NO. 93214-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 32937-2-III
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JAMES SCHIBEL, and 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,
Petitioners,

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Richard Eymann, Eymann Allison Hunter Jones, P.S., Michael Withey, and Law Offices of Michael Withey, PLLC (hereinafter "the Attorneys"), defendants below, ask the Court to accept review of the Court of Appeals decision designated in Part B of this petition. Respondents James and Patti Schibel (hereinafter "the Schibels") are the Attorneys' former clients.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published decision on April 26, 2016. A copy of the decision is in the Appendix at pages A-1 through A-15.

C. ISSUE PRESENTED FOR REVIEW

Generally - Does an attorney's withdrawal from a case with court approval and in compliance with applicable court rules preclude future actions for legal malpractice and other causes of action based on the withdrawal under the doctrine of collateral estoppel? This is a matter of first impression in Washington.

Specifically - Does the Attorneys' court-approved withdrawal collaterally estop the Schibels from asserting claims of legal malpractice and breach of fiduciary duty based solely on the withdrawal where the following facts exist: (1) the Attorneys complied with all applicable rules

regarding the withdrawal; (2) the Schibels had notice of the Attorneys' intent to withdraw; (3) the Schibels were motivated to oppose the withdrawal; (4) the Schibels filed a written objection to the withdrawal with the assistance of another attorney; (5) the Schibels argued against the withdrawal at a hearing; (6) the Schibels made every argument they make in support of their malpractice and breach of fiduciary duty claims in opposing the withdrawal; and (6) the trial court and Court of Appeals approved the withdrawal after determining that the Attorneys were ethically obligated to withdraw?

D. STATEMENT OF THE CASE

1. The Attorneys' Court-Approved Withdrawal

The Attorneys represented the Schibels in an underlying lawsuit against the Schibels' commercial landlord for damages allegedly caused by mold contamination ("the Underlying Lawsuit"). CP 2; 8-20.

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

The Schibels filed a written objection to the proposed withdrawal with the assistance of their nephew, who is an attorney. CP 69-71; 122-126. The Schibels agreed with the motion to continue the trial date. CP 69-71; 127-130.

The parties argued the motion to withdraw and the motion to continue on October 27, 2010. The trial court granted the motion to withdraw, concluding that the Attorneys were ethically obligated to withdraw. CP 69-71; 139. The trial court then proceeded to deny the Schibels' motion to continue the trial date due to their representation that they did not foresee finding a new attorney any time soon. CP 138.

The Schibels, with the assistance of a new attorney, filed an appeal of the order allowing the Attorneys to withdraw and the order denying the motion for continuance to the Washington Court of Appeals. CP 69-71; 152-54, 164. On June 19, 2012, the Court of Appeals affirmed the trial court's ruling. CP 69-71; 149-164. The Court of Appeals in this case characterized the ruling as follows: "we agreed with the trial judge's findings that counsel's ethical obligations required the withdrawal." Appendix, A-4. The Washington Supreme Court denied the Schibels' Petition for Review on December 10, 2012 (CP 167-168), and the United States Supreme Court denied their Petition for Writ of Certiorari on May 13, 2013. CP 169-170.

2. Procedural History in This Case

In their Complaint in this case, the Schibels assert claims of legal malpractice and breach of fiduciary duty against the Attorneys based solely on the Attorneys' court-approved withdrawal from the Underlying Lawsuit. CP 1-20. As the chart below illustrates, each of the Schibels' arguments made in support of their claims in this case was either made or contradicted in their opposition to the Attorneys' motion to withdraw in the Underlying Lawsuit:

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

ARGUMENTS IN THIS ACTION	ARGUMENTS IN THE UNDERLYING LAWSUIT
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.

The Attorneys moved for summary judgment dismissal, arguing that the claims were barred by collateral estoppel. CP 21-32; 250-258. Since the issue is a matter of first impression in Washington, the Attorneys cited cases from other jurisdictions in which similar post-withdrawal claims were barred. Id. The Schibels, in turn, cited cases from other jurisdictions to support their position. CP 172-192.

The trial court denied the Attorneys' motion for summary judgment. CP 289-301. In its letter ruling, the trial court explained, "There is no precedent in the State of Washington holding that withdrawal

from a case with court permission and in compliance with applicable court rules precludes future actions for legal malpractice or other causes of action based on the withdrawal . . . Where there are conflicting rulings in other jurisdiction, and Washington has no settled precedent, this court will allow the Plaintiffs to make their argument in court." CP 297-98.

The Court of Appeals for Division III granted the Attorneys' Motion for Discretionary Review:

> . . . [T]he issue is one that Washington courts have not addressed and on which courts in other jurisdictions have disagreed. Since resolution of this issue may "materially advance the ultimate termination of the litigation," *see* RAP 2.3(b)(4), this Court accepts the superior court's certification of the issue.

Appendix B-4.

The Court of Appeals denied the Attorneys' appeal, without oral argument, entering its ruling on April 26, 2016. Appendix A-1 through A-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Appeal Involves Matters of Substantial Public Interest

Whether an attorney's court-approved withdrawal precludes legal malpractice and breach of fiduciary duty claims based solely on the withdrawal is a matter of first impression in Washington. Foreign jurisdictions that have examined the issue are split. The issue raises important questions regarding Washington attorneys' duties and

obligations under the Rules of Professional Conduct and the Civil Rules, the trial courts' role in deciding whether to allow attorneys to withdraw, and the legal effect of attorneys and trial courts fulfilling their obligations under the rules. These are all matters of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4(b)(4).

2. Washington Law Regarding Attorney Withdrawal Over Client Objections

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

In *Robbins v. Legacy Health System, Inc.*, 177 Wn. App. 299, 309-311, 311 P.3d 96 (2013), the Washington Court of Appeals outlined a trial court's role in determining whether to permit an attorney to withdraw over a client's objections. The Court of Appeals explained that trial courts should consider "all pertinent factors," including but not limited to:

> [W]hether withdrawal will delay trial or otherwise interfere with the functioning of the court, whether the client has had or will have an opportunity to secure substitute counsel, whether the client has sufficient prior notice of the lawyer's intent to withdraw, whether the client lacks the ability to prove a prima facie case, whether the client has failed to

pay the lawyer's fees, whether the client has failed to cooperate with the lawyer, whether a denial of withdrawal will cast an unfair financial burden on the attorney, whether the lawyer is unable to find or communicate with the client, and whether there is any other prejudice to the client or lawyer.

. . .

Some of these factors are found in RPC 1.16, which addresses the circumstances under which an attorney can or must decline or terminate representation. The rule provides that a lawyer may withdraw from representing a client if

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

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

(7) other good cause for withdrawal exists.

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

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

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

Collateral estoppel, also called issue preclusion, bars re-litigation of any issue that was actually litigated in a prior lawsuit. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). The party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). In denying the Attorneys' appeal, the Court of Appeals determined that the first and fourth elements were not satisfied.

a. The Court of Appeals erred in determining that the first element of collateral estoppel is not satisfied.

In opposing the Attorneys' motion for summary judgment, the Schibels argued that the trial court in the Underlying Lawsuit did not determine the Attorneys' "true motive" for the withdrawal or whether the

manner of withdrawal breached the Attorneys' duties to the Schibels. CP 188-189. The argument fails.

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

As demonstrated by the table above, the Schibels in the Underlying Lawsuit either raised or contradicted all of the arguments they make in this case regarding the alleged impropriety of the Attorneys' withdrawal. 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 Schibels have offered no new arguments in this case. They have simply repackaged their previously rejected arguments as claims for legal malpractice and breach of fiduciary duty. This is not permissible under the doctrine of collateral estoppel. "[Collateral estoppel] prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (citations and quotations omitted). The doctrine "is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in the previous litigation." *Id.*

b. Foreign authority contradicts the Court of Appeals' decision.

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

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

. . . We are reluctant to hold that an authorized withdrawal from representing a client by a federal district judge constituted malpractice. *See, e.g., Washington v. Rucker*, 202 Ga. App. 888, 415 S.E.2d 919 (1992). In *Rucker*, the Georgia Court of Appeals . . . concluded that it was aware of no case where withdrawal with court permission in accordance with the rules constituted legal malpractice. Similarly, the South Carolina Supreme Court has held that where the propriety of an attorney's withdrawal has been litigated and decided in a prior federal antitrust suit and was not appealed, it is *res judicata* and cannot be relitigated in a suit against former counsel for legal malpractice. *See Lifschulz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999). At the very least, [the attorney] has the right to rely upon a valid order of the federal district court permitting him to withdraw. . . . (Citation omitted.)

It would present a perverse state of affairs if a trial court could permit trial counsel to withdraw from representation and then that attorney became an "insurance policy" for the former client, after the former client settled for a lesser amount than what she believed she was due. We are aware that the federal district court refused [plaintiff] a continuance, but that factor does not affect the legitimacy of the order permitting [the attorney's] withdrawal. In our judgment, if [the client] believed [the attorney's] withdrawal to be wrong, that battle should have been waged before the federal district court and on appeal and not in a separate lawsuit against former counsel.

Accordingly, because the federal district court permitted [the attorney's] withdrawal, thereby sanctioning his actions in doing so, [the client] cannot now, in a separate lawsuit, state facts constituting legal malpractice on either a theory of negligence or breach of contract based on the allegation that the withdrawal was wrongful.

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

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

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

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

c. The foreign and Washington authority cited by the Schibels does not support the Court of Appeals' decision.

Each of the cases cited by the Schibels in support of their position lacks one or more of the critical facts present in this case. In some cases there was no notice to the client of the intent to withdraw,[1] in some there was no hearing regarding the withdrawal,[2] in some the clients did not oppose the motion to withdraw,[3] and in some there were no post-

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

2 *Allen v. Rivera*, 125 A.D.2d 278 (N.Y.A.D. 2 Dept. 1986), *Vang Lee v. Mansour*, 289 S.W.3d 170 (Ark. App. 2008), *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004) (the opinion is silent)

3 *Allen v. Rivera*, 125 A.D.2d 278 (N.Y.A.D. 2 Dept. 1986), *Greening v. Klamen*, 719 S.W.2d 904 (Mo. App. E.D. 1986),

withdrawal claims against the attorney.[4] In addition, the cases cited by the Schibels fail to address the negative public policy ramifications of the rule adopted by the Court of Appeals in this case.

d. The Court of Appeals erred in determining that the fourth element of collateral estoppel is not satisfied.

Application of collateral estoppel will not work an injustice when the party opposing preclusion has had the opportunity to present his evidence and his arguments on the issue to the trial court and the Court of Appeals. *Hansen v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993). In the Underlying Lawsuit, the Schibels had the opportunity to and did present evidence and argument to the trial court and the Court of Appeals in support of their position that the Attorneys' withdrawal was improper. All of the arguments the Schibels make in this case were made or contradicted in the Underlying Lawsuit. The trial court and Court of Appeals simply ruled against them.

In this case, the Court of Appeals determined that it would be unfair to bind the Schibels to the trial court's determination that the withdrawal was proper because the Schibels asked to address the court ex parte in chambers, and were denied. However, the Schibels' inability to address the trial court ex parte did not stop them from making every

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[4] *Fisher v. State*, 248 So.2d 479 (Fla. 1971), *Kingdom v. Jackson*, 78 Wn. App. 154, 896 P.2d 154 (1995), *In re Disciplinary Proceedings Against Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004)

argument they now make in support of their malpractice and breach of fiduciary duty claims in opposing the withdrawal.

The rule embodied in the Court of Appeals' decision in this case that allows a client to bring a legal malpractice case against an attorney after trial and appellate courts have definitively ruled that the attorney was obligated by ethical considerations to withdraw would result in very significant harm to the practice of law and attorney-client relations in Washington State. The rule would create an unfair and impossible dilemma for attorneys in similar circumstances: (1) be forced by their ethical duties to withdraw and suffer the ignominy and cost of defending against a possible claim based on the withdrawal; or (2) be forced to continue with representation and be faced with potential disciplinary action for violating the RPCs in doing so.

As long as the client, as here, had every opportunity under the law and civil procedure to contest the attorney's withdrawal motion, there is no "injustice" in applying collateral estoppel. What would be unjust would be to force the attorney to choose between the two unfair and onerous choices outlined above. Once the court, after notice and opportunity to be heard, determines the attorney is entitled to withdraw for ethical reasons, further collateral inquiry into the grounds of reasons for the withdrawal must end. To allow a collateral attack on this central

finding would embroil courts in endless second guessing of trial court decisions to allow attorneys to withdraw, long after that issue was definitively resolved.

The *Bright* and *Keywell* decisions appropriately address the public policy concerns implicated by the Court of Appeals' decision in this case. In *Bright*, the court recognized that embodied in a trial court's order allowing an attorney to withdraw is a determination that the attorney's conduct in obtaining the order was proper. Allowing the client to sue the attorney after obtaining such an order, in the *Bright* court's language, would be "perverse".

The *Keywell* court recognized that application of collateral estoppel would "encourage[] only proper withdrawal in future cases" and "would have few negative effects", but failing to apply it "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."

There is no injustice in applying collateral estoppel in this case. The fourth and final element of collateral estoppel is satisfied.

F. CONCLUSION

This case presents a significant issue for this Court's consideration under RAP 13.4(b)(4). The principles at issue here have implications for

every attorney and client involved in litigation in the State of Washington. Review under RAP 13.4(b)(4) is merited.

This Court should reverse the Court of Appeals and remand the case to the trial court with directions to enter summary judgment on behalf of the Attorneys.

RESPECTFULLY SUBMITTED this 26th day of May, 2016.

FORSBERG & UMLAUF, P.S.

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By: _____ PER AUTHORIZATION
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DECLARATION OF SERVICE

I, Lynda T. Ha, declare under penalty of perjury that I am over the age of 18 and competent to testify as to service in this matter.

On the date given below, I caused a copy of Petition for Review on May 26, 2016 by 4:30 p.m. to:

Attorneys for Plaintiffs/Respondents:
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of May, 2016 at Seattle, Washington.

Lynda T. Ha

FILED
April 26, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

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, Petitioners.	)	No. 32937-2-III PUBLISHED OPINION

KORSMO, J. — This court granted interlocutory review of an order denying summary judgment in order to determine whether this legal malpractice action was foreclosed by the outcome of a previous appeal upholding the withdrawal of the petitioner attorneys in the underlying case. We agree with the trial court that the issues decided in the previous action were different, affirm its ruling, and remand for further proceedings.

FACTS

This malpractice action alleges that attorneys Richard Eymann and Michael Withey, along with their respective law firms (collectively Attorneys), failed to protect their clients' best interests when they withdrew on the eve of trial and were unable to secure a continuance from the trial court. That original action had been brought by respondents James and Patti Schibel against their former landlord, alleging breach of a commercial lease and negligent infliction of injury due to mold exposure. The trial court permitted the withdrawal over the objection of the Schibels. At the same hearing, the court denied the continuance and indicated that the matter would remain set for trial.

The Schibels were represented by a different attorney when the commercial lease action was filed in 2007. The Attorneys took over in early 2009 after the original counsel withdrew due to a fee dispute. The Attorneys entered into a contingent fee agreement with the Schibels. Clerk's Papers (CP) at 225-30. That agreement provided that the Schibels controlled the decision to accept any settlement offers; the Attorneys were authorized to front litigation costs subject to repayment by the Schibels. CP at 227-29.

When the Attorneys took over the case, the pending April 2009 trial date was continued to April 2010. A conflict with the trial court's schedule then led to rescheduling the trial date to August 2010. Two days before that trial, Ms. Schibel's father passed away and the case was rescheduled to November 1, 2010. The trial judge announced that there would be no more continuances.

During this period of time the Schibels and the Attorneys disagreed over whether to accept a settlement offer. The Attorneys stressed the weaknesses in the case, including inconsistent deposition testimony from Mr. Schibel and a strongly adverse view of the action by a focus group. The Attorneys also asked for an assurance that the extensive costs incurred to that point and expected for trial would be paid. They likewise did not reach an agreement on that topic. The Attorneys then wrote their clients on October 10 that they would need to withdraw in light of the breakdown of their relationship. CP at 244-47. A motion to withdraw and a motion to continue the trial date were filed the next day. Both the Schibels and the landlord objected to the withdrawal. The matter went to hearing on October 27 before the Honorable Annette Plese.

The Schibels represented themselves on the withdrawal motion. They requested to make their argument in camera, but the trial court denied the request, viewing it as improper ex parte contact. Finding compliance with CR 71, the trial court permitted the Attorneys to withdraw, noting that it was consistent with the Attorneys' ethical obligations. Judge Plese then denied the motion for a continuance. The Schibels were expected to proceed pro se on November 1 if they had not obtained counsel or settled by that time. The Schibels reached an oral agreement to dismiss the case without costs. However, they neither signed that agreement nor appeared for trial. The case was then dismissed with prejudice.

The Schibels retained counsel and appealed, challenging the withdrawal and continuance rulings. This court affirmed. *See Schibel v. Johnson*, noted at 168 Wn. App. 1046 (2012). Specifically, this court concluded that the trial judge did not abuse her discretion in granting the withdrawal. *Schibel*, slip op. at 5-10. While ethical duties define when an attorney can withdraw from a case, the trial court's discretion to permit the withdrawal is governed by case authority rather than the ethical rules. *Id.* at 6-8. We also rejected the Schibels' argument that an attorney could not withdraw if the client would be harmed by the action. *Id.* at 9. Instead, we agreed with the trial judge's findings that counsel's ethical obligations required the withdrawal. *Id.* at 9-10. We also concluded that the trial judge had not abused her discretion in denying the continuance. *Id.* at 10-12.

Represented by another new attorney, the Schibels then filed the current malpractice action against the Attorneys. Discovery ensued and eventually the Attorneys filed a motion for summary judgment, arguing that the Schibels were collaterally estopped by the previous appeal from challenging their withdrawal from the lease case.[1] The trial court, the Honorable James Triplet, disagreed with the argument in a lengthy

[1] The Attorneys also contended that the Schibels lacked expert testimony to support their legal malpractice claim. The Schibels responded with an affidavit from retired Judge Roger A. Bennett explaining in his view that the Attorneys did breach the standard of care in withdrawing on the eve of trial. The trial court ruled that material questions of fact existed. CP at 297. This aspect of the summary judgment ruling is not at issue in this appeal.

letter opinion. The trial court concluded that there was no Washington precedent governing the interplay between a judicially-approved withdrawal from representation under CR 71 and legal malpractice. It also noted that the issues resolved in the original case were different from those in the malpractice case and that the Schibels had not had a fair opportunity to contest the ethical problems because they could not present their argument ex parte.

This court granted the Attorneys' motion for discretionary review. The case was submitted to a panel without oral argument.

ANALYSIS

The sole issue presented is whether the trial court correctly determined that collateral estoppel did not apply to bar the malpractice action. We agree with the trial court that the issues decided in the previous action are not the same as those presented by this case. Although this matter comes to us as an issue of collateral estoppel, at its heart the question here involves an attorney's duty to his client.

Several well-settled principles of law govern our review of this action. Summary judgment is proper when the moving party bears its initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). If that initial showing is made, then the burden

shifts to the other party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 225-26. The responding party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.* This court applies de novo review to an order granting summary judgment on the basis of collateral estoppel. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994).

The plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship that gives rise to a duty of care, (2) an act or omission by the attorney in breach of that duty, (3) damage to the client, and (4) proximate causation between the breach of duty and the damage incurred. *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). The standard of care is uniform throughout the state of Washington: "that 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." *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968).

Collateral estoppel precludes relitigation of the same issue in a subsequent action involving the parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). In order to prevail on a claim of collateral estoppel, the party seeking application of the doctrine bears the burden of showing that (1) the identical issue

was decided, (2) there was a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party (or in privity with a party) to the earlier proceeding, and (4) application of collateral estoppel will not work an injustice against the estopped party. *Id.* at 307. The estopped party must have had a "full and fair opportunity to litigate the issue in the earlier proceeding." *Id.*

Also relevant to our discussion, as they were in the first appeal, are CR 71 and RPC 1.16. In general, CR 71 describes the manner in which an attorney can withdraw from representing a client, with the process varying depending on if the client objected to the withdrawal and whether counsel was appointed by the court. When a client objects to the request, "withdrawal may be obtained only by order of the court." CR 71(c)(4). Particularly relevant in both the former case and this one is the final sentence of CR 71(a): "Nothing in this rule defines the circumstances under which a withdrawal might be denied by the court."

An attorney shall not represent a client if "the representation will result in violation of the Rules of Professional Conduct or other law." RPC 1.16(a)(1). The following subsection of the rule states circumstances when permissive withdrawal is ethically allowed.

> . . . a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.

RPC 1.16(b).

The Attorneys argue that Judge Plese necessarily decided that their withdrawal from the lease case complied with their ethical obligations, thus precluding the Schibels from maintaining a malpractice action on the same theory. The Schibels contend that the previous appeal merely resolved the issue of whether the trial court erred in permitting the Attorneys to withdraw, but did not resolve the issue of whether the attorneys ethically withdrew. Washington courts have not yet decided whether a court-sanctioned withdrawal by counsel prevents a malpractice action predicated on counsel's allegedly improper withdrawal from a case, but other states have addressed the issue.

The Attorneys rely heavily on decisions from Arkansas and Michigan. The Arkansas action involved a malpractice claim against an attorney who had been permitted

to withdraw from a federal case by a federal district judge. The Arkansas court understandably stated: "We are reluctant to hold that an authorized withdrawal from representing a client by a federal district judge constituted malpractice." *Bright v. Zega*, 358 Ark. 82, 186 S.W.3d 201, 205 (2004).[2] The court reasoned that it would be a "perverse state of affairs" to allow an attorney's court-authorized withdrawal to effectively act as an insurance policy for a client to settle and then sue for malpractice due to the withdrawal. *Id.* In the course of its analysis, the Arkansas court also relied on the decisions in *Washington v. Rucker*, 202 Ga. App. 888, 415 S.E.2d 919 (1992), and *Lifschultz Fast Freight, Inc. v. Haynesworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999), where courts similarly had stated that court-sanctioned withdrawals serve as bars to malpractice actions. *Id.* at 205.[3]

The Schibels, in turn, rely on the decisions in *Fisher v. State*, 248 So. 2d 479 (Fla. 1971), *Allen v. Rivera*, 125 A.D.2d 278, 509 N.Y.S.2d 48 (1986), and *Greening v.*

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[2] Respondents correctly note that *Bright* does not apply to actions for malpractice committed before withdrawal or to situations where the proper procedures for withdrawal under Rule 71 were not followed. *See Vang Lee v. Mansour*, 2008 Ark. App. 91, 289 S.W.3d 170, 174.

[3] The Attorneys also rely on *Keywell & Rosenfeld v. Bithell*, 254 Mich. App. 300, 657 N.W.2d 759, 782-90 (2002). There the Michigan Court of Appeals ruled that the trial court erred in permitting the validity of a court-sanctioned withdrawal to be reconsidered by the jury hearing an action for unpaid attorney fees.

Klamen, 719 S.W.2d 904 (Mo. Ct. App. 1986), as well as two Washington decisions applying related principles. The primary case is *Fisher*.

There the Florida Supreme Court outlined Florida's rule for allowing an attorney to withdraw after entering an appearance. *See Fisher*, 248 So. 2d at 484-86. In holding that a trial court should rarely withhold approval for an attorney to withdraw, the court also noted that the court's approval will not eliminate civil liability to the attorney:

> 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.*

Id. at 486 (emphasis added). Significantly, Division Two of this court adopted the *Fisher* rationale for withdrawals in *Kingdom v. Jackson*, 78 Wn. App. 154, 160, 896 P.2d 101 (1995), the same case this court relied on in deciding *Schibel v. Johnson*. In so doing, *Kingdom* quoted the entire quoted passage from *Fisher* with approval. *Id.* Because Washington has adopted Florida's rule for withdrawal, respondents argue that it is logical that Washington also should adopt Florida's rule for whether the granting of an attorney's request to withdraw relieves the attorney of liability.[4]

[4] The Attorneys argue that the italicized line in the *Fisher* case is mere dicta and should not be followed. While that particular line may be obiter dictum in the strictest

In *Kingdom*, the court noted that case law, rather than court rule, governs whether an attorney is permitted to withdraw, making it a matter left to the discretion of the trial court. *Id.* at 158. It is not necessary for a trial court to decide whether an attorney would violate the ethical rules by withdrawing; the trial court needs only to "*consider* all pertinent factors," which includes various ethical rules under RPC 1.16.[5] *Id.* at 158 (emphasis added). In fact, when "withdrawal is sought by a retained attorney in a civil case, it generally should be allowed." *Id.* at 160. In addition, the comments to the rule expressly note that because an attorney oftentimes cannot specifically state the reasons for wanting to withdraw without compromising client confidences, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." RPC 1.16, cmt. 3. Effectively, an attorney who perceives an ethical problem with continued representation, communicates that fact

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sense because it was not necessary for the court's holding, the Florida court appeared to have been anticipating a logical consequence of its holding and addressing it as part of its reasoning for the holding. Such reasoning is still persuasive. Further, Missouri has specifically adopted the *Fisher* analysis in the context of summary judgment for a legal malpractice lawsuit. *Greening*, 719 S.W.2d at 905, 907. To the extent it is dicta in *Fisher*, it is not dicta in *Greening*.

[5] At the time of *Kingdom*, this rule was listed as RPC 1.15. It was renumbered RPC 1.16 and amended effective September 1, 2006. The amendment moved current RPC 1.16(b)(1) from the prefatory section of the rule to be listed as a separate reason permitting withdrawal. *See* Rule 1.16, 157 Wn.2d 1241-44 (2006).

to the trial judge, and complies with the procedural requirements of CR 71, is entitled to withdraw from representation.

We agree that because Washington applies Florida's construction of CR 71, it also is appropriate to apply its understanding of the implications of that construction to attorney malpractice allegations based on counsel's withdrawal from representation. CR 71 essentially is divorced from an attorney's ethical obligations to his client. While the ethical considerations found in RPC 1.16 may inform a trial court's decision on a contested motion to withdraw, those considerations do not dictate the trial court's CR 71 ruling. As comment 3 to RPC 1.16 suggests, an attorney's statement that professional considerations require withdrawal permits a trial court to accept that rationale without determining that it is a correct statement of the factual circumstances. In other words, the court is permitted to accept counsel's assertion without actually determining that withdrawal is required by the rule.

An attorney discipline ruling provides analogous support for our position. *In re Discipline of Cohen*, 150 Wn.2d 744, 82 P.3d 224 (2004). The contested issue in that action was whether the attorney could be sanctioned for withdrawing from representation one month before a trial de novo. The attorney does not appear to have raised CR 71 as a defense to the disciplinary action, but did contend that withdrawal was mandated by his health problems. *Id.* at 755-57. Rejecting that argument, the court turned to the permissive withdrawal factors of former RPC 1.15. *Id.* at 757. Concluding that leaving

the client without counsel shortly before trial was a material adverse effect on the client that cost him money and denied him his day in court, the court determined that Cohen had violated former RPC 1.15(b). *Id.*

While *Cohen* did not analyze CR 71, we believe that it still informs on that application of that rule in this circumstance. When an attorney withdraws from a case, he still can be disciplined when there is an adverse effect on the client. The propriety or impropriety of withdrawal under CR 71 is a separate issue from the impact of the withdrawal on the client.

With that understanding of Washington law, we now, finally, turn to the collateral estoppel questions presented by this appeal. The trial court found that the first and fourth factors of collateral estoppel—identity of issues and injustice to a party—were not satisfied. We again agree with the trial court.

The first consideration of collateral estoppel is whether the previous action *necessarily* decided the same issue presented in the current case. *Christensen*, 152 Wn.2d at 307. As suggested by our previous discussion, the answer in this case is "no." At issue in the first case, as with most contested cases of withdrawal, was whether or not the Attorneys complied with CR 71. The court did not answer the questions of whether the Attorneys correctly perceived that ethical considerations required them to withdraw or that the Attorneys actually were motivated by that reason. Judge Plese's comments concerning the Attorneys' ethical obligations, affirmed by this court's acceptance of that

rationale in the first appeal, merely confirmed that the Attorneys properly stated their ethical concerns in conformity with comment 3 to RPC 1.16. Neither Judge Plese nor this court determined that there actually was an ethical problem with continued representation.[6]

Accordingly, the first factor of collateral estoppel is not present. While the failure to establish any of the court prongs of the collateral estoppel standard is fatal to the petitioners' argument, we briefly will discuss the fourth factor because the trial court also relied on it and the parties have argued it.

The fourth factor is whether applying collateral estoppel would work an injustice to a party. We agree that it would in this circumstance. The Schibels asked to address the court in chambers so that Mr. Johnson and his attorney would not hear the details of their disagreement with the Attorneys. When Judge Plese correctly determined that the issue could not be heard ex parte, the Schibels were left with the dilemma of either not raising the issue or having Johnson's attorney listen to the Attorneys discuss the weakness of their pending case. Under those circumstances, we cannot conclude that it would be fair to bind them to a decision where not all evidence and argument were

[6] While this state's construction of CR 71 would permit the argument that a contested withdrawal hearing will never *necessarily* resolve the ethical propriety of a withdrawal, we can foresee instances in which the ethical problem would properly be before the trial court and necessarily decided. This case is not one of those instances.

presented. The trial court correctly determined that it would work an injustice to collaterally estop the Schibels despite the prior extended litigation of the CR 71 issue.

We therefore affirm Judge Triplet's decision to deny summary judgment. An attorney properly permitted to withdraw in accordance with CR 71 does not also earn an endorsement of his view of any ethical concerns that might be presented by the withdrawal. RPC 1.16.

The case is remanded for further proceedings.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, J.

The Court of Appeals

of the

State of Washington

Division III

JAMES SCHIBEL, et ux., Respondents, v. RICHARD EYMANN, et al., Petitioners.	)	No. 32937-2-III COMMISSIONER'S RULING

Richard Eymann, Michael Withey and their law firms (Eymann) seek discretionary review of the Spokane County Superior Court's October 24, 2014 Order Denying Defendants' Joint Motion for Summary Judgment of James and Patti Schibel's action against them for legal malpractice. The Order certifies the matter as one that "involves a 'potential' controlling question of law as to which there is substantial ground for a difference of opinion." And, "[i]mmediate review of the Order may materially advance the ultimate termination of the litigation." Order at 2. *See* RAP 2.3(b)(4).[1]

[1] This language in the Order is almost identical to the language of RAP 2.3(b)(4), which allows the superior court to certify an interlocutory Order for review in certain circumstances. The sole difference is the addition of the word "potential" before

The superior court's memorandum opinion of August 6, 2014 states that the Schibels sued their landlord in January 2007 for damages they suffered as a result of alleged mold contamination on the leased premises. Their lawyer withdrew in February 2009 because of issues he had with the Schibels over fees, settlement authority, and lack of communication. In March 2009, they entered into a written agreement with Eymann to represent them. The superior court continued the trial date several times. At the time of the sixth continuance, the superior court advised the Schibels it would not grant another continuance. It set November 1, 2010 as the date for trial.

On October 12, 2010, Eymann moved to withdraw as counsel. The Schibels' and the defendants in the suit opposed the motion. The court granted Eymann's motion. It advised the Schibels their option, if they could not find an attorney, was to proceed pro se.

On October 29, 2010, the Schibels and their landlord entered an oral settlement agreement. They did not appear for trial on November 1st because they allege that Eymann told them the superior court had taken the trial off its calendar. The superior court dismissed the case on November 24, 2010 on the landlord's motion. The superior court held that absent a written settlement agreement, the Schibels had a duty to appear for the November 1, 2010 trial date. The Schibels unsuccessfully appealed the orders that

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"controlling question of law," which does not change the meaning of the provision because the outcome, *if decided in Eymann's favor*, would control the Schibel's suit.

allowed Eymann to withdraw and denied their motion for continuance.

Subsequently, the Schibels sued Eymann for malpractice. In its motion for summary judgment, Eymann argued that the doctrine of collateral estoppel barred the Schibels' malpractice claim against them. I.e., in the Schibels' first appeal, which challenged the superior court's decision that allowed Eymann to withdraw, the Schibels had argued that because trial of their claim against their landlord was set to start in three weeks, the court abused its discretion when it granted Eymann's motion. They did not prevail on that argument. And, in this action, they argue that Eymann committed malpractice when it moved to withdraw so close to trial of their claim against their landlord. According to Eymann, the court's rejection of the Schibels' argument in the first appeal precluded their argument here that Eymann committed malpractice when it withdrew as their counsel.

The superior court reviewed conflicting authority from other jurisdictions. *See, e.g., Bright v. Zega,* 358 Ark. 82, 186 S.W.3d 201 (2004); and *Allen v. Rivera*, 125 A.D. 278, 509 N.Y.S. 48 (N.Y.A.D. 2 Dept. 1986). But it also noted that in *Kingdom v. Jackson*, 78 Wn. App. 154, 160, 896 P.2d 101 (1995), in which the Washington Court of Appeals reversed an order that *denied* an attorney's motion to withdraw, the court quoted a Florida case that included a statement that the grant of a motion to withdraw does not insulate the attorney from civil liability. *See also In re Disciplinary Proceedings against*

Cohen, 150 Wn.2d 744, 82 P.3d 224 (2004) (Attorney who withdrew one month before trial violated RPC 1.15(b), 1.3, and 1.4.)

In its memorandum decision that denied Eymann's motion for summary judgment of the malpractice claim, the superior court summarized, as follows:

> So it seems that other jurisdictions have varied on whether withdrawing from a case with court permission and in accordance with court rule 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 withdrawal does not preclude a subsequent malpractice action.

(Emphasis in original.). Motion, Appendix, Memorandum Decision at A-010.

In the superior court's view, the better reasoned authority supported it holding that the earlier grant of the motion to withdraw did not preclude the Schibels' malpractice claim based upon that withdrawal. Nevertheless, it recognized, and this Court agrees, that the issue is one that Washington courts have not addressed and one on which courts of other jurisdictions have disagreed. Since resolution of this issue may "materially advance the ultimate termination of the litigation," *see* RAP 2.3(b)(4), this Court accepts the superior court's certification of the issue.

Accordingly, IT IS ORDERED, the motion for discretionary review is granted.

February , 2015

Monica Wasson
Commissioner

The Court of Appeals

of the

State of Washington

Division III

JAMES SCHIBEL, et ux.,	)	No. 32937-2-III
	)	
Respondents,	)	
v.	)	COMMISSIONER'S RULING
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