

62646-9

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No. 62646-9-I

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

In re the Estate of,  
HERBERT WILLIAMS

Deceased.

TOM O'BRIEN, as AdmPR of the Estate of HERBERT aka Hubert WILLIAMS,  
Appellant/Cross-Respondent,

vs.

INSLEE, BEST, DOEZIER & RYDER, P.S., a Washington professional service corporation, and its DOE SUCCESSORS IN INTEREST; JOHN MILLER and JANE DOE MILLER, a marital community; MORROW & OTOROWSKI, LLP, a Washington limited liability partnership and its ROE SUCCESSORS IN INTEREST; and CHRISTOPHER OTOROWSKI and JANE DOE OTOROWSKI, a marital community; and JOHN or JANE DOE,

Respondents/Cross-Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Michael J. Fox, Judge  
Honorable Glenna S. Hall, Judge

JOINT REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

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## I. INTRODUCTION

In their opening brief, the respondents/cross-appellants (the Lawyers) observed that this case evokes BLEAK HOUSE with its probate setting and its interminable and convoluted procedural history. This court has the opportunity to put this matter to rest on appeal now. If this court does not sustain the trial court's dismissal of this action, it should reverse the April 4, 2008 order of Judge Hall denying the Lawyers' respective motions for summary judgment.

Judge Fox followed the ruling of Judge Hall and ordered O'Brien to step aside and substitute the statutory beneficiaries as parties plaintiff against the Lawyers. O'Brien failed to comply with those orders. The court correctly dismissed the case. The dismissal of the case should be affirmed. The parties have briefed those issues fully.

If it reaches the cross-appeal, however, the court should recognize that this case never had any merit. Under Washington law, neither O'Brien nor the statutory beneficiaries may sue the Lawyers; alternatively, the actions against Otorowski and against Miller are each barred by the statute of limitation; or, in the case of Mr. Miller, it is barred by *res judicata*.

For all of these reasons, the case should remain dismissed. This short brief is in strict reply to those issues raised by the appellant's

response to the cross-appeal. They are taken up in the order they were first presented.

## II. ARGUMENT

### A. MILLER AND OTOROWSKI OWED NO DUTY TO O'BRIEN.

[W]e hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries.

*Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994).

John Miller and Christopher Otorowski did not owe any duty to Tom O'Brien. That was the narrow issue laid before Judge Hall. While O'Brien keeps flashing the statutory beneficiaries before the court, they are not parties. Issues as to them are irrelevant when discussing O'Brien.

None of the factors in *Trask* apply to impose a duty on the Lawyers in favor of O'Brien. Assuming that Miller and Otorowski's carelessness was a factor in Tony's defalcation, did it hurt O'Brien? No, because he is not entitled to the money. Could Miller or Otorowski have foreseen harm to O'Brien? No, because he did not even exist as the personal representative in 2002. Consequently, they could have foreseen no harm to O'Brien. No connection exists between their conduct and a nonexistent injury.

Personal representatives need no protection from the attorneys of predecessor personal representatives. Those attorneys need not be

burdened with the possibility that a new personal representative might hold them to account for their loyalty to his predecessor.

**B. MILLER AND OTOROWSKI DID NOT OWE A DUTY TO THE STATUTORY BENEFICIARIES.**

The issue of duty to the statutory beneficiaries is a different issue from the duty owed to O'Brien. If, however, there were any question that the cases cited by O'Brien and his attempts to analogize with guardianship cases are wrong, this case should prove it.

O'Brien devotes significant briefing jabbing at Tony's lawyers. In his Brief, O'Brien chides them for a catalog of supposed wrongs: Failing to burden Tony with a larger bond, Reply Brief of Appellant/Cross-Respondent at 9; defending Tony from the attacks of his siblings and their parents, *id.* at 10, 11, 14, 15-16; failing to allocate the wrongful death proceeds even though Herbert's heirs were still in dispute, *id.* at 10-11; failing to keep the court informed of the non-intervention probate, *id.* at 12, 14; knowing Tony had serious health problems, *id.* at 12, 13; ensuring that legal staff was being publicly respectful as to the Tony, *id.* at 12-13, encouraging the client to diligently close the probate, *id.* at 13, 16, 17, 19; and having to nag Tony for payments, *id.* at 14-15, 16-17.

It takes little effort to put a positive spin on what O'Brien now attempts to characterize as negligence, self-dealing, and aiding and

abetting. If nothing else, it demonstrates the palpable burden on the profession.

Any attorney who has been in practice for any length of time has had a client like Tony: he cannot complete discovery requests, will not keep appointments, does not pay the bill, and has a large bucket of excuses from which to draw.

The law should not evolve in such a fashion that the lawyer for such clients abandons them, assumes they are crooks, “rats them out” and stops advocating their cause because they are less than perfect clients. After all, most people wind up in an attorney’s office because something is wrong and they need legal help. Lawyers represent the guilty and the innocent and those who fall along the spectrum in between.

Advocating their clients’ position is precisely what Miller and Otorowski did. “[T]he unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.” *Trask*, 123 Wn.2d at 845.

Otorowski followed the instructions from his client in conjunction with the client’s probate lawyer. His engagement ended with the success of a settlement for a significant sum. He had no further involvement in the estate.

Miller had the direct, long-term relationship with Tony Williams that is controlled by the unequivocal holding in *Trask*. A duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate's beneficiaries.

**C. STATUTE OF LIMITATIONS.**

The only difficulty in arguing the statute of limitations defense, in this case is identifying the plaintiff who should be time-barred. As with the other aspects of the appellate briefing now, the plaintiff to whom the duty is supposedly owed is a constantly moving target.

Below Miller took the position that if it is the personal representative to whom the duty is owed, that was Tony, and he certainly knew when bad things happened because he did them. O'Brien was not even around, so how could Miller and Otorowski even owe him a duty?

The statutory beneficiaries are not and were not parties to this action so what bearing does their knowledge even have on the issue? If there is a statute of limitation at all, any tolling issue is when "the client discovers" the lawyers have erred. *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976). If O'Brien stepped into Tony's shoes, why may he hide behind the knowledge or lack of knowledge of Herbert's children? Their knowledge becomes irrelevant.

Christopher Otorowski was finished with this case in January of 2002, over five years before this action was commenced. He did nothing to hide anything from anyone; and now he is accused of not complying with SPR 98.16W. Miller zealously represented Tony's interests and now he finds himself sued by a complete stranger. These points have been thoroughly briefed.

*Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007) analyzes the tolling of statutes of limitations in actions prosecuted by a personal representative. In *Atchison* the decedent passed away in June 2000 as a result of lymphoma. The personal representative sought damages from the decedent's employer for wrongful death, alleging that the employer negligently caused the lymphoma. The personal representative was the decedent's only child and most immediate next of kin. At the time of the decedent's death, however, the child was only 15 years old. In 2003, the child reached the age of majority. In 2005, she was appointed personal representative of the decedent's estate. In 2006, more than three years after the decedent's death but within three years of attaining majority, the child Kaela filed the wrongful death action. The superior court dismissed the case. The Supreme Court affirmed, holding the statute of limitation was not tolled during the child's minority:

The tolling statute applies only to “a person entitled to bring an action,” RCW 4.16.190, and the personal representative is the only person who fits that requirement. At the time the action accrued, Kaela could not have been appointed personal representative, she could not have been “entitled to bring [the] action,” and thus we conclude that the tolling statute cannot apply.

*Atchison*, 161 Wn. 2d at 380, ¶ 16 (emphasis omitted).

Only Herbert’s minor children were protected by SPR 98.16W, and there is no tolling during their minority. They were also both represented by guardians *ad litem*. The only party plaintiff in this case is O’Brien. O’Brien was not the entitled to bring an action against anyone when Tony misappropriated money. The statute of limitations was not tolled while O’Brien was not appointed, because he was not “entitled to bring an action.”

While Judge Hall may have thought that made no sense, it is the law. It does make sense from the standpoint of defendants who are alleged of failing to exercise care over matters that happened long ago.

**D. RES JUDICATA BARS A CLAIM AGAINST JOHN MILLER AND INSLEE BEST.**

O’Brien misunderstands John Miller’s defense on appeal. The claim of *res judicata* not only bars claims to recover John Miller’s fees but claims for malpractice as well. O’Brien’s only real defense is that the judgment entered against Tony in the estate proceedings was not a final judgment. That certainly has not been O’Brien’s claim all along. Section

8 of his TEDRA petition (CP 728-29) shows that he collected on the judgment, and that the judgment was modified and corrected about two years after it was entered. O'Brien has very much considered the judgment final. In a sense he is a judgment creditor.

A judgment such as this for an attorney's fees, even if taken by default, is a bar to a malpractice claim later made against the attorney. While the issue has not been specifically addressed in Washington, any of a number of courts have acted on this issue and those which recognize the rule of mandatory counterclaims hold that if a client allows judgment to be taken against him for fees, he is later barred from claiming malpractice. John Miller received judgment against O'Brien for his fees and O'Brien failed to timely make a motion to set aside that judgment but rather enjoyed the fruits thereof and now complains that he should have another shot at John Miller.

A leading case in this area is *Brunacini v. Kavanagh*, 117 N.M. 122, 869 P.2d 821 (1993), *cert. denied*, 870 P.2d 753 (1994). There the attorney sued for his legal fees and the client failed to assert any claim for legal malpractice.

In the present case the claim for malpractice and the claim for legal fees have a common origin (the opinion letter) and a common subject matter (the performance of legal services). The two claims are logically related, and, absent some other consideration, the claim for legal malpractice

was a compulsory counterclaim to the Law Firm's claim for legal fees.

869 P.2d at 825. By failing to raise the claim of malpractice as a counterclaim in the action for fees, the plaintiff's claim was barred. *See Hoffenberg v. Hoffman & Pollok*, 288 F. Supp. 2d 527, *recons. denied*, 296 F. Supp. 2d 504 (S.D.N.Y. 2003); *Chai Properties Corp. v. Carb, Luria, Glassner, Cook & Kufeld*, 288 A.D.2d 44, 733 N.Y.S.2d 336 (2001).

This can be stated another way, as illustrated by the RESTATEMENT (SECOND) JUDGMENTS §22 (1982), which provides that a claim is barred if it would nullify the initial judgment or would impair the rights established in the initial action.<sup>1</sup> Our Supreme Court has accepted this Restatement in *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 863, 726 P.2d 1 (1986).

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<sup>1</sup> § 22 Effect of Failure to Interpose Counterclaim

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

O'Brien knew from the day he was appointed that Tony had misappropriated estate funds, and he knew that John Miller was his attorney. He knew that, as to the minors, none of the funds had been placed in a blocked account; he knew that Tony's bond was \$5,000.00; he knew that John Miller had a judgment against the estate for the balance of his fee; and he had every fact that he needed to assert a claim against John Miller, if in fact such a claim existed. He even paid a portion of the judgment to Miller. He did not do it, and he is barred by *res judicata* from raising it now.

### III. CONCLUSION

If this court does not sustain the trial court's dismissal of this action, it should reverse the April 4, 2008 order denying the Lawyers' respective motions for summary judgment. Under Washington law, neither O'Brien nor the statutory beneficiaries may sue the Lawyers; alternatively, and for a number of reasons, the actions against Otorowski and against Miller are each barred by the statute of limitation; or, in the case of Mr. Miller, the claims are barred by *res judicata*.

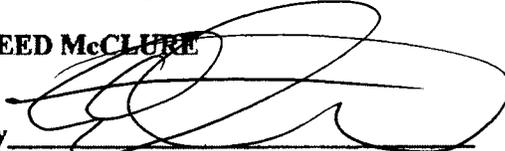
DATED this 26<sup>th</sup> day of August, 2009.

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