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**State of Washington**  
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**IN THE COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON**

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**Darrell Riste, Cathy Riste and Tyler Riste,**

**Appellant(s)/Plaintiff(s)**

**v.**

**The Idaho Law Group LLP, P. Rick Tuha P.C.,  
P. Rick Tuha, Rick Tuha, Hala Lilifa Afu Jr., Hala Afu**

**Appellee(s)/Defendant(s)**

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**APPELLANT(S) REPLY BRIEF**

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## I. INTRODUCTION

Appellant(s)/Plaintiff(s) arguments in the Superior Court and within their Opening Brief clearly indicate that the Defendant(s) failed to meet their burden to prove each prong of Collateral Estoppel. Within the Superior Court's Order (CP 538-47) and the Defendant(s) Pleadings nowhere is there to be found a legal argument or lawfully admitted evidentiary basis for a finding of Collateral Estoppel as to any issue precluded. (CP 538-547) Plaintiff(s) believe the misconception of the Superior Court's finding is inadvertently incorrectly based on the Defendant(s) misstatement of fact(s), mis-characterization of the issues in Yakima Superior Court Case # 12-4-00514-8 (Hereinafter the "Probate Matter") and/or Yakima Superior Court Case # 16-202459-39 (Hereinafter the "Fiduciary Matter"). Specifically, the Court's Order erroneously relies upon the misstatement(s) of the Defendant(s) and finds without any logic, factual basis or legal reasoning that Cathy and/or Tyler Riste were "Parties" to the Probate Matter. (CP 538-547) Defendant(s) Responsive Brief, continues their deceptive pleading motif, insisting that the Superior Court correctly determined that Cathy and/or Tyler Riste were "Parties" and further muddying the waters by introducing representations of assertions and/or legal arguments which were not raised below in the case matter under heading IV. A. 1-6 (pg 14-33) and those arguments should not be for consideration by this honorable Court. (ARB 14-33) In similar magnitude the Superior Court in the instant matter and the Defendant(s) failed to argue/find that the issue of damages in the Probate Matter was "material and essential" to the Probate Judgment. (AOB 18-19) Without any reasonable or other audible saying of finding on record (or otherwise) by the Court or argument by the opposing party that the issue of damages in the Probate Matter was "material and essential" to the prior judgment

application of Collateral Estoppel to the damages at issue in each of the Appellant(s) Claims for Malpractice, Breach of Fiduciary Duty, Breach of Contract and violation of the Consumer Protection Act (Hereinafter “CPA”) the findings of the lower Court need be reversed by the Honorable Justices of this Appeal Court. (CP 538-547, AOB 18) A review of the Probate Court’s Judgment and the Transcripts of those proceedings reveals unequivocally that the issue of damages was never reached, argued or decided and was therefore not “material and essential” to the Probate Court’s Judgment. (AOB 16-20, CP 305-325) As set forth in Appellant(s) Opening Brief and consistently represented within their Pleadings below, Collateral Estoppel may only be applied to issues which were “material and essential” to the prior judgment **even if the issues are otherwise identical.** (AOB 13-22) The Superior Court’s Order is devoid of any finding that the issue of damages was “material and essential” to the Probate Judgment (AOB 13-22, CP 305-325) requiring reversal as the Defendant(s) failed to meet their burden to prove the issue of damages was “material and essential” to the prior judgment by not addressing the “material and essential” requirement at all. (ARB 1-39 As a further explanation of the complete failure of proof and/or lack of any evidentiary basis for application of Collateral Estoppel; the Probate Case involved a Petition by Darrell Riste (Neither Cathy or Tyler Riste were designated parties or otherwise proven to be served in accordance with law) to remove the Personal Representative (Hereinafter “PR”) of the Estate of Dan McAnally and/or Trustee of the Riste Trust for breach of fiduciary duty, claiming the PR caused damages to the Estate including the sale of commercial realty referred to as the Viking Village for less productive assets. (CP 305-325) The Probate Court’s decision to deny Darrell Riste’s Petition for a removal order was based upon a manifest error,

determination that the PR did not breach his fiduciary duty. (CP 305-325) The Probate Court never reached the issue of damages in rendering its' Judgment and thus the issue of damages in this matter even if identical to the issue of damages in the Probate Matter cannot be Collaterally Estopped. (AOB 13-22, CP 305-325) Without any legal basis for application of Collateral Estoppel to issues which were not "material and essential" to the prior judgment, Plaintiff(s) Complaint cannot be dismissed. (AOB 13-22, CP 538-547)

The harm alleged in this matter to have been caused by the Defendant(s) unlike the harm alleged to have been caused by the PR in the Probate Matter is the failure of the Defendant(s) to adequately advise the Plaintiff(s) on their legal rights to prevent the sale of the Viking Village Commercial Realty (Hereinafter "VV") including the failure to properly advise the Plaintiff(s) on their options to secure a Trust and Estate Dispute Resolution Act (Hereinafter "TEDRA") agreement and/or to make a timely objection to prevent the PR from selling the VV *which did not necessarily rely on any proof that the PR breached a fiduciary duty or caused any damages.* (AOB 13-22; CP 171 ln 22 - 172 ln 20, 178 ln 17-19, 179 ln 9 - 181 ln 8) The Superior Court's order and the Defendant(s) argument(s) erroneously found/argued without any legal/evidentiary basis that all issues raised by the Complaint were identical to those issues raised in the Probate Matter merely because the Complaint sought damages for the Defendant(s) failure to prevent the sale of the VV. (CP 538-547) The Complaint alleges that the Defendant(s) were obligated to the client and required to have taken action and/or provide legal advice which would have apprised the Plaintiff(s) of viable legal options for preventing the PR from selling the VV **which did not require any proof of the PR's breach of fiduciary duty**; such as the failure to properly advise the

Plaintiff(s) of their right to Petition the Court for a TEDRA agreement to retain the VV. (AOB 13-22) The Complaint alleged that the Defendant(s) failures to protect their client's interests and causes unnecessarily did bring about unchallenged wrongdoings where the PR underhandedly continued to sell the VV and that the sale could have been prevented if it were not for the Defendant(s) outright malpractice amongst other unethical standards of practice in not representing the client as employed to do. (AOB 13-22) The Defendant(s) did not present any testimonial evidence which negated any issues necessary to prove the Plaintiff(s) Claims which did not require proof of the PR's breach of fiduciary duty. (CP 538-547)

Furthermore, there are present Claims/issues of damages within the Complaint which were not even similar to the issue of damages raised in the Probate matter. The Complaint included the issue of the Defendant(s) legal fees as damages under each of the Appellant(s) Claims for Malpractice, Breach of Fiduciary Duty, Breach of Contract and violation of the CPA. (AOB 1-42) Defendant(s) harmed the Plaintiff(s) by taking payments for services without actually providing competent legal representation and/or in violation of the CPA by misrepresenting their qualifications and/or expertise in handling the matters for which representation was agreed upon. (AOB 1-42) These are issues which could not lawfully have been precluded because they were not in any way implicated in the Probate Matter. (CP 305-325) Plaintiff(s) are entitled to have a jury decide whether the Defendant(s) committed Malpractice, Breached their Fiduciary Duty, Breached their Contract or violated the CPA and if Appellant(s) should be entitled to a return of the fees paid to the Defendant(s) and for Damages. (AOB 1-42)

The Superior Court's Order specifically found that Plaintiff(s) Malpractice, Breach of Contract and Breach of Fiduciary Duty claim

against the Defendant(s) was barred because the Defendant(s) submitted testimonial evidence in the form of the prior Judgment/Transcripts from the Probate Matter which was erroneously relied upon to find that the issue of damages in the two proceedings supposedly were identical,

Plaintiffs cannot make a showing that they would have prevailed because that had their current attorneys seek the remedy they believe their former attorneys failed to achieve. However, Plaintiffs' current attorneys were unsuccessful in the Probate Matter which means that Plaintiffs' claims of malpractice against their former attorneys fail

(CP 543). The Court's finding erroneously equates the Probate Court Order which found that the PR did not breach his fiduciary duty (which did not include any findings on the issue of damages) to a finding that there could not possibly be any damages caused by the Defendant(s) failures to adequately advise the Plaintiff(s) of their legal rights and/or to prevent/object to the PR's request for Court Authorization to sell the VV and avert the sale regardless of any breach of fiduciary duty by the PR. (*Id.*) The Superior Court failed to consider all issues raised within the Complaint, under the claims of Malpractice, Breach of Fiduciary Duty or Breach of Contract including the Defendant(s) failures to properly advise the Appellant(s) on their viable legal options to prevent the sale of the VV which should have included a TEDRA Petition and/or objections to prevent the sale which would not have required any proof of the PR's breach of his fiduciary duty and instead would have relied only on the fact(s) that the Defendant(s) failed to properly advise the Appellant(s) that they may request and/or file a Petition for a TEDRA. (AOB 16-20) Accordingly, the Court's finding that the Defendant(s) submitted testimonial evidence which negated the damages issue of All Claims and shifting the burden to the Appellant(s) to prove a factual dispute are erroneous. (CP 538-547)

Furthermore, the Superior Court's finding that the Appellant(s) failed to produce any evidence that they could have prevailed is erroneous and/or an abuse of discretion,

...absent Defendants' alleged incompetent representation, they would have prevailed in their motions, [and/or] that Plaintiffs fault Defendants for not taking actions which Plaintiffs later had subsequent legal counsel take. Those actions did not succeed. Thus, the Plaintiffs have no damages.

(CP 544, see also CP 546 sec b & c). First of all, the Defendant(s) did not submit any testimonial evidence negating any element of the Plaintiff(s) Malpractice, Breach of Fiduciary Duty, Breach of Contract or CPA claims. (Emphasis added, CP 305-325) Stultifying is the erroneous lower Court's order indicating that Defendant(s) submitted admissible evidence which negated for the Court the damages issue of each of the Plaintiff(s) Claims and justified shifting the burden to the Plaintiff(s) to establish a factual dispute in regards to the damages issue of each of the Appellant(s) Claims. (CP 538-547) In so doing, here the Court utilized the only one admissible questionable evidence submitted by the Defendant(s) and relied upon the Judgment/Transcript from the Probate Matter and/or Civil Matter which did not include any facts which can conceivably negate the issue(s) of damages being claimed by Complainant(s). (CP 305-325, 544) The Court's mysterious analytic leap between the evidence and its' finding that the damages issue of each of the Plaintiff(s) Claims were negated is devoid of any logical connection between the Probate Judgment and the issues of damages implicated by the Claims. (CP 543-546, 305-325) The Defendant(s) Responsive Brief like the Superior Court's order does not clarify what fact was relied upon to negate the issue of damages necessary to Plaintiff(s) Claims and does nothing more than repeat the Superior Court's mysterious finding(s). (CP 538-547) Even if the burden was

shifted to the Plaintiff(s) to establish a factual dispute the Court should have considered the verified pleadings and documentary evidence submitted by the Plaintiff(s) to establish a factual dispute and failure to do so is reversible error. (AOB 13-22) Plaintiff(s) submitted the Probate Court's Order and/or the Transcript of the Probate Removal Hearing as an evidentiary exhibit and/or in a Request for Judicial Notice and those documents reveal that the issue of damages was never discussed, argued or considered by the Probate Court and/or that the issue of damages was not identical in all respects. (CP 540-41, Para 3-4; 541 Para 9)

**II. ARGUMENTS RAISED WITHIN DEFENDANT(S)  
RESPONSIVE BRIEF WHICH WERE NOT RAISED BELOW AND  
ARE THEREFORE WAIVED (RAP 2.5(a))**

**A) COLLATERAL ESTOPPEL ARGUMENTS NOT RAISED  
BELOW WHICH ARE WAIVED BY LAW**

Defendant(s) filed several pleadings below, none of which included any of the following arguments which are set forth in the Defendant(s) Responsive Brief (CP 540-541);

**1) APPELLANT(S) COULD NOT HAVE PREVENTED THE PR'S  
SALE OF THE VV UNDER ANY CIRCUMSTANCES AND ANY  
ORDER BY THE SUPERIOR COURT WHICH WOULD HAVE  
PREVENTED THE PERSONAL REPRESENTATIVE FROM  
SELLING THE VV WOULD HAVE BEEN REVERSIBLE ERROR**

For the first time on Appeal the Defendant(s) raise the argument within their Responsive Brief at page 11 & 15-16 that even if the Plaintiff(s) would have made an objection/petition in the Probate Matter while represented by the Defendant(s), regardless of the substance or basis for the objection/petition, that the Plaintiff(s) could not have prevented the Court's authorization and any order denying authorization would have been reversible error,

ILG's advice and Riste's decision not to object to the sale

are irrelevant—the Ristes could not prevent it from being sold.

...  
Had the Superior Court intervened, it would have been a reversible error because “[t]he trial court’s involvement, exercise of authority, and order construing will [would have] violate[d] much of the testator’s expressed intent.” []  
In other words, the P.R. had the right to sell Viking Village, regardless of whether ILG challenged the sale in 2014.

(ARB 11, 15-16) Not only is the argument untimely it irrationally relies upon *In re Estate of Rathbone*, 190 Wn.2d 332, 345 (2018) which did not involve a Removal or TEDRA Petition and merely addressed the scope of the statutory authority for a petition for a probate accounting, which the Supreme Court in *Rathbone* appropriately found not to include authorization for a TEDRA or challenges to the acts of a PR which were required to be brought under differing statutory authorities, respectively. (*Id.*) The Defendant(s) stretch the truth and meaning of *Rathbone* beyond all conceivable recognition by suggesting that *Rathbone* has implications for the matters herein. (ARB 16-18) Defendant(s) also argue incorrectly for the first time on Appeal that the Probate Court’s finding(s), namely, that there was no breach of fiduciary duty and that the PR had good cause for the sale, was dis-positive of any conceivable objection which could possibly have been made by the Defendant(s). (ARB 11) These arguments were not made below within the Defendant(s) pleadings and are waived by operation of law, “...failure to raise this issue below precludes appellate review...” ((*State v. Harrington*, 56 Wn. App. 176, 181 (1989), citing, *State v. Warren*, 55 Wn. App. 645, 649-50 (1989); *State v. Branch*, 129 Wn.2d 635 (1996); RAP 2.5(a))

Furthermore, the Defendant(s) argument fails to consider all objections/petitions which could have been made opposing the PR’s Request for Court Authorization to sell the VV including those not

requiring proof of any wrongdoing by the PR. (AOB 13-22; CP 171 ln 22 - 172 ln 20, 178 ln 17-19, 179 ln 9 - 181 ln 8) Plaintiff(s) by contrast have argued below and within their Opening Brief that an objection to the PR's Request for Court Authorization to sell the VV and/or a Petition under TEDRA based upon their wishes as the SOLE beneficiary(s) would have caused the Court to deny authorization to sell. (*Id.*) These issues were without challenge in the Superior Court and accordingly should not have been dismissed. (*Id.*)

Finally, the Defendant(s) did not introduce any testimonial evidence which negated any issue necessary to prove any of Appellant(s) claims, and the burden was not lawfully shifted to the Appellant(s) to produce evidence of a factual dispute. (See below)

**2) THE APPELLANT(S) VERIFIED PLEADINGS WERE NOT "DECLARATIONS" AND THEREFORE NOT ADMISSIBLE AS EVIDENCE AT THE SUMMARY JUDGMENT HEARING**

For the first time on Appeal the Defendant(s) argue within their Responsive Brief at page 13 that the Plaintiff(s) verified pleadings were not admissible as evidence based upon CR 11(a) & RCW 9A.72.085(a), "[t]his does not qualify as admissible evidence. Likewise, Riste cannot reasonably claim that the verification substitutes for a declaration because it fails to state the location where it was signed and fails to certify that it was signed under penalty of perjury under Washington law." (ARB 13 fn. 14) None of the Defendant(s) pleadings below asserted any legal arguments under CR 11(a) & RCW 9A.72.085(a) and therefore these arguments are waived, "...failure to raise this issue below precludes appellate review..." ((*State v. Harrington*, *supra*, citing, *State v. Warren*,

supra; *State v. Branch*, supra; RAP 2.5(a)) Further, even if these arguments would have been presented below they would have been unavailing as the Plaintiff(s) verified pleadings substantially complied with the requirements for declarations because they were verified by personal knowledge. ((*Johnson v. King County*, 148 Wn. App. 220 (Wash. Ct. App. 2009)- claimant substantially complied with the requirements of RCW 9A.72.085, and the trial court erred by dismissing the claimant's lawsuit.; see also, *Raymond v. Pacific Chem.*, 98 Wn. App. 739 (1999 Wash. App.), rev'd, 143 Wn.2d 349 (Wash. 2001); see AOB 29-32, 34-35) Furthermore, the Court should have extended leniency to the non moving party and considered the Plaintiff(s) pleadings verified by personal knowledge under penalty of perjury, dated and signed as declarations. (AOB 31-32)

### **3) BOTH CIVIL PROCEEDINGS HAD THE SAME BURDEN OF PROOF; PREPONDERANCE OF THE EVIDENCE**

For the first time on Appeal the Defendant(s) argue within their Responsive Brief at page 21 that the burden of proof applicable to the prior proceeding in the Probate Matter and the Complaint were the same, no where in the Defendant(s) pleadings below was the burden of proof discussed and therefore the argument made in the Defendant(s) Responsive Brief at page 21-22 section 2 is waived by operation of law, "...failure to raise this issue below precludes appellate review..." ((*State v. Harrington*, supra, citing, *State v. Warren*, supra; *State v. Branch*, supra; RAP 2.5(a)) Furthermore, the Defendant(s) were required to prove that the burden of proof was the same in both proceedings and they failed meet their burden. (AOB 21-22) Contrary to the Defendant(s) assertions (ARB

21 fn 17), the Pleadings/Transcripts of the Probate Proceedings which were admitted into evidence clearly reflect that the Probate Court made its decision in chambers, specifically, the Probate Court announced its decision at first appearance without any opportunity for argument,

Okay. Well, I'm going to make a finding today. I'll come back to the standing issue in just a moment. First of all, there is a valid trust. It does not need to be a separate from the will. I don't think that that argument is supported by any case law. And, also, I'm not finding a conflict of interest in this. There was no breach of fiduciary duty. I understand here that Mr. Riste feels that he wasn't treated appropriately, but there's a long way from feeling to an actual breach of fiduciary duty, and I'm not seeing that in this case. As far as the standing issue, I think it's somewhat moot because I'm not finding that the underlying action is supported. ...I'm going to deny the request, and it looks like this estate is going to close.

(CP 315-316) As such, the Defendant(s) have failed to prove that the same burden of proof was applicable in the probate proceeding, a proceeding in which the Court only considered prima facie evidence and decided the matter in chambers without any opportunity for the Appellant(s) to engage in discovery, argue or present their matter for decision to a jury. (AOB 20-22)

**4) COLLATERAL ESTOPPEL BARS CATHY AND TYLER RISTE'S CLAIMS BECAUSE THEY ACTUALLY PARTICIPATED IN THE PROBATE CASE AND WERE IN PRIVITY**

For the first time on Appeal the Defendant(s) argue within their Responsive Brief at page 22-24 that Cathy and/or Tyler Riste were in "PRIVITY" and/or participated in the Probate Matter, no where within their Pleadings in the Superior Court did the Defendant(s) make any argument regarding "PRIVITY" and only made a general assertion that Cathy and/or Tyler Riste were "PARTIES". (CP 113-114, 135-136)

Therefore, the argument made in the Defendant(s) Responsive Brief at page 22-24 section 3 which asserts that Cathy and Tyler Riste were in “PRIVITY” is waived, “...failure to raise this issue below precludes appellate review...” ((*State v. Harrington*, supra, citing, *State v. Warren*, supra; *State v. Branch*, supra; RAP 2.5(a)) Furthermore, the Superior Court’s Order did not find that Cathy and/or Tyler Riste were in “PRIVITY” and found only that Cathy and Tyler Riste were “PARTIES,” “Plaintiffs in this case are the same individuals participating in the litigation in both the Probate Matter and Fiduciary Matter. The third element of collateral estoppel is satisfied.” (CP 545) The Defendant(s) failed to prove that Cathy or Tyler Riste were “PARTIES” and the Court’s reliance on evidence not contained within the record to find that they were “PARTIES” was a violation of Due Process and/or an abuse of authority. (AOB 22-25) Specifically, the Court relied upon probate pleadings which were not introduced by either party and without providing either party an opportunity to respond in violation of Due Process. (CP 544 paragraph 3, see, WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) The Court unlawfully relied upon and also incorrectly determined that Appellant(s) counsel signed the, “Notice of Motion and Motion for hearing on Petitioner's Motion to Recuse Judge Hahn; To Remove the Personal Representative... ,” on behalf of all of the Appellant(s) without providing an opportunity to respond in violation of the Due Process. (*Id.*) Likewise, the Court unlawfully relied upon and also incorrectly determined that Appellant(s) counsel signed the, “Notice of Motion and Motion for Hearing on Petitioner's Petition for an Accounting...,” on behalf of the Appellant(s) and without any opportunity to respond in

violation of the Due Process. (*Id.*) Likewise, the Court unlawfully relied upon and also incorrectly determined that Appellant(s) counsel signed the, “Notice of Objection and Objection to the Proposed Findings of Fact and Conclusions of Law...,” on behalf of the Appellant(s) without an opportunity to respond in violation of Due Process. (*Id.*)

Even if this Court does consider Defendant(s) “PRIVITY” arguments, “PRIVITY” has not been proven by a preponderance of the evidence by mere citation to dictionary definitions of “PRIVITY” or citation to unpublished legal authorities which define “PRIVITY” in the broadest possible sense without any similarity to this case. (ARB 23-24) Contrary to Defendant(s) argument, neither Cathy nor Tyler Riste were in “PRIVITY” with Darrell Riste in the Probate Matter because Darrell Riste’s interests in the Probate Matter were divergent and competing. (CP 305-325) In the Probate Matter Darrell Riste asserted his right(s) to the VV as the SOLE beneficiary under the Will and/or invalidation of the Riste Trust, an argument which could have negated any and all rights that Cathy or Tyler Riste had in the VV. (CP 305-325, 538-547) Further, neither Cathy or Tyler Riste had standing to contest any issue involving the PR of the Estate in the Probate Matter because they were not beneficiaries of the Estate. (CP 305-325, 538-547) Cathy and/or Tyler Riste were merely beneficiaries of the Riste Trust whose interests could only be represented in the Probate Matter by the Trustee of the Riste Trust who in point of fact argued on behalf of Cathy and Tyler Riste by opposing all relief requested by Darrell Riste. (CP 305-325, 538-547) Darrell Riste’s assertion of rights which were antagonistic to the Trustee of the Riste and both Cathy and Tyler Riste should dispel the Defendant(s)

argument that Darrell Riste adequately represented them,

[g]enerally, privity for the purposes of res judicata “is construed strictly to mean parties claiming under the same title.” [ ]. A party has privity with a nonparty if the party adequately represented the nonparty's interests in the prior proceeding. [ ]. Privity is also established when a nonparty is in actual control of the litigation or substantially participates in it. [ ]. “Mere awareness of the proceedings is not sufficient to place a person in privity with a party to the prior proceeding.”

((Internal Citations omitted, *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503-04 (2008), see also, *United States v. Deaconess Med. Ctr.*, 140 Wn.2d 104, 111 (2000); *Eckstrom v. Hansen*, No. 76571-0-I, 2018 Wash. App. LEXIS 1748, at \*9 (Ct. App. July 30, 2018), citing, *McDaniels v. Carlson*, 108 Wn.2d 299, 306 (1987) - The requirement for privity in collateral estoppel is “strict.”; *Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 776 (2001)) In this case, like the *Estate of Spahi* and *Loveridge*, Cathy and/or Tyler Riste’s interests were not the same as those of Darrell Riste, “...does not have the same interests as [...] would have... the aggrieved person and [ ] are not [ ] in privity, particularly because of [the] potential difference between [their] interests” ((*Loveridge v. Fred Meyer*, 125 Wn.2d 759, 766 (1995)) A determination of PRIVACY should be based upon the circumstances implicated, “[i]n determining whether a party and nonparty were in privity, courts must consider the nature of the relationship between the two parties and the nature of the claims.” ((*Tuttle v. Estate of Tuttle*, No. 49669-1-II, 2018 Wash. App. LEXIS 1236, at \*13 (Ct. App. May 30, 2018), internal citations omitted)) Furthermore, “[a] nonparty is in privity with a party [only] if that party adequately represented the nonparty's interest in the prior proceeding. ((*Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161

Wn.2d 214, 224 (2007), referring to, *Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 337 (1992)) Accordingly, even the *Barlindal* and *City of Longview Police Dep't* cases cited by Defendant(s) require proof of a “unity of purpose,” which was clearly lacking in these matters. (See, *ARB* 23) The Superior Court’s ruling on Darrell Riste’s challenge to the validity of the Riste Trust was the crux of Darrell Riste’s arguments and the first order of business in the Probate Matter, “First of all, there is a valid trust. It does not need to be a separate from the will...” (CP 315, see also, 320-322)

Darrell Riste was the only person besides the Trustee of the Riste Trust with standing to object to the PR’s actions in the Probate Matter, “[Appellant] is the only entity entitled to assert the [their defense] and has had no previous opportunity to assert it. Under these circumstances it is not unfair or vexatious to require Defendant(s) to relitigate.” (*Estate of Spahi*, at 776, supra) Darrell Riste’s interests were not identical to the interests of Cathy or Tyler Riste and there cannot conceivably be any “unity of purpose” where Darrell Riste’s Probate Petition sought to invalidate all rights of Cathy and/or Tyler Riste. (CP 305-325) The only person with standing to bring a claim on behalf of Cathy and/or Tyler Riste was the Trustee and he opposed Darrell Riste’s Petition for Removal. (CP 305-325)

##### **5) APPLICATION OF COLLATERAL ESTOPPEL WAS APPROPRIATE AND HAS NOT RESULTED IN INJUSTICE**

For the first time on Appeal the Defendant(s) argue within their Responsive Brief at page 24-27 that application of Collateral Estoppel did not result in injustice, no where within their Pleadings in the Superior

Court did the Defendant(s) make any such argument and therefore failed to prove in accordance with their burden to do so that there was no injustice as required under the fourth prong of Collateral Estoppel. (CP 113-114, 135- 136) Therefore, the Superior Court's Order should be reversed. ((*Daniels v. Carlson*, supra at 303) - The burden to affirmatively prove each and every prong of this inquiry rests with the party seeking preclusion, and that party's failure to do so prevents application of the doctrine.)) The arguments made in the Defendant(s) Responsive Brief at page 24-27 section 4 which asserts for the first time that there was no injustice is waived by operation of law, "...failure to raise this issue below precludes appellate review..." ((*State v. Harrington*, supra, citing, *State v. Warren*, supra; *State v. Branch*, supra; RAP 2.5(a)) Furthermore, the Defendant(s) assert in their Responsive Brief that Appellant(s) have unlawfully raised the injustice factor for the first time in their Opening Brief. (ARB 25) Defendant(s) argument is unavailing as the burden to prove that no injustice would result was upon the Defendant(s) and they failed to set forth any argument at all that injustice would not result. (CP 113-114, 135- 136) Without any arguments being made by the Defendant(s) below the Appellant(s) were under no duty to prove that an injustice would result. (*See, Daniels*, supra) Furthermore, the Court's order erroneously relies upon legal arguments which were not made by the Defendant(s) and without providing the Plaintiff(s) an opportunity to respond in violation of Due Process,

[t]he fourth element of collateral estoppel, the injustice element, is rooted in procedural unfairness. "Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." In both the Probate Matter and the Fiduciary Matter, Plaintiffs received a full and fair hearing. They were given

appropriate notice of the actions and the hearings in the matters. They were represented by legal counsel. They filed legal memoranda. They filed sworn declarations. They participated, through their attorneys, in multiple hearings. Because of this, the fourth element of collateral estoppel is met.

(CP 545; WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) The Court cited *Schibel v. Eymann*, 189 Wn.2d 93, 102 (2017) as the legal authority for its' finding that no injustice would result but the Defendant(s) never cited to or made any legal argument based upon *Schibel v. Eymann* at any time. (CP 113-114, 135- 136) Thus, the Court's finding unconstitutionally relies upon legal arguments in which the Plaintiff(s) were not provided any opportunity to respond in violation of Due Process. (WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) Furthermore, the Court for the second time (as aforesaid) erroneously relied upon a fact which was untrue, unproven and/or unargued by the Defendant(s), namely, that Cathy and/or Tyler Riste were "PARTIES" to the Probate proceeding. (Aforementioned, see, above; CP 545) Finally, the cases cited in Defendant(s) Responsive Brief, in which they argue that ALL prior proceedings provide a full and fair opportunity to litigate fails to provide any citation to a probate proceeding; which was decided by a commissioner in chambers based only on the presentation of prima facie evidence and without any opportunity for discovery, to present/rebut evidence and/or cross examination and a jury trial is refutable (Also, see AOB 25-27)

**B) THE RISTES FAILED TO ADEQUATELY PLEAD OR PROVIDE ANY EVIDENCE OF FRAUD**

For the first time on Appeal the Defendant(s) argue in their Responsive Brief at page 27-29 that Plaintiff(s) CPA claim was required to be plead with particularity. (ARB 28) Having not presented such premise at

the lower Superior Court in any of their Pleadings they cannot make this argument now to assert or prove an argument before this Honorable Court that the CPA claim was required to be plead with particularity. The Defendant(s) failure to raise this issue below precludes appellate review...” ((*State v. Harrington*, supra, citing, *State v. Warren*, supra; *State v. Branch*, supra; RAP 2.5(a)) Regardless, the Plaintiff(s) claim of fraud was plead with particularity as set forth below.

**III. APPELLANT(S) A) PLEAD FRAUD WITH THE REQUISITE PARTICULARITY REQUIRED FOR EACH AND EVERY ELEMENT OF A CLAIM FOR FRAUD AND B) THE DEFENDANT(S) DID NOT SUBMIT ANY TESTIMONIAL EVIDENCE WHICH NEGATED ANY NECESSARY ELEMENT OF THE FRAUD CLAIM AND C) THE BURDEN WAS NOT SHIFTED TO THE APPELLANT(S) TO PROVE THROUGH THE PRESENTATION OF TESTIMONIAL EVIDENCE THE EXISTENCE OF A FACTUAL DISPUTE**

**A) APPELLANT(S) A) PLEAD FRAUD WITH THE REQUISITE PARTICULARITY REQUIRED FOR EACH AND EVERY ELEMENT OF A CLAIM FOR FRAUD**

Contrary to the Defendant(s) arguments the Complaint set forth all elements of fraud with particularity. (AOB 27) Defendant(s) made a blanket argument in the Superior Court that fraud was not plead with particularity. (CP 137, 113) In response, Plaintiff(s) set forth each of the required eight elements of a lawful claim of fraud and the allegations supporting those elements. (CP 96, 152) It is an erroneous judgment of the Superior Court below to have found that Plaintiff(s) failed to plead fraud with particularity without indication of which element(s) were deficient. (CP 546) Here, Appellant(s) Opening Brief set forth the references within the Complaint to the eight requirements for fraud. (AOB 27) Defendant(s) Responsive Brief asserts for the first time on appeal that Plaintiff(s)

Complaint was deficient because it failed to name “a particular member of ILG or [] when, where, or how [the fraud was committed]...” (ARB 27-29) Conversely of the Defendant(s) supposition, being such is without a premise for argument at this Court, Plaintiff(s) did factually specify that it was all of the Defendant(s), acting in concert, working together as claimed by Appellant(s) for the fraud;

7. The Plaintiff(s) are informed and/or believe and thereon alleges, that at all times herein mentioned, each of the Defendant(s), all of them and/or Does 1-20, were the agents and/or employees of each of the remaining Defendant(s), all of them and/or Does 1-20, and in doing the things herein alleged, were acting within the course and/or scope of said agency and/or employment, in that the actions of each of the Defendant(s), all of them and/or Does 1-20, as herein alleged were authorized, approved, and/or ratified by each of the other Defendant(s), all of them and/or Does 1-20, as principals and/or employers.

...

46. The Plaintiff(s) alleges that each and every Defendant(s) including Does 1-20, the Defendant(s) in their own professional capacity, individually, or as attorney/counsel/legal firm, an employee or owner/operator, or collectively together or otherwise owed a professional duty being legally obliged not only to the Estate of Dan McAnally/RISTE TRUST, the public at large and the beneficiaries, () but upon and to one another in an individual and/or professional capacity according to their employment, position or title a fiduciary/contractual duty(s)/obligation(s), failing to do so, as outlined hereafter and incorporated/instituted in each and every wrongful act and/or of every paragraph outlined by the Plaintiff(s) herein, to wit:

(CP 170, 177) Plaintiff(s) Complaint further set forth that the fraudulent acts of the Defendant(s) were committed during the Defendant(s) employed representation;

16. Throughout representation, the Defendant(s), all of them and/or Does 1-20, made affirmative misrepresentations and/or fraudulent statements to the , failed to disclose and/or purposefully withheld material information from the and/or failed to understand,

investigate, research and/or explain information received from third parties and/or opposing counsel.  
(CP 172) Further, Appellant(s) Complaint in the lower Superior Court at Yakima further set forth that the fraudulent acts took place in the State of Idaho and/or the State of Washington,

I. The , being residents of the State of Idaho, hired the Defendant(s), all of them and/or Does 1-20, and any and/or all agents and/or partners of the Defendant(s), all of them and/or Does 1-20, to protect the interests in the legal matters related to the Estate of Dan McAnally and/or the RISTE TRUST, the case arising out of the State of Washington, Spokane County via a limited admission of the Defendant(s), Pro Hac Vice, to represent the interest(s).

(CP 168) The Complaint resonated further that the Defendant(s) committed the fraudulent acts by deceiving the Plaintiff(s) regarding the Defendant(s) qualifications to handle legal representation of the Plaintiff(s) interests, their expertise, their knowledge, the applicable legal authorities which were relevant to the implicated matters and the viable legal options which were available to the Plaintiff(s) to stop the sale of the VV within the following paragraphs of the Complaint which are to voluminous to reproduce herein and are referred to specifically by paragraph number appearing within the Complaint, 11, 16, 57, 59, 65, 66, 77, 79 & 113 - 127. (CP 171-172, 180-182, 184-185 & 192-194)

As such, the Court's finding that Plaintiff(s) failed to plead fraud with particularity is erroneous and/or an abusive requiring reversal.

**B) THE DEFENDANT(S) DID NOT SUBMIT ANY TESTIMONIAL EVIDENCE WHICH NEGATED ANY NECESSARY ELEMENT OF THE FRAUD CLAIM**

The Court's finding that the Defendant(s) submitted admissible testimonial evidence which negated a necessary element of Plaintiff(s)

fraud claim is too an erroneous judgment of the facts and does not logically fall on any evidence submitted by the Defendant(s). (CP 305-325) As explained above, the only relevant testimonial evidence submitted by the Defendant(s) for which the Court could lawfully consider in rendering its' decision was primarily just the Judgment/Transcript of the Probate Proceeding. That transcript of proceeding did not disclose any fact which could conceivably justify a finding that an element of Plaintiff(s) claim of fraud was negated. (CP 546) The Court's failure to specify in it's far reaching order/judgment which element(s) of fraud was negated is instructive of the Court's error and/or abuse of discretion. (CP 546)

Though not a persuasive argument, the Court's finding that Defendant(s) submitted testimonial evidence negating a required element of fraud is that the issue of damages was precluded, as clearly stated by Appellant(s), the order was an erroneous finding and/or abusive.

**C) THE BURDEN WAS NOT SHIFTED TO THE APPELLANT(S) TO PROVE THROUGH THE PRESENTATION OF TESTIMONIAL EVIDENCE THE EXISTENCE OF A FACTUAL DISPUTE**

Without presentation of any evidence negating any necessary issue the burden was not shifted to the Plaintiff(s). (AOB 28-35) Even if the Court properly shifted the burden to Plaintiff(s) to prove through the presentation of testimonial evidence the existence of a factual dispute the Plaintiff(s) verified pleadings including the exhibits attached thereto and/or their Request for Judicial Notice should have been admitted and considered by the Court; it was not. (AOB 31, see, CP 130-141, 245-254, 455-461, 510-516) The Judgment/Transcript from the Probate Proceedings clearly reveal that the issue of damages in the Probate Matter

was not “essential and material” to the prior judgment. ( presented above)  
Therefore, the Plaintiff(s) proved the existence of a factual dispute with regard to any element of fraud which the court erroneously overlooked and thereby negated.

**IV. THE SUPERIOR COURT DID NOT FIND THAT PLAINTIFF(S) A) WERE REQUIRED TO PLEAD THEIR CPA CLAIM WITH PARTICULARITY BUT DID ERRONEOUSLY FIND THAT THE DEFENDANT(S) B) SUBMITTED TESTIMONIAL EVIDENCE NEGATING A REQUIRED ELEMENT OF THE CPA CLAIM C) THAT THE BURDEN WAS SHIFTED TO THE PLAINTIFF(S) TO PROVE THE EXISTENCE OF A FACTUAL DISPUTE AND THAT THE PLAINTIFF(S) DID NOT SUBMIT ANY EVIDENCE ESTABLISHING A FACTUAL DISPUTE**

**A) THE SUPERIOR COURT DID NOT FIND THAT PLAINTIFF(S) WERE REQUIRED TO PLEAD THEIR CPA CLAIM WITH PARTICULARITY**

Contrary to the Defendant(s) arguments the Court did not find that Plaintiff(s) were required to plead their CPA claim with particularity and their argument that the Plaintiff(s) were required to do so made within their Responsive Brief for the first time on Appeal is waived. (((ARB 27, CP 546 as aforementioned above, “...failure to raise this issue below precludes appellate review...” ((*State v. Harrington*, supra, citing, *State v. Warren*, supra; *State v. Branch*, supra; RAP 2.5(a))) Disregardless of the facts Defendant(s) knowingly failed in raising the issue they still do not cite to a legal authority that a CPA claim must be plead with particularity and refer only to authorities which require fraud to be plead with particularity.

**B) THE SUPERIOR COURT ERRONEOUSLY FOUND THAT THE DEFENDANT(S) SUBMITTED TESTIMONIAL EVIDENCE NEGATING A REQUIRED ELEMENT OF THE CPA CLAIM**

The Court's finding that the Defendant(s) submitted admissible testimonial evidence which negated a necessary element of Plaintiff(s) CPA claim is erroneous and cannot logically be based upon, where a lack of evidence, that which was not submitted by the Defendant(s). (AOB 31, see, CP 130-141, 245-254, 455-461, 510-516) Once again, restated, the only testimonial evidence, clearly irrelevant, submitted by the Defendant(s) for which the Court relied upon to render its' decision was the Judgment/Transcript of the Probate Proceeding. Such proceeding did not disclose any fact which could conceivably justify a finding that an element of Plaintiff(s) CPA claim was negated. (CP 546) The Court's failure to specify in its order/judgment which element(s) of the CPA claim were negated is instructive of the Court's error and/or abuse of discretion. (CP 546)

The only plausible argument which can be made to support the Court's finding that Defendant(s) submitted testimonial evidence negating a required element of Plaintiff(s) CPA claim is the issue of damages which as explained at length in this reply by Appellant(s) was erroneous and/or an abuse of discretion.

**C) THE SUPERIOR COURT ERRONEOUSLY FOUND THAT THE BURDEN WAS SHIFTED TO THE PLAINTIFF(S) TO PROVE THE EXISTENCE OF A FACTUAL DISPUTE AND THAT THE PLAINTIFF(S) DID NOT SUBMIT ANY EVIDENCE ESTABLISHING A FACTUAL DISPUTE**

As a reinstatement, without presentation of any evidence negating any necessary issue the burden was not shifted to the Plaintiff(s). (AOB 28-35) Even if the Court properly shifted the burden to Plaintiff(s) to prove through the presentation of testimonial evidence the existence of a

factual dispute the Plaintiff(s) verified pleadings including the exhibits attached thereto and/or their Request for Judicial Notice should have been admitted and considered by the Court. (AOB 31, see, CP 168-196, 145-155, 93-98, 503-509) The Judgment/Transcript from the probate proceedings clearly reveal that the issue of damages in the Probate Matter was not “material and essential” to the prior judgment. (See above) Therefore, the Plaintiff(s) proved the existence of a factual dispute with regard to any element of a CPA claim.

**V. DEFENDANT(S) ERRONEOUSLY ARGUED IN THEIR RESPONSIVE BRIEF THAT PLAINTIFF(S) CHALLENGE TO THE SUPERIOR COURT’S FINDING IS A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE INTRODUCED BY THE PLAINTIFF(S) IN THE SUPERIOR COURT WHICH IS WAIVED FOR FAILURE TO MAKE A SUFFICIENCY OBJECTION**

Defendant(s) argue for the first time on Appeal that Plaintiff(s) challenges to the Superior Court’s finding(s) of fact(s) and/or application(s) of the law(s) to the facts was an untimely objection to the sufficiency of the evidence. (ARB 30) Defendant(s) mistakenly equate the Plaintiff(s) challenge to the Superior Court’s finding(s) of fact(s) and/or the application of the law(s) to the facts as an untimely objection to the sufficiency of the evidence. (ARB 30) Plaintiff(s) Opening Brief challenges the Superior Court’s finding(s) of fact(s) and application(s) of the law(s) to the evidence submitted by the Parties not the validity or reliability of the evidence submitted. (AOB 1-42)

**VI. CONCLUSION**

The Plaintiff(s) Claims do not include issues identical to those decided in the Probate Matter and preclusion of the issue of damages and corresponding dismissal of the Complaint is an erroneous finding of fact

and/or erroneous application of the law(s) to the fact(s). Only issues which are “material and essential” to a prior judgment may form the basis of Collateral Estoppel even if otherwise identical. The Defendant(s) failed to meet their burden to prove each element of Collateral Estoppel and may not raise arguments in their Responsive Brief which were not raised in the Superior Court. The Plaintiff(s) were not required to submit evidence proving a factual dispute under any Claim because the evidence submitted by the Defendant(s) did not negate any necessary element of any Claim. Even the arguments raised in the Defendant(s) Responsive Brief fail to meet the burden to produce evidence proving Collateral Estoppel. The Defendant(s) failed to prove the issues were identical, that Cathy and/or Tyler Riste were “Parties” or in “Privity” and that application of Collateral Estoppel would not result in injustice. Further, the Court’s finding that fraud was not plead with particularity is not based upon any logical interpretation and is plainly contradicted by the allegations within the Complaint. Finally, Plaintiff(s) CPA claim was plead in accordance with law which did not require pleading with particularity.

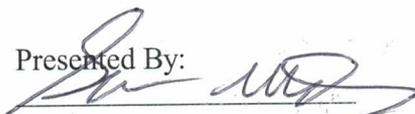
Date: 9/4/18

Respectfully submitted,



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and/or erroneous application of the law(s) to the fact(s). Only issues which are “material and essential” to a prior judgment may form the basis of Collateral Estoppel even if otherwise identical. The Defendant(s) failed to meet their burden to prove each element of Collateral Estoppel and may not raise arguments in their Responsive Brief which were not raised in the Superior Court. The Plaintiff(s) were not required to submit evidence proving a factual dispute under any Claim because the evidence submitted by the Defendant(s) did not negate any necessary element of any Claim. Even the arguments raised in the Defendant(s) Responsive Brief fail to meet the burden to produce evidence proving Collateral Estoppel. The Defendant(s) failed to prove the issues were identical, that Cathy and/or Tyler Riste were “Parties” or in “Privity” and that application of Collateral Estoppel would not result in injustice. Further, the Court’s finding that fraud was not plead with particularity is not based upon any logical interpretation and is plainly contradicted by the allegations within the Complaint. Finally, Plaintiff(s) CPA claim was plead in accordance with law which did not require pleading with particularity.

Date: \_\_\_\_\_

Respectfully submitted,

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**September 04, 2018 - 11:07 AM**

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