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No. 93214-0

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES SCHIBEL, an individual; and PATTI SCHIBEL,
an individual; and the marital community thereof,
Respondents.

v.

RICHARD EYMANN, an individual; EYMANN ALLISON HUNTER
JONES, P.S., a Washington professional services corporation; MICHAEL
WITHEY, an individual; LAW OFFICES OF MICHAEL WITHEY,
PLLC, a Washington professional limited liability company,
Appellants and Petitioners,

SUPPLEMENTAL BRIEF OF RESPONDENTS

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 ORIGINAL

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I. Introduction

The issue in this case has been fully briefed, and both the trial court and the Court of Appeals issued opinions explaining their reasoning. In an effort to avoid unnecessary repetition, this supplemental brief shall focus on the latest arguments articulated in the Attorneys' Petition for Review (the "Petition"). Plaintiffs and Respondents James and Patti Schibel did not oppose the Petition because they could not, in all candor, deny that this appeal "involves an issue of substantial public interest." But recognizing the importance of this issue should not be seen as softening in the Schibels' position; their former attorneys should not be given blanket immunity for their misconduct simply because the trial court granted their motion to withdraw.

II. Issue Presented

As noted by the Court of Appeals, the "sole issue presented is whether the trial court correctly determined that collateral estoppel did not apply to bar the malpractice action."¹ And, as the Court of Appeals noted, "Washington courts have not yet decided whether a court-sanctioned withdrawal by counsel prevents a malpractice action predicated on counsel's allegedly improper withdrawal from a case...."²

¹ Court of Appeals Opinion, p. 5

² *Id.* at 8

In their Petition, the appellants agree that this is the main issue on appeal. They attempt, however, to raise a second “issue,” which is whether collateral estoppel applies “specifically” in this particular case. But this is not really an independent issue; if court sanctioned withdrawal does not collaterally estop malpractice claims based on that withdrawal, then the trial court correctly denied summary judgment.

III. Statement of the Case

Even though this appeal is from denial of the appellants’ summary judgment motion, and all facts and inferences from those facts must therefore be viewed in the light most favorable to the Schibels, the appellants persist in presenting the facts in the light most favorable to themselves and ignoring unfavorable facts. While all the pertinent facts are set forth in the Respondents’ Brief, the following summary may prove helpful.

A. The Underlying Lawsuit

The beginning of this legal saga started more than twelve years ago, in February 2004, when the Schibels leased a commercial space in Spokane to operate a children’s arts and crafts business called “Creative Genes.”³ A month after moving

³ CP 208, Para. 4

in, the Schibels began to experience various health problems, including respiratory distress, coughing, bloody noses, wheezing, sinus pain and congestion, headaches, eye and throat irritation, and facial swelling. Thereafter, there was a water leak the landlord refused to repair, which exacerbated the mold problem.⁴ As a result of the landlord's conduct, the Schibels were made ill, forced to move out of the premises, and lost their business. They sued the landlord for fraud, negligence, breach of contract, and breach of warranty, seeking damages in excess of \$425,000.⁵

B. The Attorneys' Contingent Fee Agreement

The Schibels originally hired an attorney on an hourly basis, but they parted ways when he tried to raise his hourly rate by 25% in the middle of the engagement.⁶ Thereafter, the Schibels hired the defendants in this action, Richard Eymann and Michael Withey (hereafter referred to jointly as "the Attorneys").⁷ The Schibels entered into a written "Attorney's Contingent Fee Agreement" with the Attorneys. This agreement contemplated the possibility that "no recovery" would be

⁴ *Ibid.*

⁵ *Ibid.*; CP 213-224

⁶ CP 208, Para. 5

⁷ CP 208-209, Para. 6

obtained,” and the Attorneys would receive no fee. The Attorneys also promised that “no compromise or settlement of the Client’s claims shall occur without the Client’s approval” The Attorneys further agreed to advance all costs incurred in pursuing the lawsuit.⁸

C. The Attorneys Failure to Prepare for Trial

In July 2010, The Attorneys arranged for a focus group to get some feedback on the case. After Withey made the presentation to the focus group, the group provided very negative feedback.⁹ Eymann told the Schibels several times that Withey wanted out of the case—based on the feedback from the focus group—because Withey felt it was unlikely they would win at trial.¹⁰

Despite the Schibels’ requests to do so, the Attorneys refused to take the depositions of the landlord’s four expert witnesses. The Attorneys also did not contact the Schibels’ lay witnesses to prepare their trial testimony. Similarly, the Attorneys did not subpoena any of the Schibels’ lay witnesses for the impending trial.¹¹

⁸ *Ibid.*; CP 225-230

⁹ CP 209, Para. 7

¹⁰ CP 209, Para. 9

¹¹ CP 209, Para. 8

D. The Attorneys' Financial Concerns

After the focus group, the Attorneys became extremely concerned about their financial risk in taking the case to trial. The Attorneys had already expended \$55,000 in costs, and they were anticipating another \$25,000-\$30,000 to try the case.¹² The Attorneys started demanding assurances from the Schibels that they would reimburse these costs, should they lose at trial. For example, forty-five days before the trial, Eymann wrote:

Finally, if we go to trial what assurance can you provide that the costs and expenses of the trial will be reimbursed if we lose? As you know, we have been advancing these costs and expenses since we took over the case, but with the range of settlement offers from the defense on the table ... and the risks of an adverse result, given the focus group 13-1 vote against you, we do [not] think it fair to expect us to bare [sic] that risk or burden.¹³

Eymann raised the subject of costs again, one week later:

Finally, what are your thoughts on the costs to proceed through trial – are you in a position to pay them. [sic] I need to let Withey know the answer to that ASAP and after the focus group my partners are very concerned about the same thing – that after advancing the costs since Vance deserted you, the prognosis for a favorable verdict, is, in our

¹² CP 203, Lines 19-20

¹³ CP 232-233

combined experience of some 65 years of litigation cases, at best poor.¹⁴

E. The Attorneys' True Reasons for Withdrawal

Three weeks before the trial, the Attorneys sent a lengthy letter to the Schibels announcing and explaining their decision to withdraw.¹⁵ This letter repeatedly raised the issue of the costs of going to trial. For example, the Attorneys complained: "We have spent almost \$55,000 out of our pockets in pursuit of justice and this strategy." Later in the same letter, the Attorneys wrote: "For the last month we have asked you to commit to paying us the expected costs of trial \$25k to 30k but you have not made provisions for doing that."

In addition to their concerns about their financial exposure, the Attorneys also disagreed with the Schibels regarding the value of the case. As the Attorneys wrote in their withdrawal letter: "We understand that you don't accept our judgment or agree with our advice and recommendations [regarding settlement]. This is again unfortunate." The Attorneys referred to the focus group in trying to convince the Schibels to lower their settlement demand. "We were most disappointed when the focus groups resoundly [sic] found

¹⁴ CP 234-235

¹⁵ CP 244-247

against us and would not award you very much money even if they were to find liability.” But the parties disagreed about the significance of the focus group’s feedback: “Your actions since the focus group have been to discount our advice, to argue with us about the facts, and to not realize that we don’t provide this advice lightly.”

At the end of their letter, the Attorneys summed up the true reasons for their withdrawal:

In sum, for the last several months we have offered you the benefit of our analysis of the facts and law of the case, but you have steadfastly insisted that your judgment on the likely outcome at trial is better than ours. You have refused to even entertain any strategy, i.e. settlement that did not involve a trial of the case, unless it is \$350,000 or more.

Accordingly we are forced to withdraw as your counsel ...

**F. The Attorneys Misled the Trial Court
Regarding the True Reasons for Withdrawal**

The Attorneys’ conduct raises at least a reasonable inference—if not the overwhelming conclusion—the sole reason the Attorneys withdrew was to protect their financial interests. But when it came to telling Judge Plese why they were

withdrawing, the Attorneys tried to paint a much different picture. In their pleadings, the Attorneys obfuscated:

Withdrawing counsel are cognizant of the need to preserve the attorney-client privileged communications and any other confidential matters. It is therefore not appropriate to describe the full context of or decision to withdraw as plaintiffs' counsel, other than to say that this highly unusual step was taken very reluctantly and after great thought and soul searching on our part.

The Attorneys papers and arguments at the hearing had the desired effect of misleading Judge Plese into believing the Attorney had an ethical obligation to withdraw. As a result, Judge Plese's written order stated that the "current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." In sum, the Attorneys never divulged to Judge Plese the real reason for their decision to withdraw—their concern about losing money.¹⁶ Had they been forthright, Judge Plese's decision may have been much different.

G. The Attorneys' Last-Minute Withdrawal Harmed the Schibels

At a prior hearing, Judge Plese had informed the Attorneys that she would not continue the trial again. Nevertheless, the Attorneys did not condition their withdrawal

¹⁶ CP 203-204

on her granting another continuance. As a result, the Attorneys abandoned the Schibels the Wednesday before a Monday trial. Thanks to this last-minute withdrawal, the Schibels could not find new counsel to represent them. As a result, their case was dismissed, with prejudice.¹⁷ In sum, as a direct result of the Attorneys' conduct, the Schibels received nothing for their claims—they never even had their day in court.

H. The Attorneys Breached Their Duties to the Schibels in Numerous Ways

In opposition to the defendants' summary judgment motion, the plaintiffs submitted the declaration of their expert, Clark County Superior Court Judge Roger A. Bennett (Retired). In addition to pointing out the numerous breaches of the Attorneys' duties, Judge Bennett's declaration also highlighted how the Schibels never had a full and fair opportunity to litigate their malpractice claims when they opposed the Attorneys' withdrawal motion.

Judge Bennett offered several opinions regarding the Attorneys' failure to meet the standard of care. For example, Judge Bennett opined: "My review of the materials and facts presented...convince me that the withdrawal by Plaintiffs' prior attorneys, Mr. Eymann and Mr. Withey, left the Plaintiffs in an

¹⁷ CP 249

impossible situation, and doomed any possibility of Plaintiffs salvaging their case.”¹⁸

Judge Bennett’s also opined that the Attorneys placed their own financial concerns over the interests of their clients in a way that caused harm to their clients:

All of these facts demonstrate that the Attorneys had lost any confidence in the case, and their chances of recovering attorney’s fees based upon a satisfactory result at trial. They were facing a significant personal financial loss if the matter proceeded to trial. If so, the Attorneys’ concerns would certainly be understandable, however, the overriding concerns under the RPC are the interests and desires of the client.¹⁹

Judge Bennett expressed his concern that the Attorneys wished to withdraw because the Schibels disagreed with them regarding the settlement value. Judge Bennett pointed out that—under the RPC and the contingent fee agreement—the Schibels had the exclusive right to decide how much to accept in settlement. “If the Attorneys used the mechanism of withdrawal in order to circumvent the Clients’ exclusive right, that would be a breach of the duty owed to the Plaintiffs, and of the standard care.”²⁰

¹⁸ CP 198, Lines 1-4

¹⁹ CP 200, Lines 21-25

²⁰ CP 201, Lines 11-13

Moreover, Judge Bennett opined the Attorneys were also motivated to withdraw because they had not adequately prepared for trial.

There is other evidence as to why the Attorneys sought to withdraw. According to the Declaration of Plaintiff James Schibel, the Attorneys, as of October 10, 2010, when they gave notice to Plaintiffs of the impending withdrawal, had issued no subpoenas for any of the more than fifty witnesses they proposed to call at trial. Further, they had not deposed the defense experts in the case.²¹

Judge Bennett faulted not only to the *timing* of the withdrawal, but also the *manner* in which it was obtained, because the Attorneys failed to divulge to Judge Plese several material facts. "In my opinion, however, based upon my twenty-one years as a Superior Court judge, and having granted or denied such motions [to withdraw] on numerous occasions, it appears to me that there were several significant and material facts that were not presented to the judge who approved the withdrawal."²² For example:

The judge was not advised that the attorneys were owed \$55,000.00, and were concerned about incurring another \$25,000.00 to \$30,000.00 in trial costs;

²¹ CP 202, Lines 13-17

²² CP 203, Lines 11-14

The judge was not informed that the breakdown in the attorney-client relationship was because the clients were exercising their right to decline to settle the case;

The judge was not informed that the withdrawal was made (as alleged by Plaintiff James Schibel) in order to secure a continuance;

The judge was not informed that the withdrawal was not based upon any wrongdoing by the clients.²³

Instead of trying to present a clear and accurate picture to Judge Plese as to the reasons for their withdrawal, the Attorneys used coded and charged language to leave the false impression that they had some ethical duty to withdraw due to some unspecified wrongdoing by the Schibels.

As a Superior Court judge, I have heard dozens of motions to withdraw by counsel. In reading the above quoted oral argument and pleading, the first thing that occurs [to me] is that this is exactly the type of language that attorneys use, almost like a code, to represent that the client wishes to do something that violates the attorney's ethical obligations....²⁴

Judge Bennett concluded the Attorneys used the excuse of the attorney-client privilege to create an unfair impression, to

²³ CP 203, Lines 19-26

²⁴ CP 204, Lines 8-11

the disadvantage of their clients. “This hearing was held in the context of a contested request to withdraw, on short notice, pitting the Attorneys against unrepresented lay clients. The attorney-client privilege belongs to the client, and cannot be exercised by the attorney to the detriment of the client.”²⁵

Judge Bennett summed up his opinions as follows:

In conclusion, the Attorneys’ actions in withdrawing from representation, and presenting the Motion to Continue Trial Date and the Notice of Intent to Withdraw for decision four days before trial fell below the standard of care required of a reasonable, diligent and prudent attorney in the State of Washington. Further, the decision to withdraw had the inevitable effect of abandonment of the Plaintiffs at the most critical and important juncture of the litigation.

If the decision to withdraw was also based upon a lack of preparation for trial, and a desire to use withdrawal as a means to obtain a continuance, as stated in the declaration of James Schibel, that strategy also fell below the standard of care for a reasonable, thorough and diligent attorney.²⁶

²⁵ CP 204, Lines 15-17

²⁶ CP 205, Lines 8-16

IV. Argument

A. The Issues Are Not Identical

As the Court of Appeals noted in its decision below, “[t]he first consideration of collateral estoppel is whether the previous action necessarily decided the same issue presented in the current case.”²⁷ As this court has put it, “[t]he party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is *identical* with the one presented in the second action.”²⁸ Moreover, the identical issue must have been necessarily decided in the first action. “Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding.”²⁹

Thus, it is not enough for the issues to be similar, or for the facts to be the same. As this court has explained:

Since all of the elements of collateral estoppel must be met, if the issues are not identical, collateral estoppel will be denied. Most importantly for this case, mere factual identity is insufficient to meet this requirement; estoppel will

²⁷ Court of Appeals Opinion, p. 13 (citation omitted)

²⁸ *Nielson by and Through Nielson v. Spanaway general Medical Clinic, Inc.*, 135 Wn.2d 255, 263, 956 P.2d 312 (1998) (emphasis added)

²⁹ *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004)

be denied unless the issues are also legally identical.³⁰

In their briefs, the Attorneys consistently harp on the fact that the Schibels' arguments opposing the withdrawal overlap with the Schibels' arguments on their malpractice claim. But such an overlap is not sufficient to meet the test for collateral estoppel. As Judge Triplet explained in his decision rejecting the Attorneys' argument:

The issues in this action and in the underlying action are similar because they involve the same parties and the same facts. Thus, it is understandable that similar arguments would be used in both actions. However, the issues under review in each action are distinct.³¹

Similarly, the Court of Appeals held that the issues were not identical:

At issue in the first case, as with most contested cases of withdrawal, was whether or not the Attorneys complied with CR 71. The court did not answer the questions of whether the Attorneys correctly perceived that ethical considerations required them to withdraw or that the Attorneys actually were motivated by that reason.³²

³⁰ *Hanson v. City of Snohomish*, 121 Wn.2d 552, 573-74, 852 P.2d 295 (1993) (citations omitted)

³¹ CP 296

³² Court of Appeals Opinion, p. 13

In sum, the issues in the malpractice action are not identical to the limited issues that the trial court necessarily decided in order to grant the motion to withdraw. As the Court of Appeals wrote: “It is not necessary for a court to decide whether an attorney would violate ethical rules by withdrawing; the trial court needs only to ‘consider all pertinent factors,’ which includes various ethical rules under RPC 1.16.”³³

B. Barring Their Claims Through Collateral Estoppel Would be Unjust to the Schibels

The fourth requirement for the application of collateral estoppel is that it “will not work an injustice against the estopped party.”³⁴ For this reason, “the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.”³⁵

In their Petition, the Attorneys assign error to the lower court’s finding that the Schibels had not had a fair and full opportunity to litigate their malpractice claims in the context of the withdrawal motion. But the Attorneys’ argument should be rejected, for two reasons.

³³ *Ibid.* (citing *Kingdom v. Jackson*, 78 Wn.App. 154, 896 P.2d 101 (1995))

³⁴ *Christensen, supra*, 152 Wn.2d at 307

³⁵ *Ibid.* (citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998))

First, the Attorneys seem to conflate having *an opportunity* with a *full and fair opportunity*. Like almost all clients who find themselves in their position, the Schibels had only a few weeks to oppose their Attorneys' motion. Like most clients, they were now pitted against their counsel, without any counsel of their own. The Schibels were ill equipped to present all the evidence in opposition to the motion to withdraw that they will be able to present—with the assistance of counsel—in the current malpractice lawsuit.

Second, and perhaps more importantly, the Schibels could not address the court *ex parte*, which left them “with the dilemma of either not raising the issue or having [the opposing party’s] attorney listen to the Attorneys discuss the weakness of their pending case.”³⁶ The Attorneys argue in their Petition that the Schibels’ “inability to address the trial court *ex parte* did not stop them from making every argument they now make in support of their malpractice and breach of fiduciary duty claims in opposing the withdrawal.”³⁷ But this argument seems naïve if not downright disingenuous. If the Schibels had a full-throated debate with their Attorneys regarding the true reasons for the withdrawal in front of opposing counsel, the Schibels ran the risk of severely prejudicing their case at trial.

³⁶ Court of Appeals Opinion, p. 14

³⁷ Petition, pp. 16-17

In sum, both the trial court and the Court of Appeals determined that the fourth requirement of collateral estoppel had not been met. Because there was no full and fair opportunity for the Schibels to present their malpractice claims, which makes application of collateral estoppel against them unjust, this Court should affirm the rulings below.

C. It would be Bad Public Policy to Adopt the Attorneys' Proposed Bright-Line Rule

The Attorneys are asking this court to adopt a bright-line rule that an attorney can never be held liable for withdrawing from a client's case—regardless of the harm to the client—whenever the trial court allows the attorney to withdraw. Such a rule would seem to be a bad policy, for several reasons.

First, even the case relied upon most heavily by the Attorneys—the Arkansas case of *Bright v. Zega*³⁸—has not been interpreted as establishing such a bright-line rule; in a subsequent Arkansas case, the court decided that “the trial court’s grant of the motion to withdraw cannot serve as an absolute shield to a separate cause of action for legal malpractice.”³⁹

³⁸ 186 S.W.3d 201 (Ark. 2004)

³⁹ *Vang Lee v. Mansour*, 289 S.W.3d 170 (Ark. App. 2008)

Second, the Florida Supreme Court rejected such blanket immunity in *Fisher v. State*,⁴⁰ and that portion of its opinion was quoted favorably by the Court of Appeals in *Kingdom v. Jackson*.⁴¹ Similarly, the courts in New York and Missouri have also rejected the same plea for blanket immunity.⁴²

Third, the Attorneys seek to persuade this court to adopt this bright-line rule by setting up a false dilemma. They argue that—absent such blanket immunity—an attorney would be forced either to withdraw and “suffer the ignominy and cost of defending against a possible claim based on the withdrawal,” or to “continue with the representation and be faced with potential disciplinary action for violating the RPCs in doing so.”⁴³ But the Attorneys had a simple way to avoid this “dilemma;” don’t withdraw on the eve of trial unless you have a legitimate reason for doing so, and don’t mislead the trial court as to the true reasons for the withdrawal. If the Attorneys’ had followed that path, they would not have been sued for malpractice.

⁴⁰ 248 So.2d 479, 486 (Fla. 1971)

⁴¹ 78 Wn.App. 154, 160, 896 P.2d 101 (1995)

⁴² *Allen v. Rivera*, 509 N.Y.S.2d 48, 125 A.D.2d 278 (N.Y.A.D. 2 Dept., 1986); *Greening v. Klamen*, 719 S.W.2d 904, 907 (Mo. App. E.D. 1986)

⁴³ Petition, p. 17

V. Conclusion

For the foregoing reasons, Plaintiff and Respondents James and Patti Schibel respectfully request that the Court of Appeals decision be affirmed.

Respectfully Submitted
on October 28, 2016

Steven E. Turner

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WSB No. 33840
*Attorney for Respondents
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Supplemental Brief of Respondents** on:

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- E-mail. (Pursuant to Civil Rule 5(b)(7), all counsel have consented in writing to service by e-mail.)**
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DATED this 28th day of October 2016.

Steven E. Turner

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Dear Clerk of Court,

Enclosed please find the Supplemental Brief of Respondent in the case referenced above.

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