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COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

DARRELL RISTE, TYLER RISTE, CATHY RISTE,

Appellants,

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,

Respondents.

BRIEF OF RESPONDENTS STOKES LAWRENCE, P.S.; GEORGE
VELIKANJE; BAKER BOYER BANK; AND ALAN M. DILLMAN

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I. INTRODUCTION

George Velikanje, Stokes Lawrence Velikanje Moore & Shore, Stokes Lawrence, P.S., (hereinafter collectively Stokes Lawrence) and Baker Boyer Bank and Alan M. Dillman (hereinafter collectively the Bank), respondents before this court and defendants before the trial court ask this Court to affirm the Yakima County Superior Court's November 6, 2017 Order granting their Motion for Summary Judgment.

This case involves the probate of Dan McAnally's estate, who died September 22, 2012. Pursuant to the terms of the will, Baker Boyer Bank was appointed personal representative (PR) of Mr. McAnally's estate. Thereafter, Baker Boyer Bank retained Mr. Velikanje as attorney for the PR. On September 25, 2012, Baker Boyer Bank successfully petitioned Yakima County Superior Court to admit the will to probate and confirm the bank as PR with nonintervention powers. This brief refers to the Superior Court that handled the probate of the will as the "probate court."

Issues concerning the closure of the estate arose, and Plaintiff-appellant Darrell Riste, a beneficiary of the estate, filed a petition with the probate court requesting to remove Baker Boyer Bank as PR for conflicts of interest and breach of fiduciary duties, amongst other requests. The probate court rejected Darrell Riste's arguments, approved all fees for the PR and closed the estate. This court then affirmed the Probate Order on

appeal in *In re Estate of Dan McAnally*, 3 Wn. App. 2d 1049, 2018 WL 2069521 (2018).

While the probate matters were pending, Plaintiffs-Appellants Darrell, Cathy, and Tyler Riste (hereinafter collectively the Ristes) filed this action, alleging in a voluminous 152-page complaint the same issues which were the subject of Darrell Riste's petition to the probate court. Because the Ristes were making the same allegations as in the Probate Court, and because Stokes Lawrence owed no duty to the Ristes, the Superior Court correctly dismissed the Ristes' claims against them.

The Ristes have made it impossible to have any legal review of the case because they cite to the record only once in their Statement of the Case, serious violation of the Rules of Appellate Procedure.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Stokes Lawrence and the Bank assign no error to the superior court's decision.

Issues Pertaining to Assignments of Error

Stokes Lawrence and the Bank disagree with the Ristes' statement of Issues Pertaining to Assignments of Error. Stokes Lawrence and the Bank believe the single issue on appeal is more properly stated as follows:

Whether the superior court properly dismissed the Ristes' claims as a matter of law on summary judgment, where:

1. Collateral estoppel barred the Ristes' claims against Stokes Lawrence and the Bank, because the probate court previously decided the same issue against the Ristes;
2. As a matter of Washington law, Stokes Lawrence did not owe a duty of care to the estate or heirs when representing the PR in a probate action;
3. The Ristes violate the Rules of Appellate Procedure by failing to cite properly or sufficiently to the record in their appeal brief; and
4. The Ristes violate the Rules of Appellate fail to cite, and/or misstate, authority in their appeal brief.

III. STATEMENT OF THE CASE

A. The probate court ruled against the Ristes on the same claims the Ristes are pursuing in this action.

The Ristes allege that Stokes Lawrence and the Bank caused damages to them allegedly suffered as a result of the handling of and testamentary disposition of the Viking Village Shopping Center. The shopping center was an asset of the estate of Dan McAnally. Attorney George Velikanje drafted Mr. McAnally's will, dated October 21, 2005. CP 2257. Mr. McAnally died testate on September 22, 2012 in Yakima County. CP 402. The will was admitted to probate in Yakima County

Superior Court on September 22, 2012. CP 209. The will appointed Baker Boyer Bank as PR of the Estate. CP 212. Pursuant to the terms of the will, the PR of the estate, Baker Boyer Bank, retained Mr. Velikanje as attorney for the PR. *Id.*

Mr. McAnally's will contained specific bequests in favor of Darrell Riste and pecuniary bequests in favor of Darrell Riste and Fred Wickholm, who is not a party to this case. CP 213. The will left the residue of the decedent's estate to a testamentary trust for the benefit of Darrell Riste and his family, including Cathy and Tyer Riste. CP 213-15. On May 8, 2014, Darrell Riste signed a receipt for his full distributive share, and the receipt was filed in the probate matter on May 13, 2014. CP 1590. The PR paid itself fees in accordance with the published fee schedule. CP 2123. It also paid its counsel, Stokes Lawrence. CP 2123.

The trial court in the *McAnally* probate action (hereinafter "the probate court") entered findings of fact and conclusions of law against Mr. Riste. In an unpublished decision, this court affirmed. *In the Matter of the Estate of Dan McAnally*, 3 Wn. App. 3d 1049, 2018 WL 2069521 (Div. 3 May 3, 2018), attached as the Appendix to this brief, at 1, 10-20.¹ As discussed at § V.C., *infra*, the doctrine of collateral estoppel precludes

¹ This court may take judicial notice of proceedings in an action that is ancillary or supplementary to the present action. *See, e.g., Swak v. Dep't of Labor & Indus.*, 40

the Ristes' relitigation of those findings of fact and conclusions of law in this action. Those findings of fact and conclusions of law included:

1. The fees of the PR and the PR's counsel were reasonable and incurred for the benefit of decedent's estate. CP 389; App. at 20.

2. The testamentary trust decedent's will created is valid under Washington law. CP 390; App. at 10, 12-13.

3. All bequests by Mr. McAnally in favor of Darrell Riste, whether specific or pecuniary, have been paid in full. CP 390.

4. Mr. McAnally's will did not contain a specific devise of the Viking Village Shopping Center to Darrell Riste. CP 390; App. at 12-13.

5. Mr. McAnally's will did not contain any provision prohibiting or restricting the right of the PR to sell the Viking Village Shopping Center. CP 391; App. at 12-13.

6. The PR did not commingle its assets with the assets of Mr. McAnally's estate and did not improperly commingle assets of decedent's estate with the assets of the Riste Trust. CP 391; App. at 13-14.

7. The PR did not violate any fiduciary duties or responsibilities. CP 391; App. at 14.

Wn.2d 51, 53, 240 P.2d 560 (1952). This court therefore may consider the probate proceedings in both the superior court and this court.

8. Stokes Lawrence, counsel for the PR, did not violate any of its fiduciary duties or responsibilities. CP 391.

B. At all times, as attorney for the PR, Stokes Lawrence, and as PR for the estate, the Bank, acted diligently and caused no harm to the Ristes.

The largest asset of the McAnally Estate was a small shopping center in Selah, Washington, the Viking Village Shopping Center. CP 235. However, the property was poorly maintained and in need of significant repairs and upgrades. CP 871. The PR was concerned about maintaining a real property asset in a trust with income beneficiaries and residual beneficiaries. CP 223-24. Accordingly, the PR determined that the best course of action was to sell the property and invest the proceeds more appropriately for a family trust. CP 646. At the time of this decision, Darrell Riste, Cathy Riste, and Tyler Riste retained their own attorney, who voiced objections to the sale of the property. CP 219-22. In response, the PR petitioned the probate court for an order authorizing the sale. CP 230-34. The Ristes' attorney appeared at the hearing and offered no opposition when the court entered an order approving the sale of the Shopping Center at a price of \$1,400,000.00 subject to various contingencies. CP 248-49.

One of the contingencies of the sale was an environmental study, because an auto repair shop and a dry cleaning business had operated on

the property for many years. CP 237-43. An environmental study ultimately concluded that there were significant environmental concerns and estimated cleanup costs between \$147,000.00 and \$561,000.00. CP 251-53. The buyer attempted to renegotiate the sale terms to address these costs, but the parties could not reach an agreement and the sale fell through. CP 255. Shortly thereafter, new buyers were found who were willing to accept the property as is with a sale price of \$1,100,000.00. CP 647. The PR contacted the Riste family and requested approval for the sale. CP 55. Via email, Darrell Riste approved the sale at the \$1,100,000.00 price. *Id.* In reliance on the Riste family approval, the PR moved forward with the sale. CP 647. The transaction closed in May 2015. *Id.*

In 2016, with new counsel, the Riste family asserted that the sale was improper and filed claims in both the probate and this present action. In this action, they seek to hold Stokes Lawrence and the Bank liable for damages allegedly suffered as a result of the sale. CP 1, 3.

IV. SUMMARY OF ARGUMENT

For three reasons, this court should affirm the superior court's dismissal of this action.

First, a failure to cite the record precludes review of the contention. The Ristes' opening brief contains wholesale violations of the Rules of

Appellate Procedure by failing to cite the record. In the few instances the Ristes did cite the record, those citations were inaccurate, incomplete, or misleading. This court should disregard the Ristes' brief and thus affirm.

Second, this court should affirm because collateral estoppel bars the Ristes' claims. They litigated and lost the same issues in the probate proceeding as they assert here. *In the Matter of the Estate of Dan McAnally*, 3 Wn. App. 3d 1049, 2018 WL 2069521 (Div. 3 May 3, 2018), attached as the Appendix to this brief.

Third, Stokes Lawrence represented only the PR, not the Ristes as beneficiaries, and under the present facts neither owed nor breached any legal duty to the Ristes.

This court should award Stokes Lawrence and the Bank its reasonable attorney fees. The Ristes' appeal brief is difficult to comprehend; the Ristes fail to cite adequately or properly to the record on appeal; collateral estoppel bars the present claims, to the extent they can be discerned; and even if collateral estoppel did not apply, the Ristes fail to prove the existence, much less the breach, of any legal duty by Stokes Lawrence. This appeal is frivolous. This court should order the Ristes to pay Stokes Lawrence's and the Bank's reasonable attorney fees.

V. ARGUMENT

A. **The standard of review is de novo, but this court may affirm on any ground the record supports.**

This Court engages in the same inquiry as the trial court when reviewing a summary judgment order. *See Wilson v. Steinback*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). However, a trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof. *Swartley v. Seattle Sch. Dist. No. 1*, 70 Wn.2d 17, 421 P.2d 1009 (1966).

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of material fact. *LePlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” CR 56(c). When reasonable persons could reach but one conclusion from all the evidence, summary judgment is appropriate.

Here, the trial court correctly found that no disputes as to any material facts existed, and the Stokes Lawrence and the Bank were entitled to judgment as a matter of law.

B. The Ristes' violations of the Rules of Appellate Procedure pervade their brief and preclude review of their assignments of error.

1. The Ristes' Statement of the Case fails to cite to the record to support their factual assertions and thereby violates RAP 10.3(a)(5), and this court should disregard it.

As described more fully below, the Ristes' brief violates the Rules of Appellate Procedure in multiple ways. These violations preclude review of some or all of the alleged errors the Ristes assign to the trial court's decision. Unfortunately, these many RAP violations resemble those that the same attorneys committed in the appeal of the *McAnally* probate action. As this court noted:

Mr. Riste violates the rules of appellate procedure in multiple ways. First, his brief does not contain a statement of facts. RAP 10.3(a)(5) requires such a statement. To the extent he includes assertions of facts in his various arguments, he either does not cite the record to support his assertion, or he cites an *allegation* in his petition to support his assertion, or he cites to a span of dozens or even hundreds of pages. Further, Mr. Riste's brief often summarily states his view of the law without any analysis, followed by string citations to statutes and cases.

We will nevertheless address Mr. Riste's more coherent arguments, even some of which are not accompanied by proper citations to the record or legal argument.

Estate of McAnally, App. at 10 (italics in original).

A party must cite the record to support a factual contention in his brief. RAP 10.3(a)(5). A failure to cite the record precludes review of the contention. *Simmerman v. U-Haul of Inland Northwest*, 57 Wn. App. 682, 685, 789 P.2d 763 (1990).

The purpose of [RAP 10.3(a)(6)] and related rules “is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority.” *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992). This court is not obligated to search the record for evidence supporting a party's claim of error. *Heilman v. Wentworth*, 18 Wn. App. 751, 754, 571 P.2d 963 (1977).

Estate of McAnally, App. at 9. This court may impose sanctions for a party's failure to cite the record adequately. RAP 10.7.

Only once in their Statement of the Case did the Ristes cite the record. App. Br. at 2-5. Their Statement of the Case is full of factual and legal assertions that go entirely unsupported by the record. For example, the Ristes state they are seeking damages from Stokes Lawrence for acts committed prior to administration of the will, including negligence in drafting the will. App. Br. at 3. Further, the Ristes state that none of the pre-administration claims were at issue in the Probate Removal hearing and were not addressed in the Superior Court in case no. 12-4-00514-8. *Id.* They fail to cite any support anywhere in the record for this factual assertion. These violations of RAP 10.3(a)(5) make it impossible for this

court, Stokes Lawrence, and the Bank to assess the arguments in the Ristes' brief.

2. The Ristes' Argument fails to cite sufficient legal authority and/or misstates legal authority and thereby violates RAP 10.3(a)(6), and this court should disregard it.

A party must cite to legal authority and reference to relevant parts of the record when supporting the issues presented for review. RAP 10.3(a)(6). "Without adequate, cogent argument and briefing, this court should not consider an issue on appeal." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (quoting *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990)). Thus, when briefings supplied by a party leave questions as to the precise issues being raised, the party has not properly raised issues on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d at 160. A party waives an assignment of error not adequately argued in its brief. *State v. Motherwell*, 114 Wn.2d 353, 358, 788 P.2d 1066 (1990).

Throughout their entire Argument, the Ristes misstate or misrepresent case law authority, misstate or misrepresent legislative intent in reference to the Revised Code of Washington, and improperly use citations to the record as authority for legal conclusions.

On Page 8 of their opening brief, the Ristes cite CP 723-24, Plaintiff's Opposition to Summary Judgment, in support of their argument that for collateral estoppel to apply against Cathy and/or Tyler Riste, Stokes Lawrence was required to prove by clear and convincing evidence Cathy and/or Tyler Riste were in privity to Darrell Riste in the Yakima Superior Court Case No. 12-4-005514-8. App. Br. at 8. Under RAP 10.3(a)(6), the Ristes cannot simply cite their opposition to summary judgment as authority for legal issues they are arguing.

Unfortunately, the Ristes continued to cite their own superior court briefs in their entirety, rather than actual proof in the record, as support for their factual assertions. In asserting that the only "material and essential" finding the probate court had authority to make was whether or not the "Prima Facie" evidence justified removal, the Ristes cite CP 716-31, Plaintiffs' Opposition to Summary Judgment, in its entirety, and CP 2095-2116, the probate court's Finding of Facts and Conclusions of Law, in its entirety. App. Br. at 10. This in no way meets the clear requirements of RAP 10.3(a)(6).

While "*Id.*" is an acceptable form of short form citation, the Ristes use it indiscriminately, and incorrectly, to cite the record. At pages 9-10 of the Ristes' brief, they use "*Id.*" in support of their assertion that Darrell Riste would have received all of the Estate's residuary assets "which

otherwise would have been distributed to the Riste Trust (if valid)” if the Riste Trust was invalid. App. Br. at 9-10. However, before that citation, the Ristes cite CP 372-373, 390, 398, and 405, all of which do not discuss the assertion the Ristes are making when citing “*Id.*” The Ristes next cite “*Id.*” as support for their assertion that Cathy and Tyler Riste were different than Darrell Riste. App. Br. 9-10. Again, the previous citations to the record do not support the Ristes’ assertion.

Similarly, at page 17 of the Ristes’ brief, they cite “*Id.*” as support for a myriad of assertions, including: (1) That the “Attorney Defendants” owed a duty to draft the testamentary documents clearly to effectuate the decedent’s intent to allow the beneficiaries to have income from the shopping center during their lifetimes; (2) that the “Attorney Defendants” owed a duty to draft testamentary documents to ensure future administrators of the trust had clear instructions 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;” (3) that the “Attorney Defendants” failure to do so caused the beneficiaries to lose their right to “high income” from the shopping center; and (4) that only the “negligent Pre Administration acts of the ‘Attorney Defendants.’” App. Br. at 17. These improper citations to the record make it almost impossible to ascertain what support exists in the record for the Ristes’

assertions. Such rules exist to relieve the court of the burden of “search[ing] through sometimes large volumes of material” in the record on appeal. *Cf. Thomas*, 99 Wn.2d at 99-100 (therein violation of RAP 10.4(c)).

It is the Ristes’ burden on appeal to assign error, RAP 10.3(a)(4); articulate the issues on appeal, *id.*; present a “fair statement of the facts and procedure relevant to the issues presented for review” and include “[r]eference to the record ... for each factual statement[,]” RAP 10.3(a)(5); and present “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). The Ristes’ brief repeatedly violates these clear standards. Their violations of RAP 10.3(a) render this court’s task of review virtually impossible. Instead, the Ristes simply stated their view of the law, without analysis, followed by string citation to statutes and cases. Thus, this court should decline to review the issues they raise on appeal.

If there is to be a rule, there must be a point at which failure to comply therewith can no longer be tolerated. That point has been reached in the present case. Therefore, since petitioners’ claims involve no important constitutional questions which we might otherwise be inclined to address, we now follow the reasoning of *Arnold [v. Laird]*, 94 Wn.2d 867, 874, 621 P.2d 138 (1980) and refuse to consider petitioners claimed errors.

Thomas, 99 Wn.2d at 101.

C. The Ristes cannot collaterally attack the closed estate of Dan McAnally.

The fact that the Estate is closed bars any collateral attack on the orders in the probate proceedings. In their Motion for Summary Judgment, Stokes Lawrence and the Bank relied on *Meryhew v. Gillingham*, 77 Wn. App. 752, 893 P.2d 692 (1995). CP 2173. *Meryhew* sets forth the general rule in Washington that probate proceedings cannot be collaterally attacked. *Id.* at 754; *see also Ryan v. Plath*, 18 Wn.2d 839, 140 P.2d 968 (1943); *Farley v. Davis*, 10 Wn.2d 62, 116 P.2d 263 (1941).

The settled law in this state [is] that orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments in rem and are conclusive and binding **upon all persons having any interest in the estate and upon all the world as well.**

Ryan, 18 Wn.2d at 857 (emphasis added). The only exception to this general rule is for extrinsic (or collateral) fraud. *Id.*; *Meryhew*, 77 Wn. App. at 754. However, this exception is narrow:

[T]he fraud relied upon must be extrinsic or collateral to the issues tried in the original proceeding, that is to say, the fraud on the part of the prevailing party must have been such as deprived the unsuccessful party of a fair hearing upon the original controversy.

Ryan, 18 Wn.2d at 857. In other words, “[t]here must have been fraud in procuring the original judgment or decree.” *Id.* (quoting *Farley*, 10 Wn.2d at 71) (emphasis added).

Here, the probate court closed the Estate of Dan McAnally. CP 2125-27; CP 1046-48. After a review of the voluminous record, this court affirmed. *Estate of McAnally*, App. at 22. Simply, there was absolutely no extrinsic or collateral fraud. *Id.* As this court reasoned in its opinion:

The court commissioner’s decision is consistent with the record. The record is replete with communications between the PR and Mr. Riste about the terms and conditions of the conditional sale and eventual sale. This includes Mr. Riste’s approval of the eventual sale on March 20, 2015.

Id. at 17.

Thus, while the Ristes argue that they were denied a full and fair opportunity to litigate their allegations of fraud and negligence against the estate, the Washington Supreme Court held in *Farley* and *Ryan* that it does not matter because the estate was closed. Therefore, the Bank acted lawfully during the probate proceedings. Further, Stokes Lawrence owed a fiduciary duty to its client, the Bank, not to undermine its legal position and would be violating that duty if instead it tried to help out the beneficiaries in some way.

D. Collateral estoppel bars the Ristes from bringing claims they litigated and lost in probate court.

Even if the Ristes could collaterally attack the closed estate, which they may not, the doctrine of collateral estoppel bars their claims in this action. Washington courts apply collateral estoppel where: (1) the issue decided in the prior litigation is identical to the one presented in the current action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party in privity with a party to the prior adjudication; and (4) application of the doctrine would not work an injustice. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002) (citing *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); *Nielsen v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)).

Here, the Ristes are collaterally estopped from asserting the claims against Stokes Lawrence and the Bank because they raised the same issues in the probate proceeding, and the court found against them on all points. They cannot raise the same in this case, a separate action. Collateral estoppel provides “a means of preventing the endless relitigation of issues already litigated by the parties and decided by a competent tribunal.” *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001); *see also Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327, 99 S. Ct. 645, 58

L. Ed. 2d 552 (1979) (collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating identical with the same party and of promoting judicial economy by preventing needless litigation).

1. The issues in the probate action were identical to those in the present action.

It is beyond dispute that the Ristes raised the same issues in the probate action and in the present action:

1. In both the probate action and this action, the Ristes challenged the validity of the trust and authority of the PR to sell the shopping center. CP 62, 910.
2. In both the probate action and this action, the Ristes asserted that the conduct of the PR constituted breach of fiduciary duty and breached the terms of the trust, was fraudulent, grossly negligent, constituted conflict of interest, and constituted collusion and/or embezzlement. CP 3, 898.
3. In both the probate action and this action, the Ristes asserted that Mr. Velikanje as attorney for the PR breached fiduciary duties, had a conflict of interest, negligently drafted the trust and will, and as a result should be required to disgorge his fees. CP 3, 898.

Thus the Ristes made functionally identical allegations in both the probate action and in this case.

2. The dismissal of all of Ristes claims in the probate proceeding was final and on the merits.

The probate order constituted a final judgement on the merits. The finality test for collateral estoppel is not the same as the finality test for CR 54. *Cunningham v. State*, 61 Wn. App. 562, 566-67, 811 P.2d 225 (1991); *Chau v. Seattle*, 60 Wn. App. 15, 119, 802 P.2d 822 (1991). When it comes to collateral estoppel, Washington courts have adopted a more relaxed approach than CR 54. *Cunningham*, 61 Wn. App. at 567.

[T]here has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another courtroom.

Id. For purposes of collateral estoppel, a final judgment “includes prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. *Id.* at 567 (quoting Restatement (Second) of Judgments § 13 (1982)).

Because the Ristes appealed the probate order under CR 54, a stricter standard of finality, a discussion of each factor is unnecessary. The probate order was clearly final and on the merits of the case. Further, Ristes do not contest the finality of the order anywhere in their Brief to this court.

3. The Ristes were parties to the earlier probate proceeding.

The Ristes assert that Cathy and Tyler Riste were not parties to the probate proceeding. That assertion is false. Cathy Riste (Darrell Riste's wife) and Tyler Riste (Darrell Riste's son) were all parties to the probate action, and the same attorney, Rick Tuha, represented all three. CP 2254, 2258. The Ristes provided their attorney, Mr. Tuha, timely notice of all proceedings. CP 2258. He did not file any objections on behalf of any of his three clients. CP 2259. While representing the Ristes, Mr. Tuha informed Stokes Lawrence that the Ristes did not oppose the sale of Viking Village. *Id.* Attorneys Samuel Walker and Kevin Holt later filed a notice of appearance on behalf of the Riste family. *Id.*

a. Even if Cathy Riste and Tyler Riste were not parties, they were in privity with Darrell Riste.

The doctrine of virtual representation allows collateral estoppel to apply against a non-party when the former adjudication involved a party with substantial identity of interests with a non-party. *Garcia v. Wilson*, 63 Wn. App. 516, 520, 820 P.2d 964 (1991). Virtual representation is established for purposes of collateral estoppel when there exists a "mutual or successive relationship to the same right or property." *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984). In *Hackler*, the

father of the former wife in a dissolution action actually testified in the proceeding and was deemed to be in privity. The court said,

The binding effect from the adjudication flow from the fact that when the successor acquires an interest in the right, the successor is then affected by the adjudication in the hands of the former owner.

Id. at 794.

Here, the interests of all three Ristes are nearly, if not entirely, identical. All three are beneficiaries of the McAnally Estate, and all three are making the same allegations which were made in the probate matter, of which Darrell Riste was the party asserting the claims. CP 908-12. Indeed, the same lawyers represented Darrell Riste in the probate action. Still, the Ristes argue Cathy and Tyler Riste had interests in the estate which diverged materially from those of Darrell Riste in the underlying matter. App. Br. at 6. However, if true, those lawyers could not represent the Ristes in both actions without creating a significant conflict of interest. *See generally* RPC 1.7.

Further, the Ristes use *Garcia* to argue virtual representation applies **only** when the non-party participated in the former adjudication, “for instance as a witness, and when there is evidence that the subsequent action ‘was the product of some manipulating or tactical maneuvering.’” App. Br. at 8. The Ristes misquote *Garcia* in an attempt to argue Cathy

and Tyler Riste needed to be, in some way, a part of the probate matter. This argument contravenes settled Washington law. Participation in the prior adjudication is merely a factor; it is not controlling. Where a nonparty was involved in the subject matter, was a witness, and was aware of the first action, “nothing would be accomplished by allowing the second action.” *Garcia*, 63 Wn. App. at 521 (citation omitted).

Moreover, as discussed above, attorney Tuha represented Cathy and Tyler during the administration of the probate estate. They received notice of each and every probate proceeding, including the Petitions to sell Viking Village; to close the Estate; and to remove the Personal Representative and Trustee. CP 2258. Thus, Cathy and Tyler Riste were even more involved in the earlier proceeding than was the plaintiff in *Garcia*. Unlike the *Garcia* plaintiff, Cathy and Tyler Riste were actually parties to the probate proceeding.

The Ristes fail to distinguish the facts of this case from *Garcia*. Nor do the Ristes explain how they could be represented parties in the earlier probate proceeding and yet somehow not qualify as “participants.” Their receiving notice and making a conscious choice, on the advice of capable counsel, not to object in the proceedings is participation, especially in light of *Garcia*.

- b. Even if Cathy and Tyler Riste were not parties to the action or in privity, the doctrine of virtual representation still binds them the prior adjudication.**

RCW 11.96A.120 provides for the application of the doctrine of virtual representation.

Notice to a person who may represent and bind another person under this section has the same effect as if notice were given directly to the other person.

RCW 11.96A.120(1). Further, RCW 11.96A.120 provides:

An action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise represented under this section.

RCW 11.96A.120(11).

The Ristes seek to avoid the doctrine of virtual representation by arguing that the interests of Darrell Riste conflicted with those of Cathy and Tyler Riste. They argue that it was in Darrell Riste's best interest to have the trust declared invalid, whereas it was in Cathy and Tyler Riste's best interests to have the trust be declared valid. These arguments fail as a matter of law.

If the trust is held invalid, there would be a lapse of the bequest of the residue, and since the will did not name a contingent beneficiary, the residue will pass by intestacy to Dan McAnally's heirs at law. CP 211-17. Even Washington's anti-lapse statute will not provide Darrell Riste and his family any benefit from the residue because they do not fall into the

category of descendants. *See Estate of Kvande v. Olsen*, 74 Wn. App. 65, 871 P.2d 669 (1994) (holding that a testamentary trust failed because the trust beneficiary died before the testator, and because the beneficiary was not a relative of the decedent, the anti-lapse statute did not apply).

The anti-lapse statute does not apply to the Ristes. RCW 11.12.110 provides that a lapse of a bequest will not occur if the intended beneficiary of that bequest was a relative of the decedent (a descendant of the decedent's grandparent) and the beneficiary predeceases the testator and leaves descendants. From there, no lapse of the bequest occurs, and the bequest passes to those descendants by right of representation. RCW 11.12.110. Darrell Riste is not a descendant of Dan McAnally's grandparents, and his heirs would not be entitled to any benefit under the anti-lapse statute if the trust was held invalid. The probate court found that Darrell Riste was not an heir at law of Mr. McAnally, and that finding was not appealed. CP 390. Therefore, the Ristes' argument fails because if the conflict which they argue existed, under the anti-lapse statute neither party would be entitled to the bequests in the will. Thus, no actual conflict exists because neither, Darrell, Cathy, nor Tyler Riste benefits from the trust being found invalid, and therefore the doctrine of virtual representation binds the Ristes to the findings of the probate court.

4. Application of collateral estoppel would not work an injustice.

Pages 10-15 of the Ristes' brief attacks application of collateral estoppel here, but it is unclear which elements of the doctrine they are attacking. But as the trial court held, the Ristes had their day in court, so injustice would not result from their relitigating their claims here.

a. The difference in burdens of proof between courts is not determinative in courts applying collateral estoppel.

The Ristes assert that differing burdens of proof in two proceedings **precludes** application of collateral estoppel. App. Br. at 12 (citing *Standlee v. Smith*, 83 Wn.2d 405, 518 P.2d 721 (1974)). This argument fails for two reasons.

First, the Ristes fail to cite any legal authority for the proposition that the burden of proof in a probate removal proceeding is different than in a general civil lawsuit. It is difficult to glean from the Ristes' poorly written, sometimes incoherent brief how, if at all, the burden of proof in the *McAnally* probate action differed from the burden of proof in this action. See App. Br. at 13. The Ristes do cite two removal statutes, RCW 11.68.070 and RCW 11.28.260, but neither states a burden of proof. App. Br. at 13; RCW 11.68.070; RCW 11.28.260.

The two cited statutes simply grant courts the discretion to remove a PR and revoke his/her letters testamentary. "If, upon hearing of the

petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal ... then, in the discretion of the court ... the personal representative may be removed[.]” RCW 11.68.070. Given this broad discretion, it is far more likely that prevailing in a removal proceeding is less burdensome than it is in a civil lawsuit like the present action.

Second, even if the Ristes could establish different burdens of proof between the two proceedings, the authority they use to argue injustice is flawed. The Ristes’ argument depends wholly on *Standlee* and similar cases following the same rule. The *Standlee* Court held that collateral estoppel did not apply to preclude a parole board from considering felony charges against a parolee, Standlee, of which he had been acquitted. *Standlee v. Smith*, 83 Wn.2d at 407-09. But the acquittal had occurred because the prosecution failed to prove the felonies beyond a reasonable doubt; the parole hearing officer, in contrast, must “be reasonably satisfied that the terms of the parole have been violated.” *Id.* at 309 (citation omitted). The *Standlee* Court suggested that the burden of proof at the parole was “a fair preponderance of the evidence.” *Id.* at 408-409 (citation omitted). Contrary to the Ristes’ argument, the *Standlee* Court did not rule as a matter of law that any difference in burdens precludes application of collateral estoppel.

- b. The Ristes were not denied due process, because in the probate action they fully litigated and lost the same issues they raise in this action.**

The Ristes next argue that it is unjust and indeed unconstitutional to preclude their current damage claims when damages were not requested in the probate court. App. Br. at 14. However, the issue of damages is irrelevant, as the probate court conclusively determined after extensive motion practice spanning more than two years, that: (1) the McAnally will did not contain any provision prohibiting the right of the PR to sell the Viking Shopping Center; (2) the PR did not violate any fiduciary duties responsibilities; and (3) counsel for the PR did not violate any fiduciary duties or responsibilities. CP 390. The Ristes' claims for damages depended on proof of wrongdoing by the Bank and Stokes Lawrence, which the probate court held did not occur. Thus, the probate court disposed of the very claims on they sought damages.

Still, the Ristes erroneously argue the trial court's dismissal of their claims effectively sets forth a rule that beneficiaries of an estate or trust cannot initiate a petition for removal without mitigating further damages because that hearing will not provide a petitioner the full and fair opportunity to litigate. App. Br. at 14. Thereby, the Ristes make a public

policy argument that petitioners/plaintiffs will have to choose between a petition for removal or a civil action for damages.

The Ristes argue that the probate court lacked courtroom formalities, such as cross-examining witnesses, and submitting factual questions to a jury, and that they therefore were denied due process. App. Br. at 14. However, the case the Ristes cite, *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 318, 96 P.3d 957 (2004), does not support this assertion. Nor does Washington law preclude the application of collateral estoppel when prior proceedings lack the procedural formalities of trial courts.

The *Christensen* Court held that considerations of alleged injustice and public policy do not prevent application of collateral estoppel based on a previous an administrative ruling to preclude a plaintiff from making the same claim, but for damages, in superior court.

[C]hoosing an administrative proceeding may ultimately preclude a later tort claim due to an agency's factual findings. However, this is the essence of collateral estoppel. There is nothing inherently unfair about this result provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied.

Id. at 312-13.

Washington courts do recognize the preclusive effect of factual findings of an administrative proceeding, when the same claims are then

litigated in court. In *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 505-06, 745 P.2d 858 (1987), a Deputy Chief of Police in Bremerton was demoted and he petitioned to the Bremerton Civil Service Commission, contending he was demoted in bad faith. The Commission issued findings of facts and conclusions of law, finding that Shoemaker's demotion was valid. *Id.* Shoemaker later filed a civil-rights action in federal court, which dismissed the action on summary judgment because the Commission's ruling was binding based on collateral estoppel. *Id.* Shoemaker appealed to Ninth Circuit, which certified the question to the Washington Supreme Court. *Id.* The Court held that even though the Commission's hearing examiners were not attorneys, and even though the rules of evidence were not in force, the issues were the same, and Shoemaker was collaterally estopped from bringing his claims in federal court. *Id.* at 511.

The Supreme Court summed up the preclusive effect of previous decisions where the prior adjudicative process lacked certain procedural formalities:

Due process does not require any particular form or procedure ... [.] It only requires that a party receive proper notice of proceedings and an opportunity to present its position before a competent tribunal.

Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) (quoting *Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 728, 648 P.2d 181, review denied, 98 Wn.2d 1011 (1982).

Here, the facts are more compelling than in *Shoemaker* or *Christensen*. Unlike either of those cases, in the probate action underlying this case, Mr. Riste filed the probate action in superior court, where the rules of evidence applied and greater formalities were observed. Furthermore, the same counsel represented the Ristes in both the probate action and this action. In both actions, the court heard oral argument.

Further, attorneys Walker and Holt appeared and argued in the probate action and have represented the Ristes throughout this action. CP 2259. The Ristes had ample opportunity to present their case in the probate proceedings, in which their attorneys filed voluminous motions and argued against closure of the estate and payment of fees for both the PR and its counsel, Mr. Velikanje.

Notably, the Ristes have been fighting this war not on two fronts, but on three. Attorney Tuha represented Darrell, Cathy, and Tyler in the probate action. CP 788. Attorney Tuha received notice of all proceedings. CP 2258. Mr. Tuha filed no objections to the probate court proceedings, including the sale of the Viking Village Shopping Center. CP 2259. Thus, it was the Ristes' own counsel's actions and inactions that

resulted in the preclusive effect of the probate court's decisions. Indeed, Cathy and Tyler Riste have sued Mr. Tuha for legal malpractice, CP 2264, while also denying that they were parties to the probate action. *Id.*

E. Even if collateral estoppel did not preclude the Ristes' claims, Stokes Lawrence was not their attorney and owed them no legal duty.

1. Generally, an attorney for the PR owes no legal duty to beneficiaries of the estate.

An attorney who represents the PR in a probate action generally owes no legal duty to the estate or heirs. *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). In *Trask*, as in this case, plaintiff filed a legal-malpractice action against the attorney of the PR, alleging negligence, breach of fiduciary duty, and breach of contract. The Supreme Court found that the attorney's sole duty was to the PR. *Id.* The Court recognized that an impermissible conflict of interest would arise if the attorney also owed a duty of care to the estate or to the heirs of the estate.

After analyzing our modified multifactor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate beneficiaries.

Id. at 845. The *Trask* Court affirmed summary judgment of dismissal of all of the estate beneficiaries' claims against the attorney for the PR. Here, the trial court made the same determination. In doing so, the trial court held that Mr. Velikanje's sole responsibility was to his client, Baker

Boyer Bank. Beneficiaries of the estate have no cause of action and no standing to bring a claim against counsel for the PR. Therefore, Mr. Velikanje owed no duty of care to the Riste family while acting as attorney for the PR of the Estate of Dan McAnally.

2. The Ristes misapply the six-part *Trask* test.

The Ristes attempt to apply the six-part *Trask* test to establish that Stokes Lawrence owed them any legal duty but misstate the authority they cite or fail entirely to provide any.

a. Mr. Velikanje intended to benefit the PR of the McAnally Estate, not the Ristes.

The Ristes cite *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987) as support for their assertion that Stokes Lawrence owed them a duty. App. Br. at 16-17. *Stangland* does not support their assertion. The *Stangland* Court cited out-of-state authority that discusses the third-party-beneficiary theory where the beneficiaries of a will are intended to benefit from the relationship between the testator and the attorney drafting the will. *Id.* at 681 (citing *Lucas v. Hamm*, 56 Cal.2d 583, 590, 15 Cal. Rptr. 821, 364 P.2d 685 (1961); *Stowe v. Smith*, 184 Conn. 194, 197-98, 441 A.2d 81 (1981)). Here, while Washington law is clear as to the lack of duty owed to beneficiaries of estates from attorneys of PRs, as decided in *Trask* seven years after the Supreme Court's holding in *Stangland*.

However, even if there was a duty owed, Mr. Velikanje, at all times representing the Bank, exercised due diligence in drafting the testamentary documents. Contrary to the Ristes' argument, the *Stangland* Court never held that an attorney for a PR owes a duty to a beneficiary of an estate, but only that even if a duty was owed, "the law will give it recognition and effect only as it is defined by a particular standard of conduct." *Stangland*, 109 Wn.2d at 681. In Washington, the particular standard of care for a lawyer performing professional services is "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Id.* at 682; *Walker v. Bangs*, 92 Wn.2d 854, 859, 601 P.2d 1279 (1979) (quoting *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968)). And nowhere in their brief, or in submissions to the trial court, did the Ristes articulate any particular standards of conduct Stokes Lawrence supposedly violated.

b. As for parts two through four of the six-part *Trask* test, the Ristes fail to cite authority for their argument.

Without citing to authority, with the exception of "*Id.*," which lacks any context in citations within the Ristes' argument, the Ristes simply argue in substance that a poorly drafted will or trust inevitably

causes harm to beneficiaries. The Ristes offer no legal authority for their conclusory assertion that the harm they perceive was foreseeable.

Nor do the Ristes provide any authority for their bald assertion that they suffered injury as a result of Stokes Lawrence's supposed negligence. Nor do the Ristes provide any authority for their bald assertion that a close connection existed between the Stokes Lawrence's conduct and the Ristes' alleged injuries.

c. Contrary to the Ristes' assertion, Washington observes no "public policy of preventing future harm to attorney malpractice/fraud victims."

The Ristes next argue there "is a public policy of preventing future harm to attorney malpractice/fraud victims[.]" App. Br. at 19 (citing *Parks v. Fink*, 173 Wn. App. 366, 378, 293 P.3d 1275 (2013)). They assert that the legal profession would not be unduly burdened by imposing a duty to beneficiaries of a will. While acknowledging that the *Parks* court held that such liability would impose a burden on the legal profession, *id.* at 378, the Ristes essentially misrepresent the holding of that case. In *Parks*, a prospective beneficiary of a client's will brought a legal malpractice action against an attorney, alleging negligence in preparing the will. The *Parks* court rejected imposition of a duty on the attorney:

To impose a duty in this case would severely compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship. We therefore hold that an attorney owes no duty of care to a prospective beneficiary to have a will executed promptly.

Id. at 368. Similarly:

Imposing a duty even under these circumstances could diminish the attorney's duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship. On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary.

Id. at 388-89.

Stokes Lawrence's sole duty was to Baker Boyer Bank, and not the Riste family. As in *Trask*, the *Parks* court recognized the impermissible conflict of interest that would arise if the attorney also owed a duty of care to the estate or to its heirs. *Id.* *Parks* defeats the Ristes' claims against Stokes Lawrence as a matter of law.

F. Stokes Lawrence and the Bank move for an award of reasonable attorney fees, because this appeal has no colorable merit.

Pursuant to RAP 18.1, Stokes Lawrence and the Bank ask that this court assess against the Ristes all attorney fees and expenses Stokes Lawrence and the Bank have incurred on appeal.

RAP 18.9 authorizes an award of attorney fees if a party files a frivolous appeal. An appeal is frivolous if there are no debatable issues on

which reasonable minds might differ and it is so totally devoid of merit that there was no possibility of reversal. *Fay v. Northwest Airlines Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). RAP 18.9(a) further authorizes an award of attorney fees when a party violates the Rules of Appellate Procedure. Here, the Ristes have filed a frivolous appeal, forcing Stokes Lawrence and the Bank to incur substantial legal expense. Collateral estoppel defeats all of the Ristes' claims. Even if collateral estoppel did not apply, Stokes Lawrence owed the Ristes no legal duties. The Ristes committed repeated, pervasive, serious violations of the Rules of Appellate Procedure, making the task of responding to their appeal brief vastly more difficult and expensive for Stokes Lawrence and the Bank and more burdensome for this court. This is the very type of case for which the fee sanction in RAP 18.9(a) exists.

VI. CONCLUSION

The Ristes' burden on summary judgment was to present proof that raised a genuine issue of material fact to show that collateral estoppel did not preclude this action. As a matter of law, they failed to carry that burden. The probate court's findings were conclusive and binding on the Ristes. Even if they had a cognizable claim precluding collateral estoppel in this action, they provided no proof that their current claims differed from those before the probate court. They could not do so for the simple

reason that they asserted many of the same claims in both actions. Thus, the trial court correctly held that collateral estoppel barred the Ristes' claims against Stokes Lawrence and the Bank.

Nor did the Ristes meet their burden of proving that Stokes Lawrence owed them a duty of care when representing the PR of the McAnally Estate. As a matter of law, no such duty existed.

The Ristes' brief to this court contains a litany of violations of the Rules of Appellate Procedure. They failed to cite the record to support many of their factual assertions, misstated the record in support of other factual assertions, and failed to cite the required authority in support of their legal arguments. Such violations preclude review of their arguments and warrant an award of reasonable attorney fees.

Accordingly, this court should affirm the trial court's dismissal of The Ristes' claims in their entirety.

Respectfully submitted this 4th day of March, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 4, 2019, I caused service of the foregoing pleading on each and every attorney of record herein:

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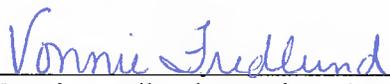
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