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Division III  
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**COA NO. 358216**

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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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**APPELLANTS OPENING BRIEF**

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## **I. INTRODUCTION**

Review is requested of the interpretation(s) and/or application(s) of the law(s) and the finding(s) of the fact(s) of the Superior Court. The laws were misinterpreted, misapplied and erroneous findings of fact were made. The Superior Court abused its discretion denying Plaintiff(s) Constitutional Right(s) to Due Process pursuant to WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV.

## **II. ASSIGNMENTS OF ERROR**

1) Collateral Estoppel is not authorized for Plaintiff(s) malpractice claim, breach of fiduciary duty(s) claim or their breach of contract claim because the issues in Yakima Superior Court Case Number 12-4-00514-8 were not *identical in all respects, did not involve the same controlling facts, the applicable legal rules did not remain unchanged nor were the substantially same bundle of legal principles* at issue. And, were not adjudicated in any previous matters. (CP 168-192, 542-545)

2) Collateral Estoppel was not applicable against Cathy Riste or Tyler Riste's malpractice claim, breach of fiduciary duty(s) claim or their breach of contract claim because neither Cathy Riste nor Tyler Riste were parties or in privity with Darrell Riste in Yakima Superior Court Case Number 12-4-00514-8. (CP 168-192, 542-545)

3) Application of Collateral Estoppel against Plaintiff(s) malpractice claim, breach of fiduciary duty(s) claim or their breach of contract claim in this matter is unjust. (CP 168-192, 542-545)

4) The Complaint included all required elements of a valid Claim for fraud

which was pleaded with particularity as required under Washington Court Rule 9. (CP 168-196, 542-545)

5) Plaintiff(s) have set forth a valid claim for violation of the consumer protection act including a flagrant violation of the consumer protection act justifying punitive damages. (CP 192-196, 542-545)

6) The Court's finding that the Defendant(s) submitted "adequate" "testimonial evidence" or argument to shift the burden in a summary judgment motion conducted under CR 56 in regards to the Consumer Protection Act and/or Fraud Claim to the Plaintiff(s) to prove the existence of a material factual dispute was erroneous and/or an abuse of discretion. (CP 168-196, 542-545)

7) The Court's finding that an award of punitive damages was not authorized by the legislature or existing law for flagrant violations of the consumer protection act is erroneous. (CP 168-196, 546-547)

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1) The Plaintiff(s) claim against the Defendant(s) for legal malpractice, breach of fiduciary duties or a breach of contract did not include issues which were *identical in all respects* to the issues set forth in Darrell Riste's claim(s) against the Personal Representative of the Estate of Dan McAnally and the Trustee of the Riste Trust (Hereinafter "PR/Trustee") for breach of these Defendant(s) fiduciary duties. (Assignment(s) of Error # 1) (CP 168-192, 305-325, 542-545)

2) The Plaintiff(s) claim against the Defendant(s) for legal malpractice, breach of fiduciary duties or a breach of contract did not involve *the same*

*controlling facts* as Darrell Riste's claim(s) against the PR/Trustee for breach of their fiduciary duties. (Assignment(s) of Error # 1) (CP 168-192, 305-325, 542-545)

3) The Plaintiff(s) claim against the Defendant(s) for legal malpractice, breach of fiduciary duties or a breach of contract did not involve *applicable legal rules which remain unchanged* from the applicable legal rules in Darrell Riste's claim(s) against the PR/Trustee for breach of their fiduciary duties. (Assignment(s) of Error # 1) (CP 168-192, 305-325, 542-545)

4) The Plaintiff(s) claim against the Defendant(s) for legal malpractice, breach of fiduciary duties or a breach of contract did not involve *substantially the same bundle of legal principles that contributed to the rendering of the judgment* in Darrell Riste's claim(s) against the PR/Trustee for breach of their fiduciary duties. (Assignment(s) of Error #1) (CP 168-192, 305-325, 542-545)

5) Neither Cathy Riste or Tyler Riste were a party or in privity with Darrell Riste in Yakima Superior Court Case Number 12-4-00514-8. (Assignment(s) of Error # 2) (CP 168-192, 305-325, 542-545)

6) Neither the Defendant(s) Motion to Dismiss nor any of their supporting pleadings or affidavits included any arguments that virtual representation was applicable to either Cathy Riste or Tyler Riste and the Court's findings that virtual representation was applicable by relying upon legal arguments and/or evidence which were not set forth in the record and/or not consistent with the law regarding virtual representation is erroneous and/or an abuse of discretion. (Assignment(s) of Error # 2) (CP 168-192, 542-545, 130-141, 245-254, 455-461, 510-516)

7) Darrell Riste was not provided with Due Process in Yakima Superior Court Case Number 12-4-00514-8. (Assignment(s) of Error # 3) (CP 93-

98, 145-154, 264-285, 411-451, 305-325, 503-509, 536-547)

8) The legislative purpose of a Probate Removal Hearing that is conducted in the manner in which Commissioner Kevin Naught in Yakima Superior Court Case Number 12-4-00514-8 conducted that hearing (Decision made in Chambers) was and are different than the purpose of a civil litigation matter which unlike the Probate Removal Hearing, a civil litigation requires the court to provide the parties a full and fair opportunity to litigate including but not limited to the right of the parties to conduct discovery and to have the credibility of witnesses and evidence brought to bar, decided by a jury of their peers after a trial. (Assignment(s) of Error #

3) (CP 93-98, 145-154, 264-285, 411-451, 305-325, 503-509, 536-547)

9) Neither Cathy Riste nor Tyler Riste were provided with Due Process including but not limited to their rights to a full and fair opportunity to litigate in Yakima Superior Court Case Number 12-4-00514-8.

(Assignment(s) of Error # 3) (CP 93-98, 145-154, 264-285, 411-451, 305-325, 503-509, 536-547)

10) The Disparity of relief requested/available between the probate removal hearing and the instant complaint for damages caused by the Defendant(s) was so great that application of Collateral Estoppel is unjust in this matter. (Assignment(s) of Error # 3) (CP 93-98, 145-154, 264-285, 411-451, 305-325, 503-509, 536-547)

11) Application of Collateral Estoppel in this matter violates Public Policy. (Assignment(s) of Error # 3) (CP 93-98, 145-154, 264-285, 411-451, 305-325, 503-509, 536-547)

12) The Plaintiff(s) claim of fraud included all required elements and was plead with particularity as required by CR 9. (Assignment(s) of Error # 4) (CP 168-196, 546)

13) The Plaintiff(s) claim of Defendant(s) violatin of the consumer

protection act and corresponding punitive damages included all required elements and was plead with particularity as required by CR 9.

(Assignment(s) of Error # 4 & 7) (CP 168-196, 546-547)

14) The Defendant(s) failed to submit “adequate” “testimonial evidence” or argument to shift the burden in a summary judgment motion conducted under CR 56 in regards to the Consumer Protection Act and/or Fraud Claim to the Plaintiff(s) to prove the existence of a material factual dispute. (Assignment(s) of Error # 6) (CP 130-141, 245-254, 455-461, 510-516)

15) The Court may not consider argumentative assertions or legal conclusions set forth in an Attorney Declaration which is testified to by personal knowledge. (Assignment(s) of Error # 6) (CP 130-141, 245-254, 455-461, 510-516)

16) Even had the Defendant(s) submitted “Adequate” “Testimonial evidence” their argument fails to meet their burden to prove that the Complaint is deficient in any manner and the Plaintiff(s) therefore were not required to submit further evidence to prove the existence of a material factual dispute under CR 56. (CP 130-141, 245-254, 455-461, 510-516)

#### **IV. STATEMENT OF THE CASE**

Procedural facts of the case are, Plaintiff(s) employed and paid Defendant(s), The Idaho Law Group LLP, P. Rick Tuha P.C., P. Rick Tuha, Rick Tuha, Hala Lilifa Afu Jr., Hala Afu to represent their cause(s) in a Probate matter in the estate of the RISTE TRUST, Dan McAnally, deceased estate, in the Yakima County Probate Court, Case # 12-4-00514-8. (CP 539) Said Defendant(s) gave assurances to Plaintiff(s), Darrell Riste, Beneficiary of the Dan McAnally Estate and RISTE TRUST that

they were experts and knowledgeable in legal matters related to Estates, Wills, Trusts, Probate, Trial and other legal matters which were pertinent to represent the Plaintiff(s) and the Estate of Dan McAnally and RISTE TRUST's interests. (CP 168-196) The Defendant(s) not only failed to provide the Plaintiff(s) proper representation before the Yakima Bar, they intentionally on a regular basis placed their own interests above those of the Plaintiff(s) without explanation, knowledge or consent of their client(s), the Plaintiff(s)-Appellant(s). (*Id.*) Defendant(s) acts and failures brought tremendous asset and income losses to the Plaintiff(s)-Appellant(s) who now seek an appeal before this Division on the lower Court's errors granting a summary judgment to the Defendant(s). (CP 538-547)

Darrell Riste filed a Petition for Removal of the Personal Representative of the Estate of Dan McAnally and the Trustee of the Riste Trust (Hereinafter "PR/Trustee") in Yakima Superior Court Case # 12-4-00514-8 on September 6, 2016 for breach of their fiduciary duties including but not limited to the sale of Estate/Trust commercial realty at a loss. (CP 320) Neither Cathy Riste nor Tyler Riste were parties or in privity with Darrell Riste. (CP 313; 216-217) Darrell Riste was a named beneficiary of the Estate and hired Defendant(s) to represent him in the Estate matter. (CP 313; 216-217) Darrell Riste, Cathy Riste and Tyler Riste filed a Civil Complaint against the PR/Trustee in Yakima Superior Court Case # 16-202459-39 on September 6, 2016 for damages to their respective interests as beneficiaries of the Estate and/or the Riste Trust. (CP 415-451) Yakima Superior Court Case # 12-4-00514-8 was decided against Darrell Riste on January 26, 2017. (CP 312-325) Thereafter Yakima Superior Court Case # 16-202459-39 was erroneously barred by Collateral Estoppel on November 6, 2017 based on the findings in Yakima

Superior Court Case # 12-4-00514-8. (CP 415-451) Yakima Superior Court Case # 16-202459-39 is on Appeal to this Court. (CP 539) Yakima Superior Court Case # 12-4-00514-8 was also the subject of an appeal in this Court and is now awaiting Discretionary Review by the Washington Supreme Court. (CP 539) Defendant(s) were not defendant's or parties in either Yakima Superior Court Case # 12-4-00514-8 or 16-202459-39 nor were any of their actions contested therein. (CP 312-325; 415-451)

Plaintiff(s) below in the instant matter (Yakima Superior Court Case # 17201660-2) and Appellant(s) herein Darrell Riste, Cathy Riste and Tyler Riste filed a civil complaint against Defendant(s) for their negligent representation of Darrell Riste in Case # 12-4-00514-8 the beneficiaries of the Riste Trust (including Cathy Riste and Tyler Riste) which is the subject of this appeal. (CP 168-196) Plaintiff(s) instant complaint below sought damages for the Defendant(s) malpractice, breach of fiduciary duty(s) and outright breach of a contract in failing to properly advise or failing to properly defend Darrell Riste's interests in Yakima Superior Court Case # 12-4-00514-8 and Cathy Riste and Tyler Riste's interest as beneficiaries of the Riste Trust. (CP 168-196) Plaintiff(s) instant complaint below, Yakima Superior Court Case # 17201660-2, alleged that Defendant(s) failure to properly advise or represent Darrell Riste and predecessors, being Cathy Riste and/or Tyler Riste's interests in the Riste Trust caused damages to Darrell Riste, Cathy Riste and Tyler Riste's interests as beneficiaries and/or contingent beneficiaries of the Estate of Dan McAnally (Darrell Riste) or the Riste Trust (Darrell Riste, Cathy Riste (contingent) and Tyler Riste (contingent)). (CP 168-196)

Plaintiff(s) alleged that the Defendant(s) caused them harm in the form of losses to the Estate/Trust in the form of valuable and productive commercial real estate and business which was sold by the PR/Trustee

through an underhanded sale during administration of the Estate for less productive assets despite the beneficiaries stated contrary wishes. (CP 168-196; 312-325; 415-451) Plaintiff(s) instant complaint alleged that the Defendant(s) failed to properly advise the Plaintiff(s) of the applicable laws regarding administration of an Estate/Trust, the legal basis for opposing the PR/Trustee's intended sale of commercial realty and/or the Defendant(s) failed to make an appropriate and TIMELY objection in the probate court to the PR/Trustee's sale of the Estate/Trust's commercial realty which resulted in losses of more than sixteen million dollars was malpractice, breach of fiduciary duty and a breach of contract. (CP 168-196, 322 fn 4) The Court's reliance upon the finding in Yakima Superior Court Case # 12-4-00514-8 that Darrell Riste authorized the sale in a written communication to the PR/Trustee prior to the sale does not consider the failures of the Defendant(s) and/or the fraudulent misrepresentations made by the Defendant(s) to the Plaintiff(s) prior to the alleged authorization regarding the applicable laws and any rights or opportunities for objecting to the PR/Trustee's sale. (CP 322 fn 4; 514, 536) The Defendant(s) fraudulent and/or negligent communications to the Plaintiff(s) regarding the laws applicable to the administration of the Estate/Trust were not considered or raised as issues in Yakima Superior Court Case # 12-4-00514-8 (CP 538-547) and are thus ripe for litigation in the instant matter. (CP 168-196)

The Probate court (12-4-00514-8) never reached the damages issue related to the sale of the commercial realty at a loss because the court found that Darrell Riste failed to make a TIMELY objection to the PR/Trustee's "Petition for Authorization to Sell the Estate Realty" while represented by the Defendant(s). (CP 321-322) Appellant Darrell Riste fired Defendant(s) after they failed to prevent the PR/Trustee from selling

the commercial realty and Plaintiff(s) hired new counsel herein seeking to remove the PR/Trustee for selling the commercial realty for less productive assets and potentially nullify the sale but the Petition for Removal was denied as an untimely objection by the probate court preventing the Plaintiff(s) from rectifying the damages caused by the Defendant(s) negligence. (CP 321-322) The judgment of the Probate Court was then erroneously relied upon in the civil action to Collaterally Estop the Civil Complaint (16-202459-39) a finding that the PR/Trustee was found to not have breached any of his fiduciary duties. (CP 538-547) As such, Plaintiff(s) instant complaint which seeks damages from the Defendant(s) for their failures to make represented timely objection as required by the probate court in Yakima Superior Court Case Number 12-4-00514-8 and/or for failing to properly advise the Plaintiff(s) on the applicable laws has nothing to do with the PR/Trustee's actions in selling the commercial realty without an objection being made at the time of the hearing on the PR/Trustee's "Petition for Authorization to Sell Estate Realty". (CP 321-322, 536) The Probate Court's challenged finding that the PR/Trustee did not breach any of his fiduciary duties has nothing to do with the Defendant(s) failure to properly advise Plaintiff(s) on the applicable laws and/or their failure to object in court proceedings at bar on behalf of Darrell Riste in a timely manner to the PR/Trustee's intended sale of the Estate's commercial realty for reasons other than the PR/Trustee's breach of fiduciary. (CP 168-196, 536)

The Complaint also alleges that the Plaintiff(s) are entitled to the return of the fees paid to the Defendant(s) and for damages/punitive damages caused by the Defendant(s) flagrant unfair business practices in

violation of the consumer protection. (CP 168-196) None of these claims against Defendant(s) require proof of any fact which was at issue in Appellant, Darrell Riste's probate action in the Yakima Superior Court Case Number 12-4-00514-8 or Plaintiff(s) civil action in the Yakima Superior Court Case Number 16-202459-39. (CP 168-196; 312-325; 415-451) In fact, Plaintiff(s) were denied any right to proceed against the PR/Trustee in both of Yakima Superior Court Case Number 12-4-00514-8 and 16-202459-39 for failure of Defendant(s) to timely represent and object. (CP 321-322; 415-451)

In the instant matter below, the Defendant(s) failed to produce any admissible "testimonial evidence" or adequate legal argument proving all of the required elements of Collateral Estoppel and the Superior Court's order barring Plaintiff(s) claim in the instant matter is clearly erroneous on multiple levels. (CP 538-547) Record of the proceedings lacked representation by the Defendant(s). The Superior Court abused its discretion in applying the laws and making legal findings which were not argued by the Defendant(s) in any Pleading filed with the Court. (CP 538-547) Essentially, the Superior Court appears to have *Sua Sponte* introduced legal argument on behalf of the Defendant(s) and decided the matter based upon the Court's own arguments without providing the Plaintiff(s) any opportunity to respond in violation of the Due Process guarantees of the State of Washington and the United States Constitutions. (CP 538-547) The Superior Court's ruling in the instant matter that all elements of Fraud were not plead and/or that they were not plead with particularity is erroneous. (CP 546) A concise statement of each element of a claim for fraud was plead with particularity and the Plaintiff(s)

“Verified” Pleadings based upon “Personal Knowledge” should have been accepted as proof (if needed) rebutting the Defendant(s) so called “Contentions” that there was no material dispute of fact. (CP 546)

Likewise, the Court’s finding that Plaintiff(s) Consumer Protection claim was barred for lack of material evidence is erroneous and reversible error. (CP 546) .Conclusive, contrary to the Superior Court’s finding, the legislature has authorized punitive damages for flagrant violations of the Consumer Protection Act as plead within the Complaint. (CP 547)

The Superior Court’s conversion of the Defendant(s) CR 12(b) Motion to Dismiss...” into a Motion for Summary Judgment under CR 56 the following errors are evident and are unfairly prejudicial. (CP 538-547)

The Superior Court made the finding that the Defendant(s) “Attorney Statements” so called “Contentions” were sufficient to shift the burden to the Plaintiff(s) to prove their was a material factual dispute even though the Defendant(s) had not submitted any admissible “testimonial evidence” proving the lack of a material factual dispute. (CP 1-556) The only admissible “testimonial evidence” submitted by the Defendant(s) were the Declarations of Defendant(s) counsel; the actual Motion to Dismiss and supporting Pleadings filed by the Defendant(s) which contained inadmissible “Argument” which was barred by the Washington Supreme Court from consideration in a Summary Judgment hearing. The Court’s finding that the Defendant(s) submitted admissible evidence and/or argument to prove that there was no material factual dispute and to shift the burden to the Plaintiff(s) to prove an actual material factual dispute is a erroneous judgment. (546-547) Nothing in the Defendant(s) Declaration or Pleadings negated any of the required elements of the Fraud and/or

Consumer Protection Act claims. Furthermore, it is actual bias when the Court erroneously refused to consider the Plaintiff(s) “Verified” Complaint and other “verified” Pleadings of the Plaintiff(s) even though based upon personal knowledge.

#### **V. ARGUMENT**

This Court conducts *De Novo* review of Collateral Estoppel bars to litigation. (*Maytown Sand and Gravel, LLC., v. Thurston County*, 198 Wn. App. 560, 581 (2017)). Further, there are erroneous interpretation(s) and/or applications of the law(s) to the undisputed facts which should be reviewed *de novo*. (*Kommavongsa v. Haskell*, 149 Wn.2d 288, 295 (2003)). The trial court also made erroneous finding(s) not based upon any facts in the record. ((*Thorndike v. Hesperian Orchards*, 54 Wn.2d 570 (1959))  
The trial court has also abused its discretion,

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

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

Accordingly, this Court should review these matters *De Novo* as the ruling is a Collateral Estoppel bar to the instant matter which includes numerous erroneous applications of law(s), application(s) of the law(s) to the facts, erroneous findings of fact(s) and a clear abuse of discretion.

## **VI. SPECIFIC ARGUMENTS FOR ASSIGNMENTS OF ERROR**

### **A) COLLATERAL ESTOPPEL MAY NOT BAR PLAINTIFF(S) CLAIMS FOR MALPRACTICE, BREACH OF FIDUCIARY DUTIES OR A BREACH OF CONTRACT**

The elements of collateral estoppel are:

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

((*Shoemaker v. Bremerton*, 109 Wn.2d 504, 507-08, (1987), citing, *Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489 (1985) and *Rains v. State*, 100 Wn.2d 660, 674 (1983)) 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. (*Daniels v. Carlson*, 108 Wn.2d 299, 303 (1987)) Under the first prong of Collateral Estoppel the Court should require the moving party to prove the issues are *a) identical in all respects, b) that the controlling facts and applicable legal rules remain unchanged and c) involve substantially the same bundle of legal principles that contributed to the rendering of the first judgment even if the facts and the issues are identical,*

application of collateral estoppel is limited to situations where the issue presented in the second proceeding is

*identical in all respects* to an issue decided in the prior proceeding, and “where the controlling facts and applicable legal rules remain unchanged.” Further, issue preclusion is appropriate only if the issue raised in the second case “involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,” even if the facts and the issue are identical.

((*Maytown Sand & Gravel LLC v. Thurston County*, 198 Wn. App. 560, 582 (2017), citing, *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 805 (2008); *Lopez-Vasquez v. Dep't of Labor & Indus.*, 168 Wn. App. 341, 345-346))

### **1) IDENTICAL ISSUES**

#### **a) THE ISSUES ARE NOT IDENTICAL IN ALL RESPECTS BECAUSE THE UNDERLYING CLAIMS WERE DISTINCTLY DIFFERENT THAN THE PRIOR PROCEEDINGS AND THE CLAIM FOR DAMAGES RESULTING FROM THE SALE OF COMMERCIAL REALTY IN THE INSTANT MATTER WAS NOT DECIDED AND/OR WAS IMMATERIAL TO THE PRIOR JUDGMENT**

1) The Plaintiff(s) claim against the Defendant(s) for legal malpractice, breach of fiduciary duties and a breach of contract (CP 168-196) did not include issues which were set forth in Darrell Riste’s claim(s) against the PR/Trustee for breach of the PR/Trustee’s fiduciary duties in Case # 12-4-00514-8 (CP 215 - 234) or the civil complaint Case # 16-202459-39 (CP 411 - 451) against the PR/Trustee. The Superior Court in Case # 16-202459-39 barred that complaint against the PR/Trustee for breach of their fiduciary duties et al... based upon Collateral Estoppel pursuant to Case # 12-4-00514-8. (CP 415-451) Plaintiff(s) Complaint in this instant matter raised only claims against Defendant(s) for malpractice, breaches of their fiduciary duties and a breach of contract. (CP 168-196) None of these claims were raised or decided in Case # 12-4-00514-8 or Case # 16-202459-39 (CP 538-547).

i-iv) The Superior Court erroneously found that Darrell Riste's claim against the PR/Trustee for breach of the PR/Trustee's fiduciary duties raised the *identical issue* of Defendant(s) malpractice, breach of fiduciary duties and a breach of contract. (CP 542-544)

Not present within Defendant(s) moving papers, including his "Motion to Dismiss" (CP 132-141), did the Defendant(s) set forth any argument or produce any evidence which showed that Case # 12-4-00514-8 or 16-202459-39 contained the identical issue of Defendant(s) malpractice, breach of fiduciary duties or a breach of contract. (CP 538-547; See further discussion of damages below) Accordingly, Plaintiff(s) "Opposition to Defendant's Motion to Dismiss...", "Response..." and further "Reply..." informed the Court that Defendant(s) had not produced any evidence or made any argument that the elements of these claims against Defendant(s) were at issue in Case # 12-4-00514-8 or 16-202459-39. (CP 149-150, 95-96, 506) The Superior Court's Order granting Defendant(s) request for Dismissal of the malpractice, breach of fiduciary duties and a breach of contract claims against Defendant(s) failed to address Plaintiff(s) arguments that the assumed *identical issues* were not raised in the preceding matter(s) and simply found that Collateral Estoppel barred these claims due to the erroneous court ruling in case # 12-4-00514-8 against the PR/Trustee:

"Plaintiffs' current attorneys were unsuccessful in the Probate Matter which means that Plaintiffs' claims of malpractice against their former attorneys fail...  
Plaintiffs' breach of fiduciary duty claim fails for the same reason their legal malpractice claim fails...  
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 543-544)

Here, the Superior Court’s Order is devoid of any reference to the record or factual finding that Defendant(s) malpractice, breach of fiduciary duties and a breach of contract was an issue that was *identical in all respects* to the issue in Case # 12-4-00514-8 or 16-202459-39. (CP 538-547) As such, the Superior Court’s Order dismissing these claims against Defendant(s) erroneously interpreted the requirements of Collateral Estoppel; the decision relies upon erroneous finding(s) of fact that the issues were *identical in all respects*. (*Maytown Sand & Gravel LLC v. Thurston County*, 198 Wn. App. 560, 582 (2017)) Furthermore, the Defendant(s) did not meet their burden to affirmatively prove that the issues were *identical in all respects* because they did not produce any evidence or make any argument that the Defendant(s) malpractice, breach of fiduciary duties and a breach of contract claims were at issue in the prior proceedings. (*Daniels v. Carlson*, 108 Wn.2d 299, 303 (1987))

v) As to the Damages element of these claims, specifically, not present within Defendant(s) moving papers including his “Motion to Dismiss” (CP 132-141) did Defendant(s) set forth any argument or produce any evidence which showed that Case # 12-4-00514-8 or 16-202459-39 contained an allegation that **Defendant(s)** caused harm to the Plaintiff(s) in these matters. (CP 1-556) Accordingly, Plaintiff(s) “Opposition to Defendant’s Motion to Dismiss...,” “Response...” and further “Reply...” informed the Court that Defendant(s) had not produced any evidence or made any argument that the harm caused by **Defendant(s)**

was at issue in Case # 12-4-00514-8 or 16-202459-39. (CP 149-150, 95-96, 506) The Superior finding in Case # 12-4-00514-8, that Darrell Riste failed to prove that the **PR/Trustee** committed a breach of fiduciary duties and correspondingly never reached the issue of damages caused by the sale of commercial realty and business for less productive assets. (CP 544) The Superior Court in the instant matter erroneously found that Plaintiff(s) were barred from proving damages caused by the **Defendant(s)** because there was no harm found to be caused by the **PR/Trustee** in Case # 12-4-00514-8. (CP 322, 544) Plaintiff(s) claim for damages against the **Defendant(s)** in the instant matter sought damages against the **Defendant(s)** for failure to properly advise the Plaintiff(s) of the applicable laws, regarding the PR/Trustee's administration and/or the **Defendant(s)** failure to represent Riste's objection to the PR/Trustee's sale of the Estate/Riste Trust's commercial realty and business during administration **at a time when an objection would have prevented the sale**, regardless or not of the PR/Trustee's breaches of fiduciary duties. (CP 322, 544) Soon after the Court in Case # 12-4-00514-8 approved the PR/Trustee's **UNOPPOSED** (CP 538, 544) "Petition for Authorization to sell..." the commercial realty and business, the Plaintiff(s) fired Defendant(s) and sought diligently to employ new counsel. Being a burdensome task, eventually retained their current attorney(s) to mitigate the harm caused by the Defendant(s) negligent representation and failure to properly object/prevent the PR/Trustee's sale of the commercial realty for less productive assets. (CP 168-196, 312-325) Plaintiff(s) current attorney's filed a "Petition to Remove the PR/Trustee..." for breaches of fiduciary duties and corresponding damages resulting from the

PR/Trustee's sale of the commercial realty. (CP 312-325) The Court found that Plaintiff(s) objection to the sale of the commercial realty was untimely, that the PR/Trustee had not breached any fiduciary duties and that therefore no damages could be attributed to the PR/Trustee. (CP 544) The PR/Trustee's breach of fiduciary duty and the corresponding harm caused by the PR/Trustee is distinctly different from the claim in this instant matter for malpractice, breach of fiduciary duty and a breach of contract against the Defendant(s) including the corresponding damages that Defendant(s) caused. (CP 168-196) While the related loss of value of the commercial realty and business would be accumulative in both matters if it was actually decided in Case # 12-4-00514-8 the fact remains that damages were not decided and not material and essential to the judgment. (CP 264-285) Subsequently, they were not material and essential to the judgment in Case # 12-4-00514-8; even had they been decided upon. (CP 168-196) Only issues that are identical and "material and essential" to the first controversy may be precluded in the second action. (*Revisiting Claim and Issue Preclusion in Washington*, Kathleen M. McGinnis, March 30, 2015, 90 Wash. Law Rev. 75, 88-89, citing, *E. v. Fields*, 42 Wn.2d 924 (1953); CP 319-325, 538-547). The reversible fact is that the Probate Court found the PR/Trustee did not breach any fiduciary duties and that the objection to the sale of the commercial realty was untimely and that therefore there could not possibly be any damages. (CP 544) Plainly stated, the instant matter alleges that the sale of the commercial realty and business could have been prevented if the Defendant(s) would have objected to the PR/Trustee's "Petition for Authorization for Sale" in a timely manner (CP 544) whether or not the PR/Trustee was found to have

breached any fiduciary duties as set forth in Case # 12-4-00514-8 and/or that the Defendant(s) failure to properly advise Darrell Riste of the applicable laws (on the concerned matters) and the opportunities to object unnecessarily allowed the PR/Trustee to sell lucrative commercial realty for less productive assets unopposed. (CP 168-196, 544) Furthermore, “Collateral estoppel precludes only those issues that were actually litigated and necessary to the final determination in the earlier proceeding.” ((*Shoemaker v. Bremerton*, 109 Wn.2d 504, 507-508 (1987 Wash.) citing, *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 228 (1978); *Peterson v. Department of Ecology*, 92 Wn.2d 306, 312 (1979); *Haslund v. Seattle*, 86 Wn.2d 607 (1976); *King v. Seattle*, 84 Wn.2d 239 (1974); *Restatement (Second) of Judgments* § 27 (1982)) The issue of damages was not essential to the prior judgment which did not reach the issue of damages because the Court found there was no breach of fiduciary duty, hence, that there could not be any proximately caused damages, “... they have not made a prima facie showing of proximate causation of their alleged damages...” (CP 544) If the Defendant(s) would have properly informed the Plaintiff(s) of the applicable laws and/or made a timely objection to the sale of the commercial realty the sale could have been prevented through the presentation of some of the same evidence presented in Case # 12-4-00514-8 and additional evidence which the Defendant(s) should have obtained through proper discovery (which the instant Complaint alleges the Defendant(s) failed to do - CP 168-196) and the beneficiaries testimony regarding their wishes for a TEDRA (Chapter 11.96A RCW) allowing the commercial realty to be retained. (CP 168-196) The Defendant(s) should have properly represented and advised the Plaintiff(s)

and objected to the sale by arguing among other things that the SOLE duty of the PR/Trustee was to the beneficiaries who wished the PR/Trustee to retain the commercial realty and that a TEDRA agreement was in order. (CP 168-196) That is the basis of this lawsuit and these issues were not considered or decided in the probate matter. (See, RCW Chapter 11.96 & 11.96A et al) Defendant(s) are alleged to have failed to adequately represent and advise the Plaintiff(s) of the applicable laws available to them to prevent the sale of the commercial realty which includes the Trust Estate Dispute Resolution Act et al... (RCW 11.96A)

**b) THE SAME CONTROLLING FACTS AND BUNDLE OF LEGAL PRINCIPLES ARE NOT RAISED IN THE INSTANT MATTER BECAUSE THE FACTS ARE COMPLETELY DIFFERENT AND THE BURDEN OF PROOF APPLICABLE IN THE PROBATE MATTER WAS MORE STRINGENT THAN IN THE INSTANT MATTER**

As stated above, the malpractice, breach of fiduciary duties and a breach of contract claims against the Defendant(s) were not raised in either Case # 12-4-00514-8 or 16-202459-39. (CP 305-325, 415-451; 538-547) Further, the facts raised in the instant Complaint regarding the Defendant(s) malpractice, breach of fiduciary duties and a breach of contract were found by the Court to involve differing facts than the prior proceedings,

“...their Complaint infers a breach of [the Defendant(s)] RPC 1.1 (i.e. competence), RPC 1.3 (i.e.diligence), and RPC 1.3 (i.e. communication)...  
Plaintiffs allege [Defendant(s)] failed to adequately investigate and research matters, failed to adequately inform Plaintiffs, failed to object to the petition to sell the shopping center, failed to petition for removal of the personal representative, failed to petition for the removal of the trustee, failed to preserve evidence, provided misleading, inaccurate and fraudulent information to

Plaintiffs, failed to take legal action against the personal representative and the trustee for wrongful acts and violations of fiduciary duties, failed to be honest with Plaintiffs regarding Defendants' qualifications, experience, reputation and expertise, and failed to allow Plaintiffs to make an informed decision.

(CP 543-544; See also Plaintiff(s)) Pleadings at CP 95-96, 149, 168-196))

None of these facts or arguments were raised or decided in the prior proceedings. (*Id.*) Defendant(s) failed to meet their burden to produce any evidence that these claims were raised in the prior proceedings. (*Id.*)

Moreover, the difference in the degree of the **burden of proof** in the two proceedings precludes application of Collateral Estoppel even if the same arguments and/or facts were at issue, ““unless the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,”” Collateral Estoppel may not be applied. (*Standlee v. Smith*, 83 Wn.2d 405, 407 (1974), (internal quotation marks omitted) (quoting *Neaderland v. Commissioner*, 424 F.2d 639, 642 (2d Cir. 1970)). In the probate matter, Commissioner Naught did not make any findings regarding the burden of proof which he applied, “the record does not disclose whether evidence was ever presented on the issue” ((*Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1283-1284 (1986); (CP 543-544) As such, the determination of all legal, factual and credibility issues was subject to the discretion of Commissioner Naught which presents an unintelligible and/or more stringent burden of proof than would be applicable in a civil action which would require only proof by a preponderance of the evidence. What standard of proof Commissioner Naught applied in the probate proceedings is unclear. What rules were applicable ie... what was the applicable burden of proof, the Plaintiff(s) should be given the benefit of

any doubt. The Defendant(s) have not met their burden to produce evidence to support a finding that the same confined bundle of legal principles were at issue. ((*Standlee v. Smith*, 83 Wn.2d 405, 407 (1974)) Defendant(s) did not set forth any argument in any of their Pleadings at bar which identified a confined identical burden of proof and as such have failed to meet their burden to prove all of the elements of Collateral Estoppel thereby rendering Collateral Estoppel inapplicable, nullifying the Court's ruling below.

**3) NEITHER CATHY RISTE NOR TYLER RISTE WERE A PARTY OR IN PRIVITY WITH ANY PARTY IN THE PROBATE MATTER AND THEREFORE COLLATERAL ESTOPPEL IS IN APPLICABLE UNDER WASHINGTON LAW**

A non party cannot constitutionally be bound to an issue decided in another adjudication,

[a] person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." Richards, 517 U.S., at 798 (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Hansberry, 311 U.S., at 40, 61 See also, e.g., Richards, 517 U.S., at 798; Martin v. Wilks, 490 U.S. 755, 761 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969).

((*Taylor v. Sturgell*, 553 U.S. 880, 892-893 (2008)) Moreover, none of the virtual representation factors set forth by *Garcia v. Wilson*, 63 Wn. App. 516 (1991) were plead or argued by the Defendant(s) below and the Court abused its discretion in making findings on arguments not raised by the Defendant(s). (CP 538-547, WA Const Article I, Sec. 3 and the US Const.

Amend(s) X & XIV) Further, the Court did not make any factual or legal findings consistent with the requirements for a finding of virtual representation,

“1) ‘whether the nonparty in some way participated in the former adjudication, for instance as a witness,’ (2) ‘[t]he issue must have been fully and fairly litigated at the former adjudication,’ (3) ‘the evidence and testimony will be identical to that presented in the former adjudication,’ and (4) ‘there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so.’”

(*Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 66 (2014), citing, *Garcia v. Wilson*, 63 Wn. App. 516 (1991); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891 (2005); *Frese v. Snohomish County*, 129 Wn. App. 659 (2005); see, CP 545.) Erroneously, the court found that Cathy Riste and Tyler Riste were parties without reliance upon any factual evidence on or within the record or as to a applicable legal authority. (CP 545; RCW § 5.44.010; *State v. Lord*, 117 Wn.2d 829, 882 (1991) - “To the extent that this argument is based upon evidence not in the record, and never offered for inclusion in the record, it is without merit”)) Furthermore, none of the extraneous evidence relied upon by the Court is legally sufficient to find that Cathy Riste or Tyler Riste were “designated Party(s)” or that they were “Served with Process” in accordance with the requirements of the laws in the State of Washington. ((*Taylor v. Sturgell*, 553 U.S. 880, 892-893 (2008); WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) No evidence was submitted by the Defendant(s) which showed that Cathy Riste or Tyler Riste were “designated Party(s),” likewise, no proof of service upon either Cathy Riste or Tyler Riste was admitted into evidence. (CP 545) As such,

neither Cathy Riste nor Tyler Riste were parties or in privity under Washington Law. (*Id.*) Instead the court appears to find that virtual representation has occurred by erroneously relying on legal authorities not presented by the Defendant(s) which are also inapplicable and/or relying on evidence not offered by either party and not included anywhere within the record in the case. ( CP 545; WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) Further, the facts as relied upon by the court (even if true) are irrelevant to any finding of virtual representation under existing the law of the State. (542-545) The court has relied upon facts which were not presented by either party, do not exist on or in the record and therefore violate Due Process. (*Id.*) The Court's reliance upon evidence not presented to the Court by either party and without providing any opportunity to rebut is an abuse of discretion and/or violation of Due Process. ((*Id.*); Wash. CR 56(h)) In consequence, had Defendant(s) presented these frivolous arguments below Plaintiff(s) would have set forth legal argument proving that neither Cathy Riste nor Tyler Riste were parties nor in privity. (*Id.*) Whereas the Defendant(s) failure to raise these factual matters below constitutes a waiver of the right to do so. (*Id.*) As stated above it is the Defendant(s) burden to prove all of the confined elements of Collateral Estoppel and they have failed to address anywhere within their pleadings how Cathy Riste or Tyler Riste were in privity, "...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)) Defendant(s) have therefore failed to meet their burden to prove the third required prong of Collateral Estoppel and the Court's finding that virtual

representation occurred based on facts and legal argument not before the Court is a violation of Due Process. (CP 545; WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV)

**4) APPLICATION OF COLLATERAL ESTOPPEL IS UNJUST BECAUSE IT DENIES THE PLAINTIFF(S) THEIR CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE CONSTITUTIONS OF THE STATE OF WASHINGTON AND THE UNITED STATES OF AMERICA WHICH GUARANTEES A FULL AND FAIR OPPORTUNITY TO LITIGATE**

All of the Plaintiff(s) are guaranteed the right to a full and fair opportunity to litigate,

the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding...[t]he injustice component is generally concerned with procedural, not substantive irregularity. This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum.

((*Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 307 (2004 Wash.), citing, *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65 (1998) & *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 795-99 (1999); WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV)

The probate court decision which is the basis for the Superior Court's Collateral Estoppel bar to the instant litigation did not afford the Plaintiff(s) a "full and fair opportunity to litigate" their claims of malpractice, breach of fiduciary duties and a breach of contract against the Defendant(s). (CP 315-351) These claims against the Defendant(s) were not shown by any evidence to have been brought forth in the probate matter. (Emphasis added, CP 538-547) Furthermore, the claims which were made against the PR/Trustee were in accordance with the legislative

intent for these claims to be based only upon Prima Facie evidence. (RCW § 11.68.070) The legislature intended a removal hearing to provide an expedient hearing based upon the presentation of only “Prima Facie” evidence (RCW § 11.68.070), and without a full blown trial conducted with a full and fair opportunity to be heard if decided in chambers, “[t]he applications and acts authorized by RCW § 11.28.250 may be heard and determined in court or at chambers.” (RCW § 11.28.260) Clearly, the legislatures authorization to conduct the hearing in chambers based upon only the presentation of Prima Facie evidence was intended to provide the beneficiaries an expedient hearing without a full and fair opportunity to litigate so that the beneficiaries could prevent further harm by a recalcitrant PR/Trustee during the pendency of a civil complaint. ((RCW § 11.68.070, § 11.28.250, § 11.28.260) Indeed, the Defendant(s) did not introduce any evidence below that the Probate Removal hearing was conducted after each party had an opportunity to conduct discovery or that an adversarial trial was conducted after the parties had an opportunity to conduct discovery. (CP 538-547) In fact, the Trial Transcripts disclose that the Probate Court decided this matter in chambers and announced the Court’s decision at the first appearance of the parties in court. (CP 312-318) The transcripts clearly reflect that the Court did not afford Plaintiff(s) with any right to discovery or an adversarial trial with the opportunity to examine and/or cross examine witnesses before a jury. (CP 312-318) Without providing Plaintiff(s) a full and fair opportunity to litigate the decision cannot have preclusive effect on the instant matter. ((*Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 307 (2004 Wash.), citing, *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255,

264-65 (1998) & *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 795-99 (1999); WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) It would be unjust to allow the decision of the Probate Removal Hearing which was for a different purpose than a civil complaint for damages to have preclusive effect.

**B) FRAUD WAS PLEADED WITH PARTICULARITY  
AS REQUIRED UNDER WASHINGTON COURT RULE  
NUMBER NINE.**

The law in the State of Washington requires that a Fraud claim be pleaded with particularity, facts which give rise to the allegation of fraud are,

Fraud must be pleaded with particularity. CR 9(b). Particularity requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud. See *Pedersen v. Bibioff*, 64 Wn. App. 710, 721, 828 P.2d 1113 (1992); *Harstad v. Frol*, 41 Wn. App. 294, 301-02, 704 P.2d 638 (1985). ...

The elements of fraud include

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely on it; and (9) damages suffered by the plaintiff.

((*Union Bank, NA v. Blanchard*, 194 Wn. App. 340, 359 (2016), citing, *Stiley v. Block*, 130 Wn.2d 486, 505 (1996) and *Adams v. King County*, 164 Wn.2d 640, 662 (2008)) Neither the Defendant(s) nor the court below identified any specific element of Plaintiff(s) claim of fraud that was not pleaded with particularity and instead made a blanket statement which

failed to provide Plaintiff(s) any opportunity to respond in accordance with Due Process. (CP 546-547; WA Const Article I, Sec. 3 and the US Const. Amend(s) X & XIV) The Defendant(s) failed to meet their burden to prove that Plaintiff(s) complaint was deficient and the court erroneously accepted their blanket assertion that fraud was not pleaded with particularity without reference to any specific element of the claim which was deficient or an opportunity to amend. (CP 538-547) Plaintiff(s) complaint sets forth that the Defendant(s) were hired by the Plaintiff(s) to represent their interests in the Estate of Dan McAnally and/or the Riste Trust, that the Defendant(s) knowingly fraudulently induced the Plaintiff(s) into hiring the Defendant(s) and that thereafter the Defendant(s) provided knowingly false or fraudulent information to the Plaintiff(s) thereby causing harm to the Plaintiff(s) interests in the Estate/Riste Trust in the form of loss in value (Commercial Realty sold without objection for less productive assets) and the fees for services paid to the Defendant(s) and that Plaintiff(s) were entitled to rely on the Defendant(s) for advice because they were their attorney. (CP 168-196)

**C) ALL ELEMENTS OF FRAUD WERE SET FORTH  
WITH PARTICULARITY**

Plaintiff(s) complaint alleged that Defendant(s) represented themselves as experts in Wills & Trust and litigation thereof and that they could provide legal representation of the Plaintiff(s) interests in the Estate of Dan McAnally and/or the Riste Trust with the intent that Plaintiff(s) hire them as their attorney(s). (CP 152, 168-196) Plaintiff(s) complaint alleged that Defendant(s) misrepresented their ability as attorney(s) or experts in Wills and Trust matters and that those misrepresentations were

made with full knowledge that the Defendant(s) were not competent in Washington State Wills and Trust matters, let alone experts. (CP 152, 168-196) Plaintiff(s) also alleged that the Defendant(s) provided the Plaintiff(s) with knowingly false, knowingly incorrect and/or knowingly irrelevant information throughout their representation of the Plaintiff(s) in a fraudulent attempt to secure payment for their services all the while secretly scuttling the Plaintiff(s) interests without Plaintiff(s) knowledge. (CP 152, 168-196) Plaintiff(s) justly relied upon Defendant(s) who were otherwise know to be respectable attorney(s) to represent their interests in the Estate/Riste Trust matters. (CP 152, 168-196) Plaintiff(s) alleged that the Defendant(s) fraud had caused them to lose value in the form of commercial property which was sold without objection for less productive property and/or the wasted attorney's fees paid to the Defendant(s). (CP 152, 168-196) Each element of a claim for fraud was set forth in the complaint with particularity. (CP 150-152, 168-196) None of the Defendant(s) Declarations or Pleadings contained any information to negate any element of the Plaintiff(s) fraud claim. (CP 130-141, 245-254, 455-461, 510-516)

**D) PLAINTIFF(S) MADE A VALID CLAIM FOR VIOLATIONS OF THE CONSUMER PROTECTION ACT INCLUDING AN AWARD OF PUNITIVE DAMAGES AND THE COURTS DISMISSAL OF THIS CAUSE OF ACTION BASED UPON A PERCEIVED LACK OF MATERIAL FACTUAL DISPUTE IS ERRONEOUS**

The Defendant(s) being the moving party bear the burden of presenting evidence which indicates an absence of a material fact necessary to prove Plaintiff(s) CPA claim and only after presentation of admissible "testimonial evidence" through the presentation of a declaration of facts know by personal knowledge and ascribed thereby the

witness is the burden shifted to the non moving party to produce “testimonial evidence” or argument to establish the existence of a material fact,

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion

((*Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989); see also, *Am. Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763 (1976), citing, *Peninsula Truck Lines, Inc. v. Tooker*, 63 Wn.2d 724, 726 (1964) - “To the extent that the affidavit contained the attorney's conclusions and other surplusage, it is to be disregarded.”)) The Superior Court erroneously found that the Defendant(s) met their initial burden to show the absence of a material fact through the presentation of admissible “testimonial evidence,”

The bare allegations in the Complaint and the various responses/replies by the Plaintiffs do not rebut the Defendants' contentions nor do they disclose the existence of a material fact issue. "The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value." There is no disputed material fact in this matter, only allegations. Thus, Defendants are entitled to the dismissal of the CPA claim. (CP 546)

The reference by the Court to “Defendant’s Contentions” is an unauthorized reference to inadmissible “attorney’s conclusions and other surplusage” contained in the Defendant(s) “Motion to Dismiss,” “Reply...,” “Response...,Pre-assignment” and “Response...Judicial

Notice”. (CP 130-141, 245-254, 455-461, 510-516) which was signed only by the Defendant(s) counsel rather than any “testimonial evidence” set forth in a declaration of personal knowledge by the Defendant(s). ((See, CP 546; compare, *Am. Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763 (1976)) In fact the Defendant(s) did not submit any verified declarations besides their attorney’s declarations (CP 101-109, 211-244, 462-499, 517-537) which in point of fact did not set forth any “testimonial evidence” applicable to the CPA claim and merely made conclusory legal arguments. (*Id.*) As such, the Court erroneously found that the Defendant(s) “inadequate declarations” shifted the burden to Plaintiff(s) to prove a material factual dispute existed, “[only] after the moving party submits adequate affidavits, [does] the nonmoving party [need to] [] set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” ((*Seven Gables Corp. v. Mgm/Ua Entm’t Co.*, 106 Wn.2d 1, 13 (1986), internal citations omitted; see, CP 546)) Even if the burden was lawfully shifted, the Appellants(s) unlike the Defendant(s) submitted evidence to rebut their “Contentions” through pleadings verified by personal knowledge including their complaint, opposition, response and their reply. ((CP 168-196, 145-155, 93-98, 503-509; see, *Meadows v. Grant’s Auto Brokers*, 71 Wn.2d 874, 879 (1967)), citing, 6 J. Moore, *Federal Practice* para. 56.22(1), at 2819-20 (2d ed. 1966); 3 W. Barron & A. Holtzoff, *Federal Practice & Procedure* § 1237, at 171 (1958) - “it is almost the universal practice -- because of the drastic potentials of the motion -- to scrutinize with care and particularity the affidavits of the moving party while indulging in some leniency with respect to the affidavits presented

by the opposing party.”)) As such, the Plaintiff(s) submitted “Testimonial evidence” verified by the Plaintiff(s) personal knowledge of which the Court was required to consider and which did clearly rebut the Defendant(s) “Contentions,” which were erroneously relied upon by the Court to dismiss the CPA claim,

the Complaint does not specify how or why any of the alleged acts were unfair or deceptive. To meet that element, a plaintiff must show that the actions by a defendant were either intended to deceive or could deceive a substantial portion of the public or that the action constituted an unfair trade practice. *Hangman*, 105 Wn. 2d at 786-87. This was not pled. Further, there is no discussion of how or why the Complaint satisfied the third element, an effect on the public interest. A private contract, like the one at issue in the Complaint, does not affect the public interest. *Jolley v. Blueshield*, 153 Wn. App. 434, 222 P.3d 1264, 1273 (Div. 2 2009). To affect the public interest, a plaintiff must show that the act does in fact or could affect the public more broadly *Benkhe v. Aherns*, 172 Wn. App. 281, 294 P.3d 729 (Div. 1 2012). Plaintiffs make no such allegations in their Complaint. Indeed, the allegations in the Complaint suggest the alleged actions were limited to the specific circumstance of this case.

(CP 139) Contrary to the Defendant(s) “Contentions” and the Court’s findings, the complaint does “specify how or why any of the alleged acts were unfair or deceptive,” “ that the actions by [the] defendant were either intended to deceive or could deceive a substantial portion of the public or that the action constituted an unfair trade practice” and that “the act does in fact or could affect the public more broadly.” (CP 139; *Univ. of Wash. v. Gov’t Emps. Ins. Co.*, 200 Wn. App. 455, (Wash. Ct. App. 2017))

Specifically, the “Verified” Complaint alleges at paragraph 2 (CP 169), that, “The Defendant(s), all of them and/or Does 1-20, represented to the Plaintiff(s), that the Defendant(s), all of them and/or Does 1-20, were experts and/or were otherwise knowledgeable in legal matters related to

Estates, Wills, Trusts, Probate, Trial and/or other legal matters which may be/have been pertinent to represent the Plaintiff(s) and/or the Estate of Dan McAnally's and/or the RISTE TRUST's interests," and at paragraph 3 (CP 169), that, "The Defendant(s), all of them and/or Does 1-20, represented to the Plaintiff(s) that the Defendant(s), all of them and/or Does 1-20, were competent and/or had sufficient experience and/or ability to protect the Plaintiff(s) and/or the Estate of Dan McAnally and/or the RISTE TRUST's interests in the Estate of Dan McAnally and/or the RISTE TRUST whatever the situation may be/have been at and/or throughout trial in these matters if necessary" and at paragraph 8 (CP 170), that, "the Defendant(s), all of them and/or Does 1-20, regularly and/or intentionally placed their interests above those of the Plaintiff(s). The Defendant(s), all of them and/or Does 1-20, disregarded the Plaintiff(s) instructions, best interests, desires, rights, explanations, information provided and/or common sense imparted upon the Defendant(s)," and at paragraph 15 (CP 172), that, "The Defendant(s), all of them and/or Does 1-20, held themselves out as as experts in the matters for which they assumed representation of the Plaintiff(s)...," and at paragraph 16 (CP 172), that, "Throughout representation, the Defendant(s), all of them and/or Does 1-20, made affirmative misrepresentations and/or fraudulent statements to the Plaintiff(s), failed to disclose and/or purposefully withheld material information from the Plaintiff(s) and/or failed to understand, investigate, research and/or explain information received from third parties and/or opposing counsel," and at paragraph 114 (CP 192), that, "The Defendant(s), all of them and/or Does 1-20, knowingly and/or intentionally misstated their qualifications to handle the Plaintiff(s) legal

matters,” and at paragraph 115 (CP 193), that, “The Defendant(s), all of them and/or Does 1-20, falsely advertised their services in relation to the matters implicated herein as experts and/or highly qualified and/or competent to undertake,” and at paragraph 116 (CP 193), that, ““The Defendant(s), all of them and/or Does 1-20, acts and/or omissions before, during and/or after their representation of the Plaintiff(s) were misleading and/or intentionally misleading and/or false and/or deceptive,” and at paragraph 118 (CP 193), that, “The Defendant(s), all of them and/or Does 1-20, knowingly took advantage of the Plaintiff(s) inability to understand the complex legal matters and/or whether the advice they were receiving was accurate and/or non misleading,” and at paragraph 119 (CP 193), that, “The Defendant(s), all of them and/or Does 1-20, by doing any and/or all of the acts herein alleged have engaged in unfair competition and/or unfair and/or deceptive acts and/or practices in the conduct of trade and/or commerce,” and at paragraph 120 (CP 193), that, “The Defendant(s), all of them and/or Does 1-20, by doing any and/or all of the acts herein alleged have engaged in a conspiracy in restraint of trade and/or commerce,” and at paragraph 127 (CP 194), that, ““The Defendant(s), all of them and/or Does 1-20, actions as set forth herein injured other persons and/or had/has the capacity to injure other persons and is therefore injurious to the public interest””.

As such, none of the Defendant(s) “Contentions” that the Complaint failed to state a valid claim of all elements of a valid CPA claim were true, all of the Defendant(s) “Contentions” are fabrications which a simple reading of the verified complaint confirms. (CP 168-196) All elements of a Consumer Protection Act Claim were plead with the

required specificity and the Defendant(s) “Contentious” arguments and speculative statements without any “testimonial evidence” to substantiate their “Contentions” lacks the requisite showing of the absence of an issue of material fact necessary to shift the burden to Plaintiff(s) to prove a material factual dispute. ((*Seven Gables Corp. v. Mgm/Ua Entm't Co.*, 106 Wn.2d 1, 13 (1986), internal citations omitted)) Even if the burden was shifted and Plaintiff(s) were required to prove the existence of a material factual dispute, that evidence was presented in the form of the Plaintiff(s) “verified” complaint, opposition, response and reply. (CP 168-196, 145-155, 93-98, 503-509) Furthermore, Plaintiff(s) Complaint alleged that the Defendant(s) committed flagrant violations of the Consumer Protection Act which authorizes the remedy of punitive and/or treble damages. (CP 193; See, RCW 19.86.090; RCW 19.86.140)

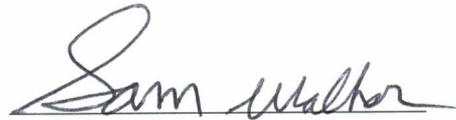
## **V. CONCLUSION**

Defendant(s) failed to meet their burden to prove all required elements of Collateral Estoppel and as such the Court was in error in barring Appellants Malpractice, Breach of Fiduciary Duty and a Breach of Contract claims. Defendant(s) failed to meet their burden to prove that the Plaintiff(s) Fraud and/or Consumer Protection Act claims failed to set forth all required elements with particularity. The evidence and argument submitted by the Defendant(s) in support of their summary judgment request for dismissal of the Fraud and Consumer Protection Act claims was inadequate to shift the burden to Plaintiff(s) to prove the existence of a material factual dispute. Even if the burden shifted the Plaintiff(s) verified Pleadings clearly set forth the required elements of a Fraud and/or

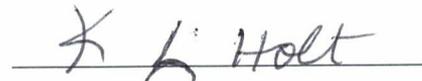
Consumer Protection Act claim and a material factual dispute. The Court's reliance upon evidence and legal argument which were not introduced by either party is an abuse of discretion and a violation of the Plaintiff(s) rights to Due Process under the Constitutions of the State of Washington and the United States. The Superior Court's order dismissing the Plaintiff(s) claims should be reversed without need for further hearing in the Superior Court.

Date: July 12, 2018

Respectfully submitted,



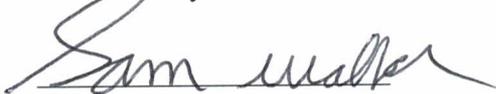
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**July 12, 2018 - 9:44 AM**

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