Supreme Court No. _____

IN THE SUPREME COURT FOR THE

STATE OF WASHINGTON

JAYAKRISHNAN K. NAIR

Petitioner,

vs.

RICHARD J. SYMMES, Individually and on Behalf of the Marital Community Comprised of RICHARD J. SYMMES and JANE DOE SYMMES, and SYMMES LAW GROUP, PLLC, a Washington Professional Limited Liability Company,

Respondents.

PETITION FOR REVIEW FROM A DECISION OF DIVISION I OF THE WASHINGTON COURT OF APPEALS, CASE NO. 77629-1

Brian J. Waid
WSBA No. 26038
WAID LAW OFFICE, PLLC
5400 California Ave. S. W., Ste D
Seattle, Washington 98136
Telephone: 206-388-1926
Email: bjwaid@waidlawoffice.com
Counsel for Petitioner

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I. Introduction

The Petition of Jayakrishnan "Jay" Nair addresses yet another issue critical to protection of clients victimized by the legal malpractice of their attorneys: Would a manifest injustice occur if a summary decision in a prior litigation in which the **client could not assert** the legal malpractice claim were to collaterally estop the client from *ever* asserting the legal malpractice claim? Although arising here in the context of a Bankruptcy Court order awarding fees, the issue also arises in other contexts, such as summary proceedings related to attorney fees. See, *e.g., Monk v. Driesen,* 2012 WL 4857208 *2-3 (Div. I);[1] *Ferguson v. Waid,* 2019 WL 1644134 *7-8 (Div. I, 04/15/19). The collateral estoppel issue raised in this Petition is also similar to the collateral estoppel issue (*i.e.,* "manifest injustice") raised in the Petition for Review (pp. 11-17) pending in *Butler v. Calfo, Harrigan, Leyh & Eakes, LLP,* Supreme Court case no. 97101-3.

II. Identity of Petitioner

The trial court dismissed Petitioner Jayakrishnan ("Jay") Nair's

[1] Petitioner cites *Monk v. Pierson* solely as an example of circumstances in which the issue can arise and *not* as persuasive authority.

legal malpractice complaint pursuant to CR 12(b)(6), based on collateral estoppel, and the Appellant in Division I which affirmed that dismissal.

III. Decision Below

Division I affirmed the trial court dismissal of Mr. Nair's legal malpractice complaint pursuant to CR 12(b)(6), holding that the Bankruptcy Court Order approving Respondent Symmes' fees in Mr. Nair's Chapter 7 bankruptcy collaterally estopped Mr. Nair from pursuing this legal malpractice claim against Respondent Symmes, even though Nair had could not have pursue the legal malpractice claim at the time of the fee order.

IV. Issues Presented for Review

1. Did the Court of Appeals err, as a matter of federal law, when it held that Nair's legal malpractice claim was not part of his bankruptcy estate because it "arose after Nair filed for bankruptcy."

Answer: Yes.

2. Would a manifest injustice occur if Washington Courts apply collateral estoppel to bar clients from pursuing legal malpractice claims based on a prior, summary decision by another Court in which the client could not have asserted the legal malpractice claim?

Answer: Yes.

V. The Petition Warrants Review Under RAP 13.4(b)

The Court should grant review pursuant to RAP 13.4(b)(4) because the issue of whether collateral estoppel should bar a client victimized by legal malpractice from pursuing the client's legal malpractice claim based upon a first-in-time summary proceeding in which the client could *not* assert the legal malpractice claim, reoccurs frequently in legal malpractice claims and should therefore be resolved by this Court.

VI. Statement of the Case

This legal malpractice case arises out of the underlying bankruptcy proceeding of Petitioner Jayakrishnan "Jay" Nair in which the Bankruptcy Court summarily approved the attorney fee application of his former counsel (Respondent Symmes), despite the existence of controverted facts relating to whether the attorney had committed malpractice and Jay's lack of standing to assert a legal malpractice claim at the time of the Bankruptcy Court fee order. On Symmes' CR 12(b)(6) motion, King County Superior Court dismissed the Nair's Complaint, holding that collateral estoppel bars his claims for legal malpractice, based on the Bankruptcy Court order that approved Symmes' fee application. Appx. 37. On appeal, Division I The Court premised its decision on its belief that Mr. Nair's legal malpractice claim was not part of his bankruptcy estate because it "arose after Nair filed for bankruptcy." Appx. 18. The

Court thus reasoned that Jay collateral estoppel was appropriate because the summary Bankruptcy Court proceeding relative to fees provided Jay with "a full and fair opportunity to litigate the issue of whether Symmes breached the duty of care in the Bankruptcy Court." *Id.,* 17-20.

Because the trial court decided this case pursuant to CR 12(b)(6), the facts alleged in Mr. Nair's Complaint are accepted as true.[2]

Jay Nair is an immigrant from India, the co-founder of a biotech startup, Ratner Biomedical Inc. and a real estate entrepreneur. CP 2 ¶3.0[3] At the time of his bankruptcy filing on April 29, 2015, Mr. Nair owned five cash-positive investment properties and other assets. *Id.* In October 2014, Mr. Nair learned that First Tech Credit Union "FTCU," which held a second-position deed of trust on one of Mr. Nair's five investment properties, in the amount of $100,000 and a then-current balance of approximately $72,000, had initiated foreclosure proceedings against that one property. CP 3 ¶3.1 At the time, Mr. Nair subscribed to a prepaid legal insurance company known as "ARAG." *Id.* ¶3.2. Mr. Symmes' had contracted with ARAG to offer ARAG-paid and/or below-market legal fees to ARAG members. *Id.* Mr. Symmes' listing on the ARAG Legal

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[2] *E.g., Reid v. Pierce County,* 136 Wn.2d 195, 201, 961 P.2d 333 (1998), *citing Chambers-Castanes v. King County,* 100 Wn.2d 275, 278, 669 P.2d 451 (1983); *J.S. v. Village Voice Media Holdings, LLC,* 184 Wn.2d 95, 100, 359 P.3d 714 (2015).

[3] Petitioner's Appendix at pp. 21-28 and the Clerk's Papers CP 001-008.

Center for Members, appeared under the Legal Issue heading "Real Estate and Home Ownership" and Type of Issue heading "Foreclosure." *Id.* The website of the Symmes' law firm, Symmes Law Group, PLLC,[4] markets itself with "Stop Foreclosure. Stop Collections. End Your Stress. BE DEBT FREE!" and "Seattle Bankruptcy Attorney Who Gets Debt Relief Fast." *Id.*

When his personal attempts to resolve the non-judicial foreclosure proceeding failed, Jay found Symmes' listing with ARAG. CP 3¶3.2. On or about April 15, 2015, Mr. Nair retained Mr. Symmes and the Symmes Law Group, PLLC, to assist him in resolving the foreclosure through the ARAG prepaid legal insurance plan, at a rate of $187.50 per hour. *Id.*

Upon acceptance of representation, Mr. Symmes undertook a duty of competence to Nair, to meet or exceed the standard of care applicable to a reasonably prudent Washington attorney representing a client in the same or similar situation as Nair. CP 3 ¶3.4. At the time Nair first retained Symmes, Nair had approximately two weeks remaining in which to resolve the foreclosure and thus preserve Nair's ownership interest in the investment property. CP 4 ¶3.5. He also had ample cash resources readily available to pay off the FTCU debt in full, including $20,000 in

[4] Petitioner refers to Mr. Symmes and his law firm collectively as "Symmes," for ease of reference. No disrespect is intended.

cash in liquid accounts, and $100,000 in a 401k. *Id.* Jay could have taken money out of the 401k and re-deposited it within 60 days without any tax penalty. *Id.* He also alerted Mr. Symmes to his (Nair's) financial circumstances, including the fact that he had approximately $6,000,000 in real estate investments and privately held shares in the Ratner Biomedical startup. *Id.*

Jay relied heavily on Symmes' professed expertise in defending foreclosures and representing clients in bankruptcy proceedings. CP 4 ¶3.6. Symmes was aware of Jay's lack of knowledge about bankruptcy and that he relied on Symmes' recommendations as to how he (*i.e.,* Nair) should proceed. *Id.* ¶3.7.

Symmes advised Jay to file Chapter 13 bankruptcy and advised him against using his 401k funds because of the potential 10% tax penalty. CP 4 ¶3.8. Symmes and and his law firm, Symmes Law Group, PLLC filed Jay's Chapter 13 bankruptcy petition on April 29, 2015. *Id.* ¶3.9. However, Jay was not eligible for relief under Bankruptcy Code §109(e). *Id.* ¶3.10. Symmes knew, or reasonably should have known, that Jay was not eligible for relief under Chapter 13 of the Bankruptcy Code. *Id.* ¶3.11.

On July 16, 2015, the Chapter 13 Bankruptcy Trustee objected to confirmation of Jay's Nair's Ch. 13 plan, citing among other problems, the fact that Jay did not qualify for Ch. 13 relief. CP 5 ¶3.12. The Trustee's

Objection furthermore pointed out that Symmes had not served the Ch. 13 plan on Mr. Nair's creditors, and that the Ch. 13 plan as submitted was not confirmable. *Id.* The Trustee also objected to Symmes' Ch. 13 flat fee of $3,500 as not reasonable. *Id.* ¶3.13.

Upon service of the Chapter 13 Bankruptcy Trustee's motion to dismiss, Symmes could, and should, have advised Jay to agree to dismiss the bankruptcy case, rather than convert the case to either a Chapter 7 bankruptcy liquidation, or a Chapter 11 case. CP 5 ¶3.14. Symmes instead advised Mr. Nair to convert his case to Chapter 11 rather than Chapter 13. *Id.* Jay followed Symmes' advice and Symmes thus filed a motion to convert Mr. Nair's bankruptcy case to a Chapter 11 case on August 11, 2015. *Id.* The Court granted the motion to convert to Chapter 11 on September 2, 2015. *Id.*

Symmes did not provide Jay with the material information necessary to enable him to give informed consent to the conversion from Ch. 13 to Ch. 11, particularly considering the risk to Jay that he might lose control of the Ratner Biomedical start-up company, as well as the administrative and other time-consuming and costly burdens imposed on the Debtor-in-Possession in a Ch. 11 case. CP 5-6 ¶3.15.

After conversion of Jay's bankruptcy to a Chapter 11 business

reorganization, Jay repeatedly asked Symmes to have the bankruptcy dismissed; however, Symmes told Jay that he could not dismiss the bankruptcy and, if he were to file a motion to dismiss, the creditors and the US Trustee might move to convert the case to a Chapter 7 liquidation. CP 6 ¶3.16. Nevertheless, on or about October 5, 2016, the Bankruptcy Court converted Jay's bankruptcy from a Chapter 11 case to a Chapter 7 case. *Id.* ¶3.18; CP 146 ¶26. Jay thereupon terminated his attorney-client relationship with Symmes effective on October 14, 2016. *Id.* ¶3.18; CP 147 ¶27. On or about January 27, 2017, Jay retained Attorney Shashi Vijay to represent him as replacement counsel in the bankruptcy proceeding. CP 6 ¶3.18. On April 5, 2017, Ms. Vijay succeeded in negotiating a settlement with the Bankruptcy Trustee, which allowed Jay to dismiss the bankruptcy proceeding filed by Symmes. *Id.* ¶3.19. Jay alleges that Symmes breached the standard of care in numerous respects. CP 6-7 ¶4.0(A)-(H); see further, CP 75-78 ¶¶11-17.

After Jay terminated Symmes' services in the bankruptcy case, Symmes filed a motion in the Bankruptcy Court to approve his fees. CP 53-56; CP 147 ¶29.[5] Jay, represented by replacement counsel, objected to and controverted Symmes' application. CP 58-86, 121-126. The Bankruptcy Court acknowledged that "[t]he parties here. . .dispute

[5] Appendix 46.

whether Mr. Symmes breached his duty of care, whether the debtor suffered damages, and whether the alleged breach caused the alleged damage." CP 148 ¶5.[6] Nair requested an evidentiary hearing. CP 124. On March 23,2017, the Bankruptcy Court summarily granted Symmes' motion and entered findings of fact and conclusions of law favorable to Symmes. CP 140.[7] The Bankruptcy Court explicitly resolved disputed issues of fact despite conflicting accounts by Jay and Symmes as to the facts and circumstances related to the allegations of malpractice by Symmes. CP 149 ¶¶7-11. The Bankruptcy Court dismissed Mr. Nair's bankruptcy case on April 5, 2017. CP 153.

After dismissal of his bankruptcy became final, Jay filed this Complaint for Legal Malpractice on June 26, 2017. Appx. 21. Symmes answered the Complaint. Appx. 29. On September 28, 2017, Symmes filed a CR 12(b)(6) motion to dismiss, based on collateral estoppel. CP 17. Nair opposed the motion. CP 155-202. Symmes replied. CP 203. The trial court granted Symmes' motion and dismissed Jay's Complaint with prejudice on October 31, 2017. Appx. 37. Nair timely appealed. CP 220.

The Division I of the Court of Appeals affirmed the trial court Dismissal on May 28, 2019. Appx. 9. Nair timely moved for

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[6] Appendix 47.
[7] Appendix 39.

reconsideration. Appx. 2. Division I denied his motion for reconsideration on July 1, 2019. Appx. 1.

VII. ARGUMENT

1. The Court Reviews the Trial Court and Division I Decisions *De Novo.*

De novo review of the trial court order of dismissal pursuant to CR 12(b)(6) applies in this Court as it did in Division I. *E.g., J.S. v. Village Voice Media Holdings, L.L.C.,* 184 Wn.2d 95, 100, 359 P.3d 714 (2015). The Court also reviews *de novo* whether collateral estoppel applies to bar relitigation of an issue. *E.g., Schibel v. Eymann*, 189 Wn.2d 93, 98, 399 P.3d 1129 (2017).[8]

2. Nair Could Not Have Filed His Legal Malpractice Claim in the Bankruptcy Court.

Petitioner agrees, but only in part, with Division I, that "[i]n deciding whether an opportunity to litigate is 'full and fair,' a court must

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[8] "CR 12(b)(6) motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Cutler v. Phillips Petrol. Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994) *quoting Hoffer v. State,* 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *quoted with approval, J.S. v. Village Voice, supra,* 184 Wn.2d at 100. "Dismissal under CR 12(b)(6) is appropriate only if 'it appears beyond a reasonable doubt that no facts exist that would justify recovery.'" *In re Parentage of C.M.F.,* 179 Wn.2d 411, 418, 314 P.3d 1109 (2013), *quoting Cutler,* 124 Wn.2d at 755, *quoted with approval in J.S. v. Village. Voice Media, supra,* 184 Wn.2d at 100.

make a practical judgment. . .". Appx. 15. However, "impossibility" will always trump "practicality;" *i.e,* here, Mr. Nair could *never* have asserted his legal malpractice claim against Symmes in the Bankruptcy Court prior to the dismissal of the bankruptcy because the Trustee owned that claim.

Division I's error arose out of its erroneous belief that Nair's claim "arose after Nair filed for bankruptcy." App. 18. The Court thus reasoned that Nair, rather than the Bankruptcy Trustee owned the claim at the time of the fee decision. *Id.* However, under the federal bankruptcy code, a bankruptcy petitioner must disclose pre-petition claims, including contingent and unliquidated claims, in the bankruptcy reorganization plan, or in the debtor's schedules or disclosure statements. 11 U.S.C. § 521(a). Property of the bankruptcy estate thus includes a bankruptcy debtor's legal malpractice claim. *E.g., Suter v. Goedert,* 396 B.R. 535, 550 (D. Nev. 2008), *cited with approval, In re Flores*, 2010 WL 6259989 *3 (B.A.P. 9th Cir. 2010).[9] Accord, *Sierra Switchboard Co. v. Westinghouse Elec. Corp.,* 789 F.2d 705, 709 (9th Cir. 1986)(Personal injury claims become

[9] Division I distinguished *Suter* solely on the basis that Nair's claim arose *after* he filed bankruptcy. Appx. 9-10. That distinction disappears upon correction of the Court's misunderstanding of bankruptcy law governing asserts of the bankruptcy estate.

part of the bankruptcy estate). Here, Nair expressly alleged that Symmes breached the standard of care when he advised Nair to file bankruptcy and also at the moment he filed the bankruptcy petition. Appx. 006-007. He also listed the legal malpractice claim as an asset of the bankruptcy estate. Indeed, Respondents did *not* dispute that the legal malpractice claim was an asset of the bankruptcy estate.

Pursuant to 11 USCA §323, the Bankruptcy Trustee, *not* the Debtor, is the representative of the Chapter 7 bankruptcy estate, charged with a fiduciary duty to take control of all property of the bankruptcy estate. 11 USCA §704.[10] Property not abandoned or administered remains property of the bankruptcy estate. *Bartley-Williams v. Kendall,* 134 Wn.

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[10] Personal reorganization through a Chapter 13 "wage-earner" bankruptcy and business reorganization through a Chapter 11 bankruptcy differ from Chapter 7 liquidation in that the Debtor-in-Possession normally fulfills the duties of the Chapter 7 Trustee, including retaining control over the assets of the Debtor-in-Possession, including unliquidated and contingent claims. This case is therefore inapposite to cases in which a reorganization Debtor-in-Possession or a Bankruptcy Trustee asserted the legal malpractice claim following a Bankruptcy Court fee determination. Examples of such cases include *Grausz v. Englander,* 321 F.3d 467 (4th Cir. 2003)(Ch. 11 Debtor-in-Possession); *D.A. Elia Const. Corp. v. Damon & Morey,* 389 B.R. 314 (W.D.N.Y. 2008); *Intelogic Trace, Inc. v. Buccino & Associates, Inc.,* 226 B.R. 382 (W.D. Tex. 1998)(Ch. 7 Trustee); *In re Iannochino,* 242 F.3d 36 (1st Cir. 2001)(fee application by Ch.13 debtor's counsel filed after conversion to Ch. 7; legal malpractice lawsuit filed two years later by debtors; no indication of whether Trustee had abandoned the malpractice claim).

App. 95, 101, 138 P.3d 1103 (2006) accord, 11 USCA § 554(d).[11]

In that context, Rule 7017 of the Federal Rules of Bankruptcy Procedure incorporates Rule 17 of the Federal Rules of Civil Procedure, and requires that any lawsuit on behalf of the Chapter 7 debtor-in-bankruptcy, "must be prosecuted" in the name of the real party in interest." Thus, until the Bankruptcy Court either dismissed Jay's bankruptcy, or his Chapter 7 Bankruptcy Trustee abandoned his legal malpractice claim, Jay could not have commenced an Adversary Proceeding[12] against Symmes in the Bankruptcy Court to assert an affirmative claim for legal malpractice.[13] Accord, *In re Hickman*, 384 B.R. 832, 839-840 (B.A.P. 9th Cir. 2008)("To the extent that the counter-

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[11] *Bartley-Williams, supra,* 134 Wn. App. at 100 explains that "dismissal of Hamilton's bankruptcy and the vacation of the discharge of his debts had the effect of transferring Hamilton's claim from the bankruptcy estate back to the petitioner. **A dismissal of a bankruptcy case revests property of the estate to the original holder of the property**. 11 U.S.C. § 349(b)(3). Hamilton therefore brought suit for his own benefit, not for the benefit of his bankruptcy estate or his creditors." Nair presents the identical situation in that the Trustee owned the legal malpractice claim until the Bankruptcy Court dismissed Nair's bankruptcy on April 5, 2017. Mr. Nair had no standing to assert a claim for legal malpractice damages prior to that date.

[12] Jay's legal malpractice claim would have required the filing of an Adversary Proceeding pursuant to Fed. R. Bkrpty. P. 7001(1).

[13] In similar fashion, judicial estoppel bars a debtor/litigant from taking inconsistent positions by failing to disclose a pre-petition claim during bankruptcy proceedings and later attempting to pursue that claim. *Bartley-Williams, supra*, 134 Wn. App. at 100. However, judicial estoppel does *not* bar the Bankruptcy Trustee from asserting the same claim because "bankruptcy debtors and trustees have separate identities for purposes of judicial estoppel." *Arkison v. Ethan Allen, Inc.,* 160 Wn.2d 535, 540–41, 160 P.3d 13 (2007).

claim could lead to affirmative relief, it is. . .property of the estate controlled by the trustee as to which Hickman has no authority to bind the trustee."), *citing Restatement (Second) of Judgments* §§ 27–29, 34 & 40.

In re Alvarez, 224 F.3d 1273, 1278 (11th Cir. 2000) thus held that a legal malpractice claim which (as here) results from the filing of the bankruptcy petition itself is indeed property of the bankruptcy estate "as of" the commencement of the bankruptcy case. See further, *Stokes v. Duncan*, 378 Mont. 433, 437, 346 P.3d 353, 356 (2015)("Once a cause of action becomes the property of the bankruptcy estate, it remains so unless abandoned by the estate. 11 U.S.C. § 554(d)").

Moreover, unlike *Intelogic, supra* 226 B.R. at 384, Jay Nair had no capacity to force the Bankruptcy Court to continue the fee application hearing and call for commencement of an adversary proceeding to resolve the legal malpractice allegations, because he had no ability to file the legal malpractice case as long as the Bankruptcy Trustee owned the claim.

Mr. Nair's legal malpractice claim against Symmes was therefore property of his bankruptcy estate at the time of the hearing on the Symmes' fee application. As a result, he could not assert that claim as a counterclaim in opposition to Symmes fee application.

Whether Termed a "Full and Fair Opportunity to Litigate," Or Prevention of a "Manifest Injustice," Washington Should Not Collaterally Estop Clients from Pursuing Legal Malpractice Claims Against Their Former Attorneys Based on a First-in-Time Court Proceeding *In Which the Client Could Not Have Asserted the Legal Malpractice Claim.*

The ability of clients to assert their legal malpractice claims is critical to our system of justice. Accordingly, whether phrased as a "full and fair opportunity" to litigate the claim in the first-in-time litigation, or to prevent a "manifest injustice," Washington should not collaterally estop clients from asserting their legal malpractice claims based on a first-in-time, summary court decision **in which the client could not have asserted the client's legal malpractice claim.**

In that context, "[t]he preclusive effect of a federal-court judgment is determined by federal common law." *In re Lopez*, 2017 WL 443540 *7 (B.A.P. 9th Cir. 2017), *quoting Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008), *citing Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001); accord, *Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 336-337, 835 P.2d 239

(1992)(preclusive effect of Bankruptcy Court judgment).[14]

The Ninth Circuit has thus explained that collateral estoppel "prevents a party from relitigating an issue decided in a previous action if four requirements are met: '(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment[15] in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.'" *Quest Integrity USA, LLC v. A.Hak Indus. Servs. US, LLC*, 2017 WL 3237372 *2 (W.D. Wash. 2017), *quoting Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) and *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000). See further, *Restatement (Second) of Judgments* §28.

Collateral estoppel is particularly inappropriate when the party to be estopped (*i.e.,* Nair) had "no incentive [or] initiative to litigate the malpractice issue" in the Bankruptcy Court. See, *Penthouse Media Group, Inc. v. Pachulski Stang Ziehl & Jones, LLP,* 406 B.R. 453, 460-461 (S.D.N.Y. 2009)(rejecting application of legal malpractice); accord,

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[14] United States Constitution, art. IV §1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." It does not apply to federal court judgments.

[15] The Bankruptcy Court fee determination qualifies as a "final judgment" for purposes of collateral estoppel. *Woodley, supra,* 67 Wn. App. at 336-337.

Forston-Kemmerer v. Allstate Ins. Co., 198 Wn. App. 387, 406-407, 393 P.3d 849 (2017)(significant difference exists in the "quality" of the parties when party to be estopped has disincentive to pursue the first litigation);[16] see further, Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 842 (1985).

Washington courts apply essentially the same criteria, *i.e.*, (1) the issue decided in the prior action was identical to the issue presented in the second action; (2) the prior action ended in a final judgment on the merits; (3) the party to be estopped was a party or in privity with a party in the prior action, and; (4) application of the doctrine would not work an injustice. *E.g., In re Estate of Hambleton,* 181 Wn.2d 802, 834, 335 P.3d 398 (2014); *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC,* 183 Wn. App. 459, 491, 334 P.3d 63 (2014), *aff'd,* 184 Wn.2d 176, 357 P.3d 650 (2015). Washington's requirement that application of collateral estoppel "not work an injustice" generally corresponds to the federal requirement that the litigant had a full and fair opportunity to litigate the matter in the prior action.

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[16] Professor Trautman observed that "[t]here is a danger that in seeking to relieve the crowded dockets and backlog of litigation, courts will too readily turn to the rules of res judicata and collateral estoppel. It is critical to remember that the doctrines of claim and issue preclusion are court-created concepts. Accordingly, they can be adjusted to accommodate whatever considerations are necessary to achieve the final objective—doing justice. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash. L. Rev. 805, 842 (1985).

In those contexts, *Restatement (Second) of Judgments* §28 further provides, in pertinent part:

> "Although an issue is actually litigated and determined by a valid and final judgment. . .**relitigation** of the issue in a subsequent action between the parties **is not precluded in the following circumstances**: . . . .(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relative to the allocation of jurisdiction between them; or. . **.(5) There is a clear and convincing need for a new determination of the issue. . .(c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."** (Emphasis added).

Here, Mr. Nair could not have had a "full and fair opportunity" to litigate his legal malpractice claim against Mr. Symmes because he had *no* standing (or capacity) to assert that claim—because the Ch. 7 Bankruptcy Trustee, not Nair, owned the claim at that point in the bankruptcy proceedings. In similar circumstances, *Donahue v. Strain,* 2017 WL 3311241 *6-7 (E.D. La. 08/03/17) refused to bar a wife's relitigation of state-law tort claims (of domestic abuse) against her ex-husband despite specific findings in the divorce and custody proceeding that there was "no credible evidence . . .to suggest that any [of the Plaintiff's allegations of domestic violence are] true" and "there was no evidence in [the divorce and custody proceeding] record that [Brandon Donahue] is an abuser or violent person." The Court reasoned that

"Plaintiff's state-law tort claims were not 'actually litigated' in the divorce and custody case" because "Plaintiff could not and did not bring state-law tort claims . . .in the divorce and custody proceeding." *Id.* at 6.

Here, as in *Donahue,* Mr. Nair could not have brought his state-law tort claims in the Bankruptcy Court. The Court should therefore reject application of collateral estoppel to first-in-time court decision in those situations in which the litigant could *not* have litigated the claim in the first-in-time proceeding.

VI. CONCLUSION

Petitioner Jayakrishnan "Jay" Nair therefore respectfully asks that the Court grant his Petition and, after further proceedings, reverse the trial court and Court of Appeals, reinstate his Complaint, and remand this case to the trial court for further proceedings consistent with this Opinion.

DATED: July 30, 2019.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2019, I caused a true and correct copy of the foregoing Petitioner's Petition for Review to Respondents, through their attorneys in the manner indicated below:

Counsel for Respondents:
Lori W. Hurl
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, Washington 98164

( ) U.S. Mail
( ) Hand Delivery
(X) ECF System

Dated: July 30, 2019.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid
BRIAN J. WAID
WSBA No. 26038
Attorney for Petitioner

WAID LAW OFFICE

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