No. 329372

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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JAMES SCHIBEL, an individual; and PATTI SCHIBEL, an individual; and the marital community thereof,

Respondents

vs.

RICHARD EYMANN, an individual; EYMANN ALLISON HUNTER JONES, P.S., a Washington professional services corporation; MICHAEL WITHEY, an individual; LAW OFFICES OF MICHAEL WITHEY, PLLC, a Washington professional limited liability company,

Petitioners

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# BRIEF OF PETITIONERS

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Roy A. Umlauf, WSBA #15437
Jeffrey T. Kestle, WSBA #29648
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-1039
(206) 689-8500

James B. King, WSBA #8723
Markus W. Louvier, WSBA #39319
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201
(509) 455-5200

Attorneys for Appellants

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## I. INTRODUCTION

Appellants Richard Eymann ("Eymann") and Michael Withey ("Withey") are attorneys.[1] They represented Respondents James and Patti Schibel ("the Schibels") in a mold contamination lawsuit in Spokane County Superior Court ("the Underlying Lawsuit"). In October 2010, the trial court in the Underlying Lawsuit authorized the Attorneys' withdrawal as the Schibels' attorneys, explaining, "[the Schibels'] counsel gave proper notice of intent to withdraw and that their attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of [the Schibels'] counsel." (CP 69-71; 72-73).

After the Underlying Lawsuit concluded, the Schibels brought this action for legal malpractice and breach of fiduciary duty against the Attorneys. Both claims are based on the allegation that the Attorneys' court-authorized withdrawal was improper.

The Attorneys moved for summary judgment dismissal of the Schibels' claims, arguing that withdrawal from a case with court permission and in compliance with applicable rules precludes future actions for legal malpractice or other causes of action based on the withdrawal. The trial court denied the Attorneys' motion for summary judgment. The Attorneys request that this Court reverse the trial court's

[1] The Appellants are Mr. Eymann, Mr. Withey, and their respective law firms. They are referred to collectively in this brief as "the Attorneys."

decision and rule that the Schibels' claims against the Attorneys are barred by collateral estoppel.

## II. ASSIGNMENT OF ERROR

The trial court erred in denying the Attorneys' motion for summary judgment. The Schibels are collaterally estopped from suing the Attorneys for legal malpractice and breach of fiduciary duty based on the Attorneys' withdrawal because the Attorneys complied with all applicable rules regarding withdrawal, the Schibels had notice of the withdrawal, the Schibels filed a written objection to the withdrawal with the assistance of another attorney, the Schibels argued against the withdrawal at a hearing, the Schibels already made every argument in support of their claims in this case in opposing the withdrawal, and the trial court and Court of Appeals in the Underlying Lawsuit determined that the withdrawal was proper.

## III. STATEMENT OF THE CASE

### A. The Underlying Lawsuit

On January 9, 2007, the Schibels filed a lawsuit against their commercial landlord for damages allegedly caused by mold contamination (CP 2; 8-20). Attorney Calvin Vance ("Vance") was the Schibels' first attorney in the Underlying Lawsuit. On February 29, 2009, Vance filed a motion to withdraw as the Schibels' attorney, arguing (1) the Schibels failed to pay for his services; (2) the Schibels unreasonably refused to give

him any settlement authority; (3) the Schibels stopped communicating with him; and (4) the attorney-client relationship was "irretrievably broken" (CP 69-71; 74-96).

On March 13, 2009, the Attorneys appeared on the Plaintiffs' behalf (CP 69-71; 97-99).

On April 3, 2009, the trial court approved Vance's withdrawal (CP 69-71; 100-101).

The trial date was November 1, 2010. On October 12, 2010, the Attorneys filed and served a Notice of Intent to Withdraw (CP 69-71; 102-109). They advised the trial court that "[t]he withdrawal was based upon the breakdown in communication, trust and confidence in the attorney-client relationship." (CP 69-71; 110-117). The Attorneys also filed a motion to continue the trial date to allow the Schibels time to retain new counsel (CP 69-71; 118-121).

The Schibels filed an objection to the motion to withdraw with the assistance of their nephew, who is an attorney (CP 69-71; 122-126). The Schibels supported the motion to continue the trial date (CP 69-71; 127-130).

The parties argued the motion to withdraw and the motion for continuance on October 27, 2010. The trial court granted the motion to withdraw after the following discussion:

> THE COURT: But at this point, it appears that there is a breakdown with you [the Schibels] and counsel, and the Court has no choice at this time other than to allow them to withdraw on your behalf. They've given proper notice. They're here.
>
> . . .
>
> So at this point, I am going to allow Mr. Eymann and Mr. Withey to withdraw. They've given the proper notice, and at this point, the Court can't, on a civil case, order them to stay on board and work the case, especially with their ethical obligations.
>
> So I am going to sign an order allowing them to withdraw today....

(CP 69-71; 139).

The trial court then proceeded to deny the Schibels' motion to continue the trial date after the following discussion:

> THE COURT: Well, it sounds like, though, even if I continued it, you still would have the same issues and problems of getting counsel.
>
> MR. SCHIBEL: Correct.
>
> . . .
>
> THE COURT: [F]rom your declaration, there isn't even anybody that's interested in stepping up to the plate. So even continuing it to give you time to get counsel doesn't sound like that's even an option.
>
> MR. SCHIBEL: [I]t seems fairly bleak that we will be able to find somebody in the real immediate future.

(CP 138.)

On October 29, 2010, two days after the trial court approved the withdrawal, the Schibels, now pro se, entered into an oral settlement agreement with their landlord's attorneys (CP 69-71; 152-153). Under the agreement, both parties would dismiss their claims with prejudice, with no payment to either party (Id.). The Schibels then refused to sign a written settlement agreement (Id.). On November 24, 2010, after the Schibels' landlord filed a motion to enforce the oral settlement agreement, the trial court dismissed the case (Id.).

**B. The Schibels' Unsuccessful Appeal**

The Schibels, with the assistance of a new attorney, appealed the order allowing the Attorneys to withdraw and the order denying the motion for continuance to the Washington Court of Appeals (Id.). On June 19, 2012, the Court of Appeals affirmed, finding that "the trial court properly exercised its discretion when it granted the Schibels' attorneys' motion to withdraw." (CP 158). The Washington Supreme Court denied the Schibels' Petition for Review on December 10, 2012 (CP 167-168), and the United States Supreme Court denied their Petition for Writ of Certiorari on May 13, 2013 (CP 169-170). Thus, there has been a final, binding, and non-appealable adjudication of (1) the propriety of the Attorneys' withdrawal, and (2) the Schibels' failure to obtain a continuance of their case.

## C. Procedural History in This Case

In their Complaint in this case, the Schibels assert claims of legal malpractice and breach of fiduciary duty against the Attorneys based on the Attorneys' court-approved withdrawal from the Underlying Lawsuit (CP 1-20).

The Attorneys moved for summary judgment dismissal. They argued that the Schibels could not prove that the Attorneys' conduct fell below the standard of care and that the claims were barred by collateral estoppel (CP 21-32; 250-258).

In response to the Attorneys' motion, the Schibels submitted the declaration of their legal standard of care expert Roger Bennett, who opined that the Attorneys' withdrawal fell below the standard of care (CP 193-206). Mr. Bennett offered no opinions regarding the Attorneys' conduct apart from the timing and manner of the withdrawal (Id.).

The trial court denied the Attorneys' motion for summary judgment (CP 289-301).

This Court granted the Attorneys' Motion for Discretionary Review to determine whether the Schibels' claims, which are based solely on the Attorneys' withdrawal, are barred by collateral estoppel.

## IV. ARGUMENT

### A. Standard of Review

A trial court's ruling on a summary judgment motion is subject to a de novo standard of review. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). "A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (alteration in original) (quoting CR 56(c)). The reviewing court should view "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." Id., at 794.

### B. Washington Law Regarding Attorney Withdrawal Over Client Objections

CR 71 governs the withdrawal of attorneys involved in civil litigation. CR 71(c)(1) provides that an attorney seeking to withdraw as counsel in a civil case shall file and serve a Notice of Intent to Withdraw. CR 71(c)(4) provides that if the client objects, withdrawal may be obtained only by order of the court.

In *Robbins v. Legacy Health System, Inc.*, 177 Wn. App. 299, 309-311, 311 P.3d 96 (2013), the Washington Court of Appeals outlined a trial court's role in determining whether to permit an attorney to withdraw over

a client's objections. The Court of Appeals explained that trial courts should consider "all pertinent factors," including but not limited to:

> [W]hether withdrawal will delay trial or otherwise interfere with the functioning of the court, whether the client has had or will have an opportunity to secure substitute counsel, whether the client has sufficient prior notice of the lawyer's intent to withdraw, whether the client lacks the ability to prove a prima facie case, whether the client has failed to pay the lawyer's fees, whether the client has failed to cooperate with the lawyer, whether a denial of withdrawal will cast an unfair financial burden on the attorney, whether the lawyer is unable to find or communicate with the client, and whether there is any other prejudice to the client or lawyer.
>
> . . .
>
> Some of these factors are found in RPC 1.16, which addresses the circumstances under which an attorney can or must decline or terminate representation. The rule provides that a lawyer may withdraw from representing a client if
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given

reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; *or*

(7) other good cause for withdrawal exists.

RPC 1.16(b) (emphasis added). The rule is phrased in the disjunctive such that an attorney may ethically withdraw if the client will not be hurt, if the client exhibits any of five specific behaviors, or if other good cause exists.

RPC 1.16(c) recognizes that a court may order a lawyer to "continue representation notwithstanding good cause for terminating the representation" and requires a lawyer to comply with such an order.

## C. The Schibels Are Collaterally Estopped from Asserting Claims Arising Out of the Attorneys' Court-Approved Withdrawal

Collateral estoppel, also called issue preclusion, bars re-litigation of any issue that was actually litigated in a prior lawsuit. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). The party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it

is applied. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998).

### 1. The First Element of Collateral Estoppel is Satisfied – The Trial Court in the Underlying Lawsuit Determined that Defendants' Withdrawal Was Proper.

In opposing the Attorneys' motion for summary judgment, the Schibels argued that the trial court in the Underlying Lawsuit did not determine the Attorneys' "true motive" for the withdrawal or whether the manner of withdrawal breached the Attorneys' duties to the Schibels (CP 188-189). The argument fails.

The Attorneys gave proper notice under CR 71 of their intent to withdraw. The Schibels filed a written objection to the withdrawal with the assistance of an attorney and then argued against the withdrawal at the October 2010 hearing. During the hearing, the trial court determined that the Attorneys had an ethical obligation to withdraw (CP 139-140). After the hearing, the trial court granted the motion to withdraw, explaining "[the Schibels'] counsel gave proper notice of intent to withdraw and that their attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of [the Schibels'] counsel." (CP 69-73.) This is the precise issue that the Schibels seek to re-litigate in this action. The claims are identical. The Schibels retained a new attorney and appealed the decision. The Court of Appeals affirmed and

the Washington Supreme Court and United States Supreme Court declined review.

As demonstrated by the table below, the Schibels in the Underlying Lawsuit either raised or contradicted all of the arguments they make in this case regarding the alleged impropriety of the Attorneys' withdrawal. The fact they raised each of these claims undermines their present assertion that the issues are "different" between the two cases. The fact they now seek to contradict any particular argument made earlier demonstrates they are engaged in a futile attempt to gain a "second bite at the same apple."

| ARGUMENTS IN THIS ACTION | ARGUMENTS IN THE UNDERLYING ACTION |
|---|---|
| Withdrawal violated RPC 1.16 (CP 184-185). | Withdrawal violated RPC 1.16 (CP 69-71; 122-126; 258-288). |
| The Attorneys withdrew because the Schibels would not settle (CP 183-184). | Mr. Schibel: "[A]ll the difficulty between the attorney-client relationship that they have brought forth that they cite seems to stem from us not taking the last best settlement offer that was on the table, which we really didn't know about until they were obtaining their withdrawal, and they wanted us to take that." (CP 69-71; 142.) |
| Withdrawal so close to trial made it impossible to find replacement counsel (CP 183). | Withdrawal creates an "impossible situation ... for the Schibels." (CP 123.) |

| ARGUMENTS IN THIS ACTION | ARGUMENTS IN THE UNDERLYING ACTION |
|---|---|
| The Attorneys were not adequately prepared for trial (CP 184). | The plaintiffs argued the opposite proposition in the underlying appeal: "Eymann and Withey were prepared to try the case" (CP 281). |
| The Attorneys improperly suggested that the withdrawal was caused by plaintiffs' wrongdoing (CP 184). | "[T]he unfortunate connotation of Mr. Eymann's vague statements is that the Schibels have done something wrong, or proposed to do something wrong, that requires or permits withdrawal under R.P.C. 1.16. This is simply not the case. The Schibels have never suggested that Counsel engage in illegal or unethical conduct." (CP 124.) |
| Defendants placed their financial concerns over the interests of their clients. Judge not told payment of fees or costs an issue (CP 182, 184). | The plaintiffs advised the trial court that defendants intended to file liens for unreimbursed expenses and quantum meruit fees and asked that any withdrawal be conditioned on Defendants waiving their right to any and all fees and costs (CP 128-129). |

In determining that the Attorneys had an ethical obligation to withdraw from the Underlying Lawsuit and that such withdrawal was proper, the trial court necessarily considered and rejected each of the following arguments made by the Schibels:

- The withdrawal violated RPC 1.16.
- The Attorneys withdrew because the Schibels would not settle or some other improper reason (including that the Attorneys were not prepared for trial).

- The withdrawal put the Schibels in an impossible position.
- The attorneys improperly and falsely argued that the Schibels had done something wrong.
- The attorneys were placing their financial interests above the Schibels' interests.

These issues were actually litigated in the Underlying Lawsuit and determined in favor of the Attorneys. The trial court did not have to consider the argument made in this case that the attorneys were not prepared for trial, but that is because, as the Schibels themselves advised the Court of Appeals, "Eymann and Withey were prepared to try the case." But implicit in the trial court's ruling, and the affirmance on appeal, was the inarguable and factually unassailable reality that the Attorneys' reasons for withdrawal, as expressed to the court, were justifiable, proper, and legally sufficient. To have sought withdrawal because they were not prepared to try the case would have been unjustified, improper, and legally insufficient.

The Schibels have offered no new arguments in this case. They have simply repackaged their previously rejected arguments as claims for legal malpractice and breach of fiduciary duty. This is not permissible under the doctrine of collateral estoppel. "[Collateral estoppel] prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted." *Christensen v. Grant County Hosp.*

*Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (citations and quotations omitted). The doctrine "is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in the previous litigation." Id.

Although Washington courts have not addressed the issue, courts in several other jurisdictions have held that withdrawal from a case with court permission and in compliance with applicable rules precludes future actions for legal malpractice or other causes of action based on the withdrawal. *See Wilkins v. Safran*, 649 S.E.2d 658 (N.C. App. 2007); *Bright v. Zega*, 186 S.W.3d 201 (Ark. 2004); *Keywell & Rosenfeld v. Bithell*, 254 Mich. App. 300, 657 N.W.2d 759 (2002); *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Geurard*, 486 S.E.2d 14 (S.C. App. 1997). Washington's courts should follow suit given Washington's adherence to the basic principles of collateral estoppel which underlie these rulings.

The Arkansas Supreme Court's decision in *Bright v. Zega* is directly on point. There, the trial court granted the attorneys' motion to withdraw. The client alleged that she could not find replacement counsel because of the impending trial date. Consequently, she entered into an allegedly insufficient settlement. After the settlement, she sued her former attorneys for legal malpractice and breach of contract. The trial court

dismissed the claims pursuant to CR 12 and the Arkansas Supreme Court affirmed, explaining:

> . . . We are reluctant to hold that an authorized withdrawal from representing a client by a federal district judge constituted malpractice. *See, e.g., Washington v. Rucker*, 202 Ga. App. 888, 415 S.E.2d 919 (1992). In *Rucker*, the Georgia Court of Appeals . . . concluded that it was aware of no case where withdrawal with court permission in accordance with the rules constituted legal malpractice. Similarly, the South Carolina Supreme Court has held that where the propriety of an attorney's withdrawal has been litigated and decided in a prior federal antitrust suit and was not appealed, it is *res judicata* and cannot be relitigated in a suit against former counsel for legal malpractice. *See Lifschulz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999). At the very least, [the attorney] has the right to rely upon a valid order of the federal district court permitting him to withdraw. . . . (Citation omitted.)
>
> It would present a perverse state of affairs if a trial court could permit trial counsel to withdraw from representation and then that attorney became an "insurance policy" for the former client, after the former client settled for a lesser amount than what she believed she was due. We are aware that the federal district court refused [plaintiff] a continuance, but that factor does not affect the legitimacy of the order permitting [the attorney's] withdrawal. In our judgment, if [the client] believed [the attorney's] withdrawal to be wrong, that battle should have been waged before the federal district court and on appeal and not in a separate lawsuit against former counsel.
>
> Accordingly, because the federal district court permitted [the attorney's] withdrawal, thereby sanctioning his actions in doing so, [the client] cannot now, in a separate lawsuit, state facts constituting legal malpractice on either a theory of negligence or breach of contract based on the allegation that the withdrawal was wrongful.

In *Keywell &. Rosenfeld v. Bithell*, 254 Mich. App. 300, 355-356, 657 N.W.2d 759 (2002), the Court of Appeals of Michigan applied collateral estoppel under similar circumstances, explaining:

> . . . Applying collateral estoppel in this case will play an important role in encouraging only proper withdrawal by counsel in future cases. If clients could challenge a withdrawal after an attorney or law firm established the grounds to withdraw identified in MRPC 1.16 and acquired permission to withdraw in the form of a court order then attorneys and law firms would have no incentive to go through this formal procedure. Stated another way, if collateral estoppel did not apply in this situation, withdrawing under court order would expose an attorney or law firm to exactly the same consequences as abandoning a client. This exposure, in turn, would discourage law firms and attorneys from taking the time and incurring the expense of obtaining permission from the court to withdraw, which is what MRPC 1.16, operating in conjunction with MCR 2.117(c), contemplates. Alternatively, failing to apply collateral estoppel in this case may force some attorneys and law firms to remain counsel in cases in which the attorney-client relationship has degraded to the point where it is no longer beneficial to the client. Moreover, applying collateral estoppel in this way would have little effect on a subsequent malpractice action. After an attorney or law firm withdraws, the client could still challenge the attorney or firm's conduct in the time preceding the withdrawal, which would not have been necessarily litigated in the decision concerning a motion to withdraw. Thus, the value of applying the collateral estoppel doctrine in this case is not only significant, it has few negative effects.

In the present case, the Attorneys' notices of withdrawal complied with CR 71(c)(1). Once the Schibels objected to the withdrawal, the Attorneys could only withdraw pursuant to court order. CR 71(c)(4).

After a hearing on the Schibels' objections, which included all of the arguments with which they seek to support their legal malpractice and breach of fiduciary duty claims against the Attorneys in this case, the trial court determined that the Attorneys were ethically obligated to withdraw and authorized the withdrawal. The Schibels' efforts to appeal the decision failed in three separate appellate courts. The Schibels had a full and fair opportunity to litigate the propriety of the withdrawal in the trial court and the appellate courts. They lost. The identity of issues element of collateral estoppel is satisfied.

**2. The Second and Third Elements of Collateral Estoppel Are Satisfied.**

The Schibels do not contest that the second and third elements of collateral estoppel ((2) judgment on the merits in earlier proceeding, and (3) party against whom collateral estoppel asserted was a party to the earlier proceeding) are satisfied.

**3. The Fourth Element of Collateral Estoppel is Satisfied – There Is No Injustice in Dismissal.**

Application of collateral estoppel will not work an injustice when the party opposing preclusion has had the opportunity to present his evidence and his arguments on the issue to the trial court and the Court of Appeals. *Hansen v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993). In the Underlying Lawsuit, the Schibels had the opportunity

to and did present evidence and argument to the trial court and the Court of Appeals in support of their position that the Attorneys' withdrawal was improper. The trial court and Court of Appeals disagreed. All of the arguments they make in this case were made or contradicted in the Underlying Lawsuit. The fourth and final element of collateral estoppel is satisfied.

All of the elements of collateral estoppel are satisfied and Respondents' claims should be dismissed.

## V. CONCLUSION

The purpose of collateral estoppel is to encourage respect for judicial determinations by ensuring finality, and to conserve judicial resources by discouraging the same parties from re-litigating the same issues again and again. *State Farm v. Avery*, 114 Wn. App. 299, 57 P.3d 300 (2000). Here, after the Schibels had a full and fair opportunity to present their objections, the trial and appellate courts determined that the Attorneys' withdrawal was proper. The Schibels are barred by collateral estoppel from re-litigating the same issues in this action. The trial court's order denying the Attorneys' motion to dismiss should be reversed.

RESPECTFULLY SUBMITTED this 25TH day of June, 2015.

FORSBERG & UMLAUF, P.S.

By: _____

Roy A. Umlauf, WSBA #15437
Jeffrey T. Kestle, WSBA #29648
Attorneys for Appellants Michael Withey
and Law Offices of Michael Withey, PLLC

EVANS, CRAVEN & LACKIE, P.S.

By: _____

James B. King, WSBA #8723
Markus W. Louvier, WSBA #39319
Attorneys for Appellants Richard Eymann
and Eymann Allison Hunter Jones, P.S.

FOR PER WRITTEN AUTHORIZATION

## CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF APPELLANTS on the following individuals in the manner indicated:

Steven Erik Turner
Steven Turner Law PLLC
1409 Franklin Street, Suite 216
Vancouver, WA 98660
(X) Via Email Pursuant to Agreement
(X) Via UPS Delivery

James B. King
Evans, Craven & Lackie, P.S.
818 West Riverside, Suite 250
Spokane, WA 99201
(X) Via Email Pursuant to Agreement
(X) Via UPS Delivery

**SIGNED** this 26th day of June, 2015, at Seattle, Washington.

Lynda T. Ha