 377 (emphasis added). Notably absent from Commissioner Verellen’s ruling is any reference to a position or assertion by Smith/Guarino (or Yarmuth). The Commissioner simply held that Moran failed to meet his burden to justify discretionary review. This decision was a result of Moran's failure to meet his burden, not of Smith/Guarino's skilled advocacy or any "position" they may have taken.

Further, as set forth above, the Trial Court did not dismiss the claims against Smith/Guarino only because they were time-barred; it also dismissed the claims because they failed as a matter of law, for the reasons set forth above. Accordingly, even if judicial estoppel applied – and it does not – the Court should still affirm the dismissal because the claims fail on their merits.

H. Moran's Appeal Is Frivolous, and Smith/Guarino is Entitled To An Attorney Fee Award.

Smith/Guarino respectfully requests that the Court award it the attorney fees it incurred in this appeal under RAP 18.9. In determining whether to impose sanctions for a frivolous appeal, the Court examines, based on the record as a whole, whether “there are no debatable issues upon which reasonable minds could differ” and whether “the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987); *see also Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, 191 (1980). Here, an award of reasonable attorney's fees and costs to Smith/Guarino is appropriate under RAP 18.9, as all of Moran's arguments in this appeal against Smith/Guarino are frivolous.

As set forth above, Moran's conversion claim both fails as a matter of law (because Moran did not and cannot plead the required elements) and because it is time-barred. *See supra* Parts V.C-D. Moran's Complaint failed to allege any rational argument based on law or fact to support a claim for conversion against Smith/Guarino. *See* CP 1-9. Put simply, Moran's conversion claim against Smith/Guarino was frivolous and unsupported by any rational argument on the law or facts.

Moran's claim to “foreclose on its attorney's lien” was similarly frivolous, for the reasons set forth above. *See supra* Parts V.B, V.E-F. Moran wholly failed to allege any underlying cause of action that might establish its right to obtain relief against Smith/Guarino.

Finally, both of Moran's claims against Smith/Guarino were plainly time-barred, as explained above. Both are subject to a three-year limitations period, and even under a generous application of that period, the claims are still clearly time-barred. *See, e.g., Reid v. Dalton*, 125 Wn. App. 113, 121-22 (2004) (affirming grant of fees and costs under RCW 4.84.185 where plaintiff's claims were, *inter alia*, time-barred under the applicable statute of limitations). Even if Moran *had* alleged valid causes of action (it did not), it is beyond dispute that both of its claims were plainly time-barred.

VI. CONCLUSION

The Trial Court properly dismissed the claims against Smith/Guarino under CR 12(b)(6), and this Court should affirm. Moran's claims for conversion and to foreclose on the attorney lien both fail as a matter of law. Moran has not pled the required elements to state a claim for conversion against Smith/Guarino. Similarly, Moran does not have a contract-based attorney lien claim against Smith/Guarino, and Moran fails to plead any other underlying theory of recovery to foreclose on the attorney lien against Smith/Guarino. Additionally, both claims are barred by the three-year limitations period, which began to run at latest in 2007—making the complaint filed here in 2011 untimely. This Court should affirm the dismissal of the claims against Smith/Guarino.

Finally, because the arguments Moran asserts in this appeal are frivolous, Smith/Guarino respectfully requests that it be awarded the attorney fees it incurred in this appeal under RAP 18.9. Moran's claims

against Smith/Guarino are not well grounded in fact or law, and the arguments it makes in this appeal are baseless. Accordingly, Smith/Guarino respectfully requests an award of attorney fees

Dated this 15th day of May, 2012.

Respectfully submitted,
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VII. APPENDIX

See Appendix in Brief of Respondents Yarmuth Wilson Calfo PLLC and Richard and Jane Doe Yarmuth.

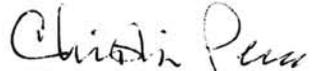
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 1st day of May, 2012, a copy of BRIEF OF RESPONDENTS RYAN AND JANE DOE SMITH AND JOHN AND JANE DOE GUARINO was sent via email to:

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Christie Percy

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