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SUPREME COURT
STATE OF WASHINGTON
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No. 95861-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Estate of:

TAYLOR GRIFFITH

KENNETH GRIFFITH and JACKIE GRIFFITH,

Petitioners,

v.

BRADLEY J. MOORE,
in his capacity as Personal Representative,

Respondent,

MICHAEL B. KING; CARNEY BADLEY SPELLMAN, P.S., et al.,

Petitioners.

RESPONDENT HARRIS CREDITORS' ANSWER TO PETITION FOR REVIEW

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A. Introduction.

A lawyer may not appear and act on behalf of a client and then switch sides in the same case. RPC 1.9 prohibits an attorney acting against the interests of a former client in a substantially related matter "unless the former client gives informed consent, confirmed in writing." Petitioners, the lawyers retained by a liability insurer to represent the personal representative of the Taylor Griffith Estate, do not even cite, much less discuss, RPC 1.9, the rule the courts below correctly recognized disqualified them from challenging the personal representative they had formerly represented in the same action.

The Court of Appeals' decision affirming the trial court's disqualification order follows well-settled law governing the professional responsibilities of counsel retained by an insurer to their insured clients. Far from raising any grounds for review, former counsels' petition merely confirms that petitioners continue to act not in the interests of their current, or former, clients, but in the interests of the insurer who is paying them, contrary to *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986). This Court should deny review.

B. Restatement of Facts.

The Court of Appeals opinion fairly sets out the underlying facts and procedural history. Briefly, Taylor Griffith, age 16, was driving a pickup truck registered to his father and insured through his parents' insurance with Travelers Home and Marine Insurance, traveling from his father's landscaping business, where Taylor was employed and had been washing a company vehicle. (CP 2049) Taylor crossed the center line on State Route 202 and collided head-on with an SUV driven by Steven Harris and his wife of 50 years, Margaret. (CP 2029) Taylor and Mr. Harris were killed; Mrs. Harris was seriously injured. (CP 2029)

The Harris family could not obtain information about the Griffiths' insurance coverage and limits from Travelers even after they retained counsel. (CP 14-15, 1242) In December 2014, the Harris family filed suit against the Estate of Taylor Griffith and the Griffith parents, alleging the Griffith parents' liability for negligent entrustment and under the family car doctrine, seeking the joint and several liability of all defendants, and asserting that Travelers' refusal to respond to requests for coverage information or otherwise negotiate had prompted plaintiffs' decision to sue. (CP 20, 22)

Travelers assigned defense counsel at the Lewis Brisbois law firm to represent both the Griffith parents and Taylor's estate. (CP 988-89) That firm filed a joint Answer on behalf of all defendants admitting that the vehicle Taylor had been driving was registered to his father Kenneth and that Taylor was a permissive user. (CP 25-26; *see also* CP 2319) It does not appear that the defense counsel Travelers retained to jointly defend the Griffith parents and Taylor's Estate had (or have) ever explored or discussed potential conflicts between their clients. (CP 381-82)

The lawyers retained by Travelers to jointly represent the Estate and Griffith parents also failed to appoint either of Taylor's parents, the sole heirs of his intestate estate, or any other qualified individual, as personal representative. (Op. 2-3) Shortly before trial was scheduled to begin in the Harris family's tort action, the Harris plaintiffs exercised their right under RCW 11.28.120 as creditors of the Estate to have the court appoint a personal representative. (CP 1620) Over the objection of the Travelers-retained lawyers who were representing all the Griffith defendants in the tort action, a court commissioner appointed attorney Brad Moore as personal representative in December 2015. (CP 30-31) Mr. Moore was selected as personal representative for his expertise in insurance bad

faith law and because of the potential conflict between the interests of the Griffith parents and their son's estate. (Op. 3-4)

The Lewis Brisbois firm filed an amended Notice of Appearance in the tort action on behalf of the Griffith parents "and BRADLEY J. MOORE, as Personal Representative of THE ESTATE OF TAYLOR GRIFFITH." (CP 2254-56) (capitalization in original) Then Travelers-retained defense counsel refused to share internal case information with Mr. Moore, refused to follow his directions, and over his objection moved to revise the commissioner's order appointing him as personal representative of the Estate, on the ground that Mr. Moore is a "plaintiff's personal injury practitioner." (CP 902; Op. 4-5, 11)

After Mr. Moore's appointment and Lewis Brisbois' amended Notice of Appearance on his behalf, Travelers retained petitioners Michael King and Jacquelyn Beatty, who filed notices of association with Lewis Brisbois, appearing on behalf of both the Estate and the Griffith parents in the tort action. (CP 40, 1816) Shortly after appearing as co-counsel for all defendants, Mr. King expressly acknowledged to Mr. Moore that the Griffith defendants' interests were potentially in conflict. (CP 83, 119) Nevertheless, defense counsel neither sought nor obtained conflict waivers.

Instead, after the Harris plaintiffs voluntarily dismissed the Griffith parents from the tort action on the second day of trial, the trial court at the request of the plaintiffs asked Mr. King and Ms. Beatty to identify their client. (CP 80) They both affirmed in open court that they represented the Estate, and Mr. King thereafter argued and filed briefing in defense of the Estate against the Harris claims. (CP 2348; Op. 6) In contrast to petitioners' new appellate argument that they were mistaken in claiming to represent the Estate in response to the trial court's inquiry (Pet. 14, 20), at the time petitioners deliberately stated that they represented the Estate in order to remain at counsel table, and to "active[ly] participat[e] in the defense [of the Estate] going forward." (CP 567, 81)

Over the next few days, the conflicts between the mutually insured and represented Griffith defendants intensified. Ms. Beatty and Mr. King eventually filed Notices of Partial Withdrawal as counsel for the Estate in the tort action, and were allowed to withdraw as counsel for the Estate. (CP 783, 1508, 1527, 2748; Op. 6-7)

Ms. Beatty then filed a notice of appearance on behalf of the Griffith parents in both the tort action and the Estate probate action, and Mr. King filed a petition in the probate action to remove Mr. Moore as personal representative of the Estate, and "to undo his ultra

vires actions." (CP 799, 1140-45; *see also* CP 959) Mr. King and Ms. Beatty asserted that their "*sole mission*" was to force the removal of their former client, personal representative Moore. (CP 553) (emphasis in original)

On the motion of the Harris family and Mr. Moore as personal representative of the Estate, the trial court disqualified Mr. King and Ms. Beatty from representing the Griffith parents against the Estate under RPC 1.9(a) in April 2016. (CP 782) As the trial court recognized, "[t]hese clients' interests could not get any more adverse." (CP 784) The attorneys now petition for review of the Court of Appeals decision affirming the trial court's disqualification order.

C. Argument Why Review Should Be Denied.

1. The Court of Appeals decision is wholly consistent with RPC 1.9 and the principles requiring disqualification of an attorney who sues a former client.

a. An attorney cannot sue a former client; all doubts are resolved in favor of disqualification.

"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." RPC

1.9(a). If the conflict has not been waived, the attorney must withdraw. *See Discipline of Carpenter*, 160 Wn.2d 16, 26, ¶ 19, 155 P.3d 937 (2007) (attorney violated RPC 1.7 and 1.9 by initially representing two clients with conflicting interests and thereafter defending one of the clients in an indemnification action brought by the other client; no waiver of conflict absent informed written consent); *State v. Stenger*, 111 Wn.2d 516, 520-21, 760 P.2d 357 (1988).

Disqualification orders are reviewed for abuse of discretion. All doubts must be resolved in favor of disqualification, as an attorney's "conduct should not be weighed with hairsplitting nicety." *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 946, 468 P.2d 673 (1970).

b. The attorney-client relationship is between the attorney and an estate's personal representative.

"In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate." *Estate of Larson*, 103 Wn.2d 517, 520-21, 694 P.2d 1051 (1985) (citing *Estate of Peterson*, 12 Wn.2d 686, 123 P.2d 733 (1942)). As Mr. King conceded shortly after admitting in open court that he represented the Estate (CP 81, 567), Mr. Moore as personal representative represents the Estate, and Mr. King and Ms. Beatty as co-counsel for

the Estate, represented Mr. Moore. *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994).[1]

Mr. King and Ms. Beatty were not "mistaken." (Pet. 2, 14, 19) That an Estate may only act through its personal representative is not an open question. *Peterson,* 12 Wn.2d at 730. And this Court decidedly did not leave "open the question whether an attorney could represent [an] Estate against its personal representative" in *Trask.* (Pet. 18) This Court rejected a duty to estate *beneficiaries* by the attorney representing the personal representative of an Estate in *Trask,* citing *Larson* for the proposition that "in probate the attorney-client relationship exists between the attorney and the personal representative." 123 Wn.2d at 840. In doing so this Court clearly relied on the attorney's obligations to his client, the personal representative of the estate, noting "the unresolvable conflict of interest an estate attorney encounters in deciding whether to

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[1] Petitioners repeatedly claim they "sought to protect the Estate and its beneficiaries against Moore" (Pet. 6-7, 14, 17-18), but they in fact sought to protect the liability insurer from an insurance bad faith claim – the Estate's primary asset. Petitioners ignore that the personal representative's duty to marshal estate assets is owed not just to a beneficiary but to all those "beneficially interested in the estate" including its "valid creditors." *Estate of Wilson*, 8 Wn. App. 519, 527-28, 507 P.2d 902, *rev. denied*, 82 Wn.2d 1010 (1973); *Kerns v. Pickett*, 49 Wn.2d 770, 772, 306 P.2d 112 (1957) ("the power of executors to manage and control an estate exists *for the protection of creditors*") (emphasis in original).

represent the personal representative, the estate, or the estate heirs" that would otherwise exist. *Trask,* 123 Wn.2d at 845.

c. An attorney's words and actions can prove the attorney-client relationship, particularly where a liability insurer appoints defense counsel to represent an insured.

The attorney-client relationship "may be inferred from the parties' conduct *or* based upon the client's reasonable subjective belief." *Teja v. Saran,* 68 Wn. App. 793, 795, 846 P.2d 1375, *rev. denied,* 122 Wn.2d 1008 (1993) (emphasis added) (*citing Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)). Here, Mr. Moore (unsuccessfully) instructed his insurer-appointed attorneys to provide their case evaluations, not to seek his removal, not to limit the scope of the summary judgment on liability, and to agree to arbitration when it was clear they were unprepared for trial. (CP 51, 56, 381-83, 401-02, 491) He clearly thought his counsel should be acting on behalf of him and the Estate. Yet as the Court of Appeals correctly recognized (Op. 10), the represented party's subjective belief is not a necessary predicate to violation and disqualification under RPC 1.9(a). Nor could Mr. Moore's frustrations and objection to his insurer-retained attorneys' failure to follow his directions excuse counsels' failure to comply with RPC 1.9. (Op. 10-11)

In *Teja,* Division III held that the trial court erred in denying a motion to disqualify an attorney who had previously consulted with an individual about a business dispute and then appeared on behalf of the other party after litigation was commenced. 68 Wn. App. at 800. "[A]ttorney side switching undermines the integrity of the legal system in the eyes of the public;" nothing less would protect "the ethical purity of the legal system." 68 Wn. App. at 801. Petitioners do not cite, much less discuss, *Teja,* a case that refutes their claim that "in every other case that Beatty and King have found, regardless of jurisdiction," the client's subjective belief controlled the existence of the attorney-client relationship. (Pet. 10-11)

Petitioners' reliance on *Discipline of Jackson*, 180 Wn.2d 201, 322 P.3d 795 (2014) (Pet. 10 n.5) is particularly misplaced. In *Jackson*, the disbarred attorney argued "that there was no attorney-client relationship because the record is devoid of any evidence that North believed Jackson was his [transaction] lawyer," but the attorney had "made offers on various properties, negotiated contracts, and held funds" for North. 180 Wn.2d at 229, ¶ 78. Subjective belief may be required in cases like *Bohn* where, unlike here, there is no objective indicia of the creation of the attorney-client relationship. But the *Jackson* Court, citing *Bohn*, recognized

that "the attorney's words or actions" were relevant to the determination of the relationship, rejecting the argument that the client's subjective belief was controlling. 180 Wn.2d at 229, ¶ 78.

As in *Jackson,* there is objective evidence that petitioners represented Mr. Moore in his capacity as personal representative of the Harris Estate. Petitioners filed notices of association as co-counsel with Lewis Brisbois for all defendants, including "Bradley J. Moore, as Personal Representative of the estate of Taylor Griffith." (CP 36, 40, 48) They unequivocally affirmed to the trial court that they represented the Estate, both on the record and in briefing filed in the tort action after the Griffith parents had been dismissed, admittedly to remain as counsel for the Estate as the sole remaining defendant in the tort action. (CP 2348) For purposes of RPC 1.9(a), this conduct *by the attorneys* proves the attorney-client relationship with the Estate.

Reliance on such objective indicia of an attorney-client relationship is particularly justified where, as here, defense counsel is chosen by a liability insurer to represent an insured. In the insurance context, the insured may have never met insurer-selected defense counsel and may have no say in her selection, but defense counsel nonetheless owes a duty of loyalty to the insured client. *See*

Kruger-Willis v. Hoffenburg, 198 Wn. App. 408, 416-17, ¶¶ 16-19, 393 P.3d 844, *rev. denied*, 189 Wn.2d 1010 (2017) (Pet. 18). The Court of Appeals thus correctly held that "[a]s soon as Beatty and King filed their notices of appearance, they owed their client the duties discussed in *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986)." (Op. 11)

Though they fail to even cite *Tank* in their petition, the petitioner lawyers indisputably owed their duties of loyalty to Mr. Moore as personal representative of the Estate, not to the insurer who had retained them, under *Tank* and its progeny. The Bar advisory opinion relied upon by the Court of Appeals (Op. 12, quoting WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1578 (1994)) also correctly reflects the consequences of filing a notice of appearance and association as co-counsel by a lawyer retained by an insurance company to represent insureds whose interests then conflict. The Court of Appeals correctly held that RPC 1.9 prevents an attorney from appearing on behalf of a client and then acting against the client's interest in the same lawsuit.

d. An insurance attorney's claimed "mistake" in representing a client cannot excuse the attorney's subsequent attempt to sue the client.

Petitioner attorneys now claim that their deliberate assertions that they represented the Estate were somehow mistaken and should be "excused," because they are not "trusts and estates" lawyers. (Pet. 4, 6)[2] First, petitioners argued the opposite below in response to the trial court's request for additional briefing to address RPC 1.9, vociferously claiming that they could represent the Estate without being later foreclosed from removing the Estate's personal representative. (CP 1521-31) Second, excusing petitioners' claimed "mistake" would work a remarkable reversal not only of the fiduciary burdens placed on attorneys in representing their clients and their representations to the courts, but of an insurer's duty to defend

[2] Put more affirmatively, petitioners argue that they should not be bound by their affirmations of representation because they are insurance defense lawyers. Petitioners erroneously rely on *City of Goldendale v. Graves,* 14 Wn. App. 925, 929-30, 546 P.2d 462 (1976), *aff'd on other grounds,* 88 Wn.2d 417, 562 P.2d 1272 (1977) to argue that "attorneys are human, thus occasionally make mistakes." (Pet. 14, 20) In *Goldendale,* an attorney failed to note an appeal of a DUI conviction to Superior Court within 20 days of filing of the District Court transcript, as required by JCrR 6.03(b). 14 Wn. App. at 926. The appellate court found good cause to allow the appeal to go forward because counsel had complied with all other procedural deadlines, and missed this one deadline "through no intent or act of his own volition." 14 Wn. App. at 929. Here, to the contrary, petitioners' alleged "mistake" was substantive, pervasive, deliberate, and intended to protect the insurer that had retained them, not the insured client they represented.

under *Tank*. Petitioners cite no authority for the proposition that they should not be bound by their representations and actions, supposedly taken on behalf of the Estate, nor is there any. *See Discipline Proceeding Against Vetter,* 104 Wn.2d 779, 787, 711 P.2d 284 (1985) (no excuse to misconduct that disbarred attorney "failed to realize that as the attorney for the personal representative, he represented the . . . estate").

Nor does *Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 393 P.3d 844 (2017) (Pet. 18) support the claim that petitioners, having been retained by the *insurer* to represent the Estate, were not Mr. Moore's attorney given he was lawfully appointed as the Estate's personal representative. In *Kruger-Willis*, unlike here, the *plaintiff* claimed that insurer-retained defense counsel had no authority to act for the insured defendant in settling her tort claim. Unlike here, there also was no evidence that the defense attorney had acted contrary to his insured client's wishes. Petitioners also confuse the broad scope of representation with the authority to bind the client or perform particular acts within the scope of representation. *See* RPC 1.2. *Kruger-Willis* does not in any way support petitioners' claim that an attorney can act adversely to the client's expressed interests

and direction, or that the attorney can subsequently seek to have his client removed from his position. (Pet. 17)

In claiming to represent the Estate, the attorney petitioners represented Mr. Moore, the personal representative; they could not thereafter represent the Griffith parents in attempting to have their former client removed as personal representative. The trial court did not abuse its discretion in concluding that disqualification was the only proper remedy for the attorneys' violation of RPC 1.9(a); the Court of Appeals' opinion affirming that discretionary decision follows well-settled law governing attorneys' ethical responsibilities and disqualification, and raises no issue for further review under RAP 13.4(b).

2. Acting on information gained through RCW 2.44.030 does not "nullify" or "judicially override" the statute.

RCW 2.44.030 provides a statutory mechanism for "either the client or the opposing party" to ask the court to require an attorney to establish their authority "to start[] or pursue[] litigation." *Johnsen v. Petersen,* 43 Wn. App. 801, 806-07, 719 P.2d 607 (1986). It is one of a series of statutes in RCW ch. 2.44 defining an attorney's authority to act in court proceedings. Under these interrelated statutes, a court can compel an attorney to confirm the general

authority to appear on behalf of a client and the specific authority to take particular actions during the litigation, all at the risk to the attorney of being ordered to "repair the injury to either party" from any unauthorized activity. RCW 2.44.020. The Court of Appeals' decision does not in any affect these broad statutory rights or remedies.

The Harris family moved to compel proof of the authority of petitioners to act as contemplated by RCW 2.44.030; Mr. Moore as personal representative of the Estate joined in the motion, as his former lawyers now sought his removal as personal representative. (CP 1, 4, 990) The trial court thereafter relied on the representations of petitioner attorneys that they represented the Estate in ordering their disqualification from representing the Griffith parents in their (or their insurer's) "mission" to have Mr. Moore removed as personal representative.

The Court of Appeals' opinion does not even cite this procedural statute; it is an understatement for petitioners to admit that in this case "[n]o party has argued that RCW 2.44.030 violates the constitution." (Pet. 9) For this reason alone, the Court should decline to consider petitioners' claim that the Court of Appeals' decision "nullifies th[e] statute by judicial fiat." (Pet. 9)

Buchsieb/Danard, Inc. v. Skagit Cnty., 99 Wn.2d 577, 581, 663 P.2d 487 (1983) ("We continue to adhere to our rule that, except as to issues of manifest error affecting a constitutional right, issues not raised at the trial court or the Court of Appeals cannot be raised for the first time before the Supreme Court.") (citing *Pappas v. Hershberger,* 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975); *Peoples Nat'l Bank v. Peterson,* 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973)). As petitioners do not (and could not) claim a constitutional right to represent one client against another, RAP 2.5(a) has no application.

In any event, petitioners' argument that the Court of Appeals "nullified" a statute it doesn't even mention makes no sense. Neither the Court of Appeals' decision nor any fanciful extrapolation from it would support the petitioners' claim that their notices of appearance on behalf of the Estate would render their clients (or the courts) helpless to challenge their conduct as counsel thereafter. As the trial court's decision well illustrates, RCW 2.44.030 remains a powerful mechanism for a client or any other interested party to challenge the authority of an attorney who has switched sides or otherwise acted against her client's interests.

3. That petitioners have been sued for their violation of the RPCs is no basis for consideration of documents that were neither before the trial court or the Court of Appeals.

By separate order entered on December 18, 2017 (Ex. A), over three months before it issued its decision on the merits, the Court of Appeals denied petitioners' motion to "add documents to [the] record on appeal." Although they did not timely seek review of that interlocutory decision "within 30 days after the decision [was] filed," RAP 13.5(a), petitioners now rely on the same documents that the Court of Appeals prohibited them from putting in the record, attaching their motion in the Court of Appeals as Appendix C to their Petition (hereafter cited as "Motion").

The Court of Appeals correctly recognized that evidence of subsequent proceedings or lawsuits, even between the same parties, does not meet the rigorous criteria of RAP 9.11. *See Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003). Petitioners concede both that RAP 9.11's criteria "impose a strict limitation upon additions to the record" and that they can meet none of these criteria in the instant case, arguing instead that the Court should waive the requirements of RAP 9.11 altogether "to serve the ends of justice." (Motion 3-4) That argument is without merit, and undermined by the very case petitioners cite, *Washington Federation of State*

Employees, Council 28, AFL-CIO v. State of Washington, 99 Wn.2d 878, 884-86 n.4, 665 P.2d 1337 (1983) (waiving only the rule's former prohibition against consideration of additional evidence except on the Court's "own initiative;" "we grant[] the motion only upon determining that the six conditions of RAP 9.11(a) were satisfied.").

In the Court of Appeals, petitioners claimed that the rejected documents were relevant to their standing to appeal the disqualification order. (Motion 2) Respondents do not challenge the Court of Appeals' conclusion that the petitioners have standing because they were found to have violated the Rules of Professional Conduct, so that justification for admission is gone. And petitioners have never explained how the Court of Appeals' refusal to consider documents that admittedly do not meet the conditions of RAP 9.11(a) would somehow allow the Harris family to "get away with saying one thing to this Court and then something entirely different to the trial court in the same case." (Motion 4) Their accusation of hypocrisy rings hollow. The trial court disqualified petitioners, and the Court of Appeals affirmed, because they sought to remove the personal representative of the Estate after appearing and acting on his behalf in the underlying tort case. That is what the Harris family has been "saying" all along. The fact that, along with the insurer that was

directing their bad faith litigation decisions, disqualified counsel has now been sued by the Estate and by the Harris family is completely irrelevant to petitioners' right to sue their former client as counsel for the Griffith parents.

D. Conclusion.

This Court should deny review of the Court of Appeals decision affirming the trial court's order disqualifying petitioners.

Dated this 18th day of July, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 18, 2018, I arranged for service of the foregoing Respondent Harris Creditors' Answer to Petition for Review, to the Court and to the parties to this action as follows:

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CASE #: 75246-4-I
In re the Estate of: Taylor Griffith

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on December 18, 2017, regarding appellant's Carney Badley Spellman, P.S.; Michael B. King; Karr Tuttle Campbell; & Jacquelyn Beatty motion to add documents to record on appeal:

At the direction of the panel, the motion is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Exhibit A

SMITH GOODFRIEND, PS

July 18, 2018 - 3:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95861-1
Appellate Court Case Title:	In re the Estate of: Taylor Griffith
Superior Court Case Number:	16-4-00622-9

The following documents have been uploaded:

- 958611_Answer_Reply_20180718145051SC390473_9889.pdf
  This File Contains:
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Comments:

Respondent Harris Creditors' Answer to Petition for Review

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