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

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,

REPLY BRIEF OF PETITIONERS

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I. INTRODUCTION

The Attorneys complied with CR 71 when they obtained a trial court order allowing their withdrawal in the Underlying Lawsuit. The Schibels had a full and fair opportunity to litigate their objections to the Attorneys' withdrawal in the trial court and in the Court of Appeals. Each element of collateral estoppel is satisfied and the Schibels' claims against the Attorneys should be dismissed.

II. EACH ELEMENT OF COLLATERAL ESTOPPEL IS SATISFIED

The elements of collateral estoppel are: (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). Each of the elements is satisfied in this case and the Schibels' claims should be dismissed.

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

"[Collateral estoppel] prevents a second litigation of *issues* between 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) (quotations and citations omitted). In *Christensen*, the plaintiff, a paramedic, lost an administrative claim before the Public Employment Relations Commission ("PERC") against a county hospital district for retaliatory discharge. He then sued the hospital district in superior court for wrongful discharge in violation of public policy. In affirming the trial court's summary judgment dismissal based on collateral estoppel, the Washington Supreme Court explained:

> Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, *Civil Procedure* §35.32, at 475 (1st ed. 2003) (hereafter Tegland, *Civil Procedure*). **It is distinguished from claim preclusion "'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.'"** *Rains v. State*, 100 Wash.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 225-26, 588 P.2d 725 (1978)); *Kyreacos v. Smith*, 89 Wash.2d 425, 427, 572 P.2d 723 (1977); *see Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV., 805, 805, 813-14, 829 (1985) (hereafter Trautman, *Claim and Issue Preclusion*); Tegland, *Civil Procedure* §35.32, at 475. Claim preclusion, also called res judicata, "is intended to prevent relitigation of an entire cause of action and **collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in the previous litigation.**" *Luisi Truck Lines, Inc., v. Wash.*

> *Utils. & Transp. Comm'n*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967).

Christensen, 152 Wn.2d at 306 (emphasis added).

In the present lawsuit the Schibels may be making a somewhat different "claim" or asserting a different "cause of action" (i.e., that the lawyers committed malpractice because they were not prepared to try their case and sought withdrawal for that reason), but the determinative and "crucial issue" is the same as was already decided in the Underlying Lawsuit: Were the Attorneys entitled to withdraw from representing the Schibels? The Schibels are now arguing that the Attorneys should not have been allowed to withdraw because they were not prepared to try the case. But the crucial issue of the appropriateness of the Attorneys' withdrawal was decided against the Schibels, after a full opportunity to object and be heard, even if their cause of action/claim (legal malpractice) was not adjudicated.

The Schibels' present action for legal malpractice is factually and legally premised upon the trial court's order granting the Attorneys leave to withdraw. Such order was the "crucial issue" (under *Christensen*) already resolved because it was the *sine qua non* of the cause of action for legal malpractice. Had the court denied the motion to withdraw, the trial would have gone forward with unknown results. But in such

circumstances, the Schibels could not have maintained a legal malpractice claim based upon the Defendants obtaining an order allowing them to withdraw for any reason. The doctrine of collateral estoppel clearly forecloses this claim.

The only authority the Schibels cite to support their argument that the issues in the Underlying Lawsuit and those in this action are different is the dissenting opinion in *Hanson v. City of Snohomish*, 121 Wn.2d 552, 573-74, 852 P.2d 295 (1993). The controlling majority opinion in *Hanson* shows that the issues are in fact identical.

In *Hanson*, Gerald Hanson was charged with first degree assault for allegedly shooting a 7-Eleven store clerk. The critical evidence in his criminal case was the victim's identification of Hanson as the man who shot her. Hanson filed a motion to suppress the identification evidence, claiming the police obtained it improperly. The motion was denied, the identification evidence was presented to the jury, and the jury found Hanson guilty. The Court of Appeals affirmed the trial court's evidentiary ruling, but reversed the conviction on other grounds.

Meanwhile, Hanson filed a civil action against City of Snohomish for malicious prosecution, false arrest and imprisonment, negligent investigation, and violation of civil rights arising out of the allegedly improper identification procedures used by the police.

The trial court in the civil action granted City of Snohomish's motion for summary judgment based on collateral estoppel. The Washington Court of Appeals reversed, finding that there was no identity of issues: "[T]he issue in the criminal action was Hanson's guilt or innocence. The admissibility of the identification evidence ... [is] ... collateral to that central issue." *Hanson v. City of Snohomish*, 65 Wn. App. 441, 447, 828 P.2d 1133 (1992).

The Washington Supreme Court disagreed, and reversed, explaining:

> The doctrine of collateral estoppel bars relitigation of the issue regarding impropriety of the identification procedures used by the police in initiating the criminal action against Gerald Hanson.
>
> . . .
>
> There also was identity of issues. In the criminal action, Hanson moved for suppression of the identification evidence claiming the identification was manipulated, impermissibly suggestive and improper on the part of the police. The same arguments and the same evidence are now presented in his civil action.
>
> . . .
>
> . . . The challenges, the evidence and the arguments Hanson presents in the present civil case are identical to those presented to the trial court at the suppression hearing and to the Court of Appeals.... The issue was and is whether the Snohomish police impermissibly manipulated identification evidence. We thus find the element of identity of issues is met for purposes of collateral estoppel.

Hanson, 121 Wn.2d at 560-63.

The analysis in the present case is the same as that employed by the Washington Supreme Court in *Hanson*. The crucial issue in both the Underlying Action and in this action is the propriety of the Attorneys' withdrawal. The challenges, the evidence and the arguments regarding the propriety of the withdrawal that the Schibels present in this case are identical to those they presented to the trial court and Court of Appeals in the Underlying Lawsuit. The Schibels have simply repackaged the issue already decided in the Underlying Lawsuit (i.e., the propriety of the withdrawal) into a new claim (i.e., the withdrawal constitutes malpractice). This is demonstrated by the table below, which the Schibels failed to address in their appellate response brief.

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.)

ARGUMENTS IN THIS ACTION	ARGUMENTS IN THE UNDERLYING ACTION
Withdrawal so close to trial made it impossible to find replacement counsel (CP 183).	Withdrawal creates an "impossible situation ... for the Schibels." (CP 123.)
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. The Schibels are barred from taking an opposite position in this case because "[collateral estoppel] prevents a second litigation of *issues* between parties, even though a different claim or cause of action is asserted." *Christensen*, 152 Wn.2d at 306 (quotations and citations omitted).

The identity of issues element is met for purposes of collateral estoppel in this case.

2. The Parties Agree That 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 parties opposing preclusion had the opportunity to present their evidence and arguments on the issue to the trial court and the Court of Appeals. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993). *Hanson* demonstrates that the two proceedings need not be procedurally identical in order for this rule to apply. There, the Washington Supreme Court determined that a criminal court's determination on a pretrial evidentiary motion that evidence was not obtained improperly barred a subsequent civil case based on the plaintiff's claim that the evidence was obtained improperly.

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 Schibels had three-weeks' notice of the Attorneys' intent

to withdraw prior to the hearing, they presented evidence and written and oral argument in support of their position, they raised every argument they raise in this case as to why they believe the withdrawal was improper, they had a strong incentive to oppose the withdrawal, their attorney nephew assisted them in opposing the withdrawal at the trial court level, and a new attorney represented them in the appeal of the trial court order allowing the withdrawal.

In determining whether the withdrawal was proper under CR 71(c)(4), the trial court was to 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.

Robbins v. Legacy Health System, Inc., 177 Wn. App. 299, 309-311, 311 P.3d 96 (2013).

The determination of the Attorneys' motion to withdraw necessarily included an examination of the adequacy of the Attorneys'

reasons for seeking withdrawal and the potential negative impacts of the withdrawal on the Schibels. The Schibels had a full and fair opportunity to litigate these issues with the trial court and the Court of Appeals. Justice does not require litigating these same issues a second time in the present case.

What would be unjust is for the Attorneys to be subject to legal malpractice claims based solely on a court-sanctioned withdrawal they obtained after complying with all applicable Civil Rules. The Court of Appeals of Michigan's language in *Keywell &. Rosenfeld v. Bithell*, 254 Mich. App. 300, 355-356, 657 N.W.2d 759 (2002), is apropos:

> . . . 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.

The fourth and final element of collateral estoppel is satisfied.

III. THE CASES CITED BY THE SCHIBELS ARE NOT ON POINT

In *Fisher v. State*, 248 So.2d 479 (Fla. 1971), the Florida Supreme Court determined that the trial court improperly reversed its prior order allowing an attorney to withdraw where the case was not yet set for trial and the withdrawal would not interfere with the proper functioning of the court. The Florida rules for withdrawal in 1971 focused solely on the impact the withdrawal would have on the court, not the attorneys or clients. The court's language that "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 ... if [withdrawal] is wrongfully done" was dicta, as the plaintiff did not file an action against the attorney.

In *Kingdom v. Jackson*, 78 Wn. App. 154, 896 P.2d 154 (1995), the Washington Court of Appeals reviewed 22 foreign cases, including *Fisher*, *supra*, and determined that the trial court erred in not allowing an

attorney to withdraw. The case is inapposite because the client did not file a post-withdrawal action for legal malpractice.

In *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004), the attorney took the following action without the client's knowledge or approval: (1) continued the trial date; (2) voluntarily dismissed the case when opposing counsel would not allow another continuance; (3) failed to file a confirmation of joinder and missed a status conference, resulting in another dismissal; (4) transferred the case to mandatory arbitration; and (5) failed to file a jury demand in connection with a trial de novo. With a summary judgment motion pending against his client, the attorney filed a motion to withdraw, citing poor health. The case is inapposite because (1) there is no suggestion that the client opposed the motion to withdraw or that there was a hearing on the motion, and (2) the client did not file a post-withdrawal action for legal malpractice.

In *Allen v. Rivera*, 125 A.D.2d 278 (N.Y.A.D. 2 Dept. 1986), the trial court granted the attorney's motion to withdraw based on alleged client misconduct. The appellate court ruled that the client's of breach of contract claim was not barred by the order permitting the withdrawal because the client did not have a full opportunity to litigate the issue (there was no hearing) and because the client did not have incentive to resist the

motion because there was no impending trial. In this case, the plaintiffs had a full opportunity to litigate the propriety of the Defendants' withdrawal and had strong incentive to do so.

In *Greening v. Klamen*, 719 S.W.2d 904 (Mo. App. E.D. 1986), the clients did not object to the attorney's withdrawal. The Missouri Court of Appeals ruled that the order allowing the withdrawal did not bar a subsequent action by the client for breach of contract because it did not conclusively establish that the withdrawal was made for good cause. In this case, the clients objected to the withdrawal and had a full opportunity to litigate whether the withdrawal was proper and complied with the applicable Court Rules.

In *Vang Lee v. Mansour*, 289 S.W.3d 170 (Ark. App. 2008), the withdrawing attorney did not advise the client of his motion to withdraw and there was no hearing. In this case, the clients had notice and a full opportunity to litigate the motion to withdraw.

The cases most closely analogous to the facts in this case are cited in the Defendants' opening brief. The closest case is *Bright v. Zega*, 186 S.W.3d 201, 205 (Ark. 2004), where the Arkansas Supreme Court stated:

> 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.

Here, the plaintiffs fought the battle over the propriety of the Defendants' withdrawal in the trial court and the Washington Court of Appeals. They lost. All of the arguments they make in this case were made or contradicted in the Underlying Lawsuit. All of the elements of collateral estoppel are satisfied and plaintiffs' claims should be dismissed.

IV. 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 24th day of September, 2015.

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FOR

PER WRITTEN APPROVAL

1441571 / 1221.0027

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 REPLY BRIEF OF PETITIONERS on the following individuals in the manner indicated:

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SIGNED this 25th day of September, 2015, at Seattle, Washington.

Lynda T. Ha