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

Darrell Riste, Cathy Riste and Tyler Riste,

Appellant(s)/Plaintiff(s)

v.

The Personal Representative of the Estate of Dan McAnally, The Trustee of the Riste Trust, Baker Boyer Bank, The Vice President of Baker Boyer Bank, Alan M. Dillman, Velikanje, Moore & Shore, Attorneys at law, Stokes Lawrence, Velikanje Moore & Shore, Stokes Lawrence, P.S., George Velikanje, and Does 1-30

Appellee(s)/Defendant(s)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant(s) and Plaintiff(s) in the Superior Court (Hereinafter “Plaintiff(s)”), seek review by Division Three of the State of Washington Courts of Appeal of the Decision(s) entered on November 6, 2017 and the Amended Order entered on December 8, 2017 granting summary judgment to the Appellee(s) and Defendant(s) (Hereinafter “Defendant(s)”) based upon Issue Preclusion and also precluding other claims as a matter of law (Yakima Superior Court Case # 12-00541-8). The laws of the State of Washington were misinterpreted, misapplied, the Court made erroneous findings of fact and abused its’ discretion. The Superior Court failed to set forth its’ interpretation(s) of law(s), application(s) of law(s) to the undisputed fact(s) and any fact(s) which were relied upon. The Superior Court’s Decision is a violation of Plaintiff(s) Constitutional right(s) to Due Process. (WA Const Article I, Sec. 3; RAP Rule 10.3)

II. ASSIGNMENTS OF ERROR

1) It was erroneously found that all of the Plaintiff(s) claims for acts committed by ALL of the Defendant(s) **during administration** were precluded by the judgment of the Yakima Superior Court in Case number 12-4-00514-8.

2) It was erroneously found that Plaintiff(s) claims for acts committed by the “Attorney Defendant(s)” **prior to administration** were barred as a matter of law.

3) It was error for the Court to dismiss Plaintiff(s) claim(s) with prejudice without providing an opportunity to review the Court’s legal authority or factual basis for dismissal and an opportunity to amend the

complaint accordingly.

III. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1) Neither Cathy Riste nor Tyler Riste were parties or in privity with any party and therefore may not be precluded from bring the instant civil complaint based upon the judgment of the Yakima Superior Court in Case number 12-4-00514-8. (Assignment(s) of Error 1, 3)

2) The issues decided in Yakima Superior Court Case number 12-4-00514-8 were not identical to the issues brought forth by the Plaintiff(s) in the instant civil complaint. (Assignment(s) of Error 1, 3)

3) Application of Issue Preclusion is unjust under the circumstances. (Assignment(s) of Error 1, 3)

4) The Defendant(s) did not meet their burden to prove by clear and convincing evidence all four of the required elements of Collateral Estoppel. (Assignment(s) of Error 1, 3)

5) Plaintiff(s) claims against the “Attorney Defendant(s)” for acts they committed **prior to administration** were not barred as a matter of law. (Assignment(s) of Error 2, 3)

IV. STATEMENT OF THE CASE

Plaintiff(s), Darrell Riste, Cathy Riste and Tyler Riste filed the instant Yakima Superior Court Complaint (Case # 16-2-02459-39) against all of the named Defendant(s) herein for acts committed by each of the Defendant(s) individually and/or collectively **during administration** of the Estate/Riste Trust which caused Plaintiff(s) harm to their divergent interests in the Estate of Dan McAnally and/or the Riste Trust. The

Yakima Superior Court Complaint (Case # 16-2-02459-39) **ALSO** sought damages from the “Attorney Defendant(s)” which included **ONLY**; Velikanje, Moore & Shore, Attorneys at law; Stokes Lawrence, Velikanje Moore & Shore; Stokes Lawrence, P.S.; and George Velikanje (hereinafter referred to as the “Attorney Defendant(s)”) for acts committed **prior to administration**, specifically but not exclusively, negligence in drafting the Will/Riste Trust. None of the **pre administration claims** were at issue in the Probate Removal hearing nor were they considered or addressed by the Yakima Superior Court in Case # 12-4-00514-8 (Probate Removal Hearing). The Court’s Dismissal in the instant matter with Prejudice of the **pre administration claims** against the “Attorney Defendant(s)” was in error on multiple levels and/or a manifest abuse of discretion unsupported by the weight of the evidence. The liability of these “Attorney Defendant(s)” to third party intended beneficiary(s) is not barred as a matter.

In addition to the **pre administration claims**, the instant Complaint (Case # 16-2-02459-39) alleged that **all of the Defendant(s)** committed acts **during administration** causing harm to the Plaintiff(s) which were required to be litigated in accordance with Due Process including but not limited to the right(s) to discovery, a full and fair opportunity to litigate and a jury trial. The Court’s preclusion of these claims which occurred **during administration** was in error and/or a manifest abuse of discretion. In Yakima Superior Court Case # 12-4-00514-8 (the Probate Removal Petition) the Plaintiff(s) did not request the Court to decide whether the PR/Trustee “actually” committed breaches of his fiduciary duty(s) and only requested the Court to determine whether or

not removal was justified based upon the “Prima Facie” presented; the only finding that the Probate Removal Court had jurisdiction and/or authority to make was whether removal was justified based upon the “Prima Facie” evidence that was presented. RCW 11.68.070, 11.28.260. The legislature’s intent for a probate removal hearing (which in this case lasted only fourteen minutes) was that it provide immediate/emergency relief to protect an Estate/Trust from further waste/misappropriation pending a fully litigated civil matter. *Id.* Specifically, the legislature authorized the Plaintiff(s) to present “Prima Facie” evidence in a removal hearing and further authorized the court to make the removal decision in chambers without any opportunity for the parties to conduct discovery, call witnesses or for a jury. *Id.* The legislature afforded the judicial officer the right to conduct the removal hearing on a cursory basis without the full range of Due Process which was required to be provided to litigants in a civil matter, specifically so that the beneficiary’s could immediately mitigate and/or prevent further harm to the Estate/Trust pending the resolution of their civil lawsuit without prejudicing the civil claims. *Id.* The Plaintiff(s) complied with all legislative procedures in requesting removal based upon “Prima Facie” evidence while the civil matter was pending and requested the court to continue the probate removal hearing if further “Prima Facie” evidence was needed to justify removal. *Id.* Accordingly, the Plaintiff(s) complied with the legislatures directive in presenting “Prima Facie” evidence while the civil matter was ongoing and accordingly requested the Court to decide **ONLY** whether or not Removal was justified based thereon that “Prima Facie” evidence, informing the court that the civil complaint was already filed and under way. CP 683.

The Petitioner did not make any request for the Probate Removal Court to decide whether or not the PR/Trustee actually committed the acts alleged to have caused damages which were at issue in the civil complaint. The Petition for Removal informed the Probate Court that a civil complaint regarding the PR/Trustee's misdeeds was ongoing and that if the Court required further "Prima Facie" evidence justifying removal that such further evidence could be provide upon discovery in the civil matter. *Id.* The only finding of the Probate Removal Court that was "material and essential" to the Plaintiff(s) request was whether or not removal was justified based upon the "Prima Facie" evidence, all other findings were not authorized under Washington State Law and/or were merely "evidentiary". The Court has no jurisdiction to make findings/orders which exceed the extent of relief requested by the Plaintiff(s). The Probate Court did not have jurisdiction to make conclusive findings on the PR/Trustee's misdeed without providing the Party(s) their Constitutional Rights to Due Process including but not limited to discovery, cross examination, impeachment and a jury trial. The findings of the Probate Removal Court in this matter other than the finding that removal was not justified based upon the "Prima Facie" evidence were "evidentiary" and should not have been relied upon to preclude the instant matter.

V. ARGUMENT

The elements of collateral estoppel are:

- (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an

injustice on the party against whom the doctrine is to be applied.

Shoemaker v. Bremerton, 109 Wn.2d 504, 507-08, (1987), citing, *Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489 (1985) and *Rains v. State*, 100 Wn.2d 660, 674 (1983). Issue Preclusion only applies when the issues to be precluded were “ultimate facts,” which were “directly at issue in the first controversy and upon which the claim rests” and does not apply to “evidentiary facts” which may have been proven in the underlying matter but were collateral to the claim asserted. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 229, (1978). Furthermore, Plaintiff(s) Cathy Riste and Tyler Riste had interests in the Estate and/or Riste Trust which diverged materially from those of Darrell Riste in the underlying matter and they cannot therefore be bound to findings of the first tribunal. *Stevens County v. Futurewise*, 146 Wn. App. 493 (Wash. Ct. App. 2008); see also, *Lim v. Precision Risk Mgmt.*, No. C12-0395JLR, 2012 U.S. Dist. LEXIS 162861, at 13 (W.D. Wash. Nov. 14, 2012). The party urging dismissal bears the burden of persuasion. See, *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 495, (2006), citing *Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure* § 1609, at 129 (3d ed. 2001); *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222 (2012). Even where Privity can be established Issue Preclusion is barred if preclusion would work an injustice, “[I]njustice' means more than that the prior decision was wrong.” *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299 (Wash. Ct. App. 2002). An injustice occurs where a party has not been provided a full and fair opportunity to litigate the issue in the

prior proceeding. *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255 (Wash. 1998); *Yellowowl-Burdeau v. City of Tukwila*, No. 2:16-cv-01632-RAJ, 2017 U.S. Dist. LEXIS 67693, at 7 (W.D. Wash. May 3, 2017).

In applying Issue Preclusion, the instant Court made several erroneous interpretation(s) and/or applications of the law(s) to the undisputed facts which should be reviewed de novo. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295 (2003). The trial court also made erroneous finding(s). *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570 (1959). The trial court has also abused its discretion,

[j]udicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *MacKay v. MacKay*, 55 Wn.2d 344 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562 (1941).

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971). Where the trial court fails to make sufficient findings to allow for review on appeal the Court of Appeals "may independently review," or "remand". *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808 (2009), citing, *In re Firestorm 1991*, 129 Wn.2d 130, 135 (1996), citing, *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222 (1992).

Here, the Superior Court failed to set forth any legal or factual findings necessary to establish all four elements of Issue Preclusion and perplexingly issued a blanket order finding that Issue Preclusion barred all

claims. As such, the Court of Appeals review should be De Novo. *Id.*

VI. SPECIFIC ARGUMENTS FOR ASSIGNMENTS OF ERROR

1) Plaintiff(s) claims for acts committed by ALL of the Defendant(s) **during administration** should not have been precluded by the judgment of the Yakima Superior Court (Case number 12-4-00514-8).

A) ONLY DARRELL RISTE WAS A PARTY OR “IN PRIVITY” IN YAKIMA SUPERIOR COURT CASE NUMBER 12-4-00514-8

In order for the Court to apply Issue Preclusion against Cathy Riste and/or Tyler Riste the Defendant(s) were required to prove by clear and convincing evidence that Cathy Riste and/or Tyler Riste were “In Privity” to Darrell Riste in Yakima Superior Court Case number 12-4-00514-8. CP 723 ln 20 - 724 ln 16; CP 1471 ln 15-28; 1475 ln 1-18. No evidence was admitted by the Defendant(s) to support any finding that Cathy Riste and/or Tyler Riste were “In Privity” in the underlying proceeding and therefore the Court’s finding is erroneous. Virtual representation requires proof that Cathy Riste and/or Tyler Riste participated in or manipulated the prior proceeding,

[t]he doctrine of virtual representation allows collateral estoppel to be used against a nonparty that is in privity with a party. *State v. Cloud*, 95 Wn. App. 606, 614, 976 P.2d 649 (1999) (quoting *Garcia*, 63 Wn. App. at 520); see *Frese v. Snohomish County*, 129 Wn. App. 659, 665, 120 P.3d 89 (2005). This doctrine is applied cautiously due to the danger of depriving a nonparty of its day in court. *Frese*, 129 Wn. App. at 665 (quoting *Garcia*, 63 Wn. App. at 520). Washington courts apply this doctrine **only when the nonparty participated in the former adjudication, for instance as a witness, and when there is evidence that the subsequent action “was the product of some manipulation or tactical maneuvering.”** *Garcia*, 63 Wn. App. at 521.

Stevens County. v. Futurewise, 146 Wn. App. 493, 508 (2008). No evidence was presented by the Defendant(s) that Cathy Riste or Tyler Riste “Participated” in Yakima Superior Court Case number 12-4-00514-8 or “Manipulated” it. *Stevens County. v. Futurewise*, at 503-04 - (Privity is established when a nonparty is in actual control of the litigation or substantially participates). No arguments were made by the Defendant(s) and no findings were set forth by the Court that either Cathy Riste and/or Tyler Riste “Participated” in or “Manipulated” Yakima Superior Court Case number 12-4-00514-8. As such, the Court’s finding that Issue Preclusion barred Cathy Riste and Tyler Riste’s civil complaint was a misinterpretation of the law(s), incorrect application of the law(s) to the facts and/or an abuse of discretion. *Id.* Furthermore, Cathy Riste and/or Tyler Riste’s “Legal Interests” in Court Case number 12-4-00514-8 were divergent from Darrell Riste’s “Legal Interests;” “two principles: (1) mere participation in the litigation of a previous action does not necessarily mean privity; (2) parties are not in privity if their interests diverged in the previous action.” *Lim v. Precision Risk Mgmt.*, No. C12-0395JLR, 2012 U.S. Dist. LEXIS 162861, at 13 (W.D. Wash. Nov. 14, 2012), ((referring to *Stevens County v. Futurewise*, 146 Wn. App. 493 (2008))). Darrell Riste’s “Legal Interests” in Yakima Superior Court Case number 12-4-00514-8 included requesting that the PR be removed for failing to challenge the validity of the Riste Trust. CP 372-373, 390, 398, 405. If the Riste Trust was invalid Darrell Riste would have received all of the Estate’s residuary assets which otherwise would have been distributed to the Riste Trust (if valid). *Id.* Contrary to Darrell Riste’s “Legal Interests,” both Cathy Riste and/or Tyler Riste’s “Legal Interest(s)” was in ensuring

that the Riste Trust was valid so that they may receive income payments from the Riste Trust during their lifetime(s). *Id.* Cathy and/or Tyler Riste's interests were divergent from those of Darrell Riste. CP 723 ln 20 - 724 ln 16; CP 1471 ln 15-28; 1475 ln 1-18. The record does not contain any allegations by the Defendant(s), nor could any such finding be supported by the record, that the Plaintiff(s) Cathy Riste and/or Tyler Riste were parties or in privity with Darrell Riste and/or that their "Legal Interests" coincided with those of Darrell Riste. CP 723 ln 20 - 724 ln 16; CP 1471 ln 15-28; 1475 ln 1-18. As such, the court misinterpreted the law(s), incorrectly applied the law(s) to the undisputed facts, made a finding of fact which was unsupported by the record and/or an abused its' discretion.

B) THE ISSUES WHICH ARE RAISED IN THE CIVIL MATTER WERE "IMMATERIAL" AND "NON ESSENTIAL" ISSUES IN YAKIMA SUPERIOR COURT CASE NUMBER 12-4-00514-8

Only issues that are identical and "material and essential" to the first controversy may be precluded in the second action. *Revisiting Claim and Issue Preclusion in Washington*, Kathleen M. McGinnis, March 30, 2015, 90 Wash. Law Rev. 75, 88-89, citing, *E. v. Fields*, 42 Wn.2d 924 (1953); CP 716-31, 1469-1502 & 2095-2116. The probate removal petition presented "Prima Facie" evidence for removal of the Personal Representative of the Estate and/or Trustee of the Riste Trust. CP 1646-1768, 2095-2116. The only "material and essential" finding that the court had jurisdiction/authority to make was that which was legislatively conferred; whether or not the "Prima Facie" evidence justified removal. CP 716-31, 1469-1502 & 2095-2116. The Petition for Removal did not

request the court to make conclusive findings on the alleged improvident acts of the PR/Trustee nor was the court authorized to do so without providing the Plaintiff(s) a right to discovery and a jury trial. CP 1646-1768, 2095-2116. The legislature intended the removal hearing to be conducted in a cursory manner based upon the presentation of “Prima Facie” evidence in order to allow Plaintiff(s) an immediate protection of the assets of an Estate/Trust while the civil matter was pending. *Id.* In fact the legislature specifically authorized a removal decision to be made by the court in chambers, which is what Commissioner Naught did. RCW 11.68.070, 11.28.260; CP 716-31, 1469-1502 & 2095-2116. As such, Commissioner Naught’s decision to deny removal pursuant to RCW 11.68.070 & RCW 11.28.260 without affording the Plaintiff(s) an opportunity for discovery and a jury trial cannot be the lawful basis to preclude Plaintiff(s) civil complaint. *Id.* The Probate Removal hearing which was conducted by Commissioner Naught without allowance for discovery did not provide a full and fair opportunity to litigate and was merely a proceeding to determine whether removal was justified based upon “Prima Facie” evidence. *Id.* A conclusive finding on whether or not the PR/Trustee committed the wrongful acts could only be determined in accordance with Due Process which did not occur in the hearing conducted by Commissioner Naught who did not allow for discovery, a jury trial or a continuance. *Id.* The legislatures intent was that the court make findings of an “evidentiary” nature in rendering its probate removal decision but that it could not conclusively decide matters that were at issue in a civil matter. *Id.* Any other interpretation of the legislative intent would violate the Appellant(s) right(s) to Due Process and would impede the

beneficiary's in complying with their duty to mitigate damages to an Estate/Trust while the civil matter was pending by seeking Removal. *Id.* Stated differently, the probate removal hearing was not required to be conducted with the same Due Process procedures required for a civil lawsuit which is required to be conducted with Due Process, because the removal hearing was an authorized cursory measure to afford a beneficiary a right to an immediate removal of a PR/Trustee based upon the presentation of "Prima Facie" evidence in order to prevent further unnecessary harm. RCW 11.68.070; RCW 11.28.260; CP 716-31, 1469-1502 & 2095-2116. The legislature did not intend to allow the court sitting in a probate removal hearing which required only "Prima Facie" evidence to usurp a litigants right to Due Process. *Id.* The Plaintiff(s) alerted the Probate Removal Court of the civil matter which was pending and that if further "Prima Facie" evidence justifying removal was needed that such could be provided after discovery in the civil matter. *Id.* As such, dismissal of the instant matter was an erroneous interpretation of the law(s), application of the law(s) and/or an abuse of discretion.

C) THE BURDEN OF PROOF WAS MORE STRINGENT IN THE PROBATE REMOVAL PROCEEDING THEREBY PRECLUDING APPLICATION OF ISSUE PRECLUSION

A difference in the degree of the **burden of proof** in the two proceedings precludes application of Collateral Estoppel. *Standlee v. Smith*, 83 Wn.2d 405, 407 (1974); CP 722-23 & 1474 (criminal acquittal does not have preclusive effect on parole revocation proceedings because lower burden of proof applies in revocation proceeding); see also *State v. Jones*, 110 Wash. 2d 74, 78-79 (1988) (issue preclusion does not apply

when the party against whom it is being sought had a significantly higher burden of proof in the initial proceeding); *Beckett v. Department of Social & Health Servs.*, 87 Wash. 2d 184, 186-88 (1976) (criminal acquittal did not preclude later civil fraud case because of different burdens of proof), overruled on other grounds in *In re McLaughlin*, 100 Wash. 2d 832, 843 (1984). The burden of proof applicable in the probate removal hearing was not set forth by the court and it is unclear to what standard of proof the court relied upon in making its' discretionary determination(s). *Id.*; see also CP 2095-2116. The only "essential and material" finding in a probate removal hearing which is conducted in the manner in which Commissioner Naught proceeded is whether or not removal was justified based upon the "Prima Facie" evidence. CP 716-31 & 1469-1502; see also CP 2095-2116. The Petition for Removal did not request the Court to determine conclusively whether or not the PR/Trustee breached his fiduciary duty(s) and ONLY requested that the court review the "Prima Facie" evidence to determine whether or not removal was justified while the Appellant(s) civil complaint was at bar and/or to continue the removal hearing until further evidence discovered in the civil matter justifying removal could be provided. *Id.*; See also CP 1646-1768; CP 2095-2116. Furthermore, the burden of proof at the removal hearing was more stringent than the preponderance of the evidence standard due to the court's refusal to allow for discovery, essentially requiring the Plaintiff(s) to prove their case without any opportunity for discovery.

D) A FULL AND FAIR OPPORTUNITY TO LITIGATE HAS BEEN UNCONSTITUTIONALLY DENIED

The Constitution(s) of the State of Washington and the United States guarantees a party a full and fair opportunity to litigate. CP 719-730, 1472-1480. Appellant(s) were effectively denied their Constitutional rights to Due Process by the court's order of preclusion because it effectively denied the Plaintiff(s) any opportunity to conduct discovery, depose witnesses, rebut the Defendant(s) testimony, cross examine any witnesses and to submit the factual disputes to a jury. (See above) The public policy concerns mitigate in favor of providing Plaintiff(s) the opportunity to initiate a civil action for damages and also a petition for removal to mitigate further damages and not requiring the Plaintiff(s) to chose between the two. CP 719-730 & 1472-1480, see specifically, *Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 309-310 (2004 Wash.) citing, *State v. Williams*, 132 Wn.2d 248 (1997). The Court's Dismissal of Appellant(s) claims effectively sets forth a rule of law that a beneficiary of an Estate/Trust cannot attempt to mitigate further damages to the Estate/Trust by initiating a Petition for Removal because that hearing will not afford the Petitioner a full and fair opportunity to litigate.

In that regard it was unjust for the court to preclude Plaintiff(s) civil matter which sought damages in excess of sixteen million dollars based upon the findings of a probate removal hearing where no damages were requested. *Id.* The disparity of relief between the two proceedings is so great that Plaintiff(s) did not have the same incentive to litigate in the Probate Removal Hearing as they did in the civil matter thereby rendering preclusion unconstitutional. Emphasis added, *Christensen v. Grant Cty.*

Hosp., 152 Wn.2d 299, 309 (2004); *Shoemaker v. Bremerton*, 109 Wn.2d 504, 513 (1987 Wash.) (This is a persuasive argument, depending on the actual disparity.); *Mack v. S. Bay Beer Distribs.*, 798 F.2d 1279, 1284 (9th Cir. 1986); *Reninger v. Dep't of Corrections*, 134 Wn.2d 437 (1998); *Shoemaker v. Bremerton*, 109 Wn.2d 504 (1987); CP 716-731, 742-748, 1459-1502 & 2234-2240.

E) THE DEFENDANT(S) DID NOT MEET THEIR BURDEN TO PROVE BY CLEAR AND CONVINCING EVIDENCE ALL FOUR OF THE REQUIRED ELEMENTS OF COLLATERAL ESTOPPEL

As stated above the Defendant(s) have the burden to prove by clear and convincing evidence each of the required elements of Issue Preclusion. Accordingly, the Pleadings and arguments made by the Defendant(s) fail to set forth any factual or legal basis for finding all four required elements of Issue Preclusion have been met. As such, the Court's Preclusion of the Plaintiff(s) claims is an incorrect interpretation of the law(s), application of the law(s) to the facts and/or an abuse of discretion.

2) APPELLANT(S) CLAIMS AGAINST THE "ATTORNEY DEFENDANT(S)" FOR ACTS COMMITTED PRIOR TO ADMINISTRATION WERE NOT BARRED AS A MATTER OF LAW

The Washington Supreme Court has set forth a six part test for determining whether an attorney owes a duty to a non client,

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;

- (4) the closeness of the connection between the defendant's conduct and the injury;
- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.

Trask v. Butler, 123 Wn.2d 835, 842-43 (1994). As set forth below, the Court's decision was not based on a correct interpretation and/or application of the law to the undisputed facts and/or was a manifest abuse of discretion.

A) THE "ATTORNEY DEFENDANT(S)" DRAFTING OF THE WILL/RISTE TRUST WAS INTENDED TO BENEFIT THE APPELLANT(S)

An attorney who drafts a Will or a Trust necessarily intends to benefit the beneficiaries,

In *Stangland v. Brock*, 109 Wn.2d 675 (1987), we acknowledged the right of an estate beneficiary to bring a cause of action against an attorney under the multi-factor balancing test and the third party beneficiary test for errors in drafting a will. In finding a duty to beneficiaries under the multi-factor balancing test, we recognized "if the beneficiaries could not recover for the attorney's alleged negligence, no one could." *Stangland*, at 681.

Emphasis added, *Trask v. Butler*, 123 Wn.2d 835, 843 (1994).

Likewise, the "Attorney Defendant(s)" drafted the Will and/or Riste Trust at the instruction of the Decedent to directly benefit the Plaintiff(s) who are named beneficiary(s). CP 212-217. The Will and Riste Trust were drafted several years prior to the Decedent's passing by the "Attorney Defendant(s)". These "Attorney Defendant(s)" owed a duty to the intended beneficiary(s) to draft the testamentary transfer documents

to ensure that the Shopping Center would be transferred from the Estate to the Riste Trust in kind and to thereafter be maintained as an asset of the Riste Trust subject to sale only upon the condition specified in the Will/Riste Trust. CP 212-217, 1-154. The “Attorney Defendant(s)” owed a duty to draft the testamentary documents to provide clear instructions to the future administrator of the Estate and/or Riste Trust to effectuate the Decedent’s intent which was to allow the beneficiary(s) to enjoy the income from the Shopping Center during their lifetimes subject only to the limitations set forth in the Will/Riste Trust. *Id.* The “Attorney Defendant(s)” owed a duty to draft the testamentary documents to ensure that the future administrator/trustee had a clear instruction that there was no duty to diversify and that the Shopping Center would not be sold unless the condition listed in paragraph 10.1 of the Riste Trust occurred. *Id.* The “Attorney Defendant(s)” failure to draft the testamentary instruments with clear instructions caused the beneficiary(s) to lose the right to the high income from the Shopping Center during their lifetimes because the administrator sold the Shopping Center based upon his misconceived duty to diversify for less productive assets without compliance with paragraph 10.1 of the Will/Riste Trust. *Id.*

Only the negligent Pre Administration acts of the “Attorney Defendant(s)” are at issue in this regard, the PR of the Estate or the Trustee of the Riste Trust were not authorized to act until the passing of the Decedent and commencement of Administration long after the negligent drafting of the testamentary documents occurred. *Id.* The allegations of the Plaintiff(s) in regards to the acts of the “Attorney Defendant(s)” prior to administration in drafting the Will and/or Riste

Trust represent an independent cause of action and were not barred as a matter of law. CP 2344. These acts of the “Attorney Defendant(s)” are not barred as a matter of law because Plaintiff(s) were the intended beneficiary(s) and no one else can sue for the “Attorney Defendant(s)” wrongdoing(s). *Trask*, supra at 843.

B) HARM TO THE APPELLANT(S) WAS FORESEEABLE AT THE TIME THE “ATTORNEY DEFENDANT(S)” DRAFTED THE WILL/RISTE TRUST

Clearly, an attorney who drafts a Will or a Trust knows and intends to draft that instrument as desired by the grantor/trustor to benefit the beneficiary(s). *Id.* No plausible argument can be made that an attorney does not intend to draft these instruments in a manner to benefit third party(s). *Id.* Likewise, no plausible arguments can be made that a poorly drafted will or trust which fails to effectuate the purposes for its creation in an efficient and effective manner will not cause foreseeable harm to the beneficiary(s). *Id.*

C) THE APPELLANT(S) DID SUFFER INJURY AS THE RESULT OF THE “ATTORNEY DEFENDANT(S)” NEGLIGENTLY DRAFTED WILL/RISTE TRUST

Appellant(s) were harmed by the negligently drafted testamentary instruments in that the PR of the Estate misinterpreted the Decedent/Trustor’s intention that the Shopping Center be maintained unless assets with a higher net income stream could be procured in its place and that there was no duty to diversify. *Id.* The PR incorrectly believing his duty to diversify controlling sold the Shopping Center for less productive assets and in contravention of the Decedent’s intentions.

Id. Damages in excess of sixteen million dollars were caused by the poorly drafted testamentary instruments. Appellant(s) were denied their Due Process right to conduct discovery and thereafter prove the Decedent's intention(s) which were not at issue and/or not determined in the removal hearing and have these claims decided by a jury.

D) THERE WAS A CLOSE CONNECTION BETWEEN THE "ATTORNEY DEFENDANT(S)" CONDUCT AND THE APPELLANT(S) INJURIES

The negligent drafting of the testamentary instruments was the proximate and but for cause of the harm to the Appellant(s) interests in the Estate of Dan McAnally and/or as beneficiaries of the Riste Trust.

E) THERE WAS A POLICY OF PREVENTING FUTURE HARM

There clearly is a public policy of preventing future harm to attorney malpractice/fraud victims, "In this case, our examination of factors five and six requires us to consider the policy conflict between the prevention of future harm to attorney malpractice victims and the burden imposed on the legal profession by imposing liability." *Parks v. Fink*, 173 Wn. App. 366, 378 (2013). Unlike in *Parks*, there is no added burden to the Attorney Defendant's by holding them accountable to the beneficiaries for their malpractice in drafting testamentary documents.

F) THE LEGAL PROFESSION WILL NOT BE UNDULY BURDENED BY A FINDING OF LIABILITY

There is no burden on the attorney profession of imposing a duty to third party intended beneficiaries of a Will/Trust once the attorney has

completed his services. *Id.* Unlike the undue burden in *Parks* there is no burden imposed in this matter from requiring an attorney to do nothing more than what he was already obligated to do for the Decedent/Trustor. *Parks v. Fink*, 173 Wn. App. 366, 378 (2013).

V. CONCLUSION

Plaintiff(s) claims were not barred by Issue Preclusion because neither the Party(s) nor the issues were identical and a full and fair opportunity to litigate was not provided. The probate removal hearing as conducted by Commissioner Naught without allowance for discovery, a jury trial or a continuance and where he applied a more stringent standard by requiring proof based only on the “Prima Facie” evidence does not provide a basis to preclude Appellant(s) civil complaint. The burden of proof imposed upon Darrell Riste at the probate removal hearing was significantly more stringent than that applicable in the civil matter where discovery and presentation of all ascertainable proof would have been available to prove by a preponderance of the evidence the PR/Trustee’s misdeeds. Furthermore, the disparity of relief between a removal hearing which did not seek damages and a complaint for damages of over sixteen million dollars is extreme and presents a significantly different incentive to litigate. The Appellant(s) have been unconstitutionally denied a “full and fair” opportunity to litigate. Finally, the claims against the “Attorney Defendant(s)” are not barred as a matter of law.

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