No. 329372

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

v.

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,
Appellants,

BRIEF OF RESPONDENTS

Steven E. Turner
WSBA No. 33840
1409 Franklin Street, Suite 216
Vancouver, WA 98660
Telephone: (971) 563-4696
steven@steventurnerlaw.com
Attorney for Respondents

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I. Introduction

This appeal presents the court with one dispositive issue.

Collateral Estoppel. Defendants contend that plaintiffs' claims for legal malpractice and breach of fiduciary duties are collaterally estopped because the trial court judge allowed defendants to withdraw in the underlying lawsuit. But the legal issues in the two proceedings are not identical, plaintiffs did not have a "full and fair" opportunity to litigate their claims in the withdrawal proceedings, and barring the plaintiffs' claims against their former attorneys would result in a severe injustice. Should this Court reject defendants' collateral estoppel defense?

II. Statement of the Case

A. The Underlying Lawsuit

The beginning of this legal saga started more than ten years ago, in February 2004, when Plaintiffs Patti and Jim Schibel leased a commercial space in Spokane to operate a children's arts and crafts business called "Creative Genes." The landlord had represented that the premises were in good repair, that the roof did not leak, and that the premises were suitable for the Schibels' business and clientele. The landlord further agreed in the lease to maintain the premises in suitable condition.[1]

[1] CP 208, Para. 4

A month after moving in, however, the Schibels began to experience various health problems, including respiratory distress, coughing, bloody noses, wheezing, sinus pain and congestion, headaches, eye and throat irritation, and facial swelling. In May of 2004, the roof leaked in several places and a noticeable moldy and musty odor emanated from the premises, after which the Schibels' physical symptoms severely worsened. Although they reported these problems promptly to the landlord, he failed and refused to repair the roof leaks or deal with the odors. Moreover, the landlord encroached on the Schibels' exclusive use of the premises for his private construction and painting operations, causing additional fumes to enter the premises.[2]

As a result of the landlord's conduct, the Schibels were made ill and forced to move out of the premises before the lease term. Accordingly, they sued the landlord for fraud, negligence, breach of contract, and breach of warranty, seeking damages in excess of $425,000.[3]

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[2] *Ibid.*

[3] *Ibid.*; CP 213-224

B. The Hiring of Defendants Eymann and Withey

The Schibels were originally represented by attorney Kelley Vance. But when Mr. Vance tried to raise his hourly rate by 25% in the middle of their engagement, they decided to part ways with Mr. Vance in early 2009.[4] Thereafter, the Schibels hired the defendants in this action, Richard Eymann and Michael Withey (hereafter referred to jointly as "Counsel"), to take over the lawsuit. Counsel filed their Notice of Appearance in March 2009, at which time trial was set seventeen months out, in August 2010.[5]

The Schibels entered into a written "Attorney's Contingent Fee Agreement" with Counsel. In it, Counsel agreed to "proceed with legal proceedings" on behalf of the Schibels against their landlord "for all damages sustained." The agreement contemplates the possibility that "no recovery is obtained," in which case, Counsel would receive no fee. Counsel further agreed that they would "act solely for the benefit of the Client, free of any conflicts of interest." They also promised that "all offers of settlement shall be communicated to the Client, and no compromise or settlement of the Client's claims shall occur without the Client's approval …." Counsel

[4] CP 208, Para. 5

[5] CP 208-209, Para. 6

further agreed to advance all costs incurred in pursuing the lawsuit.[6]

C. Counsels' Handling of the Case

The August 2010 trial date was eventually continued to November 1, 2010. But when Judge Plese allowed that continuance, she advised the parties that she would not continue the trial date again.[7] Meanwhile, despite the Schibels' requests to do so, Counsel refused to take the depositions of the landlord's four expert witnesses. Counsel also did not contact the Schibels' lay witnesses to prepare their trial testimony. Similarly, Counsel did not subpoena any of the Schibels' lay witnesses for the November 1, 2010 trial.[8]

In July 2010, Counsel arranged for a focus group to get some feedback on the case. Defendant Withey handled the presentation to the focus group. The focus group reacted very negatively to Withey's presentation, which the Schibels believe he mishandled badly.[9] In August 2010, and at least once thereafter, defendant Eymann told the Schibels that defendant Withey wanted out of the case because—based on the feedback

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[6] *Ibid*.; CP 225-230

[7] CP 211, Para. 21

[8] CP 209, Para. 8

[9] CP 209, Para. 7

from the focus group—Withey felt it was unlikely they would win at trial.[10]

D. Counsels' Financial Concerns

Thereafter, Counsel became extremely concerned about their financial risk in taking the case to trial. Counsel had already expended $55,000 in costs, and they were anticipating at least $25,000 more in costs to try the case.[11] Even though they had agreed to advance all costs in their contingent fee agreement, Counsel started demanding additional assurances from the Schibels that they would reimburse those costs, should they lose at trial. Throughout September 2010, Counsel repeatedly hammered away at the Schibels regarding how these costs would be paid, should they lose at trial.

On September 7, 2010, defendant Eymann warned about the costs of having one of plaintiff's expert witnesses testify at the trial. "Brodkin will probably charge well over $10k for court appearance and preparation, but less than $20k."[12]

The following week, on September 16, 2010, defendant Eymann expressed Counsels' concerns about their financial exposure in another email to the Schibels:

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[10] CP 209, Para. 9

[11] CP 203, Lines 19-20

[12] CP 231

> Finally, if we go to trial what assurance can you provide that the costs and expenses of the trial will be reimbursed if we lose? As you know, we have been advancing these costs and expenses since we took over the case, but with the range of settlement offers from the defense on the table … and the risks of an adverse result, given the focus group 13-1 vote against you, we do [not] think it fair to expect us to bare [sic] that risk or burden.[13]

One week later, on September 23, 2010, defendant Eymann again raised the subject of costs

> Finally, what are your thoughts on the costs to proceed through trial – are you in a position to pay them. [sic] I need to let Withey know the answer to that ASAP and after the focus group my partners are very concerned about the same thing – that after advancing the costs since Vance deserted you, the prognosis for a favorable verdict, is, in our combined experience of some 65 years of litigation cases, at best poor.[14]

E. Counsels' True Reasons for Withdrawal

On October 10, 2010, Counsel sent a lengthy letter to the Schibels announcing and seeking to justify their decision to withdraw just three weeks before trial.[15] Counsel repeatedly raised the issue of the costs of going to trial. For example,

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[13] CP 232-233

[14] CP 234-235

[15] CP 244-247

Counsel complained: "We have spent almost $55,000 out of our pockets in pursuit of justice and this strategy." Later in the same letter, Counsel wrote: "For the last month we have asked you to commit to paying us the expected costs of trial $25k to 30k but you have not made provisions for doing that."

In addition to their concerns about their financial exposure, Counsel were also aggravated with the Schibels because they disagreed over the settlement value of the case. As Counsel wrote in their withdrawal letter: "We understand that you don't accept our judgment or agree with our advice and recommendations [regarding settlement]. This is again unfortunate." Counsel referred to the focus group in trying to convince the Schibels to lower their settlement demand. "We were most disappointed when the focus groups resoundly [sic] found against us and would not award you very much money even if they were to find liability." But the parties disagreed about the significance of the focus group's feedback: "Your actions since the focus group have been to discount our advice, to argue with us about the facts, and to not realize that we don't provide this advice lightly."

At the end of their October 10 letter, Counsel summed up the reasons for their withdrawal as follows:

> In sum, for the last several months we have offered you the benefit of our analysis of the facts

> and law of the case, buy you have steadfastly insisted that your judgment on the likely outcome at trial is better than ours. You have refused to even entertain any strategy, i.e. settlement that did not involve a trial of the case, unless it is $350,000 or more.
>
> Accordingly we are forced to withdraw as your counsel …

The same day he emailed the withdrawal letter, defendant Eymann also left the Schibels a voicemail in which he indicated that Withey was no longer willing to go to trial for them and expressing his doubt that he would be able to try the case alone.[16]

These facts raise at least a reasonable inference, if not a strong presumption, that the true motivation for Counsels' decision to withdraw was not due to some nebulous "ethical" duty, but to save their own financial skin. This inference is further supported by the fact that defendant Eymann repeatedly told the Schibels that Counsels' strategy was to withdraw so Judge Plese would have no choice but to continue the case so the Schibels could hire new counsel.

[16] CP 210, Para. 17

F. Counsels' Stated Reasons for Withdrawal

When it came to telling the Judge why they were withdrawing, however, Counsel tried to paint a much different picture. In their pleadings, Counsel stated that:

> Withdrawing counsel are cognizant of the need to preserve the attorney-client privileged communications and any other confidential matters. It is therefore not appropriate to describe the full context of or decision to withdraw as plaintiffs' counsel, other than to say that this highly unusual step was taken very reluctantly and after great thought and soul searching on our part.

Along these same lines, at oral argument on the motion to withdraw, Mr. Withey stated: "We're obviously in a very difficult situation here, Your Honor, and I think we put in the papers the reasons for the withdrawal, and I think there's very substantive reasons."

These statements raise at least a reasonable inference that Counsel sought to give Judge Plese the false impression that they were withdrawing because of some wrongdoing on behalf of the Schibels. But this is simply not true. Moreover, nowhere in their papers, or in their comments at the hearing, did Counsel divulge to Judge Plese the real reasons for their decision to withdraw. Judge Plese was not advised that the attorneys were owed $55,000 and were concerned about incurring another $30,000 in trial costs, or that the "breakdown" in the attorney-

client relationship was because the clients were exercising their right to decline to settle the case, or that the withdrawal was made in order to secure a continuance. Finally, Counsel did not inform Judge Plese that the withdrawal had nothing to do with any wrongdoing on the part of the Schibels.[17]

G. Plaintiffs Were Prejudiced by Their Counsels' Withdrawal Four Days Before Trial

Even though Judge Plese had informed Counsel that she would not be granting any more continuances, Counsel did not condition their motion to withdraw on the granting of such a continuance. As a result, Counsel abandoned the Schibels the Wednesday before a trial starting that Monday. This caused severe prejudice and harm to the Schibels. Counsel cannot deny this, especially when they spoke so eloquently about the potential harm in support of their motion to continue the trial.

For example, Counsel told Judge Plese that, due to their withdrawal, "the trial date of November 1, 2010 is no longer possible." They further stated that if the Schibels were not given time to "obtain counsel to prosecute this meritorious case," the "prejudice to the plaintiffs would be great."[18] Defendant Eymann also told Judge Plese that the looming trial

[17] CP 203-204

[18] CP 69-171, Exhibit H

date made finding new counsel for the Schibels "a difficult thing to do." And defendant Withey told Judge Plese that, due to their withdrawal, "obviously, a trial continuance would be necessary," because the Schibels "can't try this case without counsel."[19]

Mr. Withey was right about one thing—the Schibels could not try the case without counsel. And thanks to the last-minute withdrawal, the Schibels could not find new counsel to represent them. Accordingly, the Schibels sought appellate review of Judge Plese's denial of the motion to continue the trial. On or about October 29, 2010, Counsel also advised the Schibels that the trial date was taken off the court's calendar, so they did not appear for trial on November 1, 2010.[20] On November 24, 2010, Judge Plese dismissed the Schibels' case, with prejudice, because they did not appear.[21] The Schibels appealed from that decision, as well, but all of their appeals were unsuccessful.[22] In sum, as a result of Counsels' conduct, the Schibels have received nothing for their claims, and they have never had their day in court.

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[19] CP 69-171, Exhibit K

[20] CP 211, Para. 22

[21] CP 249

[22] CP 211, Para. 22

H. Counsels' Breach of Their Duties to Plaintiffs

In opposition to the defendants' summary judgment motion, the plaintiffs submitted the declaration of their expert, Judge Roger A. Bennett (Retired). Judge Bennett's declaration further illustrates the grounds for the plaintiffs' claims against the defendants. More importantly, they highlight how plaintiffs never had a "full and fair" opportunity to litigate their claims against counsel in the context of their motion to withdraw.

Judge Bennett's declaration is detailed and comprehensive. In it, he details his qualifications, which include more than twenty years as a Washington Superior Court Judge presiding over more than 900 trials, six years as a Chief Deputy Prosecuting Attorney personally trying roughly 100 cases, including homicide and death penalty cases, and, most lately, working in private practice.[23] In his declaration, Judge Bennett also lists the fifty pleadings, orders, transcripts, letters, emails, declarations, and other documents that he reviewed in order to formulate his opinions.[24]

Based on his qualifications and his review of the materials, Judge Bennett offers several opinions regarding Counsels' failure to meet the standard of care that they owed to

[23] CP 194-195

[24] CP 195-197

the Schibels, both under the Rules of Professional Conduct and under the law of legal malpractice. For example, Judge Bennett declares that: "I believe that the withdrawal from representation of the Plaintiffs by Mr. Withey and Mr. Eymann, (hereafter: the Attorneys), under the unique circumstances of this case, constituted conduct which fell below the standard of care for Washington attorneys."[25] Judge Bennett similarly opines that: "My review of the materials and facts presented in the materials made in this matter convince me that the withdrawal by Plaintiffs' prior attorneys, Mr. Eymann and Mr. Withey, left the Plaintiffs in an impossible situation, and doomed any possibility of Plaintiffs salvaging their case."[26]

Judge Bennett's declaration also supports the view that Counsel placed their own financial concerns over the interests of their clients in a way that caused harm to their clients:

> All of these facts demonstrate that the Attorneys had lost any confidence in the case, and their chances of recovering attorney's fees based upon a satisfactory result at trial. They were facing a significant personal financial loss if the matter proceeded to trial. If so, the Attorneys' concerns would certainly be understandable, however, the

[25] CP 197, Lines 21-23

[26] CP 198, Lines 1-4

> overriding concerns under the RPC are the interests and desires of the client.[27]

Judge Bennett expresses his concern that it appeared Counsel was also motivated to withdraw because the Schibels disagreed with them regarding the amount they should accept in settlement. Judge Bennett points out that—under the RPC and the contingent fee agreement, the Schibels had the exclusive right to decide how much to accept in settlement. "If the Attorneys used the mechanism of withdrawal in order to circumvent the Clients' exclusive right, that would be a breach of the duty owed to the Plaintiffs, and of the standard care."[28]

Judge Bennett also faults counsel for withdrawing so close to the trial date, which made it impossible to hire substitute counsel in time to handle the trial: "While Plaintiffs were put on notice that they may need to hire different counsel, as early as October 10, 2010, it is incomprehensible that any lawyer would accept the case for trial on November 1, 2010."[29]

Counsel also failed to exercise due care, according to Judge Bennett, by assuming that Judge Plese would continue the trial date and by leaving the Schibels to prepare to try the case, in four days, without representation. "Given the circumstances

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[27] CP 200, Lines 21-25

[28] CP 201, Lines 11-13

[29] CP 202, Lines 1-3

and timing of the withdrawal, no reasonably careful and prudent attorney would believe that withdrawal was in the best interests of the client, or that the rights of the client would be adequately protected."[30]

Moreover, Judge Bennett expresses his view that the attorneys were motivated to withdraw because they had not adequately prepared for the upcoming trial.

> There is other evidence as to why the Attorneys sought to withdraw. According to the Declaration of Plaintiff James Schibel, the Attorneys, as of October 10, 2010, when they gave notice to Plaintiffs of the impending withdrawal, had issued no subpoenas for any of the more than fifty witnesses they proposed to call at trial. Further, they had not deposed the defense experts in the case.[31]

And if Counsel simply assumed that Judge Plese would continue the trial date, that assumption was also unfounded.

> The Attorneys could not predict that the case would be continued. In fact, the best prediction, based upon the trial judge's previous statements, was that the case would not be continued. If the judge had denied the Motion to Continue Trial Date, whoever had to try the case, be it the plaintiffs, *pro se*, or the Attorneys, if the withdrawal had been denied, would have been

[30] CP 202, Lines 9-12

[31] CP 202, Lines 13-17

> unable to effectively try the case if witnesses were not scheduled, were not subpoenaed, and were not prepared.[32]

Judge Bennett assigns fault not only to the ***timing*** of Counsels' withdrawal, but also to the ***manner*** in which Counsel withdrew. According to Judge Bennett's opinion, Counsel failed to disclose to Judge Plese several material facts. "In my opinion, however, based upon my twenty-one years as a Superior Court judge, and having granted or denied such motions [to withdraw] on numerous occasions, it appears to me that there were several significant and material facts that were not presented to the judge who approved the withdrawal."[33] For example:

> The judge was not advised that the attorneys were owed $55,000.00, and were concerned about incurring another $25,000.00 to $30,000.00 in trial costs;
>
> The judge was not informed that the breakdown in the attorney- client relationship was because the clients were exercising their right to decline to settle the case;
>
> The judge was not informed that the withdrawal was made (as alleged by Plaintiff James Schibel) in order to secure a continuance;

[32] CP 202, Lines 19-25

[33] CP 203, Lines 11-14

> The judge was not informed that the withdrawal was not based upon any wrongdoing by the clients.[34]

Instead of trying to present a clear and accurate picture to Judge Plese as to the reasons for their withdrawal, Counsel used coded and charged language to leave the false impression that they had some ethical duty to withdraw due to some unspecified wrongdoing by the Schibels.

> As a Superior Court judge, I have heard dozens of motions to withdraw by counsel. In reading the above quoted oral argument and pleading, the first thing that occurs [to me] is that this is exactly the type of language that attorneys use, almost like a code, to represent that the client wishes to do something that violates the attorney's ethical obligations, as discussed in RPC 1.16 (b) (2) and (3) set out above.[35]

Judge Bennett's conclusion is that Counsel used the excuse of the attorney-client privilege to create an unfair impression, to the disadvantage of their clients. "This hearing was held in the context of a contested request to withdraw, on short notice, pitting the Attorneys against unrepresented lay clients. The attorney-client privilege belongs to the client, and

[34] CP 203, Lines 19-26

[35] CP 204, Lines 8-11

cannot be exercised by the attorney to the detriment of the client."[36]

Judge Bennett then notes that the impression given to Judge Plese as to why they wanted to withdraw was contrary to the reasons set forth by Counsel in their withdrawal letter to their clients. "The withdrawal letter of October 10, 2010 makes no mention of any concern about ethical issues; it focuses entirely on inconsistent statements leading to credibility issues, the possibility of a defense verdict and costs against the plaintiffs, and the unpaid advanced costs and potential costs at trial of $25,000.00 to $30,000.00."[37] Moreover, Judge Bennett opines that the reasons set forth in Counsels' withdrawal letter were not valid, and it was a breach of duty to withdraw for those reasons.

> These reasons for withdrawal were not cited to the court, but in my opinion, neither would have been valid, because the cost of advancing expenses of the trial were assumed by the Attorneys in their fee agreement, and further, the risk of the clients acting unreasonably (in the Attorneys' eyes) in refusing to settle the case was assumed by the Attorneys under the RPC, and in the Fee Agreement.[38]

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[36] CP 204, Lines 15-17

[37] CP 204, Lines 18-21

[38] CP 205, Lines 3-7

Based on the foregoing analysis, Judge Bennett sums up his opinions as follows:

> In conclusion, the Attorneys' actions in withdrawing from representation, and presenting the Motion to Continue Trial Date and the Notice of Intent to Withdraw for decision four days before trial fell below the standard of care required of a reasonable, diligent and prudent attorney in the State of Washington. Further, the decision to withdraw had the inevitable effect of abandonment of the Plaintiffs at the most critical and important juncture of the litigation.
>
> If the decision to withdraw was also based upon a lack of preparation for trial, and a desire to use withdrawal as a means to obtain a continuance, as stated in the declaration of James Schibel, that strategy also fell below the standard of care for a reasonable, thorough and diligent attorney. [39]

In sum, James Schibel's and Judge Bennett's declarations should provide sufficient evidence to carry the Schibels' burden to oppose Counsels' summary judgment motion.

III. Argument

Counsel argues that all of plaintiffs' claims are barred by collateral estoppel because they received blanket immunity from any such claims when the trial court judge allowed them to

[39] CP 205, Lines 8-16

withdraw as counsel. But Counsels' argument lacks merit, for several reasons.

A. The Issues Are Not Identical

In order for collateral estoppel to apply, the issues presented in the first and second proceeding must be "identical."

> Since all of the elements of collateral estoppel must be met, if the issues are not identical, collateral estoppel will be denied. Most importantly for this case, mere factual identity is insufficient to meet this requirement; ***estoppel will be denied unless the issues are also legally identical***.[40]

A review of the pleadings and oral argument in the underlying case reveals that the only issue decided in that proceeding was whether Counsel could withdraw. But the issues in the present case are whether the ***true motive*** for Counsels' decision to withdraw, and whether the ***manner*** in which they withdrew, fell below the standard of care and/or breached their fiduciary duties to the Schibels. Because these issues are not legally identical, collateral estoppel should be denied.

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[40] *Hanson v. City of Snohomish*, 121 Wn.2d 552, 573-574, 852 P.2d 295 (1993) (citations omitted) (emphasis added)

As Judge Triplett wrote in his letter ruling denying the summary judgment motion:

> In the initial action, Judge Plese was faced with whether or not to allow counsel to withdraw under CR 71. She found good cause existed based upon a breakdown in communication between attorney and client and undefined "ethical obligations." Nowhere in her comments does it appear that she discussed or even considered wither the attorneys breached any duty of care to their clients. She never raised the issue or made any findings whether or not the reasons for or timing of the withdrawal breached any of the attorneys' duties to their client.[41]

Moreover, the claims were not identical in the underlying case and the current action. In the underlying case, the claims were brought by the Schibels against their former landlord for personal injury and damages arising from mold infestation. In the current action, the Schibels' claims are for malpractice and breach of fiduciary duty against their former counsel. As noted by Judge Triplett, "[b]efore this point, it has not been argued that the Defendants' withdrawal breached their fiduciary duty to the Schibels."[42]

In sum, the issues in the current suit are clearly not the same as the issues in the underlying suit, even when focusing narrowly on the defendants' motion to withdraw as counsel. As

[41] CP 296

[42] CP 296

Judge Triplett concluded: "Hence, the issue in the underlying suit was whether the trial court abused its discretion [in granting the motion to withdraw] and the issue in the current suit is whether the Defendant's [sic] duty of care fell below the professional standard."

B. Applying Collateral Estoppel Would be Unjust Because Plaintiffs' Did not Have a Full and Fair Opportunity to Litigate Their Malpractice Claims in the Withdrawal Proceeding

Similarly, collateral estoppel may only be applied when it does not "work an injustice on the party against whom it is applied."[43] In ruling on the summary judgment motion, the trial court had to accept the Schibels' evidence and draw all reasonable inferences from that evidence in their favor. And if Counsel dumped their clients four days before trial for no reason other than to save their own financial skin, it is hard to see how immunizing Counsel from liability would not "work an injustice" on the Schibels.

Moreover, it would be unjust to bar the plaintiffs' claims for malpractice and breach of fiduciary duty because they did not have a full and fair opportunity to litigate these claims in the context of their attorneys' motion to withdraw. Plaintiffs only

[43] *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)

had a few weeks to respond to defendants' motion to withdraw. They had no opportunity to take discovery or depose their former counsel. They were unrepresented by counsel at the hearing of the motion. They also had to be careful what they disclosed during that hearing so as to not prejudice their underlying claims against their landlord. In short, one cannot equate a layperson's opposition to their attorneys' motion to withdraw with a full-blown lawsuit against their attorneys for malpractice. As Judge Triplett found, "the Defendants cannot be immunized from liability without giving the plaintiffs an opportunity to be heard."[44]

C. The Court Decisions from Other States Weigh Heavily in Plaintiffs' Favor

Defendants have brought before the court four non-Washington cases which they contend support their proposition that an order allowing withdrawal will provide an attorney with blanket immunity from any claims arising out of that withdrawal. As will be shown below, however, none of these cases arose out of a malpractice claim against attorneys arising out of their withdrawal. Moreover, defendants simply ignore several other non-Washington cases that have reached the exact opposite conclusion.

[44] CP 296

The leading case in this regard comes from Florida. In *Fisher v. State*, the Florida Supreme Court held that an order allowing withdrawal does not shield attorneys from potential liability to their clients arising from that withdrawal:

> We hold that in a civil case any attorney of record has the right to terminate the attorney-client relationship and to withdraw as an attorney of record upon due notice to his client and approval by the court. Approval by the court should be rarely withheld and then only upon a determination that to grant said request would interfere with the efficient and proper functioning of the court. ***The approval of the court of such withdrawal will not relieve the attorney of any civil liability for breach of duty or negligence to his client nor from appropriate disciplinary procedures for such act, if it is wrongfully done***.[45]

Counsel not only ignore the *Fisher* case, but they fail to point out to this Court that the language set forth above was quoted verbatim by Judge Morgan of the Washington Court of Appeals, who cited favorably to the *Fisher* case.[46]

Counsel also fail to bring to this Court's attention a disciplinary decision by the Washington Supreme Court in which the attorney was severely disciplined for withdrawing,

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[45] *Fisher v. State*, 248 So.2d 479, 486 (Fla. 1971) (emphasis added)

[46] *Kingdom v. Jackson*, 78 Wn. App. 154, 160, 896 P.2d 101 (1995)

even though his withdrawal was allowed by the trial court in the underlying action.

> Here, the WSBA established that Cohen withdrew less than a month before trial and that Erickson could not find another attorney to take his case. Erickson also suffered financial consequences since he paid Cohen for at least some of his legal fees. Thus, Cohen's last-minute withdrawal clearly had a material adverse financial effect on Erickson, and effectively denied him his day in court. Therefore, we hold that the hearing officer correctly concluded that Cohen violated RPC 1.15(b), 1.3, and 1.4 when he withdrew from Erickson's case one month before the scheduled trial.[47]

The same can be said of defendants' conduct toward the Schibels. In fact, the *Cohen* case presented facts that are nearly identical to the current case, in that the client "was unable to obtain new counsel after Cohen withdrew because of the difficult procedural posture of his case. Cohen left his client with no jury, trial de novo, and a rapidly approaching trial date."[48]

At least two other courts have also held that an order allowing withdrawal provides no protection to counsel for subsequent claims by their former clients. In New York, an

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[47] *In re Disciplinary Proc. Against Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004)

[48] *Id*. at 228

attorney withdrew—like Counsel here—on false pretenses: "Neglecting to mention the dispute with the plaintiff over his legal fees, the defendant sought leave to withdraw solely on the basis of alleged acts of misconduct of his client, the plaintiff herein."[49] The trial court allowed the attorney to withdraw, over the client's objection, and the client sued. The attorney moved for summary judgment, but the New York appellate court rejected it because—like the present case—there was a triable issue of fact as to the true motivation for the withdrawal. "We note, initially, that the affidavits submitted in connection with the motion and cross motion for summary judgment contain conflicting assertions which create a genuine issue of fact as to whether Mr. Rivera's withdrawal as counsel for the plaintiff in the Federal action was motivated by his own financial concerns rather than by any misconduct by the plaintiff."[50]

Like defendants here, the New York attorney argued that the underlying court's order allowing the withdrawal collaterally estopped any claims based on that withdrawal. The New York Appellate Court rejected that argument, finding that the legal issues were not identical. The court noted that the only showing needed for withdrawal was that there were "satisfactory

[49] *Allen v. Rivera*, 509 N.Y.S.2d 48, 125 A.D.2d 278 (N.Y.A.D. 2 Dept., 1986)

[50] *Id*. at 50

reasons." But "[t]he existence of such 'satisfactory reasons' would not rule out the possibility of misconduct on the part of [the attorney] or the possibility that he unjustifiably abandoned the plaintiff's case before he formally withdrew." The court also found that the client did not have the "fair opportunity to litigate that, or any similar, issue," in the underlying action.[51]

In a similar context, in Missouri, the appellate court reversed a summary judgment in favor of the former attorney, citing *Fisher* to reject the attorney's collateral estoppel argument:

> Defendant also argued in support of his motion for summary judgment that he justifiably withdrew because he had the permission of the bankruptcy court to withdraw. ***The approval of the court is a prerequisite to the right to withdraw in a civil case, but such approval will not relieve the attorney of any civil liability for breach of his duty to his client***. *Fisher v. State*, 248 So.2d 479, 486 (Fla.1971). Thus, the mere fact of approval by the bankruptcy court does not support summary judgment.[52]

Defendants' collateral estoppel argument also fails because the authorities they cite are either distinguishable or do not actually support the proposition for which they are cited.

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[51] *Id*. at 51

[52] *Greening v. Klamen*, 719 S.W.2d 904, 907 (Mo. App. E.D. 1986) (emphasis added).

For example, Defendants rely heavily on the Arkansas decision in *Bright v. Zega*.[53] But that case does not stand for the broad proposition that an order allowing withdrawal provides blanket immunity to an attorney from subsequent claims by the client. The Arkansas Court of Appeals made clear in a subsequent opinion, *Vang Lee v. Mansour*, that such protection is only conditional.[54] Like Counsel here, the attorney in *Vang Lee* brought a summary judgment motion against the client's malpractice claim, which the trial court granted by "following a bright-line rule that a prior order granting counsel permission to withdraw insulates the attorney from any legal malpractice claim after the attorney is relieved."[55]

The Court of Appeals reversed and refused to read *Bright v. Zega* as broadly as urged by Counsel:

> This brings us to the real point on appeal, which is whether the trial court's permitting appellee to withdraw insulates appellee from legal malpractice liability. We agree with appellant that under these circumstances, ***the trial court's grant of the motion to withdraw cannot serve as an absolute shield to a separate cause of action for legal malpractice*** ….[56]

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[53] 186 S.W.3d 201 (Ark., 2004)

[54] *Vang Lee v. Mansour*, 289 S.W.3d 170 (Ark. App. 2008)

[55] *Id*. at 171

[56] *Id*. at 174 (emphasis added)

Instead, the *Vang Lee* court held that the attorney could still be liable for any acts of malpractice leading up to the withdrawal, and the act of withdrawal could also create liability if it was not obtained in the proper manner. Thus, the Arkansas court held that the *Bright* decision "does not insulate appellee from malpractice leading up to withdrawal, nor does it create a blanket rule if there is misfeasance or malfeasance in acquiring permission to withdraw."[57] Moreover, the court held that the trial court erred by finding, as a matter of fact, that the attorney "did not mislead the trial court in asking to withdraw,"[58] which was disputed by the client. Thus, the court concluded: "Given the posture of summary judgment, viewing the evidence and all inferences deducible from the evidence in the light most favorable to the non-moving party, it was error to enter judgment as a matter of law upon summary judgment."[59]

It is also important to note that even though the decision in *Bright v. Zega* was issued by the Arkansas Supreme Court thirteen years ago, it has never been cited by any court outside of Arkansas for any proposition. Moreover, of the six times it has been cited in Arkansas, five of those instances had nothing to do with blanket immunity for malpractice, and the remaining

[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.

decision was the *Vang Lee* case, which rejected any reading of *Bright v. Zega* as providing such blanket immunity.

The other three cases cited by Counsel also do not compel the granting of their summary judgment motion. In the Michigan case cited, there was no claim of malpractice by the client, only a claim by the lawyers against the client for non-payment of fees.[60] In the North Carolina case, the court did not actually apply the doctrine of collateral estoppel; it merely ruled that, based on the facts before it, there was no breach of duty and no damages caused by the attorney's withdrawal.[61] And in the South Carolina case, the client—unlike the Schibels here—did not allege that the attorneys breached any duties in seeking and gaining permission to withdraw.[62]

In sum, a proper application of the doctrine of collateral estoppel, and a careful reading of the authority cited by both sides, calls for the denial of Counsels' summary judgment motion.

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[60] *Keywell and Rosenfeld v. Bithell*, 657 N.W.2d 759 (Mich. App. 2002)

[61] *Wilkins v. Safran*, 649 S.E.2d 658 (N.C. App. 2007)

[62] *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Geurard*, 486 S.E.2d 14 (S.C. App. 1997), *affirmed in part, and modified, vacated in part*, 513 S.E.2d 96 (1999)

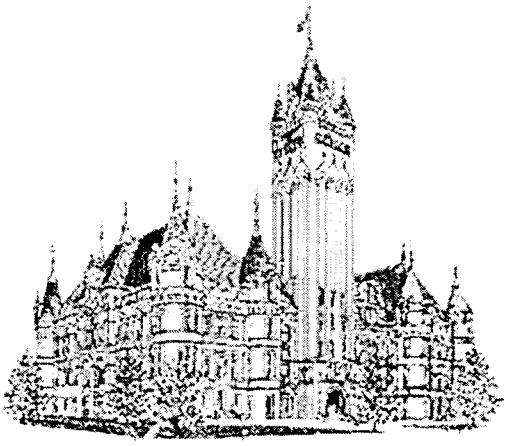
IV. Conclusion

For the foregoing reasons, Plaintiffs James and Patti Schibel respectfully request that this reject this appeal and affirm the trial court's ruling.

Respectfully Submitted
on August 28, 2015,

Steven E. Turner

Steven E. Turner
WSB No. 33840
Attorney for Respondents
James and Patti Schibel



SPOKANE COUNTY COURT HOUSE

SPOKANE COUNTY SUPERIOR COURT
Department No. 2

James M. Triplet
Judge

MARY A. BENNETT
Bailiff/Judicial Assistant

ALLISON R. STOVALL
Official Court Reporter

SPOKANE COUNTY COURTHOUSE
1116 W. BROADWAY, SPOKANE WASHINGTON 99260-0350
(509) 477-5713 • FAX (509) 477-5714 • TDD: (509) 477-5790
dept2@spokanecounty.org

August 6, 2014

Steven E. Turner	Jeffrey T. Kestle	James B. King
1409 Franklin St., Suite 216	901 5th Ave., Suite 1400	818 W. Riverside, Suite 250
Vancouver, Washington 98660	Seattle, Washington 98164	Spokane, Washington 99201

IN RE: Schibel v. Eymann, et al., Cause No. 14-2-00135-0

Defendants Richard Eymann and Michael Withey (and their respective law firms) represented the plaintiffs, James and Patti Schibel, in a mold contamination suit. The Defendants are now seeking summary judgment against the Schibels in their claim against them for legal malpractice and breach of fiduciary duty. To rule in favor of the Defendant's motion for summary judgment, the court must find that the Defendants have proven that: (1) the Plaintiffs are collaterally estopped from relying on counsel's court-approved withdrawal as a basis for their claim; and (2) there are no triable issues of fact relating to the Defendant's breach of duty, damages, or causation.

Summary judgment is proper if the pleadings, deposition and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The court must consider the facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party. *Wilson v. Steinback*, 98 Wn. 2d 434 (1982).

Facts

A. Underlying Action

In May 2004, James and Patti Schibel leased a commercial space in Spokane for an arts and crafts business. Pl.'s Mem. in Opp. to Def.'s Summ. J. Mot., p. 2. The landlord promised the Schibels the premises were in good repair and suitable for their business. *Id.* However, a month after moving in, the Schibels began experiencing health problems associated with mold contamination. *Id.* at 3. In January 2007, Attorney Kelly Vance represented the Schibels in a suit

for fraud, negligence, and breach of contract, seeking damages in excess of $425,000. *Id.* The landlord filed a counterclaim for unpaid rent.

In February 2009, Vance filed a motion to withdraw as the Plaintiff's attorney, arguing (1) the Plaintiffs failed to pay for his services; (2) the Plaintiffs unreasonably refused to give him any settlement authority; (3) the Plaintiffs stopped communicating with him; and (4) the attorney-client relationship was "irretrievably broken." Mem. of Authorities in Supp. of Def.'s Joint Mot. for Summ. J., p. 2. The court approved Vance's withdrawal. *Id.*

B. Eymann & Withey

In March 2009, the Schibels entered into a written contingent fee agreement with attorneys Richard Eymann and Michael Withey for representation. Pl.'s Mem. in Opp. to Def.'s Summ. J. Mot., p. 3. At that point, the trial was set for August, 2010. *Id.* Due to a failed attempt at mediation, a Schibel family illness, and the death of Ms. Schibel's father, the court continued the trial five times. *Schibel v. Johnson*, 168 Wash. App. 1046, Not Reported in P.3d (2012) at page 1. The sixth and final trial date was set for November 1, 2010. *Id.* Upon granting the final continuance, the court advised the parties that it would not continue the trial date again. Pl.'s Mem. in Opp. To Def.'s Summ. J. Mot., p. 4.

On October 12, 2010, Eymann and Withey served a notice of intent to withdraw and a motion to continue the trial date. Mem. of Authorities in Supp. Of Def.'s Joint Mot. For Summ. J., p. 3. The defendant in the underlying suit opposed the motion to continue, and the Plaintiffs filed an objection to Eymann and Withey's motion to withdraw. *Id.* The court held a hearing on October 27 to decide the motions. *Id.*

The court granted the motion to withdraw, but denied the motion to continue the trial. Court Record, p. 6, 8. The court based its ruling on the facts that the court had already continued the trial several times over defense objections, the Plaintiff's counsel gave proper notice of intent to withdraw, and in a civil case, the court could not "order them to stay on board and work the case, especially with their ethical obligations." *Id.*

With no available counsel, the trial court proffered that the Schibels' option at that point was to proceed to trial pro se. *Id.* The court told the Schibels they had until Friday (two days) to decide whether they were going to trial. Pl.'s Brief to the Court of Appeals, p. 10.

On October 29, 2010, the Schibels entered into an oral settlement agreement with the defendant in the underlying suit. *Schibel*, Supra at 4-5. The Schibels informed the trial court that "the case had been settled and not to bring in a [jury] panel for Monday." *Id.* Accordingly, the Schibels did not appear for their trial date on November 1, 2010. However, the Schibels never signed the settlement agreement. *Id.* The Schibels assert they didn't appear for trial after Eymann and Withey advised them on October 29 that the trial had been taken off the court calendar. Declaration of James Schibel, Page 5 Paragraph 22.

The defendant in the underlying suit filed a motion to enforce the settlement agreement, and the court dismissed the case on November 24, 2010. *Id.* After Mr. Schibel confirmed that an oral agreement had been made, the court explained that "[i]f [they] could not get a written agreement, the Court expected counsel and Mr. and Mrs. Schibel to be here [on November 1]." RP at 155.

C. Plaintiff's Appeal

Represented by new counsel, the Schibels appealed the trial court's orders allowing the withdrawal and denying trial continuance. *Schibel*, Supra at 4-5. The Court of Appeals affirmed the ruling, finding that "the trial court properly exercised its discretion when it granted the Schibels' attorneys' motion to withdraw." *Id.* at 10. The appellate court also affirmed the trial court's denial of a continuance. The Schibels' petitions to the Washington Supreme Court and the United States Supreme Court were denied.

Collateral Estoppel

The first issue before the court is whether the Schibels' complaint should be barred by collateral estoppel. Collateral estoppel generally establishes that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *State v. Mullin*, 152 Wash. 2d 107, 113, 95 P.3d 321 (2004). The Washington Supreme Court has recognized the test for collateral estoppel:

> The party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc., 135 Wash. 2d 255, 263, 956 P.2d 312 (1998).

Here, the Defendants claim the Schibels' complaint is collaterally estopped because the trial court allowed the defendants to withdraw in the underlying suit. The Defendants argue they gave proper notice under CR 71 and the trial judge determined the Defendants had an ethical obligation to withdraw. Mem. of Authorities in Supp. of Def.'s Joint Mot. for Summ. J., p. 9. The Defendants assert the Schibels had a fair opportunity to litigate the propriety of the Defendant's withdrawal not only before the trial court, but also in the court of appeals. *Id.* The Defendant's argue the Schibels' present claim is an attempt to re-litigate the same issue again. Def.'s Reply Brief in Supp. of Joint Mot. for Summ. J., p. 2.

Legal Authority and Argument

The Defendants claim that "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 withdrawal." Mem. Of Authorities in Supp. of Def.'s Joint Mot. For Summ. J., p. 8. In support of their argument, the Defendants cite the foreign authority of *Wilkins*

v. Safran, 185 N.C. App. 668, 649 S.E.2d 658 (2007)[1]; *Bright v. Zega*, 358 Ark. 821, 86 S.W. 3d 201 (2004); *Keywell and Rosenfeld v. Bithell*, 254 Mich. App. 300, 657 N.W.2d 759 (2002)[2]; and *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Geurard*, 486 S.E. 2d 14 (S.C. App. 1997)[3].

Of these cases, the Defendants cite language from *Bright v. Zega*. There, the trial court granted the attorneys' motion to withdraw, and the plaintiff could not find replacement counsel before the trial date. The withdrawal was in November 2002 and the trial was in April 2003. 358 Ark. at 83-85. Consequently, she accepted an allegedly insufficient settlement. *Id.* After the settlement, the plaintiff sued her former attorneys for breach of contract and legal malpractice. *Id.* The Arkansas Supreme Court affirmed the trial court's dismissal of the plaintiff's claims. *Id.* at 88. The Court explained,

> 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 that former client settled for a lesser amount than what she believed she was due. We are aware that the federal district court refused Ms. Bright a continuance, but that factor does not affect the legitimacy of the order permitting Zega's withdrawal. In our judgment, if Ms. Bright believed Zega'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 Zega's withdrawal, thereby sanctioning his actions in doing so, Ms. Bright cannot now, in a separate lawsuit, state facts constituting legal malpractice under either a theory of negligence or breach of contract based on an allegation that that withdrawal was wrongful.
>
> *Bright v. Zega* Supra at 88.

While it could be argued that *Bright v. Zega* is distinguishable from the Schibel case because the withdrawal was five months before trial instead of five days before trial, *Bright v. Zega* undoubtedly provides a great deal of protection for an attorney that properly withdraws with a court order from ensuing actions by the client. However, that protection is not unconditional. In *Vang Lee v. Mansour*, 104 Ark. App. 91289 S.W.3d 170, the Arkansas Court

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[1] The attorney defendant in *Wilkins* suffered a heart attack. North Carolina RPC 1.16(a) states that an attorney "*shall* withdraw from the representation of a client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]" *Wilkins*, 649 S.E. 2d at 673. The court held that the defendant's motion for summary judgment was properly granted against the plaintiff's claim of attorney negligence/malpractice because the motion complied with state RPCs allowing withdrawal due to defendant's ill health. The court ruled "[b]ecause defendants asserted a proper basis and moved to withdraw, defendants' conduct did not breach their fiduciary duty owed to plaintiff." *Id.* at 674.

[2] This case is distinguishable from the Schibels' action because the client in *Bithell* never claimed that the attorney committed malpractice. The suit was a claim by the lawyer against the client to collect non-payment of fees.

[3] This case has been Affirmed in Part and Modified, Vacated in Part. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999).

of Appeals declined to extend the ruling in *Bright*. The *Vang Lee* court explained that a court order allowing withdrawal does not provide blanket immunity to an attorney from subsequent claims by the client:

> This brings us to the real point on appeal, which is whether the trial court's permitting appellee to withdraw insulates appellee from legal malpractice liability. We agree with appellant that under these circumstances, the trial court's grant of the motion to withdraw cannot serve as an *absolute* shield to a separate cause of action for legal malpractice . . . . However, [*Bright v. Zega*] does not insulate appellee from malpractice leading up to withdrawal, nor does it create a blanket rule if there is misfeasance or malfeasance in acquiring permission to withdraw.

Vang Lee, Supra at 96.

The *Vang Lee* case is distinguishable from the case at hand because the attorney failed to provide notice of his intent to withdraw, and thus denied an opportunity to be heard to the client.

In contrast to the cases cited by the Defendants, the Plaintiffs cite to foreign cases holding that an order allowing withdrawal provides no protection to counsel for subsequent claims by their former clients. In *Fisher v. State*, 248 S. 2d 479 (Fla. 1971), the appellate court, reviewing a criminal contempt finding against a lawyer for refusal to appear at trial when his motion to withdraw had been denied, stated:

> "We hold that in a civil case any attorney of record has the right to terminate the attorney/client relationship and to withdraw as an attorney of record upon due notice to his client and approval by the court. Approval by the court should be rarely withheld and then only upon a determination that to grant said request would interfere with the efficient and proper functioning of the court. The approval of the court of such withdrawal will not relieve the attorney of any civil liability for breach of duty or negligence to his client nor from appropriate disciplinary procedures for such act, if it is wrongfully done."

Fisher at 486.

In Defendants' reply memorandum, they argue this language is dicta as the Plaintiff did not file an action against the attorney. I will accept the representation that the Plaintiff did not file an action against the attorney, since that fact was not mentioned in the decision. However, in *Kingdom v. Jackson*, 78 Wn. App. 154 (1995), our appellate court, in reviewing cases from around the country regarding the reasons courts rely on to grant or deny withdrawal of counsel, cited with approval the same language in *Fisher*, including the fact that the granting of a withdrawal will not relieve the attorney of civil liability for negligence to his client. The same language in *Fisher* was cited with approval in *Greening v. Klamen*, 719 S.W. 2d 904 (Mo. App. E.D. 1986)[4].

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[4] Action brought against former attorney by a former client. The appellate court reversed a summary judgment against a breach of contract claim, rejecting the attorney's collateral estoppel argument. "The approval of the court

In *Allen v. Rivera*, 125 A.D. 2d 278, 509 N.Y.S. 2d 48 (N.Y.A.D. 2 Dept., 1986), a former client brought an action against an attorney for return of a retainer and damages, and the attorney counterclaimed for services rendered on the theory of quantum meruit. The Supreme Court, Appellate Division, held that : (1) whether attorney had good cause to justify his withdrawal as counsel presented factual question precluding summary judgment; and (2) former client was not collaterally estopped by prior order permitting attorney to withdraw as counsel from litigating issue of whether withdrawal was justified. "We note, initially, that the affidavits submitted in connection with the [motions] contain conflicting assertions which create a genuine issue of fact as to whether Mr. Rivera's withdrawal as counsel for the plaintiff... was motivated by his own financial concerns rather than by any misconduct by the plaintiff." *Rivera* at 279. This is similar to the claims asserted by the Schibels against Eymann and Withey in this matter.

The defendant attorney in *Rivera* raised the issue of collateral estoppel:

> "The defendant argues, however, that the decision of the federal court, which permitted him to withdraw as counsel, necessarily included a finding of fact that his withdrawal was justified. Therefore, the defendant concludes that relitigation of this issue is barred by the doctrine of collateral estoppel. We do not agree."

Rivera at 280.

The *Rivera* court went on to state that in the withdrawal matter, all the court had to decide was whether there were satisfactory reasons for withdrawal. "The existence of such 'satisfactory reasons' would not rule out the possibility of misconduct on the part of Mr. Rivera or the possibility that he unjustifiably abandoned the plaintiff's case before he formally withdrew. Thus, it is far from clear that the issue of the defendant's good faith in withdrawing his counsel was, in fact, decided by the federal court. Accordingly, collateral estoppel may not be invoked to preclude litigation on this issue, since it was not necessarily decided in the prior proceeding."

Rivera at 280.

It is also worth noting that *In re Disciplinary Proceedings Against Cohen*, 150 Wash. 2d 744, 82 P.3d 224 (2004), the Supreme Court of Washington addressed a scenario similar to the Schibels. Although the attorney in Cohen acted without his clients consent, he was disciplined for withdrawing, even though his withdrawal was allowed by the trial court in the underlying action. *Cohen* , 82 P.3d at 755-56. Cohen withdrew less than one month before trial, and the client was unable to obtain new counsel due to the posture of the case and the rapidly approaching trial date. *Id.* at 751-52. The Court ruled that "Cohen's last-minute withdrawal clearly had a material adverse financial effect on [the plaintiff], and effectively denied him his day in court. Therefore, we hold that the hearing officer correctly concluded that Cohen violated RPC 1.15(b), 1.3, and 1.4 when he withdrew from Erickson's case one month before the scheduled trial." *Id.* at 757.

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is a prerequisite to the right to withdraw in a civil case, but such approval will not relieve the attorney of any civil liability for breach of his duty to his client. Thus, the mere fact of approval by the bankruptcy court does not support summary judgment." *Greening*, 719 S.W. 2d at 907 (citation omitted).

So it seems that other jurisdictions have varied on whether withdrawing from a case with court permission and in accordance with court rules precludes a subsequent action based on that withdrawal. Though Washington has not ruled definitively on the issue, it has been touched on as previously mentioned, seeming to support the jurisdictions where the prior granting of a withdrawal does not preclude a subsequent malpractice action.

In the underlying action, Judge Plese was faced with a motion to withdraw pursuant to Civil Rule 71. That rule provides for withdrawal upon written 10-day notice by the attorney. Once the Schibels objected, Eymann and Withey had to seek court approval to withdraw. CR 71(a) acknowledges that nothing in that rule defines the circumstances under which a withdrawal might be denied by the court.

Judge Plese's written order of October 27, 2010, found that "plaintiff's counsel gave proper notice of intent to withdraw and that the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel. That finding was based on the affidavit of Richard Eymann filed on October 14, 2010, where he asserted that "the withdrawal was based upon the breakdown in communication, trust, and confidence in the attorney-client relationship. See affidavit of Richard Eymann, Page 2 Paragraph 5. Later, Mr. Eymann stated that "as a result of these events and other issues protected by the attorney-client privilege, the trial date of November 1, 2010, is no longer possible." Declaration of Eymann, Page 2 Paragraph 7.

The court in its oral ruling made the following comments at Page 8: "But at this point, it appears that there is a breakdown with you and counsel, and the court has no choice at this time other than to allow them to withdraw on your behalf. They have given the proper notice. They're here." Later at Page 9 the court said: "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.

I can find no other reference in either the court's oral decision or its written orders that outline what those ethical obligations were found to be by the court. The Schibels raised RPC 1.16 in their declaration to Judge Plese but asserted none of those considerations were present. The Court of Appeals also discussed RPC 1.16, but Mr. Eymann did not discuss RPC 1.16 in his declaration in support of the withdrawal, neither attorney cited to it during their oral arguments, and Judge Plese never discussed it in her decision.

On appeal, the Court of Appeals denied the Schibels' challenge to the court's granting of the notice of intent to withdraw. The appellate court analyzed the appeal based on an abuse of discretion standard, and noted that a trial court abuses its discretion only when it exercises its discretion in a manner that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. The Court of Appeals held as follows:

> "The trial court found that the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." *C.P.* at 546. The record contains numerous filings related to this issue. The record cited "the breakdown in communication, trust and confidence in the attorney-client relationship." *C.P.* at 510. After reviewing the Schibels' and counsel's declaration and the record, we conclude the

trial court's finding that good cause existed for withdrawal was not manifestly unreasonable. The trial court properly exercised its discretion when it granted the Schibels' attorney's motion to withdraw."

Court of Appeals decision Pages 9-10.

Turning my attention now back to determining whether collateral estoppel applies, the party asserting the doctrine must first prove that the issue decided in the prior adjudication is identical with the one presented in the second action.

In the initial action, Judge Plese was faced with whether or not to allow counsel to withdraw under CR 71. She found good cause existed based upon a breakdown in communication between attorney and client and undefined "ethical obligations". Nowhere in her comments does it appear that she discussed or even considered whether the attorneys breached any duty of care to their clients. She never raised the issue or made any findings whether or not the reasons for or timing of the withdrawal breached any of the attorneys' duties to their client.

The issues in this action and in the underlying action are similar because they involve the same parties and the same facts. Thus, it is understandable that similar arguments would be used in both of the actions. However, the issues under review in each action are distinct. The Schibels are not asserting the same claim in this suit as they asserted in the underlying action. During the underlying trial, the Schibels merely objected to the Defendant's motion to withdraw. On appeal, the issue argued was whether the trial court abused its discretion by allowing the Defendants to withdraw and by not continuing the trial date. Before this point, it has not been argued that the Defendants' withdrawal breached their fiduciary duty to the Schibels.

Hence, the issue in the underlying suit was whether the trial court abused its discretion and the issue in the current suit is whether the Defendant's duty of care fell below the professional standard. "Since all of the elements of collateral estoppel must be met, if the issues are not identical, collateral estoppel will be denied. Most importantly for this case, mere *factual* identity is insufficient to meet this requirement; estoppel will be denied unless the issues are also *legally* identical." *Hanson v. City of Snohomish*, 121 Wn. 2d 552, 573-74, 852 P.2d 295 (1993) (citations omitted).[5]

The fourth element of collateral estoppel is whether application of the doctrine will work an injustice. *Hansen v. City of Snohomish*, 121 Wn. 2d 552, 852 P.2d 295 (1993). In *Hansen*, the Washington Supreme Court held that application of collateral estoppel will not work an injustice when the party opposing preclusion has had the opportunity to present his evidence and arguments on the issue to the trial court and a court of appeals. *Hansen*, 121 Wn. 2d at 563. Again, as the Schibels have yet to argue negligence of their attorney in court, the Defendants cannot be immunized from liability without giving plaintiffs an opportunity to be heard.

As the issue that was adjudicated in the prior action is not identical to the issue in the Schibels' present action, and not allowing the Schibels their day in court would work an injustice

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[5] *See also Seattle–First Nat'l Bank v. Cannon*, 26 Wash.App. 922, 925, 615 P.2d 1316 (1980); *Standlee v. Smith*, 83 Wash.2d 405, 518 P.2d 721 (1974)

on them, the first and fourth elements of collateral estoppel fails and the doctrine does not apply in this case.

Triable Issues of Fact

The second issue before the court is whether the Plaintiffs lack sufficient evidence to support a claim of legal malpractice and breach of fiduciary duty.

> To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. . . . To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.

Hizey v. Carpenter, 119 Wn. 2d 251, 260-61, 830 P.2d 646 (1992). "Expert testimony is often required to determine whether an attorney's duty of care was breached in a legal professional negligence action, because the '[l]aw is admittedly a highly technical field beyond the knowledge of the ordinary person.'" *Geer v. Tonnon*, 137 Wn. App. 838, 851, 155 P.3d 163 (1979) (citation omitted).

The Plaintiffs in this case have procured the opinion of retired Judge Roger A. Bennett as an expert witness. Mr. Bennett's years of experience as a trial lawyer and a Superior Court Judge qualifies him as an expert witness in this case. Mr. Bennett has submitted a declaration wherein he offers several opinions of how the Defendants' failed to meet the standard of care owed to their clients, the Schibels.

Mr. Bennett's opinion is that both the timing of the attorneys' withdrawal and the manner in which they withdrew fell below the requisite standard of care. He relies on allegations by the Schibels that the withdrawal was because of financial considerations by the attorneys and a possible defense verdict instead of any true ethical considerations. He further asserts the attorneys failed to candidly disclose these concerns and instead masked their true concerns under an ethical veil.

While Mr. Bennett's declaration is not solely determinative of whether the Defendants' standard of care fell below the duty owed, it offers enough evidence for the Plaintiffs to survive summary judgment on the issue. Looking at the evidence in the light most favorable to the Schibels, this court finds there is a genuine issue of material fact regarding the Plaintiffs ability to provide evidence to support a claim of legal malpractice and breach of fiduciary duty.

Conclusion

There is no precedent in the state of Washington holding 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. Viewing all inferences deducible

in a light most favorable to the non-moving party, the Court will deny the Defendant's motion because, (1) there is no state precedent on the matter at this time; (2) any state precedent there is on the matter would weigh in the Plaintiff's favor; and (3) the relevant case law from other jurisdictions is not exceedingly persuasive.

Where there are conflicting rulings in other jurisdictions, and Washington has no settled precedent, this court will allow the Plaintiffs to make their argument in court. Additionally, this court believes that there is a genuine issue of material fact regarding the Plaintiffs ability to provide evidence to support a claim of legal malpractice and breach of fiduciary duty. Accordingly, the Defendant's motion for summary judgment is denied.

Done this 6th day of August, 2014.

Honorable James M. Triplet

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Brief of Respondents** on:

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

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

by the following indicated method or methods:

- ☒ **E-mail. (Pursuant to Civil Rule 5(b)(7), all counsel have consented in writing to service by e-mail.)**
- ☐ **Facsimile communication device.**
- ☐ **First-class mail, postage prepaid.**
- ☐ **Hand-delivery.**
- ☐ **Overnight courier, delivery prepaid.**

DATED this 28th Day of August 2015.

Steven E. Turner

Steven E. Turner, WSBA No. 33840
Attorney for Respondents