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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Court of Appeal Cause No. 327043

IN THE COURT OF APPEALS, DIVISION III, OF THE STATE OF WASHINGTON

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WESLEY B. AMES and STANLEY R. AMES, Appellants

v.

DARLEEN AMES and ARLETA J. PARR, Respondents

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APPEAL BRIEF

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### **III. INTRODUCTION AND RELIEF REQUESTED**

This case is a result of the actions of Respondents/Defendants, Darleen Ames and Arleta J. Parr in interfering with Appellants Wesley Ames' and Stan Ames' property insurance contract by falsely imprisoning the insurance agent. The direct result of Respondents' contract interference was non-renewal of the insurance contract with attendant need to obtain replacement insurance coverage at dramatically increased insurance premiums and with added legal costs.

Appellants/Plaintiffs request this Court reverse the trial court's dismissal of the action. Due to the clear prejudice exhibited by the trial court judge against hearing Appellants'/Plaintiffs' cause of action, Appellants further request the case be remanded to a different judge.

### **IV. ASSIGNMENTS OF ERROR**

A. The trial court erred in ruling Appellants/Plaintiffs did not have standing to bring the action for tortious interference with Appellants' property insurance contract and refusing to correct the error on reconsideration.

B. The trial court erred in ruling Appellants' claim for gross negligence was barred by collateral estoppel and refusing to correct the error on reconsideration.

C. The trial court erred in ruling Appellants' claim for gross negligence was barred by judicial estoppel, and refusing to correct the error on reconsideration.

## **V. STATEMENT OF THE CASE**

Appellants Wesley B. Ames ("Wes") and Stanley R. Ames ("Stan")<sup>1</sup> own the remainder interest in the real property located at 3885 Haverland Meadows Road, Valley, WA 99181 consisting of about 160 acres of farmland and forested land, including the house and farm buildings thereon as well as farm equipment, farm vehicles, and farm tools and supplies (the "Farm"), as evidenced by recorded Deed.

Throughout September, 2011, Wes and Stan had an insurance contract in force through insurance agent, Fran Jenne, to provide insurance coverage for certain assets on the Farm. During a review of insurance coverage for the Farm, Stan Ames became aware there were significant assets on the farm which had not been previously insured by Roy and Ruby Ames, but which should be insured.

On September 14 or 15, 2011, the insurance agent, Fran Jenne, went to the Farm to evaluate additional improvements on the Farm for possible added insurance coverage. Upon arriving on the Farm, Fran

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<sup>1</sup> To avoid confusion between multiple individuals having the same last name, first names will be used in this brief.

Jenne went to the house, told the residents, Roy and Rubye Ames why she was there, and received their approval. Fran Jenne then began her evaluation, including taking pictures of the property and improvements.

Shortly after beginning, Ms. Jenne observed Darleen Ames (“Darleen”) arrive in a vehicle and then observed one of the vehicles being moved to block Ms. Jenne’s departure. Upon observing her exit being blocked and observing the behavior of Arleta Parr and Darleen Ames, Ms. Jenne felt very uneasy with the developing circumstances. As a result, Ms. Jenne requested the car be moved so she could leave and returned to her car without performing further work. The blocking vehicle was not moved.

After she entered her vehicle, Ms. Jenne locked the car doors and called 911 to report the situation to the Sheriff’s Department and request assistance.

While Ms. Jenne was on the telephone with the 911 Operator, Arleta Parr came to the car and demanded identification. Ms. Jenne showed her identification through the closed car window and again asked them to move the car so she could leave, and told them she was on the phone with 911.

Arleta told Ms. Jenne to delete the photos she took, and if Ms. Jenne would delete the photos she took, she MAY be allowed to leave.

Ms. Jenne told Arleta Parr and Darleen Ames she would wait for the authorities to arrive, which she did. Following the deputy's arrival, he inquired into the situation and told Ms. Jenne she was free to go as she wished, and advised Arleta Parr and Darleen Ames they were really pushing it.

Throughout the entire episode, Arleta Parr and/or Darleen Ames were on a cell phone call, apparently coordinating their actions with a third party, apparently Darleen's husband, Randall Ames.

By intentionally blocking the only exit from the Farm and refusing to remove the blockage when requested, Arleta Parr and Darleen Ames committed criminal False Imprisonment of Ms. Jenne. See throughout Ex. E in CP at 383-676 for description of events of the false imprisonment..

Arleta Parr and Darleen Ames each separately admitted their illegal actions in sworn Declarations signed October 13, 2011 and filed on October 14, 2011 in the Washington State Superior Court in and for the County of Stevens, Case No. 2011-2-00373-4, but each tried to excuse her clearly criminal actions by stating she did not understand her conduct was illegal. Ex. G and H respectively in CP at 383-676.

In a then-concurrent criminal case, Darleen's husband, Randall Ames, was charged with 4<sup>th</sup> Degree Assault, but was able to avoid a conviction by negotiating and accepting a Stipulated Order of

Continuance. Darleen Ames used the same vehicle of the SOC to avoid criminal prosecution for the false imprisonment by simultaneously negotiating an agreement from the prosecutor handling her husband's Assault case in Stevens County, Washington to not pursue felony false imprisonment charges against her. CP at 205-207.

As a direct result of Ms. Jenne's concerns for her personal safety caused by her false imprisonment, Ms. Jenne stated she was not comfortable returning to the Farm so long as Randall Ames, Darleen Ames, and/or Arleta Parr have any presence on the Farm and would not allow another member of her staff go to the Farm. Therefore, Ms. Jenne refused to work with Stan and Wes as insurance agent any longer. See Ex. E in CP at 383-676.

Furthermore, as a direct result of the deliberate interference with the business functions of the insurance agent, and of Randall Ames' and Darleen Ames' complete failure to maintain or repair buildings, equipment, and/or fences on the Farm, Randall Ames, Darleen Ames, and Arleta Parr have interfered with the insurance contract, resulting in non-renewal of the insurance coverage.

Ms. Jenne further indicated she was uncomfortable recommending any other insurance company provide insurance coverage for the farm so

long as Randall Ames, Darleen Ames, and/or Arleta Parr have any presence on the farm. See Ex. E in CP at 383-676.

As a direct result of the joint criminal actions of Arleta Parr and Darleen Ames falsely imprisoning the insurance agent and thereby interfering with the insurance contract, and the refusal of Darleen Ames and her husband, Randall Ames, to effect necessary repairs and improvements, renewal of the insurance contract was refused. Stan's and Wes' farm insurance coverage therefore terminated at the renewal date, effective November 12, 2011. Stan and Wes were therefore forced to obtain high risk insurance at substantially higher cost, paying approximately \$2000 more for insurance than before Respondents' interference, and were subjected to at least \$5500 in other costs connected with obtaining replacement insurance and addressing the results of the false imprisonment of the insurance agent.

The Trial Court clearly expressed its reluctance to hear this case, emphasizing it was between family members and stating the courts cannot provide desired vindication in such disputes. RP at 46-47. However, larger interests also apply, including the always-present interest that the courts should properly and fairly apply the law. Appellants respectfully submit the trial court allowed the narrow interests of docket control and

avoiding involvement in a potentially messy dispute to lead it into clearly erroneous findings of fact, conclusions of law, and legal ruling.

In order to simplify the case and issues, Appellants/Plaintiffs withdrew Count II: Conspiracy of the Complaint or accepted its dismissal. CP at 138.

## **VI. LAW AND ARGUMENT**

### **A. The trial court erred as a matter of law when it ruled Appellants did not have standing to bring their interference with contract claim concerning interference with their own insurance contract.**

The court below committed clear legal error in ruling Appellants Stan Ames and Wes Ames did not have standing to bring their interference with contract and conspiracy claims. CP at 123. As a question of law, Washington appellate courts review questions of standing *de novo*. *Spokane Airports v. Rma, Inc.*, 206 P.3d 364, 369, 149 Wn. App. 930 (Wash. App., 2009)(citing *Pinecrest Homeowners Ass'n v. Glen A. Clonninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004)).

#### **1. Appellants Have Standing to Bring Interference with Contract Claims Because Appellants are Parties to the Contract.**

The contract at issue in the present interference with contract claims was an insurance contract covering certain assets

on the Ames Farm. The trial court appears to have been confused, with its comments and decision suggesting the Court may have believed the claim was, instead, for false imprisonment. RP at 46-47. In their Motion for Reconsideration, Appellants agreed they would not have standing for a claim for false imprisonment of the insurance agent by Respondents (CP at 138), but there is no such claim in this case. See CP at 1-9. Respondents' false imprisonment of the insurance agent, Fran Jenne, was the element of improper action through which Respondents interfered with Appellants' insurance contract and with Appellants' firm business expectation the insurance contract would be renewed as usual, thereby making Respondents' contract interference tortious.

As stated by the Washington Supreme Court:

The fundamental premise of the tort--that a person has a right to pursue his valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party--has been crystallized and defined in Restatement, Torts § 766, as follows:

Except as stated in Section 698 [betrothal promises], one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

- (a) perform a contract with another, or
- (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

*City of Seattle v. Blume*, 134 Wn.2d 243, 265, 947 P.2d 223 (1997).

The nature of the tort of interference with contract dictates that standing to bring suit is governed by the same requirement of cognizable interest in the contract as exists for an action for breach of contract. For the trial court to analyze Appellants' standing as if the claim were for false imprisonment instead of for tortious interference with contract is plainly and simply an inexplicable clear legal error, which produced the Court's erroneous ruling. See, e.g., RP at 49-50.

It is axiomatic that the in order to have standing to bring a claim, the party must have sufficient legal interest in the matter. For claims in involving contracts, generally the only parties with sufficient legal interest are the parties to the contract and intended third party beneficiaries. *West v. Thurston County*, 183 P.3d 346, 347, 349, 144 Wn. App. 573 (Wash. App., 2008) (citing *Miller v. U.S. Bank of Washington, N.A.*, 865 P.2d 536, 72 Wn.App. 416 (Wash. App., 1994)). See also *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 277 P.3d 18, 32, 168 Wash.App. 56 (Wash. App., 2012).

The same logical connection and sufficient legal interest is also present between parties having standing and a claim in tort for tortious interference with contract. That is, a party bringing an interference with contract claim must be a party to the underlying contract or an intended third party beneficiary because those are the only parties having the requisite interest in the matter.

In this case, it is uncontested that Appellants had an insurance contract covering certain assets on the Ames Farm. It is further uncontested that after the incident during which Respondents blocked the insurance agent, Fran Jenne, from leaving the Ames Farm, Appellants received a notice the insurance contract would not be renewed. The parties to the insurance contract were the insurance company providing the insurance coverage and the Appellants, Wesley Ames and Stan Ames (as the real party in interest because he is the sole owner of Ames Development Corp.) The insurance agent, Fran Jenne, was not a party to the contract and therefore had no legally protectable interest in the contract or in its renewal and therefore also did not satisfy the requirements for intended third party beneficiary standing. *Mearns v. Scharbach*, 12 P.3d 1048, 1055, 103 Wash.App. 498 (Wash. App., 2000).

Once again, the insurance agent, Fran Jenne, was not a party to the contract and not an intended third party beneficiary, and therefore did not have standing to bring an interference with contract action, even though she could have brought an action for false imprisonment. As parties to the contract, Appellants, Stan Ames and Wes Ames did and do have standing to bring their claim for tortious interference with contract (also referred to as intentional interference with contract), and also suffered damages as a result of Respondent' wrongful interference.

As a result, the trial court's flawed approach produced a result which is a logical contradiction and is directly contrary to controlling law. The trial court's decision would effectively eliminate the tort of intentional interference with contract, at least whenever the tortfeasor's wrongful actions involved wrongful action against an agent for another party to the contract.

That is, the trial court held the interference with contract claim was personal to the insurance agent, and Appellants therefore did not have standing to bring the claim. CP at 123. On the other hand, it is clear the insurance agent did not have standing to bring the interference with contract claim. Thus, it is a logical and legal impossibility for the tortious interference with contract

claim to be personal to the insurance agent, Fran Jenne as asserted by the trial court (RP at 50).

Therefore, Appellants respectfully request this Court reverse the dismissal by the lower court and enter the legally correct ruling that Appellants have standing to bring the tortious interference with contract claim in this Action.

**B. Collateral Estoppel Does Not Apply to the Present Action Because There Was No Requirement to Bring the Claim in the Stevens County Case and the Issue of Respondents'/Defendants' Liability Was Not Considered by the Stevens County Court.**

Collateral estoppel cannot appropriately be applied in this case. On appeal, the trial court's decision to apply collateral estoppel to dismiss the negligence claim in this action is reviewed *de novo*. *World Wide Video of Washington, Inc. v. City of Spokane*, 103 P.3d 1265, 1273, 125 Wn. App. 289 (Wash. App., 2005) (citing *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004)).

Collateral estoppel applies only to issues which were actually and necessarily determined in a prior action. *Christensen v. Grant County Hosp. Dist.*, 96 P.3d 957, 961, 152 Wn.2d 299 (2004); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-508 (1987) (citing *Seattle-First National Bank v. Kawachi*, 91 Wn.2d

223, 228 (1978); *Nielsen v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262 (1998); *Reninger v. State*, 134 Wn.2d 437, 449 (1998). As the parties asserting collateral estoppel, Respondents/Defendants bore the burden of establishing all of the requirements for collateral estoppel. *Christensen v. Grant County Hosp. Dist.*, 96 P.3d at 961. Respondents failed to do so, with the result the trial court's application of collateral estoppel was error.

Further, the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue. *Nielson v. Spanaway General Medical Clinic, Inc.* 135 Wn.2d 255, 262 (1998) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561; *Rains v. State*, 100 Wn.2d 660, 665 (1983)).

The relevant issues in this case are whether Respondents falsely imprisoned the insurance agent, Fran Jenne, and the consequences of Respondents' actions. These issues were not actually and necessarily determined in the Stevens County Case, and there is no evidence indicating these particular issues were previously litigated. Therefore, the initial basic requirements for application of collateral estoppel are absent. The fact that the Stevens County Superior Court allocated responsibility for future insurance using other bases (i.e., responsibility of Life Tenants and

who had control of insurability) is irrelevant to a collateral estoppel analysis.

Further well-established requirements for collateral estoppel in Washington are:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication; and
- (4) precluding relitigation of the issue will not work an injustice.

*Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 731 (2011)

(citing *Clark v. Baines*, 150 Wn.2d 905, 913 (2004));

*Shoemaker v. City of Bremerton*, 109 Wn.2d at 507.

**(1) Identical issue:** The requirement for identical issues is not met. The present action principally involves the issues of (a) whether Respondents falsely imprisoned the insurance agent; and (b) whether Respondents' false imprisonment of the insurance agent caused the additional insurance and other costs to Appellants. See CP at 1-9. These issues were never addressed in the Stevens County Case no matter how Respondents attempt to

distort the proceedings. In part, these issues were never litigated in the Stevens County Case because they concerned actions by individuals who were not parties in the Stevens County Case, and further because the corresponding claims were separate from the Stevens County Case claims and were therefore not required to be brought in the Stevens County Case, e.g., as compulsory counterclaims under CR 13 or third party claims under CR 14.

In contrast, the issues in the Stevens County Case involved resolution of the ownership and control of the Farm between the present Appellants and present third parties, Roy and Ruby Ames. Insurance and current Respondents' false imprisonment of the insurance agent were only peripheral interlocutory matters and did not at all concern the liability of Respondents for the results of their illegal action. Thus, the issues are not identical and this requirement for application of collateral estoppel is not met.

**(4) Precluding relitigation will not work an injustice:**

This requirement means the party must have had a full and fair opportunity to litigate the issue in a neutral forum. *Nielson v. Spanaway General Medical Clinic, Inc.* 135 Wn.2d at 265 (citations omitted) (emphasis added). Later, the Washington

Supreme Court expanded on the question of injustice and what constitutes a “full and fair opportunity” by stating:

The injustice component is generally concerned with procedural, not substantive irregularity. This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly, applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum.

*Christensen v. Grant County Hosp. Dist.*, 96 P.3d 957, 961, 152 Wn.2d 299 (Wash., 2004) (internal citations omitted).

Contrary to the requirements for collateral estoppel,

Respondents were subjected to procedural unfairness from the very beginning of the Stevens County Case through Judge Nielson’s violation of CR 65(b) by ordering a TRO for 39 days despite the limit of 14 days demanded by CR 65(b). CP at 80-84 (see particularly p.4 of the order at lines 21-23). The direct result of Judge Nielson’s deliberate violation of CR 65(b) is that Stan Ames and Wes Ames were wrongfully locked into Judge Nielson’s court even after being subjected to Judge Nielson’s clear bias in the very first hearing in the case. Judge Nielson’s violation of CR 65(b) therefore pervasively contaminated subsequent proceedings,

including the interlocutory motion hearings apportioning insurance cost responsibility between current Appellants and Roy and Ruby Ames. Judge Nielson's pervasive bias is evident from the observations by multiple third parties who witnessed the court proceedings in Stevens County Superior Court and who formed a firm recognition of judicial bias by Judge Nielson. Ex. 7 within CP at 313-370. Indeed, Appellants and others present during motion hearings and during trial even observed courtroom employees shaking their heads in disbelief at some of Judge Nielson's rulings against the present Appellants. See e.g., Declaration of Delores Ward in Ex. 7 within CP at 313-370. Therefore, applying collateral estoppel against Appellants to any issues in the present case would be unjust because Appellants were not afforded the fair process to which they were entitled.

Furthermore, the limits expressed in *Christensen v. Grant County Hosp. Dist.* are clearly present here in this case. The Stevens County Case involved only a peripheral interlocutory motion hearing which did not involve the present Respondents. As a result, *Christensen* shows that the interlocutory motion hearing could not have constituted a "full and fair opportunity to litigate". Appellants did not have adequate opportunity to conduct proper

discovery, to call and cross-examine witnesses, and to test all evidence in the manner provided in a trial on the merits.

In addition, due to the peripheral nature of the interference with contract by the present Respondents to the claims in the Stevens County Case, Appellants did not have motivation to litigate the matter vigorously in the Stevens County Case in a manner consistent with a proper surrogate for trial at required for application of collateral estoppel.

For collateral estoppel, a final judgment resulting from a trial or at least a quasi-trial such as an arbitration proceeding or a sufficiently adjudicatory administrative proceeding is required. Appellants find no case holding that a simple interlocutory motion hearing constitutes a “full and fair opportunity to litigate”. Therefore, even to the extent current Respondents’ actions in blocking the insurance agent from leaving the Farm was raised in an interlocutory motion hearing, collateral estoppel would not apply because a motion hearing cannot constitute a “full and fair opportunity to litigate” the issue under controlling law.

For the reasons just stated, collateral cannot be properly applied and Appellants request the trial court’s application of collateral estoppel to dismiss the negligence claim be reversed.

**C. Judicial Estoppel Cannot Properly be Applied to the Present Action Because Appellants Had Not Previously Relied on a Clearly Inconsistent Position, There Was No Risk of Deception of the Court, there are Changed Facts, and No Unfairness to Respondents Exists.**

A trial court's decision with respect to the application of judicial estoppel is reviewed for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

The U.S. Supreme Court explained judicial estoppel in the following term: "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)(emphasis added). The Supreme Court continued, stating that "this rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory

argument to prevail in another phase." *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000)). Further, "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") *Id.* (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* 4477, p. 782 (1981)).

The general context for application of judicial estoppel is pointed out above, and it is important to recognize judicial estoppel should only be applied subject to particular constraints. Those constraints have been expressed numerous times by the U.S. Supreme Court, the Washington Supreme Court and Washington appellate courts. The U.S. Supreme Court has provided controlling precedent, together with better explanation of some of the primary factors governing whether judicial estoppel should be applied in a particular case.

Quite notably, the function of judicial estoppel is to preserve the integrity of the courts. *New Hampshire v. Maine*, 532 U.S. 742 (2001) ("courts have uniformly recognized that its purpose is 'to protect the integrity of the judicial process'" citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982);

also citing *In re Cassidy*, 892 F.2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protect[s] the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts' " (quoting *Stretch v. Watson*, 6 N. J. Super. 456, 469, 69 A. 2d 596, 603 (1949)). Thus, judicial estoppel is not a mechanism to reach a desired result or to benefit a particular party where the integrity of the courts is not threatened.

The U.S. Supreme Court in *New Hampshire v. Maine* also identified three factors typically used for analyzing whether judicial estoppel applies. *New Hampshire v. Maine*, 532 U.S. 742. These three factors have been referred as primary factors or core factors by Washington courts. See, e.g., *Skinner v. Holgate*, 173 P.3d 300, 303, 141 Wn. App. 840 (Wash. App. 2007). Each of these three primary factors will be indicated below as stated by the U.S. Supreme Court in *New Hampshire v. Maine*.

**First Judicial Estoppel Factor:** The first factor is that "a party's later position must be "clearly inconsistent" with its earlier position. *New Hampshire v. Maine*, 532 U.S. 742 (citing *United*

*States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997).

Controlling and persuasive court application of the term “clearly inconsistent” makes it clear that the earlier and later positions must be wholly inconsistent, with no alternative meanings and co-extensive in scope. Reviewing Washington courts do not appear to have provided clarity on this point, but very relevant persuasive authority is provided from other jurisdictions. For example, the First Circuit Court of Appeals stated “the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive.” *Guay v. Burack*, 677 F.3d 10, 56 Bankr.Ct.Dec. 89 (1st Cir., 2012). Other courts addressing the meaning of the term “mutually exclusive” have applied similar meanings.

Several facts support a finding that Respondent(s) were agents for Roy and Rubye Ames for only limited purposes. For example, Arleta Parr has testified she handles some of the bill paying for Roy and Rubye Ames; in so doing Arleta Parr appears to be acting as an agent. On the other hand, as exhibited by the

conduct of Arleta Parr in impeding and harassing Appellants during Appellants' court-authorized inspection visit to the Ames Farm on August 18, 2013, Arleta Parr was not acting as agent, but instead was acting independently of Roy and Rubye Ames in concert with Randall Ames.

Thus, in the present case, the limited scope of agency on behalf of Roy and Rubye Ames by Respondents precludes a finding that Appellants' reference to Respondents being agents makes Appellants' present claims "clearly inconsistent." Because Appellants' position in the present case that Respondents were independent actors when they falsely imprisoned the insurance agent, Fran Jenne, is not "clearly inconsistent" with the prior declaration which referred to Respondents as agents, the first factor militates strongly against application of judicial estoppel.

**Second Judicial Estoppel Factor:** The second factor is that "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *New Hampshire v. Maine*, 532 U.S. 742 (citing *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (CA6 1982)). If

the party did not succeed in a prior proceeding, the party's later inconsistent position introduces no "risk of inconsistent court determinations" and therefore does not threaten judicial integrity. *New Hampshire v. Maine*, 532 U.S. 742 (citing *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991); *Hook*, 195 F.3d, at 306; *Maharaj*, 128 F.3d, at 98; *Konstantinidis*, 626 F.2d. at 939).

Critically, it is not sufficient merely that the party prevailed in the prior proceeding. Instead, the party must have prevailed based on the prior clearly inconsistent position. In making this point, the U.S. Supreme Court stated that “[a]s we explained in *New Hampshire*, that doctrine typically applies when, among other things, a party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.” *Reed Elsevier Inc. v. Muchnick*, 130 S. Ct. 1237, 176 L.Ed.2d 18 (2010)(quoting *New Hampshire v. Maine*, 532 U.S. 742, 750)(internal quotation marks omitted; emphasis added). This same point was also emphasized by a Washington State Court of Appeals, which stated “[a]s part of this factor, the party must

convince the court to accept the previous position taken by the party. *Chd, Inc. v. Taggart*, 220 P.3d 229, 234, 153 Wn. App. 94 (Wash. App., 2009)(citing *New Hampshire*, 532 U.S. at 755; additional citations omitted). Furthermore, the prior proceeding must have actually adjudicated the prior representation; it is not enough that the prior representation was made. *Kellar v. Estate of Kellar*, 172 Wash.App. 562, 291 P.3d 906, 915 (Wash. App., 2012).

Applying the above law to the present matter, the Stevens County Superior Court did not utilize Appellants' statement the present Respondents were agents of Roy and Rubye Ames in formulating its decisions. None of the evidence before this Court, specifically including all documents submitted by Respondents/Defendants, show any reliance by the Stevens County Superior Court on Respondents' agency status or lack thereof. There is simply no evidence that the Stevens County Superior Court either accepted or relied on Appellants' statement that Respondents were agents, as is clearly necessary under the *Reed Elsevier* and *Chd, Inc.* and *Kellar* cases, among others. As a direct result, the trial court's application of judicial estoppel is clearly erroneous in this case.

Also very importantly, Appellants did not prevail in the prior action based on convincing the Stevens County Superior Court that Respondents acted as agents for Roy and Rubye Ames when Respondents blocked the insurance agent from leaving the Ames Farm, and actually did not prevail at all in any meaningful way. The relief Appellants previously requested following Respondents' false imprisonment of the insurance agent is shown in one of the documents Respondents submitted in support of their Motion for an Order Dismissing Plaintiffs' Complaint ("Respondents' Motion") and Memorandum in support thereof ("Respondents' Memo"). CP at 18-32. That document (Exhibit C in CP at 383-676) shows the present Appellants asked for access to the Ames Farm to effect any repairs, to prevent unapproved third parties from accessing the Ames Farm except for the residence, and from allowing property to be taken from the Ames Farm. None of these requests was granted by the Stevens County Superior Court. See, e.g., Ex. J in CP at 383-676. The only requested item granted was access to the Ames Farm by an insurance agent. *Id.*

However, even this item bore no relationship to the present Appellants convincing the court that Respondents acted as agents

when falsely imprisoning the insurance agent. In granting insurance agent access, the Stevens County Superior Court was effectively saying that Roy and Rubye Ames should not allow criminal actions on the Farm on which Roy and Rubye Ames asserted they had control. Therefore, this order related to Roy and Rubye Ames' asserted control of the Farm, not to any statement by Appellants about Respondents' potential status as agents.

Following trial, the question was who would be responsible for insurance on the Ames Farm, a responsibility for which the Life Tenant is normally responsible. Assignment of responsibility for insurance to Roy and Rubye Ames as Life Tenants was therefore only what would normally be done, and did not relate to the Present Respondents' false imprisonment of the insurance agent and certainly not to any role of Respondents as agents for Roy and Rubye Ames.

In view of the preceding discussion, the clear conclusion is that the second Factor strongly opposes application of judicial estoppel.

**Third Judicial Estoppel Factor:** The third factor is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the

opposing party if not estopped. *Hampshire v. Maine*, 532 U.S. 742 (citing *Davis*, 156 U.S., at 689; *Philadelphia, W., & B. R. Co. v. Howard*, 13 How. 307, 335-337 (1852); *Scarano*, 203 F.2d, at 513 (judicial estoppel forbids use of "intentional self-contradiction ... as a means of obtaining unfair advantage"); see also 18 Wright 4477, p. 782.

It does not appear that Washington reviewing courts have clearly explained what is meant by "unfair advantage" or "unfair detriment." In this case, as discussed above, the situation is that Appellants treating Respondents as independent actors in the present case, and referring to Respondents as agents in a prior declaration are not "clearly inconsistent" because of the limited scope of Respondents' agency. Further, Appellants did not persuade the earlier court Respondents acted as agents and thereby prevail. In this context, there is no unfairness in requiring Respondents to answer for their tortious interference with contract. Respondents did not suffer any cost in the Stevens County Case, and Appellants did not gain any benefit in the Stevens County Case based on convincing that court the present Respondents acted as agents in trapping the insurance agent. As a result, there is no basis on which to say Appellants would receive an unfair

advantage or impose an unfair detriment on Respondents. The further conclusion is that this third factor does not favor judicial estoppel.

**Additional Factors:** While the three factors noted above have been identified as primary factors or core factors, other factors can also be useful in a judicial estoppel analysis in various factual contexts. Appellants request the Court review Plaintiffs' Response to Defendants' Motion for Order Dismissing Plaintiffs' Complaint for reasons why the additional factors also oppose application of judicial estoppel. CP at 39-89.

**Additional Circumstances in Which it is Inappropriate to Apply Judicial Estoppel:** Further, applying judicial estoppel can be inappropriate when the party can explain the differing positions, e.g., when the prior position is due to inadvertence or mistake (*Skinner v. Holgate*, 173 P.3d at 303) or when there are changed facts. *Chd, Inc. v. Taggart* 220 P.3d 229, 165 Wn. App. 94 (Wash. App., 2009).

Appellants' statement that Defendants were agents of Roy and Rubye Ames was based on Roy and Rubye Ames' own assertions of full control over the Ames Farm. Thus, Roy and Rubye Ames directly induced Appellants' statement concerning

agency through Roy's and Rubye's own representations.

Appellants have subsequently discovered Roy and Rubye Ames' control is, at most, extremely limited. As a particular example, during Appellants' court-authorized inspection of the Ames Farm on August 18, 2013, Arleta Parr, Darleen Ames' husband, and Darleen Ames' children aggressively impeded and harassed Appellants throughout Appellants' inspection visit. Appellants later learned Roy and Rubye Ames were not aware of and had not authorized the harassing and impeding conduct against Appellants, and were not even present on the Ames Farm at the time.

Inapplicabilty of Judicial Estoppel: As just explained above, judicial estoppel should not be applied in this case because the core factors are not satisfied. Particularly noteworthy is the fact that there is no risk of either the trial court on this matter or the prior court was misled and, indeed, no risk of the appearance that either court was misled. Applying judicial estoppel in this case turns the rare exception of judicial estoppel into a rule which swallows fair jurisprudence. Thus, application of judicial estoppel was manifestly unreasonable and untenable.

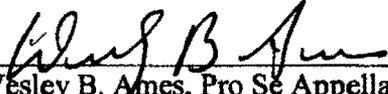
## **VII. CONCLUSION**

As discussed above, the trial court's ruling that Appellants/Plaintiffs lacked standing to bring the tortious interference with contract claim was clearly wrong as it is contrary to all controlling law. Thus, in accordance with consistent controlling law and to provide a legally correct decision, this decision must be reversed.

The trial court also clearly erred in its conclusion collateral estoppel and/or judicial estoppel applied to any claim, because the requirements for these estoppel doctrines were not satisfied. Whatever its motivations, the trial court's analysis of these issues was defective. Thus, the decision of the trial court on these issues should also be reversed.

Upon reversal, in view of the trial court's extreme reluctance to hear the case, and the lengths the trial court went in disposing of this case, Appellants respectfully request the case be remanded to a different judge for further proceedings.

Submitted this 15th day of May, 2015

  
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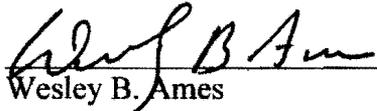
  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 15<sup>th</sup> day of May, 2015, I personally served a copy of the attached Appellants' Brief via email to the persons hereinafter named:

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