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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 347460

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

ALLAN and GINA MARGITAN,

Respondents,

v.

MARK and JENNIFER HANNA,

Appellants.

AMENDED BRIEF OF APPELLANTS

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I. INTRODUCTION

Unhappy with the Spokane Regional Health District's (SRHD) decision requiring Appellants/Defendants Mark and Jennifer Hanna (Hanna) to relocate their drain field in the parties' easement on a delayed basis, Respondents, Allan and Gina Margitan (Margitan), brought suit against SRHD, subsequently adding claims against Hanna. Their claim was that the drain field must be removed immediately as it was in unlawful proximity to Margitan's waterline. Despite Margitan's failure to prove the proximity of the waterline to the drain field, or to prove an intentional tort, or to prove a causal connection between the presence of the drain field in the easement and damages, the Trial Court submitted the case to the jury, allowing an award of economic damages and general damages for emotional distress.

Further, Margitans had previously litigated these issues before the Spokane Regional Health District's Board of Health (SRHD-BOH) and had sought review of its unfavorable decision in Spokane County Superior Court. Nevertheless, the Trial Court below allowed Margitan to re-litigate these issues in this case, failing to recognize that collateral estoppel barred re-litigation.

Additionally, despite the Trial Court's having recognized that Hannas' delay in relocating the drain field in the easement was pursuant to a lawful compliance schedule issued by the appropriate administrative agency, SRHD, the Trial Court issued a mandatory injunction, ordering Hanna to remove the drain field. That Order was unfairly prejudicial and reflected an abuse of discretion.

Finally, while recognizing Margitan's misconduct, the Trial Court failed to implement an appropriate sanction, denying Hannas a fair trial. Accordingly, this Court should remand this case to the Trial Court with orders that Margitan's claims be dismissed or, alternatively, order a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Hannas' CR 50(a) motion and submitting the issues of liability and damages to the jury when Plaintiffs had failed to prove an interference with their use of the road and utility easement.

2. The trial court erred in denying Hannas' motion for a new trial in accordance with CR 59(a)(5), (6) and (7), as Plaintiffs failed to prove interference with the easement, and failed to prove a proximate causal connection between the presence of the drain field in the easement

and their claims for economic and non-economic (emotional distress) damages.

3. The trial court erred in denying Hannas' CR 50(a) and 50(b) motions regarding damages for emotional distress as Plaintiffs failed to prove an intentional tort, or any supporting legal theory.

4. The trial court erred in its Order of October 12, 2016, denying Defendants Hannas' motions under CR 50(b) and CR 59 as substantial evidence did not support Findings of Fact Nos. 5, 6, 8, 12, 14 and 15; and Conclusions of Law Nos. 1, 2, 3 and 4 were erroneous.¹

5. The trial court erred in failing to recognize that the doctrine of collateral estoppel barred Margitan's re-litigation of their issue that Hannas' drain field must be immediately removed, and the issue of whether Defendants Hannas' drain field was in an unlawful/dangerous proximity to Margitan's waterline.

6. The trial court erred in ordering Hanna to remove the drain field when Hanna remained in compliance with a lawful and agreed compliance schedule with SRHD.

7. The trial court erred in not providing an appropriate remedy for Hannas for Margitans' pre-trial misconduct including refusal to

¹ Several of the Court's Findings of Fact are actually statements as to testimony that was given and descriptions of jury findings. It is unclear if the Court actually made its own Findings of Fact.

comply with the Court's orders that they produce discoverable financial information and delaying tactics on the eve of trial which further unfairly impeded Hannas' defense. The combination of these actions denied Hanna a fair trial on liability and damages and justify a new trial under the provisions of CR 59(a)(1), (2) and (9).

III. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

1. Was there substantial evidence by Plaintiffs that their claimed economic losses and emotional distress were proximately caused by an intentional act of Defendants Hanna?

2. Does an encroachment in an easement by the servient estate necessarily constitute an interference with the use of the easement by the dominant estate?

3. Does the presence of a drain field in a road and utility easement alone constitute an interference with a waterline, absent proof that the drain field is in unlawful proximity to the waterline or is having any effect on the transport or quality of the water?

4. Are emotional distress damages recoverable absent proof of an intentional tort or evidence that establishes a lawful basis for such an award?

5. Is a party entitled to damages for emotional distress that arises from their participation in litigation?

6. Can a party recover emotional distress damages against a private defendant for plaintiff's frustration with perceived errors, actions, and inactions of government agencies over which defendant has no control?

7. Does collateral estoppel preclude Margitan from re-litigating in Superior Court the issue that Defendants Hannas' drain field should be removed immediately due to its unlawful proximity to their waterline, having previously litigated those issues before the Board of Health and having fully exercised their rights of review under the Administrative Procedures Act?

8. Did the trial court in equity abuse its discretion in issuing a mandatory injunction when Hannas were proceeding in accordance with a lawful compliance schedule issued by the appropriate government agency?

9. Did the misconduct of Margitans pre-trial, taken as a whole, effectively deny Hannas the ability to adequately prepare a defense?

10. Should the Court of Appeals exercise its inherent authority to preserve the integrity of the judicial system by ordering an appropriate sanction where the trial court's sanction and its implementation is inadequate?

IV. STATEMENT OF CASE

A. Factual Background.

Plaintiffs/Respondents Margitan and Defendants/Appellants Hanna are neighbors. Each own parcels within Short Plat 1227-00, a plat consisting of three adjoining parcels. Hannas are owners of Parcel #2, which lies in between Margitans' Parcel #1 and #3. All three parcels are favored by a 40-foot "Road and Utility" easement, which connects the short plat to the county road. (Exh. P-2) Plaintiffs Margitan originally purchased Parcel #1 and built a home there in 2002. (RP 361) At approximately the same time, Defendants Hanna purchased Parcel #2 and built a home there. (RP 362) In March 2003, Hannas completed installing a drain field for their home for the sole purpose of disposing of sewage. (CP 424; CP 1266-67) A third party purchased and occupied an existing home on Parcel #3. (RP 372; CP 424) Each of the parcels were supplied utilities through the 40-foot easement, including a separate waterline dedicated to each parcel. (RP 361). In July 2003, the original waterlines were abandoned and replaced with new, separate waterlines serving each parcel. (RP 362-365; RP 618, *II.* 16-17; Exh. P-140) The waterline which services Parcel #3 is at the center of this litigation. The

actual location of the two-inch waterline within the 40-foot easement is unknown, (CP 1008; RP 464-465, *ll.* 12-15).² Further, Margitans never attempted to prove that the drain field was unlawfully close (10 feet) to the waterline.

In building his home, Hanna's independent contractor installed an on-site sewage system. (CP 257; CP 315) Defendants Hanna mistakenly advised the contractor that the road and utility easement was 20 feet wide. (CP 315) This resulted in some portion of the drain field of the septic system being placed within the easement. WAC 242-272A-0210 requires that the edge of a drain field be at least five feet from the edge of an easement.

In 2010, Margitan purchased Parcel #3, including the existing home. (CP 424; RP 374, *ll.* 21-22) Margitan rented the home to third persons on several occasions and there were no complaints about the water. (RP 457) Ultimately Margitans determined they would substantially remodel the existing structure.

In 2012, Hanna commenced a quiet title action against Margitan and others to determine whether several roads crossing their Parcel #2 represented easements (hereinafter "quiet title action"). (Exh. P-165;

² There was evidence before the Court in connection with motions for summary judgment regarding the claims of intentional interference by SRHD that it was located 14 feet from the drain field, well outside the required minimum of 10 feet. CP 1050-51.

CP 316) During the pendency of that action, Margitan obtained a copy of the Hanna's On-Site Septic System "As Built" drawing, which Margitan believed demonstrated that the drain field was partially located within the easement. (RP 416; CP 257) He thus complained to SRHD requesting that it require removal. (RP 417, *ll.* 15-18)

Upon receipt of Mr. Margitan's complaint, SRHD inquired and, concluding that the drain field was likely not compliant, contacted Hanna requesting that he demonstrate compliance with the WAC, or remedy non-compliance. (Exh. P-156, RP 489-490) In light of the quiet title action, Hanna requested that any remediation be deferred until after that action was concluded. (RP 551, *ll.* 21-24) Acting within the authority of WAC 242-272A-0430(2), on October 18, 2013, SRHD agreed with Hannas on what the trial court below found to be a valid compliance schedule within SRHD's authority. (CP 135) The agreement provided that, within 30 days after his quiet title action was concluded, Hanna would submit a plan of remediation for compliance with the WAC. Hanna also agreed that, within 60 days of approval of that plan, the drain field would be brought into compliance. (CP 135-136) The agreement also provided that if the existence of the drain field in the easement was shown to present a risk to health, SRHD could require immediate compliance, irrespective of the agreement. *Id.*

On November 29th, after Hanna and SRHD had reached agreement, Margitan again requested that the drain field be removed. (Exh. P-85) For the first time he alleged that the existence of the drain field would affect his water line located in the easement. (RP 554) SRHD advised Margitan of its agreement with Hanna binding them to a compliance schedule. It explained that the outcome of Hannas' quiet title action was uncertain and that SRHD would not require Hanna to move his drain field twice. (CP 316-317; RP 686)

Unhappy with that response, Margitan sought review by the Public Health Officer, Dr. Joel McCullough. (CP 1094; Exh. P-89) He requested that Hannas be required to move their drain field out of the easement immediately due to his speculation that the edge of the drain field may be within 10 feet of Parcel #3's waterline. (Exh. P-92)

Dr. McCullough reviewed Margitan's submittal and, noting that Margitan had failed to demonstrate that Hannas' drain field jeopardized Margitan's waterline, denied Plaintiffs' relief. (Exh. P-92; CP 1096)

Margitan then sought review of Dr. McCullough's decision by the SRHD-BOH again claiming that he had a residence he could not utilize. Under the Board's procedures, Margitan was afforded notice, assistance of counsel, the ability to present evidence and consider the evidence against him, the abilities to call witnesses and cross-examine adverse witnesses,

the ability to make argument, and the right to seek an appeal. Once again, Margitan failed to produce any evidence of the location of his waterline in relation to the edge of the drain field. (CP 45-49)

After the hearing, the Board entered Findings of Fact and Conclusions of Law and Final Order on April 22, 2014. (CP 45-49) It specifically found that the existence of the drain field in the easement alone did not pose any imminent health risk. It found that there was no evidence to support Margitan's contention that the drain field posed a threat to their waterline. It found that the compliance agreement was appropriate, upholding Dr. McCullough's decision. Finally, it found that, even if the drain field was within 10 feet of the waterline, the risk of any threat to public health was remote. (CP 48)

At no time did Mr. Margitan attempt to locate his waterline or determine its proximity to the drain field. At no time did he test his water to determine if there had been any contamination. (RP 472) At no time did Margitan take advantage of the opportunity provided him by the agreed compliance schedule to demonstrate a health risk by testing his water or locating his waterline.³ (RP 472)

³ Margitan's obstinance in this regard is remarkable. Despite the fact that establishing either of these was a sure way to get SRHD to act, Margitan stubbornly clung to the position that he could force the SRHD and Hanna to do his will, without a showing of interference or public health risk.

Instead, in August 2014, Margitan called for a final inspection of a portion of the structure he had completed by the Spokane County Building and Plans Department, even though his water remained off. Margitan had turned off the water to Parcel #3 when he began the remodel. (RP 458) On inspection the inspector, Ken Utley, found the home had no running water. (CP 479; RP 638) When he inquired of Mr. Margitan, Plaintiff responded that he was afraid to turn the water on because of his concern that the drain field in question might be too close to Parcel #3's pressurized waterline. (CP 479; RP 462-463) Mr. Utley did not approve the home for a Certificate of Occupancy because there was no running water. (RP 638) Margitan still declined to turn the water on. (RP 458; CP 481; CP 1045)

Water is supplied to Parcel #3 by Stevens County Public Utility District (RP 466-467) and the short plat, on its face, prohibits the use of private wells. (Exh. P-2) Accordingly, had Mr. Margitan turned the water on he would have passed inspection and received his Certificate of Occupancy. (CP 482)

On September 3, 2014, the Building and Planning Department issued a report, "Inspection Results." (Exh. P-101) The report observed that Mr. Margitan was claiming that his potable water supply was in danger and that Margitan has provided that agency corroboration of that issue with SRHD. (Exh. P-101) He then contacted both SRHD, and his

water purveyor and learned that neither of them certified the potability of water. (RP 449) He then began claiming that the Inspection Results report established his inability to obtain a Certificate of Occupancy due to the mere encroachment in the easement of the drain field. (RP 412, *ll.* 3-17)

With the Board's unfavorable decision, Margitan brought an action in Superior Court in accordance with the APA, RCW 34.05.514-526, to reverse the Board's decision, Spokane County Superior Court Cause No. 14-2-01879-1. (CP 1074) He claimed the Board was wrong because the presence of the drain field in the easement alone was sufficient to establish that his waterline was compromised. He again failed to submit any evidence of the location of the waterline, or the condition of the water, thus failing to prove any injury or damage. Noting that proof of "injury in fact" was a requirement for seeking APA review, the Superior Court dismissed Margitan's claim for lack of standing. (CP 1115-1116)

This Court upheld that decision at *Margitan v. Spokane Reg'l Health Dist.*, 192 Wn. App. 1024 (2016) (unpublished) (CP 313-339) noting again that Margitan's failure to prove the unlawful proximity of the waterline to the drain field constituted a failure to prove any damages or injury, and thus defeated standing to seek review.

Unhappy with that result, but still unwilling to test his water or locate the water line, Margitan brought the instant action against SRHD.

Hannas' 2012 quiet title action upon which the agreement/compliance schedule was based concluded on July 21, 2016, and the trial below commenced on August 1, 2016, ten days later. (RP 122)

B. Procedural Background.

Margitans commenced this action against Spokane Regional Health District and Spokane Regional District Board of Health on February 13, 2015. (CP 232-235) They did not sue Hanna. As he had before the Board of Health, Margitan sought to force SRHD to require Hanna to remove their drain field NOW. The Complaint alleged intentional and negligent refusal by SRHD to enforce the WAC regarding setback limitations for installation of on-site septic systems. (CP 236-242)

On April 22, 2015, Margitans "consolidated" counterclaims they had asserted against Hanna in the quiet title action with this action. (CP 261) Hanna answered the Complaint denying the allegations and asserting affirmative defenses. (CP 265)

Margitan moved to amend their Complaint on September 21, 2015 as they wanted to have all defendants within one complaint, and to add claims against Hanna for intentionally and negligently refusing to enforce WAC 242-272A-0210 (CP 1230) Hanna resisted this first amendment based, *inter alia*, on res judicata/collateral estoppel, as the amendment

sought to add claims that had been previously litigated before the SRHD-BOH and reviewed by the Spokane County Superior Court in Cause No. 14-2-0187. (CP 1067) On December 10th, the Trial Court found that the Plaintiffs were collaterally estopped from asserting those claims against Hanna and denied the amendment as futile. (CP 268)

Plaintiffs sought reconsideration and on December 15, 2015, while that reconsideration was pending, brought a motion to authorize a Second Amended Complaint. (CP 271) As to Hannas, the purpose of this amendment was to amend the prayer for relief to seek damages for interference with Margitans' easement. The Court reconsidered the motion for the first amendment and allowed it on January 19, 2016. (CP 292) The Court then allowed the second amendment on February 11, 2016. (CP 1196)

On February 22, 2016, Hanna filed their Answer to the Second Amended Complaint, denying the allegations and asserting affirmative defenses, including collateral estoppel and res judicata, lack of jurisdiction and lack of standing by Margitan to enforce the WAC regulation. (CP 302)

On November 23, 2015, Hanna moved for summary judgment dismissal for Counts 3, 4 and 5 of Plaintiffs' Complaint, contending that those claims had been previously brought in the 2012 action and that res

judicata and collateral estoppel therefore barred their assertion. (CP 1152)
The Court denied that motion on March 17, 2016, finding that the dismissal and consolidation order from the 2012 quiet title action did not constitute a final judgment on the merits. (CP 1202)

Hanna moved for reconsideration, arguing, *inter alia*, that all the requirements for the application of collateral estoppel were present. The Court denied that motion on May 18, 2016, expressing concern that “Margitans have never had their day in court” on the claims. (CP 387)

SRHD also sought summary judgment dismissal of the claims against it for negligently or intentionally failing to enforce the WAC. SRHD sought dismissal, *inter alia*, under the Public Duty Doctrine. In addressing the “failure to enforce” exception to the doctrine, the Court recognized that SRHD’s response to Margitan’s notice, its demand of Hanna, and its agreement holding Hanna to a compliance schedule, were all authorized under WAC 246-272A-430(3). *Id.* (CP 1374) The Court noted that the agreement had been the subject of an appeal of SRHD-BOH by Margitan, and that the Board had found the agreement an appropriate exercise of SRHD’s authority. The Court also noted that SRHD was not required to take corrective action as to Margitan’s allegation that the drain field was too close to the waterline, as there was no proof of that claim. *Id.*

On February 12, 2016, Plaintiffs Margitan moved for summary judgment, seeking an order by the Court requiring Hanna to relocate everything from the easement, including the drain field, some decorative rocks and trees, and Inland Power & Light's power box and lines. (RP 114-115; RP 273) Margitan referred to his easement as "exclusive" and claimed an absolute right to install a new utility (high-speed Internet access) anywhere within the 40-foot easement he desired. Hanna resisted, again asserting the principles of res judicata and collateral estoppel, as well as questioning the equity of the relief requested. (CP 1061) On July 1, 2016, one month before trial, the Court granted the motion in part. (CP 162) The Court rejected Hannas' res judicata/collateral estoppel and equitable arguments and held that the encroachment alone was sufficient to find, as a matter of law, that the Hannas were liable for interference with the Margitan easement. (RP 158) The Court did not order the injunction, however, believing that a prior "maintain status" order in the 2012 quiet title action remained in effect. The Court limited its order to an injunction prohibiting any additional inhibition by Hanna of Margitans' access to their 40-foot easement, and further allowed Margitan to place a new high-speed Internet line within the utility easement. (CP 162)

On July 11, 2016, Margitans reacted strongly to this ruling and filed a motion for reconsideration. (CP 182) Margitan filed a Declaration

personally attacking the judge and claiming that he had become an advocate for the Hannas. (CP 164) He questioned Judge Triplet's "integrity, character, credibility, and the procedural failures in his court." This was not, however, the only thing he was upset with Judge Triplet about.

Over the preceding months, Hannas had attempted to develop facts to support their defense. After an unsuccessful attempt at obtaining an informal agreement with Margitans' counsel to test the water, Hanna sought discovery under Rule CR 34. When that was refused by Margitan, Hanna brought a motion to compel (CP 433)

Margitans resisted, making the disingenuous argument that they were not alleging that the water in Parcel #3 was contaminated.⁴ Margitans also alleged that since the inspection report required that either SRHD or their water purveyor certify that the water was potable – any testing by Margitans would not be sufficient. (CP 448; RP 473, *ll.* 1-2) On July 1st, the same day as he issued his ruling on Margitan's Motion for Summary Judgment, Judge Triplet granted the motion, noting that the occupancy permit had been denied because Margitan questioned whether his water was potable. (CP 490) Margitans moved for reconsideration and, on

⁴ That this argument was disingenuous is demonstrated by the hypothetical Allan Margitan presented to the jury at trial. (RP 458, L. 22 – 459, L. 24) *See also* Judge Triplet's comments at RP 492-493.

July 20th, ten days before trial, also moved to disqualify Judge Triplet. (CP 939) Further, Margitans requested that the judge not decide any of the pending motions until this disqualification motion had been determined. (RP 61-62) Despite the fact that the motion was utterly groundless (RP 62), the judge postponed a decision on the reconsideration.⁵

Margitans were also upset with the judge for another reason. Due to Margitans' claim of financial losses and associated emotional distress, Hanna sought discovery of Margitans' financial records, serving an appropriate Request for Production on March 10, 2016. Margitans objected on March 24, 2016, resulting in a decision by Judge Triplet dated May 18, 2016. (CP 393) Noting that the Margitans had made a claim of damages of \$100,000 per month for each plaintiff for emotional distress related to their alleged precarious financial condition, the Court denied the Motion for Protective Order and ordered that they respond to Hannas' discovery within 15 days of the date of the Order, i.e., June 2, 2016. (CP 396)

However Margitans did not respond, but rather moved for reconsideration arguing, incredibly, that they had been surprised by the request for financial information. (CP 497; CP 502) That reconsideration

⁵ At the time the motion was brought, Judge Triplet had already made numerous discretionary rulings. This fact, when considered against the baseless claim of bias, clearly brought the motion within the purview of CR 11.

was also denied on July 1, 2016. (CP 502) Nevertheless, Margitans continued to refuse to produce their financial information.

On July 27, 2016, four days before trial, the Court denied Margitans' disqualification motion. (CP 992)

Margitans also brought a number of motions to be heard August 1st, the first day of trial, including an odd CR 60 Motion to Vacate the granting of SRHD's earlier motion for summary judgment, a motion for sanctions regarding removal of survey stakes, a motion to continue the trial, a motion to reconsider, a motion seeking disqualification of Mr. Perdue as counsel for Hannas and Ms. Fossum as counsel for SRHD-BOH, and a motion to certify issues to the Court of Appeals. (RP 4, *ll.* 5-17) None of those motions had merit and all were denied. (RP 38, *l.* 5; RP 49, *ll.* 7-8; RP 60, *l.* 25 – RP 61, *l.* 1; RP 64, *ll.* 12-17; RP 102, *ll.* 10-11; RP 83, *ll.* 11-12)

On August 1, 2016, the first day of trial, the Court asked Margitans if they intended to produce the financial information and, through counsel, Margitans stated that they would not. (RP 330, *ll.* 15-21; RP 333) The Court initially imposed a sanction through granting Hannas' Motion in Limine #16, disallowing any claim for emotional distress based on lost profits for the inability to rent or to refinance. (RP 337, *ll.* 18-23; RP 338, *ll.* 13-17; CP 737) However, at the end of trial, the Court did not apply that

sanction, instead instructing the jury that it could award emotional distress damages for anything except the inability to rent. (RP 972-973)

After two days of motions, trial began. Margitans were allowed to proceed on their theory that the drain field in the easement was too close to the waterline, thus denying them a Certificate of Occupancy. However, there was no proof of the location of the waterline in relationship to the drain field. There was no evidence of any interference with the waterline.

As trial continued, Hannas' counsel continued his efforts to locate an expert who could test the water, report results, and testify at trial. He was unsuccessful. (RP 765) The Court considered the circumstances and after discussion allowed a remedy of Hannas' counsel cross-examining Margitan on his refusal to allow water testing. (RP 769-775) That sanction was doomed to failure given the complicated pattern of Margitan's delaying tactics and the interrelationship of his refusals with his motion to disqualify the judge.

After several days of trial, the evidence was closed. Hanna moved for judgment under CR 50(a). That motion was denied. (RP 961) The case was given to the jury and it returned a verdict in the amount of \$422,244, consisting of \$210,125 for lost rents, \$12,119 for increased cost due to inability to refinance, and \$200,000 for emotional distress. (CP 774)

On August 16, 2016, Hannas moved for judgment under CR 50(b), demonstrating that Margitans had utterly failed to prove any interference by Hannas with their waterline or the utility use of their easement. (CP 775) Hannas also moved for a new trial under CR 59(a)(5), (6) and (7), (CP 781) and for remittitur under RCW 4.76.030, (CP 193) again raising the issues of res judicata, lack of proof of interference, lack of proof of causation and lack of evidence to support emotional distress. (CP 193) Hannas also challenged the emotional distress award of \$200,000 as being contrary to the instructions and as reflecting passion and prejudice. (CP 784-785)

The Judge denied the motions and Judgment on the Verdict was entered on August 18, 2016. (CP 199)

On October 12, 2016, the Trial Court entered an Amendment of Judgment, reducing the award for emotional distress to \$75,000. He found that the \$200,000 award was the result of passion and prejudice and of counsel's closing argument in violation of the sanction order. (CP 218) Hanna timely appealed.

V. ARGUMENT

A. Standard of Review.

A decision granting or denying summary judgment is reviewed *de novo*. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)

(denying); *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (granting).

This Court also reviews a trial court's CR 50 ruling *de novo*, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is proper only when, reviewing the evidence in the light most favorable to the non-moving party, substantial evidence cannot support a verdict for the non-moving party. *Id.* at 493. A decision granting or denying a motion for a new trial pursuant to CR 59 is reviewed under the abuse of discretion standard. However, when the grounds given for granting or denying new trial are predicated upon questions of law, the scope of review is *de novo*. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012).

This Court reviews the trial court's issuance of a mandatory injunction under the abuse of discretion standard. Such injunction will be overturned if the decision is based on untenable grounds or reasons or where the decision is manifestly unreasonable or arbitrary. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). A court's decision is manifestly unreasonable if it is "outside the range of acceptable choices, given the facts and the applicable legal standards. A decision is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it's based on an incorrect standard or the

facts do not meet the requirements of the correct standard.” *Lawrence v. Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001), publication ordered (Mar. 27, 2001).

B. The Court Erred in Denying Defendants’ CR 50(a) and (b) Motions as Plaintiff Failed to Prove Any Interference, Intentional or Otherwise, With Their Road and Utility Easement Which Proximately Caused Damages.

The Plaintiffs’ Second Amended Complaint, in particular Paragraph 4.4 thereof, alleged damages caused as follows:

“ . . . emotional distress, increased financing costs and loss of rental income due to interference with domestic water supply to Parcel #3 of the Short Plat 1227-00.

Although Plaintiffs submitted evidence of economic losses, they submitted no evidence that those losses were due to any interference with the domestic water supply to Parcel #3, or any other utility use. Accordingly, Conclusion of Laws Nos. 2, 3 and 4 were in error. The Court should have granted Hannas’ CR 50(a) Motion for Judgment as a Matter of Law (CP 775), subsequently recognized its error of law (encroachment = interference) and granted the CR 50(b) Motion post-trial, or, at a minimum, granted a new trial under CR 59.

1. Interference.

To recover damages, the dominant estate must first establish an interference. *See Littlefair v. Schulze*, 169 Wn. App. 659, 665, 278 P.3d

218, 221 (2012), *as amended on denial of reconsideration* (Sept. 25, 2012); *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798, 803 (1962). The interference pled was to the waterline, yet the Trial Court recognized the Margitans had failed to establish that the drain field was within 10 feet of the waterline in violation of the WAC. (RP 962)

An analysis of interference must begin with an understanding of the rights afforded Margitans by the road and utility easement. Margitan's view is that he has the exclusive right to utilize any and all parts of the 40-foot easement, including the right to require Hanna to relocate the power box of Inland Power & Light! (RP 114; RP 273) But as this Court has previously noted, Margitan has no such right. *Margitan v. Spokane Reg'l Health Dist.*, 192 Wn. App. 1024 (2016) (unpublished) at (CP 313). An easement is a right to enter and use property for some specified purpose. *Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.*, 170 Wn.2d 442, 243 P.3d 521 (2010). An easement is a right, distinct from ownership, to use in some way the land of another without compensation. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). The easement for Short Plat 1227-00 is neither a covenant nor a negative easement, i.e., it does not prevent Hanna from making whatever use of his property he desires. The rights of both dominant and servient estate owners are not absolute and "must be construed to permit a due and reasonable enjoyment of both

interests so long as that is possible.” *Cole v. Laverty*, 112 Wn. App. 180, 185, 49 P.3d 924 (2002). What an easement owner such as Margitan is entitled to is that Hanna not interfere with his use consistent with the purpose of the easement.

Accordingly, a servient estate holder’s placement of a structure within the confines of the easement, i.e., an encroachment, does not necessarily constitute an interference. The encroachment only becomes actionable when it interferes with the dominant estate holder’s use of the easement. *Thompson*, 59 Wn.2d at 407. There is no evidence that the location of the waterline, or that the presence of the drain field within the easement, had any effect on its ability to deliver water or any effect on the potability of the water.

To overcome this lack of proof, Margitans continuously argued that their right of “proper enjoyment” of the easement was interfered with because the presence of the drain field gave them concern for the potential effect on the potability of his water. (RP 947) This possibility of a problem does not amount to interference.

The Court recognized that there was no evidence that the waterline was within the 10-foot restriction. Yet the Trial Court still denied the CR 50(a) motion, holding that the jury could determine whether the drain field’s presence had “affected the Margitans’ enjoyment of their property.”

(RP 962, *ll.* 17-19) In the absence of proof of a physical interference, that was error. The phrase “proper enjoyment” is used interchangeably in case law with the term “proper use.” *See Littlefair v. Schulze*, 169 Wn. App. 659 at 665, 278 P.3d 218 (2012), and *Thompson, supra*, 59 Wn.2d at 407. It describes nothing more than the ability to use the easement for its original purpose. It does not refer to a separate right based on the dominant owner’s subjective belief that “all is well.” Subjective distress, caused by an interference with the use, can be an item of damage; it is not, however, the interference itself.

Margitans’ proof was solely that a portion of the drain field encroached into the easement. Margitan offered no proof that the encroachment interfered with the road or waterline purposes of the easement. Plaintiff failed to prove an interference, i.e., an act by Hanna which actually, not potentially, interfered with Margitans’ use of the easement in accordance with its purpose. Accordingly the trial court erred in not granting the CR 50(a) motion.

2. Causation.

In denying the CR 50(a) motion the Trial Court recognized that Margitans had failed to prove that the waterline is within the 10-foot restriction area. (RP 962; RP 948) The Court felt that testimony that the parties would not be litigating “but for” the presence of the drain field and

Margitans' testimony that moving the drain field would solve his concern was sufficient proof of causation. (RP 962, ll. 11-16) Hannas provided the Court an opportunity to correct this error of law with their CR 50(a) motion.

An essential element of a plaintiff's cause of action for any tort is proximate cause, i.e., that there be some reasonable connection between the acts or omission of the defendant and the injury the plaintiff has suffered. (16 Wash. Prac., *Tort Law & Practice*, §5.1 (4th Ed.)). Proximate cause is composed of two distinct elements: (1) cause in fact; and (2) legal cause *Id.* (collecting cases). Cause in fact, or "but-for" causation, exists where a direct, unbroken sequence of events link the actions of the defendant to the injury to the plaintiff. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 194 P.3d 274 (2008). Legal causation requires a plaintiff to show that the relationship between his injury and the defendant's conduct is "proximate" enough to justify imposition of responsibility on the defendant using considerations of sound policy and common sense. *See Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 906 P.2d 336 (1995); *Smith v. Preston Gates Ellis LLP*, 135 Wn. App. 859, 147 P.3d 600 (2006). Margitan failed to prove the element of proximate cause as his "but for" causation was discontinuous. He failed to prove that the placement of the drain field in the easement caused him any injury.

Further, neither policy nor common sense would justify imposing legal causation under the evidence presented.

In denying the CR 50(b) and CR 59 motion, the Trial Court cited to testimony of the “Building Inspector” that absent encroachment by the drain field, there would be no concern about separation between the waterline and the drain field.” (FOF #5; CP 213) Actually there was no such testimony and FOF #5 is in error. The Building Inspector was Tim Utley. His answer to a similar question (RP 632) was equivocal stating, “I’m not sure.” The question he stated, “probably not” to was:

So back at the time the inspection was done, had this drain field not been in that easement, we wouldn’t even have this document up here now, would we?

(RP 879, *ll.* 2-5) The only other testimony on that issue, other than Mr. Margitan’s, was that of Steven Holderby, who was asked by Mr. Lockwood, “So had the system been moved to the replacement area as requested, we wouldn’t be here now, would we?” Holderby’s answer was, “Probably not. I can’t say.” (RP 687) Finally, Margitan’s testimony was “if the septic system was not in the easement, it wouldn’t be an issue here today.” (RP 463, *ll.* 10-12)

This testimony is insufficient as a matter of law to support proximate cause. It is equivocal, ambiguous “but-for” causation testimony

which fails to address actual interference with the use in question, i.e., the waterline utility.

Margitan also attempted to connect his damages to the initial placement of the easement by pointing to the wording of Exhibit P-101, the Inspection Results report, as the reason his Certificate of Occupancy was denied. He claimed that unless and until SRHD or his water purveyor, Stevens County PUD, certified his water as potable, his “hands were tied.” (RP 438, *ll.* 17-23, RP 450, *ll.* 2-5)⁶ Yet, Exhibit P-101 does not purport to reflect the exclusive means by which Margitan could verify the potability of his water. Margitan presented no testimony by the author of the report (Mr. Utley’s supervisor) (RP 877, *ll.* 8-13) that SRHD and the water purveyor were the *only* agencies whose certification Building and Planning would accept. Further, there was no evidence that Margitan advised Building and Planning that neither of the agencies listed were capable of certifying the potability of his water. The State Department of Health could have certified the water, but Margitan never contacted them, nor did he test the water himself, or even locate the waterline to determine the potential for contamination. (RP 686, *ll.* 2-12; RP 458, *l.* 20)

Margitan did not pass his final inspection and obtain his Certificate of Occupancy because he had no running water in his home (RP 870-871)

⁶ But Margitan learned early on that neither those agencies certify the potability of water, and did not contact the agency, Department of Health, that could. (RP 449)

- no other reason. Margitan testified that he was aware he needed running water in his home to pass the inspection and obtain his Certificate of Occupancy, but that he didn't want to turn it on. (RP 871) He also testified he had not tested his water because he was "afraid of the result." (RP 472)

In short, Plaintiffs feigned helplessness in the face of agency limitations and took an extremely narrow view of the Inspection Results language, doing nothing further to resolve his concern. He did not further seek a Certificate of Occupancy, did not contact any other agencies, did not inquire of either SRHD or Stevens County PUD as to the appropriate agency to contact, did not locate his waterline, did not turn his water on, and did not have his water tested. This highly unusual approach to a potential problem was not foreseeable, and, thus, even if Margitan had proven that the drain field was in unlawful proximity to his waterline, his obstinance would act as an intervening superseding cause. *See Jones v. Leon*, 3 Wn. App. 916, 478 P.2d 778 (1970).

C. Plaintiffs Failed to Prove an Intentional Tort – Accordingly Emotional Distress Damages Were Not Awardable and Finding of Fact Nos. 8 and 15 Were in Error.

Plaintiffs' Complaint alleged an intentional interference with the waterline in an effort to justify an award of emotional distress damages. While it is true that emotional distress damages are awardable for an intentional tort, such a tort requires a volitional act and cannot be based on

an omission or a failure to act. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 683, 709 P.2d 782, 786 (1985). *See generally*, 16 Wash. Prac., *Tort Law and Practice*, §14.2 (4th Ed.); *Robb v. City of Seattle*, 176 Wn.2d 427, 437, 295 P.3d 212, 218 (2013). Further, the volitional act must be done with intent, i.e., plaintiff must prove that the defendant intended the consequences of his act or recognized that the consequences were substantially certain to follow. *Bradley, supra*, 104 Wn.2d 677.

The primary focus of Margitan's claim for damages was the failure of Hanna to remove the drain field from the easement. An intentional tort cannot be based on the failure to act. Accordingly, to be actionable, Margitans must prove that that initial placement was done with the intent to cause the consequences of the act on that Hannas believe that the consequences were substantially certain to result from it. "If the actor knows that the consequences are certain or substantially certain to result from this act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Bradley, supra*, 104 Wn.2d at 682; *Restatement (Second) of Torts*, §158 (1965). *See also*, Intent Definition *Restatement (Second) of Torts*, §8Ab (1965).

In that regard, there is no evidence that the Hannas were aware of the location of the waterline, or that they were aware a new waterline might be placed in unlawful or dangerous proximity to their drain field.

There is no evidence to suggest that Hannas should have recognized that their drain field's presence in a 40-foot wide easement was substantially certain to interfere with a two-inch waterline.

At the time the drain field was installed, Margitan didn't even own Parcel #3. There can thus be no intent by Hanna to interfere with a future desire by Margitan to operate a rental unit on that parcel. Absent the proof of such intent, Margitan's intentional tort claim fails and emotional distress damages were not awardable.

D. The Trial Court Erred in Denying Hannas' CR 50(b) and/or Hannas' CR 59 Motions as There Was Not Substantial Evidence of Proximate Causation of Emotional Distress.

After the jury's verdict, Hannas timely moved for judgment as a matter of law under CR 50(b) and for a new trial under CR 59. In denying those motions, the Court erred in its Findings of Fact Nos. 8 and 15 and Conclusions of Law Nos. 2, 3 and 4, as substantial evidence did not support an award of emotional distress damages as no intentional act had been proven. (CP 211-217)

The jury was instructed that it could award emotional distress damages if it found "that defendants' acts were intentional." (CP 771; RP 975) There were no "acts" of Defendants Hanna which were "intentional" as that term defines an element of an intentional tort. *See* discussion, *supra*. Hanna's delay in relocating his drain field was pursuant

to his compliance agreement with SRHD. Moreover, the only testimony regarding emotional distress by either plaintiff concerned their frustration in dealing with government agencies and emotional distress generated by their participation in this litigation. Neither is an appropriate basis for an award of emotional distress damages against Hanna. The Trial Court allowed emotional distress damages believing that there had been some “general testimony” by Plaintiffs of emotional distress due to intentional and unreasonable conduct by Hanna. (FOF #8; CP 214) This, and Finding of Fact #15 (CP 215) were in error, as there was no testimony to that effect and no proof of an intentional act.

The only witnesses to testify as to emotional distress damages were Allan Margitan and his wife, Gina.

1. Allan Margitan.

Mr. Margitan’s testimony regarding emotional distress was ambiguous as to Hanna. Mr. Lockwood asked about Margitan’s “emotional distress that you’re having because of this,” without defining what the “this” is, and without a context for the jury. Margitan’s response was, “It’s just unbelievable that somebody can sit there and take something from you, and you have no control.” (RP 455) Given the evidence at trial, no reasonable person could conclude that Hanna had taken anything from Margitan. Further, the control comment clearly

related to Mr. Margitan's frustration with the government agencies. Given Hannas' status as a private citizen, stress caused by the acts and omissions of those agencies cannot be chargeable to him.

Margitan further testified that the agencies not responding to him took the solution out of his hands (RP 449-450), his not being able to do anything with the structure was "very upsetting" as "my hands have been tied," (RP 453), and his interactions with the agencies was "where the emotional part of this comes in." (RP 885) At closing Margitan's counsel argued of Margitan's frustration with the "quagmire" of dealing with the agencies. (RP 979) Margitan's frustration with these agencies is not chargeable to Hanna.

2. Gina Margitan.

Gina Margitan's testimony on emotional distress was even less definitive. The question posed to her was, "How has this litigation affected you and your family?" (RP 840, *l.* 23) Although she mentioned in passing the presence of the septic system in the easement, the focus of her testimony was her frustration with the agencies' actions and to the fact that testimony she heard during trial was upsetting to her. (RP 841, *l.* 6) Further, her testimony regarding her husband's distress was in terms of his reacting to "the litigation." Even Mr. Lockwood's question of Ms. Margitan regarding damages was posed in terms of "dealing with the

litigation.” (RP 842, ll. 18-19) Interestingly, her response revealed that the request for damages for emotional distress was in reality a tactic to motivate removal of the septic system. (RP 842, ll. 20-24)

In sum, the emotional distress damages were not awardable because they were based on Hannas’ lawful compliance with SRHD’s schedule for removal, distress of the litigation, and the delays and inactions of government agencies in responding to Margitan’s demands.

Finally, although the Trial Court properly reduced the award for emotional distress as being the product of passion and prejudice, he then bottomed his award on his recollection that there was evidence of emotional distress associated with the inability to refinance. As there was no such evidence, Conclusion of Law No. 3 was in error. (CP 216)

E. Collateral Estoppel Bars Margitan from Re-Litigating Issues that Were Previously Litigated and Determined Before the Board of Health.

In considering two motions for summary judgments by Hannas, and Hannas’ resistance to Plaintiffs’ motion for summary judgment for an injunction, the Trial Court refused to apply principles of collateral estoppel. The Trial Court concluded that because Margitans were not a party to the SRHD agreement with Hanna (CL #1; CP 215), and because there was no final judgment (CP 1202), that res judicata or collateral estoppel would not apply.

Before the Public Health Officer, Dr. Joel McCullough, and before the SRHD-BOH, Margitan litigated the same issues he litigated in this case, issues which went to the heart of his causes of action. The Board of Health held an adjudicatory hearing on February 27, 2014. (CP 340) Prior to the hearing, the rules and applicable Code provisions governing the hearing were provided to the parties and members of the Board by letter dated February 21, 2014, and Margitan had no objections to the procedures. *Id.* The parties had the right to representation by counsel. The issues before the Board included whether Hannas' drain field was within the easement, whether it was too close to Margitans' pressurized waterline, whether there was an immediate risk to public health, and whether SRHD's agreement with Hanna to delay relocating of the easement was appropriate. (CP 343-344; CP 1319-20)

Margitan submitted 48 pages of exhibits and testified and made argument. Witnesses were sworn and testimony taken, including extensive cross-examination by Mr. Margitan. At no point in the proceeding, however, did Mr. Margitan establish the location of the waterline or offer any proof that his water was threatened or was not potable. *Id.*

Based on this evidentiary hearing, the Board of Health issued Findings of Fact and Conclusions of Law and a Final Order on April 22, 2014. (CP 1006) The Board found, as a matter of fact, that the drain field was partially within the 40-foot easement and accordingly was non-conforming. (FOF #1.4; CP 1007) The Board found that the pressurized

waterline was “somewhere within the 40-foot easement,” that its proximity to the drain field had not been established, there was no imminent public health risk presented by the existence of the drain field within the easement, and that SRHD had entered an agreement for compliance with Hannas. The Board concluded that SRHD had latitude to address corrections for non-conforming onsite systems, and that the agreement between SRHD and Hanna was appropriate. The Board also concluded that even if there was insufficient horizontal separation, the public health risk would be minimal. The Board therefore upheld the Public Health Director and Health Officer, Joel McCullough, M.D.’s, decision.

Margitan then sought review in Superior Court pursuant to RCW 34.05.514. The relief he sought was immediate removal of the drain field. An essential element of Margitan’s ability to seek review was a demonstration of harm. The harm Margitan was contending was that the illegal proximity of the drain field to his waterline posed a threat. Once again he failed to prove that allegation. Accordingly, his action was dismissed for lack of standing.

Margitan then appealed that decision to this Court, which decided in an unpublished opinion that the Superior Court was correct. That opinion is instructive. (CP 313) Margitan argued that the non-complying drain field could potentially contaminate his drinking water, that the drain field’s encroachment violated his right to locate his utilities anywhere he

pleased within the 40-foot easement. Finally, Margitan contended the location of the drain field inside the easement prevented his gaining a Certificate of Occupancy. These are precisely the issues Margitan litigated in the trial of this action.

This Court noted that Margitan had failed to demonstrate an infraction, and that “potential” contamination did not demonstrate an injury. This Court also noted that Margitan had no right to exclusive possession of the entire 40-foot easement and that he remained free to use the property for road and utilities as designated in the easement document. The Court noted that the encroachment of the drain field does not, by itself, render a water supply unsafe. Thus, absent a showing that it is within 10 feet of the waterline, no violation is demonstrated and thus any inability to obtain a Certificate of Occupancy is not related. Concerning Margitan’s argument that the Inspection Results report (Exh. P-101) demonstrated that the drain field encroachment was the cause of his denial of Certificate of Occupancy, this Court properly noted that the document “repeated Margitan’s worry, not the County’s concern, about the encroachment of the drain field.” The Court then suggested that, if Margitan believed Hanna had violated the direction of the Health District that Hanna locate the waterline, he could seek to enforce that order. Margitan never did so.

Thus issues critical to Mr. Margitan’s case, i.e., the unlawful proximity of the drain field to the waterline, whether the potability of his

water was threatened, whether it was necessary that the drain field be brought into compliance immediately and whether SRHD's agreement with Hannas was lawful, were all litigated by Margitan and all determined by the Final Order of the Board of Health and upheld upon review in accordance with the Administrative Procedures Act.

Collateral estoppel prevents the re-litigation of a particular issue in a subsequent action, even though the subsequent action involves a different claim or cause of action. *E.g., Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). The doctrine of collateral estoppel promotes judicial economy and serves to prevent inconvenience or harassment of the parties. *Christianson v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel has four elements:

- (a) The issue decided in the prior action is identical to the issue presented in the subsequent action;
- (b) The prior action entered a final judgment on the merits;
- (c) The party to be estopped was a party in the prior action; and
- (d) Application of the doctrine does not work an injustice on the party against whom the doctrine is to be applied.

Id., 152 Wn.2d at 307.

In considering whether to apply collateral estoppel to bar the litigation of an issue previously litigated before an administrative agency, three additional factors are considered: (a) whether the agency, acting within its competence, made a factual finding; (b) the differences between the administrative proceeding procedures and court procedures; and (c) public policy considerations. *Stevedoring Servs. of Am. v. Eggert*, 129 Wn.2d 17, 40, 914 P.2d 737 (1996).

Applying these factors to the instant action results in the conclusion that Margitans should not have been allowed to re-litigate issues essential to their cause of action in this case:

1. Identical Issue.

First the issue decided in the administrative proceeding, i.e., whether the location of the drain field required immediate removal due to its unlawful proximity to Margitan's waterline is identical to the issue presented in this action. The essence of Margitan's claim for damages is based on his contention that he was unable to obtain the Certificate of Occupancy because of the waterline's proximity to the drain field, and that this inability caused his damages. Those are the identical contentions Margitan pursued both before the Board and upon review, as well as in this action.

2. Final Judgment.

Second, the administrative action ended in a final judgment on the merits. Where there has been an adequate hearing and an opportunity for

review, the finality element is met. *Cunningham v. State*, 61 Wn. App. 562, 566, 811 P.2d 225 (1991). Here, it is undisputable that this agency action ended in a final judgment on the merits. Margitan had full ability and opportunity to present evidence, make legal arguments, call witnesses and cross-examine witnesses. The Board of Health then issued written Findings of Fact and Conclusions of Law and a Final Order issued April 22, 2014. (CP 45) The judgment was appealable and indeed was appealed. Accordingly, the finality element has been met.

3. Party To Be Charged.

Third, it goes without saying that Margitan was a party to the prior action before the Board and upon review.

4. Injustice Component.

The fourth element is whether application of the doctrine will work an injustice on Margitan. The injustice component is generally concerned with procedural, not substantive, irregularity. In other words, the focus of this element is whether in an earlier proceeding the litigant had a full and fair opportunity to litigate. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 309, 57 P.3d 300 (2002). Margitan had a full opportunity to establish the issues he re-litigated in this action. Further, there is no injustice as Margitans failed again to prove an unlawful proximity of the waterline to the drain field in the trial below.

5. Administrative Proceeding Factors.

Finally, the additional factors to be considered when the prior litigation was before an administrative agency all support the application of collateral estoppel. First, the Board of Health is clearly acting within its competence. RCW 70.05.060 provides the Board of Health “the supervision over all matters concerning the preservation of the life and health of the people in its jurisdiction.” That authority includes protecting public health by minimizing the potential for public exposure and adverse effects to public health related to onsite sewer systems. WAC 246-272A-0001. The issue is not whether the Board of Health has the authority to award damages or issue injunctive relief. *See Christianson, supra*, 152 Wn.2d at 319.

Second, the differences between procedures before the Board of Health and court procedures are minimal. Washington courts have relied on “essential elements of adjudication” per the *Restatement (Second) of Judgments*, §83 (1982) to determine this element. Applying those principles we see that Margitan was provided adequate notice, had the right to present evidence and legal argument in support of his contentions, as well as a fair opportunity to rebut evidence and argument by opposing parties. We see that the Board formulated issues of law and fact in terms of the application of rules with respect to the parties and the specific issue before it and that it issued a final order. *See* WAC 246-10-101 et seq.;

WAC 246-272A.430-440. Finally, the proceeding was officially recorded and the parties had the right to counsel as well as the right to appeal.

Public policy supports application of the collateral estoppel in this instance and favors the adjudication of specialized issues by the agency with the expertise and responsibility to determine them. A significant administrative and statutory process has been created in recognition of this policy and Margitan took full advantage of every aspect of it. Accordingly, this element is met. Allowing Margitan to once again litigate these issues in fact contravenes public policy. As the United States Supreme Court explained in an opinion applying collateral estoppel to an administrative agency determination:

Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversary proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already borne their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

Astoria Fed. Sav. & Loan Ass'n. v. Solimino, 501 U.S. 104, 107-108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

The end result is that Defendant Hanna, not Margitan, has been prejudiced. Hanna entered into a lawful compliance schedule with the appropriate authority for bringing the drain field into compliance. Hanna was then sued for not taking action sooner than allowed by the compliance

schedule. Indeed, the jury was allowed to proceed to award damages for Hannas' lawful compliance.

F. The Court Abused its Discretion in Entering a Mandatory Injunction Where Hanna was in Compliance with SRHD's Compliance Schedule.

Onsite septic systems (OSS) and drain fields fall squarely within the expertise and authority of the Spokane Regional Health District. It is the agency charged with responsibility for onsite septic systems. It follows extensive regulations governing, inter alia, certain setback requirements for OSS and enforcement mechanisms. *See, in particular*, WAC 242-272A-0001 (Scope of Authority); -210 (Setbacks); -0430(2) (Compliance). As the Trial Court recognized, the compliance agreement reached with SRHD and Hannas was an appropriate exercise of its power upheld after a thorough review. *See* discussion, *supra*. (CP 1374) Nevertheless, it issued an order of removal and allowed Plaintiffs to introduce evidence and argument regarding that order. This error was highly prejudicial to the defense.

In light of the prior administrative adjudication, which was properly reviewed and upheld by the Superior Court and the Court of Appeals, the trial court's decision reflects an abuse of discretion. As pointed out in the preceding section, numerous cases recognize the value of proceedings under the APA and prevent collateral attack on decisions

properly arrived at thereunder. Accordingly, the Trial Court should not have proceeded in equity to re-order the results of the APA proceedings.

The Trial Court's fashioning of equitable remedies is reviewed for abuse of discretion. *See* Brief, *supra*, at p. 22. Further, one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of the immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174 (2015), *review denied*, 185 Wn.2d 1004 (2016).

Margitan failed to establish a well-rounded fear of immediate invasion of his legal easement rights, as he failed to prove an *interference* or any damages associated with leaving the drain field encroachment in place. Margitan had proven only a technical violation of an administrative rule without a showing of adverse impact to him. That proof fails as a matter of law to establish interference, as pointed out above. Thus, the Court's order was based on factual findings unsupported by the record, as well as an incorrect standard (encroachment equals interference) and on facts that did not meet the appropriate standard (actual interference with use). Accordingly, the Trial Court's decision was based on untenable grounds and untenable reasons.

The Trial Court compounded its error by then allowing Margitan's counsel to both examine witness (RP 878), as well as argue to the jury (RP 951; RP 994), that the Court had ordered the drain field moved. This, when combined with the evidence the drain field remained in place, suggested that Hanna was defying the Court. This was highly and unfairly prejudicial and likely contributed to the excessive award of damages. The error warrants a new trial.

G. Margitans' Misconduct and the Trial Court's Failure to Impose an Appropriate Sanction, Combined with Margitans' Counsel's Disregard of the Court's Sanction in Closing Argument, Denied Hannas a Fair Trial.

Margitan intentionally and unlawfully interfered with Hannas' ability to discover relevant facts to address Margitans' claims of inability to rent and of financial embarrassment. Without that discovery, Hannas were unable to rebut those claims and were unfairly prejudiced as seen by the jury's award. Essentially, the entire award was based on those two claims and emotional distress related thereto. Although the Trial Court recognized Margitans' misconduct, it failed to define and apply an appropriate remedy. Considering the totality of Margitans' conduct, that remedy should have been an order prohibiting Margitans from proceeding with proof on those claims for economic losses. A review of Margitans'

pre-trial conduct is informative in addressing this issue. *See* Brief, *supra* at pp. 16-20.

CR 59 includes additional bases for granting a new trial including (1) irregularity in the proceedings of the court or adverse party which prevented a party from having a fair trial, (2) misconduct of the prevailing party and (9) that substantial justice was not done. Application of any of the three to Margitans' conduct and sharp practices, as well as the Trial Court's response, support a new trial. Margitans' refusal without justification to allow water testing, their delaying implementation of that order by bringing a specious motion to disqualify the trial judge two weeks before trial, their steadfast refusal to produce their financial records, up to and through trial, combined with the multiplicity of other groundless motions brought the first day of trial, clearly establish Margitans' intent to unfairly prejudice Hannas' trial preparation and presentation.

Margitans' delay tactics caused the judge to delay addressing Margitans' reconsideration of the water testing order until the first day of trial. Hannas' counsel tried throughout the trial to locate an expert who could test the water, obtain the results, and testify. He was unsuccessful. (RP 769) The Court thus recalled Margitan's tactics and attempted to fashion a remedy, but that remedy was ineffective. (*See* discussion RP 770, *l.* 24 – RP 771, *l.* 13; RP 774, *l.* 4 – RP 778, *l.* 4) Accordingly,

Hannas were denied the opportunity to demonstrate that a primary contention of Margitans was untrue, and denied them a fair trial.

This prejudice was compounded by Margitans' flat refusal to obey the trial judge's order to provide responses to Hannas' Second Requests for Production regarding their financial records, and the Court's response.

Initially, the Trial Judge determined that the sanctions for the Margitans' refusal would be to deny Margitans' damages for emotional distress attributed to lost profits and their inability to rent, as well as their inability to refinance. (RP 333; CP 737) The Trial Court did not consider Margitans' other misconduct or specious motions in arriving at the sanction. (RP 331-338)

However, the Court eliminated the restriction regarding the alleged inability to refinance at the time it instructed the jury. (RP 973, *l.* 5-10; RP 975, *ll.* 21-24) It appears this happened because the Judge was reading from a form of the order that did not have the interlineations the court had made to implement his decision to exclude the inability to refinance as a basis for emotional distress damages. RP 905 -909. (CP 737) This was highly irregular and unfairly prejudicial. To compound matters, Margitans' counsel violated what was left of the remedy that was imposed by arguing that the jury should determine emotional distress damages by equating them with the amount of damages otherwise awardable, omitting

any reference to the restriction the Court imposed. (RP 982; FF #11; CP 215) Ironically the inability to refinance became the basis for the court's revised emotional distress award!

It is true that a trial court has broad discretion in fashioning remedies and in controlling trials. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Where the culmination of various acts of misconduct, violation of orders, delaying tactics and sharp practices operate to deny parties a fair opportunity to prepare and present their case, the Trial Court should fashion sanctions that not only addresses the misconduct, but also protects the innocent party from injustice. When the Trial Court fails to do so, a new trial should be ordered. Where that conduct is particularly egregious and the sanction inadequate, this Court should not hesitate to act to preserve the integrity of the courts and the principles of justice. This is particularly true where the sanction imposed proves ineffective, either because it was not strong enough, or because it was not fully implemented—even where an objection was not made. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985); *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058, 1060 (2000).

Here, Margitans engaged in unlawful, inexcusable conduct pre-trial. The Trial Court's sanction, and in particular its implementation was inadequate. Margitans succeeded in encumbering and restricting the defense's proof and rather than being sanctioned, reaped a substantial benefit.

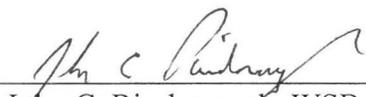
Under the circumstances, this Court should remand the case with direction for a new trial.

VI. CONCLUSION

Appellants Hanna request that this Court dismiss Margitans' action with prejudice. In the alternative, this Court should remand this case with orders for a new trial.

DATED this 26 day of May, 2017.

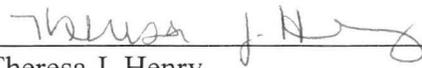
PAINE HAMBLEN LLP

By: 
John C. Riseborough, WSBA #7740
Attorneys for Appellants Mark and
Jennifer Hanna

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 2017, I caused to be served a true and correct copy of the foregoing **AMENDED BRIEF OF APPELLANTS**, by the method indicated below and addressed to the following:

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Theresa J. Henry

FILED

OCT 12 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 347460

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

ALLAN and GINA MARGITAN,

Respondents,

v.

MARK and JENNIFER HANNA,

Appellants.

**APPELLANTS HANNA'S STATEMENT OF
ADDITIONAL AUTHORITIES**

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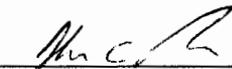
Pursuant to RAP 10.8, Appellants Hanna submit the following additional authorities concerning application of collateral estoppel by Washington courts:

In *Schibel v. Eymann*, 189 Wn.2d 93, 399 P.3d 1129 (2017), the Washington Supreme Court held, as a matter of law, when an attorney's withdrawal was litigated in a prior suit and approved by the trial court, the issue of the attorney's withdrawal is res judicata and cannot be relitigated in a subsequent suit for malpractice. Regarding the fourth element of collateral estoppel, the injustice element, the Court observed that this element "is rooted in procedural unfairness," i.e., "whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." *Id.* at ¶ 19, 399 P.3d at 1133-34 (citation omitted).

The Court decided *Schibel* on August 3, 2017 and the case was published in Washington Reports: Official Advance Sheets on September 26, 2017. A copy of the opinion is attached hereto.

DATED this 11th day of October, 2017.

PAINE HAMBLEN LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of October, 2017, I caused to be served a true and correct copy of the foregoing **APPELLANTS HANNA'S STATEMENT OF ADDITIONAL AUTHORITIES**, by the method indicated below and addressed to the following:

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James D. Perkins	<u> </u>	DELIVERED
US Department of Justice	<u> Y </u>	U.S. MAIL
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Theresa J. Henry

189 Wash.2d 93
Supreme Court of Washington.

James SCHIBEL, an individual, and
Patti Schibel, an individual; and the
marital community thereof, Respondents,

v.

Richard EYMANN, an individual; Eymann Allison
Hunter Jones, PS, a Washington professional
services corporation; Michael Withey, an individual;
Law Offices of Michael Withey, PLLC, a Washington
professional limited liability company, Petitioners.

No. 93214-0

|
Argued Feb. 2, 2017

|
Filed Aug. 3, 2017

Synopsis

Background: Former clients sued former attorneys for malpractice, alleging attorneys had improperly withdrawn from underlying action on eve of trial. The Superior Court, Spokane County, James M. Triplet, J., 2014 WL 10539082, denied attorneys' motion for summary judgment. Attorneys appealed. The Court of Appeals, Korsmo, J., 193 Wash.App. 534, 372 P.3d 172, affirmed. Former attorneys petitioned for review.

[Holding:] The Supreme Court, Madsen, J., held that collateral estoppel applied to bar any malpractice claims former clients may have had against former attorneys that stemmed from former attorneys' withdrawal in a prior case.

Reversed.

Gordon McCloud, J., filed dissenting opinion, joined by González and Wiggins, JJ.

*1130 Appeal from Spokane County Superior Court, No. 14-2-00135-0, Honorable James M. Triplet.

Attorneys and Law Firms

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Steven Erik Turner, Steven Turner Law PLLC, 1409 Franklin St., Ste. 216, Vancouver, WA, 98660-2826, for Respondent.

Opinion

MADSEN, J.

¶1 In this case, former clients are suing their attorneys for legal malpractice based, in part, on the attorneys' withdrawal from a prior case. But the attorneys obtained that withdrawal by court order. In the original case, the former clients appealed the court's order approving withdrawal, and that appeal was rejected. The attorneys thus argue that collateral estoppel applies to bar a malpractice action based on their withdrawal. We agree. We hold that the fact of withdrawal by court order in an earlier proceeding is dispositive in a later malpractice suit against the attorney. Although other malpractice complaints unrelated to the withdrawal would not be precluded, a client cannot relitigate whether the attorney's withdrawal was proper. If we are to have rules permitting attorney withdrawal, we must allow attorneys to have confidence in those rules. We, therefore, reverse the Court of Appeals.

FACTS

¶2 In this malpractice action, James and Patti Schibel allege that attorneys Richard Eymann and Michael Withey (Attorneys) committed legal malpractice and breached their fiduciary duties. Specifically, the Schibels claim that the Attorneys committed malpractice because they failed to timely and adequately prepare for trial, failed to properly handle settlement discussions and negotiations, and improperly withdrew from the case on the eve of trial.

¶3 The original case began in 2007 when the Schibels sued their former landlord, Leroy Johnson, for breach of a commercial lease and negligent infliction of injury

due to mold exposure. When the Schibels originally filed their action, a different attorney represented them. But that attorney withdrew in 2009 due to a fee dispute with the Schibels. When the original attorney withdrew, the Attorneys took over the case and entered into a contingent fee agreement with the Schibels.

¶4 Trial for the original case was continued several times. When the Attorneys took over the case, trial was continued to April 2010. The trial court continued the case twice more before setting a trial date of November 1, 2010. At the last continuance, the judge stated that there would be no more continuances.

¶5 On October 10, 2010, the Attorneys informed the Schibels via letter that they would need to withdraw in light of the breakdown of the relationship between them and *1131 the Schibels. The next day, the Attorneys filed a motion to withdraw and a motion to continue the trial date. The Schibels objected to the motion to withdraw. The hearing on the motions was held on October 27, 2010 before Judge Annette Plese. Present at the hearing were the Schibels, the Attorneys, and counsel for Johnson. The Schibels explained that they had been unable to find replacement counsel because of the fees they still owed to the Attorneys. When Judge Plese asked the Schibels whether they would be able to find replacement counsel if she granted a continuance, they expressed that it seemed “fairly bleak” that they could in the immediate future. Clerk’s Papers (CP) at 138.

¶6 Judge Plese granted the Attorneys’ motion to withdraw, explaining:

[A]t this point, it appears that there is a breakdown with you and counsel, and the Court has no choice at this time other than to allow them to withdraw on your behalf. They’ve given the proper notice. They’re here.

....

... I am going to allow [the Attorneys] to withdraw. They’ve given the proper notice, and at this point, the Court can’t, on a civil case, order them to stay on board and work the case, especially with their ethical obligations.

Id. at 139-40. Judge Plese then denied the motion for a continuance, explaining that after Johnson strenuously objected to the last continuance, she had said that there

would be no further continuances. *Id.* at 140. The Schibels and Johnson then attempted settlement negotiations, but those negotiations failed. In November 2010, the Schibels’ case against Johnson was dismissed with prejudice.

¶7 The Schibels retained counsel and appealed the withdrawal and continuance rulings. The Court of Appeals affirmed. *Schibel v. Johnson*, noted at 168 Wash.App. 1046, 2012 WL 2326992, at *1. The Court of Appeals concluded that the trial court had properly exercised its discretion when it granted the Attorneys’ motion to withdraw. 2012 WL 2326992, at *4. The Schibels petitioned this court for review, which we denied. *Schibel v. Johnson*, 175 Wash.2d 1024, 291 P.3d 253 (2012). And the Schibels sought review in the United States Supreme Court, which was also denied. *Schibel v. Johnson*, —U.S.—, 133 S.Ct. 2344, 185 L.Ed.2d 1065 (2013).

¶8 The Schibels then filed this malpractice action against the Attorneys. The complaint alleged that the Attorneys were negligent based on their failure to timely and adequately prepare for trial, their failure to properly handle settlement discussion and negotiations, and various actions surrounding the Attorneys’ conduct in withdrawing from the case. The alleged actions surrounding withdrawal included failing to timely inform the Schibels of withdrawal, moving to withdraw too late in the case, failing to condition their withdrawal on a continuance, and failing to disclose earlier the “interests and intentions” that led the Attorneys to withdraw. CP at 4-5.

¶9 The Attorneys moved for summary judgment, arguing that complying with applicable rules and obtaining the court’s permission for withdrawal precludes future actions for legal malpractice based on that withdrawal. The trial court denied the motion for summary judgment. On interlocutory appeal, the Court of Appeals affirmed. *Schibel v. Eymann*, 193 Wash.App. 534, 372 P.3d 172 (2016). We accepted review and now reverse.

ANALYSIS

[1] [2] [3] ¶10 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 305, 96 P.3d 957 (2004); Court Rule

(CR) 56(c)). We review a trial court's ruling on summary judgment de novo. *Christensen*, 152 Wash.2d at 305, 96 P.3d 957. We also review de novo whether collateral estoppel applies to bar relitigation of an issue. *Id.*

¶11 CR 71 governs the withdrawal of attorneys involved in civil litigation. CR 71(c) provides that an attorney may withdraw by notice in the following manner:

- (1) *Notice of Intent to Withdraw.* The attorney shall file and serve a Notice of *1132 Intent to Withdraw on all other parties in the proceeding....
- (2) *Service on Client.* Prior to service on other parties, the Notice of Intent to Withdraw shall be served on the persons represented by the withdrawing attorney....
- (3) *Withdrawal Without Objection.* The withdrawal shall be effective, without order of court ... unless a written objection to the withdrawal is served by a party on the withdrawing attorney....
- (4) *Effect of Objection.* If a timely written objection is served, withdrawal may be obtained only by order of the court.

In this case, the Schibels objected to the Attorneys' withdrawal, so the Attorneys could withdraw only by order of the court. CR 71(c)(4).

¶12 The Rules of Professional Conduct (RPC) also address when an attorney may withdraw. RPC 1.16(b) permits an attorney to withdraw from representation 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.

The rule is written in the disjunctive, meaning an attorney may withdraw if there is no harm to the client, the client has engaged in any of the five specific behaviors, or other good cause exists.

[4] [5] [6] ¶13 Collateral estoppel, also known as issue preclusion, bars relitigation of an issue in a later proceeding involving the same parties. *Christensen*, 152 Wash.2d at 306, 96 P.3d 957. Collateral estoppel promotes judicial economy and prevents inconvenience or harassment of parties. *Id.* (citing *Reninger v. Dep't of Corr.*, 134 Wash.2d 437, 449, 951 P.2d 782 (1998)). Importantly, collateral estoppel provides finality in adjudications, shielding parties and courts from expending resources in repetitive litigation. *Id.* at 307, 96 P.3d 957. Collateral estoppel precludes only those issues that were actually litigated and necessary to the final determination in the earlier proceeding. *Id.* (citing *Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987)). For collateral estoppel to apply, the party seeking it must show (1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice. *Id.*

[7] ¶14 The parties have argued this case as one involving collateral estoppel. Although some courts from other states have also used collateral estoppel to address the question posed by this case, others have not. *See Bright v. Zega*, 358 Ark. 82, 186 S.W.3d 201, 205 (2004) (where the propriety of withdrawal has been litigated in a prior suit, it is res judicata and cannot be relitigated in subsequent suit for legal malpractice); *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 324 S.C. 645, 486 S.E.2d 14, 17-18 (App. 1997) (court's prior ruling allowing counsel to withdraw is the "law of the case" in subsequent case for breach of duty based on that withdrawal), *aff'd in part and overruled in part on other grounds*, 334 S.C. 244, 513 S.E.2d 96 (1999). *Cf. Allen v. Rivera*, 125 A.D.2d 278, 509 N.Y.S.2d 48, 50 (1986) (collateral estoppel does not apply because it is not clear that the court approved

withdrawal necessarily determined, as a matter of fact, that the attorney was not guilty of misconduct). We acknowledge there is a split *1133 among courts in the application of collateral estoppel in these cases. But taken together with the principles of judicial immunity and a respect for court orders, we agree with the courts that have applied preclusion doctrines to these types of claims.

¶15 We hold that the Schibels are collaterally estopped from relitigating whether the Attorneys' withdrawal was proper. To the extent that their malpractice claims against the Attorneys rely on the withdrawal being improper, preclusion applies and the Attorneys are entitled to summary judgment. This does not, however, preclude the malpractice claims that the Schibels raise for the Attorney's conduct unrelated to the court sanctioned withdrawal.

¶16 The Schibels do not dispute that the second and third elements of collateral estoppel are satisfied in this case. Therefore, our inquiry focuses only on the first and fourth elements. Under CR 71(c)(4), the trial court acts as a gatekeeper for attorneys seeking to withdraw when the client objects. In this malpractice action, the Schibels have focused on the Attorneys' actions in withdrawing. But that focus is misplaced. Once the court approved the Attorneys' motion to withdraw, the withdrawal became an action of the court. With that proper focus in this case, it is clear that collateral estoppel applies to bar any malpractice claims that stem from the withdrawal.

¶17 The first element for collateral estoppel requires that the issue in the earlier proceeding is identical to the issue in the later proceeding. The Attorneys argue that the Schibels' malpractice claims are based entirely on arguments that they raised in the earlier proceeding. The Court of Appeals disagreed and found that the issues were not identical:

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.

Schibel, 193 Wash.App. at 546, 372 P.3d 172. Characterized this way, the Court of Appeals found that the issues were not identical. This analysis, however, does not account for the fact that only the trial court could grant the motion to withdraw.

[8] [9] ¶18 Through CR 71(c)(4), we have established a system by which individual attorneys cannot make the ultimate decision to withdraw. The trial court must intervene and order the withdrawal. Once the trial court approved the Attorneys' withdrawal, it sanctioned the Attorneys' actions in doing so and the withdrawal became a decision of the court, which could then be appealed. The issue of withdrawal was actually litigated in the prior case because whether the withdrawal was proper necessarily turns on whether the trial court abused its discretion in approving the withdrawal. The Court of Appeals found it had not. Thus, withdrawal was proper. Any of the Schibels' malpractice claims that rely on the fact of withdrawal present the same issue. By reframing their wrongful withdrawal argument, the Schibels are seeking to hold the Attorneys liable for a decision of the court.¹

[10] ¶19 The fourth element of collateral estoppel, the injustice element, is rooted in procedural unfairness. “ ‘Washington courts *1134 look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.’ ” *Thompson v. Dep't of Licensing*, 138 Wash.2d 783, 795-96, 982 P.2d 601 (1999) (quoting *In re Marriage of Murphy*, 90 Wash.App. 488, 498, 952 P.2d 624 (1998)). The Schibels argue that this element is not satisfied because although they had had an opportunity to be heard, they did not have a full and fair opportunity.

¶20 But the Schibels did have a full and fair opportunity to be heard in the prior proceeding. The Schibels were permitted to object to the Attorneys' motion to withdraw under CR 71. Judge Plese held a hearing on that motion where she heard argument from both sides. The Schibels then, with the assistance of an attorney, appealed Judge Plese's order to the Court of Appeals. That court rejected the Schibels' argument in an unpublished opinion. Then, the Schibels were able to pursue two other appeals, in our court and in the United States Supreme Court, both of which were rejected. The Schibels were afforded all opportunities to be heard consistent with our court rules. In stark comparison, courts from other states have found

the injustice element not satisfied when the court approved the attorney's withdrawal without a hearing or without notice to the client. See *Allen*, 509 N.Y.S.2d at 51; *Vang Lee v. Mansour*, 104 Ark.App. 91, 289 S.W.3d 170, 174 (2008). Applying collateral estoppel in this case will not be an injustice.

¶21 Sound logic supports applying collateral estoppel to these claims as well. In short, the rule and process dictated by the court rules have to mean something. When attorneys comply with the court rule for withdrawal, they should have confidence in that rule. Allowing former clients to proceed against attorneys for malpractice based solely on court sanctioned withdrawals would dissuade attorneys from following the court rules. If collateral estoppel is not applied to these claims, withdrawing by court order would expose attorneys to the same consequences as simply abandoning their clients. See *Keywell & Rosenfeld v. Bithell*, 254 Mich.App. 300, 657 N.W.2d 759, 789-90 (2002). We want to encourage attorneys to follow the rules that have been put into place for their withdrawal. This will allow the trial courts to continue to act as gatekeepers for withdrawal, protecting the attorneys, the clients, and the system of justice.

¶22 The Arkansas Supreme Court employed this logic in a similar case. In *Bright*, a former client attempted to sue an attorney for negligence based, in part, on allegations that the attorney wrongfully withdrew from her case. The Arkansas Supreme Court affirmed the trial court's dismissal of the client's claim, explaining:

We are reluctant to hold that an authorized withdrawal from representing a client by a federal district judge constituted malpractice.... At the very least, [the attorney] has the right to rely upon a valid order of the federal district court permitting him to withdraw.

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 that former client settled for a lesser amount than what she believed she was due.... 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 ... based on an allegation that that withdrawal was wrongful.

Bright, 186 S.W.3d at 205. The court in *Bright* concluded that the client had failed to state facts on which relief could be granted. While the court relied on a different legal principle, its rationale equally supports applying collateral estoppel.

¶23 Here, the Attorneys moved to withdraw, the Schibels contested that withdrawal, and the trial court ultimately authorized the withdrawal. The Schibels appealed and thus waged their battle against the withdrawal. That battle having been waged, the Schibels cannot wage it again. Collateral estoppel applies *1135 to preclude a claim of legal malpractice based on a court approved withdrawal under CR 71(c)(4).

CONCLUSION

¶24 In the prior proceeding, the Schibels had a full and fair opportunity to actually litigate their challenge to the trial court granting the Attorneys' motion to withdraw. The fact of withdrawal by court order is dispositive in a later malpractice suit. Collateral estoppel thus precludes any malpractice claim based on that withdrawal and summary judgment on those claims is appropriate. We therefore reverse the Court of Appeals as to those claims that involve withdrawal. Because the complaint alleges malpractice claims separate from the withdrawal, such as failing to prepare for trial, those claims are not precluded.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Owens, J.

Stephen, J.

Yu, J.

GORDON McCLOUD, J. (dissenting)

¶25 This case presents a question of first impression for this court: whether a trial court order approving an attorney's withdrawal from representation, over the client's objection, has preclusive effect barring the client's later action for attorney malpractice arising from the withdrawal. Under traditional collateral estoppel analysis, as applied to the facts in this case, the answer is clearly no. The majority departs from traditional collateral estoppel analysis and adopts a new rule barring malpractice plaintiffs from asserting that a court-sanctioned withdrawal was, in fact, improper. The majority certainly asserts policy reasons for this departure. But the policy reasons can be addressed in the context of traditional collateral estoppel analysis, without adopting a new rule that will be difficult to apply. I therefore respectfully dissent.

FACTS

The Underlying Case

¶26 In March 2009, James and Patti Schibel hired attorneys Richard Eymann and Michael Withey (Attorneys) to represent them in an action for fraud, negligence, breach of contract, and breach of warranty against their commercial landlord, Leroy Johnson. On October 10, 2010, the Attorneys moved to withdraw from representing the Schibels. The Schibels objected to the withdrawal, in part because the trial in their action against Johnson was scheduled to begin November 1. In conjunction with their motion to withdraw, the Attorneys sought a continuance on the Schibels' behalf. But at that point, the court had already granted five continuances and had expressly advised the parties that it would not grant any more.

¶27 The record before this court contains only one document in which the Attorneys addressed the reasons they sought to withdraw: an affidavit by attorney Eymann in support of the motion to *continue*. In that affidavit, Eymann asserted (in relevant part) that “[t]he withdrawal was based upon the breakdown in communication, trust and confidence in the attorney-client relationship” and a continuation is necessary “[a]s a result of [various] events and other issues protected by the attorney client

privilege.” Clerk's Papers (CP) at 112 (emphasis added). The record contains no filing by the Attorneys connecting the withdrawal motion to any Rule of Professional Conduct (RPC) or other ethical obligation.

¶28 By contrast, the record *does* contain a filing by the Schibels addressing RPC 1.16, which governs an attorney's obligations when “Declining or Terminating Representation.” In this filing, titled “Objection to Motion to Withdraw as Counsel for Plaintiffs,” the Schibels objected to “the unfortunate connotation of Mr. Eymann's vague statements [regarding attorney-client privilege] ... that the Schibels have done something wrong, or proposed to do something wrong, that requires or permits withdrawal under R.P.C. 1.16.” CP at 124. That declaration then goes on to deny any such wrongdoing.

*1136 ¶28 On October 27, 2010, Judge Annette Plese¹ held a hearing on the motion to withdraw and the motion for a continuance. Present were the Schibels, the Attorneys, and counsel for Johnson. On the issue of withdrawal, the Schibels were reluctant to argue their opposition in front of Johnson's attorneys and asked the court to exclude them. CP at 139 (“it seems our case is pretty damaged at this point, and we're not sure that it would be appropriate to argue in front of the defense counsel”). Judge Plese denied that request. The Schibels then decided to argue three points in objection to the withdrawal motion: (1) that the Schibels had not planned or threatened to fire the Attorneys, (2) that all the alleged difficulty in the attorney-client relationship “seems to stem from us not taking the last best settlement offer that was on the table,” and (3) that the only time the Schibels asked for any fee waiver was after the Attorneys moved to withdraw, so that replacement counsel could “take the case ... knowing that they would [not] have to fight for attorney's fees.” CP at 142-43.

¶29 Judge Plese granted the motion to withdraw. In her oral ruling, she explained:

[I]t appears that there is a breakdown with you and counsel, and the Court has no choice at this time other than to allow them to withdraw on your behalf.

....

They've given the proper notice, and at this point, the Court can't, on a civil case, order them to stay on

board and work the case, especially with their ethical obligations.

CP at 139-40. Judge Plese's written order also cited the Attorneys' "ethical obligations" as the basis for withdrawal: "Plaintiff's counsel gave proper notice of intent to withdraw and that the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." CP at 73. But Judge Plese did not state what "ethical obligations" she was referring to. Judge Plese also denied the Schibels' motion for another continuance.

¶30 The Schibels then entered into settlement negotiations with Johnson, but those negotiations broke down. In November 2010, the Schibels' case against Johnson was dismissed with prejudice.

The First Appeal

¶31 With the assistance of a new attorney, the Schibels appealed the trial court's orders denying their last motion for a continuance, granting the Attorneys' motion to withdraw, and dismissing their case with prejudice. *Schibel v. Johnson*, noted at 168 Wash.App. 1046, 2012 WL 2326992, at *1. The Court of Appeals reviewed all three orders for abuse of discretion and affirmed. 2012 WL 2326992, at *2-6. With respect to the withdrawal order, the court reasoned that "[w]hen withdrawal is sought by a retained attorney in a civil case, it generally should be allowed" unless "specific articulable circumstances warrant [denial]." *Id.* at *3 (first alteration in original) (quoting *Kingdom v. Jackson*, 78 Wash.App. 154, 160, 896 P.2d 101 (1995)). It observed that the Attorneys had complied with Civil Rule (CR) 71(c), which governs notice and other procedural requirements entailed in withdrawal, and it stated that "numerous filings" in the record supported the trial court's conclusion that "the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." *Id.* at *3-4. But in support of that holding, the court cited only a single document, apparently: attorney Eymann's affidavit on the motion for a continuance, attesting that withdrawal was necessitated by "the breakdown in communication, trust and confidence in the attorney-client relationship." *Id.* at *4. Then, citing generally "the [parties'] declarations and the record," the court held that "the trial court's finding that good cause

existed for withdrawal was not manifestly unreasonable." *Id.* at *4.

The Malpractice Case

¶32 In January 2014, the Schibels filed an action against the Attorneys for negligence *1137 /legal malpractice and breach of fiduciary duties. The complaint alleged that the Attorneys failed to prepare adequately in the action against Johnson and then, knowing that the trial court would not grant any more continuances, "articulated fictitious reasons to justify the proposed withdrawal." CP at 3.

¶33 The Attorneys moved for summary judgment dismissal of the claims arising from their withdrawal. Of relevance here, they argued that the October 2010 hearing on their motion for withdrawal had preclusive effect because when the trial court "determined that the Defendants had an ethical obligation to withdraw," it necessarily ruled that the withdrawal did not breach any legal duty. CP at 251.

¶34 The Schibels opposed summary judgment and attached a declaration by retired Judge Roger A. Bennett. In the declaration, Judge Bennett opined that the Attorneys' withdrawal constituted conduct falling below the standard of care "under the unique circumstances of this case." CP at 197. Specifically, he stated that his review of 50 separate documents relating to the Attorneys' representation of the Schibels convinced him that the Attorneys withdrew because they feared they would not recover sufficient fees if they went to trial. Judge Bennett opined that this violated RPC 1.2 and the Schibels' contingent fee agreement with the Attorneys, both of which vest authority to accept or reject settlement offers solely in the client. He also noted, consistent with James Schibel's declaration, that the Attorneys might have sought to withdraw because they were unprepared for trial and knew they would probably not be able to obtain another continuance. Of relevance to the collateral estoppel argument, Judge Bennett listed "several significant and material facts that were not presented to the judge who approved the withdrawal," including the amount of money the Attorneys were owed, the additional costs they expected to incur if they went to trial, and the fact that the alleged breakdown in the attorney-client relationship stemmed from the clients'

refusal to settle. CP at 203. Finally, Judge Bennett cited a document—apparently before the court on the motion to withdraw but not included in the record here—titled “Plaintiffs’ Counsels’ Response to Schibel Plaintiffs’[] Objection to Withdrawal of Counsel.” CP at 203-04. Bennett’s declaration quotes this document as stating:

“Withdrawing counsel are cognizant of the need to preserve the attorney-client privileged communications and any other confidential matters. It is therefore not appropriate to describe the full context of or decision to withdraw as plaintiffs’ counsel, other than to say that this highly unusual step was taken very reluctantly and after great thought and soul searching on our part.”

CP at 204. Judge Bennett opined that Judge Plese probably interpreted this statement as implying that the Schibels intended to present false evidence or perjured testimony and that the Attorneys therefore had an ethical obligation to withdraw.

¶35 The trial court denied the motion for summary judgment. It acknowledged that Judge Plese had identified the Attorneys’ “ethical obligations” as one reason to grant the withdrawal motion, but it concluded that it could not determine, on the basis of the record before it, “what those ethical obligations were found to be.” CP at 295. Indeed, in the hearing on the motion, the trial court wondered whether the Attorneys should have corrected Judge Plese when, at the hearing on their withdrawal motion, she cited these “obligations” as a basis to grant:

And I suppose if it wasn’t really—if maybe [Judge Plese] misunderstood that, maybe there was an obligation to correct that on the record with her by counsel: “Judge, we don’t want to give that impression that our clients have done something wrong,” because the Schibels were saying, “We haven’t done anything wrong. There’s no basis for it.” [2]

*1138 Verbatim Report of Proceedings (VRP) (May 23, 2014), *Schibel v. Eymann*, at 28 (Wash. Ct. App.).

¶36 Ultimately, the court ruled that collateral estoppel did not apply because although “similar arguments would be

used in both of the actions,” the issues presented were distinct:

The Schibels are not asserting the same claim in this suit as they asserted in the underlying action. During the underlying trial, the Schibels merely objected to the Defendant’s motion to withdraw. On appeal, the issue argued was whether the trial court abused its discretion by allowing the Defendants to withdraw and by not continuing the trial date. Before this point, it has not been argued that the Defendants’ withdrawal breached their fiduciary duty to the Schibels.

Hence, the issue in the underlying suit was whether the trial court abused its discretion and the issue in the current suit is whether the Defendant’s duty of care fell below the professional standard.

CP at 296. The court also concluded that because the issues presented were not identical, according preclusive effect to the withdrawal ruling would work an injustice.

¶37 The Court of Appeals granted discretionary review and affirmed. *Schibel v. Eymann*, 193 Wash.App. 534, 546-47, 372 P.3d 172, review granted, 186 Wash.2d 1009, 380 P.3d 497 (2016).

ANALYSIS

¶38 In order to prevail on their claim of collateral estoppel, the Attorneys must show that:

“ ‘(1) the issue decided in the prior adjudication [is] identical with the one presented in the second; (2) the prior adjudication ... ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted [was] a party or in privity with a party to the prior litigation; and (4) application of the doctrine [will] not work an injustice.’ ”

In re Pers. Restraint of Moi, 184 Wash.2d 575, 580, 360 P.3d 811 (2015) (quoting *State v. Williams*, 132 Wash.2d 248, 254, 937 P.2d 1052 (1997) (quoting *State v. Cleveland*, 58 Wash.App. 634, 639, 794 P.2d 546 (1990))), cert. denied, — U.S. —, 137 S.Ct. 566, 196 L.Ed.2d 456

(2016). The purpose of these prerequisites is to ensure that the estopped party has had a “full and fair opportunity to litigate” the issue in the earlier proceeding. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

¶39 Like both the trial court and the Court of Appeals in this case, I conclude that neither the first nor the fourth element of collateral estoppel is satisfied. I would therefore affirm the Court of Appeals' holding that the Schibels are not collaterally estopped to pursue a malpractice claim asserting improper withdrawal.

I. The First Element of Collateral Estoppel Is Not Satisfied Because the Motion To Withdraw and Malpractice Action Are Governed by Different Legal Principles

¶40 For the first element of collateral estoppel to be satisfied, the issues in the two cases must be identical in every respect. *Standlee v. Smith*, 83 Wash.2d 405, 408, 518 P.2d 721 (1974) (quoting *Neaderland v. Comm'r*, 424 F.2d 639, 642 (2d Cir. 1970)). Thus, even if two actions involve the same underlying facts, collateral estoppel does not apply “ ‘unless the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment.’ ” *Id.* (internal quotation marks omitted) (quoting *Neaderland*, 424 F.2d at 642). Even “a difference in the degree of the burden of proof in the two proceedings [can] preclude[] application of collateral estoppel.” *Standlee*, 83 Wash.2d at 407-08, 518 P.2d 721 (internal quotation marks omitted) (citing *Helvering v. Mitchell*, 303 U.S. 391, 397, 58 S.Ct. 630, 82 L.Ed. 917 (1938)).

¶41 Consistent with this standard, we must compare the legal principles governing the motion to withdraw and the legal principles governing the malpractice action based on the withdrawal, in order to determine whether the first element of collateral estoppel is satisfied in this case. The majority forgoes that comparison and instead finds the first *1139 element satisfied “because whether the withdrawal was proper necessarily turns on whether the trial court abused its discretion in approving the withdrawal.” Majority at 1133. But this conclusory statement only begs the question presented here: whether “ ‘the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the

rendering of the first judgment.’ ” *Standlee*, 83 Wash.2d at 408, 518 P.2d 721 (quoting *Neaderland*, 424 F.2d at 642). And the answer to that question is clearly no.

¶42 In their malpractice action, the Schibels will need to prove their case, including the fact that the Attorneys' withdrawal constituted conduct falling below the standard of care, by a preponderance of the evidence. *Ang v. Martin*, 154 Wash.2d 477, 481-82, 114 P.3d 637 (2005). By contrast, in opposing the motion to withdraw the Schibels did not address the Attorneys' duty of care at all—they just argued that *they* (the Schibels) hadn't done anything unethical. Judge Plese made no findings related to the standard of care or the Attorneys' fiduciary duties.

¶43 Nor did Judge Plese apply any burden of proof. Instead, relying solely on the parties' affidavits—and denying the Schibels' request to argue the issue in more detail outside defense counsel's presence—Judge Plese made a credibility determination: she accepted the Attorneys' contention that their relationship with the Schibels had so deteriorated that continued representation would be unethical.

¶44 When Judge Plese made that credibility determination, she was exercising discretion within the “ ‘bundle of legal principles’ ” that applies to contested withdrawal motions. *Standlee*, 83 Wash.2d at 408, 518 P.2d 721 (internal quotation marks omitted) (quoting *Neaderland*, 424 F.2d at 642 (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 602, 68 S.Ct. 715, 92 L.Ed. 898 (1948))). Among these is the rule that trial courts should err on the side of permitting withdrawal since [t]he attorney-client relationship is consensual,” and deny a motion only if “specific articulable circumstances warrant that result.” *Kingdom*, 78 Wash.App. at 160, 896 P.2d 101. As the Court of Appeals observed, Judge Plese's ruling was consistent with Comment 3 to RPC 1.16, which advises that “ ‘[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.’ ” *Schibel*, 2012 WL 2326992, at *3 (alteration in original) (quoting RPC 1.16 cmt. 3). In a malpractice action, by contrast, the trial court could not make such a credibility determination on summary judgment. The Schibels would instead be permitted to fully develop their theory of the case and test the Attorneys' credibility through cross-examination.

¶45 In light of this difference, the first collateral estoppel element is not satisfied. There is no identity of issues here because the legal principles governing the withdrawal motion are substantially different from those that would govern a malpractice action based on the withdrawal.

II. The Fourth Element of Collateral Estoppel Is Not Satisfied Because the Withdrawal Hearing Is Not an Adequate Substitute for a Malpractice Trial

¶46 For similar reasons, applying collateral estoppel here would work an injustice; thus, the fourth element is not satisfied. Even if the same basic facts are relevant to both the withdrawal motion and the malpractice action, the Schibels were not permitted to argue those facts in detail in the withdrawal proceeding. As explained above, the Schibels attempted to argue the withdrawal motion in private, so they would not have to disclose details of their case in front of the defendant, Johnson. But the trial court denied that request and thus limited the Schibels' argument. The majority fails to acknowledge this aspect of the withdrawal hearing. Majority at 1134 (“Judge Plese held a hearing on that motion where she heard argument from both sides.”). The trial court also substantially deferred to the Attorneys' vague assertion that “ethical concerns” required them to withdraw.

¶47 In the context of the contested CR 71 motion, neither of these trial court actions constituted an abuse of discretion—that is why the Schibels could get no relief on appeal *1140 from the withdrawal order.³ But neither did these trial court actions constitute a full and fair adjudication of the Attorneys' fiduciary duties. Thus, treating the withdrawal hearing as a substitute for the malpractice action works an injustice. See *In re Moi*, 184 Wash.2d at 583, 360 P.3d 811 (“[O]ur case law on [the] injustice element [of collateral estoppel] is most firmly rooted in procedural unfairness [and thus] “Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.” ’ ” (citation omitted) (quoting *Thompson v. Dep't of Licensing*, 138 Wash.2d 783, 795-96, 982 P.2d 601 (1999) (quoting *Marriage of Murphy*, 90 Wash.App. 488, 498, 952 P.2d 624 (1998)))).

III. The Majority Adopts a New Rule of Collateral Estoppel Specific to an Attorney's Contested Motion

To Withdraw That Is Not Justified by Legitimate Policy Concerns

¶48 For the reasons given above, the trial court and the Court of Appeals were correct in this case: a straightforward application of collateral estoppel principles dictates that Judge Plese's withdrawal order should have no preclusive effect on the Schibels' subsequent malpractice action. But the majority has not engaged in a straightforward application of collateral estoppel principles. Instead, it has forgone a traditional analysis in favor of a policy holding insulating attorneys who obtain court approval to withdraw over a client's objection, even when those attorneys do so by what the former clients allege—and we are only at the allegation stage—is deception.

¶49 The majority reasons that this holding is necessary to prevent attorneys from “simply abandoning their clients.” Majority at 1134. In other words, the majority concludes that if a court order does not insulate attorneys from civil liability for improper withdrawal, then attorneys will have no incentive to seek such an order and will instead just abandon their clients. I am not persuaded by this reasoning.

¶50 CR 71 prohibits an attorney in a civil case from withdrawing, over a client's objection, without court approval. Attorneys do not follow this rule just because a violation risks liability in a subsequent malpractice action; they do so because that is what the RPCs require. Withdrawal in violation of CR 71 is sanctionable misconduct. *E.g.*, *In re Disciplinary Proceeding Against Pfefer*, 182 Wash.2d 716, 729-30, 344 P.3d 1200 (2015) (attorney subject to discipline for violating RPC 1.16(c) and (d) by withdrawing without sufficient notice). Thus, as a policy matter, I disagree that we must craft a new rule of civil immunity in order to entice attorneys into meeting their professional obligations.

¶51 Moreover, I believe the majority's new rule will prove confusing and difficult to apply in practice. In this case, for example, the Schibels allege that the Attorneys failed to prepare adequately for trial and mishandled settlement negotiations. Majority at 1130. The majority holds that they may pursue *those* claims since they are “separate from the withdrawal.” *Id.* at 1135. But in addition to proving that the Attorneys breached their professional and fiduciary duties, the Schibels must prove causation and damages—they must prove that the Attorneys' breach

caused them to lose money they would otherwise have recovered in a jury trial or settlement. Presumably, the Attorneys will defend against those allegations by arguing that any such loss had a very different cause: the Attorneys' *proper* withdrawal, necessitated by their "ethical obligations." CP at 73. If the Attorneys do raise that defense, will they be able to cite Judge Plese's withdrawal order, recognizing those "ethical obligations" as evidence? Will the Schibels be allowed to refute the allegation that their unethical conduct forced the Attorneys to withdraw?

¶52 The majority's new rule does not answer these questions. It assumes a clean distinction between malpractice claims "based on the withdrawal" and malpractice claims "separate from the withdrawal," but that distinction breaks down in practice. At best, this new rule will prove confusing to *1141 apply. At worst, it will shield attorneys who have not been candid about their true reasons for withdrawing from a case. Certainly, it is not justified by the policy concerns the majority cites.

CONCLUSION

¶53 I would apply traditional collateral estoppel analysis, as the trial court and Court of Appeals did in this case, and affirm. The majority departs significantly from that analysis and adopts a new rule of civil immunity for attorneys who withdraw allegedly on false pretenses. I see no policy justification for this rule, and I think it will be difficult to apply in practice. I therefore respectfully dissent.

González, J.

Wiggins, J.

All Citations

189 Wash.2d 93, 399 P.3d 1129

Footnotes

- 1 As an action of the court, judicial immunity would prevent a plaintiff from filing a civil suit against the judge for approving the withdrawal. Judicial immunity is rooted in public policy. The immunity is not designed to protect judges as individuals; rather, it is extended to judges to protect the interests of society. *Adkins v. Clark County*, 105 Wash.2d 675, 677, 717 P.2d 275 (1986). "If disgruntled litigants could raise civil claims against judges, then 'judges would lose "that independence without which no judiciary can either be respectable or useful." ' " *Taggart v. State*, 118 Wash.2d 195, 203, 822 P.2d 243 (1992) (quoting *Butz v. Economou*, 438 U.S. 478, 509, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872))). Preserving judicial immunity for judicial decision-making is necessary for maintaining the respect for an independent judiciary necessary in our democratic society. Further, we note that a court order can be a superseding cause that will break the causal chain necessary to establish a negligence claim. *See Bishop v. Miche*, 137 Wash.2d 518, 532, 973 P.2d 465 (1999) (finding that the judge's decision not to revoke probation broke any causal connection between any negligence and the injury).
- 1 The relevant procedural history in this case involves both the original withdrawal proceeding and the present malpractice action. To avoid confusion, I refer to the trial court in the withdrawal proceeding as "Judge Plese" and the trial court in the present case as "the trial court."
- 2 In response to this observation, counsel for the Attorneys replied, "Sure. But ... the issue was is this withdrawal proper, and that's what she had to determine. She determined yes. Court of Appeals said yes. And under collateral estoppel ... it's been adjudicated..." VRP (May 23, 2014), *Schibel v. Eymann*, at 28-29.
- 3 And that is why the majority errs by concluding that the application of collateral estoppel will not work an injustice because the Schibels had the opportunity to appeal the withdrawal order. *See* majority at 1134.