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NO. 358216

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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DARRELL RISTE, CATHY RISTE, and TYLER RISTE,

Appellants/Plaintiffs,

v.

THE IDAHO LAW GROUP, LLP, P. RICK TUHA P.C., P. RICK  
TUHA, HALA LILIFA AFU, JR., AND HALA AFU,

Respondents/Defendants.

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**BRIEF OF RESPONDENTS THE IDAHO LAW GROUP, LLP, P.  
RICK TUHA P.C., P. RICK TUHA, HALA LILIFA AFU, JR., AND  
HALA AFU**

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## I. INTRODUCTION

The Yakima County Superior Court correctly dismissed Appellants Darrell, Cathy, and Tyler Ristes' ("the Ristes") case. CP at 538. The Ristes' claims were either barred by collateral estoppel, failed to state a claim on which relief could be granted, or were unsupported by the evidence in this case.

The Ristes' claims in the underlying Complaint relied on failed theories asserted in a prior case, *In re Estate of Dan McAnally*, Yakima County Case No. 12-4-00514-8 (the "Probate Case").<sup>1</sup> Astonishingly, the Ristes reasserted many of those same failed theories in another case, Yakima County Superior Court Case No. 16-2-24593-9, *Darrell Riste, Cathy Riste, and Tyler Riste v. The Personal Representative of the Estate of Dan McAnally, the Trustee of the Riste Trust, Baker Boyer Bank, Alan Dillman, Stokes Lawrence Velikanje Moore & Shore, George Velikanje, and Does 1-30* ("Fiduciary Matter").<sup>2</sup> That case, like the Probate Case, criticized the Personal Representative's handling of the Estate of Dan McAnally. The Complaint underlying this Appeal asserted misconduct and malpractice by Respondents P. Rick Tuha, Hala Afu, and P. Rick

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<sup>1</sup> At times, in the underlying matter, ILG referred to this case as the "Estate Case." While these terms were used interchangeably in the Superior Court case, ILG will use Judge Naught's language "Probate Case" for the purposes of clarity. CP at 539.

<sup>2</sup> In the underlying proceeding, this case was sometimes referred to as the "Trustee Case" or the "Velikanje Case." For the purposes of clarity, ILG has adopted the term used by Judge Naught. CP at 539.

Tuha, P.C. (dba Idaho Law Group) (collectively, “ILG”).<sup>3</sup> The Ristes claimed that ILG breached various duties owed to them for not pursuing the Ristes’ current counsel’s failed efforts in the Probate Case and the Fiduciary Matter. *See, e.g.* CP at 170-71. Subsequent litigation and appeals have demonstrated that the Ristes’ current counsel’s legal arguments were categorically incorrect and that ILG correctly advised them to not take action. *See In re Estate of McAnally*, No. 35054-1-III, 2018 Wash. App. LEXIS 1055, at \*10 (May 3, 2018) (unpublished);<sup>4</sup> CP at 496-97. In essence, the Ristes’ current counsel is inappropriately attempting to shift the blame for their failures. This is not permitted by collateral estoppel.

After failing on the issues presented in this case four times,<sup>5</sup> the Ristes filed this appeal alleging the same unsuccessful arguments and legally inviable theories. Again, and contrary to this Court’s recent admonitions, the Ristes have provided vague, and at times incoherent arguments, many of which have been waived because they were not

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<sup>3</sup> P. Rick Tuha and Rick Tuha are the same person. Likewise, Hala Afu and Hala Lilifa Afu, Jr. are the same person. It is unclear why the Ristes included multiple derivations of the same names.

<sup>4</sup> Pursuant to GR 14.1, this case is non-binding and can be used for persuasive authority only. However, this case provides important details regarding the basis for estoppel in a related case involving the same parties and, therefore, should be considered.

<sup>5</sup> *See* CP at 319-26, 496-97, 538; *McAnally*, 2018 Wash. App. LEXIS 1055, at \*22.

argued to the Yakima County Superior Court.<sup>6</sup> RAP 2.5(a). The Superior Court's ruling should be affirmed for the same reason that the case was dismissed: the Ristes already lost on the relevant issues, failed to state a claim on which relief can be granted, and provided no evidence supporting their claims.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

While framed as seven separate assignments of error, the only true issue on appeal is whether the Superior Court erred in dismissing the Ristes' claims. CP at 538. This is reviewed *de novo*. *Floeting v. Grp. Health Coop.*, 200 Wn. App. 758, 763, 403 P.3d 559, 562 (2017).

Contrary to the Ristes' specific assignments of error:

1. Collateral estoppel bars the Ristes' legal malpractice, breach of fiduciary duty, and breach of contract claims because the issues of causation and damages were identical to issues raised in the Probate Case.

2. Collateral estoppel bars Cathy and Tyler Ristes' claims because they were in privity with Darrell Riste and participated in the underlying litigation.

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<sup>6</sup> "Riste violates the rules of appellate procedure in multiple ways.... To the extent he includes assertions of facts in his various arguments, he either does not cite the record to support his assertion, or he cites an allegation in his petition to support his assertion, or he cites to a span of dozens or even hundreds of pages. Further, Mr. Riste's brief often summarily states his view of the law without any analysis, followed by string citations to statutes and cases." *McAnally*, 2018 Wash. App. LEXIS 1055, at \*10. This statement is equally true on this Appeal.

3. The application of collateral estoppel was not unjust because the Ristes had a full and fair opportunity to be heard, which comported with the principles of due process.

4. The Ristes failed to plead fraud with particularity and provided no evidence that they were either deceived or damaged.

5. The Ristes failed to adequately plead and provided no evidence of Consumer Protection Act violations.

6. The Superior Court properly considered evidence outside of the record and therefore appropriately converted ILG's motion to dismiss to a motion for summary judgment.

7. The Superior Court's dismissal of the punitive damages claim was proper.

Contrary to the Ristes' assignments of error, the Superior Court decision was proper and any errors were harmless. This Court should affirm the Superior Court.

### **III. STATEMENT OF THE CASE**

This Appeal should be viewed in light of the Probate Case and the Fiduciary Matter, which are both relevant to the Superior Court's decision. CP at 540-41. The Superior Court, at the request of ILG, properly considered these matters in making its decision. *Id.*

**A. Statement of Facts**

**1. Dan McAnally dies, leaving assets to Darrell Riste.**

This appeal arises out of the Ristes' dissatisfaction with the distribution of the assets of Dan McAnally following Mr. McAnally's death on September 22, 2012. CP at 305. Mr. McAnally's will left Darrell Riste substantial assets including a house and more than \$300,000. CP at 305-07. The estate also included a piece of commercial real estate in Selah, Washington called "Viking Village." CP at 267, 280, 522.

Mr. McAnally's will also created a testamentary trust ("Riste Trust") of which Darrell Riste was the beneficiary. CP at 307; *McAnally*, 2018 Wash. App. LEXIS 1055, at \*2. His wife Cathy and son Tyler were contingent beneficiaries of the Riste Trust. CP at 228. In his will, Mr. McAnally appointed Baker Boyer Bank as the Personal Representative ("P.R.") of the estate and Trustee of the Riste Trust. CP at 320-21. Under the will, the P.R. had non-intervention powers, meaning that it had the right to dispose of assets without seeking court approval. CP at 282, 321.

**2. The Probate Case was initiated to distribute Mr. McAnally's property.**

The Probate Case was brought before the probate court in Yakima County Superior Court. CP at 539. Eventually, the P.R. sought to sell Viking Village to use the proceeds to create a more diverse and liquid trust. CP at 321. Although the P.R. did not need the Superior Court's

approval to sell the property, it petitioned the Superior Court in the Probate Case to allow it to make the sale. CP at 539. The Ristes retained ILG to help them investigate legal options connected with the sale. CP at 319-20, 535-36. After some discussion regarding whether to contest the sale of Viking Village, Darrell Riste decided against it. CP at 535-36. The Superior Court allowed the sale in 2014. CP at 229.

Two years later, after hiring their current counsel Samuel Walker and Kevin Holt, the Ristes<sup>7</sup>

filed a petition concerning several matters: a request to recuse the judge who had approved the conditional sale of Viking Village, a request to remove Baker Boyer Bank as PR for conflicts of interest and breaches of fiduciary duties, a request for an order requiring the PR to file an accounting, a request for denial of fiduciary and attorney fees, and a request for an order freezing the assets of the estate.

*McAnally*, 2018 Wash. App. LEXIS 1055, at \*\*5-6; *see also* CP at 215.

The Ristes failed in that petition on all counts.<sup>8</sup> *See* CP at 215-234. In that decision, the Superior Court specifically held that the P.R.'s non-intervention powers allowed it to sell Viking Village and that there was no

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<sup>7</sup> In both his January 26, 2017 and January 14, 2018 orders, Judge Naught notes that each of the Ristes petitioned for the requested relief. CP at 228, 545. This is contrary to the Ristes' assertions in the appeal that only Darrell Riste petitioned the Superior Court in the Probate Case. Ristes Br. at 22-24.

<sup>8</sup> The Ristes' Complaint does not disclose that they unsuccessfully attempted to bring these claims. *See generally* CP at 168-96. This omission is glaring and troubling. Likewise, the Complaint does not state that ILG did anything to cause them to lose on those theories. *Id.*

breach of any duty. CP at 322. It also held that neither the P.R. nor its attorney breached any fiduciary duty to the Ristes. CP at 216. The Superior Court's decision was affirmed by this Court. *McAnally*, 2018 Wash. App. LEXIS 1055 at \*\*1, 22.

### **3. The Ristes sue the P.R.**

Later, the Ristes' current counsel filed the Fiduciary Matter against the P.R. and its associates. CP at 480-81. The 152 page complaint in that case alleged that the P.R./Trustee and its representatives had committed the same violations that were alleged in the Ristes' petition in the Probate Case, including that they had breached their fiduciary duties to the Ristes and committed other torts related to their handling of the Probate Case, in particular their handling of the sale of Viking Village.<sup>9</sup> CP at 481. None of these claims were time-barred.

Because the claims in the Fiduciary Matter were identical to those raised in the Probate Case, the P.R. defendants moved for summary judgment on collateral estoppel grounds. CP at 481. The Superior Court granted that motion in full. CP at 497. The Ristes appealed that decision and it is currently pending with this Court. *See* COA (Division III) No.

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<sup>9</sup> *See* note 8, *supra*.

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**4. The Ristes sued ILG in the underlying case.**

On May 3, 2017, the Ristes' California counsel improperly filed the underlying case without first obtaining admission *pro hac vice* in that case. CP at 168, 196.<sup>11</sup> The Complaint alleged four causes of action against ILG: legal malpractice, breach of fiduciary duty, breach of contract, and violation of the Washington Consumer Protection Act, 19.86 *et seq.* ("CPA"). CP at 168. In the Complaint, the Ristes allege that ILG breached its duties to the Ristes based on its representation in the Probate Case. *See* CP 168-196.

**B. Procedural History of This Case**

In response to the Complaint, ILG filed a motion to strike the Complaint based on it being filed by a non-Washington-licensed attorney. CP at 206-09. Concurrently, ILG filed the motion to dismiss at issue in this appeal, asserting that the Complaint was not properly before the Court, venue was improper in Spokane County, collateral estoppel barred the Ristes' relief, and failure to state a claim. CP at 132. To support its collateral estoppel argument, ILG submitted a copy of the Yakima County

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<sup>10</sup> ILG notes that this matter is stayed. Another appeal, COA (Division III) No. 357899 appears to arise from the Fiduciary Matter, but is against Mr. Dillman. That case is also stayed.

<sup>11</sup> Apparently, the issue arose as Mr. Walker had sought *pro hac vice* admission in a different case than the one he ultimately filed the Complaint in. CP at 207. The Complaint in this case is not signed by a Washington Attorney in violation of CR 11. CP at 196. This defect has never been corrected.

Superior Court's decision in the Probate Case. CP at 212, 228-34. The Ristes objected to dismissal and submitted unsworn evidence, including four exhibits, to support their arguments. CP at 147, 264-285. However, the Ristes never challenged the admissibility or the authenticity of that order.

Prior to the hearing, Mr. Walker obtained admission *pro hac vice*. CP at 393. ILG withdrew its motion to strike and that portion of the motion to dismiss as moot. CP at 13-14. At the first hearing on ILG's motion to dismiss, the Spokane County Superior Court granted relief in part, finding venue was improper in Spokane County and transferring the case to Yakima County for further proceedings. CP at 5-6, 8-9, 31-34. In its oral decision, the Spokane Court held that the Yakima County Superior Court was better suited to decide issues of collateral estoppel. CP at 12-13.

After the case was transferred to the proper venue, the Ristes improperly submitted two affidavits of prejudice against the two judges that had been involved in the Probate Case and the Fiduciary Matter.<sup>12</sup> *See*

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<sup>12</sup> Notably, this is not the first time that the Ristes have used this tactic. They also moved to exclude Judge Hahn in the Probate Case. CP at 320. As the Superior Court noted, the Ristes' current counsel wrote "[i]t is imperative to the Court and to the Petitioner that recusal of Judge Hahn be granted so as to prevent any further *judicial impropriety*. Judge Hahn, whether negligently or in an otherwise improper manner authorized the sale of the SHOPPING CENTER and Property based on a *horrendous interpretation* of the Revised Washington Code and/or the express terms of the WILL. *The error is so egregious that it suggests incompetence*. Judge Hahn's *diligence and impartiality will be called into question* in this motion to remove the PR/TRUSTEE and the impending civil complaint." *Id.* (italics added; citations omitted).

CP at 403-04. Ultimately, the Ristes withdrew one of those affidavits and the issue was mooted. CP at 538.

The Yakima County Superior Court heard ILG's motion to dismiss on December 8, 2017. CP at 538. After allowing time for the additional submissions by the parties, on January 12, 2018, the Court issued its order. CP at 538. The Court found that, because it considered factors outside of the pleadings, the motion to dismiss would be treated like a motion for summary judgment. CP at 541-42. After examining all of the non-duplicative documents properly before the Court,<sup>13</sup> the Superior Court held that the Ristes' legal malpractice, breach of fiduciary duty, and breach of contract claims were all barred by collateral estoppel because the Ristes' current counsel unsuccessfully raised those same issues and causes of action in the Probate Case. CP at 542-44. The Superior Court reasoned that, because the Ristes failed in the Probate Case, they could not prove that ILG caused the damages in this case. CP at 544.

The Superior Court dismissed the Ristes' implicit fraud claim for failing to plead fraud with particularity and failing to show damages. CP at 546. Additionally, the Superior Court dismissed the Ristes' CPA claim

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<sup>13</sup> Notably, the record is devoid of admissible evidence presented by the Ristes that supports their claims for relief. They submitted no declarations or affidavits related to the substantive issues in the case and did not properly authenticate any documents, even though the Ristes were warned of the necessity to do so. CP at 111-12, 121. Notwithstanding these failures, the Superior Court did consider a transcript they submitted with a request for judicial notice. *See* CP at 541.

because the Ristes failed to present evidence that created an issue of material fact supporting their claim. CP at 546. Finally, the Court dismissed a separately stated claim for punitive damages, finding that the Ristes had not shown they were appropriate in this case. CP at 547. This appeal followed.

#### IV. ARGUMENT

The Ristes have already lost four times. CP at 215, 497, 547; *McAnally*, 2018 Wash. App. LEXIS 1055 at \*\*1, 22. In many ways, this case should begin and end with the fact that the P.R. had every right to sell Viking Village with or without the Court's or the Ristes' approval. CP at 322; *McAnally*, 2018 Wash. App. LEXIS 1055 at \*13. *See also In re Estate of Lowe*, 191 Wn. App. 216, 228, 361 P.3d 789, 795 (2015) (citing RCW 11.68.090(1)). Because the P.R. did not need approval, ILG's advice and the Ristes' decision not to object to the sale are irrelevant—the Ristes could not prevent it from being sold. Moreover, the Superior Court found that the P.R. not only had the right to sell Viking Village, but also had good cause. CP at 322 (“The P.R. provided a rational basis for the sale in that it wanted to diversify the Trust estate.”). Although the Ristes (twice) timely challenged the P.R.'s actions and decisions, the Yakima County Superior Court found that the P.R. did nothing actionable in selling the building or handling the *McAnally* estate. CP at 216, 496-97.

Nonetheless, the Ristes have brought this appeal asserting the same issues they have lost on each prior occasion. Collateral estoppel, or issue preclusion, is intended to prevent unnecessary re-litigation, like this case, from occurring. *Gosney v. Fireman's Fund Ins. Co.*, 3 Wn. App. 2d 828, 876, 419 P.3d 447, 475 (2018) (“The purpose of the doctrine of collateral estoppel is to promote judicial economy by avoiding relitigation of the same issue, to afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to litigants.”) (quoting *LeMond v. Dep’t of Licensing*, 143 Wn. App. 797, 804, 180 P.3d 829 (2008) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993))). In other words, issue preclusion is intended to protect the integrity of the Courts’ prior decisions and avoid inconsistent outcomes. The Superior Court properly found that collateral estoppel applied to this case, and then used it to dismiss the Ristes’ claims.

The Ristes’ Complaint was long, convoluted, and unclear. In their Complaint, the Ristes made several allegations of fraud, including in their CPA claim. *See* CP at 192-94. Claims involving fraud are held to a higher pleading standard. CR 9(b) (“In all averments of fraud or mistake, the circumstances, constituting fraud or mistake shall be stated with particularity.”). As the Superior Court found, the Ristes’ Complaint missed the mark and did not meet this higher standard. Even if it had been

properly pled, the Ristes presented no evidence in support of their fraud claim and could not prove damages based on the Superior Court's prior decisions.

Finally, as noted above, the Court properly converted ILG's motion to dismiss to a motion for summary judgment when it was provided with and considered matters outside of the pleadings. CP at 542. The Ristes, however, failed to submit any admissible evidence that created a material fact to rebut ILG's defenses.<sup>14</sup> The Superior Court properly entered summary judgment in favor of ILG.

As discussed above and as more thoroughly explained below, ILG's motion was properly granted. Thus, ILG respectfully request that the Superior Court be affirmed.

**A. The Superior Court properly granted summary judgment on collateral estoppel grounds.**

Collateral estoppel applies when a case presents (1) identical issues, (2) which have already been decided via a final judgment on the

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<sup>14</sup> The Ristes assert that their verified complaint should have been treated as admissible evidence. Ristes Br. at 11-12. This is incorrect. A verification is not intended to be used create affirmative evidence. Instead, it is a certification that the document is grounded in fact, warranted by existing law, is not put forward for an improper purpose, and that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." CR 11(a). This does not qualify as admissible evidence. Likewise, the Ristes 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. RCW 9A.72.085(a); CP at 196. Moreover, they waived this argument by not asserting it at the Superior Court level.

merits, (3) when the same party (or a party in privity) has already asserted those issues, and (4) injustice will not result from precluding further action. *Shoemaker v. Bremerton*, 109 Wn. 2d 504, 507-08, 745 P.2d 858, 860 (1987). Collateral estoppel may be raised on a motion to dismiss or a motion for summary judgment. *See Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849, 854 (2008); *Schibel v. Eymann*, 189 Wn.2d 93, 104, 399 P.3d 1129, 1135 (2017) (reversing superior court for not properly applying collateral estoppel on summary judgment). Collateral estoppel must be used against a party (or a party in privity) who was subject to the prior judgment. *State v. Mullin-Coston*, 152 Wn. 2d 107, 114, 95 P.3d 321, 324 (2004). However, it need not be brought by a party from that same case. *Id.* Here, the Superior Court properly found all of these elements were met by its prior decisions in the Probate Matter.<sup>15</sup> CP at 545.

**1. Collateral estoppel bars relitigation of the issues in this case because they are identical to the issues in the probate case.**

The issues decided in the Probate Case were dispositive of the claims in this case. While the Ristes' Complaint was difficult to comprehend, it asserted that ILG erred in their representation of the Ristes by failing to properly advise the Ristes regarding claims against the P.R.

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<sup>15</sup> It is worth noting that the Fiduciary Matter found collateral estoppel applied, too. CP at 496-97. That decision applies equally to issues in this case and should, likewise, preclude relitigation of the issues in this Appeal.

and Trustee (including breach of fiduciary duty and removal), failing to properly contest the fees, and failing to properly challenge the disposition and sale of the shopping center. CP at 173-177. However, while represented by their current counsel, the Ristes pursued these claims and the Superior Court twice, conclusively found against them. CP at 264-85, 496-97.

In the Probate Case, the Ristes challenged the P.R.'s decision to sell Viking Village, asserted a breach of fiduciary duty against the P.R., requested removal of the P.R., requested that the P.R. be denied his fees, and requested an order freezing the assets of the estate. *McAnally*, 2018 Wash. App. LEXIS 1055, at \*5-6; *see also* CP at 215. These are the exact same claims the Ristes alleged in their unsuccessful case against the P.R. Defendants in the Fiduciary Matter. CP at 485. Moreover, these are the exact same issues that the Ristes faulted ILG for not properly advising them to pursue in this case. *See* CP at 173-177.

In both the Probate Case and the Fiduciary Matter, the Superior Court found that neither the P.R. nor its attorneys acted inappropriately and, thus, did not harm the Ristes. CP at 264-85, 496-97. That finding is dispositive of the issues in this case. Absent impropriety that harmed the Ristes, the Ristes have no claims against ILG for not bringing those claims. Having lost on these same issues twice with their current counsel,

the Ristes cannot now blame ILG, who did not represent them on those matters, for their (and their current counsel's) losses in the Probate Case or the Fiduciary Matter.

The Ristes attempt to assert that, because they did not previously bring a legal malpractice, breach of fiduciary duty, or breach of contract claim against ILG, the issues cannot be identical. Ristes Br. at 14. Like they did at the Superior Court, the Ristes appear to confuse collateral estoppel and *res judicata*, which would require the exact same claims against the same parties. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 108, 297 P.3d 677, 684 (2013) (requiring identical causes of action for *res judicata* to apply). Collateral estoppel *does not* operate that way. It looks at *issues* decided in a case. *Shoemaker*, 109 Wn. 2d at 507. Here, the issues of causation and damages between this case and the Probate Case and the Fiduciary Matter are the same.

In their Opening Brief, the Ristes clarified the issues of liability, somewhat, asserting that ILG's failure to timely challenge the validity of sale of Viking Village caused them harm. Ristes Br. at 8.<sup>16</sup> This claim fails as a matter of law because the P.R. had non-intervention powers and had the right to dispose of the property *without Court approval*. Indeed, "[t]he

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<sup>16</sup> However, this allegation was not made in the Complaint. The word "timely" is only used once in the Complaint and refers to the P.R.'s failure to timely "file and/or report and/or disclose information to the Plaintiff(s) and/or the government." CP at 176.

purpose of nonintervention powers is to prevent courts from managing personal representatives' decisions regarding estate administration." *In re Estate of Rathbone*, 190 Wn.2d 332, 345, 412 P.3d 1283, 1289 (2018). 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." *Id.* at 346. In other words, the P.R. had the right to sell Viking Village, regardless of whether ILG challenged the sale in 2014.

The recently decided *Rathbone* case is instructive. In that case, the decedent's will named one of her three sons as her personal representative with non-intervention powers. *Id.* at 335. The personal representative exercised his right to purchase a piece of real property from the estate and distribute the proceeds to his other siblings named in the will. *Id.* at 336-37. Unhappy with this action, one of the siblings filed an action challenging the personal representative's decision. In that case, the Superior Court construed the will and ordered a greater distribution to the challenging sibling. *Id.* at 337. However, the Supreme Court reversed, finding that the superior court should not have intervened on a will where non-intervention powers were granted. *Id.* at 345. *Rathbone* demonstrates that the type of challenge suggested by the Ristes would not have been effective. In fact, this Court previously held the same in the Probate Case

appeal. *McAnally*, 2018 Wash. App. LEXIS 1055, at \*13.

As discussed in the Superior Court’s opinion “[a] personal representative granted nonintervention powers can administer the estate without further court orders. RCW 11.68.090(1).” *Lowe*, 191 Wn. App. at 228. If a party disagrees with how the estate is being managed by the personal representative, the remedy is to seek the personal representative’s removal. *Id.* (citing RCW 11.68.070). Here, that is exactly what happened. CP at 30. The Ristes unsuccessfully challenged the P.R. and, on appeal, this Court affirmed the decision to not remove the P.R. *McAnally*, 2018 Wash. App. LEXIS 1055, at \*22.

The P.R.’s authority to sell Viking Village is unquestionable. More importantly, the decision to sell was found to be appropriate by the Superior Court. CP at 231. Challenging that authority and that decision, which the Ristes have unsuccessfully done, would have been foolish. The Superior Court properly precluded the Ristes’ attempts to relitigate these issues through a collateral action.

**a. The legal malpractice claim fails because the Ristes cannot show causation or damages.**

The Ristes’ malpractice, breach of fiduciary duty, and breach of contract claims all arise from the same set of grievances: ILG did not handle the claims and issues related to the Probate Case and the Fiduciary

Matter appropriately. CP at 177-92. However, what the Ristes fail to recognize is that their current counsel had the ability to timely bring (and in fact did bring) all of the claims that he asserted ILG should have brought. CP at 496-97. The Ristes lost on all of those claims. *Id.*

Because of these failures in the Probate Case and the Fiduciary Matter, the Ristes cannot prove damages on the basis that ILG should have brought those claims. In a legal malpractice action, “[t]o recover, the plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent.” *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 328, 111 P.3d 866, 876 (2005). Here, the Ristes had the chance to test their theories with their current counsel and lost. Necessarily, ILG’s failure to advise the Ristes to act in the way that the Ristes’ current attorneys unsuccessfully acted could not have harmed the Ristes—in fact, the decision to not act was *better*, considering the time and money expended on the failed litigation. Given that their current attorneys tried and failed on the same theories, the Ristes can neither prove causation or damages.

**b. The breach of fiduciary duty claim fails because the Ristes cannot show causation or damages.**

The Ristes, without stating a particular fiduciary duty, also brought a breach of fiduciary duty claim. At the Superior Court, the Ristes acknowledged that their claim was related to competence. CP at 151. The

Superior Court inferred breaches of the duties of competence, diligence, and communication. CP at 543 (referring to RPC 1.1-1.3). These are identical to the claim for legal malpractice discussed above.

To plead a breach of fiduciary duty claim, a plaintiff must state the “(1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury.” *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 433–34, 40 P.3d 1206 (2002). As discussed above, the Ristes must show that they would have achieved a materially better outcome had ILG not breached these duties. *VersusLaw*, 127 Wn. App. at 328. Given the strategies and theories asserted as breaching the fiduciary duties failed when brought by their current counsel, this cannot be the case. The Superior Court properly dismissed this claim as identical to the legal malpractice claim.

**c. The breach of Contract claim fails because the Ristes cannot show causation or damages.**

The Ristes’ breach of contract claim also fails. To establish a breach of contract, the Ristes must show there was a duty under the contract that ILG breached, which caused them harm. *Nw. Mfrs. v. Dep’t of Labor*, 78 Wn. App. 707, 712, 899 P.2d 6, 9 (1995). In this case, they have to show, “but for” ILG’s actions they would have succeeded. Considering the Ristes later brought and lost the same claims, the Ristes can not meet this standard.

**2. Both civil proceedings had the same burden of proof: preponderance of the evidence.**

At the Superior Court, the Ristes did not raise the issue of the divergent burdens of proof between the Probate Case and this case. *Prostov v. Dep't of Licensing*, 186 Wn. App. 795, 821-22, 349 P.3d 874, 887 (2015) (“Generally, an appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a). A party must inform the court of the rules of law it wishes the court to apply and offer the trial court an opportunity to correct any error.”) (citing *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). The Ristes’ response to the motion to dismiss did not mention this issue at all. *See* CP at 149-50. The Ristes waived this issue by not raising it at the trial court level.

Notwithstanding their waiver, the Ristes do not present any law supporting their claim that the burden of proof was different between the two proceedings.<sup>17</sup> In fact, as these were both civil matters, the standard of proof was a preponderance of the evidence. *See, e.g., Carlton v. Black (In re Estate of Black)*, 153 Wn.2d 152, 180, 102 P.3d 796, 810-11 (2004) (“Since the presumptive burden of proof for civil cases is by a

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<sup>17</sup> The Ristes discuss certain procedural elements and facts of the underlying procedure that are not contained in the record. Specifically, they discuss a decision being made in chambers. Ristes Br. at 4, 26. While it may be inferred from the short transcript, the documents in the record do not reflect any proceedings taking place in chambers. *See* CP at 315-17. Regardless, the Ristes were afforded due process. *See infra* § A.4. They received notice, appeared, submitted evidence, and argued. *See* CP at 320-25.

preponderance of the evidence, *Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995), and proving execution of a lost will for probate is the same as proving execution of any other will, it follows that standard of proof applies when a lost will is offered for probate until the legislature mandates otherwise”). This is a non-issue.

However, even if the burdens were different, that would not change the outcome of this matter. The Ristes’ current counsel brought each and every claim that they asserted ILG should have brought. The current counsel lost on all of those claims. The Ristes cannot be allowed to escape the simple fact that their current attorneys’ theories all failed. Likewise, blame for their current attorneys’ failure on those theories must not be shifted to ILG, who did not assert those theories and did not participate in the failed litigation.

**3. Collateral estoppel bars Cathy and Tyler Ristes' claims because they actually participated in the Probate Case and are in privity with Darrell Riste.**

The Ristes incorrectly claim that Cathy and Tyler Ristes' claims are not subject to collateral estoppel. First, and most importantly, they waived this issue by not raising it at the Superior Court level. *Prostov*, 186 Wn. App. at 821-22; RAP 2.5(a). The Ristes’ response to the motion to dismiss did not mention this issue at all. *See* CP at 149-50.

Second, even if they did, Cathy and Tyler Riste are in privity<sup>18</sup> with Darrell Riste. In the context of collateral estoppel, this Court has held “[p]rivity denotes a mutual or successive relationship to the same right or property.” *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 143, 925 P.2d 1289, 1293 (1996) (citing *Owens v. Kuro*, 56 Wn.2d 564, 354 P.2d 696 (1960)); *see also City of Longview Police Dep’t v. Potts*, No. 48410-2-II, 2017 Wash. App. LEXIS 2942, at \*12 (Ct. App. Dec. 27, 2017) (unpublished).<sup>19</sup> Here, Cathy and Tyler Riste alleged property rights arise out of their interest in the McAnally will and the Riste Trust—the same instruments that provide Darrell Riste a property interest. CP at 545. The fact that the Ristes are in privity with one another is the only thing that gives Tyler and Cathy Riste standing in this case. Without it, it is unclear how they would have been harmed.

In *Barlindal*, the Court of Appeals found privity between a municipality and a county when they had a “common purpose,” “mutual objective,” and could both have “benefited financially” from a joint prosecution and forfeiture effort. 84 Wn. App. at 144. Here, the Ristes are in privity with one another for the same reasons noted in *Barlindal*. They

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<sup>18</sup> Privity means either “a relationship between persons who *successively have a legal interest in the same right or property*” or “an interest in a transaction, *contract*, or legal action to which one is not a party arising out of a relationship to one of the parties.” Meriam Webster Online Dictionary, Privity, *available at* <https://www.merriam-webster.com/dictionary/privity> (last accessed Aug. 8, 2018) (emphasis added).

<sup>19</sup> Unpublished decisions have persuasive authority only under GR 14.1.

had a common interest and mutual objection if the Probate Case and the Fiduciary Matter and, had they been successful, they could have jointly benefited. *Id.* The Ristes' privity is further demonstrated by the Complaints in this case, the Probate Case, and the Fiduciary Matter all alleging wrongdoing against the Ristes jointly. *See* CP at 168, 228, 496-97.

Finally, while represented by the same counsel as in this appeal, all the Ristes actually participated in both the Probate Case and the Fiduciary matter. CP at 228, 415, 545. The Ristes never contradicted these findings with evidence to the contrary.

In summary, based on the Ristes' family relationship and their successive interest in the same will and trust, the Ristes were in privity. The Ristes' assertions of error relating to ILG's failure to demonstrate "virtual representation"<sup>20</sup> are irrelevant based on the record and without merit based on the law. The Superior Court correctly found this element.

**4. The application of collateral estoppel was appropriate and has not resulted in injustice.**

At the Superior Court level, the Ristes spent one line briefing their argument on injustice, it reads: "Fourth, the [Ristes] would suffer

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<sup>20</sup> The Ristes' reliance on virtual representation, which is an *exception* to the privity requirement, is confusing and unavailing. *Garcia v. Wilson*, 63 Wn. App. 516, 520-21, 820 P.2d 964, 965 (1991). As discussed, Tyler and Cathy Riste actually participated in the Probate case, just like the plaintiff in *Garcia*, who also lost her case on summary judgment. *Id.* at 522-23; CP at 228, 415, 545.

irreparable injustice if they were precluded from bringing a claim against their prior attorney's [sic] for damages which have resulted from the [ILG's] actions simply because the [Ristes] attempted to mitigate the damages by filing a petition for removal." CP at 149-150. They support this assertion with no citations to the law, no evidence, and no analysis. They did not brief procedural due process, mention any of the concerns with their right to be heard, express concerns about the procedures in the Probate case, mention burdens of proof, or discuss any of the issues raised in their Brief. Ristes Br. at 25-27. They have waived all of these issues. *Prostov*, 186 Wn. App. 795; RAP 2.5(a).

Notwithstanding their waiver, the Ristes assert that collateral estoppel should not apply because they did not have a full and fair opportunity to litigate the issues in probate Court in violation of the principals of collateral estoppel and their due process rights under the Washington State and U.S. Constitutions. Under established law, the "injustice element" of collateral estoppel, "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.*'" *Schibel*, 189 Wn.2d at 102 (citing *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601 (1999) (quoting *In re Marriage of Murphy*, 90 Wn. App. 488, 498, 952 P.2d 624 (1998)). Washington courts

have found that probate proceedings meet these standards. *Estate of Tolson*, 89 Wn. App. 21, 37, 947 P.2d 1242, 1251 (1997) (finding out-of-state court's probate decision on the domicile of the decedent had collateral estoppel effect); *cf. Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816, 819 (1980) (*res judicata* applied to preclude a collateral attack based on the outcome of a probate proceeding). Even cases that are decided by an administrative law judge may have collateral estoppel effect. *Christensen v. Grant Cty. Hosp.*, 152 Wn.2d 299, 321, 96 P.3d 957, 968 (2004). Precedent dictates that process that the Ristes received was sufficient.

Setting aside legal precedent, the Ristes had a full and fair opportunity to litigate their case in the Probate Matter. The record on appeal shows that they had notice of the proceedings, actually appeared, submitted papers and documents, and argued. CP at 228. Collateral estoppel was properly allowed.

While not argued in their briefing, constitutional due process is typically rooted in notice and an opportunity to be heard.<sup>21</sup> It has long

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<sup>21</sup> *In re Petrie*, 40 Wn.2d 809, 812, 246 P.2d 465, 467 (1952) (“We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial”); *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 246 (1944) (“fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for

been established that “due process does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.” *White v. Powers*, 89 Wash. 502, 507, 154 P. 820, 823 (1916). Collateral estoppel is consistent with these principals in this case because it requires not only actual prior adjudication, but also participation. The Ristes had the opportunity to be heard at the Probate Court, on appeal, and in the Fiduciary Matter. Their participation in these cases demonstrates they received all the process that was due under the law. The Superior Court did not err.

**5. The Ristes failed to adequately plead or provide any evidence of fraud related to their claims.**

While the Ristes did not bring a fraud claim, their CPA claim relies on allegations of fraud. *See* CP at 192-194. The Ristes’ Complaint repeated claims of fraud, deception, and misrepresentation,<sup>22</sup> but provided no further details regarding the specifics of that alleged conduct. Claims of fraud and misrepresentation are subject to a higher pleading standard and must be pled with specificity. CR 9(b). To plead fraud, the plaintiff must provide enough information to “apprise the defendant of the facts that give rise to the allegation of fraud.” *Adams v. King Cty.*, 164 Wn. 2d 640, 662, 192 P.3d 891, 902 (2008). Typically, this means that a plaintiff must plead

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which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled.”).

<sup>22</sup> *See* CP at 168-196 at ¶¶ 16, 34, 50, 55, 58-59, 62, 66, 79, 87-88, 90, 94, 100, 116, 119.

the who, what, why, when, where, and how of such allegations. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 233, 370 P.3d 25, 32 (2016). The Ristes' allegations of fraud and misrepresentation were not supported by any such details. Additionally, the Ristes provided no such evidence of fraud in the record.

The Ristes' opening brief, too, lacks these specifics and cites repeatedly to their *entire Complaint*. See Ristes Br. at 28-29. Based on the page numbers cited, the Ristes appear to be referring to the paragraphs referenced in response to their motion to dismiss. CP at 152.<sup>23</sup> However, none of these paragraphs names a particular member of ILG or states when, where, or how the statement was made. The Ristes' allegations are plainly deficient. *McAfee*, 193 Wn. App. at 233. Because the Ristes' CPA claim relied on allegations of fraud and misrepresentation, it should have been pled with the requisite particularity. *Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276, 281 (2006) ("While inexperienced pleadings may survive a summary judgment motion, insufficient pleadings cannot."). Failure to do so justified dismissal.

More importantly, however, most of the paragraphs that the Ristes state support their fraud claims, including paragraphs 22-24, 50, 52, 54, 61, 63, 68, 70, 72, 74, 76, 98, 99, do not assert misrepresentations. CP at 173, 178-79, 181-84, 190. Instead, these paragraphs assert that ILG did not inform the Ristes of their ability to assert the failed legal claims asserted in

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<sup>23</sup> See CP at 168-196 at ¶¶ 16, 22, 23, 24, 35, 36, 46, 47, 49, 50, 52, 54, 55, 57, 59, 61, 63, 65, 66, 68, 70, 72, 74, 76, 98, 99, 100, 111, 112, 113-127.

the Probate Case and the Fiduciary Matter by the Ristes' current counsel. CP at 268-70, 496-97. It is nonsensical that the Ristes have asserted a claim for not advising them to pursue losing legal arguments. This goes to the heart of the Superior Court's second basis for dismissing the fraud claim; under the facts of this case, the Ristes could not have been damaged by ILG for not bringing the Ristes' unsuccessful claims that were brought by their current counsel.

Not only did the Ristes have the opportunity to provide further detail in their response to the Motion to Dismiss, they also had additional time to supplement the record with declarations or other evidence supporting their fraud allegations. CP at 538. The Ristes opted to do neither. Thus, even if the pleading standard was met, the Ristes failed to submit any admissible evidence creating an issue of fact on their fraud claims. The claims related to fraud were properly dismissed on summary judgment.

**6. The Ristes provided no evidence supporting their CPA claims.**

The Superior Court correctly converted ILG's CR 12(b)(6) motion to a motion for summary judgment and properly found that the Ristes had no evidence of consumer protection violations. As previously noted, the Ristes submitted no admissible evidence supporting their claims in this case or contradicting ILG's defenses. Thus, their CPA claim relied entirely on the Superior Court's prior records in the Probate Case and the Fiduciary Case presented by ILG and one transcript provided by the

Ristes. *See* CP at 415, 540-41. These materials were devoid of any evidence of CPA violations.

The Ristes' concern regarding the decision on the CPA claim relies primarily on two issues: 1) the Superior Court's conversion of the motion to dismiss into a motion for summary judgment; and 2) the assertion that the declarations submitted were improper. Ristes Br. at 24. The Ristes never raised the issue of the sufficiency of the declarations or exhibits at the Superior Court and have therefore waived any right to challenge the declarations and attachments. *Prostov*, 186 Wn. App. at 821-22; *see also Meadows v. Grant's Auto Brokers*, 71 Wn.2d 874, 881, 431 P.2d 216, 220 (1967) (holding that a person must challenge a declaration of affidavit and "Failure to make such a motion waives the deficiency.").<sup>24</sup> Although they have waived the right to challenge the evidence in the case, their arguments still fail. The Superior Court properly converted the motion when it considered outside evidence. CR 12(b). Moreover, not only were the Ristes on notice of their need to challenge the factual record on the motion, they did just that. *See* CP at 415, 540-41.

Under CR 12(b), if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties

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<sup>24</sup> This Court has also noted that "arguments to exclude evidence must be addressed to the trial court. We review evidentiary matters solely for manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). And we presume that the judge knows the law and disregards improper evidence. As a matter of course, we consider only those factual allegations that are supported by the record." *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 692, 106 P.3d 258, 263 (2005). There can be no abuse of discretion in the Court considering its own prior rulings.

shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.” *See also Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 256 n.1, 787 P.2d 553, 554 (1990) (case involving stipulated facts was properly converted to a motion for summary judgment).

From the onset, ILG’s motion to dismiss included matters outside of the pleadings; specifically, ILG argued that the Court’s prior order in the Probate Case had collateral estoppel effect. CP at 135-36. The Ristes’ Complaint did not discuss that order. In response to the motion, the Ristes attached 60 pages of unverified exhibits, a point ILG raised in its Reply. CP at 111. After the close of briefing on the motion, the Ristes submitted further unsworn documents in their late filed request for judicial notice. CP at 411, 415. In that request, the Ristes stated “[t]he transcript attached hereto as Exhibit ‘A’ [is] relevant to the determinations of the *Defendant(s) Summary Judgment Motion* in this matter. The transcripts reflect the rulings made in Case #’s 16-24593-9 & 12-4-00514-8 that the Defendant(s) herein are the liable for the Plaintiff[s] damages.” CP at 411-12 (emphasis added). Additionally, the Superior Court permitted both sides to submit further briefing following the motion to dismiss. CP at 538. In other words, the Ristes knew the rule, treated the motion to dismiss like a summary judgment motion, were provided an opportunity to provide further briefing, and submitted evidence, but failed to produce admissible evidence supporting their CPA claims.

CR 56(c) specifically permits other documents to be attached in support of a motion for summary judgment. This Court has held that attaching documents to an attorney's declaration is acceptable and may be considered. *Am. Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763, 551 P.2d 1038, 1043 (1976) ("the attached copies of documents establish that the portion of the affidavit referring to such documents was based on testimonial knowledge."). In *American Linen*, like here, the attorney submitted documents from a prior case, authenticating them based on personal knowledge, which the Court found acceptable. *Id.* Here, however, there is the added issue that the documents relevant to the case were produced by this Court and (in one case) the judge who decided the motion. These are admissible, self-authenticating records, which were provided to the Court for its convenience and of which the Court could have taken judicial notice. ER 201(b); 902. It is likely the Ristes did not challenge these orders because they knew they were authentic since they actually participated in the underlying matters. There was no error in allowing this evidence.

To prove a CPA claim, a plaintiff must provide evidence that: "(1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest.... [(4)] injury to plaintiff in his or her business or property... [and (5)] a causal link be established between the unfair or deceptive act complained of and the injury suffered." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 784-85, 719 P.2d 531, 535 (1986). To meet the deception 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 and the Ristes provided no evidence supporting this element. Additionally, there is no discussion of how or why the Ristes 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 (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 (2012). The Ristes made no such allegations in their Complaint and provided no evidence supporting their claim.

Finally, the Ristes' CPA claim arises from the same alleged improper conduct as their other claims. *See* CP at 192. The Superior Court repeatedly held that the Ristes were not harmed. *See, e.g.*, CP at 319-26, 496-97. The Ristes failed to plead damages or causation under the CPA independent from the other claims. CP at 192-94. Additionally, the Superior Court's findings on the other claims foreclose their relief on causation and damages grounds. *See supra* § IV.A. As the Ristes provided no contrary argument or evidence, the Superior Court properly dismissed this claim for want of evidence.

**7. The Superior Court properly dismissed the claim for punitive damages because it dismissed all of the substantive claims.**

With no analysis, the Ristes asserted their claim for punitive damages was improperly dismissed. First, there is no separate cause of action for punitive damages. Punitive damages can only be awarded when there are actual damages and special circumstances, like statutory authority. *See Bircumshaw v. Wash. State Health Care Auth.*, 194 Wn. App. 176, 206, 380 P.3d 524, 539 (2016). Second, RCW 19.86.090 creates a right for discretionary exemplary treble damages not to exceed \$25,000, but not punitive damages. Third, RCW 19.86.140 also creates mandatory civil penalties based on certain violations, but does not create a right for punitive damages. The Ristes' Brief stated no basis for their punitive damages claim.

Finally, based on the record presented, the Superior Court correctly found that there was no evidence submitted in the record which supported the Ristes' punitive damages claim. Accordingly, this claim was also properly dismissed.

**8. Any error by the Superior Court was harmless.**

Even if the Superior Court erred in its decision in some way, the error was a non-reversible, harmless error. Unless an error in an underlying proceeding causes prejudice to the losing party, the lower court

should not be reversed. *Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 380, 292 P.3d 108, 114 (2013) (*Lincoln v. Transamerica Investment Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978)). Errors are not prejudicial unless they would have affected the outcome of the case. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (“error without prejudice is not grounds for reversal.”) (citations omitted).

Here, the Ristes have been afforded multiple opportunities with their current counsel to fully litigate their case, but have lost on each attempt. These losses are determinative of the outcome in this case. The Ristes could not have been harmed by their former attorneys’ failure to bring those claims. For this reason, any alleged error was harmless and should be disregarded.

**9. ILG should be awarded its attorneys fees for defending this frivolous appeal.**

Pursuant to RAP 18.9, ILG respectfully requests that this Court order the Ristes to pay their attorney’s fees for defending this frivolous appeal. Under Washington law, “an appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that it is so devoid of merit that there is no possibility of reversal.” *Ramirez v. Dimond*, 70 Wn. App. 729, 734,

855 P.2d 338, 341 (1993) (citing *Boyles v. Department of Retirement Sys.*, 105 Wn. 2d 499, 506-07, 716 P.2d 869 (1986)). When considering awarding fees, all doubts regarding frivolity are resolved in favor of the appellant. *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356, review denied, 112 Wn.2d 1006, cert. denied, 493 U.S. 873, 110 S. Ct. 204, 107 L. Ed. 2d 157 (1989).

Here, the appeal was frivolous for the reasons mentioned in the brief. The Ristes have already lost on these same issues, but have repeatedly forced other parties to participate in expensive litigation. This case is even more galling because the Ristes' current attorneys are trying to shift blame for their failures and incorrect legal theories onto other attorneys who did not advise the Ristes to pursue those failed strategies. In this case, ILG should receive its fees for having to defend against this frivolous and duplicative litigation.

Additionally, attorney's fees are merited in this case because, despite this Court's recent admonition, the Ristes have again submitted a brief that failed to follow this Court's Rules and contained improper citations to the record.<sup>25</sup> See RAP 10.7, 18.9. In addition to citing whole

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<sup>25</sup> "Riste violates the rules of appellate procedure in multiple ways.... To the extent he includes assertions of facts in his various arguments, he either does not cite the record to support his assertion, or he cites an allegation in his petition to support his assertion, or he cites to a span of dozens or even hundreds of pages. Further, Mr. Riste's brief often summarily states his view of the law without any analysis, followed by string citations to

documents in the record, the Ristes asserted many bases for appeal which were not raised at the Superior Court in violation of RAP 2.5(a). These actions were improper and increased the cost of this appeal markedly. ILG should be awarded its attorney's fees.

## V. CONCLUSION

The Court should affirm the Superior Court's order dismissing all of the Ristes' claims against ILG. The Superior Court correctly saw this case for what it was: a transparent attempt to relitigate already decided matters. The Ristes' current counsel brought the underlying suit asserting that the Ristes were damaged by not making various claims against the P.R. in the Probate Case and the Fiduciary Matter. The Ristes' current counsel brought those claims and lost. The Superior Court correctly determined that the Ristes' could not shift the blame for their current attorneys' failures on to ILG and correctly applied collateral estoppel.

The Superior Court also correctly applied the legal standards at issue in this case. Having considered issues outside of the pleadings, it correctly converted the motion to dismiss to a motion for summary judgment. The Ristes, despite actually submitting evidence, produced nothing to rebut the defenses in ILG's motion. In the absence of a disputed issue of material fact, the Superior Court properly dismissed the remaining

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statutes and cases." *McAnally*, 2018 Wash. App. LEXIS 1055, at \*10. Here, the Ristes brief suffer the same defects.

claims.

Based on the foregoing, ILG respectfully requests that the Court affirm the Superior Court's orders granting dismissing all claims against all ILG with prejudice and award its attorneys fees in this appeal.

DATED this 13th day of August, 2018.

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**August 13, 2018 - 1:50 PM**

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